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Tribes Well-Equipped To Sue US For Climate-Related Harm

By **Rob Roy Smith and Claire Newman** (April 10, 2019, 4:07 PM EDT)

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Oil companies are playing whack-a-mole against a new crop of lawsuits seeking relief from the impacts of climate change. While climate litigation is not new, impactful victories, such as federal regulation of greenhouse gasses resulting from the win in Massachusetts v. EPA in 2007, are few and far between. More recent climate cases filed by cities, states, fishermen and even a group of children impacted by climate change test different legal theories, such as liability under tort law (nuisance, negligence or strict liability), the Constitution (the due process clause) and the public trust doctrine.

Which claim will succeed is yet unclear; however, one group of plaintiffs missing from climate litigation that could assert unique rights in addition to the claims listed above is federally recognized Indian tribes.

As tribes are inherently land-based communities, climate change exacts a greater toll on tribes than other communities. Tribes suffer unique injuries as a result of climate change, such as the loss of medicinal plants or marine resources that they are entitled to take under the treaties with the United States. Unlike cities, states and industries impacted by climate change, tribes are also equipped with unique legal rights stemming from their trust relationship with the United States. With careful consideration, these legal rights may provide the basis for relief against the United States.

Recent Climate Litigants Test a Variety of Claims to Tackle Climate Change

In Juliana v. United States, 21 young people claim that the federal government violated their rights under the Constitution and the public trust doctrine by exacerbating known harms associated with climate change. In 2016, the federal district court in Eugene, Oregon, denied defendants' motion to dismiss these claims on the basis that the federal government's failure to adequately regulate carbon emissions violates plaintiffs' right to "a climate system capable of sustaining human life" — a bold new fundamental right under the due process clause of the Fifth Amendment.[1]

Equally noteworthy, the court held that plaintiffs' claim under the public trust doctrine (arguing that the federal government holds natural resources in trust for the people) was cognizable in federal court. A final significant feat for the plaintiffs in this case was defendants' concession regarding the existence of climate change.[2] Arguments are proceeding at the Ninth Circuit.

In City of Oakland v. BP PLC, the cities of Oakland and San Francisco sued the five largest producers of fossil fuels for public nuisance, in this case, inundation of the cities resulting from sea level rise. As in Juliana, the parties agreed about the existence of climate change and the cities' eventual inundation. In an attempt to avoid the rule that the Clean Air Act displaces federal nuisance claims seeking abatement of interstate carbon emissions,[3] the cities' lawsuit targets defendants' production and sale of fossil fuels abroad.

The district court ruled that the cities could not overcome the presumption against fashioning new federal common law in areas affecting foreign affairs and that balancing the pros and cons of fossil fuel production was better left to the legislative or executive branches.[4] The case is on appeal to the Ninth Circuit.

Lawsuits filed by the state of Rhode Island and the Pacific Coast Federation of Fishermen's Association pursue strict liability and negligence claims, among others, against a group of 21 oil producers in state court.[4] Rhode Island's lawsuit asserts injuries to public trust resources and public health as well as economic injuries associated with sea level rise, ocean acidification, extreme precipitation and drought. The fishermen assert economic injuries arising from California and Oregon's closures of the Dungeness crab fishing season. Like other climate plaintiffs, Rhode Island and the fishermen allege that the oil companies had extensive knowledge that fossil fuel production would cause climate change and inflict long-lasting damage, but nonetheless concealed the danger, refuted accepted climate science and developed disinformation campaigns to mislead customers.

Based on these allegations, Rhode Island and the fishermen test negligence and strict liability theories, including failing to warn customers of the effects of climate change, designing defective products that threaten the climate, and violating companies' duty of care to consumers. Defendants have removed both cases to federal court based on the "unique[] federal interests" at issue and federal preemption of state law. Whether plaintiffs are successful in remanding the cases back to state court remains to be seen.[5]

In People of the State of New York v. Exxon Mobile Corp., the New York Attorney General chose an entirely different tack, suing Exxon Mobile for shareholder fraud under state securities law and common law.[6] According to the complaint, Exxon misled investors "concerning the company's management of the risks posed to its business by climate change regulation." The company allegedly falsely reported that it had added a "proxy cost" of carbon to its business to account for the likely effect of future climate regulations, but in fact, it applied little to no proxy cost, exposing it to significant regulatory risk. As opposed to seeking compensation for harms associated with climate change, New York seeks disgorgement of money obtained as a result of Exxon's fraud.

Tribal Plaintiffs May Assert Unique Claims Against the United States for Climate-Related Harms

Indian tribes are uniquely situated in the fight against climate change. Unlike other plaintiffs, tribes have, since time immemorial, occupied lands and relied on natural resources now threatened by climate change. Tribal treaties give rise to fiduciary obligations on the part of the United States to protect Indian trust resources. In short, tribes have unique standing, rights and injuries resulting from climate change which may form the basis of successful climate action where others have failed.

Native Village of Kivalina was the first federally recognized tribe to bring a lawsuit against major energy companies seeking damages for the erosion of their arctic village due to global warming. In 2012, the Ninth Circuit dismissed Kivalina's suit, holding that under AEP the Clean Air Act displaced federal nuisance claims.[7] Yet several avenues remain open to tribes seeking relief from the United States. Three claims warranting tribes' consideration are the right of occupancy, breach of trust and the reserved rights doctrine.

First, the impacts of climate change, such as severe drought, flooding, sea level rise or forest fires may impair tribes' continued occupancy of lands set aside by treaty to provide a "permanent homeland and abiding place" for future generations.[8] In this way, the impacts of climate change implicate one of tribes' most fundamental rights — the "right of occupancy."[9] The United States' failure to mitigate these threats or to furnish in-lieu lands for relocation may violate specific treaty provisions securing tribes' right of occupancy on their land. In certain cases, violation of this right could result in a taking compensable under the Indian Tucker Act in the Court of Federal Claims.[10]

Second, tribes may consider claims arising from their trust relationship with the United States. In instances where the federal government has assumed "elaborate control" over tribal property, the government's failure to protect that property from climate-related harms may constitute a breach of the fiduciary duties owed to the tribe by the United States.[11] In order to prevail, tribes should identify a duty arising from "rights-creating" or "duty-imposing" language contained in a federal statute.[12]

Third, tribes may consider enforcing rights to natural resources reserved at the time of time of treaty-making. Some of these rights, such as the "right of taking fish at all usual and accustomed fishing grounds and stations"[13] were explicitly reserved in the treaties, while courts have implied the reservation of other resources, such as water sufficient to fulfill the purpose of the reservation.[14] In a historic victory, the U.S. Supreme Court recently affirmed an injunction against the state of Washington requiring it to repair dilapidated culverts necessary for the survival of anadromous fish.[15]

In doing so, the Supreme Court upheld an interpretation of the treaty as requiring the protection of fishery habitat from man-made depredation. In the context of climate change, the United States failure to protect reserved rights that results in a taking of treaty resources could be explored as another basis for relief.

Building a case against the United States for climate-related harms would be no small undertaking. In addition to marshaling the complex science of climate change, tribes will need to be prepared to prove standing and avoid dismissal under the political question doctrine. Nonetheless, faced with serious ongoing threats to Indian homelands, public safety and natural resources; the president's denials; and, Congress's failure to act, the judiciary may provide the last hope for tribes seeking relief from the harsh realities of climate change.

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[1] 217 F. Supp. 3d 1224, 1252 (D. Or. 2016).

[2] Id. n. 3.

[3] See American Electric Power Company v. Connecticut, 564 U.S. 410, 424 (2011)

[4] City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1027 (N.D. Cal. 2018).

[5] See State of Rhode Island v. Chevron Corp. et al., 2018 WL 4999785 (D.R.I.); Pacific Coast Federation of Fishermen's Associations, Inc., Case No. CGC-18-571285 (Cal. Sup. Ct. Nov. 14, 2018).

[6] See Pl.'s Reply in Support of Its Motion to Remand to State Court, State of Rhode Island, 2018 WL 4999785 (D.R.I.); Def.'s Notice of Filing of Notice of Removal of Action, Case No. CGC-18-571285 (Cal. Sup. Ct. Dec. 13, 2018).

[7] Index No. 452044/2018 (N.Y. Sup. Ct. Oct. 10, 2018) (complaint seeking liability against Exxon Mobile for securities fraud under the Martin Act Securities Fraud, General Business Law §§ 352 et seq. and Executive Law § 63, and for actual and equitable fraud under New York common law) available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20181024_docket-4520442018_complaint.pdf .

[8] Native Vill. of Kivalina v. ExxonMobil Corp., 696 F.3d 849, 858 (9th Cir. 2012).

[9] See Winters v. United States, 207 U.S. 564, 565 (1908).

[10] Johnson v. McIntosh, 21 U.S. 8 (1823) (recognizing that the United States took title to land subject to the Indian "right of occupancy").

[11] See 28 U.S.C. § 1505 (authorizing jurisdiction over claims brought by federally recognized tribes arising under federal law, executive order or which are otherwise cognizable by non-Indians).

[12] See United States v. Mitchell, 463 U.S. 206, 225 (1983).

[13] See United States v. Navajo Nation, 556 U.S. 287, 301 (2009).

[14] See e.g., Art. 5, Treaty of Point Elliot of 1855.

[15] See Winters, 207 U.S. at 576-577.

[16] Washington v. United States, 138 S. Ct. 1832 (2018).