

INDIGENOUS RESPONSES TO CLIMATE CHANGE AND WATER QUALITY
CONCERNS IN THE GREAT LAKES

Wenona Singel¹

As a citizen of the Little Traverse Bay Band of Odawa Indians in Michigan, I have an indigenous perspective on the governments of the Great Lakes. A recent book² on climate change in the Great Lakes Region begins with an observation that four critical points must be addressed for effective mitigation and adaptation:

- Downscale our understanding of the effects of climate change to understand the local impacts (bring climate change “home”);
- Engage expertise on coupled human and natural systems;
- Deploy expertise on decision making under uncertainty; and
- Link scientific analysis with deliberation.

This is interesting because tribal governments are well equipped to do these four things in ways that others are perhaps not. In terms of understanding the local ramifications of a changing climate, tribes are in a unique position with their capacity to collect detailed data regarding local impacts, as a result perhaps of climate change, within their communities. Furthermore, they have the resources and capacity to engage in a deep collection of data regarding changes in water temperatures, changes in habitats, changes in ice formation, changes in precipitation, etc., and impacts on water resources and the ecosystem.

Tribes also have the capacity to engage expertise on the relationship between human systems and natural systems. This is important because it also raises consciousness to the fact that tribes bring an important insight based on their traditional ecological knowledge. Many tribal members also have deep insight into the relationship between the ecosystem and those species — plants

¹ Associate Professor of Law and Associate Director of the Indigenous Law and Policy Center, Michigan State University College of Law; presidential appointee to Advisory Board of the St. Lawrence Seaway Development Corp., Ann Arbor, MI.

² T. DIETZ & D. BIDWELL, CLIMATE CHANGE IN THE GREAT LAKES REGION: NAVIGATING AN UNCERTAIN FUTURE (2011).

and animals and fish — that they harvest as part of their treaty rights and the impact that climate change may have on their ability to survive as a culture, as a people and to continue their way of life.

Furthermore, tribal councils typically base decisions on the principle that they need to take into account the impact of today's decisions on next steps and next generations. This is a precautionary principle. Tribes acknowledge that it is important to tread lightly because there is tremendous uncertainty regarding human impacts on the environment. As a result, tribes tend to approach changes to the environment with utmost care.

And then finally, with regard to linking scientific analysis and deliberation, tribes are in a very unique position. Tribal governments and coalitions and intertribal Natural Resource Commissions employ some of the best wildlife and fisheries biologists in the country, if not in the world. Not only are they relying on their cultural teachings, traditional teachings, and traditional ecological knowledge, but they are also working closely with the best biologists and scientists to develop an understanding of climate change's impacts and potential affects in the future and steps we can take to both mitigate and adapt to those changes.

The following is a brief overview of some of the important aspects of tribal governance that many people may not be fully aware of. We have, in the United States, a tremendous number of tribes that are affected by decisions made about the Great Lakes. The U.S. Environmental Protection Agency's Region 5 serves thirty-five federally recognized tribes within the states of Michigan, Minnesota, and Wisconsin.³

³ *Region 5 Tribal Program*, U.S. ENVTL. PROT. AGENCY, www.epa.gov/tribal/region-5-tribal-program (last visited Aug. 1, 2018).



Source: U.S. Environmental Protection Agency ⁴

Among those tribes there are many different cultural backgrounds represented. The Anishinaabe includes the Odawa, Ojibwe, and Potawatomi. There are also other Native American nations within Great Lakes states, including the Oneida Nation of Wisconsin, the Menominee Indian Tribe of Wisconsin, and New York has the Haudenosaunee Confederacy (that some people call the Iroquois Confederacy), which is represented by tribes like Hyouka, Seneca, Onondaga, and Tuscarora. It’s important to note the large cultural families that these tribes represent because they have their own and unique languages, their own histories and teachings, and their own important traditional ecological knowledge.

Understanding this topic requires taking into account some basics of federal Indian law. Foremost of which is the fact that tribes are sovereigns. Tribes

⁴ *Tribal Lands in US EPA Region 5*, U.S. ENVTL. PROT. AGENCY, www.epa.gov/sites/production/files/2015-08/documents/r5-tribal-land-map.pdf (last visited Aug. 1, 2018).

were described once by Justice Marshall in 1831 as domestic dependent nations.⁵ More recently, Justice O'Connor referred to tribes as the third sovereign⁶, in other words, states and federal government are two separate sovereigns in the United States, and tribes represent the third sovereign. Tribes are also, in a sense, pre-constitutional and extra-constitutional. Their existence predates European occupation of North America and the existence of the United States of America by thousands of years.

Furthermore, tribes were not active parties in framing the U.S. Constitution, and they are not directly covered by the Constitution. The Constitution makes two references to tribes. One refers to Congress's authority to regulate commerce with Indian tribes as well as with the states' subordinations. The other refers to the apportionment of representatives but excluding Indians not taxed, which in a way, represents that fact that tribes are seen as outsiders to this compact that formed the Constitution.

While the Constitution does not directly confine the material that creates an understanding of the nature of tribal sovereignty, much can be learned about tribal sovereignty by looking to the content of Indian treaties. Indian treaties are essentially those constituent documents that have a Constitutional nature. They were documents negotiated by tribes in the United States, in which the parties articulate their relationship with each other. And then furthermore, the Constitution reminds us that treaties are the supreme law of the land and, therefore, conflicting state laws are superseded by treaties and that includes, of course, Indian treaties as well. There is a history of over 400 treaties negotiated by Indian tribes with the United States.

Now many of those 400 treaties were negated by the federal government, but more than 200 remain extant and are binding today. Those treaties often include language in which the United States agreed to offer protection to tribes and where tribes accept that protection. In general terms, this galvanized a federal law doctrine called the Trust Responsibility, which states that the federal government has responsibility to protect Indian tribes.

With respect to regulating affairs, the Supreme Court has interpreted Congress as having authority to exercise what's called plenary in power in Indian

⁵ Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831).

⁶ See Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. REV. 1 (1997).

affairs.⁷ This is so Congress can enact legislation that impacts Indian tribes, and in fact, hundreds of statutes and all of U.S. Code: Title 25⁸ relates to Indian tribes. In a Supreme Court case file, Chief Justice Marshall first articulated the principle that the law of Georgia had no application within the reservation of the Cherokee Nation. But it's this general principle that state authority is very limited within Indian country, which includes Indian reservations. In general, there is limited second authority within Indian country. It is worth emphasizing that tribal sovereignty is inherent. It predates the existence of the United States and the power to govern that tribes exercised today is not a grant or a delegation from the federal government, but rather is a power that they have retained and never fully lost.

Also relevant to the laws and policies that govern the Great Lakes are Indian treaty rights. There is a long history of treaty negotiation, and these treaties serve many purposes. Most notably they created reservations and included session of many significant swaths of land. But in addition, in many cases they also provided explicit express protection of tribal rights to hunt, trap, fish, and gather on ceded lands. And so these are, in other words, user rights that exist on the ceded territory. One of the Supreme Court's earliest cases involved tribes in the Northwest where the court recognized that Indian treaty rights allowing tribal members to fish off the reservation were so fundamental to the existence of the tribes that to deny them would be to ignore that the fish were as necessary to the existence of the tribes as the atmosphere.

Tribes, as they hunt, fish, and continue ways of life that are fundamental to their culture and existence in their ceded territories, also acknowledge an implicit servitude on those lands. Treaties have been important in this area. When there is legal ambiguity, several conventions require that that the court endeavors to account for how the tribes understood the treaty and not how the United States interprets it. This is because, in many cases, the treaties were negotiated and drafted by federal Indian agents, not by the Indians themselves. Furthermore, they were negotiated and drafted in English, which was often not the language of the tribal members. As a result, ambiguities are interpreted literally and in favor of the Indians. The courts look to the Indian's interpretation of those treaty rights in order to understand those areas where there is confusion.

⁷ See e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

⁸ 25 U.S.C. §§ 1-5636.

A treaty is not a grant of rights, but rather it's a reservation of all rights that are not explicitly ceded. Treaties throughout the Great Lakes involve off-reservation treaty rights. Historically, tribal members asserted these rights knowing they did not relinquish the right to continue their way of life off-reservation. But then they began to be arrested and to be prosecuted for this. Though these prosecutions resulted in some winning cases and some losing cases for these tribal members, eventually the tribes and the United States worked collectively to bring large scale litigation to affirm the existence of off-reservation treaty rights. And that ultimately resulted in three significant wins affecting the Great Lakes within Michigan, Wisconsin, and Minnesota. *Minnesota v. Mille Lacs Band of Chippewa Indians* was the most recent case from 1999.⁹ The tribes exercised their off-reservation rights to hunt, trap, fish, and gather in areas that are critical to the tribes' continuation of their ways of life.

The states initially asserted, after this important litigation, that they have the right to impose state regulations to conserve off-reservation resources. They were worried that the tribes would exercise their right and deplete the fisheries, for example. But tribes are able to preclude state regulation by regulating the resource themselves, both through tribal law and also through intertribal commissions that established regulations for those resources. Great Lakes tribes look to both the Great Lakes Indian Fish and Wildlife Commission (GLIFWC) and the Chippewa Ottawa Resource Authority (CORA), which are intertribal coalitions that form commissions that collectively regulate tribal off-reservation treaty rights for tribes.

Treaties are one aspect in which tribes exercise governance and in which they have held an interest in protecting the quality of the Great Lakes. But in addition, tribes have other ways in exercising self-governance. One is under the Clean Water Act,¹⁰ where tribes have the power to exercise what is called "treatment in a state authority." There are many tribes within the Great Lakes basin that exercise this authority and that even includes, for some tribes, waters of the basin's systems, such as the St. Regis Mohawk Tribe. It is interesting to look at how the tribes articulate their intended purpose when promulgating water quality standards under the Clean Water Act because often it's quite distinctive from the purposes that a non-native government would assert when establishing these standards.

⁹ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

¹⁰ Clean Water Act, 33 U.S.C. §§ 1251-1388.

The St. Regis Mohawk refer to using the water for traditional, cultural, and ceremonial purposes and that informs the water quality standards that they then articulate. The Bad River Band refer to their original Anishinaabe teachings; the Anishinaabe word for water is “*nibi*” and it is a sacred living part of Earth. As such, that water is essentially a sacred resource that is critical to the culture and way of life of the Anishinaabe people and critical to *manoomin* (wild rice), *name* (Lake Sturgeon), and *ogaa* (walleye). The Grand Portage Band also has water quality standards under the Clean Water Act, but it is also involved in monitoring and collecting data related to the nutrient levels of the water in the reservation and at Grand Portage National Monument. The tribe is involved both in measuring and understanding the relationship between nutrient levels and climate change. The reseeded of *manoomin* on reservations in Northern Michigan is an example of the work tribes are involved in as they endeavor to protect the environment and honor water resources as essential for life. It is our utmost responsibility to care for water resources.

There has been a national effort by the 567 tribal governments in the United States that recently articulated tribal climate principles.¹¹ These are principles that tribes would like the federal agencies to respect in their interactions to promote and allow tribes to make decisions which help tribal members and communities mitigate and adapt to climate change. Additionally, tribes individually undertake specific efforts to study climate change, as do organizations like GLIFWC. GLIFWC exclusively recognizes that climate change can affect those resources which are harvested as part of tribal treaty rights, and as a result, GLIFWC is at the forefront of understanding how climate change affects for example, fish diets, as well as understanding what kind of species are likely to be more vulnerable as a result of climate change.

¹¹ B. GRUENIG, K. LYNN, G. VOGGESSER, AND K. POWYS WHYTE, TRIBAL CLIMATE CHANGE PROJECT: UNIVERSITY OF OREGON, TRIBAL CLIMATE CHANGE PRINCIPLES: RESPONDING TO FEDERAL POLICIES AND ACTIONS TO ADDRESS CLIMATE CHANGE (2015), https://tribalclimate.uoregon.edu/files/2010/11/Tribal-Climate-Change-Principles_2015-148jghk.pdf (last visited Aug. 1, 2018).