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Navigating Indigenous
Climate Litigation:
A Roadmap

What to remember when litigating climate change initiated by indigenous communities:

1.

Renewing indigenous knowledge, such as traditional ecological knowledge, can bring together indigenous communities to strengthen their own self-determined vision for addressing climate change.

2.

To strengthen a case, common tort, and administrative law can be supplemented with specific obligations owed to indigenous peoples.

3.

While climate litigation as policy regulation is tempting, some courts have been reluctant to adjudicate on issues relating to climate change policy, when a statute has already established certain requirements.

4.

We must ensure that the promise of indigenous climate litigation does not result in the further neocolonial mischaracterization of indigenous people.

5.

Placing the burden of litigating climate change on indigenous people today is an exploitation of their vulnerable position.

Climate Litigation: Most Viewed Reviews

★★★★★ 12 August 1992

'Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture, and interests and enable their effective participation in the achievement of sustainable development.'

– Principle 22 of the Rio Declaration

★★☆☆☆ 21 October 2021

'The claims made in this proceeding are not consistent with the policy goals and scheme of the legislation and in particular the goals of ensuring that this country's response to climate change is effective, efficient, and just. Private litigation against a small subset of emitters, requiring them to comply with requirements that are more stringent than those imposed by statute, will not be effective to address climate change at a national level, let alone globally.'

- *Smith v. Fonterra*, Judgment of the Court of Appeal of New Zealand

★★★★★ 22 September 2022

'It is uncontested that the authors' lives and cultures are highly dependent on the availability of the limited natural resources to which they have access, and on the predictability of the natural phenomena that surround them.'

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United Nations Human Rights Committee

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Navigating Indigenous Climate Litigation: A Roadmap

Daniel Billy and others v. Australia

The indigenous inhabitants of the Torres Strait Islands filed a complaint aimed at Australia's climate inaction, stating that it violated their fundamental human rights under the International Covenant of Civil and Political Rights (Art. 6 (the right to life), Art. 17 (the right to be free from arbitrary interference with privacy, family, and home), Art. 27 (the right to culture)).

The first time the United Nations Human Rights Committee has found that a state's failure to protect people from the impacts of climate change can amount to a violation of international human rights law. However, it did not find a violation of the right to life.

It held that States must prevent interference with a person's privacy, family, or home that arises from conduct not attributable to the State, at least where such interference is foreseeable and serious.

Native Village of Kivalina v. Exxon Mobil Corp.

This case was brought under the federal common law doctrine of public nuisance.

The plaintiffs presented that in the past years, sea ice had formed later than previously and broken up earlier, had been thinner and less extensive. This led to heavier storm waves which destroyed the coastline, leading to massive erosions.

The United States Court of Appeal for the 9th Circuit concluded that the political question doctrine precluded judicial considerations of the claim brought by Kivalina.

Kanuk v. State of Alaska

The plaintiffs led a challenge under the concept of atmospheric trust litigation, which builds upon legal doctrines relating to the public trust doctrine.

The Supreme Court of Alaska dismissed the lawsuit stating that the causes of action were non-justiciable. The Court was unreceptive to the atmospheric trust doctrine and concluded, that the allocation of fault and cost of global warming should be left for determination by the executive or legislative branch.

Smith v. Fonterra

The plaintiff sued 7 of New Zealand's largest companies. He alleged that the defendants' contributions to climate change constitute a public nuisance, negligence, and breach of a duty to cease contributing to climate change.

Smith argued that striking out his claims against private entities would be a breach of the Treaty of Waitangi (signed in 1840 between Māori chiefs and the British Crown) and relevant principles of tikanga (Māori customary practices or behaviors).

The Court decided that this was not the case, arguing that shared action and a common, legislative approach should be pursued.

This decision is now being appealed in front of the Supreme Court of New Zealand.

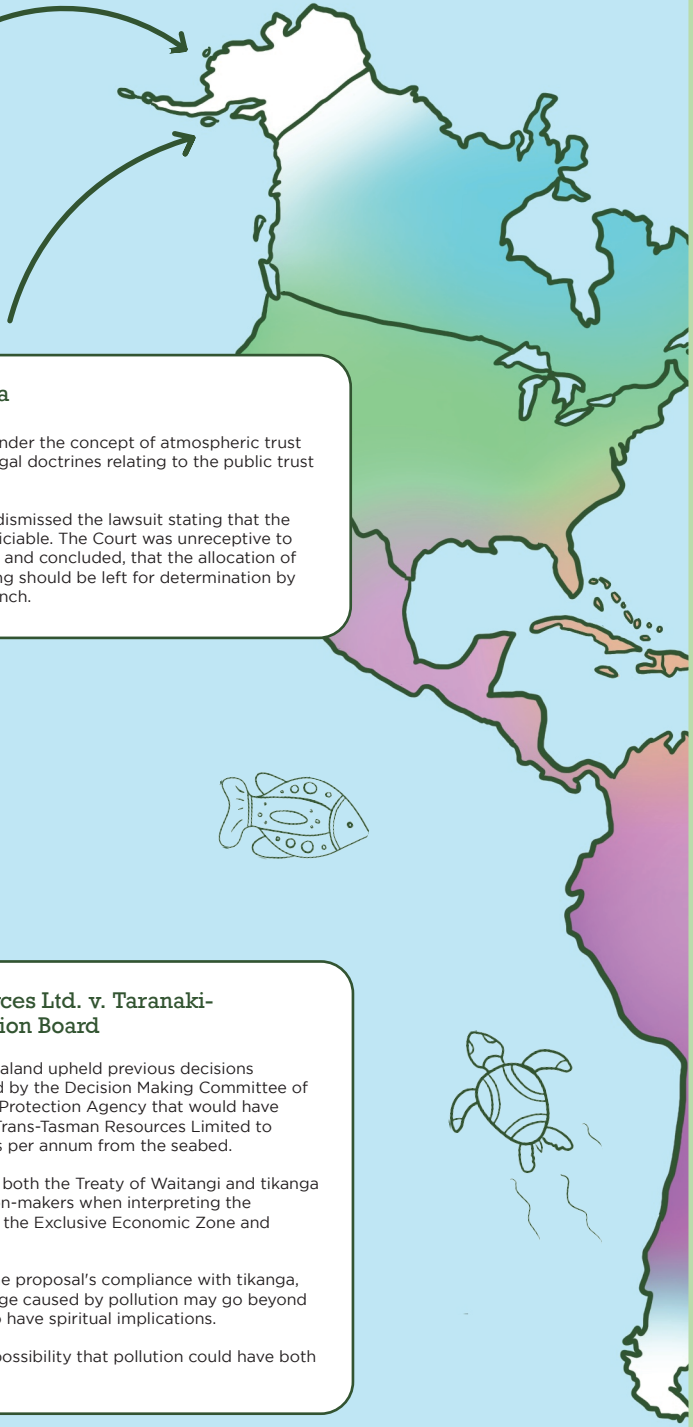
Trans - Tasman Resources Ltd. v. Taranaki-Whanganui Conservation Board

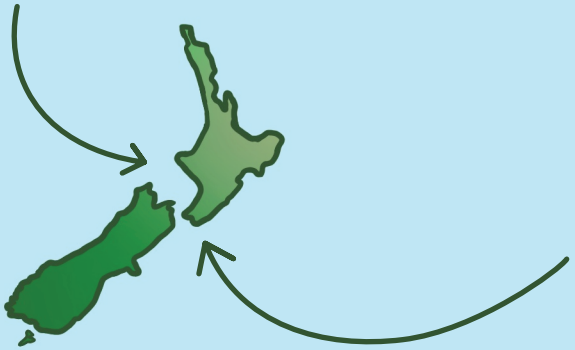
The Supreme Court of New Zealand upheld previous decisions quashing the consents granted by the Decision Making Committee of New Zealand's Environmental Protection Agency that would have allowed the mining company Trans-Tasman Resources Limited to extract up to 50 million tonnes per annum from the seabed.

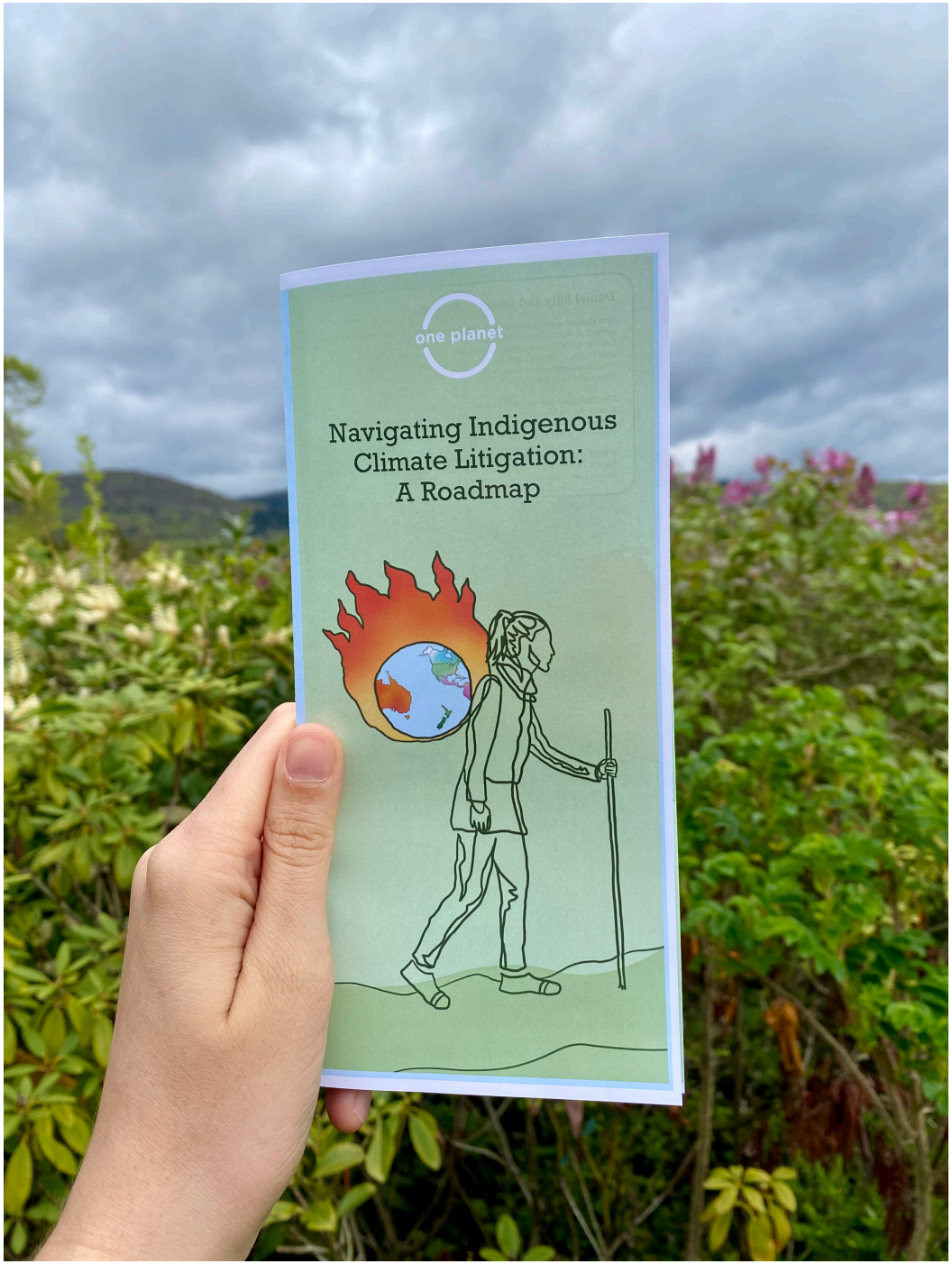
It accepted the argument that both the Treaty of Waitangi and tikanga must be considered by decision-makers when interpreting the requirements necessary under the Exclusive Economic Zone and Continental Shelf Act of 2012.

The court took into account the proposal's compliance with tikanga, which suggests that the damage caused by pollution may go beyond physical effects and could also have spiritual implications.

The court acknowledged the possibility that pollution could have both physical and spiritual impacts.



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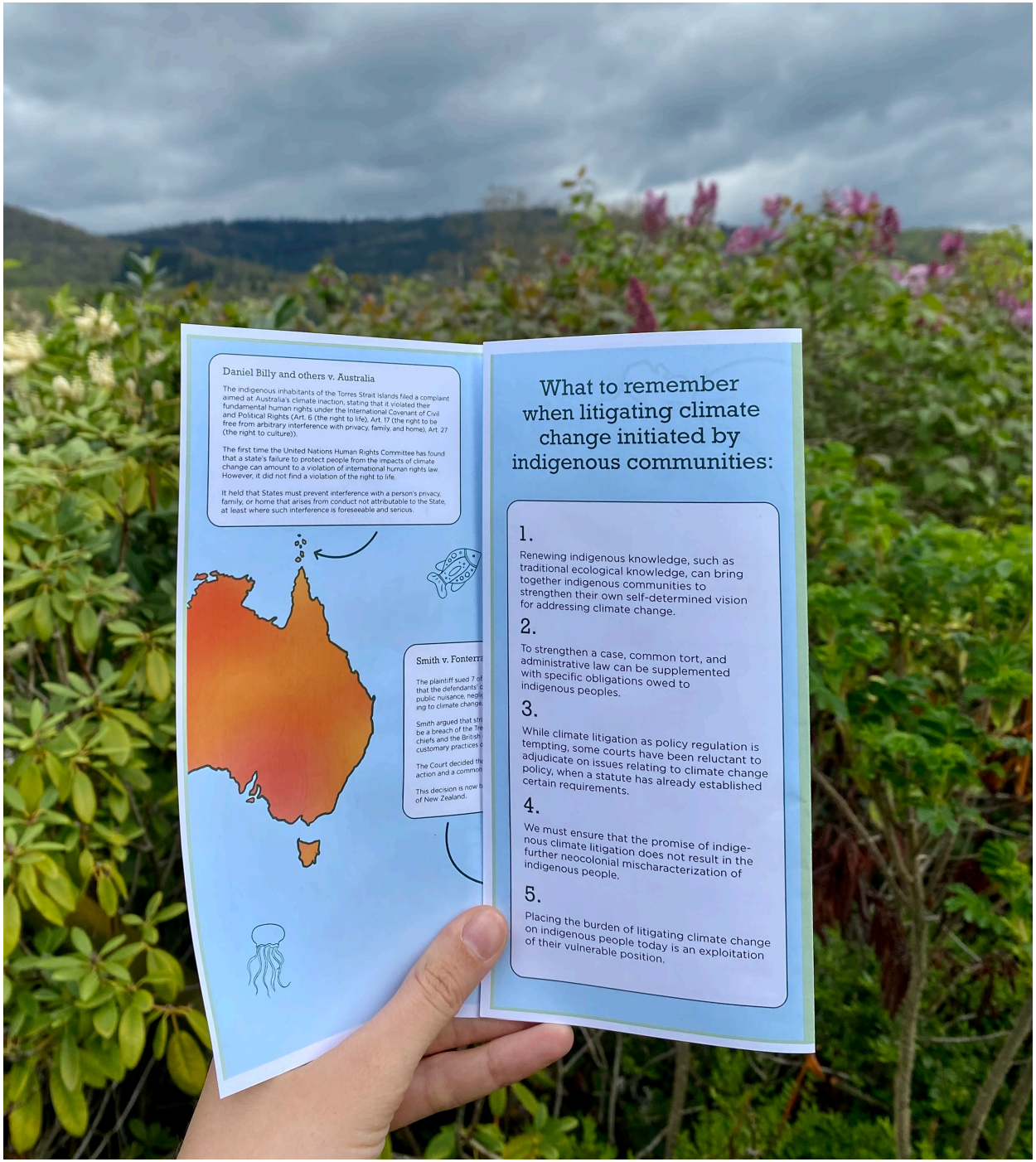
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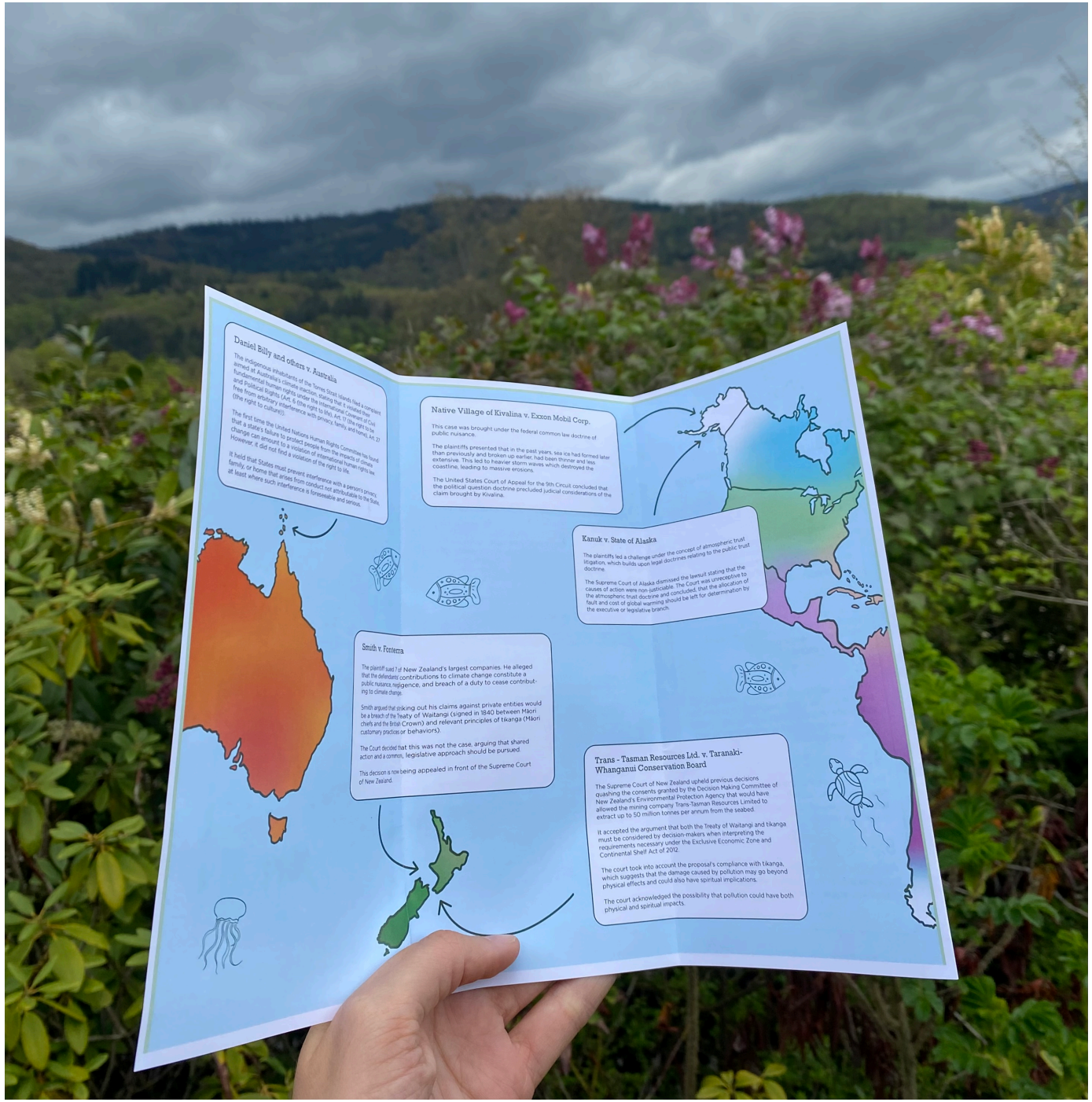
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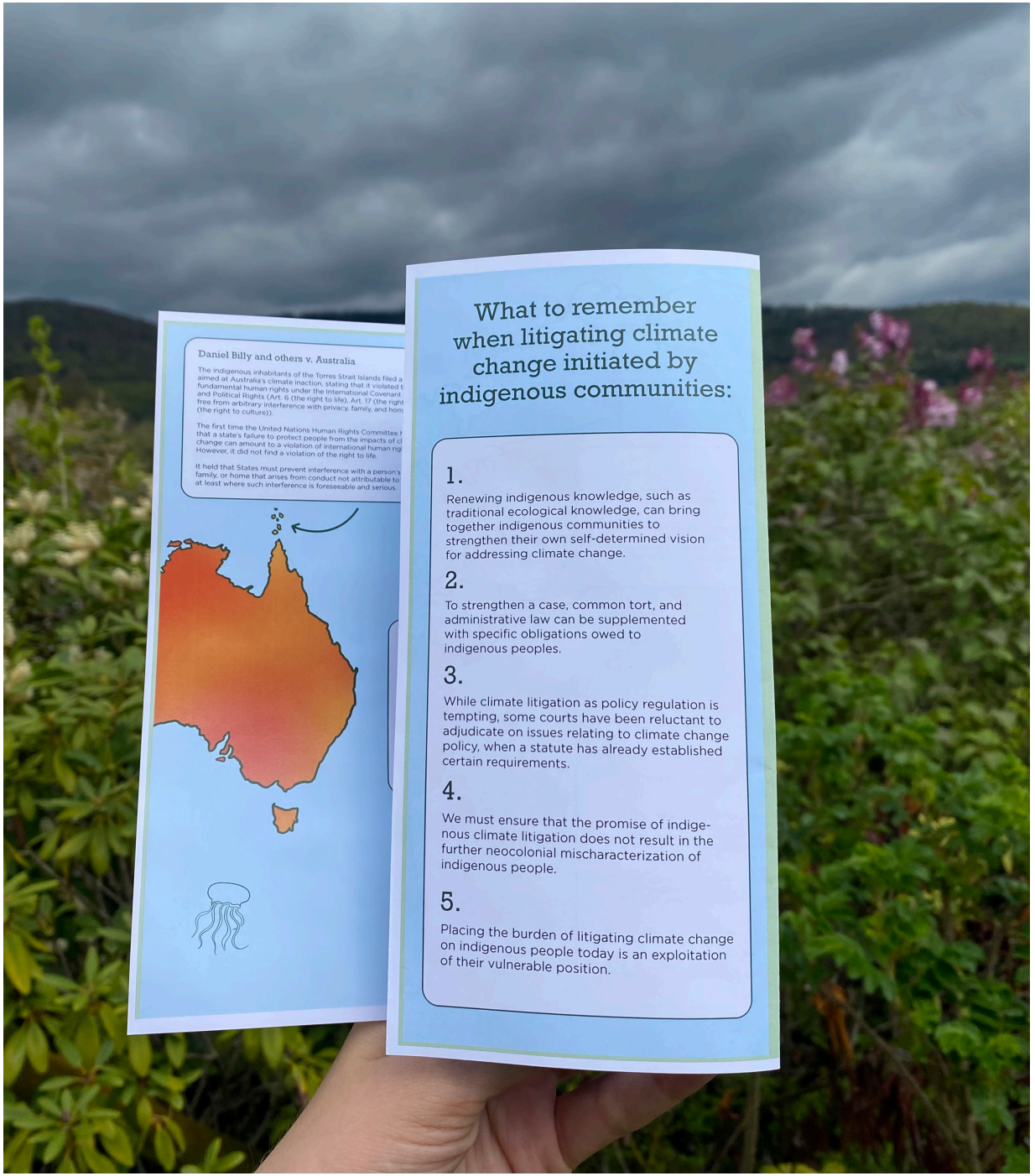
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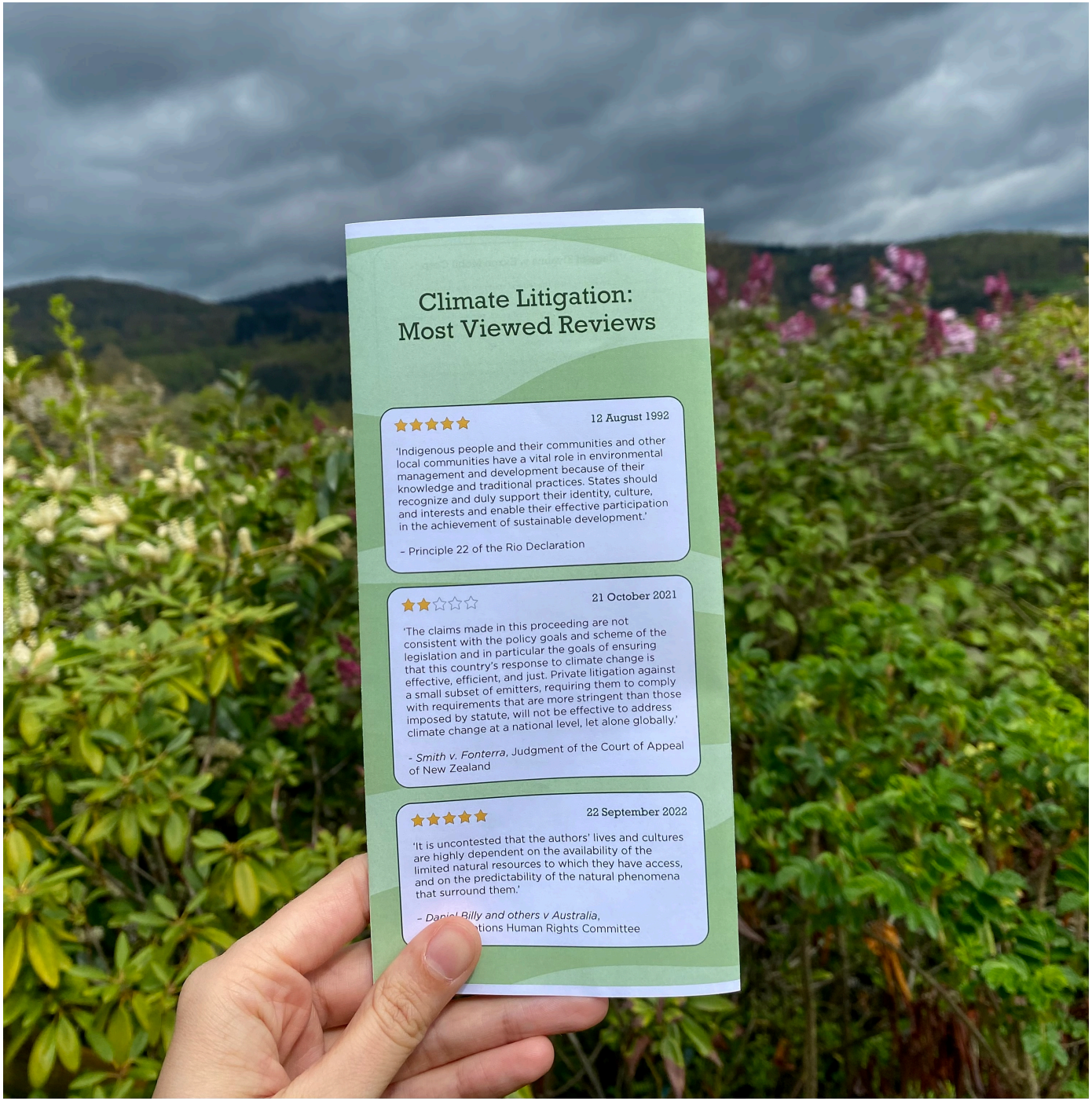
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