Effective Access to Justice: Applying the Parens Patriae Standing Doctrine to Climate Change-Related Claims Brought by Native Nations

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Applying the Parens Patriae Standing Doctrine to Climate Change-Related Claims Brought by Native Nations

Elizabeth Ann Kronk¹

*Tribes in Alaska are facing nothing less than the loss of their entire culture.*

— National Tribal Air Association (2009)

I. INTRODUCTION

A. The Unique Impact of Climate Change on Native Nations

Native Nations,² who often foretell the fate of the rest of the world, are experiencing profound impacts likely related to climate change.³ In the Inuit village of Shishmaref, Alaska, which has been

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² The author specifically chose the term “Native Nations” for use throughout this article. This choice was made deliberately to be as inclusive as possible.

³ Most scholars agree that climate change is happening now. *See* National Congress of American Indians, Resolution #EWS-06-2004 -- Supporting a National Mandatory Program to Reduce Climate Change Pollution and Promote Renewable Energy (2006 Mid Year Session) (“the National Academy of Sciences (NAS) reviewed and declared global warming a real problem caused in part by human activities....”). The debate no longer centers on the reality of climate change, but rather on the extent of its impact on the environment. As a brief overview, it is believed that exacerbated climate change is related to the increased human production of greenhouse gases, such as carbon dioxide. Greenhouse gases naturally heat the earth by trapping radiation within the earth's atmosphere. However, the increased amount of greenhouse gases has caused more radiation to be trapped in the atmosphere, thereby warming the earth’s atmosphere and affecting the overall global climate. *See generally* Pew Center on Global Climate Change, *Climate Change 101*, http://www.pewclimate.org/global-warmingbasics/climate_change_101/ (accessed Apr. 21, 2011).
inhabited for over 4,000 years, homes are falling into the sea, as the shoreline dramatically erodes because of melting permafrost. Many Native Nations across the Pacific Northwest face unprecedented insect infestations, which have attacked their forests causing heavy forest mortalities. The Navajo Nation experienced an outbreak of the Hanta virus as a result of the substantial proliferation of mice scurrying onto the reservation in reaction to changing atmospheric conditions.⁴ The impacts of climate change on Native Nations are real, profound and immediate.

For over a decade, Native Nations have observed anomalies in nature that have caused alarm among Native people during the recent decades of climate change. For example, in 1998, Nations in the Pacific Coast and Rocky Mountain regions reported the following:

- Increased winds that tended to be constant;
- Violent weather changes where storms wiped out intertidal shellfish;
- Declining salmon runs;
- Deformed fish;
- Significant decreases in the life spans of individual Natives due to the unavailability of traditional foods;
- Air pollution due to burning forests;
- Minimum river flows necessary for native fish species; and
- Erosion due to rising sea levels.⁵

Furthermore, Native Nations are facing major economic and cultural impacts also related to climate change.⁶ As climate change

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⁴ Alan Parker et al., *Climate Change and Pacific Rim Indigenous Nations, Executive Summary* 1–2, 19 (Alan Parker et al. eds., 2006) [hereinafter *Climate Change*].


⁶ Daniel Cordalis & Dean B. Suagee, *The Effects of Climate Change on American Indian and Alaska Native Tribes*, 22 Nat. Resources & Env. 45 (Winter 2008) (“Climate change will affect American Indian tribes differently than the larger American society. Tribal cultures are integrated into the ecosystems of
forces many migratory species to leave their traditional ranges, Native Nations, who may only have rights to hunt or fish in certain defined areas, may find it difficult if not impossible to survive in their traditional manner. Additionally, Native Nations that rely on tourism may face the negative economic effects of a decline in tourism, as the changing environment decreases the desirability of tourism enterprises. Native Nations may also face increased adverse health effects related to climate change, including emerging mental health problems resulting from the loss of homes and cultural resources.

Because of the unique character of Native Nations, these communities are more likely to be impacted by climate change. First, because Native Nations are often tied to specific areas of land, such as reservations, it is impossible for Natives to leave these areas to either escape the effects of climate change or perhaps to follow migratory species moving to new ranges without abandoning their land. Furthermore, as species shift their ranges to follow their preferred climates, such shifts may threaten Native cultures, as Natives may no longer be able to access these species. Alaskan Natives may be particularly hard hit by shifts in the ranges of species, such as caribou, as the Alaska Native Claims Settlement Act of 1971 extinguished Alaskan Natives’ claims to aboriginal title and hunting and fishing rights.

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North America, and many tribal economies are heavily dependent on the use of fish, wildlife, and native plants.”).

7. Native Peoples, supra n. 5, at 10 ("Native peoples today feel increasingly vulnerable to significant environmental changes because they are no longer able to cope easily with changes by relocating. Few contemporary tribes can afford the purchase of large tracts of new land, and federal laws hinder the transfer or expansion of Tribal jurisdiction. Tribes therefore see their traditional cultures directly endangered by the magnitude of the projected climate change.").


9. Climate Change, supra n. 4, at 23.

10. 43 U.S.C. § 1603 (2006); Cordalis & Suagee, supra n. 6, at 47 ("Alaska may be experiencing the impacts of global warming more than any other place on Earth, and Alaska Native tribes are among the first American populations..."
able to argue for movement beyond existing boundaries, as they have no claim to aboriginal territories and rights.

Native Nations have therefore been among the first to feel the profound impacts of climate change. This is because Native communities are some of the most vulnerable in the United States, given their unique relationship to the environment as well as the extreme geographical locations of many of these communities. These communities contribute little, if at all, to the problem of climate change and, yet, bear a disproportionately large adverse impact from climate change given their unique vulnerability.

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11. Cordalis & Suagee, supra n. 6, at 45 ("The Fourth Assessment Report of the UN Intergovernmental Panel on Climate Change Working Group II recognizes that American indigenous communities are among the most sensitive to climate change in North America and that ‘indigenous communities in northern Canada and Alaska are already experiencing constraints on lifestyles and economic activity from less reliable sea and lake ice (for travelling, hunting, fishing and whaling), loss of forest resources from insect damage, stress on caribou, and more exposed coastal infrastructure from diminishing sea ice.’") (citing www.ipcc.ch/ipccreports/ar4-wg2.htm).

12. Peggy M. Shepard & Cecil Corbin-Mark, Climate Justice, 2 Envtl. Just. 163 (Dec. 2009) ("Climate researchers report that vulnerable communities, even in the most prosperous nations, will be the first and worst hit [by climate change]. In this country, the most impacted areas will be communities-of-color, Indigenous Peoples, and low-income communities that are socio-economically disadvantaged, disproportionately burdened by poor environmental quality, and least able to adapt.").

13. Rebecca Tsosie, Indigenous People and Environmental Justice: The Impact of Climate Change, 78 U. Colo. L. Rev. 1625, 1628 (2007); National Tribal Air Association, Impacts of Climate Change on Tribes in the United States, 12-13 (Dec. 11, 2009) ("Any impact to tribal resources due to climate change is largely the result of decades of emissions from sources outside of Indian Country (even the most developed and industrialized tribal carbon footprint is miniscule)....Although Tribal sources are not a significant cause of climate change, they are the ones most keenly feeling the effects.").
B. Case Study: Native Village of Kivalina v. ExxonMobil Corporation

Given that Native Nations bear a disproportionate impact of the adverse effects of climate change and there currently is not an applicable federal cause of action based on federal statutory law,


15. Despite several recent actions, there is no federal regulation currently in place that could form that basis of a claim against defendants, such as the one brought in Kivalina. On December 7, 2009, the Environmental Protection Agency (EPA) arguably took the first step toward regulating greenhouse gases under the Clean Air Act (CAA). On that date, Administrator Jackson signed a finding under Section 202(a) of the CAA that six greenhouse gases constitute a threat to public health and welfare. EPA, Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act, http://www.epa.gov/climatechange/endangerment.html (accessed Jan. 5, 2011) [hereinafter Endangerment Finding]. Following EPA’s Endangerment Finding, EPA and the National Highway Traffic Safety Administration (NHTSA) announced proposed regulations for light-duty vehicles effective starting with the 2012 model year. EPA, Regulations and Standards, http://epa.gov/otaq/climate/regulations.htm (accessed Jan. 5, 2011). Similarly, the agencies announced proposed greenhouse gas regulations targeting heavy-duty vehicles effective starting with the 2014 model year. Id. On May 13, 2010, EPA issued a final rule that “sets thresholds for greenhouse gas (GHG) emissions that define when permits under the New Source Review Prevention of Significant Deterioration (PSD) and title V Operating Permit programs are required for new and existing industrial facilities.” EPA, Final Rule: Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, http://www.epa.gov/NSR/documents/20100413fs.pdf (accessed Jan. 5, 2011). This rule should have taken effect automatically on January 2, 2011. Id. On December 23, 2010, EPA issued a proposed schedule for establishing greenhouse gas standards under the CAA for fossil fuel-fired power plants and petroleum refineries. EPA, Regulatory Initiatives, http://www.epa.gov/climatechange/initiatives/ (accessed Jan. 5, 2011). However, despite these numerous EPA proposals, it currently does not appear that a comprehensive national regulatory strategy is in place for the type of facilities owned and operated by the defendants in Kivalina. Additionally, since the EPA’s 2009 Endangerment Finding, there has been a change in the political composition of Congress. Notably, the House of Representatives is now controlled by the Republican Party and there are indications that further EPA climate change-related regulation may not be possible given the current congressional political climate. For example, incoming Chairman of the House Energy and Commerce Committee,
Native Nations have turned to public nuisance claims in an effort to curb the greenhouse gas emissions likely causing climate change, which has been so detrimental to their environment. To understand how Native Nations are moving forward with climate change-related claims based on public nuisance theories, it is helpful to explore one claim that has already been brought by such a community, the Native Village of Kivalina and City of Kivalina (Kivalina), against those who allegedly contribute significant greenhouse gases to the environment.16 Kivalina “are the governing bodies of an Inupiat village of approximately 400 people ... located on the tip of a six-mile barrier reef located ... some seventy miles north of the Arctic Circle.”17 “Native Village of Kivalina is a self-governing, federally recognized Tribe established pursuant to the provisions of the Indian Reorganization Act of 1934 and amended in 1936.”18 Historically, Kivalina was protected from strong winter storms by Arctic sea ice surrounding the barrier reef.19 However, because of a warming environment related to climate change, the sea ice that traditionally protected the community is melting, and, as a result, Kivalina is

Rep. Fred Upton (R-MI), has indicated that he will work to block any further EPA regulations related to climate change. Eric W. Dolan, GOP House Energy Chairman Vows to Block Climate Regulations (Jan. 3, 2011), http://www.rawstory.com/rs/2011/01/incoming-energy-chairman-plans-block-regulations-carbon-emissions/# (accessed Apr. 22, 2011). Accordingly, the future of climate change-related regulation is unclear. Therefore, currently there is no federal regulatory option upon which a claim may be based similar to the claim brought in Kivalina, as discussed more fully below.


17. Id. at ¶ 1.

18. Id. at ¶ 13.

19. Id.
experiencing a “massive erosion problem.”20 “Houses and buildings are in imminent danger of falling into the sea ... Critical infrastructure is imminently threatened with permanent destruction.”21 “The U.S. Army Corps of Engineers and the U.S. Government Accountability Office have both concluded that Kivalina must be relocated due to global warming and have estimated the cost [of relocation] to be from $95 million to $400 million.”22

In light of the massive injury Kivalina is currently suffering and the impending loss of the land upon which the Nation is located, Kivalina filed a complaint in the United States District Court for the Northern District of California (District Court) on February 26, 2008, against several private entities that allegedly contribute significantly to climate change through their emissions of greenhouse gases.23 Kivalina based its complaint on claims of federal common law of public nuisance, state private and public nuisance, civil conspiracy, and concert of action.24 In relevant part, Kivalina requested monetary damages for current injuries sustained, as well as a declaratory judgment “for such future monetary expenses and damages as may be incurred by Plaintiffs in connection with the nuisance of global warming.”25

In response to Kivalina’s complaint, Defendants filed motions to dismiss under the Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), alleging that Kivalina’s complaint failed to meet standing requirements and should be precluded under the political question

20. Id. at ¶ 4.
21. Id.
22. Id. at ¶ 1.
23. Kivalina’s complaint asserts that “Defendants in this action include many of the largest emitters of greenhouse gases in the United States.” Id. at ¶ 3. The complaint then goes on to detail the actual greenhouse gas emissions for each defendant during certain years. Id. at ¶¶ 18–122. For example, in 2006, BP emitted “65 million tons of carbon dioxide equivalent greenhouse gases,” Chevron “emitted 68 million tons of carbon dioxide equivalent” and ConocoPhillips emitted “62.3 million tons.” Id. at ¶¶ 23, 29, 34.
24. This article will focus on Kivalina’s federal common law claim for public nuisance, as such a claim may be similarly considered and brought by other Native Nations suffering the adverse impacts of climate change.
25. Complaint, supra n. 16, at ¶ 5, Relief.
doctrine. On September 30, 2009, United States District Judge Saundra Brown Armstrong dismissed Kivalina’s claim, finding that the complaint was precluded under the political question doctrine and that Kivalina lacked standing. In applying the six factors from Baker v. Carr, which are applicable in determining when the political question doctrine applies, the District Court held that the second and third Baker factors applied to Kivalina’s complaint, and, as a result, its claims were barred under the political question doctrine.

Furthermore, the District Court determined that Kivalina did not meet the requirements of Article III standing. Notably, the District Court also determined that Kivalina was not entitled to the relaxed standing requirements typically afforded sovereigns, or special solicitude, under the parens patriae standing doctrine. However, Judge Armstrong failed to provide any analysis to support her conclusion that the doctrine applied to the claims brought by Kivalina.


29. Kivalina, 663 F. Supp. 2d at 876 (“Plaintiffs’ global warming nuisance claim seeks to impose liability and damages on a scale unlike any prior environmental pollution case cited by Plaintiffs. Those cases do not provide guidance that would enable the Court to reach a resolution of this case in any ‘reasoned’ manner.”).

30. Id. at 877 (“Plaintiffs ignore that the allocation of fault – and cost – of global warming is a matter appropriately left for determination by the executive or legislative branch in the first instance.”).

31. Id. at 876–877.

32. Id. at 880–882.

33. Id. at 882.

On March 10, 2010, Kivalina filed its opening brief in the United States Court of Appeals for the Ninth Circuit, appealing the District Court’s decision. Since the District Court’s decision dismissing Kivalina’s complaint, both the United States Court of Appeals for the Second Circuit and Fifth Circuit reached results contrary to the decision of the District Court on claims very similar to the claim based on the federal common law of public nuisance brought by Kivalina. This article will therefore explore the contrary analyses applied by these courts to better understand how the parens patriae doctrine must be considered in these types of cases brought by Native Nations and why Judge Armstrong’s decision was in error.

The purpose of this article is not to assert that Native Nations should succeed on claims under the federal common law of public nuisance stemming from injuries sustained as a result of climate change. Rather, this article suggests that Judge Armstrong’s decision was incorrect and that the parens patriae standing doctrine should apply to claims based on federal public nuisance like the claim brought by Kivalina. Accordingly, when considering these types of claims brought by Native Nations, courts must apply the parens patriae standing doctrine in considering whether tribes have standing to bring such claims. To support this conclusion, the article first

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37. *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). However, sitting en banc, the U.S. Court of Appeals for the Fifth Circuit dismissed the appeal when one of the nine judges recused herself, resulting in the court’s determination that it lacked quorum to conduct judicial business. *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010). Given the lack of a discussion of the merits of the climate-change related claim at issue in *Comer* by the court sitting en banc, this article will focus on the U.S. Court of Appeals for the Second Circuit’s decision in *Conn*.

38. The author recognizes that litigation may be a short term solution to the problem facing many Native Nations as a result of climate change. One scholar
examines how past courts have applied the *parens patriae* standing doctrine, focusing on the United States Supreme Court’s decisions in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez* (Snapp) and *Massachusetts v. EPA* (Massachusetts). Next, the article will consider the application of “traditional” Article III analysis, as described by the Court in *Lujan v. Defenders of Wildlife* (Lujan), to claims such as the one brought by Kivalina. The article then discusses why, given the foregoing, the *parens patriae* standing doctrine is applicable to Native Nations, such as Kivalina. Finally, the article will briefly conclude with why the application of the doctrine of *parens patriae* to claims similar to the one brought by Kivalina has potentially broader implications for both the fields of federal Indian law and environmental law.

II. APPLICATION OF *PARENS PATRIA*E DOCTRINE TO CLAIMS BROUGHT BY NATIVE NATIONS

Since the United States Supreme Court’s decision in *Lujan*, standing has played a pivotal role in any environmental litigation. Climate change-related claims are no different. In particular, the decisions in two recent climate change-related cases, *Massachusetts* and *Connecticut v. American Electric Power Company, Inc.* (Connecticut) have turned on the question of standing. In both *Massachusetts* and *Connecticut*, the courts found in favor of the plaintiffs on the question of standing. In particular, the courts extended the doctrine of *parens patriae* to the state plaintiffs, therefore finding that the plaintiffs had standing. Because the state

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42. *Mass., 549 U.S. at 539; Conn., 582 F.3d at 338.*
plaintiffs in these cases are sovereigns, the courts determined that application of the *parens patriae* doctrine was appropriate, which then led to a finding that the states had standing because they were protecting the interests of their citizens and had more than a passing interest in resolution of the matter at issue. Accordingly, the application of the *parens patriae* doctrine has been crucial to the standing determination where sovereigns have previously brought climate change-related claims on behalf of their citizens, such as in *Massachusetts* and *Connecticut*.43

Like the state plaintiffs in *Massachusetts* and *Connecticut*, Kivalina and other Native Nations possess inherent sovereignty.44 Accordingly, courts should extend the *parens patriae* doctrine to Kivalina and similar claims brought by other Native Nations, just as

43. There may be some concern that a courts’ consideration of claims based on injuries from climate change may lead to Congress removing such causes of action or a loss of credibility of the federal court system should the American public perceive the courts as overstepping. However, following the decisions in *Mass. v. EPA*, *Conn. v. Am. Elec. Power Co.*, and *Comer v. Murphy Oil USA* (panel decision), neither Congress nor the American public responded in such a negative fashion. Accordingly, based on the failure to react to these three momentous decisions, it is likely that such dire ramifications would not result from a similar decision in favor of Kivalina. Notably, however, there is one important difference between the plaintiffs at issue in these three cases and Kivalina’s claim: the Native Village of Kivalina is a federally-recognized tribe. *Complaint, supra n. 16, at ¶ 13.* However, as mentioned above and explained more fully below, the purpose of this article is not to assert that Kivalina and similarly-situated Native plaintiffs should succeed on their claims, but rather they should have effective access to justice through the courts’ consideration of the merits of their claims.

44. Chief Justice Marshall recognized the sovereignty of Native Nations in finding that such nations are “domestic dependent nations.” *Cherokee Nation v. Ga.*, 30 U.S. 1 (1831). Furthermore, in *Worcester v. Ga.* the following year, Chief Justice Marshall went on to explain that the laws of Georgia had no force or effect in Indian country, in part because of the inherent sovereignty of Native Nations. 31 U.S. 515 (1832). Since these early cases, Native sovereignty has been eroded through court decisions and congressional action, but the U.S. Supreme Court and Congress continue to recognize the inherent sovereignty of Native Nations. See e.g. *U.S. v. Lara*, 541 U.S. 193 (2004) (upholding a congressional act that recognized the inherent sovereignty of Native Nations, which ultimately allowed successive prosecutions by both the federal and tribal governments because they are “separate and distinct sovereign bodies.”).
the Supreme Court and Second Circuit did in Massachusetts and Connecticut, respectively. Like these state plaintiffs, Kivalina is bringing suit in the best interests of its residents to protect their health and welfare. Given the extreme situation currently facing Kivalina, it has more than a passing interest in the outcome of the litigation. Therefore, as more fully explained below, the rationale previously justifying the application of the parens patriae doctrine to states applies equally to Native Nations, such as Kivalina.

A. Historical Application of the Parens Patriae Standing Doctrine

The United States Supreme Court’s decision in Snapp is a useful starting point for any analysis involving the application of the parens patriae standing doctrine given the Court articulated the test for when the doctrine applies. The case is also helpful to this article’s analysis because the Commonwealth of Puerto Rico was the petitioner in Snapp. In Snapp, the United States Supreme Court articulated the test for parens patriae standing, finding that a sovereign: (1) “must articulate an interest apart from the interests of particular private parties, i.e., the States must be more than a nominal party;” (2) “must express a quasi-sovereign interest;” and (3) must have “alleged injury to a sufficiently substantial segment of its population.” The Snapp Court went on to identify two types of quasi-sovereign interests: (1) protecting “the health and well-being...of its residents,” and (2) “securing observance of the terms under which [the state] participates in the federal system.”

In addition to its articulation of the test for when the parens patriae standing doctrine should be applied, the Court’s decision in Snapp is helpful to the analysis here because of the unique status of the Commonwealth of Puerto Rico. Previously, the parens patriae standing doctrine had largely been applied to claims brought by states, such as the state of Georgia in Georgia v. Tennessee Copper

45. The Commonwealth of Puerto Rico brought suit against east coast apple growers arguing that the apple growers had violated federal laws that preferred domestic laborers, such as citizens of Puerto Rico, over foreign temporary workers. Snapp, 458 U.S. at 597.
46. Id. at 607.
47. Id. at 607–608.
Unlike the fifty states, the Commonwealth of Puerto Rico has a different relationship with the United States of America, just as Native Nations have a different political relationship with the federal government than states do with the federal government. Therefore, although the Court’s analysis in


49. Unlike the fifty states, the relationship between the United States of America and the Commonwealth of Puerto Rico has been defined arguably through congressional delegation. Alex Tallchief Skibine, *Redefining the Status of Indian Tribes within “Our Federalism”: Beyond the Dependency Paradigm*, 38 Conn. L. Rev. 667, 692 n. 143 (May 2006) (“To further define the relationship with Puerto Rico, Congress enacted the Puerto Rican Federal Relations Act... offering a compact to the people of Puerto Rico, and authorizing Puerto Rico to adopt its own Constitution. In 1952, Puerto Rico adopted a Commonwealth Constitution, which was then approved by the United States Congress, thereby bringing the compact into existence.”) (citations omitted). Furthermore, there are notable similarities and differences between Native Nations and the Commonwealth of Puerto Rico. First, the Commonwealth of Puerto Rico is not considered a separate sovereign for purposes of the dual sovereignty exception to double jeopardy. *U.S. v. Sanchez*, 992 F.2d 1143 (11th Cir. 1993). On the contrary, the U.S. Supreme Court found that Native Nations were separate sovereigns for purposes of the dual sovereignty exception to double jeopardy. *U.S. v. Wheeler*, 435 U.S. 313 (1978). The Commonwealth of Puerto Rico and Native Nations are similar, however, in that there remains a question as to whether Congress has retained plenary authority over both. Skibine, supra n. 49, at 692 n. 143 (“One of the contested issues is whether Congress has retained its plenary power after the enactment of the 1950 legislation and Commonwealth Constitution.”); *U.S. v. Kagama*, 118 U.S. 375 (1886). Justice Scalia recognized this similarity between Native Nations and the Commonwealth of Puerto Rico during oral argument in *U.S. v. Lara* when he asked Billy Jo Lara’s attorney, Alexander Reichert, whether the status of Native Nations was like that of the Commonwealth of Puerto Rico. Oral Argument Transcript from *U.S. v. Lara*, 2004 WL 193036 (argued Jan. 21, 2004). Given the similarities between Native Nations and the Commonwealth of Puerto Rico, it may therefore be argued that because the *parens patriae* standing doctrine was extended to Puerto Rico by the Court in *Snapp*, the Court would similarly extend the doctrine to claims brought by Native Nations. This conclusion may be buttressed by the Court’s finding in *Wheeler* that the dual sovereignty exception to double jeopardy applies to tribal prosecutions, whereas at least one court reached the contrary conclusion with regard to the Commonwealth of Puerto Rico. However, this assertion warrants greater development and a full discussion of this topic is beyond the scope of this article. At the very least, however, the Court’s decision in *Snapp* with regard to the application of the *parens patriae* standing doctrine to the Commonwealth of Puerto
Snapp is not directly applicable to Native Nations because Native Nations do differ from the Commonwealth of Puerto Rico, the Snapp Court’s analysis related to the Commonwealth of Puerto Rico strongly suggests that the doctrine of *parens patriae* would apply to other entities possessing sovereign aspects. The Court’s decision in Snapp is an important piece in determining whether the *parens patriae* standing doctrine may be applicable to Native Nations because the Court determined that statehood was not a prerequisite for the application of the doctrine. Notably, the Snapp Court explained that:

> Although we have spoken throughout of a “State’s” standing as *parens patriae*, we agree with the lower courts and the parties that the Commonwealth of Puerto Rico is similarly situated to a state in this respect: It has a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any state.  
>  
> Accordingly, like the Commonwealth of Puerto Rico in Snapp, so too does Kivalina and other similarly situated Native Nations have a quasi-sovereign interest in the health and well-being of their citizens given the dire impacts of climate change. This interest is at least as strong as the states, such as Massachusetts.

To understand Kivalina’s and other Native Nations’ potential arguments under the *parens patriae* standing doctrine, it is also helpful to consider the United States Supreme Court’s application of the doctrine to state claims in *Massachusetts*. In *Massachusetts*, the Court considered a claim brought by a group of states, local governments and private organizations asking the Court to consider whether the Environmental Protection Agency (EPA) had the statutory authority to regulate greenhouse gas emissions from new motor vehicles, and, if so, whether its stated reasons for refusing to do so were consistent with the Clean Air Act. Before reaching the

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Rico means that statehood is not a requirement of the doctrine and that the Court will consider application of the doctrine to entities with a quasi-sovereign interest.

50. *Snapp*, 458 U.S. at 608 n. 15.
52. *Id.* at 505.
merits of the plaintiffs’ claims, the Court first had to address whether plaintiffs had standing to bring their claims against EPA. As discussed more fully in the next section, the Court did consider the traditional Article III standing requirements under *Lujan* and concluded that the plaintiffs had Article III standing.

More importantly for the purposes of this article, the Court also discussed the application of the *parens patriae* standing doctrine, or special solitudes, for quasi-sovereigns acting in their sovereign capacities. Relying on *Tennessee Copper*, the Court concluded that in its capacity as a quasi-sovereign, “the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”53 Furthermore, the Court cited *Missouri v. Illinois* as support for the proposition that there is federal jurisdiction “in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a state,” and also when there is “substantial impairment of the health and prosperity of the towns and cities of the state . . . .”54

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54. *Id.* at 520 n. 17 (citing *Mo. v. Ill.*, 180 U.S. 208, 240–241 (1901)). Federal pre-emption is likely a significant hurdle for potential Native litigants bringing public nuisance claims related to climate change. In a nutshell, courts may decline to consider such claims if a viable argument can be made that the federal government is already “occupying the field” through existing federal statutory law. As previously discussed, however, it does not appear that federal regulation, at least not under the CAA, is likely to address the concerns complained of in Kivalina’s complaint. Tsosie, *supra* n. 13 (discussing the current status of regulation of greenhouse gases under the CAA). Moreover, although the effects of *Mo. v. Ill.* were thought to have been addressed through federal legislation, claims based on common law have generally been allowed in cases involving specific property damage. *Ill. v. City of Milwaukee*, 406 U.S. 91 (1972). Accordingly, even assuming EPA regulates greenhouse gases under the CAA, such regulation would not necessarily pre-empt the ability of Native Nations to bring claims based on damage to property. As can be seen from the Kivalina example, property damage sustained by Native Nations as a result of climate change can be extensive. Furthermore, the Court in *City of Milwaukee* when considering whether the Clean Water Act pre-empted a state claim based on a common law public nuisance claim, explained that “[w]hen the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making
The Court went on to explain that “[w]hen a State enters the Union, it surrenders certain sovereign prerogatives . . . These sovereign prerogatives are now lodged in the Federal Government, and Congress has ordered EPA to protect Massachusetts (among others) by prescribing standards . . . .”55 Given the states had surrendered a portion of their sovereignty to the federal government, the EPA was required to act to protect those states as a result, and the states had an interest in protecting the rights of their citizens, the Court concluded that the state plaintiffs were entitled “special solicitude” in the Court’s standing analysis.56 Accordingly, the Court in Massachusetts applied the parens patriae standing doctrine to the states suing to protect their property and the general health and welfare of their citizens from the effects of climate change. Moreover, there is no requirement for “states suing as parens patriae to meet the test for organizational standing.”57

As presented by the Court in Massachusetts and more fully explored below, the rationale underlying the standing doctrine of parens patriae applies equally to Native Nations as it does states. Therefore, the doctrine of parens patriae should be extended to claims brought by tribal governments where appropriate.

B. Traditional Standing under Lujan

Even under “traditional” standing analysis, it is likely that Kivalina and other similarly-situated Native Nations have standing to bring climate change-related claims. In Lujan,58 the United States Supreme Court articulated what has come to be understood as the traditional standing test under Article III of the United States Constitution. “Lujan holds that a litigant must demonstrate that it has suffered a concrete and particularized injury that is fairly traceable to reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.” 406 U.S. at 104. Similarly, there is nothing from the historical record to suggest that when Native Nations surrendered their external sovereignty to the United States that they also surrendered their ability to make reasonable demands based on federal common law in the federal courts.

55. Snapp, 458 U.S. at 519.
56. Id. at 520.
57. Conn., 582 F.3d at 339.
58. Lujan, 504 U.S. at 555–556.
the defendant, and that it is likely that a favorable decision will redress that injury."59 Moreover, there are two basic elements required for procedural standing: "(1) the plaintiff must be a person 'accorded a procedural right to protect his concrete interests;' and (2) the plaintiff must have some concrete interest threatened that is the ultimate foundation of his or her standing."60 Some may assert that the connection between the injury to Kivalina and the Defendants' emissions is too tenuous to support standing under Lujan.61 However, "[t]he casual connection in Kivalina, albeit broad, is tighter than what the Fifth Circuit approved in Comer."62 Moreover, since

60. Abate, supra n. 38, at 126 (citing Lujan v. Defenders of Wildlife, 504 U.S. at 573).
61. Abate, supra n. 38, at 132–133 ("[A]llusions regarding global warming were the six categories of substantive injuries that the court determined to be insufficient to confer standing in Center for Biological Diversity v. Abraham . . . Because the court found the plaintiffs' global warming concerns and assertions to be too abstract and conjectural to be caused by the defendants' failure to comply with certain provisions of the Energy Policy Act, and to be unlikely rectified by the relief requested, the court concluded that the plaintiffs failed to satisfy the injury requirement of Article III standing for these allegations.") (citations omitted). Id.
62. Randall S. Abate, Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time, 85 Wash. L. Rev. 197, 242 (2010) [hereinafter Abate, Public Nuisance]. In Comer, the plaintiffs' claim alleged that the defendants' greenhouse gas emissions ultimately resulted in Hurricane Katrina, which in turn damaged their private property. 585 F.3d at 859 ("The plaintiffs allege that defendants' operation of energy, fossil fuels, and chemical industries in the United States caused the emission of greenhouse gasses that contributed to global warming, viz., the increase in global surface air and water temperatures, that in turn caused a rise in sea levels and added to the ferocity of Hurricane Katrina, which combined to destroy the plaintiffs' private property, as well as public property useful to them."). It may therefore be argued that the claims at issue in Comer were one step removed from those at issue in Kivalina. In a nutshell, the Comer plaintiffs argued that the defendants' emissions resulted in climate change, which led to the increased "ferocity" of Hurricane Katrina, and that Hurricane Katrina in turn caused the damage to their private property. Alternatively, Kivalina asserts that the defendants' emissions resulted in climate change, which in turn directly led to the adverse impacts to Kivalina's property (or the property interests of her citizens). It may therefore be asserted that the damage
the United States Supreme Court’s 2000 decision in *Friends of the Earth v. Laidlaw Environmental Services (Laidlaw),* it appears that courts have been moving toward a broader interpretation of standing. \[\text{\textsuperscript{63}}\] "Lujan and Laidlaw taken together stand for the proposition that the exacting ‘concrete and particularized . . . actual or imminent, not conjectural or hypothetical’ standard from Lujan can be met with allegations of injury that are narrowly tailored to focus on the use and enjoyment of local resources as in Laidlaw."\[\text{\textsuperscript{65}}\]

As with the *parens patriae* standing doctrine, the Court in *Massachusetts* also considered whether the plaintiffs had traditional Article III standing under *Lujan.* Below, Judge Sentelle of the United States Court of Appeals for the District of Columbia Circuit, in applying standing standards as articulated in *Lujan* to the plaintiffs claims, found that “they had alleged that global warming is ‘harmful to humanity at large,’ but could not allege ‘particularized injuries’ to themselves.”\[\text{\textsuperscript{66}}\] However, the Court responded by finding that the widespread nature of the harm did not present an "insuperable jurisdictional obstacle."\[\text{\textsuperscript{67}}\]

Ultimately, at least one scholar has concluded that Kivalina meets the standing requirements under *Lujan* and, as a result, this type of claim could spread throughout the international community. Professor Randall Abate explains that "[t]he case involves two essential elements for success: (1) identified victims who have suffered direct harm from climate change impacts; and (2) the degree of harm suffered constitutes cultural genocide because of the need to relocate the population fundamentally alters the subsistence lifestyle of the community."\[\text{\textsuperscript{68}}\]

Whether claims brought by a Native Nation meet the *Lujan* test for standing, however, would largely become a moot point should the *parens patriae* standing doctrine be applied to such claims. This is because it is generally accepted that Article III

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\[\text{\textsuperscript{64}}\] Abate, *supra* n. 38, at 124.

\[\text{\textsuperscript{65}}\] Id. at 131.

\[\text{\textsuperscript{66}}\] Id. at 131.

\[\text{\textsuperscript{67}}\] Id. at 498.

\[\text{\textsuperscript{68}}\] Abate, *Public Nuisance, supra* n. 62, at 247.
standing is established when a sovereign brings suit on behalf of its citizens.69

C. Application of Parens Patriae Standing Doctrine to Claims Brought by Native Nations

Given the foregoing analysis, whether the parens patriae standing doctrine applies to Native Nations must now be considered. Application of the parens patriae standing doctrine to Native Nations claims is not a wholly new concept. The Quapaw Tribe of Oklahoma asserted standing under the parens patriae standing doctrine in Berrey v. Asarco Inc.70 The Tribe brought claims of public and private nuisance, as well as other claims, in order to initiate the cleanup of the Tar Creek Superfund Site, which was partially located on tribal land.71 In relevant part, the court explained that “[t]he Tribe brought suit as parens patriae under the common law public trust doctrine.”72 The issue was whether the defendants’ counterclaims against the Tribe were barred by tribal sovereign immunity, and it appears that the court accepted the Tribe’s assertion that the parens patriae standing doctrine applied. Although related to the court’s analysis of the question of whether tribal sovereign immunity applied to bar the defendants’ counterclaims, the court did recognize that tribal sovereign immunity is a privilege enjoyed by Native Nations, given that they are sovereign.73

Moreover, the United States District Court for the Northern District of Oklahoma apparently explicitly found that the Indian tribes have standing under the parens patriae standing doctrine.

69. Mass., 549 U.S. at 519–521 (recognizing that the sovereign state’s right to protect its quasi-sovereign interests arises from and satisfies the requirements of Article III of the U.S. Constitution).
70. Berrey v. Asarco Inc., 439 F.3d 636 (10th Cir. 2006).
71. Id. at 640–641.
72. Id. at 640 n.1.
73. Id. at 643 (“It is well established that Indian tribes possess the common law immunity from suit traditionally enjoyed by sovereign powers.”) (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).
This Court [U.S. District Court for the Northern District of Oklahoma] has already found that Indian tribes, like states and other governmental entities, have *parens patriae* standing to protect quasi-sovereign interests . . . Indeed, the Court observed that an Indian tribe "can have standing to sue to protect its own interests or, in appropriate situations, the interests of its members through a *parens patriae* action."  

"Likewise, the Supreme Court has long recognized the quasi-sovereign nature inherent in the tribal system of government."  
Numerous other courts have also recognized Native Nations’ ability to assert standing under the *parens patriae* standing doctrine.  

Despite the fact that several courts have recognized the application of the *parens patriae* standing doctrine to Native Nations and the United States Supreme Court in *Snapp* even recognized that statehood was not a prerequisite to the application of the doctrine, it may be argued that the doctrine is not applicable to Native Nations because they are “domestic dependent nations” or that their sovereign interests result from a delegation from the federal

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76. Id.

government therefore invalidating such an application of the doctrine. Such a conclusion, however, would be in error. As previously explained, despite the Cherokee Nation v. Georgia holding that Native Nations are “domestic dependent nations,” the United States Supreme Court reaffirmed that Native Nations are sovereign as recently as 2004. The Court’s decision in Lara is also important because the Court found that the Tribe’s authority was not a result of a delegation from the federal government but rather due to the Tribe’s inherent sovereignty. Moreover, despite the erosion of the external authority of Native Nations over the years, it has remained unquestioned that Native Nations maintain the right to self-government. Because of this right to self-government, it also remains unquestioned that Native Nations have sovereign authority over their citizens. Accordingly, to this day, Native Nations possess a quasi-sovereign interest in the well-being of their citizens that is not the result of a federal delegation. For these reasons, it is appropriate to apply the parens patriae standing doctrine to Native Nations claims under the circumstances articulated by the Court in Snapp.

III. LOOKING BEYOND KIVALINA: IMPORTANT IMPLICATIONS TO THE FIELDS OF FEDERAL INDIAN LAW AND ENVIRONMENTAL LAW

The analysis above presents important implications for the fields of federal Indian law and environmental law beyond the issue of whether Native Nations can successfully bring federal common law public nuisance claims related to climate change. With regard to the field of federal Indian law, the above analysis provides a

78. Lara, 541 U.S. at 199 (upholding a congressional act that recognized the inherent sovereignty of tribes, which ultimately allowed successive prosecutions by both the federal and tribal governments because they are “separate and distinct sovereign bodies.”).
79. Id.
mechanism for buttressing tribal sovereignty.\textsuperscript{82} Given the unique contours of the sovereignty possessed by Native Nations,\textsuperscript{83} "[t]ribal sovereignty is thus a paradox. It transcends, and therefore requires no validation from, the United States government. At the same time, tribal sovereignty is vulnerable and requires vigilant and constant defense in our legal and political forums."\textsuperscript{84} Because of this uniqueness, Native Nations benefit from any efforts made to buttress their sovereignty. As discussed above, the United States Supreme Court has already extended the doctrine of \textit{parens patriae} to states and the Commonwealth of Puerto Rico on the theory that these entities possess quasi-sovereign concerns related to the well-being of their citizenry. As such, application of the doctrine of \textit{parens patriae} to Native Nations would further bolster the argument that Native Nations are sovereign and that they possess quasi-sovereign interests in the well-being of their citizens.

With regard to environmental law, the analysis above presents an important component to any standing analysis involving Native Nations. As previously mentioned, the question of whether an entity has standing is an incredibly important point in any environmentally-related litigation. Application of the doctrine of \textit{parens patriae} to Native Nations is a mechanism to simplify the standing analysis related to claims brought by Native Nations. Sadly, Native Nations not only bear a disproportionate impact of the effects of climate

\begin{itemize}
  \item \textsuperscript{82} See \textit{supra} n. 44 for a discussion of the sovereignty possessed by Native Nations.
  \item \textsuperscript{83} Notably, because of the sovereignty possessed by Native Nations, Native Nations have a special government-to-government relationship with the federal government. Cordalis & Suagee, \textit{supra} n. 6 at 45 (citing Exec. Or. No. 13,175, 2, 65 Fed. Reg. 67249 (Nov. 6, 2000)). \textit{See also} 25 U.S.C. § 3601 ("there is a government-to-government relationship between the United States and each Indian tribe ...."). Because of the special government-to-government relationship that exists between American Indian tribal nations and the federal government, "the federal government must be prepared to defend vigorously the environmental self-determination that tribes already have." Sarah Krakoff, \textit{Tribal Sovereignty and Environmental Justice} in \textit{Justice and Natural Resources: Concepts, Strategies, and Applications} 179 (Kathryn M. Mutz, Gary C. Bryner, and Douglas S. Kenney eds., Island Press 2002). Accordingly, the doctrine of \textit{parens patriae} should be applied to claims brought by Native Nations in federal court, similar to those claims brought by Kivalina, in part in recognition of the federal government's responsibility to defend tribal self-determination.
  \item \textsuperscript{84} Krakoff, \textit{supra} n. 83, at 163.
\end{itemize}
change but also bear disproportionate adverse impacts in many environmental contexts. As such, Native communities are environmental justice communities. Accordingly, when potential claims based on environmental law and related to the quasi-sovereign interests of a Native Nation arise in Indian country, the doctrine of parens patriae should apply to make the standing analysis easier for these types of claims to the benefit of environmental advocates working in Native communities.

IV. CONCLUSION

In sum, Judge Armstrong got it wrong. The parens patriae standing doctrine applies to Native Nations, like Kivalina, who bring claims to protect their sovereign interests in the health and well-being of their citizens, which are directly threatened by climate change. By considering the rationale of courts applying the parens patriae standing doctrine, it becomes clear that this rationale is equally applicable to claims brought by Native Nations. As previously explained, the Snapp Court indicated that the doctrine could be applied where the sovereign’s interests were separate from those of private parties, the sovereign is acting to protect a quasi-sovereign interest, and the sovereign is trying to protect the interests of a significant portion of its residents. The Court went on to explain that protecting the health and well-being of residents is a quasi-sovereign interest and that statehood was not a prerequisite to application of the doctrine. Additionally, the Court in Missouri v. Illinois seemed to suggest that protection of a sovereign’s property

85. Id. at 162 (“First, virtually all Indian tribes clearly fit into Getches and Pellow’s definition of groups who come to the table with ‘palpable and endemic disadvantage,’ stemming from a long history of discrimination, exclusion, and deliberate attempts to destroy their cultural and political communities. Second, the obvious disproportionate environmental harms borne by Native peoples have meant that they are already a part of the discussion — to let them continue to be so without a conscious articulation of the role of tribal sovereignty would be counterproductive to determining appropriate remedial strategies.”).
86. Snapp, 458 U.S. at 607.
87. Id. at 607–608.
interests is another quasi-sovereign interest. Finally, given Native Nations' strong sovereign interests in the health and well-being of their citizens as well as their property, it would be appropriate for courts to extend the doctrine to claims brought by Native Nations, as has been done in the past for similarly-situated sovereigns. Taken together, these decisions strongly support the extension of the *parens patriae* doctrine to claims raised by Native Nations.

Native Nations, such as Kivalina, meet the *Snapp* test as they have interests in the protection of their land and citizens separate from private parties. They have a strong interest in protecting the health and well-being of their citizens from the devastating effects of climate change, which is a quasi-sovereign interest. Similarly, as in *Missouri*, Native Nations bringing claims based on injuries sustained by climate change will likely be seeking to protect a property interest in their land, as well as the unique relationship many tribal people have with the land. Moreover, the Court’s willingness to extend the *parens patriae* standing doctrine to a claim brought by Puerto Rico, an entity whose political status may be more closely related to Native Nations than the fifty states, is a key factor in favor of applying the doctrine to claims brought by Native Nations, like the claim raised by Kivalina.

This article started with a statement from the National Tribal Air Association that “Tribes in Alaska are facing nothing less than the loss of their entire culture” as a result of climate change. They are also facing the loss of their land, with devastating consequences to the health and well-being of their citizens as well as potentially the very future political existence of such Native Nations. As explained above, both Congress and the United States Supreme Court have consistently recognized that Native Nations retain their sovereignty, especially their inherent right to self-govern their citizens. It is therefore difficult to imagine a situation where a sovereign would have a stronger interest in the welfare of its citizens than the situation currently facing Native Nations as a result of climate change, such as the dire situation facing Kivalina. Until the federal government adopts a national regulatory structure to counteract the effects of climate change (and even then claims related to property damage and

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based on federal common law may remain viable), it remains likely that Native Nations, such as Kivalina, will have to turn to claims of federal public nuisance in an effort to counterbalance the extreme effects of climate change on their communities. In such instances, it is apparent that the \textit{parens patriae} standing doctrine applies to claims brought by Native Nations.