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ENVIRONMENTAL JUSTICE, RESOURCES AND TERRITORIES IN THE LIGHT OF CONSTITUTIONAL PROCESSES

"Decolonizing American Environmental Law: Native American Sovereignty, Environmental Justice, and Resource Management"

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Introduction

Today, over nine million American Indian and Alaska Native citizens of 574 federally-recognized Indian nations live on 334 reservations in thirty-five states as well as in small towns, suburbs, and cities in all fifty states; the nearly one hundred million acres controlled by Native governments in Indian Country represents the fourth largest state in the U.S., the Navajo Nation itself larger than ten U.S. states.

Indigenous conceptions of legal geography transcend what Benedict Anderson called "sovereignty [that] is fully, flatly, and evenly operative over each square centimeter of a legally demarcated territory."[1] Native nations are governed by the U.S. national constitution and the constitutions of the states in which their reservations lie, but also by their own tribal constitutions, which represent what scholars call a "third sovereignty," and what critics call "super-citizenship."

Today I want to talk about the evolution of Native Americans' political and legal sovereignty and its implications for environmental justice.

[1] Quoted in Thomas Biolsi, "Imagined Geographies: Sovereignty, Indigenous space, and American Indian Struggle," *American Ethnologist* 32, no. 2 (May 2005), 240.

First, a brief word about legal geography as a relevant methodology for studying Indigenous people's environmental history. As Irus Braverman et al. contend in their 2014 book *The Expanding Space of Law*, "Legal geographers note that nearly every aspect of law is located, takes place, is in motion, or has some spatial frame of reference…. Likewise, social spaces, lived places, and landscapes are inscribed with legal significance. Distinctively legal forms of meaning are projected onto every segment of the physical world."[2]

In assessing this methodology, Braverman promotes the toolkit of ethnography because it can, she writes, "enhance legal geography by allowing practitioners to ask how people live, constitute, and imagine social space, place, and landscape as well as how people understand themselves as living, doing, and imagining the legal."[3] Thus ethnography analyzes the legal cartography of indigenous people's traditional knowledge and conceptions of land use.

This approach could be applied to the study of many colonized peoples, but it is especially useful for understanding Native Americans. Mere Roberts' idea of "mind maps" is also useful to help us think of the ways in which Native people have connected the legal and the geographic in a framework that links, to quote Roberts, "spiritual, spatial, temporal, and biophysical information about a particular place."[4]

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[2] Irus Braverman et al. "Introduction," *The Expanding Spaces of Law: A Timely Legal Geography*, eds., Irus Braverman et. al (Palo Alto: Stanford University Press, 2014), 1. "Legal geographers contend that in the world of lived social relations and experience, aspects of the social that are analytically identified as either legal or spatial are conjoined and co-constituted…. These meanings are open to interpretation and may become caught up in a range of legal practices. Such fragments of a socially segmented world—the *where* of law—are not simply the inert sites of law but are inextricably implicated in *how* law happens."

[3] Irus Braverman, "Who's Afraid of Methodology?: Advocating a Methodological Turn in Legal Geography," in *The Expanding Spaces of Law*, 124. In addition, ethnography is "in accord with legal geography's increasing commitment to challenging the linear, monolithic, and rational definitions of space and time."

[4] Mere Roberts, "Mind maps of the Māori," *GeoJournal* 77, no. 6 (2012), 741. Her essay is included in a special issue focusing on "Geography for and with Indigenous Peoples: Indigenous Geographies as Challenge and Invitation."

The Fight over Indian Country

Throughout the 20th century and into the present day, Native leaders have defended the legal, political, and environmental dimensions of the *particular place* of the Indian reservation, pursuing in U.S. courts and the United Nations the related processes of property regime transition -- decolonization, privatization, and enclosure -- to ensure that Indian Country was, and is, regulated by Indian traditions and represented Indian interests.

Increasingly, these decolonizing measures found expression in tribal constitutions. By 1934, roughly 65 Native nations had adopted constitutions regulating reservation affairs. By 1945, the number was over 220.[5] Native people promoted the reservation as a "protected area" that constituted underlying land rights defined by treaties, thus sustaining the notion of Indian Country as not only a cultural space but as a sovereign legal space.

But not all Americans supported Native sovereignty. In the Cold War discourse of the 1940s and 1950s, American politicians, especially Republicans, viewed Indian Country as an Un-American space. They tried to abrogate hundreds of treaties by "terminating" Native Americans' legal control of their reservations, which contained vast amounts of uranium, coal, oil, rangeland, and water.

American officials used Cold War rhetoric to justify what amounted to a Soviet style liquidation of Native sovereignty. Sen. George Malone of Nevada, for example, argued that the U.S. was "spending billions of dollars fighting Communism" while it was "perpetuating the systems of Indian reservations and tribal governments, which are natural Socialist environments." Other politicians called reservations prisons or concentration camps that confined Native people to the reservation, preventing them from entering what they called

[5] David E. Wilkins and Shelly Hulse Wilkins, *Native Disenrollment and the Battle for Human rights* (Seattle: University of Washington Press, 2017), 49-51.

"mainstream" society.

Contesting this congressional "termination" movement in the 1950s, Native activists articulated a different conception of the reservation, one which asserted that law, not race, defined the parameters of Indian Country. Joseph Garry, the president of the National Congress of American Indians, argued that "Reservations do not imprison us. They are ancestral homelands, retained by us for our perpetual use and enjoyment. We feel we must assert our right to maintain ownership in our own way, and to terminate it only by our consent."[6]

Echoing Garry, the Apache activist Clarence Wesley called on the U.S. government to both protect "rights solemnly promised by treaty and law" and to give Indian nations "the same kind of [economic aid] program that is carried on in underdeveloped countries," in essence to give Native people a Point Four aid program the U.S. was funding in developing countries abroad.[7]

But the federal government refused to accord Native nations the status of foreign nations, especially those also undergoing decolonization. Rather, U.S. officials promoted natural resource development on Indian reservations during the 1950s and 1960s. As a result, Native governments were forced to reckon with the environmental damage and health crises wrought by uranium, coal, and water extraction projects in Indian Country that privileged American corporate interests, not American Indians' interests.

For example, of 150 Navajo who worked in a New Mexico uranium mine "133 had either died of radiation-induced lung cancer or had contracted cancer and severe respiratory ailments such as fibrosis." After decades of extractive activity that degraded their land, water, air, and

[6] Joseph Garry, "A Declaration of Indian Rights." Emergency Conference Bulletin folder, Box 257, Records of the National Congress of American Indians; Banquet Meeting, February 26, 1954.
[7] Clarence Wesley, "Guest Editorial," *AmerIndian: American Indian Review*, Sept.–Oct. 1957, 2.

health, and failed to improve their own energy grid, Navajo leaders confronted the need to create the regulatory authority to address this damage.[8]

Native nations thus began campaigns for economic justice – because they were denied a fair price for their resources; for environmental justice -- because they were targeted on account of their poverty and political powerlessness; for energy justice -- because they sacrificed their resources and health for non-Native people's energy needs in distant U.S. cities; and for participatory justice -- because the federal government made decisions about natural resource projects without their input.[9]

Native American Environmental Sovereignty

Native people saw some progress in the 1970s. The U.S. Environmental Protection Agency (EPA) allowed Native nations to apply for Class I air quality standards, the most stringent category. When the EPA approved the Northern Cheyenne's Class I application, it triggered the transboundary pollution standards of the Clean Air Act. As a result, a group of energy companies, including one seeking to build a huge coal-burning plant near the Northern Cheyenne reservation, sued the EPA. But the courts upheld the EPA's approval, forcing the new plant to redesign its pollution control system, a move which reduced its annual pollution

[8] *Defending Mother Earth: Native American perspectives on environmental justice.* Jace Weaver, ed. (Maryknoll, N.Y.: Orbis Books, 1996), 47-48. The Navajo Environmental Protection Commission was launched in August 1972 to codify the Navajo's right to establish rules and regulations protecting the quality of air, water, and land. But it took 2 years to establish, in part because of funding issues. And it faced opposition from Arizona and New Mexico, which did not want to strengthen tribal governments. Another problem was that the U.S. Environmental Protection Agency EPA had not yet addressed tribal governments' regulatory authority. In the end, the NEPC had little impact.

[9] On energy justice, see "Maria Isabel Casas-Cortes et al., "Blurring Boundaries: Recognizing Knowledge-Practices in the Study of Social Movements," *Anthropological Quarterly* 81:1 (2008), 17-58.

emissions by over 90% and thus saved both Northern Cheyenne and neighboring Montana residents from exposure to tons of hazardous airborne emissions.[10]

Another key development came in 1975 when Native leaders formed the Council of Energy Resource Tribes (or CERT), creating their own version of OPEC to counter the political power of energy companies. Native politicians were outraged when they discovered that the federal government invited energy companies to draft their mining leases that gave Native nations a scandalously low rate for their resources. CERT grew from 25 Native nations in 1975 to 42 in 1985, representing over half of all Native people.[11]

Building on this organizational success, in 1981 the National Congress of American Indians resolved that "Indian rights to their natural resources are private rights for the exclusive use and benefits of Indians and are not public rights to be controlled by the unilateral action of the United States." In addition, the resolution called on the U.S. to fund Native nations' "highly intensified management systems for Indian natural resources, including tribal environmental controls, which systems and experts shall be under the sole control of the Indian Tribes."[12] In short, the resolution called on the federal government to honor its treaties with Native nations and to support resource development and pollution control on Native people's terms.

These campaigns paid dividends in the early 1980s with a series of U.S. Supreme Court decisions that codified Native governments' right to manage their resources. And Congress passed the Indian Mineral Development Act and the Federal Oil and Gas Royalty Management

[10] James M . Grijalva and Daniel E. Gogal, "The Evolving Path Toward Achieving Environmental Justice for Native America," *News and Analysis* 40 (Washington, D.C.: Environmental Law Institute, 2010).
[11] Marking CERT's 10th anniversary, CERT chairperson Judy Knight celebrated the "degree to which each tribe has developed its own innovations in protecting tribal rights and resources, in managing complex governmental and enterprise responsibilities, and in fostering prudent development that respects our own priorities and values."
[12] "Resolution of the National Congress of American Indians on the Assertion of Indian Rights and Standards for Natural Resource and Trust Responsibilities," 173; 177. Adopted October 1981 at the NCAI Annual Convention. Semi-Annual Reports and Operating Procedures, NCAI papers, University of New Mexico.

Act, which, respectively, gave Native nations control over negotiations and required the Secretary of the Interior to ensure that Native nations received fair prices for their resources. In the post-WWII period, Native Americans lost nearly $5.8 billion because of inadequate accounting and lax enforcement of resource development contracts.

In addition, Native nations such as the Northern Ute, Northern Cheyenne, and the Crow created their own tribal monitoring programs to measure air pollution and began pressuring Congress to give them the same rights as states in applying environmental standards to their reservations.

Native people's claim to environmental sovereignty was strengthened in 1987 when the U.S. Congress established the Treat as States program, TAS, which required the EPA to grant Native nations the right to both set their own regulatory procedures as an independent sovereign authority and demand adherence to each reservation's air and water quality standards under the Clean Water Act, Clean Air Act, and Safe Drinking Water Act. Congress also created the Indigenous Peoples Subcommittee to expand input of Native people on environmental issues affecting their reservations and the Indian Environmental General Assistance Program to help them establish environmental protection programs and collect evidence for lawsuits against polluting industries.

These changes in federal policy gave Native leaders the economic, energy, and participatory justice they sought and new tools to address the impact of energy development on their nations' health, economy, and landscapes.

Within 20 years, the EPA had authorized hundreds of Native nations large and small to regulate their own environmental standards. In addition, the TAS policy was extended to other departments of the federal government, including Energy, Defense and the National Park

Service. Feeling empowered, Native nations began to develop their own air quality codes that would go beyond federal standards for monitoring air quality and conducting inspections, as the Southern Utes did in 2008.

One other development is worth noting. In 2011, the EPA acknowledged the value of Traditional Ecological Knowledge (or TEK) by forming the Tribal Science Council and supporting the Local Environmental Observers Network (or LEO), which has become a global observation network that shares local knowledge of environmental change with government scientists and policy-makers.[13] David Korten has framed this as "emergent alternative wisdom," centered on energy production and environmental policy that takes into account all dimensions of reservation life, the human and natural ecosystem.[14]

Conclusion

Yet, despite the evolution of legal and environmental sovereignty that I've outlined, it is politically contingent because the U.S. Congress retains so-called "plenary power" to change all of that if it wanted to. As noted, some Americans view Native people as un-American and want to erode or end their so-called "third sovereignty." Given the sharply rightward turn in the U.S. Supreme Court and the Republican Party, which has long been hostile to Native American rights, the exercise of plenary power remains a possibility.

The Republican president Donald Trump supported the Keystone XL and DAPL pipeline projects, weakened federal laws like the National Environmental Policy Act and Clean Water

[13] https://www.leonetwork.org/en/docs/about/about

[14] Quoted in Dana Powell, "The Indigenous Environmental Justice Movement," *Development* 49, no. 3 (2006), 129. In 2020, Deb Haaland (Pueblo) became the first Native person to hold a cabinet position as Secretary of the Interior, which oversees all policies affecting Native people and their lands, and Charles Sams (Cayuse and Walla Walla) became the first Native person to direct the National Park Service, which has had a contentious relationship with Native nations abutting national parks carved out of indigenous territory in the late 19th and early 20th centuries.

Act that enable Native nations to manage reservation development, and, despite opposition from Alaska Natives, sought to open both the Arctic National Wildlife Refuge to oil and gas leasing and the Tongass National Forest to new logging and mining projects. In addition, the EPA's American Indian environmental programs have been challenged in court by corporations and state governments opposed to Native sovereignty.

These challenges to Native people's right to a clean environment and a fair share of resource development are faced by many other environmental justice groups, which both highlight the ways in which BIPOC communities suffer from energy development but also champion clean energy that can address a climate crisis that will disproportionately affect them. For example, the Idle No More movement organized in 2012 by First Nations women connected U.S. and Canadian Indigenous activists fighting fossil fuel development. In turn, Canadian Indigenous groups crossed the border to join the resistance to the Dakota Access Pipeline (DAPL).[15] The Standing Rock Sioux activists were also joined by Palestinian youth, Black Lives Matter activists, and Indigenous leaders from Central America.

Native Americans, therefore, will have to continue their centuries-long fight for sovereignty, demanding that the federal government honor the hundreds of treaties it signed with Native nations in the 19th century and contesting efforts by state governments and corporations to diminish their legal rights to manage the particular place of the reservation, on the basis of their terms and their traditions.

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[15] On the Idle No More movement, see Febna Caven, *Cultural Survival Quarterly* (February 2013) https://www.culturalsurvival.org/publications/cultural-survival-quarterly/being-idle-no-more-women-behind-movement Also see *Environmental Racism in the United States and Canada: Seeking Justice and Sustainability*, Bruce Johansen, ed. (Westport, CT: Praeger Publishing, 2020). On Standing Rock and DAPL, see *Standing with Standing Rock: Voices from the #NODAPL Movement*, eds. Nick Estes and Jaskiran Dhillon (Minneapolis: University of Minnesota Press, 2019); and Dina Gilio-Whitaker, *As Long as Grass Grows: The Indigenous Fight for Environmental Justice, from Colonization to Standing Rock* (Boston: Beacon Press, 2019).