

Treaties could be key in helping indigenous communities fight effects of climate change

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Some may view treaties between indigenous peoples and the federal government as a relic of the 19th century, but they just might provide a way for tribes to mitigate the effects of climate change on their lands and communities. A University of Kansas law professor has authored a study showing that provisions of treaties can lead the way to fighting the effects of climate change, which often hit native communities earliest and most severely.

Elizabeth Kronk Warner, associate dean of academic affairs, professor of law and director of the Tribal Law and Government Center at the KU School of Law, has authored "Everything Old is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change Threatened Resources." The article examines provisions of two native treaties and how they have been successfully argued to require the [federal government](#) to address damages done to fishing resources of the Swinomish and Nez Perce tribes. The cases are proof that treaties, which were no longer drafted after the 1870s, could be a new way to fight the effects of climate change on native communities.

"I don't think anyone has ever looked at treaties for this reason," Kronk Warner said. "It may not be a cure-all, but it could certainly be part of a larger solution. It's applying what has been a very successful solution to a new context."

In the case of the Swinomish and Nez Perce tribes, their treaties with the federal government contained specific provisions that their fishing

access and rights be maintained as they were a vital part of their culture, daily life and very survival. When those rights were infringed, the tribes were successful in bringing action that eventually required the federal government ensure fulfillment of those rights.

There are more than 500 federally recognized tribes in the United States, many of which have treaties with the federal government. Those who are negatively affected by climate change could potentially use the treaties as a legal tool to mitigate those effects, Kronk Warner said. For example, tribes with provisions regarding hunting rights whose lands are affected by drought, wildfires, rising coastlines or other effects of climate change could bring suit arguing the federal government is bound by its treaty to protect those rights.

Federal courts have proven in recent history to be very protective of hunting and fishing rights protected by treaties. Kronk Warner said provisions related to infrastructure and many other aspects of native life could potentially be part of a legal strategy as well. She added that, in her legal opinion, the argument that climate change was not a foreseeable issue when the treaties were signed would not be an argument relieving the federal government of its obligation to uphold the agreement.

Kronk Warner compares the approach to litigation against big tobacco companies. It took decades to find the right legal strategy to eventually hold the companies liable for health damages their products caused. Similarly, using treaty provisions to mitigate the negative effects of climate change could be the next step in an ongoing battle, in which climate change is already devastating the lands and resources of tribes across the country. Looking to treaties could be a valuable tool, as litigation and adaptation plans have had varying levels of success.

Kronk Warner, a citizen of the Sault Ste. Marie Tribe of Chippewa Indians, has written extensively on climate change, native law and

indigenous knowledge's role in the fight against climate change. She was also recently appointed a district judge for the Prairie Band Potawatomi Nation and will serve on the Healing to Wellness Court. Her most recent article will be published in the University of Nebraska Law Review and is available online.

While climate change has already begun having negative effects on native lands, communities and resources, the legal fight to ameliorate the effects is still fairly new. Looking to treaties, which many have failed to view as a solution to a modern problem, could be key.

"How [climate change](#) impacts tribes will continue to change, and how [tribes](#) react to that will change as well," Kronk Warner said. "Examples are highly localized, but I think this is an approach that any tribe with a treaty could look to use."

More information: Elizabeth Ann Kronk Warner. Everything Old is New Again: Enforcing Tribal Treaty Provisions to Protect Climate Change Threatened Resources, *SSRN Electronic Journal* (2015). [DOI: 10.2139/ssrn.2652954](#)

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