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Résumé de l'article

La région de l'Arctique est en crise à cause des effets des changements climatiques. Les impacts de ces changements climatiques sont une menace pour les communautés autochtones de l'Arctique. À cause des effets disproportionnés de ces changements climatiques, les communautés autochtones sont des communautés de justice environnementale. La première partie de cet article discute de la façon dont les nations amérindiennes sont des nations de justice environnementale, et discute aussi des facteurs qui leur sont propres et qui pourraient s'appliquer aux réclamations en matière de justice environnementale qui se manifestent dans un « Indian country ». Par la suite, deux études de cas seront évaluées afin de découvrir si ces concepts ont déjà été appliqués aux demandes dans le domaine de la justice environnementale qui ont été soumises par plusieurs différentes communautés autochtones de l'Arctique. La deuxième partie traite d'une demande que la Conférence circumpolaire inuite a déposée devant la Commission interaméricaine des droits de l'homme. La troisième partie se penche sur les nombreuses poursuites intentées par le village autochtone de Kivalina contre des entreprises privées qui émettaient des gaz à effet de serre. Ces études de cas mettent en évidence l'échec des forums internationaux et nationaux qui ne prennent pas en compte la situation particulière des peuples autochtones habitant dans l'Arctique et en tant que communautés de justice environnementale.

International and Domestic Law Dimensions of Climate Justice for Arctic Indigenous Peoples

ELIZABETH ANN KRONK WARNER* AND RANDALL S. ABATE**

ABSTRACT

The Arctic region is in crisis from the effects of climate change. The impacts of climate change pose a particular threat to Arctic indigenous communities. Because of the disproportionate impacts of climate change, these indigenous communities are environmental justice communities. Part I of this article discusses how indigenous nations are environmental justice communities and discusses the unique factors that may apply to environmental justice claims arising in Indian country. The article then presents two case studies to explore how, if at all, these

RÉSUMÉ

La région de l'Arctique est en crise à cause des effets des changements climatiques. Les impacts de ces changements climatiques sont une menace pour les communautés autochtones de l'Arctique. À cause des effets disproportionnés de ces changements climatiques, les communautés autochtones sont des communautés de justice environnementale. La première partie de cet article discute de la façon dont les nations amérindiennes sont des nations de justice environnementale, et discute aussi des facteurs qui leur sont propres et qui pourraient s'appliquer aux réclamations en matière de justice

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concepts have been previously applied to environmental justice claims brought by various Arctic indigenous communities. Part II addresses the Inuit Circumpolar Conference's petition to the Inter-American Commission on Human Rights. Part III considers the Native Village of Kivalina's lawsuit against numerous private emitters of greenhouse gases. These case studies underscore the failure of international and domestic forums' consideration of the special situation of Arctic indigenous peoples as environmental justice communities.

environnementale qui se manifestent dans un « Indian country ». Par la suite, deux études de cas seront évaluées afin de découvrir si ces concepts ont déjà été appliqués aux demandes dans le domaine de la justice environnementale qui ont été soumises par plusieurs différentes communautés autochtones de l'Arctique. La deuxième partie traite d'une demande que la Conférence circumpolaire inuite a déposée devant la Commission interaméricaine des droits de l'homme. La troisième partie se penche sur les nombreuses poursuites intentées par le village autochtone de Kivalina contre des entreprises privées qui émettaient des gaz à effet de serre. Ces études de cas mettent en évidence l'échec des forums internationaux et nationaux qui ne prennent pas en compte la situation particulière des peuples autochtones habitant dans l'Arctique et en tant que communautés de justice environnementale.

Key-words: *Arctic, indigenous peoples, climate change, environmental justice, Native Americans, human rights.*

Mots-clés : *Arctique, peuples autochtones, changements climatiques, justice environnementale, amérindien, droits de la personne.*

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INTRODUCTION

The Arctic region is in crisis from the effects of climate change. These effects imperil the physical integrity of the Arctic landscape and, correspondingly, the human rights of its indigenous inhabitants.

Climate change is related to the release of greenhouse gas emissions. As human activities continue to add greenhouse gases such as carbon dioxide into the atmosphere, the naturally occurring greenhouse effect intensifies.[1] The

1. Jeremy P Greenhouse, "Climate Change and the Common Law, Who's to Pay for Global Warming?" (2011) 68:2 Bench & B Minn 16. The greenhouse effect is the process by which the earth's atmosphere moderates the surface temperature of the earth by trapping greenhouse gases and then radiating them back to the earth's surface. James Salzman & Barton H Thompson, Jr, *Environmental Law and Policy*, 3d ed (New York: Foundation Press/Thomson Reuters, 2010) at 123.

intensification of this effect by the addition of greenhouse gases into the earth's atmosphere has resulted in the steady increase of average global temperatures. The Intergovernmental Panel on Climate Change (IPCC) has concluded that human activity is largely to blame for this continued increase in global average temperatures.[2]

Climate change impacts the Arctic region more severely than the rest of the world due to its thinner atmosphere and vast expanses of ice-covered land and sea.[3] In September 2012, sea ice in the Arctic Ocean reached a record low since satellite data of ice coverage began in 1979.[4] Analysis of the satellite data taken by NASA and the NSIDC–supported National Snow and Ice Data Centers showed that sea ice coverage had dropped to 1.32 million square miles in September 2012, which is 30,000 square miles less than the previous record low set in September 2007.[5] Arctic sea ice has continued to decline by 13 percent per decade since 1979, resulting in new record lows each year.[6] In addition to the continued decline of surface area ice coverage, the ice remaining is thinner and less resistant to the summer melting.[7] The loss of sea ice, which is crucial in so many ways to many Arctic indigenous life styles, is directly related to climate change.

A self-perpetuating cycle of increased warming is underway in the Arctic. As the warming temperatures melt away the sea ice that serves as a reflector of the sun's rays, the dark Arctic Ocean absorbs more heat from the sun.[8] This heated

2. Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report* at 36-37 online: IPCC <http://ipcc.ch/publications_and_data/ar4/syr/en/main.html> (Note that all online references were accessed 25 March 2013).

3. Susan Joy Hassol, *ACIA, Impacts of a Warming Arctic: Arctic Climate Impact Assessment* (Cambridge, UK: Cambridge University Press, 2004) at 11 online: ACIA <http://amap.no/acia/> [ACIA Executive Summary].

4. NASA, *Arctic Sea Ice Hits Smallest Extent in Satellite Era* (19 September 2012) online: NASA <http://www.nasa.gov/topics/earth/features/2012-seaicemin.html>.

5. *Ibid*.

6. *Ibid*.

7. Michon Scott & Rebecca Lindsey, "Arctic Sea Ice Getting Thinner, Younger," *NOAA Climate Watch Magazine* (2 October 2012) online: NOAA Climate.gov <http://www.climatewatch.noaa.gov/article/2012/arctic-sea-ice-getting-thinner-younger>.

8. ACIA Executive Summary, *supra* note 3 at 35.

water is then carried throughout the Arctic by currents resulting in faster melting and increased warming throughout the entire region.[9] These warmer waters are likely making it more difficult for older ice sheets to remain intact, contributing to the increase in younger, thinner and less resilient ice sheets now inhabiting the Arctic region.[10] The increase in the surface temperature is also causing seawater to expand and sea levels to rise.[11]

The impacts of climate change "pose a particular threat to indigenous communities, many of which are highly dependent on natural resources vulnerable to climate change, and few of which have the financial resources to adapt to loss of these resources and other perils."[12] A comprehensive study of climate change impacts in the Arctic published in 2004, the Arctic Climate Impact Assessment (ACIA), concluded that Arctic coastal communities will experience increased exposure to storms and thawing permafrost, making them extremely vulnerable to disruption of transportation, buildings, and other infrastructure.[13] One commentator noted with respect to the impact of climate change on the Inuit's housing that, "[u]npredictable weather, such as the increased frequency of storms along the coast and the heavier summer precipitation, makes the construction of housing at traditional sites more difficult."[14] As explained more fully below, the Inuit of Canada, Greenland, Russia, and the United

9. Andrew Van Wagner, "It's Getting Hot in Here, So Take Away All the Arctic's Resources: A Look at a Melting Arctic and the Hot Competition for its Resources" (2010) 21 Vill Envtl LJ 189 at 194.

10. See generally Complaint, *Native Village of Kivalina v ExxonMobil Corp*, 663 F Supp 2d 863 (ND Cal 2009) [*Kivalina Complaint*].

11. *Ibid* at 130.

12. Martin Wagner & Donald M Goldberg, "An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change" (Paper presented at the 10th Conference of the Parties to the Framework Convention on Climate Change, Buenos Aires, Argentina, 15 December 2004) at 2.

13. ACIA Executive Summary, *supra* note 3 at 11.

14. Jessie Hohmann, "Igloo as Icon: A Human Rights Approach to Climate Change for the Inuit?" (2009) 18:2 Transnat'l & Contemp Probs 295 at 305 (discussing the connection between the ICC's petition and the Inuit's use of igloos, which was a traditional housing method used by the Inuit) [footnotes omitted].

States are facing the loss of their environment, land, and culture as a result of climate change. Similarly, rising sea levels are posing devastating risks to the indigenous peoples of the Native Village of Kivalina, Alaska, who have indicated that they have observed a loss in the Arctic sea ice that serves to protect their village from harsh winter storms.[15] Arctic indigenous peoples are enduring the harsh impacts of climate change despite the fact that these communities have added little, if any, greenhouse gases that contribute to climate change.

Climate change is disproportionately impacting Arctic indigenous peoples. Consequently, these communities are environmental justice communities. The environmental justice claims of Arctic indigenous peoples result from the effects of climate change intersecting with indigenous peoples' human rights. In order to explore these realities more fully, Part I of this article discusses how American indigenous nations are environmental justice communities and discusses the unique factors that may apply to environmental justice claims arising in Indian country. The article then presents two case studies to explore how, if at all, these concepts have been previously applied to environmental justice claims brought by various indigenous communities. Part II addresses the Inuit Circumpolar Conference's[16] (ICC) petition to the Inter-American Commission on Human Rights (IACHR) in December 2005. Part III considers the Native Village of Kivalina's lawsuit filed in federal court in the United States in February 2008 against numerous private emitters of greenhouse gases.

15. *Kivalina Complaint*, *supra* note 10 at 868-69.

16. After submitting its claim in 2005, the Inuit Circumpolar Conference changed its name in 2007 to the Inuit Circumpolar Council. However, given that this article analyzes the 2005 petition, the term "Inuit Circumpolar Conference" (ICC) is used for consistency with the terminology used in the petition. The ICC includes Inuit that are citizens of the United States. Hari M Osofsky, "Complexities of Addressing the Impacts of Climate Change on Indigenous Peoples Through International Law Petitions: A Case Study of the Inuit Petition to the Inter-American Commission on Human Rights" in Randall S Abate & Elizabeth Ann Kronk, eds, *Climate Change and Indigenous Peoples: The Search for Legal Remedies* (Northampton, MA: Edward Elgar, 2013) 313 [Osofsky, "Impacts of Climate Change"] ("In the Alaskan context, part of that recognition includes viewing the Inuit as part of the Alaska Native Regional Corporations.").

Although the ICC and Kivalina claims involve different forums, defendants, and legal theories, both were brought by Arctic indigenous communities in response to the negative impacts of climate change on their communities. Accordingly, evaluation of the ICC's and Kivalina's claims is helpful in understanding how environmental justice as applied to indigenous communities may include consideration of factors not applicable to environmental justice claims raised by other environmental justice communities. For example, although the ICC was ultimately unsuccessful in its petition to the Inter-American Human Rights Commission, the ICC's complaint itself is an example of how indigenous communities might move forward with a legal argument premised on the key factors of sovereignty and the unique connection between indigenous communities and their land and environment.

Moreover, this article will underscore how Arctic indigenous peoples' environmental justice claims also involve human rights dimensions, as climate change is destroying their environment and, as a result, their culture. These case studies underscore the failure of international and domestic forums' consideration of the special situation of Arctic indigenous peoples as environmental justice communities. For example, the plaintiffs in the *Kivalina* litigation should have been able to have had their case proceed to the merits instead of having it dismissed on federal displacement grounds.

As fully explained in Part I, environmental justice claims arising in Indian country must take into consideration indigenous sovereignty, the federal trust relationship, and the unique connection between many indigenous communities and their land and environment. Both the ICC and Kivalina complaints are examples of how indigenous communities might incorporate these considerations into legal claims. However, in both of the case studies examined here, the legal forums failed to take these legal factors into consideration. As a result, the indigenous communities suffered.

I. Application[17] of Environmental Justice to Claims Arising in Indian Country[18]

Although many indigenous communities are environmental justice communities in that they are being disproportionately impacted by climate change while contributing little to the problem of climate change, the application of environmental justice in Indian country within the United States differs from its application to other American environmental justice communities. Accordingly, this section begins by exploring the development of environmental justice claims in the United States. The section then explains the unique attributes of indigenous communities that must be taken into consideration before applying environmental justice principles to claims arising in Indian country.

A. BACKGROUND ON ENVIRONMENTAL JUSTICE CLAIMS

Before examining environmental justice as it specifically applies to indigenous communities, it is helpful to first understand the origin and meaning of environmental justice. Environmental justice is rooted in several social justice movements within the United States, including the Civil Rights Movement of the 1950s, 1960s, and 1970s; the Anti-Toxics Movement; the

17. Portions of this part of the article are reprinted from Elizabeth Ann Kronk Warner's previous work by permission of the publishers from "Application of Environmental Justice to Climate Change-Related Claims Brought by Native Nations" in Sarah Krakoff & Ezra Rosser, eds, *Tribes, Land, and the Environment* (Farnham: Ashgate, 2012) 75.

18. Although the term "Indian country" is a phrase of legal significance, it is used broadly in this article and intends to be inclusive of Native lands in Alaska. This distinction is important because in *Alaska v Native Village of Venetie Tribal Government*, 522 US 520 (1998), the US Supreme Court held that, except for one island reservation, Indian country, as used in its legal meaning, no longer exists in Alaska following passage of the *Alaska Native Claims Settlement Act*. "Indian country" is defined at 18 USC § 1151 (1994) as:

> **(a)** all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, **(b)** all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and **(c)** all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

struggles of indigenous communities,[19] the Labour Movement; and the traditional environmental movement.[20] Many scholars point to the 1982 protests in Warren County, North Carolina, against a PCB dump and publication of the United Church of Christ Commission for Racial Justice's 1987 study, *Toxic Wastes and Race*, as catalytic events in the formation of the environmental justice movement.[21] Both of these events and subsequent efforts during the "first generation of environmental justice claims" focused on siting decisions and ensuring that people of color and lower socio-economic communities did not bear a disproportionate negative impact from environmental burdens and had equal access to decision making.[22]

As the field of environmental justice has grown, it has included several different concepts of "justice." "Environmental justice, as a field, asks how environmental law fails to advance values of distributive justice, procedural justice, corrective justice, and social justice."[23] David Getches and David

19. Rebecca Tsosie, "Indigenous People and Environmental Justice: The Impact of Climate Change" (2007) 78 U Colo L Rev 1625 at 1629-30 [Tsosie, "Indigenous People"]. ("Proponents of the environmental justice movement during the 1980s and 1990s generally considered Native Americans to be victims of 'environmental racism,' similar to other racial minorities, based on their similar history of exclusion, stereotyping, and economic and political disenfranchisement. Indeed, ample factual support exists for the perspective that Native peoples live in vulnerable communities, beset by a multitude of hazardous conditions.").

20. Luke W Cole & Sheila R Foster, *From the Ground Up* (New York: NYU Press, 2001) at 19-30.

21. *Ibid* at 20-21.

22. Tsosie, "Indigenous People," *supra* note 19 at 1628-29.

23. Lesley K McAllister, "On Environmental Enforcement and Compliance: A Reply to Professor Crawford's Review of Making Law Matter: Environmental Protection and Legal Institutions in Brazil" (2009) 40 Geo Wash Int'l L Rev 649 at 673. Notably, Native nations are being denied procedural justice when courts refuse to consider the merits of their claims, instead opting to dismiss claims like the one brought by Kivalina on the basis of threshold legal questions such as standing. This problem leads to Native nations being excluded from meaningful participation and leads to unjust environmental results, both of which are demonstrated by the District Court's decision in *Kivalina*. Amy Hardberger, "Why We Do the Things We Do? The Role of Ethics in Water Resource Planning" (2008) 6 Santa Clara J Int'l L 129 at 142-43. ("Procedural justice provides for equal treatment of citizens in many procedural aspects to ensure that everyone has a voice.") [footnotes omitted]. Effective access to courts is an important consideration extending beyond environmental justice, as "it is nonetheless important to err on the side of ensuring that environmental standing

Pellow considered what constitutes an environmental justice issue in light of newly emerging considerations and challenges.[24] As they explain, "the ambit of environmental justice issues has stretched well beyond attacking the classically urban problem of undesirable facility siting and unequal pollution impacts."[25]

Given the increased breadth of the environmental justice field, the question of what now constitutes an environmental justice claim arises. Getches and Pellow conclude that environmental justice claims only extend to the claims of disadvantaged communities.[26] "The definition of the term *community* connotes some commonality in interests, backgrounds, occupations, or legal treatment among people, as well as the existence of ties to a particular place."[27] In addition to focusing on community concerns, environmental justice concerns are those where the inequality faced by the community intensifies the disadvantages facing the community.[28] Accordingly, environmental justice concerns today are those facing communities of color and poor communities where the inequality that these communities face intensifies their environmental disadvantages.[29]

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continues to evolve in a way that affords meaningful access to the courts during this era of global environmental crisis in which we live." Randall S Abate, "*Massachusetts v EPA* and the Future of Environmental Standing in Climate Change Litigation and Beyond" (2008) 33 Wm & Mary Envtl L & Pol'y Rev 121 at 176.

24. David H Getches & David N Pellow, "Beyond 'Traditional' Environmental Justice" in Kathryn M Mutz, Gary C Bryner & Douglas S Kenney, eds, *Justice and Natural Resources: Concepts, Strategies, and Applications* (Washington, DC: Island Press, 2002) 3.

25. *Ibid* at 5-6.

26. *Ibid* at 25.

27. *Ibid* at 24.

28. *Ibid* at 26.

29. As explained more fully in Part I.B., any definition of environmental justice as applied to indigenous communities must also include consideration of tribal sovereignty. Sarah Krakoff, "Tribal Sovereignty and Environmental Justice" in Mutz, Bryner & Kenney, *supra* note 24, 161 at 178. ("Because justice for tribal peoples requires support for tribes as distinct political entities, any definition of environmental justice must include the norm of tribal sovereignty.")

B. ENVIRONMENTAL JUSTICE CLAIMS ARISING IN INDIAN COUNTRY

With a background understanding of environmental justice generally, one can apply environmental justice to indigenous communities. Indigenous communities are environmental justice communities.[30] There are similarities between indigenous communities and other environmental justice communities, such as a history of discrimination.[31] Given this history of discrimination that indigenous nations and individual Indians faced in federal courts, access to the courts is of increased importance today. In particular, federal courts should reject decisions like *Kivalina* that dispose of environmental justice claims for procedural reasons without reaching the merits of such decisions. However, environmental justice claims arising in Indian country[32] also differ from environmental justice claims arising elsewhere by virtue of the fact that they involve sovereign indigenous nations. These claims differ because they must be considered in light of: (1) tribal sovereignty, (2) the federal trust responsibility between the federal government and indigenous nations, and (3) the unique connection between many tribal communities and their environment. For example, in *Kivalina*, as discussed more fully in Part III *infra*, both the federal district court and Ninth Circuit Court of Appeals failed to consider the Nation's sovereignty, especially in the district court's

30. *Ibid* at 162 ("First, virtually all Indian tribes clearly fit into Getches and Pellow's definition of groups who come to the table with 'palpable and endemic disadvantage,' stemming from a long history of discrimination, exclusion, and deliberate attempts to destroy their cultural and political communities. Second, the obvious disproportionate environmental harms borne by Native peoples have meant that they are *already* a part of the discussion—to let them continue to be so without a conscious articulation of the role of tribal sovereignty would be counterproductive to determining appropriate remedial strategies.").

31. Like other environmental justice communities, indigenous nations faced historical discrimination. Of particular relevance is the fact that federal courts often discriminated against tribal and individual Indian claimants, especially before 1934. Nell Jessup Newton, "Federal Power over Indians: Its Sources, Scope, and Limitations" (1984) 132 U Pa L Rev 195 at 216-18 [Newton, "Federal Power"] (explaining in general reference to the 19th century that "[u]ndoubtedly, racial and cultural prejudice played no small role in federal actions toward Indians during this period.").

32. See *supra* note 18 for the definition of "Indian country."

discussion of the Nation's standing. Consequently, the Native Village of Kivalina was deprived of an environmentally just outcome.

1. Indigenous Sovereignty

Indigenous nations differ from other environmental justice communities because of their status as sovereigns.[33] While other environmental justice communities typically come to gather as informal groups whose legal rights flow from environmental laws, indigenous nations' legal rights flow as an initial matter from their sovereignty.[34] Indigenous nations exist as entities separate from state and federal governments. A myriad of historical legal developments led to this separateness. American Indian tribes are extra-constitutional, meaning that tribes exist apart from the American Constitution.[35] In the early 19th century, the US Supreme Court affirmed the separateness of indigenous nations. In *Cherokee Nation v Georgia*,[36] the US Supreme Court held that American Indian tribes were "domestic dependent nations," highlighting their separateness from both state and federal governments. In

33. The United States distinguishes between federally recognized and non-recognized indigenous nations. However, the question of an indigenous nation's sovereignty is separate from the American government's recognition of that sovereignty. This is because indigenous nations pre-dated the formation of the federal government.

34. Under American law, there are two categories of indigenous nations in the United States. The first group is those that have been federally recognized by the United States of America through its Congress. Congress has the ability to recognize certain indigenous nations under the US Constitution's Indian Commerce Clause. *US Const* art 1, § 8, cl 3. By virtue of being federally recognized, these indigenous nations will have certain rights and responsibilities that non-recognized nations do not have. See generally Nell Jessup Newton et al, eds, *Cohen's Handbook of Federal Indian Law* (Newark, NJ: Lexis Nexis, 2005). The list of federally recognized tribes is available at 77 Fed Reg 47868 (10 August 2012). The second group is those that have not been federally recognized and therefore do not have access to the same privileges and legal principles applicable to federally recognized tribes.

35. Scholars have noted that "tribal sovereignty is both pre-constitutional and extra-constitutional." Ann E Tweedy, "Connecting the Dots Between the Constitution, The Marshall Trilogy, and *United States v Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty" (2009) 42:3 U Mich JL Reform 651 at 656 (citing at n 17, Gloria Valencia-Weber, "The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets" (2003) 5 U Pa J Const'l L 405 at 417).

36. 30 US (5 Pet) 1 (1831).

Worcester v Georgia,[37] the US Supreme Court further clarified the separateness of American Indian tribes, finding that the laws of the states shall have "no force or effect" within the exterior boundaries of American Indian tribal territory. Nevertheless, Congress has plenary authority over Indian country. Congress's plenary authority over Indian country is exemplified by the US Supreme Court's decision in *United States v Kagama*,[38] where the Court noted "[i]n the modern era, as tribes have increasingly assumed governmental functions formerly performed by the Bureau of Indian Affairs and Indian Health Service, the relationship between the federal government and the tribes is often described as a government-to-government relationship."[39]

Today, indigenous nations have limited authority over non-Indians,[40] and the majority of matters that tribal courts address involve property and family law.[41] This practice is consistent with the general policy of the American federal government to leave issues related to American indigenous members solely within the inherent tribal sovereignty of tribal governments.[42] Moreover, Congress has recognized tribal sovereignty through passage of the *Indian Self-Determination and Educational Assistance Act*[43] and by subsequently amending various

37. 31 US (6 Pet) 515 (1832).

38. 118 US 375 (1886).

39. Daniel Cordalis & Dean B Suagee, "The Effects of Climate Change on American Indian and Alaska Native Tribes" (2008) 22:3 Nat Resources & Env't 45 (citing Exec. Order No. 13,175, 2, 65 Fed Reg 67,249 (6 November 2000)). See also 25 USC § 3601 ("there is a government-to-government relationship between the United States and each Indian tribe. . .").

40. See *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978); *Plains Commerce Bank v Long Family Land & Cattle*, 554 US 316 (2008) (holding that although American Indian tribal courts have jurisdiction to regulate conduct on tribal lands, that power is lost once the land is transferred to non-Indians).

41. Nell Jessup Newton, "Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts" (1998) 22:2 Am Indian L Rev 285 at 308.

42. See generally *Worcester v Georgia*, *supra* note 37 (holding that the laws of Georgia did not have any effect within the Cherokee Nation's territory); *Santa Clara Pueblo v Martinez*, 436 US 49 (1978) (holding that tribes have the power to determine tribal membership).

43. 25 USC § 450 (2006).

federal statutes to allow for increased tribal governance.[44] As a result, indigenous nations may now regularly assume governmental functions that were previously held by the federal government.[45]

Environmental justice claims arising in Indian country differ from claims arising elsewhere because of the inherent sovereignty that indigenous nations possess. "Tribal sovereignty is thus a paradox. It transcends, and therefore requires no validation from, the United States government. At the same time, tribal sovereignty is vulnerable and requires vigilant and constant defense in our legal and political forums."[46] Moreover, unlike claims brought by other environmental justice communities, indigenous nations' environmental justice claims "must be consistent with the promotion of tribal self-governance."[47] This is because environmental justice claims arising in Indian country include not only racial considerations but also political considerations, as indigenous nations have a special government-to-government relationship with the American federal government.[48] An environmental injustice occurs if American courts, such as in the *Kivalina* litigation discussed in Part III, fail to consider the sovereignty of indigenous nations, because these nations cannot meaningfully participate in the legal process if courts fail to consider

44. Congress has authorized tribal control over federal environmental programs on reservations under the *Clean Air Act (CAA)*, 42 USC § 7601(d)(1)(A) (1970); *Clean Water Act (CWA)*, 33 USC § 1377(e) (1972); *Safe Drinking Water Act (SDWA)*, 42 USC § 300j-11 (1974); *Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)*, 7 USC § 136 (1996); and major portions of *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)*, 42 USC §§ 9601-9657 (1980) online : <http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

45. Cordalis & Suagee, *supra* note 39 at 45.

46. Krakoff, *supra* note 29 at 163.

47. *Ibid*.

48. Additionally, individual American Indians have a political relationship with their tribal governments. Rebecca A Tsosie, "Negotiating Economic Survival: The Consent Principle and Tribal State Compacts Under the Indian Gaming Regulatory Act" (1997) 29 Ariz St L J 25 at 27. The United States Supreme Court recognized that the political relationship between individual Indians and indigenous tribes is separate from a racial relationship in *Morton v Mancari*, 417 US 535 (1974).

something so essential to indigenous nations as their sovereignty.[49] Moreover, given the United States has recognized a special government-to-government relationship exists between over 560 American indigenous nations and the federal government, "the federal government must be prepared to defend vigorously the environmental self-determination that tribes already have."[50]

2. Federal Trust Relationship with Indigenous Nations

In addition to the consideration of tribal sovereignty, environmental justice claims arising from within Indian country require consideration of the unique trust relationship between the federal government and indigenous nations.[51] The federal government's trust responsibility arises from the unique history between the federal government and indigenous nations. As a result of this unique history, "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal

49. Krakoff, *supra* note 29 at 163; Tsosie, "Indigenous People," *supra* note 19 at 1652 ("Such a notion of justice must incorporate an indigenous right to environmental self-determination that allows indigenous peoples to protect their traditional, land-based cultural practices regardless of whether they also possess the sovereign right to govern those lands or, in the case of climate change, prevent the practices that are jeopardizing those environments.").

50. Krakoff, *supra* note 29 at 179.

51. Related to the federal trust responsibility doctrine is the concept that the federal government is morally obligated to act in the best interests of indigenous nations given the historical trauma heaped upon these governments by the federal government. For example, in the mid-20th century, the federal government set about "'terminating' the federal trust relationship with Native nations, abolishing reservations and subjecting Indians to the control of state laws. Where it was implemented for particular tribes and reservations, this termination program created disastrous poverty and dislocation for Indian communities." Reid Peyton Chambers, "Compatibility of the Federal Trust Responsibility with Self-Determination of Indian Tribes: Reflections on Development of the Federal Trust Responsibility in the Twenty-First Century" 2005 Rocky Mtn Min L Found J 13A-2 [footnotes omitted]. A complete discussion of potential moral responsibility of the federal government to indigenous nations is beyond the scope of this paper. For the United States to be legally responsible for violating its federal trust responsibility to a federally recognized tribe, there must be a statute or treaty provision that requires the federal government to manage the trust corpus at issue on behalf of the tribe. See *United States v Mitchell*, 463 US 206 (1983); *United States v Navajo Nation*, 537 US 488 (2003); *United States v White Mountain Apache Tribe*, 537 US 465 (2003).

government. . .”[52] This trust relationship emerged from the many cessions of both land and external sovereignty of indigenous nations to the federal government.[53] The trust responsibility between indigenous nations and the United States imposes the most exacting duty on the federal government to protect the natural resources of indigenous nations.[54] “Scores of cases emphasize this duty of protection, and many hold that the duty imposes an affirmative obligation on government. In particular, the federal government owes federally recognized indigenous nations fiduciary obligations related to the management of tribal trust lands and resources.”[55]

To better understand the trust responsibility that the federal government owes to indigenous nations, it is helpful to look to the history between the sovereigns. The federal trust responsibility doctrine has been the subject of many court decisions related to Indian country over the past two centuries. The doctrine has its origins in Chief Justice Marshall’s opinion in *Cherokee Nation v Georgia*, where the Chief Justice stated that Indians’ “relation to the United States resembles that of a ward to his guardian.”[56] Also, the federal government began to hold lands in trust for tribal governments.

In a more recent decision, the Court further defined the contours of the federal trust responsibility doctrine by following the common law trust principles as articulated in

52. 25 USC § 3601 (2011).

53. Mary Christina Wood & Zachary Welcker, “Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement” (2008) 32 Harv Envtl L Rev 373 at 387-88.

54. Mary Christina Wood, “Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance” (2009) 39:1 Envtl L 91 at 93-94.

55. Cordalis & Suagee, *supra* note 39. See also Chambers, *supra* note 51 at 13A-9 (“Recognizing that the United States has, under the Constitution, broad power over Indian affairs sufficiently extensive to make the tribes comparatively vulnerable to the exercise of that power, this guardian-ward construct also protects tribes from the peril to which that power potentially subjects them.”).

56. *Supra*, note 36 at 17. “The concept of the trust responsibility under the Marshall Court decisions, then, was that tribes agreed to cede some of their lands in return for a federal obligation to protect the remaining lands and tribes’ rights to govern themselves free from interference by any other government.” Chambers, *supra* note 51 at 13A-9.

Restatement (Second) of Trusts, Sections 205-212.[57] In this regard, once the federal trust responsibility is established, the federal government must "meet the higher standards applicable to private trustees."[58]

Recognition of the federal trust responsibility has not been limited to the courts. President Nixon recognized the federal trust responsibility in his 1968 Special Message to Congress on the Problems of the American Indian:

> The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States Government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations.[59]

Subsequent administrations have reaffirmed and even expanded upon Nixon's recognition of the federal trust responsibility doctrine.[60]

In addition to the specific trust responsibility between indigenous nations and the federal government, Professor Mary Christina Wood has argued that there is a general trust obligation on the part of federal and state governments to

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57. 463 US 206 (1983) at 226. In developing the federal trust responsibility doctrine in this manner, the Court found that the doctrine applied whether there was a trustee (federal government), beneficiary (Indian nation) and trust corpus (tribal property, etc. to be managed by the federal government). *Ibid*. This understanding of the federal trust responsibility was reaffirmed recently in the Court's decision in *United States v White Mountain Apache Tribe*, *supra* note 51.

58. Chambers, *supra* note 51 at 13A-17.

59. Richard Dixon, "Special Message to the Congress on Indian Affairs" 213 Pub Papers (8 July 1970).

60. "For example, President Reagan's Message to Congress on January 24, 1983 continued the commitment of the Nation to strong government-to-government relations with tribes and to support tribal self-government and economic self-sufficiency. President Clinton's Executive Order 13175 recognized 'the right of Indian tribes to self-government' and supported 'tribal sovereignty and self-determination.' President George W. Bush issued a Presidential Proclamation 7500 November 12, 2001 stating 'we will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities.'" Chambers, *supra* note 51 at 13A-4 [footnotes omitted].

protect citizens from the impacts of climate change.[61] A trust relationship includes a duty of loyalty from the trustee, in this case the federal government, to the beneficiary, indigenous nations:

> The duty of loyalty reaches its pinnacle with respect to natural assets necessary for public survival—like the atmosphere. Because such assets are crucial and irreplaceable, breaching the strict duty of loyalty may bring irreversible damage to society and future generations. Thus, the inquiry into fiduciary loyalty must be particularly demanding with respect to issues such as global warming. While it is true that government sometimes must balance competing public interests in managing the natural trust, that situation is much different than making a trade-off of public interests to benefit private singular interests.[62]

The federal government's federal trust responsibility to indigenous nations should inform consideration of any environmental justice claim arising in Indian country.[63] Failure to include consideration of this responsibility results in indigenous nations being deprived of meaningful participation in the consideration of climate change related claims, which are in fact environmental justice claims. When this responsibility is binding, the federal government owes the most exacting obligation to indigenous nations to ensure that their natural resources are sustained. Trust responsibilities extend to the

61. Wood, *supra* note 54 at 96 ("In the face of climate crisis, the most pressing matter is defining a fiduciary obligation for protecting the atmosphere, a trust asset that has never before been 'managed'. . . The scientifically established structure reflected in the *Target*, as adapted to comport with changed scientific understanding, can be invoked as a generic standard of fiduciary obligation applicable to each industrialized nation.") [footnotes omitted].

62. *Ibid* at 100 [footnotes omitted].

63. This principle, that the federal government owes certain duties and obligations to indigenous nations under the federal trust responsibility doctrine, may appear to contradict the principle that decision makers must also take into consideration tribal sovereignty when evaluating environmental justice claims arising in Indian country. However, the goals of respecting tribal sovereignty and upholding the federal trust responsibility must be fulfilled within the regulatory scheme applicable to modern day Indian country. Resolution of the apparent tension between these two legal concepts is beyond the scope of this chapter.

federal government as a whole. As such, in evaluating an environmental justice claim arising in Indian country, such as the *Kivalina* claim, it is critical that federal courts uphold the federal government's trust responsibility to indigenous nations. Failure to do so results in an environmental injustice.

3. Unique Tribal Connection to the Land and Environment

> *We are the land*. — Paula Gunn Allen, Laguna Writer, *Iyani: It Goes This Way*

Indigenous communities' claims also require special consideration because many indigenous cultures and traditions are tied to the environment and land in a manner that differs from other environmental justice communities.[64] Land "is the source or spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape."[65] Similarity in connections to environment and the land between

64. Each tribal nation has a different relationship with its environment and there is not a common "Native experience," but rather a broad diversity of thought and experience related to one's relationship with land and the environment. In particular, traditional stereotypes of indigenous people as "Noble Savages" or "Bloodthirsty Savages" should be avoided. See Rebecca A Tsosie, "Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge" (1996) 21 Vt L Rev 225 at 271 [Tsosie, "Tribal Environmental Policy"] ("The problems of cross-cultural interpretation and the attempt to define 'traditional' indigenous beliefs raise a common issue: the tendency of non-Indians to glorify Native Americans as existing in 'perfect harmony' with nature (the 'Noble Savage' resurrected) or, on the other hand, denounce them as being as rapacious to the environment as Europeans (the 'Bloodthirsty Savage' resurrected)."); see also Ezra Rosser, "A Historical Indians and Reservation Resources" (2010) 40 Envtl L 437 at 465-68 (explaining the stereotype of Natives as environmental stewards and its likely origins).

65. Frank Pommersheim, "The Reservation as Place: A South Dakota Essay" (1989) 34 SDL Rev 246 at 250; see also National Congress of American Indians, Resolution #EWS-06-2004—Supporting a National Mandatory Program to Reduce Climate Change Pollution and Promote Renewable Energy (2006 Mid-Year Session) ("climate-related changes to the weather, food sources, and local landscapes undermine the social identity and cultural survival of American Indians and Alaskan Natives. . .").

indigenous people may be a result of the fact that many indigenous cultures are "land-based."[66] Moreover, many individual indigenous people possess a spiritual connection with land and the environment.[67] These people "continue to have a deep relationship with ancestral homelands for sustenance, religious communion and comfort, and to maintain the strength of personal and interfamiliar identities. Through language, songs, and ceremonies, tribal people continue to honour sacred springs, ancestral burial places, and other places where ancestral communities remain alive."[68] The spiritual connection between many indigenous nations and their surrounding environment is crucial to the sovereignty of these nations.[69]

Therefore, as the land changes due to climate change, many communities may be faced with devastating impacts on their culture, spirituality and traditions, especially as land is literally lost to the elements as is the case in the Arctic where both the Native Village of Kivalina and the Inuit Circumpolar Council are located. Such spiritual, cultural and historical connections to the land affected play an important role in any environmental justice claims arising in Indian country. This is because for many indigenous nations land, identity and sovereignty are uniquely connected. A court's failure to consider these interconnections would negatively impact the quality of the indigenous nation's participation in the legal process.

66. Tsosie, "Tribal Environmental Policy," *supra* note 64 at 274.

67. *Ibid*. "American Indian tribal religions. . . are located 'spatially,' often around the natural features of a sacred universe. Thus, while indigenous people often do not care when the particular event of significance in their religious tradition occurred, they care very much about *where* it occurred." *Ibid* at 282-83 [footnotes omitted].

68. Wood & Welcker, *supra* note 53 at 381.

69. *Ibid* at 424 ("Trust concepts therefore help to provide tribes with two essential tools of traditional Native self-determination: access to sacred lands and the ability to sustainably use the natural resources on those lands. These were, and remain today, vital tools of nation-building.").

II. FIRST CASE STUDY: THE ICC'S 2005 PETITION TO THE IACHR

A. THE INUIT CIRCUMPOLAR CONFERENCE'S PETITION

The ICC represents over 150,000 Inuit residing in Canada, Greenland, Russia and the United States.[70] Because of climate change, the Inuit are experiencing profound changes in their environment. As Sheila Watt-Cloutier, Chair of the ICC explained in 2005, "[t]he range of these changes is well known: melting permafrost, thinning and ablation of sea ice, receding glaciers, invasion of species of animals not previously seen in the Arctic, increased coastal erosion, longer and warmer summers and shorter winters."[71] More than changing the Inuit environment, these changes have life-altering implications for the Inuit as, for many, their culture is intimately connected to the environment and cold.[72] "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."[73] Although the Inuit have previously demonstrated the ability to adapt to a changing environment, the extensive and likely permanent changes to the Arctic because of climate change will decrease or even potentially eradicate their ability to adapt.[74] This conclusion is buttressed by the fact that past successful adaptation efforts occurred at a time before the Inuit were legally tied to certain

70. "The Climate Change Petition by the Inuit Circumpolar Conference to the Inter-American Commission on Human Rights" (Presentation by Sheila Watt-Cloutier, Chair, Inuit Circumpolar Conference, delivered at the Eleventh Conference of the Parties to the UN Framework Convention on Climate Change, Montreal, 7 December 2005) online: <http://www.inuitcircumpolar.com/index.php?ID=318&Lang=En>.

71. *Ibid*.

72. *Ibid*.

73. *Ibid*.

74. *Ibid*; Hohmann, *supra* note 14 at 306 ("While the Inuit have shown a strong ability to adapt to changes in the location of their housing without relinquishing their culture, the lives of many Inuit, especially the young, are fractured by the move into settled areas and the loss of contact with the land.") [footnotes omitted].

portions of the land.[75] These legal restrictions on the American Inuit further reduce their ability to adapt to the impacts of climate change, as they are constrained to certain portions of land.[76]

On December 7, 2005, the ICC filed a petition with the IACHR, which is a Commission of the Organization of American States (OAS).[77] Sixty-two Inuit were named as petitioners in the petition.[78] The ICC determined that the OAS system was an appropriate venue for its concerns because

> it is receptive to claims by private citizens, it is often progressive and innovative in interpreting and applying human rights law, it takes note of new developments in other human rights systems, and its interpretation of the rights within its purview seems favorable to such a claim.[79]

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75. See generally Newton et al, *supra* note 34 for a discussion of how the *Alaska Native Claims Settlement Act* legally affects the property interests of Alaskan Inuit. Admittedly, the *Alaska Native Claims Settlement Act* only impacts the American Inuit. See also Hohmann, *supra* note 14 at 315 ("An Inuit culture forced to remain static in order to retain its right to be recognized by the government as valuable and unique cannot adapt to these changing conditions without risking the loss of important rights, recognized only after long struggle with the Euro-Canadian culture and state.").

76. *Ibid*. Based on the authors' attendance at the University of Ottawa's conference entitled "Environmental Justice and Human Rights: Investigating the Tensions, Exploring the Possibilities" on 8-10 November 2012, it appears that the law applicable to Canadian Inuit would also negatively affect their ability to adapt to the deleterious effects of climate change. For more information on this conference, see online: <http://www.cdp-hrc.uottawa.ca/?p=5570>.

77. Although the ICC represents Inuit living in Greenland and Russia as well as in Canada and United States, the ICC's 2005 petition was limited to those Inuit living in Canada and the United States, as the IACHR's jurisdiction is limited to nation states within the Americas. 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 7 December 2005) online: <http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf> [ICC Petition]. The Organization of American States is composed of all of the nations of North and South America. Organization of American States online: OAS <http://www.oas.org>. The IACHR is headquartered in Washington, D.C. *Ibid*.

78. *Ibid*. Even though the petition was submitted on behalf of individual Inuit, sovereignty considerations, as discussed above, are still applicable as the individual Inuit are members of sovereign indigenous nations and the sovereign identity of these Inuit nations may go to the very personhood of the individual Inuit. See generally 77 Fed Reg 47868 (10 August 2012) (listing those indigenous nations recognized by the United States, including some Inuit communities).

79. Wagner & Goldberg, *supra* note 12 at 1.

The ICC brought its claim in the IACHR against the United States.[80] "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.'"[81] The ICC argued that as a significant contributor to climate change through its greenhouse gas emissions, the United States is a significant contributor to the negative environmental impacts affecting the Inuit in both Canada and the United States.[82] Because of the United States' significant contribution to climate change, the ICC asserted that Inuit rights under the American Declaration of the Organization of American States had been violated.[83] Specifically, the ICC argued that the United States, because of its greenhouse gas emissions, had infringed the following rights under the American Declaration: the right to enjoy the benefits of their (Inuit's) culture, the right to use and enjoy lands they have traditionally used and occupied, the right to use and enjoy their personal property, the right to the preservation of health, the right to life, physical integrity and security, the right to their own

80. ICC Petition, *supra* note 77. The ICC petition focused on the United States in part because of the American withdrawal from Kyoto, "a decision which the petition argues forms a key part of the US failure to control its greenhouse gas emissions adequately." Osofsky, "Impacts of Climate Change," *supra* note 16 at 318. Even though the United States' involvement in international discussions related to climate change under the Obama Administration has arguably increased, the United States remains outside of the Kyoto Protocol as of this writing. *Ibid* at 319. Overall, some commentators have concluded that the United States has been the slowest nation to respond to the global problem of climate change. Sarah Nuffer, "Human Rights Violations and Climate Change: The Last Days of the Inuit People?" (2010) 37 Rutgers L Rec 182 at 184.

81. *Ibid* at 188 (citing at n 69 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" (2007) 43 Stan J Int'l L 3 at 36).

82. ICC Petition, *supra* note 77.

83. Osofsky, "Impacts of Climate Change," *supra* note 16 at 325 ("[T]he petition relied upon rights contained in the regionally-based American Declaration of the Rights and Duties of Man because the United States is not party to the American Convention on Human Rights.") [footnotes omitted].

means of subsistence, and the Inuit's' rights to residence and movement and inviolability of the home.[84]

After filing the petition with IACHR, Sheila Watt-Cloutier, then-Chair of the ICC, explained that:

> [w]hat is happening affects virtually every facet of Inuit life—we are a people of the land, ice, snow, and animals. Our hunting culture thrives on the cold. We need it to be cold to maintain our culture and way of life. Climate change has become the ultimate threat to Inuit culture. How would you respond if an international assessment prepared by more than 300 scientists from 15 countries concluded that your age-old culture and economy was doomed, and that you were to become a footnote to globalization?[85]

Despite the fact that the ICC knew it would be exceedingly difficult to succeed on the petition to the IACHR, the ICC still moved forward with the petition in an effort to open up the dialogue about the link between greenhouse emissions and climate change, as well as the effects of climate change on indigenous people.[86] As Sheila Watt-Cloutier noted, the petition had "great moral value" and was a vehicle to "educate and encourage."[87] The petition was a mechanism to engage the United States on the issue of its greenhouse gas

84. ICC Petition, *supra* note 77 at 74-95. For a general discussion of each of these claims, see Nuffer, *supra* note 80 at 189-91.

85. Osofsky, "Impacts of Climate Change," *supra* note 16 at 313-14 (citing Sheila Watt-Cloutier, *supra* note 70).

86. *Ibid* at 316. Interestingly, however, the petition was not a "lost cause." As Professor Osofsky explained "[t]he Inuit petition builds on the existing jurisprudence in the Inter-American Commission on Human Rights by presenting an environmental rights' harm that is separated in both time and location from the behavior causing it. The previous decisions of the Inter-American Commission and Court on Human Rights demonstrate receptiveness to the interweaving of environmental harm and human rights violations, especially in the context of indigenous peoples." *Ibid* at 327 [footnotes omitted]. Conversely, however, "the Inuit petition was filed in the wake of the US government refusing to change its behaviour in response to a successful petition by Mary and Carrie Dann—members of the Western Shoshone indigenous peoples—to the Inter-American Commission on Human Rights that challenged the US government's expropriation of their land; it was thus unclear at the time of filing what formal change would have resulted even if the Commission had been more amenable to the Inuit's petition." *Ibid* at 329.

87. Nuffer, *supra* note 80 at 192 (citing Hari M Osofsky, "The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights" (2007) 31 Am Indian L Rev 675 at 686).

emissions and its significant contributions to climate change.[88] Although the IACHR would not have had the authority to compel the United States to reduce its greenhouse gas emissions, the ICC hoped that a favourable outcome would have compelled the United States to enter into negotiations related to its greenhouse gas emissions.[89]

The IACHR's response to the ICC's petition was exceedingly brief, consisting of only two paragraphs.[90] 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 rights protected by the American Declaration."[91] Ultimately, the IACHR found that "it will not be possible to process [the ICC's] petition at present because the information it contains does not satisfy the requirements set forth in those Rules and the other applicable instruments."[92] In response to the IACHR's letter and determination of the merits of the ICC's petition, the ICC requested that the IACHR hold a hearing on the potential connection between climate change and human rights, which was the basis of the ICC's original petition to the IACHR.[93] The IACHR granted the ICC's request and held a hearing on the connection between climate change and human rights in March 2007.[94] "Sheila Watt-Cloutier, Martin Wagner, and Donald Goldberg spoke on behalf of the Inuit people. While

88. Osofsky, "Impacts of Climate Change," *supra* note 16 at 316. Although it would be difficult to draw a direct connection between the ICC's petition and the United States' subsequent actions, the United States' participation in international discussions related to climate change and its domestic regulation of greenhouse gases have increased since the ICC's petition was filed in 2005. *Ibid* at 320-23. It is therefore possible that the ICC petition played a role in spurring the United States to act to curb its greenhouse gases. Professor Osofsky explained that "the petition becomes a dialogue between the United States and indigenous peoples based in the Arctic (including in the United States) through a shared commitment to human rights protection; the petition thus potentially serves as a bridge between nation-states and civil society." *Ibid* at 326.

89. Wagner & Goldberg, *supra* note 12 at 4.

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

91. *Ibid*.

92. *Ibid*.

93. Osofsky, "Impacts of Climate Change," *supra* note 16 at 314, n 3.

94. *Ibid* at 314.

the hearing did not force the IACHR or the United States to take any action, it publicized the issue of GCC [Global Climate Change] and the human rights violations of the Inuit people."[95] Since the hearing in 2007, the IACHR has indicated that it remains interested in the rights of indigenous peoples within the Americas.[96]

B. EVALUATING THE ICC'S PETITION FROM AN ENVIRONMENTAL JUSTICE PERSPECTIVE

Having outlined the contours of the ICC petition to IACHR, it is now possible to explore the petition from an environmental justice perspective. The ICC petition to the IACHR is interesting in that it advances the development of indigenous groups' environmental justice claims. The ICC's petition arose because of environmental justice concerns and threats to the human rights of ICC members. In essence, by bringing their claim in the IACHR, the Inuit co-opted the international human rights regime to bring forward an environmental justice claim. The Inuit contribute little to the problem of climate change. However, the Inuit are losing their land and culture because of climate change. As explained in the ICC's petition, it is the United States that is contributing substantial greenhouse gas emissions.[97] Rather than approaching this inequitable reality from an environmental regulation perspective, the ICC petition reframed the issue as a threat to human rights.[98] Accordingly, the ICC's petition constitutes an interesting legal development as the petition takes what is an environmental justice problem and explores it from a human rights perspective.

As Professor Hari Osofsky explained, the petition is a valuable legal development in the "extent to which the petition

95. Nuffer, *supra* note 80 at 191 (citing at n 107 Letter from Sheila Watt-Cloutier, Martin Wagner, and Daniel Magraw to Santiago Canton, Executive Secretary Inter-American Commission on Human Rights, 15 January 2007 online: <http://www.ciel.org/Publications/IACHR_Letter_15Jan07.pdf>).

96. Osofsky, "Impacts of Climate Change," *supra* note 16 at 314.

97. ICC Petition, *supra* note 77.

98. Nuffer, *supra* note 80 at 188 ("This petition [ICC petition] is the first to connect GCC [Global Climate Change] and human rights.") (citing ICC Petition, *supra* note 77 at 6).

creates links across several types of divisions generally recognized in the law."[99] "The Inuit's attempt to 'encourage and inform' forms part of a transnational regulatory dialogue in which a mix of public and private actors participate."[100] Although often linked in practice, the discourse about human rights is a separate issue from claims based on human rights under the law.[101] However, given that the ICC's petition was unsuccessful based on its merits, the petition not only identifies ways in which existing legal doctrines may be bridged, but also represents limitations within the existing legal regime, at least as the law applies to victims of climate change.[102] As one scholar concluded, "while human rights present a powerful strategy for marginalized communities in the face of climate change, the risks inherent in these strategies should be carefully considered by the Inuit."[103] An interesting post-script to the ICC's petition, however, is that the international community's awareness of the relationship between climate change and human rights has developed considerably in the years following the petition.[104]

Not only did the ICC's petition help develop the law in an important way by viewing claims related to climate change from both environmental justice and human rights perspectives, the ICC's petition is consistent with the unique factors discussed above that should be considered when evaluating an environmental justice claim arising within Indian country.

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99. Osofsky, "Impacts of Climate Change," *supra* note 16 at 316.

100. *Ibid* at 332 [footnotes omitted].

101. Hohmann, *supra* note 14 at 308 (discussing the connection between the ICC's petition and the Inuit's use of igloos, which was a traditional housing method used by the Inuit).

102. Osofsky, "Impacts of Climate Change," *supra* note 16 at 316.

103. Hohmann, *supra* note 14 at 309 (discussing the connection between the ICC's petition and the Inuit's use of igloos, which was a traditional housing method used by the Inuit).

104. See Nuffer, *supra* note 80 at 192. See also UNHRC, 10th Sess, 41st Mtg, Res 10/4, *Human Rights and Climate Change*, 25 March 2009 online: <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf> ("*Affirming* that human rights obligations and commitments have the potential to inform and strengthen international and national policymaking in the area of climate change, promoting policy coherence, legitimacy and sustainable outcomes.").

First, any environmental justice claim brought by an indigenous nation must include a consideration of the nation's sovereignty and the federal government's trust responsibility to indigenous nations. Although the ICC petition does not speak directly to American Inuit sovereignty or the federal government's trust responsibility to Inuit nations, the petition does speak at length of the necessity of the IACHR's consideration of the particular historical, cultural, social and economic situation and experience of the Inuit petitioners.[105] As explained at length above, American Inuit indigenous peoples' sovereignty and the federal trust relationship owed to the Inuit peoples are integral parts of their history and social and economic situation.[106] Accordingly, the ICC petition creates a space for consideration of the Inuit's sovereignty and the American federal government's trust responsibility to American Inuit.

Moreover, any environmental justice claim arising in Indian country and involving indigenous people should address the community's unique connection to the land, both legally and from a spiritual and cultural perspective. The ICC's petition to the IACHR also fulfills this objective. The ICC's petition is based on the United States' alleged violation of the Inuit's' human rights, rights including the right to use and enjoy lands that they have traditionally used and occupied, right to use and enjoy their personal property, and rights to residence and movement and inviolability of the home.[107] The assertion that the United States violated the Inuit's basic human rights in these various ways recognizes that many Inuit are uniquely connected to the land that they live on and that the connection to the land is important to both their property and personhood. More than mere property, the land and environment in question provide the foundation for the Inuit culture.[108]

105. ICC Petition, *supra* note 77 at 70-72.

106. *Ibid* at Part I.B.1 & 2.

107. *Ibid*.

108. Hohmann, *supra* note 14 at 295 (discussing the connection between the ICC's petition and the Inuit's use of igloos, which was a traditional housing method used by the Inuit).

Furthermore, the ICC petition is consistent with Inuit tradition and culture, which relied on oral traditions.[109] "The petition provides a telling of the story of the US responsibility for the devastation climate change has wreaked upon them."[110] Environmental justice counsels that the community should be empowered to bring its claim.[111] Here, the Inuit community told its own story of the impacts of climate change and filed its own petition with the IACHR. In this way, the ICC petition is consistent with principles of environmental justice as applied to claims arising in Indian country.

III. SECOND CASE STUDY: *KIVALINA'S* CLAIM IN AMERICAN COURTS

This part of the article summarizes the courts' decisions in the *Kivalina* litigation in the United States District Court for the Northern District of California in September 2009 and the United States Court of Appeals for the Ninth Circuit in September 2012. It then analyzes the *Kivalina* litigation from an environmental justice perspective and argues that, because of the special circumstances of indigenous nations, the plaintiffs in *Kivalina* should be deemed to have standing and their claim should be considered justiciable. Although the

109. Although this article makes reference to cultures and traditions mentioned in the ICC petition, the authors recognize that one should not pigeonhole indigenous peoples into cultural stereotypes. *Ibid* at 310 ("Similarly, to emphasize the differences between them and the rest of Canadian society, some Inuit organizations may deem it useful to depict their members as primarily preoccupied with traditional pursuits. In both cases, though, it is wrong to believe and let others believe that Inuit identity is bounded by a narrowly defined series of traditional cultural traits.") (citing at n 70 Louis-Jacques Dorais, *Quaqtaq: Modernity and Identity in an Inuit Community* (Toronto, Buffalo and London, UK: University of Toronto Press, 1997) at 6). Moreover, it is important not to view culture and tradition as "frozen" and impervious to change. *Ibid* at 313-14 (citing at n 82 John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am Indian L Rev 37 at 60).

110. Osofsky, "Impacts of Climate Change," *supra* note 16 at 333; see also Hohmann, *supra* note 14 at 295, 309 ("It is because climate change is a human story that we have connected climate change and human rights.") (citing Sheila Watt-Cloutier, "Connectivity: The Arctic-The Planet: Address on Receiving the Sophie Prize," address delivered at Oslo, Norway, June 2005 online: <http://www.inuitcircumpolar.com/index.php?auto_slide=&ID=317&Lang=En&Parent_ID=&current_slide_num)>.

111. See generally Cole & Foster, *supra* note 20.

plaintiffs failed to secure relief in federal court, Kivalina's journey in the American court system could continue for several more years at the state level. Unfortunately, Kivalina may not be able to sustain its community in its current location for the duration of the litigation.

A. THE *KIVALINA* LITIGATION

The Native Village of Kivalina, a self-governing, federally recognized tribe of Inupiat Native Alaskans, sits precariously at the top of a six-mile long barrier reef on the northwest coast of Alaska. Located approximately seventy miles north of the Arctic Circle, it is a tiny island on a thin strip of land, nestled between a sea and a lagoon.[112] The Kivalina coast is comprised of sea ice, which acts as a barrier for the small village against coastal storms and waves.[113] The sea ice surrounding this environmentally vulnerable island is critical to its survival.

In the past decade, storms have caused the loss of approximately 100 feet from the Kivalina coastline.[114] In 2006, the United States Army Corps of Engineers (USACE) released a report on the erosion suffered by Kivalina, concluding that climate change has affected the extent of sea ice surrounding the island's coastline.[115] Since 2006, climate change has continued to exact its toll on the island of Kivalina. Homes and buildings are in imminent danger of falling into the sea and critical infrastructure is threatened with permanent destruction.[116]

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112. *Native Village of Kivalina v ExxonMobil Corp*, 696 F (3d) 849 at 868-69 (9th Cir 2012) [*Kivalina*].

113. *Ibid*.

114. Christine Shearer, *Kivalina: A Climate Change Story* (Chicago: Haymarket Books, 2011) at 14.

115. US Army Corps of Engineers, Alaska District, *Alaska Village Erosion Technical Assistance Program: An Examination of Erosion Issues in the Communities of Bethel, Dillingham, Kaktovik, Kivalina, Newtok, Shishmaref, and Unalakleet* (April 2006) at 23.

116. Brief of Plaintiffs-Appellants, *Native Village of Kivalina v ExxonMobil Corp*, [10 March 2010] No. 09-17490 at 8.

The reduction and near destruction of the protective sea ice has rendered the island uninhabitable and has triggered a need for relocation in the immediate future. In 2003, the USACE and the United States General Accounting Office predicted that a dangerous combination of storm activity "could flood the entire village at any time."[117] A decade later, the inhabitants of Kivalina continue to live in fear of being destroyed by the effects of climate change and remain unable to afford the millions of dollars in relocation costs necessary to re-establish the community in a safer location.

With no available options to ensure the safety of their future, the Native Village of Kivalina and the City of Kivalina ("plaintiffs") decided to take this matter to court to seek damages for the costs of relocating their community of approximately 400 residents. The plaintiffs filed a federal common law claim of public nuisance against twenty-two major oil, energy, and utility companies.[118] The plaintiffs alleged that these defendants were "substantial contributors to global warming,"[119] and that the greenhouse gas emissions from these companies exacerbated sea level rise and ultimately contributed to increased coastal erosion that destroyed part of their village and will require relocation of Kivalina's residents.[120] The plaintiffs also claimed that these companies were "conspiring to mislead the public about the science of global warming."[121]

The defendants moved to dismiss the case for lack of subject matter jurisdiction and for failure to state a claim.[122]

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117. US, General Accounting Office, *Alaska Native Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance* (Report #GAO-04-142) (December 2003) at 32.

118. *Kivalina*, *supra* note 112 at 853. The defendants are: (1) ExxonMobil Corp; (2) BP PLC; (3) BP America; (4) BP Products North America; (5) Chevron Corp; (6) Chevron USA; (7) ConocoPhillips Co; (8) Royal Dutch Shell PLC; (9) Shell Oil Co; (10) Peabody Energy Corp; (11) The AES Corp; (12) American Electric Power Co; (13) American Electric Power Services Corp; (14) Duke Energy Corp; (15) DTE Energy Co; (16) Edison International; (17) MidAmerican Energy Holdings Co; (18) Pinnacle West Capital Corp; (19) The Southern Co; (20) Dynegy Holdings; (21) Xcel Energy; and (22) Genon Energy.

119. *Ibid* at 853-54.

120. *Ibid*.

121. *Ibid* at 854. A discussion of the civil conspiracy claim is beyond the scope of this article.

122. *Ibid*.

The district court dismissed the case because the plaintiffs lacked standing[123] and because the dispute was non-justiciable under the political question doctrine.[124]

In a 3-0 decision, the United States Court of Appeals for the Ninth Circuit relied on federal displacement reasoning to affirm the district court's dismissal of the plaintiffs' claims.[125] In considering the federal common law claim of public nuisance, the court first addressed "whether such a theory is viable under federal common law in the first instance and, if so, whether any legislative action has displaced it."[126] Ultimately answering both questions in the affirmative, the court stated that "federal common law develops when courts must consider federal questions that are not answered by statutes."[127] The court also confirmed that "federal common law can apply to transboundary pollution suits."[128] Nevertheless, the court concluded that regardless of whether Kivalina could assert a valid public nuisance claim against the defendants, "[i]f Congress has addressed a federal issue by statute, then there is no gap for federal common law to fill."[129] Accordingly, if a statute (in this instance, the *Clean Air Act*) directly addresses the issue in dispute, federal common law claims are barred.[130]

Consistent with these principles, the court relied on the 2011 US Supreme Court decision in *American Electric Power (AEP) v Connecticut* because of its similarities to the *Kivalina* situation.[131] Although the plaintiffs in *AEP* sought only injunctive relief requesting abatement of future carbon

123. *Ibid*.

124. *Ibid*. The political question doctrine refers to matters that federal courts will not adjudicate because they are inappropriate for judicial review. Erwin Chemerinsky, *Constitutional Law*, 3d ed (New York: Aspen Publishers, 2009) at 103. The doctrine is supported by separation of powers principles in that it "minimizes judicial intrusion into the operations of other branches of government and that it allocates decisions to the branches of government that have superior expertise in particular areas." *Ibid*.

125. *Ibid* at 853.

126. *Ibid* at 855.

127. *Ibid*.

128. *Ibid*.

129. *Ibid* at 856.

130. *Ibid*.

131. *Ibid*.

emissions, unlike the plaintiffs in *Kivalina* who sought damages caused by previous emissions, the *AEP* Court concluded that "under current Supreme Court jurisprudence, if a cause of action is displaced, displacement is extended to all remedies."[132] The Court reasoned that if congressional action has displaced a federal common law cause of action, "it would be incongruous to allow it to be revived in another form."[133]

Therefore, when Congress gave the power to regulate carbon and other emissions to the EPA, it charged that agency with regulating all aspects of that field, including the remedies available.[134] The Ninth Circuit acknowledged that "[t]he Supreme Court could, of course, modify. . . [its] approach to displacement, and will doubtless have the opportunity to do so."[135] However, until then, this theory of displacement bars federal claims like the one at issue in the *Kivalina* case.

The Ninth Circuit's opinion did not unanimously embrace this federal displacement reasoning, however. Judge Pro's concurring opinion highlighted "tension in Supreme Court authority on whether displacement of a claim for injunctive relief necessarily calls for displacement of a damages claim. . ."[136] Judge Pro distinguished cases on which the majority opinion relied to support his conclusion that there is an inherent conflict with the displacement doctrine.[137]

Judge Pro noted that there is a potential gap in the majority opinion's reasoning barring *Kivalina's* claim.[138] He asserted that the federal displacement logic in the majority opinion should not control *Kivalina's* situation because it involves a claim for damages, unlike *AEP*, and because the law is unclear as to whether displacement of injunctive relief would necessarily preclude a claim for damages. Once the Ninth Circuit's decision is removed from its federal displacement moorings, the environmental justice equities can be properly considered.

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132. *Ibid* at 857.
133. *Ibid*.
134. *Ibid* at 858.
135. *Ibid* at 857.
136. *Ibid* at 858.
137. *Ibid* at 859 -67.
138. *Ibid* at 865-66.

Judge Pro, however, went on to conclude that Kivalina lacked standing.[139] He reasoned that the plaintiffs were unable to show plausible traceability from the defendants' actions to their injuries.[140] Moreover, the plaintiffs did not pinpoint a specific time that the injury occurred.[141] According to Judge Pro, if the plaintiffs were deemed to have standing, the named defendants would potentially be held liable for greenhouse gas emitters from around the world and throughout history if the plaintiffs' claim were allowed to proceed.[142] Consequently, the plaintiffs are doubly burdened by the unfriendly federal displacement reasoning in the majority opinion and the unfriendly standing reasoning in the concurring opinion of the Ninth Circuit decision.

Undaunted by this unwelcoming reception, the plaintiffs in the *Kivalina* case filed a petition for rehearing en banc with the Ninth Circuit. On November 22, 2012, the Ninth Circuit denied the petition in a two sentence decision: "The panel has voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc."[143]

On May 20, 2013, the US Supreme Court denied Kivalina's petition for a writ of certiorari.[144] Options in the US court system for the *Kivalina* plaintiffs are now extremely limited and unlikely to succeed. They can file a new case in state court alleging a state law-based public nuisance claim, which is unlikely to succeed because the courts will likely conclude that the *Clean Air Act* pre-empts such claims.[145] Potential federal or state legislative remedies may be available to the

139. *Ibid* at 867.
140. *Ibid* at 868.
141. *Ibid*.
142. *Ibid*.
143. Order on Petition for Rehearing, *Native Village of Kivalina v ExxonMobil Corp* [27 November 2009] No. 09-17490.
144. Petition for writ of certiorari denied, *Native Village of Kivalina v ExxonMobil Corp* [20 May 2013] No. 12-1072 online: <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-1072.htm>.
145. J Wylie Donald, "No En Banc Appeal in Kivalina: So What's Next for Climate Change Litigation?" *Climate Lawyers.com* (8 December 2012) online: Climate lawyers.com <http://www.climatelawyers.com/post/2012/12/08/No-En-Banc-Appeal-in-Kivalina3b-So-Whats-Next.aspx>.

Kivalina residents; however, a discussion of those options is beyond the scope of this article.

B. EVALUATING THE *KIVALINA* CASE FROM AN ENVIRONMENTAL JUSTICE PERSPECTIVE

As discussed in Part I of this article, environmental justice claims arising in Indian country must include consideration of (1) tribal sovereignty, (2) the federal government's trust responsibility to indigenous nations, and (3) the special cultural and spiritual relationship that indigenous nations have to their lands. As a branch of the federal government, the federal judiciary should uphold these obligations.

From an environmental justice perspective, several arguments can be advanced to advocate for the continued consideration of the plaintiffs' federal common law public nuisance claim in *Kivalina*. First, the plaintiffs in *Kivalina* argued that they were entitled to relaxed "special solicitude"[146] standing requirements derived from *Massachusetts v EPA*.[147] The district court concluded that the plaintiffs were not entitled to such special standing because, unlike the state plaintiff in *Massachusetts v EPA*, the plaintiffs here were seeking damages against a variety of private interests, not asserting procedural rights concerning an agency's rulemaking authority.[148] The special sovereign status of federally recognized tribes like the Native Village of Kivalina should enable these communities to have standing in these cases.[149]

Standing merely grants parties the right to have the merits of their claims heard in court. The plaintiffs in *Kivalina* still would face daunting challenges in proving their case at trial and ultimately securing damages for relocation from

146. The term "special solicitude" in the majority's opinion in *Massachusetts v EPA*, 549 US 497 (2007) is derived from the landmark case, *Georgia v Tennessee Copper*, 206 US 230 (1907). The term refers to a state's special ability to sue on behalf of its citizens to protect the natural resources and environmental health and safety of its citizens within its borders.

147. *Kivalina Complaint*, *supra* note 10 at 883 (citing *Massachusetts v EPA*, *supra* note 146).

148. *Ibid*.

149. See generally Elizabeth Ann Kronk, "Effective Access to Justice: Applying the *Parens Patriæ* Standing Doctrine to Climate Change-Related Claims Brought by Native Nations" (2011) 32 Pub Land & Resources L Rev 1.

the corporate defendants. Nevertheless, as an environmental justice community with special sovereign status, Kivalina should have standing to bring this claim. Such a ruling would not create a problem of opening the floodgates of litigation because very few entities in the nation enjoy this special sovereign status to sue on behalf of its residents. Such claims would be limited to the 50 states and the federally recognized tribes. Federal environmental law already recognizes this special status of Indian tribes by authorizing tribes to manage *Clean Air Act* and *Clean Water Act* programs on tribal lands through the treatment as state provisions of these laws.[150] Conferring standing to these federally recognized tribes would promote procedural justice for these environmental justice communities.

Second, there is a fundamental analytical flaw in the Ninth Circuit's reasoning in *Kivalina*. The majority opinion improperly relied on the Supreme Court's decision in *AEP* as support for dismissing the *Kivalina* case on displacement grounds. Unlike the scenario in *AEP* in which the plaintiffs were seeking injunctive relief, the plaintiffs in *Kivalina* are seeking damages and this remedy should not be barred by federal displacement reasoning. Judge Pro's concurring opinion in *Kivalina* recognized this potential flaw in the majority opinion's reasoning; however, he supported dismissal of the case because he concluded that the plaintiffs lacked standing.

Third, the plaintiffs' federal common law public nuisance claim should be heard based on the trusteeship relationship that the federal government has with Indian tribes and because of the tribes' special relationship to their lands. The outcome in *Kivalina* could still hold as a general matter, but from an environmental justice perspective, a narrow exception to the bar on federal common law public nuisance actions could be carved out for federally recognized tribes for these reasons. The federal government has a legal and moral duty of protection that it is failing to fulfill by allowing indigenous communities to lose their homelands. Moreover, the cultural

150. See EPA American Indian Environmental Office Tribal Portal, "Treatment in the Same Manner as a State" online: <www.epa.gov/tp/laws/tas.htm>.

and spiritual ties that tribes have to their lands require a heightened level of federal protection to avoid potential cultural genocide at the hands of climate change impacts in indigenous communities throughout the Arctic region.

One theme that unifies these points is that federal courts should apply a more "searching scrutiny" in evaluating these types of claims because they go to the very "personhood" of individual Natives. This is consistent with the Canons of Construction applicable to claims involving tribes and Indian people.[151] The Canons of Construction counsel that ambiguities should be resolved in favour of tribes, terms should be interpreted as Indians would have understood them, and provisions should be liberally construed in tribes' favor.[152] Moreover, territorial integrity is essential to sovereignty. Without such integrity it is difficult to maintain the separateness that is fundamental to sovereignty. It is through their citizenship in such tribal nations that many Natives define; it is the essence of their "personhood." Therefore, because climate change threatens the territorial integrity of many indigenous nations, it also threatens the very "personhood" of affected Natives. Such a threat certainly deserves a heightened level of review by federal courts.[153]

CONCLUSION

Climate change has imperilled and continues to jeopardize the physical integrity of the Arctic landscape and, correspondingly, the human rights of its indigenous inhabitants. Climate change impacts the Arctic region more severely than the rest of the world. Furthermore, Arctic indigenous communities are especially vulnerable to the abrupt and extreme changes to their homeland wrought by climate change

151. See generally Newton et al, *supra* note 34.

152. *Ibid*.

153. Newton, "Federal Power," *supra* note 31 at 244 ("[T]ribal membership is at the core of Indian *personal* identity, reflecting much more than a shifting political value choice or voluntary association. The tribe is a projection of the autonomous individual Indian. To some extent this unique interrelationship between tribe and individual identity is already recognized in the law: tribal membership as defined by the tribe is often the key element in determining whether a person is an Indian for some legal purposes.") [footnotes omitted].

because these communities typically rely heavily on natural resources vulnerable to climate change and lack financial resources to adapt to the loss of the natural resources.

This article has examined two case studies to convey the application of environmental justice principles to climate change impacts in Arctic indigenous communities. Although the ICC and *Kivalina* claims involve different forums, defendants, and legal theories, both were brought by Arctic indigenous communities in response to the negative impacts of climate change on their communities. Environmental justice as applied to indigenous communities draws on principles applicable to all environmental justice communities, such as the need for enhanced procedural and corrective justice for these communities, but it also includes consideration of factors not applicable to other environmental justice communities. Principles of tribal sovereignty, the federal government's trust responsibility to tribes, and many tribes' cultural and spiritual ties to their lands are important principles that should drive consideration of environmental justice claims to assist members of the Inuit and Kivalina communities. As demonstrated by the foregoing discussion, the ICC's IAHRC petition is an example of how an indigenous community can weave considerations of sovereignty and unique connections to land and the environment into a legal complaint challenging those who contribute to climate change. Conversely, the *Kivalina* litigation demonstrates how courts' failure to consider these unique attributes of indigenous communities leads to unjust results. Ultimately, to ensure environmental justice for these communities, both complaints brought by indigenous communities and the legal forums considering such complaints must incorporate environmental justice and the unique attributes of indigenous communities into any consideration of claims related to the impacts of climate change on indigenous people.