2015

REDD+: Climate Justice or a New Face of Manifest Destiny? Lessons Drawn from the Indigenous Struggle to Resist Colonization of Ojibwe Forests in the Nineteenth and Twentieth Centuries

Philomena Kebec

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Part of the [Environmental Law Commons](#), [Indian and Aboriginal Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Kebec, Philomena (2015) "REDD+: Climate Justice or a New Face of Manifest Destiny? Lessons Drawn from the Indigenous Struggle to Resist Colonization of Ojibwe Forests in the Nineteenth and Twentieth Centuries," *William Mitchell Law Review*: Vol. 41: Iss. 2, Article 4.

Available at: <http://open.mitchellhamline.edu/wmlr/vol41/iss2/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

REDD+: CLIMATE JUSTICE OR A NEW FACE OF MANIFEST DESTINY? LESSONS DRAWN FROM THE INDIGENOUS STRUGGLE TO RESIST COLONIZATION OF OJIBWE FORESTS IN THE NINETEENTH AND TWENTIETH CENTURIES[†]

Philomena Kebec^{††}

I.	INTRODUCTION.....	552
II.	INDIGENOUS PEOPLES AND REDD+ POLICYMAKERS MUST ADDRESS HOW REDD+ WILL AFFECT THE HUMAN RIGHTS OF INDIGENOUS PEOPLES.....	554
III.	OJIBWE RESISTANCE TO TAKEOVERS OF LAND, TERRITORIES, AND NATURAL RESOURCES	560
	A. <i>The Ojibwe Treaties of 1837, 1842, and 1854 and the Reservation of Rights to Use Natural Resources.....</i>	561
	B. <i>Individualization of Land Title: Loss of Land and Natural Resources and Self-Government Rights.....</i>	565
	1. <i>Allotment Led to the Division of Reservation Lands Among Individual Band Members.....</i>	565
	2. <i>Allotments Were Lost on a Massive Scale and Ojibwe Reservations Were Stripped of Their Marketable Timber.</i>	566
IV.	CONCLUSIONS AND RECOMMENDATIONS	568

I. INTRODUCTION

Historically, logging, mining and other forms of natural resource development have meant the loss of lands for indigenous

[†] This article was originally printed in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES (Randall Abate & Elizabeth Ann Kronk, eds. 2013).

^{††} Policy Analyst, Great Lakes Indian Fish and Wildlife Commission. JD, University of Minnesota, 2008; BA, University of Minnesota Twin Cities, 2002. I thank Elizabeth Kronk, Randall Abate, Leonardo Crippa, Armstrong Wiggins, and R. Tim Coulter for reading and commenting on earlier versions of this piece. I gratefully acknowledge Kaitrin Vohs for her research assistance.

peoples. Reducing Emissions from Forest Degradation and Deforestation (REDD+) is a unique form of natural resource development because it entails conservation, not extraction. REDD+ is an international initiative meant to promote investment in forest conservation and reforestation in tropical regions in order to mitigate climate change by reducing deforestation and forest degradation.¹ As indigenous peoples generally employ economic and cultural institutions that promote the sustainable use of natural resources, one might assume that indigenous peoples are in favor of REDD+. It has even been suggested that REDD+ might be the only way indigenous peoples in tropical forests will survive the tremendous pressure posed by traditional forms of development.²

The recognition of customary rights to lands and natural resources is essential to protecting indigenous landowners from impoverishment.³ In the context of the increasing global demand for large-scale agriculture, Olivier De Schutter, U.N. Special Rapporteur on the Right to Food, has determined that land cannot be treated as any other commodity, especially considering that in agricultural-based economies landlessness causes poverty.⁴ According to De Schutter, “treating land like any other commodity, which constitutes for many poor rural households their only productive asset and an essential safety net against economic shock, would be a mistake of historic proportions.”⁵

REDD+, as it is currently conceptualized, may facilitate the wide-spread violation of indigenous peoples’ human rights, including the loss of their lands and territories.⁶ In fact, the track record of REDD+ pilot projects shows a pattern of violations.⁷ It is naïve to assume that indigenous peoples will want to participate in REDD+ just because it entails conservation. On the contrary,

1. *About REDD+*, UN-REDD PROGRAMME, <http://www.un-redd.org/AboutREDD/tabid/582/Default.aspx> (last visited Dec. 2, 2014).

2. Naomi Roht-Arriaza, “*First, Do No Harm*”: *Human Rights and Efforts to Combat Climate Change*, 38 GA. J. INT’L & COMP. L. 593, 603 (2010).

3. Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT’L L.J. 503, 533 (2011).

4. *Id.* at 559.

5. *Id.*

6. Donald M. Goldberg & Tracy Badua, *Do People Have Standing? Indigenous Peoples, Global Warming, and Human Rights*, 11 BARRY L. REV. 59, 62–63 (2008); see Roht-Arriaza, *supra* note 2, at 603.

7. 1 INDIGENOUS ENVTL. NETWORK, NO REDD PAPERS 45–47 (Hallie Boas ed., 2011)

indigenous peoples are likely to oppose REDD+ unless REDD+ programs develop and implement mechanisms to effectively recognize and protect their rights. Indigenous peoples are not victim communities who will uniformly succumb upon the application of a certain level of pressure. On the contrary, indigenous peoples make up some of the most resilient and politically savvy communities on the planet, most having survived more than 500 years of various forms of colonization. As indigenous peoples own and control much of the territory in tropical regions, REDD+ will not be successful unless it incorporates the aspirations of indigenous peoples and provides recognition and protection for their human rights.

This article will highlight some of the risks indigenous peoples are likely to confront as REDD+ brings foreign investment to tropical forests. The article will compare what is now happening with REDD+ in tropical forests to the situation faced by the Ojibwe of North America when they entered into treaties with the United States in the nineteenth century. In both situations, colonization occurred, or is occurring, through foreign investment in forests and the imposition of formal property rights schemes into lands and territories of indigenous peoples.

Part II describes how REDD+ is expected to function and how REDD+ projects could lead to the violations of the rights of indigenous peoples. Part III explains how the United States acquired rights to Ojibwe lands at the expense of Ojibwe human rights. Part IV offers conclusions and recommendations. Instead of promoting policies that lead to human rights violations and ecosystem collapse, this chapter proposes that indigenous peoples and REDD+ policy makers develop policies and mechanisms that protect indigenous peoples' rights to self-determination and right to own and control their lands, territories and natural resources to improve the likelihood that REDD+ will succeed.

II. INDIGENOUS PEOPLES AND REDD+ POLICYMAKERS MUST ADDRESS HOW REDD+ WILL AFFECT THE HUMAN RIGHTS OF INDIGENOUS PEOPLES

The adoption of REDD+ into the Copenhagen Accords was seen as hopeful to many because it promises to solve two of the most vexing problems confronting humanity today: decimation of

2015] REDD+: CLIMATE JUSTICE OR NEW MANIFEST DESTINY? 555

the tropical forests and climate change.⁸ REDD+ is expected to work by increasing the value of standing forests, either through the development of funds to support sustainable forestry programs or the creation of carbon offset markets that would allow investors to purchase shares of sustainably managed forests.⁹ Both types of systems entail foreign investment into tropical forests. REDD+ proponents argue that tropical forests will continue to be logged or burned until their value standing exceeds their value dead.¹⁰ For many indigenous peoples who depend on tropical forests, the promise of REDD+ rings hollow. By increasing the value of their property and effectively incorporating tropical forests into the global economy, indigenous peoples risk the loss of their lands, territories, natural resources and entire ways of life.¹¹ At the same time, countries implementing REDD+ programs have failed to engage in meaningful consultations with indigenous peoples or commit to respecting their free, prior and informed consent with respect to projects that would implicate their interests.¹² Many indigenous peoples have expressed disgust that those least responsible for the emissions that have led to the climate change crisis are expected to give up their human rights in order to solve the crisis.¹³

8. Randall S. Abate, *A Tale of Two Carbon Sinks: Can Forest Carbon Management Serve as a Framework to Implement Ocean Iron Fertilization as a Climate Change Treaty Compliance Mechanism?*, 1 SEATTLE J. ENVTL. L. 1, 6 (2011).

9. Maria Banda & John Oppermann, *Building a Latin American Coalition on Forests: Negotiation Barriers and Opportunities*, 44 VAND. J. TRANSNAT'L L. 527, 542–43 (2011).

10. See Randall S. Abate & Todd A. Wright, *A Green Solution to Climate Change: The Hybrid Approach to Creating Reductions in Tropical Deforestation*, 20 DUKE ENVTL. L. & POL'Y F. 87, 90 (2010).

11. Stephanie Baez, Note, *The "Right" REDD Framework: National Laws that Best Protect Indigenous Rights in a Global REDD Regime*, 80 FORDHAM L. REV. 821, 826–27 (2011); see also David B. Hunter, *Human Rights Implications for Climate Change Negotiations*, 11 OR. REV. INT'L L. 331, 357 (2009).

12. FOREST PEOPLES PROGRAMME, LESSONS FROM THE FIELD: REDD+ AND THE RIGHTS OF INDIGENOUS PEOPLES AND FOREST DEPENDENT COMMUNITIES 3 (2011).

13. Letter from La Confederación de Nacionalidades Indígenas del Ecuador (CONAIE) to Ban Ki Moon, Sec'y Gen., United Nations (June 4, 2010) (on file with author) (rejecting REDD+ as a just solution to climate change in Ecuador and instead calling for a ban on the extraction of oil from beneath Ecuador's Yasuni National Park); see Naomi Johnstone, *Indonesia in the "REDD": Climate Change, Indigenous Peoples, and Global Legal Pluralism*, 12 ASIAN-PAC. L. & POL'Y J. 93, 110–12 (2010).

Tropical forests are being lost at significant rates, with 13 million hectares lost annually in the 2000s.¹⁴ These forests contain the majority of the planet's land-based and freshwater biodiversity.¹⁵ The profoundly beneficial environmental services that tropical forests provide to all people have led some to conclude that global initiatives to protect these forests are inevitable.¹⁶ Apart from the effect this loss is having on the global climate, at least 60 million indigenous peoples are completely dependent on tropical forests.¹⁷

Indigenous peoples living in forested lands often lack legal title to their lands and territories, instead holding their lands and territories under customary land title.¹⁸ In fact, much of the area covered by tropical forest in Central and South America is governed by a patchwork of customary and statutory land title systems, with many owners, indigenous peoples, local communities, individuals and other entities lacking formal legal title over their property.¹⁹ The lack of a formal western-style system of land holding has been identified as a major driver of deforestation.²⁰ Accordingly, land demarcation may be a necessary step in the process of protecting the remaining tropical forests. It is almost certainly a necessary step to prepare for participation in REDD+ carbon offset markets.²¹ The process of demarcating land for the

14. UNITED NATIONS FOOD & AGRIC. ORG., GLOBAL FOREST RESOURCES ASSESSMENT 2010: KEY FINDINGS 3 (2010).

15. GREENPEACE, BAD INFLUENCE: HOW MCKINSEY-INSPIRED PLANS LEAD TO RAINFOREST DESTRUCTION 2 (2011).

16. Banda & Oppermann, *supra* note 9, at 556–57.

17. Melissa Farris, *The Sound of Falling Trees: Integrating Environmental Justice Principles into the Climate Change Framework for Reducing Emissions from Deforestation and Forest Degradation (REDD)*, 20 FORDHAM ENVTL. L. REV. 515, 524 (2010).

18. See generally *Maya Indigenous Cmty. of the Toledo Dist. v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L./V/II.122, doc. 5 rev. 1, 727 (2004); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Interpretation of the Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Aug. 12, 2008); *Indigenous Cmty. Yakye Axa v. Paraguay*, Merits, Reparations, and Costs, Interpretation of the Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (Feb. 6, 2006); *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

19. See MARK S. FREUDENBERGER ET AL., U.S. AGENCY FOR INT'L DEV., USAID ISSUE BRIEF: THE FUTURE OF CUSTOMARY TENURE 5 (2011).

20. Maron Greenleaf, *Using Carbon Rights to Curb Deforestation and Empower Forest Communities*, 18 N.Y.U. ENVTL. L.J. 507, 576 (2011).

21. Lloyd C. Irland, "The Big Trees Were Kings": Challenges for Global Response to

purpose of participating in REDD+ programs, however, is fraught with risk to indigenous peoples.

One of the most serious threats to indigenous peoples in land demarcation is the risk that governments will break up collective land holdings and issue title to individuals. For indigenous peoples, holding land collectively is critical to maintaining a land-base, growing or collecting food and sustaining cultural and spiritual traditions.²² Gender equality within REDD+ programs is fast becoming an important issue²³ and could justify the breakdown of collectively held land.

A report produced for the United States Agency for International Development (USAID) identified several areas of concern with respect to REDD+ and women's rights in Asia, including women's right to individually own and control land, and the exclusion of individual women from benefits-sharing for REDD+ payments.²⁴ Unfortunately, the report lacks any discussion of the perspective of indigenous women and the importance to indigenous communities in maintaining collective control over their territories, and instead calls for REDD+ institutions to work towards transforming women's property rights by providing women with secure title to forest resources.²⁵

Imposing a westernized framework for women's property rights, emphasizing the rights of individuals to possess lands over the rights of indigenous peoples, could violate the human rights of indigenous peoples and lead to the loss of their lands and territories.²⁶ While it may be appropriate for governments to institute reforms securing title for women on land owned by non-indigenous people and communities, indigenous peoples possess

Climate Change and Tropical Forest Loss, 28 UCLA J. ENVTL. L. & POL'Y 387, 412–13 (2010).

22. INTER-AM. COMM'N ON HUMAN RIGHTS, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES ¶¶ 63–68 (2009).

23. AFR. UNION ET AL., FRAMEWORK AND GUIDELINES ON LAND POLICY IN AFRICA 23 (2010).

24. JEANNETTE GURUNG ET AL., U.S. AGENCY FOR INT'L DEV., GETTING REDD+ RIGHT FOR WOMEN: AN ANALYSIS OF THE BARRIERS AND OPPORTUNITIES FOR WOMEN'S PARTICIPATION IN THE REDD+ SECTOR IN ASIA 11–14 (2011).

25. *Id.* at 23–24.

26. *See infra* Part III.B (explaining that when American officials broke up land holdings of indigenous peoples into individual plots, millions of acres of lands were permanently lost because impoverished individuals were susceptible to overreaching by land speculators and local governments).

the right of self-determination, which includes the right to make internal decisions to hold their lands, territories and natural resources as communal property.²⁷ Without a landbase, continuing to function as a separate people is nearly impossible. The failure to recognize and protect the right of self-determination with respect to land rights often leads to further human rights violations, including the right to life, personal integrity, a dignified existence, food, water, health, education and the rights of children.²⁸

The right of indigenous peoples to collectively own and control their lands, territories and natural resources is recognized and protected by numerous human rights documents, including Article 23 of the American Declaration on the Rights and Duties of Man,²⁹ Article 21 of the American Convention on Human Rights,³⁰ and Article 14 of the African Convention on Human and Peoples' Rights.³¹ One of the first international cases to recognize that the right to own property extends to indigenous peoples was *Awas Tingni (Mayagna Sumo) Community v Nicaragua*.³² The Inter-American Court of Human Rights decided that Nicaragua violated Article 21 of the American Convention on Human Rights when it sold timber concessions to a Korean logging company on land the Awas Tingni community owned under customary title, thus, violating the right of the community to use and enjoy their property.³³ The Court determined, "indigenous groups, by their very existence, have the right to live freely in their own territory."³⁴

With the adoption of the U.N. Declaration on the Rights of Indigenous Peoples in 2007, states recognized that indigenous

27. See *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 123–56 (June 17, 2005).

28. See INTER-AM. COMM'N ON HUMAN RIGHTS, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES ¶ 81 n. 220 (2009).

29. See *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, doc. 5 rev. 1, 860 (2002).

30. See *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 120 (Mar. 29, 2006).

31. Centre for Minority Rights Dev. (Kenya) *ex rel. Endorois Welfare Council v. Kenya*, Afr. Comm'n on Human & Peoples' Rights, Commc'n. No. 276/2003, ¶ 211 (Feb. 4, 2010).

32. See *generally* *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

33. *Id.* ¶ 153.

34. *Id.* ¶ 149.

peoples have a distinct right to self-determination. Through the process of negotiating the text of the declaration, states articulated their understanding that indigenous peoples possess the right to self-determination, which includes a wide range of activities that should be free from state interference.³⁵ Included in the declaration are provisions recognizing the right of self-determination with respect to indigenous peoples' ownership and management of their natural resources.³⁶ Article 21 of the American Convention and Article 1 of the International Convention on Civil, Political and Social Rights calls for the recognition of the rights of indigenous and tribal peoples "to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied."³⁷ Thus, the right of self-determination for indigenous peoples includes the right to use and develop their lands, territories and natural resources without undue interference by states.

While it is not entirely clear how the rights to carbon will be characterized (as part of the land or divisible from the land), indigenous peoples own and control the carbon within their territories under the principle of indigenous peoples' permanent sovereignty over natural resources. Accordingly, states may not adopt policies that take away the right of indigenous peoples to the carbon within their territories without their free, prior and informed consent.³⁸ While some countries applying for REDD+ program funding seem to have taken the position that carbon is linked to land ownership and that indigenous peoples owning the land also own the carbon,³⁹ at least one country, Indonesia, has

35. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

36. *Id.* art. 26.

37. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 93–95 (Nov. 28, 2007).

38. See Declaration on the Rights of Indigenous Peoples, *supra* note 35, art. 19 ("States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.").

39. SECRETARÍA DE AMBIENTE Y DESARROLLO SUSTENTABLE DE LA NACIÓN, ARGENTINA REDD-READINESS PLAN PROPOSAL 48 (2010); see also DAVID TAKACS,

taken the opposite position in its national REDD+ policy, denying that indigenous peoples have rights to carbon on most forested lands.⁴⁰ REDD+ projects are being instituted in Indonesia before competing land claims are settled, effectively precluding community consent in decisions regarding whether to participate in such programs.⁴¹ At least one community is losing access to territories essential for growing their subsistence crops,⁴² and the project is generating confusion and political division among indigenous communities.⁴³

III. OJIBWE RESISTANCE TO TAKEOVERS OF LAND, TERRITORIES, AND NATURAL RESOURCES

While the context is different, drawing on the historical experience of other woodlands indigenous nations, such as the Ojibwe, and following their story forward may be critical to assisting indigenous peoples negotiating agreements related to REDD+ and formulating a legal and political strategy to achieve the best possible outcomes.

In the mid-nineteenth century, Ojibwe⁴⁴ bands⁴⁵ from the Great Lakes area confronted challenges similar to those indigenous

CONSERVATION INT'L, FOREST CARBON: LAW AND PROPERTY RIGHTS 41 (2009).

40. Letter from Fatimata-Binta Victoire Dah, Chairperson of the Comm. for the Elimination of Racial Discrimination, to I. Gusti Agung Wesaka Puja, Ambassador, Permanent Mission of the Republic of Indon. to the United Nations Office at Geneva (Mar. 13, 2009), *available at* http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia130309.pdf.

41. REBECCA PEARSE & JULIE DEHM, FRIENDS OF THE EARTH INT'L, IN THE REDD: AUSTRALIA'S CARBON OFFSET PROJECT IN CENTRAL KALIMANTAN 16–17 (Ronnie Hall et al. eds., 2011), *available at* <http://www.criticalcollective.org/wp-content/uploads/REDD-report-2.pdf>.

42. *Id.* at 16.

43. *Id.* at 17.

44. The Ojibwe are also referred to as Chippewa (an anglicized version of Ojibwe) or Anishinabe. The term “Ojibwe” is used in this chapter because it is more specific to the indigenous peoples of the western Great Lakes, whereas “Anishinabe” also includes Pottawatomi, Menominee, and Odawaa peoples, who are indigenous peoples with different histories and different treaties.

45. The Ojibwe organized themselves into semi-autonomous bands joined by common language, history, and culture. WILLIAM W. WARREN, HISTORY OF THE OJIBWAY PEOPLE 38–39 (2d ed. 2009). Ojibwe leaders generally only speak on behalf of their own community or band, but bands negotiated treaties with the United States together and have continued to work on an intertribal basis when confronted with common threats. RONALD N. SATZ, CHIPPEWA TREATY RIGHTS: THE

peoples face today with REDD+. The Lake Superior Ojibwe owned and controlled millions of acres of densely forested lands along the southern shore of Lake Superior and extending west into what is now Michigan, Wisconsin, and Minnesota.⁴⁶ They held their land collectively, but had developed a complex system of allocating resources fairly among bands and family groups.⁴⁷ Their system is likely analogous to customary land systems currently used by indigenous peoples in tropical forests. Collective ownership of the lands, territories, and natural resources supported the communities' subsistence economies, allowing families and groups to harvest the resources they needed. Ojibwe communities harvested an abundance of seasonal foods, including fish, berries, wild rice, maple sugar, medicinal plants, and wild game.

The expansion of the United States westward was perceived to be as inevitable as is the expansion of REDD+ into the tropical forests today.⁴⁸ As with REDD+, the move to demarcate property rights within the forests was driven by outside investors who sought access to the bounty of natural resources controlled by the Ojibwe.⁴⁹ Agents of the U.S. government communicated to the Ojibwe in the 1830s that the United States needed their territories for logging, mining and settlement, insinuating the land would be taken through negotiation or by force.⁵⁰ Ojibwe leaders chose to negotiate, determining that this process would best preserve their communities' rights.⁵¹

A. *The Ojibwe Treaties of 1837, 1842, and 1854 and the Reservation of Rights to Use Natural Resources*

The Ojibwe entered into several treaties with the United States during the nineteenth century. In the treaties of 1836,⁵² 1842,⁵³ and

RESERVED RIGHTS OF WISCONSIN'S CHIPPEWA INDIANS IN HISTORICAL PERSPECTIVE 9–10 (Carl N. Hayward ed., 1991).

46. CHARLIE OTTO RASMUSSEN, OJIBWE JOURNEYS: TREATIES, SANDY LAKE & THE WAABANONG RUN 16 (2003).

47. CHARLES E. CLELAND ET AL., FAITH IN PAPER: THE ETHNOHISTORY AND LITIGATION OF UPPER GREAT LAKES INDIAN TREATIES 21–22 (2011).

48. See MARY LETHERT WINGERD, NORTH COUNTRY: THE MAKING OF MINNESOTA 104 (2010).

49. See *id.* at 128–30.

50. SATZ, *supra* note 45, at 37–38.

51. WINGERD, *supra* note 48, at 131.

52. Treaty with the Chippewa, U.S.-Chippewa, July 29, 1837, 7 Stat. 536

1854,⁵⁴ the Ojibwe relinquished full ownership rights over much of Ojibwe territory (areas that now encompass much of northern Wisconsin and Minnesota) held under aboriginal or customary title in exchange for the legal right over smaller areas of territory and the promise of protection and the payment of money and goods.⁵⁵ Of all of the treaties negotiated between the Ojibwe and the United States, these treaties are particularly interesting because they stipulate the Ojibwe peoples' reservation of rights to access natural resources on lands they ceded to the United States. For example, the reserved rights provision from the 1837 treaty reads: "the privilege of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President and the Senate of the United States."⁵⁶

Despite explicit provisions in the Treaties of 1837, 1842 and 1854 reserving the right to harvest natural resources within the ceded territories, the states took the position that statehood abrogated any treaty rights held by indigenous peoples.⁵⁷ Beginning in the early twentieth century, state game wardens began enforcing state fish and game laws on Ojibwe band members exercising their reserved rights.⁵⁸ Band members who defied state law by exercising their treaty rights faced fines, arrests, and the confiscation of their boats, guns, and nets.⁵⁹ Most Ojibwe families depended on the harvesting of natural resources for their basic survival until at least the 1940s.⁶⁰ Often lacking the ability to pay fines, husbands and fathers had to serve jail time for exercising their treaty rights while family members starved at home.⁶¹ Throughout the twentieth

[hereinafter 1837 Treaty].

53. Treaty with the Chippewa, U.S.-Chippewa, Oct. 4, 1842, 7 Stat. 591 [hereinafter 1842 Treaty].

54. Treaty with the Chippewa, U.S.-Chippewa, Sept. 30, 1854, 10 Stat. 1109 [hereinafter 1854 Treaty].

55. 1854 Treaty, *supra* note 54, arts. 1–5, 11; 1842 Treaty, *supra* note 53, arts. 1–2, 4; 1837 Treaty, *supra* note 52, arts. 1–5.

56. 1837 Treaty, *supra* note 52, art. 5.

57. *See, e.g.,* State v. Doxtater, 2 N.W. 439, 447 (Wis. 1879).

58. SATZ, *supra* note 45, at 83.

59. *Id.* at 83, 85, 88.

60. CLELAND ET AL., *supra* note 47, at 45.

61. *Id.*

2015] REDD+: CLIMATE JUSTICE OR NEW MANIFEST DESTINY? 563

century, band members resisted violations of their treaty rights in the field⁶² and in court.⁶³

In 1974, the Lac Courte Oreilles Band of Lake Superior Chippewa sued the state of Wisconsin, challenging its authority to regulate off-reservation fishing carried out by Mike and Fred Tribble, Lac Courte Oreilles band members.⁶⁴ The federal district court consolidated the Lac Courte Oreilles case with cases brought by other Ojibwe bands party to the treaties of 1837 and 1842.⁶⁵ In 1983, the U.S. Court of Appeals for the Seventh Circuit ruled in favor of the Ojibwe bands.⁶⁶ In similar litigation against the State of Minnesota, the Mille Lacs Band of Ojibwe prevailed before the U.S. Supreme Court.⁶⁷

The Lac Courte Oreilles litigation continued for eight years, resulting in a framework for tribal-state natural resource sharing that recognized and protected the human rights of the Ojibwe bands. In the initial circuit decision, the panel decided that the Ojibwe bands retained their rights to hunt, fish, and gather within the ceded territory on publicly held land, as agreed within the treaties; statehood and an invalid removal order had no effect on the validity of the treaties.⁶⁸

After Seventh Circuit's broad strokes in *Voigt I*, the district court was tasked with working out the details. Judge James Doyle held that the bands "have the right to exploit virtually all the natural resources in the ceded territory, as they did at treaty time."⁶⁹ This included 42 species of animals and fish and more than 100 varieties of plants.⁷⁰ The court further determined that the plaintiffs could employ modern hunting and fishing methods to

62. Interview with Gerry Whitebird, Bad River Elder, in Odanah, Bad River Reservation (Aug. 23, 2011). To deter inspection by state game wardens, Gerry placed loads of dirty diapers on top of his treaty-harvested ducks. *Id.*

63. Band members challenged Wisconsin's failure to recognize their treaty rights in 1901, 1908, 1933, and 1940. SATZ, *supra* note 45, at 83, 85, 87.

64. *Id.* at 94.

65. *Id.* at 95.

66. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt, 700 F.2d 341, 365 (7th Cir. 1983).

67. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 176 (1999).

68. *Voigt*, 700 F.2d at 365.

69. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1430 (W.D. Wis. 1987).

70. *Id.* at 1426–28.

exercise their rights⁷¹ and that they were entitled to a share of the resources sufficient to provide them with a moderate living.⁷² In later decisions, the court crafted a detailed framework for sharing resources, restricting the ability of the state to burden treaty-reserved rights by regulations “to ensure the minimum possible infringement upon the tribes’ treaty rights,” with the court empowered to scrutinize the relationship between the stated purpose of the regulation and its effect on the Ojibwe bands.⁷³

The district court decisions required the bands to create effective mechanisms for regulating band members’ in their exercise of treaty rights.⁷⁴ In effect, the court demanded that the Ojibwe bands resume exercising their inherent right of self-determination with respect to off-reservation natural resources. Specifically, the bands were required to manage the resources on a collective, intertribal basis, and as individual bands.⁷⁵ The bands were tasked with “undertak[ing] effective management programs and adopt[ing] and enforce[ing] regulations consistent with [legitimate state conservation, health and safety interests]; (2) remain[ing] within the tribal allocation of resources; and (3) engage[ing] in intertribal co-management to accomplish effective self-regulation.”⁷⁶

Leaders from the seven bands party to the *Lac Courte Oreilles* litigation formed the Voigt Task Force to develop regulations governing Ojibwe harvests and to jointly negotiate with the state on resource allocation and state regulation.⁷⁷ They also formed their own agency, the Great Lakes Indian Fish and Wildlife Commission (GLIFWC), to enforce tribal natural resource law, promote conservation within the ceded territories, and educate the broader public about Ojibwe treaty rights.⁷⁸

71. *Id.* at 1430.

72. *Id.* at 1434.

73. *Lac Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 668 F. Supp. 1233, 1239 (W.D. Wis. 1987).

74. Ann McCammon-Soltis & Kekek Jason Stark, *Fulfilling Ojibwe Treaty Promises—An Overview and Compendium of Relevant Cases, Statutes and Agreements*, in MINWAAJIMO—TELLING A GOOD STORY: PRESERVING TREATY RIGHTS FOR THE PAST 25 YEARS 48, 51 (LaTisha A. McRoy & Howard J. Bichler eds., 2011).

75. *Id.*

76. *Id.*

77. CLELAND ET AL., *supra* note 47, at 124, 127.

78. McCammon-Soltis & Stark, *supra* note 74, at 51–52.

Through the Voigt Task Force, GLIFWC, and their own governments, Ojibwe bands use treaty rights to gain a seat at the table when state and federal agencies make decisions concerning the environment and natural resources. Today, state agencies work with the bands to manage fisheries and other natural resources within the ceded territories. The bands bring another level of investment and expertise to natural resource management, which has increased the availability of walleye in the ceded territories, benefiting Indian and non-Indians alike. In this case, upholding the right of indigenous peoples to exercise self-determination with respect to their share of natural resources has led to a healthier ecosystem and benefits accruing to indigenous and non-indigenous communities alike.⁷⁹

B. Individualization of Land Title: Loss of Land and Natural Resources and Self-Government Rights

The Treaty of 1854 represented a major political victory for the Ojibwe because it created reservations, or permanent homelands, for the Lake Superior Ojibwe bands.⁸⁰ While the treaty should be celebrated, a provision in the 1854 treaty calls for the allotment of the reservations.⁸¹ At the time of the negotiations, it was unlikely that the Ojibwe signers understood the full implications for the allotment of their lands and how it would contribute to land loss and loss of self-determination rights territories within reservation boundaries.⁸²

1. Allotment Led to the Division of Reservation Lands Among Individual Band Members

As the United States acquired the territories of Ojibwe and other indigenous peoples, it adopted policies aimed at weakening the authority of indigenous peoples' governments. One of the most

79. See, e.g., AMAZON CONSERVATION TEAM—ACT BRAZIL ET AL., FREE, PRIOR AND INFORMED CONSENT: SURUI CARBON PROJECT 33–34, 37 (Almir Narayamoga Surui et al. eds., Maíra Irigaray & Rebecca Vonada trans., 2010).

80. CLELAND ET AL., *supra* note 47, at 221–23. The nine reservations include L'Anse (home of the Keweenaw Bay Ojibwe community), Lac Vieux Desert, Bad River (formerly called La Pointe), Lac du Flambeau, Lac Courte Oreilles, Fond du Lac, Red Cliff, and Grand Portage. 1854 Treaty, *supra* note 54, art. 2.

81. 1854 Treaty, *supra* note 54, art. 3.

82. See CLELAND ET AL., *supra* note 47, at 216–17.

important components of this campaign was allotment, or individualization of indigenous peoples' lands.⁸³ With allotment, lands that had been held collectively were divided into small tracts for individual tribal members.

The allotment policy began in the 1850s when the United States included provisions for allotment in treaties with indigenous peoples. The Treaty of 1854 is an example of this type of treaty. Article 3 of the treaty authorizes the President of the United States to "assign to every family or single person . . . eighty acres of land for his or their separate use."⁸⁴ Surveys of the La Pointe, Red Cliff, Lac Courte Oreilles, and Lac du Flambeau began in the 1860s, with the first allotments distributed within the following ten years. Beginning in 1888, the allotment policy was applied to other Ojibwe reservations and to indigenous peoples across the United States with the enactment of the General Allotment Act, also known as the Dawes Act.⁸⁵

2. *Allotments Were Lost on a Massive Scale and Ojibwe Reservations Were Stripped of Their Marketable Timber*

At first, the U.S. government held allotments in trust for indigenous individuals. Trust status shielded it from state taxation and sale.⁸⁶ The rules governing alienability changed as pressure to take over lands held by indigenous individuals increased.⁸⁷ In 1906, Congress passed the Burke Act, rewriting the rules governing the termination of trust status for allotments.⁸⁸ The Burke Act provided for the issuance of a fee-simple patent upon the determination by the Secretary of Interior that the owner of the allotment, or allottee, was competent to manage his or her affairs.⁸⁹ After

83. See *id.* at 215–16. Other components of the policy included compulsory education for indigenous children, forcible conversion to Christianity, and assimilation into westernized culture and economies. See Lisa M. Poupart, *The Familiar Face of Genocide: Internalized Oppression Among American Indians*, 18 HYPATIA 86, 87 (2003).

84. 1854 Treaty, *supra* note 54, art. 3.

85. General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (1887), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, tit. I, § 106(a)(1), 114 Stat. 1991.

86. *Id.*

87. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10–11 (1995).

88. *Id.*

89. MELISSA L. MEYER, *THE WHITE EARTH TRAGEDY: ETHNICITY AND DISPOSSESSION AT A MINNESOTA ANISHINAABE RESERVATION, 1899–1920*, at 153

2015] REDD+: CLIMATE JUSTICE OR NEW MANIFEST DESTINY? 567

receiving title to their allotments in fee simple status, allottees often lost their land in questionable tax sales,⁹⁰ through foreclosure after entering into predatory mortgages,⁹¹ or by swindle.⁹²

Generally, timber companies first acquired the allotments of individual Ojibwes. A typical 40-acre allotment would sell for approximately \$25, from which a timber company could harvest thousands of dollars of pine.⁹³ Others lost their lands after property taxes went unpaid and local governments would seize the allotments and sell them in tax auctions.⁹⁴ During this period, logging occurred without consideration for long-term sustainability. Within allotted Ojibwe reservations, timber companies removed nearly all of the trees, leaving few economic opportunities for band members who had formerly enjoyed employment logging and in the timber mills.⁹⁵ Often, impoverished band members had no choice but to leave their homelands to find work.⁹⁶

Allotting collectively held lands proved immediately devastating to indigenous communities.⁹⁷ Indigenous peoples' governments had limited control over how the allotments occurred and could not block the sale of excess lands.⁹⁸ By 1934, when the allotment policy formally ended, while many allotments continued to be held in trust, non-indigenous individuals and entities had wrested approximately 130 million acres of land from allottees, or around two-thirds of the lands allotted.⁹⁹ Ojibwe communities in what is now known as Wisconsin and Minnesota lost at least 840,000

(1994); see *United States v. First Nat'l Bank of Detroit*, Minn., 234 U.S. 245, 257 (1914).

90. See, e.g., *United States v. Dewey Cnty.*, 14 F.2d 784, 786 (D.S.D. 1926).

91. MEYER, *supra* note 89, at 155–56.

92. Individuals from the La Pointe or Bad River Reservation lost their allotments by signing an “X” on documents they believed to relate to the receipt of old-age pensions, but in fact, were quitclaim deeds or their equivalent. Interview with Sylvia Cloud, Bad River Elder (Nov. 9, 2011).

93. CLELAND ET AL., *supra* note 47, at 304.

94. MEYER, *supra* note 89, at 210.

95. *Id.* at 223.

96. *Id.* at 223–24.

97. See generally LOUISE ERDICH, *TRACKS* (1988); MEYER, *supra* note 89.

98. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) (holding that the consent of indigenous peoples was not required for the sale of excess lands); see Royster, *supra* note 87, at 14.

99. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 16.03[2][b] (Nell Jessup Newton et al. eds., 2012), available at LEXIS.

acres of land due to allotment.¹⁰⁰ The loss of land and timber resources, combined with the criminalization of treaty-protected hunting and fishing, led to the impoverishment of the Ojibwe people. Sickness and starvation became the norm in the early and mid-twentieth century, where wealth—in the form of food and freedom—had previously abounded.¹⁰¹

The legacy of allotment continues to frustrate the efforts of indigenous peoples in exercising authority over their territories. Today, land tenure on former allotted reservations resembles a checkerboard of land held in fee status by Indians and non-Indians and land held in trust status by the United States. In a series of decisions beginning with *Montana v. United States*,¹⁰² the Supreme Court curtailed the ability of tribal governments to regulate the activities of non-Indians on fee lands within reservation boundaries.¹⁰³ The federal government continues to exercise nearly total control over Indian trust lands.¹⁰⁴ Thus, within communities that were formerly allotted, indigenous peoples are extremely limited in their ability to exercise internal self-determination with respect to their territories.

IV. CONCLUSIONS AND RECOMMENDATIONS

The ongoing human rights violations perpetrated by the U.S. federal and state governments against the Ojibwe and other indigenous peoples, as a result of the allotment of their

100. *Allotment Information for the Midwest Region*, INDIAN LAND TENURE FOUND., <https://www.iltf.org/resources/land-tenure-history/tribe-reservation-allotment-information> (last visited Dec. 14, 2014) (follow the link for the Midwest region).

101. After losing its land base during the early twentieth century, White Earth Ojibwes attracted congressional attention due to high rates of starvation and diseases such as trachoma and tuberculosis. See MEYER, *supra* note 89, at 220.

102. 450 U.S. 544 (1980).

103. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989) (White, J., plurality opinion for Nos. 87-1699 and 87-1711) (calling for limiting the Montana exceptions to activities that are “demonstrably serious and . . . imperil the political integrity, the economic security, or the health and welfare of the tribe”); see also *South Dakota v. Bourland*, 508 U.S. 679, 692 (1993) (“[R]egardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control.”).

104. Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy Over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 447 (2006).

reservations, provide an example of what not to do when undertaking efforts to formalize legal relationships to lands and territories. In Ojibwe communities, violating the rights of Ojibwe bands in an effort to exercise self-government in the management of their territories and natural resources, led to an ecosystem-wide crisis. Their vast pine forests were destroyed within one generation when foreign investors plundered the resource.¹⁰⁵

If REDD+ programs continue to fail to incorporate recognition and protection for the rights of indigenous peoples, it is likely that REDD+ itself will destroy tropical forests.¹⁰⁶ The experience of the Ojibwe bands post-*Voigt* shows that when Ojibwe bands forced the state to recognize and uphold their human rights with respect to the ceded territories, and allow Ojibwe bands to meaningfully participate in decisions affecting the ceded territories, substantial environmental benefits accrued. One commentator explains that the act of recognizing the interest of indigenous peoples in the land protects it from “appropriation by the world’s largest consumers,” and that allowing for “a diversity of approaches to human interaction with the environment” and “entrusting stewardship of a particular ecosystem to the finely tuned cultural expertise that indigenous peoples have developed through millennial relationships with their ancestral lands” promotes true sustainability.¹⁰⁷

By applying these principles to REDD+, states and indigenous peoples could create programs that allow all parties to meet their goals.¹⁰⁸ However, mutually beneficial agreements do not happen

105. See, e.g., Michelle M. Steen-Adams, Nancy Langston & David J. Mladenoff, *White Pine in the Northern Forests: An Ecological and Management History of White Pine on the Bad River Reservation of Wisconsin*, 12 ENVTL. HIST. 614, 620, 625 (2007).

106. See Roht-Arriaza, *supra* note 2, at 605. See generally Chris Lang, *Interview with Teguh Surya, WALHI: “We Are Against REDD. We Are Against Carbon Trading.”*, REDD-MONITOR.ORG (Mar. 9, 2012), <http://www.redd-monitor.org/2012/03/09/interview-with-teguh-surya-walhi-we-are-against-redd-we-are-against-carbon-trading/> (recommending that, in addition to addressing the issue of safeguards, REDD+ programs adopt a definition of forests that favors native forests and institute reforms that curb demand for tropical forest resources and prevent leakage).

107. Matthew F. Jaksa, *Putting the “Sustainable” Back in Sustainable Development: Recognizing and Enforcing Indigenous Property Rights as a Pathway to Global Environmental Sustainability*, 21 J. ENVTL. L. & LITIG. 157, 162 (2006).

108. Indigenous areas exhibit significantly lower rates of deforestation and forest degradation than non-indigenous areas. See Andrew Nelson & Kenneth M. Chomitz, *Effectiveness of Strict vs. Multiple Use Protected Areas in Reducing Tropical Forest*

by chance—they require strong protections for indigenous peoples' rights to self-determination and control of lands and territories, resources, and mechanisms to secure implementation and compliance. While the voices and participation of indigenous women is critical to this process, unilaterally allotting indigenous peoples' collectively held land in order to promote women's rights would constitute a serious mistake and would likely lead to a myriad of problems, including the loss of indigenous peoples on a massive scale.

The story of the Ojibwe is useful in the context of REDD+ because it illustrates the passion and persistence of indigenous peoples fighting for recognition of their rights. Ojibwe band members continued to hunt and fish, risking steep fines and arrests, for more than seventy years after the state began enforcing its regulations against them. They sued the state on a regular basis for the recognition of their rights, consistently articulating a demand for recognition of the rights their ancestors negotiated in the treaties. They finally prevailed when the political climate in the United States turned in favor of recognition for indigenous peoples' rights. Likewise, indigenous peoples in tropical forest countries are resisting violations of their human rights.¹⁰⁹ Indigenous peoples in Brazil affected by the construction of the Belo Monte dam have mounted a multi-faceted campaign to draw attention to their plight. They secured precautionary measures through the Inter-American Commission on Human Rights,¹¹⁰ engaged in civil disobedience and public protest throughout Brazil, and have gained the support of Brazilian public prosecutors and Hollywood personalities.¹¹¹ REDD+ policymakers should expect to

Fires: A Global Analysis Using Matching Methods, PLOS ONE, Aug. 2011, at 1.

109. ORG. OF AM. STATES, RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS art. 25 (2013); Emily Achtenberg, *Bolivia: TIPNIS Consulta on Hold, Communities Reject Militarization*, NACLA (Aug. 30, 2012), <https://nacla.org/blog/2012/8/30/bolivia-tipnis-consulta-hold-communities-reject-militarization>; see also *Inter-American Commission on Human Rights Precautionary Measures*, ORG. AM. STATES, <http://www.cidh.oas.org/medidas/2011.eng.htm> (last visited Dec. 2, 2014);

110. *Inter-American Commission on Human Rights Precautionary Measures*, *supra* note 109.

111. Barbara Fraser, *Hundreds of Indigenous Protest Belo Monte Dam, Brazilian Government Boycott Talks*, INDIAN COUNTRY TODAY MEDIA NETWORK (Nov. 10, 2011), <http://indiancountrytodaymedianetwork.com/2011/11/10/hundreds-indigenous-protest-belo-monte-dam-brazilian-government-boycotts-talks-60547>.

2015] REDD+: CLIMATE JUSTICE OR NEW MANIFEST DESTINY? 571

encounter similar resistance if their programs fail to incorporate sufficient recognition and protection for the rights of indigenous peoples. Apart from the tremendously important human rights considerations, the failure to adhere to internationally recognized property rights standards will likely deter investment in REDD+.