

Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*

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Sovereignty has an integral relationship to the issue of climate change. The environmental laws and development policies of global nation-states have created the current crisis, and these sovereigns have the capacity to mitigate the high level of greenhouse gas (GHG) emissions or facilitate appropriate adaptation policies to deal with future climate events. Within the United States, federally recognized tribal governments possess sovereignty and the ability to develop laws governing their lands, resources, and members according to their own norms.¹ However, tribal sovereignty within the United States is, to some extent, limited by tribes’ status as “domestic dependent nations.”² In that

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1. See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK] (documenting U.S. federal Indian law).

2. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 1, 17 (1831) (holding that Indian tribes are not “foreign nations” within the meaning of the United States Constitution and finding that they are, instead, “domestic dependent nations” under the protection of the U.S. government).

sense, tribal environmental authority tracks the scope of sovereignty and self-determination that has emerged from federal Indian law and policy.³

With respect to the issue of climate change, the domestic sovereignty framework is inadequate to address the challenges confronting indigenous communities because tribal jurisdiction is largely circumscribed by boundaries of reservation and membership. International human rights law offers a more comprehensive framework of analysis for the principle of indigenous self-determination, because it governs the relationship of indigenous peoples with their traditional lands and resources and places responsibility on the nation-states to account for the impact of their policies upon indigenous peoples.⁴ This Article highlights the need for federally recognized tribal governments in the United States to work effectively within the domains of tribal law, federal law, and international human rights law, as they craft appropriate strategies to deal with the impacts of climate change.

Part I of this Article will consider whether indigenous peoples have distinctive rights in an era of climate change and, if so, how those rights are best framed. Part II will then address the way in which the political sovereignty of U.S. tribal governments operates to confirm their legal rights to govern their lands and resources. The limitations of this model become apparent because climate change is a global problem, implicating the actions of governments throughout the world, and the impacts of climate events extend beyond political boundaries, necessitating intersovereign accords. Consequently, international law plays an important role and Part III will consider how international human rights law serves as a focal point for differentiating the rights of vulnerable groups from the rights of the nation-states. Part IV will highlight the need to merge the international and domestic frameworks of sovereignty to meet the challenges of climate change for indigenous peoples.

3. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 228 (1996) [hereinafter Tsosie, *Tribal Environmental Policy*] (citation omitted); see Rebecca Tsosie, *Climate Change, Sustainability, and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVTL. & ENERGY L. & POL'Y J. 188, 210-14 (2009) [hereinafter Tsosie, *Climate Change, Sustainability, and Globalization*].

4. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 3, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

I. UNDERSTANDING INDIGENOUS RIGHTS: THE DOMAINS OF
POLITICAL AND CULTURAL SOVEREIGNTY

Within the United States, indigenous peoples are grouped into three classifications: Indian tribes, Alaska Native peoples, and Native Hawaiians.⁵ These groups do not share equal rights under the domestic political structure.⁶ The U.S. government has crafted a political relationship with many Indian tribes and Alaska Native peoples, which results in their status as “federally recognized Indian tribes.”⁷ To some extent, these groups share common legal rights, though they may also experience differences depending on the character of their specific treaties or political histories. However, the rights of tribal governments to exercise territorial jurisdiction are linked to the concept of “Indian Country.”⁸ This impairs the rights of Alaska Native governments because the United States Supreme Court has issued a restrictive reading of “Indian Country” in Alaska due to the effect of the Alaska Native Claims Settlement Act, which revoked most existing reservations within the state.⁹ According to the Court in *Alaska v. Native Village of Venetie Tribal Government*, the village governments are not “dependent Indian communities,” and Indian Country in Alaska is limited to one existing reservation (Metlakatla) and allotments still held in Native title.¹⁰ Although the tribal government will still possess the ability to regulate its members, it may not have equivalent jurisdiction over nonmembers. Thus, tribal governments without a reservation may be perceived as “less sovereign” because they cannot exercise taxing and regulatory jurisdiction on the same basis as tribal governments who still possess a trust land base.

There are many other groups that maintain that they are indigenous peoples, despite the lack of federal recognition.¹¹ Native Hawaiian people, for example, are the indigenous peoples of the islands that now comprise the state of Hawaii. They are not “Indian tribes” and are

5. See CAROLE E. GOLDBERG ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 123-44 (6th ed. 2010) (describing the background issues in tribal-federal legal relations); *id.* at 784-92 (describing the rights of Native Alaskan groups); *id.* at 792-805 (describing the unique status and rights of Native Hawaiians).

6. See *id.* at 784-85, 792-93.

7. See COHEN’S HANDBOOK, *supra* note 1, § 3.02.

8. See 18 U.S.C. § 1151 (2006) (offering the relevant statutory definitions of “Indian Country” that are used to assess jurisdiction).

9. Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (2006).

10. *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520, 530-31 & n.5 (1998).

11. Some of these groups, such as the Lumbee of North Carolina, are state-recognized. Others, such as the Piro-Manso Tewa of New Mexico, lack state or federal recognition. See COHEN’S HANDBOOK, *supra* note 1, § 3.02 n.63.

instead culturally linked to other Polynesian peoples, such as the Maori of New Zealand and the Samoan people.¹² Although the federal and state governments recognize their status as indigenous peoples and extend certain political and legal rights, Native Hawaiians do not enjoy the same status as federally recognized tribal governments, nor are they eligible to petition for recognition under the administrative rules governing recognition for Indian tribes.¹³ Although Senator Akaka (D-Hawaii) and others have introduced legislation to effectuate federal recognition for more than twelve years, none of these bills has successfully been enacted into law.¹⁴

Despite these differences, there is a continuing tendency within the United States to conflate the political status of federally recognized Indian tribes with that of indigenous peoples. This becomes particularly important in an era of climate change because only federally recognized Indian tribes have jurisdiction to govern their lands and resources. Nonrecognized tribes and Native Hawaiians are indigenous peoples, but they do not have the ability to regulate their lands and resources as distinctive governments, nor do they have the ability to receive statutory delegations of federal authority, which would allow them to exercise meaningful control over air, water, or land resources.¹⁵ In that sense, members of these groups must rely upon their status as individual citizens of the United States in order to participate in the existing structures of governance. Because of these distinctions, federally recognized tribal governments are the only indigenous peoples within the United States who have the ability to generate environmental laws of their own choosing and apply them to their lands and resources.

This Article proposes that the political sovereignty of federally recognized Indian tribes is a source of political rights, while the “cultural sovereignty” that is expressed by all indigenous peoples is a source of human rights. Indigenous peoples who lack the status of U.S. federally recognized Indian tribes may rely heavily upon the latter set of claims, whereas the federally recognized tribes of the United States have two separate sources of rights (which may, but sometimes do not, operate in tandem). The U.S. government publishes a list of federally recognized

12. *See id.* §§ 3.02, 4.07.

13. *Id.* § 3.02.

14. *See id.* § 4.07; *see, e.g.*, Native Hawaiian Government Reorganization Act of 2009, S. 1011, 111th Cong. (2009); Native Hawaiian Government Reorganization Act of 2005, S. 147, 109th Cong. (2005).

15. *See* COHEN’S HANDBOOK, *supra* note 1, § 3.02.

tribes through the Department of Interior.¹⁶ Thus, it is fairly easy to see these tribal governments as rights-holders. This is not necessarily true of other indigenous groups.

Although there is no established definition of “indigenous peoples” within international law, the term is generally understood to comprise the “original inhabitants of traditional lands who maintain [their] traditional values, culture, and way of life.”¹⁷ The U.N. Declaration on the Rights of Indigenous Peoples, for example, uses the term “indigenous” in reference to the status of these peoples as the long-standing, land-based cultures of a local environment, describing in detail their composite rights, which are intergenerational and closely related to land and culture.¹⁸ Under this view, indigenous peoples enjoy human rights to live in their collective units, according to their traditional ways of life because they have a right to cultural survival. Thus, they enjoy the right of self-determination as separate peoples, even though they may not have political status as sovereigns under domestic law. The collective values and ways of life that are maintained by these indigenous communities are often expressed through the “traditional ecological knowledge” held by the group.¹⁹ This knowledge is the “culturally and spiritually based way in which indigenous peoples relate to their ecosystems.”²⁰ Importantly, the concept of traditional ecological knowledge comprises both indigenous systems of environmental ethics and the group’s scientific knowledge about the local environment derived from generations of interaction.²¹ In that sense, this is a form of indigenous law governing the group’s relationship with the natural environment.²²

Thus, the political sovereignty of indigenous peoples under U.S. federal Indian law is grounded in a more ancient sovereignty, which is an “internal, culture-and-community-based model of sovereignty” that

16. Indian Entities Recognized and Eligible To Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47,868-73 (Aug. 10, 2012).

17. Tsosie, *Tribal Environmental Policy*, *supra* note 3, at 272 (quoting Simon Brascoupe, *Indigenous Perspectives on International Development*, 9 AKWE:KON J. 6, 8 (1992) (internal quotation marks omitted)).

18. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007).

19. Tsosie, *Tribal Environmental Policy*, *supra* note 3, at 272 (citing Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT’L ENVTL. L. & POL’Y 127 (1994)).

20. Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT’L ENVTL. L. & POL’Y 127 (1994).

21. *See id.*; Tsosie, *Tribal Environmental Policy*, *supra* note 3, at 273 n.267.

22. *See* Tsosie, *Tribal Environmental Policy*, *supra* note 3, at 272-73; *see also* Martha Johnson, *Documenting Dene Traditional Environmental Knowledge*, AKWE:KON J. (SPECIAL ISSUE), Summer 1992, at 72, 72-79.

reflects the identity of Native peoples as the first Nations of this land.²³ The concept of cultural sovereignty is a valuable basis for the construction of an indigenous right to self-determination because it is constructed from within Native societies, rather than from the outside by the federal courts or Congress, who struggle to determine the limits on inherent sovereignty.²⁴ All indigenous peoples possess the capacity to express their cultural sovereignty independent of the nation-state. The Native Hawaiian people, for example, possess cultural forms of sovereignty, even though they lack the same political status as federally recognized Indian tribes.²⁵ Cultural sovereignty is a tool to protect native rights to language, religion, and culture, including traditional ecological knowledge.

Although each indigenous Nation possesses its own knowledge and understanding, there are many parallels among indigenous peoples with respect to their ethical frameworks regarding the land and environment. For example, most indigenous peoples maintain the concept of caring for the land in a way that benefits the current people, as well as future generations.²⁶ The relationship of indigenous peoples to their traditional environment is intergenerational, linking the current people to their ancestors and to the future generations.

Another central feature of many indigenous world views is found in the spiritual relationship that indigenous peoples have with the environment. Most indigenous world views do not sharply differentiate between the religious and secular aspects of human existence. Rather, as Vine Deloria, Jr., observed, “[A] central task of tribal religions is to ‘determine the proper relationship that the people of the tribe must have with other living things and to develop the self-discipline within the tribal community so that man acts harmoniously with other creatures.’”²⁷ These ethical precepts are powerfully represented within traditional ecological knowledge.

The traditional knowledge of indigenous peoples reflects a distinctive land ethic on many different levels. Many indigenous peoples share the belief that the Earth is a living, conscious being that must be

23. See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 197 (2001).

24. See *id.* at 196.

25. COHEN’S HANDBOOK, *supra* note 1, §§ 3.02, 4.07(4).

26. Tsosie, *Tribal Environmental Policy*, *supra* note 3, at 273.

27. *Id.* at 274 (quoting VINE DELORIA, JR., GOD IS RED, A NATIVE VIEW OF RELIGION 88 (1992)).

treated with respect and care.²⁸ The natural forces of wind, water, earth, and fire are understood to be quite powerful and capable of destroying humans who abuse their own tentative relationship with the natural world. Thus, within the traditional world view of many indigenous peoples, the relationship of human beings to the natural world must be premised on an ethic of respect and reciprocity, sometimes linked up to a model of stewardship rather than the Western property-based notion of dominion.²⁹ In a way of thinking that perceives man and nature as part of an ordered, balanced, and living whole, human beings have social and kinship relationships with other beings.

Importantly, many indigenous languages reflect the idea that personhood extends to nonhuman species, such as fish, animals, and plants.³⁰ In the Pacific Northwest, for example, many indigenous peoples have a concept of “First Foods,” such as salmon and huckleberries, which were given to the People at Creation for their sustenance and care and which, in turn, are celebrated as sacred resources, necessary for the continued survival of the People.³¹ The idea of a food resource as “sacred” is not one to which Western European peoples are accustomed. However, it is an essential concept for many indigenous peoples and often constitutes an important basis for their political accords with the United States. In fact, the United States signed treaties with many tribes in the Pacific Northwest validating their right to continue fishing and gathering at their usual and accustomed places, even if these were no longer located on reservation lands.³² In this way, U.S. federal treaty law implicitly encompasses the traditional law of the Native peoples in the Pacific Northwest.

In sum, the traditional laws of Native peoples acknowledge a unique relationship between the indigenous peoples and the specific places and landscapes that have facilitated their existence for thousands of years. The very identity of many Native peoples is circumscribed by particular landforms and waterways. For example, in the Southwest, the Navajo people perceive their world to be bounded by four sacred mountains, as

28. *Id.* at 276.

29. *Id.* at 275-76.

30. *Id.* at 279.

31. *Id.* at 280; Indian Country Conservancy, *Healthy Nations, Healthy People*, INDIANCOUNTRYCONSERVANCY.ORG (Sept. 30, 2011), <http://www.indiancountryconservancy.org/newsupdates/2011/9/30/health-nations-healthy-people.html>.

32. See Tsosie, *Tribal Environmental Policy*, *supra* note 3, at 316.

do the Tewa people.³³ In the Pacific Northwest, the Native people are tied to a landscape that reflects the importance of the oceans (for example, the Salish Coastal Sea) and inland waterways (such as the Columbia River and Snake River).³⁴ Many species of plants and animals provide the foods and medicines for these peoples and they are treated with reverence and respect. Indigenous languages and ceremonies reflect these lifeways, and, thus, they represent the core of indigenous self-determination.

The cultural sovereignty of indigenous peoples is the operative construct for understanding traditional ecological knowledge, including the ethical and scientific aspects of that knowledge in an era of climate change. However, the ability of an indigenous group to protect its traditional knowledge, lands, ceremonies, and lifeways is closely linked to its ability to engage with other sovereigns on a government-to-government basis. For many years, the primary environmental justice concern for federally recognized Indian tribes in the United States revolved around the fact that tribal sovereignty was routinely disregarded in the service of the dominant society's energy development and environmental goals.³⁵ This changed, to some extent, in the 1980s, in the wake of the political movement for tribal self-determination. The federal pollution control statutes, for example, were amended to acknowledge the pivotal role of tribal governments in regulating the reservation environment through "Treatment as States" provisions.³⁶ Today, the movement to effectuate climate justice invokes a larger context for indigenous self-determination.

II. THE FRAMEWORK FOR CLIMATE JUSTICE WITHIN DOMESTIC U.S. LAW

The framework for contemporary Native claims to climate justice is closely linked to the domestic rights of federally recognized Indian

33. *Id.* at 283-84 (citing ALFONSO ORTIZ, *THE TEWA WORLD: SPACE, TIME, BEING, AND BECOMING IN A PUEBLO SOCIETY* 19 (1969); PEGGY BECK & ANNA WALTERS, *THE SACRED: WAYS OF KNOWLEDGE, SOURCES OF LIFE* 82 (1977)).

34. *See, e.g.*, CHARLES WILKINSON, *THE PEOPLE ARE DANCING AGAIN: THE HISTORY OF THE SILETZ TRIBE OF WESTERN OREGON* 17-24 (2010); MICHAEL C. BLUMM, *SACRIFICING THE SALMON: A LEGAL AND POLICY HISTORY OF THE DECLINE OF COLUMBIA BASIN SALMON* 3, 65-67 (2002).

35. *See generally* Tsosie, *Tribal Environmental Policy*, *supra* note 3, at 288-95 (discussing the relationship of traditional values and environmental policy).

36. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1377(e) (2006); Clean Air Act, 42 U.S.C. § 7601(d) (2006).

Nations to govern their lands and resources.³⁷ In the United States, tribal regulatory authority over reservation lands is defined by a complex intersection of treaty law, statutory law, and case law. Such authority is conditioned on the status of the group as a federally recognized Indian tribe and the status of the land as “Indian Country.”³⁸ In general, tribal governments may govern their members and their territories. However, the jurisdictional authority of tribal governments has been limited by judicial decisions involving nonmembers and fee lands within a reservation.³⁹ Thus, even within Indian Country, there are jurisdictional constraints that might operate to limit the regulatory authority of the tribal government.

Because of the complex jurisdictional rules applicable to tribal regulatory authority on the reservation, the Environmental Protection Agency (EPA) has developed federal/tribal partnerships to govern the control of pollution, which enables effective regulatory jurisdiction over air and water resources.⁴⁰ The EPA’s tribal policy recognizes the important federal interest in avoiding dual regulatory jurisdiction over reservation lands and resources and favors tribal implementation of air and water quality standards under the Clean Air Act and the Clean Water Act.⁴¹ This regulatory scheme has a firm statutory foundation in the tribal amendments to the major pollution control statutes. Each of the federal environmental statutes, with the exception of the Resource Conservation and Recovery Act (RCRA), was amended during the late 1980s and early 1990s to give Indian Nations the ability to assume regulatory authority in partnership with the EPA.⁴² Although various states challenged that authority by protesting that it would impose unacceptable costs on states, including spillover effects, the courts have uniformly upheld the federal statutory and administrative scheme that enables tribal governments as domestic sovereigns to regulate the

37. See Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1663-64 (2007). The text that follows is taken from that article. See *id.* at 1647-51.

38. *Id.* at 1647.

39. See, e.g., *Montana v. United States*, 450 U.S. 544, 566-67 (1981) (holding that the Crow Tribe lacked jurisdiction to regulate hunting and fishing by non-Indians on non-Indian-owned fee land within the Crow Reservation).

40. See Dean B. Suagee & Christopher T. Stearns, *Indigenous Self-Government, Environmental Protection and the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT’L ENVTL. L. & POL’Y 59, 79-81 (1994).

41. See COHEN’S HANDBOOK, *supra* note 1, § 10.02(1).

42. See *id.* § 10.02(2).

reservation environment through cooperative federal/tribal partnerships.⁴³ In this sense, federally recognized Indian tribes participate in the domestic sovereignty model that characterizes the U.S. federal system.

It is important to acknowledge that the tribal amendments to the federal environmental statutes were not necessary to *enable* Indian Nations to regulate environmental conditions on the reservation. The inherent sovereignty of federally recognized tribal governments provides the foundation for tribal regulatory authority on the reservation.⁴⁴ However, the tribal amendments enable tribal governments to exercise their authority more effectively in order to deal with transboundary pollution sources and also allow them to secure federal funding to enhance their capacity to develop effective pollution control programs.⁴⁵

Under the domestic model, Congress establishes the minimum standards for pollution control through nationwide statutory programs, which are administered by the state and tribal governments through a partnership model.⁴⁶ Both state and tribal governments have the ability to develop standards that are more stringent than the federal minimum levels, and the EPA mediates the interjurisdictional challenges of imposing the higher standards, which are applicable to upstream sources outside the jurisdictional boundaries of the local sovereign.⁴⁷ To the extent that tribal or state governments fail to conform to the federal minimum standards, they open themselves to liability if the federal statute allows for citizen suits.⁴⁸ However, tribal governments do not have a similar cause of action for harms caused to important cultural sites *off* the reservations, such as sacred sites on state or federal public lands.⁴⁹ State and federal governments may engage in mining, for example, in a way that complies with relevant federal environmental statutes, but which desecrates Native sacred sites.⁵⁰ These cases are quite frustrating for tribal governments because the federal courts have failed to see these

43. See, e.g., *City of Albuquerque v. Browner*, 97 F.3d 415, 429 (10th Cir. 1996) (upholding water quality standards established by Isleta Pueblo under the Clean Water Act); *Montana v. EPA*, 137 F.3d 1135, 1142 (9th Cir. 1998) (upholding EPA regulations allowing tribes to be treated as states under the Clean Water Act).

44. JUDITH V. ROYSTER & MICHAEL C. BLUMM, *NATIVE AMERICAN NATURAL RESOURCES LAW* 219-20 (2002).

45. See *id.* at 220-21.

46. *Id.* at 219; Tsosie, *Tribal Environmental Policy*, *supra* note 3, at 234-35.

47. ROYSTER & BLUMM, *supra* note 44, at 219.

48. COHEN'S HANDBOOK, *supra* note 1, § 10.06; see, e.g., *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989).

49. COHEN'S HANDBOOK, *supra* note 1, § 14.03(2)(c)(ii)(B).

50. See *id.* § 10.08.

claims as eligible for protection under the First Amendment Free Exercise Clause or the Religious Freedom Restoration Act.⁵¹

Thus, the civil rights applicable to U.S. citizens seeking to vindicate their right to obtain damages for environmental harm or to obtain protection for their right to freely practice their religions do not adequately protect the interests of indigenous peoples. Environmental claims and religious claims are completely separate under U.S. domestic law, and neither category effectively deals with indigenous human rights to self-determination or cultural survival. This is a paramount challenge facing indigenous peoples in an era of climate change. As many Alaska Native villages are discovering, climate-related events such as rapid sea-level rise and the melting of permafrost threaten to cause both loss of their land base and loss of their associated cultural lifeways, which are heavily dependent upon their traditional, subsistence-based practices.⁵² In the context of earlier tort litigation surrounding the *Exxon Valdez* oil spill, the federal courts upheld the award of natural resource damages under the environmental statutes, but disregarded the claims made by Native Alaskan communities for the destruction of their cultural lifeways, finding that culture operates internally in the “mind and heart,” and, consequently, it is up to individuals to choose whether to “continue” their cultures or not.⁵³ This limited concept of cultural value is the product of the American melting-pot ideology, in which citizens are perceived as having a primary identity based on their shared civic values and in which their religious and cultural differences are confined to the “private” sphere. The melting-pot ideology of the United States has absolutely no resonance for indigenous peoples, who have fought tenaciously to preserve their separate status as peoples, including the political and cultural components of that identity.

Importantly, the domestic model has fallen short in the service of climate justice. There is still no broad-based federal legislation limiting GHG emissions or providing any enforceable remedy for victims of climate-based events. In fact, some politicians and their supporters maintain that climate change is a “hoax” invented to serve a particular

51. For more information on a case dealing with this issue, see Press Release, EARTHJUSTICE, Grand Canyon Uranium Mining Ban Defended by Havasupai Tribe, Conservation Coalition (Mar. 13, 2012), <http://earthjustice.org/news/press/2012/grand-canyon-uranium-mining-ban-defended-by-havasupai-tribe-conservation-coalition>.

52. See Tsosie, *Indigenous People and Environmental Justice*, *supra* note 37, at 1644-46.

53. *In re Exxon Valdez*, No. A189-0095-CV(HRH), 1994 WL 182856, 1995 AMC 1440, 1447-48 (D. Alaska Mar. 23, 1994) (order granting Exxon’s Motion for Summary judgment on Native class claims for noneconomic injury), *aff’d*, 104 F.3d 1196 (9th Cir. 1997).

political agenda.⁵⁴ To the extent that communities within the United States are the victims of catastrophic events such as flooding, fire, hurricanes and the like, they are served by domestic programs operated by entities such as the Federal Emergency Management Agency (FEMA).⁵⁵ All of these programs have restrictions and limitations, and, as the victims of Hurricane Katrina discovered, they may or may not provide effective relief for the many types of property and personal harm that the victims experience.⁵⁶

III. INTERNATIONAL LAW AND CLIMATE JUSTICE

At the global level, there have been three primary policy responses to the issue of climate change: prevention, mitigation, and adaptation.⁵⁷ By the early 1990s, it was apparent to scientists and concerned policymakers that prevention was not realistic, so the discussion shifted to mitigation and adaptation.⁵⁸ Not surprisingly, there is a lack of concerted agreement on what policies might effectively mitigate climate change, particularly because GHG emissions are cumulative over time and the actual rise of GHG emissions has vastly exceeded the projections made under various models within the last decade.⁵⁹ Today, the clear focus of climate policy is on adaptation policy, although the framework for this analysis is heavily dependent upon economic and scientific data, rather than the normative or moral considerations that characterize claims for climate justice.⁶⁰ Because of this, the appeal to international human rights law is particularly important for indigenous peoples.

Internationally, the nation-states hold the power with respect to accords on climate change. The United Nations Framework Convention

54. See generally SENATOR JAMES INHOFE, *THE GREATEST HOAX: HOW THE GLOBAL WARMING CONSPIRACY THREATENS YOUR FUTURE* (2012) (detailing the evidence against climate change hysteria).

55. FED. EMERGENCY MGMT. AGENCY, *THE FEDERAL EMERGENCY MANAGEMENT PUBLICATION 1*, 17 (2010), available at <http://www.fema.gov/library/viewRecord.do?fromSearch=fromsearch&id=5417>.

56. See, for example, the *Comer v. Murphy Oil USA, Inc.*, litigation, in which the federal courts refused to recognize plaintiff's attempts to hold oil companies liable for the harms they suffered as a result of Hurricane Katrina. *Comer v. Murphy Oil USA, Inc.*, No. 1:05-CV-436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009); *Comer v. Murphy Oil USA*, 598 F.3d 208 (5th Cir. 2010); *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010).

57. Dale Jamieson, *Adaptation, Mitigation, and Justice*, in *PERSPECTIVES ON CLIMATE CHANGE: SCIENCE, ECONOMICS, POLITICS, ETHICS* 217 (Walter Sinnott-Armstrong & Richard B. Howarth eds., 2005).

58. *Id.* at 218.

59. See *id.* at 218-19.

60. See *id.* at 220-21.

on Climate Change entered into force in 1994, and by 2004, 189 countries, including the United States, had ratified this Convention.⁶¹ Thus, as a political matter, there is an overwhelming consensus among world nations that climate change is real and merits policy intervention. There is widespread disagreement, however, on what that policy intervention should entail. The Kyoto Protocol, which entered into force in 2005, called for a top-down approach in which the signatory nations would agree to abide by emissions targets in order to meet future containment goals.⁶² However, the Kyoto Protocol also invoked a norm of common but differentiated responsibility among nation-states, tied to their level of development.⁶³ The industrialized nations shouldered the burden to establish binding emissions targets, while developing countries, such as China and India, had the continued ability to exploit fossil fuel resources. Because of this “unfairness,” the Bush Administration refused to ratify the Kyoto Protocol, and this position continues to dominate U.S. participation in climate negotiations.⁶⁴ The most recent international discussions on climate change, held in Copenhagen, Cancun, and Durban, have resulted in a shared agreement among nations on aspirational goals and further discussions on what ought to be done, but no meaningful international treaty is yet in place, nor is there a workable long-term strategy that would actually implement the aspirational goals.⁶⁵

Consequently, it seems apparent that domestic law (a bottom-up approach) is still the best vehicle to establish a workable legal framework for climate justice. However, a collective international effort is also necessary. No one country can institute an effective response to climate change because it is a global problem. The international arena has the capacity to motivate concerted action, require nation-states to work together to establish a common fund for mitigation and adaptation efforts (as is the goal of the proposed “Green Climate Fund”)⁶⁶ and establish a comprehensive monitoring and reporting system to track progress. Developments within the international arena can also transform our

61. *Id.* at 218.

62. *See id.* at 218-19.

63. Under the Kyoto Protocol, the developed countries are listed in Annex 1, and all other countries fall into non-Annex 1 status. *See id.* at 219 & n.4.

64. *See id.* at 219-20.

65. *See United Nations Framework Convention on Climate Change*, UNITED NATIONS, <http://unfccc.int/meetings/items/6240.php> (last visited Feb. 27, 2013).

66. GREEN CLIMATE FUND, GOVERNING INSTRUMENT FOR THE GREEN CLIMATE FUND 2 (2011), *available at* http://gcfund.net/fileadmin/00_customer/documents/pdf/GCF-governing-instrument-120521-block-LY.pdf.

conception of indigenous peoples' human rights in an era of climate change.⁶⁷

To date, Native Nations within the United States operate within the framework of U.S. policy on climate change, mainly because they lack standing as independent nations to either agree to or dissent from the international conventions.⁶⁸ This can work to the advantage of federally recognized Indian Nations, such as the Crow Tribe and the Navajo Nation, which possess large reservations with significant reserves of coal, oil, and gas.⁶⁹ These Indian Nations are in many ways similar to developing nations, because they typically have high rates of poverty and unemployment, and they lack the infrastructure necessary to attract other forms of economic development.⁷⁰ They may also suffer from the residual environmental impacts of prior resource development, necessitating further infusions of capital from the mining industries responsible for these conditions. The ability of tribal governments to exercise territorial jurisdiction over trust lands and resources also provides some measure of immunity from state laws that might establish limitations on GHG emissions.⁷¹ Thus, without any binding federal legislation capping emissions, tribal governments may develop fossil fuel resources without regard to the impacts on other state, national, or tribal governments. Tribal sovereignty to develop energy resources is enhanced by the political and economic power of the United States in the global marketplace.⁷²

However, being tied to the economic and energy policies of the United States can work to the disadvantage of tribal governments, such as those in Alaska, which are already suffering the burdens of climate change and cannot formulate any effective claim for redress of these harms.⁷³ For these groups, the appeal to climate justice signals the reality that the impact of climate change will fall disproportionately upon indigenous communities that possess land-based and subsistence economies, rather than industrial economies, and which practice traditional norms of balancing human activities with the natural

67. See United Nations Framework Convention on Climate Change, Durban, South Africa, Nov. 28-Dec. 11, 2011, *Report of the Conference of the Parties on Its Seventeenth Session*, at 19-20, U.N. Doc. FCCC/CP/2011/9 (Mar. 15, 2012) (reporting on the plan for the design of the Green Climate Fund).

68. Tsosie, *Climate Change, Sustainability, and Globalization*, *supra* note 3, at 197.

69. *Id.*

70. *Id.*

71. *See id.*

72. *Id.*

73. See Tsosie, *Indigenous People and Environmental Justice*, *supra* note 37, at 1642-44.

environment. These groups do not contribute significantly to the problem of climate change, but they suffer the attendant harms, including flooding, droughts, fire, and loss of aquatic, marine, and terrestrial ecosystems and their associated species. There is no available cause of action under domestic law to enjoin harmful emissions of GHG or to gain compensation for these losses. Nor does a Native village or community have any right under domestic or international law to be relocated as a community.⁷⁴ For this reason, many indigenous leaders, such as Sheila Watt-Cloutier, claim that climate change could result in the wholesale loss of entire cultures and lifeways.⁷⁵ By shifting the focus to international human rights law, it is possible to envision a broader foundation for indigenous self-determination in an era of climate change.

IV. INDIGENOUS PEOPLES AND ENVIRONMENTAL SELF-DETERMINATION

In an era of climate change, it is necessary to evaluate indigenous claims to sovereignty in relation to the right of self-determination, which belongs to all peoples. The two concepts are not coextensive. For example, the various Pacific Island Nations are “sovereign,” but this does not mean that they have the capacity to control the international discussion on climate change, nor can they demand reparations for the harm they are suffering from the rising sea levels, even if this ultimately results in the loss of their entire land base.⁷⁶ Under contemporary international policy, it is unclear what happens to the citizens of a nation that loses its entire territory through “flooding,” as opposed to military force. Climate events are not considered to be the “fault” of any

74. See Rebecca Tsosie, Keynote Address, *Indigenous Peoples and Global Climate Change: Intercultural Models of Climate Equity*, 25 J. ENVTL. L. & LITIG. 7, 10-11 (2010). The native Village of Kivalina, for example, has not yet been successful in its efforts to limit the attempts of Exxon and other energy companies to avoid liability for harms caused by excessive greenhouse gas emissions. See *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (holding that the Native Village of Kivalina lacked Article III standing to sue oil companies for federal common law public nuisance on the theory that global warming was causing the rapid melt of Arctic sea ice). The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of the Village of Kivalina’s claim, concluding that the federal Clean Air Act displaced the common law public nuisance claim. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).

75. See Press Release, Inuit Circumpolar Council, Inuit Petition Inter-American Commission on Human Rights To Oppose Climate Change Caused by the United States of America (Dec. 7, 2005), <http://inuitcircumpolar.com/index.php?ID=316&Lang=En>.

76. For an additional discussion of the impact of climate change on peoples within the South Pacific and other small Island states, see Alexander Gillespie, *Small Island States in the Face of Climate Change: The End of the Line in International Environmental Responsibility*, 22 UCLA J. ENVTL. L. & POL’Y 107 (2003-2004).

particular nation, and therefore liability for harm cannot attach to particular nations. In comparison, because indigenous peoples within the United States are also citizens of the United States, they will be relocated from flooded areas, either as individual citizens, or perhaps as communities, depending on the available resources and programs of domestic agencies.⁷⁷ In sum, the harms to indigenous communities will be redressed, if at all, as a matter of domestic policy.

Despite their political differences, the right to self-determination for the Pacific Island Nations, as well as indigenous peoples in the United States and elsewhere, is closely tied to their ancestral land base. This suggests that there is at least a moral right to “environmental self-determination” that should entail the right to survive as a distinctive land-based people.⁷⁸ There are many international declarations and conventions that attest to the connections between indigenous peoples and their traditional lands and resources, and those connections are specified in detail within the United Nations Declaration on the Rights of Indigenous Peoples, which is the most comprehensive and current account of the human rights of indigenous peoples.⁷⁹

Indigenous peoples lack status as nations for purposes of international law, however, and their human rights claims are advanced, if at all, through nongovernmental organizations (NGOs).⁸⁰ The Inuit Circumpolar Council (ICC), for example, represents the interests of the Inuit people, who are currently located across international borders on land within Canada, the United States, and Greenland.⁸¹ The ICC filed a claim in 2005 with the Inter-American Commission on Human Rights, alleging that the impacts of global warming and climate change on the Inuit people, resulting from various acts and omissions of the United States, constituted a violation of their human rights.⁸² Although the Inter-American Commission on Human Rights ultimately found that this was not a claim upon which it could grant relief, due to the nature of climate change as a global phenomenon, the Inuit petition is useful in a policy sense because it illustrates how the claims of indigenous peoples to self-determination are tied to land, territory, and environment, and how they transcend national borders in their cultural and historic dimensions.

77. See Tsosie, *supra* note 74, at 11.

78. Tsosie, *Indigenous People and Environmental Justice*, *supra* note 37, at 1663-69.

79. See *id.* at 1665.

80. *Id.* at 1664.

81. *Inuit Circumpolar Council Charter*, INUIT CIRCUMPOLAR COUNCIL, http://inuitcircumpolar.com/index.php?auto_slide-&ID=374&Lang=En&Parent_ID=¤t_slide_num= (last visited March 8, 2013) (adopted on June 15, 1977).

82. Tsosie, *Indigenous People and Environmental Justice*, *supra* note 37, at 1669.

Building on the Inuit example, climate policy needs to establish a coherent framework for sustainability at the level of *place*. For indigenous peoples, an ethic of place is central to their longstanding identity as a distinctive people related through time and tradition to a particular set of lands and natural environment. Thus, sustainability was the natural outcome, if not the intentional result, of the traditional land ethic that is associated with many indigenous peoples. In modern political discourse, the term “sustainability” is frequently used, but lacks a common definition. The lack of shared meaning likely results from confusion as to whether it is possible to give an empirical scientific or economic account of sustainability (for example, can we prove, as an objective matter, that a policy or practice is or is not “sustainable”?) and because there is widespread disagreement on the potential normative accounts.

Under the utilitarian framework that has been the pervasive lens of environmental policy in the United States, economics is the way to measure the benefits and costs of development. Conversely, under many indigenous epistemologies, human and natural systems are interconnected and human needs are limited by the need to support the natural environment, inspiring a broader set of values to measure harm and benefit. To the extent that one draws on the utilitarian framework to maximize the development goals of world nations in order to fulfill the immediate needs of world populations, there is no effective counter-measure to protect the interests of the natural world or future generations. That is a moral problem and one that must be addressed in order to craft an effective strategy for climate change.

The lack of consensus among world nations about how to create an effective international convention on climate change relates to the disparities in development and economic status among the global nations. If this effort is characterized as a “justice” issue, sustainability requires an examination of the historical and contemporary relationships between nations, peoples, and individuals. Sustainability also requires an examination of the relationship between human beings and the natural environment, which might be expressed through an ethic of place that examines specific ecosystems and the impacts of human behaviors on these ecosystems. Science, ethics, and economics have always been the pillars of environmental policy, and they continue to serve as the foundation for the discussion on climate policy.

What is needed in the future is an intercultural model of climate equity that can account for the multiple values that are at stake in the discussions about climate policy, at the national and international levels.

In each of these discussions, indigenous peoples are represented as distinctive political and cultural entities. Within domestic policy, federally recognized Indian tribes are at the table as governments within regional and national discussions on climate policy. They have the sovereign right to develop their lands and resources, and they have the sovereign right to incorporate traditional environmental values into their own laws and policies. Tribal governments will be important entities in the upcoming discussions about adaptation planning and ecosystem management, given the documented environmental changes that are occurring and affect all lands, whether under the control of state, federal, or tribal governments.

Within international policy, indigenous peoples will become victims of climate change unless there is meaningful attention to the human rights that are at stake, including the fundamental right of self-determination. However, the status of “victim” or “vulnerable population” does not accord any rights under the prevailing legal structures,⁸³ and the compensation for harm, if any, will come through voluntary international humanitarian endeavors.

International human rights law can serve as a powerful repository of alternative norms to guide further articulation of a human right to indigenous environmental self-determination.⁸⁴ At a basic level, what does it mean to be “indigenous?” It means that there is a relationship through time between the people and a particular environment. If that relationship is destroyed, what happens to the identity of the group? That is what is at stake in Alaska and all other places where indigenous peoples are losing their land base and way of life as a consequence of climate change. It is in the interest of all indigenous governments to participate in the discussion of climate equity and formulate an account of environmental self-determination for place-based peoples.

V. CONCLUSION

The domestic and international dimensions of climate justice are exceedingly complex, and there are no easy answers to these issues. However, formulating a robust ethical basis for our decision making is

83. *See id.* at 1659-60, 1663-69.

84. The United Nations has recognized that climate change is a “global problem requiring a global solution” and has advocated a human rights centered approach to the problem. *See* Human Rights Council Res. 18/22, at 2-3, Human Rights and Climate Change, 18th Sess., Sept. 30, 2011, U.N. Doc. A/HRC/RES/18/22 (Oct. 17, 2011). An additional source of norms applicable to indigenous peoples’ human rights can be found in the Int’l Labour Org. [ILO], *Indigenous and Tribal Peoples Convention*, ILO Convention No. 169 (June 27, 1989), available at http://www.ilo.org/indigenous/Resources/Publications/WCMS_100897/lang--en/index.htm.

central to the challenge of achieving sustainability in an era of climate change. The utilitarian calculus continues to be the dominant underpinning for climate equity at the international and domestic levels, reducing justice to a desired economic outcome. In fact, the ethical inquiry must be much broader. Indigenous peoples have always understood that the relationship of a people to the land entails a responsibility—to the land itself and to the future generations that have a right to live on those lands. In some ways, the Anglo-American common law doctrine of waste factored that relationship into the concept of property rights by limiting the activities of the current owner to preserve the estate of future owners.⁸⁵ As a collective global society, we have lost our capacity to generate any meaningful limitation on the right to develop, and we jeopardize the survival of our planet, not to mention the legacy of the future generations, by this failure.

The issue of climate justice, for indigenous peoples, is not so much about sovereignty in the political sense, as it is about sovereignty in the cultural sense. Native place-based knowledge serves as a powerful repository of scientific information about how to ensure the survival of distinctive ecosystems given the threat of climate change, and it also serves as a repository of ethical norms about what the optimal relationship should be between human beings and the natural environment. Climate justice must transcend narrow accounts of social justice (for example, as an equal right to develop) or of reparative justice for harms, such as relocation of entire villages or nations, that are caused by ineffective mitigation or adaptation strategies. Instead, national and international policies and programs should fairly consider and respect the different cultures, values, and circumstances of affected populations. Mechanisms of procedural justice, which look to the nation-states as the parties to effectuate international climate policy, must expand to consider the rights of all peoples to self-determination. In the United States, domestic policy must respond to the interests of all indigenous nations and ensure that the environmental risks are appropriately measured and that tribal governments enjoy access to technology and resources necessary to achieve adequate adaptation plans. An intercultural model of climate equity will inspire new alternatives to guide environmental and development policies for our collective future.

85. For background information on the law of waste, see Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 *CORNELL L. REV.* 653, 658-62 (2006).