Arizona Legal Studies

Discussion Paper No. 12-07

Tribal Sovereignty and Climate Change: Moving Toward Intergovernmental Cooperation

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March 2012

Chapter 3

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Moving Toward Intergovernmental Cooperation

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In Brief

- Climate-change impacts directly affect the resources, communities, and cultural identity of tribal governments, but defining the role of tribal governments in addressing these impacts calls into question who decides the scope and content of tribal jurisdiction.
- Historically, state governments and the federal government sought ownership of Indian lands, and Congress and the courts privatized Indian lands and limited tribal authority, treating tribes as dependent nations and providing little opportunity for them to manage their natural resources as autonomous actors.
- In the 1970s, US Environmental Protection Agency recognized tribal governments as the primary parties for making environmental decisions and managing environmental programs on Indian lands and successfully lobbied Congress to recognize tribes as states for purposes of environmental laws.
- Recently, tribes have accessed US courts and international bodies seeking relief from climate-change impacts on human rights grounds. Although tribes' success in court has been limited to date, their efforts illustrate the proactive approach of tribal governments in addressing climate change.

Native American imagery and stereotypes hold unique and contradictory places in popular culture, many of which transcend discussions of environmental regulation and climate-change policy. On one hand, there is the stereotype of the American Indian as a noble savage: the watchful steward of the land in its natural state. In this image, the American Indian does not tinker with the ecosystem but coexists in a special albeit passive harmony. This is the well source for popular myths about how the natural world works; the stereotype assumes that any Native American within arm's reach

can take us back to find the simple answers to what we do not know about the mysterious ordering of nature and how to preserve it. This stereotype was powerfully illustrated in 1971 by the efforts of the not-for-profit Keep America Beautiful Inc., an organization focused on the development of a national ethic of cleanliness. The "Crying Indian" commercial, played by the Greek-American actor Iron Eyes Cody, focused the attention of millions of Americans on their personal practices that contributed to littering.[1]

On the other hand, there is the stereotype of the American Indian as a savage—untrustworthy—whose tribal contemporaries pursue illegitimate business interests such as casinos. This stereotype assigns a negative attribute to the actions of tribal governments and delegitimizes their sovereignty on the false pretense that they manipulate Native American cultural identity for self-interest and financial gain.[2] The cause and consequence are by no means arbitrary: at times American jurisprudence has vigorously trammeled upon the distinct legal and cultural identity of Native Americans, overlooking cooperative efforts by tribal governments that are choosing to find sustainable economies to end poverty, fostering economic self-determination, and working with Congress on progressive ways to manage precious tribal resources. Indeed, American Indian law and policy actively engage this stereotype. Lorie Graham has noted that "Americans may have a hard time acknowledging—despite the lip service paid to tribal sovereignty—that at the core of most Indian law decisions today is a historically rooted negative mythology of cultural inferiority and Indian savagery."[3]

Beneath the veil of these stereotypes lies a rich and complex story that explains resource management systems and their inner workings between tribal, state, and federal governments. When examined more closely, stereotypes and popular nomenclature, both romantic and damning, noble and ignoble, fall to the side to reveal a resilient tribal cultural context shaped by episodic and contradictory forces around one core question: Who decides the scope and content of tribal jurisdiction? Discussion regarding the law's response to climate change tends to overlook tribal governments completely, yet they play a significant role juxtaposing federal and state actors who all too often are viewed as the dominant institutions for reform. Tribal governments manage significant natural resources in critical habitats (e.g., arid lands of the Southwest), even though, as Bethany Berger observes, Native Americans have historically fallen at the bottom of leading socioeconomic indicators in the country.[4]

The impact of climate change directly affects the resources, communities, and cultural identity of tribal governments, but defining the role

of tribal governments in addressing these impacts requires recognition of them as a third level of government that functions concurrently within the federal system. With respect to climate-change policy, recognition and understanding of the role of tribal governments create new challenges of direction, controversies, and exciting opportunities by cracking open the presumptive federal–state duopoly over planned responses, adaptation, diffusion, innovation, mitigation, and the role and application of science. Recognition of tribal authority, however, is not without intergovernmental tensions and struggles; the process has been endlessly frustrated by the US Supreme Court, which, as S. James Anaya claims, "has propagated a demeaning myth of conquest and diminished the impact of the indigenous point of view in the resolution of relevant conflicts."[5]

This chapter explores and addresses the role of tribal governments within the climate-change debate. First, it examines the historic and legal framework that defines tribal sovereignty and the emergence of tribal sovereignty within the context of environmental federalism. The chapter highlights significant gaps in tribal jurisdiction arising from federal policy over matters relevant to climate-change policy and describes how tribes respond strategically, including appeals to international human rights law. Next, the chapter explores the potential adaptation of tribal governments to climate-change policy by analyzing and comparing experiences with water management programs under the Clean Water Act of 2002[6] and other federal environmental protection statutes designed to empower tribal resource management in partnership with the US Environmental Protection Agency (EPA). Finally, it explores two issues that will likely influence tribal resource management in the future in light of climate change. First, continued resource depletion on tribal territory may affect the scope and content of tribal jurisdiction by providing the basis for a stronger set of claims to limited tribal resources. Second, emerging independent actors such as nongovernmental organizations play a unique role in contributing to strategic tribal resource management projects.

The History of Tribal Sovereignty

The status of tribal sovereignty in American jurisprudence is the culmination of an epic legal narrative that reflects distinct policy shifts between the federal government and federally recognized Indian tribes. Two themes emerge, however, from the historic shifts in federal Indian policy: the overarching or plenary authority of Congress over Indian lands and affairs, on

one hand, and the interpretation by the US Supreme Court with regard to tribal governments as domestic dependent nations on the other. Just as federal Indian law and policy have ranged widely in scope and application, the landscape that defines Indian country is equally diverse. According to the 2009 *Federal Registrar*, 564 Indian tribes are federally recognized in the United States,[7] of which 229 are federally recognized Native Alaskan Villages. Indian trust lands are a unique form of land tenure and are the touchstone of tribal land holdings that span the contemporary landscape and include arid lands, boreal forests, high plains, canyons, and watersheds; they abut national and state parks, military bases, urban areas, and a wide variety of other environs with valuable and unique ecosystems.

The indigenous homelands that predate European contact were bound through complex customary legal systems whose diverse intersocietal frameworks illustrated the richness of Native American societies across North and South America. The fortunes of Native Americans and tribal governments shifted dramatically in concert with federal Indian policy, which is categorized into five distinct eras: treaty making (1789–1871); allotment and assimilation (1871–1928); the Indian New Deal, or Indian Reorganization era (1928–45); the termination era (1945–61); and the era of self-determination (1961 to present).[8]

1789–1871: Treaty Making

The origins of federal plenary authority can be traced back to the treaty-making era. Following the American Revolution, tribes engaged in treaty making with the federal government on a nation-to-nation basis, seeking mutual friendship, respect, and recognition of one another's autonomy. Treaties were made between the executive branch and a specific tribe or group of tribes based upon the foregoing mutuality and set aside significant tracts of indigenous territory. Inherent powers of tribal self-government were held by the tribe in reserve, and the treaty affirmed tribal authority over specific demarcated territory.

Recognizing tribal authority within a treaty defined early federal–tribal relations and continues to apply in situations where the scope of tribal authority is juxtaposed between state and federal laws and the courts. For instance, in 1999, a majority decision by the US Supreme Court upheld the fishing rights of the Mille Lacs Indian Band in *Minnesota v. Mille Lacs Band of Chippewa Indians*, contrary to arguments made by the State of Minnesota that it retained jurisdiction to regulate.[9] In 1837, the United States entered into a treaty with several Chippewa Bands to purchase their

land in exchange for guarantees, including "the privilege of hunting, fishing, and gathering wild rice, upon the lands, the rivers, and the lakes included in the territory ceded."[10] Minnesota argued in 1999 that events leading up to its admission into the Union in 1858 had resulted in the loss and removal of these treaty rights, but the provisions of the 1837 treaty were held by the majority of the Supreme Court to guarantee the Chippewa Bands a usufructuary right to fish despite subsequent changes to their territory.

The use of treaties ended by 1871, brought about by westward expansion and burgeoning pressure by settlers and local governments for Congress to open up tribal lands for development. Despite a sharp change in federal policy over plenary authority to acquire Native American lands as well as the removal of Native American populations onto reservations, treaties are regarded as foundational agreements that shape the federal–tribal relationship. The end of the treaty-making era reflected the plenary role sought by Congress over Indian lands and affairs. Vexed by the president's exclusive treaty-making portfolio, Congress reacted harshly to their exclusion and used its control over federal money to amend the Indian Appropriations Act, cleverly requiring the president to have congressional consent prior to spending any new treaty dollars. This action had the practical result of terminating all future treaty making with Indian tribes.[11]

1871–1928: Allotment and Assimilation

The allotment and assimilation era from 1871 to 1928 was characterized by federal policies that imposed plenary authority over Indian lands and affairs. Emerging jurisprudence on the sweeping scope of plenary power further undermined tribal authority to govern within the reservation boundaries. Congress and the Supreme Court foreclosed comanagement opportunities in the wake of westward settlement and new state governments seeking to exert their own authority and control on tribal lands. The policy shift to allotment and assimilation had staggering consequences: in 1887, approximately 138 million acres constituted Indian trust lands for Native Americans;[12] this figure has since plummeted to approximately 55 million acres.[13]

The most significant federal statute during the allotment and assimilation era was the Dawes Act of 1887,[14] which struck a blow to tribal land holdings by parceling off yeoman's tracts to both tribal and nontribal individuals and transferring large tribal land holdings into federal surplus trust lands.[15] The continued westward expansion by non-Indians placed the question of Indian title and the residual powers of tribal governments squarely on the congressional agenda. Newly elected members were concerned that

their citizens could not access the vast resources held on treatied lands and reservations, so Congress, through the Dawes Act, sought to make possible the privatization of these holdings along with the assimilation of tribal governments by undermining their territorial base and ability to govern over non-Indians within the reservation boundaries. Judith Royster observes that, "as non-Indian settlement of the trans-Mississippi West burgeoned, federal policy shifted from the removal of tribes" to "the isolation of tribes in pockets of lands carved out of aboriginal territories."[16] The result is the modern checkerboard of reservation land holdings among communal, tribal, and nontribal landowners. The allotment policy officially ended in 1934, but Royster's conclusion describes its significance as "the greatest and most concerned attack on the territorial sovereignty of the tribes."[17]

1928–1945: The Indian New Deal

Despite the lasting footprint of these allotments on tribal lands, the inherent and reserved powers of tribal governments remained intact following the end of the allotment era into the emergence of President Franklin Roosevelt's policy of the Indian New Deal in 1928. In 1934, the Indian Reorganization Act sought to restore expropriated treaty lands; the statute provided a widely adopted model for tribal governance that emphasized the separation of powers and a framework for tribal government to interface with the growing array of federal services that were responsible for Indian affairs.[18] The statute formally ended the federal policy with regard to allotment and surplus lands and established a mechanism for tribal governments to reclaim some of the lands that had been taken away. Section 465 allows the US secretary of the interior to acquire new lands and place them into trust, including lands located beyond the reservation boundary, and add them to the reservation.[19] In 1977, the final report by the American Indian Policy Review Commission found that between 1936 and 1974, approximately 595,157 acres were returned to tribal governments through this mechanism.[20]

The Indian Reorganization Act prevented further allocation of individual title of tribal lands, but it did not quiet the title of existing allotees. Thus, while lands were put into trust for tribal governments, questions over the rights of non-Indian fee owners who found themselves inside the reservation set the stage for a new struggle over the scope of tribal authority. For example, a 2001 US Supreme Court decision strictly limited tribal sovereignty in relation to non-Indian fee lands. The Court held in *Atkinson Trading Co., Inc. v. Shirley* that the Navajo Nation did not have jurisdiction

over non-Indian fee lands upon which a small non-Indian business operated; the owners defeated the Nation's attempts to levy a tribal sales tax, further limiting the scope of tribal authority within the reservation boundaries.[21]

The failure of the New Deal era to reconcile prior allotments created a legacy that illustrates the episodic policy shifts that highlight the lack of a singular or static federal Indian policy. As Charles Wilkinson explains, "There are a number of scattering forces that push Indian law away from any center," and most notable is the shifting role of federal Indian policy.[22] Absent a unitary legal doctrine, Wilkinson's "splintering influences" are pervasive, with disputes growing over treaties, federal statutes, the role of race, precise location of lands and resources, third-party interests in common resources, and myriad other factors.[23] With respect to any unitary doctrine, plenary power within the five policy eras suggests a constitutional interpretation by Congress different from treaty interpretation and that its oversight is part of a broader power "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."[24] The absence of an interpretative anchor and the encroachment of federal plenary authority resulted in a jurisprudence that is, in Wilkinson's view, "not what American Indians would choose."[25]

1945–1961: Termination of Federal Recognition

Federal Indian policy made yet another dramatic shift at the dawn of the cold war, when Congress decided that terminating the federal trust responsibility would empower tribes to assimilate. So Congress began to identify prospective tribes and withdraw federal recognition through targeted legislation. The significance of how this policy reflected congressional intent to end the distinct status of Native Americans was captured by Royster: "Termination was assimilation with a vengeance."[26] Approximately 109 tribes were subjected to congressional legislation that withdrew federal recognition, thereby cutting off financial support for tribal communities and releasing tribal trust lands.[27] For example, in 1954 Congress enacted the Menominee Indian Termination Act with the expectation that the tribe would create a small corporation and function much like a county government subject to the laws of Wisconsin.[28]

The most significant action with regard to tribal termination was the passage of Public Law 280.[29] Enacted by Congress in 1953, the law gave certain states, including Wisconsin and California, broad civil and limited criminal jurisdiction over Indian tribes. However, it contains an important caveat that protects tribes from being deprived "of any right, privilege, or

immunity afforded under Federal treaty" concerning hunting and fishing.[30] The Menomonee Tribe was a signatory to the Wolf River Treaty of 1854 and successfully argued before the US Supreme Court in *Menominee Tribe of Indians v. United States* in 1968 that despite the termination of the federal relationship, the treaty rights to hunt and fish were still in force and effect.[31] The *Menominee* decision was indicative of the shifting tribal–federal relationship. The legal framework set forth under termination was cumbersome, and states often were unable to adequately oversee new jurisdictional matters that pertained to tribes.

1961 to Present: Self-Determination and the Creation of Domestic Dependent Nations

In 1964, federal policy toward Indian tribes began to change once again when the "Great Society" initiatives under President Lyndon Johnson began to fund tribal communities, as impoverished constituents in the fight against poverty, through the Economic Opportunity Act.[32] By 1968, recognition of the status of marginalized Native Americans on poor reservations coincided with growing awareness about race, civil rights, and class struggle in the United States more generally. In 1970, President Nixon formally denounced termination, describing Native Americans as the most deprived and isolated minority group in the nation.[33] Nixon championed new federal legislation that was designed to empower tribal governments with management over specific areas that were of the utmost importance to sustainable community development. For example, the genesis of modern tribal police and health-care programs dates to the 1975 passage of the Indian Self-Determination and Education Assistance Act,[34] which gave tribal governments the option to control federally funded programs where the tribe had jurisdiction. And yet, given the dramatic shift in federal policy by Congress during this new era, what could tribes expect with regard to judicial perspectives on tribal regulatory authority?

Early American jurisprudence affirmed federal control over Indian lands and Indian affairs when the US Supreme Court promulgated the doctrine of tribal sovereignty in the landmark Marshall trilogy, three cases that were delivered between 1823 and 1832.[35] Chief Justice John Marshall envisioned tribal sovereignty through international law's own lens of antiquity: discovery, war, conquest, wardship, and dependency afforded to the victor the spoils of nationhood. The Marshall trilogy affirmed the autonomy of Indian tribes but made it dependent upon federal plenary oversight. Federal Indian law's origin with regard to the legitimacy of tribal governance was timed to

American history itself as Marshall's vision of tribal sovereignty was tied to Native American subjugation under English and then American law. His decisions recognize Native American sovereignty prior to European contact, but with discovery and conquest their autonomy was diminished, and within the American legal system tribes held a collective status as domestic dependent nations: wards that were dependent upon federal protection by the growing numbers of non-Indians who craved their lands and resources.

This jurisprudential footprint remains today and continues to narrow the scope of tribal authority over lands and resources. As domestic dependent nations, the jurisdictional powers of tribal governments are under constant pressure from judicial interpretation. The patchwork of landholdings resulting from allotment illustrates this vulnerability when non-Indian landowners within reservation boundaries reject tribal jurisdiction. This issue was tackled in 1981 by the US Supreme Court in *Montana v. United States*, where the Crow Tribe attempted to prohibit all hunting and fishing by nonmembers, including fee holders of non-Indian property within the reservation.[36] Tribal hunting and fishing rights were included in their original treaty of 1851; however, the Crow Tribe's territory had been reduced significantly with successive shifts in federal policy aimed at assimilating tribal governments and diminishing Indian title.[37] When the Tribe attempted to regulate fishing and hunting over non-Indian landowners within the reservation, the Court held that tribes could regulate only with express congressional delegation and intent. Congressional delegation and a tribe's inherent retention of its tribal power could be validly executed under one of two exceptions, known commonly as the *Montana* exceptions:

1. When a consensual relationship has been entered into between the tribe and the non-Indian, such as a commercial contract, a lease, or a partnership. In these instances, the non-Indian has acquiesced to tribal jurisdiction of the tribe, thus being subject to the tribal code as it applies to their dealings (i.e., taxation and licensing).

2. When the tribe's political integrity, economic security, or health and welfare, is directly affected by the non-Indian's conduct, or where the core tribal governmental interest is affected.

Unfortunately, the Supreme Court has narrowly construed this second exception, as illustrated by several cases. In *Montana* the Court found that nothing in the conduct of non-Indian hunters and fishers threatened the Crow Tribe's political or economic well-being "as to justify tribal regulation," and

accordingly, the Tribe lacked regulatory jurisdiction over the nonmembers and their conduct on non-Indian lands.[38] Similarly, in 1997, the US Supreme Court held in *Strate v. A-1 Contractors* that a state highway that intersected tribal land was not under tribal authority.[39] The highway was originally a US Army road that was granted as a right-of-way and never sold. Incredibly, the Court held that the easement gave the highway attributes of non-Indian fee land—similar to the land in *Montana*—because the highway was open to the public and maintained by the state.[40] The Court concluded that the tribe had not retained a "gate-keeping right" over the land.[41]

With respect to climate change, the Supreme Court's interpretation of tribal sovereignty exposes a potential weakness in seeking to build and enforce alternative models to the federal–state duopoly that has dominated the climate-change discourse. That is, if tribal governments are unable to enforce their laws within the reservation proper regardless of tribal membership, the jurisdictional quagmire suggests that tribes lose. The Supreme Court's perspective on the scope and content of tribal jurisdiction leaves very little recourse for tribal governments hoping to secure their rights as a legitimate third sovereign to the environmental protection arena. The court's reliance on congressional plenary power, observes Angela Riley, "assumed that Congress's management of Indian affairs is proper pursuant to its plenary power, and Congress has freely exercised that authority, both in favor of and against tribal interests."[42] This approach overlooks the centrality of land in defining Native American culture and fails to explore the purpose behind a tribe's exercise of authority. As Dean Suagee observes, "Tribal cultures are deeply rooted in the natural world; therefore, protecting the land and its biological communities tends to be a prerequisite for cultural survival. While tribal officials tend to have a wide range of reasons for developing environmental regulatory programs, the survival of tribal culture is usually one of the main reasons."[43]

Federal plenary authority has exerted vast power over Indian affairs. Consequently, little collaborative comanagement has occurred between tribal and federal governments; instead, the courts have a history of reducing and limiting tribal sovereignty. Federal jurisprudence has resulted in Indian lands being pursued for non-Indian profit, offered narrow views of the tribes' natural resources as potential commodities, and promoted the general attitude that tribes are dependent entities, with little room for tribes to be genuinely autonomous actors in managing their natural resources. Going forward, important collaborative comanagement opportunities exist that can inform a richer and more pluralistic jurisprudence as it relates to

climate change. As potential working models, these opportunities suggest a practical recognition of the constituent connection between the rights of Native Americans and the topography of the land itself, where proximity to abutting reservation lands, its history with respect to the tribe and the chain of title, places the subject matter within the ambit of the tribe's cultural fabric and customary understanding of the world. The role of the environment in shaping Native American cultural identity and the rights that flow from this connection make the issue of climate change all the more pressing. As Rebecca Tsosie explains, the tort-based approach to categorizing environmental harm from climate change limits a proper impact assessment because indigenous perspectives view consequences inseparable from the physical, spiritual, and cultural destruction of a people.[44]

Federal Environmental Laws and Tribes as States

Environmental laws at the federal level establish national standards for protecting and restoring a wide range of subjects in the environment. These standards act as a basic floorboard in terms of what states and tribes must adhere to. The US EPA's regulatory and enforcement role in the protection and maintenance of air quality, safe drinking water, waste management, and hazardous materials does not prohibit states and tribal governments from filling in gaps or establishing higher standards. A key policy goal of federal environmental laws is to create cooperative systems that incentivize the implementation of local, regional, and state environmental protection measures. The transboundary aspects of these laws, however, necessitate the US EPA's broad oversight, bringing to the fore the issue of federal plenary power over tribal governments, but with a unique cooperative approach. The US EPA has an established track record of promoting tribal environmental regulation, and according to Suagee, the US EPA policy complements tribal policy and perspective that reflects the centrality of land and the environment within Native American culture: "Tribal cultures are deeply rooted in the natural world; therefore, protecting the land and its biological communities tends to be a prerequisite for cultural survival. While tribal officials tend to have a wide range of reasons for developing environmental regulatory programs, the survival of tribal culture is usually one of the main reasons."[45] Policies of the US EPA with regard to tribal regulatory powers further illustrate Royster's compelling reference to tribal governments as the "third sovereign" as it reflects both their inherent sovereignty and the

strength that tribal authority derives from federal pollution control statutes and, as we will discuss, over state jurisdiction.[46]

In 1970, the emergence of a US EPA tribal policy began in earnest with the consultation framework established within the National Environmental Policy Act.[47] In 1984, the stage was set for important legislative developments that became a watershed for tribal authority over the environment. First, the US EPA adopted the widely touted "Policy for the Administration of Environmental Programs on Indian Reservations"[48] in direct response to legitimate tribal criticism of the agency's previous oversight of tribal sovereignty and the need for tribal governments to enact their own environmental protections. The policy recognized tribal governments as "the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with Agency standards and regulations."[49] Second, the US EPA's successful lobbying of Congress to authorize the treatment of Indian tribes as states (TAS) effected legislative amendments to several key EPA-administered statutes. Those that enable the application of tribal authority under TAS provisions are the Clean Water Act (CWA), Clean Air Act (CAA),[50] Safe Drinking Water Act (SDWA),[51] National Historic Preservation Act,[52] and the Comprehensive Environmental Response, Compensation and Liability Act.[53] All were amended to include TAS, although TAS under the CAA and SDWA are program specific, whereas TAS under the CWA is largely inclusive of the entire statute.

The importance of TAS as it applies to CWA came to the fore in 1996 in *Albuquerque v. Browner*,[54] which involved a challenge by the City of Albuquerque to a decision by the US EPA to require the city to meet the more stringent CWA standards of a downstream Indian tribe.[55] The City of Albuquerque's wastewater treatment facility was situated along the Rio Grande less than six miles upstream of Isleta Pueblo's reservation boundary. The city's discharge limits under the National Pollutant Discharge Elimination System (NPDES) were set by the US EPA; however, while the US EPA revised the facility's discharge limits to meet New Mexico's more stringent standards, Isleta Pueblo filed for TAS recognition pursuant to §518(e) of the CWA.[56] The US EPA, having granted this recognition, successfully tailored the city's facility NPDES permit to meet the even more stringent standards set by Isleta Pueblo. In doing so, the US EPA recognized the tribe's rights to set stricter standards just as individual states do, and upheld the higher standards.

Browner provides a powerful illustration of the courts interpreting congressional plenary power from a purposive perspective; inquiring into

the statute's objective and intent can define the scope of tribal regulatory authority relative to the statute's aims and objects. In *Browner* the inquiry was in regard to the purpose of congressional statutory protection conferred on behalf of the Isleta Pueblo pursuant to the CWA's TAS provision. This was evident when Albuquerque unsuccessfully argued that the designated downstream use of the water was not prescribed and thus not protected by the CWA. Justice Edwin Mechem, however, considered the purpose of the CWA, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters through reduction and elimination of pollutant discharge into those waters."[57] Although Isleta Pueblo refused to fully disclose the water's designated use on the basis that it concerned sacred religious ceremonies, the Court concluded that it involved ingestion of water not unlike a fishable or swimmable standard of protection.[58]

The result of this decision is a unique and vital extension of tribal sovereignty beyond the territorial limits of the reservation and where the regulation of a common resource is concerned. Moreover, because Albuquerque and the Isleta Pueblo were governed concurrently by the NPDES, and the US EPA carried ultimate jurisdiction pursuant to environmental federalism, the TAS assignment for Isleta Pueblo did not undermine the CWA federal–state partnership as TAS subsumed tribal–state jurisdiction in a manner consistent with federal environmental law. Specifically, in this instance, the CWA's legislative objective rationally connected the national and transboundary aspects of the regulated area through TAS, and the result is an important remedy against regulatory gap: a situation where all but one party are subject to the same regulation over a common resource. To put the matter differently, the jurisdictional controversy would be no different had Isleta Pueblo caused the point-of-source discharge in contravention of the CWA; its legislative objective is geared toward empowering both tribal and state governments to pursue higher standards and ensuring that neither party is precluded from seeking US EPA review under the TAS CWA system.

The Environmental Justice Approach to Tribal Sovereignty

Expanding from US EPA's model, how can we more broadly develop a workable approach to climate-change policy that recognizes the unique history of the tribes and tribal sovereignty and appropriately balances tribal interests with national environmental interests? This section examines the role of social justice or environmental justice (EJ) as it relates to tribal

sovereignty and climate change, and the concurrent emergence of related international human rights concerns. Both themes approach the role of causation broadly, in contrast with the narrow tort-based approach in determining environmental harms. *Browner* coincided with a renewed interest by EJ scholars to focus on the deepening relationship between tribes and the federal government as Congress increased its efforts to protect tribal control over environmental regulation on the reservation. EJ scholars monitor how systemic institutional problems, including access to justice, can cause disparate environmental impacts due to socioeconomic status, gender, race, or political power. An example of the EJ approach is to perform such an assessment on a local community. According to Sarah Krakoff, "environmental justice for tribes must be consistent with the promotion of tribal self-governance," and a just framework is one that protects and achieves tribal "authority to control and improve the reservation environment."[59] Krakoff's definition advocates for a deeper appreciation of the reasons why tribal economic development projects are controversial from an environmental protection perspective. Native Americans criticize the EJ approach for ignoring the context through which tribal governments are forced to make decisions. According to Suagee, tribes have difficulty applying this approach to controversial decisions about developing their natural resources, and while "people in the EJ movement are genuinely interested in learning about tribal concerns and finding ways to deal with these issues that are acceptable to tribal peoples, a blind spot with respect to tribes is a common affliction."[60]

EJ does, however, raise important issues that federal Indian law fails to address in light of the narrow application of plenary power. When courts rule in favor of Congress and indirectly favor third-party lease holders on tribal lands, such as mining companies, what can tribes do? In reviewing the federal framework, Mary Wood observes the impact that uranium mining has had on the Navajo reservation and concludes, "In assessing whether federal approval decisions adequately protect the usable tribal land base, courts should also consider the ever-present externalities resulting from pollution that accompanies many forms of industrial development. Serious pollution becomes a form of land confiscation every bit as consequential to tribal interests as outright condemnation."[61] In this regard, the issue of causation and environmental harm illustrates why tribal governments exert authority to protect their land and way of life despite the absence of procedural protections. By expanding the range of factors that institutions should consider in determining the scope of tribal authority, EJ scholars provide a useful

window through which we can begin to examine a more comprehensive approach to adjudicating competing interests over common resources.

Adjudicating Indigenous Rights Pertaining to Climate Change

In 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[62] The event affirmed significant and emerging developments in the field of international human rights law as it pertains to the rights of indigenous peoples and communities worldwide. In general, once indigenous communities have exhausted their domestic remedies within the nation-state system, they can seek recourse to international and regional human rights decision-making bodies, which recognize that indigenous communities can suffer loss of land, cultural identity, and the ability to self-govern under domestic systems (see Anaya spotlight, p. 71).

UNDRIP adds to the growing jurisprudence that is being shaped by indigenous petitioners seeking relief from human rights abuses before international and regional human rights decision-making bodies. In addition, UNDRIP can establish procedural standards in relation to institutional responses by nation-states seeking to comply with international human rights, a significant point in regard to climate-change policy. For example, Article 32 of UNDRIP establishes the rights of indigenous peoples to "determine and develop priorities and strategies for the development or use of their lands or territories" and requires states to "consult and cooperate in good faith" before approving the development of "any project affecting their lands or territories" with "effective mechanisms for just and fair redress for any such activities."[63]

How do international human rights standards affect indigenous peoples and climate-change policymaking? See "Incorporating Rights of Indigenous Peoples in Climate-Change Initiatives" on page 71.

UNDRIP is inclusive of all parties: it recognizes and safeguards against the rights of others in several provisions, including discrimination, and concludes with Article 46(3), which reads, "The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, nondiscrimination, good governance and good faith."[64] UNDRIP can play an important role in shaping domestic climate-change policy. As a tool for renewed domestic claims and international petitions, however, the issues of remoteness and causation cannot be overlooked when characterizing climate change as a

tort-based claim with respect to loss of environment, resources, and cultural identity. US courts have placed limits, as demonstrated by *Native Village of Kivalina and City of Kivalina v. ExxonMobil Corp. et al.*, in which an Alaskan Native village filed a nuisance suit against twenty-four defendant oil companies, claiming they were responsible for climate-change impacts that are affecting their communities.[65] On September 30, 2009, the US district court granted a summary motion for dismissal in favor of the oil companies.[66] While the court did not dispute the claim that the Village of Kivalina could become submerged due to melting ice and rising sea levels, it could not find causation necessary to allow the Tribe standing for a nuisance suit, and accordingly, the Tribe lacked a justifiable cause of action.

Remoteness and causation were also issues with regard to the human rights petition filed by the Inuit Circumpolar Conference (ICC) before the Inter-American Commission on Human Rights (IACHR), asserting within the normative framework of international human rights law that climate change infringed and breached the petitioners' human rights guaranteed under the Organization of American States (OAS) system.[67] On November 16, 2006, IACHR denied consideration and admissibility of the human rights petition filed by the ICC.[68] Unlike in *Kivalina*, in which the indigenous claimants named specific oil companies as tortfeasors, the ICC petition sought human rights protections and relief from global warming caused by the United States of America.[69] The IACHR's letter to the petitioners stated that the claims did not enable the IACHR to determine "whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration."[70] In short, the UNDRIP may be best viewed as a forward-looking document that can establish progressive benchmarks to a new regulatory system, given the current limits of liability for the purposes of making a determination under the OAS system and international human rights law more generally.

The caveat to this, however, is the recognition that customary law is an evolutionary process. It is significant to note that the ICC petition created awareness and strengthened coalitions within the petitioner group; it also raised the IACHR's understanding of the issues. The fact that the IACHR was able to continue a hearing on the substance of the issues advanced the discourse on indigenous human rights law as it relates to climate change.

In a similar vein, on April 24, 2009, the Indigenous Peoples' Global Summit on Climate Change issued the Anchorage Declaration that explicitly prescribes how the organization will uphold the fundamental human rights affirmed by the UNDRIP "in all decision-making processes and activities related to climate change."[71] This critical document strengthens the human rights framework on climate change and the rights of indigenous peoples,

and while several nations—including the United States and Canada—did not vote in support of it, it has become part of the international human rights framework.[72] Prior to the ICC petition, the recognition of international human rights of indigenous peoples and indigenous communities arose from cases involving the infringement or denial of traditional land tenure, and the issue of climate change will remain an important issue before the IACHR and other international decision-making bodies.[73]

Options for Tribal Representation in Climate-Change Policy

The limits of tribal sovereignty and domestic dependent nationhood beg the question: What alternatives do tribal governments have when considering a response to climate-change policy? Federal environmental law relies on cooperation among parties as a means to govern and manage resources. An earlier section discussed the limits of tribal sovereignty as defined by federal Indian law; however, the subsequent analysis of TAS strongly suggests that federal environmental law can intercede to recognize and strengthen claims for tribal authority where the depletion of a resource is integral to tribal identity, whether or not the resource crosses outside the reservation boundary. The EJ approach and the growing field of international indigenous human rights law shed important light on the limits of viewing climate change as a narrowly defined tort-based cause of action. These approaches also provide instructive reference points in structuring an institutional response that focuses on inclusion of tribal perspectives and meaningful tribal participation within the regulatory context. It is important to note that TAS already places stringent requirements on tribal governments seeking to obtain and secure a TAS designation by the US EPA; that tribes with TAS designation already come to the regulatory table with peer reviewed capacity adds further support to an inclusive regulatory model.[74]

Interagency Efforts Advance Tribal Interests

With respect to the climate-change policy and tribal governments, independent federal research agencies and nongovernmental organizations can play unique roles in strategic tribal resource management projects and advancing tribal claims. For example, in 2009 the National Center for Atmospheric Research under the National Oceanic and Atmospheric Administration (NOAA) testified before Congress to advance a National Climate Service

and create an integrated organization to produce authoritative information on climate change "that would enable decision-makers to manage climate-related risks and opportunities, along with other local, state, regional, tribal, national, and global impacts."[75] In 2009, the National Climate Service was announced, emphasizing the need to work among agencies at the federal, state, and tribal levels. In another initiative, the US Department of the Interior issued a Secretarial Order in September 2009 that established the Climate Change Response Council, which is responsible for developing multiyear management plans to increase understanding of climate change and its impact across all Interior bureaus, with particular emphasis on the impact to tribes.[76]

The ability of tribal governments and their agencies to interface between federal and state governments within a cooperative framework is not new or unique. For example, the restoration of the lake trout population in Lake Superior has been viewed as a model for federal–state–tribal comanagement; it began in 1996 with a partnership between the interstate fishery committee and the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) and continues to implement a multitude of tracking techniques for a range of trout species.[77] With an established record of success, GLIFWC's delegated jurisdiction by the eleven-member, federally recognized Ojibwe tribes in Wisconsin, Michigan, and Minnesota readily lends itself to integrating with such organizations as the National Climate Service. GLIFWC illustrates the potential role that can be played by tribal agencies with established records of success and a history of effective comanagement. The prevalence of tribal organizations that aggregate over a common cause and in conjunction with independent agencies and intergovernmental bodies offers significant opportunities for developing law and policies with regard to climate-change responses.

Looking Ahead: Growing Recognition and Hope for Greater Equity

Many scholars have studied the domestic-international aspects of federal Indian law and EJ issues concerning indigenous claims for "climate justice"—rights to protection from climate change caused by others. Within international indigenous human rights law, the customary framework is shifting as numerous agencies and organizations are beginning to apply existing international human rights instruments to the issue. The absence of a human rights discourse with respect to indigenous peoples and climate

change has not been quietly set aside: S. James Anaya, United Nations Special Rapporteur on the Rights of Indigenous Peoples, has characterized the lack of discourse with regard to indigenous communities and the impacts of climate change as deplorable.[78] Indeed, there is a sense of urgency behind this observation, as illustrated by the president of Bolivia's announcement that his country will take a lead role in addressing climate change from the indigenous community perspective and host a World Conference on Climate Change. Bolivia has officially extended invitations to the conference through its Permanent Mission to the United Nations and the Secretariat of the UN Permanent Forum on Indigenous Issues.[79]

Native Americans and tribal governments cover a broad cross section of society and geography and are culturally diverse. The climate-change claims made under tribal sovereignty cross into the international human rights framework, in part reflecting the systemic law and policy barriers posed by congressional plenary power and tribal authority being consistent with domestic dependent nationhood.

With respect to climate-change policy, tribal governments oppose the normative presumption of a federal–state duopoly. Having a better understanding of the tribe's unique role will help inform future discourse as it applies to environmental federalism, including their ability to anchor jurisdictional rights to cooperative resource management agreements and the preservation of TAS status—with the real potential of moving toward a tripartite system of governance over common resources.

Environmental federalism offers a unique opportunity to revisit the frustrating jurisprudence that courts seem to generate all too frequently. *Browner* illustrates how Congress and the US EPA can direct judicial interpretation through a federalist perspective in a manner that is consistent with their respective fiduciary duties and responsibilities toward Native Americans, while protecting tribal regulatory control over transboundary and common resources. The recognition of TAS status is further evidence that tribal governments can change the practices of underperforming governmental actors along patterns of use that may not readily fit into common understandings and practices. However, they can be properly interpreted with analogy to other prescribed categories under the CWA. The ability of tribal governments to form strategic coalitions and pursue international venues in asserting their claims is an area of further consideration in developing effective responses to climate change. The expertise contained in many tribal management organizations fosters the development of new partnerships and

highlights the sophistication of tribal governments and their responsiveness, further supporting a regulatory discourse that is inclusive and participatory and that provides meaningful process to all parties concerned. Moreover, it puts to rest the stereotype of American Indian environmental stewardship as depicted by Iron Eyes Cody and offers a more active and equitable institutional portrayal of effective tribal environmental and resource management.

Abbreviations Used in This Chapter

CAA	Clean Air Act
CWA	Clean Water Act
EJ	environmental justice
GLIFWC	Great Lakes Indian Fish and Wildlife Commission
IACHR	Inter-American Commission on Human Rights
ICC	Inuit Circumpolar Conference
NOAA	National Oceanic and Atmospheric Administration
NPDES	National Pollutant Discharge Elimination System
OAS	Organization of American States
SDWA	Safe Drinking Water Act
TAS	tribes as states
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
US EPA	US Environmental Protection Agency

Notes

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