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The Double-Edged Sword of Sovereignty by the Barrel: How Native Nations Can Wield Environmental Justice in the Fight Against the Harms of Fracking

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ABSTRACT

Natural resource extraction has become an appealing form of economic growth for many Native nations. Nations have experienced booming economic growth and prosperity from oil and gas development, but this has come at the expense of environmental and social harms to their communities. These environmental and social harms develop because the oil and gas industries and the Native nations' governments externalize costs of environmental and social protections onto the public in order to reap the benefits of saved costs. The ability to punt these environmental and social costs can be attributed to encroachments on sovereignty, institutional racism, and internal corruption, all of which cause great harm to Native citizens. Litigation against environmental and social harms is not the best solution for ensuring healthy environments when Native nations pursue economic development through oil and gas extraction. Instead, distributive and social justice policy solutions, under an environmental justice framework, can successfully provide protections to communities and the environment by forcing oil and gas industries to internalize all costs of oil and gas development and growth. This Comment, through the use of case studies, determines best practices of distributive and social justice policy solutions that Native nations can implement to internalize the costs of oil and gas extraction. Further, this Comment examines these best practices in the context of the booming oil and gas economy in the Mandan, Hidatsa, and Arikara Nation and the Bakken oil field.

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INTRODUCTION

Natural resource extraction has become an appealing form of economic growth for many Native nations. Currently, the Mandan, Hidatsa, and Arikara Nation (MHA Nation)[1] is experiencing a period of significant growth in oil and gas development on the Bakken oil fields.[2] The MHA government and private oil and gas companies have promoted and supported this activity. As a result, the Nation has experienced booming economic growth and prosperity, but it has come at the expense of environmental and social harms to the community. The oil and gas companies, federal government, North Dakota state government, and MHA Nation have failed to address these harms on behalf of the Mandan, Hidatsa, and Arikara. These environmental and social harms develop because the oil and gas industries and the MHA government externalize costs of environmental and social protections onto the public in order to reap the benefits of saved costs. The ability to punt these environmental and social costs can be attributed to encroachments on sovereignty, institutional racism, and internal corruption, all of which cause great harm to MHA citizens.

At first glance, an obvious solution is to sue bad actors in federal court for breaking environmental laws. Because of the complex nature of environmental harm, however, it is often difficult to identify the polluters, collect the required evidence, and establish the necessary causal requirements. Even if the appropriate defendant is found, litigation is costly and time-consuming, which delays addressing many of the broader problems caused by oil and gas development. While litigation can be a useful tool for reaping punitive damages for many environmental

1. The Mandan, Hidatsa, and Arikara peoples have rejected the federally recognized name, the Three Affiliated Tribes, to fight against past and current colonial and Anglo-American praxis working to dismantle their individual indigenous identities. To respect and stand in solidarity with all Natives' right to self-identification, this Comment will not refer to the Mandan, Hidatsa, and Arikaras people as the Three Affiliated Tribes, but as the MHA Nation. Further, this Comment will use the language of Native nations instead of tribes in an attempt to change how we as a society view Native people, their governments, and their inherent sovereignty. This change in language gives recognition to Native nations as separate political entities and demands a true government-to-government relationship with the United States and individual states. Equal relationships among governments will ensure respect for Native sovereignty and Native people.

2. Zachary Toliver, *Tribes Collect Millions in Oil Revenue: Three Affiliated Tribes Set to Collect $184 Million in Revenue; Money to be Used for Infrastructure*, MHA NATION NEWS (Apr. 24, 2014), http://www.mhanation.com/main2/Home_News/Home_News_2014/News_2014_04_April/news_2014_april_24_tribes_collect_millions_in_oil_revenue_three_affiliated_tribes_set_to_collect_184million_in_revenue_money_to_be_used_for_infrastructure.html [https://perma.cc/27XF-JSCQ].

harms, traditional environmental and civil rights litigation strategies are rarely successful, and they do not address the core issues for communities of color, especially Native communities.[3] Thus, litigation, at least alone, is not the best solution for MHA citizens.

Given the limitations of litigation, another viable option, and the focus of this Comment, is reforming policy by combining an environmental justice approach with distributive and social justice solutions tailored for oil and gas industries in Native nations. Environmental justice is a movement to address the environmental disparities borne by people of color and the poor.[4] The goal of environmental justice advocates is to end environmental racism, the systematic process of burdening communities of color with disproportionate environmental risks while white communities receive a disproportionate amount of resources for environmental protection.[5] Next, distributive justice is defined as "the right to equal treatment . . . to the same distribution of goods and opportunities as anyone else . . . ."[6] This definition includes the right to equal distribution of the benefits of environmental protections.[7] Finally, social justice demands that "members of every class have enough resources and enough power to live as befits human beings, and second, that the privileged classes . . . be accountable to the wider society for the way they use their advantages."[8] Governments of Native nations can create new laws and policies in line with distributive and social justice solutions applied under an environmental justice framework—like strong environmental regulations, tax increases to fund infrastructure costs, and cultural resource protection regulations—to force extractive industries to internalize the costs of environmental, social, and economic harms inflicted on Native communities. Further, Native governments should work with state and federal governments to

3. *See generally* Clifford Rechtschaffen, *Overview of the Environmental Justice Movement*, *in* ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATIONS 3 (Clifford Rechtschaffen et al. eds., 2009).
4. *Id.*
5. *Id.*
6. Robert R. Kuehn, *A Taxonomy of Environmental Justice*, *in* ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATIONS 6, 8 (Clifford Rechtschaffen et al. eds., 2009); *see also* Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D. L. REV. 381, 426–28 (1998) (discussing the problem of listing Native reservations as critical habitats of endangered species because it forces Nations to forgo economic opportunities and places disproportionate conservation burdens on Natives when the endangered species were brought to the brink of extinction by non-Native development). The distributive justice solution requires "burdens of conservation to be borne by those who have benefitted from activities which drove species toward extinction." *Id.* at 427.
7. Kuehn, *supra* note 6, at 8.
8. *Id.* at 12.

develop policies and agreements that protect Native communities from harmful non-Native actions, both inside and outside Indian country.

Thus, the MHA Nation would be best served by adopting distributive and social justice solutions to hold oil and gas industries and Native governments accountable for internalizing the costs of environmental degradation. The MHA Nation is not unique when it comes to the struggle to develop and manage booming oil and gas industries on its lands, but it does provide an illustrative example that other Native nations can consider before pursuing economic growth through natural resource extraction.

Part I of this Comment provides a brief background on environmental justice and discusses the shortcomings of litigation, while also discussing distributive and social justice policy solutions under the environmental justice framework. This Part then examines the unique position inhabited by Native nations as both communities of color and sovereign nations. Finally, Part I examines environmental justice litigation within the context of Native nations. Part II provides an overview of the oil and gas industry, in particular a specific natural gas extraction technique called hydraulic fracturing (fracking), and examines the costs and benefits of oil and gas extraction for Native nations. Part II also describes the collateral consequences of boom and bust economies on Native nations. Part III proposes distributive and social justice policy solutions as alternatives to litigation to protect the environment and respect the sovereignty of Native nations with boom and bust oil economies. Finally, Part IV applies distributive and social justice policy solutions under an environmental justice theory to the fracking industry in the MHA Nation. This Comment concludes by arguing that litigation is not the best solution for ensuring healthy environments when Native nations pursue oil and gas economic development. Instead, distributive and social justice policy solutions can successfully provide protections to the community and environment by forcing oil and gas industries and Native governments to internalize all costs of oil and gas growth.

I. ENVIRONMENTAL JUSTICE AND THE UNIQUE POSITION OF NATIVE NATIONS

A. Principles of Environmental Justice

The environmental justice movement began in the 1980s as a response to environmental racism perpetrated by the conventional environmental organizations of the time.[9] Environmental racism is "any policy, practice or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color."[10] In response to environmental racism, environmental justice organizers created five key principles of environmental justice to unite the movement under a common direction: (1) protect all persons from environmental degradation; (2) adopt an approach that prevents harm to the public's health; (3) place the burden of proof on those who seek to pollute; (4) eliminate the requirement to prove intent to discriminate; and (5) strategically target resources and actions to redress existing inequities.[11] In order to assure all five principles of environmental justice are upheld, community involvement throughout the development and implementation of legal and policy solutions is crucial.

To fully promote all five principles, the environmental justice movement has adopted four different advocacy tools: distributive justice, procedural justice, corrective justice, and social justice.[12] These tools are used together to achieve each of the five principles of environmental justice through a combination of litigation and policy strategies. This Comment focuses on policy strategies using the distributive and social justice tools. Distributive justice stresses fair outcomes and equal distribution of goods and opportunities with respect to health and environmental harms and benefits.[13] Social justice demands equal access to enough resources to live. Social justice also seeks to hold the privileged class accountable to the rest of society for the use of its advantages.[14] Specifically, I argue that policy solutions and these two environmental justice tools are best suited for the unique position of Native nations working to protect their environments and their tribal sovereignty. Distributive and social justice

9. Rechtschaffen, *supra* note 3, at 3.
10. Kuehn, *supra* note 6, at 7.
11. *Id.* at 8.
12. Kristen Marttila Gast, Note, *Environmental Justice and Indigenous Peoples in the United States: An International Human Rights Analysis*, 14 TRANSNAT'L L. & COMTEMP. PROBS. 253, 257 (2004).
13. Kuehn, *supra* note 6, at 8.
14. *Id.* at 12.

solutions in a policy context call for governmental and economic reforms that force polluters to internalize the costs of their pollution.

B. Traditional Practice of Environmental Justice: A Combination of Environmental and Civil Rights Laws and Litigation

An environmental justice legal approach combines civil rights and environmental laws in order to achieve social justice for communities of color.[15] Advocates of this approach call for a shift in civil rights law—which mostly limits legal relief to situations where intentional discrimination can be proven—to encompass broader protections for all negatively affected groups. These broader protections could be used to fight injustice "even when injustice results from a complex set of political, economic, social and historical factors not explicitly—though implicitly and structurally—connected to race."[16] Communities of color face multifaceted, cumulative, and disproportionate environmental burdens due to the discriminatory enforcement of environmental laws and disparate exposure to toxins.[17] A major part of the problem concerns the policies, regulations, and internal business decisions that focus on "economic efficiency," which prioritizes production, profit, and externalization of environmental degradation costs onto the public.[18] Businesses protect their profits by avoiding any increased costs that would come with reducing the negative environmental effect of their activities. For many environmental justice advocates, the solution is to end the "systematic strategy of cost displacement" from businesses to communities of color by forcing businesses to pay for the environmental and public health damages they cause.[19]

Environmental justice advocates have attempted to use civil rights litigation to help people of color stop the placement of polluting industries and hazardous waste disposal sites near their neighborhoods. Unfortunately, attempts to use the Equal Protection Clause, the Civil Rights Act, and Section 1983 have all been

15. Uma Outka, Comment, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 216 (2005).
16. *Id.* at 217. Daniel Faber, a leading environmental justice scholar, clearly describes the problems with cost-benefit analysis and its effect on communities of color: "[I]t costs capital and the state much less to displace environmental health problems onto people who lack health insurance, possess lower incomes and property values, and as unskilled or semiskilled laborers are more easily replaced if they become sick or die." *Id.* at 215. This description shows the influence of institutional racism on environmental decisions, which in turn demonstrates the importance of requiring industries to internalize all costs of business.
17. *Id.* at 211–12. The 1987 study by the United Church of Christ's Commission for Racial Justice found that three out of five blacks and Latinos, and about half of all Asian Americans and Natives, live in communities with uncontrolled toxic waste sites. *Id.* at 212.
18. *Id.* at 214–15.
19. *Id.*

limited by the U.S. Supreme Court.[20] These limitations have closed the door to most legal strategies and have prevented communities of color from using the courts to make industries internalize the costs of their pollution.

In addition, environmental laws are limited in their success in compelling polluters to internalize the cost of environmental harms.[21] Environmental laws authorize activities that pose health and environmental harms and fail to address the problem of multiple exposures and cumulative effects on communities burdened with multiple pollution sources.[22] These unregulated harms, both singular and cumulative, are costs externalized by polluters and paid for by the public. Further, environmental laws emphasize the importance of scientific and economic decisionmaking and seem detached from ethically problematic outcomes.[23] This detachment encourages the placement of all environmental hazards in concentrated areas that have both low economic value and heavy pollution; these locations also tend to be populated by communities of color.[24] In light of these

20. *See id.* at 216–31; *see also* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (requiring the same proof of intent to discriminate in order to establish a claim under Title VI of the Civil Rights Act of 1964); Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (creating a higher burden for plaintiffs to establish a Fourteenth Amendment claim by requiring proof of intent to discriminate in addition to proof of a governmental action's disproportionate effect on a racial group); Washington v. Davis, 426 U.S. 229 (1976) (determining the respondents must prove the facially neutral performance test was actually a purposeful device to discriminate to prove an infringement on their constitutional rights); Morton v. Mancari, 417 U.S. 535, 553 (1974) (holding that the Bureau of Indian Affairs's preferential hiring of Natives from federally recognized tribes was not a racial classification, but rather a political one).

21. *See, e.g.*, Outka, *supra* note 15, at 232.

22. *Id.* at 233 (citing Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 643 (1992)) ("[P]ollutant levels that are literally killing peopledo not necessarily violate our environmental laws.").

23. *Id.* at 233. "One serious impediment to addressing environmental injustice through environmental law is the orthodox emphasis placed on detached scientific and economic decision-making, as if . . . the decision-making process itself is not related to the ethically problematic outcomes it produces." *Id.*

24. *Id.* at 211. Cap and trade programs (the buying and selling of saved emission credits, while the federal government simultaneously lowers the cap of emissions allowed to enter the atmosphere), differing levels of technology-based standards, and varying degrees of permissible emitted pollutants and toxins described in the Clean Air Act (CAA) encourage industries to transfer pollutants and develop in areas already containing similar industries, thus subjecting some communities to all pollutants and not equally distributing the harms. Lea Lambert, *Trading Rights for Greenhouse Gases: The Dilemma of Cap-and-Trade and Environmental Justice*, 24 GEO. MASON U. CIV. RTS. L.J. 205, 221 (2014). "[E]nvironmental justice advocates claim an unconstrained market system will, at a minimum, fail to realize the full benefits of co-pollutant reduction and, at a maximum, worsen the current pattern of inequality. In an emissions trading system, the industrial business owners and the market ultimately control where emissions reductions occur on a localized level." *Id.* at 208. *Contra* Joseph Lam, *Coupling Environmental Justice With Carbon Trading*, 12 SUSTAINABLE DEV. L. & POL'Y 40, 40–41 (2012) ("[E]nvironmental justice and cap and trade can actually be harmonized . . . [with] a more robust and nuanced cap and trade system that promotes principles of public participation, equity, and empowerment, while still maintaining an

limitations, traditional civil rights and environmental laws' ability to protect communities of color from systematic environmental racism has been severely narrowed by the judicial system and can provide little relief for Native nations.

C. The Unique Position of Native Nations

Native nations and their communities are uniquely positioned when facing environmental injustice because they have legal rights to be culturally distinct from the larger American society through self-governance and cultural ties to the environment.[25] These legal rights are not available to any other community of color in the United States. This unique position affects their ability to use common environmental justice strategies to achieve remedies for environmental harms.[26]

Native nations' perspectives have not typically been understood and welcomed in traditional environmental litigation, as demonstrated by the arguments and litigation against the University of Arizona and the Vatican's development of large binocular telescopes on *Dzil Nchaa Si'An* (also known as Mount Graham) in the White Mountains of Arizona.[27] This mountain is sacred to both the San Carlos and White Mountain tribes, providing a portal to the spirit world and serving as an ancestral Apache resting place and ceremonial

optimal and efficient market-based system. In fact, a cap and trade program could even be used to spur on environmental justice.").

25. Angela R. Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 92 (2005). "In the United States, where American Indians enjoy a sovereign status vis-à-vis the federal government, the development and/or revitalization of tribal legal systems is an integral part of tribal life. American Indians govern themselves by tribal law through various institutional forms, including, among others, tribal councils, tribal courts, and tribal peacemaking systems." *Id.*; Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1112 (2009). "[A] common understanding shared by many of the world's indigenous peoples: as a people, they literally came from the land, are defined by the land, and have a responsibility to the earth that is integral to their identity as peoples. As one scholar writes, 'Tribal cultures, from the time of their creation, have been formed, shaped, and renewed in relationship with mountains, mesas, lakes, rivers, and other places that are imbued with the spirituality, history, knowledge, and identity of the people.'" *Id.*

26. Many environmental justice communities use the community involvement requirements of the National Environmental Policy Act (NEPA), CAA, Clean Water Act (CWA), and other environmental statutes as the legal hook to sue government entities for noncompliance in order to stop or slow a project down. Community involvement requirements are typically during the notice and comment stage of an agency's rule promulgation.

27. Lee Allen, *Pray for Arizona's Mount Graham During National Sacred Places Prayer Days*, INDIAN COUNTRY TODAY MEDIA NETWORK (June 18, 2012), http://indiancountrytodaymedianetwork.com/2012/06/18/pray-arizonas-mount-graham-during-national-sacred-places-prayer-days-119122 [https://perma.cc/8LCB-UG6E].

site.[28] Once part of the original San Carlos Apache reservation, *Dzil Nchaa Si'An* was taken by the federal government in 1872.[29] The controversy centered on the University of Arizona and the Vatican gaining access to *Dzil Nchaa Si'An* from the U.S. Forest Service without consulting the Apache Nations, a step the Apache Survival Coalition contested was required by law.[30] The University and the Vatican intended to build a telescope structure on the land.[31] The 9th Circuit did not reach the question of whether the National Historic Preservation Act (NHPA) applied in the case, but it affirmed the district court's holding in favor of the U.S. Forest Service.[32] The court did state the district court applied the incorrect latches standard[33] in the case, but it reasoned that remanding the case would be incorrect because the tribe and Coalition had an inexcusable delay in bringing the case and remanding would cause undue prejudice to the respondents.[34] This case is merely one example of the various cases and legal routes taken by the Apache Survival Coalition and how litigation has not been a successful strategy to protect *Dzil Nchaa Si'An*.[35] The placement and construction of the complex eighteen-telescope structure destroyed much of the old growth forest, harmed

28. *Chronology of Apache Opposition to Astronomy Development on Mt. Graham*, NA MAKA O KA AINA, http://www.mauna-a-wakea.info/maunakea/H1_chronology.html [https://perma.cc/HQ47-QHEZ] [hereinafter *Chronology of Apache Opposition*]. Anthropological scholar Dr. Keith Basso stated in one of the various court proceedings, "[a]s interpreted by the Apache, damage to Mount Graham would certainly result in damage to themselves, for damage to the mountain could only be seen as a display of profound disrespect. Such disrespect would precipitate a lasting disruption in the workings of the universe, and this in turn would bring serious harm to persons living within it. In short, permanent damage to Mount Graham would be construed by the Apache as an act of religious desecration, of wanton and gratuitous defilement, and its shattering repercussions would be numerous and profound." *Id.*

29. *See* Allen, *supra* note 27.

30. *Chronology of Apache Opposition*, *supra* note 28. The U.S. laws—National Environmental Policy Act (NEPA), American Indian Religious Freedom Act (AIRFA), National Historic Preservation Act (NHPA), and Endangered Species Act (ESA)—require a certain level of cultural studies and consultation with local Native nations harmed by federal projects and programs. *Id.*

31. *Id.*

32. Apache Survival Coal. v. United States, 21 F.3d 895, 905 (9th Cir. 1994).

33. The latches standard is fact specific and requires a party to establish "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Id.* at 905 (quoting Lathan v. Brinegar, 506 F.2d 677, 692 (9th Cir. 1974)). For environmental cases, the latches criteria must be applied sparingly in suits brought to vindicate the public interest. *Apache Survival Coal.*, 21 F.3d at 905 (quoting Preservation Coal., Inc. v. Pierce, 667 F.2d 851, 854 (9th Cir. 1982)). While determining the district court incorrectly did not do a latches analysis, after reviewing the facts the Ninth Circuit ruled the petitioners were barred by latches and ruled in favor of the respondents. *Id.*

34. *Id.* at 907.

35. See generally *Chronology of Apache Opposition*, *supra* note 28, for a full discussion of the timeline of the *Dzil Nchaa Si'An* controversy.

the natural habitat of the endangered Red Squirrel Piñatas, and desecrated the sacred Apache site.[36]

When advocating against the construction of the telescope, the Native community shared stories through tribal resolutions about the religious and cultural significance of the mountain and the *Gaahn*, the guardian spirits of the Apache who reside on *Dzil Nchaa Si'An*, as a way of asserting their cultural and religious claims to the mountain.[37] These stories were dismissed because the court did not value nor consider the importance of Apache oral history and determined that no "authentic" Apache claimed the mountain as sacred.[38] The San Carlos and White Mountain Apache who were directly affected by this case believed the best way to resolve the issue and ensure the Native perspective was heard would have been to utilize their traditional restorative practices.[39] Accordingly, Native rights advocates have argued that the American political and judicial systems tend to fragment the resolution process through the formalities and adversarial nature of trials.[40] In contrast, it is common for Native judicial systems to approach the same problem by examining all contributing factors and inviting all parties to participate in a restorative justice process.[41] This process typically incorporates family, clan, and community forums and is informed by traditional practices through stories and lessons from elders.[42] When these practices are subjected to the American political and judicial processes, the Native narratives and stories are dismissed as religious, magical, fantastical, and without legal significance, as seen by the telescope controversy on *Dzil Nchaa Si'An*.[43]

36. *Id.*
37. *Id.* The *Gaahn* are spiritual beings that reside on *Dzil Nchaa Si'An* and provide "health, direction, and guidance" to the Apache people. *Id.*
38. *Id.* After witnessing the legal controversy, one scholar noted, "[E]nvironmental law has been colonized by a perverse system of values which is antithetical to achieving environmental justice for American Indian peoples . . . ." Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, *in* ENVIRONMENTAL JUSTICE: LAW, POLICY, AND REGULATIONS 111 (Clifford Rechtschaffen et al. eds., 2009).
39. *See id.* at 112.
40. Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, *in* JUSTICE AS HEALING INDIGENOUS WAYS 108, 110–12 (Wanda D. McCaslin ed., 2005).
41. *Id.*
42. *Id.*
43. Williams, *supra* note 38, at 112. In the Mount Graham telescope controversy, the Apache Nation's traditional and spiritual beliefs were not seen as a credible source to support the cultural significance of the mountain until an anthropologist at the University of Arizona was able to confirm the oral tradition by reference to old anthropological journals documented by a white scholar. *Id.* at 114–15. This verification process demonstrates that the court did not legitimize surviving Native oral tradition on its own merits, but rather required a white academic to confirm it.

In addition to different treatment under federal law,[44] Native nations are also unique because of their traditional, historical, and cultural connections to the land. Distributive and social justice solutions to environmental harms must be tailored to the individual Native nation—they should not be limited to addressing mere physical damage, but rather should also focus on the cultural and religious consequences connected to environmental degradation.[45] Furthermore, many nations were forcefully removed from their ancestral lands and defrauded or coerced into agreeing to treaties ceding large tracts of land to the U.S. government.[46] The consequences of removal and the loss of ancestral lands through coercive treaties have left many Native nations in abysmal economic conditions.[47] Consequently, many nation leaders prioritize economic and social benefits of land use and natural resource extraction over members' ecologic and public health concerns.[48]

Economic coercion and political opportunism of private oil and gas companies and of leaders within Native governments, create a unique environmental justice problem, one that litigation is ill-suited to solve. Despite community members' opposition to many environmentally risky projects, there is some proof that coercion, intimidation, and other corruption motivated by greed results in approval of such projects by Native governments.[49] Litigation is ineffective for two main reasons. First, Native governments have established sovereign immunity that can be waived only by the U.S. Congress or through self-imposed contracts or resolutions. Because of this, Native nations are protected from lawsuits brought by their members or outside parties, thus limiting

44. Dean B. Suagee, *Turtle's War Party: An Indian Allegory on Environmental Justice*, 9 J. ENVTL. L. & LITIG. 461, 465 (1994).

45. Kyle W. La Londe, *Who Wants to Be an Environmental Justice Advocate?: Options for Bringing an Environmental Justice Complaint in the Wake of* Alexander v. Sandoval, 31 B.C. ENVTL. AFF. L. REV. 27, 50 (2004).

46. Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49, 50 (2008–10) (discussing the interrelationships among layers of administrative laws producing the tragic result of the Trail of Tears).

47. *See generally* FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION (Oxford University Press ed., 2009).

48. Gast, *supra* note 12, at 266–68. The author contends that Native communities should bring environmental justice suits under international human rights law to the International Convention on the Elimination of All Forms of Racial Discrimination's (ICERD) Committee on the Elimination of Racial Discrimination. *Id.* at 279. While the author correctly states that the United States did agree to follow the ICERD, there are limited means of enforcing any decision coming from the committee, and this approach will likely not provide an on-the-ground solution for communities for a long time.

49. *Id.* at 268. "[T]here is evidence . . . a second, supportive vote held shortly after the first may have been the result of coercion and intimidation, and that opponents . . . who worked for the tribal government lost their jobs and suffered other repercussions." *Id.*

the opportunity to sue regarding corrupt Native governmental decisions related to the oil and gas industries' development.[50] Second, Native nations have varied amounts of environmental regulations depending on each nation's unique governance structure and many rely on federal environmental regulations that are inadequately enforced on Native lands.[51]

Sovereign immunity and the lack of adequate Native environmental regulations or enforcement of federal laws create a unique situation that is exploited by oil and gas companies. Rich natural resources, minimal environmental regulations, and willing Native government officials all contribute to the booming extraction industry in Indian country and the environmental destruction that results. Sovereign immunity and the shortage of resources for sufficient environmental regulations limit litigation's ability to provide favorable results for Native communities. Given the shortcomings of litigation, this Comment argues that distributive and social justice policy solutions would better promote a balance between favorable economic and ecologic outcomes to limit harms from private oil and gas companies and corrupt governmental officials.

D. Environmental Justice Case Study: Skull Valley Goshute Nation

The environmental justice framework strives to empower and inform the communities most affected by environmental degradation so that they can make decisions for themselves. Thus, the unique position of Native nations as sovereigns with particular economic, social, and cultural concerns requires environmental justice advocates at times to accept environmental destruction in exchange for economic development as long as the community played a large role in the decisionmaking process.

The Skull Valley Goshute Nation (Goshute Nation), located within the boundaries of Southern Utah, is just one example of a nation that chose economic development at the expense of the environment. The Nation has a deep history of colonization and oppression. In particular, the Nation has experienced displacement by Mormon settlers who claimed lands and other resources, treaties broken by the federal government, diminishment of traditional lands, and forced assimilation into settlement and farming lifestyles.[52]

50. Erik S. Laakkonen, *Up in Smoke?* Narragansett, Hicks, *and the Erosion of Tribal Sovereign Immunity*, 11 J. GENDER RACE & JUST. 453, 453–54 (2008).
51. Gast, *supra* note 12, at 266.
52. *History: The Goshutes*, UTAH AM. INDIAN DIGITAL ARCHIVE, http://www.utahindians.org/archives/goshute/history.html [https://perma.cc/8N9Y-8GTE].

As a result of forced removal from their home lands in the Great Basin area to a 18,000 acre reservation in Tooele County, Utah, the Goshute Nation of the modern era has been left with a weak economic base, unemployment, and rampant poverty.[53] Furthermore, the land belonging to the Nation's small band of 123 enrolled members was subject to environmental destruction at the hands of the federal government, which had surrounded the borders of the Goshute Nation with a federal storage facility for nerve agents, a nerve gas incinerator, weapons testing, and a weapons training range.[54] These federal facilities have already degraded the Nation's land base to the point that it is of little economic value. Consequently, since the land had already been polluted by hazardous waste, the Nation decided to contract with a private company to store nuclear waste as an economic growth option to combat the extreme poverty of its citizens.[55]

The contract and waste storage project, however, was never completed. A coalition of the Utah state government and its citizens framed the proposed nuclear waste storage on Goshute lands as environmental racism and fought against the project's success.[56] While a legitimate environmental concern for non-Natives, this intended resolution does not fit into the environmental justice framework. The coalition of the Utah government and its citizens was motivated by a concern for the health and wellbeing of the surrounding Utah population, not the economic prosperity of the Goshute Nation's citizens.[57] Furthermore, the coalition did not organize against the federal storage facility for nerve agents, nerve gas incinerator, weapons testing, and weapons training range that have had profound environmental effects on the Goshute, thus showing a general fear of nuclear waste but little actual concern for the Goshute people. A central goal of environmental justice is to empower disadvantaged groups to control their own environments. By seeking environmental redress regarding the nuclear waste storage site, the coalition and the State of Utah undermined the Goshute Nation's authority to control its land base and economic prosperity.[58]

Whether Anglo paternalism or self-interest was the motivation behind the Utah effort to kill the project, it succeeded. The eventual defeat of the project was heralded as an environmental justice victory.[59] Consequently, the Goshute Nation was prevented from pursuing its self-determined and informed economic

53. *See* Sierra M. Jefferies, Note, *Environmental Justice and the Skull Valley Goshute Indians' Proposal to Store Nuclear Waste*, 27 J. LAND, RESOURCES & ENVTL. L. 409, 409–10 (2007).
54. *Id.* at 410.
55. *Id.* at 415–16.
56. *Id.* at 419.
57. *Id.* at 422.
58. *Id.* at 422–23.
59. *Id.* at 409.

and environmental decision to utilize its small land base to benefit its community.[60] The environmental justice framework allows for environmental degradation, but only when the disadvantaged community has full control over the decision process. Like the Goshute Nation, all Native nations need to have the power to decide for themselves which industries, if any, are allowed on their lands and which environmental effects they are willing to accept as a community. Distributive and social justice policy solutions allow for Native nations to tailor their laws to reach a balance between economic prosperity and environmental protection.

While environmental justice litigation does not provide successful legal solutions to resolve Native nations' environmental harms, the underlying goals and theories of environmental justice work to empower communities of color and advocate for a change in how our legal system addresses environmental racism. When dealing with the federal government, private actors, or their own governments, Native communities should use distributive and social justice policy solutions to promote the five key provisions of environmental justice theory and should work to ensure the community is informed to make its own decisions about environmental protection. Policy solutions using the distributive and social justice tools under an environmental justice framework, and not litigation, are better suited to handle the unique needs of Native nations.

II. THE PROBLEM

A. Costs and Benefits of Hydraulic Fracturing and Environmental Regulations on Native Lands

Many Native nations are pursuing economic development by expanding oil and gas industries within their lands.[61] The expansion of extractive industries, specifically hydraulic fracturing, has sparked heated debates.[62] These debates are

60. *Id.* at 411. After considering a variety of economic ventures, the Goshute Band based the policy decision to lease their lands to a private group for the temporary storage of 40,000 metric tons of spent nuclear fuel on the presence of hazardous waste facilities and nerve gas incinerators already surrounding the Skull Valley Reservation. *Id.*

61. Hannah Wittmeyer, *Fracking on Indian Reservations*, FRACKWIRE (June 14, 2013), http://frackwire.com/fracking-on-indian-reservations [https://perma.cc/38UB-AKG8] (explaining that the Blackfeet and Crow Nations in Montana, the Ute Nation in Utah, and the Southern Utes in Colorado are all leasing lands to fracking).

62. *Id.*

centered on potential environmental harms, use of common law and regulations, and the safety of communities near extraction sites.[63] Hydraulic fracturing (fracking) is the current method used to extract shale natural gas from the gas reserves below shale and rock formations.[64] This method uses high-pressure injections of water, sand, and chemicals underground to release trapped gas.[65] The new process of horizontal drilling has increased the amount of extractable gas and is the leading cause of the major fracking boom in Native nations.[66] Fracking is seen as a game changer because it provides economic benefits for states and Native nations, lowers gas prices, increases jobs, and decreases reliance on foreign oil imports.[67] The horizontal fracking advancement and the economic boom, however, come at a cost, one for which all governments need to prepare.

One major concern with the growing use of fracking is the environmental harms associated with the processing, transportation, and use of natural gas. The large volumes of water and sand that are pumped into the ground to break up the rock later flow back to the surface, which causes wastewater contamination.[68] This wastewater can contain toxins such as arsenic, barium, lead, mercury, and radioactive elements like radium.[69] These toxic substances, plus methane gas (a major component of natural gas), contaminate drinking and surface water and increase air pollution.[70] Studies have shown that around twenty-nine of the

63. *Id.* The debate many Native nations are having focuses on issues related to royalties benefiting some landowners and not others, race-to-the-bottom regulations to compete with state regulations, corruption of landowners and tribal leadership, destruction of wildlife and the environment, and lack of access to information regarding the true value of the oil and gas extracted from their lands. Turtle Mountain Indian Reservation has completely banned fracking from its lands in response to these lingering questions. *Id.*

64. Mike Malfettone, Note, *A Nation Fractured: Drilling Into the Debate Over Fracking*, 2 ARIZ. J. ENVTL. L. & POL'Y 1039, 1039 (2011).

65. Joe Schremmer, Note, *Avoidable "Fraccident": An Argument Against Strict Liability for Hydraulic Fracking*, 60 U. KAN. L. REV. 1215, 1219–20 (2012) (discussing the three-step process of fracking: (1) injecting fracking fluid to break the rock; (2) injecting proppants (sand) to hold fractures permanently; and (3) back flushing the fracking fluids back to the surface, leaving the proppants behind).

66. Malfettone, *supra* note 64, at 1039.

67. *Id.* Regarding shale oil, U.S. President Barack Obama declared, "Recent innovations have given us the opportunity to tap large reserves—perhaps a century's worth . . . ." *Id.*

68. MATTHEW MCFEELEY, NAT'L RESOURCES DEF. COUNS., STATE HYDRAULIC FRACTURING DISCLOSURE RULES AND ENFORCEMENT: A COMPARISON (July 2012), http://www.nrdc.org/energy/files/fracking-disclosure-IB.pdf [https://perma.cc/GJU2-6X7C].

69. *Id.*; *see also* Michael N. Mills & Robin B. Seifried, *What Is Fracking Wastewater and How Should We Manage It?*, 28 NAT. RESOURCES & ENV'T 9, 10 (Winter 2014) (stating that wastewater is generally composed of 95 percent water, 4.5 percent proppants (solid materials like sand used to keep fractures open), and 0.5 percent chemical additives).

70. MCFEELEY, *supra* note 68, at 3. *See generally* Jake Hays & Seth B.C. Shonkoff, *Toward an Understanding of the Environmental and Public Health Impacts of Unconventional Natural Gas Development: A Categorical Assessment of the Peer-Reviewed Scientific Literature, 2009–2015*, 11

chemicals used in fracking are considered human health risks.[71] Accordingly, both the Safe Drinking Water Act (SDWA) and the Clean Air Act (CAA) list the chemicals as hazardous.[72] Depending on the type of well, anywhere from 10 to 50 percent of the fracking fluid will return to the surface.[73] Each well can require up to four or five million gallons of fracking fluid, resulting in difficult and harmful disposal processes.[74] This water is stored in pits or tanks, injected back into the wells, or transported to state water treatment facilities, many of which are incapable of removing fracking chemicals from the water.[75]

Oil and gas industries question whether the wastewater will actually seep through the thick shale into the water supply or return to the surface. They claim that because the wastewater is stored a mile or more under the surface, the shale and other rock formations will protect the shallow fresh groundwater supply.[76] After reviewing the existing, but limited, fracking science and coal basin geology

PLOS ONE 1 (2016), http://journals.plos.org/plosone/article/asset?id=10.1371%2Fjournal.pone.0154164.PDF (discussing how out of 685 peer reviewed scientific journal publications "84% of public health studies contain findings that indicate public health hazards, elevated risks, or adverse health outcomes; 69% of water quality studies contain findings that indicate potential, positive association, or actual incidence of water contamination; and 87% of air quality studies contain findings that indicate elevated air pollutant emissions and/or atmospheric concentrations.").

71. MINORITY STAFF OF H.R. COMM. ON ENERGY & COMMERCE, 112TH CONG., CHEMICALS USED IN HYDRAULIC FRACTURING 1 (2011), http://www.conservation.ca.gov/dog/general_information/Documents/Hydraulic%20Fracturing%20Report%204%2018%2011.pdf [https://perma.cc/958A-XK62] ("Between 2005 and 2009, the oil and gas service companies used hydraulic fracturing products containing 29 chemicals that are (1) known or possible human carcinogens, (2) regulated under the Safe Drinking Water Act for their risks to human health, or (3) listed as hazardous air pollutants under the Clean Air Act. These 29 chemicals were components of more than 650 different products used in hydraulic fracturing.").

72. *Id.*

73. Mills & Seifried, *supra* note 69. The toxins discussed do not include the waste associated with the process of drilling the well, which is created before fracking begins. *Id.*

74. Malfettone, *supra* note 64, at 1041.

75. *Id.* In Pennsylvania, the treatment plants were unequipped to remove toxins from the more than 1.3 billion gallons of water, and Food and Water Watch stated that at least three states have discharged the partially treated wastewater into rivers, lakes, and streams. *Id.*

76. Schremmer, *supra* note 65, at 1222. The oil and gas industries are using the 2004 Environmental Protection Agency (EPA) findings in its report. *See* EPA, EVALUATION OF IMPACTS TO UNDERGROUND SOURCES OF DRINKING WATER BY HYDRAULIC FRACTURING OF COALBED METHANE RESERVOIRS (June 2004), https://fracfocus.org/sites/default/files/publications/evaluation_of_impacts_to_underground_sources_of_drinking_water_by_hydraulic_fracturing_of_coalbed_methane_reservoirs.pdf. The EPA's most recent executive summary for an upcoming study finds that "there are above and below ground mechanisms by which hydraulic fracturing activities have the potential to impact drinking water resources," but there have not been "widespread, systemic impacts on drinking water resources in the United States." EPA, ASSESSMENT OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING FOR OIL AND GAS ON DRINKING WATER RESOURCES: EXECUTIVE SUMMARY, at ES-6 (June 2015), https://www.epa.gov/sites/production/files/2015-07/documents/hf_es_erd_jun2015.pdf [https://perma.cc/ZA2N-RAM3].

literature, the Environmental Protection Agency (EPA) determined there was no evidence directly linking fracking to water quality degradation and considered the limited reports it reviewed authoritative.[77] Because there was no direct evidence of harmful effects of wastewater presented in the literature review or the reports at the time, the EPA was not required to and in fact did not conduct a detailed site-specific contamination study of complaint areas.[78] It is worth noting that most, if not all, of the reports that claim fracking is not harmful to the environment are funded by the fracking industry.[79] Even with the contested levels of environmental harm from water pollution caused by fracking, many state and local governments have created regulations related to wastewater and fracking in general, which can be used as strong examples for others to model.[80]

The lack of federal laws concerning fracking has left formal implementation of fracking regulations up to the states and Native nations.[81] The Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) all provide exemptions from their purview for the fracking industry.[82] Most of the wastewater from

77. Schremmer, *supra* note 65, at 1221–22.

78. *Id.* In the end, the EPA concluded that the "dilution, dispersion, and diffusion by groundwater, adsorption by the formation rock, and even biodegradation mitigate the risks posed by frac fluids that flow back does not recover." *Id.* at 1222; *see also Natural Gas Extraction-Hydraulic Fracturing*, EPA (Mar. 25, 2015), http://www2.epa.gov/hydraulicfracturing [https://perma.cc/94XQ-F3DE] (discussing the effects of the EPA's study on the fracking industries and related environmental and health concerns).

79. Steve Rushton, *Is There Any Scientific Study—Not Sponsored by Industry—That Asserts Fracking Is Safe?*, OCCUPY.COM (July 23, 2014), http://www.occupy.com/article/there-any-scientific-study-%E2%80%93-not-sponsored-industry-%E2%80%93-asserts-fracking-safe [https://perma.cc/ASA2-N6J4].

80. For example, Wyoming became the first state to require full disclosure of fracking chemicals. *See* Jacquelyn Pless, *Fracking Update: What States Are Doing to Ensure Safe Natural Gas Extraction*, NAT'L CONGRESS ST. LEGISLATURES (July 2011), http://www.ncsl.org/research/energy/fracking-update-what-states-are-doing.aspx [https://perma.cc/QK9U-B6GN]. In addition, many local governments, including Denton, Texas, are amending their zoning codes to ban fracking. Alex Dropkin & Terrence Henry, *How the Denton Fracking Ban Could Work*, NPR, https://stateimpact.npr.org/texas/tag/denton [https://perma.cc/N7VT-Z245].

81. Malfettone, *supra* note 64, at 1042.

82. Mills & Seifried, *supra* note 69, at 11. For example, the Energy Policy Act of 2005 exempted wastewater created during the injection of fracking fluid from the Safe Drinking Water Act (SDWA), with the justification that the SDWA regulates disposal of the wastewater. *Id.* The Resource Conservation and Recovery Act (RCRA) exempts oil and gas development from hazardous waste regulations. *Id.* The Clean Water Act (CWA) has exemptions for industrial storm water permits, reasoning that oil and gas do not pose any risk to the areas. *Id.* Lastly, the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) exemption for petroleum and natural gas is intended to avoid duplication of regulations covered by the Oil Pollution Act. *Id.*

fracking is regulated through state-administered programs and by state oil and gas resource conservation and water quality agencies.[83] The range of state regulations vary from complete bans on fracking, like in Vermont, to very permissive regulations, like in North Dakota.[84] Some local governments in New York have banned or placed moratoriums on fracking through their local zoning laws, which have been upheld by the state appellate court.[85]

The Department of the Interior Bureau of Land Management (BLM), however, issued a final ruling outlining initial steps toward regulations of fracking on federal and Native lands, which, if it survives litigation, could provide a framework for a nationwide regulation to limit or ban fracking.[86] The benefits of this new BLM ruling include: (1) providing royalties that proportionately benefit all landowners; (2) avoiding the economic motivation to race to the bottom and deregulate; (3) offering federal protection from land grabs by private individuals and Native government leaders; (4) supplying protection for the wilderness; and (5) providing federal assistance and technical knowledge to Native authorities and landowners.[87]

Many Native nations are hesitant to support a federal fracking regulation, however, because they are concerned about infringements on sovereignty and losing the economic edge that comes with imposing only limited regulations.[88] Because of the exemptions in most federal environmental statutes, states, local governments, and, arguably, Native nations currently all have the flexibility to create their own fracking regulations to ensure their communities and environments will be protected. Nevertheless, Native nations should not oppose a

83. *Id.*

84. VT. STAT. ANN. tit. 29, § 571 (2011) ("Hydraulic fracturing; prohibition (a) No person may engage in hydraulic fracturing in the State. (b) No person within the State may collect, store, or treat wastewater from hydraulic fracturing."); *State Fracking Regulations*, ALS, http://www.alsglobal.com/en/Our-Services/Life-Sciences/Environmental/Capabilities/North-America-Capabilities/USA/Oil-and-Gasoline-Testing/Oil-and-Gas-Production-and-Midstream-Support/Fracking-Regulations-by-State [https://perma.cc/4BHX-9T47] (general discussion of the fracking regulations in North Dakota); *see also Rules and Regulations*, N.D. INDUS. COMMISSION, https://www.dmr.nd.gov/oilgas/rules/rulebook.pdf [https://perma.cc/LGG4-URYR].

85. Norse Energy Corp. v. Town of Dryden, 108 A.D.3d 25 (N.Y. App. Div. 2013).

86. *See generally* Kerstie B. Moran, *The Bureau of Land Management's Finalized Hydraulic Fracturing Rule on Tribal Lands: A Responsibility or Intrusion?*, 39 AM. INDIAN L.R. 585 (2015). The goals of the final ruling are to "ensure that wells are properly constructed to protect water supplies, to make certain that the fluids that flow back to the surface . . . are managed in an environmentally responsible way, and to provide public discourse of the chemicals used . . . ." Hydraulic Fracturing on Federal & Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 1430).

87. Wittmeyer, *supra* note 61.

88. *Id.*

baseline federal standard for fracking regulations. Rather, Native nations should support and adopt a national standard incorporating a distributive justice solution, which would provide them with environmental and economic benefits. A national standard would force every oil and gas company to comply with a baseline environmental quality standard. Having this baseline would take away the incentive of oil and gas companies to target governments that allow them to operate without environmental protections. It will also force companies to internalize all the costs of fracking, making the business fairly represent the true costs of natural gas. Thus, a federal baseline would take away Native governments' incentive to contract with oil and gas companies that ultimately destroy the environment. This is a distributive justice solution because it evens out the playing field of economic incentives, reflects the true costs of fracking, and adds environmental protections to the currently unregulated fracking industry.

Native nations should also adopt a national standard for fracking regulations as a social justice solution. By drawing the baseline with a regulation and taking away the economic incentive to pollute, nations will have the freedom to draft laws and enter into contracts tailored to their needs, both economically and environmentally. This social justice solution provides both environmental protection and access to the economic benefits of fracking. While waiting for a national standard, Native nations can model their own fracking regulations on the examples of many states and other nations that already provide for enhanced environmental controls.

The creation of fracking regulations will grant direct control to many Native nations over the levels of pollutants permitted from fracking and will set community-informed regulations for all fracking industries to follow when developing on Native lands. Supporting the BLM's new ruling on fracking regulation will provide a strong baseline, but the creation of regulations specific to fracking in Native nations need to be tailored to the particular needs of the community. Only regulations that are informed by Native communities and that seek to protect Native nations' sovereignty will qualify as a true distributive and social justice solution to provide environmental justice results.

B. Collateral Damages of Boom and Bust Oil Economic Cycles

In addition to immediate physical pollution, the boom and bust cycles typical of oil and gas economies also cause significant collateral damage to Native nations' social, political, and economic structures, such as an increase in crime rates and the destruction of reservation infrastructure. Boom and bust economic cycles involve a process of repetitive expansion and contraction of economic

growth, affecting jobs, investments, and national revenue management.[89] These boom and bust cycles have harmful effects, particularly on economies dependent on oil and gas revenues, like many Native nations developing fracking industries.

For many Native nations, the development of oil and gas industries is their primary source of economic revenue. These nations become dependent on the success of oil and gas industries and quickly develop boom and bust economic cycles that tether the nation's economic stability to the price of oil. This boom and bust economy has been described as the economic phenomenon of the "resource curse."[90] The resource curse refers to "the inverse association between growth and dependence on natural resource revenues, especially minerals and oil."[91] Oil-dependent countries, because of their reliance on oil and gas extraction revenues, tend to develop structures and incentives that link economic performance with poverty, bad governance, injustice, and conflict, eventually leading to significant collateral damage.[92] Nations develop oil-dependent economies as a result of: (1) reduction of competitiveness in other exports, hindering the diversification of the economy; (2) long-term price deflation and price volatility, which create economic shocks and cause difficulties in budgetary discipline and income distribution; and (3) the creation of few jobs per unit of capital invested, and the few jobs that are created require specialized technical skills that many unemployed people do not have, thus failing to provide jobs for those most in need.[93] Harms associated with a country's economic development while dependent on oil and gas lead to social consequences, and eventually to social unrest.

The boom and bust oil economy leads to significant collateral damages, including high poverty rates, poor health care, high child mortality rates, and poor educational performance.[94] Policymakers during economic booms use money to satisfy more urgent short-term needs instead of making long-term investments to develop solutions to collateral damage in areas such as education and healthcare.[95] Furthermore, foreign companies with capital and technological advantages form partnerships with non-Native domestic elites to develop expensive oil and gas exploration operations, which leads to the marginalization of domestic

89. *Boom and Bust Cycle*, INVESTOPEDIA, http://www.investopedia.com/terms/b/boom-and-bust-cycle.asp [https://perma.cc/K2WY-GUA9].
90. Terry L. Karl, *Oil-Led Development: Social, Political, and Economic Consequences* 4–5 (Ctr. on Democracy, Dev., & the Rule of Law, Working Paper No. 80, 2007).
91. *Id.* This inverse association between growth and dependence is considered a constant motif of economic history that has been observed across time and in countries that vary by size. *Id.*
92. *Id.* at 31.
93. *Id.* at 5–6.
94. *Id.* at 7.
95. *Id.* at 11.

entrepreneurs in the industry and a failure to create new jobs for Native community members.[96] This results in foreign monopolies gaining influence over the nation's politics and economy, further contributing to dependency on revenues created by oil and gas industries. Oil and gas economic dominance and its influence on the political structure of nations encourage inefficient governance and political corruption, thus creating opportunities for economic coercion and political opportunism to externalize the harmful costs of oil and gas development to the community.[97] Efforts to reform a nation's governance are blocked in order to sustain patterns of corruption, including payoffs of top officials and leaders' advocacy of policies that benefit supporters and friends for political gain.[98]

In addition, boom and bust economic cycles encourage a rapid influx of people from outside the community, leading to inflated prices of goods and services, overburdened infrastructure in the area, increased housing costs and demands, heightened crime, and possibly a destroyed local social fabric.[99] These significant collateral damages create particular hardships for Native communities because of their unique position as communities of color and sovereign nations that have already been weakened by long histories of land loss, termination, and discrimination policies of the U.S. government. Thus, nations need to adopt distributive and social justice policy solutions to prevent the harms associated with having an oil-dependent economy.

Because of the system-wide effects of this collateral damage and the difficulties of pinpointing individuals to sue to remedy such damage, litigation is not an effective way to hold private oil and gas businesses and Native governments accountable for the harms caused by boom and bust economic cycles. Distributive and social justice policy solutions must focus on working with nations to develop their economies in order to minimize the harm caused by oil and gas development.

III. DISTRIBUTIVE AND SOCIAL JUSTICE POLICY SOLUTIONS

When deciding to utilize their oil and gas natural resources, Native nations would be best served by implementing distributive and social justice policy solutions to provide safeguards against the harmful effects of oil and gas extractive

96. *Id.* To prevent marginalization of domestic entrepreneurs, local business leaders work closely with the state or foreign oil and gas industry. *Id.*

97. *Id.* at 16.

98. *Id.* at 19. Policy choices that allow for corruption tend to include: (1) creating larger public sectors with regulatory interventions; and (2) financing mega projects where payoffs can be hidden, like specialized infrastructure and defense projects. *Id.* at 19–20.

99. *Id.* at 25.

industries. This Part discusses examples of distributive and social justice policy solutions, including increasing revenue transparency of private oil and gas companies and Native governments, implementing revenue management schemes, and diversifying economies outside of revenues from oil and gas extraction. The Southern Ute Nation provides an example of how a Native nation can implement these distributive and social justice policy solutions. In addition, this Part suggests the development of protective environmental regulations to minimize the harms associated with extractive industries, and it highlights the Navajo Nation as an example of a Nation that has successfully done so.

A. Revenue Transparency, Revenue Management, and Diversification of Economy

Native nations should advocate for increased revenue transparency and management schemes for private oil and gas companies and Native governments, as well as diversified economies unrelated to oil and gas. These are distributive justice policy solutions because they allow for Native governments to reinvest the revenue gained by oil and gas production back into the community to build up reliance against the eventual bust of the economy. Furthermore, these are social justice policy solutions because they require oil and gas companies to internalize production costs while at the same time permitting nations to develop their economies and provide for their citizens. Distributive and social justice solutions should help protect community members from the boom and bust economic cycles and allow for a balance between the nation's economic and ecological concerns.

To ensure revenue transparency and effective revenue management schemes, Native nations should first develop robust governments committed to being candid about finances. These governments need to develop principles informed by traditional and contemporary cultural knowledge to assert their sovereignty and independence from federal paternalism, as well as ensure fairness, balance, and community inclusion.[100] While democracy is not necessary to establish a robust and responsive government, successful Native governments need to provide a forum for dissenting opinions and citizen criticism of leaders' decisions and policies.[101] Room and freedom to dissent provide space for community advocates to make demands of leaders and promote effective revenue management schemes that are responsive to community needs. If government

100. *See* Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1054–55 (2007).
101. *Id.* at 1074–75.

leaders are not responsive to the community's needs, the governmental structure should provide for an opportunity to remove leaders. Development of Native governments and governmental infrastructure is a distributive justice solution because it provides equal access for all the nation's citizens to participate and critique governmental officials and their actions, thus offering an opportunity for redress for the harms of oil and gas development. This will allow for community advocacy regarding the implementation of revenue transparency and effective revenue management schemes in the legal framework of the government structure. Stronger governmental infrastructure is also a social justice policy solution because governmental entities can be properly utilized by citizens to hold the oil and gas companies, as well as corrupt government officials, accountable for the harms associated with oil and gas economies.

Furthermore, to protect citizens from boom and bust cycles and the collateral damage caused by oil and gas industries, nations need to develop effective revenue management schemes to avoid the temptation to pursue shortsighted projects and instead develop long-term investments in social services and community resources, such as education, healthcare, city and road infrastructure, housing, and sustainable job development. Oil and gas companies depend on nations' roads to operate, but they externalize the cost of maintaining road infrastructure onto communities. Furthermore, companies benefit from education systems, emergency healthcare facilities, and housing for their employees (many of whom are not citizens of the nation). These investments can be funded by nations' inherent power to tax businesses within their jurisdictions. Nations can also contract with oil and gas companies to create favorable terms for the community, such as ensuring Native court jurisdiction over the company and its employees. Revenue management can also allow for adequate funding of Native environmental agencies to regulate and enforce compliance with the nation's environmental laws. Having oil and gas money fund long-term investments is a type of distributive justice because it will ensure the community has access to education, health care, infrastructure, and jobs during the boom and bust of the oil and gas economy. Without these long-term investments, social services will deteriorate and the distribution will fall unevenly to benefit only those who can pay for them. Developing long-term investments using oil and gas money will also provide social justice policy solutions by ensuring oil and gas companies are accountable and pay for the external costs of business inflicted on community resources.

Lastly, nations need to promote diversification of their economies through new and traditional industries. For some nations, traditional agricultural industries can provide a stable business to help communities weather a busting oil and

gas economy. Other nations construct casinos if located near cities,[102] develop Native-owned small businesses,[103] and provide tourist services.[104] A diverse economy will supply stable revenue streams and employment for community members, as well as promote independent Native-run industries to increase the sovereignty of the nation. Each of these benefits is a distributive justice solution to the harms associated with the boom and bust oil and gas economy in that it ensures community members can maintain jobs and have enough economic resources to sustain their families, as well as that the nation as a whole will not go bankrupt after the fall of an oil and gas economy. In addition, the advantages of economic diversification embody a social justice solution because they provide a stable and trustworthy economy for nations and break the dependence many nations feel they have on the federal government.

Improving revenue transparency, developing revenue management, and diversifying the economy are all distributive and social justice policy solutions that will provide protective measures from the boom and bust cycles of oil and gas economies and force private oil and gas companies and Native governments to internalize the costs of collateral damages caused by fracking.

B. Case Study: Southern Ute Nation Growth Fund

The Southern Ute Nation's Growth Fund provides an example of a Native nation that successfully developed an economic plan to maximize benefits from the boom cycles of the oil and gas economy, while at the same time protecting its community and preparing for the incoming economic bust.[105] In 1994, the Southern Ute Nation Tribal Council (Tribal Council) created and purchased collection companies to gather, process, and transport their natural gas extractions from the reservation to customers both on and off the reservation.[106] By managing all aspects of the oil and gas industry, the Tribal Council had full control of related revenues and was able to implement transparency and management policies that would develop the infrastructure for their reservation.

102. *500 Nations Indian Casinos SuperSite!*, 500 NATIONS, http://500nations.com/Indian_Casinos.asp [https://perma.cc/9WMM-FBUT].
103. *Native American Development Corporation*, NADC, http://www.nadc-nabn.org [https://perma.cc/5GKR-K4A5].
104. *Welcome to the Navajo Nation!*, DISCOVER NAVAJO, http://www.discovernavajo.com [https://perma.cc/73YT-EZJS].
105. *About Us*, SOUTHERN UTE INDIAN TRIBE GROWTH FUND, http://www.sugf.com/AboutUs.aspx [https://perma.cc/F9GR-ABHB].
106. *Id.*

With this development, by 2000 the Tribal Council created a Growth Fund with the mission to consolidate the management of the Nation's business activities and to diversify economic operations both on and off the reservation.[107] The Growth Fund established Tribal organizations for residential and commercial construction, mixed-use projects, and private equity funds. It also facilitated the growth of businesses that provided diverse economic opportunities for the Nation's citizens.[108]

The Southern Ute Nation should serve as an example for other Native nations regarding how to develop an independent business model that will both properly manage oil and gas money as well as create new industries to promote economic growth. The Southern Ute Nation successfully implemented distributive justice policy solutions through its Growth Fund because it allowed the Nation to redistribute fracking revenue to its citizens through its infrastructure development group. Even though people of the Southern Ute Nation have to live near oil and gas facilities, the money produced is not being collected by a few individuals, but is instead being shared to benefit the whole community. Moreover, the Growth Fund is a social justice policy solution because it fosters the growth of the Southern Ute Nation economy, ensuring all members of the community benefit from the boom and are protected from the harmful effects of the bust. The Tribal Council's actions of internalizing the costs of collateral damage from the fracking industry and protecting community members from the boom and bust cycles of the oil-based economy are effective examples of distributive and social justice policy solutions.

C. Developing Environmental Regulations

After establishing protections from boom and bust oil economies, Native nations will further benefit from the development of environmental laws that set regulatory standards for the oil and gas industries to follow as requirements for drilling on Native lands. The creation of environmental regulations can serve as distributive and social justice policy solutions if written to encourage oil and gas companies to internalize the costs of protecting the environment. Requiring companies to internalize the costs of environmental protection

107. *Id.*

108. *Business Areas*, SOUTHERN UTE INDIAN TRIBE GROWTH FUND, http://www.sugf.com/BusinessAreas.aspx [https://perma.cc/QCN9-Q2JQ]. For example, the Growth Fund has facilitated the development of a real estate group with a "diverse real estate portfolio [that] includes investments in California, Colorado, Kentucky, Illinois, Maryland, Missouri, Nevada and Texas" and the construction of the Sky Ute fairgrounds for "the annual Southern Ute Fair and Powwow, rodeos, equestrian events and various other group activities." *Id.*

through compliance with environmental regulations is a distributive justice policy solution because it ensures equal distribution of environmental protection to members of Native nations. Nations mandating a baseline level of environmental protection equal to or higher than neighboring states' baseline levels will ensure Native communities will have at least the same protections as their non-Native neighbors. Environmental regulations also provide a social justice policy solution because they create a legal universe in which oil and gas companies must operate. This legal universe sets community-defined boundaries that balance the needs of economic development with environmental protection. Furthermore, environmental regulations would keep companies from exploiting a regulatory vacuum for their own benefit at the cost of the community and its environment.

While litigation is not an ideal solution, Native courts provide a type of distributive and social justice solution because they reinforce Native sovereignty to protect their communities and environments through a Native-controlled and informed grievance process. The power to create and enforce environmental regulations relates to the unique position Native nations hold as sovereigns in constitutional and federal law, as well as in environmental justice theory and practice. Enforceable environmental regulations are a distributive justice policy solution because: (1) they ensure a community of color is protected by a set of regulations that all other people within the borders of the United States have (or should have) access to; and (2) they ensure a group of citizens within a nation has control in drafting and enforcing those regulations, something that all citizens of other nations have (or should have) the power to do. Moreover, environmental regulations are a type of social justice policy solution because they allow Native communities to strike a balance between economic development and environmental protection—on their own terms—thus guaranteeing access to these significant goals without dependence on the U.S. federal government for resources and security.

Establishing environmental regulations specific to Native nations is not any more difficult than creating environmental regulations at a state or local government level. Of course there will be politics, money, and a balancing of many different constituent opinions, but that is to be expected from policy creation at any level. Enforcing these regulations, especially against non-Natives, however, proves to be more challenging than is the case for state and local governments, thus creating an environmental justice concern.[109]

109. Montana v. United States, 450 U.S. 544, 564 (1981) (holding that Native nations do not have regulatory jurisdiction over nonmembers on fee simple land).

Successfully implementing and enforcing environmental regulations can yield huge benefits for nations considering development of their oil and gas natural resources. First, nations need to establish regulatory jurisdiction over private nonmember parties drilling on Native lands. Second, nations need to set environmental regulations informed by traditional values and culture to allow for environmental protection, while also balancing the nation's economic goals. These environmental regulations must be drafted with standards equal to or higher than those of neighboring states and U.S. federal environmental law. Finally, if regulations are not followed by oil and gas companies, Native nations need to exercise their right of jurisdiction in Native agencies and courts, as well as their power of exclusion, to litigate and enforce compliance with environmental regulations.

1. Establishing Regulatory Jurisdiction Over Private Nonmember Parties

The Supreme Court has established a jurisdictional maze for determining a nation's civil regulatory jurisdiction over nonmembers on Native lands. *Montana v. United States*[110] is the controlling authority for determining Native nations' civil regulatory jurisdiction over the actions of nonmembers on fee-simple land.[111] The Court determined that the "[e]xercise of tribal power beyond what is necessary to protect tribal self-government or control internal relations is inconsistent with the dependent status of tribes and so cannot survive without express congressional delegation."[112] In addition, the Court created the presumption that Native nations do not have regulatory jurisdiction over nonmembers on fee simple land, unless the nation can prove it meets one of two *Montana* exceptions.[113]

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements [(the *Montana* I exception)]. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe [(the *Montana* II exception)].[114]

110. *Id.* at 565.
111. Philip H. Tinker, *In Search of a Civil Solution: Tribal Authority to Regulate Nonmember Conduct in Indian Country*, 50 TULSA L. REV. 193, 199 (2014).
112. *Montana*, 450 U.S. at 564.
113. *Id.* at 565.
114. *Id.* at 565–66 (citations omitted).

The Supreme Court has severely narrowed the application of both exceptions in post-*Montana* cases, thus limiting the ability of nations to successfully enforce civil regulatory jurisdiction over nonmembers on fee simple land.

The nation can benefit from contracting with extractive industries because by doing so it not only secures favorable terms for the community, but also—if contracted correctly—meets the first *Montana* exception to provide for civil regulatory jurisdiction. For a nation to meet the consensual relationship exception there "must be a nexus between the consensual relationship and the regulation or controversy at issue."[115] The Supreme Court has upheld nations' inherent rights to tax nonmembers conducting business within the nation's borders, but the taxation must be sufficiently connected to the consensual relationship between the nonmember and the nation. The first *Montana* exception is limited by *Atkinson Trading Co. v. Shirley*,[116] where the Court states that "[a] nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another . . . ."[117] The Supreme Court is currently deliberating on a case, *Dollar General Co. v. Mississippi Band of Choctaw Indians*,[118] using the *Montana* line of cases to determine if the Mississippi Band of Choctaw Indians has jurisdiction to adjudicate tort claims against Dollar General, a nonmember company who entered into a consensual contractual relationship to operate a Dollar General store within the Nation's boundaries and agreed to be subject to the Nation's judicial jurisdiction.[119] Depending on the Court's holding, nations' jurisdiction to adjudicate certain claims could either be protected or limited.

The second *Montana* exception allows nations to have civil regulatory jurisdiction over nonmembers on fee land where the conduct "threatens or has some direct effect on the political integrity, the economic security, or the heath or welfare of the tribe."[120] Based on its sweeping language, this exception seems like it should be interpreted broadly to promote civil regulatory jurisdiction over nonmembers in the best interests of these nations. The Supreme Court, however, has construed this exception narrowly, requiring nations to prove the nonmember's conduct has a "direct effect" on the "political integrity, the economic

115. Tinker, *supra* note 111, at 204 (citing two Tenth Circuit cases: McArthur v. San Juan Cty., 309 F.3d 1216, 1223 (10th Cir. 2002) and Crowe & Dunlevy v. Stidham, 640 F.3d 1140 (10th Cir. 2011) (both cases discussing the nexus test for the first *Montana* exception)).

116. 532 U.S. 645 (2001).

117. *Id.* at 656.

118. *See* Dollar General Corp. v. Mississippi Band of Choctaw Indians, No. 13-1496, 2016 WL 3434397 (U.S. June 23, 2016).

119. *Id.*

120. Montana v. United States, 450 U.S. 544, 566 (1981).

security, or the health or welfare of the tribe,"[121] and maintaining that nations' inherent power does not reach "beyond what is necessary to protect tribal self-government or to control internal relations."[122] While the Supreme Court has never granted a Native nation civil regulatory jurisdiction over nonmembers under a *Montana* II exception, some lower federal courts have supported nations' regulatory and adjudicatory jurisdiction under particular circumstances.[123]

Nations working to establish regulatory and adjudicatory jurisdiction to enforce their environmental regulations should develop a clear governmental structure, such as legislative and judicial bodies. Furthermore, each environmental regulation should be written to overcome the *Montana* presumption and meet either *Montana* exception if subsequently challenged in federal courts.

2. Establishing Environmental Regulations

Nations can establish environmental regulations that can withstand a *Montana* challenge in various ways. The adoption of environmental codes has allowed nations to regulate the behavior of polluters on their lands; this form of regulation has not yet been contested by the Supreme Court under the *Montana* standard.[124] The clearest way to develop environmental regulations is to allow for the administration of federal environmental regulatory programs on Native lands. The U.S. Congress has amended many federal environmental statutes to include nations as eligible regulatory entities and has given them authority that should be upheld against a *Montana*-type challenge.[125] For energy development and extractive industries, the Clean Air Act (CAA), the Clean Water Act (CWA), and the Safe Drinking Water Act (SDWA) provide the most regulatory power and have all been amended to treat "tribes as states" (TAS).[126] To meet the TAS requirements, a nation must show: (1) the nation's governing body can

121. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008).
122. Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997).
123. Tinker, *supra* note 111, at 207 n.110 (citing Water Wheel Camp Recreational Area, Inc. v. LaRance, 642 F.3d 802, 819 (9th Cir. 2011) (holding that the tribal courts had adjudicative jurisdiction under *Montana* II for tenant trespass claims)); *see also* Attorney's Process and Investigation Servs., Inc. v. Sac & Fox Tribe of the Miss. in Iowa, 609 F.3d 927, 939 (8th Cir. 2010) (holding that the tribal courts had adjudicative jurisdiction under *Montana* II in a claim against private security contractors who had raided the Nation's government with the intent to seize control).
124. The D.C. Circuit upheld the EPA's delegation authority to regulate air quality on all land within reservations, including fee land held by private landowners who are not tribe members. Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1284 (D.C. Cir. 2000).
125. Heather J. Tanana & John C. Ruple, *Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration*, 32 UTAH ENVTL. L. REV. 1, 21 (2012).
126. *Id.*

carry out substantial governmental duties and powers; (2) the management and protection of resources occurs within exterior boundaries of the reservation or other areas within the nation's jurisdiction; and (3) the nation is expected to be capable of carrying out the functions of the regulation.[127] Once a nation has met the TAS requirements under one statute, it has established the requirements for all three statutes.[128] Because of the Supreme Court's narrowing of nations' regulatory jurisdiction under the *Montana* line of cases, however, nations' authority under TAS programs is limited to what is provided by the specific language of each statute.[129]

The Environmental Protection Agency (EPA) does not grant authority over nonmembers to nations under the TAS program in every instance, requiring "a showing that the potential impacts of regulated activities on the tribe are serious and substantial" and that "activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare."[130] Since 1984, however, the EPA has promoted a government-to-government relationship with Native nations and recognized nations as the primary parties for setting standards and managing programs on Native lands.[131] Thus, if a nation meets the TAS qualifications, it should adopt federal environmental statutes under these TAS amendments, which would provide the nation with regulatory jurisdiction over nonmembers polluting on Native lands.

A second option for nations is to adopt their own environmental regulations informed by their particular traditional and cultural needs. In *United States v. Mazurie*,[132] the Supreme Court determined that tribal sovereignty gives nations the inherent power to regulate affairs of the nation that affect internal and social relations of tribal life.[133] While tribal sovereignty has been limited by many different acts of Congress and the Supreme Court, nations still have the power to

127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 22.
131. *Id.* at 23; *see also* Wisconsin v. EPA, 266 F.3d 741, 750 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002) (holding that the EPA correctly granted TAS status under the second *Montana* exception to Mole Lake Band of Lake Superior Chippewa Indians to regulate their water on Mole Lake Reservation); Montana v. EPA, 137 F.3d 1135, 1142 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998) (determining the EPA correctly approved the Confederated Salish and Kootenai Tribes' authority to regulate non-Indians and businesses within the Flathead reservation finding the "activities of the non-members posed such serious and substantial threats to Tribal health and welfare that Tribal regulation was essential"); City of Albuquerque v. Browner, 97 F.3d 415, 429 (10th Cir. 1996) (holding the Isleta Pueblo can enact water quality standards more stringent than the federal standards under the powers of inherent tribal sovereignty).
132. United States v. Mazurie, 419 U.S. 544 (1975).
133. *Id.* at 557.

draft regulations for their internal affairs, like environmental regulations. Each nation will have to work closely with its attorney generals to carefully draft legislation emphasizing that violations of environmental regulations directly affect the "political integrity, the economic security, or the heath or welfare of the tribe" in order to meet the burden for a *Montana* II exception. Furthermore, nations can require in their environmental regulations that all nonmember oil and gas companies contractually comply with the environmental regulations and consent to the nation's jurisdiction before operating on Native lands. These measures should withstand any challenge to the nation's regulatory and adjudicatory jurisdiction and meet the *Montana* I exception.[134]

The pushback that many Native nations could experience when developing environmental regulations is both internal and external. Drafting complex environmental codes is time consuming and requires some understanding of legal code development. Not all nations have access to lawyers who can draft extensive environmental codes.[135] Furthermore, nations must fight the political urge to race to the bottom and not contractually bind nonmember oil and gas companies to environmental regulations in the hopes of encouraging them to come to Native territories instead of competing states. While this urge is attractive to encourage oil and gas development and economic growth, it does not leave Native nations in a position to enforce compliance with any current or future Native environmental laws. Ensuring nonmember oil and gas companies' compliance with nations' environmental laws allows nations the flexibility to set environmental protections for their lands and protects nations' sovereignty and right to control the behaviors of others in their territories. While there is a chance of less economic revenue, Native nations will preserve the right of self-determination over their lands, environment, and natural resources.

134. It is unclear how the Supreme Court will rule on *Montana* exception cases in the environmental law context. The Supreme Court has denied cert for all environmental cases challenging the *Montana* II exception. Further, the equally divided court in *Dollar General* gives no insight on how the Court would apply a *Montana* I exception. Theoretically, contractually binding nonmember oil and gas companies under Native nations' environmental regulations survive any jurisdictional legal challenges under both *Montana* exceptions. *Cf.* H. Scott Althouse, *Idaho Nibbles at Montana: Carving Out a Third Exception for Tribal Jurisdiction Over Environmental and Natural Resource Management*, 31 ENVTL. L. 721 (2001) (discussing the *Montana* exceptions and advocating for a third exception directly relating to Native jurisdiction over environmental and natural resource management).

135. To overcome the barriers to lack of resources and legal support, many Native nations partner with local legal services or create legal clinics focused on code development with local law schools. While these solutions are not ideal, they help provide free (or at least inexpensive) legal support for nations hoping to develop environmental regulations.

Establishing environmental regulations and using the inherent power of sovereign nations to exercise regulatory jurisdiction is a distributive and social justice policy solution for Native nations. The unique position of Native nations as both communities of color and sovereign nations allows for the creation of environmental regulations to be a distributive justice policy solution because these regulations can help ensure Native communities have the same environmental protections as non-Native communities, promoting the nation's sovereignty in the process. Furthermore, environmental regulations are a social justice policy solution because they allow Native communities to strike a balance between economic development and environmental protection. This ensures Native communities can be economically prosperous on their own terms. Having environmental regulations on oil and gas industries will internalize the costs of environmental harms as companies comply with environmental quality standards, which will lessen the environmental burden felt by the community.

3. Exercising the Right to Enforce Compliance With Environmental Regulations

Lastly, Native nations must exercise their rights to enforce compliance with their environmental regulations. If the environmental regulations are written to survive *Montana* claims against the nation's right to adjudicatory jurisdiction, nations should not have too much difficulty legally enforcing their laws. A concern many nations face, however, is whether they have the governmental infrastructure to actually enforce regulations. Nations must adequately staff environmental agencies to monitor and cite polluters who violate environmental regulations. Nations must also have adequate legal staff to bring claims against violators in Native courts. Furthermore, nations need to have an adequate police force to effectively exclude people from their territories. Finally, nations must be willing to enforce environmental regulations, even at the cost of losing oil and gas companies' business, in order to legitimize their claims to regulatory and adjudicatory jurisdiction.

Having the power to enforce compliance with environmental regulations on the nation's terms is a distributive and social justice solution because of the unique position Native nations possess as both communities of color and sovereign nations. Enforcement of environmental regulations allows the fair distribution of legal protection for Native communities who are not being protected through enforcement of environmental regulations in either U.S. state or federal courts. The freedom from dependency on state and federal courts also creates a social justice policy solution because it allows Native nations to set the terms of environmental

regulation enforcement, thus ensuring Native-controlled economic development and environmental protection.

D. Case Study: Navajo Nation's Adoption of Federal Environmental Statutes and Development of Navajo Uranium Laws

Because of its adoption of federal environment statutes and development of Navajo-specific environmental codes, the Navajo Nation provides an example of the success nations can have in creating and enforcing environmental regulations. Uranium mining first took hold in the Navajo Nation during the beginning of World War II, and the industry boomed during the Cold War.[136] Throughout thirty years of mining, no precautions were taken to protect miners—only limited health studies were conducted—and no services were provided to help those affected by the deadly effects of the high levels of radiation, radon gas, and radioactive dust.[137] The Navajo were never informed of the risks of lung cancer, birth defects, and burning sores from working in the mines, breathing the dust blown across the towns, and drinking radioactive wastewater.[138] The U.S. government chose not to inform the Navajo because of its fear that the miners would quit, and replacements would be "difficult to secure because of fear of cancer . . . [which] would seriously interrupt badly needed production of uranium."[139] On July 16, 1979, the United States' largest nuclear spill occurred when more than 1100 tons of uranium tailings, along with one hundred million gallons of radioactive wastewater, spilled into the Rio Puerco River after a mud-packed dam failed by Church Rock in the Navajo Nation.[140]

To limit environmental harms and other negative effects from uranium mines, the Navajo Nation Environmental Protection Agency (NNEPA) created its own process of review under the Navajo Nation Uniform Regulations (NN Uniform Regulations) to regulate implementation of and compliance with environmental laws, review permit applications, and establish standards for rulemaking.[141] The NN Uniform Regulations met all the NEPA requirements, but they created additional requirements for the approval process of any permit falling

136. Bradford D. Cooley, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND, RESOURCES, & ENVTL. L. 393, 395 (2006).
137. *Id.*
138. *Id.* at 396.
139. *Id.*
140. *Id.*
141. NAVAJO NATION ENVTL. PROTECTION AGENCY, UNIFORM REGULATIONS FOR PERMIT REVIEW, ADMINISTRATIVE ENFORCEMENT ORDERS, HEARINGS, AND RULEMAKING UNDER NAVAJO NATION ENVIRONMENTAL ACTS § 101, http://www.navajonationepa.org/Pdf%20files/Uniform.pdf [https://perma.cc/26NL-SMTK].

under Navajo environmental laws, placed control with the NNEPA director for all permitting processes, and set out clear steps and requirements for the public comment process.[142]

In addition, the Navajo Nation met the TAS standards under the Clean Water Act, and to ensure stricter standards than the federally mandated minimum, passed the Navajo Nation Clean Water Act (NNCWA) to provide more protection for Dinè, the Navajo people.[143] The Navajo Council determined that "the degradation of the waters of the Navajo Nation shall be minimized, and that economic growth should occur in a manner consistent with the preservation of existing clean Navajo Nation water resources."[144] The Navajo Nation's creation of stricter clean water standards is a prime example of distributive and social justice policy solutions to ensure community involvement in the protection of the Navajo environment and the Nation's sovereignty.

In an attempt to protect the health and wellbeing of Dinè, the Navajo Council also instated uranium bans on tribal lands. The Dinè Natural Resources Protection Act (DNRPA) prohibits any uranium mining and processing in the Navajo Nation.[145] In addition, the Navajo Nation passed the Radioactive Materials Transportation Act (RMTA) in 2012, which regulates the transportation of uranium and other radioactive materials crossing the reservation.[146] Under the authority of these laws, the Navajo Council voted in the 2014 summer session to rescind legislation passed by an unauthorized committee. This legislation allowed Uranium Resources Incorporated (URI) to conduct on-site mining on private lands on the eastern edge of the Navajo Nation near Church Rock, as well as to transport uranium across Navajo trust lands.[147] Thus, these two Navajo laws, in combination with the NNCWA, have given the Navajo Nation the power to prevent any uranium mining on Navajo lands.

The prevention of uranium mining and the development of stricter clean water environmental regulations are distributive and social justice policy solutions because they allowed the Navajo Nation to protect its environment, promote its own sovereignty, and enforce permitting requirements so that

142. *Id.* at §§ 201–14.

143. NAVAJO NATION ENVTL. PROTECTION AGENCY, NAVAJO NATION CLEAN WATER ACT §§ 103 (a)(3)–(4), http://www.navajonationepa.org/Pdf%20files/Clean%20Water.pdf [https://perma.cc/26NL-SMTK].

144. *Id.*

145. Anne Minard, *Navajo Nation Slams Door on Deal That Would Have Allowed Uranium Mining*, INDIAN COUNTRY TODAY MEDIA NETWORK (Aug. 1, 2014), http://indiancountrytodaymedianetwork.com/2014/08/01/navajo-nation-slams-door-deal-would-have-allowed-uranium-mining-156143 [https://perma.cc/Q4QA-6EXF].

146. *Id.*

147. *Id.*

companies internalize the environmental costs of business. Native nations can model their own environmental regulations after those of the Navajo Nation, which serve as an example of solutions independent of enforcement in state or federal courts.

IV. APPLICATION OF DISTRIBUTIVE AND SOCIAL JUSTICE POLICY SOLUTIONS TO THE MANDAN, HIDATSA, AND ARIKARA NATION

The Mandan, Hidatsa, and Arikara (MHA) Nation is currently experiencing a period of growth in oil and gas development on the Bakken oil fields. This growth is endorsed by private oil and gas industries and the MHA government. The booming oil and gas economy has brought prosperity to the Nation, but at the high cost of many environmental and social harms.[148] The MHA Nation has 1300 oil wells scattered across more than 1500 square miles of the reservation and produces more than 386,000 barrels of oil every day.[149] It has been reported that the MHA Nation environmental director and his team of five other officials deal with at least one, and up to three, spills a day.[150] MHA citizens are breathing polluted air and drinking polluted water; MHA government officials are exploiting their positions of power to benefit themselves; and the increased presence of non-Natives is destroying reservation infrastructure and increasing criminal behavior, all of which affect the community. The best solution for MHA citizens is to advocate for tailored distributive and social justice policy solutions involving governmental and economic reforms that will force fracking industries to internalize the costs of their pollution.

Outside the shared Native experiences of colonialism, assimilation, and genocide, the Mandan, Hidatsa, and Arikara have their own unique history and connection to ancestral lands. Each group was an independent nation prior to the formation of the U.S. government and operated with its own

148. *See generally* Shelby Bohnenkamp et al., *Concerns of the North Dakota Bakken Oil Counties: Extension Service and Other Organizations' Program Responses to These Concerns* (Aug. 2011), https://www.ag.ndsu.edu/ccv/documents/bakken-oil-concerns [https://perma.cc/G4X7-H9GR] (providing a detailed account of the concerns surrounding the boom and bust economy associated with oil and gas extraction in the Bakken oil fields).

149. George Lerner & Christof Putzel, *Tribal Environmental Director: 'We Are Not Equipped' for N.D. Oil Boom*, AL JAZEERA AM. (May 16, 2015, 8:15 PM) http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/5/16/tribal-environmental-director-we-are-not-equipped-for-nd-oil-boom.html [https://perma.cc/UH6D-HM64].

150. *Id.* "I'll just come out and admit it: We can't handle it right now," Edmund Baker said. "We are not equipped. We are not staffed . . . You need competent people, you need people who are not only scientifically equipped, you need people who know how to understand the law, and enforce the law and hold companies accountable." *Id.*

governmental, cultural, and economic systems.[151] After many treaties and the loss of large tracts of land, the Mandan, Hidatsa, and Arikara were combined under federal recognition as the Three Affiliated Tribes on the Fort Berthold reservation.[152] Due to the loss of land and individual national identity, the MHA Nation was politically and economically weakened and did not have the foundational strength to prevent the political opportunism and economic coercion associated with oil and gas development.

In 1944, the U.S. Congress further handicapped the MHA Nation's economy by passing the Flood Control Act and approving the construction of the Garrison Dam. Even after the MHA community staged an organized opposition to the Garrison Dam, Congress decided to break its treaty promises, flooding the MHA lands and effectively destroying the economic and, more importantly, the traditional lifestyles of the MHA community. The dam approval either failed to consider or purposefully ignored the fact that the dam would flood the premium agricultural lands of the MHA people living in the area.[153] After the Garrison Dam approval, the MHA Nation filed complaints and sent representatives to Washington D.C. to object to the project.[154] After the Garrison Dam was built, the MHA Nation lost over a fourth of the total reservation, as well as almost all of the key agricultural lands where MHA citizens and their ancestors had lived for generations.[155]

The construction of the dam destroyed the MHA community's way of life and was the key factor that drove the reservation and its members into poverty. When developing distributive and social justice policy solutions, environmental justice advocates and community members must incorporate plans that are sensitive to the cultural effects associated with the dam flooding. The first step is for

151. *See, e.g.*, ELIZABETH A. FENN, ENCOUNTERS AT THE HEART OF THE WORLD: A HISTORY OF THE MANDAN PEOPLE 33–36 (2014).

152. ROY W. MEYER, THE VILLAGE INDIANS OF THE UPPER MISSOURI: THE MANDANS, HIDATASA, AND ARIKARAS xi–xii (1977).

153. *Id.* at 212. In 1943, the Nations passed a resolution strongly opposing the dam and discussing the adverse effects it would have on the reservation.

154. *Id.* at 213–17. In a speech before the U.S. House of Representatives, Carl Whitman Jr., elected chairman of the MHA Nation, protested the bill, emphasizing the 1851 treaty that guaranteed the reservation lands to the MHA Nation forever. He stated:

> We kept our promise and have worked to build up a strong and growing cattle industry and steadily expanding agricultural program. Just as we're in sight of economic independence you began to build a reservoir and take away the heart of our reservation and divide it into five isolated segments. The homes which we built, the bottom lands on which 85 percent of our people lived and on which [our] cattle industry depended, our churches, our schools, our government, and our social life will be disrupted. *Id.*

155. *Id.* at 220.

the community to embrace the Nation's history related to the Garrison Dam, understanding the efforts involved in opposing the dam. Second, the community must recognize the harm that comes with the flooding of agricultural lands—including its effects on the economic, cultural, and political stability of the MHA Nation—which will allow advocates to create solutions that cater to these growing concerns. Lastly, the MHA Nation must develop new policies that increase community involvement in environmental solutions, economic development from new resources, and political restructuring. Environmental justice advocates must strongly consider the impact of the Garrison Dam on the MHA community before working toward distributive and social justice solutions to address the fracking industry's negative effects on MHA lands.

A collection of community opinions in the Sustainable Prosperity report has already begun to inform policy solutions regarding the social, political, and economic concerns surrounding the fracking industry.[156] This report encourages the retelling of traditional stories in order to reenergize the practice of storytelling and preserve the values, culture, and tradition of the MHA as a way of empowering the economic self-reliance and cultural resilience of the community.[157] Some suggestions focus on creating a cultural center with the mission of healing from the Garrison Dam disaster, as well as establishing a multi-generational advisory council tasked with healing the community through core MHA values.[158] Preserving the values, culture, and tradition of the MHA Nation is one example of distributive and social justice policy solutions centered on recognizing and recovering from harmful policies of the federal government.

The development of the Bakken oil fields and the fracking industry have brought both prosperity and challenges to the MHA Nation. After generations of poverty, economic self-reliance is a huge concern for many members, and the development of the Bakken oil fields opens up new opportunities. Citizens are looking for individual self-sufficiency as well as long-term economic opportunities for their nation as a whole.[159] Native-owned oil and drilling firms have opened up, and new jobs in both the energy industry and non-oil businesses

156. *See, e.g.*, SUZANNE COONAN ET AL., FIVER RIVERS CONSULTING, SUSTAINABLE PROSPERITY: BUILDING A BRIDGE TO A BRIGHTER TOMORROW (2012), http://www.visionwestnd.com/documents/MHANationSustainableProsperityReportFinalVersion-2.pdf [https://perma.cc/RGG2-YFYY].

157. *Id.* at 28.

158. *Id.* at 28–29.

159. *Id.* at 15. A notable quote recorded in the Sustainable Prosperity report states the importance of self-sufficiency and how the "[d]iscovery of oil is our opportunity to rebound. We're impacted with all the traffic, but we own most of the land it's on. We need to reserve/put away most of this oil money." *Id.* at 16.

have helped with unemployment and low wages.[160] Most of the 150 oilfield firms in the MHA Nation are owned by its members, and these firms are given preferential treatment for contracts and oilfield work on the reservation.[161] The Tribal Council has built affordable housing, provided below-market rental units, and subsidized home ownership with low-interest financing options.[162] In addition, the Nation has spent millions of dollars on education, including K–12 schooling, and on healthcare services.[163] These improvements and increased job opportunities are examples of how oil dollars can benefit the community.

The booming fracking industry and oil money, however, have also brought many political, social, economic, and environmental hardships to the community. First, the political corruption of the Tribal Council and former chairman, Tex "Chief Red Tipped Arrow" Hall, shows the political opportunism involved in contracting with oil and gas companies without any regard for externalized costs to the public.[164] Hall is rumored to have become a millionaire as a result of his connections with the fracking industry, and the Tribal Council has been criticized for purchasing a 149-passenger yacht for senators and oil company executives to sail the waters from the Garrison Dam.[165] This corruption has influenced Hall and the Tribal Council to actively oppose federal fracking regulations and to block any measures to hold oil and gas companies accountable for their pollution.[166] The opposition to fracking regulations is an explicit act to protect the oil and gas industries and allow them to externalize environmental harms onto the public. Hall and the Tribal Council's political corruption shows the effects of political opportunism, which benefits oil and gas companies economically at the expense of the community's health and well-being.

In response to public outcry, both Mark Fox and Damon Williams, two candidates who ran to replace Hall as chairman, promised in their election campaigns to increase transparency in the Nation's finances and take an active role in

160. Phil Davies, *Bakken Has Brought Prosperity, Challenges, to Fort Berthold Indian Reservation*, FAIR FIELD SUN TIMES (Nov. 20, 2014, 2:46 PM), http://www.fairfieldsuntimes.com/business/article_994375e8-69e3-11e4-82f2-57ff0a29cc9f.html [https://perma.cc/H7YV-25JH].

161. *Id.*

162. *Id.*

163. *Id.*

164. Winona Laduke, *'Unspeakable Poverty of Loss': Intergenerational Trauma and the Bakken Oil Fields*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 8, 2014), http://indiancountrytodaymedianetwork.com/2014/10/08/unspeakable-poverty-loss-intergenerational-trauma-and-bakken-oil-fields-157243?nopaging=1 [https://perma.cc/XQZ4-KAS8].

165. *Id.*

166. Wittmeyer, *supra* note 61.

regulating the oil industry.[167] After winning the election, Fox's top three priorities were to tackle oil industry effects on the community, improve the Nation's fiscal management, and implement tribal governmental reforms to best situate the MHA Nation during the booming fracking industry.[168] The election of Fox as the new chairman is an example of the community taking steps to implement distributive and social justice policy solutions that will require private oil and gas companies and the government to internalize the costs of fracking without the use of litigation.

Other governmental reforms and independent community oversight are necessary in addition to using the democratic process to replace leadership in the MHA Tribal Council. First, creating an independent community-run ethics committee would allow for members to air their concerns and oversee government officials. The 2008 Ethics in Government Ordinance established the Ethics and Rules Committee, whose members are selected by the MHA Tribal Council.[169] Opening up at least half of the committee membership to a nationwide election would allow for increased community involvement and would limit the Tribal Council's control and influence on the committee. A robust ethics committee responsive to the public will allow for more transparency and community involvement in the governmental process, thus working toward limiting political opportunism in the oil and gas industry and preventing the public from being forced to foot the environmental costs. This solution overcomes sovereign immunity barriers in litigating against Native government officials and opens the door for internalization of the environmental costs of fracking in the MHA Nation.

In addition to maintaining a more community-oriented ethics committee, MHA citizens should consider other distributive and social justice policy solutions. For example, they should consider amending the Oil and Gas Tax Agreement between the MHA Nation and North Dakota. In the current

167. Tim McDonnell, *How 3,500 Voters in North Dakota Could Put the Brakes on America's Biggest Fracking Boom*, MOTHER JONES (Nov. 3, 2014, 6:23 PM) http://www.motherjones.com/print/263811 [https://perma.cc/NLH2-9X8J]. Lynn Helms, head of the North Dakota Department of Mineral Resources, said: "Both candidates are less friendly to rapid development than the current administration," and she expressed a deep concern the election would "put a noticeable freeze" on the area's oil development. *Id.*

168. *Priorities Set for New MHA Chairman*, KXNEWS (Nov. 26, 2014, 4:49 PM), http://www.kxnet.com/story/27432889/priorities-set-for-new-mha-chairman [https://perma.cc/JW8N-SW78].

169. MANDAN HIDATSA & ARIKARA NATION, ETHICS IN GOVERNMENT ORDINANCE § III(A) (2008) (on file with author). The ethics committee allows for public complaints and has in place administrative hearing procedures with an appeal process to the Fort Berthold District Courts. *Id.* at § III(D-I).

agreement, the State of North Dakota is receiving 50 percent of all tax revenue, even though the majority of the oil tax income originates from tribal trust wells owned and operated by MHA citizens.[170] Nowhere in the agreement does North Dakota promise financial help for infrastructure costs, increased law enforcement services, development of health facilities, or environmental protection.[171] Even though it receives only half of the oil tax revenue, the MHA Nation must bear the full external costs of the oil and gas industry, including road maintenance and replacement. Moreover, the MHA must bear the social costs related to increased drug use and domestic abuse, as well as higher costs of living.[172] The MHA police force has only twenty members; sometimes only two officers are on duty in the whole reservation at one time.[173] With the increase of man-camps,[174] violent crimes (sexual violence and drug-related crimes)[175] committed by nonmembers cannot be prosecuted in MHA courts, thus limiting the control Native officials have on MHA lands.[176] The MHA Nation cannot afford to both lose half of the oil tax revenue and pay for all the external costs of the oil and gas industry. The agreement needs to be amended to raise the amount of taxes on the oil and gas companies, refuse to give North Dakota any MHA oil tax revenues, or hold North Dakota responsible for collaboratively funding projects to improve the infrastructure, social welfare, and health of the MHA community. The MHA Nation can lobby the North Dakota legislature and governor, develop a public relations campaign focused on informing North Dakota citizens and presenting a sympathetic case, and insist on creating more favorable terms than the current tax agreement. Because it is such a large economic player in North Dakota, the MHA Nation should have some political leverage to establish more favorable

170. *Priorities Set for New MHA Chairman*, *supra* note 168. This is an improvement, because previously two-thirds of oil taxes went to North Dakota. *Id.*

171. OIL AND GAS TAX AGREEMENT BETWEEN THE THREE AFFILIATED TRIBES AND STATE OF NORTH DAKOTA (June 21, 2013), https://www.nd.gov/tax/data/upfiles/media/oilgastax agreement.pdf?20160225203246 [https://perma.cc/2QTD-MT42].

172. *See, e.g.*, Sari Horwitz, *Dark Side of the Boom*, WASH. POST (Sept. 28, 2014), http://www.washingtonpost.com/sf/national/2014/09/28/dark-side-of-the-boom [https://perma.cc/XC5G-NEJ5].

173. *Id.* The MHA Nation needs "more police officers, housing for recruits, more tribal prosecutors and judges, and additional drug treatment facilities . . . ." *Id.*

174. Man-camps are temporary and densely populated encampments for men who migrated to the MHA Nation following oil and gas jobs.

175. *See generally* Nikke Alex, *Dark Side of Oil Development: Bakken Oil Boom Pumping Sexual Violence Into Fort Berthold Reservation*, MISS NIKKE BLOG, http://missnikke.com/post/108614556446/dark-side-of-development-bakken-oil-boom-pumping [https://perma.cc/6JN2-JY66].

176. *Id.* The MHA Nation has not yet implemented the amended Violence Against Women Act, which would allow for Native jurisdiction over nonmembers perpetrating abuse against domestic partners. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 47, 127 Stat. 54 (2013).

terms. Increasing the MHA Nation's access to oil tax revenues will force oil and gas companies to pay for the external costs of doing business, thus demonstrating a distributive and social justice policy solution to the environmental and social harms associated with the fracking industry.

Next, the MHA government should adopt and update federal environmental codes, develop MHA-specific environmental codes, and ensure environmental protections are included in agreements made with oil and gas businesses. The implementation of stricter environmental regulations will develop a baseline for environmental protection requirements. This is a distributive justice solution because it will allow the MHA citizens a fair distribution of environmental protection, similar to the environmental protections enjoyed by North Dakota citizens under North Dakota environmental regulations. Furthermore, environmental regulations are a social justice solution because they promote the sovereignty of the MHA Nation and allow the MHA community to define the balance between environmental protection and economic development.

First, the Region 8 Environmental Protection Agency and the Three Affiliated Tribes Environmental Division need to increase staff and funds to ensure regulations are enforced, contracts are followed, and litigation can be pursued. Currently, one person monitors the reservation's water quality, and the environmental division's limited staff can only react to spills rather than taking preemptive steps to prevent pollution.[177] The MHA Nation could legislatively mandate that a certain percentage of its oil and gas profits go toward funding and staffing MHA environmental agencies.

In addition to properly staffing and funding the environmental division, the MHA Tribal Council should adopt the Clean Air Act (CAA) and the Safe Drinking Water Act (SDWA) under the Treat as State (TAS) amendments. MHA has already successfully implemented the TAS provisions of the Clean Water Act and begun regulating the reservation's water using federal laws with the addition of Native laws.[178] The MHA Nation may not want to develop new environmental regulations because doing so is time-consuming and the limited environmental staff may not have the capacity to incorporate full clean air and safe drinking water acts into MHA codes. Furthermore, MHA may feel the political pushback from oil and gas industries that are benefiting from an unregulated economy. The MHA will have to balance the need for

177. Davies, *supra* note 160.

178. *Water Quality*, THREE AFFILIATED TRIBES ENVTL. DIVISION, http://www.tatenviro.org/waterquality [https://perma.cc/9V5U-8WLT].

environmental regulations with the potential loss of business, thus fighting the urge to race to the bottom against the North Dakota market. Incorporating the other federal environmental statutes is not only a distributive and social justice solution for the MHA Nation, but it also will provide a baseline of environmental regulation like that currently in use by the rest of the United States. The MHA Nation will benefit by developing distributive and social justice policy solutions that make oil and gas industries and the MHA government internalize the costs of environmental harms from fracking, and that protect the health and well-being of both the environment and the MHA community.

CONCLUSION

Traditional environmental justice litigation strategies are not successful for Native nations because of their unique status, which requires balancing environmental protection, tribal sovereignty, and economic development. In particular, litigation does not allow for the oil and gas industries and Native governments to internalize the environmental and social costs of fracking, nor does it tackle the economic coercion and political opportunism that continue to plague Native communities. Alternatively, tailored distributive and social justice policy solutions, informed by the community, will provide successful remedies to ensure the internalization of environmental and social costs of fracking. Additionally, these solutions will help Native nations achieve the proper balance between economic and ecological concerns as they navigate the growth of oil and gas industries on their lands.