



4-2-2015

# Working to Protect the Seventh Generation: Indigenous Peoples as Agents of Change

Elizabeth Ann Kronk Warner

Follow this and additional works at: <http://digitalcommons.law.scu.edu/scujil>

### Recommended Citation

Elizabeth Ann Kronk Warner, *Working to Protect the Seventh Generation: Indigenous Peoples as Agents of Change*, 13 SANTA CLARA J. INT'L L. 273 (2015).

Available at: <http://digitalcommons.law.scu.edu/scujil/vol13/iss1/11>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Journal of International Law by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# Working to Protect the Seventh Generation: Indigenous Peoples as Agents of Change

Elizabeth Ann Kronk Warner\*

---

\* Professor Kronk Warner is an associate professor and Director of the Tribal Law and Government Center at the University of Kansas School of Law. Her research focuses on the intersection of Indian law and environmental law, and she has written several articles related to climate change and indigenous peoples, energy development in Indian country, and tribal environmental law. She is also the co-editor for *Climate Change and Indigenous Peoples: The Search for Legal Remedies* and co-author for *Native American Natural Resources*. She serves as acting Chief Judge for the Sault Ste. Marie Tribe of Chippewa Indians Court of Appeals, and is a citizen of the same Tribe. She would like to thank Professor Rebecca Tsosie and Tim Coulter for their mentorship and inspiration related to this important topic.

This essay builds on my comments presented in response to Professor Rebecca Tsosie's article at "The Environment and Human Rights" symposium co-hosted by the *Santa Clara Journal of International Law* and the Center for Global Law & Policy on January 24 and 25, 2014. Professor Tsosie's presentation and resulting article focus on the ethics of remediation. This article takes the concepts underlying the ethics of remediation, as articulated in Professor Tsosie's article, and applies them to the climate change context, specifically examining climate change-related petitions brought by indigenous communities.

This essay considers the actions of indigenous peoples, who possess tremendous capacity to impact the global environment given that they occupy nearly 20 percent of the world's land surface and are stewards of 80 percent of the planet's biodiversity.<sup>1</sup> While Professor Tsosie's article considers the consequences of historic government policies and the way these policies may be perpetuated against indigenous communities, the following work addresses instances in which indigenous communities have successfully advanced the ethic of remediation, or at least the underlying principles of an ethic of remediation, thereby improving upon the *status quo*. Specifically, this article considers instances where the actions of indigenous communities in Canada and the United States have brought global attention to environmental injustice and human rights abuses.

To accomplish this, the essay begins with a discussion of how indigenous communities may differ from other communities struggling with environmental impacts to their human rights. Next, the article continues with an examination of the Inuit petition to the Inter-American Human Rights Commission. Then, the essay turns to developments in the United States, evaluating claims brought by the Native Village of Kivalina in U.S. federal courts and environmental justice claims advanced by indigenous advocates. Ultimately, the article concludes that, while many indigenous communities have historically been victims of governmental policies and colonialism, modern day indigenous communities are also agents of change and are advancing consideration of environmental abuses from a human rights perspective. Given that indigenous peoples number over 370 million and are located across 70 countries,<sup>2</sup> their capacity to impact the development of law cannot be underestimated.

- 
1. Claudia Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural but Often Forgotten Partners*, THE WORLD BANK (May 2008), <http://siteresources.worldbank.org/INTBIODIVERSITY/Resources/RoleofIndigenousPeoplesinBiodiversityConservation.pdf>.
  2. *Indigenous Peoples, Indigenous Voices*, U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, [http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf) (last visited Jan. 4, 2015).

## **I. Differentiating Indigenous Communities from Others Facing Environmental Externalities Threatening Human Rights**

Before beginning the analysis of legal claims advanced by indigenous communities, it is helpful to first examine how indigenous communities may differ from other environmental justice or communities enduring the human rights impacts of environmental contamination. Indigenous communities differ from other communities given, in some instances, their recognized sovereignty or, at the very least, their recognized right to self-determination, unique connection to the land and environment, indigenous environmental knowledge, and proven capacity for adaptation. As seen in the following section, these differences often inform legal claims and remedies sought by indigenous peoples, especially in the climate change context.

### ***A. Indigenous Sovereignty and Self-Determination***

Several nations, such as the United States, have recognized the sovereignty of indigenous communities. In the United States, federally recognized tribes<sup>3</sup> exist as entities separate from state and federal governments. A myriad of historical legal developments led to the distinct nature of federally recognized tribes.<sup>4</sup> American Indian tribes are extra-constitutional, meaning that tribes pre-existed the formation of the U.S. federal government and imposition of the American Constitution.<sup>5</sup> In the early 19<sup>th</sup> century, the United States Supreme Court affirmed the separateness of Native nations. In *Cherokee Nation v. Georgia*,<sup>6</sup> the Supreme Court held that tribes were “domestic dependent nations,” distinguishing them from both state and federal governments. In *Worcester v. Georgia*,<sup>7</sup> the Court further clarified the distinct nature of American Indian tribes, finding that the laws of the states shall have “no force or effect”

- 
3. “Federally recognized tribes” is a legal term of art denoting those tribes with which the United States federal government has developed a government-to-government relationship. At the time of writing, the federal government has recognized 566 tribes. Bureau of Indian Affairs, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 78 Fed. Reg. 87, 26384 (U.S. Dep’t of the Interior, May 6, 2013).
  4. Portions of this article have been adapted from the author’s chapter. Elizabeth A. Kronk Warner, *Application of Environmental Justice to Climate Change-Related Claims Brought by Native Nations*, in *TRIBES, LAND AND THE ENVIRONMENT* 75 (Sarah Krakoff and Ezra Rosser eds., 2012).
  5. Scholars have noted that “tribal sovereignty is both pre-constitutional and extra-constitutional.” Ann Tweedy, *Connecting the Dots Between the Constitution, The Marshall Trilogy, and the United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. REFORM 651, 656 (2008-2009) (citing Gloria Valencia-Weber, *The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 417 (2003)).
  6. 30 U.S. 1 (1831).
  7. 31 U.S. 515 (1832).

within the exterior boundaries of American Indian tribal territory. Although the nature of tribal sovereignty within the United States has changed over the ensuing decades, tribes maintain aspects of sovereignty today. For example, “[i]n the modern era, as tribes have increasingly assumed governmental functions formerly performed by the Bureau of Indian Affairs and Indian Health Service, the relationship between the federal government and the tribes is often described as a government-to-government relationship.”<sup>8</sup> Similarly, Congress indicated its recognition of tribal sovereignty through passage of the Indian Self-Determination and Educational Assistance Act<sup>9</sup> and by subsequently amending various federal statutes to allow for increased tribal governance.<sup>10</sup> Ultimately, “[t]ribal sovereignty is . . . a paradox. It transcends, and therefore requires no validation from, the U.S. government. At the same time, tribal sovereignty is vulnerable and requires vigilant and constant defense in our legal and political forums.”<sup>11</sup>

Even in countries that do not recognize indigenous sovereignty, the right to self-determination still exists. This right is exemplified by Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples, which states that “[i]ndigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>12</sup> This same right to self-determination is also found at Article 1 of the International Covenant on Civil and Political Rights<sup>13</sup> and Article 1 of the International Covenant on Economic, Social and Cultural Rights.<sup>14</sup> Accordingly, indigenous communities worldwide

---

8. Daniel Cordalis & Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, 22 NAT. RES. & ENV'T 45, 45 (2007-2008) (citing Exec. Order No. 13,175, Sec. 2, 65 Fed. Reg. 218, 67249 (Nov. 6, 2000)). See also 25 U.S.C. § 3601 (“there is a government-to-government relationship between the United States and each Indian tribe”).

9. 25 U.S.C. § 450 (2006).

10. Given the topic of this section, perhaps of special note are congressional amendments allowing tribal control over federal programs on reservations under the Clean Air Act, 42 U.S.C. § 7601(d)(1)(A), Clean Water Act, 33 U.S.C. § 1377(e), Safe Water Drinking Water Act, 42 U.S.C. § 300j-11, Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136, and major portions of CERCLA, 42 U.S.C. §§ 9601-9657.

11. Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, in JUSTICE AND NATURAL RESOURCES: CONCEPTS, STRATEGIES, AND APPLICATIONS 161, 163 (Kathryn M. Mutz et al. eds., 2002).

12. U.N. Declaration on the Rights of Indigenous Peoples art. 3, G.A. Res. 61/295, U.N. Doc. A/61/L.67 and Add. 1 (Sept. 13, 2007), available at [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf).

13. G.A. Res. 2200A (XXI) 29, U.N. Doc. 14668 (Mar. 23, 1976), available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last visited June 19, 2014).

14. G. A. Res. 2200A (XXI) 27, U.N. Doc. 14531 (Jan. 3, 1976), available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (last visited June 19, 2014).

possess a level of political and developmental freedom, regardless of whether the domestic nation where they are located recognizes indigenous sovereignty.

Based on the foregoing, environmental claims and those with human rights elements raised by indigenous communities “must be consistent with the promotion of tribal self-governance.”<sup>15</sup> Governments, therefore, owe unique obligations to indigenous communities by virtue of the communities’ political status.<sup>16</sup>

### ***B. Unique Indigenous Connection to the Land and Environment***

In addition to the foregoing, many indigenous peoples also possess unique connections to the land, including legal, spiritual, and cultural connections, which play an important role in the human rights claims raised by indigenous peoples in response to environmental problems. From a legal perspective, many indigenous communities may be tied to a specific piece of land because of domestic laws. For example, in the United States, the federal government holds a significant portion of tribal land in trust for tribal communities.<sup>17</sup> For land that is held in trust, the federal government owns a fee simple interest, but the tribes have the right of beneficial use.<sup>18</sup> The majority of federal Indian law often turns on the legal status of the land at issue.<sup>19</sup> Accordingly, if a tribe or indigenous community were ever to leave land with such special legal status because of negative environmental impacts, such as those from climate change, the tribe would also lose certain legal rights based on the status of the land.

In addition to this legal connection to the land, many tribes also possess spiritual or cultural connections to the land. For many indigenous people, land “is the source or spiritual origin and sustaining myth which in turn provides a landscape of cultural and emotional means. The land often determines the values of the human landscape.”<sup>20</sup> This strong connection to the environment may be a result of the fact that many indigenous cultures are “land-based.”<sup>21</sup>

---

15. Krakoff, *supra* note 11, at 164.

16. *Id.* at 179.

17. FELIX S. COHEN, COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 3.04 (Nell Jessup Newton et al. eds., LexisNexis 2012).

18. *Johnson v. McIntosh*, 21 U.S. 543 (1823).

19. *See generally* COHEN, *supra* note 17.

20. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 250 (1989); *See also* National Congress of American Indians, Resolution #EWS-06-004, *Supporting a National Mandatory Program to Reduce Climate Change Pollution and Promote Renewable Energy* (2006), available at [http://www.ncai.org/attachments/ResolutionKSLvpcMnfSafhsDsxFnQcTDKMclEpNfvEPQFCsLlhonOXZrOOXu\\_EWS-06-004.pdf](http://www.ncai.org/attachments/ResolutionKSLvpcMnfSafhsDsxFnQcTDKMclEpNfvEPQFCsLlhonOXZrOOXu_EWS-06-004.pdf) (“climate-related changes to the weather, food sources, and local landscapes undermine the social identity and cultural survival of American Indians and Alaskan Natives”).

21. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics*,

Moreover, beyond the tribes, many individual indigenous people possess a spiritual connection with the land and the environment.<sup>22</sup> Such individuals may “continue to have a deep relationship with ancestral homelands for sustenance, religious communion and comfort, and to maintain the strength of personal and interfamilial identities. Through language, songs, and ceremonies, tribal people continue to honor sacred springs, ancestral burial places and other places where ancestral communities remain alive.”<sup>23</sup> In her article, Professor Tsosie elaborates on this connection, saying that “[i]ndigenous peoples, unlike other groups, maintain an intergenerational presence on their lands and often practice a ‘subsistence’ (sustainable) economy, which is infused with an integrated set of cultural norms comprising a system of environmental ethics.”<sup>24</sup>

Legal evidence of this strong cultural and spiritual connection to the environment exists. For example, in the United States, many tribes have adopted tribal environmental laws that protect natural resources, such as water, because of their spiritual or cultural significance, in addition to concerns about environmental degradation and quality.<sup>25</sup> Similarly, in this same vein, the Confederated Salish and Kootenai Tribes (CSKT), located on the Flathead Reservation within Montana, USA, adopted a CSKT Climate Change Strategic Plan.<sup>26</sup> In their Strategic Plan, the Tribes identified several sectors warranting special consideration in light of the impacts of climate change. The Tribes included “Culture” as one of the sectors the Tribes should specifically plan for in developing their climate change-related laws.<sup>27</sup> Moreover, the Tribes indicated that culture should be given the highest priority in terms of protecting the resources from the negative effects of climate change.<sup>28</sup>

---

*Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 274 (1996).

22. *Id.* “American Indian tribal religions . . . are located ‘spatially,’ often around the natural features of a sacred universe. Thus, while indigenous people often do not care when the particular event of significance in their religious tradition occurred, they care very much about where it occurred.” *Id.* at 282-83.
23. Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 HARV. ENVTL. L. REV. 373, 381 (2008).
24. Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT’L L. 203, 208 (2015) [hereinafter Tsosie, *Ethics of Remediation*].
25. Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental “Laboratories,”* U. COLO. L. REV. (forthcoming Spring 2015), available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID\\_2395729\\_code1708382.pdf?abstractid=2395729&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID_2395729_code1708382.pdf?abstractid=2395729&mirid=1).
26. CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, CLIMATE CHANGE STRATEGIC PLAN 3 (Sept. 2013), available at <http://www.cskt.org/CSKTClimatePlan.pdf> [hereinafter CLIMATE CHANGE STRATEGIC PLAN].
27. *Id.* at 66.
28. *Id.*

Recognition of the important connection between indigenous cultures and spirituality to the land and environment is not limited to tribes located within the United States. For example, Article 24 of the U.N. Declaration on the Rights of Indigenous Peoples recognizes the right to protect certain plants and animals because of their special medicinal purposes for indigenous communities.<sup>29</sup> Article 25 goes on to elaborate that “[i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”<sup>30</sup> Moreover, Article 29 recognizes that indigenous communities have a right to the protection and conservation of their environments.<sup>31</sup> Article 31 explicitly recognizes that indigenous communities have a right to protect their traditional environmental knowledge.<sup>32</sup> Taken in its totality, the U.N. Declaration of the Rights of Indigenous Peoples serves as international recognition of this often unique connection between indigenous peoples and their environment.

Accordingly, as demonstrated above, if an indigenous community possesses a unique connection to the land, for any reason—whether cultural, religious or legal—any legal strategy designed to advance the human rights of such a community must take this connection into consideration. Failure to do so would result in injustice.

### ***C. Indigenous Environmental Knowledge***

Another potential factor that must be considered in examining the human rights of indigenous communities is the potential existence of Traditional Environmental Knowledge or Indigenous Environmental Knowledge. As noted above, Article 31 of the U.N. Declaration on the Rights of Indigenous Peoples recognizes the right of indigenous communities to protect their traditional environmental knowledge. As Professor Maxine Burkett explains, in terms of climate change,

[Indigenous Environmental Knowledge] describes the indigenous methods used to respond to historical extremes that climate forecasts portend with greater frequency and severity—such as floods and drought—and suggests proven adaptations. It can also describe a lens, or worldview, with which decisions should be

---

29. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 12, at art. 24.

30. *Id.* at art. 25.

31. *Id.* at art. 29.

32. *Id.* at art. 31.

made that might facilitate long-range, multigenerational adaptive governance.<sup>33</sup>

Evidence of the importance of traditional environmental knowledge is clear in the CSKT's Climate Change Strategic Plan mentioned above, which explicitly and pervasively incorporates traditional environmental knowledge from the Tribes' elders. Where possible, the Tribes work to incorporate Traditional Ecological Knowledge into their goals and actions as expressed in the Climate Change Strategic Plan. For example, the Tribes' forestry goals include developing a greenhouse to grow native and cultural plant species.<sup>34</sup> Similarly, the land goals include engaging in practices to promote the growth of native plants.<sup>35</sup> In terms of achieving the cultural goals, the Tribes task the Tribal Council and CSKT Elders Advisory Council, who possess Traditional Ecological Knowledge, with this responsibility.<sup>36</sup>

Therefore, traditional environmental knowledge plays an important role in indigenous communities and, in light of the impacts of climate change on indigenous communities, its importance to such communities may only continue to grow. As such, traditional environmental knowledge must be considered when developing human rights claims arising within indigenous communities.

#### ***D. Indigenous Capacity for Adaptation***

Related to a communities' traditional ecological knowledge is the ability of the community to adapt in the face of extreme environmental stressors, such as climate change. Although not a legal difference *per se*, it is notable that many indigenous communities possess ample adaptation experience. For many such communities, the ability to adapt was necessary in light of colonization and oppression from a foreign "conqueror."<sup>37</sup> Foreign nations colonized many indigenous communities. Because of such colonization and resulting oppression by the dominant society, indigenous communities were often subject to severe physical and emotional stressors, as well as being placed in "less desirable" locations within the new nation.<sup>38</sup> This historical displacement resulted in

---

33. Maxine Burkett, *Indigenous Environmental Knowledge and Climate Change Adaptation*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 96, 96 (Randall S. Abate & Elizabeth A. Kronk eds., 2013).

34. CLIMATE CHANGE STRATEGIC PLAN, *supra* note 26, at 54.

35. *Id.* at 57.

36. *Id.* at 66.

37. See e.g., Carmen G. Gonzalez, *Market, Monocultures, and Malnutrition: Agricultural Trade Policy Through an Environmental Justice Lens*, 14 MICH. J. OF INT'L L. 345, 378-79 (2006) (suggesting that through colonization foreign communities subjugated indigenous communities).

38. COHEN, *supra* note 17, at §§ 1.01-07.

many indigenous communities finding themselves in physical locations that are more susceptible to modern day negative environmental externalities, such as the effects of climate change. In addition to these relatively modern stressors related to colonization and foreign aggression, there is also ample evidence that many indigenous communities survived massive climatic disruptions in the more distant past, such as severe cold and ice.<sup>39</sup>

The fact that indigenous communities continue to persist in light of such outrageous historical stressors is a testament to their significant capacity for adaptation and resiliency. Moreover, such a proven record of adaptation led to the substantial development of traditional environmental knowledge, which is discussed above. Taken in its totality, given their demonstrated record of successful adaptation, indigenous communities may prove to be helpful guides to other communities facing threats to their human rights because of negative environmental impacts.

As demonstrated by the foregoing discussion, many<sup>40</sup> indigenous communities do possess attributes that affect human rights claims brought on their behalf. For example, there may be specific legal rights possessed by indigenous communities, such as their right to sovereignty or self-determination and right to land, that are not applicable to other similarly situated communities. Similarly, factors of indigeneity, such as the existence of traditional environmental knowledge and a strong connection to land for reasons outside of the law, must also be considered in pursuing human rights claims of such communities. It should never be forgotten that many, if not most, indigenous communities have a demonstrated record of adaptation and resiliency—a record that may prove inspirational for other communities facing human rights harms as a result of environmental stressors. Building especially on this last point, the next section of the essay considers two legal claims that may prove helpful to other communities looking for a legal remedy to human rights abuses resulting from environmental harm.

## **II. Learning from the Indigenous Experience: The ICC Petition to the IACHR and Kivalina’s Claim in a United States Court**

Building on this idea of indigenous communities as potential “guides” for other communities struggling with environmental impacts on human rights,

---

39. See generally VINE DELORIA, JR., *RED EARTH, WHITE LIES: NATIVE AMERICANS AND THE MYTH OF SCIENTIFIC FACT* (1997).

40. The author acknowledges that tremendous diversity exists amongst indigenous communities. The purpose of this essay is not to essentialize a common indigenous experience, but rather to acknowledge that some commonalities may exist between communities.

this section of the essay explores two ground-breaking legal claims brought by indigenous communities. Although the claims are brought by different indigenous groups in different legal forums, both claims focus on climate change, which, like the legacy of radioactive contamination, “can lead to cultural and even physical genocide for contemporary communities, if the harms are not fully engaged and redressed.”<sup>41</sup> Moreover, like radioactive contamination discussed in Professor Tsosie’s article, indigenous communities have contributed little, if anything, to the problem of climate change, yet bear the disproportionate impacts of its negative effects<sup>42</sup>—effects which have the capacity to obliterate indigenous communities and lives. Similarly, the justification leading to radioactive contamination and climate change—development for the sake of the general good rather than consideration of indigenous communities or other specific communities<sup>43</sup>—is the same. In other words, the benefit of uranium production and greenhouse gas emissions does not lie with indigenous communities, and the harm of these activities is intergenerational. Not only are the negative externalities of climate change and radioactive contamination similar amongst indigenous communities, but these communities may all be part of the dialogue on “international sacrifice areas.”<sup>44</sup> Given the similarity in impact and communities involved, consideration of other claims brought by indigenous communities to combat the impacts of climate change is appropriate.

First, this section examines the Inuit Circumpolar Council’s (ICC) claim against the United States in the Inter-American Commission on Human Rights (IACHR). In its 2005 claim, the ICC alleged that the United States violated the human rights of ICC members due to the United States’ greenhouse gas emissions. Second, the section considers the claim brought by the Native Village of Kivalina against significant private corporate emitters of greenhouse gases in the federal courts of the United States. Although Kivalina’s claim did not specifically rely on alleged human rights abuses, the claim parallels the one brought by the ICC, and therefore is instructive to future litigants. The section concludes with some general thoughts on how these cases advanced (or

---

41. Tsosie, *Ethics of Remediation*, *supra* note 24, at 208.

42. *Id.* at 209. Similarly, “the harms of radioactive contamination fall disproportionately on Indigenous women and children, as well as community members who practice traditional, subsistence economies, which often include elders.” *Id.*

43. *Id.* at 212 (explaining that although uranium production was undertaken for the public good, “the harms disproportionately fell upon Navajo people, primarily the Navajos who worked in the mines on the reservation, as well as their families”).

44. *Id.* at 244.

distracted from) efforts of indigenous communities to find legal redress for human rights impacts resulting from environmental harms.

**A. *The ICC Petition to the IACHR***<sup>45</sup>

*What is happening affects virtually every facet of Inuit life—we are a people of the land, ice, snow and animals. Our hunting culture thrives on the cold. We need it to be cold to maintain our culture and way of life. Climate change has become the ultimate threat to Inuit culture. – Sheila Watt-Cloutier*<sup>46</sup>

The ICC represents over 150,000 Inuit residing in Canada, Greenland, Russia, and the United States.<sup>47</sup> Because of climate change, the Inuit are experiencing profound changes in their environment. As Sheila Watt-Cloutier, then Chair of the ICC explained in 2005, “[t]he range of these changes is well-known: melting permafrost, thinning and ablation of sea ice, receding glaciers, invasion of species of animals not previously seen in the Arctic, increased coastal erosion, longer and warmer summers and shorter winters.”<sup>48</sup> More than changing the Inuit environment, these changes have life-altering implications for the Inuit as their culture is intimately connected to the environment and cold.<sup>49</sup>

As a result of the devastation being wrought on the Inuit way of life because of climate change, the ICC filed a petition with the IACHR against the United States of America on December 7, 2005.<sup>50</sup>

---

45. *Id.* at 262 (considering the ICC’s petition to the IACHR may be particularly instructive and related to Professor Tsosie’s article and presentation given that “a group of Navajo tribal members . . . took action to engage political redress for the harms of radioactive contamination on their lands, filing a petition in the Inter-American Commission on Human Rights with the Organization of American States”).

46. Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conf., Presentation at the Eleventh Conference of Parties to the UN Framework Convention on Climate Change, in Montreal, Canada (Dec. 7, 2005), *transcript available at* <http://mailman.fsr.com/pipermail/vision2020/2007-October/049013.html>.

47. Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, Inter-Am. Comm’n H.R., Petition No. P-1413-05, 9 (Dec. 7, 2005) [hereinafter ICC Petition to the IACHR], *available at* <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/finalpetitionicc.pdf>.

48. Watt-Cloutier, *supra* note 46.

49. ICC Petition to the IACHR, *supra* note 47, at 18.

50. *See generally id.* Although the ICC represents Inuit living in Greenland and Russia as well as in Canada and United States, the ICC’s 2005 petition was limited to those Inuit living in Canada and the United States, as the IACHR’s jurisdiction is limited to nation states within the Americas. The Organization of American States is composed of all of the nations of North and South America. *Member States*, ORG. OF AMERICAN STATES, [http://www.oas.org/en/member\\_states/default.asp](http://www.oas.org/en/member_states/default.asp) (last visited Sept. 7, 2014).

Though the United States is not a member of the American Convention on Human Rights, the Inuit petition noted that because the petition raises “transgressions of the American Declaration on the Rights and Duties of Man, to which the United States committed, the Inter-American Commission on Human Rights has jurisdiction to resolve the dispute.”<sup>51</sup>

The ICC argued that because of its substantial greenhouse gas emissions which are shown to cause climate disruption, the United States is a significant contributor to the negative environmental impacts affecting the Inuit in both Canada and the United States,<sup>52</sup> and therefore Inuit rights under the American Declaration of the Organization of American States had been violated.<sup>53</sup>

Despite the fact that the ICC knew it would be exceedingly difficult to succeed on the petition in front of the IACHR, the ICC moved forward with the petition in an effort to open up the dialogue about the link between greenhouse emissions and climate change, as well as the effects of climate change on indigenous people.<sup>54</sup> As Sheila Watt-Cloutier noted, the petition had “great moral value” and was a vehicle to “educate and encourage.”<sup>55</sup> The petition was a mechanism to engage the United States on the issue of its greenhouse gas emissions and its significant contributions to climate change.<sup>56</sup> Although the IACHR would not have had the authority to compel the United States to reduce its greenhouse gas emissions, the ICC hoped that a favorable outcome would

- 
51. Sarah Nuffer, *Human Rights Violations and Climate Change: The Last Days of the Inuit People?*, 37 RUTGERS L. REC. 182, 188 (2010) (citing Randall S. Abate, *Climate Change Liability and the Allocation of Risk: Climate Change, The United States, and the Impacts of Arctic Melting: A Case Study in the Need for Enforceable International Environmental Human Rights*, 43A STAN. J. INT'L L. 3, 48 (2007)).
52. ICC Petition to the IACHR, *supra* note 47, at 68-69.
53. Hari M. Osofsky, *Complexities of Addressing the Impacts of Climate Change on Indigenous Peoples Through International Law Petitions: A Case Study of the Inuit Petition to the Inter-American Commission on Human Rights*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 313, 314-15 (Randall S. Abate & Elizabeth Ann Kronk eds., 2013) (“[T]he petition relied upon rights contained in the regionally-based American Declaration of the Rights and Duties of Man because the United States is not party to the American Convention on Human Rights.”) (citation omitted); ICC Petition to the IACHR, *supra* note 47, at 68-69 (arguing that the United States, because of its greenhouse gas emissions, had infringed upon the following rights under the American Declaration: the right to enjoy the benefits of their (Inuit) culture, the right to use and enjoy lands they have traditionally used and occupied, the right to use and enjoy their personal property, the right to the preservation of health, the right to life, physical integrity and security, the right to their own means of subsistence, and the Inuit’s rights to residence and movement and inviolability of the home).
54. Osofsky, *supra* note 53, at 323.
55. Nuffer, *supra* note 51, at 192 (citing Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights*, 31 AM. INDIAN L. REV. 675, 687 (2007)).
56. Osofsky, *supra* note 53, at 323.

have at least compelled the United States to enter into negotiations related to its greenhouse gas emissions.<sup>57</sup>

The IACHR's response to the ICC's petition constituted two paragraphs.<sup>58</sup> The IACHR determined that "the information provided [in the ICC's petition] does not enable [the Commission] to determine whether the alleged facts would tend to characterize a violation of the rights protected by the American Declaration."<sup>59</sup> Ultimately, the IACHR found that "it will not be possible to process [the ICC's] petition at present because the information it contains does not satisfy the requirements set forth in those Rules and the other applicable instruments."<sup>60</sup>

In response to the IACHR's letter and determination of the merits of the ICC's petition, the ICC requested that the IACHR hold a hearing on the potential connection between climate change and human rights, which was the basis of the ICC's original petition to the IACHR.<sup>61</sup> The IACHR granted the ICC's request and held a hearing on the connection between climate change and human rights in March 2007.<sup>62</sup> "While the hearing did not force the IACHR or the United States to take any action, it publicized the issue of GCC [Global Climate Change] and the human rights violations of the Inuit people."<sup>63</sup> Since the hearing in 2007, the IACHR indicated that it remains interested in the rights of indigenous peoples within the Americas.<sup>64</sup>

### ***B. Kivalina's Claim in the Federal Courts of the United States***

The ICC petition to the IAHRIC marks efforts by an indigenous community to have its claims adjudicated by a foreign forum. Indigenous communities within the United States have also looked domestically to find an opportunity to redress the negative impacts of climate change on human rights. An example of

---

57. Martin Wagner & Donald M. Goldberg, Presentation at the 10th Conference of the Parties to the Framework Convention on Climate Change, Buenos Aires, Arg., *An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change*, at 4 (Dec. 15, 2004), available at [http://www.ciel.org/Publications/COP10\\_Handout\\_EJCIEL.pdf](http://www.ciel.org/Publications/COP10_Handout_EJCIEL.pdf).

58. Letter from the Inter-American Comm'n on Hum. Rts. to Org. of American States, responding to Petition No. P-1413-05 (ICC Petition to the IACHR, *supra* note 47) (Nov. 16, 2006), available at <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf> (last visited Sept. 7, 2014).

59. *Id.*

60. *Id.*

61. Osofsky, *supra* note 53, at 314.

62. *Id.* at 313-14.

63. Nuffer, *supra* note 51, at 184 (citing Letter from Sheila Watt-Cloutier, Martin Wagner & Daniel Magraw to Santiago Canton, Executive Secretary of the Inter-American Comm'n on Hum. Rts. (Jan. 15, 2007), available at [http://www.ciel.org/Publications/IACHR\\_Letter\\_15Jan07.pdf](http://www.ciel.org/Publications/IACHR_Letter_15Jan07.pdf)).

64. Osofsky, *supra* note 53, at 314.

such a domestic claim is the claim brought by the Native Village of Kivalina, which is located within Alaska. Kivalina “are the governing bodies of an Inupiat village of approximately 400 people . . . located on the tip of a six-mile barrier reef located . . . some seventy miles north of the Arctic Circle.”<sup>65</sup> Historically, Kivalina was protected from strong winter storms by Arctic sea ice surrounding the barrier reef.<sup>66</sup> However, because of climate change, the sea ice that traditionally protected the community is melting, and as a result, Kivalina is experiencing a “massive erosion problem.”<sup>67</sup> “Houses and buildings are in imminent danger of falling into the sea . . . . Critical infrastructure is imminently threatened with permanent destruction.”<sup>68</sup> “The U.S. Army Corps of Engineers and the U.S. Government Accountability Office have both concluded that Kivalina must be relocated due to global warming and have estimated the cost [of relocation] to be from [USD]95 million to [USD]400 million.”<sup>69</sup>

In light of the massive injury Kivalina is currently suffering and the impending loss of the land upon which the community is located, Kivalina filed a complaint in the United States District Court for the Northern District of California (“District Court”) on February 26, 2008, against several private entities that allegedly contributed significantly to climate change through their emissions of greenhouse gases.<sup>70</sup> Kivalina based its complaint on claims under the federal common law of public nuisance, state private and public nuisance, civil conspiracy, and concert of action. In relevant part, Kivalina requested monetary damages for current injuries sustained, as well as a declaratory judgment “for such future monetary expenses and damages as may be incurred by Plaintiffs in connection with the nuisance of global warming.”<sup>71</sup> On September 30, 2009, Kivalina’s complaint was dismissed, as the District Court found that the complaint was precluded under the political question doctrine and that Kivalina lacked standing.<sup>72</sup>

---

65. Complaint at ¶ 1, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009) (No. C 08–1138 SBA) [hereinafter *Kivalina Complaint*].

66. *Id.* at ¶ 4.

67. *Id.*

68. *Id.*

69. *Id.* at ¶ 1.

70. Kivalina’s complaint asserts that “Defendants in this action include many of the largest emitters of greenhouse gases in the United States.” *Id.* at ¶ 3. The complaint then goes on to detail the actual greenhouse gas emissions for each defendant during certain years. *Kivalina Complaint*, *supra* note 65, at ¶¶ 18-122. For example, in 2006, BP emitted “65 million tons of carbon dioxide equivalent greenhouse gases,” Chevron “emitted 68 million tons of carbon dioxide equivalent” and ConocoPhillips emitted “62.3 million tons.” *Id.* at ¶¶ 23, 29, 34.

71. *Id.* at ¶ 125.

72. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d at 868 (granting defendants’ motions

On March 10, 2010, Kivalina appealed the District Court's decision in the United States Court of Appeals for the Ninth Circuit.<sup>73</sup> In a 3–0 panel decision, the Ninth Circuit relied on federal displacement reasoning to affirm the District Court's dismissal of the plaintiffs' claims.<sup>74</sup> Kivalina's petition for rehearing *en banc* with the Ninth Circuit was also rejected.<sup>75</sup> On May 20, 2013, the U.S. Supreme Court denied Kivalina's petition for a writ of certiorari.<sup>76</sup> Accordingly, Kivalina has exhausted potential avenues of federal review within the United States of its federal common law public nuisance claim.

### ***C. Concluding Thoughts on Recent Indigenous Legal Efforts to Combat the Effects of Climate Change***

The preceding discussion is instructive for two overarching reasons. First, as previously suggested, indigenous communities, such as the ICC, have been at the forefront of the effort to protect against human rights abuses caused by environmental stressors. Other communities facing similar threats to their human rights, especially within the climate change context, would therefore be wise to look to the indigenous experience for some guidance. This conclusion is only buttressed by the fact that many indigenous communities have a proven record of adaptation and resiliency.

The foregoing discussion is also illuminative of the concepts of restorative justice, as discussed in Professor Tsosie's paper and within the context of radioactive contamination. By unpacking the elements of restorative justice and applying those same elements to the claims and factors discussed above, we can see that the principles advanced by Professor Tsosie apply beyond the concept of radioactive contamination.

Professor Tsosie provides guidance on the concept of restorative justice. As she explains, "the focus of [existing] cases is to determine who is legally responsible for paying for the harms of radioactive contamination."<sup>77</sup> Moreover, she cautions that "the existing [United States] federal law lacks any capacity to provide moral redress for a set of wrongs that is part of a broader history of

---

to dismiss for lack of subject matter jurisdiction).

73. Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2010), *available at* <http://turtletalk.files.wordpress.com/2010/05/kivalina-opening-brief.pdf>.

74. *Id.* at 858.

75. Native Vill. of Kivalina v. ExxonMobil Corp., Order on Petition for Rehearing, No. 09-17490 (Nov. 27, 2009).

76. Native Vill. of Kivalina v. ExxonMobil Corp., 133 S.Ct. 2390 (2013), *available at* <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-1072.htm>.

77. Tsosie, *Ethics of Remediation*, *supra* note 24, at 206.

injustice for indigenous peoples.”<sup>78</sup> As demonstrated by the foregoing discussion, previous complaints brought by indigenous peoples have started down the path of an ethic of remediation. Professor Tsosie advocates for “holistic attention” to current environmental and public health issues. Accordingly, this section of the essay briefly considers the claims of the ICC and Kivalina from several perspectives, in an effort to best understand the claims of these communities.

For example, these claims can be examined from a moral perspective, one that distinguishes between right and wrong, good and bad. Professor Tsosie explains that an “intercultural approach to remediating” the harm threatening indigenous peoples is necessary to achieve “the moral objectives of reparative justice.”<sup>79</sup> Moreover, given that the United States federal government serves as a trustee to its indigenous populations, Professor Tsosie goes on to conclude that “a trustee has a greater moral duty to repair harm than a nation that does not have this responsibility.”<sup>80</sup> Such responsibility does not arise as charitable relief, but rather, as a matter of right for many indigenous communities.<sup>81</sup> This is because “if self-determination means that the Indigenous group has a right to protect its traditional lands and lifeways, as well as the health of its members, or that the Indigenous merits redress for harms suffered during the ‘wardship’ era, then the concept does have moral weight.”<sup>82</sup>

To understand what constitutes “moral repair,” Professor Tsosie looks to Margaret Walker’s philosophy, as Walker posits that “such a response must align with principles of justice ‘in an ancient and enduring sense, putting individuals in right with each other and communities as a whole’ and in accordance with mutually agreed measures of ‘what is due each other.’”<sup>83</sup> Professor Tsosie goes on to explain that “moral repair” “requires a commitment to build sustainable tribal economies, rather than encouraging destructive forms of development that jeopardize the long-term viability of tribal lands and the health of tribal members.”<sup>84</sup>

Implicit within the foregoing is the idea that indigenous communities must be able to actively participate in the “telling” of their story for justice to ensue. “In order to ‘heal’ the past, victim groups must be able to move beyond their sense of powerlessness and vulnerability, and they may need to tell their stories and

---

78. *Id.*

79. *Id.* at 210.

80. *Id.* at 236.

81. *Id.*

82. *Id.* at 244-45.

83. Tsosie, *Ethics of Remediation*, *supra* note 24, at 249-250.

84. *Id.* at 259.

have the public acknowledge them.”<sup>85</sup> Professor Tsosie concludes that international fora may be used to allow indigenous peoples to engage the public in a dialogue about the impacts to their community. Such a dialogue can be an exercise in “cultural sovereignty.”<sup>86</sup> Moreover, such exchanges avoid “testimonial injustice,” which occurs when indigenous community members are excluded in favor of scientific and economic accounts of harm. While this may not yet have happened for communities suffering the impacts of radioactive contamination, the Inuit community may have experienced testimonial injustice.

The ICC petition to the IAHRIC is an example of an indigenous community telling its own story. First, the ICC, although its actions were supported by outside actors, took the lead in developing its petition to the Commission. Moreover, its actions spurred a dialogue on the links between greenhouse gases and climate change and between climate change and human rights. For example, although it would be difficult to draw a direct connection between the ICC’s petition and the United States’ subsequent actions, the United States’ participation in international discussions related to climate change and its domestic regulation of greenhouse gases have increased since the ICC’s petition was filed in 2005.<sup>87</sup> It is therefore possible that the ICC petition played a role in spurring the United States to act to curb its greenhouse gases. Professor Osofsky explained that “the petition becomes a dialogue between the United States and indigenous peoples based in the Arctic (including in the United States) through a shared commitment to human rights protection; the petition thus potentially serves as a bridge between nation-states and civil society.”<sup>88</sup> By telling their own story, albeit with the help of some international actors, the ICC was able to create a space for consideration of their unique cultural considerations—considerations that are meaningful in remediation discourse. As Sheila Watt-Cloutier explained, “the Inuit human rights petition . . . was designed to show the world what was really happening.”<sup>89</sup>

In addition to the moral dimensions of restorative justice, Professor Tsosie also examines issues affecting indigenous populations from an environmental justice perspective. “Within environmental justice, the discussion often revolves around notions of fairness and equality in the distribution of benefits and burdens within society, with special attention to disparities caused by economic

---

85. *Id.* at 250.

86. *Id.* at 259.

87. Osofsky, *supra* note 53, at 313-18.

88. *Id.* at 326.

89. Tsosie, *Ethics of Remediation*, *supra* note 24, at 270.

deprivation or racial discrimination.”<sup>90</sup> Like radioactive contamination, which is explored in her article, the prior cases discussed in this essay can also be considered from an environmental justice lens. Although the ICC and Kivalina claims involve different forums, defendants, and legal theories, both were brought by American indigenous communities in response to the negative impacts of climate change on their communities. Environmental justice, as applied to indigenous communities, draws upon principles applicable to all environmental justice communities, but it also includes consideration of factors not applicable to other environmental justice communities, as discussed at the beginning of this essay.

It is important to note that environmental justice and human rights may be connected as environmental justice concerns, such as the disparate impact of radioactive contamination and climate change on indigenous people, and may lead to human rights violations. “The human rights approach illuminates the . . . issues at the level of ‘heart’ and ‘mind,’ evoking the actual experience of the communities that suffer from the politics surrounding energy development and remediation efforts.”<sup>91</sup>

Professor Tsosie also considers climate justice in the development of an ethics of remediation. Given that the above discussion focuses on legal claims related to the impacts of climate change on indigenous communities, climate justice is particularly applicable to the claims brought by the ICC and Kivalina. Professor Tsosie explains that the literature on climate change attempts “to discern which part of ‘climate change’ is attributable to ‘natural phenomena,’ and which part is anthropogenic.”<sup>92</sup> We see the same in the Commission’s and courts’ determinations discussed above. In terms of the claim brought by the ICC, the Commission was unable to find a connection between the United States’ greenhouse gas emissions and the impacts to the Inuit environment. In the case of Kivalina’s claim, the Northern District of California questioned whether climate change was even an appropriate issue for adjudication in courts, as it involves important scientific and policy considerations.

Despite the fact that factors contributing to the development of an ethic of restorative justice may be present in the cases discussed above, the issue of whether “justice” has been secured for the Kivalina and ICC communities, however, remains open. The ICC petition certainly was not a “lost cause,” as the law has developed in important and notable ways as a result of the petition. As Professor Osofsky explained,

---

90. *Id.* at 258.

91. *Id.* at 272.

92. *Id.* at 258.

The Inuit petition builds on the existing jurisprudence in the Inter-American Commission on Human Rights by presenting an environmental rights' harm that is separated in both time and location from the behavior causing it. The previous decisions of the Inter-American Commission and Court on Human Rights demonstrate receptiveness to the interweaving of environmental harm and human rights violations, especially in the context of indigenous peoples.<sup>93</sup>

In terms of radioactive contamination, Professor Tsosie speculates that “securing ‘justice’ under the [United States federal] law will likely depend upon intervention by a third party with resources and standing to bring this federal claim.”<sup>94</sup> The ICC and Kivalina, although aided by non-governmental entities such as the Center for International Environmental Law and the Native American Rights Fund, pursued their claims themselves. Were they able to obtain justice? At the very least, it is clear that both indigenous communities succeeded in spurring dialogue regarding the impact of climate change on indigenous peoples.

### **III. Conclusion**

Indigenous communities are not victims. Far from it. As demonstrated above, indigenous communities are leaders in terms of adaptation and resiliency. Some indigenous communities, such as the ICC and Native Village of Kivalina, have also led the way in terms of examining how the human rights framework may be used to assist a community recovering from environmental trauma. Moreover, although most would likely agree that these communities have not received justice, elements of the ethics of restorative justice, as articulated by Professor Tsosie in her article being explored here, are present. Accordingly, the ethics of restorative justice apply beyond the realm of radioactive contamination and certainly apply to the impacts of climate change on indigenous communities. Ultimately, this essay agrees with Professor Tsosie that “[w]e must recast the claims of Indigenous communities in the form of self-determination, appreciating the unity of land, community, and culture that provides the nexus for this moral and political right.”<sup>95</sup>

---

93. Osofsky, *supra* note 53, at 327.

94. Tsosie, *Ethics of Remediation*, *supra* note 24, at 228.

95. *Id.* at 271.

