

Native Communities and Climate Change: Legal and Policy Approaches to Protect Tribal Legal Rights

Professor Mark Squillace, J.D., Director, mark.squillace@colorado.edu
Jonathan Hanna, J.D., Research Associate, hannajm@colorado.edu
Natural Resources Law Center, University of Colorado School of Law
Boulder, Colorado 80309-0401
303-492-1287

Summary of Findings: Studies have shown that over the last century the earth has already experienced measurable changes in the climate—rising temperatures, warming oceans, thawing polar ice sheets, and changes in the hydrologic cycle, to name a few. If climate change is not adequately addressed, these trends will continue or even accelerate, and it is certain that people throughout the world will suffer adverse consequence under even the most conservative predictions of future climate scenarios. In light of this reality, a growing number of local, state, and regional efforts have evolved to tackle the issues presented by climate change. However, because of the complexity of climate change and the widespread nature of its effects, an effective solution to mitigate climate change will certainly require broad national policy and federal legislation.

In developing a legal and policy framework to address climate change, policymakers must consider how climate change affects Native American communities. Traditional tribal practices and relationships with the natural world form the spiritual, cultural, and economic foundation for many Native American nations— foundations that will be, and in some cases already are, threatened by climate change. Thus, important ethical reasons exist for taking into account the impact of climate change on native communities. Moreover, many aspects of tribal culture—for example, subsistence practices and water rights for tribal lands—have been recognized and protected by treaties, statutes, and judicial decisions. In the event of growing scarcity of natural resources and other effects of climate change, tribal enforcement of these interests could pose problems for current patterns of use and consumption by non-tribal parties. Therefore, policymakers must be aware of the fact that climate change will have weighty legal and practical ramifications on tribes.

The Natural Resources Law Center is engaged in a study that is examining the various ways in which climate change will impact tribes. The study is also considering the legal and policy options that might help tribes address these impacts. The study begins with a discussion of generally applicable measures such as climate change litigation and various statutory approaches that are beginning to appear on the local, state, and regional levels. It then reviews four regional case studies—Alaska, the Pacific Northwest, the Southwest, and Florida—to flesh out the range of impacts from climate change on tribes. It also discusses the legal and policy measures that tribes might employ to adapt to climate change and to protect their legal rights in the absence of broad federal climate change policy. A draft of the study is currently being circulated for comment and is available on the NRLC's website at <http://www.colorado.edu/law/centers/nrlc/pubs.htm>

As sovereign entities, tribes must retain control over how to best address the effects of climate change on their communities, and some of the approaches described in the presentation are already being employed by tribes. Nonetheless, for policymakers to ignore the implications of climate change for tribes would almost certainly lead to tension between tribal and non-tribal

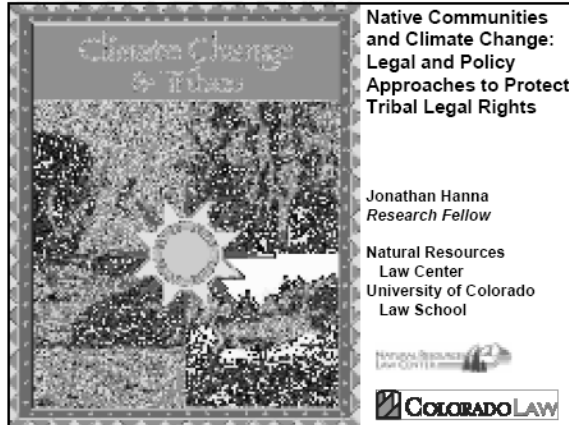
interests. By understanding the implications of climate change for tribes, by including them in the process of crafting national climate change policy and legislation, and by forging cooperative relationships with tribes, policymakers can ensure solutions that will be fair and equitable for everyone.

Practical implications of the research for tribal communities: Climate change has already begun to impact tribal communities, especially in Alaska where the impacts of climate change more pronounced. While some tribal communities are well aware of the potential harm that climate change may cause them and have begun to consider ways to address that harm, other tribes lack the resources and information that will be necessary to develop and effective climate change strategy. The NRLC study is designed to help fill that gap and ensure that the impacts of climate change on Native Americans and the means to redress those impacts become a more prominent issue in the debate over who best to address climate change.

The policy or practice relevance of the research: As suggested in the above summary, policymakers need to better understand the implications of climate change for tribes and help ensure that these implications are considered in fashioning short and long term solutions in terms of both adaptation to climate change and mitigation of its impacts.

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Intergovernmental Panel on Climate Change (IPCC) 4th Assessment Report (2007)

Predicts continuation of observed trends for:

- Temperature
- Precipitation
- Sea Levels
- Extreme Events
- Hydrologic Patterns
- Environmental Impacts

Implications of Climate Change

Considerations for policymakers in crafting comprehensive climate change policy

- **Ethical:** Traditional tribal practices form the spiritual, cultural, and economic foundation for many Native American nations— foundations that are seriously threatened by climate change. In addition, the effects of climate change will fall disproportionately on tribes.
- **Legal and Practical:** Many aspects of tribal culture— e.g., subsistence practices and water rights for tribal lands—have been legally recognized and protected. In the event of growing scarcity of natural resources due to climate change, tribal enforcement of these interests could pose problems for current patterns of use and consumption by non-tribal parties.

Over-Arching Strategies Potentially Available to Tribes Nationwide

- Intra-Tribal Policy
- Cooperative Efforts
- Climate Change Litigation
- Climate Change Legislation

Intra-Tribal Policy

- Development of renewable energy projects on tribal lands
- Emphasis on renewable energy through role as consumers or operators of power companies
- Energy-efficient tribal land use planning and building codes
- Other mitigation strategies--e.g. devoting tribal lands to carbon sequestration

Cooperative Efforts between Tribes, Government Entities, and the Private Sector

- Where the interests of multiple tribes are aligned, intertribal entities offer shared resources and a collective voice—e.g. NWIFC & CRITFC, Inter-Tribal Council of Arizona, Alaska Federation of Natives
- Also, such entities can be powerful advocates as well as provide valuable opportunities to share legal, policy, and scientific advice—e.g. NTEC, CERT, NAFWS

Litigation

- Increasing climate change litigation—e.g. *Massachusetts v. EPA*; tribes have not yet joined as parties, but might in the future
- Tribes can also become involved as *amici*, as treaty fishing tribes did in *National Wildlife Federation v. National Marine Fisheries Service*

Legislation

- Broad national climate change policy is still lacking, but there are a number of legislative measures below the federal level:
 - Regional: The Regional Greenhouse Gas Initiative (RGGI) is an agreement between 7 northeastern states to impose the nation's first mandatory cap-and-trade program for CO₂ emissions by power plants
 - State: states are adopting a number of approaches—emissions targets, emissions caps/offset requirements, emissions reporting and registry programs, and Climate Action Plans
 - Local: perhaps the most widespread and well-known is the U.S. Mayors Climate Protection Agreement—over 450 mayors, representing 62 million Americans (as of 4/12/07)

Regional Strategies for Tribes to Consider

- While climate change occurs on a global scale, the effects vary greatly from region to region
- Moreover, tribal cultures—and the tribal legal rights based on these lifestyles—vary from region to region due to unique histories and the close connection between a tribe and its geographic location
- Thus, there are also a number of more specific approaches tribes may consider based on the tribal location and legal rights at issue.

Pacific Northwest Tribes

The Treaty Fishing Right

- Water rights adjudications/negotiations—e.g. Snake River Basin Adjudication (Nez Perce)
- Endangered Species Act—e.g. NWF v. NMFS
- Contract-law approaches—dry-year/split-season leases, forbearance/subordination agreements
- Protection of public land—e.g. Hanford Reach
- Dam policy—e.g. FERC re-licensing

Alaska Natives

Subsistence Lifestyles

- Human rights petitions—e.g. Inuit Circumpolar Conference petition to the Inter-American Commission on Human Rights
- Claims to off-shore hunting and fishing rights
- Improving existing subsistence rights protections—e.g. treaties, ANILCA, state law
- Enhanced assistance for flooding and erosion—e.g. Alaska Floodplain and Erosion Mitigation Act (S. 49)

Southwest Tribes

Federally Reserved Water Rights

- Water rights adjudications—e.g. Arizona v. California
- Water rights negotiations—e.g. Gila River Indian Community settlement
- Comprehensive natural resource management policy—preventing harm to tribal land/resources by non-tribal interests
- Merging groundwater and surface water regimes
- Re-visiting “Practicably Irrigable Acres” standard

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To view a full copy of the report, please visit the Natural
Resources Law Center website:
<http://www.colorado.edu/law/centers/nrlc/>

Or contact the NRLC via e-mail:
nrlc@colorado.edu