



At Sidebar

by Hon. Elizabeth Ann Kronk Warner

The Miner's Canary Foretelling the Fate of the World: Climate Change and Native Communities

At this very moment, entire communities in the

United States are threatened with total annihilation. Increasingly intense “super storms” and massive erosion menace these communities, and the possibility of being swept into the ocean always looms large on the horizon. The scene is not part of a screenplay for a major Hollywood production, but, rather the daily reality of many Alaska Natives. Within the United States, native communities are the modern day miners’ canaries, forewarning of the impact of climate change on this country and beyond. Despite contributing little, if any, to the problem of climate change, American Natives are disproportionately bearing its impacts. On a daily basis, native peoples’ homes, health, livelihood, and lifestyles are threatened. Starting in 2005, native communities in the United States started to fight back against the disparate impacts of climate change, bringing the fight to international and domestic courts. This article examines some of the legal claims that have been used by native communities to protect their homes from those who contribute the most to climate change. The article begins with an examination of the international claim brought by the Inuit Circumpolar Council (ICC) and then moves to the domestic claim of the Native Village of Kivalina, ending with a pending claim involving atmospheric trust litigation. Ultimately, the impacts of climate change on native people are profound and real; what remains to be seen is whether the American legal system will provide a remedy for the devastation.

Impact of Climate Change on Native Communities¹

The impacts of climate change on native people within the United States are real, profound, and immediate. For example, in 1998, nations in the Pacific Coast and Rocky Mountain regions reported increased winds; violent weather changes; declining salmon runs; deformed fish; significant decreases in the life spans of individuals due to the unavailability of traditional foods; air pollution due to burning forests; minimum river flows necessary for native fish species; and erosion due to rising sea levels.² More recently, in 2009, the National Tribal Air Association released a report detailing the impacts of cli-

mate change on Indian Country, which included (1) ocean acidification threatening shellfish; (2) shorter growing seasons; (3) changes in forest composition; (4) threats to freshwater fish; (5) decreased lake levels; (6) extreme weather events; (7) decreased availability of drinking water; (8) drought; (9) invasive species and related loss of traditional plants and animals; (10) increased water temperatures that negatively impact fisheries; (11) increased air quality problems; and (12) increased incidents of wildfires.³

In the Arctic, the impacts of climate change are particularly pronounced and devastating. Increasing temperatures have caused sea ice and permafrost to melt.⁴ Given that Alaska Native communities rely on the permafrost for aspects of their daily lives and, in many instances, cultures are built around the stability of permafrost, this trend is deeply troubling. Climate change is also causing Alaska Natives to suffer severe local impacts to their daily activities, such as whaling, sealing, fishing, and reindeer herding.⁵ On the whole, climate change has caused hunting, fishing, and travel in the Arctic to become more difficult and often perilous.⁶ Overall, it has devastated Alaska Natives, and, in some instances, the very existence of native communities is threatened. In the Inuit village of Shishmaref, Alaska, which has been inhabited for more than 4,000 years, homes are falling into the sea, as the melting permafrost has drastically eroded the shoreline. Because of this, the Newtok Native village is “sinking and flooding and eroding” and will be forced to relocate.⁷

Because many natives living within the United States possess significant connections to the land due to subsistence lifestyles and/or cultures and traditions, the impacts of climate change may affect native communities more than others. Moreover, because of legal constraints, the impacts of climate change may be exacerbated. Given that native nations are often legally tied to specific areas of land, such as reservations, it is impossible for them to leave and either escape the effects of climate change or perhaps to follow migratory species moving to new ranges without abandoning their land and legal rights. Such legal constraints reduce their ability to adapt to climate change.

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Ultimately, native communities contribute little, if at all, to the problem of climate change, yet they bear a disproportionately large adverse impact given their unique vulnerability.⁸ This is a profound injustice.

Legal Remedies Pursued in Court

As a result of such injustice, native communities have sought to have their rights vindicated in various courts, both international and domestic. This section examines three of these claims: (1) the claim brought by the ICC against the United States in front of the Inter-American Commission on Human Rights (IACHR); (2) the claim brought by the Native Village of Kivalina against numerous private parties that emit substantial amounts of greenhouse gases; and (3) the claim brought by children against the federal government for violating the public trust doctrine, which is currently pending in the

at present because the information it contains does not satisfy the requirements set forth in those Rules and the other applicable instruments.¹⁵ The ICC then requested that the IACHR hold a hearing on the potential connection between climate change and human rights.¹⁶ The IACHR granted the request, holding a hearing in March 2007.¹⁷ Since then, the IACHR has remained interested in the rights of indigenous peoples vis-à-vis climate change within the Americas.¹⁸

Kivalina's Nuisance Claim

Within the federal courts, the Native Village of Kivalina and City of Kivalina (collectively Kivalina) brought a claim against numerous private greenhouse gas emitters under theories of public and private nuisance based on federal and state law. 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 70

"Climate change has become the ultimate threat to Inuit culture."

—Sheila Watt-Cloutier⁹

U.S. Court of Appeals for the District of Columbia Circuit. Although each of these claims involved different plaintiffs, defendants, and legal arguments, all were attempts to protect native communities from the ravages of climate change.

ICC Petition to the IACHR

Within the United States, the ICC was the first indigenous organization to bring its legal claims related to climate change to a legal entity for consideration. The ICC represents more than 150,000 Inuit residing in Canada, Greenland, Russia, and the United States. As noted above, they are experiencing profound changes in their Arctic environment as a result of climate change. More than changing the Inuit environment, these changes have life-altering implications for the Inuit people, as their culture is intimately connected to the environment and cold temperatures.¹⁰

"For Inuit, warming is likely to disrupt or even destroy their hunting and food sharing culture, as reduced sea ice causes the animals on which they depend to decline, become less accessible, and possibly become extinct,"¹¹ Sheila Watt-Cloutier explained to the UN Framework Convention on Climate Change in 2005.

On Dec. 7, 2005, the ICC filed a petition against the United States with the IACHR, which is a commission of the Organization of American States.¹² "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."¹³ The ICC argued that as a significant contributor to climate change through its greenhouse gas emissions, the United States ultimately violated the ICC's human rights under the American Declaration of the Organization of American States.

In response, the IACHR determined that "the information provided [in the ICC's petition] does not enable us to determine whether the alleged facts would tend to characterize a violation of the rights protected by the American Declaration."¹⁴ The IACHR went on to explain that "it will not be possible to process [the ICC's] petition

miles north of the Arctic Circle."¹⁹ Historically, Kivalina was protected from strong winter storms by Arctic sea ice surrounding the barrier reef.²⁰ However, because of a warming environment related to climate change, the sea ice that previously protected Kivalina is melting, and the community is experiencing a "massive erosion problem."²¹ "The U.S. Army Corps of Engineers and the U.S. Government Accountability Office both concluded that Kivalina must be relocated due to global warming. ..."²²

As a result, Kivalina filed a complaint in the U.S. District Court for the Northern District of California on Feb. 26, 2008, against several private entities that allegedly contribute significantly to climate change through their emissions of greenhouse gases.²³ Kivalina based its complaint on claims of federal common law of public nuisance, state private and public nuisance, civil conspiracy, and concert of action. Federal subject-matter jurisdiction was based on the federal common law claim. 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."²⁴

On Sept. 30, 2009, the district court dismissed Kivalina's complaint, finding it was precluded under the political question doctrine and that Kivalina lacked standing.²⁵ On March 10, 2010, Kivalina appealed the court's decision to the Ninth Circuit.²⁶ The Ninth Circuit upheld the district court's dismissal of the plaintiffs' claims based on federal displacement reasoning, holding that the federal public nuisance claim was no longer viable following the U.S. Supreme Court's decision in *AEP v. Connecticut*.²⁷ The Kivalina plaintiffs filed a petition for rehearing *en banc* with the Ninth Circuit, which the court denied on Nov. 22, 2012. The Supreme Court denied Kivalina's petition for a *writ of certiorari* on May 20, 2013.²⁸

Atmospheric Trust Litigation

Although not a claim brought by a tribe or indigenous organization, a case currently pending in the D.C. Circuit is of great importance to many natives within the United States. The case, *Alec L. v. Gina McCarthy, et al.*, involves five children and two nonprofit

organizations as plaintiffs.²⁹ The claim against six federal agencies demands they develop a comprehensive Climate Recovery Plan to reduce America's greenhouse gas emissions. The legal theory at the heart of the complaint is the public trust doctrine. The plaintiffs argue that the doctrine mandates that sovereign governments, such as the United States, manage and protect vital natural resources, such as the atmosphere and water, for the common benefit of its citizens. Because greenhouse gases lead to climate change, which corrupts these vital natural resources, the plaintiffs allege that the federal agencies have not upheld their duty to the public under the public trust doctrine. The case is remarkable in its acknowledgment of the federal public trust doctrine and the presence of children as plaintiffs. The plaintiffs allege that the federal government has violated their right to a healthy environment and that the planet will be damaged for future generations as a result of the defendants' failure to manage climate change. Interestingly, similar complaints have been successful at the state level, and it remains to be seen whether a federal court will acknowledge the existing federal public trust doctrine in this context.³⁰

That the plaintiffs look beyond the current generation to the impact of climate change on future generations is very much consistent with the concept of the Seventh Generation, which exists within many native communities. Although the concept varies somewhat, the Seventh Generation teaches us that the impact of our actions should be considered in light of their effect on seven generations from our own. Because the plaintiffs' claim is very much relevant and important to Indian country, several *amici* with significant connections to Indian Country, including the National Congress of American Indians (NCAI), submitted an amicus brief in support of plaintiffs on Nov. 12, 2013. As explained by NCAI in its press release regarding the amicus brief, "climate change ravages Native Nations, and the federal government ... has a responsibility to assist these Nations by rapidly reducing greenhouse gas emissions in order to mitigate the worst impacts of climate change." The federal government has a trust responsibility to tribes to lower greenhouse gas emissions and act in the best interest of tribes.³¹

The impact of the amicus brief and the overall success of the claim remain to be seen as the D.C. Circuit has yet to reach a decision in the case at the time of writing.

Conclusion

On a daily basis many natives living within the United States face the disproportionate impact of climate change on their land, environment, and lifestyle. Climate change is a reality for many of them, but, what remains a mystery is what, if any, legal remedies will be effective in providing relief from these devastating impacts. As discussed above, several tribes and organizations have attempted to find a remedy in a legal forum, from the international claim of the ICC to the domestic claims of Kivalina and children. In many ways, climate change litigation mirrors the tobacco litigation—many acknowledge the harm caused, but it may take some time to find the right legal claim and remedy. Given the devastating impacts to Indian Country, the legal profession should remain seized on this issue so that the miner's canary does not perish. ☉

Endnotes

¹Portions of this section of the article are taken from the amicus



brief written by the article author. See Brief in Support of National Congress of American Indians, et al. as *Amici Curiae* in Support of Plaintiffs-Appellants Seeking Reversal, *Alec L. v. Gina McCarthy, et al.*, No. 13-5192 (D.C. Cir. Nov. 12, 2013).

²Native Peoples—Native Homelands Climate Change Workshop: Final Report (Nancy G. Maynard ed., 1998).

³"Impacts of Climate Change on Tribes in the United States" (Dec. 11, 2009), www4.nau.edu/tribalclimatechange/resources/docs/res_ImpactsCCTribesNUS.pdf.

⁴Daniel Cordalis and Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, 22 NAT. RESOURCES & ENV'T 45, 47 (2008) ("Alaska may be experiencing the impacts of global warming more than any other place on Earth, and Alaska Native tribes are among the first American populations to feel the effects of global climate change. Erosion and flooding affect 86 percent of Alaska Native villages to some extent, with the greatest effects felt along the coast.") (citing General Accounting Office, *Alaska Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance*, GAO-04-142 (Dec. 2003)).

⁵*Id.*

⁶*Id.*; Azadeh Ansari, 'Climate Change' Forces Eskimos to Abandon Village, CNN.COM (April 28, 2009) www.cnn.com/2009/TECH/science/04/24/climate.change.eskimos/index.html?eref=rssus.

⁷Terri Hansen, 8 Tribes That Are Way Ahead of the Climate-Adaptation Curve, INDIAN COUNTRY TODAY (Oct. 15, 2013), indiancountrytodaymedianetwork.com/2013/10/15/8-tribes-are-way-ahead-climate-adaptation-curve-151763.

⁸Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1628 (2007); National Tribal Air Association, *Impacts of Climate Change on Tribes in the United States*, 12-13 (Dec. 11, 2009) ("Any impact to tribal resources due to climate change is largely the result of decades of emissions from sources outside of Indian

Country (even the most developed and industrialized tribal carbon footprint is miniscule) ... Although Tribal sources are not a significant cause of climate change, they are the ones most keenly feeling the effects.”).

⁹Inuit Circumpolar Conference, Presentation at the Eleventh Conference of Parties to the UN Framework Convention on Climate Change, Montreal: The Climate Change Petition by the Inuit Circumpolar Conference to the Inter-American Commission on Human Rights (Dec. 7, 2005), www.inuitcircumpolar.com/index.php?ID=318&Lang=En.

¹⁰Presentation by Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference, Eleventh Conference of the Parties to the UN Framework Convention on Climate Change Montreal, (Dec. 7, 2005), www.inuitcircumpolar.com.

¹¹*Id.*

¹²Although the ICC represents Inuit living in Greenland and Russia as well as in Canada and the United States, its 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. 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 (submitted Dec. 7, 2005), earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf. The Organization of American States is composed of all of the nations of North and South America. ORGANIZATION OF AMERICAN STATES, www.oas.org (last visited Dec. 5, 2012). The IACHR is headquartered in Washington, D.C. *Id.*

¹³Sarah 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)).

¹⁴Letter from the Organization of American States to Sheila Watt-Cloutier, et al. regarding Petition No. P-1413-05 (November 16, 2006) graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf.

¹⁵*Id.*

¹⁶Hari 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, 498, n. 3 (Randall S. Abate and Elizabeth Ann Kronk, eds. Edward Elgar 2013).

¹⁷*Id.* at 498-499.

¹⁸*Id.* at 499.

¹⁹*Native Village of Kivalina v. ExxonMobil Corp.*, 2008 WL 594713, ¶ 1 (N. D. Cal. Feb. 26, 2008) (No. CV081138SBA).

²⁰*Id.*

²¹*Id.* at ¶ 4.

²²*Id.* at ¶ 1.

²³Kivalina’s complaint asserts that “Defendants in this action include many of the largest emitters of greenhouse gases in the United States.” *Id.* at ¶ 3.

²⁴*Complaint, supra* n. 16, at ¶ 5, *Relief*.

²⁵Or. Granting Defs.’ Mot. to Dismiss for Lack of Subject Mat-

ter Jxn., *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (Sept. 30, 2009).

²⁶Appellants’ Opening Br., *Native Village of Kivalina v. ExxonMobil Corp.* (9th Cir. Mar. 10, 2010) (No. 09-17490) (turtletalk.files.wordpress.com/2010/05/kivalina-opening-brief.pdf).

²⁷*Id.* at 853; *AEP v. Connecticut*, 131 S.Ct. 2527 (2011).

²⁸Petition for writ of certiorari denied, *Native Village of Kivalina v. ExxonMobil Corp.*, [20 May 2013] No. 12-1072, available at www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-1072.htm.

²⁹For more information on the case, see ourchildrenstrust.org/US/Federal-Lawsuit (last visited Jan. 14, 2014).

³⁰The public trust doctrine is a long-standing and venerable doctrine. “[T]he origins of the public trust doctrine lie in Roman law, in the Institutes of Justinian, and in the English Magna Carta and the writings of Sir Matthew Hale. Transported across the Atlantic, the first manifestation of the doctrine occurred in an early 19th century case.” Michael C. Blumm and Mary Christina Wood, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW*, 57 (Carolina Academic Press 2013). The seminal decision in the field, *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), held that the public trust doctrine acts as a limit on legislative sovereignty.

³¹NCAI, “NCAI Joins with Other Native Organizations and the Obama Administration to Address the Effects of Climate Change in Indian Country” (Nov. 15, 2013) www.ncai.org/news/articles/2013/11/15/ncai-joins-with-other-native-organizations-and-the-obama-administration-to-address-the-effects-of-climate-change-in-indian-country.



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