

---

---

REBECCA TSOSIE\*

## Keynote Address\*\*

### Indigenous Peoples and Global Climate Change: Intercultural Models of Climate Equity

I am very pleased to be here and honored that you entrusted me with the opening remarks for this wonderful symposium. I want to start with this thought: I see the climate change issues confronting us today as an *opportunity*. These are serious issues, to be sure, and they seem quite overwhelming, which inspires many people to choose not to think about them at all, preferring instead to turn on the TV and focus on the crazy antics of our celebrities. However defeated one might feel, this is our opportunity to see where old ways of thinking are not serving us well and where we need to create new ways of thinking. The central challenge for all of us is to be able to conceive of some *other* way of thinking that is better suited to carry us through this crisis.

When one looks at the politics of climate change at the international, domestic, and tribal levels, there is an overwhelming

---

\* Professor of Law, Willard H. Pedrick Distinguished Research Scholar, and Executive Director of the Indian Legal Program at the Sandra Day O'Connor College of Law at Arizona State University. Professor Tsosie would like to thank Maureen McGee, Autumn Johnson, Teresa Jacobs, and all the other students associated with the *Journal of Environmental Law and Litigation* who worked tirelessly to produce this outstanding symposium on the important issue of climate equity. She also thanks Dean Margie Paris and the faculty and staff of the University of Oregon School of Law for their warm welcome and exceptional support for environmental and natural resources issues and the rights of Native peoples.

\*\* This keynote address was presented by Professor Rebecca Tsosie at the *Journal of Environmental Law and Litigation's* symposium, *Advocating for an Environment of Equality: Legal and Ethical Duties in a Changing Climate*, held in Eugene, Oregon, on September 11, 2009. JELL wishes to thank Professor Tsosie and all of the other participants and attendees of this year's symposium.

focus on the economics because that is what we perceive to be our immediate need. How will it disadvantage us if we must curb greenhouse gas (GHG) emissions? How are we going to survive this crisis in a bad economy, given the mortgage crisis and failing financial institutions? In a frame of mind driven by fear, it is impossible to plan long term for the future, and we tend to make short-term, survival choices instead. Many Native communities were forced to adopt short-term, survival thinking during the nineteenth century when federal policymakers sought to appropriate Native lands, relocate Native communities, and extinguish traditional Native economies. These patterns of thinking haunt us still, prompting us to ask how we are going to survive an era of climate change. So, at this moment, we have an opportunity to overcome that way of thinking and create a transformative mode of thought that will enable us to deal with the crisis of climate change.<sup>1</sup>

The adoption of the Declaration on the Rights of Indigenous Peoples by the U.N. General Assembly in 2007 was a historic event.<sup>2</sup> The document had been in the process of development for over twenty-five years, and the fact that it passed by a majority vote, despite the United States, Australia, Canada, and New Zealand voting against it, was particularly significant. Shortly thereafter, I attended a conference of indigenous peoples from all over the world. The representatives at the conference agreed that, within their traditional ways of thinking, the Declaration represented a moment of transformative thought and had a momentum that could carry us forward. One of the individuals who attended the conference was a Maya elder from Guatemala who was a spiritual leader for his people. Through a translator this elder spoke about the Mayan calendar, which predicts the year 2012 as the end of a cycle and the beginning of another. He said that many people are mischaracterizing the prediction as the end of the world, but he said it is better described as the end of a form of consciousness. He said that the initial contact of indigenous peoples on this continent with Europeans marked the start of the current era. This era has been defined by darkness and a state of mind that is fearful and reactive, largely in response to the many

---

<sup>1</sup> See, e.g., Rebecca Tsosie, *Engaging the Spirit of Racial Healing within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21 (2005) (exploring what it means to heal injustice that is embedded in society at the level of both structure and consciousness).

<sup>2</sup> Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/61/L.67 (Sept. 13, 2007).

forms of violence that were perpetrated during the era of European colonialism. He said that we could no longer afford to be caught up in this way of thinking, and that the new era would be transformational.

This prophecy has an analogue with the events that transpired at a meeting of the U.N. General Assembly on December 11, 1992. Oren Lyons, Faithkeeper of the Six Nations of the Iroquois Confederacy, and Thomas Banyaca, a traditional elder from the Hopi Nation, held up an illustration representing an ancient rock drawing located on the Hopi Reservation. According to Mr. Banyaca:

This rock drawing[] shows part of the Hopi prophecy. There are two paths. The first with high technology but separate from natural and spiritual law leads to these jagged lines representing chaos. The lower path is one that remains in harmony with natural law. Here we see a line that represents a choice like a bridge joining the paths. If we return to spiritual harmony and live from our hearts we can experience a paradise in this world. If we continue only on this upper path, we will come to destruction.<sup>3</sup>

These views are shared by many other indigenous peoples whose origin stories often teach the importance of integrating the spiritual laws that govern the universe with the laws created by human beings. Humans have created laws based on a limited understanding of the scientific principles governing the material world, as well as societal laws that stem from political discourse. The Earth's survival is contingent upon honoring *both* spiritual and human laws. So, how do we do that?

I want to talk about where indigenous peoples fit into the existing politics of climate change. In the United States, contemporary policymakers understand federally recognized Native Nations to be domestic dependent nations. This means that they have the governmental capacity to address issues arising on their own reservation lands and impacting their own tribal members. In many ways, they have a power analogous to that of a state or municipal government. However, Native Nations are importantly distinct because their sovereignty is inherent and they are not political subdivisions of federal or state governments. Of course, this is not a universal understanding. In many other parts of the world, indigenous peoples are treated primarily as ethnic groups and not as political

---

<sup>3</sup> Thomas Banyacya, Hopi Elder, The Hopi Message to the U.N. General Assembly (Dec. 11, 1992), *available at* <http://www.nativeamericanchurch.com/Signs/HOPI-UNMsg.html>.

sovereigns. For example, in Latin America, some governments are granting timber and mining contracts to corporations that exploit the rainforest and other resources on the traditional homelands of indigenous peoples. The massive deforestation of such lands has led to the wholesale destruction and removal of indigenous communities from their lands, as well as episodes of violence reminiscent of what happened in the United States during the nineteenth century. In these countries, indigenous rights may be associated with the need to demarcate traditional territories and generate protective laws to ensure the basic survival of indigenous people.

When one looks at the issue of climate change, the consequences of deforestation and mining are significant. The indigenous communities in Latin America are in many ways victims of these policies, lacking a separate, sovereign voice within the domestic political structure. However, in the United States, Native Nations who have significant coal reserves have the sovereign power to continue their mining activities. Native Nations can even site new power plants on reservation lands, as the Navajo Nation has chosen to do in the context of its proposed Desert Rock Power Plant. Thus, the question of where Native peoples fit into the discussion of climate change is quite complicated and promotes an inquiry into whether we can craft tribal environmental policies that resonate with traditional worldviews, as well as operate in a global context to secure appropriate economic development. Economic development is important for all governments, as is the need to protect the rights of Native peoples to continue living on their traditional lands.

I would propose that many U.S. policies are very shortsighted in terms of their impact on Native peoples. The best example is what is happening in the Arctic. The massive ice melt and destruction of permafrost are jeopardizing the continued survival of many Alaska Native villages. Many villages are being rapidly flooded out of their traditional lands, and community members are having difficulty continuing their traditional subsistence economies because of the destruction of hunting grounds and the animal species that live in these environments. There is no law that protects Native peoples from the destruction of indigenous lands or lifeways that results from climate change, either at the international or domestic level. In the United States, indigenous groups can petition the federal government for assistance through either the Federal Emergency Management Agency or the Bureau of Indian Affairs, but there is no guarantee that

they will receive assistance. Assistance, either at the international or domestic level, is offered only when it is cost effective.

Does anyone have an idea of what it costs to move an entire village? The current projection is \$400 million.<sup>4</sup> However, that is merely a projection. Perhaps there is a way to reduce the cost, but it could cost even more. What we know is that it is generally much less expensive to relocate individuals and families to urban centers, enabling them to secure jobs, than it is to remove an entire village and relocate it to a site where the community can continue to live a land-based, subsistence way of life. Without any legal cause of action to secure damages for the destruction of the village and traditional lifeways, it is likely that climate refugees across the world will be treated as victims without specific rights. The obligation to assist will be viewed as a moral, rather than legal, duty, and a utilitarian calculus will not promote the type of assistance that these groups really require.

The utilitarian calculus requires us to evaluate the cost in dollars to relocate climate refugees. However, what costs are we missing? That is what I think we really need to focus on. The costs that we are missing include the countless examples of ongoing and wholesale destruction of people as cultural groups, including the destruction of their traditional lifeways and the knowledge that comes from living on those lands in a particular way over so many generations. That is priceless. That is a value that will disappear forever. Cost-benefit analysis is not going to provide a remedy.

What I am trying to do in my work is to develop a way of thinking about these harms and to promote an intercultural model of climate equity that can account for the multiple values that are at stake in these debates. I also strive to pay attention to how indigenous peoples are situated politically so that these claims can be brought into the domestic and international policy arenas. Currently, indigenous peoples' interests are largely subsumed within those of the nation-state. So, the United States will generate its policy on climate change and say "we are taking care of our native people," and Brazil will do likewise. There is no space at the table for Native peoples as separate governments to assert their interests at the international level.

---

<sup>4</sup> U.S. GEN. ACCOUNTING OFFICE, ALASKA NATIVE VILLAGES: MOST ARE AFFECTED BY FLOODING AND EROSION, BUT FEW QUALIFY FOR FEDERAL ASSISTANCE 32 (2003); Complaint at 1, 46, *Native Village of Kivalina v. ExxonMobil Corp.*, No. 08-1138 (D. Cal. 2009).

Instead, they must generally assert their claims through nongovernmental organizations (NGOs).<sup>5</sup> This is one reason why their claims generally are not vindicated. The Inuit took their collective claim to a forum at the Organization of American States. The Inuit argued that the United States should be held liable for the destruction of their villages as a result of climate change because the United States has declined to place enforceable limitations on GHG emissions.<sup>6</sup> Although the Inter-American Commission on Human Rights held a hearing, it did not order relief, indicating that this claim was nonjusticiable against the United States.<sup>7</sup> There are many contributors to GHG emissions, and the harm is cumulative over time, which makes it very different to pin liability on one actor.

I would like to share some additional thoughts with you regarding climate change policy and the rights of indigenous peoples so that we can evaluate the utility of employing an intercultural model of climate equity. I will focus my thoughts on the respective and interactive domains of international, domestic, and tribal policy.

At the international level, the main concern is how to get multiple values into the discussion, given the dominance of economic analysis. The equity issue at the international level, as I understand it, involves a tension between the rights of industrialized nations to continue to support their economies and the rights of developing nations to develop in a way that that allows them to compete economically with industrialized nations. As I understand the history of sustainable

---

<sup>5</sup> For example, the “Indigenous Environmental Network took a delegation of 12 Native people from the United States and Canada to the 15th Conference of the Parties of the United Nations Framework Conference on Climate Change held in Copenhagen, Denmark” in December of 2009. Tom B.K. Goldtooth, *Raising the Bar After Copenhagen*, INDIAN COUNTRY TODAY, Jan. 4, 2010, at 5. The group called for “stringent and binding emission reduction targets” in their asserted capacity as “the guardians of Mother Earth,” charged with making “principled stands for the global well-being of all people and all life.” *Id.*

<sup>6</sup> 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), available at <http://www.inuitcircumpolar.com/index.php?Lang=En&ID=316>; 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 (Dec. 7, 2005), available at <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf>.

<sup>7</sup> Letter from Ariel E. Dulitzky, Assistant Executive Sec’y, Inter-Am. Comm’n on Human Rights, to Paul Crowley, Legal Representative of Sheila Watt-Cloutier et al. (Nov. 16, 2006), available at <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>.

development within international policy, the United States was adamant that the concept should not evoke a right to develop. However, the international discourse ultimately resulted in the recognition of such a right. This raises some questions. How can we create an equitable structure for this right? How are the rights of indigenous peoples protected in this process? If Brazil, for example, has a right to develop, does this entail a right to grant mining and timber franchises in the rainforest? Is the right of indigenous peoples to live on their traditional lands and practice their lifeways subordinate to this right? Who decides?

The United States, of course, is in a much better position to respect indigenous rights because it is in a government-to-government relationship with federally recognized Native Nations. If there is going to be international leadership that understands the interests of indigenous peoples at the table, this leadership must be championed by nations like the United States and Canada because these nations already recognize the political sovereignty of Native peoples.

International human rights law can serve as a powerful repository of alternative norms to guide the further articulation of indigenous sovereignty over lands, territories, and resources, as demonstrated by the various provisions of the Declaration on the Rights of Indigenous Peoples. 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 set of lands. If that relationship is destroyed, what happens to the identity of the group? That is what is at stake in Alaska and all of the other places where indigenous peoples are losing their land base and way of life as a consequence of climate change. In my work, I have argued for an indigenous right to environmental self-determination. This right would be constructed from international human rights norms and serve as a means to secure the relationship between indigenous peoples and their lands, which is unique and has endured for generations.<sup>8</sup> The Declaration on the Rights of Indigenous Peoples provides support for such a right, as does the theoretical work of scholars such as Professor James Anaya.<sup>9</sup>

At the domestic level, all of the attention in the United States has been focused on pending climate legislation in Congress. The

---

<sup>8</sup> See Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1663–69 (2007).

<sup>9</sup> See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004); S. JAMES ANAYA, *INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES* (2009).

Waxman-Markey Bill has passed the House of Representatives, and an analogous bill is pending in the Senate.<sup>10</sup> The United States' domestic policy will drive the country's commitment to crafting strategies to address climate change. This legislation reflects environmental policy based on a negotiated compromise among the various industries and actors that will be impacted by limitations on emissions. It is not a policy guided by altruism or any higher order set of interests. Consequently, the policies supported by the legislation are scattered across the board. Tribal governments have been included in the national agenda, and they are recognized as governments as are states and municipalities, but they are not recognized as having any special rights as indigenous peoples. There is no provision that addresses what is happening to Native Alaskan villages, for example, even though tribal leaders lobbied Congress to account for the harm to those communities.

Within the domestic arena, there have been two stages of U.S. policy dealing with the environmental rights of Native peoples.<sup>11</sup> In response to the environmental justice movement of the 1980s, certain scholars noted that the history of energy exploitation on Native lands had left those lands among the most contaminated spots in the nation.<sup>12</sup> Massive uranium mining occurred on Native lands throughout the Southwest, leaving much of the land and water contaminated with radioactive waste.<sup>13</sup> There are significant health risks associated with that contamination, and most of the contamination has not yet been remediated due to significant economic costs. Native lands and resources have also been damaged by coal strip-mining and the effects of hydroelectric power plants, which largely serviced the growth of urban centers off the reservation.<sup>14</sup> Due to this widespread environmental harm, many environmental justice scholars depicted Native people as victims,

---

<sup>10</sup> See American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

<sup>11</sup> Tsosie, *supra* note 8, at 1654.

<sup>12</sup> See, e.g., MARJANE AMBLER, *BREAKING THE IRON BONDS: INDIAN CONTROL OF ENERGY DEVELOPMENT* (1990).

<sup>13</sup> See Barbara Rose Johnston & Susan Dawson, *Resource Use and Abuse on Native American Land: Uranium Mining in the American Southwest*, in *WHO PAYS THE PRICE? THE SOCIOCULTURAL CONTEXT OF ENVIRONMENTAL CRISIS* (Barbara Rose Johnston ed., 1994); PETER H. EICHSTAEDT, *IF YOU POISON US: URANIUM AND NATIVE AMERICANS* (1994).

<sup>14</sup> Tsosie, *supra* note 8, at 1630.

much in the same way that climate refugees are now portrayed. However, the response of tribal leaders in the 1980s was quite different. They responded as active agents and not as victims, noting that the problem was that tribes had not been given the ability as governments to govern their own lands. Rather, as of that time, the tribes were expected to conform to federal or state policies.

The movement toward environmental self-determination led to amendments to the U.S. federal environmental pollution control laws calling for the treatment of tribes as states. Now, tribal governments can set water and air quality standards to protect their lands and resources.<sup>15</sup> It is interesting to me that the Waxman-Markey Bill does not affirmatively adopt a policy to treat tribes as states. Rather, it more generally promotes their participation in the various programs that will emerge from the different titles of the statute. The Bill supports the ability of tribes to participate in the basic structure, but it does not enable them to act as sovereigns with independent decision-making authority. This is a clear deficiency in the legislation. As I read the various provisions of the Bill, tribal governments are authorized to compete for resources to enhance energy efficiency, they are held to the same compliance standards as other governments in terms of the cap and trade scheme, and they are not given an equal allocation of resources to deal with all of the costs associated with these responsibilities. Instead of the set allocations that are provided to states, tribal governments will have to engage in a competitive grant process, which will ultimately provide resources to some tribes and not to others. To the extent that tribes are encouraged to invest in alternative energy projects, there will be costs attendant to leasing, zoning, transmission lines, and environmental protection. The idea that we should shift to a green economy is noble, but only if tribal governments are supported in the shift from fossil fuel to renewable energy. On the Navajo and Hopi Reservations, the local economy is heavily dependent upon coal mining. Many tribal members are employed by the mines and power plants, and, even with these jobs, the overall unemployment rate is nearly forty percent.<sup>16</sup> If the tribes lose the revenue and jobs from coal mining, what will happen?

---

<sup>15</sup> See generally 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, 234–37 (1996) (discussing tribal amendments to the Clean Air Act and Clean Water Act).

<sup>16</sup> John M. Broder, *Closing of Mine on Tribal Lands Fuels Dispute Over Air, Water and Jobs*, N.Y. TIMES, Jan. 1, 2006, § 1, at 12.

Domestic policy must engage the specific tribal interests at stake, both in their capacity as governments and in their capacity as indigenous peoples.

The Navajo Nation is at the forefront of the discussion of climate change and energy policy. The Navajo Nation is committed to developing its coal resources as it transitions into renewable energy production. Although this may seem contrary to the interests expressed by other indigenous peoples, namely the Inuit villages who have lobbied for limitations on GHG emissions, the Navajo Nation has continually asserted its right to develop, just as developing nations have done. The Navajo Nation has an abundance of coal and a large population to support. In addition, the Navajo Nation must deal with the federal bureaucracy that continues to control energy production on tribal lands. In terms of renewable energy and the ability for tribes to engage in entrepreneurial relationships with outside corporations that are productive and not exploitive, federal policy needs to create specific mechanisms that will enable these partnerships.

The situation within Indian Country is not identical to that outside of Indian Country because of trust land restrictions. If nuclear power is touted as a source of green energy, there will be significant pressure on tribes to develop their uranium resources, possibly without adequate safeguards if the best and most current technology imposes undue costs. Approximately twenty-five percent of the recoverable uranium in the United States is located within the Navajo Nation, and many other reservations hold rich deposits as well.<sup>17</sup> In recognition of the tremendous and continuing harms caused by uranium mining on the Navajo Nation, the Tribe enacted the Dine Natural Resources Protection Act of 2005, which prohibited uranium mining within Navajo Indian Country.<sup>18</sup> If coal mining is curtailed on the Navajo Nation, will the tribe be forced to reexamine its stance on uranium production? Is such a choice defensible? Should the United States be compelled to remediate the existing contamination before promoting further uranium production? These issues must be addressed using an intercultural model of climate equity.

There are many issues to think about, and our discussion will continue. So, I will offer only one concluding thought: we must be

---

<sup>17</sup> See Bradford D. Cooley, Note, *The Navajo Uranium Ban: Tribal Sovereignty v. National Energy Demands*, 26 J. LAND RESOURCES & ENVTL. L. 393, 393 (2006).

<sup>18</sup> NAVAJO NATION CODE tit. 18, § 1303 (2005).

willing to engage the ethical basis for our decision making because that is really what we are dealing with in the modern era. Policy makers tend to conflate the ethical and economic inquiries, and that approach is sustained by the predominant utilitarian approach to environmental policy. That utilitarian calculus is currently the primary underpinning for climate equity at the international and domestic levels. The ethical inquiry must be much broader. The relationships that are at stake in the era of climate change are not just among current nations and peoples. They encompass a profound history and, more specifically, an ancestral history for Native peoples that traces back to the roots of their identity. With that relationship comes a responsibility to the lands and to future generations. This is an intergenerational way of thinking that defines a current people in relationship to their ancestors, to their lands, and to future generations. The concept of intergenerational equity has been evoked in international discussions about sustainable development, but I do not see it being honored. Thus, the December 2009 discussions at Copenhagen focused on who would get the benefits of a new climate policy, instead of who would take responsibility for the harms that have accrued and will accrue in the future. We must open our minds beyond that limited notion of benefit and responsibility.

I would also argue that Native peoples should not be lumped into the victim, vulnerable population discourse because that results in a gratuitous transfer of benefits from whoever is willing to lend a hand, rather than a tangible right that can be enforced and sustained.<sup>19</sup> This is the moment when the old conceptions of sovereignty that privileged only the interests of the nation-states must give way, as we contemplate what it means for peoples to enjoy the right to self-determination. The Declaration on the Rights of Indigenous Peoples states that indigenous peoples have a right to self-determination. What it means to have self-determination is the autonomous ability to think, plan, craft, set into action, and protect the land and the people in perpetuity. That is what we were given at the inception of our being, and that is the responsibility that we carry forward into the future.

---

<sup>19</sup> See, e.g., Sharon Hoffman, *Preparing for Disaster: Protecting the Most Vulnerable in Emergencies*, 42 U.C. DAVIS L. REV. 1491 (discussing the need for statutory provisions that will secure protection for vulnerable populations during disasters and require adequate preparation for these groups as a matter of emergency planning).

