Public Land & Resources Law Review

Volume 0 *Case Notes 2022-2023* Article 3

5-17-2023

Minnesota Dep't of Nat. Res. v. Manoomin

Anna Belinski
University of Montana, anna.belinksi@umontana.edu

Minnesota Dep't of Nat. Res. v. Manoomin, No. AP21-0516, (White Earth Band of Ojibwe Ct. of Appeals March, 10, 2022)

Anna Belinski*

In 2021 manoomin (wild rice), a legally recognized person in White Earth Band tribal law, brought a case in White Earth Band of Ojibwe Tribal Court against the Minnesota Department of Natural Resources. Wild rice brought this case against the Minnesota Department of Natural Resources' over its issuance of a water permit to Enbridge Inc. for the construction of the Line 3 oil pipeline. Though ultimately ruling that the Tribal Court did not have subject matter jurisdiction because the activity at issue occurred by non-Indians outside of the reservation boundaries, this case still brings a novel consideration in the tribal jurisdiction analysis because of its push for tribal sovereignty via legal rights of nature legislation.

I. INTRODUCTION

In 2021 manoomin (wild rice) brought a case in White Earth Band of Ojibwe Tribal Court against the Minnesota Department of Natural Resources (MDNR) for their issuance of a water permit to Enbridge Inc. for the construction of the Line 3 pipeline.[1] Though ultimately ruling that the Tribal Court did not have subject matter jurisdiction after applying the *Montana* test[2], this case still brings a novel consideration in the tribal jurisdiction analysis because of its push for tribal sovereignty via legal rights of nature legislation.[3]

Manoomin, the White Earth Band of Ojibwe and elected members of its Reservation Business Committee, certain White Earth Band members, certain members of other tribes, and non-Indian citizens (together "Manoomin") filed a complaint against the MDNR, its Commissioner, Deputy Commissioner, and Water Resources Section Manager, and unidentified MDNR Conservation Officers (together the "State").[4] Manoomin requested, among other things, declaratory relief seeking that the court declare manoomin possesses an inherent right to "flourish" and "regenerate," and injunctive relief to rescind the water

* Anna Belinski, Juris Doctor Candidate 2024, Alexander Blewett III School of Law at the University of Montana.

1. Minn. Dep't of Nat. Res. v. Manoomin, No. AP21-0516 at 1 (White Earth Band of Ojibwe Ct. of Appeals March, 10, 2022) https://perma.cc/KB24-38AG.
2. Montana v. United States, 450 U.S. 544 (1981); *Manoomin*, No. AP21-0516 at 14.
3. Rights of nature legislation is discussed further in part II sub-part C.
4. *Manoomin*, No. AP21-0516 at 1.

permits granted by MDNR to Enbridge.[5] The State filed a responsive Motion to Dismiss arguing, that the White Earth Band Tribal Court "lacked subject matter jurisdiction to hear the claims . . . because the defendants are not members of the band and the acts challenged occurred off-reservation."[6]

Manoomin is a case of first impression; it is the first tribal court case to be brought on behalf of a natural resource and was only made possible because of the legal rights granted to manoomin by White Earth Band tribal code.[7] The instant case progresses legally recognized rights of nature as well as tribal sovereignty over traditional homelands. Though this case was barred by the court's application of federal common law, it provides necessary insight into the potential for tribes to forward the rights of nature movement and the jurisdictional intricacies that will need to be navigated to do so. Rights of nature legislation is imperative to preserve healthy and sustainable ecosystems, but U.S. court systems have been extremely reluctant to enforce any inherent legal rights for nature to thrive and flourish.[8] By passing rights of nature legislation in tribal code, tribes have the opportunity to strengthen their sovereignty and use their legal systems to enforce repercussions for damage done to the environment while also providing an example to US courts of how rights of nature can be enforced. As such, this note will explore the potential for tribes to promote legal rights of nature and evaluate the specific jurisdictional considerations tribes must address when looking to pass them in tribal code.

II. LEGAL BACKGROUND

A. Tribal Sovereignty

Since time immemorial, tribes have lived on the land that is now the United States of America, but as soon as European boats landed on the eastern shores, people began removing tribes from their traditional homelands. This practice shifted to removing tribes onto reservations, signing treaties to memorialize the agreements, and continued for a century.[9] The adjudication of Indian rights in the U.S. courts began in the early 1800s with the Marshall Trilogy. This sequence of cases set the groundwork for Federal Indian law, declaring that: (1) the U.S. government has a preemp-

---

5. Complaint at 45–47, *Minnesota Dep't of Nat. Res. v. Manoomin* (White Earth Band of Ojibwe Ct. of Appeals March, 10, 2022) (No. AP21-0516) https://perma.cc/8V6F-9GXG).

6. *Manoomin*, No. AP21-0516 at 3.

7. Mary Annette Pember, *'Rights of nature' Lawsuit Hits a Sweet Spot*, INDIAN COUNTRY TODAY (Aug. 15, 2021) https://perma.cc/C7BX-3T3W.

8. Sierra Club v. Morton, 405 U.S. 727 (1972).

9. Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13; Future Treaties with Indian Tribes, 25 U.S.C. § 71 (1988); Indian Removal Act of 1830, Pub. L. 21-148, 4 Stat. 412 §§ 2–7 (1830).

tive right of purchase to extinguish a tribe's aboriginal title of their traditional homelands;[10] (2) the U.S. federal government has a trust responsibility toward tribes;[11] and (3) in accordance with guiding principles of tribal sovereignty and self-governance, states must be legally and politically separate from reservations and state law is not enforceable on reservations.[12]

Since the Marshall Trilogy, the U.S. courts have continued to suppress tribal sovereignty. The federal government has done so through allotment and assimilation policies such as Indian boarding schools,[13] deciding that non-tribal members are not subject to tribal laws except in very specific circumstances,[14] assertion of federal authority over crimes on reservations,[15] and inferring that certain tribes impliedly forfeited their own lands and sovereignty,[16] among many more policies.

Because of this consistent infringement on tribal sovereignty and decisions made by U.S. courts and government officials presuming the eradication of tribal nations, the tribal court jurisdiction is fraught with limitations and constraints imposed upon it.

B. Montana v. United States

In 1975, the U.S. sought a quiet title action on behalf of itself and the Crow Tribe of Indians against the state of Montana to resolve a dispute over which entity could regulate hunting and fishing on fee land within the bounds of the reservation.[17] This case, *Montana v. United States,*[18] created a subject matter jurisdiction analysis still used today as the paramount analysis to determine if a tribe has civil jurisdiction over a non-member on fee land.[19]

The approach and rule that came out of *Montana v. United States* is now referred to as the "*Montana* doctrine," and states that a tribal court does not have civil subject matter jurisdiction over a non-member on non-`tribal fee land, except if one of three scenarios is satisfied. Those scenarios are: (1) when the nonmember and tribe enter into a consensual relationship by way of commercial dealing, contracts, leases, or other arrangements; (2) if the conduct of the non-member "threatens or has some

---

10. Johnson v. M'Intosh, 21 U.S. 543, 587 (1823).
11. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
12. Worchester v. Georgia, 31 U.S. 515, 556-57 (1832).
13. 25 U.S.C. § 331 (repealed 2000); Indian Civilization Fund Act, Pub. L. 15-85, 3 Stat. 516b (March 3, 1819).
14. Montana v. United States, 450 U.S. 544 (1981); Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047 (2005).
15. Ex Parte Crow Dog, 109 U.S. 556 (1883).
16. Mashpee Tribe v. Mashpee, 447 F. Supp. 940 (1978).
17. *Montana*, 450 U.S. at 549.
18. *Id.*
19. Subject matter jurisdiction and land ownership is discussed further in part VI sub-part G.

direct effect on the political integrity, the economic security, or the health or welfare of the tribe;" or (3) when explicitly authorized by Congress.[20] It is relevant to note that tribes rarely have criminal jurisdiction over non-members, and only have it over their own tribe's members for small crimes not covered by the Major Crimes Act.[21]

C. Rights of Nature

The modern rights of nature movement is largely attributed to the 1975 law review article by Christopher Stone titled "Should Trees Have Standing."[22] In this article, Stone makes a case for the legal recognition of natural resources in their own right. Reasoning against critics, Stone writes that throughout American legal history, "each successive extension of rights to some new entity has been seen as unthinkable," be it prisoners, women, Black people, Indians, or corporations.[23] Stone's argument is that nature is ripe for exploitation and abuse in our American legal system because it does not have standing in its own right, damages to it are only quantifiable in relation to an injured legal person, and it cannot be a beneficiary of awards.[24] As such, he proposes a guardianship approach in which a person can petition the court to be granted guardianship over a natural resource that seems to be in danger of exploitation so they can oversee its care, inspect it, speak for it in court, and monitor potential court ordered redress.[25]

This idea, though seemingly novel to many Americans, is deeply rooted in Indigenous Ways of Knowing.[26] In light of this, as the growing rights of nature movement seeks to grant legal rights and personhood to natural resources across the globe, much of it is being led by indigenous

---

20. *Montana*, 450 U.S. at 564–66.

21. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978); Major Crimes Act, 18 U.S.C. § 1153 (1948).

22. Christopher D. Stone, *Should Trees Have Standing—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

23. *Id*. at 451, 53.

24. *Id*. at 463.

25. *Id*. at 464–66.

26. Indigenous Ways of Knowing refers to the unique and diverse way Indigenous peoples have gathered knowledge from both human relationships and interactions as well as plant and animal nations over millennia. *See, e.g.*, Office of Indigenous Initiatives, *Ways of Knowing*, Queens University, https://perma.cc/WUS3-ARZ2 (last visited April 3, 2023); Kekek Jason Stark, *Bezhigwan Ji-Izhi-Ganawaabandiyang: The Rights of nature and its Jurisdictional Application for Anishinaabe Territories*, 83 MONT. L. REV. 79, 84–87 (2022); RESOLUTION ESTABLISHING RIGHTS OF THE KLAMATH RIVER, The Yurok Tribal Council, Res. No. 19-40 (May 9, 2019); *Innovative bill protects Whanganui River with legal personhood*, NEW ZEALAND PARLIAMENT (March 28, 2017), https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/ [hereinafter *Whanganui River*].

groups of the areas.[27] In the United States, *Manoomin* is only the second rights of nature case to be addressed in court.[28]

D. Rights of Manoomin Ordinance

"Manoomin" is the Ojibwe name for wild rice and is an essential part of the Anishinaabe creation story, culture, and diet.[29] Manoomin grows along the shores of the Great Lakes and inland lakes and rivers of Ontario, North Dakota, Michigan, Wisconsin, and Minnesota and is traditionally harvested via canoe.[30] Much of the harvested manoomin for the White Earth Band grows on Lower Rice Lake on the White Earth Reservation and on their ceded traditional homelands.[31]

In 2018, the White Earth Reservation Business Committee of the White Earth Band of Chippewa Indians passed Resolution No. 001-19-009 referred to as the Rights of Manoomin Ordinance.[32] This ordinance decreed the rights of manoomin to "exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation."[33] In addition, the ordinance created a legal right for people to "harvest manoomin, and protect and save manoomin seeds, within the White Earth Reservation" and created criminal sanctions for harm done to manoomin or those trying to harvest it.[34] The Rights of Manoomin Ordinance gave standing for manoomin as a plaintiff in this case and provided the statutory rights for other plaintiffs to allege harm.

---

27. *See, e.g.*, RESOLUTION ESTABLISHING RIGHTS OF THE KLAMATH RIVER, The Yurok Tribal Council; RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009 (Dec. 31, 2018); Whanganui River, *supra* note 25; Katie Surma, *Ecuador's High Court Affirms Constitutional Protections for the Rights of nature in a Landmark Decision*, INSIDE CLIMATE NEWS (Dec. 3, 2021), https://perma.cc/E5BG-JJ2U.

28. Isabel Kaminski, *Streams and Lakes Have Rights, a US County Decided. Now they're suing Florida*, THE GUARDIAN (May 1, 2021), https://perma.cc/A3YH-54C9; Pember, *supra* note 6.

29. Stark, *supra* note 25; *Manoomin – the Good Berry*, GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION, https://perma.cc/HB7F-XT9X (last visited April 3, 2023).

30. Manoomin – the Good Berry, *supra* note 28.

31. Minn. Dep't of Nat. Res. v. Manoomin, No. AP21-0516 at 8 (White Earth Band of Ojibwe Ct. of Appeals March, 10, 2022) https://perma.cc/KB24-38AG; Manoomin – the Good Berry, *supra* note 28.

32. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians.

33. *Id*. §1(a).

34. *Id*. §1(b), §2.

III. FACTUAL BACKGROUND

To the Anishinaabe people, manoomin is *Aw manidoo gaa-pagidendang yo omaa akiing da-biijikaamigak manoomin*.[35] This concept is translated as "the Creator is the one that put this wild rice to be growing here on earth."[36] Anishinaabe people have harvested manoomin and viewed it as a sacred gift and medicine throughout the evolution of their tribe since time immemorial.[37]

Enbridge's Line 3 pipeline project was proposed in 2014 to replace 382 miles of existing pipeline as part of Enbridge's Mainline pipeline system, the largest oil pipeline in North America.[38] The Mainline pipeline system crosses through Canada, Minnesota, Wisconsin, Michigan, Illinois, and Indiana. Line 3 specifically carries oil from the Alberta tar sands to Superior, Wisconsin.[39]

The existing pipeline was constructed In the 1950s and bisected the Leech Lake and Fond du Lac reservations in Minnesota.[40] The new pipeline segment will no longer go directly through the Leech Lake reservation but will cross through treaty land of the White Earth, Leech Lake, Red Lake, and Mille Lacs Tribes.[41] In November 2020, the U.S. Army Corps of Engineers approved the re-route and replacement of Line 3 despite extensive community opposition.[42]

On June 4, 2021, the MDNR issued a permit for Enbridge to increase its water use for construction of the pipeline by five billion gallons (10 times more than the original permit).[43] Prior to granting this permit, MDNR waited five months to consult with the White Earth Band and finally informed them about the permit on May 27, 2021, one week before approving it.[44] Manoomin alleged that the increase in water use would drain Lower Rice Lake located on the White Earth Reservation as well as other lakes located on treaty land to such an extent that it would damage the growth and flourishing of manoomin and interfere with tribal members' rights to harvest via canoe.[45]

---

35. Stark, *supra* note 25, at 84.

36. Stark, *supra* note 25, at 84.

37. Stark, *supra* note 25, at 84–85.

38. Mary Annette Pember, *Enbridge Line 3 Divides Indigenous Lands, People*, INDIAN COUNTRY TODAY (Feb. 19, 2021), https://perma.cc/E7LF-VVRT.

39. *Id.*

40. *Id.*

41. *Line 3 Replacement Project*, ENBRIDGE INC., https://perma.cc/X6CV-EXS8 (last visited April 4, 2023).

42. Pember, *supra* note 37.

43. Minn. Dep't of Nat. Res. v. Manoomin, No. AP21-0516 at 2 (White Earth Band of Ojibwe Ct. of Appeals March, 10, 2022) https://perma.cc/KB24-38AG (citing Complaint at 38, *Manoomin*, (No. AP21-0516)).

44. *Manoomin*, No. AP21-0516 at 2.

45. Complaint at 37, *Minnesota Dep't of Nat. Res. v. Manoomin* (White Earth Band of Ojibwe Ct. of Appeals March, 10, 2022) (No. AP21-0516) https://perma.cc/8V6F-9GXG.

IV. PROCEDURAL HISTORY

After the June 4, 2021 approval of the new and increased water permit for Line 3, Manoomin filed a complaint in White Earth Band Tribal Court on August 4, 2021.[46] Manoomin alleged that the issuance of the permit by MDNR, which may substantially decrease the amount of public water available, infringed on their treaty rights to harvest manoomin on their ceded land.[47] Manoomin further alleged infringement on their rights to harvest manoomin and manoomin's right to flourish on the White Earth Reservation under the Manoomin Ordinance.[48]

On August 18, 2021, the State filed a Motion to Dismiss which was denied the same day.[49] On August 19, 2021, the State sued the Tribal Court judge, Judge DeGroat, and the White Earth Nation in federal court.[50] The federal court case was dismissed on sovereign immunity grounds and subsequently appealed by the State to the 8th Circuit.[51] On September 13, 2021, the State filed a Notice of Appeal for the denial of the Motion to Dismiss in White Earth Tribal Court.[52]

V. HOLDING

On December 21, 2021, the White Earth Band of Ojibwe Court of Appeals had a hearing on the matter and issued an opinion on March 10, 2022, granting the State's Motion to Dismiss for lack of subject matter jurisdiction.[53] Manoomin argued that the location of the activity was less relevant than the location of the significant resulting injury of water depletion, which would be on the White Earth Reservation. The court instead found the State's argument, that the location of the activity itself must be on tribal land, to be more persuasive.[54]

The court did find that it had authority to enforce treaty rights and protect natural resources on or off the reservation as granted to it by tribal code and therefore could theoretically enforce the Rights of Manoomin Ordinance.[55] However, the federal government has limited the personal and geographic application of tribal court jurisdiction largely to tribal members and the reservation itself.[56] This case was regarding a non-White Earth member and the action took place on ceded treaty lands, not the

---

46. Complaint, *Manoomin*, (No. AP21-0516).
47. *Id*. at 39.
48. *Id*. at 44.
49. *Manoomin*, No. AP21-0516 at 3.
50. *Id.* at 3.
51. Minn. Dep't of Nat. Res. v. White Earth Band of Ojibwe, No. 21-3050, 2022 U.S. App. LEXIS 26045 (8th Cir. 2022).
52. *Manoomin*, No. AP21-0516 at 4.
53. *Id.* at 17.
54. *Id*.
55. *Id.* at 6.
56. Montana v. United States, 450 U.S. 544 (1981); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

White Earth Reservation. Therefore, the question of whether the court may rule on the matter was ultimately a question of federal law.[57]

Under federal law, a non-member can be subject to civil litigation in tribal court as a defendant if they are on tribal land or if they are on non-tribal fee land but within the bounds of the reservation and a *Montana* exception is met. Manoomin argued that the second *Montana* exception applied (that the conduct of the non-member threatened the health or welfare of the tribe), and therefore the court spent most of its opinion deliberating its application. The court decided that Manoomin successfully pleaded on-reservation impacts to the health and welfare of the tribe resulting from the Line 3 project.[58] However, the court also ruled that the actual activity being objected to must be conducted on tribal land in some capacity. The court found that baring federal law, Congressional action, or explicit treaty language, non-member activities off-reservation that threaten tribal interests on-reservation are insufficient to invoke a tribal court's jurisdiction.[59]

VI. ANALYSIS

A. Montana Analysis

1. Location of the Activity

The court presents a logical basis for its opinion that given prior caselaw, a tribal court does not have jurisdiction over a non-member—even if a *Montana* exception applies—if the act occurred outside the boundaries of the reservation.[60] The court was persuaded by seven federal court cases whose decisions were released post-*Montana*.[61] Of these seven cases, five ruled in favor of tribal court jurisdiction over a non-member because a *Montana* exception was satisfied.[62] Yet only three of the cases found the location of the activity to be the dispositive issue. Those cases were *Plains Commerce Bank v. Long Family Land & Cattle Co.*,[63] *F.T.C. v. Payday Fin., LLC*,[64] and *Hornell Brewing Co. v. Rosebud Sioux Tribal Court.*[65] *Manoomin*, though, is distinguishable from each of these and therefore the tribal court should have held that it retained subject matter jurisdiction.

In *Plains Commerce Bank*, the U.S. Supreme Court ruled that the Cheyenne River Sioux's tribal court did not have subject matter jurisdiction because "in no case have we found that *Montana* authorized a tribe to

57. *Manoomin*, No. AP21-0516 at 6.
58. *Id.* at 9.
59. *Id.* at 15.
60. *Id.* at 17.
61. *Id.* at 9.
62. *Id.* at 9–11.
63. 554 U.S. 316 (2008).
64. 935 F. Supp. 2d 926 (D.S.D. 2013).
65. 133 F.3d 1087 (8th Cir. 1998).

regulate the sale of [ ] land. Rather, our *Montana* cases have always concerned nonmember conduct on the land."[66] In *FTC*, the South Dakota district court ruled that the fact that a contract was executed on the reservation was integral to its decision that the Cheyenne River Sioux's tribal court did have jurisdiction.[67] In *Hornell Brewing Co.*, the 8th Circuit ruled that the fact that Hornell Brewing Co. did not "manufacture, sell, or distribute" its liquor on the Rosebud Sioux Reservation made it fall outside the scope of the *Montana* test.[68]

Manoomin is distinguishable from *Plains Commerce Bank* because the Supreme Court in that case specifically noted its ruling pertained to the regulation of sale of land and not the conduct thereon. In *Manoomin*, however, it is clearly the conduct of dewatering that is being objected to, making this case fall outside of the scope of *Plains Commerce Bank*.

In both *F.T.C.* and *Hornell Brewing Co.*, the federal courts found the location of the activity to be dispositive, whether on- or off-reservation. But these cases, too, are distinguishable from *Manoomin* because *Manoomin* is a case about water and impacts all tribal members rather than just a few. The courts' rationales in *F.T.C.* and *Hornell Brewing Co.* both revolved around parties' discrete and static locations (the signing of a contract or the placement of a manufacturing facility or advertisements). As such, the courts could focus on the activities themselves and their locations. *Manoomin*, though, deals with water, which in its very nature does not respect political boundaries and is interconnected through ground and surface water. Its ubiquity, interconnectedness, and constant movement necessitate treating it different from situations such as where a contract is signed or where advertisements are displayed, and consequently the precise location of the activity being objected to is less relevant.

Further, the court in *F.T.C.* emphasizes that "the tribe or tribal member must show that the activities or conduct it seeks to regulate through adjudication occurred inside the reservation."[69] Again, because *Manoomin* is dealing with water rather than a discrete and static location, this quote should be read broadly. Dewatering that occurs just beyond the reservation boundary will quickly and seriously impact the connected water on the reservation such that the activity effectively does occur inside the reservation.[70] Other courts have taken a similar approach when dealing with electronic transactions and communications due to the inapplicability of a discrete physical location.[71]

---

66. 554 U.S. at 334.

67. 935 F. Supp. 2d at 938.

68. 133 F.3d at 1093.

69. 935 F. Supp. 2d at 938 (quoting Att'y's Process & Investigation Servs. v. Sac & Fox Tribe, 609 F.3d 927, 940 (8th Cir. 2010)).

70. Water Science School, *Groundwater Decline and Depletion*, UNITED STATES GEOLOGICAL SURVEY (June 6, 2018), https://perma.cc/6SZU-PD22.

71. AT&T Corp. v. Oglala Sioux Tribe Util. Comm'n, No. CIV 14-4150, 2015 WL 5684937, at *6 (D.S.D. Sept. 15, 2015); *F.T.C.*, 935 F. Supp. 2d at 940.

Additionally, each of the cited cases deals with one party against another in personal suits. Whereas in *Manoomin*, the impact of dewatering would be on the entire Tribe and ecosystem of the White Earth Reservation and would injure an integral part of the Tribe's culture, spiritual practices, and food source.[72] Because of this, the impact to the health and welfare of the Tribe is much broader and stronger than in the cited cases and should weigh in favor of retaining jurisdiction under the *Montana* test.

2. Application of Indian Law Canons of Construction

Finally, the cases the court relied on had to do with activities such as banking, hazardous waste storage, and telephone wires.[73] This case, though, deals with something that touches closer to the heart of the White Earth Band's culture and treaty purposes. As such, the court should have applied the Indian law canons of construction.

The canons of treaty construction demand that when interpreting a tribe's rights under a treaty, courts must read the treaty in the way the tribe would have read or understood it at the time they signed it, and in a way that favors the tribe.[74] In *Winters*, the U.S. Supreme Court found that the Assiniboine and Gros Ventre people would never have thought they were moving onto the arid reservation lands of the Fort Belknap Reservation and not be able to use water from the nearby river.[75] Therefore, the court recognized the Tribe's reserved water rights even though no such rights were explicitly mentioned in their treaty.[76] The same is true here. If the treaty is read as the Tribe would have understood it at the time of signing and it is read favoring the tribe, it is clear the Ojibwe people would not have agreed to move to the White Earth Reservation thinking they were forfeiting all ability to harvest and protect their most sacred plant and food source. Therefore, the court should have found that under the canons of treaty construction, the court retained jurisdiction to enforce the Manoomin Ordinance over its ceded treaty lands on which Tribal members gather manoomin as an incidence of the reservation.

Regardless of the court's failure to apply treaty canons of construction, the limitations put upon tribal court jurisdiction by the U.S. federal courts makes this holding unsurprising. *Manoomin* shows how challenging it is to navigate the jurisdictional maze and restraints of tribal authority. Notwithstanding the result here, *Manoomin* acts as a guide on what

---

72. Complaint at 3, *Minnesota Dep't of Nat. Res. v. Manoomin* (White Earth Band of Ojibwe Ct. of Appeals March, 10, 2022) (No. AP21-0516) https://perma.cc/8V6F-9GXG).

73. Minn. Dep't of Nat. Res. v. Manoomin, No. AP21-0516 at 9-11 (White Earth Band of Ojibwe Ct. of Appeals March, 10, 2022) https://perma.cc/KB24-38AG.

74. Winters v. U.S., 207 U.S. 564, 576 (1908).

75. *Id*. at 577.

76. *Id*.

pitfalls to avoid when bringing a rights of nature case. Further, it stands as a cairn on the path of expanding tribal sovereignty.

B. Tribal Sovereignty and Rights of nature

Creating enforceable tribal laws that reflect deeply important cultural beliefs and traditions is both an expression and obligation of tribal sovereignty. This is illustrated in the Rights of Manoomin Ordinance itself, which states that "The White Earth Band and its members possess both a collective and individual right of sovereignty, self-determination, and self-government, which shall not be infringed by other governments or business entities claiming the right to override that right."[77] The rights of nature movement, therefore, is an opportunity for tribal governments seeking to codify traditions, protect culturally integral resources, and increase and legitimize their inherent sovereignty.

C. Limitations on Tribal Jurisdiction

Native American tribes have inhabited the land that is now the U.S. since time immemorial.[78] Therefore, one of the basic principles of Federal Indian law is that tribes have reserved inherent sovereign authority over their lands and their people.[79] Consequently, courts are to presume tribal authority over a matter unless it has been explicitly abrogated by Congress through treaty or statute, or forfeited by the tribe.[80] Since the 1820s, the U.S. Supreme Court has ruled that the federal government has the exclusive right to deal with and limit tribal sovereignty, and that when the U.S. became a country, tribes became "domestic dependent nations," something different from a state, but which cannot "with strict accuracy be denominated foreign nations."[81] This assumption governs Federal Indian law today. As a basic approach, courts are to first presume there is tribal authority over a matter, then look to explicit acts of Congress through statute or treaty that may have abrogated any rights, and then look to whether the tribe surrendered any of their own rights.[82]

In the case of applying rights of nature by way of tribal code, the exercise of plenary power by the federal government is paramount to its

---

77. RIGHTS OF MANOOMIN ORDINANCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 001-19-009 §1(c).

78. *See, e.g.*, *History of White Earth*, WHITE EARTH RESERVATION BUSINESS COMMITTEE, https://perma.cc/SJJ3-U9HZ (last visited April 4, 2023); United States v. Adair, 723 F.2d 1394, 1414 (1983).

79. U.S. v. Winans, 198 U.S. 371, 381 (1905).

80. Ex parte Crow Dog, 109 U.S. 556, 572 (1883); Talton v. Mayes, 163 U.S. 376, 384 (1896); Herrera v. Wyoming, 139 S. Ct. 1686, 1698 (2018).

81. Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831); Worchester v. Georgia, 31 U.S. 515, 556–57 (1832); U.S. Const. Art. 1, § 8.

82. *E.g.*, *Winans*, 198 U.S. at 381; *Herrera*, 139 S. Ct. at 1698; United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941); Mashpee Tribe v. Mashpee, 447 F. Supp. 940 (1978).

efficacy. This exercise by the federal government has infringed on tribal nations' ability to enforce their own laws and is exemplified in the case of *Manoomin*. As such, the most relevant areas for tribal nations to consider when passing rights of nature legislation are (1) tribal membership and personhood, (2) criminal jurisdiction, (3) civil jurisdiction, and (4) land and water ownership. Each of these will be addressed below. Application of tribal rights of nature legislation on ceded treaty lands (traditional homelands of the tribe outside the reservation bounds) is beyond the scope of this note and as such will not be discussed.

D. Tribal Membership Status and Personhood

A key consideration when creating statutes that give legal rights to nature is whether the law is creating a legally recognized injury (e.g., that ecological damage to the waterway is in itself an injury even if it does not directly injure the person bringing the suit) or if the natural resource is being granted legal personhood to bring the claim itself.[83] In the latter, tribal membership must be considered as well as guardianship since the natural resource cannot represent itself in court.

A tribe has personal jurisdiction over its own members, but limited jurisdiction over non-members.[84] Therefore, if a natural resource is being granted legal personhood, a tribe will have jurisdiction over it as a member in far more instances than if it is not.[85] This may add an element of applicability of membership requirements for the tribe, as each tribe has their own systems and requirements for membership.[86] In addition, the tribe would have to consider who speaks on behalf of the natural resource since it cannot speak for itself, and the same issue of tribal membership will come into play for the selected speaker or guardian unless the tribe grants authority to a non-member explicitly.

In *Manoomin*, personhood is a relevant issue. Though the court did not have the opportunity to rule on it, the White Earth Reservation Business Committee passed Resolution No. 057-21-004 in 2020 creating a Rights of Manoomin Taskforce.[87] However, this case was brought by manoomin (among others) as a plaintiff, not the Rights of Manoomin Taskforce on behalf of manoomin. Therefore, there is still the lingering question of whether manoomin can be a plaintiff in its own right and whether this case was correctly brought by manoomin.[88]

---

83. Sierra Club v. Morton, 405 U.S. 727 (1972).
84. Montana v. United States, 450 U.S. 544 (1981).
85. *Id.*
86. *Id.* at 564.
87. CREATION OF RIGHTS OF MANOOMIN TASKFORCE, White Earth Reservation Business Committee White Earth Band of Chippewa Indians, Res. No. 057-21-004 (Dec. 11, 2020).
88. Stark, *supra* note 25, at 91–92.

E. Criminal Jurisdiction

One area of tribal law that is extremely limited is criminal jurisdiction. Beginning in the 1880s, the U.S. federal government decided that certain major crimes would be under the exclusive jurisdiction of the federal government instead of tribal governments.[89] Since then, the U.S. Supreme Court has ruled that tribes have extremely limited authority over non-members when they commit crimes on a reservation.[90] Further, in some states that enacted Public Law 280 (PL 280), the state surrounding the reservation has exclusive criminal jurisdiction on the reservation over members and non-members alike.[91] Finally, tribes may only levy criminal sanctions up to a $5,000 penalty or up to one year in jail.[92]

If a tribe wants to create criminal laws that protect a natural resource, they will likely be restrained in application to only members of that tribe as well as the degree of punishment. The impact of PL 280 in this situation is that tribes subject to PL 280 often rely wholly on state law enforcement officials and may not have their own officers to enforce lower-level crimes that are unique to that tribe and that are not included in the Major Crimes Act or Indian Country Crimes Act.[93] Furthermore, the Tribal Law and Order Act of 2010 (TLOA) gave some criminal jurisdiction back to the tribe if the tribe petitioned for it.[94]

The Manoomin Ordinance has a criminal law penalty, and the White Earth Band is a tribe for which PL 280 and the TLOA apply. Therefore, the Tribe likely has criminal jurisdiction over crimes against manoomin. However, this case is a civil one brought using the non-criminal elements of the law.[95] The Complaint does not address why Manoomin decided to bring a civil case instead of relying on tribal prosecutors to bring the case as a criminal one. However, because Manoomin was seeking injunctive and declaratory relief, it is likely that criminal sanctions simply would not have ended in recission of the water permit or further definition of the rights of manoomin.

---

89. United States v. Kagama, 118 U.S. 375, 384 (1886).

90. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

91. Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 930 (2012) (Public Law 280 "required six states to assert criminal jurisdiction and some civil jurisdiction over the Indian country located within those states.").

92. *Id*. at 926.

93. Valentine Dimitrova-Grajzl, et al., *Jurisdiction, Crime, and Development: The Impact of Public Law 280 in Indian Country*, 48 LAW & SOC'Y REV. 127, 129 (2014).

94. Pub. L. No. 111-211, 124 Stat. 2258 (Jul. 29, 2010).

95. Complaint, *Minnesota Dep't of Nat. Res. v. Manoomin* (White Earth Band of Ojibwe Ct. of Appeals March, 10, 2022) (No. AP21-0516) https://perma.cc/8V6F-9GXG.

F. Civil Jurisdiction

The issue of civil jurisdiction limited the White Earth Band in *Manoomin*. Under the *Montana* doctrine, tribes have inherent civil jurisdiction over their own members, but limited jurisdiction over non-members.[96] In situations dealing with environmental abuse it is essential that rights of nature laws confer jurisdiction to the tribal court over both members and non-members alike to enforce and protect their reservation's resources. To have civil jurisdiction over non-members, a non-member person must be in a consensual relationship with the tribe, or have done something to threaten the integrity, economic security, or health or welfare of the tribe, or have jurisdiction conferred upon them through an explicit act of Congress.[97]

Regarding rights of nature legislation, as illustrated by *Manoomin*, a tribe has a very strong argument for jurisdiction under the second *Montana* exception: that the actor has done something to threaten the political integrity, economic security, or health or welfare of the tribe.[98] Though problematic for many aspects of modern tribal sovereignty, federal courts historically have seemed to prefer tribal authority for regulations of non-members when it has to do with "activities that might seem more stereotypically Indian, [ ] such as hunting and fishing and timber management" and limiting the "legitimate interests of the tribe as the creature of a remembered past."[99] This limits tribal authority and keeps the image of a modern Native American in a box. However, in the case of rights of nature, the federal courts' tendency could be used as an advantage for tribes to retain authority under the second *Montana* exception and protect their most sacred and culturally relevant natural resources.

G. Land Ownership

Native Americans have had aboriginal title of the lands they occupy since time immemorial.[100] Under U.S. law, however, many tribes were removed from their homelands and forced onto reservations.[101] Subsequently, under the policy of allotment, tribes were stripped of communal ownership of their reservation lands and forced to divide up and allocate lands to individual tribal members.[102] The federal government sold off any non-allocated lands to non-members or retained them as federal lands. This process, known as "allotment," created a checkerboarded pattern of

---

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

97. *Id.*

98. Minn. Dep't of Nat. Res. v. Manoomin, No. AP21-0516 at 9 (White Earth Band of Ojibwe Ct. of Appeals March, 10, 2022) https://perma.cc/KB24-38AG.

99. Berger, *supra* note 13, at 1058–59.

100. Johnson v. M'Intosh, 21 U.S. 543, 573 (1823).

101. Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1197 (2010).

102. *E.g.*, 25 U.S.C. § 331; Nelson Act of 1889, 25 Stat. 642 (Jan. 14, 1889).

land ownership on reservations that has resulted in jurisdictional terrain that is difficult to navigate.

Tribes have jurisdiction over tribal members on all lands encompassed by the reservation boundary as well as some off-reservation trust, allotted, and treaty lands.[103] Under *Merrion v. Jicarilla Apache*,[104] tribes have jurisdiction over non-members on tribal trust and fee lands. When is a *Montana* exception is satisfied, tribes have jurisdiction over non-members on non-member owned fee lands within the bounds of the reservation.[105] This is particularly complicated in Alaska, where most tribes were put into corporate models rather than given lands under the Alaska Native Claims Settlement Act, thus intensely limiting tribal jurisdiction based on land ownership and treaty language.[106]

In addition to land ownership, there is the added element of treaty lands. When tribes were forced to leave their lands and move to a reservation, some signed treaties with the United States government ceding their lands but retaining the rights to hunt, gather, and fish on their traditional homelands.[107] Because each treaty is unique to that tribe, there may be explicit or implied treaty language reserving rights to the tribal government to extend legal authority onto treaty lands.[108] However, due to the limited scope of this note, the analysis of jurisdiction on treaty lands will end there.

In passing rights of nature legislation, a tribe will have to consider where the natural resource they are trying to protect lays in the network of tribal trust or fee land, non-member fee land, within or outside of the reservation boundary. Where the natural resource lays will largely govern the ease with which a tribe can assert jurisdiction to protect its health and ensure it flourishes. In *Manoomin*, this was the dispositive issue. The court decided that because the activity of dewatering was occurring beyond the bounds of the reservation and by non-members, the tribal court lacked jurisdiction.

H. Water

Because many important tribal natural resources are waterbodies, a unique consideration for rights of nature is ownership of the waterbed and water on reservations and traditional homelands. Based on the Equal Footing Doctrine, if a waterway was navigable at the time of statehood, then the state, by default, is the owner of the bed unless it was explicitly transferred to the tribe by treaty.[109] This is rare, and therefore the tribes

---

103. U.S. v. Winans, 198 U.S. 371, 381 (1905).
104. 455 U.S. 130, 159 (1982).
105. Montana v. United States, 450 U.S. 544 (1981).
106. Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 524 (1998).
107. *Winans*, 198 U.S. at 379.
108. Minn. Dep't of Nat. Res. v. Manoomin, No. AP21-0516 at 15 (White Earth Band of Ojibwe Ct. of Appeals March, 10, 2022) https://perma.cc/KB24-38AG.
109. *Montana*, 450 U.S. at 552; *but see* Treaty with the Flatheads, Etc., art. II, July 16, 1855, 12 Stat. 975.

typically have limited jurisdiction over waterbeds.[110] If the waterway was non-navigable at the time of statehood, the waterbed was not transferred to the state. Instead, any property owner adjacent to or encompassing the waterway took ownership of the waterbed.[111] Therefore, a tribe has ownership of the waterbed of all non-navigable waterways within their reservation boundaries.

Water use, though, must adhere to both tribal and state water law. Consequently, if a tribe wanted to protect a waterbody from decreased flow, their ability to do so would be limited to their tribe's recognized reservation use rights, which they can assert on other users within the state by which they are surrounded.[112] Such a right is based on their treaty, uses of the water on the reservation, the surrounding state's water law, or a compact with the state if one has been created.[113] State water use rights vary. Some states apply riparian law, some prior appropriation, and some a hybrid of the two. Which method the state applies will affect the tribe's ability to enforce certain flow levels on other water users to protect the waterbody and aquatic species.

Though *Manoomin* was not addressing water quality, it is worth briefly mentioning in the scope of rights of nature tribal law since it is so often an issue in environmental abuse. Water quality is a distinctly separate concept from streambed ownership and water use rights in water law. Instead, water quality on reservations is governed by tribal law, treaty, or the federal Clean Water Act.[114] Water quality standards that are stricter on a reservation than those of the surrounding state's can be enforceable on the reservation.[115] If a tribe wishes to enforce their rights on upstream water users discharging point source pollution, they must be done under the authority and within the limits of the Clean Water Act, not as an alternative rights of nature statute, unless the tribe has explicit authority to do so under its treaty.[116]

Manoomin brought claims seeking redress under the Rights of Manoomin Ordinance for the impact of the Line 3 water permit on water levels in lakes on the White Earth Reservation. Though the Tribe sought redress for the impact of Enbridge's water drainage, they did not attempt to enforce their Tribe's reservation water use rights. This may have been because such a claim likely would have been a federal question needing to

---

110. *Montana*, 450 U.S. at 552–53.

111. *See, e.g.*, PLL Mont., LLC v. Montana, 565 U.S. 576, 595 (2012).

112. Winters v. U.S., 207 U.S. 564, 577 (1908).

113. *Id.*; United States v. Adair, 723 F.2d 1394, 1411 (1983).

114. Michelle Bryan, *Valuing Sacred Tribal Waters within Prior Appropriation*, 57 NAT. RESOURCES J. 139, 158 (2017).

115. Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982).

116. Bryan, *supra* note 113, at 158 (citing to City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996)).

be brought in federal, instead of tribal, court. It could also have been because quantifying a reservation's use rights has never been done in a state that applies hybrid or riparian water law, like Minnesota.[117]

VII. CONCLUSION

Manoomin offers insight into the potential, yet constrained, world of tribal court jurisdiction over natural resources. In 2018, the White Earth Band of Ojibwe passed a landmark ordinance in the United States granting legal standing to manoomin and legally cognizable interests in its injury. Because of that tribal law, manoomin was able to bring a case in White Earth Band tribal court challenging the issuance of the Line 3 water permit that would threaten the habitat of manoomin and ability of White Earth Band members to harvest it. Though ultimately unable to rule on the merits of legal standing of manoomin itself, the court did make an important ruling that indicates the challenges of enforcing rights of nature legislation in tribal courts.

The rights of nature movement is an opportunity for tribal governments to simultaneously give legal protections to natural resources while strengthening tribal governance and sovereignty by flexing their authority sin this area of law. However, the opportunity is limited by the tribal court's jurisdiction. Therefore, before the tribe creates and passes its own legislation to protect natural resources, there are some essential jurisdictional considerations to make so that the law may be enforced effectively. In the case of *Manoomin*, the tribal court interpreted federal common law as limiting its subject matter jurisdiction over non-members, which ultimately forced the case to be dismissed from White Earth Tribal Court. This case exemplifies the difficult terrain of enforcing legal rights for natural resources and what other considerations must be made to continue bringing cases such as these.

117. Jacqueline Goodrum, *Taking on Water: Winters, Necessity and the Riparian East*, 43 WM. & MARY ENVTL. L. & POL'Y REV. 807 (2019).