Tribal Self-Determination in a Low-Carbon Economy

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The indigenous peoples of the world will suffer, and are suffering, impacts of climate change in ways that are different from the kinds of impacts that will be suffered by the cosmopolitan peoples that inhabit most of the centers of political and economic power in the world today. The material cultures of indigenous peoples tend to be woven into the ecosystems where they live. Their religious cultures also tend to be rooted in the particular places where they live. The roots of their cultural identities reach back into mythic time, with countless generations of traditional ecological knowledge.

The kinds of impacts that we expect global warming to bring, the kinds of impacts that we are already witnessing, will stress indigenous cultures in ways that will threaten their survival as distinct peoples. As the plant and animal communities on which indigenous cultures are dependent drastically change, it will be increasingly difficult for indigenous peoples to maintain their ways of life. The traditional knowledge of the elders will seem less and less relevant in the lives of children and younger adults.

Cultures are dynamic, and the indigenous peoples of today have changed over centuries of contact with colonial or imperial powers, or with the successors-in-interest to colonial powers, such as the American people. The surviving indigenous peoples of the continental United States, Indian tribes, in many ways have become integrated into the larger American society—integrated in many ways, yet still culturally distinct and still determined to maintain core aspects of their cultural identities. That Indian tribes still possess their own cultural identities is in many ways remarkable, given the history of federal Indian policy, which included not just warfare and forced removal but two eras of federal policy when the national goal was to force Indian people to become assimilated into the American mainstream—the "allotment" era (about 1887 to 1934) and the "termination" era (about 1943 to about 1961). *See generally* Cohen's Handbook of Federal Indian Law §§ 104, 106 (2005 ed.). Forced assimilation and destruction of culture have since been declared to be contrary to the international law of human rights. United Nations Declaration on the Rights of Indigenous Peoples, A/61/L.67, Art. 8 (Sept. 12, 2007). More affirmatively, the U.N. Declaration states, in Article 3, "Indigenous Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The United States long ago abandoned forced assimilation of American Indian peoples. For about four decades now, the official national policy relating to Indian tribes has been to support the aspirations of Indian tribes to govern themselves and determine their own futures, as embodied in federal laws such as the Indian Self-Determination and Education and Assistance Act (ISDEAA) of 1975, as amended. 25 U.S.C. §§ 450–450n, 458aa–458aaa-18. This legislation established the framework for tribal governments to take over the operation of governmental programs previously administered by the Bureau of Indian Affairs (BIA) and Indian Health Service through self-determination contracts and self-governance compacts.

While tribes are culturally distinct, and have a right to maintain their cultural identities, it is also generally true that the people who live in tribal communities are also part of the larger American society. One of the ways in which Indian country in the United States has become integrated into, or at least quite similar too, the larger American society is reliance on energy from fossil fuels. The carbon footprints of most Indian reservations are probably comparable to those of neighboring communities. Indian reservations in rural areas are similar to other parts of rural America in the extent to which people are reliant on personal motor vehicles for transportation. Most of the funding that is available for transportation in Indian country, generally through the Bureau of Indian Affairs (BIA) Indian Reservation Roads Program, 25 C.F.R. part 170, is spent on road construction and maintenance. Like most of rural America, public transportation means an occasional bus or a concept that people in cities might talk about. Like other rural American families, most homes use energy derived from fossil fuels, and Indian families face increasing costs that stretch their budgets. Aside from energy consumption, for the better part of a century quite a number of tribes have been suppliers of fossil fuels to the larger American society. And then there are the carbon footprints of tribal casinos and the people who drive or ride buses to reach them.

In light of the range of impacts on tribal cultures, the energy consumption patterns within Indian country, and the other ways that tribes contribute to our national carbon footprint, it seems obvious that tribal governments need to be sovereign partners in national and regional programs to deal with the climate crisis, including strategies to promote energy efficiency and renewable energy. Well, obvious to me anyway. Apparently not so obvious to lots of other people. Rather, it seems that, despite four decades or so of federal policy supporting the basic principle that Indian tribes really are governmental entities in our federal system, lots of people, including many well-educated lawyers who are working with dedication to deal with the climate crisis, just don't think of Indian tribes as governments. I could cite some examples in support of this assertion, but I doubt that anyone working in the arena of the climate crisis will dispute the point. If there are any readers who know of good counterexamples, please share your information with me.

The last several months I have been donating some of my time to help the National Congress of American Indians (NCAI) and other nonprofit organizations, including the National Tribal Environmental Council (NTEC), analyze and critique climate crisis and energy bills in the current Congress. My role in this group effort has been to focus on

energy efficiency, especially in buildings. Nearly half of all the greenhouse gas emissions in the United States can be attributed to the energy consumption associated with buildings: heating, cooling, lighting, appliances, and the energy embedded in construction materials. As we know how to construct buildings that are much more efficient than today's standards, and as about 75 percent of our national building stock will be replaced by the middle of this century, improvements in building energy efficiency offer great opportunities for reducing greenhouse gas emissions. The nonprofit organization Architecture 2030 projects that by using building codes to progressively ratchet down the energy use associated with buildings, we could achieve more than half of the reductions needed to get 80 percent below 2005 levels by mid-century. Bills now working their way through Congress would put us on that path, so that by 2030, the net energy consumption of new residential and commercial buildings would be close to zero. This is the objective Section 201 of the American Clean Energy and Security Act, H.R. 2454, as passed by the House on June 26, 2009, and of Section 241 of the American Clean Energy Leadership Act, S. 1462, as reported out of the Senate Committee on Energy and Natural Resources on July 16, 2009.

Section 201 of H.R. 2454 and Section 241 of S. 1462 would each repeal statutory language currently codified at 42 U.S.C. § 6833 and replace it with new language. The existing statutory language, referred to in both bills as Section 304 of the Energy Conservation and Production Act [of 1976], was enacted by the Energy Policy Act of 1992 and was substantially amended by the Energy Policy Act of 2005. The existing law provides that whenever the International Code Council revises its International Energy Conservation Code (IECC) for residential buildings and whenever the American Society of Heating, Refrigeration, and Air Conditioning Engineers (ASHRAE) revises its commercial building standards the Secretary of Energy will make a determination as to whether the code revisions will improve the energy efficiency of buildings. If the Secretary makes such a determination, then each state shall review its buildings codes in light of the revised standards and determine whether or not to revise its codes accordingly. If the state decides not to adopt the changes, it is supposed to provide its reasons in writing to the Department of Energy (DOE). The current law provides for DOE to provide technical assistance to states and incentive funding for states to implement the enhanced codes. The 2005 amendment provides that states that can document 90 percent compliance with the 2004 version of each code are eligible for incentive funding. In states without a statewide building code, local governments are eligible for the incentive funding.

The existing statutory language does not mention tribal governments. Under traditional principles of federal Indian law, on lands within tribal jurisdiction, tribal governments have the inherent sovereign authority to enact and enforce building codes; the existing statutory language does not affect this aspect of tribal sovereignty, nor does it grant authority to states to impose their building codes on lands within tribal jurisdiction. Tribes have been left out, however, for the seventeen years that this federal assistance program has been authorized. While this has not been a large federal assistance program—the DOE budget for this program in FY 2009 was about $5 million—there never has been any justification for leaving tribal governments out. My guess is that the drafters of the original legislative language just didn't think about Indian tribes as governments with the authority to enact and enforce building codes.

The provisions in the pending legislation discussed above would generally seek the goal of setting the standard for new construction at near-zero net energy by 2030. I believe it is important to be sure that tribal governments are included in this goal, and especially important to include federally funded new homes for Indian families assisted by the Department of Housing and Urban Development through the Native American Housing and Self-Determination Act (NAHASDA), 25 U.S.C. §§ 4101–4243, 24 C.F.R. part 1000, and the BIA Housing Improvement Program, 25 C.F.R. part 256.

Energy efficiency in new buildings is a big part of the solution, but we also need to be sure that federal assistance programs for retrofitting existing homes include tribal governments in appropriate ways. As passed by the House, Section 202 of H.R. 2454 would create a new retrofit program to be administered by the states, with no mention at all of tribal governments. By the time this essay is published, perhaps that oversight will have been corrected. One of the existing home retrofit programs, DOE's Weatherization Assistance Program, which is administered by the states, includes a mandate that low-income members of Indian tribes receive assistance equal to that provided to other low-income persons in each state. 42 U.S.C. § 6863(d); *see also* 10 C.F.R. §§ 440.12, 440.13. Of the $4 billion appropriated for this program in the American Recovery and Reinvestment Act, I wonder if a fair share of assistance is actually reaching low-income families in Indian country.

My challenge, my plea, to ABA lawyers who are working on climate change issues is to ask yourselves how tribal governments should fit. If the set of issues that you are working on features states and local governments, then, most likely, there are logical ways in which tribal governments should be included. If you think about it and realize that you really don't know how to answer the question, then I suggest that you please seek advice from a colleague who has some expertise in federal Indian law.

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