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ARTICLE

Looking to the Third Sovereign: Tribal Environmental Ethics as an Alternative Paradigm

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I. INTRODUCTION

December 2015 constituted a watershed month in the fight against the devastating impacts of climate change, as nearly 200 countries reached consensus at the Paris Conference of the Parties 21 (COP 21) on the need to cut greenhouse gas emissions in an effort to curb the negative impact of climate change.¹ As evidenced by the Paris COP 21, the world has decided that the time has come to address climate change. As a result of the commitments made at Paris COP 21, policy makers around the world will be considering the best methods of controlling greenhouse gas emissions and mitigating the impacts of climate change. As a result, policy makers may also be increasingly reconsidering the ethical paradigm(s) used to tackle modern environmental challenges, such as climate change. In the United States, a national, comprehensive plan to both mitigate the effects of and adapt to those effects that cannot be mitigated has yet to be developed. Therefore, now is the ideal time to reconsider

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1. Helen Briggs, *Global Climate Deal: In Summary*, BBC NEWS (Dec. 12, 2015), <http://www.bbc.com/news/science-environment-35073297> [https://perma.cc/FH49-KECH] .

the environmental ethics underlying environmental policy making.

Given the devastating impacts of climate change across the country, one may ponder the appropriate ethical framework through which effective policy will be developed. Increasingly, the moral dimension of climate change is being recognized, and policy makers and other thought leaders are already considering the possibility of a new ethical paradigm to address the issue.² To date, however, the United States has yet to turn from its anthropocentric and utilitarian view of environmental ethics.³ Yet, Winston Churchill famously reminds us to “[n]ever let a good crisis go to waste.” So, the climate change crisis could prove to be exactly the right motivation to spur development and implementation of alternative environmental ethical structures. Given its profound impacts upon communities across the country, both Native and non-Native, climate change may be the catastrophe leading to a change in the way environmental policy is viewed in the United States.⁴ Even if change comes slowly, starting such a discussion now is still valuable given the intergenerational nature of climate change and other modern environmental challenges.

In the United States, however, it is unlikely that an answer to potentially viable alternative ethical paradigms will come from the federal government. Admittedly, the federal government is certainly capable of innovation in environmental law. For example, the period between 1969 and 1980 was a time of tremendous innovation in the field, as the federal government was extremely active in regulating the environment.⁵ Since 1988,

2. Sarah Krakoff, *American Indians, Climate Change, and Ethics for a Warming World*, 85 DENV. U. L. REV. 865, 891 (2008).

3. *Id.* at 892.

4. As Professor Krakoff explains, “[w]hat global warming may do is catapult us beyond this way of thinking. Addressing global warming will mean rethinking what growth and development should consist of. The world within which growth can take place has always been defined by our ethics.” *Id.*

5. ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 71 (6th ed. 2011) (explaining that the federal government enacted numerous statutes during this time period, including the National Environmental Policy Act, Clean Air Act, and Clean Water Act); ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1 (6th ed. 2009) (“Since the late 1960’s, spectacular growth in public concern for the environment has had a profound impact on the development of American law.

however, “there has been little innovation in environmental programs,” especially at the federal level.⁶ Congress has only truly innovated in a few areas since the late 1980s.⁷ Such federal inaction may be the result of more recent political partisanship within Congress.⁸

Given such federal malaise, policy makers will need to look elsewhere to find examples of alternative ethical paradigms, but not necessarily outside of the exterior boundaries of the United States. They can look to the third sovereign—Indian tribal governments.⁹ Indian tribes have in no way been sheltered from the impacts of climate change. In many ways, Indian tribes are part of the vanguard fighting the onslaught of climate change, given their physical locations and other distinctive features.¹⁰

During this period, U.S. environmental law has grown from a sparse set of common law precedents and local ordinances to encompass a vast body of state and federal legislation.”).

6. *Id.* at 72 (“We continue to live off the intellectual capital of the active first 15 years of the modern environmental movement.”). *But c.f.* EPA, *Clean Power Plan Proposed Rule*, <http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule> [<https://perma.cc/3NXP-PKYP>].

7. GLICKSMAN ET AL., *supra* note 5, at 72 (providing some examples, such as the Clean Air Act amendments of the 1990s and the hazardous waste and oil spill laws).

8. *Id.* (“Congress has intervened in many specific controversies, but has done little more than reauthorize and make minor adjustments to the main federal laws. A partisan logjam in Congress continues to thwart efforts to amend this nation’s environmental laws.”); PERCIVAL ET AL., *supra* note 5, at 7 (“Environmental Policy has become a much more partisan issue than it was in the 1970s, when the major environmental laws passed Congress with wide bipartisan support.”); JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 12 (3d ed. 2010) (“Growing partisanship over environmental issues, however, slowed the pace of new federal legislation in the late 1990s and the first years of the 20th century. The result has been legislative stagnation.”).

9. While states have certainly been innovating in this area by adopting and developing climate change solutions, such as the Regional Greenhouse Gas Initiative in the Northeast, it is unclear whether states have taken any steps to adopt or incorporate alternative ethical paradigms into their efforts. *See generally* REGIONAL GREENHOUSE GAS INITIATIVE, <http://www.rggi.org> [<https://perma.cc/2DX6-RNFZ>]. Examination of state environmental ethics is beyond the scope of this article, but it is possible that some states may have adopted alternative ethical paradigms.

10. *See, e.g.*, Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples*, 26 TUL. ENVTL. L.J. 179, 181 (2013) (describing some of the attributes that put many indigenous communities at risk to the impacts of climate change).

For example, in the Pacific Northwest, climate change has severely impacted freshwater and oceanic environments, both of which are crucial to the survival of salmon on which many tribes in the region place great subsistence, cultural, and spiritual weight.¹¹ Similarly, in Alaska, the impacts of climate change have resulted in many Alaska Natives facing a loss of lifestyle, culture, and even traditional ecological knowledge.¹² In fact, the situation for Inuit grew so dire that the Inuit Circumpolar Conference filed a petition in the Inter-American Commission on Human Rights alleging that the United States violated its right to property and culture (among other things) because of the United States' greenhouse gas emissions, emissions which in turn led to the impacts of climate change.¹³ Tribes in the Southwest are experiencing profound impacts on their water and water rights as a result of climate change.¹⁴ And tribes in Florida are experiencing rising sea levels, which in turn inundate their lands.¹⁵

Further, as explained more fully below, tribes are not only experiencing climate change, but also taking steps to develop environmental laws designed to address the impacts of climate change. Tribes are therefore actively innovating in the area, unlike their federal counterpart. As policy makers potentially consider new environmental ethics, tribal environmental ethics can be particularly helpful.

This article, therefore, considers what role, if any, can tribal environmental ethics play in the re-examination and consideration of American environmental ethics? The answer—quite a substantial role. Tribes must straddle two worlds—a traditional one and one dominated by Western culture and values. As a result of this dichotomy, tribes are necessarily

11. Krakoff, *supra* note 2, at 874. Professor Krakoff explains that “[t]he salmon’s centrality to tribal life is reflected in tribal custom, artwork, legend, and ceremonial life.” *Id.* at 877.

12. *Id.* at 879–83.

13. Petition, Sheila Watt-Cloutier, Petition to the Inter American Commission on Human Rights Seeking Relief from Violation Resulting from Global Warming Caused by Acts and Omissions of the United States, at 2–3 (Dec. 7, 2005), http://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf [<https://perma.cc/V488-CPYW>].

14. Krakoff, *supra* note 2, at 883–85.

15. *Id.* at 885–87.

experts at adaptation and innovation. To demonstrate the value of looking to tribal environmental ethics when considering alternative ethical paradigms for the United States, this article begins by discussing the link between environmental ethics and policy making. With this understanding in place, the article then examines the importance of environmental ethics to tribes. This Part considers factors that may motivate tribes to adopt environmental ethics alternative to American environmental ethics, and also uses legal ethics as an example of the necessity, in some instances, for the development of an alternative ethical paradigm, such as one separate from the model ethical code presented by the American Bar Association. Finally, the article concludes with a discussion of how tribes are serving as laboratories of environmental ethical innovation. The Part begins with an introduction to some ethical paradigms other than anthropocentrism, such as animism and deep ecology. The purpose of this introduction is to demonstrate how tribal environmental ethics might parallel some of these alternative ethical frameworks, but also to show that tribal environmental ethics can be different. With this introduction in place, the Part argues that tribes have the capacity for innovation, and then provides explicit examples of where tribes have departed from American environmental ethics. Ultimately, given the significance of emerging environmental challenges, such as climate change, the article concludes that, if policy makers decide on the necessity of an ethical paradigm other than anthropocentrism, tribal environmental ethics provide a compelling alternative, and, tribes, as the third sovereign in the United States, demonstrate how such an alternative environmental ethic may be codified into environmental laws.

Although this article advances the idea that tribes are and can be innovators in the field of environmental ethics, it in no way seeks to perpetuate the stereotype of tribes as environmental stewards or as Noble Savages.¹⁶ Just as other governments have

16. Professor Tsosie explained that stereotypes, in all of their forms, have negative consequences for Indians and tribes, stating that:

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

the right to develop and act in ways contrary to the ethics described above, so too do tribes have the right to depart from such norms.¹⁷ Moreover, given there are 567 federally recognized tribes and many non-recognized or state recognized indigenous groups in the United States, it is difficult to identify one tribal environmental ethic. Instead, this article seeks to use examples where possible and to focus on commonalities where they exist, as there are similarities between the environmental world views of some tribes.¹⁸

II. EXAMINING ENVIRONMENTAL POLICY AND ETHICS IN GENERAL

Before delving into specific questions of what constitutes current American environmental ethics or potential alternatives, it is helpful to begin with a basic understanding of environmental policy and ethics, specifically how environmental ethics shapes environmental policy making. Environmental policy is “the product of the combined influences of environmental ethics, science, and economics.”¹⁹ Accordingly, the environmental ethics

environment as Europeans (the ‘Bloodthirsty Savage’ resurrected). Both stereotypes are a form of mythology, although they are widely perpetuated by much of the literature on American Indian belief systems.

Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 270 (1996) (citations omitted). Professor Sarah Krakoff also rejects stereotyping Indians as environmental stewards. As she explains:

First, like all human communities, American Indians do not always act in perfect sync with their deeply held norms and beliefs. Second, the hardships of economic and cultural devastation visited on tribes throughout history have left them with a lot of garbage to clean up, figuratively and literally In short, American Indian people are not hard-wired to be any closer to nature or more environmentally sensitive than non-Indian people. But their traditional religious and cultural systems of meaning revolve around the earth and its values, and these long-held beliefs have influenced how American Indians view and interact with the land and the natural world.

Krakoff, *supra* note 2, at 868.

17. Tsosie, *supra* note 16, at 227.

18. *Id.* at 268. Professor Tsosie goes on to explain that “[t]hese similarities are useful for a comparative discussion of Euro-American and indigenous land ethics, and they provide a means to understand the often different values that underlie contemporary tribal environment decision-making.” *Id.*

19. *Id.* at 226.

employed by the entity developing such policy plays a crucial role in its development; there is a strong interplay between environmental policy and the ethics underlying its creation. As Professor Rebecca Tsosie explained:

“[E]nvironmental ethics” . . . helps us analyze the moral relations between human beings and the natural environment and forms a context in which to understand our system of environmental laws. Systems of environmental ethics are comprised of values, which underlie judgments about what is “good”—either morally or materially—and norms, which are designed to place values into operation at the social level by making judgments about certain conduct.²⁰

Accordingly, before delving into the question of what policy vehicle should be used to address the causes and impacts of climate change in the United States, the first question asked should be what environmental ethic should be used in developing said policy. “A comprehensive environmental ethic deals broadly with concepts of moral rights and interests, and with our connection to other aspects of our natural world. In terms of environmental policy, an environmental ethic ‘justifies’ our actions towards the earth and our natural environment.”²¹ In selecting an environmental ethic, we are selecting our justification for the policy selected and device through which its success or failure will be measured.

Notably, this article assumes that an anthropocentric environmental ethic drives American environmental policy making today. Accordingly, the article recommends moving away from this current perspective toward the ethical paradigm described below.

III. THE IMPORTANCE OF ENVIRONMENTAL ETHICS TO TRIBES

Having identified the close relationship between environmental policy making and environmental ethics, this Part now examines the importance of environmental ethics to many tribes. The Part begins with a general overview of the

20. *Id.* at 243 (footnotes omitted).

21. *Id.* at 246–47 (footnote omitted).

importance, and then moves to a potentially motivating factor to tribes in developing robust environmental ethics—such as a unique connection to the land.²² The Part ends with an examination of legal ethics as an example of how ethical development is truly crucial for many tribes.

In general, development and incorporation of environmental ethics into environmental policy making constitutes expressions of tribal self-determination.²³ Such expression of self-determination, therefore, perpetuates tribal sovereignty. Sovereignty is important to Indian tribes because its existence allows tribes to enact laws and be governed by them.²⁴ The development and enactment of laws are fundamental expressions of sovereignty.²⁵ Environmental laws and ethics may be

22. See generally Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246 (1989).

23. Tsosie, *supra* note 16, at 299–300. Admittedly, however, departure from traditional environmental ethics may also be an expression of tribal self-determination, as tribes should not be constrained to one static conception of environmental ethics, but rather should be allowed to evolve and adapt as any other governments are allowed to do. See *id.* at 287–300. Professor Tsosie goes on to explain that “tribal sovereignty will not always result in adherence to traditional norms of economic or environmental conduct.” *Id.* at 311.

24. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (“Although no longer possessed of the full attributes of sovereignty, [Indian tribes] remain a separate people, with the power of regulating their internal and social relations.” (internal citation and quotation marks omitted)); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (prohibiting “the exercise of state jurisdiction” over the controversy at issue because it “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves”).

25. Tribal laws incorporate several different types of law, including treaties, constitutions, customary and traditional laws, legislative enactments, and administrative rulemaking. See MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* (2011); JUSTIN B. RICHLAND & SARAH DEER, *INTRODUCTION TO TRIBAL LEGAL STUDIES* (2d ed. 2010), for a general discussion of the various categories of tribal laws. Different types of law may express tribal sovereignty in different ways. For example, tribal constitutions establish basic tribal powers and governmental structure. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 4.05(3) (Nell Jessup Newton et al. eds., 2012). Some tribal constitutions also explicitly reference the inherent sovereignty of the tribe. See, e.g., ROSEBUD SIOUX TRIBE CONST. art. IV, § 3 (1962), <http://www.rosebudsiouxtribe-nsn.gov/government/tribal-laws/constitution/44-article-iv> [<https://perma.cc/M9SB-UXKE>]. Tribal customary law may also be developed to recognize the tribe’s important cultural ties to the past and the significance of tribal culture in the future. See generally Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts*, 46 AM. J. COMP. L. 287, 287 (1998) (comparing “distinctively Indian social norms” across multiple tribes’ courts).

particularly important for tribes with cultural and spiritual connections to their environment and land.²⁶ However, as Professor Christine Zuni Cruz notes, “not every sovereign act undertaken by an indigenous nation necessarily promotes [its] sovereignty Adoption of western law can create a gap between the adopted law and the people In this respect, an Indian nation’s government can . . . [alienate] its own people.”²⁷ Accordingly, just like any other nation state, a tribe should develop its environmental law consistent with its existing environmental ethics. “[U]ltimately, an indigenous nation’s sovereignty is strengthened if its law is based upon its own internalized values and norms.”²⁸ Although there are instances where application of federal law and other cultural influences have incapacitated indigenous environmental systems and ethics,²⁹ the capacity for innovation that departs from American legal norms and for identifying tribal or indigenous environmental ethics persists. Accordingly, non-Native communities considering or looking for ethical paradigms alternative to anthropocentrism can benefit from considering tribal environmental ethics, as such ethics may depart from anthropocentrism and, as discussed below, tribes are also already implementing laws based on such alternative ethical paradigms. Tribes therefore can provide templates to non-Native communities on not only what an effective alternative

Overall, “[i]n recent decades, the scope of tribal law has been widening to meet the needs of tribal self-government and contemporary self-determination. This explosion in both tribal common law decision making and positive law reflects the growing demand on Indian nations to address a wide array of matters” COHEN’S HANDBOOK ON FEDERAL INDIAN LAW, *supra*, § 4.05(1).

26. See TRIBES, LAND, AND THE ENVIRONMENT (Sarah Krakoff & Ezra Rosser eds., 2012), for a general discussion of the close spiritual and cultural connection that many tribes and individual Indians have with their tribal environments.

27. Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1, 2 (2000) (citations omitted).

28. *Id.*; see also Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL’Y 357, 358–59 (2006) (discussing common conflicts between tribal “incorpor[ation] [of] non-Indian law” and “tribes’ efforts to represent their histories and existence using their own terms”).

29. Tsosie, *supra* note 16, at 293. Also, because application of tribal environmental norms to non-members of a specific tribe may be controversial, tribal environmental ethics may not be given their fullest expression. *Id.* at 294.

environmental ethic might look like, but also how to implement such an alternative.

Consideration of tribal environmental ethics does not only benefit non-Native communities and governments. Rather, discussion and development of tribal environmental ethics benefits tribes as well through this promotion of self-determination and sovereignty. Development and articulation of tribal environmental ethics constitutes an expression of tribal self-determination. Moreover, by determining for themselves what constitutes their community environmental ethics, tribes can avoid buying ethical paradigms “sold” to them by non-Natives: paradigms designed to benefit those outside of tribal communities, rather than tribes or individual Indians.³⁰

Further, reconsideration of the environmental ethic driving American environmental policy also potentially benefits Indians and tribes, as the existing “American environmental policy has often failed to recognize the equity interests of so-called ‘minority’ populations such as American Indians and Hispanics.”³¹

30. *Id.* at 324–25.

Professor Huffman cautions Indian people against accepting the noble “in harmony with nature” role that environmentalists want them to play. By returning to traditional “preindustrial” economies and refusing to engage in other types of economic development, as environmentalists desire, Indian nations will find their often squalid circumstances worse rather than better: While white Americans pursue harmony with mother nature from their comfortable offices on the Potomac and their high tech kayaks on the Colorado, Native Americans will struggle to feed their children and make sense of a culture not of nature but of alcohol, poverty and desperation. According to Professor Huffman, “[t]his imagined Native American philosophy will neither serve the Indian nor provide a realistic path to a livable environment in the 21st Century.” Huffman likens the environmental movement to many other assimilationist movements in American history. Instead of the federal government trying to assimilate the Indians, however, the environmentalists want to set the policy agenda and “sell” it to Indians, arguing that it coincides with traditional Indian values.

Id. (citing James L. Huffman, *An Exploratory Essay on Native Americans and Environmentalism*, 63 U. COLO. L. REV. 901, 902–03 (1992)).

31. *Id.* at 264. Professor Tsosie goes on to point out that such environmental injustice spurred a movement in reaction to environmental racism, or the present day environmental justice movement. *Id.* at 264–65.

A. The Environment as Motivation for the Development of Ethical Paradigms

Beyond the generalized motivation of self-determination and sovereignty shared at some level by all governments, tribal governments may be more specifically motivated by a close connection to their land and environment. Although other communities may have a special relationship with their environments, such special relationships are not unusual for many tribes and individual Indians. Such special relationships in turn can lead to the development of robust ethical paradigms for many tribal communities. For example, the land and its environment can have special meaning for individual Indians. As Professor Rebecca Tsosie explains, “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.”³² Human geographers consider this one of the defining differences between “universalizing” and “ethnic” religions.³³

Professor Tsosie gives the example of the Tewa of New Mexico who view their world as being “bounded by four sacred mountains,” which are related to their origin myth.³⁴ Professor Frank Pommersheim agrees that land plays an important

32. *Id.* at 282–83 (footnote omitted). Professor Tsosie goes on to explain that:

Under the Native American perception of reality, which is “bound up in spatial references,” specific natural areas are imbued with complex significance. Thus, a tribe may speak of its “origin place”—such as a river, mountain, plateau, or valley—as a central and defining feature of the tribal religion. The tribe may also depend on a number of “sacred” places for practice of religious activities. These spatial references orient the people and place them within the land; they give a sense of history, rootedness, and belonging.

Id. at 283 (footnotes omitted). She ultimately concludes that “[t]he connections of the Indian people to their reservation lands are deeply-rooted and complex. Tribal governments clearly perceive that the future of the people is linked to the land; land is not fungible for Indian people, not is it merely of instrumental value.” *Id.* at 331–32.

33. JAMES M. RUBENSTEIN, *THE CULTURAL LANDSCAPE: AN INTRODUCTION TO HUMAN GEOGRAPHY* 31 (11th ed. 2013).

34. *Id.* at 283 (citing ALFONSO ORTIZ, *THE TEWA WORLD: SPACE, TIME, BEING, AND BECOMING IN A PUEBLO SOCIETY* 19 (1972)).

spiritual role for many tribes and individual Indians, as he explains that land “is the source of 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.”³⁵ For many tribes and individual Indians, this strong connection to a specific place translates into an equally strong desire to promote sustainability.³⁶ Because many tribes and Indians view their relationship with nature and future generations as “holistic, cyclical, and permanent,” a strong sense and promotion of sustainability is the natural result.³⁷

Specific to the connection between place and development of ethics, Professor Sarah Krakoff adds that, “[f]or American Indians, the place itself is sacred, and therefore the starting point for the system of beliefs and ethics that generate from it.”³⁸ Accordingly, although a close connection to the land and environment may not be completely unique to tribes, this connection certainly has motivated the development of environmental ethics for many tribal communities.

B. Legal Ethics as an Example of the Need for Tribal Ethical Paradigms in General

Having discussed some factors, such as sovereignty and a unique connection to the land, that may motivate tribes to develop tribal environmental ethics, a discussion of why ethical development is crucial is helpful. In order to understand the importance of ethics to a well-functioning legal system, one can consider the importance of legal ethics to many tribes. In this regard, the development of legal ethics parallels tribal environmental ethical growth, as both are necessary in order for tribes to incorporate the unique aspects of their communities and systems into governing ethical paradigms.

The practice of Indian law is complex for a wide variety of reasons. For example, attorneys working for tribes typically handle myriad legal matters on a daily basis, from simple

35. Pommersheim, *supra* note 22, at 250.

36. Tsosie, *supra* note 16, at 286.

37. *Id.* at 286–87.

38. Krakoff, *supra* note 2, at 869.

contract drafting to significant inter-governmental agreements.³⁹ The stress caused by such a complicated daily work environment is magnified by the fact that these attorneys are often called upon to make “snap” judgments and that, sometimes, legal decisions will intersect with personal and political issues impacting the tribe.⁴⁰ As a result, the combined effect of a tribal attorney’s work load and a sometimes chaotic work environment “can make it very difficult to safely navigate ethical responsibilities that sometimes appear to steer the attorney in conflicting directions.”⁴¹ For attorneys working for tribes and others working in the field of Indian law, these concerns are magnified by the increased growth and complexity of the field nationwide:

Indian tribes and nations control 56 million acres of land in the continental United States plus another 44 million acres in Alaska, adding billions of dollars annually to the U.S. Gross National Product – everything from energy, water and natural resources to banking and financial services, real estate development, and entertainment, hospitality and tourism.⁴²

Like federal environmental laws, the American Bar Association’s Model Rules of Professional Conduct and those rules adopted by state bar associations are evidence of the legal culture and ethical norms of mainstream American legal culture. However, mainstream legal culture does not take into consideration the nuances of tribal law or ethics, and, as a result, these mainstream ethical requirements may not always be helpful to attorneys practicing in Indian country.⁴³ As an

39. William J. Brooks, *Conflicted Out: Federal, Tribal, and Private Lawyers in the Real World of Indian Law: One (Former) Tribal Attorney’s Perspective*, in 32ND ANNUAL FEDERAL BAR ASSOCIATION INDIAN LAW CONFERENCE COURSE MATERIALS 281, 281 (Apr. 19–20, 2007) (on file with author).

40. *Id.*

41. *Id.*

42. Troy A. Eid, *Ethics Issues in Doing Business with Native American and Alaska Native Tribes and Tribal Enterprises*, 60 ROCKY MTN. MIN. L. INST. 16, 16-2 (2014).

43. Brooks, *supra* note 39, at 281–82. Many tribes have yet to develop their own tribal ethical codes, and, as a result, it is not uncommon for tribes to require attorneys practicing law within the tribe’s jurisdiction to be in good standing with a state bar association or be barred in a state. *Id.* at 281 n.1. Therefore, even an attorney working solely within a tribe’s jurisdiction may still need to comply with the state rules of professional conduct.

example, the Model Rules of Professional Conduct envision conflicts of interest between two or more clients. However, in the tribal context, conflicts may exist between the attorney and her tribal client.⁴⁴ Similarly, it is not at all uncommon for conflicts to emerge between branches of tribal government, leaving the tribal attorney to determine who her client is (which may be a difficult job).⁴⁵ This difference highlights the point that working with or for tribes may be different than working for other clients, as tribes are separate sovereigns; client/lawyer decisions made for one tribe may have profound impacts on all of Indian country;⁴⁶ and legal or political decisions in Indian country may be much more inter-twined with the tribe's society and culture.⁴⁷ These ethical quandaries may intensify given the complexity of the tribe's structure and organization.⁴⁸

One particular conflict that may be challenging for lawyers working in Indian country is the fact that decisions that benefit one tribe may disadvantage another tribe.⁴⁹ Shelby Settles Harper details some situations where this occurs,⁵⁰ such as

44. *Id.* at 282.

45. *Id.* at 290–91.

46. For example, a government attorney's ethical duty generally includes not only the government, but also a public interest. An attorney working for a tribal government may encounter a situation where a legal decision is in the best interests of the individual tribal client but could result in an outcome that disadvantages Indian country as a whole. In such a circumstance, the tribal attorney may have to ask herself what obligation, if any, she owes to Indian country in general. *Id.* at 286–87. Brooks goes on to point out, however, that some scholars argue “that [the] practice result of permitting government lawyers to qualify their duties to the constituent client based upon a separate duty to the ‘public interest,’ which is often only generally defined, is to subordinate the client's interest to the personal interest of the government lawyer.” *Id.*

47. *Id.* at 282–83.

48. See generally Kyme A.M. McGaw & Trent S.W. Crable, *Who's the Client?: Advising Tribal Leaders in an Unpredictable Legal Climate*, in 34TH ANNUAL FEDERAL BAR ASSOCIATION INDIAN LAW CONFERENCE COURSE MATERIALS 427, 429 (Apr. 2–3, 2009) (on file with author).

49. Settles Harper explains that this conflict, the interests of one tribe versus the interests of Indian country, can be particularly unsettling for lawyers working in Indian country, as they may have come to the field in an effort to help Indian country generally. Shelby Settles Harper, *Ethical Considerations in Representing Tribal Clients: Respecting the Impact our Representation has on Indian Country*, in SIXTH ANNUAL WASHINGTON, D.C. INDIAN LAW CONFERENCE 1 (Sept. 23–24, 2004) (on file with author).

50. *Id.* at 4–5.

exclusivity provisions in gaming compacts, off-reservation trust land acquisitions in another tribe's ancestral lands, opposing federal recognition of another tribe, and appealing a case to the U.S. Supreme Court where there is a high likelihood that the tribe will not prevail.⁵¹ As with conflicts of interest, the Model Rules of Professional Conduct do not contemplate that a lawyer's ethical duty flows beyond her client to a larger community, such as Indian country.⁵² The question of whether a lawyer owes an ethical duty to a larger community is not limited to tribes and Indian country. For example, some have argued that government lawyers owe a broader duty to the public interest.⁵³ Because such lawyers represent the government, the argument goes that they owe not only a duty to the government, but also to act in the best interests of the public as well. Ultimately, Settles Harper concludes that the duty to protect Indian country best lies with tribes, rather than with individual lawyers (although lawyers can certainly take steps to assist).⁵⁴ She buttresses this conclusion by explaining that it is "[h]ighly problematic [as to] the consideration of whose concept of justice or what is best for Indian Country is to prevail in the event there is an ethical or moral duty."⁵⁵

Because of the significant differences between some tribes and mainstream society, some have argued that attorneys working in Indian country need to be familiar with a tribe's customs, traditions and history in order to meet the attorney's duty of competence. As former U.S. Attorney for Colorado, Troy Eid, explained:

Far from being an academic exercise, the quest for greater historical and cultural awareness by attorneys representing or dealing with tribes and tribal enterprises goes to the heart of

51. See generally David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001) (demonstrating that many tribes have been unsuccessful in their appeals to the U.S. Supreme Court and hypothesizing as to why that is the case).

52. Harper, *supra* note 49, at 1–2.

53. See, e.g., Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 BRANDEIS L.J. 13, 13–18 (2003).

54. Harper, *supra* note 49, at 2.

55. *Id.* at 3.

every lawyer's basic obligation to provide competent representation to his or her client under Rule 1.1 of the Model Rules of Professional Conduct.⁵⁶

Given most public school curricula fail to include lessons on contemporary tribes and Indians,⁵⁷ such knowledge of tribal history and culture is not information many lawyers will acquire through their mainstream education. Some have suggested methods of easing some of the ethical challenges facing lawyers working in this field. For example, tribal law or specific contracts for legal representation may be drafted so as to address at least some of the more common ethical dilemmas.⁵⁸

Given the ethical obstacles facing attorneys working in Indian country, there are calls for tribes to develop their own rules of professional conduct and ethics. As discussed above, the modern American rules of professional conduct do not contemplate many of the unique challenges facing lawyers working in Indian country. For example, such rules do not protect larger groups or communities, such as Indian country.⁵⁹

Indian country "is not monopolitical—it is made up of [567] different federally recognized tribes and Alaska Native villages, with different historical experiences, different political philosophies, and different opportunities and disadvantages."⁶⁰ Therefore, it seems only appropriate that tribes should develop codes of professional conduct and environmental ethics that match their communities' norms and standards. This addresses the concern raised by Settles Harper and discussed above as to whose concept of justice should prevail,⁶¹ as tribes will be left to

56. Eid, *supra* note 42, at 16-7. Former tribal attorney William Brooks agrees, explaining that "[t]o be most effective in counseling and representing the interests of their tribal clients, tribal attorneys must understand the history and political/social/cultural dynamics of the tribe in order to effectively address a matter." Brooks, *supra* note 39, at 283.

57. See generally Connor K. Warner, *A Study of State Social Studies Standards for American Indian Education*, 17 MULTICULTURAL PERSP. 125 (2015).

58. For example, McGaw and Crable recommend that "[e]very contract for legal services should designate the client, the scope of the representation, and the tribal officers or representatives who have the authority to make particular decisions." McGaw & Crable, *supra* note 48, at 431.

59. Harper, *supra* note 49, at 2.

60. *Id.* at 3.

61. *Id.* at 3-4.

determine their own concept of justice both broadly under rules of professional conduct and more specifically as to their environmental ethics. In fact, Settles Harper concludes that “[t]ribes certainly would not want the non-Indian community to define its [sic] best interests, as it has for far too long. Such a result would most certainly fly in the face of tribal sovereignty.”⁶²

Tribal sovereignty therefore demands that tribes engage in development of professional rules of conduct and environmental ethics. “Tribes, as sovereign nations, are the entities charged with the duty of deciding whether to pursue their own goals at the expense of other tribes or whether to act in unison and in power with other tribes.”⁶³ Further, tribes may have pragmatic and ethical reasons for working together on such development.⁶⁴ Given tribes’ inherent sovereignty absent congressional divestiture, “[t]ribes clearly have the right to adopt ethical rules that vary from the ‘norm’ contained in the ABA Model Rules.”⁶⁵ This right is evidenced by the fact that “[t]he State Bar of Arizona has held that a lawyer working on tribal matters within a tribal jurisdiction may not be subject to state sanctions if the lawyer complies with the tribal rules, even when the tribal and state rules conflict.”⁶⁶

62. *Id.* at 4.

63. *Id.* at 7.

64. *Id.* at 4.

Tribes may choose to act in concert with one another for the betterment of Indian Country and to safeguard the inroads in self-determination they have established. Pragmatically speaking, not working in unison can hurt all of Indian Country. We have only to look throughout history to see the failed strategy of tribes that pursue their own goals at the expense of other tribes.

Id.

65. Brooks, *supra* note 39, at 291. In addition to developing tribal rules of professional conduct, Brooks also encourages tribes to consider these issues when developing and structuring their legal departments, including the structure of employment contracts with attorneys. *Id.* at 292–94. He also asserts that some ethical conflicts can be better handled by establishing a framework for communication with tribal clients. *Id.* at 294–95.

66. McGaw & Crable, *supra* note 48, at 430–31 (citing State Bar of Ariz., Ethics Op. 90-19 (1990); State Bar of Ariz., Ethics Op. 99-13 (1999)). However, McGaw and Crable go on to caution that “the lawyer should be wary because most, if not all, state bars require that their members abide by the state’s ethics rules even when practicing outside of the jurisdiction, unless other rules clearly apply.” *Id.* at 431.

As demonstrated above, tribes are both generally and specifically motivated to develop tribal environmental ethics. In general, development of ethical paradigms evidences self-determination, which in turn promotes tribal sovereignty. More specifically, many tribes may be motivated to develop their environmental ethics given their close connection, both culturally and spiritually, to their land and environment. Furthermore, the example of the need for tribal legal ethics demonstrates the importance of tribes cultivating their own ethical norms, given differences do exist between tribal and non-tribal systems.

IV. TRIBES AS LABORATORIES OF ENVIRONMENTAL ETHICS

Having examined factors that potentially motivate tribal governments to develop ethical paradigms separate from American norms, this Part now demonstrates that tribes have the capacity to develop ethical systems that may be used as templates for non-tribal communities, and that they are already innovating in this area. To better understand such tribal innovations, the Part starts with an examination of ethical paradigms outside of anthropocentrism, such as animism and deep ecology. The Part then shifts to a discussion of how tribal ethics may generally incorporate these alternative (alternative to anthropocentrism) paradigms. The Part concludes with specific examples of how tribes are already innovating in the field of environmental ethics. In this regard, this Part of the article builds on past articles arguing that tribes are “laboratories” of legal innovation.⁶⁷

A. Ethical Paradigms Alternative to Anthropocentrism

Before discussing how tribal environmental ethics might depart from the anthropocentric viewpoint of the environmental ethics represented by many federal and state laws,⁶⁸ it is helpful

67. See Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, 47 ARIZ. ST. L.J. 857, 858 (2015); Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental “Laboratories,”* 86 U. COLO. L. REV. 789, 792 (2015).

68. This article assumes that the majority of American environmental policy and regulation currently in place stems from anthropocentric environmental ethics. See Tsosie, *supra* note 16, at 246–68, for a discussion of influences that have contributed to this anthropocentric ethic. Interestingly,

to first understand what other potential viewpoints might be represented. Consideration of environmental ethics other than anthropocentrism may be helpful in order to achieve environmental justice for tribes and to have a more complete view of the environment. For example, Native scholar Professor Robert Williams claims that American environmental law has been “colonized by a perverse system of values which is antithetical to achieving environmental justice for American Indian peoples.”⁶⁹ Professor Williams goes on to argue that the Anglo-American value system “privileges what it labels as ‘human values’ over ‘environmental values’” and fails to see “that both sets of values are intimately connected . . . [to] the complete set of forces which give meaning and life to our world.”⁷⁰ Accordingly, this subpart considers environmental ethics other than anthropocentrism in order to hope to achieve environmental justice. To do this, this subpart begins introducing other potential viewpoints, such as animism and deep ecology, which could be represented in tribal environmental ethics. With this introduction in hand, the Part goes on to demonstrate how some tribal environmental ethics incorporate elements of these alternative paradigms, but, also, how some such tribal environmental ethics also move beyond these paradigms. In this regard, tribal environmental ethics serves as a robust area for non-Native consideration.

some of these influences, such as Christianity and the concept that God gave man dominion over the Earth, have been used as justification to dispossess Indians of their lands. *Id.* at 251.

69. Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1134–35 (1994).

70. *Id.*

1. Animism⁷¹

For purposes of this article, the term “animism” is used in its newer context, which “refers to the widespread indigenous and increasingly popular ‘alternative’ understanding that humans share this world with a wide range of persons.”⁷² An animist recognizes that the world is made up of a variety of “persons,” but that only some of these are human beings.⁷³ Because of the recognition that the world is made up of a variety of persons (beings), animists focus on the interrelationship between persons, taking a more holistic view of the environment and persons within it.⁷⁴ Such a recognition of personhood has profound implications, as such a knowing impacts dynamics and protocols.⁷⁵ Recognition of the “aliveness” of the world and interconnections between persons thereby separates animism from environmental ethical viewpoints typically associated with Western views.⁷⁶

71. The author is aware that some have rejected the use of this term. For example: “Many academics have jettisoned the term ‘animism’ from their critical, technical and scholarly vocabulary. They consider it irredeemably compromised by the dubious role it played in early anthropological theoriz[ing] and religious polemic.” GRAHAM HARVEY, *ANIMISM: RESPECTING THE LIVING WORLD*, at xii (2006). But many communities have given the term “new life” recently, as it adequately describes what is important and interesting to the community. *Id.* Admittedly, however, “[i]t was, and sometimes remains, a colonist slur.” *Id.* at xiii. The term is therefore used with an acknowledgement of the heavy historical “baggage” associated with its use and the fact that some may reject the use of such a term. For those who reject the usage of the term, hopefully it is still possible for them to understand the meaning the term is being used to represent in this article.

72. *Id.* at xi. This newer understanding of this environmental view is in contrast to the older usage, which “refers to an putative concern with knowing what is alive and what makes a being alive.” *Id.*

73. *Id.*

Animists are people who recogni[z]e that the world is full of persons, only some of whom are human, and that life is always lived in relationship with others. Animism is lived out in various ways that are all about learning to act respectfully (carefully and constructively) towards and among other persons. Persons are beings, rather than objects, who are animated and social towards others (even if they are not always sociable).

Id. (footnote omitted).

74. *Id.*

75. *Id.* at xiv.

76. *Id.* at 19.

One way in which some Native communities can be seen to manifest an animist viewpoint is through the use of totems. In such circumstances, “[i]ndividuals consider themselves related not only to their ‘blood’ kin (perhaps note this should read ‘genetic kin’) but also to a wider clan identified with a particular symbolic animal, a totem. The abstracted ‘society’ become manifest in the concrete encounter with clan related totemic animals and humans.”⁷⁷ For example, the author is a member of the Turtle Clan, and, historically, her duties to her Tribe were linked to those of her clan, which, in turn, were representative of turtles. Turtles hold the world on their back (in some Ojibwe creation stories), and, as a result, many turtle clan members are called on to undertake leadership positions within the Tribe. Accordingly, “totenism” is a method of connecting human persons to other types of non-human persons.

Another way that animism and the relationship between different types of persons can be seen in some Native communities is through gifts and reciprocal relationships, as “gift exchanges are integral to relational definitions of personhood and central to debates about ontology.”⁷⁸ Interrelatedness is thereby demonstrated by the giving and receiving of gifts, and, “gifts are given and received not only by humans but also by trees, forests, rivers, seas and all other living persons, communities and/or domains.”⁷⁹ Relatedly, in some Native communities, such as Ojibwe communities, a human person can be related to a non-human person, such as non-human grandparents.⁸⁰ For example, thunder is a non-human grandparent to which someone may be related.

In terms of environmental ethics, specifically:

Animist worldviews might also require that the terms “environment” and “environmentalism” be used with careful precision. Humans, badgers, eagles and microbes do live within

77. HARVEY, *supra* note 71, at 11.

78. *Id.* at 12. This theory comes from the work of Marcel Mauss. “Mauss makes it clear that reciprocation is vital to social interactions everywhere: it generates both equity and inequality as people give or withhold gifts to others. Particular societies exchange in particular ways and in doing so create and maintain relationships.” *Id.*

79. *Id.* at 13.

80. *Id.* at 19.

particular environments, but the world is not “our environment” in the sense that it is a resource chiefly for human benefit. Animism, then, might take its place among those ecological philosophies and activisms that prefer not to speak of “environmentalism” but of ecology or ecological ethics, or of living respectfully among “all our relations.”⁸¹

Furthermore, animists may be said to be environmentalists because of their unique connection to specific places and communities.⁸² So too, many Native people may not particularly care when a particular spiritual event occurred, but will care where it occurred, as previously described.⁸³ Ultimately, animists contribute to ecological or environmental thinking by recognizing the interconnectedness of all persons, human or otherwise, and asserting that many of the modern environmental problems arise because of a rejection of this fact.⁸⁴

As mentioned above, tribal environmental ethics may incorporate elements of animism. For example, the Koyukon of central Alaska believe that the environment is “both a natural and supernatural realm. All that exists in nature is imbued with awareness and power; . . . all actions towards nature are mediated by consideration of its consciousness and sensitivity.”⁸⁵ Similarly, many indigenous groups refer to the earth as a mother or grandmother, as the earth is the source of life for all people.⁸⁶ A Lakota spiritual leader describes the earth, rocks, wind, and water as being alive and having “power” within an animate universe.⁸⁷ Ojibwe environmental ethics also presents elements of animism, as “animals, plants, stones, thunder, water, hills” and

81. *Id.* at 179 (footnote omitted).

82. *Id.* at 185.

83. Pommersheim, *supra* note 22, at 250.

84. HARVEY, *supra* note 71, at 186.

85. Annie L. Booth & Harvey M. Jacobs, *Ties that Bind: Native American Beliefs as a Foundation for Environmental Consciousness*, 12 ENVTL. ETHICS 27, 33 (1990) (quoting RICHARD K. NELSON, *MAKE PRAYERS TO THE RAVEN: A KOYUKON VIEW OF THE NORTHERN FOREST* 240 (1st ed. 1983)).

86. Christopher Vecsey, *American Indian Environmental Religions*, in *AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY* 1, 13 (Christopher Vecsey & Robert Venables eds., 1980).

87. JOHN (FIRE) LAME DEER & RICHARD ERDOES, *LAME DEER, SEEKER OF VISIONS* 12 (1972).

other non-human beings are seen as “persons.”⁸⁸ Moreover, the Ojibwe word for “grandfather” includes both the human being and the spiritual elements, such as thunder.⁸⁹ Vine Deloria, Jr., explains that one of the purposes of some Native religions is to determine one’s proper relationship with all aspects of the animate and inanimate environment.⁹⁰

Professor Sarah Krakoff also describes similarities between Native religions and animism. As she explains:

Another feature of most American Indian religions is that humans are part of an animate universe and have moral relationships with all other creatures, beings, and even elements. For example, the Hopi hold several springs to be sacred. The springs play an integral role in the Hopi creation story and are part of ongoing ceremonies and practices. Likewise, animals are sacred to many tribes and are required for the proper performance of religious ceremonies. For the Northern Arapaho, Hopi, Navajo, and other plains and southwest tribes, the eagle plays a key role. For each of these tribes, an entire set of practices surrounding capture, treatment, and use of the bird comprise the religious experience.⁹¹

More generally, for many tribes, members of the tribe may have a relationship with specific animals, as the animals are considered persons.⁹² This is similar to the tokenism of animism. Ritualism, an element of animism, is also important for some tribes. For example, because of the complex relationship between human beings and other persons, many Ojibwe people believe that certain rituals and customs must be followed when taking the life of another person. When taking the life of an animal, an Ojibwe hunter may be expected to give up tobacco in exchange for the animal.⁹³

88. A. Irving Hallowell, *Ojibwe Ontology, Behavior, and World View*, in *TEACHINGS FROM THE AMERICAN EARTH: INDIAN RELIGION AND PHILOSOPHY* 141, 147 (Dennis Tedlock & Barbara Tedlock eds., 1975).

89. *Id.* at 144.

90. VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* 88 (2d ed. 1992).

91. Krakoff, *supra* note 3, at 871 (footnotes omitted).

92. Vecsey, *supra* note 86, at 21.

93. *Id.*

2. Deep Ecology⁹⁴

Deep ecology is similar to animism in certain ways. Both are typically characterized by a move away from anthropocentrism and toward a more ecological perspective, or ecocentrism.⁹⁵ Many of the early deep ecology activists felt that anthropocentric policies were inadequate to address environmental challenges of the time.⁹⁶ For example, Rachel Carson posed a philosophical challenge to anthropocentrism, as demonstrated by her work in *Silent Spring*.⁹⁷ Moreover, similar to animism's focus on all persons, human and non-human, deep ecology criticizes "human survival environmentalism" for not taking a wider "ecological perspective."⁹⁸ "One of the basic norms of deep ecology is that every life form has in principle a right to live and blossom."⁹⁹ Deep ecology calls for a fundamental paradigm shift moving environmental concerns from focusing solely on anthropocentric concerns towards "a spiritual/ecocentric value orientation."¹⁰⁰ Further, deep ecology parallels animism, as deep ecologists also look to the value of totems—positing that totems can assist in the

94. DEEP ECOLOGY FOR THE TWENTY-FIRST CENTURY, at xi (George Sessions ed., 1995), describes deep ecology in the following manner:

The long-range deep ecology movement emerged more or less spontaneously and informally as a philosophical and scientific social/political movement during the so-called Ecological Revolution of the 1960s. Its main concern has been to bring about a major paradigm shift—a shift in perception, values, and lifestyles—as a basis for redirecting the ecologically destructive path of modern growth societies.

Deep ecology can also be seen as the opposite of "shallow ecology," which was a "'shallow' anthropocentric technocratic environmental movement" developing at roughly the same time that focused on "pollution, resource depletion, and 'the health and affluence of people in the developed countries'" *Id.* at xii.

95. *See id.* at ix.

96. *Id.* at x.

97. *Id.*

98. *Id.* at xi.

99. Stephan Bodian, *Simple in Means, Rich in Ends: An Interview with Arne Naess*, in DEEP ECOLOGY FOR THE TWENTY-FIRST CENTURY, *supra* note 94, at 26, 28.

100. DEEP ECOLOGY FOR THE TWENTY-FIRST CENTURY, *supra* note 94, at xxi. George Sessions goes on to explain that "[t]he wild ecosystems and species on the earth have intrinsic value and the right to exist and flourish, and are also necessary for the ecological health of the planet *and* the ultimate well-being of humans." *Id.*

connection between humans and nature, because totems teach humans what they need to know about nature.¹⁰¹

Deep ecology does differ from animism in some ways. For example, in an interview with Arne Naess, the philosopher largely credited with being one of the fathers of the deep ecology movement, he explained that the essence of deep ecology is to ask “deeper questions.”¹⁰² Naess went on to explain that “[e]cosophy, or deep ecology, then, involves a shift from science to wisdom.”¹⁰³

At its heart, deep ecology focuses on ecocentrism.¹⁰⁴ In explaining what deep ecology is, Naess points to an eight point platform, which includes:

1. The well-being and flourishing of human and non-human life on Earth have value in themselves These values are independent of the usefulness of the non-human world for human purposes.
2. Richness and diversity of life forms contribute to the realization of these values and are also values in themselves.
3. Humans have no right to reduce this richness and diversity except to satisfy vital needs.
4. The flourishing of human life and cultures is compatible with a substantially smaller human population. The flourishing of non-human life *requires* a smaller human population.
5. Present human interference with the non-human world is excessive, and the situation is rapidly worsening.

101. Dolores LaChapelle, *Ritual—The Pattern that Connects*, in DEEP ECOLOGY FOR THE TWENTY-FIRST CENTURY, *supra* note 94, at 57, 60.

102. Bodian, *supra* note 99, at 27. In another essay, Naess explains what he means by such “deep questioning”:

The deep ecology movement seriously questions the presuppositions of shallow argumentation. Even what counts as a rational decision is challenged, because what is ‘rational’ is always defined in relation to specific aims and goals. If a decision is rational in relation to the lower level aims and goals of our pyramid, but not in relation to the highest level, then this decision should not be judged to be rational. This is an important point! If an environmentally oriented policy decision is not linked to intrinsic values or ultimates, then its rationality with a set of philosophical or religious foundations. But one cannot expect the ultimate premises to constitute rational conclusions. There are no ‘deeper’ premises available.

Arne Naess, *The Deep Ecological Movement*, in DEEP ECOLOGY FOR THE TWENTY-FIRST CENTURY, *supra* note 94, at 64, 78.

103. Bodian, *supra* note 99, at 27.

104. DEEP ECOLOGY FOR THE TWENTY-FIRST CENTURY, *supra* note 94, at xiii.

6. Policies must therefore be changed. These policies affect basic economic, technological, and ideological structures. The resulting state of affairs will be deeply different from the present.
7. The ideological change will be mainly that of appreciating life quality (dwelling in situations of inherent value) rather than adhering to an increasingly higher standard of living. There will be a profound awareness of the difference between bigness and greatness.
8. Those who subscribe to the foregoing points have an obligation directly or indirectly to try to implement the necessary changes.¹⁰⁵

Similar to the Seventh generation or intergenerational perspective of many Native communities,¹⁰⁶ deep ecology focuses on the long term ramifications of actions. As Naess explained, “[a] long-range view is characteristic of deep ecology – we feel responsible for future generations, not just the first, but the second, third, and fourth generations as well. Our [deep ecologists’] perspective in time and space is very long.”¹⁰⁷ Dolores LaChapelle draws other parallels between the deep ecology movement and Native communities. As she explains, “[m]ost native societies around the world had three common characteristics: they had an intimate, conscious relationship with their place; they were stable ‘sustainable’ cultures, often lasting for thousands of years; and they had a rich ceremonial and ritual life.”¹⁰⁸ Because of these characteristics, LaChapelle sees such Native communities as practicing a lifestyle consistent with the practices of deep ecology, as these communities are “intimately

105. Naess, *supra* note 102, at 68.

106. Tsosie, *supra* note 16, at 228–29.

For example, Oren Lyons describes Iroquois governmental decision-making as being dependent upon one central question: “will this be to the benefit of the seventh generation?” For the Iroquois nations then, governmental authority is limited by a sense of duty to protect the land and its resources for future generations. Although other Indian nations have different political traditions, it is clear that many share a commitment to preserving the land for future generations.

Id. (footnotes omitted)

107. Bodian, *supra* note 99, at 27.

108. LaChapelle, *supra* note 101, at 57.

connected” with their environments.¹⁰⁹ Rituals are a tool used to maintain the connection with the environment.¹¹⁰ Deep ecologist Gary Snyder also compares deep ecology to Native traditions, acknowledging that “Native American religious beliefs, although not identical coast to coast, are overwhelmingly in support of a full and sensitive acknowledgment of the subjecthood of nature.”¹¹¹

Interestingly, in addition to elements of animism, as discussed above, the Lakota spiritual universe could also be said to have commonalities with a vision of deep ecology environmental ethics, as the Lakota spiritual view includes a holistic vision of the world, which takes into account the smallest object to the largest.¹¹² “[T]he world view of the Lakota and other indigenous peoples perceives the ‘human and natural realms as unified and akin,’ whereas the European world view is premised on an antagonistic dualism in which the body and spirit are ‘pitted against one another in a moral struggle.’”¹¹³ Therefore, elements of both animism, with the idea of an animate universe with diverse types of persons besides human beings, and deep ecology, with the idea of a holistic vision of the environment whose purpose is broader than the value assigned it by human beings, can be seen in the environmental ethics and worldviews of some tribes and individual Indians.

Although elements of other ethical paradigms may be present in some tribal environmental ethics, however, does not mean that tribal environmental ethics mirror these alternative ethical paradigms articulated by non-Natives. As the next subpart

109. *Id.*

110. *Id.* at 58 (“What we call [Native peoples] ‘ritual and ceremony’ was a sophisticated social and spiritual technology, refined through many thousands of years or experience, that maintained this relationship.”). She goes on to explain that “[f]estivals connect the conscious with the unconscious, the right and left hemispheres of the brain, the cortex with the older three brains . . . as well as connecting the human with the nonhuman: the earth, the sky, the plants and animals.” *Id.* at 59 (citation omitted).

111. Gary Snyder, *The Rediscovery of Turtle Island*, in DEEP ECOLOGY FOR THE TWENTY-FIRST CENTURY, *supra* note 94, at 459.

112. *Id.* For a more complete discussion of Lakota cosmology, it is recommended to read John Fire Lane Deer’s entire book, as a full discussion is beyond the scope of this article and the author here necessarily must summarize a rather complicated area due to the space restrictions of publication.

113. Tsosie, *supra* note 16, at 279 (footnote omitted).

demonstrates, tribes possess the capacity to truly innovate in the field of environmental ethics—developing ethical paradigms that, although similar, may differ from those conceptualized by non-Native communities.

B. Tribal Capacity for Environmental Ethical Innovation

Having described ethical paradigms other than anthropocentrism, such as animism, this subpart now turns to consideration of how tribes, in general, possess the capacity to adopt and adapt such alternative paradigms. As demonstrated below, this Part also argues that tribal environmental ethics is more than just that non-Native alternative environmental ethics, as tribal environmental ethics represent more than the ideas represented above. The ability of tribes to incorporate their unique environmental ethics into their environmental policy has been demonstrated on multiple occasions.¹¹⁴ In order to fully understand tribal environmental ethics, tribal communities may be examined in order to “define the unique traditions governing their relationship to their indigenous lands and resources.”¹¹⁵ Scrutinizing individual tribal governments and environmental ethics will lead to discovery of certain trends between tribes, but such an examination is not designed to “essentialize” a singular “indigenous environmental ethic[]” or to suggest that “Indian nations that depart from a predominant norm are less ‘Indian.’”¹¹⁶

Despite the differences between tribes, Professor Rebecca Tsosie has identified a couple of trends that might explain why some commonalities exist between tribal environmental ethics of different tribes:

The similarities among American Indian environmental perspectives may stem from the fact that virtually all traditional Indian cultures had “land-based” rather than “industrial” or

114. *Id.* at 287. Admittedly, the scope of tribal innovation in the area is difficult to ascertain given some regulation may occur through custom, which may not be codified or unwritten. *Id.* at 289. Accordingly, this article is necessarily limited in scope, as it does not include a discussion of “unwritten rules and social norms” that may be “perpetuated through social institutions.” *Id.*

115. *Id.* at 271.

116. *Id.* at 271–72.

“market” economies. Moreover, many indigenous groups throughout North America are culturally linked to some degree and have interacted with one another for centuries. And, unquestionably, all indigenous peoples within North America have experienced very similar treatment by Europeans and have had similar responses to contact and colonization. One common response among Native American peoples appears to have been to cling to traditional belief systems as a way to define themselves in opposition to the Euro-Americans who were attempting to assimilate native peoples to Western values. Thus, in some cases, Native Americans identify themselves with the environment as a way to express their distinctive identity as “Indians.”¹¹⁷

Native environmental ethics may differ from the environmental ethics discussed above, because, for many individual Indians and tribes, environmental ethics have a spiritual quality.¹¹⁸

Because of their sovereignty and capacity for self-determination, tribes possess the tools necessary for innovation. Starting in 1970 with President Nixon’s call for a new federal policy of self-determination,¹¹⁹ the federal government has promoted the concept of tribal self-determination thereby encouraging tribes to experiment with their legal systems. Admittedly, tribes are not free from the environmental ethical norms motivating the federal government and states.¹²⁰ This is because the federal government has influenced the development of tribal environmental law, both directly through application of federal environmental laws to Indian country and indirectly

117. *Id.* at 274 (footnotes omitted).

118. *See* DELORIA, JR., *supra* note 90, at 88.

119. Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564–67 (July 8, 1970), <http://www.presidency.ucsb.edu/ws/?pid=2573> [<https://perma.cc/2GHP-YR9H>].

120. Tsosie, *supra* note 16, at 226. Professor Tsosie goes on to explain that “the traditional land ethics of indigenous peoples have undergone transformation either as a result of colonization or through a voluntary adaptation to meet changing times. Perhaps it is not even possible to define a single Anglo-American land ethic, an indigenous land ethic, or to otherwise dichotomize what may be a continuum of values that indeed intersects at several points.” *Id.* at 244.

through association.¹²¹ Moreover, tribes have certainly been influenced by other perspectives as well, such as Christianity.¹²² However, despite such European or non-Native influences, traditional Native ethical norms persist.¹²³ Moreover, as a result of this federal policy of self-determination, tribes have been free and even encouraged in some instances to develop their tribal environmental ethics, which is truly environmental self-determination.¹²⁴ It is therefore helpful to look at areas where the federal government's influence may not be as strong (such as areas where tribes possess the sovereign right to act outside of federal strictures) for examples of tribal innovation.¹²⁵

121. *Id.* at 232–42 (describing the application of federal environmental law to Indian country). Even if federal environmental laws do not explicitly mention tribes, the Supreme Court has held that a federal law of general application (i.e., one designed to have uniform application across the country) shall apply to tribes, unless a showing can be made that Congress did not intend the law to apply. *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960). Professor Tsosie goes on to explain that “[b]ecause the Indian nations are ‘domestic’ sovereigns, however, reservation lands fall, to some extent, under federal jurisdiction. Environmental conditions on the reservation are therefore subject to a dual legal structure of federal and tribal law, providing added complexity to the notion of ‘environmental self-determination.’” Tsosie, *supra* note 16, at 232 (footnotes omitted). Interestingly, however, Congress amended many of the federal environmental statutes, such as the Clean Air Act and Clean Water Act, to allow tribes to act in a manner similar to states and to regulate more stringently than the federal minimums allowed. *See, e.g., City of Albuquerque v. Browner*, 865 F. Supp. 733, 740 (D.N.M. 1993), *aff'd*, 97 F.3d 415 (10th Cir. 1996) (“EPA properly recognized the Pueblo’s authority to develop water quality standards more stringent than those of the federal government.”).

122. Tsosie, *supra* note 16, at 269–70 (explaining that Christianity has had a profound impact on tribal environmental norms). Because Christianity generally posits that human beings have dominion over land and animals, the religion can have a substantial impact on how individuals view environmental policy.

123. *Id.* at 228–29.

124. As Professor Tsosie explains more broadly, “[t]he self-determination policy, intended to ‘strengthen the Indian’s sense of autonomy without threatening his sense of community,’ encouraged tribes to assume control over many of the federal programs being administered on the reservation.” *Id.* at 18, at 229–30 (quoting Special Message to the Congress on Indian Affairs, *supra* note 119, at 566). Furthermore, this federal policy of self-determination persists, and “is a central underpinning for Congress’ recent amendments to the federal environmental regulatory programs on a similar basis to the states.” *Id.* at 230.

125. This is particularly important, because, where the federal government requires tribes to adopt or apply federal environmental laws, the federal government has also required tribes to accept “the goals and values of the majority-society.” *Id.* at 245. True indigenous environmental ethics therefore

Tribes have demonstrated capacity for innovation and adaptation.¹²⁶ For example, it has been argued that “Native communities have persisted and adapted during periods of wide-ranging natural climate variability.”¹²⁷ In fact, such demonstrated ability is recognized at the international level. For example, Principle 22 of the Rio Declaration recognizes the vital role played by indigenous communities in terms of environmental management and development “because of their knowledge and traditional practices.”¹²⁸ In fact, some commentators have gone so far as to say that “traditional indigenous values are more conducive to environmental protection than are the Western European values.”¹²⁹

In terms of tribes’ ability to innovate in the area of environmental ethics, such ability is bolstered by the intergenerational knowledge possessed by Native communities.¹³⁰ As Dr. Daniel Wildcat explains, “indigenous peoples draw on practical lifeway experiences—not one person’s experience—but that of entire nations and communities to share multi-generational ‘deep spatial’ knowledges of empirical landscapes

exist in the spaces where the federal government has not required tribes to adopt federal laws.

126. See generally Elizabeth Ann Kronk Warner, *Justice Brandeis and Indian Country: Lessons from the Tribal Environmental Laboratory*, *supra* note 69, at 857; Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental “Laboratories”*, *supra* note 67, at 792.

127. Fact Sheet, U. of Ariz. Inst. of the Env’t, Unique Challenges Facing Southwestern Tribes, http://www.swcarr.arizona.edu/sites/default/files/ACCSWUS_Ch17_Factsheet.pdf [<https://perma.cc/83XR-ST8J>].

128. Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 46 (1994) (quoting Cherie Metcalf, *Indigenous Rights and the Environment: Evolving International Law*, 35 OTTAWA L. REV. 101, 108 (2003)).

129. Tsosie, *supra* note 16, at 318.

130. In fact, the suggestion that we look to tribes for assistance in developing strategies to combat climate change is not a new one, as Professor Krakoff in 2008 stated that, “a philosophical worldview that we might turn to for instruction as we navigate this new terrain [related to climate change] is that embraced by many American Indian tribes.” Krakoff, *supra* note 2, at 868. She goes on to say that “[t]he blueprint for such a worldview [deep version of sustainability] is available to us; it is the worldview embraced by American Indian tribes.” *Id.* at 893–94.

and seascapes.”¹³¹ Given the intergenerational nature of climate change and the long time period leading to devastating impacts,¹³² native knowledge may be particularly helpful.

Furthermore, tribes may be particularly well placed to lead and innovate in the field of environmental ethics given that many tribes view land as “particularly compelling.”¹³³ Furthermore, “[t]his attachment to place, rooted in religious and cultural norms and traditions, is integral to the disparate effects tribes are experiencing due to global warming.”¹³⁴

At a broad starting point, it is worthwhile to note that custom plays a significant role in regulating tribal environments for many tribes, and therefore, many tribes have been engaged in environmental regulation and policy development for generations.¹³⁵ For example, Ronald Trosper argues that indigenous world views include:

a perception of the earth as an animate being; a belief that humans are in a kinship system with other living things; a perception of the land as essential to the identity of the people; and a concept of reciprocity and balance that extends to relationships among humans, including future generations, and between humans and the natural world.¹³⁶

This subpart accordingly demonstrates that tribes possess both the capacity and motivation for innovation. Having established this base, the next subpart looks at specific examples of such innovation.

131. Daniel R. Wildcat, *Introduction: Climate Change and Indigenous Peoples of the USA*, in *CLIMATE CHANGE AND INDIGENOUS PEOPLES IN THE UNITED STATES 1, 2* (Julie Koppel Maldonado et al. eds., 2014).

132. As Professor Sarah Krakoff explains, “[c]limate change is therefore an intergenerational collective action problem of potentially tragic proportions.” Krakoff, *supra* note 2, at 867.

133. Tsosie, *supra* note 16, at 225.

134. Krakoff, *supra* note 2, at 872.

135. Tsosie, *supra* note 16, at 245.

136. *Id.* at 276.

C. Examples of Tribal Innovations in Environmental Ethics

Having established this broad foundation that tribes are capable of innovation in the field of environmental ethics, it is helpful to look more specifically at some examples of how various Native peoples and tribes articulate their environmental ethics. Tribes are doing more than just conceptualizing alternative ethical paradigms; they are actually developing and implementing laws based on such alternative paradigms. In this regard, tribal environmental ethics may prove especially helpful to non-Native communities considering alternative ethical paradigms, as tribes are putting the theory into practice—thereby providing a template for implementation.

For example, Winona LaDuke argues that the environmental ethics of the Ojibwe and Cree people of Canada and the northern United States constitute examples of how environmental ethics can be incorporated into environmental policy making. The Ojibwe and Cree people follow the “Minobimaatisiwin” or the “good life,” which involves the idea of a cyclical relationship between human beings and the natural world, as “[i]mplicit in the concept of Minobimaatisiwin is the continuous inhabitation of place, an intimate understanding of the relationship between humans and the ecosystem, and the need to maintain that balance.”¹³⁷ The goal of Minobimaatisiwin cannot be accomplished “without the effective help and cooperation of *both* human and other-than-human ‘persons’, as well as by one’s own personal efforts.”¹³⁸

Professor Rebecca Tsosie also gives several examples of where tribal environmental ethics have been incorporated into environmental policy making:

For example, the Zuni Pueblo instituted a comprehensive agricultural project that restores community control over food production and implements traditional methods consistent with the Zuni’s unique environment such as “field rooting” and “dry farming.” Jim Enote, the director of the Zuni Conservation Project, describes the goals of the project as being based on

137. Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT’L ENVTL. L. & POL’Y 127, 128 (1994).

138. Hallowell, *supra* note 88, at 171.

traditional Zuni knowledge: Reaching a modern vision of Zuni sustainability requires developing full partnerships with [the Zuni people and] promoting the status of Zuni values, traditional knowledge, and resource management practices.¹³⁹

Examples of tribes incorporating traditional environmental ethics into policy making is not limited to efforts by single tribes. Tribes may work cooperatively through intertribal organizations to effectuate the traditional regulation of a resource. For example, the Northwest Indian Fisheries Commission is composed of twenty tribes, who came together to effectively regulate treaty resources—water and fisheries—according to tribal values.¹⁴⁰ The purpose of the Commission is “promoting respect for traditional tribal values about water and the environment.”¹⁴¹ Accordingly, the Commission is an example of tribes coming together to address modern problems with traditional values.

The idea of respect and reciprocity present in some environmental ethical paradigms other than anthropocentrism can be seen in the law adopted by tribes. For example, the Cheyenne and Arapaho Tribes include recognition of the necessity to respect the environment in their Constitution:

We, the People of the Cheyenne and Arapaho Tribes, in order to sustain and promote our cultures, languages, and way of life, protect our religious rights, establish and promote justice for all People, promote education, establish guidance and direction for our government, *respect and protect our natural environment and resources*, and advance the general welfare for ourselves and our posterity, do establish this Constitution.¹⁴²

Also, some tribes have explicitly incorporated discussion of their cultural connection with the environment into legal

139. Tsosie, *supra* note 16, at 295–96 (footnotes omitted).

140. See Emmett O’Connell, *Introducing Northwest Treaty Tribes*, NORTHWEST INDIAN FISHERIES COMMISSION, (Aug. 15, 2015), <http://nwifc.org/introducing-northwest-treaty-tribes/#more-10740> [<https://perma.cc/G2ZT-VKFQ>].

141. Rebecca Tsosie, *Tribal Environmental Policy and National Development Priorities*, in *WAR AND BORDER CROSSINGS: ETHICS WHEN CULTURES CRASH* 265, 281 (Peter A. French & Jason A. Short eds., 2005).

142. CHEYENNE & ARAPAHO TRIBES CONST. pmb. (emphasis added), <http://www.c-a-tribes.org/cheyenne-arapaho-tribes-constitution> [<https://perma.cc/BS2X-K8TE>].

documents. For example, the Saint Regis Mohawk Tribe, which is located within New York, adopted a solid waste handbook to assist in the regulation of solid waste disposal on the reservation, as solid waste disposal can be a problem in Indian country leading to adverse health effects.¹⁴³ The handbook provides guidance on the Tribe's waste disposal program.¹⁴⁴ Notably, the second chapter of the handbook starts with a discussion of traditional and cultural beliefs, recognizing that culture and traditions play an important role in many tribal communities.¹⁴⁵ The handbook concludes that the solid waste management practices advanced in the chapter are consistent with such cultures and traditions, and, therefore "will help instill community ownership of the program and will lead to good community decisions with respect to management of solid waste."¹⁴⁶ By recognizing the cultural connections, the Tribe also appears to instill greater "ownership" of the program and responsibility for the environment in the community.

Similarly, the Navajo Nation has also adopted regulations for the disposal of solid waste. Interestingly, "[t]he purpose of these regulations is to protect the health and welfare of *present and future citizens* of the Navajo Nation by providing for the prevention and abatement of air, land, and water pollution and other public health and environmental hazards related to solid waste management."¹⁴⁷ These regulations therefore explicitly recognize the intergenerational nature of environmental pollution, and take steps to regulate not just for present generations but also future generations. Such an intergenerational perspective is typically absent in anthropocentric environmental ethics.

143. LAURA J. WEBER, ST. REGIS MOHAWK TRIBE ENV'T DIV., SOLID WASTE HANDBOOK 1 (2002), http://www.srmtenv.org/pdf_files/swhandbk.pdf [https://perma.cc/R2J6-8QUX] (explaining that there is a problem with open dumping and burning of solid wastes in Indian country). The handbook speculates that this could be a result of convenience/habit and/or non-Indians illegally dumping within Indian country, and the EPA has determined that there are substantial health risks associated with such practices. *Id.*

144. *Id.* at 1–5.

145. *See id.* at 6.

146. *Id.*

147. NAVAJO NATION SOLID WASTE REGS. § 103 (emphasis added), <http://www.navajonationepa.org/Pdf%20files/Solid%20Waste2.pdf> [https://perma.cc/TPV5-C53B].

For various reasons, some tribes may not currently be in a position to enact “hard” tribal environmental laws.¹⁴⁸ These tribes may therefore work to codify the tribal community’s environmental ethic without developing a full environmental code or other sources of binding tribal environmental law. Such efforts may manifest themselves in vision statements. For example, the Muscogee (Creek) Nation, which is located within Oklahoma, includes the following statement in its Nation’s Vision Statement: “The Muscogee Nation will protect and preserve the environment and be accountable to the people.”¹⁴⁹ Similarly, it is the mission of the Osage Nation’s Congress to “[p]reserve and protect the Nation’s environment.”¹⁵⁰

The same is true for tribes located within New York. The Onondaga Nation, for example, adopted the *Vision for a Clean Onondaga Lake*.¹⁵¹ Not only is the *Vision for a Clean Onondaga Lake* a statement of the Nation’s ethical values related to Onondaga Lake, but it also includes references to the Nation’s customs and traditions, which suggests that it incorporates elements of customary law as well. The *Vision for a Clean Onondaga Lake* articulates the Nation’s goals for Onondaga Lake.¹⁵² In addition to broadly describing the vision of the Nation for Onondaga Lake, the *Vision for a Clean Onondaga Lake* also makes reference to protecting against environmental pollution and climate change.¹⁵³ By restoring the Onondaga

148. Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENVTL. L. 42, 73 n.156.

149. *Muscogee (Creek) Nation Vision*, MUSCOGEE (CREEK) NATION, <http://www.muscogeenation-nsn.gov/Pages/Articles/13April/visionstatement.html> [https://perma.cc/QVT6-SFWK].

150. *Legislative Branch*, OSAGE NATION, <https://www.osagenation-nsn.gov/who-we-are/legislative-branch> [https://perma.cc/98NF-87XR]. The Osage Nation is located within Oklahoma.

151. *Onondaga Nation’s Vision for a Clean Onondaga Lake*, ONONDAGA NATION, <http://www.onondaganation.org/land-rights/onondaga-nations-vision-for-a-clean-onondaga-lake/> [https://perma.cc/VX2M-TU4W].

152. *Id.*

153. In terms of climate change, the *Vision for a Clean Onondaga Lake* states:

Due to global warming, the sun’s rays are reaching the earth in ways that are harmful to all of us. Global warming and the sun’s rays affect the life cycles of fish within Onondaga Lake and will change the habitat so that different plants and animals will thrive along its shores. We will work to lessen the impacts of global warming.

Lake, the Nation hopes to “strengthen our culture” and the statement goes on to make numerous explicit statements referencing the culture and traditions of the Nation.¹⁵⁴

Furthermore, tribal customs and traditions, sometimes called customary law,¹⁵⁵ traditional law and tribal common law,¹⁵⁶ can prove constructive in better understanding tribal environmental ethics. As Justice Raymond D. Austin, a retired Associate Justice of the Navajo Nation’s Supreme Court, explained, “[e]mbedded in American Indian cultures, languages, religious practices, lore, and sense-of-place are useable values, norms, and mores that can help American Indian peoples overcome reservation problems and improve their living standards.”¹⁵⁷ Tribal customs and traditions, therefore, can serve as guiding legal concepts,¹⁵⁸ but it can be challenging to identify such customs on occasion.¹⁵⁹

Id.

154. *Id.* Although specific to land and therefore beyond this article’s focus on environmental pollution and climate change, the Onondaga Nation also explicitly references the importance of culture in its vision statement on land. *Stewards of the Land*, ONONDAGA NATION, <http://www.onondaganation.org/land-rights/stewards-of-the-land/> [<https://perma.cc/9KKK-8CBA>] (“The Nation and its people have a unique spiritual, cultural, and historic relationship with the land, which is embodied in Gayanashagowa, the Great Law of Peace.”).

155. “Customary law” often refers to situations where “the unique traditions and customs of different Native American tribes are cited by their tribal courts as authoritative and binding law.” Ezra Rosser, *Customary Law: The Way Things Were, Codified*, 8 TRIBAL L.J. 18, 18 (2008).

156. The question of what constitutes such law and how it should be used in tribal courts is a relatively new question that is still subject to some debate and ultimately beyond the scope of this article. See Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 58–88 (2007), for a discussion of the role of tribal custom and tradition in tribal courts.

157. Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 372–73 (2011).

158. *Id.* at 353; Fletcher, *supra* note 156, at, 60–61. Professor Ezra Rosser explains that “[t]he role of customary law depends upon the place of customary law relative to other sources—tribal, state, and federal—of law considered by tribal courts and the consequent level of authority customary law is granted.” Rosser, *supra* note 155, at 21. Interestingly, the use of customs and traditions is not limited to tribal courts, as state and federal courts will sometimes rely on common law from English and Norman courts. Fletcher, *supra* note 156, at 61–62.

159. As Professor Fletcher explains:

customary law is more easily discovered, understood, and applied in [an] insular tribal community where there are few outsiders and the tribal language is widely spoken. Conversely, in tribal communities

One example of tribal customary law is the Haudenosaunee Environmental Protection Process (HEPP). The Haudenosaunee Environmental Task Force (HETF) was created by the Haudenosaunee Confederacy (also known as Iroquois or Six Nations) to assist the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora nations “in exercising their rights and responsibilities with regard to their environmental concerns.”¹⁶⁰ The HEPP “is designed to incorporate the traditional teachings of the Haudenosaunee as a guide in creating a process that protects the natural world. The HEPP also applies Haudenosaunee values to the environment, using Haudenosaunee knowledge to identify the consequences for violating natural law and to develop culturally based enforcement processes.”¹⁶¹ The HEPP incorporates five traditional Haudenosaunee concepts into its environmental guidance: “the Thanksgiving Address; Haudenosaunee Cosmology; Kaienerekowa (Great Law of Peace) with the One Dish, One Spoon Principle; the Code of Handsome Lake; and the Kaswentha (Two Row Wampum) in accordance with the Silver Covenant Chain of Friendship.”¹⁶² The HEPP also incorporates traditional environmental knowledge.¹⁶³

Even tribes that do not enact their own tribal environmental laws may effectuate their environmental ethics through use of federal environmental laws. For example, the Northern Cheyenne of Montana generally objected to mining within their tribal lands and on neighboring lands, because of the pollution that

that are (for lack of a better word) assimilated, where the few members are surrounded and outnumbered by nonmembers, and where the tribal language is all but dead, customary law is extremely difficult to discover, understand, and apply.

Fletcher, *supra* note 156, at 59–60. Justice Austin also explains that “[t]ribes left with little of their traditional culture or language are not known to use customary law.” Austin, *supra* note 157, at 363–64.

160. Brenda E. LaFrance & James E. Costello, *The Haudenosaunee Environmental Protection Process (HEPP): Reinforcing the Three Principles of Goodmindedness, Peacefulness and Strength to Protect the Natural World*, in PRESERVING TRADITION AND UNDERSTANDING THE PAST: PAPERS FROM THE CONFERENCE ON IROQUOIS RESEARCH 61, 61 (Christine Sternberg Patrick ed., 2010), http://www.nysm.nysed.gov/publications/record/vol_01/pdfs/CH06LaFrance.Costello.pdf [<https://perma.cc/T5YM-9KRW>].

161. *Id.* at 61.

162. *Id.* at 62; see *id.* at 62–64, for a description of these various sources of tribal customary law.

163. *Id.* at 62.

resulted.¹⁶⁴ The Tribe successfully used the Clean Air Act to petition the federal Environmental Protection Agency to designate the reservation air quality as Class I (near pristine air), which impacted the amount of pollution that could be emitted from nearby power plants that were not within the Tribe's borders.¹⁶⁵

As the foregoing demonstrates, tribes not only possess the capacity for innovation, but they are actually doing so. Tribes are adopting and adapting environmental laws (and other types of laws) to reflect their tribal environmental ethics—ethics which differ from American anthropocentric environmental ethics. In this regard, non-tribal governments, such as states and the federal government, may want to turn to the third sovereign—tribes—for a better understanding of how alternative environmental ethics may be translated into environmental laws.

V. CONCLUSION

This article demonstrates that many tribes possess environmental ethics different from their American counterparts. Although elements of ethical paradigms considered by non-Native communities, such as animism and deep ecology, may be present in tribal environmental ethics—such tribal ethical paradigms are more than such elements. In this regard, tribes are laboratories of ethical innovation throughout the United States. For a variety of reasons, such as self-determination, unique history, and a strong connection to land, tribes have ample reason to develop alternative environmental ethics, and they have done so. Perhaps more importantly, tribes have gone beyond conceptualizing alternative ethical paradigms to actually implementing such paradigms. As a result, other governments may choose to consider tribal environmental ethics when deciding on an ethical paradigm to address modern environmental challenges, such as climate change. The tribal example is particularly valuable given that tribes have moved beyond merely conceptualizing alternative ethical paradigms toward actually implementing laws based on ethics other than anthropocentrism.

¹⁶⁴. Tsosie, *supra* note 16, at 297–98.

¹⁶⁵. *Id.* at 298–99.

Should the United States adopt a tribal environmental ethical paradigm, the way in which Americans interact with the environment would change. As the examples above illustrate, many tribes have developed and adopted environmental ethics calling for reciprocity, respect for, and an intergenerational concept of the environment. Such a perspective is in stark contrast to the short-term, utilitarian, anthropocentric paradigm currently employed by the United States. Moreover, adoption of a tribal environmental ethic would require a change to environmental policy making. But, the good news is that tribes have provided ample examples, only some of which are discussed above, of how this might be accomplished. Accordingly—a way forward in the face of such devastating modern environmental challenges, such as climate change, may be as simple as looking to the third sovereign for direction as to the appropriate alternative paradigm.