RESOLUTION

RESOLVED, That the American Bar Association urges the United States government to ensure that federally-recognized Indian tribes (Tribes) listed pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a, may participate fully (including, e.g. consideration for membership on United States delegations) in policy discussions on the issue of climate change domestically and in international fora;

FURTHER RESOLVED, That the American Bar Association urges the United States government to consult on a government-to-government basis with Tribes on climate change; and

FURTHER RESOLVED, That the American Bar Association urges the United States government to provide adequate and equitable financial and other support for Tribes to:

1. carry out measures such as mitigating climate change, reducing greenhouse gases, and promoting renewable energy and energy efficiency; and

2. adapt to direct impacts from climate and sea-level changes to their territorial and reservation land bases and resources, including, with the free, prior, and informed consent of Alaska Native villages imminently threatened by erosion and flooding, the development and implementation of plans for permanent relocation.
The American Bar Association (ABA) has been a leader in addressing legal issues affecting the environment and concerning federally recognized Indian tribes (Tribes). The resolution supported by this report builds on and adds to existing ABA policy in these areas. Consistent with federal Indian policy and the unique legal status of Tribes as sovereign governments in the United States, the resolution urges that the United States take a leadership role in ensuring that Tribes, which are being disproportionately impacted by climate change, are consulted with and heard on the crucial issue of climate change domestically and in international fora. The resolution urges the United States to provide full, meaningful and effective participation in international climate change fora by Tribal leaders or their designated representatives. The resolution also urges that Congress and the Executive Branch consult on a government-to-government basis with Tribes on climate change and provide adequate and equitable financial and other support to Tribes for carrying out measures such as mitigating climate change, reducing greenhouse gases, promoting renewable energy and energy efficiency, and adapting to direct impacts from climate and sea-level changes to their territorial and reservation land bases and resources, including, with the free, prior, and informed consent of Alaska Native villages imminently threatened by erosion and flooding, the development and implementation of plans for permanent relocation.

I. Existing ABA Policy in the Area of Environmental Justice and Climate Change.

In 1991, the ABA’s House of Delegates adopted a resolution on environmental justice (EJ Resolution), responding to growing evidence that the burden of adverse environmental impacts falls disproportionately on people of color and/or low income populations. The supporting report (EJ Report) specifically recognized the presence of disproportionate impacts from environmental harms on Tribal lands. The EJ Report also noted that Tribes are unique political entities with distinct environmental problems and that Native communities often have higher exposures to toxics due to subsistence activities such as fishing. The EJ Resolution urged that priority attention be given to the issue of inequitable distribution of environmental harm on minority and/or low income individuals, communities, or populations and that appropriate measures be taken to redress and eliminate situations in which such people bear a disproportionate share of environmental harm. The EJ Report recognized that a cause of the inequitable distribution of environmental harms might be “the relative absence of minority economic and political power and the structure of environmental policy making, particularly the exclusion of minority participation in the formation of environmental policy”. The ABA’s position that “the presence of environmental injustice—or the lack of environmental justice—cannot be ignored and should be addressed,” remains relevant, timely, and supportive of this recommendation.

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1 "Indian tribe" means an “Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.” Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.
2 EJ Report at page 4, n.12.
3 “Native Americans . . . eat more fish than whites and as a result are exposed to more toxics that have been bioaccumulated by those fish.” EJ Report at 6, 9-10.
4 EJ Report at page 13, n. 32 and related text.
5 EJ Report at 2.
The ABA has adopted several other environmental policies during the last fifteen years. In 1995, the ABA adopted a 1995 resolution (Public Participation Resolution) promoting effective and meaningful involvement by all affected stakeholders through the public participation provisions of environmental laws, international environmental agreements, and treaties. In 2003, the ABA endorsed a concept of sustainable development recognized by the United Nations Conference on Environment Development, which supports “simultaneous achievement of environmental protection, economic development, social development, and peace, at the same time, for present and future generations.” In a 2007 resolution, the ABA urged governments, businesses, nongovernmental organizations, and others to consider and integrate Rule of Law Initiatives with global environmental issues.

Most recently, in 2008, the ABA adopted a timely and very important policy resolution (Climate Change Resolution), urging the United States to exercise leadership in addressing climate change issues through legal, policy, financial, and educational mechanisms. The Climate Change Resolution explicitly acknowledged that climate change poses significant global risks to current and future generations, recognizing that poorer communities having more limited adaptive capacities and dependence on climate-sensitive resources are especially vulnerable. However, the Climate Change Resolution omitted any mention of the crucial and distinct impacts of climate change on Tribes' interests, lands, resources, treaty rights, and traditional, subsistence, and cultural practices. With respect to addressing climate change internationally and domestically, the Climate Change Resolution also overlooked the contributions of Tribes and their traditional knowledge of caring for the earth, and did not fairly explore the role to be played by Tribes consistent with their sovereign political status in the United States and federal Indian policy. Because the Climate Change Resolution recognizes climate change as a global problem affecting the human quality of life in both the United States and other countries, this resolution is appropriate and timely regarding Tribes and climate change issues. This resolution would enable the ABA to play a more effective role with respect to the United States, federal agencies, Congress, and elsewhere because the ABA will have taken a substantive position on this important issue.

II. Unique Legal Status of Tribal Governments and Indian Country.

There are 565 federally-recognized Tribes in the United States. As of the 2000 census, approximately 4.1 million persons self-identified as American Indians and Alaska Natives (AI/ANs), with almost half of all AI/ANs living in Indian country or Alaska Native villages.

Unlike other environmental justice communities, Tribes possess inherent sovereignty and are

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6 The Climate Change Resolution addressed efforts by state and local governments, but mentioned Tribes only once, noting that three Tribes, along with thirty-nine states, and two Canadian provinces are members of The Climate Registry, which is establishing common criteria for tracking measures to reduce emissions and a cap-and-trade program. See Climate Change Resolution at page 8.

7 See Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 60810 (Oct. 1, 2010), supplemented by 75 Fed. Reg. 66124 (Oct. 27, 2010) (adding as of October 1, 2010, the Shinnecock Indian Nation, the 565th federally recognized tribe with the dismissal of objections by the Interior Board of Indian Appeals).

8 “Indian country” comprises about 53 million acres of land and is statutorily defined as including land within a reservation, dependent Indian communities, and Indian allotments, the Indian titles to which have not been extinguished. See 18 U.S.C. §1151.
self-governing entities and regulators over their members, resources, and territories, including broad civil jurisdiction even over non-Indians on Indians lands as well as on non-member fee lands within reservation boundaries, under certain circumstances.9 In 1984, the Environmental Protection Agency (EPA) adopted a formal Indian policy recognizing, among other things, the government-to-government relationship with Tribes and their role as the primary parties for environmental policy decisions and program responsibilities for reservation lands.10 Significantly, even before 1986 when Congress began enacting amendments to major federal environmental laws authorizing Tribes to be treated in the same manner as states for protection programs,11 courts recognized Tribal authority to regulate the reservation environment.12

Besides recognized sovereign rights, many Tribes also possess treaty rights whereby such Tribes have reserved cultural, traditional, and subsistence rights to hunt, fish, and gather within and outside their reservations.13 Significantly, many Tribes and their members are dependent on subsistence activities for day to day survival as well as for cultural and traditional practices. This dependence makes Tribes particularly susceptible to adverse health effects from pollution and raises environmental justice issues as well.14 In some instances, the location of Tribes, as well as the inequitable and limited availability of federal assistance and response, results in disproportionate environmental impacts due to climate change. For example, two studies15 by the General Accounting Office (GAO) in 2003 and 2009 found growing impacts of climate change in Alaska, with potentially the greatest impacts falling on vulnerable Alaska Native villages:

Permafrost (permanently frozen subsoil), which is found over approximately 80 percent of Alaska and in northern barrier island communities, literally holds the land together. Rising temperatures in recent years have led to widespread thawing of permafrost, causing village shorelines and riverbanks to slump and erode, threatening homes and infrastructure. Rising temperatures also affect the thickness, extent, and duration of sea ice that forms along the western and northern coasts. The loss of sea ice leaves shorelines more vulnerable to waves and storm surges and, coupled with the thawing permafrost along coasts, accelerates the erosion threatening Alaska Native villages. In addition, the loss of sea ice changes the habitat and accessibility of many of the marine mammals

9 See Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); see also Montana v. United States, 450 U.S. 544, 564-566 (1981); see generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW Ch. 4 (2005 ed.).
10 EPA, Indian Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 8, 1984), available at http://www.epa.gov/indian/pdf/indian-policy-84.pdf.
11 For example, Congress has enacted tribal amendments to the Safe Drinking Water Act, Clean Water Act, and Clean Air Act affording Tribes substantially the same opportunities as states under those acts for certain programs and purposes.
14 For example, on the Askwesasne reservation, industry has devastated Mohawk traditional life. Samples of the St. Lawrence River bottom have shown over 6,000 ppm of polychlorinated biphenyls (PCBs). While many Mohawk families once ate twenty to twenty-five fish meals per month, it is now said that “the traditional Mohawk diet is spaghetti.” See Winona LaDuke, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 18 (1999).
that Alaska Natives depend upon for subsistence. As the ice melts or moves away early, walruses, seals, and polar bears move out of the hunting range.\footnote{See U.S. Gen. Accounting Office, \textit{Alaska Native Villages: Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion}, GAO-09-551 at 7-8 (June 2009).}

The GAO found erosion and flooding affecting to some extent 86 percent of all Alaska Native villages, with those affected consisting of coastal and river villages.\footnote{See U.S. Gen. Accounting Office, \textit{Alaska Native Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance}, GAO-04-142 at 13 (Dec. 2003).} As of 2009, of the 31 Alaska Native villages identified as imminently threatened, at least 12 are exploring relocation options.\footnote{See U.S. Gen. Accounting Office, \textit{Alaska Native Villages: Limited Progress Has Been Made on Relocating Villages Threatened by Flooding and Erosion}, GAO-09-551 at 12, 16 (June 2009).} Although the GAO identified three recommendations in 2009 for Congressional consideration, including designation or creation of a lead federal entity to coordinate village relocation efforts, eight federal agencies and the State of Alaska have failed to provide any comments on the draft 2009 GAO report concerning these matters.\footnote{See \textit{Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation} (Nov. 5, 2009); Exec.Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000).}

Finally, Tribes have a special political status which obligates the United States to deal with such Tribes on a government-to-government basis.\footnote{See Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000).} This is different than other minorities that the United States may identify by strictly ethnic or racial classifications. The United States also has a trust responsibility to Tribes that obligates the federal government to act in their best interest, and defend, protect, and provide certain services to such Tribes. In 2000, President Clinton issued Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, to strengthen the government-to-government relationship with Tribes and “to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.”\footnote{See Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000).} In recognition of the federal-tribal relationship, President Obama has expressed his Administration’s commitment “to complete and consistent implementation of Executive Order 13175” and “to regular and meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications.”\footnote{See \textit{Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation} (Nov. 5, 2009).} On July 22, 2009, EPA Administrator Lisa P. Jackson reaffirmed EPA’s Indian policy, recognizing that the United States has a unique legal relationship with Tribes, that Tribes are sovereign governments, and that the federal government has a trust responsibility to Tribes.\footnote{See \textit{Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation} (Nov. 5, 2009). Additional information about the reaffirmation is available at http://www.epa.gov/tribalportal/basicinfo/epa-policies.htm. On May 4, 2011, EPA issued its Policy on Consultation and Coordination with Indian Tribes, which is broader than that found in Exec. Order No. 13175. See, http://www.epa.gov/tribal/}. Administrator Jackson also noted that EPA would work with Tribes on a government-to-government basis to protect the land, air, and water in Indian Country. Most recently, Administrator Jackson also implemented an internal restructuring to bring together the Agency’s tribal and international programs under a single umbrella entitled the Office of International and Tribal Affairs (OITA). Administrator Jackson noted that “[t]his change ensures that we approach our relationship with the sovereign tribal nations within our own country in the
same way we approach our relationship with sovereign nations beyond U.S. borders.”24 In sum, climate change and what happens domestically and at the international level on climate change directly impacts the rights of Tribes, implicates the federal trust responsibility to Tribes, and calls for federal agencies to engage in regular and meaningful consultation and collaboration with Tribes on climate change policy decisions.

III. Tribes’ Efforts to Engage in International Fora on Climate Change Thwarted.

Consistent with the ABA’s Climate Change Resolution, climate change is a global problem, with certain communities, such as Tribes and other Indigenous Peoples, often being more vulnerable to the adverse impacts. As a result, Tribes and Indigenous Peoples worldwide are especially concerned with and want to participate effectively in international climate change fora. Thus far, however, Tribes’ participation has been thwarted and their concerns have gone largely unheard. The experiences of Tribes and other Indigenous Peoples during the 15th and 16th United Nations Climate Change Conferences (COP-15 and COP-16, respectively) exemplify this point.

A. COP-15 General Outcomes.

On December 7-18, 2009, the COP-15 was held at the Bella Center in Copenhagen, Denmark.25 Overall, COP-15 outcomes were far less than expected in the view of many and, for Tribes and Indigenous Peoples, the results were dismal. The result of COP-15 was the Copenhagen Accord (Accord), an agreement drawn up by five nations (United States, China, India, Brazil and South Africa), setting forth general principles and some important “commitments” such as providing money to developing nations and moving toward more transparency in the monitoring of nations’ actions.26 The Accord offers little in effectuating substantial global greenhouse gas (GHG) emissions reductions, although some global leaders claim to have secured an agreement aimed at keeping temperatures from rising above two degrees Celsius.27 The drafting of the final Accord by five nations raised the ire of other countries left out of the process, particularly developing nations that have done little to contribute to global GHG emissions but which nonetheless are experiencing its deepest and most adverse effects. The lack of commitments in the Accord led U.N. Climate Chief Yvo de Boer to express his general dismay about what was achieved, stating that the countries of the world could and should have done better.

1. The COP-15 Experience for Tribes and Other Indigenous Peoples.

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25 Of the more than 45,000 delegates registered for the conference, only 24,000 people actually attended because the Bella Center has only a 15,000-person capacity limit.
27 Under the Accord, no country is committed to new emissions reductions. Instead, preexisting commitments of emissions reductions by Annex I countries under the Kyoto Protocol are to be strengthened. In addition, the Accord fails to provide any means for closing loopholes in existing controls under the Kyoto Protocol such as the need to address rising GHG emissions among the airline and shipping industries, items not covered under the current Protocol. The Accord also fails to reflect what was included in earlier drafts such as requiring developed nations to reduce their GHG emissions by 80 percent or requiring developing countries to make their own emission reduction commitments. Some Western leaders attributed these omissions, along with others from the final Accord, to some countries unwilling to “play ball.” For example, China openly refused United States’ overtures to include its emissions reduction targets in the Accord.
Indigenous Peoples came to COP-15 prepared to engage actively in the international forum, with individual workgroups focused on issues such as adaptation, finance, and reducing emissions from deforestation and forest degradation (also known as REDD). The direction of these workgroups was dramatically affected early on during COP-15 when the International Indigenous People Forum on Climate Change (Indigenous Peoples Forum), the official indigenous caucus of the United Nations Framework Convention on Climate Change (UNFCCC), learned that the final Accord was expected to be no longer than six or seven pages. The Indigenous Peoples Forum realized that, as a practical matter, this meant the positions of the Indigenous Peoples would need to be captured in only a few short sentences as they would be competing for space with the countries officially represented at the COP-15 as well as with innumerable NGOs.

A subsequent workgroup was convened, including staff from the National Tribal Environmental Council (NTEC) and the Native American Rights Fund (NARF), to draft concise preambular and operational language for the Accord that would adequately take into account the rights of Tribes’ and other Indigenous Peoples. In particular, this workgroup recognized that such language needed: to protect Tribes’ and other Indigenous Peoples’ rights to land, territories, and associated resources in accordance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)28 and other international instruments and obligations; to ensure the full and effective participation of Tribes and other Indigenous Peoples in accordance with the right to free, prior, and informed consent;29 and to recognize the contribution of Tribes and other Indigenous Peoples and the importance of their traditional knowledge in addressing climate change. After spending many hours finalizing such language, the full Indigenous Peoples Forum approved it with minor edits.

28 The UNDRIP, which has been discussed internationally for almost thirty years, is a declaration of the fundamental rights of Indigenous Peoples throughout the world. The 370 million Indigenous Peoples, including the 4.1 million AI/ANs who are members of the 565 Tribes located in the United States, exist as some of the most disadvantaged and vulnerable populations globally. Although the UNDRIP is a legally non-binding declaration, it establishes a significant framework for acknowledging, discussing, and addressing the rights of Indigenous Peoples, including but not limited to their rights in lands, resources, and conservation and the environment. In September 2007, the United Nations General Assembly passed the UNDRIP. Only four member countries—the United States, New Zealand, Canada, and Australia—voted to reject it. Since then, Australia and New Zealand have reversed their positions, and on November 12, 2010, Canada endorsed the UNDRIP. On April 19, 2010, the United States announced that it would review its position on the UNDRIP. Between July and October 2010, the U.S. Department of State and other federally agencies held consultations with Tribes and meetings with other nongovernmental organizations (NGOs) and stakeholders, and accepted written comments. The UNDRIP has received the unanimous support of the National Congress of American Indians (NCAI), the oldest, largest, and most representative American Indian and Alaska Native Tribal government organization. On September 26, 2008, during its 65th Annual Session, the NCAI General Assembly unanimously adopted Resolution PHX-08-035, supporting the UNDRIP and urging its endorsement by the United States. The Resolution recognizes that the UNDRIP “supports and reinforces respect and protection of full self-determination rights by and on behalf of US Tribal Nations as well as the protection of tribal lands as a matter of international law and policy and is therefore in the vital interests of all US Tribal Nations.” The Resolution also states that the UNDRIP “expresses the individual and collective rights of indigenous peoples, as well as their rights that pertain to culture, identity, language, health, education, and other issues.” On December 16, 2010, President Obama announced the United States’ support for the UNDRIP during the White House Tribal Nations Conference.

29 “Free, prior, and informed consent,” as used in the UNDRIP, is an important principle deriving from the collective rights of Indigenous Peoples to their resources and lands. While the principle does not represent an outright veto right, it is more generally considered to reference processes or conditions that must be met before a sovereign state, as recognized under international law, takes actions that would infringe upon Indigenous Peoples’ rights or constitute a taking of their property.
Unfortunately, all efforts to get this language included in the final Accord proved absolutely futile because of the inability of Tribes’ and other Indigenous Peoples to influence the COP-15 decision- and policy-making processes. Significantly, this exclusion of tribal and other Indigenous Peoples from the decision-making processes and the lack of meaningful involvement by Tribes and other Indigenous Peoples in international environmental agreements, in this case the Accord, are akin to the types of concerns to which the ABA focused its Environmental Justice Resolution and Public Participation Resolution.30

Organizations, including NTEC, NARF, the International Indian Treaty Council, and the Indigenous Environmental Network, made repeated requests to meet with the U.S. Delegation to COP-15 to discuss the concerns of the Indigenous Peoples Forum. Although Jonathan Pershing, Deputy Special Envoy for Climate Change, made a public commitment on behalf of the State Department to meet with representatives of the Indigenous Peoples Forum during COP-15, this never happened.

Adding to the frustration, Tribes and other Indigenous Peoples, along with other civil society organizations, were effectively and completely physically locked out of the negotiation process during the last two days of the COP-15. The UNFCCC only allowed 300 pre-identified people, out of the 24,000 representatives present, to enter the Bella Center each day. Of these 300 pre-identified people, only 12 Indigenous Peoples’ representatives were allowed to enter the building. On Thursday, December 17, 2009, not even those 12 Indigenous Peoples’ representatives were allowed in because the names of such individuals had not been submitted timely to the UNFCCC between 2:00 a.m. and 5:00 a.m. of that morning. The Indigenous Peoples Forum had worked closely with countries in Latin American and Scandinavia to craft proposed language that would be acceptable to other countries. Unfortunately, these countries also were effectively locked out of the final process. As a result, while early drafts of the Accord included reference to UNDRIP language, everything having to do with Indigenous Peoples was stripped from the final four-page Accord. This was extremely disappointing and disconcerting for Tribes and other Indigenous Peoples present in Copenhagen, leading the Indigenous Peoples Forum to prepare the following statement concerning the COP-15 process for submission to the UNFCCC:

International Indigenous Peoples Forum on Climate Change
High Level Statement - December 18, 2009

Dear Excellencies. As Indigenous Peoples from all regions of the

30 As noted previously, unlike other environmental justice communities, Tribes are sovereign self-governing entities that have a government-to-government relationship with the United States. This status has been recognized to require consultation and collaboration with Tribes on policy decisions that have tribal implications, not just public participation. See, e.g., Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation (Nov. 5, 2009). In the international arena, however, Indigenous Peoples are viewed as a civil society, a status held by other groups such as NGOs, or even as “local communities.”
world, we have advocated that all climate policies and actions, from mitigation and adaptation, to emissions reduction targets, to finance mechanisms and capacity building, must recognize and respect the rights and contributions of Indigenous Peoples. However, our demands have not been met at this COP. Global leaders have not reached consensus on the need for a legally binding agreement that recognizes our human rights as indigenous peoples, including those embodied in the UN Declaration on the Rights of Indigenous Peoples.

As Indigenous Peoples, we also express our disappointment and frustration with the lack of progress made at this critical Climate Change meeting. It is our very survival at stake. We support those states who take the position that emissions must be reduced by 40% below 1990 levels by 2020 and by 95% by 2050. We join the wider civil society in their call for Climate Justice Now. Talks have broken down over the central issues of finding real solutions to secure adequate emission reductions as well as sufficient support for finance and technology transfer to developing countries.

We do take note of advances in the decisions relative to REDD+ and agriculture affirming respect for traditional knowledge and the rights of Indigenous Peoples. However, these references are omitted from all other COP outcome documents. These human rights must be protected through clear and unequivocal language recognizing our rights to land, territories and resources, our full and effective participation including our right of free, prior and informed consent, and protection for our traditional knowledge. In order to protect our forests, biodiversity, the air, and the water that sustains us all, we need a binding commitment to the UN Declaration on the Rights of Indigenous Peoples.

Finally, we express our sincere appreciation to all of the state parties and civil society organizations who have supported Indigenous Peoples around the world – without their support, we could not make the progress that Indigenous Peoples and the world need.

We invite all states to join in creating a world where Indigenous Peoples finally realize the enjoyment of our human rights. We fully intend to work to implement this vision of reality beyond COP 15.

Nia:wen, Thank you.

Despite the fact that the United States largely ignored the Indigenous Peoples’ representatives present in Copenhagen, including those of Tribes, COP-15 is now a touchstone informing Tribes and other Indigenous Peoples that, to make their voices heard on the crucial issue of climate change, they simply must be involved in the decision- and policy-making processes at
international fora on a larger and more meaningful and integrated scale than ever before.

2. Experience of a United States Tribal Leader in Copenhagen.

After Tribes were unable to secure even one seat on the United States Delegation to COP-15, the Obama Administration invited a tribal leader to nevertheless attend. Chairman James Steele, Jr., Confederated Salish-Kootenai Tribes, was thus brought to COP-15 on NTEC’s credentials with the generous financial support of the National Wildlife Federation and assistance of NARF. On December 17, 2009, Chairman Steele served on a panel with other United States representatives, including Wisconsin Governor Jim Doyle, who spoke to the leadership about innovations that their state and tribal governments have been taking to address and reduce GHG emissions. Thereafter, Chairman Steele met with staff from Senator Max Baucus’ (D-MT) office to discuss issues and concerns facing Tribes with respect to climate change, and how current legislation such as the Clean Energy Jobs and American Power Act (S. 1733), might be improved to benefit Tribes.31 While Chairman Steele’s presence at COP-15 enabled him to participate in an unofficial capacity, participation by other leaders of other Tribes was extremely limited or non-existent. Further, Chairman Steele should not have had to participate unofficially, which belittled his position and diminished his effectiveness.

B. Addressing the Concerns of Indigenous Peoples at COP-16.

Just prior to COP-16, the Indigenous Peoples Forum convened a two-day session at which it prepared for forthcoming negotiations. Coming away from the session, Indigenous Peoples Forum representatives called for the rights of Indigenous Peoples in all countries to be upheld, respected, and recognized in all texts and final agreements, consistent with the UNDRIP and other norms and standards of international human rights. In concert with this call, the Indigenous Peoples Forum reiterated the following three principles as its position on what must be guaranteed and implemented in all processes, agreements, and actions on climate change at regional, national and international levels:

- Full respect for Indigenous Peoples’ rights, including those contained in UNDRIP;
- Respect for the right of Indigenous Peoples to free, prior and informed consent in all climate programs and activities; and
- Recognition and protection of the traditional knowledge of Indigenous Peoples as a basis for the generation of effective solutions to climate change.

Heading into COP-16, the Indigenous Peoples Forum and its representatives broke off into individual workgroups focused on key sections of the negotiating text such as shared vision, adaptation, mitigation (including REDD+, which also addresses sustainable forest management and conservation and enhancement of carbon sinks), and finance, technology and capacity-building. Although the Indigenous Peoples Forum was quite versed on the negotiating text, the Parties issued three subsequent texts during the conference with the first and second versions coming within days of each other. This gave workgroups little time to read through the texts, develop appropriate

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recommendations, make sure these recommendations were available in both English and Spanish, and then submit the recommendations to the Indigenous Peoples Forum for its approval. If approved, the recommendations had to be passed to Parties friendly to Indigenous Peoples issues and concerns so that such Parties could carry these recommendations into their negotiating sessions with other Parties.

Unfortunately, the North American representatives of the Indigenous Peoples Forum were unable to share any of the recommendations with the U.S. delegation although these representatives made at least three meeting requests with the delegation to do so (twice at State Department briefings and once based on a personal visit to the State Department Office). The best that the representatives could achieve was to participate along side other nongovernmental organizations in State Department briefings, where there was limited dialogue between briefing participants and governmental representatives. This essentially mirrors the experience at COP-15; the repeated requests of North American representatives to meet with the U.S. delegation were also ignored.

Not only did the U.S. delegation fail to meet with the North American representatives, but it also failed to reach out to Tribes regarding participation at COP-16. As noted, for COP-15, the Obama Administration sought out a Tribal leader—Chairman Steele of the Confederated Salish-Kootenai Tribes—to serve on a Greenhouse Gas (GHG) emissions panel at its U.S. Center, a side event facility meant to underscore the climate-related actions taking place across the nation. The same could not be said of COP-16 where Tribal representatives were conspicuously absent at the U.S. Center, unlike their state and local government counterparts who were present in large numbers.

Such Tribal representation also was absent from the U.S. delegation as well. Of the 50-60 Indigenous Peoples representatives attending the Indigenous Peoples Forum, at least 9 Parties included Indigenous Peoples representatives as part of the official delegations for their countries. NTEC, the National Congress of American Indians, and a handful of other organizations had previously made a request of the Obama Administration to include Tribal leaders on the U.S. delegation. However, such representation has never occurred nor has the Administration formally responded to the organizations’ requests.

Moving beyond the concerns regarding the U.S. delegation, the Indigenous Peoples Forum expressed its dismay and disappointment over the lack of a legally-binding agreement coming out of COP-16. The Cancun Agreement, however, does contain several references to Indigenous Peoples and their rights (none which mention free, prior, and informed consent) within a number of its sections while also emphasizing that Parties should fully respect human rights in all climate change related actions. This is short of the Indigenous Peoples Forum’s demand that the rights of Indigenous Peoples be included in all parts of the agreement coming out of Cancun.

The Cancun Agreement contains greater emphasis on the need to provide Indigenous Peoples with full and effective participation in the processes growing out of international efforts to address climate change. Such inclusion falls short in a number of other provisions that encourage the participation of relevant stakeholders without explicitly referencing Indigenous Peoples, meaning that when such provisions of the Agreement are implemented, Indigenous Peoples could end up
being excluded from a seat at the proverbial table. Substantively, the Cancun Agreement includes language and concepts that fail to accommodate fully the three principles set out by the Indigenous Peoples Forum at the outset of COP-16 which demonstrates the importance of full and meaningful Tribal participation in UNFCCC proceedings and the domestic proceedings leading up to them.

C. Why ABA Should Be Concerned About the Lack of Tribes’ Participation in International Fora on Climate Change.

Increased participation by Tribes is crucial as countries of the world attempt to forge a treaty beyond the Kyoto Protocol that will affect how the United States does business in the future. These negotiations, as well as any future international climate change agreements, accords, or treaties, in turn, will subsequently impact Indian country and Alaska Native villages, and likely in more profound ways than the general public. As such, it is imperative and consistent with the special political status of Tribes and federal Indian policy that their leaders participate and that their voices be heard in forthcoming meetings under the UNFCCC, including forthcoming COPs. Tribes also are in the best position to make a case for securing additional coverage under international instruments based on the circumstances facing their communities and land as a result of climate change. In many cases, Tribes have lived in the same areas for centuries and often are being disproportionately impacted by climate change, thereby giving a unique and the best perspective on what needs to be done to address a problem affecting the world as a whole. Tribes thus need to attend international fora in greater numbers, not only in cooperation with United States official delegations, but also within international groups such as the UNFCCC, to ensure their concerns and positions on climate change do not get lost in global politics.

IV. Conclusion.

The resolution complements existing ABA policies, addressing environmental justice, sustainability, public participation, and climate change, to recommend that the United States Government take a leadership role in ensuring that Tribes, which are being disproportionately impacted by climate change, are consulted with, heard, and allowed to participate fully in policy discussions on the crucial issue of climate change domestically and in international fora. This will be especially important in ensuring that Tribes receive equitable federal financial support and assistance for mitigating climate change as well as for carrying out programs to reduce emissions of climate change.

*Again, the UNFCCC is an especially important forum for Tribes and other Indigenous Peoples because climate change implicates every aspect of indigenous rights, including but not limited to self-determination; lands, territories, and natural resources; free, prior, and informed consent; traditional knowledge; and full and effective participation in all matters affecting such rights. In addition to these matters implicated by climate change action and policy, there is the matter of the direct importance of climate change to all Indigenous Peoples, including Tribes in the United States. It is essential that Tribes receive adequate funding and are allowed adequate access to the process of assessing and addressing climate change. In addition to the direct importance of climate change, international rights under the UNDRIP can be undermined at such international fora if Tribes and other Indigenous Peoples are not present to defend and protect them. These international rights provide guarantees relevant to domestic Indian law doctrines in the United States. For example, the plenary power doctrine, in its extreme form, allows the federal government to terminate an Indian tribe’s very existence or to terminate the government-to-government relationship that tribes have a right to as sovereigns. When the entire world acknowledges the rights of Indigenous Peoples to exist and exercise their right of self-determination under international human rights instruments such as the UNDRIP, it may become much more difficult for the United States to justify its exercise of the plenary power doctrine in its extreme forms.*
greenhouse gases, including programs to promote energy efficiency and renewable energy. In addition, Federal leadership will also be important in helping Tribes adapt to direct impacts from climate and sea-level changes to their territories, lands, and resources, including supporting, in consultation with Alaska Native Tribes imminently threatened by erosion and flooding and with their free, prior, and informed consent, the development and implementation of permanent relocation plans. In the spirit of U.N. Climate Chief Yvo de Boer’s COP-15 remarks, the United States and other countries of the world can and should do better in addressing climate change. Towards that end, and consistent with ABA’s position that “the presence of environmental injustice—or the lack of environmental justice—cannot be ignored and should be addressed,” the resolution urges affirmative and significant steps in the right direction with respect to Tribes and climate change.33

Respectfully Submitted,
Steven G. McKinney, Chair
Section of Environment, Energy, and Resources
August 2011

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33 EJ Report at 2.
1. **Summary of Resolution(s).**

The resolution builds on existing ABA policies, addressing environmental justice, sustainability, public participation, and climate change, to recommend that the United States government take a leadership role in ensuring that federally-recognized tribes (Tribes), which are being disproportionately impacted by climate change, are heard on the crucial issue of climate change domestically and in international fora. The resolution also urges the government to consult with Tribes on a government-to-government basis on climate change and provide adequate and equitable financial and other support to Tribes for carrying out measures such as mitigating climate change, reducing greenhouse gases, promoting renewable energy and energy efficiency, and adapting to direct impacts from climate and sea-level changes to their territorial and reservation land bases and resources, including, with the free, prior, and informed consent of Alaska Native villages imminently threatened by erosion and flooding, the development and implementation of plans for permanent relocation.

2. **Approval by Submitting Entity.**

Approved by the Section of Environment, Energy, and Resources Council on January 29, 2011.

3. **Has this or a similar resolution been submitted to the ABA House of Delegates or Board of Governors previously?**

No.

4. **What existing Association policies are relevant to this resolution and how would they be affected by its adoption?**

In 1991, the ABA’s House of Delegates adopted a resolution on environmental justice (EJ Resolution) that responded to growing evidence that the burden of adverse environmental impacts falls disproportionately on people of color and/or low income populations. In 1995, the ABA adopted a resolution (Public Participation Resolution) promoting effective and meaningful involvement by all affected stakeholders through the public participation provisions of environmental laws, international environmental agreements, and treaties. In 2003, the ABA endorsed a concept of sustainable development recognized by the United Nations Conference on Environment Development, which supports “simultaneous achievement of environmental protection, economic development, social development, and peace, at the same time, for present and future generations.” In a 2007 resolution, the ABA urged governments, businesses, nongovernmental
organizations, and others to consider and integrate Rule of Law Initiatives with global environmental issues. In 2008, the ABA adopted a timely and very important policy resolution (Climate Change Resolution), urging the United States to exercise leadership in addressing climate change issues through legal, policy, financial, and educational mechanisms.

This resolution would build on the ABA’s 1991 EJ Resolution and 2007 Climate Change Resolution. In particular, the Climate Change Resolution explicitly acknowledged that climate change poses significant global risks to current and future generations, recognizing that poorer communities having more limited adaptive capacities and dependence on climate-sensitive resources are especially vulnerable. However, the Climate Change Resolution omitted any mention of the crucial and distinct impacts of climate change on Tribes’ interests, lands, resources, treaty rights, and traditional, subsistence, and cultural practices. With respect to addressing climate change internationally and domestically, the Climate Change Resolution also overlooked the contributions of Tribes and their traditional knowledge of caring for the earth, and did not fairly explore the role to be played by Tribes consistent with their sovereign political status in the United States and federal Indian policy. Because the Climate Change Resolution recognizes climate change as a global problem affecting the human quality of law in both the United States and other countries, the resolution is appropriate and timely regarding Tribes and climate change issues. This policy initiative would enable the ABA to play a more effective role with respect to the United States, federal agencies, Congress, and elsewhere because the ABA will have taken a substantive position on these important issues.

5. What urgency exists which requires action at this meeting of the House?

Climate change is a global issue, and Tribes and other Indigenous Peoples are being disproportionately impacted by climate change, especially due to their use of fish and other natural resources for subsistence and cultural and traditional practices, as well as their location. Through this policy, the ABA will be able to play a more effective role in helping Tribes’ voices be heard on climate change domestically and in international climate change fora. The resolution will help ensure that Tribes and, perhaps in turn other Indigenous Peoples, have equitable opportunities to participate in international climate change fora. The resolution will help ensure that Tribes receive equitable federal financial support and assistance for coping with climate change, including carrying out programs to reduce emissions of greenhouse gases and to promote energy efficiency and renewable energy and adapting to impacts of climate change being experienced by many tribal communities.

6. Status of Legislation. (If applicable.)

Federal legislation to address climate change is stalled in the 112th Congress.

7. Cost to the Association. (Both direct and indirect costs.)

This resolution will not impose costs on the ABA.

8. Disclosure of Interest. (If applicable.)
SEER, the sponsoring section, engages in CLE and other information-related activities that address climate change. No individual associated with this resolution will benefit personally from adoption of the resolution.

9. **Referrals.** (List entities to which the resolution has been referred, the date of referral and the response of each entity if known.)

The resolution with a supporting report was circulated to all sections, divisions and forums simultaneously with submission of this General Information Form and the related Executive Summary.

10. **Contact Person.**

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11. **Contact Person.** (Who will present the report to the House. Please include email address and cell phone number.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution.

The American Bar Association (ABA) urges the United States to ensure that federally-recognized Indian tribes are heard on the issue of climate change. The ABA also urges the government to consult on a government-to-government basis with tribes on climate change and to provide financial and other support to tribes for carrying out mitigation and adaptation measures, including, with consent of the tribes, developing and implementing plans for relocating affected villages.

2. Summary of the Issue Which the Resolution Addresses.

Climate change is a global issue. Due to their location as well as their use of fish and other natural resources for subsistence and cultural and traditional practices, the 565 federally recognized Tribes in the United States are being disproportionately impacted by climate change. Unlike other environmental justice communities, Tribes possess inherent sovereignty, are self-governing entities, and have a special political status obligating the United States to deal with them on a government-to-government basis. The United States also has a trust responsibility to Tribes and must consult with Tribes on government-to-government basis on matters with tribal implications such as climate change.


Through this policy, the ABA will be able to play a more effective role in helping Tribes’ voices be heard on climate change domestically and in international climate change fora. The resolution will help ensure that Tribes and, perhaps in turn other Indigenous Peoples, have equitable opportunities to participate in international climate change fora. The resolution also will help ensure that Tribes receive equitable federal financial support and assistance for coping with climate change, including carrying out programs to reduce emissions of greenhouse gases and to promote energy efficiency and renewable energy and adapting to impacts of climate change being experienced by many tribal communities.

4. Summary of Any Minority Views or Opposition that Have Been Identified.

The resolution was circulated and discussed within the substantive committees and the Council of the Section of Environment, Energy, and Resources. Changes have been made in response to numerous comments and suggestions.