

Environmental Justice and Tribal Sovereignty: Lessons from Standing Rock

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ABSTRACT. The environmental movement in the 1970s secured many landmark victories, including the passage of important legislation and the establishment of the EPA. However, these activists, while identifying critical environmental problems, failed fully to consider their cause. In particular, the environmental movement ignored the longstanding legal framework that historically secured the transfer of land away from Tribal Nations on the basis that they refused to exploit it. This Essay examines three cases, *TVA v. Hill*, *Sequoyah v. TVA*, and *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, all three of which exemplify the consequences of a federal environmental framework that fails to recognize the inherent right of Tribal Nations to protect their lands. The protests at Standing Rock represent the latest iteration of longstanding tribal dissent against an environmental law framework that has long overlooked their interests. This Essay ultimately argues that the environmental movement's failure to advocate for the restoration of tribal sovereignty under federal law has left us all with a legal framework incapable of addressing climate change.

History connects the dots of our identity, and our identity was all but obliterated. Our land was taken, our language was forbidden. Our stories, our history, were almost forgotten. What land, language, and identity remains is derived from our cultural and historic sites Sites of cultural and historic significance are important to us because they are a spiritual connection to our ancestors. Even if we do not have access to all such sites, their existence perpetuates the connection. When such a site is destroyed, the connection is lost.

-Chairman Dave Archambault, II, Standing Rock Sioux Tribe.

INTRODUCTION

Beginning in August 2016, thousands traveled to the Standing Rock Sioux Tribe (SRST) to stand in solidarity with the Tribe and voice their dissent against a pipeline that Dakota Access, LLC was seeking to construct across and under the Missouri River and the ancestral lands of SRST. The media described the movement as “environmental” with a focus on stopping “climate change,” however, these descriptors alone do not encompass all that inspired individuals to travel to, or all that happened at, Standing Rock.¹ As Chairman Archambault has explained on behalf of his Nation, SRST’s motivation to protect their lands and water comes from their understanding that the land contains “cultural and historic sites” that constitute “a spiritual connection to [their] ancestors.”² It is an understanding that hardly resonates in a legal framework designed initially to engender—and now protect—non-Native property interests in indigenous lands.

Now, well over one year since SRST first filed its complaint challenging the United States Army Corps of Engineers’ (Army Corps) decision to grant the environmental permits the pipeline needs to cross the Missouri River, SRST’s claims remain buried in a mountain of procedural motions, substantive motions for summary judgment, cross claims, interpleaders, and debates over the Army Corps’ administrative record. Standing Rock has lost every motion for emergency relief that it has sought.³ Oil now flows through a pipeline that not only creates a threat to the drinking water of millions downstream, but has also destroyed burials and desecrated sacred sites. Environmental law—the statutory, regulatory framework created in the 1970s in response to the birth of the modern day environmental movement—has failed the Tribe.

Dissent in the 1970s created the modern environmental law framework environmental lawyers and activists now employ.⁴ Today, however, the dissent at Standing Rock demonstrates that the environmental law we created in the 1970s no longer serves us, or perhaps it never truly did. The law currently on

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1. See, e.g., Justin Worland, *The Dakota Access Pipeline Fight is the Future of Environmental Activism*, TIME (Dec. 1, 2016), <http://time.com/4586218/dakota-access-pipeline-keystone-2017> [<http://perma.cc/RDC8-MNRS>] (describing the protests at Standing Rock as led by “organizers devoted to addressing climate change, indigenous rights and environmental justice all working together”).
 2. Declaration of Dave Archambault in Support of Motion for Preliminary Injunction, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d 4 (D.D.C. Aug. 4, 2016) ECF No. 6-1 (No. 1:16-cv-01534).
 3. See, e.g., *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs.*, No. 17-5043 (D.C. Cir., Mar. 18, 2017).
 4. See *infra* Part I.

the books also cannot, and will not, solve the most pressing environmental crisis we have ever faced: climate change. These failures are linked: the failure of environmental law to effectively address climate change is, in large part, the result of the environmental movement's failure to advocate for the restoration of tribal sovereignty under federal law.

At first glance, federal environmental and Indian law may seem completely disconnected and unrelated. That disjuncture, however, is precisely the problem. In the 1970s, when statutory federal environmental law was created, environmental lawyers advocated for the establishment of a legal framework that valued the preservation and protection of land, water, and air, with little to no recognition of the fact that the laws of many Tribal Nations had long valued the protection and preservation of the Earth – and therefore refused to commercially exploit it. In fact, tribal failure to exploit land provided the Supreme Court with a justification for stripping Tribal Nations of their land titles almost two hundred years ago in *Johnson v. M'Intosh*.⁵ This case led to the creation of the “Doctrine of Discovery,” which redefined indigenous land as an object to be conquered and exploited – not preserved, protected, or maintained for future generations.⁶ Following the Court's decision in *Johnson*, the failure to commercially exploit land became the legal basis for transferring title from those who would not to those who would. The current crisis at Standing Rock, therefore, is the direct result of a legal framework that legitimized the conquest and colonization of Native lands. The framework, when initially created in 1823, faced little if any dissent. The same was true in the 1970s, when the contemporary environmental law was crafted with no expressions of concern about the Supreme Court's Doctrine of Discovery. The dissent of the general (including non-Indian) public at Standing Rock this past year, therefore, presents an unprecedented opportunity to change a legal framework that has never been fully opposed.

The environmental movement will never fully succeed in creating a legal framework that recognizes the inherent value of preserving and protecting our lands, water, and air until the movement advocates for the restoration of the indigenous legal framework that historically valued the environment. The time has come to envision a different framework for environmental law. The Standing Rock movement calls on all lawyers who label themselves “environmentalists” to advocate for the eradication of the Doctrine of Discovery under *Johnson v. M'Intosh* and the restoration of tribal sovereignty under federal law. The laws

5. *Johnson v. M'Intosh*, 21 U.S. 543, 681 (1823).

6. *Id.* at 588 (announcing the “Doctrine of Discovery” and declaring that “[c]onquest gives a title which the Courts of the conqueror cannot deny”).

and traditions of Tribal Nations that demand a balance with Mother Earth should no longer serve as a basis for stripping them of their inherent right to self-govern, and instead should serve to guide American lawmakers in their efforts to address the crisis of climate change.

Part I of this Essay considers the manner in which the Supreme Court created a legal framework that predicates land ownership on commercial exploitation of the land—a value that inevitably conflicts with the environmental movement’s goal to preserve and protect. Part II explores the genesis of the contemporary federal environmental regulatory framework in the 1970s, emphasizing the absence of any advocacy for the restoration of tribal sovereignty. Part III will examine two case studies, *TVA v. Hill* and *Sequoyah v. TVA*, both of which exemplify the consequences of a federal environmental framework that fails to recognize the inherent right of Tribal Nations to protect the lands they have long lived on. Part IV shows how these tensions came to be exposed at Standing Rock in *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*.

I. JOHNSON V. M’INTOSH AND THE CREATION OF THE DOCTRINE OF DISCOVERY

In *Johnson v. M’Intosh*, the Supreme Court declared that Tribal Nations could no longer claim legal title to their own lands as their “rights to complete sovereignty, as independent nations, [were] necessarily diminished.”⁷ To reach the conclusion that Tribal Nations—such as the Standing Rock Sioux Tribe—could not claim legal title to their own lands, the *Johnson* Court reasoned that “[c]onquest gives a title [to the Conqueror] which the Courts of the conqueror cannot deny,” a claim now known as the Doctrine of Discovery.⁸ According to the Court in *Johnson*, Natives could not be left “in possession of their country” because they were “fierce savages[] whose occupation was war, and whose subsistence was drawn chiefly from the forest.”⁹ As a result, “[t]o leave them in possession of their country, was to leave the country a wilderness”—that is, land that is not commercially exploited or colonially conquered in the name of what was then viewed to be American progress.¹⁰

7. 21 U.S. (8 Wheat.) 543, 586 (1823) (“The ceded territory was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.”).

8. *Id.* at 681.

9. *Id.*

10. *Id.* (emphasis added).

Based on this rationale, the Court characterized Natives as “heathens” who could no longer claim title after “Christian people . . . [had] made a [] discovery” of their lands.¹¹ The *Johnson* Court, therefore, further predicated its holding on the fact that citizens of Tribal Nations were not practitioners of the Christian faith. While seemingly tangential and unnecessary to the Court’s holding that failing to exploit land and leaving “the country a wilderness” justified the stripping of legal title, the additive consideration of one’s Christianity—or absence thereof—further explains the refusal of federal courts today to protect or preserve lands that contain the sacred sites or burials of individuals who do not practice Christianity.¹²

Since time immemorial, the religious and spiritual beliefs of many Tribal Nations have commanded their citizens to preserve and protect the lands that contain the burials and sacred sites of their ancestors. These values, laws, and beliefs were eclipsed by the Supreme Court’s decision in *Johnson*, and to this date, have never been fully restored.¹³ According to the books and in practice, *Johnson v. M’Intosh* remains good law; it has never been overturned.

II. DISSENT IN THE 1970S AND THE BIRTH OF “ENVIRONMENTAL LAW”

Dissent, in the 1970s, created environmental law. As lawyers, we are taught in law school that law is derived from precedent, authority, and the shared communal values of our nation, state, or community. In reality, the law we practice today is often derived from dissent. For instance, Justice Harlan’s dissent in *Plessy v. Ferguson*¹⁴ subsequently transformed into the foundational authority for the majority opinion in *Brown v. Board of Education*.¹⁵ And Justice Blackmun’s dissent in *Bowers v. Hardwick*¹⁶ paved the way for the reversal of *Bowers* seventeen years later in *Lawrence v. Texas*.¹⁷

11. *Id.*

12. See generally, Steven T. Newcomb, *The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. M’Intosh, and Plenary Power*, 20 N.Y.U. REV. L. & SOC. CHANGE 303, 313 (1993) (arguing that *Johnson* was a continuation of the Christian/heathen distinction that motivated European colonialism during the fifteenth and sixteenth centuries and still shapes, although rarely explicitly, Indian law today).

13. See *id.* at 337.

14. 163 U.S. 547 (1896).

15. 347 U.S. 483 (1954).

16. 478 U.S. 186 (1986).

17. 539 U.S. 558 (2003).

Dissent, however, is not unique to Supreme Court Justices. The dissent of individual American citizens – whether through art, litigation, or the exercise of free speech in the streets – can result in changes to the laws the “majority” has put in place. The environmental movement in the 1970s constitutes a prime example. Before the 1970s, “environmental law” did not exist as a federal regulatory framework. Although individual citizens could file claims against polluters predicated on common law theories articulated by the courts themselves, no federal statute provided a “right” to file suit to protect the environment in general, or beyond one’s own private property. Indeed, prior to the 1970s, “environmental” issues were litigated almost exclusively in state courts.¹⁸ But as commercial exploitation of the environment expanded and grew, it became clear that pollution and contamination issues crossed state—even international—borders, necessitating a comprehensive federal regulatory framework.¹⁹

In response to this absence of corporate and government accountability for increasing widespread pollution in the United States, on April 22, 1970 (the first “Earth Day”), over twenty million Americans marched to demand the federal government take action to preserve and protect the environment from the growing number of threats brought on by the continued expansion of industrialization and commodification of lands and the Nation’s natural resources.²⁰ Instead of waiting for a Supreme Court Justice’s dissent to become law, American citizens exercised their constitutional right to express their dissent and advocate for the creation of the laws necessary to protect them, their communities, and their homes.

Congress responded to such demonstrations and created what we now know to be federal environmental law. By the end of 1970, Congress had passed the National Environmental Policy Act (NEPA)²¹ and the Clean Air Act

18. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 50, 52 (2004) (locating the origins of environmental law in local and state public health legislation, such as state water pollution controls).

19. See Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 *IOWA L. REV.* 545, 567-69 (2007) (“Some courts in the late eighteenth and early nineteenth centuries used the doctrines of nuisance, trespass, and strict liability to enjoin profitable industrial activities in order to protect the environment and the rights of farmers and residents to be free from pollution at the dawn of the age of federal environmental regulation in the 1970s, there was ample precedent for state and federal common law to remain a force in the growing effort to address modern-day pollution. Nevertheless, the environmental-law story generally claims that there has been little need for common law after 1970 as a result of the powerful environmental regulatory state that is better suited to deal with today’s complex environmental issues.”).

20. Brian Clark Howard, *46 Environmental Victories Since the First Earth Day*, *NAT’L GEOGRAPHIC* (Apr. 22, 2016), <http://news.nationalgeographic.com/2016/04/160422-earth-day-46-facts-environment> [<http://perma.cc/S8MM-RSLS>].

21. Pub. L. 91-190, 83 Stat. 852 (1969) (codified as amended at 42 U.S.C. §§ 4321-70f (2012)).

(CAA),²² and President Nixon had created the Environmental Protection Agency. In 1973, Congress passed the Endangered Species Act.²³ In 1972 and 1973 came the Clean Water Act (CWA),²⁴ the Noise Control Act,²⁵ and the Marine, Protection, Research and Sanctuaries Act.²⁶ By 1977, Congress had added the Toxic Substances Control Act²⁷ and the Surface Mining Control and Reclamation Act.²⁸ As Oliver Houck, one of the architects of the 1970s environmental law movement, has noted, the birth of environmental law as a creature of federal statute was “[c]ompletely unanticipated,” as “it came from a public awareness so spontaneous and deep that within a few short years, it had produced over a dozen major public welfare laws and more than twenty new federal programs.”²⁹

Thanks to the dissent of the 1970s and statutory provisions like the CWA and CAA, members of the public can file “citizen suits” – exercising a statutorily created right to bring actions against the federal government for failing to regulate and prevent pollution.³⁰ From 1970 to 2006, “[m]embers of the public filed more than 2,500 citizen suits under these [environmental law] statutes . . . challenging government actions, inactions, and other compliance.”³¹ As the D.C. Circuit Court of Appeals noted in 1971:

These cases are only the beginning of what promises to become a flood of new litigation – litigation seeking judicial assistance in protecting our natural environment. Several recently enacted statutes attest to the

22. Pub. L. No. 88-206, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. §§ 7401-7642 (2012)).

23. Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-44 (2012)).

24. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (2012)).

25. Pub. L. No. 92-574, 86 Stat. 1234 (1972) (codified as amended at 42 U.S.C. §§ 4901-18 (2012)).

26. Pub. L. No. 92-532, 86 Stat. 1052 (1972) (codified as amended in scattered sections of 16 and 33 U.S.C.).

27. Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601-29 (2012)).

28. Pub. L. No. 95-87, 91 Stat. 445 (1977) (codified as amended at 30 U.S.C. §§ 1201-1328 (2012)).

29. Oliver A. Houck, *Standing on the Wrong Foot: A Case for Equal Protection*, 58 SYRACUSE L. REV. 1, 15 (2007).

30. See Clean Water Act, 33 U.S.C. § 1365; Clean Air Act, 42 U.S.C. § 7604.

31. Houck, *supra* note 29, at 19.

commitment of the Government to control, at long last, the destructive engines of material ‘progress.’³²

“Citizen suits” constitute a curious creature of dissent, as they deputize private citizens to act in the same capacity as an attorney general bringing suit for harms suffered by the public at large. In this regard, they create a vehicle for dissent within a system, while seemingly acknowledging that they may result in change to the system itself. Perhaps this is why these suits were met with significant opposition. Indeed, conservative members of the federal bench bemoaned that citizen suits constituted an “attack” on the “American economic system.”³³

In contrast, the bipartisan Congress that passed the environmental statutes—and those who participated in the Earth Day grassroots movement—believed the shift in public perception, now accompanied with new laws, would succeed in preserving “the environment” for future generations of Americans.³⁴ Unfortunately, they were wrong. The environmental advocacy of the 1970s did not include a critique of *Johnson v. M’Intosh*. The movement neglected to address the then-existing legal framework that justified the colonial conquest of what now constitutes “American” lands on the basis that Tribal Nations had failed to commercially exploit them. As a result, the environmental law of the 1970s superficially addressed the harmful effects of rapidly increasing industrialization, but did nothing to acknowledge or remedy the fundamental principle espoused in the Court’s *Johnson v. M’Intosh* framework: namely, that land is not to be respected or preserved, but rather conquered and used commercially for profit. As a result of this governing principle, the contemporary environmental movement now faces significant challenges in effectuating the goals of the statutes passed in the 1970s.

32. Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n, 449 F.2d 1109, 1111 (D.C. Cir. 1971).

33. See Houck, *supra* note 29, at 18 (quoting Memorandum from Lewis F. Powell, Jr., to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), <http://law2.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumTypescript.pdf> [<http://perma.cc/C3EM-L69C>]).

34. Jack Lewis, *The Spirit of the First Earth Day* (Jan/Feb 1990), <http://archive.epa.gov/epa/aboutepa/spirit-first-earth-day.html> [<http://perma.cc/5N62-KPZ8>] (“Public opinion polls indicate that a permanent change in national priorities followed Earth Day 1970. When polled in May 1971, 25 percent of the U.S. public declared protecting the environment to be an important goal a 2500 percent increase over 1969. That percentage has continued to grow, albeit more slowly, so it is fair to say that the ideals espoused on April 22, 1970, however naive and simplistic they were in many ways, have left an enduring legacy.”).

III. THE CONTEMPORARY DISCONNECT OF ENVIRONMENTAL LAW

The failure of the environmental movement to address *Johnson v. M'Intosh's* commodification and colonization of land—and concomitant denial of tribal sovereignty—is apparent in the juxtaposition of one of the movement's first huge victories, *Tennessee Valley Authority v. Hill*,³⁵ with one of its earliest—and simultaneous—failures, *Sequoyah v. Tennessee Valley Authority*.³⁶ When viewed as case studies, these two examples of dissent within the context of environmental law reveal both the strength of the statutes we now have on the books as well as the inherent weakness of the 1970s environmental law framework. This framework fails to address the legal principles that are complicit in the environmental destruction of the allegedly racially inferior and “uncivilized” Tribal Nations who have long served as stewards of the lands that environmentalists now seek to protect.

*Tennessee Valley Authority v. Hill*³⁷ has been celebrated as the first major victory of the 1970s environmental movement. In 1967, the Tennessee Valley Authority (TVA) began construction of a dam at the mouth of the Little Tennessee River.³⁸ The dam threatened to devastate numerous sensitive ecosystems, as well as prime Tennessee farmland.³⁹ In particular, environmentalists expressed alarm that the proposed dam would eradicate an endangered species of the snail darter, the *Percina (Imostoma) tanasi*—a “three-inch tannish-colored fish, whose numbers [were] estimated to be in the range of 10,000 to 15,000.”⁴⁰ Thus, to save this species of snail darter, environmental groups and others brought action under Endangered Species Act of 1973 (ESA) to enjoin TVA

35. 437 U.S. 153 (1978).

36. 480 F. Supp. 608 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

37. *Id.*; see also Sara Blankenship, *From the Halls of Congress to the Shores of the Little T: The Snail Darter and the Dam: How Pork-Barrel Politics Endangered a Little Fish and Killed a River* by Zygmunt J. B. Plater, 20 ANIMAL L. 229, 231 (2013) (describing *Hill* as “the landmark environmental Supreme Court case”); Becky L. Jacobs, *Foreword*, 80 TENN. L. REV. 495, 495 (2013) (“Since its release in 1978, the ‘snail darter’ case [*Hill*] as it has come to be known has captivated an entire generation of environmental and natural resources law academics, practitioners, and students, and its influence persists some thirty-plus years later. Indeed, the case made the Top Ten list in a 2010 survey of lawyers’ perceptions of the most important cases in environmental law.”).

38. *Hill*, 437 U.S. at 157.

39. *Id.* at 157-62.

40. *Id.* at 158-59.

from completing the dam and impounding the remaining sections of the Little Tennessee River.⁴¹

To the surprise of many, the Supreme Court began its analysis with the premise “that operation of the Tellico Dam will either eradicate the known population of snail darters or destroy their critical habitat,”⁴² concluding that the ESA required it to permanently enjoin the operation of the dam.⁴³ As Houck later commented regarding the response at large to this unprecedented victory: “The press went wild—*darter stops dam*.”⁴⁴ The Supreme Court did note that the lands the TVA sought to condemn “include the Cherokee towns of Echota and Tennase, the former being the sacred capital of the Cherokee Nation as early as the sixteenth century and the latter providing the linguistic basis from which the State of Tennessee derives its name.”⁴⁵ This, however, constituted the extent of the Court’s consideration of the lawful interest Cherokee Nation (or other Cherokee Tribes such as the Eastern Band of Cherokee Indians) may have had in the lands the TVA sought to condemn. Of course, *Johnson v. McIntosh* made clear that such considerations have no place in the Court’s analysis, and the passage of the ESA did nothing to alter this.

In contrast to *TVA v. Hill*, the Eastern Band of Cherokee Indians (the “EBCI” or “Band”)—a sovereign Cherokee nation living just to the southeast on ancestral Cherokee lands—also brought a concurrent lawsuit to prevent the operation of the dam on the basis that the dam would destroy Cherokee “burial grounds [that hold] religious significance to the Cherokee people.”⁴⁶ The Tribe, however, lost.⁴⁷ The EBCI claimed that the National Historic Preservation Act, the American Indian Religious Freedom Act, and the U.S. Constitution provided the Band with a right to protect its sacred, religious and burial sites.⁴⁸ During the course of the trial, Cherokee elders came forward to testify regarding the historic Cherokee settlements and burials that the construction of the Tellico dam would destroy.⁴⁹ One elder in particular, Mr. Richard Crowe, explained that “Chota is one of the sacred Cherokee places, spoken of by [my] family as

41. *Id.* at 164.

42. *Id.* at 171-72.

43. *Id.* at 193-96.

44. Oliver Houck, *Unfinished Stories*, 73 U. COLO. L. REV. 867, 935 (2002) (emphasis added).

45. *Hill*, 437 U.S. at 156-57.

46. *Sequoyah v. Tenn. Valley Auth.*, 480 F. Supp. 608, 610 (E.D. Tenn. 1979), *aff’d*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

47. *Id.*

48. *Id.* at 610.

49. *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159, 1162 (6th Cir. 1980).

the birthplace of the Cherokee.”⁵⁰ Indeed, it “was our connection with the Great Spirit.”⁵¹ The land continued to have a presence in the life of the Tribe; Crowe “had been going to the land at Tellico for more than 30 years[,] . . . he took his children there when they were young.”⁵² Notwithstanding the testimony of Cherokee elders and the fact that the dam would destroy Cherokee burials and sacred sites, the District Court dismissed the EBCI’s claims, and the Sixth Circuit affirmed the District Court’s dismissal.⁵³ The Supreme Court then denied *certiorari*.⁵⁴

In *TVA v. Hill*, the Court did not inquire whether the environmentalists attempting to protect the snail darter owned, or held title, to the lands (or in this case, waters) where the snail darter lived. Indeed, such analysis is irrelevant under the ESA. In contrast, the District Court held (and the Sixth Circuit affirmed) that because “[t]he flooding of the Little Tennessee will prevent everyone, not just plaintiffs from having access to the land in question[,]” and further, because EBCI had no “legal property interest in the land in question,” the Band could not sustain its free exercise of religion claim under the First Amendment.⁵⁵

How does one square the EBCI’s loss with the environmental group’s simultaneous victory? Once again, the *Johnson* Court’s edict that Tribal Nations cannot claim legal title to their lands explains the disparate outcomes in these two cases. The environmental movement of the 1970s successfully created laws that blocked the construction of a dam to save the snail darter species, but failed to achieve the restoration of laws to allow Tribal Nations to protect the lands they have lived on for centuries. As Houck later explained, “[n]o story better reflects the hopes and flaws of environmental policy in the United States” than the victory of the environmentalists in *TVA v. Hill* and the concomitant loss of the Eastern Band in *Sequoyah v. TVA*.⁵⁶

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1159.

54. *Sequoyah v. Tenn. Valley Auth.*, 449 U.S. 953 (1980).

55. *Sequoyah v. Tenn. Valley Auth.*, 480 F. Supp. 608, 612 (E.D. Tenn. 1979), *aff’d*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

56. Houck, *supra* note 44, at 922.

IV. TODAY'S DISSENT AT STANDING ROCK

The failure of environmental law to provide an effective mechanism by which the Standing Rock Sioux Tribe may protect the burials and sacred sites in the path of the proposed Dakota Access pipeline illustrates that, in the intervening years since *TVA v. Hill*, we have come no closer to a legal solution.

On July 27, 2016, the Standing Rock Sioux Tribe (“Standing Rock”) filed a complaint against the U.S. Army Corps of Engineers in the United States District Court for the District of Columbia.⁵⁷ In *Standing Rock Sioux Tribe v. Army Corps of Engineers*, the Tribe challenged the Army Corps’ decision to issue Dakota Access the permits necessary under federal law to construct and operate a 1,100 mile pipeline that, at the time, was proposed to (and now does) carry over a half-million barrels of Bakken crude oil to Illinois and across four states.⁵⁸ The Tribe brought its claims under several “environmental law” statutes, including the National Environmental Policy Act (NEPA)⁵⁹ and the National Historic Preservation Act (NHPA).⁶⁰ These statutes, however, have failed to achieve an outcome that would require the United States federal government and the private Dakota Access pipeline company to respect the inherent sovereign right of Standing Rock to protect the lands that encompass their sacred sites and the graves of their relatives.

In particular, the events that transpired over the 2016 Labor Day weekend exemplify the failures of our contemporary federal environmental regulatory framework. On September 2, 2016, at a time when Dakota Access had not yet built the pipeline up to the Missouri River, Standing Rock’s former Tribal Historic Preservation Officer Tim Mentz⁶¹ filed a declaration stating that he “received an unsolicited phone call” from an individual who owned roughly 8,000 acres north just one mile of the Standing Rock reservation and directly within

57. See Complaint, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 205 F. Supp. 3d 4 (D.C. Cir. Sept. 9, 2016) (No. 1:16-cv-01534).

58. *Id.*

59. Nat’l Env’tl Pol’y Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321-4370f (2012)).

60. Nat’l Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 (codified as amended at 54 U.S.C. §§ 300101-307108 (2012)).

61. Mr. Mentz is “an enrolled member, blood affiliation of *Hunkpapa* and *Pa Baksa* (Cuthead Dakota) bands, of the Standing Rock Sioux Tribe (SRST).” Declaration of Tim Mentz at 1, *Standing Rock*, 205 F. Supp. 3d 4 (D.D.C. Aug. 11, 2016) (No. 16-1534). Mr. Mentz has almost forty years of experience working for SRST, including twelve years as the Tribe’s Tribal Historic Preservation Officer. *Id.* at 1-2.

the proposed construction path of the pipeline along the Missouri River at Lake Oahe.⁶²

Mentz's declaration further relates that the individual who had called the Tribe "stated that he was concerned about the potential destruction of culturally important sites and hoped to facilitate efforts to mitigate or avoid harm to important sites from the pipeline," so he invited Mentz to conduct a cultural survey on his land, so long as Mentz did not enter the pipeline corridor itself.⁶³ Mentz described his August 26, 2016, survey on the individual's land as follows:

At 2:30pm on that day, I followed [his] instructions to an area adjacent to the pipeline corridor to the west of Highway 1806. The pipeline right-of-way was clearly visible We immediately observed a number of stone features in the pipeline route plainly visible from the edge of the corridor. I am very confident that this site, located within the center of the corridor, includes burials because the site contained rock cairns which are commonly used to mark burials. Two cairns were plainly visible and a possible third one existed above the cut area. I then noticed . . . multiple stone rings . . . directly in the cleared pipeline corridor. Because we found significant stone features in just a short amount of time during a casual reconnaissance, we concluded this visit so that we could return with a survey team to conduct a full Class III cultural survey of the site.⁶⁴

Mentz returned on August 30 through September 1 with his company to conduct the Class III cultural survey⁶⁵ "along the south side of the DAPL corridor over a length of approximately two miles and a width of 150 feet."⁶⁶ His declaration reports that within this area, they "found a significant number of stone features (82) and archeological sites, including at least 27 burials."⁶⁷ Mentz further noted:

62. Supplemental Declaration of Tim Mentz at 1, *Standing Rock*, 205 F. Supp.3d 4 (D.D.C. Sept. 2, 2016) (No. 16-1534) [hereinafter Mentz Declaration II].

63. *Id.* at 2.

64. *Id.* at 2-3.

65. The State Historical Society of North Dakota defines a Class III cultural survey as: "[a]n intensive inventory [that] is a systematic, detailed field inspection done by, or under the direction of professional architectural historians, historians, archeologists, and/or other appropriate specialists." Class III: Intensive Cultural Resources Inventory, ST. HIST. SOC'Y OF N.D., <http://history.nd.gov/hp/siclass3.html> [<http://perma.cc/67RM-SNX3>].

66. Mentz Declaration II, *supra* note 62, at 3.

67. *Id.*

In addition to a large number of cairns, burials, and stone rings, the survey found five sites of very great cultural and historic significance. These stone feature sites are very rare to find and are located within the corridor or adjacent to the corridor by as little as a foot.⁶⁸

The remainder of Mentz's statement describes the significance of the cultural sites and burial grounds revealed by the Class III cultural survey.⁶⁹ With regards to one site in particular, Mentz concluded: "This is one of the most significant archeological finds in North Dakota in many years."⁷⁰

Just two weeks before, on August 18, Dakota Access filed its opposition to Standing Rock's motion for preliminary injunction, asserting it had fully complied with all federal environmental laws. The company claimed that, despite extensive searching and investigation in, on, and around the path of the proposed pipeline, "not a shred of evidence has been provided to this court to suggest that this activity [construction of the pipeline] has harmed or threatened a historic resource [such as a burial ground or sacred site]."⁷¹ Dakota Access was vehement, prior to this point, that its proposed path for the pipeline in no way threatened burials or sacred sites.

Everything changed when Standing Rock filed Mentz's Supplemental Declaration on September 2, 2016. On that day, Dakota Access was constructing its pipeline roughly twenty miles to the west of the property identified in the Mentz Declaration, the Missouri River, and Highway 1806. Up until that point, the company had not sent a construction crew to work on the pipeline on a Saturday or Sunday—their work had taken place Monday through Friday alone.

But less than twenty-four hours after the Tribe filed the Mentz Declaration,⁷² at 6:00 a.m. on Saturday, September 3, 2016, Dakota Access moved its equipment twenty miles to commence construction directly on top of the sacred sites and burial grounds identified in the Mentz Declaration. Water Protectors—hearing the sounds of construction just over a mile away—walked to

68. *Id.* at 4.

69. *Id.* at 5-8.

70. *Id.* at 5.

71. Dakota Access Opposition to Motion for Preliminary Injunction at 27, *Standing Rock*, 205 F. Supp. 3d 4 (D.D.C. Aug. 18, 2016) (No. 16-1534).

72. Memorandum in Support of Emergency Motion for a Temporary Restraining Order at 4, *Standing Rock*, 205 F. Supp. 3d 4 (D.D.C. Sept. 2, 2016) (No. 16-1534).

the property, peacefully demanding that the construction crew stop destroying the sacred sites and burial grounds their bulldozers were desecrating.⁷³

In response, Dakota Access utilized a private security force to unleash a fleet of attack dogs. Dog bites and bloodshed ensued, and *Democracy Now's* Amy Goodman caught some of the violence on camera.⁷⁴ Dakota Access knowingly violated numerous federal “environmental” laws on September 3, 2016, when it intentionally destroyed the sacred sites and burial grounds identified in the Mentz Declaration less than twenty-four hours after it had been filed. To date, no state or federal authority has arrested or indicted anyone for Dakota Access’ purposeful destruction of burial sites. Just as federal environmental law left the Eastern Band Cherokee with no remedy for the federal government’s destruction of our burial sites, federal environmental law has left Standing Rock without an adequate remedy or mechanism to effectuate the Tribe’s inherent sovereign right to protect its burial grounds from destruction.

It is alarming that the environmental movement of the 1970s secured laws that protect the habitat of a species like the snail darter, but ultimately, fails to affirm the inherent sovereign right of Tribal Nations to protect the lands that contain their sacred sites and the remains of the relatives.

CONCLUSION

Over the course of American history, real change to law has come about as a result of widespread dissent to a particular narrative. Law is, after all, a framework of judgments created from values shaped by narratives. For instance, consider the Supreme Court’s 2015 decision in *Obergefell* following decades of dissent against the narrative that “American” values dictate a marriage be exclusively between a man and a woman.⁷⁵ The “law” that Justice Kennedy relied on to write his decision in *Obergefell* did not change; however, the national narrative underlying the opposition to the outcome in his July 2015 opinion had.

Ultimately, laws will achieve very little if the narrative that recounts their purpose faces little to no dissent. The fundamental problem with the environ-

73. Associated Press, *Oil Pipeline Protest Turns Violent in North Dakota* (Sept. 4, 2016), <http://www.nbcnews.com/storyline/dakota-pipeline-protests/oil-pipeline-protest-turns-violent-north-dakota-n642626> [http://perma.cc/V8RV-S95T].

74. Amy Goodman, *Standing Rock Special: Unlicensed #DAPL Guards Attacked Water Protectors with Dogs & Pepper Spray*, DEMOCRACY NOW (Nov. 24, 2016), http://www.democracynow.org/2016/11/24/standing_rock_special_unlicensed_dapl_guard [http://perma.cc/K9GS-5A6H].

75. 135 S. Ct. 2584 (2015).

mental movement in the 1970s is that it did not change the nineteenth-century narrative that land constitutes an object to be colonially conquered and commercially exploited—nor did the movement address the narrative that anyone who fails to engage in such exploitation should lose their property rights in the land. This explains why the best environmental statutes on the books from the 1970s cannot solve the growing, increasingly catastrophic environmental challenges we face today in climate change. Laws like NEPA, the CWA, or the CAA were designed to effect piecemeal change; they never represented the expression of dissent against the underlying narrative that made widespread environmental destruction possible—if not fully protected—under the law.

For many, the U.S. Army Corps of Engineers' July 26, 2017, decision to grant the Dakota Access pipeline its requested permits under the CWA constitutes a clear violation of federal environmental law (specifically, the National Environmental Protection Act's requirement that an Environmental Impact Statement be undertaken anytime a federal agency engages in a "major federal action"⁷⁶). But over a year ago, the District Court denied Standing Rock's Motion for a Preliminary Injunction, and the D.C. Circuit subsequently denied their appeal.⁷⁷ Consequently, construction on the pipeline is now complete and oil is currently running.

It is true, however, that on June 14, 2017, the District Court partially granted Standing Rock's motion for summary judgment, remanding the Corps' determination *not* to undertake an EIS to the agency, noting that "[a]lthough the Corps substantially complied with NEPA in many areas, the Court agrees that it did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial."⁷⁸ The Court ultimately concluded: "Whether Dakota Access must cease pipeline operations during that remand presents a separate question of the appropriate remedy, which will be the subject of further briefing."⁷⁹ The parties have now completed this briefing⁸⁰ and on October 11, 2017, the District Court ordered that the remand of the Corps' July 27, 2016, EA and the easement granted to Dakota Access will be without vacatur, meaning that the pipeline will continue in operation while the Corps

76. See 40 C.F.R. § 1508.18 (defining "major federal action").

77. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs.*, No. 17-5043 (D.C. Cir., Mar. 18, 2017).

78. Memorandum Opinion at 2, *Standing Rock*, 205 F. Supp. 3d 4 (D.D.C. June 14, 2017) (No. 16-1534).

79. *Id.*

80. *Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe Reply Brief Regarding Remedy*, *Standing Rock*, 205 F. Supp. 3d 4 (D.D.C. August 28, 2017) (No. 16-1534).

addresses the flaws in its environmental review identified by the Court's June 14, 2017, ruling.⁸¹

Although construction of the pipeline is now complete, the District Court may order the flow of oil to stop. The grassroots movement at Standing Rock, therefore, creates a new opportunity to revise, amend, or alter the laws that stripped Tribal Nations of their inherent sovereignty—but such revisions will only achieve their stated goals if the movement registers its dissent from the underlying narrative that the Court first formulated in *Johnson v M'Intosh's* Doctrine of Discovery.

Perhaps there is hope. For the first time in American history, significant numbers of non-Indian Americans have stood up and spoken out to support a Tribal Nation fighting to protect its water, lands, sacred sites, and burial grounds. Moving forward, those engaged in dissent designed to protect the environment should ask four basic questions: (1) Whose ancestral lands are we trying to protect? (2) What narratives gave rise to the laws or legal frameworks used to justify the taking of those lands from this Tribal Nation or Nations? (3) How can we voice dissent to those narratives and advocate for the restoration of the inherent sovereign right of these Tribal Nations to protect the lands we now seek as non-Indians to protect? and (4) In seeking to address climate change, what lessons can we learn from the traditional laws and values of the Tribal Nations who have lived on these lands since time immemorial?

To be sure, Tribal Nations were never in need of a dissenting “environmental” movement to tell us that we need to protect the environment. Tribal Nations have been striving to respect and protect the land we live on since time immemorial. However, since the Supreme Court's adoption of the Doctrine of Discovery, our indigenous “environmentalism” has been used as a justification for erasing the inherent sovereignty of our Nations. Beginning with the Supreme Court's decision in *Johnson*, our “uncivilized” refusal to exploit and abuse the land we live on has been used repeatedly to strip our Nations of our inherent right to self-govern ourselves, our lands, and our resources. The laws of Tribal Nations that command respect for the Earth have, historically, been used as an excuse to destroy the Nations who created them. How, then, can one truly be an “environmentalist” without advocating for the elimination of the Doctrine of Discovery and the restoration of tribal sovereignty?

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81. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs.*, No. CV 16-1534 (JEB), 2017 WL 4564714 (D.D.C. Oct. 11, 2017).

their citizens in state, tribal, and federal courts. Special thanks and gratitude to Dr. Duane King for his insight and helpful guidance regarding Sequoyah v. TVA, and many thanks to Professor Oliver Houck, whose incredible knowledge and command of environmental law inspired and instructed the author to take the path along which she now finds herself traveling.

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