McGregor, MN, is the closest city to Lawler and nine miles from the proposed mining site

Mining Permits, Indian Law, and the Meaning of a Nation

Henry Ouellette, ‘26

There’s a certain irony to having your “community meeting” in a ghost town, but people turned up for the free chili. Nearly a hundred, actually—mostly elderly, all but two white—crowded into the back room of Jackson’s Hole, the only business left in the otherwise deserted Lawler, Minnesota, to hear a parade of corporate representatives describe how they plan to mine thousands of tons of high-grade nickel out of the sulfurous bedrock on the shores of Big Sandy Lake. The (perhaps ominously named) Talon Metals, based in the British Virgin Islands and run primarily by Canadians from a headquarters in Ontario, has its spokespeople trundle out to Aitkin County for these presentations every few months; they lament the lack of American nickel, tout their supplying agreement with Tesla, and show everyone a video of a really big drill. They assured us of the company’s commitment to its core values, which include “efficient, cost-effective production,” “compliance with regulators,” and “positivity.” Then, cracking the door to these meeting’s other ostensible purpose, “gathering community feedback,” they opened the floor to questions.

Almost all of those questions came from Lynn, a member of the anti-mining Tamarack Water Alliance who, over several hecklers, questioned Talon’s

representations of the demand for nickel production, objected to the mine's water use, and challenged its claims that the project won't leach sulfides into the air and water (a danger that, after much litigation, has stopped Minnesota's other two copper-nickel mining ventures in their tracks).[1] Eventually, Talon's Chief of External Relations, Todd Malan, told Lynn that they disagreed about the facts and that was that.

Then Jean Skinaway-Lawrence, Tribal Secretary for the Sandy Lake Band of Lake Superior Chippewa,[2] stood up. She spoke quietly and at length, seemingly directly to Malan—it was clear that they had had this conversation before.[3] She stressed the importance of "grandfather rock" and of the land that is "in [the] blood" of her and her people. She described the threat sulfur dust poses to the spiritually and economically significant *Manoomin*, or wild rice, of which Aitkin Country is the world's epicenter. Malan thanked her but didn't concede ground: he acknowledged that his answers might never satisfy her, but promised that they would "have the conversation anyway." After one final question from Lynn, people were released to their chili.

Later, I asked Skinaway-Lawrence and her spiritual advisor, Jay, what changes they would like in the permitting process. She said that the federal government should run things because it, unlike the biased and lobbying-prone state, must recognize the interests of the Tribes. Jay replied that white people aren't spiritual enough.

. . . .

These two answers—and this entire meeting—get to the core of how American Indian[4] sovereignty tends to work: it's deeply, *deeply* weird, and it's weird for the same ad hoc mixture of purpose and accident that most laws, citizenship, and the Constitution are weird. It's not one thing. So many people have told its story for so many years that it almost doesn't make sense to talk about American Indian sovereignty as *a* concept; though certain ideas structure the landscape, carving its contours like the glacial sheets that scraped Minnesota's lakes and wetlands from the bedrock, its geography cannot be pinned to a surveyor's clipboard. Most terms are debatable, and the grounds of those debates are unstable. Yet this ecosystem, its map lines drawn in immense tension with each other and their topography, has evolved in coexistence with itself for hundreds of years, through trade and wars and colonization, without snapping apart.

[1] The other proposed facilities, Twin Metals in Ely and PolyMet (now NorthMet) near Babbitt, would process ore onsite and thus have to store its mining byproducts, called tailings, which risk leaking into the watershed. Talon would get around this problem by transporting its ore to North Dakota for processing and generating its tailings there. Talon does not have a permit for this North Dakota facility nor a backup plan if they don't get one, and concerns remain about sulfur contamination from bedrock stored on the surface, which could kill the area's already dwindling wild rice and cause the bioaccumulation of methylmercury in local fish and the people who eat it.

[2] The "Chippewa" is an outdated but still standard governmental way to refer to the Ojibwe, who are part of a broad group of indigenous peoples in the Great Lakes and Canada called the Anishinaabe.

[3] Malan later confirmed this. He maintains that Talon is committed to keeping Tribes informed and that, as Talon told the Minnesota DNR, the company seeks to incorporate indigenous knowledge into its practices. (He struggled to name an example of this).

[4] I use "Indian" or "American Indian" because that's what the Mille Lacs Band and the federal government use, but I'll refer to specific groups when I can. I use "tribes" frequently when talking about the governmental relationships between United States and American Indian governments.

The story of this map, like so many stories, started with promises. We'll see a lot of these later on—one reading of Indian Law would construe it as nothing more than a promise by the federal government, and the permitting process operates in worryingly substantial part on the promises of would-be industrializers—but these first promises were simpler. The Anishinaabe and the British had both been promised land, one by their prophets and the other by their King, both for living but only one for taking.

Those who made the journey from England on faith of God and gold thought they could take what they found because their royal charters and the international law of Europe told them they could. Though John Locke would not be born until the first generation of colonists had settled "their" land, his idea that a man owns his work and if he pours that work into the land he can have that, too, had settled into their government in apparently comfortable tension with the absolute sovereignty of the King. He—as God's regional administrator—had granted these Joint Stock companies, these corporate bodies, "license" to do the "plantinge, ruling, ordering, and governing of Newe England" as long as they didn't intrude on the territory of any other Christian prince. But the "principall Ende" of at least the Massachusetts Bay Colony had—ostensibly—been to convert the natives, improving the landscape like farming or construction would; whether this would make them "Christian princes" with sovereign integrity seemed almost beside the point.[5]

Christian or not, the settlers had to deal with the indigenous people eventually. They took their land or bought it, fought wars and negotiated peaces, and, whatever the implications of what they were doing had for their conception of their government, pragmatism dictated the relationship. Though Indian confederacies rose and fell, they were no monolith, and nobody treated them as one. They fought with and against the settlers and with and against each other. The most comprehensive Indian policy—a promise to stay east of the Appalachians following the French and Indian War—was not out of any sense of obligation to the Indians; it was designed to be strategically broken again and again as the British saw fit. It was a Realist tool for keeping peace, order, and a sovereign's control of its citizens.[6]

It worked until that sovereign lost control, but the new one inherited the same half-conquered land and the need to keep it conquered. The threat of the Indians pressed on the new Constitution; after a disastrous period under the Articles of Confederation where the states could deal with (and create conflict with) the tribes, the federal government insisted on its exclusive power to govern tribal interaction with the United States. But this was as far as its power went: along with the authority to make treaties, it could govern "Commerce" with the tribes, just as it governed commerce with foreign nations and between the states, but those "Indians not taxed" played no part apportionment and did not count as residents of the states. The sovereign dealt with sovereigns, but except

[5] The Charter of Massachusetts Bay: 1629, The Avalon Project.

[6] "Proclamation Line of 1763, Quebec Act of 1774 and Westward Expansion," U.S. Department of State: Office of the Historian

for the thorny problem of borders, neither included the other.[7]

This did not stop the founders from copying the Iroquois' homework, looking to them for models of the separation of powers and key democratic principles. Rhetorically this was slightly odd—John Adams said that "for [the Iroquois] the real sovereignty rested in the body of the people," but he also railed against the "despicable bands of murdering savages" on his Western frontier. This dichotomy embodied the difficulty in categorizing attitudes towards the American Indians under one comprehensive aegis and, therefore, the deeply confused place they had as inspiration for, a key component of, and a looming menace to the new American republic.[8]

The overlap was not complete, however, not least because the delegates found other common indigenous ideas less conducive to a government run by lawyers and merchants who made it a practice to own land,[9] wealth, and other people. Indigenous peoples like the Anishinaabe share America's grounding of power in the consent of the governed, but for the Anishinaabe this follows naturally from an assumption that people are fundamentally free (not, as in America, that they have freedoms) and restricted not by the power of the government, which acts as mediator, but by our obligations to all other people, the earth included. Of course, this does not provide for a "sovereign"; though people are tied to place, their borders are permeable because people belong to multiple associations and none can completely exclude the others. Different nations should not tell each other what to do, but they share the world and bear a responsibility to not take it all for themselves. Even at the height of war, the Ojibwe and the Dakota entered each other's lodges.[10, 11]

The United States kept the lodge firmly closed. It provides for rules governing the relations not between people or groups but for relations between "the people" and "the state," and the people do not include anything that can't speak, own, or vote. Those relations emphasize individual rights, using majority rule, and trying to solve conflicts of interest through regulation and law. Certain rights are carved out for the people from the state's authority—rights which may not be infringed upon—but they are reserved away from an *assumption* of governmental power. The people have no "sovereignty" as individuals, but rather vest their right to rule in a government they have some democratic say in. The individually retained rights constrain this governmental rule, rights which grew out of the Lockean rights of life, liberty, and property, and within these constraints the state maintains the purpose of fulfilling a positive set of duties, top-down goals which guide governmental action.[12] Because the state is a democracy, not everyone needs to consent to a given decision made by the sovereign whole; as long as

[7] "American Indian Constitutions and Their Influence on the United States Constitution," RJ Miller.

[8] Ibid.

[9] Which, for decades to come, a white man needed to vote.

[10] *An Anishinaabe Politics of the International: Odaenuah, Akina, miniwaa Gchi'naaknigewin*, Hayden King.

[11] "American Indian Constitutions and Their Influence on the United States Constitution," Paul Hansen

[12] Whether your interest counts as a "right" becomes, therefore, of enormous importance: if it's a right it is unimpeachable regardless of what other people think, but, if it is not, then you best hope it doesn't conflict with a right and that the majority agrees with you.

rights are respected, the will of the majority is (indirectly) the will of the sovereign.[13]

This landscape of "maps and sharp borders"[14] which decide who has a valid interest extends to external relations; it assumes a government free from external control, self-determining and unmolested by anyone's meddling, no matter their relative brawn. In this conception, only states have sovereignty, and that sovereignty is based on a reserved right to be left alone. This manifests itself in a "restrictive" or rights-based foreign policy—separate, respective claims, such as to territory or resources, govern sovereign-to-sovereign interactions, with carefully delineated spheres of control and the adjudication of claims on the basis of those spheres.[15] In practical terms, this version of sovereignty demands a population, territory, government, diplomats, and countries willing to take those diplomats seriously.[16] Once a state possesses the first four assets, other countries are supposed to treat it as a sovereign; however, this treatment is also perhaps the most important *prerequisite* to sovereignty. To be a sovereign, you have to be treated as such, and to be treated as such you have to be a sovereign.

In any case, the United States checks all of these boxes. Its constituent states don't, because nobody —including them—treats them like sovereigns. Tribes have about as much territory, population, and government as a U.S. state, but their capacity to engage in relations with other states and the recognition of their self-government now comes only from the United States, which can, through the abrogation of treaties or the alteration of federal law, dictate its relationship to Tribes at something that falls just short of free will only because the country's own checks and balances have so far tended towards the preservation of its precedent. This imbalance, by which American Indian sovereignty depends on United States law, allows the U.S. to exploit its status as arbiter of the conditions of Indian self-rule to fiddle with the tribe's possession of the other conditions of sovereignty.[17]

This was less true in 1789 than it is now, but as settlers spread westward and decided that they wanted Indian lands and, through disease and war and dealing, usually got it, the balance of power shifted. On top of governing relationships with individual treaties, the government began to decide what powers it thought it had over the tribes, and that decision often had to do with more than the particulars of the case at hand. As the federal government governs "commerce" with the Indian tribes, even though the states first bordered and then fully contained them, a move by the federal government to empower tribes or expand its jurisdiction over them also takes power away from the states to rule within their own borders. Such sweeping rules about the nature of the U.S.-Indian relationship

[13] "American Indian Constitutions and Their Influence on the United States Constitution"

[14] *Strange Multiplicity: Constitutionalism in an Age of Diversity*, James Tully

[15]"American Indian Constitutions and Their Influence on the United States Constitution"

[16] "Montevideo Convention on the Rights and Duties of States

[17] For instance: residential schools and their subsequent corrective, the Indian Child Welfare Act, both manipulated whether American Indian families could stay together on-reservation, affecting population; the Indian Reorganization Act affected government with a template Tribal Constitution adopted largely unchanged by 35-40% of tribes; the allotment period broke up reservations–territory–into individual parcels, two thirds of which haven't been recovered; the Supreme Court has long held that the only nation the Indians are allowed to deal with is the United States.

also can't take into account the differences *between* tribes, relying on and further defining the amorphous and invented concept of "Indians" that, with its layers built up over centuries of revision, strays further and further into its own realm of self-reference and imposed definition. Finally, along with the currents of liberalism and republicanism tossing the country onwards like a flailing raft, we have continuously defined ourselves by who we are not.[18] The story of how we have included or excluded American Indians traces the story of who exactly this nation thinks it is.

John Marshall, for his part, thought that whatever it was should be Federalist. A relic of a non-existent party whose goal in life appeared to be preserving federal power and provoking Thomas Jefferson, Marshall, holed up in his Court, sketched out the roots of Indian Law. Fittingly, they grew from squabbles over land. In his first try at the problem, Marshall came up with a historical account by which the federal government inherited the British's right as conquerors to own American Indian lands; the tribes and their members might have had the right to *occupy* that land,[19] but not to sell it.[20] In the next case he backtracked on the Constitution and treaties' treatment of the Cherokee nation as sovereign, calling it a "domestic dependent" and thus not a foreign state with standing to sue in the Supreme Court at all.[21, 22] However, insisting again a year later that only the federal government could buy American Indian land, he found that it alone—and no one else—had the right to deal with the Indians. They had the right to live and rule themselves until the United States said otherwise.[23, 24] Famously, the United States under Andrew Jackson declined to enforce this—as soon as gold was found in Cherokee soil, that land stopped being theirs.

Surveyors found the copper and nickel embedded in Minnesota's soil in 1974, but the land, of course, is older.[25] The Anishinaabe came thousands of years ago, attracted eastward by a prophecy promising "the food that grows on water." They found *Manoomin*, whose grains peep over the surface of small lakes and slow-moving streams, and struck up a relationship.[26]

[18] *Civic Ideas: Conflicting Visions of Citizenship in U.S. History*, Rogers Smith.

[19] He traces this to the Proclamation of 1763, which is central to *Johnson v. M'Intosh* and every native land case which followed it. As interpreted by Chief Justice Marshall, "By that proclamation, the Crown reserved under its own dominion and protection, for the use of the Indians, "all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest," and strictly forbade all British subjects from making any purchases or settlements whatever or taking possession of the reserved lands.

[20] *Johnson v. M'Intosh*, 21 U.S. 543 (1823)

[21] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)

[22] He found their title "deriving from the Great Spirit" unconvincing, but the title of a King ordained by God was a different story.

[23] *Worcester v. Georgia*, 31 U.S. 515 (1832)

[24] Working in what he called "the Courts of the conqueror," it's difficult to see what else Marshall could have come up. It would be against the self-interest of the judicial department to acknowledge that it is an illegitimate colonial enterprise predicated on legal pretenses, that, if any other entity were to try and claim them, would be laughed out of the courtroom.

[25] Copper-Nickel Studies and Non-Ferrous Mining, Minnesota Legislative Reference Library

[26] In Ojibwe culture, *Manoomin* is not an "it" but rather a "who," the center of the web of life to be treated with reverence and respect. The grain became and remains culturally and financially integral to the Ojibwe, providing them with a source of food to both eat and, later, to sell; they, in turn, help to disperse its heavy seeds and to make sure that each rice crop is as bountiful as the one before it.

They maintained the right to collect wild rice—and other plants, fish, and game—both on and off-reservation throughout several treaties with the U.S. government which eventually, little by little, paid them to take their land away. They believed neither in land ownership nor the idea that one sovereign got to decide what happened in its borders, but facing the United States military and the promise of annual payments, they agreed to share the land with the loggers and miners waiting to take anything they could.[27] Though those payments were missed,[28] the forests felled, and collection rights incessantly ignored despite orders from the Supreme Court and polite requests from the United Nations, they have fought to maintain the right to gather food from the earth. They have retained this right to the present.

Talon Metals got their rights in 2019. Mining conglomerate Rio Tinto (best known for blowing up ancient aboriginal caves in Australia and dumping "one billion tons of waste" into a river in Papua New Guinea)[29, 30] made Talon a partner in a joint venture to mine the Tamarack Resource, and Talon runs the day-to-day business of trying to convince the government that it can do so legally and safely. Minnesota regulators have been comparatively friendly to mining efforts;[31] the real convincing must be directed toward the EPA, which looms over the state like a daemon and makes sure its work meets the standards of the Clean Water Act.

The Clean Water Act, the EPA and the rest of the federal government are also obligated to care about the Tribes,[32] and the Tribes have thus far opposed the mines. This has been with good reason: Talon's two predecessors, Twin Metals and PolyMet, are both languishing in permit purgatory after courts and agencies have pulled everything except the physical land out from under them. In a system which considers it their right to do what they want unless proven otherwise, that doesn't happen easily.

Between the two, though, Twin Metals was almost unquestionably worse. Even among experts there was an overwhelming sense of "what the f—k do you mean you want a mine in the Boundary Waters"; criticism and lawsuits against the project ranged from its enormous risks, its impact on the tourist industry of the most-visited canoe area in the country, that the permit reinstatement[33] was illegal, that Forest Service authority had been undermined, that the review wasn't

[27] "The Right to Hunt and Fish Therein: Understanding Chippewa Treaty Rights in Minnesota's 1854 Ceded Territory," 1854 Treaty Authority.

[28] A hundred and fifty Ojibwe (on the shores of the same lake where Talon wants to build its mine) died waiting for the military to bring their promised supplies, and three hundred more died when, months late and in the dead of winter, the government finally arrived with spoiled food and crumbs of the promised annuities.

[29] "Rio Tinto: A Shameful History of Human and Labour Rights Abuses And Environmental Degradation Around the Globe," London Mining Network

[30] Todd Malan worked at Rio Tinto for eight years before joining Talon Metals. Both incidents happened during his tenure.

[31] In fact, part of the Department of Natural Resources (one of the agencies responsible for approving the Environmental Impact Statements for projects like PolyMet and Talon) mandate is to *support* mining. Understandably, mining skeptics want this changed.

[32] At least the ones it recognizes—six Ojibwe Bands in Minnesota (the Sandy Lake Band is not one of them, so it works primarily under the Mille Lacs Band, which is).

[33] A series of shenanigans involving three presidents, two bickering federal agencies, and a partridge in a pear tree.

thorough, and the whole mess violated the Minnesota Environmental Rights Act.[34] Aiming to set up in Superior National Forest, Twin Metals hasn't even made it to permitting; the federal government flip-flopped between a cautious Obama, an eager Trump, and a hesitant Biden, who finally put a 20-year moratorium on mining in the area.. The Minnesota Chippewa Tribe[35] claimed the project traded away the landscape and their way of life to foreign mining companies; the mine's former special projects manager claimed that liberals just hate "anything to do with resource extraction."[36]

They don't. According to Paula Maccabee, head (and only) attorney for WaterLegacy,[37] environmental issues fall under the radar because they're *nobody's* priority at the capitol in St. Paul.[38] The GOPs are predictably pro-business and anti-hippie/liberal/brown people, but the Democrats have hardly been more sympathetic to the environmental crowd—Maccabee, charitably, thinks it's because they're saving their political capital for where they really need it;[39] however, far from the even perfunctory bemoaning of causes they'd *like* to champion if they only could, many solid MN DFLers support the mining on its supposed climate and job-boosting grounds,[40] lethargically turning against it only when the various scandals become so bad that they're compelled to publicly disavow the whole muddy, sulfurous mess. At some point in explaining

[34] This is a deeply interesting bit of legislation: though the Minnesota state constitution doesn't grant a right to a clean environment, the Act "declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation, and enhancement thereof." Basically, the Act provides a civil remedy against environmental destruction because it deems the coexistence of people and nature in "productive harmony" a key public interest. It protects a whole list of resources, including aesthetic ones, from being "materially adversely affect[ed]" by "people" (in the broadest sense) inside and outside of the state doing things inside and outside of the state. Notably, like so many environmental regulations, it's on the individual litigant to sue and it treats nature as a resource, though—also like many environmental regulations, especially federal ones—it also acknowledges that pollution doesn't care about jurisdictional borders.

[35] This is the official Ojibwe tribe, i.e. the one with an IRA constitution, and represents the six federally recognized Bands. According to the Mille Lacs Band (in a document labeled *Highly Confidential — For Discussion Purposes Only — Not Intended for Distribution* but which came up on the first page of Google) the Minnesota Chippewa Tribe was created for the purposes of the IRA and rests on shaky legal ground and is "just an organization."

[36] "Conservation vs. copper: Minnesota town debates its future with a mine," The Christian Science Monitor

[37] WaterLegacy have led the charge against PolyMet for the past fourteen years. I spoke with Paula at a community meeting the organization held about an hour south of Tamarack.

[38] Where the state once dispatched 50-odd troopers and a platoon of police vans to glower at the sodden handful of protestors whose permit to shout at nobody in particular about how Water is Life and Line 3 was illegal was about to expire. There were 950 arrests, all told, while Line 3 was being built—though incredibly, none for PolyMet or Twin Metals, as far as I can tell—and police spent so much money rounding up protestors that Enbridge had to create a special fund to finance it, which, if anything, make them arrest even more so they could get at the two million in cash being provided *by law!* to pay for the overtime free speech squelching "security" goon-ing.

[39] Though Minnesota has Dems dominating the state house, senate, and governor's throne, and they've had no trouble ramming through their agenda when they put their minds to it.

[40] The national reps have gotten in on the action too, trying to slip PolyMet's lawsuit-addled land swap through Congress on an unrelated defense bill, a circumnavigation of accountability and due process which everyone became appropriately outraged when the public learned about it

all of this to me,[41] Maccabee stopped mentioning the tribes.

The Ojibwe—and most American Indians—tend to get lumped together with environmentalists, but when they file the same lawsuits, put out similar statements, and similar public comments, the link doesn't exactly come out of nowhere. The connection is a combination of compatible(ish) positions and convenient stereotyping; American Indians and nature have been bound up in the American imagination for as long as environmentalism has. They are either assumed to have some sort of higher appreciation of nature that white guys who wear flannel try to emulate, or they are assumed out of existence.[42]

United States environmental law began with two ways of looking at nature as a resource: its economic value could be "conserved" to maximize its utility or its aesthetic value could be "preserved" for the good of mankind. For both, it was something to be conquered, our Manifest Destiny to make the earth our own, and it didn't work unless you forgot that the pristine wilderness had had people living in it until your government kicked them out. As the preservationist movement grew it took American Indians as a model for how to better engage with the earth, and they went along because, given that everything from toxic mining waste to nuclear bombs had been left in their backyards and they generally[43] don't see the earth as a cookie jar to be emptied, increased environmental regulation worked for them, too. This stream of thought joined with another, the stereotypical vision of American Indians as a passive fallen race whose culture needed white people to preserve it like the last stand of trees in a clear-cut forest.[44] It's not a coincidence that the EPA and Clean Water Act came about under the same president[45] as a recommitment to Indian self-determination and self-management. The fates of the two movements became bound, both facing similar motives and similar problems; the environmental movement claimed a familiar-sounding holistic relationship between humans and nature but also special negative effects of degradation for tribes. Environmental and Indian law have also both proven jurisdictional nightmares, and their intersection is so complicated that legal scholars fear that it's impossible to standardize. This makes them prone to delay, paperwork, and general public disinterest—in many cases the public checks out and assumes that the government will solve the problem.[46]

However, despite the jurisdictional issues, environmental law has been uniquely receptive to American Indian claims. The EPA was the first federal agency to develop an Indian policy and has worked

[41] At an informational meeting attended in its entirety by perhaps fifteen white people.

[42] "Environmental Law and Native American Law," Eve Darian-Smith

[43] In broad strokes. The worldviews of different tribes vary considerably, but this is a common enough feature.

[44] It's hard to find a better example of the prevailing attitude than "Iron Eyes Cody," an Italian from Louisiana who pretended to be an American Indian in commercials where he cried over a piece of litter. "Cody," a contrived attempt at representing a Wild West Indian, needed special protection, and Americans had what the Supreme Court would eventually call the "highest moral obligation" to help him. Moreover, it wasn't protection from actual pollution or from, again, the *actual nuclear weapons* detonated next to the Dine reservation—this was protection from what appeared to be a full bag of McDonalds hurled at him from a passing car.

[45]Nixon, of all people—the measure was incredibly popular.

[46] "Environmental Law and Native American Law"

with Indigenous communities to help them fight pollution and get involved in decision-making as governments. It even grants something called Treatment As State, under which tribal entities[47] can develop their own water quality regulations that can bind the states, which fits with a more general EPA theme of expanding tribal authority where it can. The Clean Water Act also recognizes, like Minnesota's right to environmental protection and Anishinaabe theory, that nature can't be so easily atomized into individual plots which don't relate to each other:[48] it ensures the "physical, chemical, and biological *integrity* of the nation's waters as a whole.[49]

It's worth taking a moment to compare all of this to the traditional Anishinaabe beliefs which guide their function under this regulatory framework. Just as the Americans entered into treaties with the Anishinaabe, the Anishinaabe entered into treaties with the land. Land is not only spiritual or economic, it is political, and—like all political relationships, like all *relationships*—that means obligations.[50] Land being political isn't anything new—Americans think land is political, too, as a core aspect of sovereignty and as a thing to be owned and regulated—but for the Anishinaabe it has to do with two aspects: clans and Creation.[51]

Clans help structure Anishinaabe relations; if the "nation" is a fire, clans are the coals and kinship the spark. The fire, which, another way, is the community more generally, may swell to a roar or quiet to a smolder depending on the context, but it does not go out. We can also think about the community as an "interconnected web of hearts," as the village is the heart of the community and the drum is the heart of the nation, the clan the heart of spirituality. Clans each have their animal—the martin, bear, and loon for instance—and each clan is responsible for a unique area like education or internal leadership. Clan animals teach people lessons and impart values; this makes them political, and people accept their teachings in exchange for acknowledging and respecting them. Signing a treaty with a clan not only indicates that the relationship was on behalf of the whole community, it carried forward a reciprocal relationship with the clan animal and the land.[52]

These relationships with the land weren't only possible, they were necessary. People come into the world, Creation, with a relationship to it, and that relationship is forever. The land sustains humanity, and in return we must respect and not abuse it. That imperative even impacts relations with other people—one theory traces the Anishinaabemowin word for land to its word for unity. Though Anishinaabe politics depend not upon the sovereignty of the state but the

[47]Which meet four criteria not unlike the usual criteria for sovereignty—a functional government, federal recognition, appropriate authority, and the capacity to carry out their duties.

[48]This realization actually helped motivate the federalization of environmental law in the first place—the division into many local jurisdictions created a tragedy of the commons where nobody took responsibility for pollution and people lacked recourse for contamination affecting them which they didn't cause.

[49] Ibid.

[50] *An Anishinaabe Politics of the International: Odaenuah, Akina, miniwaa Gchi'naaknigewin*

[51] Ibid.

[52]Ibid.

inherent freedom of people, we have to work together to sustainably share the land because we must share it for eternity.[53]

This sets the stage for how nations relate to each other: they practice *inclusive* sovereignty, the idea that distinct peoples can coexist on the same land in peace. We share the earth, and, although people have deep roots in the place they come[54] from, it would be ridiculous to try and maintain firm borders because nobody can own the land. This practice underlies everything from the treaty-ensured usufructuary right to collect *Manoomin* on other people's land to the idea of even signing treaties in the first place. Anishinaabe wampum treaties depicted two canoes traveling parallel on the same stream, both paddling forwards but neither trying to change the path of the other. Another way the Anishinaabe framed treaty relationships was as a bowl with a spoon: though many people want to eat, none of us can take too much. Keep this Ojibwe perspective in mind when considering the history and law to come.[55]

So chalking tribal interests up to "environmentalism" misses a lot. Clearly. The passivity of the stereotype it relies on also implicitly removes tribal agency—by positioning American Indians as requiring nothing more than spiritual and environmental preservation, it misses other things which people actually need. It also has the potential to limit sovereignty; tribes who want to extract the resources on their land come across as "inauthentic," and discussions of their sovereignty get left behind in discussions of some mystical bond with the earth that needs to be protected for them.[56] This preservationism, also present as one of the key strands of all Indian Law, comes to feel less of a legal obligation and more of a moral duty. The difference, of course, is that breaking one of those crosses the "rights" line while the other can easily fall to other valid interests. This preservationism, as well as, perhaps, the current obsession with assurances, land acknowledgements, and diversity pledges, create a situation in the American mind where we suppose that American Indians desire not adequate funding or self-government at all, but only "the white man's recognition of and respect for their dignity as men, their full human value."[57] We can give that without spending a dime.

But the environmental movement has not swept up tribes that were just standing there twiddling their thumbs; they have used it—and Indian Law—to their advantage. Though "not only is the state antithetical to Indigenous peoples in its very constitution, the existence of states then truncates Indigenous political relationships,"[58] the Anishinaabe and other tribes have used that state apparatus against itself to secure some measure of their interests.

[53]Ibid.

[54] Here we can see how Anishinaabe practices can roughly correspond to typical sovereignty—they share with it an emphasis on connection to territory and the principle that one people should not insert themselves into another's business.

[55]Ibid.

[56] "Beyond Environmentalism: #NODAPL as Assertion of Tribal Sovereignty," Andrew Curley

[57] *Discourse on Colonialism*, Aimé Césaire

[58] *An Anishinaabe Politics of the International: Odaenuah, Akina, miniwaa Gchi'naaknigewin*

This brings us back to Talon Metals' other ill-fated precursor, PolyMet, which got its first Environmental Impact Statement thrown out by the EPA. It tried again with a second EIS—which, though it also wasn't satisfactory, got a participation trophy from the EPA for "improving" over the last one, possibly because a federal and state agency had come up with the actual mining plan for them—before finally coming up with a final Statement which the DNR decided was good enough. A year later the Forest Service approved PolyMet's "land swap"; it wanted to "use" (destroy) thousands of acres of federal land and had to cough up an area "of equivalent value" to be used in the public interest.[59, 60] By 2018, PolyMet had finally moved on to getting permits.[61]

Five years later, almost none of those permits have held up. The NPDES/SES—literally a permit to contaminate water, issued by the state on borrowed authority which requires it to get EPA approval—got tossed after whistleblowers presented evidence that political leadership had buried the concerns of senior EPA staffers, not least of which was whether the EPA could enforce the permit at all, and that the EPA had gone along with it. The DNR's permit to mine got remanded after the Department hadn't granted a contested case hearing on perhaps the most contested mining case in the state's history. The Army Corps suspended its "Wetland Destruction Permit" (yes this is a thing you can get) after its big cousin the EPA—reluctantly—opened a review period for the Fond du Lac Band of Lake Superior Chippewa, with TAS, to determine whether the mine threatened its water. It concluded that it did.[62]

Notably, these permits weren't shut down because the agencies determined that the mining wasn't safe. Though people filed over *100,000 public comments* relating to PolyMet, the majority in opposition, these didn't get them shut down either. Neither did those "government-to-government" consultations with the Bands. They weren't even shut down because a judge determined that the mine wasn't safe. The permits were scrapped by courts for complicated, sort of boring administrative reasons—"procedural irregularities," improperly denied contested case hearings where the petitioner had sufficient standing, TAS. But these rulings show us what the federal and state courts, and federal and state governments, care about. Broadly, they care about holding agencies accountable to themselves.[63]

That—like so much of the state-tribe relationship—involves a whole lot of information sharing, whether so-and-so agency was required to give the Band or activist group notice or an explanation or a hearing, and, relatedly, whether their decision, which is often

[59] This is the thing footnote 42 is referring to; they just tried to make it actual federal law.

[60] The Fond du Lac Band sued over this but got dismissed since PolyMet getting the land didn't mean they would be allowed to mine and thus Fond du Lac couldn't prove standing; PolyMet just owns this land now. They also sued over the transfer of a permit for a tailings basin from LTV Steel, whose facility PolyMet was reusing, and lost because it was up to the DNR.

[61] Most of this comes from WaterLegacy, local news, legal documents, and statements from PolyMet.

[62] Ibid.

[63] They also, in the spirit of the apparently inescapable John Marshall and his insistence that it is "emphatically the province and duty of the judicial department to say what the law is," care about asserting their authority, though the state courts especially also make sure to give their agencies all plausible deference.

discretionary, can even be reviewed by a court of law. Questions of who had a right to do what, to challenge what, and to evaluate what both opened the door to and relied on the answer to another overarching question—whether a decision was "arbitrary and capricious,"[64] or, put another way, whether the evidence "reasonably supported"[65] it. In the broadest possible sense this means upholding the promise made by the agencies and the law to the people who vested power in them.

The Fond du Lac Band picked up on this. It decided that its best move would be to frame their assertion of TAS in two ways: the EPA and Army Corps had "violat[ed] [their] duties" to make sure the mine would comply with federal law, and they had "failed to protect" the Band and its rights. The Band asked the court to make the EPA reconsider its decision not to object to the dodgy NPDES/SES permit;[66] it objected to not getting a hearing for the Wetland Destruction permit and getting totally ignored as a "special cooperating agency"; it claimed the Corps didn't follow its own rules in granting the permit, part of which requires it to assess the mine's effect on the Band as a downstream State.[67]

Though all the allegations meticulously detailed in the 88-page complaint concern specific violations of federal law, the Band grounds the suit in the relationship between the United States and a tribe.[68] According to its opening volley, this relationship is both *no* more and so *much* more than that between two sovereigns. A treaty itself is just a contract between nations which either has the freedom to breach, but somewhere in the legal space between when the parties sign it and when it comes into effect, between wars settled in fevered negotiations and "consultations" conveniently forgotten, between two systems and one, it becomes a self-imposed—and self-defined—burden on the conscience of the U.S. government.

"A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations."[69]

"In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party . . . it has charged itself with moral obligations of the highest responsibility and trust."[70]

[64] *In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System / State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St. Louis County Hoyt Lakes and Babbitt Minnesota,* Minnesota Supreme Court

[65] *In the Matter of the NorthMet Project Permit to Mine Application Dated December 2017 (A18-1952, A18-1958, A18-1959), and In the Matter of the Applications for Dam Safety Permits 2016-1380 and 2016-1383 for the NorthMet Mining Project (A18-1953, A18-1960, A18-1961)*, Minnesota Supreme Court

[66] This is related to the comment suppression scandal.

[67] *Fond du Lac Band of Lake Superior Chippewa v. Cathy Stepp, Andrew Wheeler, the United States Environmental Protection Agency, and Samuel L. Caulkins*, United States District Court District of Minnesota

[68] Ibid.

[69] Washington v. Fishing Vessel Assn., 443 U.S. 658 (1979)

[70] Seminole Nation v. United States, 316 U.S. 286 (1942)

"Moral obligations of the highest responsibility and trust" smacks of preservationism, but it derives from an attempt to reconcile the two impossible tenets of Indian Law: that the tribes retain "inherent sovereignty" and that Congress can abrogate that sovereignty because it has "plenary" power over the Indian tribes.[71] As it has attempted over the years to reconcile these truths, the Supreme Court has stockpiled an arsenal of "canons of construction," interpretive principles which construe treaties and, now, statutes, as favorably as possible to Tribes and as they would have been understood at the time.[72, 73, 74] However, this creates another uncomfortable question, the same question indigenous academics and activists have been throwing back and forth for years: how can a Tribe set the terms of its own existence in "the Courts of the conqueror"?

The Supreme Court never answers those sorts of questions—it can't. Often, it's more worried, just as John Marshall was, about federal power; for the Court, the problem isn't usually that a treaty was broken, it's that someone did it without asking Congress, because nobody but Congress can break Congress' promises. Implicitly, then, the Court puts faith in proper procedure[75] and the delineation of spheres. Its questions of Indian Law are whether or not the federal government is doing something that only the states can do, or the states are doing something only the feds can do, or the Indians are doing—or asking someone to do—something they're not allowed to.

These are remarkably similar questions to the ones the courts asked in the PolyMet cases. There, too, it matters most who has standing and authority to do what, and there, too, lie complicated and dull issues of jurisdiction. Like complex environmental laws, they are deliberately designed to make sure that the tribes have very narrowly defined areas of control outside of which they have little influence, and, moreover, to make it difficult for outsiders to understand what's going on, leading the politically inclined to protest not for more tribal rights, which are obscure, but for environmental justice, which is simple.

Another theme which carries over from the broad theory of Indian Law to practice is making sure tribes know what's going on even if they can do absolutely nothing about it. The canons of construction make sure that treaties work as the signers were aware of them; now the tribes usually have a right to engage in information-sharing, which has come to constitute much of the Minnesota Chippewa Tribe's relationship

[71] United States v. Lara, 541 U.S. 193 (2004)

[72] Indian Law benefits a surprising amount from the typically conservative doctrines of Textualism and Originalism. Republican-appointed Neil Gorsuch has been its staunchest champion (eight-to-one dissent staunch) on the Court in decades, though another Originalist, Clarence Thomas (another eight-to-one dissenter), thinks that treaty interpretation should be banished back to the realm of contracts from whence it came.

[73] Arizona v. Navajo Nation, 599 U.S. ___ (2023)

[74] In other words, they're interpreted to "give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

[75] So do the Anishinaabe, albeit in a very different way. The Mille Lacs Band governs according to—and asks its members to keep in mind—the traditional values of Honesty, Humility, Truth, Wisdom, Love/Compassion, Respect, and Bravery/Courage. These are the same values King used to guide his research. Like the United States conception of procedure, these values are about fulfilling obligations as people go about their lives; unlike the United States conception, it's about affirming relationships rather than state power. More generally, Anishinaabe law revolves around processes and values which allow one to live well.

with the state: by special contract they have commissions designed to keep each other informed about everything from game populations to gambling standards. On a federal level, too, this is part of why TAS and "cooperating agencies" exist—to get information from tribes before going forward with projects.[76] This marks a distinct turning of the tables from the canons of construction—though part of the goal is still to keep them up to speed, they have to conform to things as the science and laws of the United States see them rather than the other way around.

At the end of the day, though, it's unclear exactly how much of an impact the Bands' efforts made. Though they eventually won on PolyMet, none of the Band's lawsuits exactly succeeded; the court dismissed a challenge to the land swap and they lost a case contesting a permit transfer. The big victory of the TAS lawsuit was it not getting dismissed, after which the EPA took over voluntarily. Moreover, the Band had to gather its experts, file its comments, and sue everyone they could just to get someone to listen. But the Band *is* giving challenging the land exchange another go,[77] and federal judge who clerked for Antonin Scalia found that, this time, it has standing under a standard as that seems as incompatible as it gets with Anishinaabe understandings of sovereignty: it can prove "an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical."[78, 79] In this case, the "maps and sharp borders" of our law are what one judge called "comprehensive enough, it would seem, to include even an Indian."

Though the law opened up to their claims, it did so only because the Band made the government pay attention. The Band spoke the legal language and sued in the first place because the government ignored them, which it likes to do—it's remarkably easy when most of the government's obligation is just to listen without *listening*. Tribes are not states and, whatever the government says, they must advocate for themselves primarily because no one else will. This is the same approach taken, ironically, by the environmental groups the Tribes have become associated with despite the limitations on their claims to sovereignty that that association creates. Because of the way the permit system works, anti-mining groups[80] must intervene, challenge, and comment on every inch of information

[76] Data is the soul of the permitting process, and, in order to be taken seriously, the Bands have gone above and beyond to produce the sort of data the government likes—of all the groups who submitted comments to the DNR, the Bands' had the highest proportion of "substance."

[77] *Fond du Lac Band of Lake Superior Chippewa v. Constance Cummins, Randy Moore, United States Forest Service, Thomas Vilsack, United States Department of Agriculture, and PolyMet Mining Co.*, United States District Court District of Minnesota

[78] Ibid.

[79] This is the usufructuary right to gather on the land that got swapped. The actual plan is worth noting here: according to the judge, "PolyMet Mining seeks to build an open-pit mine on the land. The United States Forest Service refused to authorize surface mining on the land. To eliminate the conflict between Poly Met Mining's desire to build an open-pit mine and the Forest Service's management of the land, Poly Met Mining and the Forest Service proposed a land exchange." This is a brilliant—or devious—way to let PolyMet get what it wants without hurting federal feelings. Given that the Forest Service *authorized* the land swap, I can only assume that it cared more about its authority than what happened to the land, and that it might have even given the mine the go-ahead if it didn't blatantly violate their own rules. Given that they got sued anyway, this didn't work.

[80] They would likely reject this characterization, contending that they have opposed mining thus far because it hasn't (and, under the Prove it First standards proposed by WaterLegacy, cannot) proved itself to be safe.

to ensure its accuracy; they cannot rely on the process to run its course unchecked. The funny thing is that, so far, they've stopped the mining in its caterpillar tracks.

But when it comes down to it, the federal government has more than Indian interests at heart; while Minnesota wants to flex its regulatory muscles by killing or sparing the mines, Indians are Congress' responsibility and it can't sit by and watch its authority get trampled. The EPA and Army Corps get ultimate veto power, having delegated but not relinquished their federal authority to the state, and once the EPA got caught with its pants down in the permit scandal the whole PolyMet project was doomed.[81] PolyMet and Twin Metals also had the misfortune of invoking the feds by using federal land.[82] The Biden administration wants domestic nickel production, but—like Minnesota's reactionary legislature—it also doesn't want to look like a villain.

All of this is to say that the PolyMet case wasn't just a win for the Fond du Lac Band's framework for how we should approach our relationship to the earth, or even the scientists and lawyers it threw at regulators and the courts. It was also a victory for a federal government trying to repair the mistakes of its preceding administration and for courts trying to balance deference to state decision-makers with evidence of flagrant disregard of protocol despite repeated warnings. It was a victory for the process itself, albeit incomplete and long overdue. All of these things are true at once.

That's how this story goes. The American Indian or her tribe adapt their claim into something the United States can accept without contradicting itself or its interests. This has taken very different forms over the centuries, as American policy has jolted from removal to allotment to reorganization to termination to self-government to the present, but it started with treaties.

The United States continued to make these treaties—things you make with a government—long after John Marshall decided that Indian Tribes were just domestic dependents, "pupils"[83] under "protection" ~~from~~ of the United States. The treaties (and statutes that replaced treaties) gave tribes a little land somewhere else and equipment to live like white people did in exchange for vast swaths of territory. They governed the U.S/Tribe relationship until the federal government decided to "allot" reservations into individual parcels,[84] the majority of which were sold off and never regained.[85] Though removal and murder did

[81]After all, the Fond du Lac TAS lawsuit never really went anywhere—the EPA and, shortly after, the Army Corps, conceded once Fond du Lac made their "will affect" determination. The permit scandal had happened under the Trump administration, and Biden's EPA appears to bear little loyalty to the politics of its predecessor.

[82] Talon claims as a selling point that its land would only belong to private parties and the state.

[83] And, in official terms, their "father," which makes later treaties very confusing to read if you don't know what the deal is.

[84]Many of the allotments are still held in trust by the federal government or owned by individuals, but the Supreme Court virtually guaranteed that these will never be transferred back to the tribes

[85] As the population grew, promises to never make Indian Territory into states dried up just like the economies of the tribes forced to relocate to unfamiliar environments and rely on government support to eke out livings in the desert. To make sure we're all on the same page: these treaties and acts and removals and rights were happening on paper in nice oak-paneled rooms in capitols while the U.S. military committed about 100 years of textbook *genocide* and once there was no more land to take, another 100 consolidating its gains.

their part to destroy the tribes, allotment did so slightly more subtly, physically breaking apart communities and their relationships.[86] These allotments, of course, violated the promises made in treaties, but Congress can do that because it can do almost anything in the "interest" of the Indians, and it gets to decide what those interests are.[87] To Congress, those interests included assimilation. Congress also, apparently, thought that "Courts of Indian Offenses"—deployed during allotment by mostly rogue or corrupt Indian Agents[88] (and somehow deriving from tribal/"improvement" power) and designed to repress cultural practices and replace traditional justice—made the cut.[89, 90]

By 1934 even the government[91] saw that allotment was, rather than assimilating people, ruining their lives. It passed the Indian Reorganization Act (called the "Indian New Deal")[92] which reorganized disparate policies into one slightly more cohesive format.[93] Most of the standardization was actually on the part of the Indians: they would join the program and set up governments, usually under standard "IRA Constitutions," which made them federally chartered corporations,[94] let them hire attorneys, and gave them access to certain government funds. Tribes now operated more homogeneously and with less traditional administration under something resembling a mini-U.S. government, but, though the Act made the BIA less overtly paternalistic, their constitutions had to get U.S. approval, as did their laws unless they amended their constitutions—as a majority did not—to specifically say otherwise.

This was roughly the state of affairs until the Red Power movement, Nixon's "self-determination," and the partial subsumption of political concern for American Indians into '70s environmentalism. Tribes accrued more and more responsibilities as they became

[86] "Excess" land not allotted to heads of household got sold off to pay for the residential schools. You can't make this s–t up.

[87] In fact, the only thing standing in Congress's way are property rights; it can do whatever it thinks is in the interest of the Indians, but it must repay (but not give back land) them if it abrogates property rights it had established.

[88] They worked for the BIA, which remained corrupt as an entity for decades

[89] *Introduction to Tribal Legal Studies*

[90] These replaced traditional consensus-based restorative justice systems, which the federal government had respected via treaty before allotment, with the American adversarial system. (The Anishinaabe used to either find a way to reconcile a person to the community or exile/kill them.) Bands now have their own adversarial courts—the civil and criminal ones are jurisdictional nightmares subject to constant argument and sometimes shared control between the tribes, states, and federal government which can only impose limited penalties and only handle certain issues. In some states, like Minnesota, what would otherwise be federal jurisdiction over a crime in "Indian territory" is delegated to the state. Tribal courts no longer have jurisdiction over non-members who are routinely present on the reservation, but Congress gave them power over non-member Indians. Tribal appellate courts, interestingly, rely on both tribal statutes and federal precedent. It is in these tribal statutes that traditional ideas can be preserved, such as the White Earth Band's 2018 law giving *Manoomin* treatment as a person. The tribes also don't have to follow the Constitution, including the Bill of Rights, because of their inherent sovereignty, though the Indian Civil Rights Act prevents tribal governments from violating *certain* rights.

[91] Here, by "the government," I mean one man, John Collier, an official in the FDR administration who had been introduced to the Pueblo by an eccentric heiress and was so taken that he dedicated his life to preserving American Indians from eradication.

[92] Because I guess FDR had to have his one "thing."

[93] Ten years before, following their service in World War I, Congress had finally made American Indians citizens. It had to do that because, of all cases, *Dred Scott* had held that though they *could* become citizens, it wasn't automatic.

[94] Not that unlike those Joint-Stock corporations of the colonial era.

subcontractors of the BIA in an attempt to resolve the contradiction inherent in the federal trust responsibility between having the federal government be responsible for managing tribal money and having tribes govern themselves.[95, 96]

Even now they still, for the most part, operate under those IRA constitutions—the Minnesota Chippewa Tribe certainly does. But compare the preamble of the Minnesota Chippewa tribal constitution:

> We, the Minnesota Chippewa Tribe...in order to form a representative Chippewa tribal organization, maintain and establish justice for our Tribe, and to conserve and develop our tribal resources and common property; to promote the general welfare of ourselves and descendants, do establish and adopt this constitution for the Chippewa Indians of Minnesota in accordance with such privilege granted the Indians by the United States under existing law.[97]

to a new draft being prepared for circulation and approval by the members of the Minnesota Chippewa:

> We, the Maamawiino Anishinaabeg Nation, the original people, have formed powerful Alliances with other nations throughout history. We will continue to form future Alliances to reunify the many people of the Maamawiino Anishinaabeg Nation. We will form Alliances to protect the Rights of Nature, uphold our treaty responsibilities, preserve our sovereignty, enrich our culture, and achieve and maintain a desirable measure of prosperity. We ordain and establish this Constitution Alliance for the governance of the Maamawiino Anishinaabeg Nation. We can enjoy freedom while acknowledging humility, gratitude, the goodness, aid, and guidance of the Universe's Creator (Gizhe-manidoo/ Ke-che-mun-e-do) in permitting us to do so.[98]

Obviously, these are radically different documents. The first, styled off the preamble of the United States Constitution, wasn't written by members of *any* tribe, let alone the one it constitutes. It incorporates Indian Law's stock preservationism into the purpose of the tribe itself while making sure to acknowledge the ultimate authority of the federal government. It speaks exclusively in the language of U.S. law. Contrast this with the second preamble; it affirms the Anishinaabe as a nation in relation to other nations, defiant of America's colonial borders. It frames the purpose of the government as the preserver and mediator of obligations to (and from) both other governments and nature. It is as close as we will get to a pure declaration of the Anishinaabe model.

Finally, consider the preamble statement to a resolution from the National Congress of American Indians in

[95] *Introduction to Tribal Legal Studies*

[96] Now, many tribes can, almost a century after the IRA, manage their own federal money as long as they can demonstrate their "competence." However, the government still conducts "trust evaluations"—the Secretary of the Interior can decide to take back trust responsibility if he thinks trust assets are in "jeopardy," though according to our dear SCOTUS the federal government still doesn't have a "positive" responsibility to make sure tribes like the water-deprived Dine get their trust resources. Tribes also have more dealing with the states than ever, though gaming compacts and gathering rights and committees and, for some, expanded state jurisdiction.

[97] *REVISED CONSTITUTION AND BYLAWS OF THE MINNESOTA CHIPPEWA TRIBE, MINNESOTA*, Minnesota Chippewa Tribe

[98] *MAZINA'IGAN MAAMAWIINO ANISHINAABEG NATION (AKA CHIPPEWA) CONSTITUTION ALLIANCE Draft 7.a*, Fond du Lac Constitutional Reform

which it calls—in detailed Western scientific terms—for the PolyMet mine to be stopped due to the threat it poses to "pristine wilderness" and Ojibwe treaty rights:

> We, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people.[99]

Though this statement comes not from one tribe but from a congress of many tribes, it does not only share features of both the Minnesota Chippewa constitution and its proposed replacement, it translates the ideas of the latter into the language of the former. The obligation to nature, which we must respect because it sustains humankind, becomes the Creator's blessing. The sovereign nation of "original people" in alliance with other nations becomes Indian nations with sovereignty secured *under* treaties, laws, and declarations. Treaty "responsibilities" become treaty "rights."

This is what tribes have to do when they deal with the United States and its non-Indian citizens both in actual court and the court of public opinion. They hold both the American grammar and vocabularies of law and values and their own in their heads at once. They live with them daily.[100] Sometimes, as above, the translation can be fairly easily traced between languages, but sometimes the outcome which the traditional framework points to doesn't really have an equivalent in the American version and will get a largely unrelated legal argument; this is the difference between the Fond du Lac Band asserting TAS, which demands that the United States follow its obligations to not tip over the Band's canoe, and it arguing that the EPA should have objected to the NPDES/SES permit because a court buying that is good for their interests.

Under this translation framework, the incongruence between what Jean Skinaway Lawrence and her advisor Jay said to me at that mining meeting in Lawler, Minnesota—that the federal government should handle the permitting and that whites need to be more spiritual—resolves itself. Ms. Skinaway-Lawrence was speaking to me about the Sandy Lake Band's interests in the language they use with the government. Jay used his own political language.[101] White people don't understand Anishinaabe spirituality, and if they did they would understand how threatening they find the mine, but they don't and the

[99] Resolution #MKE-17-007," The National Congress of American Indians

[100] Hayden King, as usual, said it more eloquently than I can: the Anishnaabe "hold multiple social perspectives while simultaneously maintaining a center that revolves around fighting against concrete material forms of oppression."

[101] He also saw me taking notes and told me that I have "stingy handwriting." I still do not know what this means.

federal government secures Indian sovereignty[102]) better than the states and should run the process. The spirituality argument might be more directly true under the Anishinaabe political framework, but the federal government claim is a better way—the authoritative, *legitimate* way—of saying what they want in a way that non-Band members will pay attention to. Some context and information are necessarily lost, it's better than not being heard at all.

Awareness will not fix colonialism and I will not pretend otherwise. But neither will dismissing American Indian perspectives because they're framed in an unfamiliar way or because they seem to go against our interests. Though Talon had told the crowd of old white conservatives that the nickel would build their pacemakers and fighter jets and that seemed to be enough for them, everyone at that mining meeting lives a couple miles from each other. They use the same roads and same gas stations. They're neighbors, no matter what the stereotypes and jurisdictional lines say, and we can disagree with our neighbors without writing them off because we don't quite understand where they're coming from. This is true for America generally: American Indians are here, 6.4 million of them. Though many live on reservations, it's not like they're in another country. Colonialism took care of that. No less importantly, the Anishinaabe value set overlaps quite a bit with the American one, even if the parallels aren't exact; they both value individual autonomy and not letting the government f–k with you, and they both understand the importance of keeping your word. This is how translation is even possible. It is also where translation can help. Ms. Skinaway-Lawrence put the mine in her terms, but the Mille Lacs Band has put it in more language which is probably a lot more familiar to most white Minnesotans:

> "As a sovereign nation, the Mille Lacs Band must have an equal voice in this process and is entitled to equal protection"[103]

Strictly speaking, this isn't true. It's not exactly a sovereign, it doesn't get an equal voice in the process, and it isn't entitled to equal protection.[104] But the Band didn't give this quote to a newspaper because it wanted to make a legal claim, it gave it to convince Minnesotans to side with the Band. Though it's admittedly a little far from traditional Anishinaabe principles, it gets the point across well enough—the Mille Lacs Band shouldn't have some other government doing things which directly affect it, an inclusive sovereignty relationship with the United States means that both of their voices are heard, and we *all* have obligations to one another. Moreover, the point of these translations is less to establish "theoretical parsimony" than to make things happen,[105] and the Fond du Lac and Sandy Lake and Mille Lacs Bands—and at one time or another all the Ojibwe living in what we now call Minnesota—have done this brilliantly.

[102]Through which they can be heard in court, where they can present arguments drawing on traditional ideas but translated into something the government will understand.

[103] "What you need to know about the Talon Metals plan to mine metals for EVs in Minnesota," MinnPost

[104] Tribes are political, not racial (or corporations with territory, regardless of what Clarence Thomas insists in opinion after opinion). This means, for instance, that the government can favor them in hiring practices, and that they can have more privileges than ordinary citizens through treaty, statute, etc.

[105] *An Anishinaabe Politics of the International: Odaenuah, Akina, miniwaa Gchi'naaknigewin*

Our Indian Law has evolved from the treatment of tribes as sovereigns to domestic dependents, from the protection of their land to their dissolution and back again; it is rife with our settler-colonial attempts to obliterate, assimilate, abrogate, and separate tribes, to tie them up in jurisdictional knots and leave them bound and passive receivers of information and sympathy and their own money held in trust by the federal government; it has wrestled with itself and lost trying to justify the coexistence of what it calls sovereigns inside its borders with the sovereignty of the federal government. It has raised again and again the question of what *it* is, a deeply unfair thing to ask of any law—let alone Indian Law. It is several things and no thing, the parchment and the words scraped again and from it by the scalpels of time and progress, a great sculptural mass which the clear-eyed can only graze like blind men groping an elephant. It is the tense nowhere between translations. The Supreme Court called it schizophrenic.[106] As has probably become evident by now, you can't just tell it from beginning to end; each movement in its web pulls on a hundred different threads. Even its descriptions turn out inconsistent.

In this chaos, despite opposition from every possible angle, the Bands have "grown [their] medicines from the cracks in concrete sidewalks."[107] They have nurtured their political philosophy through centuries of colonialism, and through translation and resistance it has grown through the settler-colonial edifice, climbing along similar threads, crawling through gaps in logic, and leaping between interpretations that are close enough. Anishinaabe law, myth, and language depend on radical freedom, which means an incredible diversity of interpretations and looking to a story to see what it tells us about how to live knowing full well that there will not be a single answer.[108] It demands an inclusive sovereignty that keeps in mind our obligations, that we work to resolve our differences because we have a relationship that we can't simply get out of. It understands that people can do what they want unless it violates the many treaties we have with each other. It asks that we not break our promises. This framework has given Anishinaabe theory the freedom to face American law. Moreover, this framework is *compatible* with American law.

Given, well, everything about how Indian Law has developed, this might seem insane. And, granted, we've seen in the PolyMet cases how even the best translations struggle to bridge the gap between incompatible values. A type of law designed around the right of the sovereign government to make decisions, which principally concerns itself with working out not whether their decision was the best for everyone but whether it was *so bad* that a court had to intervene (and won't even do that unless someone goes to the trouble to challenge it), which treats the earth as a resource to plunder and information as a substitute for consent, will resist Anishinaabe principles. But even this wall has room for the tribes; assertions of sovereignty, no matter how far from the Anishinaabe conception of themselves, can get them in the door. The law does give weight to obligations the state has said it will abide by, whether those be treaties or procedural benchmarks. The sovereign, so averse to being forced to do

[106] Haaland v. Brackeen, 599 U.S. ___ (2023)

[107] "In Defense of the Wastelands: A Survival Guide," Erica Violet Lee

[108] As long as the interpretation isn't actively trying to sabotage the community or its values. However, as a side note, this makes translation extremely difficult.

something, promised long ago a place for tribes in our Constitution and in our law. Though it can and has broken promises to tribes, the sovereign doesn't like to break promises to itself, and the federal government especially doesn't like when its states or agencies break promises the nation made. The only person that can force the federal government to do something is the federal government.

At the same time, for all the values and intentions behind our law, the words themselves are vessels for interpretation. Logically, this must be the case if we have made it this far as a country. We have interpreted and reinterpreted our law as we have changed, building in many different directions and with many different plans—Indian Law is but one particularly eclectic example. Knowing the architecture helps us navigate the law and has helped American Indians enter our legal systems, but, though the hatred and bigotry of removal and allotment cannot be excised without the whole structure collapsing, neither must we adhere to their intentions. As in the Anishinaabe tradition, one story can have several meanings; not only must a wise nation acknowledge that a singular interpretation is impossible and arrogant—I mean *look at our law*—but that this license of interpretation is necessary for a free society. It allows us to consent to our government and make it *ours*. The Constitution is just a promise we have made to each other, like the wampum belt treaties of the Anishinaabe, but to keep it we must be able to make it over and over again, and make it better and more fair. "Things which don't grow are dead things."[109] The country will change, but we carry our obligation forever.

[109] *An Anishinaabe Politics of the International: Odaenuah, Akina, miniwaa Gchi'naaknigewin*

. . . .

There had been signs that the "mining tour"[110] wasn't a great idea, but, though several wrong turns in Minnesota's back country had left us thirty minutes late and slogging along dirt and gravel roads headlong into a thunderstorm, we'd made it 140 miles and, goddamnit, we were going to have *fun*. Talon Metals' outreach rep, Jessica—who had clearly been expecting locals or journalists, not teenagers from the Cities on a very weird road trip—greeted us in the driveway and immediately launched into her spiel as she brought us to stand around boxes upon boxes of core bedrock samples in the geology shed. Though she tended to preempt criticisms we hadn't brought up in a way that came off as defensive, neither the awkwardness nor the mounting rain stopped her from leading us to the future mining site in the brightly-decaled company Tesla (the only one in a town of pick-ups) where we stood, soaking wet, and listened to her explain the economics of boom and bust until a man in a high-vis vest helpfully told us, as lightning crackled overhead, that a storm warning had come into effect.[111] If this was an unsubtle hint to wrap up the tour, we didn't take it, but we did, with Jessica's prompting, pile back into our cars and out of the downpour.

Back at Talon's offices—a cozy yellow house with walls plastered with complicated maps—talk turned to the community outreach side of the business. Talon Metals seems to be making a genuine effort to do clean(ish)

[110] As we'd come to call it, despite the mine not existing yet and the "tour" consisting of a garage, an office, and a quick trip to a field.

[111] This also meant that we wouldn't get to see the really big drill in person, as it was in a secondary location inaccessible due to muddy roads. Given that this had been one of the primary lures I'd used to convince my either very loyal or very bored friends to drive up with me, its absence was a genuine letdown.

mining in the hopes of community support, an easier permitting process, or both, but that mostly means listening to the white people of Tamarack. Talon has been working with the town to plan ahead for the jobs, housing, and businesses the mine hopes to create, but the idea that they do the same with the local Bands seemed to catch Jessica genuinely off-guard. As we talked, I got the sense that Talon has largely given up on reaching out to the Mille Lacs and Sandy Lake Bands; echoing Todd Malan's stance at the community meeting, Jessica admitted that the Bands might never accept Talon's mine, but that that wouldn't stop them from building it. She repeated another line from Malan about how, unlike feedback from the rest of the community, the Bands would get to make their points in government-to-government consultations—the implication being that their concerns are, in the end, not Talon's problem.[112]

Really, though, the Mille Lacs and Sandy Lake Bands' concerns aren't that different from everyone else's, which became obvious when I asked Jessica about how Talon had incorporated them into the mine's plans: she exclusively listed measures, like moving tailings processing to North Dakota, that address *everyone*'s worries about sulfur contamination. This could well have been another PR dodge because no actual examples exist,[113] but I'm not sure that fully explains it.

[112]She's right. Talon gets to propose whatever it wants, and the regulators try to find a way to make it work. Todd Malan's statement on national television that the mining question "shouldn't be yes or no" but "how and where" wasn't just company copy, it's a pretty fair assessment of the permitting process. Tribes do get their information-sharing and consultations, but given how those consultations tend to go and that neither Band has TAS, their concerns will be one isolated drop in an overflowing bucket.

[113] She did conclude by emphasizing that Talon strives to "seem" like they're listening.

Talon—and the government—have sequestered Tribal interests as some "other" thing to deal with while simultaneously making little attempt to actually understand what that thing is. They know both that the Ojibwe position rests on core principles which they assume they can't relate to and that the Ojibwe share the stated concerns of environmentalists (which they have a standard way of dealing with), but not that the one is a translation—for their benefit—of the other. They resort to the legal bare minimum on one hand and stock assurances on the other because they do not understand the connective tissue in between them, the connective tissue by which the U.S./Indian relationship has held itself together despite the colonialism embedded in its bones. We must do better.

On a whiteboard in the chief geologist's office, someone had written, "We are not Experts in Subjects, We are Experts in becoming Experts." Though a mildly disturbing attitude for a mining company with a 100-person staff planning to dig up thousands of tons of sulfurous ore in the middle of a f–king wetland, it's not a bad mantra for the citizens of a democracy. Indian Law is confusing in large part because it's better for our settler-colonial state if we think we can't figure it out and therefore ignore it. But we can't ignore it. Tribes have had to translate their interests into American terms for centuries, but they—and their sovereignty—are a part of the fabric of our country, and respecting ourselves as a nation means understanding and respecting them and their place in it. It means engaging as foreigners and as friends, as citizens bound together by our mutual obligations to the earth, to the Constitution, and, in both cases, to each other. It's not that hard to try and learn. We owe it to each other to try.