

Indian Rights and the Environment

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I. INTRODUCTION	345
II. RE-THINKING AN OLD MYTH ABOUT THE FUTURE OF INDIAN PEOPLES	346
III. INDIAN LAND, INDIAN RESOURCES, AND INDIAN DEVELOPMENT	347
IV. INDIANS AND ENVIRONMENTALISTS	349
V. DEVELOPING A SOUND LEGAL FRAMEWORK FOR INDIAN RIGHTS AND THE ENVIRONMENT	351
VI. CONCLUSION	354

I. INTRODUCTION

As millions of dollars poured into environmental organizations during the past decade, hundreds of activists headed for Central and South America to save threatened animals and to preserve the rain forests. Some activists arrived with naïve and romantic notions about virgin forests. They had failed to accept the fact that the forests were already occupied, used, and "developed" by Indians. The environmentalists soon met and were sometimes confronted by Indian tribes and nations asserting their ownership of the same forests, lands, and resources that the environmentalists sought to protect.

Environmental protection plans drawn up in Washington or in Latin American capitals are greatly complicated by the questions and demands of Indian communities. What role should Indians play in decisions to establish a national park or protected area on lands traditionally Indian? Who owns and who is entitled to make decisions about the valuable land involved in proposed debt-for-nature swaps? What are the responsibilities of environmental groups in dealings with Latin American governments that deny Indian rights to the land and resources at issue? How should environmentalists respond to Indian proposals for development initiatives or alternative conservation practices that conflict with their own proposals?

None of these questions is merely hypothetical. Responsible environmentalists must constantly wrestle with these and related questions in their daily work. There is an urgent need for analysis and reform of the relationship between Indian rights and environmental protection. That process must involve

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not only Indians, governments, and environmental groups, but also academics, lawyers and jurists, political and religious activists, and human rights organizations. They all have important roles to play in the development of principled laws and democratic policies that will both protect the fragile environment and guarantee the survival and development of Indian peoples in the 1990s and the twenty-first century.

II. RE-THINKING AN OLD MYTH ABOUT THE FUTURE OF INDIAN PEOPLES

The first step toward reconciling environmental policies and Indian rights involves facing some longstanding myths about Indian peoples that have shaped current laws and policies. One such myth — sustained by non-Indians for 500 years — is that Indians are disappearing peoples. In an 1898 lecture delivered to law students in Washington, D.C., a U.S. Supreme Court Justice said of Native Americans:

[The Indian race] is disappearing and probably within the lifetime of some that are now hearing me there will be very few in this country. In a hundred years you will probably not find one anywhere. . . . It is as certain as fate that in the course of time there will be nobody on this North American continent but Anglo-Saxons. All other races are steadily going to the wall. They are diminishing every year.¹

To many educated whites of the late nineteenth century, such views were simply common sense. They saw Indians as a weak or defective species unable to compete and survive in a world governed by "scientific" laws of Social Darwinism, which guaranteed the ascendancy of whites over all other races.

Not surprisingly, the Justice who made these remarks joined in two of the most infamous Supreme Court decisions on Indian law. One decision upheld the legal authority of Congress unilaterally to abrogate Indian treaties.² The other decision declared the plenary power of Congress to impose its laws on Indian tribes and nations.³ Notwithstanding the sweeping changes that have taken place in civil rights and human rights law over the past decades, neither of these cases has been overruled.

Although not always stated so candidly, the myth that Indians are disappearing peoples underlies policies toward Indians everywhere in the Americas. For example, Mario Vargas Llosa, a prominent Latin American author and 1990 Peruvian presidential candidate, articulated a modern

1. Justice John Marshall Harlan, Lecture at George Washington University Law School 12 (Jan. 8, 1898) (unpublished manuscript, on file at Library of Congress Manuscript Room).

2. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 556 (1903). *Lone Wolf* has been called the Indians' *Dred Scott* decision. *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1173 (1979) (Nichols, J., concurring), *aff'd*, 448 U.S. 371 (1980).

3. *United States v. Kagama*, 118 U.S. 375, 381 (1886).

viewpoint on the demise of Indians in a 1990 *Harper's* magazine cover story. Vargas Llosa did not emphasize the physical disappearance of Indians, but rather their inevitable assimilation into the dominant, non-Indian culture:

Perhaps the ideal — that is, the preservation of the primitive cultures of America — is a utopia incompatible with this other and more urgent goal — the establishment of societies in which social and economic inequalities among citizens be reduced to human, reasonable limits and where everybody can enjoy at least a decent and free life. . . . If forced to choose between the preservation of Indian cultures and their complete assimilation, with great sadness I would choose modernization of the Indian population, because there are priorities; and the first priority is, of course, to fight hunger and misery. . . . [W]here there is such an economic and social gap, modernization is possible only with the sacrifice of the Indian cultures.⁴

A Peruvian Indian leader, Evaristo Nugkuag Ikanan, responded:

Once more, there are many who want to intervene in the destiny of indigenous peoples, doing it externally and from 'above' us. . . . We will continue contributing, resisting and fighting for our self-determination as an expression of a civilization which is really based on individual sovereignty. What is needed now is that Mr. Vargas Llosa chooses with more information and intellectual clarity, whether he identifies himself with a modernity which requires our tragic extermination or with a liberating decolonization.⁵

Although policies toward Indians in the Americas rest at least in part on the view that Indians will die out or assimilate into a superior non-Indian world, the facts stand in stark contrast to the myth of the vanishing Indian. Today thirty million Indians live in the Americas, a number roughly equal to the combined populations of Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, and Panama. In Guatemala and Bolivia, Indians make up the clear majority of the population. In Ecuador and Peru, Indians constitute about half of the population.⁶ Indians are a significant minority population in almost every country in the hemisphere, and in many countries they still maintain a large and resource-rich land base. Indian nations and tribes throughout the Americas are carrying on the historic struggle for their land, resources, self-government, and cultures.

III. INDIAN LAND, INDIAN RESOURCES, AND INDIAN DEVELOPMENT

In discussions about present problems and future aspirations, Indian

4. Mario Vargas Llosa, *Questions of Conquest: What Columbus Wrought, and What He Did Not*, HARPER'S, Dec. 1990, at 45, 52-53.

5. Evaristo Nugkuag Ikanan, *Autonomy or Assimilation?: Reply to Mario Vargas Llosa*, IWGIA NEWSLETTER, July-Aug. 1991, at 29, 29, 35 (International Work Group for Indigenous Affairs.) Mr. Nugkuag Ikanan responded as the President of Coordinadora de las Organizaciones Indigenas de la Cuenca Amazonica (COICA), Lima, Peru.

6. Nathaniel C. Nash, *Latin American Indians: Old Ills, New Politics*, N.Y. TIMES, Aug 24, 1992, at A1. See also Mac Chapin, *Indigenous Peoples and the Environment in Central America*, 8 RESEARCH & EXPLORATION 232, 232 (1992).

leaders consistently cite Indian land rights as their most vital concern.⁷ Without their land base, Indians may be able to survive as individuals in the dominant economy and culture of their non-Indian neighbors, but they will not be able to survive and prosper as distinct peoples with distinct cultures and traditions. Indeed, governments throughout the Americas, led by Europeans and their descendants, have sought to expropriate, allot, and control Indian land and resources as a means of assimilating Indians. Policies such as these make beliefs about the disappearing Indian self-fulfilling prophecies.

New laws and policies must fully recognize how Indians view their land. Although there are differing views among Indian communities, common themes do exist. Indians generally feel a sense of permanence in their land that non-Indians do not share. Non-Indians tend to be very nomadic, to view land as a commodity to buy and sell, and to have ancestral roots on other continents. Generally, Indians hold their land in some form of communal ownership. The idea of private, individual land is historically unknown in Indian communities and is rare even today.

When Indians speak of rights to their territories, they are referring not only to the land, but also to the flora, fauna, waters, and mineral resources. Indian culture and religion typically show reverence for the land and natural resources. Many traditional Indian religions pay homage to Mother Earth, and celebrate the close interrelationships that people share with animals, plants, and natural resources. The idea of sustainable development is part of the cultural and religious heritage of most Indian peoples. This cultural and religious heritage is very much alive and well today. A recent study of the surviving forests and bio-diverse areas of Central America shows that these vital environmental areas are coterminous with the homelands of the region's six million Indians — including the Mayan, Kuna, Miskito, Sumo, Pesch, Rama, Guaymi, Garifuna, and others.⁸ The survival of Indian communities and cultures has contributed greatly to the survival of some of the world's most biologically rich environments.

It would be a mistake, however, to take too romantic a view. Indians, like all other humans, survive by killing and consuming plants and animals. They plow, plant, harvest, and mine the earth and use various natural resources for clothing, ornaments, transportation, and medicine. Like all other peoples, they have utilized and developed their territories. Some observers argue that Indians with bulldozers and chainsaws will soon be as destructive to their home environments as non-Indians are to theirs. There may be some truth to

7. See, e.g., Ikanan, *supra* note 5, at 29.

8. Chapin, *supra* note 6, at 232-33. In 1992 the National Geographic Society and Cultural Survival produced a map entitled *The Coexistence of Indigenous Peoples and the Natural Environment In Central America*. It is available through the National Geographic Society, Washington, D.C., and Cultural Survival, Cambridge, Massachusetts.

that point of view. Some Indians have already permitted toxic waste dumping, storage of nuclear waste, and other environmentally dangerous practices on their lands, while others are hotly debating whether to do so.

Nevertheless, those Indians willing to sacrifice their homelands are the exception. Most Indian communities have maintained their cultures, homelands, and resources by resisting outside forces that have attempted for centuries to destroy or purchase them. The Indian regions on maps of Central America have remained green not because non-Indians left the Indians alone, but rather because Indians successfully fought to keep the regions green.

IV. INDIANS AND ENVIRONMENTALISTS

Most environmental organizations are based in North America and Europe. Those organizations that exist in Latin America are based in cities among Ladinos and are often funded by their North American and European counterparts. Indians are on the margins of the organized environmental movement. Although some environmental groups have established good working relations with Indian organizations, most relations between Indians and environmentalists are uncertain and strained. There is even potential for serious conflict.

Like human rights workers, academics, and other nongovernmental activists, many environmentalists bring with them the baggage of their own cultures. They have been raised within the framework of laws and policies that have long oppressed Indians. Because the academic and legal communities have not yet given prominent attention to the issue of Indian rights, most environmentalists remain unfamiliar with the history of Indian land disputes. If leading human rights organizations write reports about Guatemala and Bolivia without even mentioning that the Indians of those countries are majority populations subjected to minority rule, it is not surprising that many environmentalists are not sensitive to Indian concerns.

A few examples illustrate the strain in relations between Indians and environmentalists. At a public meeting in May 1991 in Washington, D.C., the head of a Sierra Club stated that there should be no discussion about the development of petroleum resources in a rain forest in Ecuador because that area had been declared a national park and was therefore "sacrosanct." However, that area is the homeland of Indian peoples⁹ who had no voice in the government's decision to designate the area a national park. The Indians have always developed the resources in the forest, and they continually face difficult decisions about whether new types of development should occur.

9. Although Indian peoples do not generally own the land in the strict, technical sense of holding a valid, legal title, they both possess their lands and use them exclusively. From the Indian point of view, Indian rights of ownership are not fully upheld by the dominant non-Indian legal systems.

Some Indian leaders and Indian rights activists point to this dispute as an example of environmentalists ignoring Indian rights.¹⁰

Similar insensitivity was demonstrated at a 1988 conference held in Washington between environmentalists and representatives of COICA, the Amazonian Indian coordinating group. During the meeting an exchange occurred about debt-for-nature swaps, a popular environmental project. A COICA leader summarized key Indian concerns with two simple points: the debt involved was not Indian debt, while the "nature" involved was Indian land that Indians had not agreed to trade for anything.

Another disturbing trend involves attempts by mineral development corporations, hazardous waste disposal companies, lumber companies, and others to pass out favors in Indian communities to buy support for their projects.¹¹ Governments have long used this approach. More recently, environmental groups have sought support for their projects through similar steps.¹² By gaining the backing of some members of an Indian community, outsiders can create the appearance that Indians were actually involved in the decision-making process and that the whole Indian community approves. There is a danger that these divide-and-conquer tactics will seriously harm Indian communities, undermine legitimate Indian leadership, and generate a backlash against environmental projects that may be seen as manipulative or colonialist.

Nevertheless, not all trends are negative. Some effective alliances have developed to promote both environmental protection and Indian rights. The case of Yanomami of Brazil is perhaps the clearest example. The Yanomami lost about 1500 people, nearly one-fifth of their population, during the gold rush in the late 1980s.¹³ Thousands of miners brought their diseases, to which the Yanomami had no immunity, killed Indians to take their land, and poisoned their rivers with mercury, a by-product of the mining process, threatening the very survival of this proud forest-dwelling people. In the late 1970s, the Indian Law Resource Center filed a human rights complaint with the Inter-American Commission on Human Rights demanding legal demarcation of the Yanomami territory and expulsion of outsiders. Environmentalists

10. There has been helpful self-criticism about this problem from within the environmental community. In one op-ed piece an attorney for the Natural Resources Defense Council concludes that some environmentalists are more interested in getting a cheap fix of moral superiority than in solving problems. Robert F. Kennedy, Jr., *Amazon Sabotage*, WASHINGTON POST, Aug. 24, 1992, at A17.

11. For example, the Indian Law Resource Center has investigated cases of attempts to dump garbage from major U.S. cities in Miskito territory in Nicaragua by bribing local leaders for permission. See Stern Robinson, *No queremos basura tóxica en la RAAN [We Don't Want Toxic Waste in the RAAN]*, BARRICADA, Nov. 12, 1992, at 11 (Nicar.), in which the author discusses the ongoing effort to stop foreign companies from dumping toxic wastes in the Indian areas of Nicaragua's Atlantic Coast.

12. Most respected environmental groups have renounced these methods.

13. Julia Michaels, *Brazil Creates Homeland for Yanomamis*, CHRISTIAN SCI. MON., Nov. 19, 1991, at 4.

joined in this international human rights campaign as the destruction of the environment and deaths of the Yanomami increased dramatically in the mid-1980s. Faced with overwhelming pressure from environmentalists, Indian rights groups, and human rights activists at both the national and international levels, Brazilian President Fernando Collor de Mello finally undertook a serious military effort to expel the miners and signed a decree in late 1991 to demarcate 22.5 million acres of ancestral Yanomami land.¹⁴ That demarcation process has now begun.¹⁵ A number of nongovernmental organizations have agreed to monitor implementation of Brazil's new Indian laws and policies. The alliance forged in Brazil between environmentalists, human rights groups, and Indians could serve as a model elsewhere.

The case of the Miskito of Nicaragua is another example of how Indian Rights advocates and environmentalists can work together to achieve their goals. On the Miskito Coast, the government is establishing a marine and coastal protected area. The goal of the endeavor is to achieve sustainable development of marine resources such as turtles, shrimp, lobster, and fish. To realize that goal, the government must expel resource pirates from the area. The project seeks to train Miskitos to manage and police the area themselves. It was initiated not in board rooms in Washington or in government offices in Managua, but in a series of meetings held in Miskito communities along the Coast. The initial support of these communities and their continuing involvement are essential for the success of the marine protection program. Environmental groups have actively and financially supported every phase of this effort, which is the first such bottom-up environmental protection project in a Central American Indian area.¹⁶

V. DEVELOPING A SOUND LEGAL FRAMEWORK FOR INDIAN RIGHTS AND THE ENVIRONMENT

The mutual interests of Indians and environmentalists will not be secured simply by recognizing flaws in government policies and laws toward Indian communities or by building better working relationships to address particular controversies involving Indian rights and environmental protection. These are only initial steps. In the future, laws and democratic processes must replace the myths and arbitrary governmental power that now deny Indian rights and threaten Indian environments.

14. Julia Michaels, *Brazil Hopes to Strengthen Image as World Focuses on Rio Summit*, CHRISTIAN SCI. MON., June 3, 1992, at 1.

15. Todd Lewan, *Gold Rush Goes Bust in Brazilian Jungle*, CHI. TRIB., Nov. 29, 1992, at 10.

16. In a directly related development, environmentalists joined with Miskitos — including MIKUPIA, a new Miskito nongovernmental environmental group — to derail a secret contract between the Nicaraguan government and a Taiwanese company to exploit Miskito and Sumo forest resources.

Fortunately, the effort to develop a sound international legal framework for Indian rights is well underway. For the past fifteen years, Indians have worked within the human rights system of the United Nations to develop Indian rights protections. The U.N. Working Group on Indigenous Populations has been meeting for ten years and will soon release the final draft of a proposed Declaration on the Rights of Indigenous Peoples for submission to the General Assembly, perhaps as early as 1993. Three clauses from the present draft illustrate the positive changes being proposed:

[15] Indigenous peoples have the right to recognition of their distinctive and profound relationship with the total environment of the lands, territories and resources which they have traditionally occupied or otherwise used;

[16] Indigenous peoples have the collective and individual right to own, control and use the lands and territories they have traditionally occupied or otherwise used. This includes the right to the full recognition of their own laws and customs, land-tenure systems and institutions for the management of resources, and the right to effective measures by States to prevent any interference with or encroachment upon these rights. . . .

[18] Indigenous peoples have the right to the protection and, where appropriate, the rehabilitation of the total environment and productive capacity of their lands and territories, and the right to adequate assistance, including international cooperation, to this end. Unless otherwise freely agreed upon by the peoples concerned, military activities and the storage or disposal of hazardous materials shall not take place in their lands and territories.¹⁷

Within the U.N. human rights system, the issue of Indian rights has moved in one decade from the fringe to the mainstream. The annual Working Group meetings are now among the most vital and well attended of all U.N. human rights activities. Human rights experts who previously focused almost exclusively on the rights of individuals now support protection of the group rights of Indian communities.

In 1989, the International Labour Organisation (ILO) approved a new convention on the rights of indigenous peoples.¹⁸ Although it is less far-

17. U.N. ECON. & SOC. COUNCIL, COMM'N ON HUM. RTS., DISCRIMINATION AGAINST INDIGENOUS PEOPLES 48, U.N. Doc. E/CN.4/Sub.2/1992/33 (Aug. 20, 1992) (Draft Universal Declaration on the Rights of Indigenous Peoples, paras. 15, 16, and 18).

18. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), June 27, 1989, 28 I.L.M. 1382 (entered into force Sep. 5, 1991) [hereinafter ILO Convention 169]. As of December 1992, ILO Convention 169 had been ratified by six countries: Norway, Mexico, Colombia, Bolivia, Costa Rica, and Argentina. ILO Convention 169 supplants ILO Convention 107 of 1957, which had been widely discredited because it placed little or no value on indigenous cultures and furthered the assimilation of Indians. Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Convention No. 107), June 26, 1957, 328 U.N.T.S. 247. For an analysis of the human rights advances of ILO Convention 169, see S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8-2 ARIZ. J. INT'L & COMP. LAW 1 (1991). For an article that sharply criticizes ILO Convention 169 for its failure to provide full protection of Indian rights, see Sharon Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention 169*, 2 WITHOUT PREJUDICE 53 (1989). An appendix to the Venne article sets forth the text of the Resolution of the Indigenous Peoples Preparatory Meeting Relating to the International Labour Organisation's Convention Concerning Indigenous and Tribal People in Independent Countries, (July 28,

reaching than the Draft Declaration of the U.N. Working Group on Indigenous Populations, it rejects the blatantly assimilative policy of the previous ILO convention on indigenous peoples. The new convention requires Indian participation in all matters concerning development of their land and resources. It provides that:

The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

In cases in which the State retains the ownership of mineral and sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.¹⁹

Also in 1989, the Organization of American States (OAS) began its own law reform project concerning Indian rights. In 1988, the OAS General Assembly directed the Inter-American Commission on Human Rights to prepare a new juridical instrument on the rights of indigenous peoples.²⁰ That process is now underway.

Indian rights advocates hope that better legal guarantees at the international level will prompt national governments to provide better legal protection for Indian rights. Indians throughout the Americas are fighting for their rights in national courts, national legislative bodies, and constitutional conventions. Rapid changes at the national level are possible, as demonstrated in Brazil. When the Working Group on Indigenous Populations held its first meeting in

1989). *Id.* at 66.

19. ILO Convention 169, *supra* note 18, art. 15.

20. General Assembly of the Organization of American States, Resolution of November 18, 1989: THE GENERAL ASSEMBLY, CONSIDERING

. . . That in its Annual Report, the Commission [on Human Rights] has also made reference to the codification and progressive development of the international law governing human rights and has proposed several measures intended to strengthen and encourage that process; and

That in 1992, on the occasion of the celebration of the Quincentennial of the Discovery of America: Encounter of Two Worlds, the Commission has proposed that a legal instrument be adopted that year in regard to the human rights of indigenous peoples,

RESOLVES:

. . . .

13. To request the Inter-American Commission on Human Rights to prepare a juridical instrument relative to the rights of indigenous peoples, for adoption in 1992.

ORGANIZATION OF AMERICAN STATES, GENERAL SECRETARIAT, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 1989-90, OEA/Ser.L/V/II.77 rev. 1, Doc. 7, at 186 (1990). The Inter-American Commission on Human Rights will continue this task past the 1992 deadline suggested in the resolution. The General Assembly Resolution was made in response to a report by the Inter-American Commission on Human Rights on the need for an instrument concerning rights of indigenous peoples. ORGANIZATION OF AMERICAN STATES, GENERAL SECRETARIAT, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 1988-89, OEA/Ser.L/V/II.76, Doc. 10, at 245 (1989).

1982, Brazil's laws still treated Brazilian Indians as legally incompetent children. Brazil's new constitution now provides exceptionally strong support for Indian rights, and Brazil's federal courts have shown remarkable independence and courage in their support for the demarcation of Yanomami land.²¹ A Brazilian Indian organization, the United Indian Nations of Brazil,²² led the fight for constitutional protection of Indian rights.

VI. CONCLUSION

The protection of human rights and the environment requires a truly international legal order based on democratic principles. Non-Indians must reject the myths and imperialism that have shaped laws and policies toward Indians in the Americas thus far. Winston Churchill's admonition that "democracy is the worst form of government except all those other forms that have been tried from time to time," applies as well to Indians as it does to all others. Indians themselves, not outsiders, will best govern Indian land and resources.

Governments must respect democratic decision making within Indian communities and must ensure that relations between Indians and their neighbors are based on agreement rather than on domination. Although Indian communities, like all others, have difficult decisions to make about their development, there is good reason to believe that if Indians are permitted to chart their own future they will continue to serve not only themselves, but also the global environment. Working together as equals, Indian communities and the rest of the world can share important lessons about how best to provide for all future generations.

21. Overturning a government effort to break up the traditional territory of the Yanomami, Brazilian Federal Judge Novély Vilanova da Silva Reis issued a preliminary injunction on October 20, 1989, that upheld Yanomami rights to all of their traditional lands and ordered the federal police to remove all goldminers from those lands. In another case, Brazilian Federal Judge João Baptista Coelho Agiar issued a preliminary injunction on December 5, 1989, requiring the closing of illegal airstrips that goldminers were using to gain access to Yanomami lands.

22. União das Nações Indígenas, São Paulo, Brazil.