EXTRACTIVE INDUSTRIES, ENVIRONMENTAL RACISM AND INDIGENOUS RIGHTS IN THE AMERICAS

THE U.S., CANADA, AND THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

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Executive Summary

The present thesis sought out to research how and to what extent states protect indigenous rights in the United States, Canada and the Inter American System of Human Rights where extractive industries are involved. These three jurisdictions were selected for belonging to the Organization of American States, for shared borders and common colonial histories. The OAS encompasses the Inter-American Court of Human Rights, of which Canada is party to the Inter-American Convention of Human Rights and the United States is not. These commonalities, as well as the prevalence of legal disputes where resource development and extraction occurs on indigenous lands, shapes the jurisdiction choices for this thesis.

Cases dealing with extractive industries and indigenous land rights were selected from high judicial authority within each jurisdiction and were analyzed through a theoretical framework consisting of settler colonialism and environmental racism. Cases selection is not restricted to Supreme Court rulings of Canada and the United States, however, as the lower level court decisions significantly impact upon particular indigenous communities who derive their rights from territorially specific treaties.

This thesis concludes that, while legal principles that govern the Inter-American Court of Human Rights finds cases more favorably for indigenous petitioners. The decentralized legal landscape of indigenous land rights in the United States, as well as judicial limits, inhibits environmental justice for indigenous communities. Canada's streamlining efforts in law, and the principles with which its courts approach these kinds of cases reveals a better environmental justice framework for indigenous communities.

Chapter 1:

1.1 Introduction

The human rights discourse does not exclude indigenous peoples, however, the special nature of indigenous rights is often cast aside by states as peripheral obligations. The communal nature of indigenous rights tends to detach from the individual orientation of human rights, enabling violations to occur and persist without redress due to the underdeveloped legal framework surrounding indigenous rights. Throughout the Americas, indigenous rights frameworks that exist in regional, domestic and international regimes create varying legal landscapes for violations to arise, to be litigated, and to be resolved. These different landscapes of violations can be explored through indigenous land rights frameworks, extractive industries, and environmental racism.

In the United States, the protests at Standing Rock against the Dakota Access Pipeline illustrate one such intersection of indigenous land rights, extractive industries, and environmental racism. The South Dakota oil pipeline's proposed route disrupted Sioux sacred sites and received government approval without proper tribal consultation or environmental impact assessment.[1] This has been condemned by the UN Special Rapporteur on the Rights of Indigenous Peoples when they visited indigenous groups, including the Standing Rock Sioux, in the United States in the winter of 2017. [2] The visit concluded that failure to properly consult with indigenous groups, prior to permitting environmentally disruptive energy development projects, appears to be the trend that

[1] 'Key Moments In The Dakota Access Pipeline Fight' (*NPR.org*) <http://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight> accessed 29 October 2017.
[2] Human Rights Watch |350 Fifth Avenue, 34th Floor | New York and NY 10118-3299 USA | t 1.212.290.4700, 'Standing Rock's Next Stand' (*Human Rights Watch*, 9 March 2017) <https://www.hrw.org/news/2017/03/09/standing-rocks-next-stand> accessed 29 October 2017.

the United States regulatory frameworks follow.[3] While the protests were situated within a larger context of environmental protection concerns, highlighted by various other non-indigenous supporters, Standing Rock calls attention to the vulnerabilities of indigenous rights. The Standing Rock Sioux faced not only environmental and personal health risks from the pipeline, but also potential damage to their cultural integrity and religious freedom.[4] In this way, Standing Rock showcases environmental racism, whereby the risks and negative impacts associated with the extraction are disproportionately experienced by indigenous communities through decision making processes that largely exclude them.

While much of the Standing Rock story has revolved around issues of protest, the story is underpinned by the regulatory and legal details. When the U.S. Army Corps of Engineers opened its draft of approval plans for the Dakota Access Pipeline to public comment in winter 2016, there were concerns raised over the environmental and cultural impacts upon the Standing Rock Sioux tribe.[5] Most pressing at the time were the concerns that sacred burial and archaeological sites would be destroyed during the project. [6] The risks associated with the completed pipeline also sparked concerns over oil spills that would pollute the tribe's drinking water and threaten health, as well as the cultural and spiritual significance that water has to the Sioux. [7] Despite the Advisory Council on Historic Preservation's recommendation that the U.S. Army Corps of Engineers consult with tribal leaders to address those environmental and cultural concerns, the plan was approved and claimed that it would have no impact of public interest. [8] While protesters resisted construction,

[3] Human Rights Watch |350 Fifth Avenue, 34th Floor | New York and NY 10118-3299 USA | t 1.212.290.4700, 'Standing Rock's Next Stand' (*Human Rights Watch*, 9 March 2017) <https://www.hrw.org/news/2017/03/09/standing-rocks-next-stand> accessed 7 October 2017.
[4] ibid.
[5] 'Key Moments In The Dakota Access Pipeline Fight' (n 1).
[6] ibid.
[7] ibid.
[8] ibid.

the Standing Rock Sioux Tribe sued the U.S. Army Corps of Engineers for its failure to consult.[9] And while private security forces clashed with protesters, the Dakota Access, LLC company counter-sued for construction disruption.[10] The Cheyenne Sioux later joined suit with the Standing Rock Sioux, and the legal story continues to twist and appeal its way through the courts.[11] The heightened media attention surrounding the protests at Standing Rock were certainly proportionate to the clashes, however, the escalations should have been avoided had the regulatory protocols and legal protections been respected.

It is worth noting that the corporate actions regarding extractive projects that threaten indigenous rights, as can be seen in Standing Rock, do not materialize in a vacuum. The counter-suit brought filed by the Dakota Access, LLC would not have been filed had the U.S. Army Corps of Engineers followed its duties to properly consult with the tribe prior to project approval. Proper consultation could have resulted in disapproval or re-routing of the planned project, or at the very least a more transparent line of communication between the agency and the tribe. The failure to respect the importance of consultation tainted what has already been an unsavory relationship between government agencies and indigenous communities. In this sense, the state not only failed to prevent the mass protests that ensued, but also failed to prevent the threats to and violations of indigenous rights. While the use of private security forces against protestors is troubling, it is even more troubling that the state failed in its duties to protect indigenous rights in such a way as to lead to this kind of escalation. The additional legal battle the tribe engages with against a corporate entity is damning for the government agency whose role it is to mediate between public and private

[9] ibid.
[10] ibid.
[11] ibid.

interests. It's even more damning that the public interests at stake are those that have been historically and systematically suppressed.

Standing Rock is not only illustrative of indigenous land rights issues and extractive industries in the United States, but is also illustrative of the legacy of settler colonialism throughout the Americas. International solidarity, shown by indigenous groups supporting the protests at Standing Rock, reveals the transnationality of the tensions between extractive industries and indigenous communities. And while the United Nations Declaration on the Rights of Indigenous Peoples codifies the fundamentality of indigenous rights, the authority with which that treaty asserts the rights of indigenous peoples weakens within the specific regional and state contexts. Settler Colonialism throughout the Americas takes a particular form that has been shaped by the region's common colonizers, shared borders, and transnational indigenous peoples. The standoff at Standing Rock is a poignant example of how historic racial subordination continues to inform the relationship between the state and indigenous peoples.

This thesis will analyze and compare the scope and standards with which selected jurisdictions protect indigenous land rights where extractive industries are involved. While indigenous rights are special rights that do not apply to all members of society, they are fundamental, and codified as such in international human rights treaties. The jurisdictions of the Inter-American Court of Human Rights, Canada, and the United States have been selected, as members of the Organization of American States, to highlight different legal frameworks for indigenous rights. The Organization of American States includes all countries is North, Central and South America, for which the American Convention of Human Rights was written. Contemporary cases from the United States, Canadian, and the IACHR jurisdictions concerning indigenous rights and extractive industries, will be analyzed through a theoretical framework

grounded in settler colonialism and environmental racism. In terms of environmental racism, each jurisdiction will be evaluated on recognition, participation, and distribution. This analysis will support the conclusion that settler colonialism and environmental racism enable the conditions out of which these cases arise, and that a jurisprudential engagement with these theories informs progressive case law for indigenous rights and environmental justice.

1.2 Theoretical Framework

The theoretical framework upon which this thesis is based contextualizes, in part, the historical and systemic suppression of indigenous rights within the selected jurisdictions. This framework consists of settler colonialism and environmental racism. While these two theoretical approaches can be dissected separately for the purposes of defining and discussing their particular features and applications, this thesis will show the inseparability of their impact upon the selected indigenous rights cases. Each theory informs each other in practice, but the chicken and the egg question is ruled out by understanding the foundational support that settler colonialism has laid for environmental racism in this context. This relationship then begs for a nuanced understanding of environmental racism as it applies to indigenous land rights cases, which takes particular form as anti-indigenous environmental racism. While environmental justice generally seeks to rectify the wrongs of environmental racism, in all its forms, it can be evaluated on the bases of recognition, participation, and distribution. These evaluations will conclude each case study and be compared across jurisdictions.

1.2.1 Settler Colonialism

In October 2015, the Institute for the Humanities hosted a conference at Simon Fraser University in British Columbia that discussed settler colonialism and its manifestation in genocidal

policies towards indigenous peoples in Canada.[12] The conference was opened by the acknowledgement that the university sits upon tribal lands belonging to the Coastal Salish peoples, and that these Musqueam, Squamish and Tsleil-Waututh territories remain unceded to Canada.[13] This acknowledgement was much more than a ceremonial formality, however, in that this small gesture of recognition is one of the ways in which settler colonialism can be confronted and challenged. The conference was keynoted by historian Roxanne Dunbar-Ortiz's discussion of her 2015 book *An Indigenous Peoples History of the U.S.*[14] One of her previous books, *The Great Sioux Nation,* was consulted at the 1977 United Nations Conference on Indigenous Peoples of the Americas. [15] At the Simon Fraser University conference, she drew connections between the common thread of racial subordination that shaped North American policies towards indigenous peoples, and the genocidal impact that they had.

She argues that settler colonialism is the historic and continued conquest of indigenous peoples' lands and resources, which is presumed by white supremacy and consequently results in genocide. [16] The history of colonization in the Americas was competed for by European empires which derived their right to conquest from papal authority. [17] Indigenous peoples, whose presence and resistance to colonization threatened the success of expanding empires, were subsequently deemed culturally, spiritually, and racially inferior by religious reasoning.[18] These religious justifications were buttressed by imperial prospecting in resource wealth, as colonizers sought to

[12] Roxanne Dunbar-Ortiz, '(29) "Settler-Colonialism and Genocide Policies in North America" - YouTube' (Simon Fraser University, British Columbia, 27 October 2015) <https://www.youtube.com/watch?v=quLRPC0P5PE&t=4578s> accessed 30 October 2017.
[13] ibid.
[14] ibid.
[15] ibid.
[16] ibid.
[17] ibid.
[18] ibid.

secure control over territories. The emerging era of scientific categorization sought to sort and rank the natural world, and was applied to European colonization of the Americas.[19] This scientific categorization was also complicit in justifying racial subordination for the purposes of conquest. According to Dunbar-Ortiz, all these factors give shape to settler colonialism as a force of racial subordination.

The result of this force upon the indigenous peoples, for what has been centuries of colonial control over the Americas, can at best be described as conflict, and at worst as genocide. While many nations globally gained independence from their colonizers in the 20th century, the longer history of 'post-colonialism' in the Americas takes shape in forms of continued state-based colonization of indigenous peoples. Dunbar-Ortiz critiques other contemporary historians of Native American histories for concluding that genocide was not achieved, and therefore not sought, by the United States government. [20] She references the United Nations Convention on the Prevention and Punishment of the Crime of Genocide as defining genocide so clearly as to show that the United States, and other American states, have enacted genocidal policies against its indigenous peoples. [21] She asserts that not every genocidal intention must result in gas chambers to be considered as such, and that the remaining 10% of the indigenous populations that existed prior to European colonization does not show a failure of genocide, but a clear and intentional impact that European colonization, and settler colonialism, has had on indigenous peoples. [22] While this thesis does not attempt to align settler colonialism with genocide for the purpose of the case studies, it is a theoretical consideration in light of the scholarship on the subject.

[19] ibid.
[20] ibid.
[21] ibid.
[22] ibid.

This thesis will more narrowly engage with settler colonialism as a theory that maps the historic and continued conquest of indigenous lands and resources, which is underpinned by racial subordination of indigenous peoples. This subordination includes cultural, spiritual, and environmental concerns of indigenous peoples, as race more broadly encompasses temporal ethnicity. The temporality of indigenous peoples combines space and place, where communal values exist in relation to the lands within which the communities are situated. The key difference between colonialism and settler colonialism is that in post-colonial states, power was often transferred from the colonizers back to the inhabitants of the colony. However, in settler colonial states, power merely shifted from the colonial power to a dominant class of colonial settlers within the colony. These dominant classes, however intermixed with indigenous communities, continued to enforce and benefit from the systemic racial subordination that was set in motion by colonization. The continuity of settler colonialism is what shapes indigenous experiences in the Americas. The experience of being marginalized in their own traditional lands is often what defines treatment of indigenous peoples in the Americas. It is from this standpoint that settler colonialism impacts upon indigenous land rights cases, and from here that the cases will be analyzed.

1.2.2 Environmental Racism and Anti-Indigenous Racism

While settler colonialism has wide reaching social, cultural, and political implications in the Americas, this thesis will focus more specifically on its intersections with environmental racism upon indigenous land rights. Furthermore, this thesis has a North American focus, marked by the specific jurisdiction choices of Canada and the United States. Not all environmental racism, settler colonial, or all indigenous histories will be discussed, and those histories in Latin American countries will be discussed the least. Rather than detailing the vast and varied historical specificities that constitute the many Latin American countries and indigenous peoples within the

IACHR, only the relevant context of the member states involved in selected IACHR cases will be discussed. Additionally, only the relevant histories will be discussed as they apply to the specific cases within each jurisdiction.

It is necessary to situate environmental racism, indigenous peoples' rights and the right to a healthy environment in the broader context of human rights. It is argued that for human rights law to address the environment, it must be formulated globally, due to the common global interest of climate stability and environmental integrity.[23] This common interest approach underscores the principle of the right to a healthy environment as a collective right, which, by its nature, detaches from the traditional configuration of human rights as individual rights. International human rights law provides protection and procedural resources for individual claims.[24] However, according to Paula Spieler, one of the problems with environmental rights is that "[i]nternational environmental law continues to adopt stricter standards, but individuals still lack recourse to claim environmental violations in the regional and universal systems", and the limits of human rights law to address environmental rights violations uniquely impacts upon Indigenous communities.[25] The collective classification of indigenous rights lends itself to the challenge of accessing remedies for violations that intersect along environmental and indigenous rights issues because human rights continue to operate as individual rights.

[23] 'Climate Change and Indigenous Peoples' <http://www.un.org/en/events/indigenousday/pdf/Backgrounder_ClimateChange_FINAL.pdf> accessed 9 March 2017.

[24] 'The Law Oroya Case: The Relationship Between Environmental Degradation and Human Rights Violations' 1 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1148&context=hrbrief> accessed 19 November 2017.

[25] 'The Law Oroya Case: The Relationship Between Environmental Degradation and Human Rights Violations' (n 24).

In this way, framing indigenous people's rights as human rights then appears to create a tension, or at least a confusion, with how to bridge the right to a healthy environment with enforceable human rights. Environmental human rights have been classified in three conceptions that may be useful for building this legal bridge. The first posits environmental rights as "independent of and additional to previously established human rights".[26] The second "embed[s] [it] in existing human rights such as the right to life, the right to health or the right to property."[27] The third 'ecocentric' view "treats such rights as belonging to the environment itself, not to people affected by the environment", which is identified as being a less successful category for litigation.[28] Additionally, treating the environment as a separate entity from the people who depend upon it can in itself lead to injustice, where conservation serves itself rather than the human connection that depends upon environmental conservation. Of the three categories, the second embedded category appears to offer the most useful coalescence of fundamental environmental and human rights.

The IACHR acknowledges the first two conceptions in connection with Indigenous Peoples' rights. It recognizes the tension between indigenous communities who inhabit resource rich lands, and states who wish to develop the resources within those territories.[29] The IACHR implies the right to a healthy environment, though without explicitly codifying it in either the American Declaration or the American Convention, and embeds the right as the relationship

[26] 'Enforcing Environmental Human Rights: Selected Strategies of US NGOs - Viewcontent.Cgi' 2 <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1067&context=njihr> accessed 19 November 2017.
[27] ibid 3.
[28] ibid 4.
[29] 'IACHR Admits Cases Involving Ancestral Land Rights and "Environmental Racism" | International Justice Resource Center' <http://www.ijrcenter.org/2010/04/28/iach-admits-cases-land-rights-environmental-racism/> accessed 24 September 2017.

between environmental integrity and the rights to life, security and physical integrity.[30] The Inter-American system also expects states to protect environmental integrity in order to fulfil their duties to protect human rights, by recognizing a healthy environment as a precondition to enjoying human rights. [31] This precondition naturally impacts upon indigenous peoples as their physical, cultural, spiritual and economic wellbeing depends on not only the health of their environment but also their autonomy over land use.

The North American jurisprudence of Canada and the United States do not appear to theorize environmental racism and environmental rights as holistically as the IACHR does. Conceptualization of environmental rights in the United States and Canada is not as developed, due to the bottom up scheme that environmental justice typically operates by.[32] Community activism has spearheaded environmental protections campaigning, as well as social and environmental justice.[33] In the United States public pressure has resulted in the environmental protection regulations that operate separately from constitutional rights.[34] The situation is similar in Canada, where environmental protection exists as regulations that are detached from its Charter of Rights and Freedoms.[35] Generally, the two jurisdictions tend to engage with the first and third conceptions of environmental rights, independent and separate from fundamental rights and for the benefit of the environment itself, respectively. Although neither North American jurisdiction outlines it jurisprudential principles regarding environmental justice as clearly as the IACHR,

[30] ibid.
[31] ibid.
[32] Robert D Bullard, *Confronting Environmental Racism: Voices from the Grassroots* (South End Press 1993).
[33] David N Pellow and Robert J Brulle, *Power, Justice, and the Environment: A Critical Appraisal of the Environmental Justice Movement* (MIT Press 2005).
[34] Bullard (n 32).
[35] David Boyd, 'The Constitutional Right to a Healthy Environment' [2013] Law Now: Relating Law to Life in Canada.

Canadian courts and legislatures have provided more enlightened principles than the United states related to environmental justice as it relates to indigenous peoples.

More broadly, environmental racism implicates the environmental inequalities suffered by communities of color, but it has particular features when examined through the experiences of indigenous communities. In Robert Bullard's 1993 book *Confronting Environmental Racism*, the landscape of environmental racism in the U.S. is described as having sprouted from the principle of "free land" that white settlers stole from Native Americans.[36] This principle can be seen as a tenant of settler colonialism, which is anchored in the historic and continued conquest of indigenous land and resources. [37] Bullard underscores the notion that whites benefit from racism while people of color experience the costs, and that this model of inequality extends into the mechanics of environmental racism.[38] He explains that in the United States, "institutional racism shaped the economic, political and ecological landscape, and buttressed the exploitation of both land and people", and this includes the institutions that oversee environmental management and decision making.[39] He argues that racism benefits whites in areas of social, economic and political status, including health status as it relates to accessing healthy environments, and that the response to environmental racism necessarily seeks fairness, justice, and equity. [40] The environmental justice movement rightly seeks fairness and equity for communities of color, however, environmental justice for indigenous peoples requires a nuanced approached.

[36] Bullard (n 32).
[37] Daniel Martinez HoSang, Oneka LaBennett and Laura Pulido, *Racial Formation in the Twenty-First Century* (University of California Press 2012).
[38] Bullard (n 32).
[39] ibid 15.
[40] Bullard (n 32).

This nuanced approach then begs for a specific understanding of environmental racism as it applies to indigenous peoples. Just as anti-black racism takes particular shape that is necessary to define for the purposes of combatting it, anti-indigenous environmental racism requires special consideration so as to arrive at appropriate and effective indigenous environmental justice. For example, the barriers that anti-black racism pose to accessing higher education leads to the use of affirmative action as one appropriate form of racial justice. A colorblind approach to justice would see affirmative action as racist, while this is clearly not the case when seen from an informed position on the mechanics of anti-black racism. Although equity and fairness necessarily define justice, decolonized justice for indigenous peoples is not easily found within settler colonial legal frameworks because they fail to capture the communal values that characterize indigenous peoples. In certain respects, the subjectivity of fairness within a settler colonialist framework neglects the special rights that indigenous peoples are entitled to. The continued denial of treaty based land use rights is one of the ways that settler colonial legal frameworks are applied fairly, yet unjustly, towards indigenous peoples. Settler colonial justice, then, is not always appropriate for indigenous claims.

If settler colonial justice does not adequately address indigenous rights, then indigenous environmental justice must be built by different standards. There are three main areas in which environmental justice can be evaluated. According to Schlosberg, those areas are recognition, participation, and distribution.[41] Of those three, Schlosberg argues that recognition, as well as its interdependence in other environmental justice areas, receives the least scholarship. [42] For indigenous groups, this means that when government agencies are determining whether or to grant

[41] David Schlosberg, *Defining Environmental Justice: Theories, Movements, and Nature* (Oxford University Press 2009).
[42] ibid.

extractive permits and concessions to private companies, indigenous groups whose land rights are implicated must first be recognized as being stakeholders in the application process. Once they are recognized as stakeholders in the land and its use, they must also be able to participate in what takes form as environmental impact assessment periods, as well as the open comment periods which allow concerns to be raised regarding the proposed environmental development. Lastly, indigenous groups must also be equitably involved in the distribution of environmental costs and benefits associated with environmental activities. The case studies within each jurisdiction will be evaluated on these three components of environmental justice to determine how and to what extent indigenous communities suffered environmental injustice.

For example, in the United States the killing of seals and whales was prohibited by the Marine Mammal Protection Act in 1975 in an effort to maximize wildlife conservation efforts.[43] This act enabled the effectiveness of conservation efforts targeting declining numbers of seals and whales, but remained in effect after populations regained sustainable levels.[44] For conservation groups, the decline in marine mammal populations was an ecological concern. This had long been a concern for the Makah tribe of northwestern Washington State, whose tribal history and culture depends upon whaling. They were not, however, recognized or consulted in the decision to pass the act. Despite the tribe's attempt to raise awareness for overfishing concerns and implementing calls for sustainable practices, their traditional way of life had been disappearing along with declining whale and seal populations.[45] The tribe started to decline with the influx of European and Euro-American settlers in the 18th century who industrialized and mass-marketed marine

[43] '(29) Whaling Rights from a Makah Perspective - YouTube' <https://www.youtube.com/watch?v=i9Ma68LoYhg> accessed 3 November 2017.
[44] ibid.
[45] ibid.

mammal hunting.[46] The Neah Bay Treaty was signed between the federal government and the tribe in 1855, which was the only federal treaty that recognized tribal whaling rights, among other marine mammal hunting rights.[47] The settler colonial impact upon marine mammal populations caused their rapid decline, which then prompted the conservation effort that excluded the Makah's special rights.

The Makah's whaling and fishing rights have legally teetered between recognition and revocation due to the restrictions imposed by the Marine Mammal Protection Act. The Makah continue to be criticized by conservationists for their traditional marine mammal hunting rights, despite the fact that 1999 was the only year since the 1920's that an authorized group of tribal members successfully hunted a whale, and well after population levels were revived. [48] Several Makah tribal members who attempted an unauthorized whale hunt since then have not only been punished by state authorities, but were also tried in tribal court. [49] The Makah tribe continues to fight for its treaty rights to be recognized. While the prohibition of whaling has little to no impact upon most descendants of settlers, the Makah's culture, history, social hierarchies, spirituality and health have been defined by its tribal identity as whalers.[50] The compounded effects of settler colonial policies upon Native Americans, as well as the disregard for their traditional whaling rights, has resulted in what they experience as an ideological and physical assault on their identity.[51] The disregard for core tribal values in environmental sustainability lead to the overhunting that resulted in the need for an environmental protection act that excluded tribal

[46] ibid.
[47] ibid.
[48] ibid.
[49] ibid.
[50] ibid.
[51] ibid.

concerns. And while the equal application of the Marine Mammal Protection Act upon all citizens is fair within a settler colonial justice framework, the effects of its enactment upon the Makah is immensely unjust due to the tribe's historic and continued dependence on whaling.

This case can be seen through an anti-indigenous environmental racism lens. While environmental racism burdens communities of color with the environmental costs and enables whites to enjoy environmental benefits, anti-indigenous environmental racism burdens indigenous peoples with environmental costs that are wholly damaging to every aspect of their tribal identity. Lack of recognition is often at the root of injustice, which prevents participation and stifles distributive justice. Furthermore, treating the environment as an independent entity bestowed with rights can infringe upon the special land use rights of indigenous peoples. This is the nuanced problem of environmental policies and enforcement that negatively impact on indigenous peoples. Their historic and continued exclusion from environmental decision making is rooted in settler colonialism, and their cultural traditions can be targeted by the very environmental decisions which exclude them.

1.3 Literature Review

While this thesis will at times engage with the theoretical framework from a U.S. centric perspective, the three jurisdictions will be compared for their commonality as members of the Organization of American States. This choice has been made to situate personal interest and experience with U.S. centered indigenous land rights issues within an international context. The appeal of a regional comparison throughout the Americas prioritizes a 'think global, act local' attitude, which has informed much of the environmental advocacy experience that informs the interest in this thesis topic. The value in thinking globally and acting locally is that it frames indigenous land rights, which are unique to their specific geographic territories, within

international support for human rights. Environmental concerns regarding the interconnectivity of ecological and social issues supports the regional choice for this thesis, in that the interconnected nature of physical and temporal space is reflected in indigenous land rights issues in the Americas. The following literature review will clarify the research choices for this thesis, as well as reflect the specific interests in the topic.

The most central piece of literature consulted for this thesis was a recent report from the Inter-American Court of Human Rights, *Indigenous Peoples, Afro-Descent Communities and Natural Resources; Human Rights Protection in the Context of Extraction and Development Activities,* which details much of the regional concerns addressed in the following chapters. The specific rights involved will be expanded upon in the second chapter on the IACHR jurisdiction. This report explains the Inter-American legal framework for indigenous rights in the Americas, while highlighting the specific features of indigenous land rights issues where extractive industries, natural resources, and development activities occur. The second most influential piece of literature is David Pellow and Robert Brulle's 2005 book *Power, Justice, and the Environment* on environmental justice activism, which provides historical background on the topic and contextualizes the judicial role within it, mostly in the United States. Their book examines the unique position of environmental issues and regulation in the United States, and their impact upon communities of color. While their book superficially includes Native American environmental activism issues, the book focuses more broadly on non-indigenous communities of color. Daniel Martinez HoSang, Oneka LaBennet and Laura Pulido's *Racial Formation in the 21st Century* clarifies the connection between white supremacy and settler colonialism, offering tools to decolonize discussions of race. The culmination of these literatures has informed and inspired the research upon which this thesis has developed.

The IACHR report *Indigenous Peoples, Afro-Descent Communities and Natural Resources; Human Rights Protection in the Context of Extraction and Development Activities* highlights the lack of state supervision over extractive companies in protecting indigenous and afro-descent rights, including six main components by which states are obliged to protect indigenous and afro-descent rights in this context. The inclusion of afro-descent communities as indigenous peoples recognizes the unique historical, social, and cultural forces that have shaped distinct ethnic-cultural groups of afro-descent in the Americas, which, for the purposes of the report, and of the Inter-American Convention on Human Rights, are considered indigenous.[52] The term tribal peoples then includes indigenous and afro-descendant communities who share historic cultural values in collective land and natural resource ownership, for whom cultural, social and economic rights depend upon a healthy environment.[53] Because the enjoyment of their rights depends upon environmental health and autonomy over resources, the report focused on the state's obligations in the context of extraction and development.[54] The report then outlined the main areas of state responsibility to tribal communities.

The report's six components of state obligations were outlined as i) the duty to adopt the proper legal framework ii) the obligation to prevent violations iii) to abide by the mandate to supervise and monitor corporate industrial activities iv) to ensure that there are mechanisms that provide information and promote participation of indigenous peoples v) to prevent corporate illegal activity and violence vi) to guarantee access to justice in the form of investigation, punishment, and reparation where violations occur.[55] These components are not additional state

[52] 'ExtractiveIndustries2016.Pdf' <http://www.oas.org/en/iachr/reports/pdfs/ExtractiveIndustries2016.pdf> accessed 31 July 2017.
[53] ibid.
[54] ibid.
[55] ibid.

obligations, but basic responsibilities they have agreed to as OAS member states who have signed the Inter-American Convention of Human Rights. [56] In essence, the IACHR report condemns the violations that have occurred for tribal peoples, especially where extraction and development are involved.

The IACHR highlights several major issues, in addition to emphasizing the need for states to fulfill their responsibilities to the before mentioned components to curtail what is a regional problem of extraction and development that infringes upon the rights of tribal peoples. These major issues include economic globalization which has intensified the activity of foreign companies that affects tribal rights, the barriers to justice and the challenges in providing redress for violations. [57] While the report does not necessarily suggest any new approaches to addressing these issues, aside from enforcing the obligations with which states have already agreed to follow with the IACHR, it does highlight the importance of supervision and monitoring of corporate activities so as to prevent violations. It becomes clear, then, that while there is a need for increased pressure upon economic policies to synchronize with human rights, the IACHR abstains from involving itself in state economic policies, and focuses on state obligations. Rather than developing the newly emerging human rights interests in economic policies, states would be most and more immediately impactful upon tribal rights by fulfilling the six central components of its obligations, as outlined by the IACHR.

While the IACHR report is useful for understanding the international, yet regional, state obligations towards protecting indigenous rights where extraction is involved, David Pellow and Robert Brulle's 2005 book *Power, Justice, and the Environment* situates environmental justice and

[56] ibid.
[57] ibid.

racism more specifically within a U.S. context. They argue that the environmental justice movement "emerges as a result of political discontent with intensifying trends of the expansion of capital with a simultaneous decrease in government intervention and regulation".[58] A key component of the environmental justice movement is addressing environmental racism, and they suggest "that in the U.S. context race and racism are useful frames for understanding how pollution harms from the energy sector are socially distributed, as well as the larger political meaning of community activism in response to this pollution."[59] They are critical of the notion that energy deregulation is race-neutral and challenge the idea that energy companies or state bodies know best how to enact sound energy policy.[60] They explain how energy business in U.S. history plays a large role in the development of the relationship between American corporations, politics, economics and consumer culture.[61] With the state in a less proactive position to protect the environment, or the communities who suffer as a result of harm against it, the burden is heavy upon non-state actors to protect fundamental rights related to the environment. While this literature is reflective of U.S. experiences, it can be applied to the jurisdiction choices of this thesis, as the IACHR report reveals the trending environmentally racist impact of extraction upon tribal peoples.

HoSang, LaBennet and Pulido's *Racial Formation in the 21st Century* then provides clarification on U.S. notions of race, and thus environmental racism, through the lens of settler colonialism. This clarification can be used to distinguish environmental racism for indigenous peoples by examining the connections between white supremacy and settler colonialism. [62] Their arguments align orientalism with war, slavery with capitalism, and settler colonialism with

[58] Pellow and Brulle (n 33) 101.
[59] ibid 101–2.
[60] Pellow and Brulle (n 33).
[61] ibid.
[62] HoSang, LaBennett and Pulido (n 37).

genocide.[63] This connection between settler colonialism and genocide is based upon by the ways in which genocide attempts to eliminate a group of people, including means of cultural and historical extermination, and that this benefits settler colonialism by weakening indigenous barriers to control over land and resources. [64] The ways in which genocide is engaged as a component of settler colonialism in relation to white supremacy is that the settlers are the superior race endowed with a divine right to claim the land. This racial hierarchy subverted indigenous peoples, and the continued conquest of land and resources benefits from a continued denial of history, cultural values, and treaty rights.[65] While this thesis is more concerned with successful pathways within existing settler colonial legal frameworks for providing indigenous groups with justice, it does acknowledge the link between genocide and settler colonialism in the Americas.

1.4 Methodology

The selection of this thesis topic sprouted from personal interest and experience in environmental advocacy and social justice. Growing up in an area with early education programs centered on regional environmental connectivity and ecological health has shaped personal concern for environmental protection. Volunteer experience in environmental and social justice circles then informed those concerns with the racial and class distinctions that often characterize the kinds of communities that are most effected by environmental harm. In a region that prioritizes early environmental protection education, it is unfortunate that historical and contemporary indigenous voices are marginalized from the efforts. In recent years this is beginning to change, and this thesis is inspired to make a small yet privileged contribution towards highlighting the human rights concerns involved in indigenous land rights issues. The northern and western North

[63] ibid.
[64] ibid.
[65] ibid.

American focus of cases analyzed in this thesis is no accident, as it flows from regional and local ecological connectivity values. The thesis topic was chosen for these reasons.

And from there, the research has been conducted in three main areas. The first revolves around the legal frameworks of the jurisdictions, the second being the case selection, and the third being general topic information. For legal frameworks, online jurisdiction sources, as well as library databases were consulted. Case selections have been done by jurisdiction, filtered by the involvement of indigenous peoples and extractive industries. Extraction includes, for the purposes of this thesis, logging, mining, oil drilling, and extractive industries include corporate activities or development involved in extraction. The legal frameworks for each jurisdiction was expanded upon by the rights and issues that were decided upon in the court cases. The general information for the thesis and each jurisdiction has accumulated from a variety of databases, search engines, and libraries.

The initial research sought court cases from the highest judicial authority within each jurisdiction. The search criteria for cases consisted of indigenous land rights and extraction or extractive industries. Extraction, for the purpose of this thesis, includes logging, mining, and oil drilling, and extractive industries include the development necessary to extract, process, and transport those kinds of extracted resources. These criteria have ruled out several cases, such as a U.S. case which considered wind a natural resource, of which building wind mills constituted an extractive industry. It has also excluded an Inter-American Court of Human Rights case which involved Canadian owned extractive companies polluting the rainforests in Ecuador, due to the non-indigenous plaintiffs and non-indigenous rights claimed. U.S. Supreme Court cases were originally sought for this thesis, however, the low number of cases heard by the Court drastically

limited the number of cases that met the research criteria for this thesis. For this reason, federal court cases from the United States were included.

The research relied heavily upon several online legal databases. These included the National Indian Law Library, the IACHR online case archives, and the Simon Fraser University legal database, amongst others. The Supreme Court online databases for Canada and the United States were initially consulted, however they did not yield results as specific or as user friendly as the previously mentioned databases. Hein Online, Lexis Nexus and West Law, Central European University as well as the Seattle University Law School's legal databases were also heavily relied upon for the research conducted for case and non-case related sources.

The jurisdictions were chosen for a combination of academic and personal interests. Academic guidelines have structured the choice to compare three jurisdictions. The IACHR was chosen to explore a personal curiosity in the regional human rights regime in the Americas, of which my own country abstains from. Studying the success of and respect for decisions from the European Court of Human Rights inspired this personal curiosity towards the IACHR. It appears that the ECHR attempts to unite domestic laws within member states to respect human rights. While the European human rights system is by no means perfect, it did peek a personal interest as to how the Inter-American system functions, and how domestic legal and judicial frameworks compare to international ones.

Chapter 2: Canada

2.1 Chapter Introduction

On paper, Canada's national statutory and international treaty obligations leave little space for indigenous rights abuses. The Canadian indigenous rights movement, however, calls upon all levels of government and civil society to recognize the unresolved, ongoing, and emerging conflicts regarding the violation of fundamental rights of indigenous communities. The movement is shaped by claiming treaty rights, land rights, and raising awareness of environmental health concerns. The environmental damages caused by logging and mining industries in Canada disproportionately affects indigenous lands and communities, yet the movement attempts to bridge the gap in concern for environmental health by calling attention to the interconnected nature of environmental harm, and the inherent shared responsibility to prevent it. Because environmental costs are disproportionately experienced by indigenous communities, the indigenous rights movement seeks to undo the burden of responsibility for environmental justice by calling upon the state to respect its obligations.

Their enjoyment of treaty rights, constitutional rights, and internationally recognized human rights cannot materialize while the physical embodiment of those rights is limited by unhealthy, inaccessible and threatened environmental spaces. While extractive industries play an active role in causing the environmental harm that limits the enjoyment of those rights, it's the state's responsibility to work within its regional, national and international frameworks to prevent rights abuses or environmental harm from occurring. As an IACHR member, Canada must be informed of the principles with which the Commission has outlined state responsibilities towards protecting indigenous rights in the face of extraction. While there may be international pressure to

do so, Canada has also made its own domestic efforts at bridging gaps in protections for indigenous rights.

One of Canada's national frameworks that clarifies its obligations towards protecting indigenous rights is the *Constitution Act of 1982.*[66] This marks an important legal step towards bridging the gap between the State's treatment of First Nations and their codified treaty rights. Part II of the act concerns the rights of aboriginal peoples of Canada, and declares in Section 35 that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".[67] In light of Schlosberg's three components of environmental justice, it is encouraging that the principle of recognition has been underscored in Canadian federal law. It also codifies that the principle of participation must be respected by conferring with First Nations representatives prior to amending or changing the act. These principles, as discussed in the case studies, set vital standards for state obligations towards indigenous rights.

However, in practice the relationships forged between indigenous communities, regional and national government bodies and extractive industries often fail to strike a fair balance between environmental costs and benefits. This imbalance disproportionately affects indigenous communities and convolutes the assignment of accountability for rights abuses. The Parkland Institute, based in Alberta, researches political economy in Canada and examines the policy climate surrounding national and regional issues, especially where the political discourse is dominated by corporate power and market oriented values.[68] The institute advocates for indigenous

[66] 'The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11' <https://www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html> accessed 27 September 2017.
[67] ibid.
[68] 'Ten Things to Know about Indigenous People and Resource Extraction in Alberta' (*Parkland Institute*) <http://www.parklandinstitute.ca/ten_things_to_know_about_indigenous_people_and_resource_extraction_in_alberta> accessed 5 August 2017.

rights, and claims that 'we are all treaty people', so as to share the responsibility in respecting rights amongst indigenous and settler decedents, regional and national governments, private and public actors.[69] Too often, indigenous communities are burdened with the environmental and legal costs of claiming their rights.

The Alberta based *Treaty Alliance Against Tar Sands Expansion* embodies that claim that 'we are all treaty people', with its proclamation to resist environmentally hazardous and racist development projects, by buttressing resistance with indigenous and non-indigenous actors.[70] The treaty unites First Nations and allies against similar development and extraction projects, while raising awareness about the widespread effects of environmental damage caused by this kind of activity, as well as the specific harm done to indigenous communities. This kind of action embodies the indigenous rights movement in Canada by seeking to forge alliances that share responsibility in protecting the environment, as well as recognizing the special historical, cultural, and legal space that indigenous land rights are situated in.

There are several Canadian Supreme Court cases that highlight this special and precarious situation. These cases typically involve logging and mining industries and their impairment of the enjoyment of land rights. While the cases to be discussed by no means constitute an exhaustive list, the chosen cases are meant to highlight a legal theme throughout contemporary Canadian indigenous land rights claims. Each case will be discussed in terms of the environmental costs and benefits, the historical relevance of treaties and legislation, and the broader environmental justice

[69] ibid.
[70] ibid.

implications. The selected cases are also meant to highlight successful judicial approaches towards respecting indigenous rights, and to discuss one unsuccessful example.

2.2 Case Studies

2.2.1 Taku River Tlingit First Nation v. B.C.

In 2004, the Supreme Court of Canada decided the case of Taku River Tlingit First Nation v. British Columbia. In Northwestern B.C., Redfern Resources mining company had been requesting permission from the provincial government to build a road that would have cut through Taku River Tlingit First Nation land. Although the Taku River Tlingit First Nation was consulted during the environmental assessment period, in accordance with the *Environmental Assessment Act*, their objection to the road construction project had little impact. Their objection was denied by the granting of the company's construction permit. The First Nation filed a claim against the Province of B.C., and the case was decided in their favor.[71]

It is significant to note that this mining company had previously operated a mine in the province, and had intended to reopen with the construction of the access road. That the construction permit was granted by the Province of B.C., even after the Taku River Tlingit raised concerns during the environmental assessment period, shows an embedded institutional reasoning that disregards indigenous land rights. That reasoning illustrated an intersection of institutionalized and environmental racism that normalizes environmental costs for disenfranchised levels of society. The Taku River Tlingit First Nation was well aware of how environmental issues, related to mining operations in the territory, affect their land rights. This experience gives weight to the objections they raised during the assessment period. The disregard for these concerns not only stained the provincial government's relationship with the First Nation, but it also violated Canadian law. The

[71] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] SCC 29146, 3 SCR 550.

Environmental Assessment Act, Section 5, states that "with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on i) health and socio-economic conditions, ii) physical and cultural heritage, iii) the current use of lands and resources for traditional purposes, or iv) any structure, site, or thing that is of historical, archaeological, paleontological, or architectural significance" must be carefully considered and evaluated during the assessment period. [72] The environmental assessment period is meant to address concerns regarding activity that produces effects within these categories. The Taku River Tlingit First Nation's objections fell within the confines of the act's listed categories. Despite this, the province violated the act's mandate to act and exercise power over environmental management with precaution, and with the interests of aboriginal peoples.

In addition to finding a violation of the *Environmental Assessment Act* and *The Constitution Act of 1982*, the court considered whether the province's permit granting was inconsistent with the national Canadian mandate to respect aboriginal rights. Provincial policies must be consistent with the national mandate to respect indigenous rights, and to reconcile treaty rights with land title, even if the issue of legal land title has not yet been proven.[73] This is especially significant in the Taku River case, as the First Nation was engaged in the legal process of official land title recognition while Redfern Resources sought out the permit.[74] Although B.C. did fulfil its consultation duties, it failed to fulfil its duties to appropriately consider the concerns raised by the Taku River Tlingit during the environmental assessment period. The failure to do so may have been painted by the ongoing process of official land title acquisition of the Taku River Tlingit First Nation. The British Colombian Province regarded all lands within province territory as Crown Land, or National

[72] ibid.
[73] ibid.
[74] ibid.

Canadian property. Despite their authority over province lands, their duty to consult with First Nations regarding development activity, such as road building, must be consistent with a respect to indigenous peoples, an assumption of land title belonging to the First Nation, and a mandate to proceed in administrative duties with respect to aboriginal title. It was apparent to the Court that the province was taking the lack of official land title as a means to delegitimize the indigenous community's objections, and to disregard these interests.

In *Taku River First Nations v. B.C.*, the Court examined whether the provincial government of B.C. acted with respect to their obligations towards indigenous peoples. At face value, B.C. followed the *Environmental Assessment Act's* policy of consultation. This consultation was meant to engage participation with the affected indigenous community, prior to the activity in question that would change or impact their environment. The province then exercised their authority over lands and acted within their regional authority to issue a building permit. The disconnect between these two processes is what attracted the Court's attention. There are several issues that the Court considered when deciding whether the provincial government of B.C. acted within its authority *and* with respect to aboriginal rights. Official land title had not yet been recognized for the Taku River First Nation over the territory in question. According to the *Constitution Act of 1982*, aboriginal land title shall be assumed as such for aboriginal peoples without full and final legal settlement of the issue.[75] This applies to the Taku River First Nation, whose ongoing process of land title recognition was not yet settled, yet their involvement and consultation during the environmental assessment period of the mining company's proposed road construction effected their land rights, nonetheless.

[75] ibid.

Another important consideration was the scope of the impact of the construction project. The province weighed the unofficial land title, and relatively small area of land to be affected by construction, heavily in favor of permitting the road. Conversely, the Taku River First Nation raised concerns that the road would negatively impact an ecologically sensitive portion of their territory, subsequently impairing their enjoyment of land use rights.[76] They also disapproved of the road for its potential to invite future development of the area just outside Taku River Tlingit land, further and irreversibly impacting the ecological integrity of the indigenous community.[77] More broadly, the large scale environmental impact of mining activities in general has proven to be cause for concern, and the Taku River First Nation's objections to Redfern Resource's road construction fall within the widespread resistance to extractive industries and their harmful environmental impact.

The *Taku River* case encompasses several positive gains for indigenous land rights in Canada. First, the decision holds provincial governments accountable to national mandates that have outlined the principles with which aboriginal land rights shall be regarded. Second, it creates a meaningful standard by which environmental assessment periods give power to the agency of indigenous communities' concerns, by ensuring that those concerns are respected and applied to administrative decisions. The case also underscored how provincial governments shall proceed in their official duties while working under the assumption of aboriginal land title where claimed but not yet legally settled. The assumption of aboriginal land title ensures that issues, such as environmental assessment period contributions, are not disregarded for lack of legal land title. In this way it can be seen just how significant the issue of recognition is in these cases, as the denial

[76] ibid.
[77] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] SCC 29146, 3 SCR 550.

of proper recognition inhibits participation and distributional justice. The Court highlighted this issue by referring the provincial government's weighting of unofficial land title against the legitimacy of the Taku River Tlingit's objections. As these various issues coalesced under the Court's decision, they came to represent how a broader judicial approach that synchronizes treaty, provincial, and national legal instruments can benefit indigenous land rights. This benefit not only includes the protection of indigenous land rights, but also undoes the burden of disproportionate environmental and legal costs for indigenous communities.

2.2.2 Grassy Narrows First Nation v. Ontario

In 2014, the Supreme Court of Canada decided *Grassy Narrows First Nation v. Ontario*. This case involved the Grassy Narrows First Nation's claims against the provincial government of Ontario for granting a logging license to a private company. This license allowed a paper and pulp company to conduct clear cutting operations on Keewatin lands, which have been used by Grassy Narrows First Nation for harvesting.[78] Grassy Narrows harvesting rights have been recognized since Treaty 3 was signed in 1873 between Canada and Ojibway chiefs, of whom Grassy Narrows First Nation descends from. In 1912, territory including Keewatin lands, were transferred from Canadian to Ontario control. The province issued the logging license in 1997 and Grassy Narrows First Nation filed a claim against Ontario in 2005. [79]

The case settled several issues spanning across several legal documents. Treaty 3, which was signed between the Ojibway chiefs and the federal government of Canada, recognized the aboriginal harvesting rights of the indigenous signatory within Northeastern Ontario and Eastern

[78] *Grassy Narrows First Nation v Ontario (Natural Resources)* [2014] SCC 35379, 2 SCR 447.
[79] ibid.

Manitoba.[80] These harvesting rights, which included hunting, fishing, and trapping on Keewatin lands, were to be respected until the lands were 'taken up'. In the treaty, 'taking up' lands involves the use, management, or sale of lands by the relevant government, which at the time was the federal government of Canada.[81] In 1912, when the lands were transferred to Ontario, the province assumed this authority to 'take up' lands.[82] The authority of provincial power over land property is addressed in Section 109 of the *Constitution Act of 1867,* stating that "[a]ll lands…belonging to the several Provinces…and all Sums then due or payable for such lands…shall belong to the several Provinces…in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same." [83] As seen in the 2004 Taku River case, Section 35 of the *1982 Constitution Act* clearly provides the principle of respect for aboriginal rights. In this case, Ontario's authority over land management is subject to Grassy Narrows First Nation interests.

In weighing these legal spheres against the provincial authority, the Court found that, while Ontario does have the power to 'take up' lands by way of granting logging licenses, this power depends upon the respect of indigenous land rights. The clear cutting operations that were permitted by the provincial government rendered Grassy Narrows First Nation's harvesting rights ineffective. Harvesting rights are void of meaning if ecological damages alter or ruin the environments upon which traditional land uses depend. The loss of forest removes the ability to enjoy access to the very subsistence of which the indigenous community was entitled. The Court

[80] ibid.
[81] ibid.
[82] ibid.
[83] 'The Constitution Act, 1867, 30 & 31 Vict, c 3' <https://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html#VIII__REVENUES__DEBTS__ASSETS__TAXATION__139057> accessed 1 October 2017.

recognized the impairment to Treaty 3 rights that the license issuance created. The Court also underscored the importance of provincial responsibility in consulting the relevant legal instruments that frame indigenous rights.

It is also important to consider the weight of environmental costs and the legacy of settler colonialism upon the Grassy Narrows First Nation. The Court referenced the historical context out of which Treaty 3 was negotiated between the Ojibway peoples and the Crown. It explained that with westward expansion of non-indigenous Canadians, there were concerns to be settled over migration, territory, and development. The disputes that arose between indigenous peoples and settlers often turned violent, and Canada wanted to ensure safe passage for settlers through Ojibway territory. The province of what is now British Colombia had agreed to join the confederation of Canada only if the state would construct a railway from coast to coast. The railway as a bargaining tool would grant Canada access to British Colombia's resource wealth, illustrating the role that development and extraction plays in settler colonialism.

The resulting treaty not only negotiated territory and land use, but also transferred control over Ojibway lands to the Crown. The transfer in land control was checked by the agreement that Ojibway peoples retained their entitlement to traditional harvesting on the Keewatin lands. This transfer in land ownership laid the foundation for the construction of the transcontinental railway that would increase and streamline westward expansion. While this treaty outlined specific rights for the Ojibway peoples regarding land use, it primarily assigned federal ownership over the lands. The Ojibway peoples did not enjoy the benefits of westward expansion or transcontinental rail travel, and have had the ecological integrity of their lands compromised with expansion and development. Contemporary land management issues raise similar concerns over disparities in

who experiences environmental costs and benefits. Settler colonialism and environmental racism justifies the continual burden of costs placed upon indigenous peoples.

This case reiterates the role of provincial responsibility towards indigenous communities in Canada in actively recognizing First Nations and their special rights. It also makes the appropriate effort of contextualizing the historical relevance of the legal documents in question, and the legacy of that history upon the legal issues raised. While treaty rights and legislative history complicate the legal landscape over which indigenous land rights and provincial land management engage with one another, it is the reality of the landscape nonetheless. The Court clarifies how these governmental powers, aboriginal rights, and private interests must be balanced. This clarification helps to lay the foundation for preventing and settling future disputes regarding land rights, which underscores the importance and fundamentality of recognition. The Court's ruling then appears to align with the principles of environmental justice.

2.2.3 Ermineskin Indian Band and Nation v. Canada

The Supreme Court of Canada decided the case of *Ermineskin Indian Band and Nation v. Canada* in 2009. This case explores the monetary issues that arise from extraction on indigenous territory under federal land management. Many indigenous land rights cases often oppose development and extraction activities that threaten environmental health. This opposition is typically done in an effort to preserve environmental health for the enjoyment of land use rights dependent upon it. However, the *Ermineskin Indian Band and Nation v. Canada* case explores the conflict that arose over a more literal balance between environmental costs and benefits. The Ermineskin Indian Band and Nation filed a claim against Canada for allegedly enriching itself rather than investing revenues raised from mining activity on indigenous lands.

The Ermineskin Indian Band and Nation, as recognized by the Court and the State, falls under the Treaty 6 agreement of 1876. This Treaty, amongst its lengthy conditions, reserved land use rights for the band in return for a surrender of territory, rights and privileges.[84] The agreement essentially transformed the indigenous communities of the Treaty 6 territory into subjects of the Queen. The 1985 *Indian Act* defines an Indian band as "a body of Indians a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951, b) for whose use and benefit in common, moneys are held in Her Majesty, or b) declared by a Governor in Council to be a band for the purposes of this Act".[85] This distinction in land title allowed for the Crown (and later, Canada) to negotiate with private companies over extractive activity within the indigenous lands. [86] The revenue that resulted in extracted resources was held in trust by the Crown, with interest being paid to the indigenous groups.

The claims brought by Ermineskin Indian Band and Nation challenged Canada's role in financial and land managements. The claims argued that interest paid to the band was done so conveniently for Crown enrichment; essentially claiming that the State was paying less interest to the Band than they had accrued in trust. The Band also claimed that the State should have invested on the Band's behalf, so as to ensure a growth in revenue for the Band. [87] These accusations were grounded in the concern that the State control over land management and revenue from extracted

[84] Government of Canada; Indigenous and Northern Affairs Canada; Communications Branch, 'Treaty Guide to Treaty No. 6 (1876)' (3 November 2008) <http://www.aadnc-aandc.gc.ca/eng/1100100028702/1100100028704> accessed 1 October 2017.
[85] 'Indian Act, RSC 1985, c I-5' s 2.1 <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-i-5/latest/rsc-1985-c-i-5.html> accessed 1 October 2017.
[86] *Ermineskin Indian Band and Nation v Canada* [2009] SCC 31869; 31875, 1 SCR 222.
[87] ibid.

resources was done so without consideration or concern for the Band's financial status. The Court did not find violations to support these claims, however.

The Court arrived at the conclusion that the State, under Treaty 6 and the *Indian Act*, was under no obligation to invest funds from resource revenue. In fact, according to the Treaty, the *Indian Act*, the *Indian Oil and Gas Act*, and the *Financial Administration Act*, the State was restricted in conducting investments on behalf of indigenous groups.[88] The Court also decided that the State was not under the obligation to act in accordance with section 35 of the *Constitution Act of 1982*, as it was inapplicable. [89] The decision that was found in the State's favor reveals some important lessons for the judicial approach to indigenous rights.

That this case primarily consists of financial concerns shifts the focus of the arguments away from indigenous rights over land use and towards regulatory and financial legislation. Although the case concerned extractive industries and the question of whether or not indigenous rights were being violated by the state, the case had to address a different set of legal issues. The petitioning band was without a doubt concerned that the State was reaping the financial benefits in revenue raised from resource extraction, at the detriment of indigenous financial growth. This concern of financial misconduct was not supported by the Treaty rights, nor the Constitution Act's principle of respect of aboriginal rights. The Court underlined that investment and interest rights as claimed by the petitioning band do not exist within the cited legal instruments.

While the indigenous petitioner was seeking financial retribution for assumed violations of the State, their case instead brought legal clarity to State financial management. Nonetheless, there

[88] ibid.
[89] ibid.

is also an environmental justice lesson to be learned from this case. While the indigenous group clearly had recognition, due to the fact that they had an explicitly financial relationship with the state regarding extractive activities, their participation in the financial decisions were limited, and thus they felt as though they were not equitably sharing in the distribution of financial benefit from environmental exploitation. This clarity should be taken as a cue, to future indigenous rights litigation, that a focus on financial and regulatory legislation may not benefit the indigenous rights movement.

As investment benefits are neither Treaty nor Charter Rights, the band's concern for mistreatment was misrepresented as a financial issue. Had the case focused on the environmental and land use issues inevitably linked to oil and gas extraction in the territory, the Court may have found violations similar to the above discussed cases. This case plays an important role in representing the complicated legal disputes that arise within the relationship between First Nations and the federal government. While the perceived financial injustice affects the petitioner, it can be framed as an issue of participation in the environmental decision making, which extends beyond the bureaus and into the bank accounts of indigenous communities. These complicated financial relationships between First Nations and the state, nonetheless, still fall within the environmental justice framework.

2.3 Conclusion

While the situation for indigenous peoples in Canada is far from perfect, the above cases are meant to illustrate some positive examples of indigenous rights litigation. The challenges to local government brought by indigenous petitioners shows not only the important role of regional litigation, but also of the ability of the judicial system to strengthen and clarify the relationship between indigenous groups and provincial governments. With a backbone of local level indigenous

land rights litigation, future legal arguments and courts have a foundation from which to continue to rule in favor of indigenous rights. The deepened understanding that provincial administration gathers from these rulings will continue to inform future actions in relation to indigenous land rights.

The special nature of indigenous land rights is also given due attention with these cases. Because the Court has read treaties in conjunction with various legal instruments, it has legitimized the indigenous right movement's call to respect the treaties. The tendency to nullify centuries old treaties through the normalization of institutionalized and environmental racism is being consciously reworked with the Court's rulings. Not only are these rulings important for indigenous rights, but also for environmental protection in connection to the enjoyment of other rights. The connection between indigenous land rights and environmental health is such that those rights are meaningless without the preservation of nature. This relationship, though directly related to contemporary indigenous rights, may offer insights into the future of fundamental rights where environmental health is concerned.

The environmental justice implications from these cases seem to present Canada in a relatively positive engagement with recognition. Because the cases presupposed proper recognition, the *Taku River* case, for example, shows how an attempt to delegitimize or trivialize First Nations recognition is not sustained by the Court. The Ermineskin Band's recognition enabled their financial relationship (however disputed) with the state. In the *Grassy Narrows* case, the Court focused on streamlining recognition within different levels of government under concise principles. However, in the United States, as will be discussed later, the issue of official recognition continues to keep indigenous communities from claiming their special rights.

Chapter 3: United States

3.1 Introduction

In this chapter, the term 'indigenous' will be used interchangeably with 'Native American' and 'Indian'. This choice is colored by a complex, overlapping, contradictory, and opaque system of legal frameworks which also uses the terms interchangeably, as the varying term preference for self-identification. This complexity is reflected in the labyrinth of Native American land rights, treaties, and policies. It obscures efforts in preventing violations, litigating when violations and seeking redress. Often, Native American rights are reserved for federally recognized sovereign tribes. For Native American communities that are embroiled in the lengthy judicial process of applying for federal recognition, they cannot claim their special rights. Even when federal recognition and its entitlements are secured, tribes are met with additional challenges towards claiming their rights. The myriad of bureaucratic authorities that deal with Native American land rights issues are often mislead in their duties. The large number of government bodies that exercise authority over land rights issues may not operate under the same guiding principles, or the same regulations. This maze of bureaucracy contributes to the challenge of litigating rights violations. The backlog in Supreme Court hearings has left ongoing legal conflicts in the dockets of dispute, allowing for continued violation without redress. Few cases have been decided favorably for Native American lands rights in the past decade, which has a discouraging impact on litigation efforts. All of these issues create a disheartening landscape for Native American land rights.

This disheartening landscape can be seen through the thematic lenses of this thesis; settler colonialism, and environmental racism. With European conquest of territories that now constitute

the United States, Native Americans were subordinated to the ideals of 'manifest destiny'.[90] The conflict and violence that accompanied westward expansion has stained the trajectory of Native American land rights. Westward expansion not only entailed individual homesteads and organized communities of settlers on Native American lands, but also the industries of resource extraction and development that served those new settlements and drew in more settlers.[91] Extractive industries became an intrusive sidekick to settler colonialism, adding value to lands that were already desired by the United States, and adding to the tensions between the state, the tribes, and the settlers.[92] Mining and logging, as well as the development that accompanied them, damaged ecologies that Native Americans depended on for sustenance and wellbeing.[93] The wealth associated with these industries exacerbated the increased scramble for settlement.

The era of treaties between the federal government and tribes pushed Native Americans onto reservations, and reserved land use rights for off-reservation lands. Environmental harm from extraction and development was disproportionately experienced by Native Americans as their land use territories were targeted for extraction. This harm from extraction and settlement affects the integrity of the environments that tribes depend on for cultural, nutritional, and economic wellbeing. This environmental racism continues to impact Native Americans and the enjoyment of their land rights.

[90] Dunbar-Ortiz (n 12).
[91] ibid.
[92] 'Indigenous Peoples, Extractive Industries, and Human Rights' <http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534980/EXPO_STU(2014)534980_EN.pdf> accessed 23 May 2017.
[93] 'American Indians of the Pacific Northwest Collection ': <http://content.lib.washington.edu/aipnw/marr.html#intro> accessed 3 March 2017.

3.2 Settler Colonialism in the United States

A broader history of settler colonialism in the United States lends itself to understanding the context in which Native Americans' rights are framed, and how this framework enables a pattern of rights violations. After an era of treaty negotiations between the federal government and Native American tribes in the 18th and 19th centuries, territory was assigned so as to separate Native land from settlers, and arguably benefit the U.S. [94] This separation did several key things. First, and perhaps most importantly, it assigned land ownership over specific territories and outlined land use privileges for Native Americans. [95] Second, it required any future land transfers from Native Americans to be done with federal approval. [96] This means that the U.S. has a trustee-like authority over Native American territories, and has the power makes land management decisions, and should do so with tribal welfare in mind. [97] Thirdly, in exchange for transfer of land to the U.S., Native Americans were pushed onto reservations and allowed land use rights such as fishing, hunting, and trapping within the transferred territory. [98] Lastly, these treaties obliged the United States to protect these tribal rights. [99] These common treaty features characterize the agreements that were codified between Native Americans Tribes as sovereign nations and the United States government. It is important to consider, however, that these negotiations were often done under pressure, amidst violence with settlers, epidemics of new diseases, and after military dominance

[94] 'RWI_Native_American_Lands_2011.Pdf' <https://resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf#page=5&zoom=auto,-15,579> accessed 24 September 2017.
[95] 'RWI_Native_American_Lands_2011.Pdf' <https://resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf#page=5&zoom=auto,-15,579> accessed 4 October 2017.
[96] 'RWI_Native_American_Lands_2011.Pdf' (n 94).
[97] 'RWI_Native_American_Lands_2011.Pdf' (n 95).
[98] 'RWI_Native_American_Lands_2011.Pdf' (n 94).
[99] Jin Lee, 'Improving Native American Tribes' Voice in International Climate Change Negotiations' (2017) 5 American Indian Law Journal <http://digitalcommons.law.seattleu.edu/ailj/vol5/iss2/7>.

by the U.S. These treaties can be seen as a last resort by Native American tribes to secure peace, rights and sovereignty.

Although Native American tribes entered into treaty negotiations with the federal government as sovereign nations, the post-treaty era made gains in undermining that sovereignty. The Marshall Court of the 19th century played a particularly interesting role in this era. Disputes over treaty violations escalated as land use was interrupted, federal obligations were not met, and conditions for Native Americans were declining. When a culmination of these factors was brought as a case before the Supreme Court, the decision of *Johnson v. M'Intosh* made a lasting impact on Native American land rights.[100] Supreme Court Justice Marshall noted in the *Johnson* case that Native American lands must be voluntarily acquired, and underscored the importance of respect for the treaties in the process of acquisition. [101]While the decision can be read to have underscored the power of treaties, it had a more significant impact on how sovereignty and property rights of Native Americans were regarded. Marshall suggested that voluntary acquisition of lands could be pressured by force or military pursuit, and that the transfer should be done with treaties, negotiation, and mutual benefit. [102]This decision has in part shaped the principles with which the United States has engaged with Native American tribes. The Marshall Court era's other decisions, including the Dredd Scott case and *Plessy v. Ferguson*, created a foundation of case law that justified white supremacy and settler dominance.

The settler colonialism that manifested in the Supreme Court's institutional racism was succeeded by an era of policy-making regarding Native Americans. The detrimental effects of the

[100] 'Microsoft Word - 1. Singer Macro Final - 1 Singer.Pdf' <http://www.albanygovernmentlawreview.org/Articles/Vol10-1/1%20Singer.pdf> accessed 3 October 2017.
[101] ibid.
[102] ibid.

reservation system on Native American societies prompted federal policy making that sought to assimilate Native Americans. *The Dawes Act* of 1887 was one of the most significant policies in this era regarding land rights.[103] The act was a marked departure from the era of treaty making. It sought to divide reservation lands into individual allotments intended to transform Native American lifestyles with those of agriculturally focused, single family households who descended from settlers.[104] The assumption that an Anglo-settler lifestyle would solve the poor conditions with which Native American communities were faced with enacted the white supremacist underpinnings of settler colonialism.[105] Native Americans on reservations were faced with poor living, economic and health conditions. It was the position of the federal government that the blame for these conditions lay with Native American communities themselves.[106] This program offered a solution to the poor conditions created by the reservation system.

This transition from communal to private land ownership by federal policy began to undermine Native American sovereignty. Legal title often accompanies private land ownership, which is fundamental in American property law. Legal title ensures that ownership is transferred from the previous rightful owner to the next. What is often skewed, however, is that all property ownership in the United States originates in Indian title, which complicates the contemporary landscape of land ownership.[107] The basis of property law in Indian title is often ignored, despite the issue of legal title being central to land ownership disputes. As Joseph William Singer notes in

[103] ibid.
[104] Juan Francisco Pirir, 'The Extraction of the American Native: How Westward Expansion Destroyed and Created Societies' (2014) 1 The Undergraduate Historical Journal at UC Merced <http://escholarship.org/uc/item/9p2427bs> accessed 8 October 2017.
[105] ibid.
[106] ibid.
[107] 'Microsoft Word - 1. Singer Macro Final - 1 Singer.Pdf' <http://www.albanygovernmentlawreview.org/Articles/Vol10-1/1%20Singer.pdf> accessed 6 October 2017.

his article *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, ignoring Indian title is a grave misstep.[108] As Singer argues, a nation so focused on property rights must acknowledge the fundamentality of original Indian title over all United States lands.[109] The allotment program sparked by the *Dawes Act* offered private land ownership to individual Native Americans, yet this opened the pathway for declining territorial integrity of Native American tribes. Poor reservation conditions prompted many owners to cash in on their plots. These private land sales have mixed tribal territories with native and non-native ownership, making authority over land management difficult to maintain.

There are three main types of Native American land ownership that are relevant to contemporary land rights issues. Much of Native American land is *trust land*, meaning the Unites States holds land title. [110] This ownership allows the federal government to manage the lands in the interest of tribal welfare, and these lands held in trust cannot be sold. [111] The second land ownership category is *restricted fee*, in which Native American tribes hold land title, and any sale of that land must first be approved by the United States. [112] The third category is less common, but *fee simple absolute* applies to lands bought back by tribes, and is like any other land bought and sold in that it is offered no special protection unless specifically requested of the federal government. [113] Because settler colonialism is rooted in land ownership and racial subordination, these categories are problematic for protecting Native American land rights.

[108] 'Microsoft Word - 1. Singer Macro Final - 1 Singer.Pdf' (n 100).
[109] ibid.
[110] 'Microsoft Word - 1. Singer Macro Final - 1 Singer.Pdf' <http://www.albanygovernmentlawreview.org/Articles/Vol10-1/1%20Singer.pdf> accessed 4 October 2017.
[111] 'Microsoft Word - 1. Singer Macro Final - 1 Singer.Pdf' (n 107).
[112] 'Microsoft Word - 1. Singer Macro Final - 1 Singer.Pdf' (n 100).
[113] 'Microsoft Word - 1. Singer Macro Final - 1 Singer.Pdf' (n 110).

3.3 Anti-Native American Environmental Racism

Environmental racism is experienced by various communities of color, but Native Americans are in a special environmental, racial, and legal position. Although racism is and can be experienced by all people of color, making a distinction in the nuances of the experience are key to combating the phenomenon. Not all people of color experience racism uniformly. Anti-black racism, for example, can be experienced as coming from other people of color, and the specific features of anti-black racism are important to illustrate how historical, social, political and legal factors shape its manifestations. Environmental racism must be understood as the culmination of environmental decisions that lead to a disparity in the enjoyment of environmental benefits and the suffering of environmental costs along racial distinctions. However, Native American communities are situated in a different racial context than other communities of color, especially in regards to the environment. Non-Native communities of color in urban areas experience environmental racism differently, as the costs that urban communities suffer are typically associated with pollution, waste, and industrial emissions.[114] These environmental costs are also experienced by Native Americans, however, the non-urban spaces that Native American communities often occupy are exposed to the costs of extractive industries that urban communities are not. While non-Native communities of color are embedded in socio-economic lifestyles removed from a dependence on environmental sustenance, Native American communities are tied much more closely to the land. These ties are historical, cultural, and legally defined. This distinction is in no way meant to minimize that experience of urban communities of color who

[114] 'Race and Environmental Justice in the United States - Viewcontent.Cgi' <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1615&context=yjil> accessed 24 September 2017.

suffer environmental racism, but the distinction serves an important role in specifying the features of anti-Native American environmental racism.

The environmental justice movement in the United States emerged more broadly to combat environmental racism in the 1980's. While environmental protection has long been advocated for, the recognition of environmental harm disproportionately impacting communities of color was triggered by the drowning of an African American elementary school girl at a dump in 1967, sparking protests. [115] The drowning showcases a tragic example of how the choice in location for the dump, the lack in other neighborhood recreational spaces, and the lack of safety precautions led to a preventable accident. The outrage was sparked by the disparity in safety and health concerns in environmental decisions, and the protests were meant to highlight the difference in environmental equality felt along racial lines.

However, environmental justice for Native Americans arguably began at a different time, and out of different concerns. While land disputes have been ongoing since Europeans first arrived, the American Indian Movement began to use tactics in solidarity with the civil rights movement in the 1960's that demanded a recognition of their treaty rights and a call to end institutional anti-Native racism.[116] 'Fish-in' protests, as opposed to 'sit-in' protests, began in the Northwest in the 1960's and 1970's, after Native Americans had been individually cited for not complying with fishing regulations, whereby local officials violated their treaty protected fishing rights. [117] Considering the shame that is Furguson's water crisis, and this year's camp-in protests at Standing Rock, the environmental justice movement is still necessary.

[115] ibid.
[116] 'A Brief Histry of AIM' <https://www.aimovement.org/ggc/history.html> accessed 20 June 2017.
[117] 'Fish-in Protests at Franks Landing' <http://depts.washington.edu/civilr/fish-ins.htm> accessed 9 October 2017.

The environmental justice movement diverges along similar lines as environmental racism. The 1967 drowning incident and the water crisis in Ferguson underscore the disparity in urban environmental conditions along race lines. In light of that, the movement demands equality before the law, including in environmental regulation. The drowning of a white elementary school child, or the lead contamination of a white community's water supply would not only not be tolerated, but there would be a series of decisions leading up to the disqualification of the conditions that could lead to those events. The outrage triggered by these events is based upon the racial disparity and decision making that gave rise to the conditions enabling those events. Every community should have decisions made with environmental health as a priority, and there are legal protections to ensure that there shall not be disparities based upon racial distinction.

This is not necessarily the case for Native Americans, because treaty rights are special privileges that are not extended to all citizens. The American Indian Movement does not demand equality before the law, but the recognition and authority of the treaties to maintain the special rights afforded to Native Americans.[118] The events that sparked the 'fish-in' protests were based in an objection to equality before the law. Native American fishermen were being cited for violating fishing regulations, just as any other non-Native citizen would be. It is this special kind of equality before the law that continues to undermine the special treaty rights that Native Americans are entitled. While 'color-blindness' can be just as harmful for communities of color, especially in the context of affirmative action, 'native-blindness' can be just as damaging. The protests at Standing Rock demanded not only the protection of their water, but the protection of

[118] 'A Brief Histry of AIM' (n 116).

their special right to water as a cultural and spiritual element. [119] The neglect of this special right enacts the damage of 'native-blindness'. It has been an aim of the United States to undo the burden of recognizing that their jurisdiction occupies Native land. Perhaps what is most significant of 'native-blindness' is that it continues to undermine Native American land rights.

Although separating settler colonialism, and anti-Native American environmental racism was useful for the purposes of this chapter's introduction, these topics do not operate separately in reality. In practice, they inform each other and should be analyzed simultaneously. As the following case studies will illustrate, the compounded impact of these factors creates the conditions out of which the claims arise, and informs how the cases are decided. The case studies are meant to show the inseparability of those factors, and the jurisprudential limits in addressing them in the United States.

3.4 Case Studies

3.4.1 Lyng v. Northwest Indian Cemetery Protection Association

In 1988, the Supreme Court of the United States decided the case of *Lyng v. Northwest Indian Cemetery Protection Association.* In Northern California, the Forest Service opened an environmental assessment period regarding plans to connect two towns with the construction of a road cutting through public lands in the Six Rivers National Forest, of which were used by Native Americans of the Hoopa Valley Indian Reservation. [120] The Yurok, Karok, and Tolowa Indians used the area of Chimney Rock, which is alongside the portion of the National Forest that would

[119] Human Rights Watch |350 Fifth Avenue, 34th Floor | New York and NY 10118-3299 USA | t 1.212.290.4700, 'Standing Rock's Next Stand' (*Human Rights Watch*, 9 March 2017) <https://www.hrw.org/news/2017/03/09/standing-rocks-next-stand> accessed 7 October 2017.
[120] *Lyng v Northwest Indian Cemetery Protective Assn* (1988) 485 US 439 (Supreme Court).

be used for the road, and their use was designated for religious purposes. [121] The Forest Service conducted an impact study on religious practices of the Native Americans who used the Chimney Rock area, and found that road construction, and the road itself, would disturb their religious practices. [122] Upon this finding, it was recommended that the agency abandon its plans so as not to disturb Native American religious practices, however, in 1982 the agency finalized its plans with some alterations. [123] The finalized plans included an altered road route and timber harvesting within one half mile of the Chimney Rock area. [124] A claim was filed on behalf of a coalition of concerned parties including Native American individuals and organizations, nature organizations and individuals from those groups, and the State of California. [125] The case was decided against the appellees.

While the case pinpointed several acts and policies in which violations were petitioned against, the Court clarified how the case was decided, and on which grounds. The Court considered whether the "First Amendment's Free Exercise Clause prohibits the government from permitting logging in, or constructing a road through, lands traditionally used by Native Americans". [126] Previous case law regarding the Free Exercise Clause informed the Court that, in the case where parents claimed their First Amendment Rights in opposition to their child being given a social security number, the clause provides for what the government can't do regarding the individual's religious practice, not how the individual can sway government action regarding their religious

[121] ibid.
[122] ibid.
[123] ibid.
[124] ibid.
[125] ibid.
[126] ibid.

practice. [127] It is important to examine this case not only on the grounds of its decision, but also with regard to the dissenting opinions.

While the Court relied heavily on the notion that the Free Exercise Clause only limits what the government cannot do to the individual in terms of religious practice, it underscored that the government has rights to its lands. Because National Forests are public lands, the Court reiterated the government's right to manage its lands, including the right permit logging. [128] This is an especially interesting point due to the historical sensitivity around native land ownership. Although legally it is true that the federal government has the right to manage its lands, it is a particular feature of settler colonialism to deny indigenous claims to lands that once belonged to them. That the Native Americans lived on the Hoopa Valley reservation denotes a past treaty agreement, and their traditional religious use of public lands also implies a different historical and cultural understanding of land ownership. These lands were used for the religious purposes because the practices required an undisturbed natural setting. [129] The altered Forest Service plans for road construction factored in the avoidance of Native American archaeological sites. [130] However, it chose not to consider an entirely new and non-interfering road route due to the alleged difficulty in acquiring private lands for a new route. [131] Despite the acquisition of private lands being framed as a legitimate challenge, it also denotes how infringing upon Native American land use rights can be the path of least resistance because of the weak land rights protections that they have.

This reality must not be taken at 'native-blind' face value. It is particularly difficult for Native Americans to have their land rights recognized, especially where they do not have official

[127] ibid.
[128] ibid.
[129] ibid.
[130] ibid.
[131] ibid.

land ownership. Whether land ownership is limited by treaty agreements that placed control of trust land in the hands of the federal government, whether individual plots from the *Dawes Act* were sold off to undermine the integrity of tribal lands, or whether tribes cannot afford the capital to buy back lands for restricted fee simple ownership- there are historical, legal and economic barriers to Native American land ownership that must be recognized. That the federal government denotes the power of private land ownership in dissuading a new road route is a backhanded justification to infringe upon Native American land use rights. As Singer noted, the neglect of all land title originating in Indian title is important because so many land issues revolve around ownership.

The case law comparison between government action and religious practice begs to be dissected under a settler-colonial lens. The 1986 case of *Bowen v. Roy* mainly featured the parents of a child filing suit because they opposed the requirement of their daughter to be assigned a social security number.[132] That case was also considered on the basis of the First Amendment, and considered whether the Free Exercise Clause prohibited the government from issuing a social security number that violated the parents' religious view that the number would steal away their daughter's soul.[133] It was reasoned that the social security number being assigned to the child was a only subjective, and not a real, infringement upon the First Amendment.[134]

In the *Northwest Indian* case, however, there was a distinction made between the physical infringements upon Native American religious practices that government action posed, and the

[132] 'Bowen v. Roy, 476 US 693 - Supreme Court 1986 - Google Scholar' <https://scholar.google.co.kr/scholar_case?case=7792789260678712332&q=bowen+v.+roy&hl=en&as_sdt=2006> accessed 9 October 2017.
[133] ibid.
[134] ibid.

abstract infringement upon religious practice that the government action posed in the *Roy* case. [135] These infringements were also compared in the purpose of government action, which is where the judgement makes a particularly problematic argument. The Court argues that the compelling government interest in its actions that allegedly infringe upon the First Amendment's Free Exercise Clause outweigh the impact upon individual rights.[136] It can be seen that the compelling government interest in issuing social security numbers to all citizens serves the purpose of maintaining access to government services and safety to the public. Finding the compelling government interest in the Northwest Indian case seems to be stretched. While National Forest lands management indeed benefits the public, with an estimated 450,000 jobs and $36 billion in economic contributions each year, granting logging permits on Native American traditional religious lands cannot be seen as having as compelling an interest as the social security program.[137] That the State of California joined the appellants in the case speaks to the gravity of the challenges brought before the intrusion of the Forest Service.

The dissenting opinions do draw attention to the problematic reasoning relied upon in the Court's decision. Justices Brennan, Marshall, and Blackmun did not agree with the Court's opinion that the Northwest Indians do not suffer a violation of the First Amendment's Free Exercise Clause. [138] Noting the importance of solitude, quiet, and environmental integrity, as well as the sacredness of the specific location of the lands, the dissenters found that government plans for road building would indeed pose a real impairment to the Northwest Indian's enjoyment of their First Amendment right. They recognized the historical significance of the territory and the practices, as

[135] *Lyng v. Northwest Indian Cemetery Protective Assn.* (n 120).
[136] ibid.
[137] Wes Siler, 'Why Congress Can Sell Off Our National Forests, But Not National Parks' (*Gizmodo*) <https://gizmodo.com/national-park-vs-national-forest-your-public-land-expl-1697581346> accessed 9 October 2017.
[138] *Lyng v. Northwest Indian Cemetery Protective Assn.* (n 120).

well as the relative ease with which the government could secure another road route compared to the cruel suggestion that a disruption in environment, to which the religious practices depend, does not impose too severe an infringement upon the individual.[139] What's more, the dissenters also noted the tension between individual rights and the collective importance of the religious practices. They highlighted the belief that the religious practice by the individuals contributed to the wellbeing of the Native American tribes collectively. [140] While the case was not decided favorably for Native American land rights and hosted settler colonial and environmentally racist reasoning, the dissenting opinion offers useful counter-reasoning from the Supreme Court.

3.4.2 U.S. v Dann

Unfortunately, it is a common feature of cases concerning Native American rights not to be decided favorably for tribes. This is also true of what has been a long-running legal battle between the Western Shoshone Dann Band and the federal government. Their most recent domestic case, *U.S. v Dann*, was decided by the Supreme Court in 1985 and was remanded back to the 9th Circuit court, where that lower court made its unfavorable ruling in 1989. [141] This Supreme Court case attempted to settle land title dispute over millions of acres of land located mostly in Nevada, but also including parts of California, Utah, and Idaho.[142] These lands were recognized by the federal government as belonging to the tribe with the signing of the 1863 Treaty of Ruby Valley, which negotiated the government's use of land for rail, mining, timber, ranching

[139] ibid.
[140] ibid.
[141] Intercontinental.Cry, 'Western Shoshone Prevail at Ninth Circuit Court on Mining Sacred Land' (*Intercontinental Cry*, 6 December 2009) <https://intercontinentalcry.org/western-shoshone-prevail-at-ninth-circuit-court-on-mining-sacred-land/> accessed 22 October 2017.
[142] *United States v Dann* (1985) 470 US 39 (Supreme Court).

and military activity.[143] These lands have been the subject of litigation since the Indian Claims Commission (ICC) heard a case in 1951. [144] The ICC case was brought by members of the greater Shoshone tribe seeking monetary settlement for lost title to lands, which fueled a later ICC claim by members of the Western Shoshone disputing that settlement, the dispersal of funds, and their loss of Indian title over lands.[145] That 1951 ICC monetary settlement deposited $26 million dollars into a trust fund within the United States Treasury, accruing interest where it has more than doubled to this day, but has yet to be made accessible to the Shoshone tribe.[146]

While the federal government established the Indian Claims Commission in 1946 to resolve land title disputes with some finality, it also operates as a source of continued settler colonialism and institutionalized anti-indigenous racism. The conflict between the Western Shoshone and the federal government has continued over land use rights. Members of the Western Shoshone Dann Band were cited for trespassing and illegally grazing their cattle on public lands, after many incidents of threatened action by government officials. [147] Charges that were brought against the Dann Band members sparked the litigation that continues to this day. It has been documented in part by Beth Gage's 2008 film *American Outrage,* which highlights Western Shoshone sisters Mary and Carrie Dann and their struggle to have their land use rights protected and to navigate the legal process of land title. [148] The standoffs captured in the film show the legal and physical tensions between federal officials and Native Americans, as well as the economic

[143] 'Gretchen Robinson - GretchenRobinsonbackground.Pdf' <https://law2.arizona.edu/iplp/outreach/shoshone/documents/GretchenRobinsonbackground.pdf> accessed 5 March 2017.
[144] *United States v. Dann* (n 142).
[145] ibid.
[146] ibid.
[147] 'Gretchen Robinson - GretchenRobinsonbackground.Pdf' (n 143).
[148] Beth Gage and George Gage, *American Outrage* (2008).

struggle for living off the land. [149] Unresolved land title and delegitimized treaty rights set the backdrop for these standoffs between Dann Band members and public land officials, which tinges the saga with a native-blindness. Because the Dann Band uses their traditional lands to support their livestock for sustenance, the citations brought against them ignores their special land rights and reveals the problematic legacy the Indian Claims Commission has over Indian title cases.

The government's refusal to allow continued land use over traditional territory should be considered with the role of extraction in mind. The Treaty of Ruby Valley accounted for the government's intent to use the lands, amongst other purposes, for gold prospecting. Although the Indian Claims Commission sought to tear down the legitimacy of the treaties and to extinguish Indian title to simplify the national landscape of treaty lands disputes, it did so to in a way that benefitted the government at the expense of the tribes themselves. The ICC can be seen as only disassembling the treaties in part, however, because the removal of federal obligations towards protecting Native American land rights essentially removes barriers to making federal gains in extractive industry on public lands. The 1951 ICC case merely removed the Shoshone interests from the treaty so as to secure all treaty benefits with the United States. Respecting Native American traditional land use rights impeded upon the government's land management agenda, which included mining activities. While the ICC's nullification approach is tinted with an attitude of historical irrelevance towards Native American concerns, the extractive intent of the federal government in the Ruby Valley Treaty is still very much alive.

The development of extractive industry on Western Shoshone lands has continued to develop while the Dann Band's cases have been litigated. While the 1989 case sought to

[149] ibid.

distinguish between individual aboriginal title and tribal aboriginal title so as to address the Dann sisters' claims, the court's judgement concluded that individual aboriginal claims have legal standing.[150] In 2009 the Court of Appeals decided a case involving the Western Shoshone claims to Indian title.[151] The more recent litigation has included the issue of extractive industries on Western Shoshone lands, which flows from the original treaty terms, the ICC's role in weakening Indian title and Native American rights protections. This 2009 case was decided so as to stop the development of what would have been the largest open pit gold mine in the United States.[152] In this case, the tribe's religious freedoms were claimed so as to halt the mining activities that would interfere with not only the ecological health of the territory, but also Western Shoshones' ability to enjoy their special rights within the lands. It can be seen as a success within the federal court system, however, the lack of Supreme Court judgement over the issues that follow the Western Shoshone land use claims leaves open opportunities for abuses. This continues to be true concerning the mining operations within Western Shoshone territory. As discussed later in the IACHR chapter, the international attention brought to the case, and the international human rights litigation concerning it, has been the result of the history of settler colonialism, extraction, and anti-indigenous environmental racism.

3.4.3 Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers

On October 11, 2017, the U.S. District Court in Washington D.C. decided the *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* case, which involves what has been a passionate

[150] *US v Dann* (1989) 873 F 2d 1189 (Court of Appeals, 9th Circuit).
[151] *United States v Dann* (1985) 470 US 39 (Supreme Court).
[152] Intercontinental.Cry, 'Western Shoshone Prevail at Ninth Circuit Court on Mining Sacred Land' (*Intercontinental Cry*, 6 December 2009) <https://intercontinentalcry.org/western-shoshone-prevail-at-ninth-circuit-court-on-mining-sacred-land/> accessed 22 October 2017.

protest against the Dakota Access Pipeline (DAPL). The District Court's decision for remand was supported by the conclusion that the U.S. Army Corps of Engineers failed in its duties to meet procedural requirements, including properly consulting with the Sioux tribe, and assessing the environmental impact of the DAPL project proposal. [153] While this decision is not necessarily marked with a finality that is often secured in Supreme Court rulings, it is, however, a promising development in the standoff at Standing Rock for indigenous rights. The Court reasoned in its judgement the three main factors taken into consideration; 1) the high profile of the case and the controversy surrounding it, 2) the likelihood and risk of an oil spill affecting indigenous lives and indigenous rights, and 3) the impact that this case has on environmental justice. [154] At this point on the legal trajectory, the lower court awaits assessment from both parties on the impact of vacatur plans.[155] Vacatur plans denote the bureaucratic and on the ground actions involved in disassembling resource development projects. After a decision for vacatur has been made, the decision for remedy will be made from there.[156] This weighing of impact prior to ordering a remedy takes the kind of pragmatic and figurative approach to assessments periods that was so damningly lacking from the U.S. Army Corps of Engineers' agency over Standing Rock.

This case is a marked departure from what has been an inconsistent and unbeneficial litigation history of indigenous rights in the federal court system. That a federal court outlines the urgency with which environmental justice shall be applied to this kind of case reflects a hopeful shift in judicial values. It legitimizes the protests at Standing Rock, it underscores human rights values and shines a light on environmental advocacy. What's more is that the Court relied upon

[153] *Standing Rock Sioux Tribe v US Army Corps of Engineers* (United States District Court, District of Columbia).
[154] ibid.
[155] ibid.
[156] ibid.

bureaucracy as a standard by which different policies shall be adhered to with respect to, and not despite, Native American land rights. In citing various environmental policies, the case supported indigenous rights by fairly applying federal statutes equitably. While the special rights that indigenous plaintiffs often claim certainly should be protected, this case is a success story for the application of general federal policies that support, rather than compete with, indigenous rights. This time, the devil was in the details to the benefit of the Sioux tribe.

The Standing Rock case has been a multifaceted legal saga that is rooted in the U.S. Army Corps of Engineers' easement permit towards the completion of the Dakota Access Pipeline.[157] Easement construction activities were disrupting sacred lands, and the threat of an oil spill once the project was up and running sparked not only the petitioning group, but also the thousands of protesters who camped in solidarity against the encroachment of extraction, the risks to life and health, and the marginalization of Native American land rights. The Cheyenne Sioux joined the Standing Rock plaintiffs, and the corporate interests behind the Dakota Access pipeline joined the defense after an unsuccessful restraining order against the DAPL was filed, claiming the protection under the Religious Freedom Restoration Act.[158] While legal action was taken in fits and starts against the project in an attempt to find a legal avenue that would promptly halt it, emergency interruption was not supported by the courts. And in the time that it took for the Standing Rock Sioux to gain their legal footing in opposition to the pipeline, the project was completed and oil continues to flow through pipes that run under Lake Ohae. [159]

There was a myriad of policies and standards that the Court considered in determining whether the U.S. Army Corps of Engineers disregarded its duties. The case cited *The National*

[157] ibid.
[158] ibid.
[159] ibid.

Historic Preservation Act, *The Clean Water Act*, *The Rivers and Harbors Act*, the *Religious Freedom Restoration Act*, and *The National Environmental Policy Act*- all of which the plaintiffs claimed the U.S. Army Corps of Engineers had violated. [160] It is interesting to note that these acts are national standards that were used in the case to show the disparity in treatment the Standing Rock community received in environmental decision making that belittled indigenous wellbeing. While the legal authority that treaties should have in protecting special Native American rights is not relied upon as heavily in this case compared to other Native American cases, this case embodies a success story for claiming non-specialized rights to protect what are indeed special rights. Ultimately, the District Court's decision to remand the case gives back the Standing Rock Sioux the agency that they were denied by the Army Corps of Engineers.

3.5 Chapter Conclusion

While the cases discussed in this chapter are not illustrative of all contemporary Native American environmental justice litigation in the United States, they do showcase particular features of Native American environmental justice. These features have been built upon the legacy of settler colonialism, the power of extractive industries over land and environmental management, and how that power shapes anti-indigenous environmental racism. The cases discussed also show the different legal approaches towards the interests of Native Americans in preventative and post extractive industrial action, and how individual versus communal claims are weighed differently in court. The commonality in these cases, however, is that the history of the legal and jurisprudential impact upon Native American land use rights is not sealed in time, and that each case is informed and shaped by what has been litigated before, and alongside it. While courts that

[160] ibid.

apply the law and respect the treaties should arrive at opinions that provide justice to Native Americans, this has not always been the case. Perhaps there is some hope to be found in lower courts becoming attuned to the legal and socio-historical standards by which indigenous environmental justice deserves to be ruled upon.

Chapter 4: Inter-American Court of Human Rights

4.1 Introduction

This chapter will discuss and analyze the jurisdiction of the IACHR in terms of settler colonialism and environmental justice in Latin America, including cases under its jurisprudence involving extractive industries, indigenous communities, and the environment. This regional human rights authority is vested in the Organization of American States, of which Canada and the United States are members, however, this chapter does not include a case involving Canada that was brought to the IACHR due to its inconsistencies with the criteria outlined in the research methodology of this thesis. This chapter also does not detail the history of settler colonialism of each IACHR member states, but rather a general background of the regional environmental justice movements. The selected cases include *Saramaka People v. Suriname* and *Maya Indigenous Communities of Toledo District v. Belize*. These cases will be analyzed through the intersecting lenses of settler colonialism and environmental racism. This analysis will support the conclusion that the IACHR plays a vital role in providing environmental justice to indigenous communities where member states fail to enforce or implement their human rights obligations, but that justice is abstract and state inaction continues violations.

4.2 Environmental Justice and Anti-Indigenous Environmental Racism in IAHCR Member States

Because environmental justice in Latin America has largely been defined and spearheaded by indigenous groups, the racialization of environmental justice is not distinguished as acutely as it is in the United States. Walter and Urkidi clarify the features of Latin American environmental justice as having sprouted from environmental groups who advocated for indigenous communities and resisted dictatorial rule between the 1960's and 1970's, and who began to heavily mobilize in

the 1980's.[161] The economic and political factors that opened Latin American countries to resource commodification led to environmental harms such as deforestation, water and soil contamination, and degradation of the land.[162] Throughout Latin America, environmental justice networks formed to strengthen the environmental justice movement which largely focused on and advocated for indigenous communities who were most affected by extractive industries.[163] In 1998, environmental justice activists from the United States visited these regional networks and shared experiences and solidarity with local activists.[164] In Brazil in 2001 the first formal network of environmental justice networks convened, and since then have framed environmental racism as socio-environmental conflicts.[165] Just as anti-indigenous environmental racism is a particular form of environmental racism in North American contexts, the indigenous focus of environmental justice in Latin America necessarily names socio-environmental conflicts as such for the presupposition of anti-indigenous underpinnings for the injustices.

4.3 Settler Colonialism in the IACHR

This section does not to address the vastness of territory, indigenous peoples, or past and present governments that can be found within Latin American countries. Instead, it offers an overall summary of the settler colonial mechanisms that trend throughout IACHR member states, and which continue to impact upon indigenous communities. Stephan Bunker's 1985 book *Underdeveloping the Amazon* details the colonial economic development throughout the Amazon which "established a locally dominant class which created a mode of extraction and so exploited

[161] Leire Urkidi and Mariana Walter, 'Dimensions of Environmental Justice in Anti-Gold Mining Movements in Latin America' (2011) 42 Geoforum 683 <http://linkinghub.elsevier.com/retrieve/pii/S0016718511000868> accessed 7 November 2017.
[162] ibid.
[163] ibid.
[164] ibid.
[165] ibid.

both labor and nature that neither could fully reproduce itself".[166] He goes on to explain that colonial extraction responded to international market demands, and that the failure of export crops underscored the reliance on resource extraction and subsequently damaged local environment, society and modes of production.[167] He claims that "[t]he effects of this unequal exchange and of the mode of extraction which sustained it directly limited the capacity for local response to and benefit from subsequent exchange opportunities created by industrial development and technological advances in the world system.".[168] If local is understood as indigenous, then this unequal exchange can be understood as environmental racism, where settler colonialism benefits the settler dominant class at the expense of indigenous societies.

This unequal exchange continues to operate under settler colonialism throughout the Americas, where 20th century independence from imperial powers has not removed the dominant settler class or the power hierarchies which marginalize indigenous peoples. As noted in the IACHR report on indigenous peoples and afro-descent communities, this unequal exchange is marked by the racial disparity that continues to infringe upon tribal peoples' rights. The Latin American environmental justice movements that sprouted between the 1960's and 1970's were as much to protest against environmental harm upon indigenous peoples as they were to protest against the continued 'plundering' of indigenous lands and resources. [169] In this way, the mobilization against environmental injustice towards indigenous peoples is as much concerned with environmental racism as it is with settler colonialism.

[166] Stephen Bunker, *Underdeveloping the Amazon: Extraction, Unequal Exchange, and the Failure of the Modern State* (University of Chicago Press 1985) 60.
[167] Bunker (n 166).
[168] ibid 65.
[169] Urkidi and Walter (n 161).

Within Latin America exists a conflicting discourse between the right to development and indigenous rights, which is tainted by settler colonialism and environmental racism. Because indigenous communities depend upon environmental health, their concerns over extraction, development, and land use must be considered attentively. This is not usually the case, and indigenous communities' autonomy is threatened when states exercise their right to development through extending extractive concessions to industries and investments on indigenous lands.

The state's right to development within the Organization of American States is formulated as being accountable to human rights standards, especially to indigenous rights because of their particular vulnerabilities to the environmental impact of resources development.[170] This is conditioned by article 21 of the American Convention which allows the state to restrict an indigenous or tribal people's right to use traditional lands and resources only when the restrictions do not inhibit tribal enjoyment of rights.[171] However, there is a disparity between the responsibilities of the state, as outlined by its membership to the OAS and IACHR, and corporate accountability to human rights while operating on indigenous lands. Despite the IACHR's stance on the state's extended responsibility towards ensuring extractive industries respect indigenous rights, the IACHR notes an increase in instances where natural resource development has violated human rights.[172] These violations occur despite the IACHR's guiding principles for how states must ensure the protection of indigenous peoples' land rights.

The IACHR identifies the gap between principle and practice as relating to participation and consultation. States have three mandatory conditions with which to permit private extractive

[170] OAS, 'OAS - Organization of American States: Democracy for Peace, Security, and Development' (1 August 2009) <http://www.oas.org/en/iachr/media_center/preleases/2016/048.asp> accessed 28 July 2017.
[171] 'Indigenous Peoples, Extractive Industries, and Human Rights' (n 92).
[172] ibid.

operations. The first condition requires states to comply with international expropriation laws, as referenced in the American Convention's Article 21, which gives everyone the right to their property, but that that right is dominated by broader societal interests.[173] The second condition requires that states refrain from approving projects that threaten indigenous communities, yet it appears superficial in its protection of indigenous peoples' rights, due to the limits of meeting this criteria prior to initiating extractive projects.[174] The third requirement lists consent as a component that includes environmental impact assessment as well as open periods for concerns to be raised.[175] The state's failure to effectively implement these standards leads to violations and litigation.

State failures to adhere to these conditions, and the subsequent authorizations of extractive concessions, has resulted in several cases being brought before the Inter-American Court of Human Rights. Procedurally, the state is responsible for ensuring that Indigenous communities are not negatively impacted by extractive industrial activity. This responsibility falls short when corporate interests are offered little incentive to refrain from infringing upon the rights of indigenous peoples, especially where their economic interests are at stake. The lack of accountability that private actors face in these violations begs to question the effectiveness of remedial mechanisms that indict the state. The multi-national ownership of these private industries, and the environmental impact of their indigenous rights violations, signals not only the limits of human rights in preventing these issues but also the transnational implications of environmental degradation.

[173] 'IACHR Admits Cases Involving Ancestral Land Rights and "Environmental Racism" | International Justice Resource Center' (n 29).
[174] 'Indigenous Peoples, Extractive Industries, and Human Rights' (n 92).
[175] OAS (n 170).

Settler-colonialism offers a useful framework for weighing the impact of private interests on the right to a healthy environment. Because settler colonialism implies that colonialism and its economic impacts did not end with the retreat of imperial authority over the colonies, it continues in the state's marginalization of Indigenous communities and the role that corporate resource extraction plays. International and regional human rights can also be viewed through the settler colonial lens in that because human rights are framed as individual rights, the collective nature of indigenous rights is culturally and legally marginalized. This situates states' membership to human rights treaties as a reinforcing facet of settler colonialism by acknowledging indigenous rights separately from individual human rights. Indeed, indigenous groups' unique vulnerabilities and marginalization may benefit from specific human rights treaties that address their situation, but there remains cultural and legal tensions between the state's respect for human rights and Indigenous Peoples' rights. The following case studies will explore the various ways that settler colonialism impacts upon cases taken to the Inter-American Court of Human Rights.

4.4 Case Studies

The selected case studies showcase violations of indigenous rights where extractive industries were permitted by the state to carry out activities on indigenous land. The case of *Saramaka People v. Suriname, Maya Indigenous Communities v. Belize*, and *Mary and Carrie Dann v. United States*. The U.S. case is a marked departure from the Latin American focus of the IACHR jurisdiction, and its significance as one of the only internationally tried cases against the United States involving indigenous land rights and extractive industries is worth noting. The *Saramaka* and *Maya* cases reflect key concerns mentioned in the IACHR report, including afro-descendant and indigenous tribal communities that are affected by private actors engaged in

logging, mining, or oil drilling as permitted by the state. The cases brought before the commission will be summarized and discussed in terms of settler colonialism and environmental racism.

4.1.1 Saramaka People v. Suriname

The 2007 case of *Saramaka People v. Suriname,* brought before the IACHR, highlights a unique issue of Indigenous identity and challenges to their land rights in the Americas. The Saramaka people are descendants of African slaves that have lived in the Upper Suriname River area with their own distinct language, religion, culture and legal system.[176] They gained freedom and territorial sovereignty in Suriname after rebelling from, and signing a treaty with, the former Dutch colonial power in the 18th century. Suriname has been an independent nation since 1975. With its constitutional provisions consolidating State control over all non-titled lands, the Saramaka community's unregistered title to their traditionally used lands came under effective State authority. [177] Since the 1990's Suriname has been giving logging and mining concessions to extractive industries in the territories traditionally attributed to the Saramaka people. [178] These concessions were granted without seeking prior consent from the Saramaka community, and tribal community became aware of the development plans once workers arrived on their territory to begin the extractive projects.[179] The Court found violations of American Declaration rights to property, right to juridical personality, and right to judicial protection.[180]

Although the Saramaka community gained independence from their former colonizers, they found themselves further marginalized by the newly shaped national government through which their rights are not respected. This highlights a unique problem of identity and indigenous

[176] 'Saramaka People v. Suriname'.
[177] ibid.
[178] ibid.
[179] ibid.
[180] ibid.

land rights. With resource extraction being a key facet of settler-colonialism, Saramaka identity is then anchored to two problematic impacts of extraction in the former colony. The first impact is that Saramaka African-slave heritage underscores the racist and dehumanizing use of imported slave labor to exploit land, natural resources, and people. The damage wrought on the societies from which slaves were taken, and on the lands- and indigenous communities - that their forced labor was used to profit off of, reaches into contemporary land rights issues. The unique identity that was born out of Saramaka freedom marks their cultural intersection between African-slave decedents and Suriname Indigenous peoples.

The second impact is that, despite their independence from their colonial slave holders, their identity as an Indigenous community is not respected by the current state power. The slave rebellion fought against their former colonizers, and their subsequent marginalization as an Indigenous community under the new State power, illustrates how settler colonialism is manifested in the Saramaka case. The impacts of colonialism do not retreat along with the colonial power, but are replaced by the colonial descendants and the cultural politics of Indigenous subordination, that emerge with the new nation of Suriname.

Extractive industries play a continuous role in this expression of settler colonialism, as seen in the Saramaka community. The origins of the community's identity would not have emerged without the use of slave labor for resource extraction in the Dutch colony of Suriname. Ironically, despite the Saramaka's independence from the Dutch, it was the state's independence from the Netherlands that reconfigured sovereign power, and reinstated the subordination of the Saramaka. This new State authority exploits Saramaka lands for logging and mining concessions, because they do not recognize or respect their traditional land rights over the territories in use. This marginalization follows from the State's economic power being concentrated in the territory's

dense rain forests, and their reliance on extractive industries for national development. In this way it can be seen how settler-colonialism is the manifestation of power dynamics between race, class, and resources that continues after imperial power is removed and replaced.

Situating Saramaka identity within this context of settler colonialism lends itself to understanding the 2007 IACHR court case, and the arguments used regarding the State's violations of Indigenous Rights. In 2000, the Saramaka filed a complaint with the Inter-American Commission on Human Rights. They alleged that Suriname's granting of mining and logging concessions to foreign companies, without the indigenous community's prior consent, violated their property, cultural and due process rights. [181] The Saramaka claimed that because their cultural, spiritual and physical survival was directly connected to the use and enjoyment of their territory, the impacts of logging and mining activity would threaten their entire community. It is interesting to note that they are acknowledged by the IACHR as an Indigenous community, due to their physical and cultural dependence on their environment. It appears as though this recognition relies on a common environmental and cultural connectivity as a notion of Indigeneity, as much as genealogical or historical evidence is used to validate Indigenous identity. It is also important to note that the Saramaka self-identify as an Indigenous group. Their recognition by the IACHR as a distinct Indigenous community offers them the right to legal collectivity in filing a claim against the state.

Subsequently, the Inter-American Court of Human Rights found that the State violated several of the Saramaka's fundamental rights. Under the American Convention, the Saramaka Peoples' Article 21 right to property, and Article 29 right to judicial protection were violated.[182]

[181] ibid.
[182] ibid.

Because logging and mining activities would threaten the lands the community has historically used for sustenance, and spirituality, the Court found a violation of the Saramaka's right to property. The court found the violation of the right to judicial protection in that the Saramaka How the State proceeded after the judgement reveals the role that settler colonialism continues to play in justifying its marginalization of indigenous rights.

There were several key required actions, which Suriname failed to take, according to the Court's judgement on the Saramaka case. They included monetary compensation for damages, amounting up to over U.S. $600,000 and legal revisions that would respect Maroon and indigenous communities' rights to ancestral lands, and granting legal recognition of Saramaka's territory and collective right to access justice. [183] Much of these required remedies have yet to be implemented by the State, which asserts the dominance of modernization over respecting Indigenous rights. It is important to note that the state's disregard of its obligations is not only a matter of Indigenous Rights, but a matter of threatening environmental integrity. Their failure to follow the Court's recommendations not only infringes upon the autonomy of the Saramaka people, but also of the greater society. Given the delicate nature of rainforest ecology and the devastating and irreversible impacts that environmental harm has Indigenous cultures, it also threatens the environmental health and rights of the people of Suriname.

In addition to failing to meet the Court's requirements, the state has continued to engage in granting concessions to extractive industries, and to related development projects, that infringe upon indigenous territories.[184] In this regard, the Court appears to have limited impact on state violations of indigenous peoples' rights. Yet in 2012, the Secretary of the Inter-American Court of

[183] ibid.
[184] ibid.

Human Rights issued to Suriname the request for a report detailing how it has met or plans to meet its required actions under the Saramaka decision. [185]This neglect of the Court's judgement begs to question the effectiveness of the IACHR on protecting the rights of Indigenous Peoples when the State fails to do so. It also reveals the pervasiveness of settler-colonialism on the modern era of human rights, which is why, perhaps state compliance with regional human rights judgements may require more pressure from non-marginalized groups.

4.1.2 Maya Indigenous Communities of Toledo District v. Belize

In 2004 members of the Maya Indigenous Communities of Toledo District in Belize filed a petition with the Inter-American Commission of Human Rights. The petition claimed that the state violated the Indigenous group's right to communal property, right to equality before the law, and the right to judicial protection.[186] These violations stemmed from the state's granting of logging and oil mining concessions to private companies, including a Malaysian logging company, whose activities were threatening the environment on ½ million acres of traditional Maya territory.[187] The Court found that the state failed to properly consult with Maya community leaders, violating the right to religious freedom and worship, the right to a family and protection thereof, the right to the preservation of health and wellbeing, the right to judicial protection, the right to participate in government, and the right to property.[188]

[185] ibid.
[186] 'Maya Indigenous Communities v. Belize, Report, Case No. 12.053, Report No. 78/00, OEA/Ser.L/V/II.111, Doc. 20, Rev. (2000) (IACmHR, Oct. 05, 2000) - 2000.10.05_Maya_Indigenous_Communities_v_Belize.Pdf' <http://www.worldcourts.com/iacmhr/eng/decisions/2000.10.05_Maya_Indigenous_Communities_v_Belize.pdf> accessed 9 November 2017.
[187] ibid.
[188] ibid.

Of the many Central American Maya descendants, the Maya communities in Toledo District in Belize constitute their own specific linguistic groups.[189] Each village within the district elects leaders, which has been recognized as a part of the municipal government since colonial times.[190] The communities continue to engage in traditional religious and subsistence practices that depend upon undisturbed environments.[191] The Maya territories extend up to ten kilometers from their villages and are mapped in historic Mayan atlases.[192] Recognition of these traditional lands still exists in Belize law, which leaves little space to contest the claims that the state failed to consult with indigenous community leaders prior to granting extraction.[193]

The ecological impact of logging and oil development then reflects anti-indigenous environmental racism when the weight of Maya traditional subsistence is considered. The traditional form of agriculture practiced relies upon crop rotations of many years on lands that have been undisturbed.[194] It also requires traditional land management and a bank of traditional knowledge which is shared amongst the communities.[195] Religious sites within their territories include sink holes, caves, and steep hills that are used for ceremony as well as burial.[196] Streams are used for washing, drinking, and transportation, as well as fishing.[197] The impact that environmental disturbance or harm causes to Maya communities is severe, as their livelihoods, sustenance, and spirituality depend upon the health of their environments. It's not only that disturbance and harm impacts upon Maya communities, but that the lack of consultation or

[189] ibid.
[190] ibid.
[191] ibid.
[192] ibid.
[193] ibid.
[194] ibid.
[195] ibid.
[196] ibid.
[197] ibid.

participation prior to permitting extractive development did not give the Maya villages the opportunity to voice these concerns in light of private applications over resources. So, not only would Maya communities not benefit from the logging or mining, but the impact they would have upon them would wholly impair their livelihoods.

The Maya petitioners initially awaited judgement for over three years in domestic courts without redress, which lead their claim to the IACHR.[198] Originally, the petitioners and the Court hoped to reach friendly settlement. This proved to not be viable, as recorded in the Court's procedural timeline whereby the state was contacted many times for response to specific claims and questions directed from the Maya petitioners.[199] The state failed in providing adequate responses, and the petitioners lost hope in reaching friendly settlement with a state so disengaged.[200] Failure to engage with the Court or the petitioners requests for friendly settlement is tinged with a racial subordination tied to environmental racism and settler colonialism.

Although the Maya won the case, the power of the IACHR judgement is relatively weak, as the state's disregard for the judgement continues to infringe upon the rights of the Maya communities. Had the state followed its duties to consult the community leaders, the concessions may not have been granted and the violations may not have occurred. It does set a promising legal standard with the IACHR siding with the indigenous community, however, the power of that legal standard on the ground in Toledo District has little impact on discontinuing rights violations.

[198] ibid.
[199] ibid.
[200] ibid.

4.1.3 Mary and Carrie Dann v. U.S.

This case, whose U.S. domestic litigation was discussed in the United States chapter, was submitted in 1993 to the IACHR and was decided in 1999. The case submitted to the IACHR recognized that sisters Mary and Carrie Dann of the Western Shoshone Band assert their treaty rights and land title over disputed territory in Nevada, U.S.[201] The Court also recognizes that the U.S. constitution recognizes all foreign treaties, including those signed with American Indians.[202] The Dann sisters had been raising their own food and livestock on what they considered to be their traditional lands since the1940's, and had presented no point of conflict until the 1970's when they were accused of trespassing on public lands.[203] The Dann sisters claimed that their rights were violated by the trespassing charge and the confiscation of their livestock.[204] Dann ownership had been extinguished decades earlier in what was a national attempt to settle land title disputes, and the sisters argued that those procedures, as well as the trespassing charges and confiscation violated their American Declaration rights. What's more is that mining activities had been approved on the public lands.[205] Although the case was a symbolic victory for the sisters, the U.S. maintains that it has not violated the sisters' human rights, and that it will not comply with the recommendations.[206]

The case's settler colonial and anti-indigenous environmental racism analysis is discussed more in chapter two, though there are several components worth mentioning here. In the IACHR case, the involvement of the Oro Nevada company was cited, who had been granted gold mining permits over the public lands that included the Dann Band's traditional grazing grounds.[207] The

[201] 'United States 11.140' <http://hrlibrary.umn.edu/cases/75-02a.html> accessed 5 March 2017.
[202] ibid.
[203] ibid.
[204] 'U.S. 11.140' <http://www.cidh.org/annualrep/99eng/Admissible/U.S.11140.htm> accessed 10 November 2017.
[205] 'United States 11.140' (n 201).
[206] ibid.
[207] ibid.

company was not involved in domestic proceedings, and mining was only briefly mentioned, which suggests that the petitioners believed it would make a bigger impact on the IACHR's decision than in the exhausted domestic proceedings. While it is again promising for indigenous rights that this case was decided in favor of the petitioner, the reality of state refusal to act upon Court recommendations offers little redress for indigenous communities who continue to be marginalized.

4.5 Conclusion

The limitations of the Inter-American Court of Human Rights in enforcing its judgments in the above-discussed cases results in undelivered justice for the Indigenous communities whose rights were violated. The unresolved and continuing environmental harm not only further impacts the communities involved in bringing the cases forward, but future additional communities, as environmental degradation has far reaching ecological impacts. This situation sets a discouraging tone on the stage of international human rights justice. The critique of American Exceptionalism in ratifying human rights treaties, for example may be hard pressed to justify the urgency with which the United States should become party to the Inter-American Court of Human Rights, considering the power that states hold over delivering the kind of justice prescribed by an international tribunal. The question then remains how to provide justice to marginalized indigenous groups, and how to ensure that environmental protection is a recognized precondition to the enjoyment of fundamental rights.

Chapter 5: Conclusion

The analysis and comparisons of how the selected jurisdictions protect indigenous land rights where extractive industries are involved reveals the successes and setbacks in indigenous litigation against extraction. Cases from Canada, the United States, and the Inter-American Court of Human Rights were examined through theoretical lenses of settler colonialism and environmental racism, and revealed how the jurisdictions deliver indigenous environmental justice. This theoretical framework not only shaped the conditions out of which these cases arose, but also impacted upon how the cases were decided by the relevant courts. When the courts acknowledge inequity and apply law with a sensitivity to these frameworks, judgements have been made favorably for indigenous petitioners. The research suggests, however, that domestic courts may be best suited to provide justice on the ground for indigenous petitioners, due to the unenforceability of international decisions.

While the IACHR appears to have arrived at decisions most informed by the inequities produced by settler colonialism and environmental racism in indigenous land rights cases involving extraction, the lack of enforcement stunts the usefulness of the decisions. Domestic Canadian and United States courts who have sided with indigenous petitioners are able to provide justice by their ability to enforce their judgements. However, domestic courts who decide against indigenous petitioners appear to rely on black letter law standards that disregard the particular inequalities indigenous groups face that have been shaped by the historical and legal dominance of settler colonialism. While the IACHR provides an opportunity to litigate cases that have unsuccessfully exhausted domestic remedies, it does little to enforce favorable decisions. This suggests that the domestic courts, while less inclined than international human rights courts to

apply legal standards critically towards indigenous petitioners, are optimized to enforce their judgements so as to enact redress through its government actions.

This implies that, while internationally recognized indigenous human rights standards buttress international solidarity with an indigenous rights movement, focused domestic efforts may offer tangible justice and redress. This is not to say that internationally recognized human rights standards are meaningless, as they play an important role in holding states symbolically accountable towards their human rights obligations. It is to say, however, that the legal frameworks within Canada and the United States provide opportunity for enforceable redress, which can be seen as incentive to prevent further indigenous rights violations. Nonetheless, the challenges in accessing these domestic remedies also lies in the complicated domestic legal landscapes of Canada and United States, in which inconsistencies in treaty, federal and provincial law make it difficult for indigenous groups to claim their rights.

This implication can then be used as a beacon of hope for indigenous land rights issues within the United States and especially Canada. While the U.S's notorious abstinence from ratifying international human rights treaties limits alternative justice seeking options, the impact that domestic rulings have on indigenous land rights cases offers more real justice than could be expected if the U.S. were to respect the jurisdiction of international human rights courts. And in Canada, not only are domestic judgements able to offer justice on the ground, but the legal frameworks appear to be, in some cases, streamlining in favor of respecting indigenous communities. Conversely, the disparity between the IACHR standards and member states' domestic law that has been reported by the Commission underscores some of the challenges in enforcing human rights.

Canadian jurisprudence appears to offer more real environmental justice for indigenous petitioners. This is due to legislative and bureaucratic streamlining efforts, courts who engage environmental justice principles in indigenous land rights cases, and a more acute and applied awareness of settler colonial impacts upon policies which affect indigenous communities. These are lessons that should be taken across Canada's southern border. And not only are these lessons applicable to legal theory, but also to the lives of indigenous peoples and allies. The shared border between the United States and Canada, and arguably throughout the Americas, has cut the historical, ethnic, cultural and linguistic bonds that exist between indigenous communities. The recognition of unceded Salish territories at a university in British Colombia should perk up the ears of activists and allies who may be across an international border in Washington State, yet remain within Salish territory. The international attention for the protests at Standing Rock show the dissolvability of borders in solidarity for justice.

The relative upper hand that justice enforceability appears to enjoy in Canada and the United States should be understood in terms of the privileges afforded to those countries as peaceful, strong, independent democracies and world superpowers, respectively. Indeed, the privileges from which this thesis was written directly benefits from that superpower status. And it is with that privilege that this thesis hopes to draw attention to the issue of indigenous land rights. Further research that analyzes and compares the scope and standards with which selected Latin American states respect indigenous land rights cases where extractive industries are involved would expand upon this research. Because this thesis approached the topic from an experience and knowledge weighted in Anglo North America, the particular features of domestic legal frameworks in other American states very briefly examined. Further research that engages with the topic through settler colonialism and environmental racism certainly may draw different conclusions.

Nonetheless, the present research attempts to contribute to the scholarship on indigenous land rights as a human rights issue. All too often, the fundamentality of what are considered special rights for indigenous peoples are marginalized, as if the rights are additional and secondary. A critical engagement with the historical, legal, and contemporary disparities between indigenous peoples and settler colonial frameworks in the Americas offers an appropriate supplement to a strictly legal interpretation of indigenous land rights cases.

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