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## Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples' Subsistence Rights

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# SPIRIT FOOD AND SOVEREIGNTY: PATHWAYS FOR PROTECTING INDIGENOUS PEOPLES' SUBSISTENCE RIGHTS

ALLISON M. DUSSIAS\*

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The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians . . . together with the privilege of hunting and gathering roots and berries . . . .

—*Treaty of Point No Point, 1855*<sup>1</sup>

<sup>1</sup> Treaty of Point No Point, art. IV, Jan. 26, 1855, 12 Stat. 933.

Water is the life-supporting blood of Mother Earth that human beings share in common with all living things.

– *Sokaogon Chippewa Community*<sup>2</sup>

The Arctic is magnificent. It is not wilderness, for almost every square kilometer is used, known, and named. Inuit hunters travel hundreds of kilometers for seals, walrus, polar bear, whales, and caribou. Our rich and vibrant traditional knowledge is passed forward from generation to generation.

– *Inuit Petition to the Inter-American Commission on Human Rights*<sup>3</sup>

A single story can sometimes reveal more than a 1,000-page treatise can:

[An] American [man] asked [an Indian man], . . . “Can you tell me what, for you, is the meaning of God?” . . .

[The American] picked up a handful of the earth at his feet. “This,” he said, “is dead matter, the material world.” Then, pointing to the sky, he asked again, “Where is God to be found? If this is earth, what is spirit?”

[The American] was on the point of throwing the handful of earth to the ground, when the [Indian] grasped his hand and took the earth from him. “You call my Mother dead?” he said. . . . He kissed the earth, then knelt to return it to the ground.<sup>4</sup>

The story above recounts an actual conversation, which took place in India, in the state of Rajasthan. The protagonists were a Rajasthani farmer and an American visitor, in search of an understanding of what God means to ordinary Hindus. The conversation reveals a chasm separating two views of the nature of God and of the world. For the American, God and the world are separate, and the earth is merely dead matter, to be tossed aside when not deemed useful. For the Indian, God is in all things of the world, and the earth is the living mother of all, to be treated as a mother should be treated, with gratitude and respect.

A similar gap separates the traditional views of the earth and of the sacred, of the material world and of the spiritual world, held by Western societies and by the peoples of the Americas whom Columbus mistakenly identified as Indians. Past U.S. government policy makers, well aware of this gap, focused on eliminating it by imposing Western, “American” notions of nature and natural resources on the tribes of the United States. Under the policies developed by the federal government,

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<sup>2</sup> SOKAOGON CHIPPEWA COMMUNITY WATER QUALITY STANDARDS, Jan. 26, 2005, at 1, available at [http://www.epa.gov/waterscience/standards/wqslibrary/tribes/chippewa\\_5\\_wqs.pdf](http://www.epa.gov/waterscience/standards/wqslibrary/tribes/chippewa_5_wqs.pdf).

<sup>3</sup> Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, § IV.A, Dec. 7, 2005, available at <http://www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf> [hereinafter “Inuit Petition”].

<sup>4</sup> ROGER HOUSDEN, TRAVELS THROUGH SACRED INDIA xii (1996).

Native Americans were to be dispossessed of most of their ancestral lands and waters, and of their religions, languages, and other elements of their cultures as well.

Although much was lost, much also survived, and tribes today continue, as they have for generations, to assert and defend rights to the lands, waters, and other natural resources of their homelands. As tribes pursue their claims, their accounts of their interests in natural resources evidence an understanding of the natural world and its intersections with the sacred that has survived centuries of efforts to suppress it. There is a perspective at odds with the purely instrumental, “Drill, baby, drill!” understanding of land and natural resources that characterizes much of American law. This is not to adopt a romantic vision of Native Americans as living in perfect and permanent harmony with the environment, a vision expressed by the image of the weeping Indian of the 1970s anti-pollution television public service message.<sup>5</sup> Rather, this is simply to acknowledge that the Native American and Euro-American legal and cultural traditions approach questions of the rightful use and preservation of the natural environment from very different standpoints.

As tribes and indigenous peoples’ organizations work to assert and defend rights to lands, waters, and other aspects of the environment, they have followed a variety of legal pathways, relied on a diversity of legal principles and theories, and emphasized different types of rights with respect to resources. This Article explores the pathways that a number of tribes and Native communities have chosen in recent efforts to assert a particular kind of rights related to natural resources, namely, subsistence rights. Subsistence rights provide tribes and communities with opportunities to obtain sustenance from the lands and waters of their homelands, to tap into their life-sustaining potential. As they assert subsistence rights, tribes and communities are obliged to explain to non-Native people the significance of the resources at issue—a significance that often extends beyond the resources’ function as food for the body, to include their value as nourishment for the soul. These resources, and their procurement and use, are bound up with cultural and religious practices and beliefs. They are not just food for the body, but also “spirit food.”

The Article examines three pathways recently followed by tribes and Native communities in seeking protection of their rights to valued subsistence resources, focusing on the legal principles and theories on which they have relied, including treaty rights, environmental law, tribal sovereignty, and international human rights

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<sup>5</sup> A public service message, presented as part of the “Keep America Beautiful” ad campaign that aired on American television in the 1970s depicted an American Indian man canoeing on a polluted river and weeping at the site of litter. The accompanying narration stated, “Some people have a deep, abiding respect for the natural beauty that was once this country. And some people don’t. People start pollution. People can stop it.” The video is available at a number of Internet sites. See, e.g., Youtube—70’s PSA Keep America Beautiful (Crying Indian), [http://www.youtube.com/watch?v=\\_R-FZsysQNw](http://www.youtube.com/watch?v=_R-FZsysQNw) (last visited Aug. 15, 2010). The Indian was portrayed by the late actor Iron Eyes Cody. Amy Waldman, *Iron Eyes Cody, 94, an Actor and Tearful Anti-Littering Icon*, N.Y. TIMES, Jan. 5, 1999, at A15 (obituary of Iron Eyes Cody). Professor Krakoff has also warned against invoking “the mythic, romantic Indian, perpetually at one with nature and free of taint and pollution,” and noted that “American Indian people are not hard-wired to be any closer to nature or more environmentally sensitive than non-Indian people.” Sarah Krakoff, *American Indians, Climate Change, and Ethics for a Warming World*, 85 DENV. U. L. REV. 865, 868 (2008). American Indians’ “traditional religious and cultural systems of meaning[, however,] revolve around the earth and its values, and these long-held beliefs have influenced how American Indians view and interact with the land and the natural world.” *Id.*

law, as they have followed their different pathways. Part I discusses the participation of several tribes from the Great Lakes area and the Pacific Northwest in a lawsuit against the U.S. Environmental Protection Agency, based on the threat to treaty-guaranteed fishing rights arising from EPA's failure to adequately regulate mercury emissions by electric utility steam generating units. Part II shifts the focus outside of the U.S. legal system to explore the petition against the United States that Inuit communities submitted to the Organization of American States' Inter-American Human Rights Commission, based on the United States' failure to regulate activities that contribute to global warming—a failure that threatens Inuit hunting rights. Returning to domestic legal battles, Part III discusses the efforts of the Lac du Flambeau Band of Lake Superior Chippewa Indians and the Bad River Band of the Lake Superior Tribe of Chippewa Indians to obtain recognition of their regulatory authority, based on tribal sovereignty, under the Clean Water Act. Their goal is to establish water quality standards that would be stringent enough to protect the wild rice upon which they have relied for subsistence since time immemorial. The Conclusion offers some final thoughts, first, on the roles played by subsistence rights in the lives of these peoples and, second, on a common theme that runs through these three legal pathways: the sovereignty—political, cultural, and environmental—of indigenous peoples.

I. TAKING THE ROAD TO THE COURTHOUSE: ASSERTING TREATY FISHING RIGHTS IN  
*NEW JERSEY V. EPA*

The mere passage of time has not eroded, and cannot erode[,] the rights guaranteed by solemn treaties that both sides pledged on their honor to uphold. The Indians have the right to fish today wherever fish are to be found within the area of the cession[—]as they had at the time of cession[—]a right established by aboriginal right and confirmed by the Treaty of Ghent, and the Treaty of 1836. The right is not a static right today any more than it was during treaty times. . . . Because the right . . . is protected by treaties . . . , that right is preserved and protected under the supreme law of the land . . .<sup>6</sup>

Indian tribes and other indigenous peoples seemingly need to be ever alert to the possibility of indirect threats to their subsistence rights. Regulatory action—or inaction—and judicial decisions that do not directly address tribal rights may nonetheless have profound adverse effects upon them. Judges and regulators may be ignorant of, or consciously disregard, the tribal subsistence rights that are at stake as they make a decision. They may conclude (erroneously) that the rights are not threatened by the decision being made or they may decide to privilege other interests and claims over tribal subsistence rights. It is left to the affected tribes and communities and their allies to take action against these threats, such as through litigation challenging decisions that infringe upon subsistence rights.

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<sup>6</sup> *United States v. Michigan*, 471 F. Supp. 192, 280-81 (W.D. Mich. 1979) (upholding the treaty-confirmed rights of the Bay Mills Indian Community against state attempts to infringe upon them). For an examination of treaty fishing rights of tribes in Michigan and elsewhere, and the role that treaty rights might play in the preservation of the Great Lakes, see Wenona T. Singel & Matthew L.M. Fletcher, *Indian Treaties and the Survival of the Great Lakes*, 2006 MICH. ST. L. REV. 1285 (2006).

Legal challenges to government actions that threaten subsistence rights may be pursued by tribes by initiating litigation or by joining in ongoing litigation to raise issues related to tribal subsistence rights. The latter strategy was pursued in recent years by a number of tribes with treaty-protected fishing rights, who participated in litigation challenging the failure of the Environmental Protection Agency to adequately regulate mercury emissions.<sup>7</sup> EPA's regulatory failure has allowed for continuing mercury contamination by power plants, with dire consequences for fish and consequently for the fishing rights that the United States guaranteed to a number of tribes by treaty.

*A. Ignoring Treaty-Protected Rights: EPA's Backpedaling on Mercury Emissions Regulation*

Pollution poses problems for fisheries, both because of its destructive effects on the ecosystem and its contamination of fish. A right to fish is seemingly worthless without the ability to eat that fish . . .<sup>8</sup>

In *New Jersey v. EPA*, eleven tribes joined with over a dozen states and several environmental groups in a petition to the U.S. Court of Appeals for the D.C. Circuit for review of two EPA rules regarding the emission of hazardous air pollutants ("HAPs") from coal- and oil-fired electric utility steam generating units ("EGUs").<sup>9</sup> The first rule, promulgated in final form in 2005 (the "Delisting Rule"), removed coal- and oil-fired EGUs from the list of sources whose emissions are regulated under Section 112 of the Clean Air Act ("CAA").<sup>10</sup> The second rule, also promulgated in 2005, set performance standards, pursuant to Section 111 of the CAA,<sup>11</sup> for new coal-fired EGUs and established total mercury emissions limits for states and certain tribal areas (the "Clean Air Mercury Rule" or "CAMR").<sup>12</sup>

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<sup>7</sup> *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), *reh'g en banc denied* (May 20, 2008), *cert. denied*, 129 S. Ct. 1308 (2009), *cert. dismissed*, 129 S. Ct. 1313 (2009).

<sup>8</sup> Jeffrey W. Henquinet & Tracy Dobson, *The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study*, 14 N.Y.U. ENVTL. L.J. 322, 341 (2006).

<sup>9</sup> *New Jersey v. EPA*, 517 F.3d at 574-77.

<sup>10</sup> Revision of December 2000 Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Steam Generating Units and the Removal of Coal- and Oil-Fired Electric Utility Steam Generating Units From the Section 112(c) List, 70 Fed. Reg. 15,994, 15,994 (Mar. 29, 2005) [hereinafter "Delisting Rule"]. Section 112 is codified at 42 U.S.C. § 7412 (2006).

<sup>11</sup> 42 U.S.C. § 7411 (2006). Section 111 of the CAA requires the Administrator to "establish[ ] . . . standards of performance" for pollutants from new sources that the Administrator believes "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." Clean Air Act § 111(b)(1)(A)-(B), 42 U.S.C. § 7411(b)(1)(A)-(B) (2006). "Standards of performance" are to limit emissions to reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." *Id.* § 7411(a)(1).

<sup>12</sup> Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28, 606 (May 18, 2005) [hereinafter "CAMR"]. As described in the final rule's summary, by this rule EPA finalized the Clean Air Mercury Rule

Some background on the origins of the Delisting Rule is required to understand the petitioners' objections to EPA's actions. In 1990 amendments to Section 112, Congress required EPA to regulate more than one hundred specific HAPs, including mercury,<sup>13</sup> and to list and to regulate, on a prioritized schedule, "all categories and subcategories of major sources and area sources" that emit one or more HAPs.<sup>14</sup> Section 112(d) of the amended CAA directed EPA to promulgate regulations establishing, for each category and subcategory of listed HAP sources, emissions standards that require the maximum degree of emission reduction that EPA determines to be achievable.<sup>15</sup> Such standards are generally referred to as "maximum achievable control technology," or "MACT," standards.<sup>16</sup> Different criteria were to be applied to new and existing sources, with Congress specifying that new sources of HAPs must adopt, at a minimum, "the emission control that is achieved in practice by the best controlled similar source."<sup>17</sup> Existing sources of HAPs (with certain exceptions) were required to adopt emission controls equal to the "average emission limitation achieved by the best performing 12 percent of the existing sources."<sup>18</sup> Congress further provided that for HAPs that, like mercury, result in health effects other than cancer, the Administrator "may delete any source category" from the source category list (maintained pursuant to Section 112(c)(1)) *only* after determining that "emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source . . ."<sup>19</sup> Finally, Congress required that certain conditions be met before EGUs were listed as a HAP source under Section 112(c)(1), including the Administrator's performance of "a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [EGUs] of pollutants listed under subsection (b) [of this section] after imposition of the requirements of this [chapter]."<sup>20</sup> Furthermore, Congress provided that "[t]he Administrator shall regulate [EGUs] under this section, if the Administrator finds such regulation is *appropriate and necessary* after considering the results of the [required] study."<sup>21</sup>

Three studies released subsequent to the 1990 Amendment (two conducted by EPA and one by the National Academy of Sciences ("NAS")) reached the

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and established standards of performance for mercury for new and existing coal-fired electric utility steam generating units, as defined in Clean Air Act Section 111.

<sup>13</sup> Clean Air Act § 112(b)(1). For the 1990 Amendments, see Act of Nov. 15, 1990, Pub. L. No. 101-549, 104 Stat. 2399, 2531-84 (1990).

<sup>14</sup> Clean Air Act § 112(e)(1)-(3), (c)(1).

<sup>15</sup> *Id.* § 112(d)(2).

<sup>16</sup> See, e.g., EPA, CAA § 112(d): Emissions Standards, <http://www.epa.gov/ttn/atw/112dpg.html> (last visited Aug. 15, 2010) (defining the term and indicating its use in connection with Section 112(d) emissions standards).

<sup>17</sup> Clean Air Act § 112(d)(3).

<sup>18</sup> *Id.* § 112(d)(3)(A).

<sup>19</sup> *Id.* § 112(c)(9).

<sup>20</sup> *Id.* § 112(n)(1)(A).

<sup>21</sup> *Id.* (emphasis added).



conclusion that the main pathway for human exposure to mercury is fish consumption, and that existing fish methylmercury levels pose serious health risks.<sup>22</sup> Methylmercury is a form of mercury that is formed from metallic or elemental mercury by bacteria in sediments, such as those in lakes and rivers. Methylmercury is readily absorbed into aquatic organisms' tissue and is not easily eliminated, leading to its accumulation in organisms at the top of food chains, such as fish and, in turn, human beings who consume fish.<sup>23</sup> The first EPA report released after the 1990 Amendment, a mercury study report released in 1997 (the "Mercury Study"), noted that "Native Americans face the greatest risk of mercury poisoning, because as a sub-population, they consume the greatest quantities of fish."<sup>24</sup> Moreover, data indicated that a large portion of the Native American population was likely being exposed to unsafe mercury levels,<sup>25</sup> which resulted in members of some tribes having blood mercury levels that were between four and ten times the reference dose ("RfD")—the maximum acceptable oral dose of a substance.<sup>26</sup> The Mercury Study recommended that additional research on Native American fish consumption rates be conducted to allow for better estimates of methylmercury exposure.<sup>27</sup> EPA's public health hazards study of HAP emissions from EGUs (the "Utility Study"), released in 1998, found that there was "a plausible link between anthropogenic releases of mercury from industrial and combustion sources in the United States and methylmercury in fish' and that 'mercury emissions from [EGUs] may add to the existing environmental burden.'"<sup>28</sup>

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<sup>22</sup> Final Brief of Petitioners National Congress of American Indians and Treaty Tribes at 5-6, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097), available at 2007 WL 3231259 [hereinafter "Final Tribal Brief"]. The National Academy of Sciences study, completed in 2000, was entitled "Toxicological Effects of Methylmercury." *Id.* at 5.

<sup>23</sup> EPA's online Glossary of Terms defines methylmercury as:

[a]n organic form of mercury, created from metallic or elemental mercury by bacteria in sediments. Methylmercury is easily absorbed into the living tissue of aquatic organisms and is not easily eliminated. Therefore, it accumulates in organisms at the top of food chains such as tuna or humans. It can cause adverse effects in children exposed before or after birth.

EPA, Glossary of Terms, [http://www.epa.gov/economics/children/basic\\_info/glossary.html](http://www.epa.gov/economics/children/basic_info/glossary.html) (last visited Aug. 15, 2010).

<sup>24</sup> Final Tribal Brief, *supra* note 22, at 6.

<sup>25</sup> *Id.*

<sup>26</sup> *See id.* (noting that a 1997 study of Ojibwe tribal members living in the Great Lakes region, which was discussed in the Mercury Study, "indicated that 16% of the individuals surveyed had blood mercury levels that were between four and ten times the RfD"). As explained in EPA's online Glossary of Terms, "EPA defines a reference dose as an estimate, with uncertainty spanning perhaps an order of magnitude, of a daily oral exposure to the human population (including sensitive subgroups) that is likely to be without an appreciable risk of deleterious effects during a lifetime." EPA, Glossary of Terms, *supra* note 23.

<sup>27</sup> Final Tribal Brief, *supra* note 22, at 6-7.

<sup>28</sup> *New Jersey v. EPA*, 517 F.3d 574, 579 (D.C. Cir. 2008) (quoting EPA, OFFICE OF AIR QUALITY PLANNING AND STANDARDS, STUDY OF HAZARDOUS AIR POLLUTANT EMISSIONS FROM ELEC. UTIL. STEAM GENERATING UNITS—FINAL REPORT TO CONG. 7-1, 45 (1998)).

In light of the two EPA studies and the NAS study, the Administrator concluded in 2000 that it was “‘appropriate and necessary’ to regulate coal- and oil-fired EGUs under Section 112 because . . . mercury emissions from EGUs, which are the largest domestic source of mercury emissions, present significant hazards to public health and the environment.”<sup>29</sup> Consequently, the Coal- and Oil-Fired EGUs source category was added to the list, published in 2002, of source categories under Section 112(c) of the CAA.<sup>30</sup>

EPA failed, however, in spite the evidence presented by the studies described above, to develop emissions standards for EGUs. This failure culminated in EPA’s 2005 announcement that it was removing EGUs from the HAP sources list and was instead regulating their emissions under the less rigorous standards of Section 111 of the CAA.<sup>31</sup> EPA did not make the specific findings required by Section 112(c)(9) prior to removal of a source from the Section 112 list. EPA claimed that it had “‘authority to remove coal- and oil-fired units from the section 112(c) list at any time that it makes a negative appropriate and necessary finding under the section’”<sup>32</sup> and that the regulation of EGUs under Section 112 was neither “‘appropriate’ or ‘necessary.’”<sup>33</sup> EPA also established “standards of performance” for mercury emissions from new coal-fired EGUs under Section 111(b)<sup>34</sup> and a national mercury emissions cap (supplemented by a voluntary cap-and-trade program) for new and existing EGUs.<sup>35</sup> EPA’s regulatory scheme was welcomed by the electrical power industry, because it allowed utilities to buy and sell emission-reduction allowances

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<sup>29</sup> *Id.* (citing Regulatory Finding on the Emissions of Hazardous Air Pollutants From Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825, 79,827 (Dec. 20, 2000)).

<sup>30</sup> *Id.* (citing National Emission Standards for Hazardous Air Pollutants: Revision of Source Category List Under Section 112 of the Clean Air Act, 67 Fed. Reg. 6,521, 6,522, 6,524 (Feb. 12, 2002)).

<sup>31</sup> CAMR, *supra* note 12, at 28,610, 28,624-32. EPA had announced this approach, along with an alternative, in 2004. *See* Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 69 Fed. Reg. 4,652, 4,659-61, 4,683, 4,689, 4,754 (Jan. 30, 2004). Rather than the more stringent requirements under Section 112, Section 111 only requires that emissions limitations reflect the “best system of emission reduction which (taking into account the cost of achieving such reduction any nonair quality health and environmental impact and energy requirements), the Administrator determines has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1) (2006).

<sup>32</sup> Delisting Rule, *supra* note 10, at 16,032.

<sup>33</sup> *See* New Jersey v. EPA, 517 F.3d at 580.

<sup>34</sup> CAMR, *supra* note 12, at 28,613-16.

<sup>35</sup> *See id.* at 28,616, 28,622, 28,629. EPA subsequently “revised CAMR’s State mercury allocations and the statistical analysis used for new source performance standards.” New Jersey v. EPA, 517 F.3d at 580 (citing Revision of December 2000 Clean Air Act § 112(n) Finding Regarding Electric Utility Steam Generating Units; and Standards of Performance for New and Existing Electric Utility Steam Generating Units: Reconsideration, 71 Fed. Reg. 33,388, 33,388-89, 33,395-96 (June 9, 2006)). EPA did not, however, make any substantive change to the Delisting Rule. *Id.*

through a cap-and-trade program, rather than requiring that EGUs curb their own emissions by installing pollution-control equipment.<sup>36</sup>

When EPA initially had proposed removing EGUs from the Section 112(c) list,<sup>37</sup> Indian tribes, including Great Lakes tribes, and tribal organizations submitted extensive public comments expressing the view that EGUs should be subject to the most stringent emissions limitations that were permissible under the CAA, i.e., MACT standards.<sup>38</sup> Such limitations were necessary, the comments explained, because current levels of methylmercury in fish were impairing fishing rights guaranteed by treaty.<sup>39</sup> In addition to raising concerns related to treaty rights, the tribes and organizations also discussed the responsibilities of EPA to the tribes under the federal trust doctrine. The comments of the Great Lakes Indian Fish & Wildlife Commission, for example, relied on both treaty and trust obligations, as well as the obligation to deal with tribes as governments, in urging the adoption of an “aggressive schedule” to eliminate coal fired utilities’ mercury emissions:

An aggressive approach is . . . required because of the special obligations held by the federal government in its dealings with tribes. The federal government has committed, and each federal agency is obligated, to deal with the tribes on a government-to-government basis. The United States, as a treaty signatory, must live up to its treaty obligations regarding the tribes’ ceded territory rights, and it has a trust responsibility toward those tribes to protect not only the exercise of the treaty rights, but the ecosystems that support the natural resources subject to those rights.<sup>40</sup>

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<sup>36</sup> See Brian Hansen, *Electric Utilities Ask Supreme Court to Overturn Ruling on EPA Mercury Rule*, 9/22/08 INSIDE ENERGY WITH FED. LANDS 7 (2008), available at 2008 WLNR 18992506.

<sup>37</sup> Proposed National Emission Standards for Hazardous Air Pollutants; and, in the Alternative, Proposed Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 69 Fed. Reg. 4,652 (Jan. 30, 2004).

<sup>38</sup> Final Tribal Brief, *supra* note 22, at 8.

<sup>39</sup> See *id.* The Fond du Lac Band of Lake Superior Chippewa, the Leech Lake Band of Ojibwe, the Little Traverse Bay Bands of Odawa Indians, and the Mille Lacs Band of Ojibwe Indians were among the tribes submitting comments to EPA on the proposed regulations. See, e.g., Comment submitted by Christine Berini, Fond du Lac (FDL) Band of Lake Superior Chippewa (Jan. 3, 2004) (Doc. ID EPA-HQ-OAR-2002-0056-5513); Comment submitted by Brandy Toft, Air Quality Specialist, Leech Lake Band of Ojibwe (June 16, 2004) (Doc. ID EPA-HQ-OAR-2002-0056-3551); Comment submitted by Frank Ettawageshik, Little Traverse Bay Band of Odawa Indians (Apr. 23, 2004) (Doc. ID EPA-HQ-OAR-2002-0056-2010); Comment submitted by Charles J. Lippert, Mille Lacs Band of Ojibwe Indians (Dec. 31, 2004) (Doc. ID EPA-HQ-OAR-2002-0056-5476), available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064800badf5>.

<sup>40</sup> Comments of the Great Lakes Indian Fish & Wildlife Commission, Docket No. OAR-2002-0056, at 3 (June 29, 2004), available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064800b33a9> [hereinafter “GLIFWC Comments”]. The Commission was established in 1984 to assist its eleven member tribes, based in Michigan, Minnesota, and Wisconsin, in asserting and implementing their treaty rights with respect to territories ceded in 1837 and 1842 treaties. See *id.* at 1. The Commission’s website provides extensive information about the natural resource management activities of the Commission and its member tribes. See Great Lakes Indian Fish & Wildlife Commission,

In removing EGUs from the Section 112(c) list and establishing performance standards for EGUs under Section 111, EPA in effect rejected the tribal commentators' concerns. EPA thus sacrificed treaty-guaranteed rights to the desire of the electrical power industry to continue the environmentally damaging practices that were part of its way of doing business.

The *New Jersey v. EPA* petitioners seeking review of EPA's actions included fifteen states (collectively, the "Government Petitioners") and a number of environmental organizations (the "Environmental Petitioners").<sup>41</sup> The National Congress of American Indians and eleven tribes (the "Treaty Tribes") intervened in the case as petitioners after the failure of their efforts to persuade EPA to change its plan to remove EGUs from the Section 112 list. The petitioners argued that EPA's decision to ignore the requirements of section 112(c)(9) in delisting EGUs violated "Section 112's plain text and structure,"<sup>42</sup> and, in the alternative, that even if the delisting were lawful, "EPA was arbitrary and capricious in reversing its determination that regulating EGUs under section 112 was 'appropriate and necessary.'"<sup>43</sup> The Treaty Tribes raised the additional argument that EPA's failure to consider and comply with the tribes' treaty fishing rights in making the Section 112 determination violated Section 112 and was arbitrary and capricious.<sup>44</sup>

#### *B. Harvest of the Waters: The Significance of Fish and Fishing for the Treaty Tribes*

At first glance, regulation, under the Clean Air Act, of EGU emissions may appear to have nothing to do with tribal fishing rights; the Clean Water Act would seem more relevant. The relevance of the Clean Air Act to the exercise of tribal fishing rights stems, as noted above, from one of the components of EGU emissions, mercury, which, once it is transformed into methylmercury, contaminates fish.

The briefs submitted by the National Congress of American Indians ("NCAI") and the Treaty Tribes in *New Jersey v. EPA* made clear how tribal rights were affected by the EPA's planned actions and how much was at stake for tribes. The Treaty Tribes included three tribes from Michigan (the Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Little River Band of Ottawa Indians, and Little Traverse Bay Bands of Odawa Indians); one from Minnesota (the Minnesota Chippewa Tribe); one from Wisconsin (the Lac Courte Oreilles Band of Lake Superior Chippewa Indians); and five from Washington (the Jamestown S'Klallam Tribe, Lower Elwha Klallam Tribe, Lummi Nation, Nisqually

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<http://www.glifwc.org> (last visited Aug. 15, 2010). Comments submitted on behalf of Maine tribes by attorney Douglas J. Luckerman provide a more extensive analysis of the fiduciary duty of the EPA and the federal trust responsibility in connection with mercury regulation. See Comment Submitted by Douglas J. Luckerman, Representing the Maine Indian Tribes, Docket No. A-2002-0056, at 6-10 (Dec. 19, 2005), available at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064800fb860>.

<sup>41</sup> The Government Petitioners also included the Michigan Department of Environmental Quality, the Pennsylvania Department of Environmental Protection, and the City of Baltimore. See *New Jersey v. EPA*, 517 F.3d 574, 574 (D.C. Cir. 2008).

<sup>42</sup> *Id.* at 581.

<sup>43</sup> *Id.*

<sup>44</sup> Final Tribal Brief, *supra* note 22, at 2.

Tribe, and Swinomish Indian Tribal Community).<sup>45</sup> The tribes in effect brought to the courthouse with them a number of treaties that had been signed in the Great Lakes area and in the Pacific Northwest to protect inherent tribal subsistence rights: the 1837, 1842, and 1854 Treaties with the Chippewa; the 1836 Treaty at Washington; and the Treaties of Medicine Creek, Point Elliot, and Point No Point of 1855.<sup>46</sup>

While these treaties are not identical, they all contain protections for fishing rights, and in some cases for hunting and other subsistence-related rights as well. The 1837 Treaty with the Chippewa, for example, provides that “[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded [by the treaty], is guaranteed to the Indians.”<sup>47</sup> The Treaty of Medicine Creek, signed by a number of tribes of the Pacific Northwest, contains more detailed provisions relating to fishing and other subsistence rights. Article Three of the Treaty provides as follows: “The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries . . . .”<sup>48</sup> This provision indicates the significance of fish not just as a seasonal component of the diet, enjoyed when the fish were running, but rather as a resource that would be preserved, via curing, for consumption during other times of the year. For these tribes, the waters of their homelands serve as a banquet table, filled with fish, which the treaties obligated the United States to preserve.<sup>49</sup>

The tribes’ participation in the *New Jersey v. EPA* litigation indicates the continuing significance of fishing rights to tribes today. The participation of the NCAI, the oldest national organization addressing Native American interests,<sup>50</sup> suggests recognition of the case’s significance for many tribes across the United States. It is worth emphasizing that by participating in the petition, the Treaty Tribes were not seeking to establish any new rights. They only sought to protect treaty rights that had been guaranteed to them by the United States, in consideration of the

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<sup>45</sup> *Id.* at iii. For an analysis of the litigation over Pacific Northwest tribes’ fishing rights, see Vincent Mulier, *Recognizing the Full Scope of the Right to Take Fish Under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest*, 31 AM. INDIAN L. REV. 41 (2006).

<sup>46</sup> Final Tribal Brief, *supra* note 22, Treaty and Statutory Addendum Index.

<sup>47</sup> Treaty with the Chippewa, art. 5, July 29, 1837, 7 Stat. 536. The 1854 Treaty provided that the Indians who resided on the ceded territory “shall have the right to hunt and fish therein.” Treaty with the Chippewa, art. 11, Sept. 30, 1854, 10 Stat. 1109.

<sup>48</sup> Treaty with the Nisqually, Puyallup, Steilacoom, Squawksin, S’Homamish, Stehchass, T’ Peeksin, Squi-aitl, and Sa-heh-wamish Tribes and Bands of Indians at Medicine Creek, art. 3, Dec. 26, 1854, 10 Stat. 1132.

<sup>49</sup> Mary Christina Wood, *EPA’s Protection of Tribal Harvests: Braiding the Agency’s Mission*, 34 ECOLOGY L.Q. 175, 183 (2007) (noting the comment of an Indian fisherman that “the Columbia River was a ‘great table’ where many tribes would come together and partake”).

<sup>50</sup> Final Tribal Brief, *supra* note 22, at iii (noting that the NCAI is “the oldest and largest national organization addressing American Indian interests, representing over 250 Indian tribes and Alaskan Native villages”).

rights that the Tribes were ceding under the treaties. These treaty rights would be rendered meaningless, however, if EPA persisted in allowing EGUs to continue to cause mercury pollution.

*C. Asserting Treaty Rights in Court: The Arguments of the Tribal Petitioners*

The Treaty Tribes and the NCAI (collectively, the “Tribal Petitioners”) agreed with the Government and Environmental Petitioners that EPA lacked authority to ignore the statutory delisting requirements and that EPA’s new conclusion that it is not “appropriate and necessary” to regulate EGUs’ mercury emissions under Section 112 was unsupported.<sup>51</sup> The Tribal Petitioners’ focus in their brief (the “Tribal Brief”) was on “one of the starkest reasons” why EPA’s revised “appropriate and necessary” determination violated the CAA: “EPA’s utter failure to consider tribal treaty rights in making that determination.”<sup>52</sup> Had treaty rights been treated with proper regard, there would have been “no doubt that section 112 regulation of mercury emissions is required under the CAA.”<sup>53</sup>

1. Identifying the Treaty Rights at Stake

The applicable treaties secured the Treaty Tribes’ aboriginal “rights to take fish as they had since time immemorial.”<sup>54</sup> The Tribal Brief emphasized the significance of these treaties for the signatory tribes and the United States. Under these “solemn treaties,”<sup>55</sup> “the United States bound itself by its word and the force of law” to permanent protection of tribal fishing rights.<sup>56</sup> Because of the importance of fish to tribal members’ diet and livelihood at the time that the treaties were signed, the tribes “viewed a guarantee of permanent fishing rights as an absolute predicate to entering into a treaty.”<sup>57</sup> In short, the Tribes would not have been willing to sign the treaties if they had not been confident that their pre-existing fishing rights were thereby protected. For the United States as well, the treaties were very important. In exchange for guaranteeing reserved tribal rights, the United States received “the Tribes’ cessions of vast portions of what is now the United States.”<sup>58</sup>

This understanding of the nature of the treaties has influenced judicial interpretations of treaty rights, the Tribal Brief explained, leading the courts to construe fishing rights expansively.<sup>59</sup> Federal court decisions have established that treaty fishing rights:<sup>60</sup> are permanent in nature;<sup>61</sup> extend to all species of fish;<sup>62</sup> apply

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<sup>51</sup> *See id.* at 22.

<sup>52</sup> *Id.* This also constituted a violation of the Administrative Procedure Act. *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 12; *see also id.* at 3 (noting that the treaties “reserve the Tribes’ aboriginal rights to take fish throughout their fishing areas”).

<sup>55</sup> *Id.* at 12.

<sup>56</sup> *Id.* at 15.

<sup>57</sup> *Id.* (quoting *U.S. v. Washington*, 873 F. Supp. 1422, 1437 (W.D. Wash. 1994)).

<sup>58</sup> *Id.* at 3.

<sup>59</sup> *See id.* at 16.

<sup>60</sup> *Id.* at 12.

to all areas where fishing rights were reserved, meaning all areas that were traditionally fished;<sup>63</sup> and “encompass the taking of fish for all purposes, including for ceremonial, subsistence, and commercial reasons.”<sup>64</sup> Taken together, the cases that have construed tribal fishing rights “stand for the fundamental proposition that the Tribes’ fishing rights include the subsidiary rights necessary to render the treaty promises meaningful to the fishers who continue to rely on them to feed their families and communities and to secure a moderate living.”<sup>65</sup> EPA’s actions, however, threatened to render the treaty rights “a meaningless anachronism,”<sup>66</sup> the Tribal Brief argued. Because treaties are “the supreme law of the land,” EPA’s regulatory decisions that might affect treaty rights must comply with the treaties.<sup>67</sup>

Mercury pollution harms treaty fisheries and directly impairs treaty rights in a number of ways. First, mercury pollution impairs fish’s abilities to reproduce and inhibits their survival skills, resulting in decreases in available fish stock and in certain species being off-limits, thus infringing upon the treaty rights’ permanence and the Treaty Tribes’ rights to fish for the species of their choice.<sup>68</sup> The geographic component of treaty rights is also impaired by the concentration of mercury contamination in certain geographical areas, which then become off-limits.<sup>69</sup> Secondly, mercury pollution also causes neurological and cardiovascular damage to those who consume contaminated fish, creating dangers for young children and fetuses in particular.<sup>70</sup> Finally, mercury pollution makes fish less salable, as numerous advisories recommend limitations on, or elimination of, consumption of certain fish.<sup>71</sup> This impairs the treaty-protected right to make a moderate living

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<sup>61</sup> *See id.* at 17. Because of the rights’ permanent nature, tribes may use modern technology in their fisheries and make other adjustments that are needed “to maintain the rights’ viability in the face of changing circumstances.” *Id.*

<sup>62</sup> *See id.* at 18. This conclusion follows from the fact that the fishing rights are reservations of pre-existing rights, which would have extended to all species within the tribes’ traditional fishing areas. *See id.*

<sup>63</sup> *See id.* at 17, 18. Because treaty fishing rights apply to “all areas traditionally available to the tribes,” federal agencies cannot limit tribes’ geographical treaty fishing rights or allow limitations to occur. *Id.* at 18.

<sup>64</sup> *Id.* at 17. Prioritization of the purposes for fishing is left to tribal governments. *See id.* at 19.

<sup>65</sup> *Id.* at 20.

<sup>66</sup> *Id.* For further discussion of the argument that treaty fishing rights become meaningless if fish habitat is allowed to be contaminated and becomes degraded, see generally Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279 (2000); see also Catherine A. O’Neill, *Protecting the Tribal Harvest: The Right to Catch and Consume Fish*, 22 J. ENVTL. L. & LITIG. 131, 143-44 (2007).

<sup>67</sup> *See* Final Tribal Brief, *supra* note 22, at 12.

<sup>68</sup> *See id.* at 20-21.

<sup>69</sup> *See id.* at 21.

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

through fishing and the right to use treaty-protected fisheries for subsistence and ceremonial purposes.<sup>72</sup>

## 2. EPA's Flawed Decisions

Analyzed under the *Chevron* test used by courts to review agency actions, EPA's decisionmaking was flawed in several ways related specifically to treaty rights.<sup>73</sup> First, EPA had documented that fish consumption is the main pathway for human exposure to methylmercury, and that Native Americans consume more fish than any other American sub-population—consumption that occurs pursuant to treaty rights. If EPA had properly considered the treaty rights, the only possible conclusion it could have reached would have been that Section 112 regulation of mercury emissions was required.<sup>74</sup> Without such regulation, mercury would continue to contaminate treaty-protected fishing areas. Such contamination undermines the geographic component of the treaty rights, effectively renders certain fish species unavailable, interferes with making a living and utilizing fish for subsistence, and threatens treaty rights' permanence by interfering with fish reproduction.<sup>75</sup>

Secondly, EPA's failure to consider the Tribal Petitioners' treaty rights meant that its action was arbitrary and capricious.<sup>76</sup> EPA had denied that tribal members would be adversely affected as a result of EPA's actions, "asserting with dubious logic that, since any mercury regulation is arguably better than no regulation at all, the [Clean Air Mercury] [R]ule will benefit tribal members in the exercise of their treaty rights."<sup>77</sup> EPA's statement indicated its failure to give the United States' treaty obligations proper recognition and to recognize that Section 112 regulation would better honor the treaty obligations.<sup>78</sup>

Finally, EPA's gross underestimation of the effects of mercury contamination on tribal fishers did not justify its failure to consider fishing rights in making the

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<sup>72</sup> *See id.* at 21.

<sup>73</sup> *Chevron, U.S.A., Inc. v. NRDC* established that a court reviewing an agency action must first ask whether Congress has directly spoken to the question before the court, in which case the court is to end its inquiry and give effect to Congress's expressed intent. Final Tribal Brief, *supra* note 22, at 23 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 836, 842-43 (1984)); *see also* *New Jersey v. EPA*, 517 F.3d 574, 581 (D.C. Cir. 2008) (discussing the *Chevron* test). Only if the court concludes that the relevant statute is silent or ambiguous should the court proceed to *Chevron*'s second step and defer to an agency interpretation that is "based on a permissible construction of the statute." Final Tribal Brief, *supra* note 22, at 23 (quoting *Chevron*, 467 U.S. at 843). In order to determine whether a statute speaks directly to the issue at hand, a court is to consider the relevant statutory provision in context and utilize "the traditional tools of statutory construction." *Id.* at 23 (quoting *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995)).

<sup>74</sup> Final Tribal Brief, *supra* note 22, at 26.

<sup>75</sup> *See id.* at 26-27.

<sup>76</sup> *See id.* at 28-29. EPA's action thus violated the Administrative Procedure Act ("APA"). *See id.* at 29 n.4.

<sup>77</sup> *Id.* at 27.

<sup>78</sup> *See id.* at 29.



Section 112 determination.<sup>79</sup> While EPA had recognized that “tribal subsistence fishers are the members of the public most likely to be affected by power-plant-induced mercury contamination,”<sup>80</sup> the agency had claimed that tribal fishers would *not* consume unsafe levels of mercury under its proposed regulation under Section 111. EPA then used this claim to support its conclusion that Section 112 regulation was not necessary and appropriate.<sup>81</sup> Moreover, the manner in which EPA overlooked or distorted the relevant evidence in making its decisions was itself further evidence of EPA’s having acted in an arbitrary and capricious manner.<sup>82</sup>

The Tribal Brief identified three causes of EPA’s drastic understatement of mercury contamination’s impact on tribal fisheries. First, EPA “grossly underestimated current tribal fish consumption rates, and ignored historic levels of consumption altogether.”<sup>83</sup> EPA’s estimates of average daily fish consumption rates (“FCRs”) for Native American subsistence fishers were based on only one regional fish consumption study, namely, the 1994 Columbia River Inter-Tribal Fish Commission Report (“CRITFC Study”). EPA then used the results of this one study, which was based on questioning 513 adult members of four Columbia River Basin tribes,<sup>84</sup> as the basis for FCRs for *all* Native American subsistence fishers. EPA chose this approach despite considerable evidence that consumption rates of members of many of the over 550 federally recognized tribes (including Chippewa tribes) are much higher.<sup>85</sup> As EPA admitted,<sup>86</sup> there was no evidence that the FCRs of the individuals who were surveyed in the CRITFC Study, who are members of tribes in the same part of the country, with similar socio-cultural practices, are similar to FCRs for tribes in other parts of the country.<sup>87</sup> Moreover, EPA not only underestimated current tribal FCRs, but also failed to take account of the fact that the FCRs that it used did not accurately reflect tribes’ full exercise of treaty-protected fishing rights, because of the artificial suppression of FCRs necessitated by contamination of fisheries.<sup>88</sup> In order to measure the true impact of EPA’s proposed non-action under Section 112 on treaty-protected fisheries, EPA would have needed

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<sup>79</sup> This underestimation also rendered the rule regulating mercury emissions under Section 111 rather than Section 112 arbitrary and capricious under the APA. *See id.* at 29 n.4.

<sup>80</sup> *Id.* at 29.

<sup>81</sup> *See id.* at 30.

<sup>82</sup> *See id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See id.* at 31; *see also id.* at 9 (giving the full name of the CRITFC Study).

<sup>85</sup> *See id.* at 32. Also, the CRITFC Study was never intended to generate national FCRs. *See id.* at 33.

<sup>86</sup> *See id.* at 33-34.

<sup>87</sup> *See id.* at 33. The Final Tribal Brief described some additional flaws in EPA’s use of the Study and in the Study itself, such as EPA’s reduction, without explanation, of the 99th percentile FCR from 389 g/day to 295 g/day and the Study’s averaging of consumption rates among consumers and non-consumers of fish, which generated average rates that are not reflective of subsistence rates. *See id.* at 32 n.5, 33 n.6.

<sup>88</sup> *See id.* at 35; *see also id.* at 36 (noting studies that indicate that existing FCRs are suppressed).

to rely on *historical* fish consumption rates,<sup>89</sup> an approach that would have been in accord with Supreme Court precedent establishing that artificial suppression of fishing should not affect treaty obligations.<sup>90</sup> Instead, EPA had taken the illogical approach of relying on a suppressed fish consumption rate, which stems from contamination of fisheries by pollution, as a rationale for not adequately regulating such contamination.<sup>91</sup>

A second reason for EPA's drastic understatement of mercury contamination's impact on tribal fisheries was its "utterly implausible" claim<sup>92</sup> that few Native American fishermen reside in areas of significant mercury deposition.<sup>93</sup> EPA's own modeling indicated that mercury emissions were "currently being deposited in high amounts throughout the mid-west and nearly everywhere east of the Mississippi River."<sup>94</sup> EPA seriously underestimated the number of Native Americans living in this part of the United States, apparently because EPA only took into account populations currently residing within formal reservation boundaries or on trust lands, in tracts that contain at least 1,000 people.<sup>95</sup> This approach led to conclusions that few Native Americans live in Oklahoma, which is home to the nation's second largest Native American population,<sup>96</sup> or in Michigan, which is home to over 124,000 Native Americans, including members of four of the Treaty Tribes.<sup>97</sup> EPA's conclusion as to Native American residents thus could not be used to justify EPA's failure to consider tribal treaty rights.<sup>98</sup>

Finally, EPA's understatement of mercury contamination's impact was also due to the fact that EPA focused only on mercury emissions from American power plants.<sup>99</sup> By looking only at these emissions, EPA obscured "the true risks to which tribal fishers, their families, and communities are subjected."<sup>100</sup> This approach,

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<sup>89</sup> See *id.* at 36.

<sup>90</sup> See *id.* at 35. The Final Tribal Brief quoted the Supreme Court's opinion in *Washington v. Washington State Commercial Passenger Fishing Vessel Association* as follows: "The impact of illegal regulation, and of illegal exclusionary tactics by non-Indians, in large measure accounts for the decline of the Indian fisheries during this century and renders that decline irrelevant to a determination of the fishing rights the Indians . . . secur[ed] by initialing the treaties." *Id.* at 35 (quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 669 n.14 (1979)).

<sup>91</sup> See Final Trial Brief, *supra* note 22, at 36.

<sup>92</sup> *Id.* at 37.

<sup>93</sup> *Id.* at 30.

<sup>94</sup> *Id.* at 38.

<sup>95</sup> See *id.* at 41-42.

<sup>96</sup> See *id.* at 40. Oklahoma is the home of 37 federally recognized tribes and of a total of 391,949 Native Americans, according to the 2000 Census. See *id.* at 41.

<sup>97</sup> See *id.* at 41. Michigan is also the home of eight other federally recognized tribes. *Id.*

<sup>98</sup> See *id.* at 42.

<sup>99</sup> See *id.* at 30, 43.

<sup>100</sup> *Id.* at 43.

which amounted to assessing risks in a vacuum, is inconsistent with the CAA and does not support EPA's failure to consider treaty rights.<sup>101</sup>

The foregoing analysis established, the Tribal Petitioners argued, that EPA was required to consider the tribes' treaty rights as an essential part of the context for making the Section 112 determination and that proper consideration of treaty rights would have required the conclusion that regulation under Section 112 was both appropriate and necessary to fulfill the United States' treaty obligations.<sup>102</sup> The approach that EPA had instead chosen had left the Tribes in the painful position of "having to choose between exercising their solemn treaty rights and thereby compromising their health and that of their families, including the potential success of their children, or of foregoing their cultural and economic identity despite the promises made to them by treaty."<sup>103</sup> In short, they were required to make choices that the treaties were intended to protect them against.

### 3. Treaty Rights, the Environment, and Sovereignty

The issues raised by the Tribal Brief demonstrate the interconnectedness of treaty rights related to subsistence and environmental protection. Fishing rights and other subsistence rights depend not only on the continued existence of fish and other relevant resources, but their existence in an uncontaminated state. As the Tribal Brief makes so clear, if the fish are contaminated, then consuming them threatens the health of tribal members, and ultimately threatens the continued existence of the Tribe itself if tribal members are committed to exercising their treaty rights. At the very least, contamination threatens the continued existence of fishing as an aspect of tribal culture, as comments submitted to EPA by the GLIFWC noted. The GLIFWC's comments explained that fishing and consuming fish are central to the culture of the Chippewa/Anishinaabe and that the "practice of harvesting, sharing, and consuming *ogaa* (walleye) is passed down from generation to generation."<sup>104</sup> In tribal communities there was now concern, however, that "methylmercury in *ogaa* may pose serious threats to the health of tribal members' young and unborn children and therefore the continuation of these traditional lifeways."<sup>105</sup> Inadequate mercury regulation, which allows contaminating activities to continue, thus serves as a twenty-first century mechanism of cultural destruction and assimilation.

The destruction of tribal food sources resulting from EPA's failure to regulate mercury and other HAPs is painfully reminiscent of nineteenth-century government actions that deprived tribes of access to vital food resources. Tribes were increasingly confined to reservations as the nineteenth century progressed. As a result, many were prevented from accessing off-reservation land that previously had been used for hunting, fishing, crop growing, and harvesting activities. Many tribes

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<sup>101</sup> *See id.*

<sup>102</sup> *See id.* at 44.

<sup>103</sup> *Id.*

<sup>104</sup> GLIFWC Comments, *supra* note 40, at 2.

<sup>105</sup> *Id.*

were forced into dependence on government food rations, which were all too often inadequate in both quantity and quality.<sup>106</sup>

Tribes entered into treaties on the basis of the guarantee of continued access to certain resources. The contamination of these resources, resulting from the decision of the government that agreed to the treaty guarantees to permit the contamination, destroys a crucial part of the foundation of the treaty. The tribes suffer a loss of treaty-guaranteed rights, but do not recover any of the rights that they granted to the United States in exchange. In order for tribal fishing rights to continue to have any real meaning, the federal government must provide a regulatory framework that prevents the imposition of negative externalities that ultimately damage treaty-guaranteed resources. The Tribal Brief exposed EPA's continuing failure in this regard. This failure is even more egregious when it is considered in light of the trust doctrine of federal Indian law, which imposes obligations on the government to protect tribal property and other interests. The trust relationship between tribes and the government has been reaffirmed in numerous statutes, federal agency policies, and presidential policy statements.<sup>107</sup>

While the Tribal Brief focused on treaty rights, tribal sovereignty was, necessarily, also at the center of the struggle. The Tribes signed the treaties at issue in the litigation as sovereigns. Tribal members have sought to utilize the treaty rights by virtue of being citizens of particular signatory tribes. Tribal members are not just another sub-population that suffers the ill effects of mercury contamination, but rather are members of sovereign entities with longstanding treaty rights. When rights under the treaties are threatened, tribes seek to defend these rights as sovereigns. Like tribes before them in other circumstances, who have recognized the common ground on which they stand when confronting harmful actions by the United States,<sup>108</sup> they have combined forces in their attempt to vindicate their rights.

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<sup>106</sup> For a discussion of the reservation era and the hardships that confinement on reservations imposed on tribes, see generally sources cited *infra* notes 377, 380, 390.

<sup>107</sup> See, e.g., COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 420-21 nn.235-37 (Nell Jessup Newton et al. eds., LexisNexis 2005) (1941) (listing examples of statutes, federal agency policies, and presidential policy statements that reaffirm the trust relationship). For a discussion of the obligations imposed by the trust doctrine in connection with EPA's actions affecting tribal traditional food supplies, see Wood, *supra* note 49, at 178-79. For an analysis of the means to enforce the federal government's trust responsibility to protect tribal resources, see Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355 (2003). Professor Catherine O'Neill has also explored the requirements of the trust responsibility when federal agencies make environmental protection decisions that affect tribes, with a focus on the use of quantitative risk assessment to establish environmental standards to limit contamination of waters in which Pacific Northwest tribes fish. See Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3, 101-05 (2000).

<sup>108</sup> Tribes have stood together in the past in confronting the United States on the battlefield and in Washington. See, e.g., VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 23-62 (1985) (discussing pan-tribal activism in the 1960s and 1970s).

*D. EPA Unhorsed: The Court of Appeals Decision*

After considering the petitioners' contention that once EPA determined that EGUs should be regulated under Section 112 and listed them under Section 112(c)(1), EPA had no authority to delist them without taking the steps required by the statutory language,<sup>109</sup> the court of appeals agreed with the petitioners.<sup>110</sup> The court reached this conclusion from a straightforward reading of the statutory language. Because Section 112(c)(9) governs the removal of "any source category" from the Section 112(c)(1) list, and nothing in the CAA exempts EGUs from Section 112(c)(9), the only way that EPA could remove EGUs from the Section 112(c)(1) list was by satisfying the requirements of Section 112(c)(9).<sup>111</sup> EPA conceded that it had never made the findings that Section 112(c)(9) required for delisting EGUs.<sup>112</sup> Only one conclusion was possible from this analysis: "EPA's purported removal of EGUs from the section 112(c)(1) list therefore violated the CAA's plain text and must be rejected."<sup>113</sup> Having concluded that EPA had no authority to delist EGUs

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<sup>109</sup> *New Jersey v. EPA*, 517 F.3d 574, 581 (D.C. Cir. 2008). Section 112(c)(9) provides that:

The Administrator may delete any source category from the [Section 112(c)(1) list] . . . whenever the Administrator . . . [determines] that emissions from no source in the category or subcategory concerned . . . exceed a level which is adequate to protect public health with an ample margin of safety and no adverse environmental effect will result from emissions from any source.

Clean Air Act § 112(c)(9), 42 U.S.C. § 7412(c)(9) (2006).

<sup>110</sup> The court noted that in reviewing the petitioners' challenge to EPA's Delisting Rule and Clean Air Mercury Rule, the court's task was "to determine whether EPA's promulgation of them was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." *New Jersey v. EPA*, 517 F.3d at 581 (citing Clean Air Act § 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A) (2006)). The court agreed with the Tribal Brief that the two-pronged *Chevron* test governed the challenge to EPA's interpretation of the CAA. *See New Jersey v. EPA*, 517 F.3d at 581 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

<sup>111</sup> *New Jersey v. EPA*, 517 F.3d at 582. The court also noted that EPA conceded that it had listed EGUs under Section 112. *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> *Id.* EPA's action thus was rejected under step one of the *Chevron* test, which examines whether the statute speaks directly to the issue at hand. *See id.* The court rejected several arguments made by EPA in "an attempt to evade section 112(c)(9)'s plain text" and to obtain judicial deference to its CAA interpretation under step two of the *Chevron* test. *See id.* EPA tried to reach step two of *Chevron* by arguing that "section 112(n)(1) makes section 112(c)(9) ambiguous because '[l]ogically, if EPA makes a determination under section 112(n)(1)(A) that power plants should not be regulated at all under section 112 . . . [then] this determination *ipso facto* must result in removal of power plants from the section 112(c) list.'" *New Jersey v. EPA*, 517 F.3d at 582 (quoting Final Brief of Respondent United States Environmental Protection Agency at 26, *New Jersey v. EPA*, 517 F.3d 574 (No. 05-1097)). The court's response was:

this simply does not follow. Section 112(n)(1) governs how the Administrator decides whether to list EGUs; it says nothing about delisting EGUs, and the plain text of section 112(c)(9) specifies that it

from the Section 112 list without taking the steps required by the statute,<sup>114</sup> the court granted the petitions and vacated the Delisting Rule and the Clean Air Mercury Rule.<sup>115</sup>

Having handily dealt with the petition by this brief textual analysis, the court's three-judge panel did not address other contentions of the petitioners and intervenors.<sup>116</sup> Thus, the court did not comment on the Tribal Petitioners' explication of the role that treaty rights must play in EPA decisionmaking with respect to EGU emissions.

Following the denial of its petition for rehearing en banc,<sup>117</sup> EPA pressed on in its efforts to put into place an EGU emissions regulatory scheme that fails to protect fishing rights guaranteed by treaty. In October 2008, EPA filed a petition for a writ of certiorari, asking the Supreme Court to review the court's decision.<sup>118</sup> EPA's petition was filed one month after the filing of a petition by the Utility Air Regulatory Group ("UARG"), which represents American Electric Power, Southern Company, and other large utilities.<sup>119</sup> In short, EPA was once again joining forces with the electric utility industry to try to forestall adequate regulation of mercury emissions.

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applies to the delisting of 'any source.' . . . EPA can point to no persuasive evidence suggesting that section 112(c)(9)'s plain text is ambiguous. It is therefore bound by section 112(c)(9) . . . .

New Jersey v. EPA, 517 F.3d at 582. Among EPA's arguments rejected by the court was an argument that it had ignored Section 112(c)(9) in the past (and thus could do so again). *See id.* at 583. The court's response was that "previous statutory violations cannot excuse the one now before the court." *Id.*

<sup>114</sup> *See* New Jersey v. EPA, 517 F.3d at 581 (noting its agreement with the petitioners' argument).

<sup>115</sup> *See id.* at 583. The court explained the need to vacate the CAMR for both existing and new EGUs. As for existing EGUs, EPA promulgated the CAMR regulations for them under Section 111(d), but because that section "cannot be used to regulate sources listed under section 112," the fact that the EGUs remain listed under Section 112 meant that the CAMR regulations for them "must fall." *Id.* at 583. As for new EGUs, EPA promulgated the CAMR regulations for new sources under Section 111(b) "on the basis that there would be no section 112 regulation of EGU emissions and that the new source performance standards would be accompanied by a national emissions cap and a voluntary cap-and-trade program. Given that these vital assumptions were incorrect," the court had to vacate the new source performance standards and remand them for EPA reconsideration. *Id.* at 583-84 (citations omitted).

<sup>116</sup> *See id.* at 584.

<sup>117</sup> *See id.* at 574 (noting denial of rehearing en banc).

<sup>118</sup> Petition for a Writ of Certiorari, EPA v. New Jersey, 129 S. Ct. 1313 (2008) (No. 08-512) (Oct. 17, 2008), available at 2008 WL 4619509 [hereinafter "Cert. Petition"]. The petition argued that the court of appeals had erred in failing to defer to EPA's interpretation of the CAA and that the importance of the question of EPA's authority to take the actions that it preferred warranted review by the Court. *See id.* at \*11, \*18.

<sup>119</sup> *See* Brian Hansen, *Electric Utilities Ask Supreme Court to Overturn Ruling on EPA Mercury Rule*, INSIDE ENERGY WITH FED. LANDS 7, Sept. 22, 2008, available at 2008 WLNR 18992506.

EPA's petition to the Supreme Court emphasized not only what was at stake for EPA in terms of its efforts to adopt an "alternative regulatory approach," but also what is at stake for the power industry. Displaying a touching solicitude for the industry whose actions have adversely affected the rights guaranteed to the Treaty Tribes in exchange for land cessions, EPA noted how the D.C. Circuit's decision, if left undisturbed, would affect the industry: "power-plant operators will incur significant unnecessary regulatory burdens and uncertainty before judicial review of the original listing determination."<sup>120</sup> In EPA's calculation, industry expenses and discomfiture were to be given more weight than treaty rights and the health of tribal members, whose wellbeing is threatened by the effects on subsistence resources of the actions of the industry and EPA. This is not the first time that EPA has made such a calculation,<sup>121</sup> and as long as EPA focuses on protecting the interests of the industries whose actions harm the environment, it will probably not be the last.

#### *E. Looking Forward*

It is the responsibility of all citizens to see that the treaty-protected rights of the plaintiff tribes are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the councils, and in a spirit which generously recognizes the full obligation of this nation . . . .<sup>122</sup>

In February 2009, the Supreme Court rejected EPA's petition for a writ of certiorari,<sup>123</sup> leaving in place the victory of the Treaty Tribes and their allies in *New Jersey v. EPA*. The Court's decision followed an about-face by EPA, under the aegis of a new presidential administration. The government advised the Court, a few weeks before the Court announced the denial of the certiorari petition, that it no longer sought to appeal the D.C. Circuit's decision.<sup>124</sup> EPA stated in its motion to dismiss the case that it has now "decided, consistent with the court of appeals' ruling, to develop appropriate standards to regulate power-plant emissions" under Section 112 of the Clean Air Act and that it no longer sought review of the court's holding that Section 112(c)(9) provides "the sole mechanism for delisting power plants as a covered source category."<sup>125</sup> Until EPA follows through with this

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<sup>120</sup> See Cert. Petition, *supra* note 118, at \*22.

<sup>121</sup> See, e.g., Wood, *supra* note 49, at 196 (discussing the EPA perception that it should not strongly regulate pollution or force cleanups because EPA should not hurt businesses).

<sup>122</sup> *United States v. Michigan*, 471 F. Supp. 192, 281 (W.D. Mich. 1979).

<sup>123</sup> *Utility Air Regulatory Group v. New Jersey*, 129 S. Ct. 1308 (2009) (mem.); see also *EPA v. New Jersey*, 129 S. Ct. 1313 (2009) (mem.).

<sup>124</sup> See Cornelia Dean, *Environmentalists Advance on Emissions*, N.Y. TIMES, Feb. 24, 2009, at A16 (noting that government lawyers had filed papers seeking dismissal of the appeal). Commentators have characterized this decision as part of a broader effort to adopt an environmental agenda that indicates a sharp break from the previous presidential administration. See, e.g., Margaret Kriz Hobson, *The Greenest White House in History*, NAT'L J., Sept. 25, 2009, available at 2009 WLNR 19162231.

<sup>125</sup> Motion of the Environmental Protection Agency to Dismiss the Case, *EPA v. New Jersey*, 129 S. Ct. 1313, No. 08-512 (Feb. 6, 2009), available at [http://www.epa.gov/air/mercuryrule/pdfs/certpetition\\_withdrawal.pdf](http://www.epa.gov/air/mercuryrule/pdfs/certpetition_withdrawal.pdf). See also Cathy Cash,

commitment, and promulgates appropriate regulations, however, the victory of the petitioners in *New Jersey v. EPA* will remain incomplete. Fish continue to be contaminated by mercury and the EGU emissions that contribute to the contamination will remain unregulated. The seriousness of this ongoing problem was highlighted by the 2009 release of a U.S. Geological Survey report indicating that *every* fish tested in a sampling from 291 streams across the country contained mercury.<sup>126</sup>

Some hope for reduction in mercury contamination from a source other than EGUs has been raised by EPA's announcement that it is proposing rules to limit mercury (and other HAPs) emissions from cement kilns, which are the fourth largest source of mercury air emissions in the United States.<sup>127</sup> Legislation has also been introduced in the House of Representatives and the Senate to amend the Toxic Substances Control Act to phase out the use of mercury in the manufacture of chlorine and caustic soda—a proposal that House opponents have railed against as “misidentified environmental legislation that will effectively shut down U.S. manufacturers and displace U.S. workers.”<sup>128</sup> Finally, in February 2010, Senator Carper introduced a bill (the Clean Air Act Amendments of 2010) that would, among other actions, require (1) that the EPA Administrator promulgate specified mercury emissions standards for EGUs under CAA Section 112(d) and (2) that EGUs meet (by January 1, 2015) MACT emission limitations if the Administrator fails to promulgate the mercury emissions limitations by January 1, 2012.<sup>129</sup> Thus,

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*Obama EPA to Proceed with Mercury Rules, Bids for Court Dismissal*, COAL TRADER, Feb. 9, 2009, at 1, available at 2009 WLNR 3498535. Also, in January 2009, EPA published a document providing “technical guidance to states and authorized tribes exercising responsibility under section CWA 303(c) on how to use the new tissue-based criterion recommendation as they develop their own water quality standards for methylmercury,” such as implementing the National Pollutant Discharge Elimination System permit limits. U.S. EPA, Guidance Document for Methylmercury, Human Health, <http://www.epa.gov/waterscience/criteria/methylmercury/guidance-final.html> (last visited Aug. 15, 2010). The guidance is currently under review, however, as part of the Obama administration's review of EPA decisions made under the previous administration. See U.S. EPA, Fact Sheet: Methylmercury Guidance, Human Health, <http://www.epa.gov/waterscience/criteria/methylmercury/guidance-fs-final.html> (last visited Aug. 15, 2010). For a discussion of the factors that will affect the stringency of the standard that EPA ultimately adopts to regulate mercury emissions, see UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, MERCURY CONTROL TECHNOLOGIES AT COAL-FIRED POWER PLANTS HAVE ACHIEVED SUBSTANTIAL EMISSIONS REDUCTIONS (Oct. 9, 2009), <http://www.gao.gov/new.items/d1047.pdf>.

<sup>126</sup> See BARBARA C. SCUDDER ET AL., MERCURY IN FISH, BED SEDIMENT, AND WATER FROM STREAMS ACROSS THE UNITED STATES, 1998-2005, at 10 (2009), available at <http://pubs.usgs.gov/sir/2009/5109/pdf/sir20095109.pdf>.

<sup>127</sup> See National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, 74 Fed. Reg. 21,136 (proposed May 6, 2009) (to be codified at 40 C.F.R. pt. 60, 63).

<sup>128</sup> H.R. REP. NO. 111-381, at 18 (2009) (“Dissenting Views”). The relevant bills are the Mercury Pollution Reduction Act, H.R. 2190, 111th Cong., (2009), and the Mercury Pollution Reduction Act, S. 1428, 111th Cong. (2009), which was introduced in July 2009.

<sup>129</sup> S. 2995, 111th Cong., § 4 (2010). In promulgating emissions standards, the Administrator was directed to “ensure that such standards achieve at least a 90-percent



there are some reasons to be hopeful that mercury emissions from EGUs and other sources will soon be subject to regulations that are commensurate with the threat that they pose. It still remains to be seen, however, whether fish species will ultimately receive the protection from mercury contamination that is necessary in order for the petitioning tribes' impaired treaty rights to have the force that the Constitution's Supremacy Clause dictates they must have.

As for the legal pathway chosen by the Treaty Tribes in their efforts to vindicate their treaty-guaranteed fishing rights, its use by the tribes in *New Jersey v. EPA* is a reminder, in case one is needed, of the continued viability of litigation as a method for asserting tribal rights with regard to subsistence resources. Tribes would undoubtedly much prefer, however, that the United States simply honor the subsistence rights-related guarantees that it made in treaties, so that tribes do not need to follow the pathway to the courthouse to enforce their treaty rights.

## II. SENTINELS OF CLIMATE CHANGE: THE INUIT PETITION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

The process of the hunt and eating of our country food personifies what it means to be Inuit. It is on the land that our values and age-old knowledge are passed down from generation to generation. Generations—young and old—meet on the land. The wisdom of the land and process of the hunt teaches young Inuit to be patient, courageous, tenacious, bold under pressure, reflective to withstand stress, to focus and carry out a plan to achieve a goal. . . . Hunting and eating the animals we hunt are spiritual and cultural activities.<sup>130</sup>

In 2005, a transnational indigenous peoples' organization, the Inuit Circumpolar Conference ("ICC"), chose another legal pathway to seek protection of its members' subsistence rights, which are threatened by global warming. The ICC is a non-governmental organization that represents the Inuit people, whose members reside in

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reduction in emissions of mercury when applied to the listed category as a whole." *Id.* The bill also provides for the establishment of a monitoring and reporting program for EGUs' mercury emissions. *See id.* Other provisions of the bill target emissions of sulfur dioxide and nitrogen oxides. *See id.* § 3. An earlier bill, H.R. 821 (the Mercury Emissions Reduction Act), introduced in the House of Representatives in February 2009, would amend the CAA to require that mercury emissions from EGUs be subject to MACT standards for HAPs under Section 112 of the CAA. H.R. 821, 111th Cong., (2009). H.R. 821's provisions would require the Administrator of EPA to promulgate MACT standards for mercury emissions from EGUs to take effect one year after enactment. *Id.* § 3. Other mercury-related legislation proposed in 2009 included H.R. 1841 (the Acid Rain and Mercury Control Act), introduced in April 2009, which is aimed at reducing sulfur dioxide, nitrogen oxide, and mercury emissions, and S. 2913 (the Comprehensive National Mercury Monitoring Act), introduced in December 2009, which would establish a national mercury monitoring program to track mercury in the atmosphere, in water, and in fish and wildlife. *See* H.R. 1841, 111th Cong., (2009); S. 2913, 111th Cong., (2009).

<sup>130</sup> Inuit Petition, *supra* note 3, at 15 (quoting Remarks by Sheila Watt-Cloutier, Chair of the Inuit Circumpolar Conference, The World Bank Environmentally and Socially Sustainable Development Week, Washington, DC, (March 30, 2005), available at <http://www.inuitcircumpolar.com/index.php?ID=290&Lang=En>).

the United States, Canada, Greenland, and Russia.<sup>131</sup> The pathway chosen by the ICC rises above the level of national governments to appeal to an international body, in reliance on internationally recognized legal principles. The choice of this pathway reflects the cross-border character of the threat at issue. This choice also emphasizes the nature of indigenous peoples themselves: they are political entities that pre-date the existence of contemporary nation-states, whose members may reside in more than one nation-state.

In December 2005, the ICC filed a petition with the Inter-American Commission on Human Rights (“IACHR”), seeking the IACHR’s assistance in obtaining relief from human rights violations resulting from climate change, which it attributed to acts and omissions of the United States.<sup>132</sup> The IACHR, an autonomous body within the Organization of American States (“OAS”), examines petitions alleging that an OAS member State, such as the United States, has violated the petitioner’s human rights.<sup>133</sup> More specifically, the IACHR considers whether the State has violated the OAS’s basic human rights document, the American Declaration of the Rights and Duties of Man (“American Declaration”).<sup>134</sup> In addition, as to those States that have ratified the more recently drafted American Convention on Human Rights (“American Convention”),<sup>135</sup> the IACHR determines whether its provisions have been violated. After processing a petition, the IACHR prepares a report setting out its conclusions and providing recommendations to the State concerned.<sup>136</sup>

The 150-plus page petition was submitted to the IACHR by Ms. Sheila Watt-Cloutier, an Inuk who was the Chair of the ICC. Ms. Watt-Cloutier filed the petition on behalf of herself, sixty-two other named individuals, and “all Inuit of the arctic regions of the United States of America and Canada who have been affected by the impacts of climate change.”<sup>137</sup> The Petition alleged a number of violations of various Inuit rights resulting from global warming, including rights with respect to hunting and other subsistence activities.

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<sup>131</sup> See Inuit Circumpolar Council, Welcome, <http://www.inuitcircumpolar.com>; see also Inuit Petition, *supra* note 3, at 9.

<sup>132</sup> See generally Inuit Petition, *supra* note 3.

<sup>133</sup> The Commission’s work is described at its website. See Organization of American States, Human Rights, <http://www.oas.org/OASpage/humanrights.htm> (last visited Aug. 15, 2010).

<sup>134</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948).

<sup>135</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

<sup>136</sup> See Inter-American Commission on Human Rights, The Human Rights Situation of the Indigenous People in the Americas, OEA/Ser.L/V/II.108, doc. 62 (2000), § 2.D., in DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS LAW, POLICY, AND PROCESS 757 (4th ed. 2009). In the case of States that (unlike the United States) have accepted the Inter-American Court of Human Rights’ compulsory jurisdiction, the IACHR could decide to bring the matter to the Court. See *id.* at 757 (“[I]f the State in question has accepted the compulsory jurisdiction of the Inter-American Court, the Commission may decide to submit the case for adjudication.”).

<sup>137</sup> Inuit Petition, *supra* note 3, at 1.

*A. The Inuit and Climate Change*

The Inuit have developed an intimate relationship with their surroundings, using their understanding of the arctic environment to develop a culture, including tools, techniques, and knowledge, that has enabled them to subsist and thrive on the scarce resources available. All aspects of the Inuit's lives depend on their culture, and the continued viability of the culture depends in turn on the Inuit's reliance on the ice, snow, land and weather conditions in the Arctic. . . . Inuit observations and scientific studies [have] . . . document[ed] substantial and lasting alterations in the physical environment . . . due to global climate change.<sup>138</sup>

The Inuit, whose collective name means “the people” in Inuktitut, are a linguistic and cultural group descended from the Thule people whose traditional territory spans four countries: northern and western Alaska in the United States, northern Canada, Greenland, and Chukotka in the Federation of Russia.<sup>139</sup> The Petition explained that while there are “local characteristics and differences within the broad ethnic category of ‘Inuit,’” all Inuit share a culture that is “characterized by dependence on subsistence harvesting in both the terrestrial and marine environments.”<sup>140</sup> Although the Inuit today have a mixed subsistence- and cash-based economy, the Inuit still “depend heavily on the subsistence harvest for food.”<sup>141</sup> Their traditional “country food” offers far better nutrition than “store-bought” food imported into their communities.<sup>142</sup> Moreover, the benefits of participating in subsistence harvesting activities are not limited to dietary and health benefits. The harvesting activities also provide the Inuit with “spiritual and cultural affirmation, and [are] crucial for passing skills, knowledge and values from one generation to the next, thus ensuring cultural continuity and vibrancy.”<sup>143</sup>

The Petition noted the broad consensus among scientists that global warming—“an average increase in the Earth's temperature, causing changes in climate that lead to a wide range of adverse impacts on plants, wildlife, and humans”<sup>144</sup>—results from “the increase in concentrations of greenhouse gases in the atmosphere as a result of human activity.”<sup>145</sup> The United States, as “the world's largest emitter of greenhouse gases, . . . bears the greatest responsibility among nations for causing global

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<sup>138</sup> *Id.* at 35.

<sup>139</sup> *Id.* at 1. For a more detailed discussion of Inuit life and culture, see *id.* at 13-20.

<sup>140</sup> *Id.* at 1. Other cultural characteristics held in common are “sharing of food, travel on snow and ice, a common base of traditional knowledge, and adaptation to similar Arctic conditions.” *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* See also *infra* notes 204-08 and accompanying text discussing the role of hunting in cultural continuity.

<sup>144</sup> Inuit Petition, *supra* note 3, at 1.

<sup>145</sup> *Id.* For a discussion of how human activity has caused global warming, see *id.* at 27-33.

warming” and should be held accountable for the resulting violations of the human rights of the Inuit.<sup>146</sup>

The Petition drew upon the recently completed Arctic Climate Impact Assessment (“ACIA”), which resulted from the work of over 300 scientists over a four-year period. The ACIA concluded that:

The Arctic is extremely vulnerable to observed and projected climate change and its impacts. The Arctic is now experiencing some of the most rapid and severe climate change on Earth. Over the next 100 years, climate change is expected to accelerate, contributing to major physical, ecological, social, and economic changes, many of which have already begun.<sup>147</sup>

Moreover, the Inuit way of life, which is closely attuned to the physical environment, is likely to be seriously disrupted, and perhaps even destroyed, by the reduction in sea ice resulting from global warming. Sea ice is crucial for Inuit travel to traditional locations for hunting and harvesting activities.<sup>148</sup>

A study of climate change in Alaska sponsored by the U.S. Global Change Research Program highlighted the likely impacts of global warming on the health of subsistence communities like those of the Inuit:

Climate change is likely to have significant impacts on key . . . terrestrial species availabl[e] for subsistence purposes. *At a minimum* . . . caribou, moose, and various species of waterfowl are likely to undergo shifts in range and abundance . . . . Changes in diet [and] nutritional health . . . can also be expected.<sup>149</sup>

In short, the indigenous peoples of the Arctic are on the frontline when it comes to experiencing the effects of climate change, and consequently their subsistence activities are already under serious threat.

The Petition discussed at great length the dependence of Inuit life and culture on the Arctic environment; the damage that global warming caused by greenhouse gas

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<sup>146</sup> *Id.* at 1. For a discussion of the United States’ responsibility for global warming and its damaging effects on the Inuit, see *id.* at 68-69. Since the filing of the petition, the United States has been overtaken by China as the largest emitter of greenhouse gases. Keith Bradsher, *U.S. Officials Press China on Climate*, N.Y. TIMES, July 16, 2009, at A10. For a discussion of the damage to the Arctic environment caused by global warming resulting from human emissions of greenhouse gases, and of the severity of global warming in the Arctic in particular, see the Inuit Petition, *supra* note 3, at 20-34. The rises in global temperatures and the consequent climate changes are demonstrated by global temperature trends and by key indicators such as melting sea ice; thawing permafrost; rising sea levels; melting ice sheets and glaciers; and alterations in species and habitat. See *id.* at 21-27.

<sup>147</sup> Arctic Climate Impact Assessment, *Impacts of a Warming Arctic: Final Overview Report 10 (“ACIA Overview”)* (Cambridge University Press 2004), available at <http://www.amap.no/acia/>.

<sup>148</sup> See Inuit Petition, *supra* note 3, at 2.

<sup>149</sup> ALASKA REGIONAL ASSESSMENT GROUP, *PREPARING FOR A CHANGING CLIMATE: THE POTENTIAL CONSEQUENCES OF CLIMATE VARIABILITY AND CHANGE* (1999) at 19, available at <http://www.besis.uaf.edu/regional-report/regional-report.html>, quoted in Inuit Petition, *supra* note 3, at 55.

emissions is doing to the Arctic environment; the consequent harm to Inuit life and culture; and the role attributed to the United States in causing global warming. The effects of global warming violate Inuit human rights that are protected by the American Declaration, the Petition argued, by violating the Inuit's right to enjoy the benefits of their culture; their right to use and enjoy the lands they have traditionally used and occupied and their personal property; their right to preservation of health and to life, physical integrity, and security; their right to their own means of subsistence; and their right to residence and movement.<sup>150</sup> While the various rights violations are in many ways intertwined, the focus of the discussion below is on the Petition's allegations that are specifically related to subsistence rights and on the legal principles on which the ICC based its subsistence-related claims.

*B. International Legal Principles Recognizing Subsistence Rights*

The ICC's Petition based the Inuit's claim to the right to their own means of subsistence on a number of express rights in the American Declaration, arguing that this right "is inherent in and a necessary component of the American Declaration's rights to property, health, life, and culture in the context of indigenous peoples."<sup>151</sup> As recognized by the IACHR and the Inter-American Court of Human Rights, when the rights contained in the American Declaration are applied to indigenous peoples, "the unique context of indigenous culture and history" must be taken into account.<sup>152</sup> Because of its OAS membership and acceptance of the American Declaration, the United States is obligated to protect the rights of the Inuit that are under threat.<sup>153</sup>

The Petition also relied on the subsistence rights provisions of the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR")<sup>154</sup> as further support for the Inuit claims. Both the ICCPR and the ICESCR provide that "[i]n no case may a people be deprived of its own means of subsistence."<sup>155</sup> The Petition argued that the United

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<sup>150</sup> See, e.g., Inuit Petition, *supra* note 3, at 5-6 (summarizing the rights that are alleged to be violated). For an extensive discussion of the various kinds of harm to Inuit life and culture by global warming, see *id.* at 35-67.

<sup>151</sup> *Id.* at 92.

<sup>152</sup> *Id.* at 70.

<sup>153</sup> See *id.* at 5. The Petition stated, "Both the Inter-American Court and the Inter-American Commission on Human Rights have held that, although originally adopted as a declaration and not as a legally binding treaty, the American Declaration is today a source of international obligations for the OAS member States." *Id.* at 70 (citing Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Inter-Am. Ct. H.R., (ser. A) No. 10, ¶¶ 35, 45 (July 14, 1989)).

<sup>154</sup> See Inuit Petition, *supra* note 3, at 92.

<sup>155</sup> International Covenant on Civil and Political Rights ("ICCPR"), art. 1(2), Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171 (ratified by U.S. on June 8, 1992); International Covenant on Economic, Social and Cultural Rights ("ICESCR"), Dec. 16, 1966, art. 1(2), 6 I.L.M. 360, 365, 993 U.N.T.S. 3 (signed by U.S. on Oct. 5, 1977). Furthermore, Article 27 of the ICCPR provides more generally that members of minority groups "shall not be denied the right, in community with other members of their group, to enjoy their own culture." The ICESCR contains a similar provision, in art. 12 6 I.L.M. 360, 365, 993 U.N.T.S. 3, art. 15(1)

States, as a party to the ICCPR, is bound by its principles, and as a signatory to the ICESCR, must act consistently with the principles of that agreement as well.<sup>156</sup>

The Inuit's claim is also supported by the protection for the right of a people to their own means of subsistence contained in International Labour Organization Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries ("Convention 169").<sup>157</sup> Convention 169 provides that indigenous peoples' right to use lands they do not exclusively occupy, but "to which they have traditionally had access for their subsistence and traditional activities," is to be safeguarded.<sup>158</sup> Convention 169 further states that indigenous peoples' "subsistence economy and traditional activities . . . such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development."<sup>159</sup> More generally, as to the lands that indigenous peoples traditionally occupy, which presumably would be the location of many subsistence activities, their rights of ownership and possession are to be recognized.<sup>160</sup>

The Petition also referred to the U.N. Declaration on the Rights of Indigenous Peoples, then in draft form, and to its recognition of the subsistence rights of indigenous peoples in particular.<sup>161</sup> The Declaration, as adopted by the U.N. General Assembly in September 2007, provides the same assurance as did the Draft Declaration cited by the Petition: indigenous peoples have the right "to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities."<sup>162</sup> Similar recognitions of

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(signed by U.S. on Oct. 5, 1977) ("The States Parties to the present Covenant recognize the right of everyone [t]o take part in cultural life.").

<sup>156</sup> Inuit Petition, *supra* note 3, at 5. The United States has not yet become a party to the ICESCR.

<sup>157</sup> Inuit Petition, *supra* note 3, at 93 (citing Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), June 27, 1989, adopted by the International Labour Organization's General Conference in 1989 and in force since 1991, art. 14.1., 23.1, ILO Official Bull. 59, *reprinted in* 28 I.L.M. 1382, *available at* <http://www.un-documents.net/c169.htm>).

<sup>158</sup> Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), June 27, 1989, adopted by the International Labour Organization's General Conference in 1989 and in force since 1991, art. 14.1. ILO Official Bull. 59, *reprinted in* 28 I.L.M. 1382, *available at* <http://www.un-documents.net/c169.htm>.

<sup>159</sup> *Id.* art. 23.1.

<sup>160</sup> *Id.* art. 1.

<sup>161</sup> Inuit Petition, *supra* note 3, at 92. The petition cited Article 21 of the Draft U.N. Declaration on the Rights of Indigenous Peoples, stating that indigenous peoples have the right "to be secure in the enjoyment of their own means of subsistence and development." *Id.* at 93. 451 U.N. Econ. & Soc. Council, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Draft United Nations Declaration on the Rights of Indigenous Peoples, art. 21, *in* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session 105 *et seq.*, E/CN.4/Sub.2/1994/56.

<sup>162</sup> United Nations Declaration on the Rights of Indigenous Peoples art. 20, G.A. Res. 61/295, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007)

indigenous peoples' subsistence rights are included in the OAS's own Proposed Declaration on the Rights of Indigenous Peoples.<sup>163</sup> The Proposed Declaration also states that "[i]ndigenous peoples have the right to . . . autonomy or self-government with regard to . . . land and resource management, [and] the environment."<sup>164</sup> Because an indigenous people's right to its own means of subsistence is tied to the people's right to exercise control over natural resources and the physical environment, deprivation of control over natural resources and the environment "necessarily deprives indigenous peoples of their own means of subsistence."<sup>165</sup> The IACHR itself has noted that the basic principles included in many of the Proposed Declaration's provisions are not novel, but rather "reflect general international legal principles developing out of and applicable inside and outside of the inter-American system and to this extent are properly considered in interpreting and applying the provisions of the American Declaration in the context of indigenous peoples."<sup>166</sup> On the basis of the foregoing, the Petition concluded that where indigenous peoples like the Inuit are concerned, a people's right to its own means of subsistence is protected by international law and is an "intrinsic part of the rights established in the American Declaration."<sup>167</sup>

The subsistence-related provisions of the documents described above have been relied upon by other international human rights bodies addressing subsistence rights claims.<sup>168</sup> The U.N. Human Rights Committee's 2002 Concluding Observations to Sweden, addressing the rights of the indigenous Sami people, for example, recommended that Sweden take steps to give the Sami "greater influence in decision-making affecting their natural environment and their means of

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[hereinafter "Indigenous Rights Declaration"], available at <http://www.unhcr.org/refworld/docid/471355a82.html>.

<sup>163</sup> Article XVIII of the Proposed Declaration provides that indigenous peoples have the "right to an effective legal framework for the protection of their rights . . . with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence." Inter-Am. C.H.R., Proposed American Declaration on the Rights of Indigenous Peoples, art. 18.4, OEA/Ser.L/V/II.110, Doc. 22 (Mar. 1, 2001), available at <http://cidh.org/Indigenas/Indigenas.en.01/index.htm>.

<sup>164</sup> *Id.* art. 15.

<sup>165</sup> Inuit Petition, *supra* note 3, at 92.

<sup>166</sup> See, e.g., Case of Mary and Carrie Dann ("Dann"), Case 11.140 (United States), Inter-Am. C.H.R., Report No. 75/02, ¶ 129 (2002), available at <http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm>.

<sup>167</sup> Inuit Petition, *supra* note 3, at 93. See also *id.* at 92 ("In the context of indigenous peoples, the rights to self-determination and one's own means of subsistence have become recognized principles of international human rights law."). This recognition is also reflected in the United Nations Development Group Guidelines on Indigenous Peoples' Issues. See United Nations Development Group Guidelines on Indigenous Peoples' Issues (2008), available at [http://pro169.org/res/materials/en/general\\_resources/UNDG%20Guidelines,%20indigenous%20peoples.pdf](http://pro169.org/res/materials/en/general_resources/UNDG%20Guidelines,%20indigenous%20peoples.pdf).

<sup>168</sup> Inuit Petition, *supra* note 3, at 92-93.

subsistence.”<sup>169</sup> In 1999, commenting on Canada’s failure to implement aboriginal land and resource allocation recommendations, the Human Rights Committee cited Canada’s obligations under Article 1 of the ICCPR and the ICESCR, which provide that “peoples . . . may not be deprived of their own means of subsistence.”<sup>170</sup>

The U.N. Human Rights Committee has also recognized the link between protecting an indigenous people’s means of subsistence and the people’s right to culture.<sup>171</sup> In the *Lubicon Lake Band* case, the Lubicon Lake Band of Canada claimed that Canada’s failure to protect the Band’s culture from the impacts of development activities violated the Band’s right to self-determination.<sup>172</sup> The Committee stated that Canada’s actions violated the right to culture enshrined in the ICCPR because they “threaten[ed] the [subsistence] way of life of the Lubicon Lake Band.”<sup>173</sup>

Finally, the United States has also recognized the importance of the subsistence way of life to Inuit survival. In granting preference to subsistence uses of fish and wildlife in Alaska in legislation, the U.S. Congress noted that “the continuation of the opportunity for subsistence uses . . . is *essential* to Native physical, economic, traditional, and *cultural existence*.”<sup>174</sup>

### C. *The Effects of Global Warming on Inuit Hunting and Other Subsistence Rights*

The Petition documented the ways in which climate change in the Arctic is “making the Inuit’s subsistence harvest more dangerous, more difficult and less reliable” and “is gradually and steadily destroying the Inuit’s means of subsistence.”<sup>175</sup> The Inuit’s right to their own means of subsistence has been violated by deprivation of “their ability to rely exclusively on the subsistence

<sup>169</sup> *Id.* at 92 (citing Concluding Observations: Sweden 24/04/2002, U.N. HRC, 74th Sess., ¶ 15, U.N. Doc. CCPR/CO/74/SWE (2002) (citing ICCPR, arts. 1, 25, and 27), *available at* <http://www.unhchr.ch/tbs/doc.nsf/0/5d974f7dcf82864dc1256b960038d029?Opendocument>).

<sup>170</sup> Concluding Observations: Canada 07/04/99, U.N. HRC, 65th Sess., ¶ 8, U.N. Doc. CCPR/C/79/Add.105 (1999) (*citing* ICCPR, art. 1(2)) (“In no case may a people be deprived of its own means of subsistence.”). The language in Article 1 of the ICESCR is identical.

<sup>171</sup> Inuit Petition, *supra* note 3, at 92.

<sup>172</sup> *Bernard Ominayak and the Lubicon Lake Band v. Canada* (“Lubicon Lake Band”), U.N. HRC, 45th Sess., Supp. No. 40, at 27, U.N. Doc. CCPR/C/38/D/167/1984 (1990), ¶ 32.2.

<sup>173</sup> *Id.* ¶ 33. The Committee declined, however, to consider the claimed violation of the right to self-determination on jurisdictional grounds. The Petition explained that “[t]he Committee has jurisdiction over complaints by individuals under the Optional Protocol to the ICCPR, but the right to self-determination, including a people’s right to their own means of subsistence, is a collective right, over which the Committee decided it did not have jurisdiction.” Inuit Petition, *supra* note 3, at 93 n.592. The Committee noted further, however, that there is “no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.” *See id.* (quoting *Lubicon Lake Band*, *supra* note 172, ¶ 32.1).

<sup>174</sup> Inuit Petition, *supra* note 3, at 77 (quoting 16 U.S.C. § 3111(1) (2006)) (emphasis added in Petition). The Petition cited the Alaska National Interest Lands Conservation Act, which was enacted “to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.” 16 U.S.C. § 3111(4).

<sup>175</sup> Inuit Petition, *supra* note 3, at 93.



harvest,” resulting from global warming-induced changes in ice and snow, the weather, the seasons, and the land.<sup>176</sup>

### 1. Changes Affecting the Ability to Travel

Because travel is an essential component of the Inuit’s hunting and other subsistence activities, the loss of safe and reliable means of travel because of global warming deprives the Inuit of their means of subsistence.<sup>177</sup> Changes in ice and snow conditions are among the commonly observed effects of global warming. The ice is, for the Inuit, “a supporter of life. It brings the sea animals from the [N]orth . . . and in the fall it also becomes an extension of [Inuit] land.”<sup>178</sup> Travel over ice to engage in subsistence harvesting has become more dangerous and more difficult. Ice now freezes hard enough for safe travel later in the year, and once it freezes it is thinner than it once was.<sup>179</sup> Thinner ice is more dangerous to travel on, melts earlier and breaks up more suddenly in the spring,<sup>180</sup> and can make harvesting of bowhead whales—an activity which requires solid ice at least six feet thick—more dangerous and at times impossible.<sup>181</sup> Retreating pack ice has also negatively affected subsistence harvesting of seals and walrus. Hunters now have to go miles out on the ice in search of game, and many come back without having obtained the needed meat and blubber.<sup>182</sup> Later freezes and earlier, more sudden thaws have significantly shortened the winter ice travel (and hunting) season, as hunters must wait until later in the winter to travel and must stop travel earlier in the spring.<sup>183</sup>

Deteriorating snow conditions make travel over snow more dangerous and inconvenient.<sup>184</sup> Snow, like ice, now arrives later and melts earlier and more suddenly, hampering the Inuit’s travel over snow by sled and by snowmobile.<sup>185</sup> Sudden thaws can strand hunters who are traveling by either means.<sup>186</sup> Climate change has also induced shortages of the deep, dense, granular snow that is needed to build igloos. Building igloos for shelter while traveling to hunt is “a unique and important practice that is part of Inuit culture,” and this practice has increasingly

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 39.

<sup>179</sup> *See id.* at 36.

<sup>180</sup> *See id.* at 36, 40.

<sup>181</sup> *See id.* at 40 (explaining that thick ice is needed to bear the weight of the whale, and that hunters are resorting to catching smaller whales where ice thickness is inadequate, leading to the harvesting of less whale meat).

<sup>182</sup> *See id.* at 41 (describing the distances that hunters now have to travel and the shorter period of time for hunting).

<sup>183</sup> *See id.* at 43.

<sup>184</sup> *See id.* at 41.

<sup>185</sup> *See id.* at 43, 94.

<sup>186</sup> *See id.* at 44. Similarly, lack of snow can force Inuit to use boats to reach fish camps, which makes them more vulnerable to being weather bound by wind conditions. *See id.* at 43.

“been replaced by the use of uninsulated, more cumbersome tents and fixed-location cabins.”<sup>187</sup>

Climate change has also affected Inuit navigation and weather forecasting capabilities. The orientation of snowdrifts has changed, which makes navigation using them unreliable, thus “depriving the Inuit of one of the few navigation tools consistently available” to them<sup>188</sup> in a territory that lacks consistent landmarks.<sup>189</sup> The impact of such a change is comparable to “the impact on ancient mariners had the stars suddenly changed their positions in the sky.”<sup>190</sup> Complicating the picture further is the unpredictable weather, which has deprived the Inuit of their ability to forecast the weather and to plan safe travel. The new inability to forecast the weather accurately has led to cancellation of trips, stranding of travelers, and the need for more cumbersome equipment.<sup>191</sup>

## 2. Changes Affecting Harvested Foods and Their Storage

Climate change has crippled the Inuit subsistence harvest through its effect on the foods that they harvest. Land animals are fewer in number and are less healthy, because their winter food sources now lie underneath an impenetrable layer of ice<sup>192</sup> caused by the autumn freeze-thaw-freeze pattern that now exists.<sup>193</sup> Harvest activities focused on ice-dependent animals have also become less fruitful because of the disappearance of these animals’ habitat and food sources. Like the land animals, the ice-dependent animals are less healthy and declining in numbers, trends which are expected to accelerate.<sup>194</sup> Remaining animals are forced to change their locations and habits, rendering them less accessible and more difficult to locate.<sup>195</sup> These factors, combined with the impacts on the ability to travel discussed above, mean that it is sometimes simply impossible for the Inuit to hunt these animals.

Other subsistence resources, such as certain plant species, have also been adversely affected by climate change. Berries and wild greens have decreased both in quantity and quality.<sup>196</sup> Wild greens grow up fast and then wither from the warmer summers’ sun and heat.<sup>197</sup> Decreases in spring and summer precipitation

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<sup>187</sup> *Id.* at 77.

<sup>188</sup> *Id.* at 94.

<sup>189</sup> *See id.* at 77.

<sup>190</sup> *Id.*

<sup>191</sup> *See id.* at 94.

<sup>192</sup> *See id.* at 46, 94.

<sup>193</sup> *See id.* at 94.

<sup>194</sup> *See id.* at 45-46, 94.

<sup>195</sup> *See id.* at 94.

<sup>196</sup> *See id.* at 54.

<sup>197</sup> *See id.* (noting these changes and contrasting current harvests with the larger greens harvests of the past).

have caused berries to be smaller and scarcer, while warmer weather has caused them sometimes to dry out before they can be harvested.<sup>198</sup>

Finally, melting permafrost and changing weather patterns are forcing changes in traditional methods of food storage and hide preparation. Permafrost has traditionally been used as a convenient resource for meat storage, but permafrost melt has made this method less feasible and has increased the risk of food-borne illnesses.<sup>199</sup> Higher temperatures have made processing animal hides more difficult, and resulted in some skins ending up too dry or easily torn.<sup>200</sup>

As a result of travel and food source problems due to climate change, the Inuit are no longer able to rely exclusively on the subsistence harvest for their survival. Climate change has thus deprived the Inuit of their means of subsistence. Under the pressures of climate change, the traditional Inuit diet, “which for millennia has consisted of wild meat and a few wild plants,” is being replaced by “a more western store-bought diet with all of its inherent health problems.”<sup>201</sup> The Inuit have already noticed deterioration in their health as their diet has changed,<sup>202</sup> including an increase in the incidence of diabetes.<sup>203</sup> One Inuit man commented, “It would be nice for us to have all the native food that we can hunt and prepare because these are healthy foods . . . .”<sup>204</sup> Inuit mental health has also been affected by the decreased hunting opportunities, as Eugene Brower explained in the Petition: “There’s a lot of anxieties and angers that are being felt by some of the hunters that no longer can go and hunt. We see the change, but we can’t stop it, we can’t explain why . . . our way of life is changing up here.”<sup>205</sup>

### 3. Changes Affecting the Accuracy of Traditional Knowledge and Cultural Continuity

Traditional Inuit knowledge is passed to younger generations by Inuit elders, the stewards of Inuit culture. This knowledge is becoming less useful, however, because of the rapid changes in the Arctic environment that render elders’ knowledge about ice, snow, weather, and navigation outdated.<sup>206</sup> For example, the location of ice that

<sup>198</sup> *See id.* Berries that survive until the fall may end up spoiled when sudden heavy rains prevent their harvest. *See id.*

<sup>199</sup> *See id.* at 50. In addition, fish is overcooked by the more intense sunlight when laid on rocks when preparing dried fish and drying racks have been wiped out by erosion and by the severe storms that the Inuit now experience. *See id.* at 60; *see also id.* at 53 (describing the loss of drying racks by erosion and storms).

<sup>200</sup> *See id.* at 60-61.

<sup>201</sup> *Id.* at 6; *see also id.* at 62-63 (associating high blood pressure, diabetes, cancer, obesity, and cardiovascular disease with a Western diet).

<sup>202</sup> *See id.* at 55.

<sup>203</sup> *See id.* at 62.

<sup>204</sup> *Id.* at 55 (quoting Stanley Tocktoo).

<sup>205</sup> *Id.* at 64 (quoting Eugene Brower of Barrow). Additional travel dangers; changes in the conditions and appearance of the land, flora, and fauna; and destruction of homes and the accompanying relocation of communities are also affecting Inuit mental health. *See id.* at 63-64.

<sup>206</sup> *See id.* at 6, 78.

is safe to travel on has become harder to predict, as one Inuk woman described: ““You know it is scary because we can no longer depend on . . . traditional knowledge, where it was safe to travel on these areas, [and] now we don’t know.””<sup>207</sup> As elders’ knowledge becomes less useful, and as hunting trips become shorter in duration and fewer in number, “less time [is] spent in engaging in important cultural practices and teaching younger generations the intricacies of those practices.”<sup>208</sup>

Thus, the adverse impacts of climate change are not limited to its direct impacts on the food that has supported the Inuit for thousands of years. By lessening the opportunities for generations to interact with each other in traditional activities, and by rendering outdated the knowledge that elders transmit to younger generations, climate change also has adversely impacted the culture that has long sustained the Inuit. If action is not taken to address climate change, “[t]he subsistence culture central to Inuit cultural identity . . . may cease to exist.”<sup>209</sup>

#### *D. The Relief Sought by the ICC and the IACHR’s Response*

The ICC argued in the Petition that the United States has “repeatedly declined to take steps to regulate and reduce its emissions of the gases responsible for climate change,”<sup>210</sup> despite the knowledge that “this course of action is radically transforming the arctic environment upon which the Inuit depend for their cultural survival.”<sup>211</sup> Moreover, even though the United States has ratified the U.N. Framework Convention on Climate Change, it has explicitly rejected the Kyoto Protocol to the U.N. Framework Convention, thus undercutting efforts to secure agreement to curtail greenhouse gas emissions.<sup>212</sup>

The ICC argued that the United States is responsible for the enumerated violations of its subsistence and other rights<sup>213</sup> and sought the IACHR’s assistance “in obtaining relief from human rights violations resulting from the impacts of global warming and climate change caused by acts and omissions of the United States.”<sup>214</sup> The ICC requested that the IACHR visit the Arctic to confirm the harms and rights

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<sup>207</sup> *Id.* at 39-40 (quoting an Inuk woman from Baker Lake in Nunavut, Canada). Similarly, weather forecasting based on observing cloud formations, a part of Inuit traditional knowledge, is no longer reliable. *See id.* at 56-57.

<sup>208</sup> *Id.* at 78.

<sup>209</sup> *Id.* at 5.

<sup>210</sup> *Id.* at 6. *See also id.* at 68-69 (discussing the contribution of the United States to global warming).

<sup>211</sup> *Id.* at 6-7.

<sup>212</sup> *Id.* at 6. *See also id.* at 97-98 (discussing the Framework Convention).

<sup>213</sup> The Petition claimed that it was not necessary to comply with the usual requirement of exhaustion of domestic remedies prior to consideration of admissibility by the Commission, under a recognized exception to the exhaustion requirement: “the U.S. legal system does not provide an effective remedy for the human rights violations suffered by the Inuit as a result of U.S. actions and omissions related to climate change.” *Id.* at 116. *See also id.* at 112-16 (describing the lack of effective protections and remedies under U.S. law with respect to the Inuit’s subsistence and other rights).

<sup>214</sup> *Id.* at 1.

violations described in the Petition, hold a hearing to investigate the claims,<sup>215</sup> and prepare a detailed report declaring that the United States is responsible for the identified rights violations.<sup>216</sup> Finally, the ICC requested that the IACHR recommend that the United States take a number of actions, including the adoption of mandatory measures to limit greenhouse gas emissions and the establishment and implementation, in coordination with the Inuit, of “a plan to protect Inuit culture and resources, including, *inter alia*, the land, water, snow, ice, and plant and animal species used or occupied by the . . . affected Inuit; and mitigate any harm to these resources caused by U.S. greenhouse gas emissions.”<sup>217</sup>

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<sup>215</sup> *Id.* at 118.

<sup>216</sup> *See id.*

<sup>217</sup> *Id.* The Petition also requested that the IACHR report recommend that the United States “cooperate in efforts of the community of nations—as expressed, for example, in activities relating to the United Nations Framework Convention on Climate Change—to limit . . . [greenhouse gas] emissions at the global level; . . . [t]ake into account the impacts of U.S. greenhouse gas emissions on the Arctic and affected Inuit in evaluating and before approving all major government actions; . . . [e]stablish and implement, in coordination with Petitioner and the affected Inuit communities, a plan to provide assistance necessary for Inuit to adapt to the impacts of climate change that cannot be avoided; [and] . . . [p]rovide any other relief that the Commission considers appropriate and just.” *Id.*

In November 2006, the IACHR rejected the ICC's petition without prejudice.<sup>218</sup> In response, Sheila Watt-Cloutier requested that the IAHCR hold a hearing to assist it "in exploring and better understanding the relationship between global warming and human rights."<sup>219</sup> The request noted the adverse impacts of global warming, and accompanying human rights impacts, in the Americas—not just on the Inuit and their subsistence rights, but also on communities and human rights in the Caribbean, Central America, and South America. Rising sea levels, and the consequent loss of land and intrusion of saltwater into freshwater resources; threats of flooding from rapid glacial melt; and increased temperatures undermine the subsistence rights, and threaten the very survival, of affected communities.<sup>220</sup> In response, the IACHR

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<sup>218</sup> See Climate Change: CIEL Representing Inuit in Human Rights Case, [http://www.ciel.org/Climate/Climate\\_Inuit.html](http://www.ciel.org/Climate/Climate_Inuit.html) (last visited Aug. 15, 2010). See also Andrew C. Revkin, *Inuit Climate Change Petition Rejected*, N.Y. TIMES, Dec. 16, 2006, at A9 (noting that the IACHR declined to rule on the petition and that the IACHR told the ICC that "there was insufficient evidence of harm"); John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 192 (2009) (quoting Letter from Ariel E. Dulitzsky, Assistant Executive Sec'y, Inter-American Comm'n on Human Rights, to Paul Crowley, Legal Representative of the Inuit (Nov. 16, 2006), that said "the information provided does not enable us to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration"). A similar response was made to another indigenous people's global warming claim, which was made against a corporate defendant in U.S. federal court. In *Native Village of Kivalina v. ExxonMobil Corporation*, an Alaska native village sued ExxonMobil and a number of other oil, energy, and utility companies for their contributions to global warming by emissions of greenhouse gases. Global warming has melted the Arctic Sea ice that previously provided protection from winter storms. The Army Corps of Engineers had concluded that because of the resulting massive erosion, the Village must be relocated. The Village sought monetary damages for the defendants' contributions to global warming, which, the plaintiff argued, constitutes a public nuisance. See Complaint for Damages at 1-2, *Native Vill. of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. C 08-1138), available at <http://www.climatelaw.org/cases/country/us/kivalina/Kivalina%20Complaint.pdf>. In September 2009, the court granted the defendants' motion to dismiss the claim for lack of subject matter jurisdiction. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). The court held that the plaintiffs' claim for nuisance was barred by the political question doctrine and by their lacking Article III standing (based on their inability to establish causation, i.e., a sufficient connection between the defendants' conduct and the injury alleged by the plaintiffs). See *id.* at 877 (meaning of the causation element of the Article III standing test); *id.* at 882-83 (basis for the claim being barred). The court expressed disagreement with a 2009 Second Circuit decision, *Connecticut v. American Electric Power Company*, 582 F.3d 309 (2d Cir. 2009), holding that the political question doctrine did not bar a federal common law nuisance suit by the plaintiffs, which included states and private entities, against greenhouse gas emitters. See *id.* at 875. The court also disagreed with the Second Circuit's analysis of the Article III standing causation element. See *id.* at 880 n.7.

<sup>219</sup> See Letter from Sheila Watt-Cloutier, Martin Wagner (Managing Attorney, Earthjustice) and Daniel Magraw (President, Center for International Environmental Law) to Santiago Cantón, Executive Sec'y, Inter-American Comm'n on Human Rights, at 1 (Jan. 15, 2007), available at [http://www.ciel.org/Publications/IACHR\\_Letter\\_15Jan07.pdf](http://www.ciel.org/Publications/IACHR_Letter_15Jan07.pdf) [hereinafter "Watt-Cloutier Letter"].

<sup>220</sup> Watt-Cloutier Letter, *supra* note 219, at 2-3.

scheduled a one-hour hearing to hear testimony related to the links between global warming and human rights.<sup>221</sup>

In her testimony at the 2007 hearing, Sheila Watt-Cloutier spoke powerfully about the experiences of the Inuit and other indigenous peoples of the Americas with the impacts of global warming on oceans, land, health, and culture. She noted that “[g]lobal warming and climate change touches on almost every aspect of an indigenous person’s life” and related the significance of one subsistence activity, hunting, to Inuit culture:

[T]he hunting culture that I come from is not only about the pursuit of animals and the technical aspect of a hunt. Hunting is, in reality, a powerful process where we prepare our young for the challenges and opportunities not only for survival on the land and ice but for life itself. . . . We are seeing this powerful training ground on the land and ice being destroyed before our very eyes.<sup>222</sup>

#### *E. Looking Forward*

I encourage the Commission to continue its work in protecting human rights. In so doing, you will protect the sentinels of climate change—the indigenous people. By protecting the rights of those living sustainably in the Amazon Basin or the rights of the Inuit hunter on the snow and ice, this commission will also be preserving the world’s environmental early warning system.<sup>223</sup>

The IACHR’s decision to decline to proceed with consideration of the ICC’s petition may discourage other indigenous peoples that are considering bringing environment- and subsistence-related claims to the IACHR or to other international or regional bodies. The IACHR’s reaction to the Petition did not, however, indicate that the IACHR is always closed, in principle, to hearing such claims. Bringing such claims to the IACHR or other similar bodies serves to emphasize the transnational character of many of the kinds of claims that indigenous peoples make while also highlighting indigenous peoples’ status as nations that transcend contemporary internationally-recognized borders. Moreover, the fact that other environment-related claims of indigenous peoples have received a more positive response in such fora suggests that indigenous peoples should continue to consider pursuing subsistence and other environment-related claims, based on international law and human rights principles, outside their domestic legal systems.

The experience of the Mayagna (Sumo) Awas Tingni Community of Nicaragua in seeking protection of subsistence rights through the inter-American human rights

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<sup>221</sup> See Letter from Ariel E. Dulitzky, Assistant Executive Sec’y, Inter-American Comm’n on Human Rights, to Sheila Watt-Cloutier, Martin Wagner (Earthjustice) and Daniel Magraw (Ctr. for Int’l Envtl. Law) (Feb. 1, 2007), *available at* [http://www.ciel.org/Publications/IACHR\\_Response\\_1Feb07.pdf](http://www.ciel.org/Publications/IACHR_Response_1Feb07.pdf).

<sup>222</sup> Earthjustice, Nobel Prize Nominee Testifies About Global Warming (Mar. 1, 2007), <http://www.earthjustice.org/news/press/007/nobel-prize-nominee-testifies-about-global-warming.html> (last visited Aug. 15, 2010).

<sup>223</sup> *Id.* (testimony of Sheila Watt-Cloutier).

system provides a case in point of the successes that some indigenous peoples have had before regional human rights bodies. The Awas Tingni Community is located in the Northern Atlantic Autonomous Region of Nicaragua's Atlantic Coast and subsists on hunting, fishing, fruit gathering, and family and communal agriculture.<sup>224</sup> The Community objected to the Nicaraguan government's decision to grant a timber concession to a foreign company to operate on the Community's communal lands.<sup>225</sup> In the eyes of government officials, Awas Tingni consent was not required because Nicaragua did not recognize the Community's title to the land at issue but instead claimed it as state land.<sup>226</sup> The Community argued that Nicaragua had violated the American Convention on Human Rights by failing to guarantee its property rights and by granting the concession.<sup>227</sup> In addition, as a party to the International Covenant on Civil and Political Rights, Nicaragua is obligated to take "protective measures when the subsistence activities or other aspects of the culture of an indigenous community might be affected by a project authorized by the State" and to ensure the effective participation of the relevant community in the decision making process.<sup>228</sup> By threatening the Community's subsistence rights, the timber concession represented "a danger to the survival and cultural integrity of the Awas Tingni Community and its members."<sup>229</sup>

The Inter-American Court of Human Rights considered the Awas Tingni complaint because Nicaragua, unlike the United States, has ratified the American Convention and acceded to the Court's jurisdiction.<sup>230</sup> In 2001, the Court ruled in favor of the Community, finding that Nicaragua had violated the provisions of the American Convention that recognize rights to private property and to judicial protection.<sup>231</sup> The Court emphasized the close ties between indigenous peoples and

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<sup>224</sup> *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R., Case No. 11.577, Judgment of Aug. 31, 2001, ¶ 103(e) [hereinafter "Awas Tingni Judgment"].

<sup>225</sup> Compl. of the Inter-American Comm'n on Human Rights, submitted to the Inter-American Court of Human Rights in the Case of the Mayagna (Sumo) Awas Tingni Community against the Republic of Nicaragua, ¶¶ 13-14 (noting the grant of a thirty year concession to Sol de Caribe, S.A. ("SOLCARSA"), a company owned by a Korean entity, to exploit tropical forests located on Awas Tingni lands) [hereinafter "Awas Tingni Complaint"]. See also *Awas Tingni Judgment*, *supra* note 224, ¶ 103(k) (noting the grant of a thirty year forest management concession to SOLCARSA).

<sup>226</sup> *Awas Tingni Complaint*, *supra* note 225, ¶ 22 (noting that Nicaragua took the position that the land was state land); see also *id.* ¶ 142 (noting that Nicaragua took the position that land that is not officially registered is state land).

<sup>227</sup> See *id.* ¶¶ 119-23 (violation of Convention by failure to guarantee property rights); see also *id.* ¶¶ 141-42 (violation by granting the concession).

<sup>228</sup> *Id.* ¶ 144 (explaining Nicaragua's obligations under Article 27 of the International Covenant on Civil and Political Rights).

<sup>229</sup> *Id.* ¶ 143.

<sup>230</sup> *Id.* ¶¶ 87-88 (discussing the Court's jurisdiction).

<sup>231</sup> *Awas Tingni Judgment*, *supra* note 224, ¶ 173. See also *id.* ¶ 127 ("[T]here is no effective procedure in Nicaragua for delimitation, demarcation, and titling of indigenous communal lands . . ."); see also *id.* ¶ 153 ("[T]he State has violated the right of the members of the Mayagna Awas Tingni Community to the use and enjoyment of their property . . ."). The relevant articles of the Convention are Articles 21 and 25. Article 21 provides as follows:



their lands, and the lands' role in sustaining the peoples physically, spiritually, and culturally:

[T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>232</sup>

The Court ruled that Nicaragua must adopt the legal measures required to create an effective mechanism to delimit, demarcate, and title indigenous communities' property.<sup>233</sup> As to the Awas Tingni Community itself, delimitation, demarcation, and titling was required to take place within a maximum of fifteen months, "with full participation by the Community and taking into account its customary law, values, customs and mores."<sup>234</sup> The Court noted that it saw the judgment as a form of reparation, but, in addition, the immeasurable "immaterial damage" that had been caused by the lack of titling of the land also necessitated reparation.<sup>235</sup> Nicaragua cancelled the logging concession,<sup>236</sup> and in December 2008, six years after the Court's judgment,<sup>237</sup> the government of Nicaragua handed over to the Community title to 73,000 hectares of its territory.<sup>238</sup>

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"Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. . . . No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law." Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), Art. 21(1)-(2). Article 25 provides that "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention . . . ." *Id.* Art. 25(1).

<sup>232</sup> Awas Tingni Judgment, *supra* note 224, ¶ 149.

<sup>233</sup> *Id.* ¶ 173(3).

<sup>234</sup> *Id.* ¶ 164. Until the titling process was complete, Nicaragua was to abstain from acts that could affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Awas Tingni Community live and carry out their activities. *Id.*

<sup>235</sup> *Id.* ¶¶ 166-67. This "moral damages" money, in the amount of \$50,000, was to be invested in "works or services of collective interest for the benefit of the Awas Tingni Community, by common agreement with the Community and under the supervision of the Inter-American Commission." *Id.* ¶ 167. The Community was also awarded \$30,000 for the expenses of the Community and their attorneys. *See id.* ¶ 169.

<sup>236</sup> *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 1028 (5th ed. 2005). Further pressure was brought to bear on the government by the World Bank, which conditioned a financial aid package to Nicaragua on the government's development of demarcation legislation. *Id.*

<sup>237</sup> A discussion of the lengthy road to titling of the land, and the stops and starts along the way, is provided at the website of the University of Arizona College of Law's Indigenous Peoples Law and Policy Program, which played a crucial role in the success of the

Decisions like the Awas Tingni decision indicate that the pathway chosen by the Inuit Circumpolar Conference, of seeking protection of subsistence rights under international instruments from a human rights body, may prove fruitful, at least in some circumstances. It is worth noting, however, the importance of the fact that in the Awas Tingni case, the claim was made against a state that had ratified the American Convention and was subject to the Inter-American Court's authority. The Inuit claim, on the other hand, was made against an OAS member that has not ratified the Convention or accepted the Inter-American Court's jurisdiction over it. In cases where the Inter-American Commission issues recommendations as to remedial measures, these recommendations may fall on deaf ears. Indeed, this was even the case with the Awas Tingni claim, which was first brought, in 1996, to the Commission, which ruled favorably on the petition and recommended remedial action in 1998.<sup>239</sup> It was only after Nicaragua continued to refuse to demarcate the lands of the Awas Tingni Community and other indigenous communities, despite domestic law provisions requiring the government to guarantee indigenous communal lands, that the Commission itself took the case to the Court.<sup>240</sup> In short, while the pathway chosen by the ICC holds promise, its potential efficacy as a route for obtaining protection of subsistence rights is greatly enhanced when a claim can result in a binding decision rather than solely a recommendation.

In February 2007, Sheila Watt-Cloutier was nominated for the Nobel Peace Prize, in recognition of her advocacy on behalf of the Inuit.<sup>241</sup> Although Ms. Watt-Cloutier was not awarded the Prize, the choice of recipients met with her approval. Reacting to the news that the Peace Prize had been awarded to the Intergovernmental Panel on Climate Change and former U.S. Vice President Al Gore, in recognition of "their efforts to build up and disseminate greater knowledge about man-made climate change, and to lay the foundations for the measures that are needed to

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Community's claim. See Indigenous Peoples Law and Policy Program, *Awas Tingni v. Nicaragua*, <http://www.law.arizona.edu/depts/iplp/advocacy/awastingni/index.cfm?page=advoc> (last visited Aug. 15, 2010).

<sup>238</sup> Inter-American Commission on Human Rights, *IACHR Hails Titling of Awas Tingni Community Lands in Nicaragua*, Dec. 18, 2008, <http://www.cidh.oas.org/Comunicados/English/2008/62.08eng.htm>; see also S. James Anaya, *Nicaragua's titling of communal lands marks major step for indigenous rights*, Indian Country Today, Jan 5, 2009, <http://www.indiancountrytoday.com/opinion/36996734.html> (last visited Aug. 15, 2010) (discussing the efforts leading up to the titling and its significance).

<sup>239</sup> See Awas Tingni Judgment, *supra* note 224, ¶ 25 (noting the Commission's conclusions as to Nicaragua's violations of the Convention and its recommendations).

<sup>240</sup> *Id.* ¶ 28. The Commission acted pursuant to Article 51 of the American Convention on Human Rights.

<sup>241</sup> Earthjustice, Inter-American Commission on Human Rights to Hold Hearing on Global Warming, Feb. 6, 2007, <http://www.earthjustice.org/news/press/007/inter-american-commission-on-human-rights-Hearing-on-Global-Warming.html> (identifying Ms. Watt-Cloutier as having been nominated on February 1, 2007, for the Nobel Peace Prize).

counteract such change,”<sup>242</sup> Ms. Watt-Cloutier commented, “[T]his year it was planet earth that got the Peace Prize.”<sup>243</sup>

Although the IACHR refused to address the Inuit Circumpolar Conference’s claims against the United States, the U.S. Congress is nonetheless examining legislation to address climate change caused by human actions. In September 2009, Senators Boxer and Kerry introduced the 800-plus-page Clean Energy Jobs and American Power Act (a companion to a bill passed by the House of Representatives in June 2009), which is designed to “create clean energy jobs, promote energy independence, reduce global warming pollution, and transition to a clean energy economy.”<sup>244</sup> It remains to be seen whether Congress has the political will to make progress toward at last addressing greenhouse gas-induced climate change.

### III. SOVEREIGNTY AND SUBSISTENCE: PROTECTING TRIBAL WILD RICE BEDS BY REGULATING RESERVATION WATER QUALITY

The wild rice is a primary component of the migration story, the history of why the Ojibwe came to this place. Wild rice harvesting has been a cornerstone of tribal culture, subsistence, and commercial enterprises for several generations.<sup>245</sup>

<sup>242</sup> Nobel Peace Prize for 2007, Oct. 12, 2007, [http://nobelprize.org/nobel\\_prizes/peace/laureates/2007/press.html](http://nobelprize.org/nobel_prizes/peace/laureates/2007/press.html) (last visited Aug. 15, 2010).

<sup>243</sup> Nobel Foundation, Nobel Peace Prize for 2007, Ole Danbolt Mjøs, Chairman of the Norwegian Nobel Committee, Presentation Speech, Dec. 10, 2007, *available at* [http://nobelprize.org/nobel\\_prizes/peace/laureates/2007/presentation-speech.html](http://nobelprize.org/nobel_prizes/peace/laureates/2007/presentation-speech.html).

<sup>244</sup> Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009). The bill was reported out of the Senate Committee on Environment and Public Works, accompanied by a 300+ page committee report, on February 2, 2010. S. Rep. No. 111-121, at 1 (2010). The companion House legislation, H.R. 2454 (the American Clean Energy and Security Act), was passed by a vote of 219-212 on June 26, 2009. *See* <http://clerk.house.gov/evs/2009/roll477.xml> (last visited Aug. 15, 2010) (reporting the final vote on the bill).

<sup>245</sup> Bad River Band of the Lake Superior Chippewa Indians, *Application for Treatment as State for Purposes of Sections 303(c) and 401 of the Clean Water Act*, at 9 (citation omitted), *available at* [http://www.epa.gov/region5/water/wqs5/pdf/badriver/badriver\\_application.pdf](http://www.epa.gov/region5/water/wqs5/pdf/badriver/badriver_application.pdf) [hereinafter “Bad River Application”]. The Ojibwe, or Chippewa, are an Algonquian people of the Upper Great Lakes area. “Ojibwe” and “Ojibway” “are variant spellings of the same Ojibwe word, meaning ‘people who script or write.’ This refers to the pictographic form of communication the Chippewa developed and which became the lingua franca of Indian trade.” Patty Loew, *Hidden Transcripts in the Chippewa Treaty Rights Struggle: A Twice Told Story. Race, Resistance, and the Politics of Power*, 21 AM. INDIAN Q. (No. 4) 713, 725 n.1 (Fall, 1997). The term “Chippewa” is presumably a European rendition of the word “Ojibwe.” *See id.* A related term is “Anishinaabe,” which can be used as a term that includes people of the Potawatomi and Ottawa, along with the Ojibwe, Nations. *See id.*; *see also* Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 487 n.2 (2006) (stating that “[t]he Anishinabeg, or Anishinabek, are the Odawa (Ottawa), the Ojibwe (Chippewa), and Bodewadimi (Potawatomi) people of the Great Lakes, known as the ‘Three Fires’ in Michigan”). Others use the term “Anishinaabe(g)” as a synonym for the words Ojibwe, Ojibway, Ojibwa, and Chippewa. *See, e.g.*, Rachel Durkee Walker & Jill Doerfler, *Wild Rice: The Minnesota Legislature, a Distinctive Crop, GMOs, and*

The Lac du Flambeau Band of Lake Superior Chippewa Indians has pursued another pathway for protecting subsistence resources and rights. Faced with threats to its reservation's wild rice, a food source with cultural as well as dietary importance, the Tribe looked to its inherent sovereignty and the exercise of tribal regulatory authority, channeled through provisions of the Clean Water Act, as the means of securing the future of its wild rice beds. Federal treaty guarantees of reservation boundaries and subsistence-related rights have bolstered the Tribe's efforts to take on this important regulatory role. Accompanying the Lac du Flambeau Band along this pathway is another Wisconsin tribe, the Bad River Band of the Lake Superior Tribe of Chippewa Indians. The Lac du Flambeau and Bad River Bands, which share a concern over the threat posed to wild rice by degradation of reservation water, both applied to EPA to run water quality standards programs on their reservations. These tribes can look for guidance along this pathway to the experiences of three other Great Lakes area tribes that have already established water quality standards for their reservations—standards that are designed to protect wild rice beds for the current generation and for generations to come.

*A. The Lac du Flambeau Band—Safeguarding Keeshkemun's Rice*<sup>246</sup>

The Tribe has demonstrated that the waters of the Reservation provide game, fish, and wild rice that Tribal members rely on for food, and that those waters are closely tied to the preservation of the Tribe's culture and way of life. The Tribe has also demonstrated that a broad range of non-Indian activities on fee lands on the Reservation threatens to change Reservation waters in ways that would harm the Tribe's governmental, economic, cultural and health interests. The Tribe seeks TAS to protect against such harm within the framework authorized by the Clean Water Act.<sup>247</sup>

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*Ojibwe Perspectives*, 32 HAMLIN L. REV. 499 (2009). A number of Ojibwe entities are recognized as tribes by the federal government, which uses "Chippewa" in its rendering of the tribes' names. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218 (Aug. 11, 2009) (listing a number of Chippewa tribes, such as the Bad River Band of the Lake Superior Tribe of Chippewa Indians of the Bad River Reservation, Wisconsin; the Sokaogon Chippewa Community, Wisconsin; the Lac du Flambeau Band of Lake Superior Chippewa Indians of the Lac du Flambeau Reservation of Wisconsin; and the Minnesota Chippewa Tribe, Minnesota, with six component reservations: Bois Forte Band (Nett Lake); Fond du Lac Band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; and White Earth Band).

<sup>246</sup> Chief Keeshkemun led the ancestors of today's Lac du Flambeau Band to their homeland. See *infra* note 279 and accompanying text. The Lac du Flambeau Reservation was officially established by the 1837 and 1842 Chippewa treaties. See Lac du Flambeau Chamber of Commerce, History of Lac du Flambeau, <http://www.lacduflambeauchamber.com/history.htm> (last visited Aug. 15, 2010).

<sup>247</sup> Lac du Flambeau Band of Lake Superior Chippewa Indians, TAS Application, 2007 Supplement, at 8 (Apr. 3, 2007), available at [http://www.epa.gov/R5water/wqs5/pdf/ldf\\_app/LdFsupplementApril2007.pdf](http://www.epa.gov/R5water/wqs5/pdf/ldf_app/LdFsupplementApril2007.pdf).

### 1. Tribes' Role in Carrying Out the Clean Water Act

In 1987, Congress amended the Clean Water Act ("CWA") to provide a mechanism for tribes to be treated as states for the purposes of administering certain CWA programs on their reservations,<sup>248</sup> including CWA Section 303 water quality standards programs<sup>249</sup> and Section 401 discharge certification programs.<sup>250</sup> Interested tribes apply to EPA for approval to run specific water quality programs. A tribe's application must demonstrate that the tribe is federally recognized; that it has a government that carries out substantial duties and powers over a defined area; that it has authority to regulate surface water quality; and that it is capable of administering an effective water quality standards program.<sup>251</sup> States have the opportunity to review and comment on tribal assertions of authority over reservation waters within their borders, but they do not have veto power over tribal jurisdictional assertions.<sup>252</sup>

If a tribe's application is approved by EPA, the tribe develops water quality standards ("WQS") based on identifying appropriate uses for reservation waters and then developing criteria to protect the designated uses of the water.<sup>253</sup> It is in the development of designated uses for reservation waters that a tribe can act to protect culturally significant uses of water, such as subsistence-related and ceremonial uses. The public is given the opportunity to comment on the tribe's proposed WQS, which are submitted to EPA for approval following the completion of the comment process. Once a tribe receives EPA approval and is running a water quality program, it also has authority to grant or deny certification for activities that may result in discharges into waters, based on whether they would violate the tribe's WQS.<sup>254</sup>

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<sup>248</sup> See Clean Water Act § 518(e), 33 U.S.C. § 1377(e) (2006).

<sup>249</sup> 33 U.S.C. § 1313 (2006) (water quality standards and implementation plans).

<sup>250</sup> 33 U.S.C. § 1341 (2006) (certification).

<sup>251</sup> See 33 U.S.C. § 1377(e) (defining "Indian tribe" to require federal recognition and stating criteria for EPA to "treat an Indian tribe as a State" for the purposes of specified CWA provisions); see also 40 C.F.R. § 131.8 (2010). See also EPA, *EPA Considering Tribal Water Program Request, Lac du Flambeau Band of Lake Superior Chippewa Indians* (Feb. 2006) [hereinafter "EPA, *Lac du Flambeau Announcement*"].

<sup>252</sup> EPA, *Lac du Flambeau Announcement*, *supra* note 251, at 2.

<sup>253</sup> See Clean Water Act § 303(c).

<sup>254</sup> See Clean Water Act § 401. Tribes that are treated as states for the purposes of establishing WQS automatically also have TAS status for the certification of federal permits under CWA § 401. 40 C.F.R. § 131.4(c) (2010). Under the certification provisions, tribes may review any federal permit or license for activities within reservation boundaries that may result in pollutant discharges into waters, to determine if the activities will comply with the tribal WQS. Based on this analysis, a tribe may decide to certify, certify with conditions, or refuse certification. In the latter two scenarios, the relevant federal agency is required to include the tribe's conditions in its decision or deny the license or permit. See Clean Water Act § 401, 33 U.S.C. § 1341(d) (include conditions) & (a) (denial). Tribes with CWA TAS status are also entitled to notice of, and to the opportunity to object to the issuance of, federal licenses or permits outside tribal jurisdiction that may affect the quality of tribal waters. See Clean Water Act § 401, 33 U.S.C. § 1341(a)(2) (2006).

In 2005, the Lac du Flambeau Band applied for recognition of authority to regulate water quality on its reservation.<sup>255</sup> Although the Tribe sought EPA approval in this regard, it is important to identify the legal principle on which the Tribe was relying in its application: tribal sovereignty. The Tribe was seeking EPA's *acknowledgment* of its authority, based on its existing, retained sovereignty, to regulate water quality on all waters and lands within the boundaries of its reservation. It was not seeking a *grant* of authority from EPA as a supplement to inadequate tribal authority. Instead, the Tribe recognized the application for TAS designation as a "tool to implement the CWA," and as an "*action [that] does not diminish the Band's status as a sovereign nation.*"<sup>256</sup> The fact that tribal sovereignty is at the heart of the Tribe's action is apparent in both the tribal application and in EPA's evaluation of the application.

Logically speaking, tribal governmental authority should extend to all land, people, and activities within the boundaries of the tribe's reservation, as is generally the case with other sovereigns acting within their territorial boundaries. The Supreme Court's cramped reading of tribal sovereignty in 1981 in *Montana v. United States*,<sup>257</sup> however, necessitates a more complicated analysis of tribal authority by EPA. In *Montana*, the Court, applying the diminished sovereignty principle that it had invented in 1978 in its analysis of tribal criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*,<sup>258</sup> stated that a tribe retains civil adjudicatory jurisdiction over nonmember activities on nonmember fee lands within its reservation where (1) nonmembers enter into "consensual relationships with the tribe or its members through commercial dealing, contract, leases or other arrangements" or (2) nonmember "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>259</sup> Subsequent cases have established that *Montana* provides the relevant standard for

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<sup>255</sup> Lac du Flambeau Band of Lake Superior Chippewa Indians' Treatment-as-a-State Application for Designation Under Sections 303 and 401 of the Clean Water Act, Oct. 12, 2005, available at [http://www.epa.gov/region5/water/wqs5/pdf/ldf\\_app/ldf\\_tas\\_app.pdf](http://www.epa.gov/region5/water/wqs5/pdf/ldf_app/ldf_tas_app.pdf) [hereinafter "Lac du Flambeau Application"].

<sup>256</sup> *Id.* at 1 (emphasis in original). Similarly, the Bad River Band's application discussed *infra*, at § IIIB states that the Bad River Band "derives its authority to set water quality standards applicable to the entire Bad River Reservation from the tribal government's police power to protect all persons within the exterior boundaries of the Reservation and to preserve the well-being and existence of the Band. These powers are part of the Band's inherent sovereign power that has existed since time immemorial . . ." Bad River Application, *supra* note 245, at 6. In addition, the application contends, "the Band has been delegated authority to regulate water quality by Section 518 of the [CWA]." See *id.* at 19 (citing 33 U.S.C. § 1377(e)). Congress's statement, in Section 518, that EPA may authorize tribes to administer their own water quality programs in all areas within the borders of their reservations "may mean that Congress has delegated such authority to tribes; alternatively, it may mean that Congress has indicated that the United States recognizes the inherent authority of tribes to regulate such waters." *Id.* at 21.

<sup>257</sup> *Montana v. United States*, 450 U.S. 544 (1981).

<sup>258</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>259</sup> *Montana*, 450 U.S. at 565-66.

determining the extent of tribal regulatory authority over nonmembers.<sup>260</sup> As a result, EPA decision documents for TAS applications include findings of fact as to the TAS applicant's authority over the activities of nonmembers on nonmember lands on the reservation.<sup>261</sup> When it comes to asserting authority over their own members and their own land, on the other hand, tribes are on firm ground, based on inherent tribal sovereignty.<sup>262</sup>

EPA's 1991 water quality standards regulations, promulgated in the wake of the *Montana* decision, noted that, in applying the *Montana* test in the context of TAS applications, EPA would evaluate whether the potential impact on a tribe of the activities to be regulated are "serious and substantial."<sup>263</sup> Tribes are not required to demonstrate that such activities are actually polluting tribal waters as long as they show a potential for such pollution to occur in the future.<sup>264</sup>

The process of obtaining WQS program authorization and implementing tribal WQS has not always gone smoothly for tribes, as state and local governments have in some cases attacked the authorization and the enforcement of tribal WQS in court. Not content with their statutorily established right to participate in the TAS status application process through the opportunity to submit comments, some disgruntled state and local governments have resorted to litigation to try to overturn EPA's actions. The authorization of the Sokaogon Chippewa Community (also known as the Mole Lake Band of Lake Superior Chippewa Indians) to run a WQS program on its reservation, for example, was the target of such a challenge by Wisconsin.

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<sup>260</sup> See *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) ("Indian tribes' regulatory authority over nonmembers is governed by the principles set forth in [*Montana*].").

<sup>261</sup> For example, the final findings of fact appended to EPA's decision document approving the Lac du Flambeau Tribe's application described EPA's analysis and conclusions as to the authority of the Tribe over the activities of nonmembers on nonmember lands on the reservation. See EPA, *Decision Document: Approval of the Lac du Flambeau Band of Lake Superior Chippewa's Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act*, Apr. 8, 2008, available at [http://www.epa.gov/region5/water/wqs5/pdf/ldf\\_app/approval\\_docs/LDFDD.pdf](http://www.epa.gov/region5/water/wqs5/pdf/ldf_app/approval_docs/LDFDD.pdf) [hereinafter "Lac du Flambeau Decision Document"]; Lac du Flambeau Decision Document, App. II, Final Findings of Fact, Lac du Flambeau Band of Lake Superior Chippewa, Wisconsin, available at [http://www.epa.gov/region5/water/wqs5/pdf/ldf\\_app/approval\\_docs/LdF%20FOF.March7.2008.pdf](http://www.epa.gov/region5/water/wqs5/pdf/ldf_app/approval_docs/LdF%20FOF.March7.2008.pdf) [hereinafter "Lac du Flambeau Findings"].

<sup>262</sup> See EPA, *Document is Next Step in Tribal Request for Authority 2* (Feb. 2009), available at <http://www.epa.gov/r5water/wqs5/pdf/badriver/proposedfindingfactsheet.pdf> (announcing the issuance of proposed findings of fact regarding the request of the Bad River Band of Lake Superior Chippewa to set water quality standards). "As sovereign governments, tribes already have authority over their own members and land. But tribes seeking to apply their authority over nonmembers under the Clean Water Act must show how activities of those nonmembers may affect the political integrity, economic security, or health and welfare of the tribe." *Id.*

<sup>263</sup> Amendments to the Water Quality Standards Regulation That Pertain to Standards on Indian Reservations, 56 Fed. Reg. 64,876, 64,878-79 (Dec. 12, 1991). The regulations were amended in 1994. See *Indian Tribes: Eligibility of Indian Tribes for Financial Assistance*, 59 Fed. Reg. 13,814 (Mar. 23, 1994) (to be codified at 40 C.F.R. pt. 131).

<sup>264</sup> See *Lac du Flambeau Findings*, *supra* note 261, at 2.

Concerned that the grant of TAS status to the Tribe could potentially derail the state's plans for construction of a huge zinc-copper mine on a river upstream from the reservation's Rice Lake,<sup>265</sup> Wisconsin argued that the Tribe's TAS status could not extend to authority with respect to lakes because the state (it claimed) owned the underlying lake beds.<sup>266</sup> The state's efforts to prevent the Tribe from protecting reservation waters via a WQS program ultimately failed. The U.S. District Court for Wisconsin upheld EPA's approval of the Tribe's TAS application, a decision that was affirmed by the Seventh Circuit Court of Appeals.<sup>267</sup> Other tribes seeking WQS program authorization thus must consider the possibility that their efforts will also meet with state hostility and a resulting law suit.

## 2. Defending Reservation Waters and Wild Rice—The Lac du Flambeau TAS Application

When the Lac du Flambeau Band submitted an application for recognition of authority to run the water quality standards program on its reservation in 2005, thirty two other tribes had already received EPA authorization to run WQS programs, including (as noted above) another Wisconsin tribe (the Sokaogon Chippewa Community) and two other Great Lakes area tribes (the Fond du Lac Band of Chippewa and the Grand Portage Band of Chippewa, both of Minnesota).<sup>268</sup>

The Lac du Flambeau Band's application noted that the Tribe had already received TAS designation to receive funding under CWA Sections 106 (providing for grants for pollution control programs) and 314 (relating to the clean lakes program), and that the expansion of the Tribe's environmental management program had been accompanied by greater ability to successfully implement new programs.<sup>269</sup> A water program seemed to be an appropriate, and necessary, area for regulatory expansion, as tribal members are "the best managers of the water resources on the Lac du Flambeau Indian Reservation."<sup>270</sup>

The Tribe's application referred specifically to the subsistence lifestyle of tribal members and the spiritual and cultural uses of reservation water. These uses necessitate more stringent water quality standards than the state deems sufficient for waters that it regulates.<sup>271</sup> Water provides "the foundation of the Tribe's culture and

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<sup>265</sup> Wisconsin v. EPA, 266 F.3d 741, 745 (7th Cir. 2001) (noting the state's concern that TAS status could "throw a wrench into the state's planned construction of a huge zinc-copper sulfide mine on the Wolf River, upstream from Rice Lake"), *cert. denied*, 535 U.S. 1121 (2002).

<sup>266</sup> *Id.* at 746.

<sup>267</sup> *Id.* at 747. The Seventh Circuit concluded that regardless of who owned the lake beds (which the court did not decide), the federal government had properly authorized the Tribe to exercise the government's retained regulatory authority over the lakes. *Id.*; see also City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (rejecting a challenge to EPA's approval of the water quality standards of the Pueblo of Isleta, the first tribe to qualify for TAS status under the CWA).

<sup>268</sup> EPA, *Lac du Flambeau Announcement*, *supra* note 251, at 2.

<sup>269</sup> Lac du Flambeau Application, *supra* note 255, at 1.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*



the modern economy of the Reservation,” where many tribal members “exercise Treaty rights . . . to hunt, fish, and gather wild rice in the traditional manner.”<sup>272</sup> Given the lack of federally approved water quality standards to protect the reservation’s waters, there was seemingly an urgent need for the Tribe to take on the responsibility of protecting “the 260 lakes, 17,800 acres of water, 72 miles of creeks, rivers and streams and 24,000 acres of wetlands on the Tribe’s Reservation,”<sup>273</sup> for the benefit of all reservation residents and visitors. In the absence of any water quality standards for point source discharges on the Reservation, the Tribe sought to fill a significant regulatory void.<sup>274</sup>

EPA’s findings with respect to the use of water within the Lac du Flambeau Reservation recognized the significance of the cultivation of wild rice, a water-dependent native grass species. EPA noted that wild rice has been an important resource for Ojibwe peoples since before the Tribe’s treaties with the United States and that the right to gather wild rice, along with other subsistence resources, was expressly protected by the treaties.<sup>275</sup> The 1837 Treaty with the Chippewas, for example, provided that the “privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians.”<sup>276</sup>

Wild rice continues to be a significant food source for tribal members. It is a nutrient-dense food, with a higher protein content than most cereal grains.<sup>277</sup> Many tribal members still rely on rice for food and take part in the harvest.<sup>278</sup> In addition to its nutritional significance, wild rice continues to have cultural significance for the Tribe, dating to the Tribe’s arrival in the area. When the Ojibwe people came from the East, led by Chief Keeshkemun, their migration was prophesied to end at the

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<sup>272</sup> Lac du Flambeau Band of Lake Superior Chippewa Indians, TAS Application, 2006 Supp., App. 1, at 13, available at [http://www.epa.gov/r5water/wqs5/pdf/ldf\\_app/LdFsupplementMay2006.pdf](http://www.epa.gov/r5water/wqs5/pdf/ldf_app/LdFsupplementMay2006.pdf).

<sup>273</sup> *Id.* at 8.

<sup>274</sup> *See id.*

<sup>275</sup> *See* Lac du Flambeau Findings, *supra* note 261, at 10 n.12 (quoting Treaty with the Chippewas art. 5, July 29, 1837, 7 Stat. 537). Archaeologists have even found evidence of the utilization of wild rice in the Great Lakes area during the prehistoric period. *See, e.g.,* Elden Johnson, *Archaeological Evidence for Utilization of Wild Rice*, 163 SCIENCE (no. 3864) 276 (Jan. 17, 1969). Wild rice was identified as an important Ojibwe food by early European visitors to the Great Lakes area such as Pierre d’Esprit, Sieur Radisson, who described it as “a kinde of rice, much like oats, [that] . . . grows in the watter in 3 or 4 foote deepe,” in a 1668 letter to King Charles II of England. Gardner P. Stickney, *Indian Use of Wild Rice*, 9 AM. ANTHROPOLOGIST (no. 4) 115, 115 (Apr. 1896).

<sup>276</sup> Treaty with the Chippewas art. 5, July 29, 1837, 7 Stat. 537. This Treaty was cited by the Tribal Petitioners in the *New Jersey v. EPA* litigation. *See supra* note 46 and accompanying text.

<sup>277</sup> *See* Lac du Flambeau Findings, *supra* note 261, at 10.

<sup>278</sup> *See id.* In 2004, for example, 279 tribal members obtained a tribal license for collecting wild rice. *Id.*

place where they found food that grew on water.<sup>279</sup> The food that they found, which rooted them to their lands, was wild rice.<sup>280</sup>

Harvesting wild rice successfully requires knowledge that has been utilized by tribal members for generations. This tribal knowledge includes an understanding of how to: tell when the rice in a particular area is ripe; harvest the rice without breaking the stalks (to foster a second harvest); dry and sort the rice properly (to prevent mold and remove impurities); parch or dry the rice through roasting or heating (to preserve the rice grains and make them edible); hull and winnow the rice (to remove the chaff); and return enough grain to the rice beds to germinate the next year.<sup>281</sup> The harvesting “is a family and community-based activity,” which is regulated by many tribes, the EPA Findings noted.<sup>282</sup> Gathering the rice “is a cultural complex of family connections, traditions, history, and spirituality.”<sup>283</sup>

Wild rice is dependent on water for its very existence. As EPA explained in its findings, “From germination to the development of blossoms and fruit, the lifecycle of these plants and their particular yield is wholly defined by water quality and water levels.”<sup>284</sup> The plants have shallow roots, and as a result the ideal environment “is characterized by non-fluctuating (but not inundated) water levels and ‘slowly circulating, well-balanced, mineral-rich water.’”<sup>285</sup> These are conditions that historically have been found in sloughs and in other kinds of wetlands. Research has demonstrated that wild rice plants are sensitive to changes in water quality, such as changes causing increased alkalinity.<sup>286</sup> If either increased pollution diminishes water quality, or if hydrological patterns in the rice growing areas are changed from the naturally occurring patterns, then the rice will not proliferate.<sup>287</sup> In addition, changes in water quality and hydrological patterns that hurt wild rice cultivation

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<sup>279</sup> *See id.*

<sup>280</sup> *See id.*

<sup>281</sup> *See id.* at 10-11.

<sup>282</sup> *Id.* at 10.

<sup>283</sup> *Id.* at 11.

<sup>284</sup> *Id.* at 10.

<sup>285</sup> *Id.* (citation omitted).

<sup>286</sup> *See id.* (citation omitted) (noting that wild rice grows best in water with an alkalinity range of 5 to 250 parts per million (ppm), and that sulfates have an adverse impact on plant growth, to such an extent that the plants fail to grow if the sulfate level is 50 ppm or above). EPA also discussed these matters in its Final Findings of Fact for the Bad River Band’s TAS application. EPA explained that wild rice is sensitive to changes in water levels and in water quality, such as changes in alkalinity, increased presence of various pollutants, and changes in hydrological patterns. “Sulfates, copper, stream flow, pH levels and nutrients can all adversely impact the wild rice plants,” and “[l]ead, cadmium and other heavy metals can accumulate in the rice[,] having implications for human health.” EPA, *Public Review Draft—February 2009, Proposed Findings of Fact, Bad River Band, Wisconsin*, at 14, available at <http://www.epa.gov/region5/water/wqs5/pdf/badriver/publicPFOF2-09.pdf> [hereinafter “Bad River Proposed Findings”]. Moreover, water quality and hydrology changes can also boost the growth of invasive species that may out-compete wild rice. *See id.* at 15.

<sup>287</sup> *See* Lac du Flambeau Findings, *supra* note 261, at 11.

might produce conditions that are favorable for invasive species, possibly leading to displacement of the rice.<sup>288</sup>

EPA's findings also explained the importance of wild rice for various reservation wildlife species. Waterfowl use the wild rice stands for nesting cover.<sup>289</sup> Water birds depend on the rice itself as an essential food source, and also eat insects, leeches, and snails that are harbored by the rice plants.<sup>290</sup> Muskrats consume, and build their homes from, wild rice vegetation, and the muskrats in turn serve as a food source for eagles, mink, otters, and other predators.<sup>291</sup> In short, human beings are just one of the many species that depend upon the wild rice for subsistence.

In light of wild rice's importance in promoting healthy wildlife populations, along with its direct significance to the Tribe both nutritionally and culturally, EPA concluded that "impairment of wild rice uses would have a direct, harmful impact on the Tribe and its members."<sup>292</sup> Referring more broadly to both cultural and ceremonial uses of water, EPA also noted that "[r]espect for water by Tribal members is founded upon traditional Ojibwe teachings and encompasses the full range of uses of water by living beings, including humans, wildlife and fish."<sup>293</sup> EPA concluded that impairment of cultural uses specifically would have a direct, harmful impact on the Tribe and tribal members.<sup>294</sup>

Having made findings as to the tribal uses of reservation water resources that would be adversely affected by degradation of water quality, EPA also made findings as to the potential effects on surface waters of specific activities that are occurring or may occur on the Reservation. Residential and commercial development necessarily involves construction activity, which can cause runoff of polluted water into the Reservation's waterways.<sup>295</sup> Residential development and accompanying road construction and bank stabilization often involve dredging and filling of wetlands, which destroys animal and plant habitat and threatens cultural and archaeological resources.<sup>296</sup> Cranberry operations, which involve periodic flooding and later water releases from cranberry bogs, can cause loss of wetlands, hydrologic and water quality changes from water diversions and releases, and water

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<sup>288</sup> *See id.*

<sup>289</sup> *See id.*

<sup>290</sup> *See id.*

<sup>291</sup> *See id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 12.

<sup>294</sup> *Id.* Water uses that are important to maintaining tribal cultural heritage include gathering various aquatic resources for food and medicinal purposes. Ceremonial activities can include uses such as full immersion in reservation waters, inhalation of steam, and ingestion of water, necessitating that Reservation water sources "be clean and safe for these direct-contact ceremonial uses that are integral to the cultural identity of tribal members." *Id.*

<sup>295</sup> *See id.* at 13-16. Completed construction projects can lead to further degradation of water quality from storm water runoff across impervious surfaces and from contamination from septic systems.

<sup>296</sup> *See id.* at 17.

contamination from fertilizers and pesticides.<sup>297</sup> Logging activities adversely impact water quality by causing increased runoff of sediment- and pollutant-laden surface waters, including waters that are contaminated by mercury and methylmercury.<sup>298</sup> Similar adverse effects result from sand and gravel mining.<sup>299</sup> Nonmembers of the Tribe are currently engaging in these kinds of activities, resulting in adverse effects on the welfare of the Tribe and tribal members.<sup>300</sup> For example, shoreland development by nonmembers has resulted in increased sedimentation in water bodies of the Reservation, threatening wild rice yields.<sup>301</sup> Cranberry operations and their hydrological system impacts are currently threatening harm to the wild rice bed on Trout River.<sup>302</sup>

Based on the findings outlined above, EPA approved the Tribe's application to administer the CWA Section 303(c) water quality standards and Section 401 discharge certification programs on its reservation.<sup>303</sup> The Tribe clearly met the first of the four statutory requirements for TAS status,<sup>304</sup> the federal recognition requirement, as it is included on the Secretary of the Interior's recognized tribes list.<sup>305</sup> The Tribe also easily met the substantial governmental duties and powers requirement, given the Tribe's active tribal government and past EPA approval of its TAS application for CWA Section 106 participation.<sup>306</sup> Materials submitted in the

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<sup>297</sup> See *id.* at 17-18.

<sup>298</sup> See *id.* at 18-20.

<sup>299</sup> See *id.* at 21.

<sup>300</sup> See *id.* at 21-29.

<sup>301</sup> See *id.* at 24.

<sup>302</sup> See *id.* at 28.

<sup>303</sup> See Lac du Flambeau Decision Document, *supra* note 261, at 14.

<sup>304</sup> See *supra* note 251 and accompanying text.

<sup>305</sup> See Lac du Flambeau Decision Document, *supra* note 261, at 7 (citing *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 72 Fed. Reg. 13,647, 13,649 (Mar. 22, 2007)).

<sup>306</sup> See *id.* Once a tribe has made a showing that it meets the "governmental functions" requirement for one EPA program, it generally does not need to make that showing again for another EPA program. See *id.* at 7 (citing 59 Fed. Reg. 64,339, 64,340 (Dec. 14, 1994)). The Tribe submitted materials that established that nothing had changed to alter EPA's past determination. See *id.* at 8. The regulation requires that the Tribe's application include the following:

(2) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. The statement should:

(i) Describe the form of the Tribal government;

(ii) Describe the types of governmental functions currently performed by the Tribal governing body such as, but not limited to,

Tribe's application and information submitted by EPA Region 5 program offices satisfied EPA that the Tribe met the requirement of being capable of administering an effective WQS and certification program.<sup>307</sup> Given the ease with which the Tribe

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the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population, taxation, and the exercise of the power of eminent domain; and

(iii) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

40 C.F.R. § 131.8(b)(2).

<sup>307</sup> See Lac du Flambeau Decision Document, *supra* note 261, at 13-14. The regulations require that the Tribe submit the following to meet the capability requirement:

(4) A narrative statement describing the capability of the Indian Tribe to administer an effective water quality standards program. The narrative statement should include:

(i) A description of the Indian Tribe's previous management experience . . .;

(ii) A list of existing environmental or public health programs administered by the Tribal governing body and copies of related Tribal laws, policies, and regulations;

(iii) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government;

(iv) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing, reviewing, implementing and revising water quality standards;

(v) A description of the technical and administrative capabilities of the staff to administer and manage an effective water quality standards program or a plan which proposes how the Tribe will acquire additional administrative

met the latter three requirements, EPA's Decision Document paid the greatest attention to explaining how the Tribe met the regulatory authority requirement.

### 3. Establishing Regulatory Authority Over All Reservation Lands and Waters— Meeting a Key Challenge of the Application Process

EPA's regulations pertaining to the regulatory authority requirement provide that a Tribe's application must include "[a] descriptive statement of the Indian Tribe's authority to regulate water quality."<sup>308</sup> In assessing the Tribe's authority, EPA reviewed the Tribe's Constitution and a statement from the Tribe's attorney explaining the basis for the Tribe's authority and outlining its sources.<sup>309</sup> Most critically, EPA analyzed the Tribe's authority over activities of nonmembers on nonmember-owned reservation land under the approach developed pursuant to *Montana*.<sup>310</sup> EPA concluded that "the Lac du Flambeau Band has shown inherent authority over nonmember activities for purposes of the CWA water quality standards and water quality certification programs."<sup>311</sup>

EPA's Decision Document relied upon two key principles established in EPA regulations. First, the 1991 water quality standards regulations noted that, as a general matter, "activities which affect surface water and critical habitat quality may have serious and substantial impacts," and that:

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and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

40 C.F.R. § 131.8(b)(4).

<sup>308</sup> 40 C.F.R. § 131.8(b)(3). The regulations specify further that the statement of regulatory authority is to include the following:

- (i) A map or legal description of the area over which the Indian Tribe asserts authority to regulate surface water quality; (ii) A statement by the Tribe's legal counsel (or equivalent official) which describes the basis for the Tribe's assertion of authority and which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority; and (iii) An identification of the surface waters for which the Tribe proposes to establish water quality standards.

*Id.*

<sup>309</sup> Lac du Flambeau Decision Document, *supra* note 261, at 8-9. The Tribe satisfied the requirements of subsections (i) and (iii) of 40 C.F.R. § 131.8(b)(3) by submitting a reservation map and accompanying statements that identified the Reservation and its waters and indicated that the Tribe sought to set WQS for all waters within the boundaries of the Reservation. *Id.* The Tribe's submissions also provided information about the hydrology and waters of the Reservation's four major watersheds and "highlight[ed] the importance of these waterbodies to the Band." *Id.* at 9.

<sup>310</sup> See *supra* notes 257-263 and accompanying text (discussing *Montana*).

<sup>311</sup> Lac du Flambeau Decision Document, *supra* note 261, at 9.

because of the mobile nature of pollutants in surface waters and the relatively small length/size of stream segments or other water bodies on reservations . . . any impairment that occurs on, or as a result of, activities on non-Indian fee lands [is] very likely to impair the water and critical habitat quality of the tribal lands.<sup>312</sup>

Second, the 1991 regulations “noted that water quality management serves the purpose of protecting public health and safety, which is a core governmental function critical to self-government.”<sup>313</sup>

The Tribe’s attorney’s statement described the importance of water quality, highlighting the subsistence uses of the Reservation’s water bodies:

The culture of the Lac du Flambeau Band depends on the waters of the Reservation. Indeed, the name of the Reservation aptly reflects the connection of the band and its water-based natural resources—‘Lac du Flambeau,’ meaning ‘Lake of the Torches,’ gained its name from the Band’s historical traditional practice of spear fishing at night with the use of torches. . . . Traditional fishing activities, as well as subsistence hunting and gathering, are dependent on those waters. Traditional beliefs and sacred places also depend on the purity of the waters for their vitality. These ties to water, which have existed from time immemorial, are no less important today—for the Band continues to rely heavily on Reservation waters for its economic and cultural survival.<sup>314</sup>

The Decision Document noted that EPA’s recognition that “clean water may be crucial to the survival of the Band and its members.”<sup>315</sup> The document highlighted EPA’s specific factual findings with respect to particular tribal uses of Reservation waters, including wild rice cultivation, and with respect to activities, including nonmember activities, that can adversely impact water resources.<sup>316</sup> Based on these findings, EPA concluded that “existing and potential future nonmember activities within the Reservation have or may have direct effects on the political integrity, economic security and health and welfare of the Band that are serious and substantial.”<sup>317</sup> Consequently, EPA concluded, the Tribe had met the regulation’s requirement with respect to a description of its authority to regulate water quality.<sup>318</sup>

EPA informed the Tribe in April 2008 of the approval of its application to administer the water quality standards and certification program on the Lac du

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<sup>312</sup> *Id.* at 10 (quoting 56 Fed. Reg. 64,878).

<sup>313</sup> *Id.* (citing 56 Fed. Reg. 64,878).

<sup>314</sup> *Id.* at 11 (quoting Lac du Flambeau Application, Appendix B, at 7). The Tribe supported these claims with evidence “showing how current and potential nonmember activities on the Reservation have or may have direct effects on the Band’s political integrity, economic security, and health and welfare.” *Id.*

<sup>315</sup> *Id.* at 12.

<sup>316</sup> *Id.* Harmful activities include residential and commercial development and filling of wetlands. *See id.*

<sup>317</sup> *Id.* at 12-13.

<sup>318</sup> *Id.* at 13.

Flambeau Reservation.<sup>319</sup> The Tribe is in the process of developing water quality standards that will protect the wild rice beds, and other crucial resources, of the reservation. For the Lac du Flambeau Band, reliance on its governmental authority, as a sovereign acting within the boundaries of its treaty-guaranteed reservation, has provided the mechanism for safeguarding resources that are integral to its survival.

*B. The Bad River Band's Clean Water Act TAS Application*

The Bad River Band of the Lake Superior Tribe of Chippewa Indians, another Wisconsin tribe, applied for TAS status for the purposes of Sections 303 and 401 of the CWA in 2006.<sup>320</sup> The Tribe's reservation was established under the Treaty of 1854, between the Lake Superior and Mississippi Chippewa Tribes and the United States.<sup>321</sup> The Bad River Reservation, like the Lac du Flambeau Reservation, is very rich in rivers, streams, lakes, ponds, and wetlands. The Reservation's waters are not protected by any federally approved WQS, and WQS developed by Wisconsin do not apply on the Reservation.<sup>322</sup> This regulatory gap led to understandable concern on the Tribe's part about the need to protect reservation waters from any further degradation.

For generations, the Reservation's plentiful water resources have provided subsistence, as well as cultural and spiritual benefits, to its people.<sup>323</sup> Wild rice has traditionally played an important role in the lives of tribal members. The largest remaining wild rice beds on the Great Lakes lie in the Kakagon Slough, located at the mouth of the Kakagon River.<sup>324</sup> Describing the significance of wild rice, the Tribe's TAS application noted that the Tribe's identity and social cohesion is dependent on the continuing supply and quality of the Reservation's wild rice."<sup>325</sup> Wild rice's importance is celebrated at the annual harvest-time Manomin (wild rice) Celebration and it is an essential part of tribal feasts and other ceremonies.<sup>326</sup> Wild rice also serves as a year-round dietary staple, thus nourishing bodies as well as spirits.<sup>327</sup>

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<sup>319</sup> See Letter from Mary A. Gade, EPA Region 5 Regional Administrator, to the Hon. Victoria Doud, President, Lac du Flambeau Band of Lake Superior Chippewa Indians (Apr. 8, 2008).

<sup>320</sup> See generally Bad River Application, *supra* note 245.

<sup>321</sup> See *id.* at 5. See also Treaty with the Chippewa, Sept. 30, 1854, 10 Stat. 1109.

<sup>322</sup> See Press Release, EPA, Bad River Band Approved to Run Water Standards Program (July 2, 2009), available at <http://www.epa.gov/tribal/pdf/bad-river-band-cwa.pdf> (last visited Aug. 15, 2010).

<sup>323</sup> See Bad River Application, *supra* note 245, at 9.

<sup>324</sup> See *id.* For a more detailed analysis of the waters of the Reservation and the threats to them, see W.G. BATTEN & R.A. LIDWIN, WATER RESOURCES OF THE BAD RIVER INDIAN RESERVATION, NORTHERN WISCONSIN (1995). This U.S. Geological Survey report was prepared with the cooperation of the Tribe and is available at <http://wi.water.usgs.gov/pubs/WRIR-95-4207/WRIR-95-4207.pdf>.

<sup>325</sup> Bad River Application, *supra* note 245, at 9 (citation omitted).

<sup>326</sup> See *id.*

<sup>327</sup> See *id.*



The Tribe's application elaborated upon the significance of wild rice and its role in tribal culture. Harvesting the rice is a communal activity, carried out by two-person teams in canoes, each of which can harvest 80-120 pounds of rice per day. Each year between 9,000 and 15,000 pounds of rice are processed by tribal families.<sup>328</sup> Use of traditional harvesting methods ensures that some rice falls back into the water, thus re-seeding the rice beds.<sup>329</sup> Most of the harvested rice is consumed in the harvesters' homes or by their families and friends, or is used in feasts and other ceremonies.<sup>330</sup> In short, the Bad River Band, like the Lac du Flambeau Band, depends on wild rice, along with other water-based resources, to support its survival. Moreover, the Tribe chose the Bad River Reservation territory for its reservation specifically because of the quality of its wild rice and other water-dependent resources.<sup>331</sup> If the Band does not have control over these resources, then its political control and economic security are threatened.<sup>332</sup>

In June 2009, EPA approved the Bad River Band's application.<sup>333</sup> EPA's Final Findings of Fact with respect to the application<sup>334</sup> noted the presence of "the largest natural wild rice beds in the Great Lakes basin"<sup>335</sup> and listed the water bodies for which wild rice was indicated as a designated use in draft WQS that the Tribe had submitted to EPA.<sup>336</sup> One of the water bodies included as a wild rice use area was

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<sup>328</sup> *See id.*

<sup>329</sup> *See id.*

<sup>330</sup> *See id.* at 10. Subsistence needs are also satisfied through harvesting of waterfowl and fish, especially walleye, which are released into reservation waters from the tribal fish hatchery. Fish, like wild rice, has been traditionally and continues to be a major component of Bad River Band members' diet. *See id.* at 10, 16.

<sup>331</sup> *See id.* at 8-9.

<sup>332</sup> *See id.* at 8. Consequently, the Tribe needs to be able to regulate water quality in all waters to address threats to water resources posed by a variety of sources, such as agricultural pollutants, residential discharges, forestry practices, mercury and polychlorinated biphenyls (PCBs) pollution, boat wakes, and illegal dumping. *See id.* at 12-18.

<sup>333</sup> *See EPA, Decision Document: Approval of the Bad River Band of Lake Superior Tribe of Chippewa Indians' Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act*, June 26, 2009, available at <http://www.epa.gov/reg5oh2o/wqs5/pdf/badriver/approvaldocs/DecDocFinal6-26-09.pdf> [hereinafter "Bad River Decision Document"].

<sup>334</sup> Bad River Decision Document, *supra* note 333, App. II, Final Findings of Fact, Bad River Band of Lake Superior Tribe of Chippewa Indians, Wisconsin, available at <http://www.epa.gov/r5water/wqs5/pdf/badriver/approvaldocs/FinalFindingsFact6-26-09.pdf> [hereinafter "Bad River Final Findings"]. EPA's Proposed Findings of Fact were released in February, 2009. *See generally* Bad River Proposed Findings, *supra* note 286.

<sup>335</sup> Bad River Final Findings, *supra* note 334, at 4.

<sup>336</sup> *See id.* at 7-8. The designated use list identified the Bad River; the Kakagon, Sand Cut, Bad River, and Wood Creek Sloughs; and Bear Trap Creek as wild rice designated use areas. *See id.* All of the water bodies were designated for cultural, wildlife, and aquatic life and fish uses, all of which can support subsistence activities. *See id.* Some water bodies were also designated for use as cold water and/or cool water fisheries. *See id.*

the Bad River itself, which flows through the middle of the Reservation.<sup>337</sup> Gathering wild rice is, the document acknowledged, “not merely the acquisition of nutritional foodstuffs, rather it is a cultural complex of family connections, traditions, history, and spirituality.”<sup>338</sup> The Tribe’s “identity and social cohesion is dependent on the continuing supply and quality of the Reservation’s wild rice.”<sup>339</sup> In addition to serving as a cornerstone of tribal culture and subsistence, wild rice harvesting also is important in commercial terms, because some rice is sold to local stores and through roadside family stands.<sup>340</sup> The possibility of loss of opportunity for rice harvesting, which has a potential value of over \$200,000 per year, thus threatens the economic security of the Tribe.<sup>341</sup> This estimate of the monetary value of the rice, however, “does not describe the full worth of the wild rice” to the Tribe.<sup>342</sup>

EPA’s Final Findings indicate that nonmember activities on nonmember land impact water quality and hydrological patterns in ways that are harmful to wild rice cultivation.<sup>343</sup> The Tribe’s use of wild rice as a food source, its cultural significance for the Tribe, and its role in fostering healthy aquatic-dependent wildlife species support the Tribe’s assertion that “impairment of wild rice uses . . . would have or may have a serious and substantial direct impact on the Band and its members.”<sup>344</sup> In light of this threat to wild rice cultivation, as well as to other tribal uses of reservation waters, EPA concluded that the Bad River Band, like the Lac du Flambeau Band, meets the *Montana* test-based regulatory authority requirement for TAS status to establish WQS for all reservation surface waters.<sup>345</sup>

### C. Current Tribal Protection of Wild Rice Beds Under the Clean Water Act

Neither the Lac du Flambeau Band nor the Bad River Band has yet imposed water quality standards on its reservation. In order to impose EPA-approved WQS, tribes with TAS status, like states, must follow the procedures in place for this process.<sup>346</sup> The tribe must develop the proposed WQS, make the proposed WQS (and supporting technical documents) available to the public, hold a public hearing

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<sup>337</sup> See *id.* at 7 (listing the Bad River as a designated use area for wild rice), 6 (describing the Bad River’s location).

<sup>338</sup> *Id.* at 14.

<sup>339</sup> *Id.*

<sup>340</sup> See *id.* at 15.

<sup>341</sup> See *id.*

<sup>342</sup> *Id.*

<sup>343</sup> See *id.* at 17-18 (listing harmful activities carried out by nonmembers). See also *id.* at 23-30 (analyzing specific impacts of nonmember activities on aquatic life and fish, recreation, wildlife uses, and cultural/ceremonial uses).

<sup>344</sup> *Id.* at 15.

<sup>345</sup> The findings of fact also include findings as to specific impacts of nonmember activities on aquatic life and fish, recreation, wildlife uses, and cultural/ceremonial uses. See *id.* at 23-30.

<sup>346</sup> CWA § 303, 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.5.

about the proposed WQS, and then submit them to the EPA for approval.<sup>347</sup> Water quality standards embrace three elements: designated uses of each waterway or water body, consistent with the goals of the CWA; criteria, expressed in narrative statements and in numerical concentration levels, that specify the amount of specified pollutants that may be present in a water body and still protect its designated uses; and anti-degradation provisions.<sup>348</sup>

A number of other tribes with TAS status have already put into place WQS that are designed to protect the wild rice beds of their reservations. As is the case with the Lac du Flambeau and Bad River Bands, these tribes seek protection of wild rice beds because of their significance for tribal subsistence and culture. The Mole Lake Band of the Lake Superior Tribe of Chippewa Indians, Sokaogon Chippewa Community, for example, received EPA approval of its WQS, which provides protection for wild rice beds, in 1996.<sup>349</sup> The Tribe's WQS are based on the understanding that "[w]ater has always been an integral and sacred part of the Sokaogon people's survival, identity and culture. Water is the life-supporting blood of Mother Earth that human beings share in common with all living things."<sup>350</sup> Tribal designated uses include cultural uses, defined as "[u]se of all Tribal Waters for cultural, subsistence, spiritual, medicinal, ceremonial, and aesthetic purposes that include any element of the environment that is ecologically associated with Tribal Waters."<sup>351</sup> Wild rice is identified as a "[c]ultural and natural resource of the Sokaogon people that has sustained their subsistence for over 300 years."<sup>352</sup> Wild rice's significance is indicated by the fact that the Tribe's reservation "was designated with a 600 acre wild rice lake as its centerpiece."<sup>353</sup>

The Sokaogon Chippewa Community's WQS narrative water quality criteria prohibit the presence of bacteria and microorganisms at levels that may impair wild rice gathering in tribal waters. The criteria also prohibit the release of pollutants and human-induced changes to tribal waters, tribal waters sediments, and area hydrology that alter the waters' natural ambient conditions or the species composition in the waters<sup>354</sup>—changes that can negatively impact wild rice.<sup>355</sup> In addition, the Tribe's

<sup>347</sup> See 40 C.F.R. § 131.20.

<sup>348</sup> 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.2. In addition to establishing WQS as a measure of water quality, the CWA also provides for uniform effluent limitations guidelines, which are technology-based standards, promulgated by EPA, which "restrict the quantities, rates, and concentrations of specified substances discharged from point sources." *City of Albuquerque v. Browner*, 97 F.3d 415, 419 n.4 (10th Cir. 1996) (citing 33 U.S.C. §§ 1311, 1314).

<sup>349</sup> State and Tribal Water Quality Standards, Notice of EPA Approval, 63 Fed. Reg. 53,914 (Oct. 7, 1998). The Tribe received EPA authorization for a WQS program in 1995. See *id.*

<sup>350</sup> Sokaogon Chippewa Community Water Quality Standards § I(B), Jan. 26, 2005, available at [http://www.epa.gov/waterscience/standards/wqslibrary/tribes/chippewa\\_5\\_wqs.pdf](http://www.epa.gov/waterscience/standards/wqslibrary/tribes/chippewa_5_wqs.pdf) [hereinafter "Sokaogon WQS"].

<sup>351</sup> *Id.* § II(B)(1).

<sup>352</sup> *Id.* § V (definitions).

<sup>353</sup> *Id.*

<sup>354</sup> *Id.* § III(A)(6)-(8). Changes in natural ambient conditions that are to be avoided include "flow, stage, dissolved oxygen, pH and temperature." *Id.* § III(A)(7).

numeric water quality criteria, which describe Rice Lake as “the cultural centerpiece” of the Sokaogon Chippewa Community,<sup>356</sup> provide that for the protection of wild rice, the Tribe will choose the “most protective values.”<sup>357</sup> As discussed above,<sup>358</sup> state dissatisfaction with the level of protection afforded to water bodies by the Tribe’s WQS resulted in unsuccessful litigation challenging EPA’s approval of the Tribe’s TAS status application.

The Fond du Lac Band of Lake Superior Chippewa received approval of its WQS in 2001.<sup>359</sup> The relevant tribal ordinance establishes general water quality standards applicable to all waters of the Fond du Lac Reservation, while also establishing a maximum sulfate level for “[a]ny lake or stream which supports wild rice growth.”<sup>360</sup> Wild rice areas, defined as “[a] stream, reach, lake or impoundment, or portion thereof, presently, historically or with the potential to be vegetated with wild rice,” are established as designated cultural uses of the waters of the Reservation.<sup>361</sup> The definition recognizes that water bodies that do not currently support wild rice (although they may have in the past) may do so at some point. Consequently, they are to be regarded as wild rice areas in anticipation of this future use. Wild rice is listed as a designated use for twenty-three lakes on the Reservation, including lakes with the evocative names of Rice Portage Lake and Wild Rice Lake, both of which are also designated as potential Outstanding Reservation Resource Waters (“ORRW”).<sup>362</sup> The ORRW designation is given to particular waters because of their “exceptional cultural, aesthetic, recreational or ecological significance,” and water quality of waters so designated is to “be maintained and protected without degradation.”<sup>363</sup>

<sup>355</sup> See *supra* notes 28-86 and accompanying text (discussing the adverse impact of such changes on wild rice).

<sup>356</sup> Sokaogon WQS, *supra* note 350, § III(C).

<sup>357</sup> *Id.* (“For the protection of wild rice, *Zizania palustris*, SCC may derive criteria using the aquatic life methodology specified at 40 C.F.R. 132.4(a)(2) in addition to using other scientifically defensible toxicological methods in order to obtain a range of potential criteria. The most protective values based upon the available methods or tribal Ambient Water Quality Values will be chosen as the applicable . . . criteria.”).

<sup>358</sup> See *supra* notes 263-65 and accompanying text.

<sup>359</sup> EPA, Indian Tribal Approvals (Oct. 15, 2009), <http://nsdi.epa.gov/waterscience/tribes/approvable.htm>. The Tribe received EPA authorization for a WQS program in 1996. State and Tribal Water Quality Standards; Notice of EPA Approval, 63 Fed. Reg. 53,916 (Oct. 7, 1998).

<sup>360</sup> Fond du Lac Band of Lake Superior Chippewa, Water Quality Standards of the Fond du Lac Reservation, § 301(m), Ordinance # 12/98, adopted by Resolution # 1403/98 of the Fond du Lac Reservation Business Committee, Dec. 10, 1998, amended by Resolution # 1286/01 of the Fond du Lac Reservation Business Committee, Sep. 11, 2001, *available at* <http://www.epa.gov/waterscience/standards/wqslibrary/tribes/chippewa.pdf>.

<sup>361</sup> *Id.* § 302(e)(1).

<sup>362</sup> *Id.* ch. 4.

<sup>363</sup> *Id.* § 105(a)(5).

Finally, the WQS of the Grand Portage Band of Chippewa, which EPA approved in 2005,<sup>364</sup> acknowledge that the “Tribe’s existence has been dependent on the ability of the land and waters to provide natural resources for consumption, subsistence, cultural preservation, religious practice and sustainable economic development.”<sup>365</sup> Reservation water quality is to be protected so that the areas within the Reservation can continue to “serve as a refuge for Tribal members to continue to practice a life that exemplifies sustainable economic development, and that preserves the resources critical to cultural integrity and survival of the Tribe.”<sup>366</sup> Wild rice areas are established as designated cultural uses of the waters of the Reservation<sup>367</sup> and wild rice is listed as a designated use for eight lakes and one river on the Reservation.<sup>368</sup> The Tribe’s water quality criteria require that “[w]aters capable of supporting wild rice will be of sufficient quantity and quality as to permit the propagation and maintenance of a healthy ‘wild rice’ ecosystem in addition to the associated aquatic life and their habitats.”<sup>369</sup>

Given the concern for protecting wild rice beds that was reflected in the application for tribal water quality standards program authorization of the Lac du Flambeau Band,<sup>370</sup> it seems likely that the Tribe’s WQS will also take into account wild rice protection in the standards’ water quality criteria and antidegradation policy. Similarly, the Bad River Band expressed concern for wild rice in its application,<sup>371</sup> so it is also likely to include provisions aimed at protecting wild rice beds in the proposed WQS that it submits to EPA for approval.

#### D. Looking Forward

Indian people have an ability to stretch their minds, to search far back and far ahead. The Chippewa were thinking in those terms at treaty time—thinking of the long procession back ten thousand years or more, thinking of an equally long procession out ahead.<sup>372</sup>

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<sup>364</sup> EPA, Indian Tribal Approvals, *supra* note 359. The Tribe received EPA authorization for a WQS program in 1996. State and Tribal Water Quality Standards, Notice of EPA Approval, *supra* note 359.

<sup>365</sup> Grand Portage Reservation Water Quality Standards art. VI (Antidegradation Policy), Final Version as of May 24, 2005, with Revised Criteria Adopted Aug. 8, 2006, available at <http://www.epa.gov/waterscience/standards/wqslibrary/tribes/grand-portage-band.pdf> [hereinafter “Grand Portage WQS”].

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* § V(E)(1). Wild rice areas are defined as “a stream, river, lake, wetland or impoundment, or portion thereof, presently, historically or with the potential to be vegetated with wild rice.” *Id.*

<sup>368</sup> *Id.* § V tbl.1.

<sup>369</sup> *Id.* § XI(6).

<sup>370</sup> See *supra* notes 272-74 and accompanying text.

<sup>371</sup> See *supra* notes 325-32 and accompanying text.

<sup>372</sup> Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 413 (1991).

The experiences of the Great Lakes tribes discussed above in seeking to protect the wild rice beds of their reservations by shouldering responsibilities for regulating water quality suggest that this can be a rewarding pathway to follow where water-related subsistence resources are concerned. A number of tribes have now established a track record of using the Clean Water Act's TAS provisions as a means to exercise control over water resources on their reservations, even where the activities that threaten these resources are engaged in by non-Indians on non-Indian land. This pathway thus shows considerable promise for protecting water-related subsistence resources, whether they are wild rice beds or other resources, such as fish.

The cumbersome and time-consuming nature of the TAS application process should not, however, be downplayed. Moreover, acknowledgement of tribal regulatory authority must be sought on a piecemeal, program-by-program basis. Tribes must have sufficient resources if they are to make it through the TAS application process successfully. Nonetheless, this pathway toward protection has been followed successfully by a number of tribes, not just in the Great Lakes area but also in other areas, and it is likely to be followed by others in the future.

#### IV. CONCLUSION: THE ROLE OF SUBSISTENCE RIGHTS IN BUILDING BRIDGES AND ASSERTING NATIONHOOD

The rights that we have are traditional rights that go back, that extend back, that connect us directly with the earth. It's who we are. If you sever these webs that connect us to the earth whether it's the deer or whether it's fish or whether it's the timber or the gathering rights . . . you start losing the identity of who you are.<sup>373</sup>

The tribes and communities whose experiences and legal claims are examined above have sought to protect different kinds of subsistence resources and have chosen different legal pathways to do so. Nevertheless, their struggles have much in common. Common ground is apparent in both the centrality of subsistence activities in the lives of these peoples and in the ultimate legal principle on which their claims rest—the sovereignty of indigenous peoples. These commonalities are explored below.

##### A. *Subsistence Activities as Bridges*

The Great Lakes tribes, Inuit peoples, and Pacific Northwest tribes whose struggles to protect crucial natural resources are discussed above have spoken in ways that suggest that subsistence activities function for them as what may be termed bridges. These activities serve as a means of connection, or as a route for passage over a gap or a barrier. As discussed below, subsistence activities serve as bridges between tribal members in general; between generations within a tribe; between the past, present, and future; and between economic life and spiritual life. Moreover, these intertwined aspects of subsistence activities represent rejection of past federal government efforts to destroy tribal cultures and assimilate tribal members.

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<sup>373</sup> Loew, *supra* note 245, at 713 (quoting Nick Hockings, member of the Lac du Flambeau Band).

### 1. Bridges Between Tribal Members

Subsistence activities are often engaged in as community activities. Wild rice is customarily harvested and processed by Great Lakes tribes as a group activity. Inuit hunters do not hunt alone but rather rely on each other for guidance and assistance. Tribal fishing in the Midwest and Pacific Northwest requires family and communal efforts. Subsistence activities thus serve as bridges between members of these communities, binding them together as participants in activities that have long served as a kind of cultural glue.

Moreover, subsistence activities can build and preserve connections between members living within a tribe or community's territory and those who live elsewhere. When tribal members return to their reservation to participate in annual wild rice harvesting and related festivals, for example, or in seasonal hunting and fishing activities, they renew ties that may have grown attenuated. Comments by Spud Fineday, an Ojibwe from the White Earth Reservation, on the annual White Earth wild rice harvest illustrate this aspect of subsistence activities: "You get to visit people you haven't seen for a whole year, because just about everyone goes ricing."<sup>374</sup> Spending time together in subsistence activities on tribal lands can lessen not just physical distances but also social distances. Participation in subsistence activities can thus play a vital role in preserving the very existence of tribes and communities in the face of forces that draw members away from their homelands.

Finally, by fostering and preserving ties between tribal members, participation in subsistence activities functions as a belated antidote to past U.S. government efforts to destroy "tribalism" and promote self-centered individualism. Nineteenth-century government officials sought to destroy tribal members' ties to, and sense of responsibility toward, their extended families and communities. In the nineteenth century, influential Senator Henry Dawes, for example, attributed tribes' alleged failure to progress sufficiently on the road to civilization to their sense of community, lamenting that "[t]here is no selfishness, which is at the bottom of civilization."<sup>375</sup> Many reservations were subjected to division into allotments for tribal members (with "surplus" land made available to non-Indians), as part of the effort to foster exclusive individualism on the part of each Indian: "[H]e must be imbued with the exalting egotism of American civilization, so that he will say 'I' instead of 'We,' and 'this is mine,' instead of 'This is ours.'"<sup>376</sup> Kinship and community ties were to be replaced by nuclear families, each headed by a land-owning Indian man, as the key social unit.<sup>377</sup>

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<sup>374</sup> Winona LaDuke, *Wild Rice: Maps, Genes and Patents* (2001), available at <http://savewildrice.org/winona-article> (last visited Aug. 15, 2010) [hereinafter "LaDuke, *Wild Rice*"].

<sup>375</sup> D.S. OTIS, *THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS* 10-11 (Francis Paul Prucha ed., 1973) (quoting Statement of Senator Henry L. Dawes, Third Annual Meeting of the Lake Mohonk Conference (1885), reprinted in 1886 BOARD OF INDIAN COMMISSIONERS ANN. REP., reprinted in H.R. EXEC. DOC. NO. 1, pt. 5, 49th Cong. 1st Sess., app. at 819, 840).

<sup>376</sup> 1888 REPORT OF COMMISSIONER OF INDIAN AFFAIRS, H.R. EXEC. DOC. NO. 1, pt. 5, 50th Cong., 2d Sess., at lxxxix.

<sup>377</sup> See Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of Their Property Rights* 77 N.C. L. REV. 637, 683-84 (1999) (discussing government efforts to put

Preserving, and even revitalizing, activities that revolve around communal cooperation and mutual support, rather than being focused on the competitive individual pursuit of as many resources as possible, thus flies in the face of past efforts to destroy tribal ties and replace them with undiluted individualism. Rejection of this self-centered way of life in connection with subsistence activities is apparent, for example, in programs established by a number of Great Lakes tribes to ensure that elders receive portions of resources that have been harvested by other members of the tribe.<sup>378</sup>

## 2. Bridges Between Generations

In addition to serving as bridges between community members generally, subsistence activities serve more specifically as bridges between older and younger members. Subsistence activities are often multi-generational pursuits. Harvesting techniques that parents and grandparents teach to children were often taught to them by their own parents and grandparents. Knowledge of when and where certain resources are to be found, and how best to process and preserve them, is also passed down from older to younger generations. Possession of such knowledge is a component of the status of elders. The importance of the knowledge of elders in connection with subsistence activities is apparent, for example, in the Inuit climate change claim. Inuit hunters historically have depended on elders for knowledge and guidance about snow and ice characteristics, but climate change has undermined the accuracy of this knowledge.<sup>379</sup> Climate change thus threatens not only the safety of hunters and the continued viability of subsistence hunting but also the role of subsistence activities as a bridge between generations.

Undermining the role of elders, and of community members in general, in the education of native children was yet another aspect of the assimilationist agenda of past U.S. government policy toward tribes. Boarding schools and day schools, run by the government and by religious organizations under contract with the government, were established to provide formal, “American” education (with an emphasis on vocational training) to Indian children and to counter the “backward” influences of their families and communities.<sup>380</sup> This educational project was expected to have transformative effects, as a congressional report described:

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control over land into the hands of Indian men and to replace extended family ties with nuclear family ties) [hereinafter “Dussias, *Squaw* Drudges”].

<sup>378</sup> See, e.g., Bad River Final Findings, *supra* note 334, at 14. See also Chantal Norrgard, *From Berries to Orchards: Tracing the History of Berrying and Economic Transformation among Lake Superior Ojibwe*, 33 AM. IND. Q. (no. 1) 33, 43 (2009) (noting that Ojibwe tribal members’ berry gathering, which was protected by treaty, “was a group activity, in contrast to the individualism emphasized by assimilation and allotment policy”). Norrgard notes further how berrying activities have historically been intertribal; such activities thus served as a bridge stretching beyond the tribe to refresh relations with other tribes. See *id.* at 53 (“[B]errying was an intertribal activity . . . [and] a means for Ojibwe to refresh interband and intertribal networks.”).

<sup>379</sup> See *supra* notes 206-09 and accompanying text.

<sup>380</sup> See generally Allison M. Dussias, *Let No Native American Child Be Left Behind: Reenvisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 822-33 (2001) (discussing the history of the formal, government-imposed education of Native American children) [hereinafter “Dussias, *Let No Native American Child Be Left Behind*”].



Put into the hands of their children the primer and the hoe, and they will naturally, in time, take hold of the plow; and as their minds become enlightened and expand, the Bible will be their book, and they will grow up in habits of morality and industry, leave the chase to those whose minds are less cultivated, and become useful members of society.<sup>381</sup>

Preservation of “the chase” and other subsistence activities helps to counter the continuing effects of past government education programs and their denigration of traditional knowledge and of the educational role played by elders and other community members. Participation in inter-generational subsistence activities helps to preserve the bridge between older and younger community members, to continue the sharing of knowledge between generations. Where these activities are being revitalized, in connection with efforts aimed at restoring subsistence resources, intergenerational knowledge transfers that have largely disappeared can even be restored.

### 3. Bridges Across Time

Participating in subsistence activities helps to preserve a way of life that extends from the past, through the present, and into the future. Whether fishing, hunting, or wild rice cultivation is involved, the tribes and communities discussed above seek to protect activities in which their members have engaged since time immemorial. Subsistence activities and resources may be tied to a tribe’s very identity and its current location.

Subsistence activities tap into knowledge that has come down to today’s tribal and community members from their ancestors. These activities thus serve as a bridge connecting the past and the present, and deceased and living members, as the following comments by Lac du Flambeau tribal member Yolanda St. Germaine reveal:

Just being out there and seeing all those lights and knowing those are your people. Everybody’s fishing and you could hear the drum. It just kind of took me back in time. . . . [I]t could have been a hundred years ago. THEY did this at that time and we’re part of it.<sup>382</sup>

When tribes rely on treaties in making their claims for protection of subsistence activities, they are connecting with the efforts of their ancestors to ensure perpetual availability of resources that have long sustained the tribe. Moreover, when tribes seek to protect reservation lands and waters, they are seeking to preserve and protect what their ancestors valued and held at the centers of their lives. The location of the reservation of the Sokaogon Chippewa Community, for example, where the Tribe is protecting subsistence resources by imposing water quality standards, was selected by ancestors on the basis of the location of the lake at its center.<sup>383</sup> In this sense also, protection of subsistence rights represents a bridge between members of a community today and those of the past.

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<sup>381</sup> R. PIERCE BEAVER, CHURCH, STATE, AND THE AMERICAN INDIANS: TWO AND A HALF CENTURIES OF PARTNERSHIP IN MISSIONS BETWEEN PROTESTANT CHURCHES AND GOVERNMENT 67-68 (1966) (internal quotation omitted).

<sup>382</sup> Loew, *supra* note 245, at 724-25 (quoting Yolanda St. Germaine).

<sup>383</sup> See *supra* note 353 and accompanying text.

The bridges created by subsistence activities also extend forward into the future. The Inuit Circumpolar Conference's Charter, for example, notes the ICC's goal of ensuring "the endurance and the growth of Inuit culture and societies for both present and future generations."<sup>384</sup> Today's tribal members seek to protect subsistence resources not just for those who enjoy them now, but also for those who will wish to enjoy them in the future. Tribes acting to protect reservation wild rice beds from the adverse effects of water quality degradation are acting to protect not just the beds that exist today, for use today, but also to protect additional areas that are suitable for wild rice cultivation and may be used as rice beds in the future.<sup>385</sup> Tribes and native communities seek to protect terrestrial and aquatic animals from mercury pollution and climate change's impacts not just for themselves, but also for their children, their children's children, and so on.

This ethic of sustainable consumption is embodied in the "Seven Generations" principle, which recognizes the responsibility of today's people toward those of the future. As Marge Anderson has explained, "At Mille Lacs, we always look seven generations ahead. We know that if we do not keep the protection of our resources and the needs of future generations at the center of each decision we make, even the most seemingly certain of economic plans will surely fail."<sup>386</sup> Thus, decisions are to be made with a view to their impact not just today, but also for the next seven generations to come. This principle is recognized in the U.N. Declaration on the Rights of Indigenous Peoples, which affirms the right of indigenous peoples "to uphold their responsibilities to future generations" with respect to maintaining their relationship with their lands, territories, waters, and other resources.<sup>387</sup> This philosophy stands in stark contrast to the "drill, baby, drill" today, and forget about tomorrow, approach that often characterizes the dominant society's attitude toward resource development in the United States. By seeking protection for subsistence resources today, the Inuit and the tribes involved in the litigation and exercises of regulatory authority discussed above are endeavoring to ensure that these resources will be available to sustain the generations of the future.

#### 4. Bridges Between Economic Life and Cultural and Spiritual Life

Finally, subsistence activities serve as a bridge between a community's efforts to feed and sustain its families—its economic life—and its cultural and spiritual life. Hunting, fishing, and wild rice harvesting play an important role in the cultures of the communities whose claims are discussed above. Members of these communities

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<sup>384</sup> ICC, Charter, art. 3 ("Purposes").

<sup>385</sup> See *supra* notes 361-62 and accompanying text.

<sup>386</sup> Thomas D. Peacock & Donald R. Day, *Nations within a Nation: The Dakota and Ojibwe of Minnesota*, 129 DAEDALUS (no. 3) 137, 156 (quoting Marge Anderson). The Mille Lacs Reservation, home of the Mille Lacs Band of Ojibwe, is one of the seven Ojibwe reservations in Minnesota. *Id.* at 143. Marge Anderson is currently the tribe's Chief Executive. See Mille Lacs Band of Ojibwe, *Tribal Government, Elected Officials*, [http://www.millelacsobjibwe.org/Page\\_ElectedOfficials.aspx](http://www.millelacsobjibwe.org/Page_ElectedOfficials.aspx). See also Joyce Tekahnawiiaks King, *The Value of Water and the Meaning of Water Law for the Native Americans Known as the Haudenosaunee*, 16 CORNELL J.L. & PUB. POL'Y 449, 457 (2007) (noting the directive of the Haudenosaunee Great Law of Peace to "[l]eave some of the 'catch' for the future, ensuring the future of seven generations for your family and the species' survival").

<sup>387</sup> Indigenous Rights Declaration, *supra* note 162, art. 25.

have spoken about the ways in which subsistence activities are at the center of who they are as a people. They provide not just physical sustenance, but rather cultural and spiritual sustenance, thus serving as a kind of food for the spirit as well as the body. The following comment by Ronnie Chilton about making maple sugar (another treaty-protected resource) reflects this perspective: “You can cut a tree once and get some money, but if you make syrup every year, you will get money, you will get food, a sweet taste, you will smell Spring, and you will get food for your soul.”<sup>388</sup> Similarly, Winona LaDuke has commented that “[t]he wild rice harvest of the Anishinaabeg not only feeds the body, it feeds the soul.”<sup>389</sup> Undermining subsistence resources thus undermines tribal cultures; sustaining them fosters the preservation of tribal cultures.

That tribal members should describe the importance of subsistence activities in spiritual language is no happenstance, but reflects the determined survival—despite great adversity—of a traditional worldview as to the environment and human beings’ relationship with it. In the nineteenth century, the U.S. government and religious groups allied with it engaged in concerted efforts to suppress traditional Native American religions and replace them with Christianity, a project termed “Christianization.”<sup>390</sup> Traditional practices, such as ceremonial dances, were categorized as “Indian Offenses,” for which practitioners were to be punished.<sup>391</sup> Reflecting the government’s general hostility toward Indians’ traditional practices, one nineteenth-century reservation agent described ceremonial dances as “the great evils in the way of their ultimate civilization” and as a manifestation of “a heathenism as gross as that of India or Central Africa.”<sup>392</sup> Suppression of traditional practices was combined with government support for Christian missionary activities on reservations.<sup>393</sup> The continued recognition of a spiritual aspect of subsistence

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<sup>388</sup> WINONA LADUKE, *ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE* 132 (1999), quoting Ronnie Chilton. For a discussion of treaty rights with respect to harvesting maple sugar, see Robert H. Keller, *America’s Native Sweet: Chippewa Treaties and the Right to Harvest Maple Sugar*, 13 *AM. IND. Q.* (no. 2) 117 (1989). See also generally Norrgard, *supra* note 378 (exploring Ojibwe harvesting of berries, also protected by treaty rights).

<sup>389</sup> LaDuke, *Wild Rice*, *supra* note 374, at 1.

<sup>390</sup> See generally Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 *STAN. L. REV.* 773 (1997) [hereinafter “Dussias, *Ghost Dance*”].

<sup>391</sup> Dances, along with the practices of “so-called ‘medicine-men,’” were listed as “Indian offenses” in the 1883 Department of the Interior, Office of Indian Affairs’ “Rules Governing the Court of Indian Offenses,” for which tribal members could be punished, available at <http://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf>.

<sup>392</sup> 1882 REPORT OF COMMISSIONER OF INDIAN AFFAIRS, H.R. EXEC. DOC. NO. 77, 47th Cong. 2d Sess., at 65 (report of J.H. Fleming, Moquis Pueblo Agency, Aug. 31, 1882) (quoted in Dussias, *Ghost Dance*, *supra* note 390, at 788).

<sup>393</sup> These efforts culminated in the “Peace Policy” of 1869-1882, under which reservations were assigned to specific Christian religious groups for proselytization. See Dussias, *Ghost Dance*, *supra* note 390, at 777-83, 821-23 (describing the Peace Policy and the role of religious groups). Even after the formal end of the Peace Policy, religious groups operated reservation schools under contracts with the government and the government provided Protestant Christian religious education in its own schools. See *id.* at 783-87.

activities indicates the ultimate failure of these policies and modern day tribal members' continuing ties to the worldviews of their ancestors.

Moreover, participation in subsistence activities amounts to a rejection of past government policies aimed at separating native communities from traditional economic activities and integrating them, albeit in a subservient status, into the dominant society's economy. Government policies focused on forcing male tribal members to become farmers, while female tribal members were to be confined to the domestic sphere and become American-style housewives. White farmers were hired to demonstrate farming techniques to Indian men, while so-called "field matrons" were stationed on reservations to instruct Indian women as to their proper roles within their families and communities.<sup>394</sup> To the extent that men or women took on other jobs off of their reservations, they were expected to work as low-paid manual laborers.<sup>395</sup> By protecting, and even revitalizing, subsistence activities, tribal members in effect repudiate these assimilationist policies.

Lastly, subsistence activities represent efforts to preserve, or restore, consumption of foods that played an important role in preserving the health of tribal members in the past. These natural foods, preserved through traditional methods, often provide superior nutrition, free of chemical preservatives and other additives, as compared to store bought foods and to "government cheese" and other commodities made available through the Food Distribution Program on Indian Reservations ("FDPIR")<sup>396</sup> and other government programs. The Inuit, for example, have spoken about the adverse effects on their health of increased consumption of store-bought foods, in place of "country foods."<sup>397</sup> Fish is an excellent source of healthy protein (assuming it is not contaminated by mercury and other toxins),<sup>398</sup> as is wild rice, which also provides B vitamins, several minerals, folic acid, fiber, and

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<sup>394</sup> See Dussias, *Squaw Drudges*, *supra* note 377, at 680-83, 688-707 (discussing the farming-focused labor deemed appropriate for Native American men and the efforts made to instruct women in their domestic role, including the field matron program).

<sup>395</sup> Dussias, *Let No Native American Child Be Left Behind*, *supra* note 380, at 828, 833, 836-37 (describing schools' focus on vocational training, the subservient role that Native Americans were expected to play in the economy, and the shortcomings of the vocational training programs).

<sup>396</sup> For information on the FDPIR, see United States Department of Agriculture, Food and Nutrition Service: Food Distribution Program on Indian Reservations (2009), *available at* <http://www.fns.usda.gov/fdd/programs/fdpi/>.

<sup>397</sup> See *supra* notes 142, 201-04 and accompanying text (discussing "country foods").

<sup>398</sup> EPA's Fish Advisories web page notes, for example, that "[f]ish are a lean, low-calorie source of protein. However, some fish may contain chemicals that could pose health risks. When contaminant levels are unsafe, consumption advisories may recommend that people limit or avoid eating certain species of fish caught in certain places." EPA, Water Science, Fish Advisories (2009), *available at* <http://www.epa.gov/waterscience/fish>. EPA convened a National Forum on Contaminants in Fish in Portland, Oregon in November 2009, to provide an opportunity for state, tribal, and federal health and environmental officials to discuss "issues related to assessing, managing and communicating health risks and benefits associated with fish consumption." EPA, Water Science, Fish Advisories, National Fish Forum (2009), *available at* <http://www.epa.gov/waterscience/fish/forum/2009/>.

very low-fat carbohydrates.<sup>399</sup> In marked contrast to these traditional foods, government-issued bricks of pasteurized process American cheese, one of the commodities made available through the FDPIR, are high in sodium and saturated fat.<sup>400</sup> Researchers have studied the role of dietary change from healthful, traditional diets to a Western diet and the role of government supplemental food programs in the increase in degenerative health and nutritional problems among tribal members.<sup>401</sup> Adverse health impacts from switching to a Western diet have already been studied with respect to a number of specific tribes.<sup>402</sup> Preservation and restoration of traditional foodways can help to improve tribal members' health and reverse the damage done by the switch to a Western diet.<sup>403</sup>

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<sup>399</sup> See Edward E. Terrell & W.J. Wisler, *Protein and Lysine Contents in Grains of Three Species of Wild-Rice (Zizania; Gramineae)*, 136 BOTANICAL GAZETTE (no. 3) 312, 315 (1975) (noting that “[c]ompared with the major cereals, wild-rice has an average protein content greater than most commercial cultivars of barley, corn, rice, rye, sorghum, white wheats, and soft wheats”); see also E.A. Oelke et al., *Alternative Field Crops Manual: Wild Rice*, available at <http://www.hort.purdue.edu/newcrop/afcm/wildrice.html> (noting that wild rice has a high protein and carbohydrate content and is very low in fat, and describing its other nutritional benefits). The benefits of wild rice have not gone unnoticed by scientists, who developed a domesticated version of wild rice for commercial cultivation in paddies. There is concern that the paddy rice stands will contaminate Ojibwe natural wild rice stands through pollen drift. See Winona LaDuke, *The Political Economy of Wild Rice: Indigenous Heritage and University Research*, 25 MULTINAT'L MONITOR 27, 28 (2004). Additional threats come from efforts to patent wild rice strains. See, e.g., LaDuke, *Wild Rice*, *supra* note 374. See also Walker & Doerfler, *supra* note 245 (discussing Minnesota legislation relating to genetically engineered wild rice, which is designed to protect wild rice).

<sup>400</sup> For nutritional information on this product, see USDA, Household Commodity Fact Sheet (2009), available at [http://www.fns.usda.gov/fdd/facts/hhpfacts/New\\_HHPFacts/Dairy/HHFS\\_CHEESE\\_AMERICAN\\_PROCESS\\_B064\\_Final.pdf](http://www.fns.usda.gov/fdd/facts/hhpfacts/New_HHPFacts/Dairy/HHFS_CHEESE_AMERICAN_PROCESS_B064_Final.pdf). The sheet includes instructions that do not inspire confidence in its quality and health benefits: “If you see mold on the cheese, cut off at least 1 inch all around the mold spot.” *Id.*

<sup>401</sup> See generally Teresa L. Dillinger et al., *Feast or Famine? Supplemental Food Programs and Their Impacts on Two American Indian Communities in California*, 50 INT'L J. FOOD SCI. & NUTRITION (no. 3) 173 (1999) (focusing on the use of supplemental food programs by families residing on the Round Valley Indian Reservation and Indian families residing in Sacramento).

<sup>402</sup> See, e.g., Janette C. Brand et al., *Plasma Glucose and Insulin Responses to Traditional Pima Indian Meals*, 51 AM. J. CLINICAL NUTRITION (no. 3) 416 (1990) (reporting on a study of the effects of traditional Pima foods—corn, lima beans, acorns, mesquite, and white and yellow teparies—on blood glucose and insulin levels and concluding that the traditional diet may have helped to protect Pimas against diabetes; their recent adoption of the typical Western diet has led to high rates of Type II diabetes). For an analysis of the Western diet and its history, see Loren Cordain et al., *Origins and Evolution of the Western Diet: Health Implications for the 21st Century*, 81 AM. J. CLINICAL NUTRITION (no. 2) 341 (2005).

<sup>403</sup> See, e.g., Bernadette deGonzague et al., *Dietary Intake and Body Mass Index of Adults in 2 Ojibwe Communities*, 99 J. AM. DIETETIC ASSOC. (no. 6) 710 (1999) (discussing dietary change in the communities studied and its adverse impacts on health, and recommending that “[t]raditional food items, which are sources of nutrients lacking in the diet (e.g., wild rice as a source of folate) . . . be promoted in recognition of their nutritional and cultural value”). *Id.* at 715. For an interesting report on the efforts on one tribe, the Ho-Chunk Tribe, to combat

In summary, subsistence activities today serve important roles in the indigenous communities whose efforts to protect their subsistence rights are discussed above. These activities bridge the gap between the past and the present, and between the present and the future, of tribes and communities. They serve as bridges to connect different generations, as well as tribal members generally. Finally, subsistence activities connect the economic life of a tribe to its cultural and spiritual life. Moreover, the continuation of these activities represents the rejection of a number of elements of past government assimilation efforts. Given the important functions that subsistence activities continue to serve, it is no wonder that tribes and indigenous communities have fought, utilizing a variety of means, to protect their rights under domestic and international law to engage in these activities. Their efforts ultimately rest upon a principle that also has deep roots with tribes and Native communities: sovereignty.

*B. Sovereignty as the Common Ground of Subsistence Rights Protection Strategies*

The Inuit Circumpolar Conference, the tribes involved in the *New Jersey v. EPA* litigation, and the Great Lakes tribes seeking TAS status to regulate water quality on their reservations have chosen different pathways for achieving their goal of protecting their right to engage in subsistence activities. They have chosen different fora for asserting their rights and relied on different legal principles stemming from different sources. Nonetheless, just as is the case with the underlying cultural values, these pathways to protect subsistence activities depart from a common legal principle. The bedrock of each of these pathways is the collective sovereignty, or nationhood, of indigenous peoples—their inherent authority to govern, and make decisions with respect to themselves, their homelands, and their resources.

It is as sovereigns, rather than as individuals or mere groups of individuals, that tribes of the Midwest and the Pacific Northwest participated in *New Jersey v. EPA*. It is as sovereigns that the Lac du Flambeau Band and other tribes have sought recognition of their authority to set water quality standards for reservation waters. And it is as sovereigns that the members of the Inuit Circumpolar Conference have united in an organization that transcends the internationally recognized boundaries of nation-states. The discussion below explores two key aspects of these peoples' assertions of sovereignty in connection with their efforts to protect their subsistence rights.

1. Indigenous Nations as Treaty Parties and International Actors

The tribes that participated in the *New Jersey v. EPA* litigation did so to vindicate rights under treaties that guarantee fishing rights. These rights are substantially undermined, they explained, by the contamination of fish that EPA has allowed through its failure to adequately regulate utilities' mercury emissions under the Clean Air Act. These treaties were entered into by the tribes as sovereigns on the one hand, and by the United States, in acknowledgment of the tribes' sovereignty, on the other hand. The rights guaranteed by the treaties survive to the present today, as does the sovereign status of the tribes that signed them.

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Type II diabetes through an approach that draws on the Tribe's traditions, including those related to foods, see Mary Annette Pember, *Documenting Native Approaches to Wellness*, 57 NIEMAN RPTS. (no. 2) 46 (2003).

The Lac du Flambeau Band and other Great Lakes tribes that have sought to protect wild rice by establishing Clean Water Act water quality standards programs have not relied directly on treaty rights in the pathway that they have followed. Treaty rights, however, underlie their efforts, because the boundaries of their reservations were established by treaties. These treaties recognize their continuing rights with respect to the territory within the boundaries set out in the treaties, including their rights with respect to subsistence resources. Moreover, in the case of some tribes, the location of their treaty-guaranteed reservation was selected in order to ensure continued access to valued subsistence resources.

Reliance on treaty rights reflects tribes' understanding of treaties as a means of forging timeless connections—of creating relatedness—between themselves and other sovereigns.<sup>404</sup> Tribes entering into treaties with the United States understood the treaties as creating sacred obligations; such obligations might even establish kinship duties between the signatories.<sup>405</sup> The rights and relationships created by these treaties remain intact today, and thus can be relied on when subsistence activities are threatened.

While the Inuit Circumpolar Council is not a treaty signatory like the tribes discussed above, the ICC does interact with other nations. The organization reflects the complicated position of the Inuit themselves, as set out in the ICC's Charter: the Inuit are "an indigenous people, with a unique ancestry, culture and homeland," and the territory "which [they] use and occupy transcends political boundaries."<sup>406</sup> Their homeland includes the "arctic and sub-arctic areas where, presently or traditionally, Inuit have Aboriginal rights and interests," defined as "those collective and individual rights and interests which are unique to indigenous peoples."<sup>407</sup> The ICC was created as an international organization "to protect and advance Inuit rights and interest on the international level,"<sup>408</sup> through participation in international organizations and otherwise.<sup>409</sup> The ICC's four member parties, separately organized as permitted under the laws of their respective nation-states (Canada, Greenland, Russia, and the United States),<sup>410</sup> work together through the ICC to

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<sup>404</sup> See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 198 (2001).

<sup>405</sup> See *id.*

<sup>406</sup> Inuit Circumpolar Conference Charter, Preamble, available at [http://inuitcircumpolar.com/index.php?auto\\_slide=&ID=374&Lang=En&Parent\\_ID=&current\\_slide\\_num](http://inuitcircumpolar.com/index.php?auto_slide=&ID=374&Lang=En&Parent_ID=&current_slide_num). "Inuit" is defined in the Charter as "indigenous members of the Inuit homeland recognized by Inuit as being members of their people and shall include the Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)." *Id.* art. 1, § 6.

<sup>407</sup> *Id.* art. 1, § 7.

<sup>408</sup> *Id.* at Preamble.

<sup>409</sup> *Id.* art. 4 (one of the ICC's goals is "to participate in, or make representations to, international organizations concerned with matters affecting Inuit interests").

<sup>410</sup> Article 1 of the Charter provides: "'Member Party' means each of Inuit Circumpolar Council (Canada) Inc., Inuit Circumpolar Council—Alaska, ICC Greenland and ICC Russia. Each Member Party shall organize itself as the laws of its home jurisdiction permit." *Id.* art. 1, § 8.

ensure that the Inuit's right to self-determination is confirmed and that "Inuit participation in policies and activities affecting our homeland [is] assured."<sup>411</sup> The Inuit thus assert, through the ICC, an international legal right of sovereign peoples, namely, the right of self-determination.

The ICC's participation in the proceedings of an international organization is in keeping with recent developments respecting indigenous peoples' status in the international community. While international law continues to deny to indigenous peoples recognition as states, these peoples are increasingly being recognized as subjects, rather than objects, of international law. For some time, there has been a trend toward recognizing that "indigenous peoples are members of the international community who have legal personality under international law—'subjects' of international legal rights and duties rather than mere 'objects' of international concern."<sup>412</sup> Thus, "indigenous peoples are gaining recognition of their legal personality as distinct societies with special collective rights and a distinct role in national and international decisionmaking."<sup>413</sup>

Moreover, developments in recent years have indicated an increasing recognition of the right of indigenous peoples to have "a seat at the table" when international bodies are addressing issues that are of concern to indigenous peoples. The formation within the United Nations of the Permanent Forum on Indigenous Issues, for example, is but one indication of this trend. An advisory body to the Economic and Social Council, the Permanent Forum was established with "a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights."<sup>414</sup> Its responsibilities include providing "expert advice and recommendations on indigenous issues to the Council"; promoting "the integration and coordination of activities related to indigenous issues within the UN system"; and "prepar[ing] and disseminat[ing] information on indigenous issues."<sup>415</sup>

The U.N. General Assembly's long-anticipated 2007 adoption of the Declaration on the Rights of Indigenous Peoples also evidences this new direction. As Robert Coulter has explained, this development "marked a world-wide change in the way

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<sup>411</sup> *Id.* at Preamble.

<sup>412</sup> Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 35 (1994) [hereinafter "Barsh, *Indigenous Peoples in the 1990s*"]. In the 1980s, on the other hand, Professor Barsh wrote about indigenous peoples as "an emerging object of international law." Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986).

<sup>413</sup> Barsh, *Indigenous Peoples in the 1990s*, *supra* note 412, at 34.

<sup>414</sup> UN Permanent Forum on Indigenous Issues, About Us/Mandate: Permanent Forum: Origin and Development, available at [http://www.un.org/esa/socdev/unpfii/en/about\\_us.html](http://www.un.org/esa/socdev/unpfii/en/about_us.html) [hereinafter "Permanent Forum Mandate"]. The Permanent Forum was established by the U.N. Economic and Social Council resolution 2000/22 on July 28, 2000. UN Permanent Forum on Indigenous Issues, Structure within ECOSOC, available at <http://www.un.org/esa/socdev/unpfii/en/structure.html>.

<sup>415</sup> Permanent Forum Mandate, *supra* note 414.



that the countries of the world treat indigenous peoples.”<sup>416</sup> The international community had “at long last formally recognized that indigenous peoples have a permanent right to exist as peoples, cultures, and societies.”<sup>417</sup> As the Declaration was developed, hundreds of representatives of indigenous nations from all over the world participated in the drafting process and in debates on key issues.<sup>418</sup> The Declaration was adopted with the overwhelming support of the nations of the world, as indicated in the vote of 143 in favor and 4 (Australia, Canada, New Zealand, and the United States) against.<sup>419</sup>

The Declaration recognizes indigenous peoples as being “equal to all other peoples”<sup>420</sup> and having the right to self-determination, by virtue of which “they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>421</sup> In exercising this right of self-determination, indigenous peoples “have the right to autonomy or self-government in matters relating to their internal and local affairs.”<sup>422</sup> They have the “right to participate in decision-making in matters which would affect their rights”;<sup>423</sup> to “be secure in the enjoyment of their own means of subsistence;”<sup>424</sup> and to “maintain . . . their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters, and coastal seas and other resources.”<sup>425</sup>

Although the Declaration is, on its face, non-binding, it stands as “an official statement by most member countries of the United Nations that these are the legal rights of indigenous peoples in international law.”<sup>426</sup> The Declaration thus enjoys, as Coulter has observed, “considerable political and moral force, creating the basis for it to become binding international law.”<sup>427</sup> The ICC’s petition to the Inter-American Human Rights Commission represents the increasing willingness of indigenous peoples to demand respect for the rights to which they are entitled under this developing area of the law. The Commission’s holding of a hearing, while not the response requested by the ICC, indicates a recognition of the need to take steps—albeit only preliminary steps—to address claims by indigenous people that their rights have been violated.

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<sup>416</sup> Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 539 (2009). Mr. Coulter participated in the development of the Declaration for thirty-one years. *See id.* at 540.

<sup>417</sup> *Id.* at 543.

<sup>418</sup> *See id.* at 545.

<sup>419</sup> *See id.*

<sup>420</sup> Indigenous Rights Declaration, *supra* note 162, art. 2.

<sup>421</sup> *Id.* art. 3.

<sup>422</sup> *Id.* art. 4.

<sup>423</sup> *Id.* art. 18.

<sup>424</sup> *Id.* art. 20.

<sup>425</sup> *Id.* art. 25.

<sup>426</sup> *See* Coulter, *supra* note 416, at 546.

<sup>427</sup> *Id.*

## 2. Indigenous Peoples and Sovereignty—Political, Cultural, and Environmental

In a 2001 article, Wallace Coffey, former Chairman of the Comanche Tribe and a cultural resources specialist, and Professor Rebecca Tsosie called for a reappraisal of the doctrine of tribal sovereignty, “one which looks *within*—to the ‘cultural sovereignty’ of Indian Nations—for the core of its meaning rather than to an externally defined notion of tribal ‘political sovereignty.’”<sup>428</sup> While Indian law is “structured around the idea that tribal governments are separate political sovereigns with their own territorial boundaries,”<sup>429</sup> the Supreme Court has imposed limitations on tribal sovereignty in the name of the United States’ “overriding” sovereignty.<sup>430</sup> The doctrine of tribal sovereignty that has been developed by the Supreme Court, which is “rooted in the notion of *political sovereignty*,” consequently understands tribal political sovereignty as being “subject to the supremacy of the federal government.”<sup>431</sup> Because Indian law views tribal political sovereignty as dependent upon the federal government’s acknowledgment, “Indian nations will always be vulnerable to restrictions on their sovereignty, and perhaps even to the entire annihilation of their sovereignty.”<sup>432</sup> Such restrictions include the limitations on tribal regulatory authority over non-Indians with which tribes have had to contend in their efforts to establish water quality standards programs, as discussed above.<sup>433</sup>

In view of the limitations that have been imposed on tribal political sovereignty, it is necessary, Coffey and Tsosie explain, to develop an alternative vision of tribal sovereignty “that is based in the conceptions of sovereignty held by Indian nations and which responds to the challenges that confront Indian nations today.”<sup>434</sup> This vision should “embody *cultural sovereignty*: that is, the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures.”<sup>435</sup> Cultural sovereignty and political sovereignty should not, and cannot, be divorced from each other. Rather, cultural sovereignty, which “posits that culture is the living basis for the survival of Indian nations as distinct political and cultural groups,”<sup>436</sup> can “provide a different context for political sovereignty, one rooted in autonomy of Native people as distinct cultural groups.”<sup>437</sup> As W. Richard West has observed, “[p]olitical sovereignty and cultural sovereignty are inextricably linked, because the ultimate goal of political sovereignty is protecting a way of life.”<sup>438</sup> Similarly, Anishinaabe scholar Lawrence Gross has described sovereignty as “an

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<sup>428</sup> Coffey & Tsosie, *supra* note 404, at 191 (emphasis in original).

<sup>429</sup> *Id.* at 192.

<sup>430</sup> *Id.* at 193.

<sup>431</sup> *Id.* at 194 (emphasis in original).

<sup>432</sup> *Id.*

<sup>433</sup> See *supra* notes 257-61 and accompanying text.

<sup>434</sup> Coffey & Tsosie, *supra* note 404, at 195-96.

<sup>435</sup> *Id.* at 196 (emphasis in original).

<sup>436</sup> *Id.* at 202.

<sup>437</sup> *Id.* at 201.

<sup>438</sup> *Id.* at 202 (quoting W. Richard West).

issue that works on many different levels,” explaining that although “issues of land and politics must figure greatly into any discussion of self-determination[,] . . . issues of cultural sovereignty must be taken into account as well.”<sup>439</sup> After all, if “Native Americans achieved sovereignty over their land and politics, would that accomplishment have any functional meaning if, at the same time, Native Americans were fully assimilated into the culture of the dominant society?”<sup>440</sup> At its most basic level, sovereignty involves “maintaining an identity apart.”<sup>441</sup> Coffey and Tsosie cite several examples of tribes exercising cultural sovereignty in relation to land and resources, including efforts to protect treaty-guaranteed off-reservation hunting, fishing, and gathering rights. They note that these efforts represent the “crucial intersection of political and cultural sovereignty.”<sup>442</sup>

The efforts of the tribes and communities discussed above to protect their subsistence rights represent exercises of both cultural and political sovereignty. The pathways that they have chosen all demonstrate an effort to exercise cultural sovereignty—in other words, to “exercise their own norms and values in structuring their collective futures.”<sup>443</sup> They have explained the value of subsistence activities, for example, in terms of what these activities mean to the survival of their communities not in just an economic sense, but also in a cultural and spiritual sense. Moreover, their efforts reflect the “notions of relationship, respect, and continuity between generations” upon which the indigenous concept of sovereignty is based.<sup>444</sup>

Finally, the struggles of these tribes and communities demonstrate utilization of their political sovereignty, despite the limitations that have been placed upon it by the legal legacy of colonialism. Thus, they have relied on treaty rights in bringing legal claims. They have ignored the non-nation status that international law has accorded to them and banded together to seek assistance from international bodies. They have asserted the right to set water quality standards that will limit the activities of non-members not just on their reservations but also beyond its borders. And they have joined together to pursue common goals despite the divisions, such as the separation of the Ojibwe Nation and its lands into individually recognized tribes and scattered reservations, imposed by the U.S. government.

Additional insights into the efforts of tribes and communities to protect their subsistence rights come from considering their actions as exercises of *environmental* sovereignty. Professor Mary Wood and Zachary Welcker have written about the legal mechanisms that tribes can use to “assert their environmental will” and restore their “trust role over aboriginal lands.”<sup>445</sup> The native environmental sovereignty

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<sup>439</sup> Lawrence W. Gross, *Cultural Sovereignty and Native American Hermeneutics in the Interpretation of the Sacred Stories of the Anishinaabe*, 18 WICAZO SA REV. (no.2) 127, 127 (2003). See also *id.* at 132 (describing the author as a scholar and an Anishinaabe).

<sup>440</sup> *Id.* at 127.

<sup>441</sup> *Id.* at 134.

<sup>442</sup> Coffey & Tsosie, *supra* note 404, at 205.

<sup>443</sup> *Id.* at 196.

<sup>444</sup> *Id.* at 200.

<sup>445</sup> Mary Christina Wood & Zachary Welcker, *Tribes as Trustees Again: The Emerging Tribal Role in the Conservation Trust Movement* (pt. 1), 32 HARV. ENVTL. L. REV. 373, 375-

movement recognizes that “[e]nvironmental damage originating outside of reservations jeopardizes traditional economies, cultural ways of life, and the health of tribal citizens,” and that tribes “must develop ways of protecting off-reservation resources.”<sup>446</sup> Thus, in offering comments to EPA on mercury emissions regulation, the Eastern Shawnee Tribe of Oklahoma cited its sovereignty as the basis for intervening to urge the adoption of appropriate mercury emissions standards: “As it is our sovereign responsibility to protect the health of our tribal members and surrounding community, and to protect the air resources for this and future generations, we respectfully submit this comment.”<sup>447</sup>

Each of the tribes and communities discussed above can be understood as asserting its environmental sovereignty over those whose actions, both within tribal territory and outside of it, threaten the continued availability of subsistence resources. The tribes involved in the *New Jersey v. EPA* litigation and participating in the proposed mercury emissions regulation comment process, the tribes seeking recognition of their inherent authority to set reservation water quality standards, and the Inuit who petitioned the Inter-American Human Rights Commission because of their concern over global warming, all sought to control the actions of non-Native people that threatened the continued existence of crucial resources. By asserting the right to exert their environmental will over people and activities both within and outside of the boundaries of the lands and waters that domestic and international law recognize as theirs, they are reclaiming their authority as sovereign stewards of the environment.

#### V. FINAL REFLECTIONS

[There is a] need for a greater spirit of solidarity and multilateral engagement in approaching the urgent problems facing our planet. The cultivation of the values of ‘life, liberty and the pursuit of happiness’ can no longer be seen in predominantly individualistic or even national terms, but must rather be viewed from the higher perspective of the common good of the whole human family. . . . Multilateralism . . . should find expression in a resolve to address the whole spectrum of issues linked to the future of humanity and the promotion of human dignity, including secure access to food and water, . . . climate control and care for the environment . . .<sup>448</sup>

Much is at stake in the struggle to restore a fuller role for tribes and other Native peoples in management and protection of subsistence and other natural resources, for both indigenous and non-indigenous communities. As environmental degradation

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76 (2008). The article explores the use of conservation trust mechanisms by tribes to protect resources.

<sup>446</sup> *Id.* at 375.

<sup>447</sup> Letter from Charles Enyart, Chief, Eastern Shawnee Tribe of Oklahoma, to Jeff Holmstead, Assistant Adm’r for OAR (Apr. 30, 2004) (providing a comment on proposed Utility Mercury Reductions Rule).

<sup>448</sup> Pope Benedict XVI, Remarks accepting the letters of appointment of Miguel Diaz as U.S. Ambassador to the Vatican, Catholic Online, Oct. 2, 2009, *available at* <http://www.catholic.org/politics/story.php?id=34557>.

and climate change stress the ecosystems and resources on which all people—and indeed all of life—depend for survival, it is more important than ever to ensure the proper care of the natural resources that remain. As Wood and Welcker have explained, by “reclaiming a significant degree of sovereignty over natural lands” and applying their sustainability-focused traditional approach to management of resources, “tribes can help arrest the hemorrhaging of natural systems brought about by federal and state trustee mismanagement of these assets.”<sup>449</sup>

The tribes and communities discussed above seek to assert their sovereignty to determine the destiny of the environment on which their peoples depend, and in turn the peoples’ own destiny. They have focused their efforts on resources that are of particular importance to them and chosen different pathways toward meeting their goals. The greater the extent to which their efforts to exercise their environmental sovereignty succeed, the greater the chance that natural resources will survive to sustain the next seven generations of Native—and non-Native—people.

The last words are best left to someone who has long spoken eloquently of the need to protect the resources that sustain life and to make decisions on behalf of the generations to come. Oren Lyons has said:

It seems that we are living in a time of prophecies, a time of definitions and decisions. We are the generation with the responsibility and option to choose the path of life with a future for our children—or the path that defies the law of regeneration. Even though you and I are in different boats—you in your boat and we in our canoe—we share the same river of life. What befalls me, befalls you. And downstream, downstream in this river of life, our children will pay for our selfishness, for our greed, and for our lack of vision. . . . We must join hands with the rest of creation and speak of common sense, responsibility, brotherhood, and peace. We must understand that the law is the seed, and only as true partners can we survive.<sup>450</sup>

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<sup>449</sup> Wood & Welcker, *supra* note 445, at 375.

<sup>450</sup> Remarks of Oren Lyons, Chief and Faithkeeper of the Onondaga Nation of the Haudenosaunee, in *VOICES OF INDIGENOUS PEOPLES: NATIVE PEOPLE ADDRESS THE UNITED NATIONS* 31, 35-36 (Alexander Ewen ed., Clear Light Books 1994).