

# “I AM THE RIVER, THE RIVER IS ME”<sup>1</sup>: HOW ENVIRONMENTAL PERSONHOOD CAN PROTECT TRIBAL FOOD SYSTEMS

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<sup>1</sup> “*Ko Au Te Awa, Ko Te Awa Ko Au.*” This is a Maōri proverb that highlights the interconnection between the Maōri and their environment. Manu Bennet, ‘*Ko au te awa, ko te awa ko au*’, RADIO NEW ZEALAND (Mar. 17, 2017), <https://www.rnz.co.nz/news/on-the-inside/326756/ko-au-te-awa,-ko-te-awa-ko-au> [<https://perma.cc/ECJ6-L44S>].

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## INTRODUCTION

Upon the passage of the Te Awa Tupua (Whanganui River Claims Settlement) Bill,<sup>2</sup> Labour MP Adrian Rurawhe remarked “It’s not that we’ve changed our worldview, but people are catching up to seeing things the way that we see them.”<sup>3</sup> Rurawhe’s remark acknowledged the acceptance by the Crown and New Zealanders of the Māori conviction that the environment, encompassing everything from a rock to a river, has an inherent integrity and is entitled to protection solely on the basis of that integrity. The Te Awa Tupua Bill grants the Whanganui River, a river of cultural and spiritual importance to the Māori, legal personhood.<sup>4</sup> Legally recognized as “Te Awa Tupua,”<sup>5</sup> the river now has the same legal rights and interests as a person or corporation.<sup>6</sup>

While this is the second time New Zealand has granted legal personhood to a natural object,<sup>7</sup> the bill’s passage signals an exploration into the use of environmental personhood to protect culturally significant natural objects from climate change. Te Awa Tupua’s grant of personhood arrives in the midst of a global discussion on climate change,<sup>8</sup> particularly

<sup>2</sup> Te Awa Tupua (Whanganui River Claims Settlement) Bill 2017 (N.Z.) [hereinafter The Te Awa Tupua Bill].

<sup>3</sup> Isaac Davidson, *Whanganui River given legal status of a person under unique Treaty of Waitangi settlement*, NEW ZEALAND HERALD (Mar. 15, 2017), [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=11818858](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11818858) [<https://perma.cc/2L78-L4MS>].

<sup>4</sup> Davidson, *supra* note 3.

<sup>5</sup> I will refer to the Whanganui River by its legal name, Te Awa Tupua, throughout this paper.

<sup>6</sup> *Agreement entitles Whanganui River to legal identity*, NEW ZEALAND HERALD (Aug. 30, 2012), [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10830586](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10830586) [<https://perma.cc/VAM9-HGAR>].

<sup>7</sup> The first time New Zealand granted environmental personhood was in 2014 to a forest, Te Urewera. See Te Urewera Act 2014 s 3 (N.Z.).

<sup>8</sup> See Somini Sengupta & Lisa Friedman, *At U.N. Climate Summit, Few Commitments and U.S. Silence*, N.Y. TIMES (Sep. 23, 2019), <https://www.nytimes.com/2019/09/23/climate/climate-summit-global-warming.html> [<https://perma.cc/KT7H-6B3Q>]; and Somini Sengupta, *Greta Thunberg, on Tour in America, Offers an Unvarnished View*, N.Y. TIMES (Sep. 18, 2019), <https://www.nytimes.com/2019/09/18/climate/greta-thunberg.html> (detailing Greta Thunberg’s advocacy for the environment) [<https://perma.cc/9AZA-KFJ3>].

its effect on indigenous food systems. Shifts in precipitation and temperature patterns disrupt a farmer's ability to grow food, decreasing agricultural productivity and increasing food prices.<sup>9</sup> Governments have fashioned regulatory schemes to mitigate the impact of climate change and pollution.<sup>10</sup> Although these schemes do help to mitigate, they do not address the particular vulnerabilities of indigenous peoples.<sup>11</sup> These regulatory schemes fail indigenous communities because the schemes focus on the industrial and economic impact of climate change as opposed to the on-the-ground impacts.

Environmental personhood offers an alternative method of mitigating climate change's impact on indigenous food systems, specifically Native American food systems. The concept of environmental personhood has the potential to protect Native American food sovereignty during climate change. Specifically, applying New Zealand's model of environmental personhood could benefit Native American tribes in the United States. Under an environmental personhood model, Native American tribes would benefit from having their land protected, thereby conserving a source of food and cultural significance. In addition, Native American tribes would take on a greater legal and policymaking role to mitigate the consequences of climate change.

Part I of this paper discusses the development of environmental personhood and its application in New Zealand. A brief overview is given of the impact of climate change on food systems, with a focus on the impact on Native American tribes in the United States. Part II argues that the current methods of protecting Native American lands are ineffective at mitigating the impact of climate change. Environmental personhood, as implemented by New Zealand, is offered as an ideal way to address the unique challenges posed by climate change because it involves indigenous communities in the protection of traditional lands. This paper concludes

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<sup>9</sup> *Climate Change and Agriculture: A Perfect Storm in Farm Country*, UNION OF CONCERNED SCIENTISTS (Mar. 20, 2019), <https://www.ucsusa.org/resources/climate-change-and-agriculture> [<https://perma.cc/M2ZK-T4EL>] (last visited Nov. 10, 2019).

<sup>10</sup> Examples of regulatory schemes include emissions trading, incentivizing low-carbon technology, promoting renewable energy, and creating target goals for industrial sectors. *See, e.g., Economics of Climate Change*, U.S. ENV'T PROT. AGENCY <https://www.epa.gov/environmental-economics/economics-climate-change> [<https://perma.cc/3SCZ-8VU3>] (last visited Oct. 23, 2020).

<sup>11</sup> In the United States and other countries, indigenous peoples are reliant on the land and water for subsistence. Regulatory schemes proposed by governments often do not address climate change's effect on the ground, instead focusing on economic markets and industry. *See* Julie Halpert, *Native Americans and a Changing Climate*, YALE CLIMATE CONNECTION (June 21, 2012), <https://www.yaleclimateconnections.org/2012/06/native-americans-and-a-changing-climate/> [<https://perma.cc/F7CZ-YGPB>].

that environmental personhood, although imperfect, is the most likely to protect Native American tribes by preserving their land in accordance with tribal beliefs.

## I. BACKGROUND: ENVIRONMENTAL PERSONHOOD, CLIMATE CHANGE, AND AGRICULTURE

### A. WHAT IS ENVIRONMENTAL PERSONHOOD?

Environmental personhood contemplates granting natural objects (such as land, trees, or bodies of water) the rights, privileges, responsibilities, and liabilities of a legal person or entity, entitling them to “independent regard and consideration” within the legal system.<sup>12</sup> First proposed by Christopher Stone, the concept of environmental personhood views legal personhood as an alternative means of protecting the environment and natural resources.<sup>13</sup>

Under the current legal system, natural objects do not have legal rights. Courts have generally refrained from extending rights or standing to land or natural objects.<sup>14</sup> The only way a natural object is protected is through its owner. The law imbues the (human) owner with any rights and benefits attendant to owning land. If harm occurs to the natural object, the owner is entitled to bring suit and seek redress for the harm suffered.<sup>15</sup> Since a court only considers the harms to the owner, any remedies granted are designed to make the owner whole, not the natural object.<sup>16</sup>

Stone offers a framework that would allow for the rights of natural objects to be vindicated separate from a human owner: guardianship. While guardianship still entails the involvement of a human, it would permit individuals to petition a court to become the guardian for a “public natural object” or a “natural object [ ] on ‘private land.’”<sup>17</sup> Once a person

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<sup>12</sup> See Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENV'T. L. 49, 61 (2018). See also Hope M. Babcock, *A Brook with Legal Rights: The Rights of Nature in Court*, 43 ECOLOGY L. Q. 1, 9 (2016), and Christopher Stone, *Should Trees Have Standing? —Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

<sup>13</sup> Stone, *supra* note 12, at 456.

<sup>14</sup> See *Ezer v. Fuchsloch*, 160 Cal. Rptr. 486, 493 (Ct. App. 1979) (declining to grant “an independent right of existence in defendants’ pine tree.”).

<sup>15</sup> Stone, *supra* note 12, at 460–61.

<sup>16</sup> *Id.* at 463.

<sup>17</sup> Stone, *supra* note 12, at 465.

is granted guardian status by the court, they may then bring claims and assert injuries on behalf of a natural object and put any remedy towards repairing the harm suffered by the natural object. Guardianship not only secures an advocate for a natural object, it also ensures a more nuanced understanding of the issues affecting a natural object, and how best to remedy those issues in court.<sup>18</sup>

Even though Stone's article sparked a "wholesale re-evaluation of the place of human interests in relation to nature,"<sup>19</sup> environmental personhood has yet to be widely adopted. The current legal system does not view nature as something that is valued separately outside of human ownership.<sup>20</sup> Further, applying the guardianship framework raises questions over *who* should represent a particular natural object. Specifically, who would be the best representative of a natural object in court. Stone noted that environment conservation organizations could serve as capable guardians. While such organizations are well suited to represent the interests of natural objects, their representation may not be inclusive of the interests of non-members, particularly Native American tribes. This concern is most prominent when tribal lands, or a natural landmark significant to a tribe, overlap with formally protected land, such as national parks and monuments.<sup>21</sup>

## B. THE INTERCONNECTED RELATIONSHIP BETWEEN NATIVE AMERICANS AND NATURE

Within indigenous communities, nature is more than a source of sustenance or economic activity. Nature has a spiritual and cultural element. While the worldviews and spiritual systems of all Native American tribes differ, the core of each spiritual system rests upon the interconnectedness between humans and nature. Native American tribes "learned both through observation and experiment" how to live with

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<sup>18</sup> *Id.* at 470–71.

<sup>19</sup> Babcock, *supra* note 12, at 3.

<sup>20</sup> Stone, *supra* note 12, at 455–56.

<sup>21</sup> This concern affects indigenous peoples across all continents. For a chart illustrating indigenous tribes affected by overlaps between formally protected land and tribal land, see JENNY SPRINGER & FERNANDA ALMEIDA, PROTECTED AREAS AND THE LAND RIGHTS OF INDIGENOUS PEOPLES AND LOCAL COMMUNITIES: CURRENT ISSUES AND FUTURE AGENDA 6–9 (2015), [https://rightsandresources.org/wp-content/uploads/RRIRReport\\_Protected-Areas-and-Land-Rights\\_web.pdf](https://rightsandresources.org/wp-content/uploads/RRIRReport_Protected-Areas-and-Land-Rights_web.pdf) [<https://perma.cc/L9AG-FV4Z>].

nature.<sup>22</sup> Foods eaten, clothes worn, and shelters lived in depended on what was available during a given season. Natural resources, including crops and animals, were treated as relatives, imbued with a spirit. Certain foods, such as wild rice or *manoomin*, were, and still are, central to tribal diets and religious ceremonies.

The intimate relationship between Native American tribes and the land significantly changed when European settlers arrived in America.<sup>23</sup> Colonization forced Native American tribes out of their traditional lands onto reservations where they were made to give up a traditional hunter-gatherer lifestyle and pursue a sedentary lifestyle.<sup>24</sup> To make up for the loss of a hunter-gatherer lifestyle, the United States government supplied tribes with rations, intending to supplement the food tribes gathered or farmed.<sup>25</sup> However, the inability to hunt and gather traditional foods cemented a reliance on ration foods, meaning settler foods slowly replaced a traditional tribal diet.<sup>26</sup> Colonization and removal from traditional lands essentially stripped Native Americans of their relationship with their environment.<sup>27</sup>

The Native relationship to land has continually been demeaned by American policies. The Dawes Act of 1887 divided Native American reservation land into individual allotments and distributed them to individual tribal members.<sup>28</sup> Any land leftover after the allotments were sold to non-natives.<sup>29</sup> Tribal members often sold their allotments to non-natives who had the cash to purchase land. The sale of reservation land to

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<sup>22</sup> Rosalyn LaPier, *For Native Americans, a river is more than a 'person,' it is also a sacred place*, THE CONVERSATION (Oct. 8, 2017), <https://theconversation.com/for-native-americans-a-river-is-more-than-a-person-it-is-also-a-sacred-place-85302> [<https://perma.cc/H8YQ-B242>].

<sup>23</sup> ABAKI BECK, *AHWAHSIN (THE LAND/WHERE WE GET OUR FOOD): TRADITIONAL ECOLOGICAL KNOWLEDGE AND CONTEMPORARY FOOD SOVEREIGNTY ON THE BLACKFEET RESERVATION* 5 (2017).

<sup>24</sup> Abaki Beck, *How One Tribe is Fighting For Their Food Culture in the Face of Climate Change*, TALK POVERTY (Feb. 27, 2019), <https://talkpoverty.org/2019/02/27/tribal-food-sovereignty-climate-change/> [<https://perma.cc/BB49-4RDJ>].

<sup>25</sup> BECK, *supra* note 23, at 10.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 5.

<sup>28</sup> General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381). *See also Fractionation*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/buybackprogram/fractionation> [<https://perma.cc/F2VB-2Q8K>] (last visited Aug. 14, 2020); *Land Tenure Issues*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/issues/> [<https://perma.cc/P3AY-BBE5>] (last visited Aug. 14, 2020).

<sup>29</sup> *Land Tenure Issues*, *supra* note 28.

non-natives has resulted in tribal reservations being “checker-boarded.”<sup>30</sup> Consequences of checkerboarding include the loss of reservation land and an inability to pursue economic development, exercise tribal sovereignty, and access culturally significant landmarks.<sup>31</sup> These consequences are the result of jurisdictional challenges “as different governing authorities—county, state, federal, and tribal governments for example—claim the authority to regulate, tax, or perform various activities within reservation borders.”<sup>32</sup> Due to these jurisdictional challenges, tribal governments face difficulty implementing policies and regulations since parts of a reservation may be subject to conflicting authorities.<sup>33</sup>

Similar to colonization, the Dawes Act not only severed tribes’ physical relationship to the land, it also impacted their ability to engage in traditional subsistence practices. A consequence of being unable to harvest and eat traditional foods has been significantly worse health outcomes for Native Americans.<sup>34</sup> Compared to other American populations, Native Americans die at higher rates from chronic liver disease, heart disease, cirrhosis, and diabetes.<sup>35</sup> They are also more likely to suffer from unresolved cross-generational trauma.<sup>36</sup>

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<sup>30</sup> The sale of land to non-Natives has resulted in reservation lands being “checker-boarded” where Native-owned land was intermingled with non-Native owned land. *Land Tenure Issues*, *supra* note 28. Checker-boarding significantly impacts the ability of tribes to exercise their tribal sovereignty and jurisdiction, pursue economic development projects, and access culturally significant landmarks. *Fractionation*, *supra* note 28; *Land Tenure Issues*, *supra* note 28.

<sup>31</sup> *Fractionation*, *supra* note 28. *See also Land Tenure Issues*, *supra* note 28.

<sup>32</sup> *Land Tenure Issues*, *supra* note 28.

<sup>33</sup> *Id.*

<sup>34</sup> BECK, *supra* note 23, at 9. *See also* Harriet V. Kuhnlein & Olivier Receveur, *Dietary Change and Traditional Food Systems of Indigenous Peoples*, 16 ANN. REV. NUTRITION 417, 434 (1996).

<sup>35</sup> *Indian Health Disparities*, INDIAN HEALTH SERV. (Oct. 2019), [https://www.ihs.gov/sites/newsroom/themes/responsive2017/display\\_objects/documents/factsheets/Disparities.pdf](https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/factsheets/Disparities.pdf) [<https://perma.cc/A4B9-9DJA>].

<sup>36</sup> *Id.* *See also* Mary Smith, *Native Americans: A Crisis in Health Equity*, AM. BAR ASS’N, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-state-of-healthcare-in-the-united-states/native-american-crisis-in-health-equity/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/native-american-crisis-in-health-equity/) [<https://perma.cc/R8VF-HDRT>]; *Native Americans with Diabetes*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/vitalsigns/aian-diabetes/index.html> [<https://perma.cc/MP44-5AMV>].

### C. TE AWA TUPUA: A SUCCESSFUL APPLICATION OF ENVIRONMENTAL PERSONHOOD IN NEW ZEALAND

The 2017 grant of personhood to Te Awa Tupua represented the culmination of years Maōri advocacy seeking to recognize the Whanganui River as a living whole.<sup>37</sup> Te Awa Tupua is significant because of how intertwined it is in the Whanganui Iwi's culture and ancestry.<sup>38</sup> Te Awa Tupua has a central place in the Whanganui Iwi's belief and cultural system as a family member and sacred being.<sup>39</sup> As a result, the grant of legal personhood recognizes the Maōri worldview which emphasizes the relationship between people and the surrounding world.<sup>40</sup>

#### 1. *The Treaty of Waitangi and Relations between the Maōri and the Crown*

Contact with the Maōri of New Zealand was first recorded in December 1642.<sup>41</sup> However, regular encounters between the British and the Maōri began in earnest in the late 1760s.<sup>42</sup> British and other European traders traveled New Zealand to trade with the Maōri, exchanging potatoes, muskets, and other weaponry and food for Maōri goods.<sup>43</sup> The New Zealand Company, chartered in 1825, assisted British efforts to colonize New Zealand before other European nations.<sup>44</sup>

In 1840, early British settlers of New Zealand, represented by Lieutenant Governor William Hobson, signed a treaty with various Maōri

<sup>37</sup> First Reading of the Te Awa Tupua Bill (24 May 2016) 714 NZPD 11185 (testimony of Hon. Christopher Finlayson) (hereinafter First Reading). See also James Morris & Jacinta Ruru, *Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?*, 14 AUSTL. INDIGENOUS L. REV. 49, 49–50 (2010).

<sup>38</sup> The Whanganui Iwi are the Maōri tribes whose ancestors traditionally lived near the Whanganui river and claim descent from the area. Since their traditional tribal region is based around the Whanganui river, Maōri coming from that region are known as the Whanganui Iwi.

<sup>39</sup> First Reading, *supra* note 34 (testimony of Marama Fox).

<sup>40</sup> Morris & Ruru, *supra* note 34, at 49. See also Gordon, *supra* note 12, at 55.

<sup>41</sup> *A History of New Zealand 1769–1914*, MINISTRY FOR CULTURE & HERITAGE, <https://nzhistory.govt.nz/culture/history-of-new-zealand-1769-1914> [https://perma.cc/TR8L-RZGQ] (last updated July 13, 2020).

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* See also *Te Tiriti o Waitangi [The Treaty of Waitangi]*, ARCHIVES N.Z., <https://archives.govt.nz/discover-our-stories/the-treaty-of-waitangi> [https://perma.cc/T4RQ-BR37] (last visited Feb. 21, 2020).

<sup>44</sup> See *A History of New Zealand*, *supra* note 41.



tribes to establish British sovereignty over the island and recognize the rights of the Maōri.<sup>45</sup> To that end, Lieutenant Governor Hobson drafted two treaties, one in English and one in Maōri. The Maōri version of the treaty “is not an exact translation of the English text.”<sup>46</sup> For example, Article 1 of the English version provides that the Maōri “cede to [the Crown] absolutely and without reservation all the rights and powers of sovereignty,” whereas the Maōri version merely states that it gives the Crown the right of governance.<sup>47</sup> The Maōri version does not go so far as to grant a full cession of sovereignty and power to the Crown.<sup>48</sup>

Despite the fact that the two versions of the treaty did not exactly match, the treaties were signed by Maōri leadership, and the Crown assumed sovereignty over New Zealand. Once the Crown assumed sovereignty, the treaties provided that the Maōri would retain “full exclusive and undisturbed possession of their lands” (or authority over land in the Maōri version).<sup>49</sup> The different language used to express Maōri land rights invited different interpretations of the text of the treaty. Colonists, and the Crown, used the ambiguity of Maōri land rights to buy or outright take land from the Maōri in order to extract natural resources, violating the Maōri’s “full exclusive and undisturbed possession of their lands.”<sup>50</sup> In the 1870s and 1880s, Maōri lands and water were used to prospect for gold and coal, remove gravel, and clear rapids and swamps.<sup>51</sup> All of these actions “threatened fished grounds and the economic base” of the Maōri.<sup>52</sup>

The destructive actions of colonists and the Crown forced the Maōri to continuously petition the Crown to cease the destructive activities and adhere to the Treaty of Waitangi. Grievances over the failure of the Crown and the New Zealand government to honor the treaty resulted in protests during the 1970s. In response, the New Zealand Parliament passed

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<sup>45</sup> Te Tiriti o Waitangi, *supra* note 43.

<sup>46</sup> Waitangi Tribunal, *The Treaty of Waitangi/Te Tiriti o Waitangi*, N.Z. MINISTRY OF J., <https://www.waitangitribunal.govt.nz/treaty-of-waitangi/meaning-of-the-treaty/> [https://perma.cc/ZE76-T8YC] (last visited Feb. 20, 2020).

<sup>47</sup> Treaty of Waitangi, N.Z.-U.K., Feb. 6, 1840, <https://archives.govt.nz/discover-our-stories/the-treaty-of-waitangi> [https://perma.cc/T4RQ-BR37] (last visited Feb. 20, 2020). *See also* Morris & Ruru, *supra* note 37, at 49.

<sup>48</sup> Morris & Ruru, *supra* note 37, at 49.

<sup>49</sup> Treaty of Waitangi, *supra* note 47. *See also* Morris & Ruru, *supra* note 37, at 49.

<sup>50</sup> *See* Morris & Ruru, *supra* note 37, at 49.

<sup>51</sup> First Reading, *supra* note 37 (testimony of Mitiria Turei).

<sup>52</sup> *Id.*

the 1975 Treaty of Waitangi Act, which authorized the creation of the Waitangi Tribunal to investigate grievances resulting from the breach of principles contained in the 1840 Treaty of Waitangi.<sup>53</sup> On October 14, 1990, the Māori filed a claim of rightful possession over the Whanganui River, asserting that the Crown “wrongfully seized the riverbed before vesting control to local authorities.”<sup>54</sup> In 1999, after examining the claim, the Waitangi Tribunal issued a report asserting that the Whanganui Iwi had never ceded control of their interest in the river. This acknowledgement came nearly 160 years after the treaty was first signed.<sup>55</sup>

## 2. *Creating the Framework for Te Awa Tupua*

After the issuance of the report, negotiations began between the Whanganui Iwi and the Crown to work towards a settlement on the Iwi’s claim. Over the course of several years, a settlement agreement was crafted, asserting a framework that would settle claims of possession, recognize the Whanganui Iwi’s ties to the Whanganui River, and create a legal personality for the Whanganui River.<sup>56</sup> Acknowledging the cultural and spiritual significance of the Whanganui River, the framework first grants statutory recognition of the Whanganui River’s legal standing as “an indivisible and living whole.”<sup>57</sup> Second, ownership of the Whanganui River is vested in the river itself.<sup>58</sup> Third, the Whanganui River’s legal standing and self-ownership is effectuated through the appointment of a legal guardian called “Te Pou Tupua.”<sup>59</sup> Finally, the framework provides for the “Whole River Strategy,” which brings together communities, local governments and businesses who have an interest in the Whanganui River to “collaboratively develop a strategy” for the river’s future.<sup>60</sup>

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<sup>53</sup> The Treaty of Waitangi Act 1975 (N.Z.).

<sup>54</sup> Thomas E. Johnson, Note, *Enter Sandman: The Viability of Environmental Personhood to US Soil Conservation Efforts*, 20 VAND. J. ENT. & TECH. L. 259, 282 (2017).

<sup>55</sup> WAITANGI TRIBUNAL, WHANGANUI RIVER REPORT 340 (1999) (N.Z.). See also Tutohu Whakatupua Between Whanganui Iwi and the Crown [2012] (signed 30 Aug. 2012, entered into force 30 Aug. 2012) ¶ 1.6.1 (N.Z.), [http://www.wrmtb.co.nz/new\\_updates/TuutohuWhakatupuaFinalSigned.pdf](http://www.wrmtb.co.nz/new_updates/TuutohuWhakatupuaFinalSigned.pdf) [hereinafter The Whanganui River Agreement] [<https://perma.cc/KP7A-4DJG>].

<sup>56</sup> The Whanganui River Agreement, *supra* note 56.

<sup>57</sup> *Id.* ¶¶ 2.1.2, 2.4.

<sup>58</sup> *Id.* ¶¶ 2.7.1, 2.10.

<sup>59</sup> *Id.* ¶ 2.8.2.

<sup>60</sup> *Id.* ¶ 2.24.

The settlement was later enacted into law in the Te Awa Tupua (Whanganui River Claims Settlement) Bill.<sup>61</sup> The bill, following the Whanganui River Agreement, fleshes out the legal framework, or *Te Pā Auroa nā Te Awa Tupua*, that supports the grant of legal personality to the river. The river, now known as Te Awa Tupua, has ownership vested in itself as “an indivisible and living whole, incorporating all its physical and meta-physical elements.”<sup>62</sup> The human representative of the river, Te Pou Tupua, is charged with the care and well-being of Te Awa Tupua.<sup>63</sup> Te Pou Tupua, consisting of two representatives nominated by the Crown and the Whanganui Iwi, are able to bring claims on behalf of Te Awa Tupua, ensure the enforcement of the Te Awa Tupua Bill, and maintain relationships with the Iwi who have interests in Te Awa Tupua.<sup>64</sup>

The bill also establishes an advisory group, Te Karewao, to support the Te Pou Tupua.<sup>65</sup> Te Karewao would consist of Iwi and local authorities who would guide the management and care of Te Awa Tupua.<sup>66</sup> The creation of an advisory group ensures accountability from the human representatives of Te Awa Tupua as well as ensures that the concerns of the Iwi, Hapu, and authorities are represented and addressed. In addition, the bill establishes a collaborative group to work on a strategy document, Te Kōpuka nā Te Awa Tupua.<sup>67</sup> This group would collaborate with people who have an interest in Te Awa Tupua in order to set out guidance on maintaining the health and well-being of the river.<sup>68</sup>

The Te Awa Tupua Bill also offers cultural and financial redress. The bill acknowledges and apologizes for past wrongs committed by the Crown and includes provisions to strengthen the relationship between the Whanganui Iwi and the Crown.<sup>69</sup> A payment of \$80 million is made as financial redress and settlement of claims brought against the Crown, while an additional payment of \$30 million is made for the implementation and care of Te Awa Tupua.<sup>70</sup>

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<sup>61</sup> The Te Awa Tupua Bill, *supra* note 2.

<sup>62</sup> *Id.* at pt. 2, cl. 12.

<sup>63</sup> *Id.* at pt. 2, cl. 18(2). *Id.* at pt. 2, cl. 19(1)(c).

<sup>64</sup> *Id.* at pt. 2, cl. 20(1A). *Id.* at pt. 2, cl. 19.

<sup>65</sup> *Id.* at pt. 2, cl. 27.

<sup>66</sup> *Id.* at pt. 2, cl. 27, 28(1).

<sup>67</sup> *Id.* at pt. 2, cl. 29.

<sup>68</sup> *Id.* at pt. 2, cl. 29(3).

<sup>69</sup> *Id.* at pt. 3, cl. 69, 70.

<sup>70</sup> First Reading, *supra* note 37 (testimony of Pita Paraone).

In sum, the Te Awa Tupua Bill embraces environmental personhood to effectuate the legal personality of a natural object and protect it. It does this through an actual grant of legal personhood, establishing an advisory group and a policymaking group, and offering monetary redress. By legitimizing the inherent value present in Te Awa Tupua, the bill achieves the protection of a landmark with cultural and spiritual significance. Environmental personhood links the Maōri worldview of the relationship between humans and nature to the legal system, showing that it is possible for this concept to be used in protecting and advocating for indigenous environmental rights.<sup>71</sup>

#### D. CLIMATE CHANGE AND THE EFFECT ON AGRICULTURE

“Global warming” refers to the trend of increased global surface temperatures resulting from human activity.<sup>72</sup> Rising temperatures and water levels have accelerated and worsened climate-related disasters. Increasing global temperatures have led to persistent drought in the southwest United States,<sup>73</sup> prolonged fires in California<sup>74</sup> and Australia,<sup>75</sup>

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<sup>71</sup> Gordon, *supra* note 12, at 8 (“In New Zealand, as in Ecuador and Bolivia, rights of nature became a reality due in large part to the influence of indigenous ways of seeing the relationship between human beings and the world.”).

<sup>72</sup> *Climate Change*, United Nations, <https://www.un.org/en/sections/issues-depth/climate-change/> [<https://perma.cc/K5TB-XKQZ>] (last visited Dec. 1, 2019).

<sup>73</sup> See *A Closer Look: Temperature and Drought in the Southwest*, EPA, <https://www.epa.gov/climate-indicators/southwest> [<https://perma.cc/L3UA-VAGF>] (last visited Aug. 14, 2020). See also Kasha Patel, *Drought Persists in the U.S. Southwest*, NASA EARTH OBSERVATORY, <https://earthobservatory.nasa.gov/images/144216/drought-persists-in-the-us-southwest#:~:text=Persistent%20drought%20conditions%20have%20spread,standing%20out%20as%20extremely%20dry.&text=According%20to%20the%20U.S.%20Drought,drought%E2%80%9D%20conditions%20since%20January%202018> [<https://perma.cc/Y5MZ-D24Z>] (last visited Aug. 14, 2020). For an example of a recent news report of drought in the United States Southwest, see Henry Fountain, *Southwest Drought Rivals Those of Centuries Ago, Thanks to Climate Change*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/climate/drought-southwest-climate-change.html> [<https://perma.cc/SL77-N86J>].

<sup>74</sup> *2019 Incident Archive*, CAL. DEP’T OF FORESTRY AND FIRE PROT., <https://www.fire.ca.gov/incidents/2019/> [<https://perma.cc/AU5X-HTV5>] (last visited Feb. 21, 2020).

<sup>75</sup> Damien Cave, *The Fires Are Out, but Australia’s Climate Disasters Aren’t Over*, N.Y. TIMES (Feb. 23, 2020), <https://www.nytimes.com/2020/02/23/world/australia/climate-change-extremes.html?action=click&module=Top%20Stories&pgtype=Homepage> [<https://perma.cc/6XUZ-MFG7>].

and heat waves in Greenland.<sup>76</sup> In addition, rising sea levels have caused prolonged bouts of flooding and worsened flooding in places already prone to floods.<sup>77</sup>

The particular effect of climate change varies across geographic regions. Depending on the region, the frequency of rain determines whether flooding or drought conditions will become more prevalent.<sup>78</sup> Similarly, changes in the duration of hot and cool seasons can affect agricultural productivity.<sup>79</sup> Prolonged periods of heat factor into the swift depletion of water, as farmers draw upon water reserves to feed crops and livestock.<sup>80</sup> Heatwaves, in addition to depleted water sources, create the conditions for droughts.<sup>81</sup> Connected to droughts and heatwaves are the occurrence of wildfires.<sup>82</sup> Frequent and prolonged heatwaves and droughts serve as the catalyst for wildfires, adding to the further destruction of arable land.<sup>83</sup>

Industrial farming practices exacerbate the effects of global warming on agriculture. Modern agriculture relies on monoculture cropping systems, fertilizers, and pesticides.<sup>84</sup> Monoculture cropping, or the cultivation of a single crop, exposes farmers to increased financial risk, particularly the risk of crop failure as single variety crops fail to adapt to the changing climate.<sup>85</sup> Fertilizers and pesticides, beneficial for growing crops, often act as an erosive agent, displacing the upper layer of soil and the nutrients contained in that layer. Fertilizers and pesticides also contribute to the pollution of nearby water sources.<sup>86</sup> Potable sources of water in areas prone to heavy flooding are often contaminated with

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<sup>76</sup> Henry Fountain, *Europe's Heat Wave, Fueled by Climate Change, Moves to Greenland*, N.Y. TIMES (Aug. 2, 2019), <https://www.nytimes.com/2019/08/02/climate/european-heatwave-climate-change.html> [<https://perma.cc/HWJ5-RBNE>].

<sup>77</sup> Elisabetta Povoledo, *Venice Flooding Brings City to 'Its Knees'*, N.Y. TIMES (Nov. 13, 2019), <https://www.nytimes.com/2019/11/13/world/europe/venice-flood.html> [<https://perma.cc/QB82-T87X>].

<sup>78</sup> UNION OF CONCERNED SCIENTISTS, *supra* note 9. Additionally, flooding washes out roads which may prevent farmers from transporting their crops. *Id.* See also FOOD AND AGRIC. ORG. OF THE U.N., *THE FUTURE OF FOOD AND AGRICULTURE: TRENDS AND CHALLENGES* 43–44 (2017).

<sup>79</sup> FOOD AND AGRIC. ORG. OF THE U.N., *supra* note 78, at 41.

<sup>80</sup> See UNION OF CONCERNED SCIENTISTS, *supra* note 9.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

fertilizer and pesticide compounds due to the runoff from nearby farming land.

Global warming, in addition to environmentally unfriendly industrial farming practices, ultimately harm farmers and consumers. Farmers suffer from crop failure, livestock losses, and increased financial risk.<sup>87</sup> Communities either dependent on farming or located near farms also suffer from the effects of global warming and industrial farming practices. These communities face shortages of water as farmers deplete water sources to maintain their crops and livestock. These communities also lose water to pollution from fertilizer and pesticide runoff.<sup>88</sup>

Not just these communities, but all consumers feel the impact of global warming.<sup>89</sup> Particularly, increased food prices, food insecurity, and decreasing availability and quality of water will affect consumers.<sup>90</sup> Loss of crops due to flooding, drought, and other phenomena related to global warming means fewer food products available to sell.<sup>91</sup> Decreased availability of food results in higher prices and food shortages.<sup>92</sup> Food insecurity will result if consumers do not have the financial resources to buy food at higher prices.<sup>93</sup>

## II. ANALYSIS: HOW ENVIRONMENTAL PERSONHOOD CAN BENEFIT THE TRADITIONAL FOODS AND FOOD SYSTEMS OF NATIVE AMERICAN TRIBES

Environmental personhood, as exemplified by the Maōri in New Zealand, offers Native American tribes in the United States a path for protecting their food sovereignty. Current models used to protect indigenous rights, while beneficial, do not achieve the fullest protection possible, protection that environmental personhood would provide. The current models used are a treaty rights framework and an international human rights framework. Both models involve locating a right, granted by treaty or recognized by an international convention. The identified rights are then used in indigenous petitions or lawsuits to enforce that right in

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> FOOD AND AGRIC. ORG. OF THE U.N., *supra* note 78, at 41.

<sup>90</sup> *Id.* at 42-43.

<sup>91</sup> *See id.* at 41-42.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

relation to the environment. Both frameworks recognize a place for indigenous epistemologies in crafting policies that adequately address the harms of climate change on tribal lands.<sup>94</sup> However, both frameworks fail to assist in truly empowering tribes to act and advocate on behalf of their land, in that tribal leaders are unable to exercise decision-making power in decisions concerning their land.

Environmental personhood permits indigenous tribes to assume a more active role in advocating and protecting their land-related rights. Instead of searching for standing to protect their land-related rights, environmental personhood would establish the tribe as trustee or guardian for the natural object at issue. This Part briefly introduces and analyzes the two models of protecting indigenous environmental rights, and how they fall short. A discussion of environmental personhood as applied to Native American food systems analyzes how environmental personhood is a viable alternative for protecting food systems in light of climate change. Finally, this Part discusses the potential implications of the environmental personhood model.

#### A. TREATY RIGHTS FRAMEWORK: LITIGATING TREATY RIGHTS AS A MEANS OF PROTECTING INDIGENOUS INTERESTS

The treaty rights framework has been used to enforce rights that are specifically enumerated in treaties. In the early 18<sup>th</sup> and 19<sup>th</sup> centuries, treaties were used by the American government to expand westward.<sup>95</sup> In exchange for ceding control over territory and establishing permanent borders between the United States and tribal territories, Native American tribes were guaranteed rights. These treaties consisted of guaranties that Native American tribes could continue to access traditional hunting, farming, and fishing grounds, as well as receive annuities from the U.S.

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<sup>94</sup> See *id.* at 244–45 (“Many indigenous peoples share the belief that the Earth is a living, conscious being that must be treated with respect and care.”). As a result, indigenous laws reflect the relationship between indigenous groups and the land, and how indigenous identity is more often than not determined by particular natural landmarks. *Id.* at 245. See also Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, 26 TUL. ENV’T. L.J. 239, 239–40 (2013).

<sup>95</sup> See *Indian Treaties and the Removal Act of 1830*, DEP’T OF STATE, <https://history.state.gov/milestones/1830-1860/indian-treaties> [<https://perma.cc/6BRE-XUA8>] (last visited Aug. 14, 2020).

government.<sup>96</sup> Treaties also sometimes imposed requirements on the United States, such as stipulations that the United States provide cloth, tobacco, sugar, flour rations, or armaments to the tribes.<sup>97</sup> Most treaties signed by Native American tribes and the U.S. government contained various provisions recognizing the subsistence and cultural rights of Native Americans.<sup>98</sup> Rights recognized included gathering wild rice, roots, and berries, as well as maintaining access to traditional hunting or fishing grounds.<sup>99</sup> These 18<sup>th</sup> and 19<sup>th</sup> century treaties recognized the subsistence and cultural rights belonging to most Native American tribes.<sup>100</sup> Despite recognition by treaty, these rights are rarely honored, especially those pertaining to access to traditional lands.

Currently, Native American tribes seeking to enforce treaty rights against the United States, or a state or local government, turn to litigation as a means of enforcement.<sup>101</sup> Litigation subjects treaty rights to judicial interpretation, which determines whether those rights are enforceable or not.<sup>102</sup> Typically, judicial interpretation of treaty rights leans heavily on the fact that hunting and other subsistence activities were integral parts of the “diet and livelihood” of tribes.<sup>103</sup> Without hunting and subsistence rights guaranteed, it is unlikely tribes would have signed the treaty.<sup>104</sup> Due to the centrality of hunting and subsistence rights to tribal life, most judges have interpreted subsistence treaty rights as integral to the functioning of a tribe, and have been judicious in upholding and applying those rights.<sup>105</sup>

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<sup>96</sup> See e.g., Treaty with the Potawatomes, U.S.-Potawatomie Tribe, Sep. 20, 1828, 7 Stat. 317; Treaty with the Comanches, U.S.-Comanche, Kiowa, and Apache Tribes, July 27, 1853, 10 Stat. 1013.

<sup>97</sup> See, e.g., Treaty with the Potawatomes art. 2; Treaty Between the U.S. and Different Tribes of Sioux Indians, U.S.-Sioux Tribes, Apr. 29, 1868, 15 Stat. 635.

<sup>98</sup> See NAT'L CONGRESS FOR AMERICAN INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION '16 (2015), [http://www.ncai.org/tribalnations/introduction/Tribal\\_Nations\\_and\\_the\\_United\\_States\\_An\\_Introduction-web-.pdf](http://www.ncai.org/tribalnations/introduction/Tribal_Nations_and_the_United_States_An_Introduction-web-.pdf) [https://perma.cc/D5CV-5GED].

<sup>99</sup> See Treaty Between the U.S. and the Cheyenne and Arapaho Tribes of Indians, U.S.-Cheyenne and Arapaho Tribes, art. 3, Oct 14, 1865, 14 Stat. 703 (permitting tribal members to “reside upon and range at pleasure throughout the unsettled portions of that part of the country they claim as originally theirs.”).

<sup>100</sup> NAT'L CONGRESS FOR AMERICAN INDIANS, *supra* note 98.

<sup>101</sup> Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples' Subsistence Rights*, 58 CLEV. ST. L. REV. 273, 278, 284 (2010).

<sup>102</sup> See *id.* at 285.

<sup>103</sup> *Id.* at 285–86.

<sup>104</sup> *Id.*

<sup>105</sup> See *Mille Lacs Band of Chippewa Indians v. Minnesota*, 952 F. Supp. 1362 (D. Minn. 1997) (holding that the Mille Lacs Band of Chippewa Indians could exercise usufructuary rights on lands, public or private, open to the general public for hunting, fishing, and gathering); *Mille Lacs Band*



This model is exemplified by the case of *New Jersey v. EPA*,<sup>106</sup> where eleven tribes and fifteen states sued the Environmental Protection Agency (EPA) over their decision to remove coal- and oil-fired electric utility steam generating units (EGUs) from regulation under Section 112 of the Clean Air Act.<sup>107</sup> The tribes argued that the removal of these units from regulation would impair tribal fishing rights by allowing an increase in the amount of methylmercury in fish, making it unsafe as a source of food and unsalable.<sup>108</sup> They argued further that tribes entered into treaties on the basis that they would be guaranteed permanent fishing rights; the contamination resulting from the EPA's decision would essentially interfere with treaty fishing rights.<sup>109</sup> Even though fishing rights formed the foundation of their treaties, the "EPA utterly failed to consider the Tribes' treaty fishing rights, even though they should have formed an important part of the context for that determination."<sup>110</sup>

Under a *Chevron* analysis, the court ultimately concluded that the EPA violated the plain text of Section 112 of the Clean Air Act when it removed EGUs without complying with the requirements of section 122(c)(9).<sup>111</sup> *New Jersey v. EPA* illustrates how treaty rights are "related to subsistence and environmental protection."<sup>112</sup> In this scenario, "if the fish are contaminated, then consuming them threatens the health of tribal

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of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997) (affirming the district court's decision that the Mille Lacs Band of Chippewa Indians retained usufructuary rights in ceded territory); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979) (holding that a federal treaty guaranteeing tribal rights to fish in certain waters of the Great Lakes preempted Michigan fishing laws and regulations); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974) (affirming the right of Native American tribes in Washington State to co-manage salmon and other alongside the state, and to harvest them in accordance with the treaties signed between the tribes and the United States). The U.S. Supreme Court has also consistently upheld off-reservation rights. *See United States v. Winans*, 198 U.S. 371 (1905) (holding that the 1855 Treaty with the Yakima covered off-reservation fishing and hunting rights).

<sup>106</sup> *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). To provide a brief background of this case, mercury emissions from coal- and oil-fired electric utility steam generating units (EGUs) were regulated under § 112 of the Clean Air Act (CAA). The EPA later adopted a proposal that removed EGUs from a list of hazardous air pollutants, opting to regulate and control mercury emissions from EGUs under § 111 of the CAA. *Id.* at 580. This was done even though a public health hazards study found plausible links between mercury and methylmercury in fish and environmental burdens. *Id.* at 579.

<sup>107</sup> *Id.* at 580.

<sup>108</sup> Pet'r's Br. 20-21, July 25, 2007 (2007 WL 3231259).

<sup>109</sup> *Id.* at 15, 21.

<sup>110</sup> Pet'r's Br., 12, July 25, 2007 (2007 WL 2173367).

<sup>111</sup> *New Jersey v. EPA*, 517 F.3d at 581.

<sup>112</sup> *Id.* at 290.

members, and ultimately threatens the continued existence of the Tribe itself if tribal members are committed to exercising their treaty rights.”<sup>113</sup>

## B. INTERNATIONAL HUMAN RIGHTS FRAMEWORK: HOW INTERNATIONAL HUMAN RIGHTS BUOY THE PROTECTION OF INDIGENOUS RIGHTS

An alternative framework used by indigenous peoples to assert rights are international human rights. An international human rights framework looks beyond the rights guaranteed by a nation-state’s domestic treaties, constitution, or statutes. Instead, it is based on covenants, declarations, and treaties made by international organizations or between national governments in support of a specific type of right. Several covenants are key in recognizing the right of indigenous peoples to enjoy their cultural way of life and subsistence rights: The International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; the International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries; and the United Nations Declaration of the Rights of Indigenous Peoples.

The International Covenant on Civil and Political Rights (ICCPR),<sup>114</sup> adopted by the U.N. General Assembly in 1966, commits signatory parties to the protection of basic civil and political rights of all individuals.<sup>115</sup> The broad nature of the rights provided makes it significant to indigenous tribes. The ICCPR acknowledges the right of self-determination where “[a]ll peoples” have the right to choose their sovereignty and exercise their rights accordingly.<sup>116</sup> Additionally, the ICCPR provides that “[i]n no case may a people be deprived of its own means of subsistence.”<sup>117</sup> It also provides that “ethnic, religious or linguistic minorities” have the right to “enjoy their own culture.”<sup>118</sup> Notably, the United States is a signatory to the ICCPR.<sup>119</sup>

<sup>113</sup> *Id.*

<sup>114</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>115</sup> *See id.* pmb1.

<sup>116</sup> *Id.* art. 1(1).

<sup>117</sup> *Id.* art. 1(3).

<sup>118</sup> *Id.* art. 27.

<sup>119</sup> *See FAQ: The Covenant On Civil & Political Rights (ICCPR)*, Am. Civ. Liberties Union, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> [<https://perma.cc/K3PX-ECPX>]. *See also Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. HIGH

The International Covenant on Economic, Social, and Cultural Rights (ICESCR)<sup>120</sup> commits signatory parties to uphold and protect the economic, social and cultural rights of individuals and non-self-governing and trust territories.<sup>121</sup> Article 1 explicitly recognizes the right to self-determination for all peoples.<sup>122</sup> The ICESCR goes further than the ICCPR in recognizing a people's right to determine and pursue their political, economic, social, and cultural goals.<sup>123</sup> Moreover, the ICESCR includes a protection for individuals asserting that they shall not be deprived of their means of subsistence and are guaranteed the right to "take part in cultural life."<sup>124</sup> Similar to the ICCPR, it recognizes rights that are central to an indigenous way of life, while not singling out indigenous people.

The International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169) focuses specifically on indigenous peoples. Created as "a framework for indigenous and tribal peoples' empowerment,"<sup>125</sup> Convention 169 offers a framework of rights and protections that would enable indigenous peoples to utilize their right to self-determination and "participate in decision-making that affects their lives."<sup>126</sup> The rights articulated in Convention 169 are not "special rights," but rather "universal human rights" that are contextualized to the situation of indigenous peoples.<sup>127</sup> To this end, Convention 169 affirms the right of indigenous and tribal peoples to "define their own priorities for development."<sup>128</sup> Signatory governments are required to coordinate action on protecting these rights, and are prohibited from using integrationist policies that

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COMM'R, <https://indicators.ohchr.org/> [<https://perma.cc/28Z2-MD4U>] (last viewed Nov. 29, 2020).

<sup>120</sup> International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1996, 993 U.N.T.S. 3.

<sup>121</sup> *Id.* p.mbl.

<sup>122</sup> *Id.* art. 1.

<sup>123</sup> Compare International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1996, 993 U.N.T.S. 3, with International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>124</sup> International Covenant on Economic, Social, and Cultural Rights, art. 15(1)(a), Dec. 16, 1996, 993 U.N.T.S. 3.

<sup>125</sup> *Indigenous and Tribal Peoples*, INT'L LABOUR ORG., <https://www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm> [<https://perma.cc/K456-4G2M>] (last visited Jan. 26, 2020).

<sup>126</sup> BIRGITTE FEIRING, INT'L LABOUR ORG., UNDERSTANDING THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION: HANDBOOK FOR ILO TRIPARTITE CONSTITUENTS, 1989 (No. 169) 1 (2013).

<sup>127</sup> *Id.* at 3.

<sup>128</sup> *Id.* at 1.

would prevent indigenous peoples from practicing their cultural and spiritual way of life.<sup>129</sup>

Articles 14 and 23 of Convention 169 are crucial to recognizing the nexus between indigenous people's land and subsistence rights. Article 14 recognizes the ownership rights indigenous peoples have over lands to which they exclusively resided or "have traditionally had access for their subsistence and traditional activities."<sup>130</sup> Article 23 recognizes that traditional activities, such as hunting, fishing, trapping, and gathering, are important to maintaining indigenous culture and economic self-reliance.<sup>131</sup> When read together, Articles 14 and 23 acknowledge that land and subsistence activities are central to indigenous peoples' cultural and economic well-being.

The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP), a resolution passed by the United Nations in 2007, also defines the rights of indigenous peoples, including rights to cultural expression, identity, health, and economic well-being.<sup>132</sup> UNDRIP's purpose is to encourage nation-states to work with resident indigenous peoples, protect indigenous rights, and protect indigenous culture. Article 20 of UNDRIP acknowledges the right of indigenous peoples "to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities."<sup>133</sup> It also provides that "[i]ndigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress."<sup>134</sup> Article 20 recognizes an explicit right to subsistence and the means used to achieve that subsistence.

The language used in the ICCPR, ICESCR, Convention 169, and UNDRIP acknowledge principles of self-determination, subsistence rights, and cultural rights. It also acknowledges the "link between protecting an indigenous people's means of subsistence and the people's right to culture."<sup>135</sup> These rights, as articulated, may be used by indigenous

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<sup>129</sup> International Labour Organization, *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, art. 2, Sept. 5, 1991, 28 I.L.M. 1382.

<sup>130</sup> *Id.* art. 14(1).

<sup>131</sup> *Id.* art. 23(1).

<sup>132</sup> G.A. Res. 61/295, U.N. Doc. A/Res/61/295, at annex, art. 1, United Nations Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007).

<sup>133</sup> *Id.* art. 20(1).

<sup>134</sup> *Id.* art. 20(2).

<sup>135</sup> Dussias, *supra* note 101, at 302-03.

tribes to assert their ability to govern decisions related to the sovereignty and survival of their tribes.

### C. ENVIRONMENTAL PERSONHOOD: A BETTER ALTERNATIVE

While the treaty rights and international human rights models equip indigenous peoples with the language needed to assert their rights, an environmental personhood model gives indigenous tribes the mechanisms needed to exercise actual decision-making power over their land. The New Zealand model of environmental personhood has several components. First, it involves the actual grant of legal personhood to the natural object. Second, it establishes an advisory group, whose role and responsibilities encompass managing and caring for the natural object. Third, it establishes a policymaking group, whose role is to create guidance and policies on the preservation of the natural object in conjunction with other non-indigenous interested parties. Altogether, the New Zealand model of environmental personhood provides indigenous tribes with a tool to respond to the effects of climate change on their subsistence rights by allowing them to directly advocate on behalf of their land.

Some Native American tribes have already recognized the utility of applying legal personhood to culturally and spiritually significant natural objects, such as land or food sources. The following applications of environmental personhood are examples of how Native American tribes use an environmental personhood model to protect a certain natural object.

#### *1. The Bears Ears National Monument*

The Bears Ears National Monument, located in southeastern Utah, was proclaimed a national monument in late 2016 by President Obama. The presidential proclamation designating Bears Ears as a national monument<sup>136</sup> was the result of the work of the Bears Ears Inter-Tribal Coalition (BEITC) and other allies. Founded in 2015, BEITC is a consortium of five sovereign tribal nations<sup>137</sup> actively working to “protect

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<sup>136</sup> Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

<sup>137</sup> The five tribal nations are the Hopi Tribe, Navajo Nation, Ute Mountain Ute Tribe, Pueblo of Zuni, and Ute Indian Tribe. *Who We Are*, BEARS EARS INTER-TRIBAL COAL., <https://bearscoalition.org/about-the-coalition/> [https://perma.cc/YZ2G-HW88] (last visited Oct. 24, 2020).

and promote sacred, spiritual, historical, natural, scientific and cultural resources on lands within the Bears Ears landscape.”<sup>138</sup> One of BEITC’s main purposes was to map the locations of sites within Bears Ears where their ancestors sourced healing plants and foods in an effort to petition the United States to designate the land as a monument and protect it from various threats.<sup>139</sup> Bears Ears was frequently the target of the looting and grave robbing of archaeological and cultural sites, off-road vehicle use, and vandalism.<sup>140</sup> Further, the potential for the financial exploitation of the land and the ecological impact of mining and energy development prompted the BEITC to work for monument status in order to protect the land.

The land, now known as Bears Ears Monument, was granted its status as a national monument in 2016 via a presidential proclamation.<sup>141</sup> As a national monument, Bears Ears is protected from development.<sup>142</sup> Acknowledging the site’s past and current use for spiritual ceremonies and traditional hunting, fishing, and gathering practices,<sup>143</sup> BEITC was granted significant decision-making power by taking a “role in the collaborative management of the area.”<sup>144</sup> Working alongside the Bureau of Land Management (BLM) and the United States Forest Service (USFS), BEITC’s co-managers of Bears Ears, BEITC has been able to integrate traditional knowledge into land management planning.<sup>145</sup>

While the campaign for Bears Ears was not framed in terms of legal personhood, and did not result in legal personhood, it included BEITC tribes in pertinent decision-making. Similar to the New Zealand model, BEITC works with and advises the BLM and USFS on the

<sup>138</sup> *Id.*

<sup>139</sup> Kristina Johnson, *Bears Ears Monument Is A Win For Tribal Food Sovereignty. Will Trump Undo It?*, NPR: THE SALT (Jan. 9, 2017), <https://www.npr.org/sections/thesalt/2017/01/09/508586040/bears-ears-monument-is-a-win-for-tribal-food-sovereignty-will-trump-undo-it> [<https://perma.cc/3NSA-UBTH>]. The Bears Ears National Monument is located in Southeastern Utah.

<sup>140</sup> *Threats*, BEARS EARS INTER-TRIBAL COAL., <https://bearscoalition.org/threats/> [<https://perma.cc/X64Y-Z33H>] (last visited Jan. 26, 2020).

<sup>141</sup> Johnson, *supra* note 139.

<sup>142</sup> Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html> [<https://perma.cc/ZD65-LX5K>].

<sup>143</sup> Proclamation No. 9558, *supra* note 136.

<sup>144</sup> Angelo Baca, *Bears Ears is Here to Stay*, N.Y. TIMES (Dec. 8, 2017), <https://nytimes.com/interactive/2017/12/08/opinion/bears-ears-monument.html?searchResultPosition=7> [<https://perma.cc/LG6R-S742>].

<sup>145</sup> *Id.*

development of management plans for Bears Ears. BEITC's presence allows for the preservation "the physical, spiritual, and cultural identity of the Hopi, Zune, Ute, and Navajo nations" in Bears Ears.<sup>146</sup>

As a result of the designation, programs have been set up to assist in the preservation of the monument and encourage the use of traditional indigenous foods. For example, the Utah Diné Bikéyah set up the Bears Ears Indigenous Food Movement to "teach others about [the Diné's] historical relationship with the land, and at the same time, restore the health of our lands and people."<sup>147</sup> The Bears Ears Indigenous Food Movement will likely continue to benefit in the future from the BEITC's involvement in the preservation of Bears Ears, ensuring that cultural knowledge, and a nascent indigenous food revitalization, is sustained over time.

## 2. *The Rights of Manoomin*

The White Earth Band of Ojibwe in Minnesota recently passed a tribal law granting wild rice, a food with cultural and spiritual significance, legally enforceable rights.<sup>148</sup> It is the first ordinance recognizing the legal personality of plant species.<sup>149</sup> Wild rice is a significant, and nutritionally rich, food source for the White Earth Band of Ojibwe and other tribes in the Midwest.<sup>150</sup> Its significance "is celebrated at the annual harvest-time

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<sup>146</sup> *Id.*

<sup>147</sup> *Revitalizing our Indigenous Food Heritage for a Stronger and Healthier Future*, UTAH DINÉ BIKÉYAH, <https://utahdinebikeyah.org/traditional-foods-program/> [https://perma.cc/JBQ4-X9UT] (last visited Mar. 15, 2020).

<sup>148</sup> See Letter from Terry Tibbetts, Chairman, White Earth Band of Ojibwe, to Hon. Tim Walz, Governor, State of Minnesota (Jan. 25, 2019), <https://perma.cc/RWH7-AAVS>, for the resolution granting manoomin, or wild rice, rights. See also Jennifer Bjorhus, *Minnesota tribe asks: Can Wild Rice have its Own Legal Rights?*, STAR TRIBUNE (Feb. 2, 2019), <http://www.startribune.com/minnesota-tribe-asks-can-wild-rice-have-its-own-legal-rights/505618712/> [https://perma.cc/FSL9-ASR4].

<sup>149</sup> Press Release, Community Environmental Legal Defense Fund, White Earth Band Enacts First-of-Its-Kind Rights of Nature Law (Feb. 6, 2019), <https://celdf.org/2019/02/press-release-white-earth-band-enacts-first-of-its-kind-rights-of-nature/> [https://perma.cc/T747-S4NS]. See also Winona LaDuke, *The White Earth Band of Ojibwe Legally Recognized the Rights of Wild Rice. Here's Why, YES!*, MAGAZINE, (Feb. 1, 2019), <https://www.yesmagazine.org/environment/2019/02/01/the-white-earth-band-of-ojibwe-legally-recognized-the-rights-of-wild-rice-heres-why/> [https://perma.cc/VH6Q-J35R].

<sup>150</sup> See Dussias, *supra* note 101, at 320, 334.

Manoomin Celebration and it is an essential part of tribal feasts and other ceremonies.”<sup>151</sup>

The Rights of Manoomin<sup>152</sup> acknowledges that wild rice possesses “inherent rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation,” and that those rights include a “right to pure water.”<sup>153</sup> Reflecting the Ojibwe’s “relationship and responsibility to the plant,” tribal members are granted the right to harvest and protect wild rice.<sup>154</sup> In addition, it provides for the enforcement of the rights against offenders, primarily by requiring violators to pay for damages to the wild rice and its habitat.<sup>155</sup>

The Rights of Manoomin recognizes the sovereignty of the White Earth Band to make decisions related to its subsistence. Unlike the New Zealand model, the Rights of Manoomin does not create an advisory or policymaking group that involves non-tribal members. In their announcement, the White Earth Band critiqued the Governor’s Task Force on Wild Rice (Task Force), created by then-Governor Mark Dayton in 2018, for failing to properly represent tribal interests.<sup>156</sup> The Governor’s Task Force was composed of representatives from tribal and non-tribal communities, as well as industry representatives.<sup>157</sup> Of the eleven tribes residing in Minnesota,<sup>158</sup> only six tribes were represented, with one representative from each tribe, while non-tribal and industry representatives numbered eleven.<sup>159</sup> It is interesting to note that one of the Task Force’s recommendations was the expansion and support of tribal consultation.<sup>160</sup> However, since the Task Force’s recommendations are not binding, it is incumbent on future administrations to include and support the presence of tribal communities as it relates to the protection of wild rice in Minnesota.

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<sup>151</sup> *Id.* at 327.

<sup>152</sup> “Manoomin” is the Ojibwe word for wild rice. *Manoomin*, THE OJIBWE PEOPLE’S DICTIONARY, <https://ojibwe.lib.umn.edu/main-entry/manoomin-ni> [<https://perma.cc/NQP3-7FGL>] (last visited Oct. 22, 2020).

<sup>153</sup> Press Release, Chippewa Establish Rights of Manoomin White Earth Reservation and Throughout 1855 Ceded Territory (Jan. 11, 2019), <http://files.harmonywithnatureun.org/uploads/upload764.pdf> [<https://perma.cc/7SM5-WJGK>].

<sup>154</sup> *Id.* See also LaDuke, *supra* note 149.

<sup>155</sup> LaDuke, *supra* note 149.

<sup>156</sup> Press Release, *supra* note 149.

<sup>157</sup> GOVERNOR’S TASK FORCE ON WILD RICE 12 (2019).

<sup>158</sup> *Minnesota Indian Tribes*, MINNESOTA, <https://mn.gov/portal/government/tribal/mn-indian-tribes/> [<https://perma.cc/97WH-7DSV>] (last viewed Nov. 23, 2020).

<sup>159</sup> GOVERNOR’S TASK FORCE ON WILD RICE, *supra* note 157, at 12.

<sup>160</sup> *Id.* at 22.



#### D. POTENTIAL ISSUES THAT ARISE FROM THE APPLICATION OF ENVIRONMENTAL PERSONHOOD TO NATIVE AMERICAN TRIBES

While environmental personhood provides the tools necessary for tribal governments to exercise decision-making power over culturally significant foods and landscapes, it also raises several issues that must be addressed before it is used on widespread scale.

First, tribal governments must determine how to treat opposition from non-native communities with whom they share certain environmental landscapes. For example, in Bears Ears, a significant amount of opposition from non-natives arose over the designation of Bears Ears as a national monument. In addition to being an archaeological, cultural, and harvesting site for local tribes, it is also viewed as an energy- and mineral-extracting site.<sup>161</sup> The presence of gas, oil, copper, and uranium makes Bears Ears an economically valuable landscape. Non-natives opposing the monument designation argued that the designation has deprived them of economic opportunities as well as opportunities to use land recreationally.<sup>162</sup>

Compounding this issue is the Trump administration's decision to reduce the area of the Bears Ears Monument by as much as 85 percent.<sup>163</sup> While this does not necessarily mean that tribal assertions of legal personhood for culturally significant landscapes will be taken away by the federal government, it does show that such an assertion might struggle to receive acceptance by state and federal government officials.

Additionally, Native American tribes might be met with resistance when it comes to appointing a guardian for an environmental landscape or food source. While most tribes have sovereignty over tribal land, natural objects outside the tribe, for which there is significant tribal attachment, may be subject to federal or state government supervision. This means that

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<sup>161</sup> Johnson, *supra* note 139.

<sup>162</sup> *Id.*

<sup>163</sup> Turkewitz, *supra* note 142. See also Julie Turkewitz & Coral Davenport, *Interior Secretary Recommends Shrinking Borders of Bears Ears Monument*, N.Y. TIMES, (June 12, 2017), <https://www.nytimes.com/2017/06/12/us/interior-secretary-public-lands-utah-bears-ears.html?searchResultPosition=2> [https://perma.cc/WZP5-6JP8]; Julie Turkewitz, *Battle Over Bear Ears Heats Up as Trump Rethinks Its Monument Status*, N.Y. TIMES, (Mar. 14, 2017), <https://www.nytimes.com/2017/05/14/us/bears-ears-ryan-zinke.html?searchResultPosition=10> [https://perma.cc/K7MR-AYNS]; Terry Tempest Williams, *Will Bears Ears Be the Next Standing Rock?*, N.Y. TIMES, (May 6, 2017), <https://www.nytimes.com/2017/05/06/opinion/sunday/will-bears-ears-be-the-next-standing-rock.html?searchResultPosition=9> [https://perma.cc/VQ4T-9F3E].

Native American guardianship claims would compete with federal and state government claims, in addition to the claims of non-native communities who assert a competing right to enjoy a particular piece of land. Individuals or corporations who have an economic interest in a particular piece of land would also compete with Native American claims for guardianship, calling into question who can better represent the land. Furthermore, any assertion of personhood for a landscape could be subject to lawsuits in an American court system that, while recognizing personhood for corporations,<sup>164</sup> has not yet reached recognizing personhood for the environment.

However, the New Zealand model has shown that it is possible to accommodate and represent all interested parties. Under the New Zealand framework, an advisory group focuses on the practical day-to-day administration, as well as the long-term management, of the natural object. A policymaking group focuses on creating policy and guidance for the care of the river. In the context of the U.S., an advisory group would be most useful for natural objects that are subject to conflicting claims from the government, tribes, and non-tribal members. It would be the best method to ensure all stakeholders have their interests represented, and that the management policy of the natural object reflects that interest. Bears Ears is an example of collaborative management by the BEITC, BLM, and USFS, entities with significant stakes in the proper preservation of the monument. However, it is important to note that the collaborative management of Bears Ears does not include industry representatives or non-tribal members.

Another issue that arises from the application of environmental personhood is that enforcement mechanisms may be weaker because it is “more philosophical than practical”<sup>165</sup> and has not been widely accepted. As shown by the Rights of Manoomin and the Rights of Nature, tribes are including provisions that assert their right to enforce the rights of nature, a food substance, or a landscape against violators. While this has yet to be tested, it does raise the issue of whether the enforcement mechanisms will be enough to deter violators.

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<sup>164</sup> See *Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (noting that the protection of the Fourteenth Amendment Equal Protection clause extends to corporations); *Northwestern Nat'l Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906) (noting that corporations are persons for legal purposes); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–89 (2014) (holding that closely-held corporations are exempted from regulations that impose upon the owners' religious beliefs).

<sup>165</sup> Bjorhus, *supra* note 148.

Despite the issues that might arise from the application of environmental personhood to tribal lands, environmental personhood remains the better alternative. The treaty rights model only allows for the enforcement of an identified right. Enforcement of that identified right might be limited in scope depending on the judicial interpretation. The international human rights model, on the other hand, merely provides for international recognition of certain rights integral to the continuation of indigenous culture. While these rights have some degree of force, they only operate as guidelines with each country implementing the rights as they see fit.

Environmental personhood is not limited in its scope. It extends to the entirety of the land identified. Those appointed guardianship of the land can bring claims on behalf of the land and ensure that damages go directly towards rehabilitation of the land. Environmental personhood acknowledges the importance of land to tribal life. Legal personhood is the best means of ensuring the continuance of the land and the food system and cultural beliefs that rely on the land.

### III. CONCLUSION

The fact is that each time there is a movement to confer rights to some new "entity," the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless thing receives its rights, we cannot see it as anything but a thing for the use of "us"—those who are holding rights at the time.<sup>166</sup>

In the quote above, Christopher Stone aptly articulates the hesitation and skepticism society has towards the creation of rights for entities that are usually perceived as "rightless," especially nature. While skepticism of giving natural bodies rights persists, it is slowly gaining acceptance as changing climate conditions require innovative ways to protect our environment. Climate change poses a unique risk to the culture and spiritual life of tribes, and environmental personhood accounts for this threat unlike a human rights and treaty rights framework. Rapid changes in temperature and water levels negatively affect land and water bodies central to tribal food, cultural, and spiritual systems. If these rapid changes are not timely addressed, traditional ways of subsistence are at risk of disappearing and the continuation of cultural belief systems with them.

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<sup>166</sup> Stone, *supra* note 12, at 455 (internal citations omitted).

Environmental personhood sets forth the best framework for protecting traditional lands. Unlike a treaty rights approach or international human rights approach, environmental personhood allows tribal communities to insert ancestral knowledge and spiritual beliefs into plans aimed at preserving land. Granting Native American communities a stewardship position truly has the potential for engaging the tribe and ensuring their interests are represented and respected.

The Maōri's success in advocating for legal personhood for the Whanganui River shows that environmental personhood is a viable alternative for Native American tribes seeking to protect their lands and way of life. Maōri advocacy pressured the New Zealand government to recognize the legitimacy of Maōri authority and control over the Whanganui River. Some Native American tribes in the United States have begun to implement certain aspects of environmental personhood into tribal programs and advocacy. However, environmental personhood still has challenges it must overcome in its application, despite the promising results in New Zealand and Bears Ears.

First and foremost, acceptance of environmental personhood will increase legitimacy of the concept. Acceptance also ensures that non-natives will respect assertions of environmental personhood by Native American tribes, instead of ignoring it. This would also require acceptance from the legal community, particularly the judiciary as judges will ultimately determine the breadth of environmental personhood's application. Second, Native American tribes will have to consider how to engage with non-natives and corporate entities who may oppose environmental personhood. As illustrated by Bears Ears, non-natives are concerned with losing access to sources of mineral deposits, arable land, and recreational areas. Balancing the interests of both non-natives and Native American communities requires negotiation, and this negotiation will likely be fraught with tension.

Third, environmental personhood has the potential to assist tribes as they develop policies to protect land, cultural sites, and traditional foods from the effects of climate change. In particular, advisory and policymaking groups provide tribal leaders a tool to shape decisions and policy on the care and preservation of traditional foods. Advisory and policymaking groups provide tribal leaders flexibility to adjust to changes in growing and harvesting seasons, ensuring that foods are sustained for future generations.

Finally, the support of federal, state, and local governments will be needed to make environmental personhood a viable concept. Bears Ears

illustrates the importance of government support. The creation of the Bears Ears Monument meant that Hopi, Zune, Ute, and Navajo nations could preserve traditional hunting and gathering grounds and perform restorative work on areas that were damaged by climate change, looters, and visitors. The withdrawal of this support could throw preservation work into uncertainty and leave tribes scrambling to develop plans to protect their traditional lands. However, the 2020 U.S. presidential election provides hope that there will be greater federal, and state, acknowledgement of indigenous issues. A record-breaking number of Native Americans won election and reelection to Congress.<sup>167</sup> Further, Native American voter turnout in Arizona, specifically among Navajo, Havasupai, Hualapai, and Hopi populations, was decisive in clinching a Biden victory in the state.<sup>168</sup>

Environmental personhood allows Native American communities a greater role in defining the role and rights of land. Environmental personhood engages tribes and empowers tribes to speak with authority on behalf of their land and enforce rights guaranteed by treaties. In the face of climate change, environmental personhood is a practical and adaptable concept, capable of being molded to the specific concerns of each tribe. While environmental personhood does not fix the problem of climate change on tribal lands, it allows tribes to protect the land and mitigate any future changes to the land.

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<sup>167</sup> Aris Folley, *Native Americans elected to Congress in record numbers this year*, THE HILL (Nov. 5, 2020), <https://thehill.com/homenews/house/524697-native-americans-elected-to-congress-in-record-numbers-this-year> [https://perma.cc/7VSU-Q82W].

<sup>168</sup> Felicia Fonseca & Angeliki Kastanis, *Arizona turnout proves power of Native vote*, INDIAN COUNTRY TODAY (Nov. 20, 2020), <https://indiancountrytoday.com/news/arizona-turnout-proves-power-of-native-vote-1dMoUclnWEmWrsM8dahIBw> [https://perma.cc/K37L-4DR9].