



## Roundtable Summary: Legal Strategies to Address Climate Change in the Arctic

by UC Irvine School of Law Center for Land, Environment, and Natural Resources (CLEANR)\*

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# Introduction

Numerous studies have documented the severe impacts of climate change in the Arctic, and the often dire consequences for the residents and wildlife that depend upon the region's terrestrial and marine resources. Recognizing the need for legal and policy reforms to address these emerging challenges, the Center for Land, Environment and Natural Resources (CLEANR) at UC Irvine School of Law hosted a Roundtable on October 27-28<sup>th</sup>, 2017, bringing together legal professionals and other experts to discuss their experiences and examine various legal strategies to address climate change in the U.S. and Canadian Arctic.<sup>1</sup> This document is a summary of the themes and topics discussed at the Roundtable, including several areas identified for further analysis and/or action as articulated by Roundtable participants. The document reflects a range of opinions and perspectives and does not represent or imply a consensus among the participants toward any particular recommendation or course of action. It is CLEANR's intention to continue this dialogue with future gatherings to further develop specific strategies for legal and policy reforms as informed by the more overarching issues outlined below.

## I. IDENTIFYING AND RECONCILING ADAPTIVE MANAGEMENT PRIORITIES

As the pace of change accelerates in the Arctic, action is required to adjust to new conditions. The participants at the Roundtable posed several questions regarding adaptation and adaptive management, including how it should be defined, who will benefit, and what actions should be prioritized. Participants discussed traditional means of adapting (e.g., relocating with migrations of subsistence-hunted wildlife) versus modern means of adaptation (e.g., building microgrids). Participants generally agreed on the need to move toward clean and renewable energy sources to promote climate resilience in Arctic communities, but the lack of roads and other infrastructure in the region as well as lack of financial resources serve as barriers to this form of

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<sup>1</sup> Participants included: Elizabeth Brown (Staff Attorney, Our Children's Trust, Oregon); Karen Campbell (Staff Attorney, Ecojustice, British Columbia); Paul Crowley (Vice-President, Arctic, WWF Canada, Nunavut); Craig Fleener (Senior Advisor, Office of the Governor, Alaska); Erik Grafe (Staff Attorney, Earthjustice, Alaska); Elizabeth Saagulik Hensley (Attorney, Landye Bennet Blumstein LLP, Alaska); Niel Lawrence (Alaska Director and Senior Attorney, National Resource Defense Council, Washington); Jessica Lefevre (Attorney, Washington D.C.); Michael LeVine (Senior Arctic Fellow, Ocean Conservancy, Alaska); Matt Love (Attorney, Van Ness Feldman LLP, Seattle); Erin Dougherty Lynch (Staff Attorney, Native American Rights Fund, Alaska); Calvin Sandborn (Legal Director, Environmental Law Center, University of Victoria); John M. "Sky" Starkey (Attorney, Landye Bennet Blumstein LLP, Alaska); Mary Wood (Faculty Director, Environmental and Natural Resources Law Center, Professor of Law, University of Oregon School of Law); Joseph F. C. DiMento (Professor of Law and of Planning, UCI School of Law); Seth Davis (Assistant Professor of Law, UCI School of Law); Michael Robinson-Dorn (Director, Environmental Law Clinic, UCI School of Law); Paul Hoffman (Partner, Schonbrun DeSimone Seplow Harris & Hoffman LLP, Co-Director, International Human Rights Clinic, UCI School of Law); Ramin Pejan (Staff Attorney, Earthjustice, Adjunct Clinical Professor, International Justice Clinic, UCI School of Law); Elizabeth M. Taylor (Staff Attorney, CLEANR, UCI School of Law); Janine Ubink (UCI School of Law); Asena Cansu Yildiz (Fellow, CLEANR, UCI School of Law); and UCI Law Students in International Environmental Law Course.

adaptation. Participants also noted that without comprehensive climate adaptation planning at the state and local levels, adaptive management is constrained.

Additionally, participants recognized that as poverty is widespread in many rural Arctic villages, a comprehensive response to climate change must take economic and social factors into consideration. The dependency of many of these rural communities on the oil and gas industry for jobs, revenue, fuel for heat and transportation, and other necessities, poses a fundamental challenge in the context of their efforts and ability to address climate change by transitioning to alternative, renewable energy sources.

Several participants highlighted the need for adaptive regulations in the context of hunting and subsistence needs and the designation of critical habitat, noting that federal wildlife laws can sometimes act as barriers to adaptive management. The equal access clause of Alaska's Constitution, for example, was discussed as one such barrier. Participants also noted that traditional land use and ownership patterns have changed as a result of federal land use laws that can also prevent traditional adaptation techniques such as migrating with caribou herds. Some participants urged consideration of how laws and institutions themselves can be made more adaptive to enable better flexibility, including considerations such as translocation of communities, how villages can be decommissioned; regulation of hunting/fishing; and stronger emphasis on local decisions about priorities.

A number of participants recognized that there is a disparity between the types of climate-related assistance needed in the rural north and that which is needed in urbanized regions. Adopting urban models for concerns such as clean water and public health in a rural context may not be feasible or desirable. In light of these disparate needs, projects that are being planned or implemented should be re-evaluated with regard to their unique regional challenges and requirements. A first step could be a legal analysis of climate preparedness for a few select villages.

## **II. ENSURING EQUITY AND ACCOUNTABILITY**

Climate change poses disproportionate risks to rural communities in the Arctic. Many face permanent displacement due to rapid erosion while subsistence practices become more dangerous and expensive. However, participants explained that given the region's multi-faceted relationship to the oil and gas industry, policies involving fossil fuel development often lead to divisive views among residents. Some feel that oil and gas prices need to increase to fund critical development projects and programs to support rural communities, while others feel that higher prices lead to additional burdens on poor communities. Those primarily concerned with climate change feel that oil and gas development must be drastically reduced if not stopped entirely to avoid climate catastrophe, particularly in the Arctic. Others feel that Arctic residents are among those least responsible for global greenhouse gas emissions and therefore should not be made to suffer the consequences of reduced production and lowered revenue for the region. Participants noted that opinions on fossil fuel development vary depending on the particular project and the circumstances. For example, the native Gwich'in' people fear that oil

development in the Arctic National Wildlife Refuge will affect caribou, their main source of food. In contrast, the Alaska Eskimo Whaling Commission (AEWC) relies on oil and gas revenue to support their lobbying efforts. This debate expresses a fundamental tension among those that live and work in the Arctic. Participants recognized that a transition to clean energy alternatives is necessary to relieve this tension, but noted that challenges such as lack of political will and infrastructure have hindered progress toward clean energy goals.

In addition to the need for alternative energy sources, many participants recognized the need for economic diversification in order to build climate resilience. Participants pointed to the Alaska Arctic Policy as being helpful in bringing together topics such as economic development and climate change. Similarly, the Governors Tribal Advisory Council, composed of eleven tribal leaders from across the state, provides a forum for linking climate change impacts with other important concerns such as education, law enforcement, and tribal consultation. Participants agreed that Alaska should build on earlier efforts to develop a climate change strategy and develop a transition plan toward renewables and climate resilience.

In the context of climate change litigation, participants examined various methods and strategies, both at the global and domestic scale. The discussion considered questions regarding who benefits, who decides litigation priorities, who should be held accountable for damages, who decides how to use the proceeds, and how consensus can be built.

Participants specifically considered the concept of accountability: of corporate emitters, of governments to make science-based decisions, and to local communities that are most affected. Informational accountability, including environmental and financial disclosures under federal law, was also discussed. It was noted that Canada does not have as many legal tools as the U.S., and that holding government accountable is currently the most accessible approach to these issues through their legal system. Participants acknowledged the failure of efforts to ensure corporate accountability, including market-based measures such as adequate insurance for operations.

Participants discussed the 2005 Petition to the Inter-American Commission on Human Rights (IACHR), brought by the Inuit Peoples against the U.S. to demand action on climate change mitigation. They noted that although the petition for relief was not granted, it was significant in formally linking human rights to environmental issues for the first time, and bringing a human face to a technical problem. The process brought global attention to the topic and ultimately led to climate change being incorporated into multiple U.N. human rights resolutions and agreements—a significant departure from the traditional position of the human rights community, which did not initially understand or support the position that climate change is a human rights concern.

Participants also discussed the 2013 Petition to the IACHR, brought by Athabaskan Peoples against Canada, explaining that the petition was a way to tell a story about the impacts of climate change and indigenous rights, and noting that the process allowed their voice to be heard and officially documented through record-building. Participants emphasized that international strategies on human rights typically complement and provide support to domestic initiatives.

Alternatively, participants discussed the legal strategy behind the Atmospheric Trust Litigation (ATL), which aims to rapidly push emissions down based on a constitutional rights theory and the public trust doctrine. ATL is based on the premise that statutory law will not resolve the problem of climate change and that there is a need for a macro-approach that spans across many sectors and applies at both the federal and state levels. The ATL approach involves filing cases on behalf of trustees (tribes, states, the federal government) against carbon majors for damages to invest in the cleanup of the atmosphere. Some participants stressed that the decarbonization and drawdown strategies of ATL need to be prioritized because there is no alternative strategy that can avoid climate catastrophe.

As part of this discussion, participants examined the concept of tipping points, and the dichotomy of incremental change versus irreversible catastrophe as a consequence of climate change. While some recognize the need for immediate and draconian action to prevent climate catastrophe, others are not convinced that urgent action, with economic implications such as the forgoing of further fossil fuel development, are necessary. Participants discussed the dilemma of limited funding resources for climate adaptation and mitigation, with some arguing the need for the ATL macro-approach to address the root cause of climate change and others claiming that local harms should also be redressed. This matter is particularly vexing as it involves tradeoffs and entails questions of equity. Some participants felt that adaptation and mitigation funding decisions should be made by the people who are affected most and should be applied regionally in high priority places. Some participants lamented the demise of the Alaska Immediate Action Work Group but expressed hope for the Alaska Renewable Energy Fund.

### **III. SOVEREIGNTY AND SELF-DETERMINATION**

Participants reviewed the Indian Trust Doctrine under U.S. law and the responsibility that the federal government has toward indigenous peoples, and asked how this applies in the context of mitigating impacts from climate change. Several noted that federal Indian law is premised on a colonial model. Some participants pointed to treaty rights litigation in the Pacific Northwest and considered the applicability of Title 8 of the Alaska National Interest Lands Conservation Act (ANILCA), focused on subsistence rights, to the state's duty to mitigate harm in the context of marine mammal hunts. Under the trust responsibility, every ambiguous treaty and law is supposed to be resolved in favor of the tribes. Several participants noted that self-determination is closely tied to natural resource questions in the Arctic. They pointed to the AEWG as an example of the need to connect sovereignty and adaptive regulations to better reflect the government-to-government relationship with tribes.

Participants noted the complexity of tribal structure in Alaska, each region with its own perspectives and layered structure of entities. The Alaska Native Claims Settlement Act (ANCSA) transferred title and revoked most existing aboriginal land claims, thus restricting "Indian country" in Alaska. It also provided for the establishment of regional and village corporations, owned by Alaska Native people through privately owned shares of corporation stock. Considering the legal implications of ANCSA on subsistence treaty rights in the context of climate change,



some participants defined self-determination as having independent energy sources and having money to defend one's rights. They discussed the possibility of a tax to transition to a conservation economy, but cautioned against outside groups attempting to determine the future economy on behalf of tribes. Several participants pointed to Nunavut and Greenland for lessons on sovereignty and self-determination.

#### **IV. ESTABLISHING TRUST AND FORMING PARTNERSHIPS**

Recognizing that climate change is a trans-border concern, participants stressed the importance of partnerships and learning from others. Opportunities for enhanced collaboration between organizations in Canada and the U.S. were identified, with several participants highlighting the lessons from the Great Bear Rainforest in B.C., where conservation groups aligned with local indigenous leaders to transition to a more sustainable economy.

Generally, participants agreed on the need for a long-term vision and comprehensive plan to address climate change, but also noted that there is a tension between the urgency to take action quickly and the need to do it in an inclusive way. Participants noted that understanding and empathy among various factions is often lacking, and the immediate needs of Native communities often do not align with what outside entities propose. This disconnect also occurs internally, when tribal governments do not necessarily represent the views of community members. Several participants pointed to the problem of greed and corruption of local leaders. Participants also noted that these are often communities in crisis, with many social ills resulting from past trauma and high poverty rates. There is a need for local and holistic solutions to address these ills, and several participants stressed the need for including more indigenous knowledge in decision-making, recognizing the recent Alaska Tribal Child Welfare Compact as a model for empowering tribes. Participants also noted the challenges as scientists attempt to incorporate traditional ecological knowledge.

Furthermore, several participants stressed the need to improve educational opportunities for Native communities. They cited the University of Victoria's program to train Inuit lawyers in Nunavut as a successful model, noting that the University will soon offer a dual degree program in Canadian Common Law and Indigenous Law. Participants discussed how UCI and other law schools can cultivate more indigenous lawyers and foster interest in and incorporate Indigenous law into their curricula, such as by inclusion on state bar exams and creation of externship programs in the Arctic and climate relocation clinics. In sum, participants felt that the Roundtable allowed for the type of open dialogue that fosters trust and understanding, and urged further meetings to continue this important work. Participants identified several areas for further discussion and possible opportunities for reform:

##### **ADAPT FEDERAL REGULATIONS**

Participants noted that federal regulations must adapt. Attention should be given to determining how laws such as the Endangered Species Act and the Marine Mammal Protection Act can better take climate change into account, and their implications for

culture and subsistence needs. Concerns over designation of critical habitats need to be addressed.

#### DEVELOP APPROPRIATE ADAPTATION MODELS IN RURAL SETTINGS

Recognizing the unique needs of rural villages, participants highlighted the importance of appropriate climate-related programs and projects. Adopting urban models for these remote regions is not feasible and current projects should be re-evaluated with regard to the unique needs and challenges of each region.

#### INTEGRATE ADAPTATION, MITIGATION, AND SCIENCE

Adaptation, mitigation, and science should be categorized and considered in ways which reflect their connectedness. For example, the significant challenge of ocean acidification requires an integrated approach that addresses the problem from a scientific standpoint as well as an adaptive management approach to ensure that vital salmon fisheries remain healthy and productive.

#### STRENGTHEN EFFORTS FOR COMPANY LIABILITY

Participants pointed to several examples of local governments in the U.S. and Canada taking action to hold companies accountable for damages due to climate change and sea level rise. These governments are pursuing actions to force greater transparency and to make companies pay for adaptation measures such as sea walls.

#### ENCOURAGE SELF-DETERMINATION

Participants highlighted the link between climate resiliency and cultural resiliency. In the context of adaptation and indigenous peoples, this can be an opportunity for greater freedom for self-governance and management. Participants also noted that when thinking about litigation and mitigation strategies, communities' sovereignty should not be undermined.