

CLI BACKGROUND PAPER NO. 3

Native American Law

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United States law recognizes Indian tribes as distinct political bodies possessing powers of self-government over their lands and their members. Tribal governmental authority also extends to non-members of the tribes who occupy or own lands within the tribal community, particularly when non-member activities pose serious threats to the “political integrity, the economic security, or the health or welfare of the tribe.”¹

Since the 1970s and the advent of the federal policy encouraging tribal self-determination, tribes have regularly exercised their governmental powers as environmental stewards of their lands and natural resources. In developing their modern resource management regimes, they invariably call upon and embrace their respective storehouses of traditional ecological knowledge, beliefs and practices.

In this section of the Green Paper, we highlight some of the common threads of this traditional ecological knowledge and thereafter turn to modern examples of tribal resource management systems. As will be seen, among the most prominent threads that bind traditional ecological knowledge and modern-day tribal resource management practices is a profound recognition of, and commitment to, the interests of future generations of the tribe.

A. Traditional Ecological Knowledge

As with other domains of Indigenous knowledge and practice—*e.g.* systems of government, religion, philosophy, etc.—one encounters serious problems of definition when seeking to uncover or distill a body of traditional ecological knowledge relating to Indigenous peoples, including Native Americans. Among the confounding factors are the lingering influences of colonialism that often precipitated vast changes in the tribal landscape and introduced novel, sometimes conflicting, normative orientations to, or relationships with, the natural world.²

Notwithstanding these limitations, the ecologist Fikret Berkes offers a workable definition of traditional ecological knowledge in the following terms:

[A] cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment.³

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¹ *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

² See generally Darren J. Ranco, *The Ecological Indian and the Politics of Representation: Critiquing The Ecological Indian in the Age of Ecocide*, in *NATIVE AMERICANS AND THE ENVIRONMENT: PERSPECTIVES ON THE ECOLOGICAL INDIAN* 32–51 (Michael E. Harkin & David Rich Lewis eds., 2007) (hereinafter “Harkin & Rich”).

³ FIKRET BERKES, *SACRED ECOLOGY: TRADITIONAL ECOLOGICAL KNOWLEDGE AND RESOURCE MANAGEMENT* 8 (1999).

This definition accounts for both the cumulative and dynamic aspects by and through which ecological knowledge is acquired and transmitted, particularly by “societies with historical continuity in resource use on a particular land.”⁴ Legal scholar Rebecca Tsosie adds that traditional ecological knowledge embraces “both Indigenous systems of environmental ethics and the group’s scientific knowledge about environmental use that has resulted from generations of interaction.”⁵ According to Tsosie, these Indigenous systems of knowing and interacting with the natural world constitute a unique world view that, while distinctive in important ways, also shares the following attributes:

[A] perception of the earth as an animate being; a belief that humans are in a kinship system with other living things; a perception of the land as essential to the identity of the people; and a concept of reciprocity and balance that extends to relationships among humans, including future generations, and between humans and the natural world.⁶

Thus: an attribute of unity between sacred landscapes and identity, both communal and individual.

This attribute is vividly illustrated in the worldview of the Ndee people or White Mountain Apache. The Ndee utilize the same word, “ni” to convey the meaning of “mind” and “land.”⁷ The anthropologist Keith H. Basso, who conducted much of his field research among the Ndee, notes that “[k]nowledge of places is . . . closely linked to knowledge of the self, to grasping one’s position in the larger scheme of things, including one’s own community, and to securing a confident sense of who one is as a person.”⁸ As “[i]nhabitants of their landscape,” says Basso, “the Western Apache are thus inhabited *by* it as well, and in the timeless depth of that abiding reciprocity, the people and their landscape are virtually as one.” (emphasis in original).⁹ In a similar vein, the Inuit employ the word “*sila*” for both “weather” and “the elements” and for “intelligence/consciousness” or “mind.” In the Inuit worldview, “*sila* links the individual and the environment[;] a person who lacks *sila* is said to be separated from an essential relationship with the environment that is necessary for human well-being.”¹⁰

The spatial dimensions within which the Indigenous person is situated in her or his ancestral landscape also extend temporally across generations, from the ancestors to those yet to be born. For the Ndee people, the ancestors speak and guide the present generation—and future generations—through the ubiquitous reference points of place-names in the landscape. The landscape serves as a “repository of distilled wisdom, a stern but benevolent keeper of tradition, an ever-vigilant ally in the efforts of individuals and whole communities to maintain a set of standards for social living that is uniquely and distinctly their own.”¹¹ In the words of an Ndee elder, “wisdom sits in places. It’s like water that never dries up. You need to drink water to stay alive, don’t you? Well, you also need to drink from places. You must remember everything about them. . . .”¹² The elder then prophesies: “Then your mind will become smoother and

⁴ *Id.*

⁵ 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, 272–73 (1996).

⁶ *Id.* at 276.

⁷ N. BRUCE DUTHU, *AMERICAN INDIANS AND THE LAW* 93 (2008).

⁸ KEITH H. BASSO, *WISDOM SITS IN PLACES: LANDSCAPE AND LANGUAGE AMONG THE WESTERN APACHE* 34 (1996).

⁹ *Id.* at 102.

¹⁰ Sheila Watt-Cloutier, Petition to the Inter-Am. C.H.R. Seeking Relief from Violations Resulting From Global Warming Caused by Acts and Omissions of the United States, 18 (Dec. 7, 2005) (on file with author).

¹¹ Basso, *supra* note 8, at 63.

¹² *Id.* at 127.

smoother. Then you will see danger before it happens. You will walk a long way and live a long time. You will be wise. People will respect you.”¹³

As noted above, Indigenous worldviews embrace a concept of reciprocity and balance regarding relationships between people and their landscapes, and these concepts extend also to future generations. This sort of environmental ethic contributes to and informs Indigenous resource management practices of sustainability. In the contemporary context, as Tsosie contends, Indigenous peoples “thus advocate a Native concept of sustainability that ‘means ensuring the survival of the people, land and the resources for seven generations.’”¹⁴ This is not to suggest that historically, some Indigenous peoples in the present-day US did not engage in practices that were antithetical to this environmental ethic; the evidence suggests that some groups clearly did.¹⁵ In the modern era, one need only look at intra-tribal conflicts regarding clear-cut logging, or the siting of solid or hazardous waste dumps or fossil-fuel power plants on tribal lands to see contemporary expressions of this ecological paradox. But of course, one must be ever mindful of the intergenerational legacies of colonialism that often depleted the estates of tribal homelands and indeed, the tribal populations. At least in the modern era, the ecological paradox noted is often the byproduct of the colonial legacy that effectively constrains the options of tribal leaders trying to develop their lands to support contemporary communities.

B. Contemporary Tribal Resource Management Systems

As noted, contemporary tribal resource management systems often embrace their respective storehouses of traditional ecological knowledge, beliefs, and practices, as is demonstrated by the examples that follow. A key attribute of these contemporary resource management systems is the prominence that tribes ascribe to the rights of future generations.

1. The Dine or Navaho Nation

The Dine or Navajo Nation explicitly recognizes the rights of future generations and the legal duties imposed upon the Nation in managing its natural resources. The Dine Natural Resources Protection Act (DNRPA) of 2005 embraces the environmental ethic of sustainability in its opening clauses:

The Navajo Nation Council finds that the wise and sustainable use of natural resources in Navajo Indian Country traditionally has been, and remains, a matter of paramount governmental interest of the Navajo Nation and a fundamental exercise of Navajo tribal sovereignty.¹⁶

In the succeeding clause, the DNRPA references Dine Natural Law and the duty and responsibility owed to future generations:

The Navajo Nation Council finds that the Fundamental Laws of the Dine . . . support preserving and protecting the Navajo Nation’s Natural Resources, especially the four sacred elements of life—air, light/fire, water and earth/pollen—for these resources are the foundation of the peoples’ spiritual ceremonies and the Dine life way, and that it is the duty and responsibility of the Dine to protect and preserve the natural world for future generations.¹⁷

¹³ *Id.*

¹⁴ Tsosie, *supra* note 5, at 287.

¹⁵ See generally, SHEPARD KRECH III, *THE ECOLOGICAL INDIAN: MYTH AND HISTORY* (1999).

¹⁶ Diné Natural Resources Protection Act of 2005 (on file with author), available at <http://www.sric.org/uranium/DNRPA.pdf>.

¹⁷ *Id.*

These traditional ecological principles represent ground zero in an on-going intra-tribal battle among Dine citizens opposed to a tribal council proposal to build a massive 1,500 MW coal-fired power plant on the New Mexico portion of the Navajo Reservation. The opponents of this proposal suggest that reliance on alternative renewable energy sources like wind or solar power would be more consistent with Dine traditional ecological principles. According to Dine Fundamental law, the wind spirit or “*Nilchi*” is a life force that, if accorded due “respect and offering,” may be embraced within sustainable practices. Opponents of the coal-fired power plant maintain that using wind energy “in sustainable practices does not imply contaminating the air with harmful toxins[;] rather, the natural movement of *Nilchi*’i produces a force compatible and accommodating to modern sustainable living.”¹⁸

2. The Anishinaabe or Ojibwe

In the Great Lakes region, Anishinaabe or Ojibwe tribes from Wisconsin, Minnesota, and Michigan came together in the 1980s and 1990s to form an intertribal political body called the Great Lakes Indian Fish and Wildlife Commission (GLIFWC). The tribes delegated certain governmental functions to the GLIFWC to regulate tribal fishing and hunting rights, often in tandem with state resource management bodies. In 1992, seeking to infuse a distinctly Anishinaabe cultural ethic into its environmental management regime, the GLIFWC modified its mission statement and included the following reference to the “Anishinaabe Way:”

The “Anishinaabe Way” underlies the unique approach to resource management which is brought by tribal people into the critical, modern day decisions regarding natural resources. Traditional thought directs management to be holistic and integrated, respectful of all creation. An understanding of the universal order and recognition of man’s dependence on all other life forms, rather than his dominance, assures holistic management. Traditional thought also demands long-term vision, protecting the well-being, not just of the next generation or two, but of the “Seventh Generation,” thus extending responsibility for the impact of management decisions far into the future.¹⁹

While giving voice to a uniquely Indigenous worldview, the GLIFWC’s work in practice is often circumscribed by competing state interests and/or authority, particularly for off-reservation fishing resource management. Nonetheless, the GLIFWC’s statement serves as powerful testament to the enduring force of traditional ecological knowledge and Indigenous environmental ethics in action. It is worth noting here that the Menominee Tribe of Wisconsin also embraces the “Seventh Generation” principle in its forest management plan which calls on managers to “remember that we are borrowing the forest from our grandchildren.”²⁰

3. Other Tribes

A number of other tribes have articulated natural resource and/or environmental management policies that explicitly reference the rights of or duties owed to future generations. The Colville Tribe, for example, in its Hazardous Substance Control ordinances, has this declaration of policy: “The beneficial stewardship of the land, air, and waters of the

¹⁸ See Report by Ecos Consulting for Dine Citizens Against Ruining our Environment (Dine CARE). Energy and Economic Alternatives to the Desert Rock Energy Project, 44 (Jan. 12, 2008) (on file with author).

¹⁹ Quoted in Larry Nesper & James H. Schlender, *The Politics of Cultural Revitalization and Intertribal Resource Management: The Great Lakes Indian Fish and Wildlife Commission and the States of Wisconsin, Michigan, and Minnesota*, in Harkin & Rich, *supra* note 2, at 292.

²⁰ BERKES, *supra* note 3, at 35.

Colville Indian Reservation is a solemn obligation of the present generation for the benefit of future generations.”²¹ The Confederated Tribes of the Grand Ronde Community of Oregon, in its statement of tribal government principles, includes the following language: “All actions of the Tribal Government and all who serve it shall be guided by the following values; . . . The needs and rights of future generations shall be considered in all decisions of Tribal Government.”²²

Finally, the White Mountain Apache Tribe’s Environmental Code contains the following preamble in its water quality management regime:

Tú, water, is one of the gifts of the Creator that is essential to the survival of the White Mountain Apache People. Water is inseparable from our land and culture. Our homeland has always been blessed with a great number of springs, streams, and meadows to sustain a diverse and vibrant community of plants, wildlife, and people. We have always sought to protect our precious natural resources and special places. We recognize that we must assert full authority over all the lands and waters of our Reservation to protect them from abuse. The standards for water quality in this Tribal Ordinance will guide the protection of our waters for present and *future generations*.²³

B. Constitutionalizing the Seventh Generation Principle

It is appropriate to conclude this discussion of Indigenous intergenerational ecological rights and duties by noting that the Anishinaabe, among other tribal groups, have called for and produced the text of a proposed amendment to the U.S. Constitution that would entrench the rights of future generations. Noting that the Constitution’s Preamble is addressed “to ourselves and our posterity,” the members of the Seventh Generation movement have called for adoption of a “Seventh Generation Amendment” to the Constitution that provides the following:

The right of citizens of the U.S. to enjoy and use air, water, sunlight, and other renewable resources determined by the Congress to be common property shall not be impaired, *nor shall such use impair their availability for use by the future generations*.²⁴

The suggested amendment is notable for, among other things, recognizing the common interests and rights of all future generations, Indigenous and non-Indigenous. This drives home the Indigenous principle of the inter-relationship of all creation and our common stake in the integrity, security, and protection of our shared world.

²¹ Colville Tribal Law and Order Code § 4-16-2(a) (2004) (on file with author), *available at* <http://www.narf.org/nill/Codes/colvillecode/cc4ch16to17.htm>.

²² Tribal Government Purpose Ch. 200(c)(3)(H) (1994)(on file with author), *available at* <http://thorpe.osu.edu/archives/granderonde/ch200.htm>.

²³ White Mountain Apache Environmental Code, Ch. 3 Pmbl.(on file with author), *available at* <http://thorpe.ou.edu/codes/wmtnapache/env2chptr3pt1.htm>.

²⁴ *As quoted in* WINONA LA DUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 199 (1999) (emphasis added).