

INDIGENOUS PEOPLES,  
THE ENVIRONMENT  
AND LAW



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AND LAW

*AN ANTHOLOGY*

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To Joanne Marie Krippaehne  
Doris Ormsby Watters  
William Watters



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# PREFACE

One question has remained especially challenging in recent years: what is the relationship of indigenous peoples to the environment within the law? This anthology begins to take up the answer. In the process, the influence of a group of mentors and colleagues is notable. William Burke, Ralph Johnson, Leah Vaughn and William Rodgers provided the inspiration at the University of Washington Law School. Hans Christian Bugge, Anne Hellum, Jon Johnsen, Geir Ulfstein, Henning Jakhelln, Ole Kristian Fauchauld and Inger Johanne Sand, along with all the other members of the Institute of Public and International Law, and Kirsti Strom Bull, on the Faculty of Law at the University of Oslo, ensured every resource was available for research there. Jean Nesland Olsen and Dr. Tore Olsen of the Fulbright Foundation of Norway, along with the Council for the International Exchange of Scholars in the United States, supported this work as a Fulbright Scholar at the University of Oslo in 2001-2002. Erkki Hollo, on the Faculty of Law at the University of Helsinki, graciously joined Hans Christian Bugge in encouraging the development of this topic.

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The librarians at each university deserve acknowledgment for their expertise. They are joined by the staff of several other institutions including the En-

vironmental Law Centre of the International Union for the Conservation of Nature in Bonn, Germany; the Swiss Institute of Comparative Law in Lausanne, Switzerland; and, Southern Oregon University.

This intellectual heritage is reinforced by experience in the field. Notably, spending time with Jakob S. B. Jakobsen in the outdoors in Norway, learning about the Sami (formerly referred to as Lapps) from the Sami, is a special influence. In a related vein, Mount Shasta in California, Canyon de Chelly in Arizona and Chaco Canyon in New Mexico provide further inspiration in grasping the enduring legacy of indigenous peoples around the world.

Wuhan, China, Fall, 2002

Auckland, New Zealand, Spring, 2003

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# EDITORIAL NOTE

Most readers will have access to the complete works presented in this book. The omissions of portions of the selections are not indicated by ellipses. Footnotes are also not retained. Spelling follows the text as it was originally published even though there are some differences between countries.





# INTRODUCTION

What they are not familiar with people call barbarian.

—Montaigne <sup>1</sup>

The central question here, as in all issues concerning indigenous rights, is who is in a position to control resources. It is a question of land rights.

—Sami, Scandinavia <sup>2</sup>

To us Indians human rights is a matter of daily survival; it is the right to food, to firewood and to freshwater, but above all it is the right to our customs.

—Plains Cree, Canada <sup>3</sup>

Our history, identity, and tribal sovereignty are indistinguishable from the land. From time immemorial, it has always been so.

—Umatilla, United States <sup>4</sup>

This anthology provides a broad perspective on the intersection of indigenous peoples, the environment and law. The selections draw on the tradition of a more interdisciplinary approach to law where its links to policy and dispute resolution, as well as anthropology and history, are paramount. Further, prominent influences include area studies encompassing culture, geography and language, in addition to political science and sociology.

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1. Norbert Rouland, *LEGAL ANTHROPOLOGY*, Athlone Press, ix (1994).

2. Maria Sofia Aikio, *Tourism in the North and Sami Culture* in *ECONOMIC, SOCIAL AND CULTURAL TIGHTS OF THE SAMI* (Frank Horn, ed.), University of Lapland, 888 (1998).

3. Tom Svensson, *Right To Self-Determination: A Basic Human Right Concerning Cultural Survival, The Case of the Sami and the Scandinavian State* in *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES*, (Abdullah Ahmad An-Na'im, ed.) University of Pennsylvania Press, 364 (1992).

4. David Hurst Thomas, *SKULL WARS*, Basic Books, 254 (2000).

An overriding theme in this work is the common experience shared by indigenous peoples around the world. This reflects their struggle for identity, along with the paradox of dependence on the nation-state and their pursuit of a measure of autonomy. Emphasis is placed on the primacy of their relationship to nature as a unifying bond with vital importance for environmental law at the national and international level that transcends their political status.

At the same time, diversity is an equally compelling theme in this book. The selections illuminate a variety of vantage points drawn from the international community. By one estimate, indigenous peoples include perhaps 5,000 different groups in seventy countries with vast differences in culture and heritage.<sup>5</sup> The result is a wide range of customs, practices and traditions within the larger context of their remarkable prowess in adapting to the environment where survival itself is at stake and offers little choice.

In providing a perspective on these dual themes of common experience and diversity, the approach of the authors also offers insight into differences in methodology. For example, several articles use a case study approach. They combine various aspects of the social sciences in fashioning a discrete cultural focus. Other articles are less empirical but nevertheless, generally reflect analysis in a very specific context as well.

In this way, all of the selections contribute to the larger mosaic as a guide to contemporary conflicts and themes within the law concerning indigenous peoples, and particularly, environmental law. Biodiversity, community-based conservation, traditional knowledge and sustainable development are singularly prominent themes as the recognition of indigenous peoples in these areas continues to grow.

Similarly, other influences that shape the larger picture are examined. For example, the impact of human rights law, the role of national constitutions in affording protection for indigenous peoples, the responsibility of non-state actors like the World Bank in development and the means for addressing environmental harm caused by multinational corporations are addressed.

Further, on the broadest possible level, the impact of convergence and globalization is explored. As legal systems begin to resemble one another in selected areas, for example in the structure of the international approach to trade and endangered species, the tension between diversity and globalization is discussed as a particularly difficult aspect of the status of indigenous peoples around the world.

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5. John Woodliffe, *Biodiversity and Indigenous Peoples* in Michael Bowman, Catherine Redgwell, eds., *INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY*, 255, Kluwer, 1996)

In general terms, the selections presented here do not aim to articulate a comprehensive legal theory or new paradigm. Rather, they describe selected aspects of the emerging framework that places indigenous peoples squarely in the discourse of environmental law and natural resource protection in the international community. For this reason, fourteen selections deal with indigenous peoples and the specific conflicts they face from the Arctic to Japan, from Bolivia to Russia. In this respect, the perspective emphasizes more comparative features.

The discussion, however, is remarkably dynamic. This arises from the wide cultural diversity previously mentioned as well as from the fluidity of the interchange taking place at the local, regional, national and international level as indigenous peoples continue to press for recognition of their place in decision-making, environmental governance and the disposition of natural resources. In this sense, the picture highlights more international aspects.

In light of this diversity and dynamism, coupled with the embryonic state of the conceptual framework, all the selections contribute to the broader discussion and enhance understanding of 'living law' in addition to 'law on the books' or primarily theoretical constructs. For this reason, the conflicts examined here depict, in discrete cultural contexts, *how* indigenous peoples are affected by the law. Mining in Bolivia, hunting in Canada, fishing in Japan, reindeer grazing in Norway, dam building in the Philippines and the worship of the Tolowa in the West of the United States is, accordingly, considered in terms of the profound relationship indigenous peoples maintain with nature and therefore, with the culture emerging from it. In this way, the 'people' within 'indigenous peoples' and the 'people' within environmental law and natural resources management are understood more in terms of their traditions and world view, not as abstractions but rather, as specific groups seeking to maintain their cultural identity and control over the lands they have traditionally occupied.

In acknowledging the number of themes competing for analysis, practical considerations imposed limits on the selections presented here. In this way, the Ainu, the Inuit, the Makah, the Maori, Native Hawaiians, the Sami, the Yurok and the other groups included are only part of the larger assembly of indigenous peoples everywhere who strive to safeguard their environment, and thus their identity, in the quest for survival. As indigenous peoples continue to enlarge the meaning of rights in the context of the environment and the law, the empirical approach suggested in a number of the selections contained here, with particular emphasis on history, is perhaps a metaphor for the integration of knowledge that is the foundation to understanding the special place of indigenous peoples in general.

The point of departure is recognition of indigenous peoples within the environment and the law while examining their unique status and understanding their contribution at the national and international level. This requires a deeper appreciation of the legacy of the past and their quest for protection in the transition from the idealized portrait of The Noble Savage that Aldous Huxley created in *Brave New World* to citizens with a vital role in the protection of the environment, in the management of natural resources and in sustainable development.