

Legal Considerations for Climate Change Impacts on Tribes' Off-Reservation Resources

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Abstract

Climate change will continue to negatively impact off-reservation resources and tribal members' access to these resources, including numerous animal and plant species and their related habitats that are relied upon for subsistence harvesting, cultural practices, and ceremonial purposes. This paper seeks to explore existing legal avenues available to tribes to protect their resources in order to prevent such an "ecological removal." By examining legal strategies that have been used to replace both on-reservation resources and treaty-protected off-reservation resources, we gain insight into avenues for protection that may be cultivated to protect additional off-reservation resources, including traditional subsistence resources that are vulnerable to climate change. This paper documents the impact of climate change on tribal nations and subsistence rights and describes the legal framework for off-reservation resource protection by exploring sources of substantive and procedural law available to tribes in the United States to protect resources. The paper also reviews avenues for protection of off-reservation resources.

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Introduction

“You can’t protect sovereignty until you live sovereignty. We need to get past the dueling theories, silo thinking, and compartmentalization. We need to get away from the myth that managing resources can be done in a system of separately serviceable parts.”
(Charles 2009)

At its most basic, federal Indian law recognizes that tribes are sovereign governments, that Indian tribes have a unique government-to-government relationship with the United States, and that the federal government has a “permanent legal obligation to exercise statutory and other legal authorities to protect tribal lands, assets, resources, and treaty rights, as well as a duty to carry out the mandates of Federal law with respect to American Indian and Alaska Native Tribes” (USDA FS 1997). Legally cognizable tribal interests extend beyond reservation boundaries. Reserved treaty rights, the trust obligation, and other legal avenues protect tribes’ off-reservation property rights which may include hunting and fishing, grazing, water, subsistence, and gathering rights and interests (Goodman 2000).

In the Pacific Northwest, tribes have reserved rights to fish off-reservation in the Columbia River, Puget Sound, and other rivers and lakes (Goodman 2000). Additionally, many tribes reserved hunting rights on ceded land, as well as former reservation lands acquired by the United States (Goodman 2000). These rights may be exercised under tribal jurisdiction and may not be limited by states (Goodman 2000). Off-reservation reserved rights provide a meaningful entitlement to the tribal harvest of off-reservation resources; non-Native fishermen and hunters may not be favored by states if Native fishers and hunters will be negatively impacted (Goodman 2000). Further, private actors and states are prohibited from denying Native fishermen and hunters access to off-reservation resources protected under tribal reserved rights (Goodman 2000). As Goodman explains:

More recently, the loss of resources through degradation and destruction of their habitat—and the corresponding adverse affect on the ability of the tribes to exercise their reserved rights—has led to the assertion that the rights reserved by the tribes include a right to habitat protection. . . . [c]ourts and commentators have begun to recognize that the substantive nature of the off-reservation reserved right requires that fish and wildlife habitat be protected in order to ensure that the rights remain meaningful. . . . The right to protection of off-reservation habitat that supports reserved-rights species flows from the legitimate expectation tribes had in reserving such rights: that there would be sufficient resources available to ensure that the rights were meaningful (Goodman 2000).

Climate change will continue to negatively impact off-reservation resources and tribal members’ access to these resources, including numerous animal and plant species and their related habitats that are relied upon for subsistence harvesting, cultural practices, and ceremonial purposes. In Native communities, “it is not just the place that matters, but the animate world of which it is a part: the animals, plants, seasons, and rhythms that flow from centuries of knowledge about a place and all of its emanations” (Krakoff 2008). Modern legal systems, with their fierce protection of individual rights over mutual obligations between communities, fail to incorporate

this worldview of reciprocity. The law, in its current manifestation, is ill suited to address the ways in which climate change impacts interrelated groups, resource sharing, and the movement of natural systems across jurisdictional borders (Williams and Hardison 2005). Because tribal communities are dependent upon and integrated with various ecosystems, and many tribal economies rely on the daily use and subsistence harvesting of traditional plants, fish, and wildlife, climate change will continue to have a profound effect on Native people (Cordalis and Suagee 2008).

Indian peoples should begin to seriously address their own “Homeland Security.” In the history of the United States, the Tribes signed treaties and were physically removed to reservations, ceding millions of acres of land. In return for this, they were guaranteed the recognition of reserved rights to continue their ways of living. Global climate change has the potential to create the second great dispossession of indigenous peoples from their cultural heritage. It presents a form of “ecological removal” which pulls the living blanket of the Earth out from under them. Currently, the Tribes have rights to resources tied to specific tracts of land—their reservations and, in many cases, federal lands that were part of their traditional use areas (Williams and Hardison 2007).

This paper seeks to explore existing legal avenues available to tribes to protect their resources in order to prevent such an “ecological removal.” By examining legal strategies that have been used to replace both on-reservation resources and treaty-protected off-reservation resources, we gain insight into avenues for protection that may be cultivated to protect additional off-reservation resources, including traditional subsistence resources, that are vulnerable to climate change. This paper documents the impact of climate change on tribal nations and subsistence rights, and describes the legal framework for off-reservation resource protection by exploring sources of substantive and procedural law available to tribes in the United States to protect resources. This paper also reviews avenues for protection of off-reservation resources and concludes by highlighting opportunities for increased collaboration between the federal government and tribes so that effective legal protections may be developed and implemented before it is too late.

It should be noted that while this paper is in general focused on the protection of off-reservation resources, the impacts of climate change will affect tribal culture and resources more broadly. The impacts of climate change on tribal nations and the strategies employed to protect resources should be considered for both on and off-reservation resources.

The Impact of Climate Change on Tribal Nations and Subsistence Rights

The impact of climate change has been observed in most oceans and on every continent (Parry et al. 2007). Temperature increases are affecting natural systems (Parry et al. 2007). Numerous documented observations have been made regarding ways that climate change impacts physical and biological systems (Parry et al. 2007). For example, there have been changes in some Antarctic and Arctic ecosystems, warming rivers and lakes in many areas, earlier timing of spring events, upward and poleward shifts in ranges of animal and plant species, and changes in marine and freshwater biological systems associated with rising water temperatures (Parry et al.

2007). In North America, extreme weather-related events including floods, hurricanes, and droughts have caused extensive economic damage (Parry et al. 2007). Rising sea levels threaten coastal habitats and dependent species (Parry et al. 2007). Rising temperatures negatively impact access to water, water quality, and increase pollution and heat-related illnesses (Parry et al. 2007). Indigenous communities are particularly vulnerable to the impact of climate change:

Among the most climate-sensitive North American communities are those of indigenous populations dependent on one or a few natural resources. About 1.2 million (60 percent) of the U.S. tribal members live on or near reservations Many indigenous communities in northern Canada and Alaska are already experiencing constraints on lifestyles and economic activity from less reliable sea and lake ice (for traveling, hunting, fishing and whaling), loss of forest resources from insect damage, [and] stress on caribou (Parry et al. 2007, Williams and Hardison 2007, Hardison 2006).

One clear example of indigenous populations' climate-sensitivity and the negative impacts of climate change can be found by looking at traditional Inuit communities. The Inuit are a cultural and linguistic group (Watt-Cloutier 2005). Their traditional range includes Alaska, Russia, Canada, and Greenland (Watt-Cloutier 2005). The Inuit in these areas share a common culture defined by dependence on subsistence harvesting, travel on snow and ice, food sharing, a base of traditional knowledge, and adaptation to Arctic conditions (Watt-Cloutier 2005). Traditional country food is more nutritious than store-bought food (Watt-Cloutier 2005). Subsistence harvesting also serves as a spiritual and cultural foundation, preserving intergenerational knowledge, values, and skills (Watt-Cloutier 2005). The Petition to the Inter-American Commission on Human Rights highlights the impact of climate change on the Inuit's subsistence practices:

The Inuit's fundamental right to use and enjoy their traditional lands is violated as a result of the impacts of climate change because large tracks of Inuit traditional lands are fundamentally changing, and still other areas are becoming inaccessible. Summer sea ice, a critical extension of traditional Inuit land, is literally ceasing to exist. Winter sea ice is thinner and unsafe in some areas. Slumping, erosion, landslides, drainage, and more violent sea storms have destroyed coastal land, wetlands, and lakes, and have detrimentally changed the characteristics of the landscape upon which the Inuit depend. The inability to travel to lands traditionally used for subsistence and the reduced harvest have diminished the value of the Inuit's right of access to these lands (Watt-Cloutier 2005).

Climate change negatively impacts Inuit culture; ice changes affect game animals, impairing the subsistence harvest (Watt-Cloutier 2005). Population decreases of ice dependent species such as walrus, seals, polar bears, and sea birds can be attributed to disappearing ice (Watt-Cloutier 2005). Coastal erosion, due in part to the loss of permafrost and sea ice, also negatively impacts the Inuit because most live and hunt near the coast (Watt-Cloutier 2005). There have been noticeable decreases in the quality and availability of wild greens and berries in some areas; harvesting is much more difficult (Watt-Cloutier 2005). Further, climate change diminishes the ability of elders to forecast the weather, reducing their important role in preparing for a hunt (Watt-Cloutier 2005). Finally, the availability and quality of drinking water has decreased

because of the combined effects of less snowfall, erosion, melting permafrost, unpredictable early melt, changing winds, and rising temperatures (Watt-Cloutier 2005).

Indigenous communities in the lower forty-eight states have also experienced the impact of climate change on their traditional practices. In the Pacific Northwest, tribes have harvested wild salmon for cultural, subsistence, and religious purposes for thousands of years (Krakoff 2008). Climate change, along with the impact of other factors like dams, over-fishing, and logging threatens to lead to the extinction of wild salmon populations (Krakoff 2008). Rising stream and ocean temperatures will affect egg incubation, range and migration patterns, and salmon food supply (Krakoff 2008). Increased flooding will destroy spawning habitats and increase siltification of streambeds while lower summer flows will make migration more difficult (Krakoff 2008). The Columbia River Inter-Tribal Fish Commission explains the importance of wild salmon to tribes in the Pacific Northwest:

Salmon are part of our spiritual and cultural identity. Over a dozen longhouses and churches on the reservations and in ceded areas rely on salmon for their religious services. The annual salmon return and its celebration by our peoples assures the renewal and continuation of human and all other life. Historically, we were wealthy peoples because of a flourishing trade economy based on salmon Salmon and the rivers they use are part of our sense of place. The Creator put us here where the salmon return. We are obliged to remain and to protect this place As our primary food source for thousands of years, salmon continue to be an essential aspect of our nutritional health. Because our tribal populations are growing (returning to pre-1855 levels), the needs for salmon are more important than ever. The annual return of the salmon allows the transfer of traditional values from generation to generation. Without salmon returning to our rivers and streams, we would cease to be Indian people (O'Neill 2000).

In the Southwest, tribes rely on healthy sacred springs as the foundation for cultural and religious ceremonies (Krakoff 2008). Climate change will lead to water scarcity and might result in up to a twenty percent reduction in stream flows in the Colorado River basin (Krakoff 2008). In addition, climate change may lead to an increase in precipitation falling as rain rather than snow, leading to shorter and earlier run-offs in the spring (Krakoff 2008). In Florida, climate change will cause sea level rise and rising temperatures (Krakoff 2008). For the Seminole and Miccosukee Tribes, flooding as a result of sea level rise could lead to the loss of reservation lands in and around the Everglades (Krakoff 2008). In addition, climate change will negatively impact the tribes' ability to practice traditional subsistence activities like gathering and hunting in local mangrove forests, saw grass prairies, and cypress domes (Krakoff 2008).

The relationships that are at stake in an era of climate change are not just among current nations and peoples. They encompass a profound history, an ancestral history for Native peoples that traces back to the roots of their identity. With that relationship comes a responsibility to the lands and to the future generations. This is an intergenerational way of thinking that defines a current people in relationship to their ancestors, to their lands, and to the future generations. . . . What it means to have self-determination is the autonomous ability to think, to

plan, to craft, to set into action, and to protect the land and the people in perpetuity. That is what we were given at the inception of our being, and that is the responsibility that we carry forward into the future (Tsosie, in press).

This section described indigenous populations' climate-sensitivity and negative impacts upon culture. The consequences appear severe, not only for indigenous populations, but for society as a whole. The next section presents a legal framework that may offer tribes an avenue to protect the natural and cultural resources that are central to maintaining their way of life.

Legal Framework for Off-Reservation Resource Protection

Tribes may protect resources using both substantive and procedural sources of law. Substantive law defines the rights of tribes and the duties owed to tribes by the United States government such as the right to land, the rights to religion and cultural practice, and the right to self-governance. Procedural law speaks to the processes by which decisions are made by federal agencies and other stakeholders, specifically including the ways tribes must be consulted during decision-making. Both sets of law provide methods by which tribes may assert their rights to protect resources critical to their cultural practices and livelihood. In some cases, a single law or source of legal authority creates both substantive and procedural duties. For example, statutes such as the National Historic Preservation Act (NHPA) contain duties to protect historic landmarks and areas, as well as mandates to engage in a thorough review process that includes tribes before initiating projects that may impact traditional cultural properties. By reviewing these sources of law, federal agencies and tribes may better understand their legal relationship and identify opportunities for increased collaboration to protect the environment and natural resources both on- and off-reservation.

Protection of Off-Reservation Resources: Status of Tribes' Substantive Rights

There are several sources of U.S. law that protect tribes' rights to resources critical for their survival, health and well-being, and maintenance of their subsistence cultures. Specifically, the Indian trust doctrine, treaty relationships, executive orders, and statutes and regulations recognize the federal government's obligation to protect tribal off-reservation rights (USDA FS 1997).

“The United States has a duty to protect these [off-reservation (property)] treaty rights, as these rights are agreed upon government-to-government agreement, or as defined by statute or court decision” (USDA FS 1997).

Further, tribes have asserted their rights under international instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. While the United States has not ratified many international instruments designed to protect indigenous peoples' rights worldwide, pursuing protection of resources using international law provides an avenue by which tribes may exert political pressure on the United States Government. Prior to the adoption of the Declaration on the Rights of Indigenous Peoples, the International Labor Organization adopted the Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 1989). To date, this Convention

has been ratified by twenty countries and is legally binding in these nations (ILO 1989).¹ As such, it is the only legally binding source of international law establishing and protecting indigenous peoples' right to consultation. The following subsections are intended to provide background about legal avenues currently available to tribes to protect their resources and interests.

Indian trust doctrine—

The Indian trust doctrine refers to the fiduciary duty owed by the federal government to tribes (Wood 1994, 1995a). Tribes may allege violation of the Indian trust doctrine as independent grounds for legal relief, though it is likely that most lawsuits stating a claim for relief based on the doctrine would also include other violations, such as statutory or treaty violations. The doctrine grew out of the need for the federal government to address and articulate its obligations to sovereign tribes located within the nation's geographic borders.

The origin of the trust responsibility is best understood as a duty arising from the transfer of native lands to the federal government—whether by conquest, treaty, executive order, or congressional fiat. Nearly all native peoples in the United States, including those in Alaska and Hawaii, share a common loss of land and resources to an immigrant majority population with colonialist impulses. The trust doctrine represents that measure of legal responsibility on the part of the majority society to protect what the native population retained (Wood 1995b).

Because of the doctrine's evolving meaning and unpredictable interpretation, ongoing commentary and investigation into the origins, past applications, and potential future uses of the doctrine are useful. Specifically, in determining if the trust responsibility is an appropriate construct to apply to federal agency actions related to protection of off-reservation resources, it is instructive to briefly review the origins of the Indian trust doctrine.

The Marshall trilogy of cases includes *Johnson v. M'Intosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832). Through these cases the U.S. Supreme Court recognized tribal sovereignty as described by Justice Marshall: "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial." Further, through these cases the Court introduced the "domestic dependent nation" paradigm that governs tribal relations with the government today and to which the Indian trust doctrine is related. Again, as described by Justice Marshall: "It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. . . . Their relations to the United States resemble that of a ward to his guardian (*Cherokee Nation v. Georgia* 1831)."

The earliest examples of the trust obligation are found in treaties between the federal government and tribes, many of which included express provisions jointly recognizing tribal sovereignty and promising protection to tribes from the government (Wood 1994). Another feature characterizing

¹ ILO 169 has been ratified by Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Norway, Paraguay, Peru, Spain, and Venezuela. ILO 169 Ratification Table, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>.

many of the treaties negotiated in the mid-1800s was the unspoken, shared belief between tribes and the federal government that natural resources, including fish, water, and air, would remain abundant. These beliefs led to treaties premised on the erroneous notions that relations between the tribes and federal government would not one day be strained by the need to vigorously protect environmental interests, public health and welfare, traditional sources of food, and sacred spaces once reserved for prayer and now targeted by extractive industries.

While early interpretations of the trust relationship between the federal government and tribes focused on providing tribes with enough land and resources to lead a peaceful, traditional existence free from invasion by non-Native outsiders, the relationship was tainted by the federal government increasingly placing its own interests above promises made to tribes in early treaties (Wood 1994). Early judicial rulings about the federal trust developed a continuum for the concept that ranged from an obligation to protect the sovereign status of tribes to the guardian-ward relationship described in *Kagama* (Wood 1994). Both models were retained in later court opinions, contributing to uncertainty for tribes bringing claims to protect their interests under the Indian trust doctrine (Wood 1994).

Despite the somewhat inconsistent application of the Indian trust doctrine, it remains central to Indian law and has been used as a powerful tool to protect the health and natural resources of tribes on reservations. Specifically, there are examples in which tribes have challenged government actions alleged to have breached the federal government's trust obligation (Wood 1994). Such cases include demands that the federal government clean up waste on reservations and compensate tribes for mismanagement of lands (Wood 1994).² Agencies defenses to claims that their acts violate the federal trust obligation include arguments that trust responsibilities to tribes arise only through statute (Wood 1994).³ Additionally, agencies have argued that satisfaction of statutorily imposed duties, such as those in federal environmental statutes, satisfy the Indian trust doctrine (Wood 1995). Proponents of the Indian trust obligation suggest that it serves as an additional layer of protection. Professor Mary Wood explains: "Interpreting governmental fiduciary standards as coextensive with express statutory obligations in general laws is inappropriate. The Indian trust obligation centers exclusively on native interests, whereas environmental protection statutes as well as other general welfare statutes are enacted to protect the broader public interest" (Wood 1995a). In other words, "the doctrine provides a judicial avenue for developing standards more protective of native separatism," and as such could be used to protect the right to access and harvest of off-reservation resources (Wood 1994).

Treaty obligations—

Treaty rights may include a variety of off-reservation rights including hunting and fishing, grazing, water, subsistence, and gathering rights and interests. The U.S. Supreme Court handed down the seminal case recognizing these rights in *United States v. Winans* (1905) when the Court

² Wood 1994 citing *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094, 1098-101 (8th Cir. 1989) (holding that the government had a fiduciary duty to clean up open dumps on Pine Ridge reservation); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) (stating that disposal of Indian lands was not an act of guardianship); *Cramer v. United States*, 261 U.S. 219, 232-33 (1923) (holding conveyance of Indian lands by the federal government void).

³ Wood 1994 referencing: "[I]n *Mitchell II*, the Supreme Court affirmed on arguably two independent bases suggesting alternative trust paradigms. The Court first held that the executive branch must exercise fiduciary care when a trust relationship is clear from congressional enactments."

construed a treaty between the U.S. Government and the Yakama Indian Nation. On behalf of the Tribe, the United States sued the Winan brothers, operators of a state-licensed fish wheel, to enforce the reserved rights of Yakama Nation members to exercise fishing rights on portions of the Columbia River. The 1859 treaty reserved for the Tribe “[t]he exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the territory, and of erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land (*United States v. Winans* 1905).” The Court held that these reserved treaty rights survived grants of land by the U.S. Government or the State of Washington to individuals (*United States v. Winans* 1905). Further, the Court held that reserved treaty rights were not “subordinate to the powers acquired by the state upon its admission into the Union (*United States v. Winans* 1905).” This ruling established the Indian law concept that “Indian treaties did not involve a grant of rights *to* the Indians, but were rather a grant *from* them, and therefore, reserved those rights not granted to the United States by the treaty (Goodman 2000).” Treaty rights have been held to be “binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States (*Missouri v. Holland* 1920).”

Subsequent cases discussed and interpreted the Court’s holding in *Winans* describing tribes’ rights to off-reservation resources as rights held since time immemorial, confirming tribes’ rights to exercise reserved treaty rights under their own regulatory jurisdiction in most cases, and construing the reserved right as the entitlement to harvest the resource (Goodman 2000). One series of cases in Washington, commonly referred to as the *Boldt* decisions, shaped the contours of tribes’ reserved right to fish for anadromous fish.⁴ The question in *Boldt I* (1974) was whether the state of Washington could regulate tribal members’ exercise of reserved fishing rights. In this case the Courts held that tribes must be granted access to fish in the “usual and accustomed places,” and that states may only reasonably regulate tribes’ access and taking of fish from these locations when tribal fishing “imperil[s] the continued existence of the fish resource (*Boldt I* 1974).” The District Court also provided guidance, which was upheld, to the state and tribes regarding the determination of the number of harvestable fish, establishing a fifty-fifty apportionment scheme with non-Native fishing (*Boldt I* 1974).

Boldt II (1980) held that the reserved treaty right to fish extended to the right to ensure that treaty fish are protected from environmental degradation. The court held there was a “duty imposed upon the State (as well as the United States and third parties) . . . to refrain from degrading the fish habitat to an extent that would deprive tribes of their moderate living needs.” *Boldt II* (1980) was vacated on appeal (*United States v. Washington* 1983),⁵ but in 2001 the tribes filed a request

⁴ *United States v. State of Washington (Boldt I)*, 384 F. Supp. 312 (W.D. Wash. 1974), *affirmed*, 520 F.2d 676 (9th Cir. 1975), *cert. denied* 423 U.S. 1086 (1976); *United States v. Washington (Boldt II)*, 506 F. Supp. 187 (W.D. Wash. 1980), *aff’d in part, rev’d in part*, 694 F.2d 1374 (9th Cir. 1983).

⁵ *United States v. Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (“We choose to rest our decision in this case on the proposition that issuance of the declaratory judgment on the environmental issue is contrary to the exercise of sound judicial discretion. The legal standards that will govern the State’s precise obligations and duties under the treaty with respect to the myriad State actions that may affect the environment of the treaty area will depend for their definition and articulation upon concrete facts which underlie a dispute in a particular case. . . . It serves neither the needs of the parties, nor the jurisprudence of the court, nor the interests of the public for the judiciary to employ the

for determination with the Court in what has been termed the *Culvert* case (*United States v. Washington* 2007).⁶ In this case, the Court explained the Ninth Circuit’s decision vacating *Boldt II*:

The appellate court's ruling . . . cannot be read as rejecting the concept of a treaty-based duty to avoid specific actions which impair the salmon runs. The court did not find fault with the district court's analysis on treaty-based obligations, but rather vacated the declaratory judgment as too broad, and lacking a factual basis at that time. The court's language, however, clearly presumes some obligation on the part of the State; not a broad “general admonition” as originally imposed by the district court, but a duty which could be defined by concrete facts presented in a particular dispute (*United States v. Washington* 2007).

The Court held that while the guarantee of access to enough fish for a “moderate living” is not explicit treaty language, the concept was created by the Court and as a result may be interpreted by the courts (*United States v. Washington* 2007). Specifically, the Court went on to hold that the State of Washington has “a duty . . . to refrain from blocking fish access to spawning grounds and rearing habitat,” in order to fulfill its commitment to guarantee tribal members enough fish for a moderate living (*United States v. Washington* 2007). The Court explained: “In light of [the] affirmative assurances given [to] Tribes as an inducement to sign the Treaties, together with the Tribes’ understanding of the reach of those assurances, as set forth by the Supreme Court . . . this Court finds that the Treaties do impose a duty upon the State to refrain from building or maintaining culverts in such a manner as to block the passage of fish upstream or down, to or from the Tribes’ usual and accustomed fishing places (*United States v. Washington* 2007).”

Tribes will likely continue to use the courts to enforce treaty provisions protecting reserved rights and resources. Treaty rights provide a powerful tool by which to address the impact of climate change on off-reservation resources.

Executive and Secretarial orders—

Executive Orders are proclamations issued by the President that are intended to guide the practice of federal agencies. Such Executive Orders carry the full force of the law as the President derives authority to issue these declarations under the Constitution (U.S. Const, art. 2, § 1, cl. 1) or is given such authority from Congress through specific legislation (U.S. Const, art. 2 & 3, cl. 4). Secretarial Orders are intended to guide the practice and policy of the specific agency, or agencies, for which the secretary issued the Order. There are several Executive Orders and one key Secretarial Order requiring agencies to consider the impacts of federal projects on tribes.

Executive Order 12898 (1994) *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations: Agency Responsibilities*, requires agencies to include environmental justice as part of their missions. Agencies are required to do this “by identifying

declaratory judgment procedure to announce legal rules imprecise in definition and uncertain in dimension. Precise resolution, not general admonition, is the function of declaratory relief. These necessary predicates for a declaratory judgment have not been met with respect to the environmental issues in this case.”)

⁶ Order on Cross Motions for Summary Judgment at 1, *United States v. Washington*, No. CV9213RSM, 2007 WL 2437166 (W.D. Wash. Aug. 22, 2007).

and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States (Executive Order 12898 1994).”

Executive Order 13,007 (1996) *Indian Sacred Sites*, requires agencies to accommodate access to religious and ceremonial sites, protect the physical integrity of such sites, and maintain confidentiality of such sites that are located on federal lands (Executive Order 13007 1996).

Executive Order 13352 (2004) is intended to encourage cooperative efforts at conservation between local stakeholders and the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency. The Order defines "cooperative conservation" to include actions that “relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals (Executive Order 13352 2004).”

Secretarial Order 3206 (1997) *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act*, provides an example of federal agency action pursuant to a statute. The Secretaries of the Interior and Commerce issued the Order to provide guidance to federal agencies about their federal trust responsibility toward tribes (Secretarial Order 3206 1997). Specifically, the Order addresses methods by which agencies may work with tribes most effectively to promote healthy ecosystems using tribal management of lands so that the imposition of federal conservation measures is unnecessary (Secretarial Order 3206 1997). The Order was “[h]ailed as ‘the equivalent of a treaty’ by Secretary Babbitt, [and] was signed in the Indian Treaty Room (where, ironically, no Indian treaty had ever actually been signed). With the signing of SO 3206, Secretary Babbitt expressed his hope to ‘banish forever the traditional treaty process that has been one-sided, overbearing and not infrequently unfair’ (Sanders 2007).” Under the Order, departments are directed to engage in consultation with tribes (a procedural right that will be discussed below), in addition to the requirement that agencies defer to tribal management plans of tribal trust resources (Secretarial Order 3206 1997). Additionally, agencies are to partner with tribes to enhance coordination of the agencies’ missions with tribal resource management goals. Charles Wilkinson noted that the Order negotiations represented a true bilateral effort (Wilkinson 1997). However, the final version of the text, while favorable to tribes in that it enhanced tribal autonomy and provided clearer guidelines for meaningful government-to-government consultation, failed to recognize an affirmative obligation to protect trust resources.

The affirmative trust obligation would require the federal government, as trustee, to take actions in managing federal lands and sometimes in regulating non-Indian lands to restore habitat degraded by non-Indian development. The response of the federal negotiators, apparently at the behest of BLM and Bureau of Reclamation employees not at the table, was that fulfilling the affirmative trust obligation would establish a duty higher than ESA recovery standards, and that these negotiations should be limited to the context of the ESA (Wilkinson 1997).

Despite this omission, Wilkinson described the Order negotiation as a success and a model for

future negotiations. “The pageantry in the Indian Treaty Room did not commemorate some epic event, but it did rightly celebrate a solid accomplishment that holds out promise for those who believe that an honest, open, and hardworking mutuality ought to serve as the foundation for Indian policy (Wilkinson 1997).”

These Orders may be used in litigation by Tribes to allege violations of law by federal agencies. It is likely that such allegations would be accompanied by claims of other violations, such as failure to uphold the Indian trust obligation or other statutory provisions. Likewise, these Orders can be used to form the foundation of effective, mutually respectful relationships between tribes and federal agencies to ensure that projects take into account impacts on tribes’ members and resources.

Statutory and regulatory rights—

Some statutes and related regulations are designed to protect tribes’ natural, historic, and cultural resources off-reservation. Under these sources of law, tribes and other groups may challenge federal agency projects that they believe do not uphold statutory mandates. Additionally, tribes have been afforded “tribes as states” status through amendments to several federal environmental statutory schemes. This grant of power allows tribes to extend their reach beyond reservation borders. In some cases, statutory schemes also allow for the extension of tribal court orders off-reservation through full faith and credit clauses included in the statute.

The Archeological Resource Protection Act (ARPA) prohibits the removal of “archeological resources” from federal lands without a permit (ARPA 1979).⁷ Under ARPA, the federal land manager must “notify any Indian tribe which may consider the site as having religious or cultural importance” if the issuance of a permit “may result in harm to, or destruction of, any religion or cultural site (ARPA 1979).” Additionally, the National Historic Preservation Act (NHPA) may be used by tribes to protect historic or sacred lands that contain other natural resources such as fish, game, and plants if the tribe can demonstrate that it is eligible to be listed on the national register of National Historic Landmarks (ARPA 1979). The NHPA requires agencies, “in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals,” to identify and protect historic properties (ARPA 1979). One stated purpose of the Act is to preserve the “irreplaceable heritage . . . so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.”

While these statutes may help to protect some tribal resources, there are several limitations to tribes using these statutory schemes to protect off-reservation resources. Under ARPA, it is unlikely that tribes would be able to characterize plants or animals as “archeological resources” so they would have to identify other historic, religious, or cultural items located nearby that would satisfy the statutory definition in order to trigger ARPA’s protections. Likewise, under NHPA, tribes would have to meet the requirements for sites included in the historical registry in

⁷ 16 U.S.C. § 470ee (2006). Section 470bb(1) defines “archaeological resource” to mean “any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations promulgated pursuant to this chapter.” *Id.* at § 470bb(1).

order to benefit from NHPA's substantive protections (Nie 2008).⁸ Additionally, under both Acts, tribes are guaranteed notice and other consultation rights discussed in Part III.B.3, but they are not necessarily afforded the opportunity to halt permit issuance under ARPA, nor are they guaranteed recognition of resources under the NHPA process. Therefore, these statutory protections are not a guaranteed source of protection for tribes' important off-reservation resources such as plants and animals for gathering and hunting.

Another avenue of statutory protection of tribes' resources is the recognition of "tribes as states" in the Clean Air Act,⁹ the Clean Water Act,¹⁰ and the Safe Drinking Water Act.¹¹ Granting agencies the authority to treat tribes as states allows tribes' authority to extend off-reservation to impose restrictions on activities that may contaminate on-reservation resources (*Wisconsin v. Environmental Protection Agency* 2001). A final avenue of statutory protection is the Congressional mandate that federal and state courts grant full faith and credit to tribal orders included in some environmental statutes. The National Indian Forest Management Act,¹² Indian Land Consolidation Act,¹³ and the American Indian Agricultural Management Act¹⁴ include such requirements. These statutory requirements also serve to extend the reach of tribes' actions beyond reservation borders. "Legislation providing for full faith and credit, rather than comity, more clearly 'integrate' Indian tribal courts into Our Federalism on the same par with state and federal courts (Skibine 2008)."

Finally, the National Environmental Policy Act (NEPA) requires agencies to assess environmental impacts of proposed federal actions and to recommend alternative actions if needed. Under NEPA, agencies are required to prepare Environmental Impact Statements (EIS) that are subject to public comments and review by the EPA. The EIS requirement provides opportunities for stakeholders to challenge agency actions by asserting that the EIS is inadequate

⁸ NHPA's procedural provisions apply more expansively to sites eligible for listing including traditional cultural properties. See Martin Nie, *The Use of Co-management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RESOURCES J. 585, 621-22 (2008); U.S. FOREST SERV., *supra* note 3, at 65 ("When deciding whether to address a traditional cultural property concern under NHPA or AIRFA, keep in mind that properties determined to be eligible for the National Register through the NHPA consultation process are not guaranteed protection. NHPA is a procedural law, directing the Forest Service to mitigate adverse effects to significant properties. Since effects to spiritual values and sacred sites are often 'not mitigatable,' NHPA may not offer the kind of protection often sought for these types of sites."); Patricia L. Parker & Thomas F. King, NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL REGISTER BULLETIN: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 4 ("[E]stablishing that a property is eligible for inclusion in the National Register does not necessarily mean that the property must be protected from disturbance or damage. Establishing that a property is eligible means that it must be considered in planning Federal, federally assisted, and federally licensed undertakings, but it does not mean that such an undertaking cannot be allowed to damage or destroy it.").

⁹ 42 U.S.C. § 7601(d)(2) (2006).

¹⁰ 33 U.S.C. § 1377(e) (2006).

¹¹ 42 U.S.C. § 300j-11 (2006).

¹² 25 U.S.C. § 3106(c) (2006) ("Tribal court judgments regarding forest trespass shall be entitled to full faith and credit in Federal and State courts to the same extent as a Federal court judgment obtained under this section.").

¹³ 25 U.S.C. § 2207 (2006) ("The Secretary in carrying out his responsibility to regulate the descent and distribution of trust lands . . . shall give full faith and credit to any tribal actions taken pursuant to . . . this title . . .").

¹⁴ 25 U.S.C. § 3713(c) (2006) ("Tribal court judgments regarding agricultural trespass shall be entitled to full faith and credit in Federal and State courts to the same extent as a Federal court judgment obtained under this section. Nothing in this chapter shall be construed to diminish the sovereign authority of Indian tribes with respect to trespass.").

or fails to take into account important environmental considerations and consequences. This provides a powerful tool by which tribes may assert violations for projects that fail to take into account impacts on tribes' natural resources.

International instruments—

In order for international instruments to have binding legal effect, a nation must ratify the treaty or covenant indicating its intention to be bound to the legal requirements and norms articulated by the provisions of the document. Historically the United States has been reluctant to ratify international human rights and environmental treaties. In some cases, U.S. representatives believe U.S. law adequately protects rights and resources. In other cases, the U.S. declines to participate in binding international relationships for political reasons. Regardless of whether an international instrument is binding on the United States, tribes may choose to bring claims to international bodies in order to leverage political pressure against the United States by other nations.

In 2005, the Inuit Petition to the Inter-American Commission on Human Rights included claims based on rights articulated in the American Declaration; International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social, and Cultural Rights (ICESC) (Watt-Cloutier 2005). Specifically, the Inuit Petition argued that a "people's right to their own means of subsistence 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" (Watt-Cloutier 2005). Further, the petition pointed to the ICCPR right afforded to members of minority groups that states they "shall not be denied the right, in community with other members of their group, to enjoy their own culture" (Watt-Cloutier 2005). The Petition also pointed to the ICESC agreement that "[t]he States Parties to the present Covenant recognize the right of everyone [t]o take part in cultural life" (Watt-Cloutier 2005). Both ICCPR and ICESC also say that "[i]n no case may a people be deprived of its own means of subsistence" (Watt-Cloutier 2005). The Inuit Petition provides an important articulation of tribal claims and related human rights violations that could be used by groups in the future seeking similar protections.

The Declaration on the Rights of Indigenous Peoples was drafted in 1994 by a dedicated group of states and indigenous peoples, and adopted over a decade later in 2007 by the United Nations (UN 2007). While not legally binding, Article 29 of the Declaration, indigenous peoples' right to a healthy environment is recognized: "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources." Article 32 says, "indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands...and other resources." Prior to the adoption of the Declaration on the Rights of Indigenous Peoples, the International Labor Organization adopted the Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries. Article 15 recognizes the rights of indigenous peoples to "participate in the use, management and conservation" of their land and its resources. To date, the UN Declaration has been ratified by twenty countries and is legally binding in these nations. While the United States has not ratified the convention, it has recently endorsed the Convention. Ken Salazar, Secretary of the Interior, issued this statement of support:

As the Administration reexamines the United States' position regarding the U.N. Declaration on the Rights of Indigenous Peoples, we welcome the opportunity for inter-agency collaboration during the review process as well as dialogue with tribal governments and officials within the United States. This is an important undertaking that directly complements our commitment to supporting tribal self-determination, ensuring tribal self-government, respecting tribal sovereignty and carrying out our unique federal trust responsibilities. Working together with the international community, we hope to address the many challenges that indigenous peoples face around the globe (Salazar 2010).

Drafting the Convention on Biological Diversity (CBD) began in the 1980s and was finalized in 1992 at the Rio Earth Summit. The Convention sets forth obligations of states to protect and sustainably use their biodiverse resources, while recognizing that states retain sovereignty over management of these resources. The United States is a signatory to the CBD, signifying its support for the Convention, but declined to become legally bound to its terms through ratification. Indigenous peoples' interests and concerns related to the Convention are coordinated through the International Indigenous Forum on Biodiversity. Article 8(j) speaks to traditional knowledge, stating:

Each contracting Party shall, as far as possible and as appropriate:
Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.

The U.N. General Assembly named 2010 the International Year of Biodiversity, presenting opportunities to promote biological and cultural diversity (Djoghla 2010). In 2010, parties participated in negotiations on international access and a benefit-sharing instrument that speaks to genetic resources and related traditional knowledge (Djoghla 2010). Such an instrument will help to protect traditional "knowledge, innovations and practices associated with genetic resources through a requirement that such knowledge is accessed with . . . prior informed consent or approval (Djoghla 2010)."

Protection of Off-Reservation Resources: Status of Tribes' Procedural Rights

Several sources of U.S. law include tribes' right to consultation, such as the Indian trust obligation, Executive Order 13175, the National Historic Preservation Act (NHPA), and the National Environmental Policy Act (NEPA). Tribes have used these laws, particularly section 106 of the NHPA, in attempts to force government agencies into tribal consultation (*Grand Canyon Air Tour Coal. v. Federal Aviation Administration* 1998). While results of these cases are varied, one theme has emerged—the court does not often provide a definition of "meaningful consultation" under these laws, and when courts have been willing to provide such guidance, they most often equate adequacy of consultation with adequacy of timing. For example, in

Lower Brule Sioux Tribe v. Deer (2000), a case alleging violations by the Bureau of Indian Affairs, the court provided one of the only definitions of meaningful consultation available in case law: “Meaningful consultation means tribal consultation in advance with the decision maker or with intermediaries with clear authority to present tribal views to the BIA decision maker (*Lower Brule Sioux Tribe v. Deer* 2000).”¹⁵

In the Pacific Northwest, recent research efforts have helped to produce guidance for enhancement of government-to-government relations. The Forest Service engages in ongoing studies to monitor implementation of the Northwest Forest Plan—the Plan was adopted in 1993 and is designed to “coordinate... management direction for the lands administered by the Forest Service and the Bureau of Land Management and...adopt complimentary approaches by other Federal agencies within the range of the northern spotted owl (REO 2010).” Recent efforts to evaluate consultation with tribes by federal agencies responsible for implementing the Plan included interviews with twenty-two tribes in Oregon and Washington (USDA FS, in press). This research project produced a detailed list of recommendations from participating tribes regarding consultation (USDA FS, in press). While these recommendations are specific to the experiences of tribes working with federal agencies under the Northwest Forest Plan, they likely also speak to the needs of tribes consulting with federal agencies in other regions and indigenous groups consulting with states throughout the world. Tribes made three main recommendations: define and engage in meaningful consultation, institute measures for accountability within consultation protocols, and integrate consultation protocols into broader policies and programs (USDA FS, in press).

In addition to reviewing the sources of law mandating consultation with tribes, it is useful to review the findings of the Forest Service’s evaluation study and similar reports to optimize consultation policies and procedures.

Indian trust doctrine—

Tribes may use the Indian Trust doctrine not only to challenge government agency action that does not adequately protect tribal resources, but also to hold government actors accountable for meaningful consultation with tribes regarding their on- and off-reservation resources. As such, tribes have alleged violation of the trust obligation when agencies have failed to consult with tribal members or to take tribal input into consideration (*Gros Ventre Tribe v. United States* 2007). However, as the Indian trust doctrine has evolved over time through common law, there are no applicable procedures or provisions for consultation provided in the case law. Rather, the doctrine serves as a general mandate to the federal government to protect tribal assets—a goal which arguably cannot be achieved without meaningful consultation.

Executive and Secretarial orders—

Executive Order 13175 was issued by former President Clinton on Nov. 9, 2000 (Executive Order 13175 2000). The Executive Order, *Consultation and Coordination with Indian Tribal Governments*, affirmed the government’s trust relationship to tribes and mandated consultation with tribes when “formulating or implementing policies that have tribal implications (Executive

¹⁵ *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395, 401 (D.S.D. 1995). For a review of cases related to consultation with tribes in the U.S., see Derek C. Haskew, *Federal Consultation With Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AMER. INDIAN L. REV. 21 (2000).

Order 13175 2000).” Specifically, section five of the Order provides: “Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of policies that have tribal implications” (Executive Order 13175 2000). Further, section seven of the Executive Order identifies accountability measures, including certification by the agency that the provisions in the order have been satisfied upon submission of the proposed legislation or draft final regulations (Executive Order 13175 2000). Section seven also states that the “Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is properly and effectively implemented” within 180 days of the effective date of the Executive Order (Executive Order 13175 2000).

Recently, President Barack Obama also acted to protect tribes and to encourage their participation in government policy making. President Obama signed a memorandum requiring federal agencies to submit recommendations within ninety days to improve tribal participation (Obama 2009). While he has not yet released an Executive Order, it will be interesting to note the response of agencies to the memorandum and the resulting policy recommendations that may emerge to protect tribes’ right to consultation. The substantive rights included in Secretarial Order Number 3206 are discussed fully in Part III.A.3. The Order also addresses procedural guarantees afforded to tribes. The Order provides: “The Departments shall conduct government-to-government consultations to discuss the extent to which tribal resource management plans for tribal trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species (Secretarial Order 3206 1997).”

Statutory and regulatory rights—

The National Environmental Policy Act (NEPA), discussed in Part III.A.4, provides an avenue for consultation regarding projects with environmental impacts. While the Act itself does not mention Indian tribes, section 1501.2(d)(2) of the Council on Environmental Quality’s regulations mandate that agencies shall “consult[] early with appropriate State and local agencies and Indian tribes . . . when its own involvement is reasonably foreseeable” (40 C.F.R 2009). The regulations go on to mention tribes in several other locations. Specifically, they mandate that agencies invite tribes to participate in scoping, ensure that an EIS identify potential conflicts with tribal land use policies, request comments from tribes on the draft EIS, and must provide notice to tribes when effects of the project occur on reservation lands (40 C.F.R 2009). Given the lack of specificity and detail about how tribal consultation would differ significantly from the general public’s right to participate in the NEPA process, perhaps the strongest provisions of NEPA’s regulations with respect to consultation are those that allow tribes to become cooperating agencies, and regulations which mandate that the NEPA process comply with the much more detailed NHPA section 106 process, outlined above (40 C.F.R 2009).

A cooperating agency is defined as “any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major federal action significantly affecting the quality of the human environment (40 C.F.R 2009).” Tribes may apply to become cooperating agencies when the effects of the proposed federal action may occur on tribal lands (40 C.F.R 2009). Cooperating agencies are charged with participating in the NEPA process “at the earliest possible time,” assisting in the scoping process, developing environmental analyses,

which may include drafting portions of the EIS, and providing staff to assist the lead agency (40 C.F.R. 2009).

As discussed earlier, Congress enacted the NHPA to protect and preserve historic properties throughout the nation (NHPA 1966). Section 106 of the Act requires agencies engaged in federal undertakings to “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register (NHPA 1966).” According to the statute, this review must take place “prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license (NHPA 1966).” Implementing regulations detail the section 106 process and specifically list “Indian tribes and Native Hawaiian organizations” as one of several parties afforded consultative status in the 106 process (36 C.F.R. 2009). Further, the regulations mandate that federal agencies offer tribes a “reasonable opportunity to identify [their] concerns about historic properties,” and requires that such consultations are undertaken “in a sensitive manner respectful of tribal sovereignty (36 C.F.R. 2009).” The regulations also explicitly recognize the federal government’s “unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions (36 C.F.R. 2009).” As such, agencies are mandated to engage in consultation with tribes that “recognize the government-to-government relationship between the federal government and Indian tribes.” Finally, Indian tribes may elect to enter into agreements with the federal government to govern “all aspects of tribal participation in the section 106 process (36 C.F.R. 2009).” This agreement may also “grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process (36 C.F.R. 2009).”

The implementing regulations for both the NHPA and NEPA require integration of the two project review processes. NHPA mandates that agencies plan consultation in accordance with NEPA (36 C.F.R. 2009). NEPA requires agencies to prepare the EIS in consultation with NHPA (40 C.F.R. 2009). There are two methods by which agencies may satisfy the requirement to coordinate these efforts, a parallel or an integrated effort (THW 2008). Agencies engaged in the parallel process conduct the NHPA section 106 protocol alongside their NEPA process (THW 2008). “Federal agencies may convene consultation meetings separately from other environmental coordination meetings and may or can develop independent documents to detail and support their findings and determinations regarding historic properties” (THW 2008) All findings from the section 106 consultation meetings should be incorporated into documents produced for the NEPA process (THW 2008). In contrast, the integrated approach allows an agency to use the NEPA process to fulfill its section 106 responsibilities (THW 2008). “The benefit to stakeholders and the public of this integration is data sharing, cost and time savings, and an ability to present the big picture of a proposed action during preliminary planning and design development” (THW 2008). Regardless of whether an agency elects to use the integrated or parallel approach, the agency must address its responsibility to host government-to-government consultations with tribes (THW 2008).

International instruments—

While not legally binding, the Declaration on the Rights of Indigenous Peoples may be used by indigenous groups to persuade governments to engage in meaningful consultation. Several articles of the Declaration reference the right of indigenous people to consult with states. Article

18 states, “indigenous people have the right to participate in decision-making in matters which would affect their rights” (UN 2007). Article continues, “states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent” before implementing projects and policies (UN 2007). In Article 29 of the Declaration, indigenous peoples’ right to a healthy environment is recognized: “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources (UN 2007).” Finally, Article 32 says, “indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands . . . and other resources UN 2007).”

Prior to the adoption of the Declaration on the Rights of Indigenous Peoples, the International Labor Organization adopted the Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 1989). To date, this Convention has been ratified by twenty countries and is legally binding in these nations (ILO 1989).¹⁶ As such, it is the only legally binding source of international law establishing and protecting indigenous peoples’ right to consultation. The process by which Convention No. 169 was developed was unique at the time because indigenous peoples participated in negotiations of the text and were able to impact the text as non-state actors (Kravchenko and Bonine 2008). The Convention recognizes the duty of governments to develop “with the participation of the peoples concerned, [a] coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity” (ILO 1989). Article six, the heart of the convention, provides that governments shall: “consult the peoples concerned, through appropriate procedures and in particular through their representative institutions” and “establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making” (ILO 1989). Finally, Article 15 recognizes the right of indigenous peoples to “participate in the use, management and conservation” of their land and its resources (ILO 1989).

Avenues for Protection of Off-Reservation Resources

While the Legal Framework for Off-Reservation Resource Protection section details the current sources of law available to assist tribes, the following subsections delve into more detail to identify specific legal strategies. These strategies translate the legal protections available to tribes through the laws described above into concrete suggestions for ways to enhance government-to-government relationships and collaboration to protect off-reservation resources from the impacts of climate change.

Duty to Protect

The first avenue for protection from the impacts of climate change for off-reservation resources is invoking the U.S. Government’s “duty to protect” these resources using the federal trust obligation and reserved treaty rights. Such a duty will provide an adaptive method by which to preserve off-reservation subsistence and cultural resources in light of the changing climate. The foundation of the duty to protect can be found in case law, specifically the *Boldt* and *Culvert* case

¹⁶ ILO 169 has been ratified by Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Norway, Paraguay, Peru, Spain, and Venezuela. ILO 169 Ratification Table, <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>.

decisions. As discussed above, in *Boldt II* and the *Culvert* case, the Court of the Western District of Washington articulated a State duty not to degrade fish habitat in a way that would impair fishing in tribes' usual and accustomed places. The Court noted that treaty rights and related Supreme Court interpretations give rise to this duty not to harm fish that tribes rely on for a moderate living. Most notably, the Court recognized not only the State's duty not to harm fish directly, but also its duty to protect the fish habitat so that fish may thrive.

In a similar decision, *Tribes v. United States* (1996), the Klamath Tribes filed a claim for injunctive relief against the USDA Forest Service to prohibit logging of eight timber sales within the former Klamath Reservation.¹⁷ The Tribes claimed that the Forest Service had breached its trust responsibility to engage in meaningful consultation to ensure off-reservation resources were managed in a manner that protected the Tribes' treaty rights (*Tribes v. United States* 1996). Specifically, the Tribes were concerned that by logging old-growth forest, the habitat of the mule deer and other species would be degraded or destroyed (*Tribes v. United States* 1996). The Tribes relied on these species for subsistence and to maintain their traditional cultural practices (*Tribes v. United States* 1996). The Court held that the trust responsibility gave rise to a procedural duty; the federal government must consult with tribal nations in the decision-making process to avoid adverse impacts on treaty resources (*Tribes v. United States* 1996). Additionally, the government had a substantive duty to protect treaty rights and the resources on which those rights depend (*Tribes v. United States* 1996). The Forest Service acknowledged its duty to manage habitat "to support populations necessary to sustain Tribal use and non-Indian harvest," including "consideration of habitat needs for any species hunted or trapped by tribal members" (*Tribes v. United States* 1996). Because treaties are the supreme law of the land, the Court held that an inference of congressional intent to abrogate treaty rights would not stand without a clear expression of such intent by Congress (*Tribes v. United States* 1996).

These cases should be interpreted as giving rise to a general duty to protect all off-reservation resources, including the impacts of climate change on these resources. To fulfill this duty, federal and state agencies should work with tribes to identify the location of such resources, the threats posed by climate change to off-reservation resources, and suitable strategies for protection of these resources.

Tribal Co-Management

A second avenue for the protection of off-reservation resources is adopting a tribal co-management model based on six fundamental principles related to tribal sovereignty (Goodman 2000). The first fundamental principle based on tribal sovereignty requires the recognition of tribes as sovereign governments. In areas related to self-determination, child welfare, grave protection and repatriation, Congress has recognized tribal authority to create standards that can be enforced off-reservation (Goodman 2000). In these situations, tribal nations are treated differently than private stakeholders or members of the public; they are seen as governing bodies with the power and ability to act as primary decision makers (Goodman 2000). The second fundamental principle based on tribal sovereignty recognizes the trust responsibility of the U.S. Government to tribes (Goodman 2000). Procedurally and substantively, the United States is

required to include tribes in the decision-making process relating to resources protected by their reserved rights (Goodman 2000). This inclusion must be integral and further requires the U.S. Government to support the institutional capacity building of tribes (Goodman 2000). The third fundamental principle based on tribal sovereignty recognizes the need for federal agencies and tribal partners to incorporate and facilitate public involvement, participation, and access to information about the co-management process (Goodman 2000). The fourth fundamental principle based on tribal sovereignty requires agencies to integrate tribes at the earliest stages of the decision making process. As Goodman proposes:

A participatory management role would involve tribal participation in the initial discussions of a resource area, when the federal agency first considers the very concepts of management activities. Such a role would facilitate meaningful tribal input, which could guide agency decision making, including resource use, over a wider area, taking into account a broader perspective on resource conditions and on impacts of various activities on those conditions. Early integration into the process puts tribes in a position to influence the shape and direction of management activities, rather than simply providing comments on projects already developed by an agency (as in the public comment provisions of NEPA). Federal agencies have the discretion to incorporate tribes into their decision-making process at an early stage, but if agencies are reluctant to act, Congress should make the procedural mandate clear (Goodman 2000).

The fifth fundamental principle based on tribal sovereignty requires federal agencies to defer to tribal expertise, especially when a federal agency decision will affect reserved rights (Goodman 2000). In addition, federal courts can assist this effort by refusing to defer to federal agency experts when a dispute arises with tribal experts (Goodman 2000). Finally, the sixth fundamental principle based on tribal sovereignty requires federal agencies and tribes to establish a dispute resolution mechanism that is clear and objective (Goodman 2000). Further, the arbiter of any dispute must be viewed as fair and impartial by all parties involved, and the methodology employed by the arbiter must be developed and agreed upon by all parties before a dispute arises (Goodman 2000).

Another potential tribal co-management model that could be implemented to protect off-reservation resources focuses on policy implementation and statutorily provided special land-use designations (Nie 2008). Under the Tribal Self Governance Act of 1994, agencies within the Interior Department can delegate functions that are not “inherently federal” to participating tribes (Nie 2008). Tribes may also petition these agencies to manage federal programs that are of “special geographical, historical, or cultural significance” to the tribe; this may allow for tribal participation in federal land management (Nie 2008). Additionally, some governmental partnership authorities may allow tribes to implement non-discretionary aspects of certain projects (Nie 2008). There are some federal statutes that explicitly authorize the use of cooperative agreements (Nie 2008). As Martin Nie explains:

Each agency has its own vocabulary for describing how this is done, but several types of contracts, cooperative agreements, assistance agreements, and memorandums-of-understanding (MOU) are being used to share some

management, and even financial, responsibilities. As discussed below, these range from the simple to the complex. An example of the former is the use of an MOU between the Nez Perce Tribe and the USFS regarding the exemption of Nez Perce tribal members from recreational use fees at all campgrounds in several national forests when engaged in the exercise of reserved treaty rights. A more significant example is provided by agreements between the Nez Perce and USFWS to help manage wolves reintroduced into central Idaho. When the state of Idaho refused to participate in this program, the Nez Perce took full advantage of their wildlife expertise to assist in the recovery of wolves, a species of special significance to the Tribe (Nie 2008).

In another example of successful comanagement, the Klamath Tribes formed an agreement with the Winema and Fremont National Forests mandating government-to-government coordination. The agreement created a special process for when the Forest Service is considering tribal recommendations and proposals, and looks to include tribal involvement on Forest Service interdisciplinary teams (Nie 2008). Another example of successful co-management is the Santa Rosa and San Jacinto Mountains National Monument in California. The Monument includes federal, state, and tribal lands and is managed by the Agua Caliente Band of Cahuilla Indians, the Bureau of Land Management, the Forest Service, and other local governments. Various agreements provide for the preservation and protection of traditional and cultural uses of the area including tribal gathering and access to sacred places (Nie 2008).

Finally, as described above, under Section 110 of the National Historic Preservation Act (NHPA), federal agencies must minimize harm to properties that are designated as National Historic Landmarks (Nie 2008). The Bighorn Medicine Wheel in Wyoming's Bighorn National Forest was designated as a National Historic Landmark in 1969 (Nie 2008). In 1991, the Forest Service began road construction, improvements to allow unrestricted vehicular access to the site, and the construction of a parking lot next to the site (Nie 2008). When local tribes objected due to the sacred nature of the Bighorn Medicine Wheel site, the Forest Service started the consultation process as required by NHPA (Nie 2008). The consultation process resulted in a long-term plan that created an 18,000 acre "area of consultation" surrounding the Bighorn Medicine Wheel site (Nie 2008).

Land-Use Designations

A third avenue for the protection of off-reservation resources is using a federal wilderness designation to protect reserved treaty rights and sacred sites on federal land (Nie 2008). In New Mexico, the El Malpais Act uses land-use designations to protect a region of cultural and religious importance to the Zuni and Acoma Pueblos (Nie 2008). The Act provides for tribal member access to the region for traditional religious and cultural activities and also authorizes temporary closures to protect privacy for tribal religious ceremonies (Nie 2008). The T'uf Shur Bien Preservation Trust Area Act gives the Pueblo of Sandia the right to consent to or veto any new area use proposed by the United States Forest Service. Further, if Congress allows a prohibited use of the area or denies access for cultural uses, the Pueblo of Sandia must be compensated by the United States (Nie 2008). In Nevada, recent wilderness legislation has included specific provisions to protect tribal religious and cultural rights, including access to

federal lands for traditional gathering, spiritual, and cultural activities (Nie 2008). In California, the Northern California Coastal Wild Heritage Act of 2006 provides for tribal access to wilderness areas for traditional religious and cultural purposes and allows temporary closure of portions of a wilderness area to protect the privacy of tribal members when they perform traditional religious and cultural activities (Nie 2008). Related avenues for the protection of off-reservation resources include the repatriation of federal land to tribes through the reclassification process, tribally created and managed wilderness areas, and the use of other area designations with specific tribal management provisions such as national monuments, national wildlife refuges, and national conservation areas (Nie 2008).

Conservation Trust Movement

A fourth avenue for the protection of off-reservation resources is an increase in tribal involvement in the private conservation trust movement (Wood and Welcker 2008). There are several ways in which tribes could involve themselves in the movement depending on the extent of property rights held by the tribe. In the first model of tribal engagement in the conservation trust movement, tribes hold conservation title (Wood and Welcker 2008). If the title is a full fee title—meaning the tribe holds all of the property rights-- the focus is placed on land acquisition for the restoration of the reservation land base. This is true even if the land is encumbered by a third party covenant or conservation easement (Wood and Welcker 2008). However, if the tribe gains a conservation easement, the property rights continue to be held by the private property owner (Wood and Welcker 2008). In the second model of tribal conservation, tribes form land trusts to gain conservation titles (Wood and Welcker 2008). In the third model of tribal conservation, a public agency holds either a conservation title or easement that supports tribal interests (Wood and Welcker 2008). In the fourth model of tribal conservation, non-Native land trusts institute programs to protect tribal interests (Wood and Welcker 2008). As tribes become more involved in the private conservation trust movement, they will primarily focus on the beneficial use of land, protection of off-reservation resources, and restoration (Wood and Welcker 2008). As Mary Wood and Zachary Welcker explain:

For many tribes, the use of private conservation mechanisms will allow a revitalization of their spiritual connection with the landscape. Emotionally and culturally, the conservation transaction does not occur on a blank slate but rather represents a continuation of a story dating back to time immemorial... While Western conservation is certainly grounded in an ethic of stewardship, it lacks the spiritual and religious dimension that characterizes traditional Native management. Land trust professionals frequently become familiar with the land for the first time during the conservation transaction. A sterile, scientific approach often characterizes their land management style. In contrast, Native cultures have been organized for thousands of years around Creation stories that tie their emergence to the land itself, so their collective knowledge of its caretaking can be thought of as being encoded in their cultural DNA (Wood and Welcker 2008).

Tribal engagement in the conservation trust movement provides an important alternative to placing restored lands in trust ownership with the Bureau of Indian Affairs and supports tribal sovereignty (Wood and Welcker 2008). First, the conservation trust approach is more efficient

and flexible, especially when there is a limited time frame for land acquisition (Wood and Welcker 2008). Second, the conservation trust approach may allow tribes to gain more land when compared with the Bureau of Indian Affairs land restoration process (Wood and Welcker 2008). Third, the conservation trust approach supports the move from federal control to tribal trusteeship (Wood and Welcker 2008). Fourth, the conservation trust approach may alleviate the tax concerns that often lead tribes to utilize the Bureau of Indian Affairs (Wood and Welcker 2008). Fifth, the conservation trust approach protects land in perpetuity (Wood and Welcker 2008). Additionally, the conservation trust approach may help tribes protect specific off-reservation resources and locations of cultural significance because tribal-landowner relationships are allowed to develop and strengthen over time and remain focused on specific sites (Wood and Welcker 2008).

While there are many ways to structure conservation trust partnerships that include federal agencies, tribal land trusts, non-Native land trusts, and tribes, most will be categorized in one of four ways (Wood and O'Brien 2008). In a purchase/funding partnership, joint funding may help tribes or tribal land trusts to acquire fee title to a property at a lower price (Wood and O'Brien 2008). Regulatory, enforcement, and management partnerships allow for the sharing of expertise and resources among partners (Wood and O'Brien 2008). Holder partnerships provide for overlapping easements and co-holding arrangements (Wood and O'Brien 2008). Finally, backup holder partnerships provide a strong plan for the transfer of ownership in the case of dissolution or legal challenges (Wood and O'Brien 2008). The possible success of each of the four models of tribal conservation should be measured by the potential to achieve lasting conservation (Wood and O'Brien 2008). One way to gauge this potential is by looking at each model in light of landowner receptivity, administrative capacity, ability to quickly react to opportunities, and the capacity to bring conservation outside of protected land boundaries (Wood and O'Brien 2008).

In the tribal holder partnership model, tribes can utilize their administrative expertise and institutional framework to effectively implement and monitor restoration projects (Wood and O'Brien 2008). Tribal member access to and beneficial use of off-reservation resources is easier to navigate if the tribe has fee title rather than a conservation easement (Wood and O'Brien 2008). In some cases, tribes have acquired conservation easements in areas where they already have treaty-protected access rights (Wood and O'Brien 2008). In the tribal land trust model, flexibility supports successful restoration activities while partnerships with tribes addresses funding, expertise, and staffing concerns (Wood and O'Brien 2008). In the public agency model, tribes can play an important role in managing conservation easements (Wood and O'Brien 2008). Easements can also be drafted to allow tribal member access to off-reservation resources (Wood and O'Brien 2008). The public agency must plan carefully and involve the tribe at the acquisition stage, specifically identifying management expectations for both parties (Wood and O'Brien 2008). As Mary Wood and Matthew O'Brien explain:

There are established mechanisms for federal agencies to partner with tribes, due to their trust relationship. A federal agency may contract with tribes or enter into a cooperative management agreement. Another avenue, while more cumbersome, is a program funding agreement authorized by the Tribal Self-Governance Act of 1994. The Act allows tribal assumption of activities carried out by agencies within the U.S. Department of Interior. Self-governing tribes are eligible to receive

funding from the federal agency to manage the land pursuant to an agreement between the agency and the tribe. Among all of the federal agencies that are eligible to enter into such funding agreements with tribes, the USFWS is most likely to acquire conservation easements and fee lands containing tribal resources. Where this mechanism is used to formalize management relationships, it presents an overlay to the conservation easement or other acquisition document. For example, a conservation easement might expressly provide that the public agency will delegate management responsibility to the tribe; the management agreement itself would be the vehicle to express the detailed parameters of the relationship (Wood and O'Brien 2008).

Finally, in the non-Native land trust model, partnerships can be formed with tribal land trusts and tribes to support and provide for the implementation of traditional tribal conservation practices (Wood and O'Brien 2008). Non-native land trusts can also negotiate with landowners on behalf of tribal members to allow for access to and beneficial use of off-reservation resources (Wood and O'Brien 2008).

Conclusion

Traditional indigenous communities, like future generations, appear to be the victims of contemporary domestic and international decision-making that does not recognize rights to cultural survival or any duty to future generations. This deficit in global decision-making inspires an argument for 'indigenous environmental self-determination' as a human right sufficient to impose an obligation upon nation-states to mitigate the harms of climate change that jeopardize the very existence of many indigenous communities. In fact, many commentators have argued that some traditional indigenous worldviews embody an ethic of 'sustainability' that could be emulated by world governments to mitigate some of the harms of industrialization. Under this view, extinguishing Native lifeways jeopardizes our commitment to sustainability, endangering not only indigenous communities, but the entire planet (Tsosie 2009).

Tribes view the damaging effects of climate change on protected off-reservation resources as simply the most recent negative environmental action taken by non-tribal entities (Tsosie 2009). Tribal leaders have advocated for climate change legislation that will provide funding for fish and wildlife restoration and conservation as well as mitigation strategies to combat climate change impacts on off-reservation resources (Tsosie 2009). Further, as climate change continues to be addressed nationally and internationally, tribes should not only be included in the discussion but also recognized as sovereign nations (Tsosie 2009). As sovereign nations, tribes can make decisions about their lands within the reservation border; however, they should also be consulted to help determine an appropriate course of action when off-reservation resources protected by reserved treaty rights are negatively impacted by climate change (Tsosie 2009).

Some scholars argue that indigenous people and nations have a right to environmental self-determination (Tsosie 2009). To advance that right, some tribal leaders have requested appropriate funding and access to technical and financial resources to counteract the negative impact of climate change on off-reservation resources (Tsosie 2009). As Rebecca Tsosie notes:

Traditional environmental ethics are still present in many Native cultures, and these ethics speak to the enduring relationship between the group and the land. This relationship is marked by a need to plan for successive generations, to respect the land and resources that enable physical and cultural survival, and to honor the many aspects of a Universe that is alive and enables life. There is a spiritual essence to the land, water, animals, plants, and rocks that manifests in Native languages, ceremonies, and traditional knowledge. When tribal leaders call for a study of traditional knowledge to document the shifts in the natural world that characterize climate change and when they speak of cultural forms of knowledge being used to craft tribal adaptation plans, they are reaffirming the utility of an "ethic of place" and a norm of stewardship to guide the future (Tsosie 2009).

The Native Communities and Climate Change Report provides a similar perspective and several specific recommendations regarding the exercise of tribal sovereignty, consultation, and appropriate levels of funding for restoration, conservation, and mitigation (Hanna 2007). First, in support of a more effective consultation process, the Report suggests that congressional hearings should be held to allow tribal nations to present vital information to Congress before climate change provisions affecting off-reservation resources are enacted (Krakoff 2008). Additionally, the Report supports clear channels of communication between Congress and tribal leaders so that tribes can help formulate national climate change policy (Krakoff 2008). Second, the Report recommends that climate change legislation provide adequate levels of funding to help tribal nations provide for their adaptation and mitigation needs (Krakoff 2008). As Sarah Krakoff observes "Without mitigation, not only will adaptation be a never-ending endeavor, it may eventually be an unintentional exercise in tribal termination, if what it means to be a tribe is to retain a distinctive worldview and culture" (Krakoff 2008). Third, because tribes have significant capacity for renewable energy like solar and wind, the Report advocates for Congress to invest in the development of alternative energy on tribal lands (Krakoff 2008).

As this paper suggests, tribal nations can continue to utilize available legal avenues to protect their resources. These invaluable resources include fish, game, plants, water, and air and their related ecosystems and can be found both on and off the reservation. These resources continue to be depleted by the negative impacts of climate change; this degradation will continue and may increase in force and speed. Native subsistence hunting, fishing, and gathering, cultural and religious practices, and traditional ways of life intimately tied to the land are in jeopardy or have already been lost. Tribal nations may hold the United States accountable when it violates its fiduciary duty to tribes under the Indian trust doctrine (*Seminole Nation v. United States* 1942). Tribes may ensure that federal agency decisions align with executive and secretarial orders that carry the full force of the law and guarantee tribal nations government-to-government consultation with the United States (*City of Albuquerque v. Browner* 1996).¹⁸ Tribal nations may also continue to exercise their reserved treaty rights, reinforcing the fact that: (1) treaties are binding, (2) reserved treaty rights to off-reservation resources have been held by Native people since time immemorial, (3) the reserved rights entitle tribes to an actual harvest of resources, and

¹⁸ See, e.g., *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996). The Tenth Circuit upheld EPA's approval of the Pueblo of Isleta's water quality standards under the Clean Water Act. The standards imposed restrictions on upstream dischargers, including the City of Albuquerque.

(4) treaties represent a grant of rights from tribes to the United States (*Kittitas Reclamation District v. Sunnyside Valley Irrigation District* 1985).¹⁹ In addition, reliance upon statutes and regulations offer tribes the clear ability to protect off-reservation cultural, historic, and natural resources and challenge specific federal agency projects that violate statutory mandate. Finally, international instruments provide tribal nations with another avenue by which they may bring climate change and human rights claims against the United States and ask for assistance from the international community.

In conclusion, the United States has a clear duty to mitigate the negative impact of climate change on off-reservation resources. In addition, tribes have a clear right to not only access off-reservation resources, but for off-reservation resources to exist and be available to them (*United States v. Adair* 1983).²⁰ Tribal co-management (co-sovereignty) and the conservation trust movement offer valuable models for the protection of off-reservation resources (as well as for on-reservation resources) set on a foundation of the trust responsibility, government-to-government consultation, and tribal sovereignty. As Rebecca Tsosie states:

We cannot afford to maintain a set of domestic laws based on Anglo-American cultural categories, such as “property rights,” “environmental rights,” and “religious rights,” just because they are the ones we have always had and we know how and when they are enforceable, if the end result is to continually perpetuate grave injustices upon indigenous peoples. We must open our collective minds to a notion of justice that is truly intercultural in nature. Such a notion of justice must incorporate an indigenous right to environmental self-determination that allows indigenous peoples to protect their traditional, land-based cultural practices regardless of whether they also possess the sovereign right to govern those lands or, in the case of climate change, prevent the practices that are jeopardizing those environments (Tsosie 2007).

¹⁹ See, e.g., *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032 (9th Cir. 1985) (upholding the district court’s grant of an order requiring further study of the impact of water flow from a dam on treaty fishing rights reserved by the Yakima Nation); *Confederated Tribes of the Umatilla v. Alexander*, 440 F. Supp. 553, 556 (D. Or. 1977) (issuing a declaratory judgment stating that clear congressional intent is required to take treaty fishing right: “Plaintiff Indians have usual and accustomed fishing stations on Catherine Creek. Some of these will be flooded, thus destroyed, by the construction of defendant’s dam. The steelhead fishery above the dam will be destroyed. Specific congressional authority is required for such action by defendants, and none now exists.”).

²⁰ See *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983). The Ninth Circuit held that where a tribe “shows its aboriginal use of water to support a hunting and fishing lifestyle, and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use.” *Id.* at 1414. The Court went on to confirm that tribes are entitled to “the amount of water necessary to support its hunting and fishing rights as currently exercised to maintain the livelihood of Tribe members.” *Id.* See also *United States v. Wash.*, 506 F.Supp. 187, 203 (1980) (“[T]he most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken. In order for salmon and steelhead trout to survive, specific environmental conditions must be present.”).

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