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A HUMAN FACE TO INSTREAM FLOW: INDIGENOUS RIGHTS TO WATER FOR SALMON AND FISHERIES

*Paul Stanton Kibel**

ABSTRACT

In the United States and throughout the world, there are many indigenous peoples whose culture and identity are closely connected to salmon and fisheries. Such salmon and fisheries are often dependent on maintaining adequate instream flows of water in rivers. Indigenous groups in the United States and in other countries have increasingly relied on indigenous human rights laws as a basis to keep water instream to maintain salmon and fisheries. This includes reliance on sources of international law such as the International Convention on Civil and Political Rights, the United Nations Declaration on the Rights of Indigenous Peoples, the International Labor Organization's Convention on Indigenous and Tribal Peoples, the Declaration of Principles for the Defense of Indigenous Nations and Peoples in the Western Hemisphere and the Indigenous Peoples Water Declaration. This Article examines five case studies of how indigenous communities have attempted to use domestic and international law to ensure that there is adequate flowing water to sustain the fisheries upon which their tribal cultures depend. Three of these case studies come from the United States—the Columbia River Basin in the Pacific Northwest, the Nooksack River in Washington, and Stanshaw Creek in California—and the other two case studies come from the Saru River in Japan and the Whanganui River in New Zealand. Collectively, these case studies reveal that efforts to maintain instream flow are not only about preserving fish stocks and riverine ecosystems but can also be about preserving cultures.

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INTRODUCTION: SACRED SALMON

There are multiple sources of state, federal, and international law that establish legal obligations to keep sufficient water instream for salmon and other fisheries.

For example, at the state level in California, public trust law recognizes navigable surface waters and fisheries (including salmon) as public trust resources, and provides that state and local governments have an obligation to fully protect such public trust resources whenever feasible.¹ With fisheries located in rivers, streams and creeks, ensuring adequate instream flow is often needed to provide such full protection.² At the federal level, the Endangered Species Act in the United States provides for the designation and protection of critical habitats for all listed species.³ For many listed fish species, maintaining such critical habitats often requires maintaining adequate instream flows.⁴ Finally, under international law, Article 20 of the U.N. Convention on the Law of Non-Navigable Uses of International Watercourses provides “[w]atercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses.”⁵ Adequate instream flows are often essential to protecting and preserving the ecosystems of watercourses upon which fisheries rely.⁶

These sources of state, federal, and international law, however, have generally not framed the obligation to provide adequate instream flows as a fundamental human right. When viewed through the lens of indigenous rights, however, we can start to discern the basis for a human right to keep water instream for fish. This may be particularly true when it comes to instream flows needed to sustain salmon. Throughout the world, there are many indigenous cultures in which salmon are central and essential to tribal identity and health, and in which salmon restoration and instream flows are being sought as indigenous rights.⁷

¹ Nat'l Audubon Soc'y v. Superior Ct., 658 P.2d 709, 718–19, 732 (Cal. 1983).

² Katheryn A. Bilodeau, *The Elusive Implied Water Right for Fish*, 48 IDAHO L. REV. 515, 516 (2012).

³ Endangered Species Act, 16 U.S.C. §§ 1531–1544.

⁴ Bilodeau, *supra* note 2.

⁵ G.A. Res. 51/229, at 10, Convention on the Law of the Non-Navigational Uses of International Watercourses (July 8, 1997).

⁶ Bilodeau, *supra* note 2.

⁷ KATRINE BARBER, DEATH OF CELILO FALLS 24 (2005).

For instance, in Siberia and the Russian Far East, the Itelmen ethnic group on the Kamchatka Peninsula petitioned the Government of Kamchatka and the federal fishing agency to protect indigenous salmon fishing rights.⁸

As another example, in British Columbia in Canada, First Nations on the west coast of Vancouver Island have banded together to form the Nuu-chah-nulth Salmon Alliance to press the provincial and federal Canadian governments to strengthen protection of salmon stocks from logging operations that degrade spawning waters.⁹

As a final illustration of the connection between indigenous rights to water and fisheries (although not salmon-specific), in northern Mexico, the Cucapá indigenous people have been reduced from several thousand to a few hundred persons, as the Colorado River Delta (where the Colorado River flows into the Sea of Cortez) upon which they rely, has dried up due to upstream diversions.¹⁰ In 2002, a complaint was filed with the Mexican National Human Rights Commission alleging that the failure to preserve flows and fisheries in the Colorado River Delta violated the rights of the Cucapá under International Labor Organization Convention No. 169 on Indigenous and Tribal Peoples of 1989 (“I.L.O. No. 169”).¹¹ In its decision on this complaint, the Mexican National Human Rights Commission ordered Mexico’s federal natural resource agency to update the biosphere reserve management plan for the Colorado River Delta to help ensure that the cultural, ecological, and economic needs of the Cucapá people were better protected.¹²

This Article examines five case studies of how indigenous communities have attempted to use state, federal, and international law to ensure that there is adequate flowing water to sustain the fisheries upon which their tribal cultures depend. Three of these case studies come from the United States—the Columbia River Basin in the Pacific Northwest, the Nooksack River in Washington, and

⁸ David Quammen, *Where the Salmon Rule*, NATIONAL GEOGRAPHIC, Aug. 2009, at 28.

⁹ Judith Lavoie, *Bringing Back the Trees to Bring Back the Salmon*, NARWHAL (Mar. 13, 2019), <https://thenarwhal.ca/bringing-back-the-trees-to-bring-back-the-salmon>; Megan Thomas, *Old-Growth Logging Threatens Culture, Says Nuu-chah-nulth Tribal Council*, CBC NEWS (Nov. 10, 2018), <https://www.cbc.ca/news/canada/british-columbia/old-growth-logging-threatens-culture-says-nuu-chah-nulth-tribal-council-1.4899547>; Nora O’Malley, *Outcry for Wild Salmon Builds in Tofino*, TOFINO-UCLUELET WESTERLY NEWS (July 4, 2019), <https://www.westerlynews.ca/news/outcry-for-wild-salmon-builds-in-tofino>.

¹⁰ David H. Getches, *Indigenous Peoples’ Rights to Water under International Norms*, 16 COLO. J. INT’L ENV’T L. & POL’Y 259, 283–84 (2005).

¹¹ *Id.* at 284; Recomendación sobre el Caso de los habitantes de la Comunidad Indígena Cucapá, 1, Diario Oficial de la Federación [DOF], 19-4-2002 (Mex.).

¹² Getches, *supra* note 10, at 284; Recomendación sobre el Caso de los habitantes de la Comunidad Indígena Cucapá, *supra* note 11.

Stanshaw Creek in California—and the other two case studies come from the Saru River in Japan and the Whanganui River in New Zealand. In these case studies, we see both the past shortcomings of efforts to ground the right to fish and water in indigenous rights, as well as the potential for such efforts going forward.

I. CASE STUDIES OF INDIGENOUS CLAIMS TO INSTREAM FLOW TO SUSTAIN SALMON AND FISHERIES

A. *Yakima Fishing Rights and Celilo Falls on the Columbia River*

This first case study considers the ways that national governments may be more willing to protect the indigenous right to fisheries from actions by third parties than actions by the national government itself.

Celilo Falls was located on the Oregon side of the Columbia River near the town The Dalles, east of the city of Portland.¹³ According to author Katrine Barber in her 2005 book *Death of Celilo Falls* “[r]apid currents and exposed rocks created a navigational nightmare. The rapids, backwaters, and eddies also constituted what many considered the best nine-mile stretch of fishing sites on the continent.”¹⁴

Barber further elaborated on how the Indians managed to fish for salmon on this navigational nightmare:

When salmon migrated, fishers waited on scaffolds that hung from cliffs above the roaring water of the falls or on platforms that reached out over the river like pointed fingers. From these cantilevers, Indians lowered mobile and stationary nets deep into the water where millions of salmon forced their way up the river. The rushing current pushed fish backward, stunning them and allowing Indians to skillfully scoop up the fish[.]¹⁵

The Native American (Indian) tribes that traditionally fished at Celilo Falls included the Yakima, Umatilla, Warm Springs, Wasco, and Wishram.¹⁶ For these tribes, salmon represented the essential connection between human

¹³ BARBER, *supra* note 7, at 14, 19.

¹⁴ *Id.* at 19.

¹⁵ *Id.* at 23.

¹⁶ *Id.* at 38; Bruce Rigsby, *The Stevens Treaties, Indian Claims Commission Docket 264, and the Ancient One Known as Kennewick Man*, in *THE POWER OF PROMISES: RETHINKING INDIAN TREATIES IN THE PACIFIC NORTHWEST* 244, 244–45, 252–53 (Alexandra Harmon ed., 2008).

cultures and the natural world.¹⁷ This connection was evidenced by the First Salmon Ceremony common among the salmon-dependent Columbia River Basin tribes, when the return of spring salmon runs marked the end of winter and meals of dried foods.¹⁸

In 1855, the United States entered into a series of treaties with Pacific Northwest tribes, including the Yakima and the Umatilla, in the Columbia River Basin.¹⁹ These treaties became known as the Stevens Treaties, named after Territorial Governor Isaac Stevens who negotiated them on behalf of the United States.²⁰ The 1855 Stevens Treaties with the Yakima and the Umatilla provided that the tribes retained “the right of taking fish at all usual and accustomed places, in common with all citizens of the Territory.”²¹ The term “Territory” referred to the Oregon Territory because in 1855, Oregon, Washington, and Idaho had not yet been admitted as new states to the United States.²²

Over the course of the century that followed the Stevens Treaties, the Yakima were often successful in defending their fishing rights in the courts.²³ Often represented by the United States Bureau of Indian Affairs (BIA), which acted in a trustee capacity in such litigation, the Yakima were able to preserve their treaty fishing rights against claims by non-Indian fishers in two important federal court cases.²⁴

In the first case, *Seufert Brothers Company v. United States*, an Oregon fishing company attempted to oust the Yakima from access to Celilo Falls on the southern shore of the Columbia River and restrict the tribe’s fishing to the northern shore (in Washington state) of the river.²⁵ In its 1919 decision in *Seufert*, the U.S. Supreme Court upheld the right of the Yakima to fish for salmon at Celilo Falls and other spots on the Oregon side of the Columbia River, relying on the “usual and accustomed places” language in the 1855 treaty.²⁶

In the second case, *United States v. Earnest Cramer and E.R. Cramer*, the BIA filed suit in federal district court in Portland, Oregon on behalf of the

¹⁷ *Id.* at 24.

¹⁸ *Id.*

¹⁹ *Id.* at 51–52.

²⁰ *See id.* at 51; Rigsby, *supra* note 16, at 244–45, 252–53.

²¹ BARBER, *supra* note 7, at 51.

²² *Treaty of Oregon*, NW. POWER AND CONSERVATION COUNCIL, <https://www.nwcouncil.org/reports/columbia-river-history/treatyoforegon> (last visited Aug. 28, 2020).

²³ *See* BARBER, *supra* note 7, at 52–53.

²⁴ *Id.* at 36, 39–40, 52–53.

²⁵ *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919); *see also* BARBER, *supra* note 7, at 48–49.

²⁶ *Seufert Brothers*, 249 U.S. at 194.

Yakima in response to non-Indian fishermen that had constructed fishing scaffolds at Celilo Falls and other traditional Yakima fishing spots along the Columbia River.²⁷ In his 1946 decision in *Cramer*, again relying on the provisions in the 1855 treaty, federal district court judge James Alger Fee found in favor of the Yakima, granting temporary restraining orders against the Cramers and ordering the Cramers to remove their fishing scaffolds at that location.²⁸

The Yakima's court victories in the *Seufert* and *Cramer* cases, however, would soon be erased by the plans of the U.S. Army Corps of Engineers to build a new dam ("The Dalles Dam") on the Columbia River.²⁹ The reservoir behind The Dalles Dam, to be named Celilo Lake (strangely to commemorate the spot the dam would flood and bury), would inundate Celilo Falls and cover it with slack water.³⁰ Moreover, the dam would block the upstream passage of salmon returning to the spot where Celilo Falls had been located.³¹ The economic justifications given for The Dalles Dam were hydroelectric power, flood control and improved river navigation.³² The Army Corps of Engineers offered the Yakima and other tribes monetary settlements for their lost fishing rights and lost fishing income resulting from the inundation of Celilo Falls.³³

At the 1951 Appropriations Committee Hearing for the U.S. House of Representatives, Thomas Yallup (attorney for the Yakima) presented testimony emphasizing the religious importance of Celilo Falls to the tribe, explaining that "fishing at the falls water is held to be sacred to the Indians" and describing Celilo Falls as a site where Indians caught "sacred fish" for "their customary religious practices, which have been practiced for centuries and are protected now."³⁴ During the hearing, when a congressman asked Yallup if another site on the Columbia River could provide the Yakima with a substitute for Celilo Falls, Yallup responded that an alternate site "would not be a substitute to our beliefs."³⁵

When Congress approved the funds to construct The Dalles Dam in 1953, the Yakima (in a final attempt to save Celilo Falls) requested that Congress

²⁷ BARBER, *supra* note 7, at 58–59.

²⁸ *Id.* at 59.

²⁹ *Id.* at 14.

³⁰ *Id.* at 4, 14–15.

³¹ *Id.* at 87.

³² *Id.* at 31.

³³ *Id.* at 155–56.

³⁴ *Id.* at 83.

³⁵ *Id.*

consider relocating the dam thirteen miles upriver from its proposed location.³⁶ In support of the relocation alternative, Thomas Yallup argued that the dam should be built “at some other place, rather than destroy the place which we have held sacred[.]”³⁷ The proposal for an alternative dam location, however, was never given serious consideration by the Army Corps of Engineers and Congress.³⁸ The Dalles Dam was constructed in its originally proposed location and Celilo Falls was drowned by the rising waters of Lake Celilo.³⁹

As author Katrine Barber observed:

Although the federal government defended local Indians when the states of Oregon and Washington threatened their rights, it was the federal government itself that struck the crucial blow against Native fishing in the region. Through the authorization of the dams, Congress decided that the Indians *did not* have a superior right to fish the Columbia when that right competed with economic progress. . . . What did it matter if Indians retained the right to fish in “usual and accustomed” places if those places (and the fish themselves) could not survive regional progress?⁴⁰

In her book, Barber offers this account of the how local Native Americans experienced the celebrations that accompanied the completion of The Dallas Dam in 1957:

Celebrations and commemorations reveal what people consider important. As these celebrations suggest, most non-Indian people hailed The Dalles Dam as progress. The ceremonies that accompanied the various phases of construction celebrated a remade river, a “highway” upon which goods transported to and from The Dalles would be accompanied by the hum of electrical generators. In contrast, the region’s Indians mourned the loss of fishing sites and a core way of life. Rosita Wellsey remembered that as a child she watched the floodwaters behind the dam inundate Celilo: “As the little islands disappeared, I could see my grandmother trembling, like something was hitting her . . . she just put out her hand and she started to cry.”⁴¹

In the *Seufert* and *Cramer* cases, the BIA and the federal courts both stepped in to honor the federal government’s trustee obligations to the Yakima and preserve the tribe’s fishing rights from encroachment by third parties. When it

³⁶ *Id.* at 89.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 96.

⁴⁰ *Id.* at 63.

⁴¹ *Id.* at 5–6.

came to federal dam building, however, the federal government was all too ready to set aside its trustee obligations to tribes for what it perceived as more paramount economic and political interests.⁴² The fish passage and flowing water needed to sustain Yakima salmon fishing rights were sacrificed to prioritize the navigation-based commerce and hydroelectric generation in the Columbia River Basin.

B. Ainu Human Rights and Nibutani Dam on the Saru River in Japan

This second study focuses on how constitutional rights and international human rights law can inform national courts' approach to indigenous rights to water and fisheries. The study also focuses on the inadequacy of the remedies provided by these national courts for such constitutional and international law rights violations.

The Saru River is located in the Hokkaido District in northern Japan.⁴³ The capital of the Hokkaido District is the city of Sapporo.⁴⁴ The Ainu ethnic people that live along and near the Saru River consider themselves ethnically and culturally distinct from the Japanese.⁴⁵ A study conducted in 1995 indicated that seventy percent of residents in the area near the town of Nibutani were Ainu.⁴⁶

In the traditional Ainu language, the word for salmon is *shiepe*, which also means staple food.⁴⁷ Salmon is a critical source of food for the Ainu people, and a critical part of Ainu culture in terms of harvest and preparation methods and dining rituals.⁴⁸ This historical treatment of the Ainu by the Japanese has been brutal, with particular efforts by the Japanese to break the Ainu people's connection to salmon and salmon fishing.⁴⁹

In a 1997 decision by the Sapporo District Court (discussed in more detail below), the following findings were made:

In 1873 . . . the use of *uray* nets (*i.e.*, catching fish by placing stakes across a river to bar the fish from traveling up except for at a single open space where nets are set), one of the traditional Ainu fishing

⁴² See *id.* at 63.

⁴³ Mark A. Levin, *Japan: Kayano et al. v. Hokkaido Expropriation Committee: 'The Nibutani Dam Decision'*, 38 I.L.M. 394, 400 (1999).

⁴⁴ *Sapporo*, JAPANGUIDE.COM, japan-guide.com.

⁴⁵ Levin, *supra* note 43, at 395–96.

⁴⁶ *Id.* at 410.

⁴⁷ *Id.* at 411.

⁴⁸ *Id.*

⁴⁹ See *id.* at 422.

methods, was prohibited for salmon fishing at the Toyohira, Hassamu, Kotani, and Shinoro Rivers. . . . In 1878, fishing for salmon and trout was banned entirely for all rivers around Sapporo. . . . Thereafter, poaching salmon in the rivers of the Chitose area was prohibited. And after the traditional Ainu fishing method by *tesu* nets was prohibited, salmon and trout fishing even for personal household consumption was prohibited in 1897. . . . Putting the above-recognized facts together with the overall purport of the arguments submitted, we further find as follows: Because their livelihood had been sustained principally by fishing, the above-described prohibitions of fisheries, etc. plunged the Ainu people into destitution. . . . To say that those policies failed to consider the Ainu people's unique dietary customs, manners and customs, language, etc. is unavoidable. And the deterioration of the Ainu people's unique manners and customs, language, etc. was a direct consequence thereof.⁵⁰

The Court further took the time in its decision to consider the significance of these rights to Ainu culture:

The fundamental characteristics of Ainu culture are focused around hunting, gathering, and fishing, spending their lives together with nature. Because this culture was born from worshiping the bounty of nature together with their gods, the culture's notion of nature bonds together an area's culture with the land cherished by that culture in a connection so extraordinarily close that it can never be severed.⁵¹

In 1986, the Hokkaido Development Bureau approved the construction of the Nibutani Dam on the Saru River.⁵² The proposed new dam did not provide for upstream or downstream passage of salmon, and the reservoir behind the dam, Lake Nibutani, would result in the inundation of several sacred Ainu sites including *Poromoy Chashi*, situated on a flat riverside terrace.⁵³ The Hokkaido Development Bureau approved Nibutani Dam without consultations with the Ainu.⁵⁴

In an effort to preserve salmon runs on the Saru River as well as sacred sites such as *Poromoy Chashi*, in 1997 a lawsuit was decided in Sapporo District Court against the Hokkaido Appropriations Committee for two Ainu residents, Kiazawa Tadashi and Kayano Shigeru, whose property had been confiscated to

⁵⁰ *Id.* at 422–23.

⁵¹ *Id.* at 424 (brackets omitted).

⁵² *See id.* at 400–01.

⁵³ *Id.* at 410, 412–13, 415–16.

⁵⁴ *See id.* at 401.

make way for Nibutani Dam and the reservoir behind it.⁵⁵ Plaintiffs Kiazawa and Kayano relied on two main legal sources in support of their claim that the approval and construction of the dam violated the rights of the Ainu.⁵⁶

First, Kiazawa and Kayano alleged that the approval and construction of Nibutani Dam violated Article 13 of the Japanese Constitution. Article 13 provides: “All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”⁵⁷

Second, Kiazawa and Kayano further alleged that the approval and construction of Nibutani Dam had violated the 1966 United Nations International Covenant on Civil and Political Rights (ICCPR), which the Japanese Parliament ratified in 1979.⁵⁸ Article 27 of the ICCPR provides, “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”⁵⁹

Thus, unlike with the salmon-related claims of the Yakima in the United States, the Ainu claims to preserve salmon were not grounded in treaties with the national government that recognized fishing rights. Rather, the legal claims of the Ainu, in the lawsuit filed by Kiazawa and Kayano, were grounded in human rights and indigenous rights law set forth in a domestic constitution and an international treaty.

In a statement submitted to the court, plaintiff Kayano Shigeru recounted his own experiences and those of his father in regard to the Saru River and salmon:

My father was detained on a charge of fishing salmon by the Japanese police when I was a little child. A Japanese rule prohibiting salmon fishing by the Ainu, who had relied upon salmon as their staple, meant death to the Ainu. . . . Hokkaido was inhabited by Ainu people before the Japanese invasion. Every stream and swamp, in addition to the mountains and rivers, is named using the Ainu language. . . . [T]he Ainu have 15 ways of fishing salmon and more than 30 ways of

⁵⁵ *See id.* at 394, 398–99.

⁵⁶ *See id.*

⁵⁷ *Id.* at 418 (quoting NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 13).

⁵⁸ *See Levin, supra* note 43, at 417–18.

⁵⁹ *Id.* at 417 (quoting International Covenant on Civil and Political Rights art. 27, Dec. 19, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171).

cooking it. I wish the Japanese Government [would] let the Ainu have the right to fish salmon again.⁶⁰

In terms of the claims under Article 13 of the Japanese Constitution, the Sapporo District Court found:

Diversity exists in an unmistakable fashion as the respective differences in the particulars faced by each individual. . . . Premised upon this diversity and these differences, Article 13 demands meaningful, not superficial, respect for individuals and the differences arising between them. . . . If we look at these points in terms of the relationship between a dominant majority and a minority who do not belong to the majority, it often happens that the majority people, being a majority, consequently tend to ignore or forget the interests of the minority. . . . The minority's distinct ethnic culture is an essential commodity to sustain its ethnicity without being assimilated into the majority. And thus, it must be said that for the individuals who belong to an ethnic group, the right to enjoy their distinct ethnic culture is a right that is needed for their self-survival as a person. . . . Accordingly, we agree that Constitution Art. 13 guarantees to the plaintiffs' the right to enjoy the distinct ethnic culture of the Ainu people, which is the minority to which the plaintiffs belong.⁶¹

In terms of the claims under Article 27 of the ICCPR, the Sapporo District Court determined:

It is proper to understand that the ICCPR, as set out above, guarantees to individuals belonging to a minority the right to enjoy that minority's distinct culture. Together with this, there is an obligation [*sekimu*] imposed upon all contracting nations to exercise due care with regard to this guarantee when deciding upon, or executing, national policies which have the risk of adversely affecting a minority's culture, etc. Thus, the Ainu people, as a minority which has preserved the uniqueness of its culture, are guaranteed the right to enjoy their culture by ICCPR Art. 27, and accordingly, it must be said that . . . our nation has a duty [*gimu*] to faithfully observe this guarantee. . . . Indeed, the rights arising under ICCPR Art. 27, are not unlimited. . . . But in light of the aims of ICCPR Art. 27, any limits on the guarantee of rights must be kept to the narrowest degree necessary.⁶²

Building on these interpretations of Article 13 of the Japanese Constitution and Article 27 of the ICCPR, the Sapporo District Court went on to hold:

⁶⁰ Hiroshi Maruyama, *Ainu Landowners' Struggle for Justice and the Illegitimacy of the Nibutani Dam Project in Hokkaido Japan*, 14 INT'L COMM. L. REV. 63 (2012).

⁶¹ Levin, *supra* note 43, at 418–19.

⁶² *Id.* at 418.

Of course, it is conceivable that these various values may be compromised for the public interest. But in cases where such concessions are to be sought, there must also be the greatest degree of consideration that includes a sense of remorse concerning matters such as that described above of the historical background of the coerced deterioration of the Ainu people's unique ethnic culture caused by assimilationist policies. . . . Absent such remorseful consideration, what results is the thoughtless theft of nature, including land in an indigenous region that is deeply connected to a distinct ethnic culture. . . . Of course, there is absolutely no bar on using land originally issued pursuant to the Hokkaido Former Aboriginals Protection Act for the public interest, but here too, the greatest degree of consideration seems warranted. If such consideration is lacking, it reflects the majority's careless and selfish policymaking, and our judgment finding illegality cannot be avoided.⁶³

The Court then finally concluded with its final decision:

Taking all that has been written above together, we find that the Minister of Construction, who was the authorizing agency and the agent for the enterprise authority in the instant matter, neglected the investigative and research procedures that were necessary to judge the priority of the competing interests accompanying the accomplishment of the Project Plan. He unreasonably made little of and ignored various factors and values that should have been given the highest regard. . . . Therefore, we conclude that the instant Project Authorization was in violation of [the] Land Expropriation Law Article 20(3) and that such illegality succeeded to the Confiscatory Administrative Rulings.⁶⁴

When it came time to fashioning a remedy, however, notwithstanding that it found the approval of Nibutani Dam to be unlawful, the Sapporo District Court was unwilling to halt construction or order the dam's removal.⁶⁵ In its ruling, the Court stated "with the Nibutani Dam already complete and filling with water, we are forced to recognize the extraordinary harm to the public interest that would arise from reversing the Confiscatory Administrative Rulings."⁶⁶ The plaintiffs Kiazawa and Kayano, and the Ainu people, were left with a strong proclamation of illegality but were provided no injunctive relief.⁶⁷

⁶³ *Id.* at 425–26.

⁶⁴ *Id.* at 427.

⁶⁵ *See id.* at 428–29.

⁶⁶ *Id.* at 429.

⁶⁷ *See id.* at 396, 398, 429.

As author Georgia Stevens reflected in her 2004 article titled *More than Paper: Protecting Ainu Culture and Influencing Japanese Dam Development*:

The ultimate outcome of the case, however, rendered the legal content of Article 27 and the constitutional protections as mere rhetoric. While the court held that the administrative decisions to expropriate Ainu land and approve the dam project were illegal, it would not reverse the all-but-complete dam construction.

Instead, the plaintiffs were denied substantive relief on the basis that considerations of “public interest” dictated that the dam should be completed. And so the dam remains.⁶⁸

Yet the completion of Nibutani Dam and the 1997 Sapporo District Court decision are not the end of the story. In part as a result of international media coverage of the Ainu-Nibutani Dam controversy and other indigenous-natural resource conflicts around the world, in 2007 the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (“U.N. Declaration”).⁶⁹ The U.N. Declaration included provisions that speak to situations where indigenous groups have deep cultural ties to fishery resources and the instream flows such fishery resources need. Article 25 of the U.N. Declaration provides: “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, *waters* and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”⁷⁰ Article 26 of the U.N. Declaration provides:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due

⁶⁸ Georgia Stevens, *More Than Paper: Protecting Ainu Culture and Influencing Japanese Dam Development*, CULTURAL SURVIVAL (Dec. 2004), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/more-paper-protecting-ainu-culture-and-influencing>.

⁶⁹ See G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

⁷⁰ *Id.* art. 25 (emphasis added).

respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.⁷¹

In June 2008, a year after the adoption of The U.N. Declaration, the Japanese Diet officially designated the Ainu as an indigenous people of the northern part of Japan and, in particular, of Hokkaido.⁷² Based on this designation, the Japanese Government established a high-level panel of experts on Ainu affairs that resulted in funding for local investigations and research to document and preserve Ainu culture and language.⁷³ Therefore, although the Ainu were unable to stop the construction of Nibutani Dam, the litigation the Ainu brought concerning the dam helped set political events in motion that may better secure the legal status of the Ainu people.⁷⁴

From the perspective of U.S. jurisprudence, regardless of the ultimate outcome of the litigation challenging Nibutani Dam, it is interesting to note the willingness of the Sapporo District Court to rely directly on sources of international law, such as provisions of the 1966 United Nations International Covenant on Civil and Political Rights.⁷⁵ In U.S. courts, for reasons that are beyond the scope of this Article, there has often been reluctance to rely on international law to support domestic judicial decisions.⁷⁶ As Patrick McFadden noted in his article titled *Provincialism in United States Courts*:

Over the past 200 years, United States judges have developed a series of rules and practices that minimize the role of international law in domestic litigation. Considered collectively, these rules and practices embody a thoroughgoing, deeply rooted provincialism - an institutional, almost reflexive, animosity toward the application of international law in U.S. courts. As a consequence, international law plays almost no part in the judicial business of the United States. It is rarely discussed in American cases, and almost never provides the rule of decision upon which the court judgments turn.⁷⁷

The experience of the Ainu's legal efforts to protect their rights to water and salmon therefore also speak to the broader question of the status of international

⁷¹ *Id.* art. 26.

⁷² Maruyama, *supra* note 60, at 63 (discussing the Japanese decision to designate the Ainu people as indigenous).

⁷³ *See id.* However, it is also important to note that no progress has been made in guaranteeing Ainu rights.

⁷⁴ *See id.* at 68 (discussing the Nibutani Dam project).

⁷⁵ *See id.* at 72 (discussing a decision by the Sapporo district court).

⁷⁶ *See* Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 5 (1995) (discussing the role of international law in domestic litigation).

⁷⁷ *Id.*

indigenous rights law, and international law in general, in domestic courts. Some nations, such as Japan in the case of the Ainu litigation or Mexico in the case of the claims brought on behalf of the Cucapá people, have shown a willingness to ground their domestic court decisions in sources of international human rights law.⁷⁸ Other nations, like the United States, however, have often been more reluctant to do so.⁷⁹

C. Lummi Fishing Rights and Diversions on the Nooksack River in Washington

The third case study examines conflicting federal case law in the United States on the extent to which indigenous fishery rights give rise to an implied right to maintain the instream flows needed to sustain fisheries, and whether federally-recognized indigenous fishery and water rights can serve as an impetus to more robust implementation of state instream flow standards.

The Nooksack River originates in the Cascade Mountains in the State of Washington. It is comprised of three forks (the North, the South, and the Middle).⁸⁰ The Nooksack River empties into northern Puget Sound near the city of Bellingham.⁸¹ “Historically, the Nooksack River produced multiple runs of salmon annually, including both spring and fall Chinook (King), Coho (silver), Chum (Dog), and, in odd-numbered years, Pink (Humpback) salmon.”⁸² All of these salmon species are anadromous; the fish hatch and spend a portion of their lives in fresh water but then migrate to the sea to mature, returning to their fresh water natal streams to spawn.⁸³

The Lummi Reservation along the Nooksack River was established pursuant to the 1855 Treaty of Point Elliot, one of the series of Stevens Treaties discussed in Section I.A. on Yakima rights to fish and water on the Columbia River.⁸⁴ Like most Stevens Treaties, in addition to providing for lands set aside to create a reservation, the Treaty of Point Elliot also guaranteed the Lummi “the right of

⁷⁸ See Getches, *supra* note 10, at 283–85.

⁷⁹ See McFadden, *supra* note 76, at 5 (discussing the role of international law in domestic litigation).

⁸⁰ Letter from Clifford Cultee, Chairman, Lummi Indian Bus. Council, to Ken Salazar, Sec’y of the U.S. Dep’t of the Interior, and Larry Echo Hawk, Assistant Sec’y of the U.S. Dep’t of the Interior for Indian Affs. (June 6, 2011) (https://www.lummi-nsn.gov/userfiles/90_Lummi%20Nation%20Litigation%20Request%206.7.11.pdf).

⁸¹ *See id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See id.*

taking fish at usual and accustomed [places].”⁸⁵ This right is sometimes referred to as an *off-reservation* fishing right or an *aboriginal* fishing right since it is not limited to fishing at places located on reservation lands.⁸⁶

Pursuant to a 1952 piece of federal legislation known as the McCarran Amendment, the recognition and quantification of Indian water rights could initially be determined by state courts, subject to the potential review by the U.S. Supreme Court (if it chose to grant review of the state supreme court ruling).⁸⁷ Pursuant to the McCarran Amendment, the State of Washington has the authority to undertake an adjudication of water rights in the Nooksack River basin (including an adjudication of Lummi water rights derived from the fishing rights in the Treaty of Point Elliott), but to date the State of Washington has not undertaken such an adjudication.⁸⁸ The *unadjudicated* status of Lummi fishing and water rights has therefore left the Lummi Nation so far without an effective forum to defend and enforce its fishing rights from the impacts of excessive diversions of Nooksack River water by non-Indian parties.⁸⁹

In 1985, in an effort to respond to concerns raised by the Lummi Nation and others about excessive Nooksack River diversions, the State of Washington established minimum instream flows for the Nooksack River.⁹⁰ However, since the Nooksack River instream flows were established, there has been limited efforts by the State of Washington to actually enforce these instream flow standards by curtailing existing diversions.⁹¹

Due to frustration with the failure of the State of Washington to initiate an adjudication of water rights for the Nooksack River, and Washington’s weak enforcement of instream flow standards for the Nooksack River, in May 2011, the Lummi Indian Business Council adopted Resolution #2011-078 (Resolution).⁹² This Resolution provided:

WHEREAS, the Lummi people have fished in the Nooksack River and the waters of northern Puget Sound since time immemorial.

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ *See* The McCarran Amendment, 32 U.S.C. § 666 (1952).

⁸⁸ *See id.*; Letter from Clifford Cultee to Ken Salazar and Larry Echo Hawk, *supra* note 80.

⁸⁹ *See* Letter from Clifford Cultee to Ken Salazar and Larry Echo Hawk, *supra* note 80.

⁹⁰ *See* Wash. Admin. Code § 173-501-030 (1985); *see also* Chet Broberg, Northwest Washington Tribe’s Fight for Salmon and Water 2-4 (unpublished paper for Spring 2020 Water Law seminar at University of California at Berkeley School of Law) (on file with author).

⁹¹ *See* Letter from Clifford Cultee to Ken Salazar and Larry Echo Hawk, *supra* note 80; *see also* Broberg, *supra* note 90, at 2-4.

⁹² Letter from Clifford Cultee to Ken Salazar and Larry Echo Hawk, *supra* note 80 (attached Resolution #2011-078 by the Lummi Indian Business Council, adopted on May 17, 2011).

Article V of the Treaty of Point Elliot provides that the “right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory,” and

WHEREAS, the Lummi Nation retained a federal reserved water right to instream flows sufficient to support a sustainable, harvestable surplus of fish to exercise their treaty fishing rights when the reservation to take fish was made in the Treaty of Point Elliott; and

WHEREAS, at this time, state-permitted water diversions in the Nooksack River basin threaten the fish species that make up the Nation’s treaty fishery and the water resources needed to ensure a permanent, economically viable homeland for the Lummi People; and

....

WHEREAS, federal legal action brought the United States, as trustee for the Lummi Nation and its trust resources is necessary at this time in order to ensure protections and preservation of the Nation’s treaty rights, on and off the Lummi Reservation[.]⁹³

In June 2011, following the adoption of this Resolution, the Lummi Indian Business Council sent a letter to then Secretary of the U.S. Department of the Interior (Ken Salazar) and then Assistant Secretary of the U.S. Department of the Interior for Indian Affairs (Larry Echo Hawk).⁹⁴ In this June 2011 letter, which bore the heading *Litigation Request by Lummi Indian Business Council to Protect Lummi Nation Treaty Fishing and Water Rights*, the Lummi Indian Business Council stated:

Since time immemorial, the Lummi Nation and its members have harvested [salmon] for commercial, subsistence, and ceremonial purposes.

....

State-permitted water diversions have significantly depleted flows in the Nooksack River and directly threaten the treaty fishery. Simply put, fish need water. Low flows resulting from diversions result in reduced wetted habitat, increased temperatures, and impaired channel configuration. As flows go down, productive, protective side channels may become shallow, isolated ponds where fish are trapped. As stream temperatures rise, oxygen content is reduced and potential for disease increases. Low flows and reduced habitat area also result in reduced food supply. Competition for food increases as the same number of

⁹³ *Id.*

⁹⁴ Letter from Clifford Cultee to Ken Salazar and Larry Echo Hawk, *supra* note 80.

fish is concentrated into a smaller area. Finally, dewatering of streams can leave salmon eggs dry, exposed, and lifeless.

....

No state adjudication of water rights in the Nooksack basin has ever been completed and no such adjudication is currently being proposed. The Nation's reserved rights can and should be determined without the necessity of determining the status or validity of any state-based water rights in the basin.⁹⁵

In support of their June 2011 request to the U.S. Department of the Interior, the Lummi Nation relied on the Ninth Circuit Court of Appeal's decisions in the *United States v. Adair* litigation.⁹⁶

In *Adair*, at issue were water rights to the Williamson River for the Klamath Indian Tribe.⁹⁷ The treaty with the Klamath reserved the rights of fishing on the Tribe's reservation.⁹⁸ The *Adair* Court looked to guidance from the 1908 decision in *United States v. Winters*,⁹⁹ in which the U.S. Supreme Court had found implied water rights based on the underlying purposes of the treaty and based on its determination that all ambiguities in treaties with Indians should be resolved in favor of the Indians (because of the circumstances in which the treaties were negotiated).¹⁰⁰ Referring to the treaty language, in *Adair* the Ninth Circuit found support for "dual purposes" in the treaty with the Klamath: one purpose was to maintain the Klamath as an agrarian society; the second purpose was to ensure that the Klamath could continue to hunt, fish, and gather (to fish for salmon in this instance).¹⁰¹

Adair held that since one of the primary purposes of the treaty was to entitle the Klamath to continue its traditional salmon fishing, there must be water to support the existence of salmon in the river.¹⁰² Pursuant to the approach laid out by the U.S. Supreme Court in *Winters*, the Ninth Circuit found this gave rise to an instream water right.¹⁰³ Without quantifying the extent of the instream flows necessary to support the Klamath's fishing rights, in *United States v. Adair*

⁹⁵ *Id.*

⁹⁶ Letter from Clifford Cultee to Ken Salazar and Larry Echo Hawk, *supra* note 80 (citing *United States v. Adair*, 723 F.2d 1394, 1410-11 (9th Cir. 1983)).

⁹⁷ *United States v. Adair*, 723 F.2d 1394, 1397 (9th Cir. 1983); Bilodeau, *supra* note 2, at 540.

⁹⁸ *Adair*, 723 F.2d at 1414; Bilodeau, *supra* note 2, at 540-41.

⁹⁹ *Adair*, 723 F.2d at 1409; Bilodeau, *supra* note 2, at 541.

¹⁰⁰ *Adair*, 723 F.2d at 1408; Bilodeau, *supra* note 2, at 542-43.

¹⁰¹ *Adair*, 723 F.2d at 1409-10; Bilodeau, *supra* note 2, at 541.

¹⁰² *Adair*, 723 F.2d at 1415.

¹⁰³ *Id.* at 1409, 1415.

(*Adair III*) the Court clarified that any state-adjudication of this instream water right (pursuant to the McCarran Amendment) would need to provide “productive habitat” for salmon.¹⁰⁴

However, there are also state court decisions that run counter to *Adair*, most notably the Idaho District Court’s 1999 decision in the *Snake River Basin Adjudication (SRBA)*.¹⁰⁵ The *SRBA* case involved the treaty rights of the Nez Perce Tribe to the waters of the Snake River, which is tributary to the Columbia River.¹⁰⁶ Like most of the Stevens Treaties, the United States’ 1855 treaty with the Nez Perce provided the Tribe with the right of “taking fish at all usual and accustomed places.”¹⁰⁷ The fisheries at issue in the *SRBA* litigation were salmon.¹⁰⁸ Like the Klamath in *Adair*, the Nez Perce argued that the recognition of instream waters rights on the Snake River was necessary to the purposes of upholding treaty-based tribal salmon fishing rights.¹⁰⁹

In *SRBA*, however, the Idaho District Court held that *Adair* was off point because *Adair* involved fishing from water that was on the tribal reservation rather than fishing at places that were off-reservation.¹¹⁰ Relying on this factual distinction from *Adair*, the Idaho District Court refused to recognize that the Nez Perce’s treaty-based fishing rights at off-reservation locations gave rise to an implied instream water right.¹¹¹ In *SRBA*, the Idaho District Court conceded that the Nez Perce held certain rights to fish salmon but explained that it was not prepared to “take the additional leap and by judicial fiat declare a water right for that purpose.”¹¹²

The approach taken by the Idaho court in *SRBA* has been subject to criticism by water law and Indian law scholars. In her 2012 law review article titled *The Elusive Implied Water Right for Fish: Do Off-Reservation Instream Water Rights Exist to Support Indian Treaty Fishing Rights?*, Katheryn A. Bilodeau wrote:

¹⁰⁴ United States v. Adair, 187 F. Supp. 2d 1273, 1277 (D. Or. 2002) (quoting United States v. Adair (Adair II), 478 F. Supp. 336, 346 (D. Or. 1979), *aff’d*, United States v. Adair, 723 F.2d 1394 (9th Cir. 1983)).

¹⁰⁵ See In Re Snake River Basin Adjudication (SRBA): No. 39576, Consolidated Subcase 03-10022, at 40 (Idaho 5th Jud. Dist. Ct., Nov. 10, 1999), <http://www.srba.state.id.us/FORMS/sumjudg.PDF>.

¹⁰⁶ *Id.* at 5; Bilodeau, *supra* note 2, at 524.

¹⁰⁷ In Re Snake River Basin Adjudication (SRBA): No. 39576, Consolidated Subcase 03-10022, at 17, 32 (Idaho 5th Jud. Dist. Ct., Nov. 10, 1999) <http://www.srba.state.id.us/FORMS/sumjudg.PDF>.

¹⁰⁸ *Id.* at 21.

¹⁰⁹ *Id.* at 28.

¹¹⁰ *Id.* at 39.

¹¹¹ *Id.* at 40.

¹¹² *Id.* at 33.

The treaty does not expressly reserve a water right. However, the treaty did expressly reserve to the Nez Perce the right to take fish in traditional off-reservation fishing locations. *Winters* dictates ambiguities to be resolved in favor of the Indians: ‘[T]he rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.’ The implication that off-reservation water might one day be completely diverted from a stream, creating an inhabitable environment for fish, does not support the purpose of a fishing right. . . . The ambiguity should have been resolved in favor of the Nez Perce.¹¹³

Similarly, in their 2006 law-review article *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, Professor Michael C. Blumm and his co-authors David H. Becker and Joshua D. Smith commented:

In short, by authorizing state courts to interpret federally-reserved water rights, the McCarran Amendment has forced tribes into hostile forums in which tribes must be prepared to compromise their claims for streamflows that fully support the purposes of the reserved rights, perhaps settling for stream improvements that can partially restore river ecosystems. Although tribal reserved water rights claims may open the door to discussions about streamflow restoration, in practice the McCarran Amendment Era has reduced these claims to mere bargaining chips rather than vehicles for achieving the purpose of reservations through streamflow restoration.¹¹⁴

Regarding the impact of *Adair I* and the McCarran Amendments, Blumm, Becker, and Smith further commented:

Over a quarter-century after the court in *Adair I* recognized the Klamath Tribes’ reserved instream flow rights, the Klamath tribes continue to await the outcome of the state comprehensive adjudication process in order to obtain [recognition of their reserved water rights.] Although [*Adair*] was a critical first step on the road to obtaining “wet rights” to instream flows, it is quite evident that that was only the first step in a process which has yet to come to full fruition.¹¹⁵

. . . .

¹¹³ Bilodeau, *supra* note 2, at 542–43.

¹¹⁴ Michael C. Blumm et al., *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, 36 ENV’T L. 1157, 1161 (2006).

¹¹⁵ *Id.* at 1170.

[In terms of *SRBA*,] the Nez Perce argued that the treaties implied a federal right to streamflows necessary to preserve the tribe's bargained-for treaty right to fish in the Snake River Basin. Without such a right, the tribe maintained, its treaty fishing rights would be virtually meaningless.¹¹⁶

In terms of the Lummi Nation's efforts to secure instream water rights on the Nooksack River to give meaning to Lummi people's treaty-based, salmon fishing rights, it remains to be seen whether the more expansive approach in *Adair* or the more restrictive approach in *SRBA* will be adopted. Moreover, it remains to be seen how long this process will take and whether the federal government is prepared to initiate litigation on behalf of the Lummi Nation to defend the Lummi people's rights to fish salmon.

D. Karuk Fishing Rights and Diversions on Stanshaw Creek in California

The fourth case study highlights the interplay between state-law, public-trust protection (to protect public-trust resources such as fisheries) and federal-law protections for indigenous rights to fisheries and water.

In northern California, Stanshaw Creek is a tributary to the Klamath River and traditionally served as an important spawning ground for salmon and steelhead trout.¹¹⁷ However, as a result of upstream diversions by the Marble Mountain Ranch, the instream flow in Stanshaw Creek was so depleted that the creek often lost its connectivity with the downstream Klamath River.¹¹⁸ Most of the water diverted from Stanshaw Creek was used to operate an antiquated hydroelectric turbine that provided levels of electricity far in excess of what the ranch required.¹¹⁹

To address the impacts of these diversions, the enforcement unit of the California State Water Resources Control Board ("State Water Board") brought an administrative action against Marble Mountain Ranch alleging violations of California public-trust law and California reasonable-use law.¹²⁰ This enforcement action, which sought to reduce diversions to provide sufficient

¹¹⁶ *Id.* at 1197.

¹¹⁷ Brief for Karuk Tribe & Klamath Riverkeeper at 1, 6–7, Douglas Cole (Cal. State Water Res. Control Bd. Mar. 29, 2018).

¹¹⁸ *Id.* at 7–8.

¹¹⁹ *Id.* at 3, 7–8, 17, 22.

¹²⁰ CAL. STATE WATER RES. CONTROL BD., ORDER WR 2017-00XX-DWR, ORDER FINDING WASTE, UNREASONABLE METHOD OF USE, AND UNREASONABLE METHOD OF DIVERSION OF WATER AND ORDERING CORRECTIVE ACTIONS (2016), https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/marblemntn_draftorder_083016.pdf.

instream flows to sustain salmon and steelhead populations in Stanshaw Creek and restore connectivity between Stanshaw Creek and the Klamath River, culminated in several days of hearings in November 2017 before the State Water Board.¹²¹

Among the parties that participated in the 2017 State Water Board hearings on the Stanshaw Creek diversions were the National Marine Fisheries Service (NMFS), the California Department of Fish and Wildlife (CDFW), the Karuk Tribe, and Klamath Riverkeeper.¹²² The Karuk Tribe's reservation is located along the Klamath River (downstream of the confluence of Stanshaw Creek and the Klamath River).¹²³ Klamath Riverkeeper is a nonprofit conservation organization focused on protecting and restoring the fisheries and ecosystems in the Klamath River watershed.¹²⁴

In addition to presenting live testimony at the 2017 State Water Board hearings, the Karuk Tribe and Klamath Riverkeeper jointly prepared and submitted a post-hearing closing brief in March 2018.¹²⁵ The idea of the Karuk Tribe and Klamath Riverkeeper to work together to file a joint post-hearing closing brief, rather than filing separate briefs, came out of the mutual realization that there was important interplay between the indigenous claims asserted by the Karuk Tribe and the more traditional environmental claims asserted by Klamath Riverkeeper.¹²⁶ As the respective legal counsel for the Karuk Tribe and Klamath Riverkeeper discussed this interplay following the hearings before the State Water Board, it seemed like the connections between these different claims might be more effectively laid out in a joint brief rather than in separate briefs.¹²⁷

To provide a sense of this interplay, it is worth quoting at length from the joint post-hearing closing brief filed by the Karuk Tribe and Klamath Riverkeeper. The brief began by describing the Karuk Tribe and its connection to Klamath River salmon that traditionally spawned in Stanshaw Creek:

¹²¹ Brief for Karuk Tribe & Klamath Riverkeeper, *supra* note 117 at 1.

¹²² Transcript of Hearing at 13, Douglas Cole (Cal. State Water Res. Control Bd. Nov. 13, 2017), https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/marblemountain/docs/mmr_transcript1113.pdf.

¹²³ KARUK TRIBE DEP'T OF NAT. RES. WATER QUALITY ASSESSMENT REP., at 6 (2013), https://kbifm.psmfc.org/wp-content/uploads/2017/08/Karuk-Tribe_2013_0397_WQAR.pdf.

¹²⁴ Klamath Riverkeeper, FACEBOOK, https://www.facebook.com/klamathriverkeeper/?ref=page_internal.

¹²⁵ Brief for Karuk Tribe & Klamath Riverkeeper, *supra* note 117 at 1.

¹²⁶ Recollections of author Paul Kibel, who participated directly in SWRCB Stanshaw Creek hearing and related conversations with legal counsel for the Karuk Tribe.

¹²⁷ *Id.*

With over 3,600 members, the Karuk Tribe is the second largest federally recognized Indian Tribe in California. The Klamath River is the lifeblood of the Karuk people. Salmonids, including Chinook salmon, federally-protected Coho salmon, and steelhead, are essential to the health and well-being of the Karuk Tribe. As Leaf Hillman, Director of the Karuk Department of Natural Resources and cultural leader stated: “[W]e consider ourselves as salmon people, as salmon has been one of our primary subsistence foods for countless generations . . . in the place where we have our aboriginal roots, so we say from time immemorial.” The importance of salmon to the Karuk people continues today, even though the resource is in decline and is nearly decimated by over 165 years of resource extraction and dams and diversions since the Klamath gold rush era.¹²⁸

Mr. Hillman further testified that:

“[N]ot only . . . have [we] relied on [salmon in] the past, but we continue to rely on [salmon] to the extent that [they] still persist in the Basin. We continue to rely on salmon for not only our subsistence use, but also salmon have been used in our ceremonies as well as our basic identity is tied very closely to the salmon. And we consider salmon to be a very close relative of ours and therefore are obliged to take care of them much as we are obliged to take care of our relations; human relations as well as our nonhuman relations.” The decline of salmon has immeasurable negative impacts on the Karuk people.¹²⁹

After laying out the tribal perspective on restoring Klamath River basin salmon and restoring Stanshaw Creek instream flows, the joint post-hearing closing brief then provided more detail regarding alleged violations of California public-trust law and what remedy was needed to correct these violations:

The public trust doctrine establishes that the waters and wildlife of the state belong to the people, and that the state acts as a trustee to manage and protect these resources and their associated public uses for its peoples’ benefit. The purpose of the public trust “evolve[s] in tandem with the changing public perception of the values and uses of waterways.” The public trust doctrine applies to constrain the extraction of water from navigable waters that impacts navigation and other public interests, such as the right to fish, bathe, swim, and use for recreation. Ecological values are among those values protected by the public trust.

As the state agencies responsible for administering California’s water resources, including allocation of recycled water, the public trust

¹²⁸ Brief for Karuk Tribe & Klamath Riverkeeper, *supra* note 117, at 3–4 (citations and brackets omitted).

¹²⁹ *Id.* (citations and brackets omitted).

doctrine imposes on the State Board an affirmative duty to take the public trust into account in the planning and allocation of those resources, and to protect impacted public trust uses whenever feasible. This is a continuing duty, and includes the obligation to reconsider terms and conditions of past orders, decisions, or water allocations to protect public trust resources.¹³⁰

In terms of the particular conditions on Stanshaw Creek, and a proposed remedy to address these alleged public trust law violations, the joint post-hearing closing brief stated:

The Karuk Tribe, the NMFS, CDFW, and the Regional [Water] Board agree that the [Marble Mountain Ranch] diversion has significant deleterious impacts on Stanshaw Creek and the salmon and steelhead that depend on it. There are no other diversions that cause the severe negative impacts on public trust beneficial uses the creek provides. Mr. Soto, biologist for the Karuk Tribe, confirmed that dewatering of Stanshaw Creek in summer months resulted in killing of juvenile Coho salmon.

As a result of the [Marble Mountain Ranch] diversion in spring, summer and fall, Stanshaw Creek is nearly dewatered, and the cold-water pool adjacent to the Klamath River loses its ecological functionality. According to Mr. Soto, as well as fishery experts from NMFS and CDFW, the most significant problems created by the Stanshaw Creek diversion are two-fold: “First, fish are excluded from Stanshaw Creek’s thermal refuge when low flows fail to connect the creek to the river. As a result[,] these salmon are forced to seek refuge in other locations further upstream or downstream which extends their exposure to lethally warm conditions. Second, the fish residing in the refuge pool are trapped and unable to migrate away from harmful conditions or predators.” Fish require regular connectivity between the pond and the Klamath River to ensure they are able to avoid these problems, which occur at different points in time. Mr. Soto, as well as experts from NMFS and CDFW, testified that limiting the [Marble Mountain Ranch] diversion to ensure that 90% of the flow was permitted to bypass the diversion structure, and maintaining a minimum flow of at least 2 cfs below the diversion[.]¹³¹

In their March 2018 joint brief, the Karuk Tribe and Klamath Riverkeeper then offered the following account of the ways in which tribal fishing rights and California public trust law dovetail and inform each other:

¹³⁰ *Id.* at 11 (citing *Nat’l Audubon Soc’y v. Superior Court* (1983) 33 Cal. 3d 419, 434–37, 441–49; Cal. Const., art. X, § 5; Cal. Const., art. I, § 25.).

¹³¹ *Id.* at 8 (citation omitted).

Protecting public trust beneficial uses in the Klamath River Basin will protect and preserve the Karuk Tribe's culture and spiritual and physical health. The Klamath River salmon, including those that use Stanshaw Creek, are both a public trust resource and a tribal trust resource, which means the United States government has an obligation to protect these resources for the benefit of the Karuk Tribe.¹³²

As of the publication of this Article, the State Water Board of California has yet to render its decision in the Stanshaw Creek diversion hearing. It therefore remains to be seen whether the arguments raised in the post-hearing closing brief, about the ways tribal fishing rights can inform the interpretation and enforcement of California public trust law, will be accepted and relied upon by the State Water Board.

E. Māori Rights to Speak for the Whanganui River in New Zealand

The fifth and final case study illustrates the ways in which the international indigenous rights law can serve as a catalyst to the adoption of national law to recognize indigenous claims to rivers and fisheries, and the ways in which such national legislation can also fall short of the indigenous rights guaranteed in such international indigenous law.

The Whanganui River in New Zealand is located on the North Island and stretches for 290 kilometers Mount Tongariro flowing southwest to Tasman Sea on the coast.¹³³ The Māori indigenous people of New Zealand have a deep and longstanding connection to the water and fisheries of the Whanganui River.¹³⁴ As Professors Toni Collins and Shea Esterling at the University of Canterbury Law School (in New Zealand) detailed in their 2019 article *Fluid Personality: Indigenous Rights and the Te Awa Tupua (Whanganui River Claims Settlement) Act of 2017 in Aotearoa New Zealand*:

Prior to the arrival of Europeans, areas along the River were some of the most densely populated by Māori. A number of iwi (Māori tribes) had authority over the various areas along the River where they lived, depending upon it for their very existence. After the arrival of the Pākehā (Europeans/settlers) and the signing of the *Te Teriti o Waitangi* ('Treaty of Waitangi') in 1840, Pākehā understood that ownership of the River was no longer vested in the Whanganui iwi.

¹³² *Id.* at 4–5.

¹³³ See Toni Collins & Shea Esterling, *Fluid Personality: Indigenous Rights and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 in Aotearoa New Zealand*, 20 MELB. J. INT'L L. 197, 199 (2019).

¹³⁴ See generally *id.*

However, Whanganui iwi never relinquished their rights to the River and have asserted their claims since 1873.¹³⁵

. . . .

[T]he Whanganui iwi live by the principle of *kaitiakitanga* (obligation to nurture and care). They hold a deep respect for the nature as they consider it to be their *tupuna* (ancestor) and as part of this relationship they are responsible for its care and protection. This principle of *kaitiakitanga* flows from the Māori understanding that the environment is part of their broader family. They refer to this as *whanaungatanga* (kinship) which encompasses the relationships between people living and those who have passed on, the environment and the spiritual world.¹³⁶

In 2017, New Zealand enacted the Whanganui River Claims Settlement Act (also known as the Te Awa Tupua Act).¹³⁷ New Zealand's adoption of the 2017 Whanganui River Claims Settlement Act was prompted, in part, by efforts to bring New Zealand into compliance with the 2007 U.N. Declaration.¹³⁸ Among other things, this legislation contained provisions in which the government of New Zealand offered an extensive apology to the Māori related to historical dealings concerning the Whanganui River, granted the Whanganui River legal personality, and designated the Māori (referred to as the *iwi* or *hapū* of the Whanganui) as trustees entitled to speak for and sue on behalf of the Whanganui River.¹³⁹ Alongside these more innovative provisions, however, as discussed below, there are also countervailing provisions in the Whanganui River Claims Settlement Act that limit what constitutes the "river" for purposes of the Māori's trustee rights.

In terms of the apologies offered by the government of New Zealand, Sections 69 and 70 of the Whanganui River Claims Settlement Act state:

(8) The Crown acknowledges that it has failed to recognise, respect, and protect the special relationship of the iwi and the hapū of Whanganui with the Whanganui River. . . . (16) The Crown acknowledges that the diversion of the headwaters of the Whanganui River for the Tongariro Power Development scheme . . . (b) has had an adverse effect on the cultural and spiritual values of Whanganui

¹³⁵ *Id.* at 199.

¹³⁶ *Id.* at 208.

¹³⁷ See Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (N.Z.).

¹³⁸ See Collins & Esterling, *supra* note 133, at 210. See generally Declaration on the Rights of Indigenous Peoples *supra* note 69.

¹³⁹ See Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, § 20 (N.Z.).

iwi; and (c) has caused distress and remains a significant grievance for Whanganui Iwi.¹⁴⁰

. . . .

The Crown deeply regrets that it undermined the ability of the Whanganui Iwi to exercise their customary rights and responsibilities in respect of the Whanganui River, and consequently the expression of their mana. The Crown further regrets that this compromised the physical, cultural, and spiritual well-being of the iwi and hapū of Whanganui Iwi. (e) The Crown recognises that for generations the iwi and hapū of Whanganui have tirelessly pursued justice in respect of the Whanganui River. The Crown recognises and sincerely regrets the opportunities it has missed, until now, to adequately address those grievances.¹⁴¹

Section 7 of the Whanganui River Claims Settlement Act defines the Whanganui River to include:

(a) the body of water known as the Whanganui River that flows continuously or intermittently from its headwaters to the mouth of the Whanganui River on the Tasman Sea and is located within the Whanganui River catchment; and (b) all tributaries, streams, and other natural watercourse that flow continuously or intermittently into the body of water described in paragraph (a) and are located within the Whanganui River catchment[.]¹⁴²

Section 7 of the Whanganui River Claims Settlement Act defines the term “hapu of Whanganui iwi” as iwi and hapū with interests in the Whanganui River.¹⁴³

Section 13 of the Whanganui River Claims Settlement Act defines the term “Tupu ate Kawa” to mean:

[T]he intrinsic values that represent the essence of Te Awa Tupua, namely—

Ko Te Kawa Tuatahi (a) *Kto et Awa te mātāpuna o te ora*: the River is the source of spiritual and physical sustenance: Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and

¹⁴⁰ *Id.* § 69.

¹⁴¹ *Id.* § 70.

¹⁴² *Id.* § 7.

¹⁴³ *See id.*

natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River.¹⁴⁴

Section 18 of the Whanganui River Claims Settlement Act provides that the purpose of the Te Pou Tupua (the office of the Māori people) is “to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua” and that the functions of the Te Pou Tupua include “to act and speak for and on behalf of Te Awa Tupua” and “to promote and protect the health and well-being of Te Awa Tupua.”¹⁴⁵

Collectively, Sections 7, 12, 13, and 18 of the Whanganui River Claims Settlement Act suggest that the Māori will have a meaningful substantive role in how the waters and fisheries of the Whanganui River will be managed.¹⁴⁶ However, Sections 16 and 66 of the Act suggest otherwise.¹⁴⁷

Section 16 of the Act clarifies:

*Limits to the effect of this Act and deed of settlement . . . Unless expressly provided for by or under this Act, nothing in this Act— (a) limits any existing private property rights in the Whanganui River; or (b) creates, limits, transfers, extinguishes, or otherwise affects any rights to, or interest in, water; or (c) creates, limits, transfers, extinguishes, or otherwise affect any rights to, or interests in, wildlife, fish, aquatic life, seaweeds, or plants.*¹⁴⁸

Section 66 of the Act then clarifies that, in regard to fisheries:

Co-ordination of fisheries in Whanganui River catchment . . . As soon as practicable after the settlement date, the groups and organisations referred to in subsection (2) must establish a representative group (the fisheries co-ordination group) to— . . . (b) provide a *forum* for the iwi with interests in the Whanganui River to *contribute* to the protection, management, and sustainable utilisation of fisheries and fish habitat managed in the Whanganui River.¹⁴⁹

Pursuant to Sections 16 and 66 of the Act, it therefore appears that the Māori’s interest and trustee relationship to the Whanganui River does not extend to limits on the diversion of river waters or the conservation of river fish, but

¹⁴⁴ *Id.* § 13.

¹⁴⁵ *Id.* §§ 18–19.

¹⁴⁶ *See id.* §§ 7, 12–13, 18.

¹⁴⁷ *See id.* §§ 16, 66.

¹⁴⁸ *Id.* § 16 (emphasis added).

¹⁴⁹ *Id.* § 66 (emphasis added).

instead is limited to participation in a “forum” to “contribute” to the protection and management of fisheries and fish habitat.¹⁵⁰

As Professors Toni Collins and Shea Esterling note:

Yet arguably, the most significant limitation on its powers is that it does not own the water that is inextricably part of the River. The vesting of parts of the riverbed in Te Awa Tupua does not create or transfer a proprietary interest in the water because, under common law, water is incapable of being owned. Therefore, even though Te Awa Tupua comprises the Whanganui River, its rights of ownership are limited to only parts of the riverbed and *not* the water. An example of this anomaly is that there is no requirement for consent to be obtained from Te Awa Tupua to use the water.¹⁵¹

....

Water is the crucial element of a river because without water, there is only a dry channel of land. Under the *Te Awa Tupua Act*, Te Awa Tupua does not have proprietary rights to the water, which creates an anomaly because it does not own the very aspect of the River that makes it a river: the water. It is like saying that a natural person owns his or her skin, but not his or her blood — the life-giving substance.¹⁵²

....

Consequently, the *Act* reflects the gloss but not the substance of human rights; its bark without its bite.¹⁵³

When viewed comprehensively, the 2017 Whanganui River Claims Settlement Act contains some basic contradictions. On the one hand, it recognizes the unique cultural relationship of the Māori to the Whanganui River and designates the Māori as trustee to speak and sue on behalf of the river. On the other hand, the Act provides the Māori with no substantive rights as to how the waters and fisheries of the Whanganui River are managed.

II. CONCLUSION: THE INDIGENOUS RIGHT TO INSTREAM WATER

The experiences of the Yakima people at Celilo Falls, the Ainu people on the Saru River, the Lummi people on the Nooksack River, the Karuk people on Stanshaw Creek, and the Māori people on the Whanganui River have practical

¹⁵⁰ *See id.* §§ 16, 66.

¹⁵¹ Collins & Esterling, *supra* note 133, at 202 (citation omitted).

¹⁵² *Id.* at 216.

¹⁵³ *Id.* at 217.

implications for efforts to establish and build the foundations of an enforceable right to keep water instream for fisheries. These practical implications take many forms.

First, there is the effort to ground the right to instream flows for fisheries in sources of international human rights law. In the preceding analysis, we examined the Ainu's reliance (in Japan) on protections in the International Covenant on Civil and Political Rights adopted by the U.N. General Assembly in 1966,¹⁵⁴ the Cucapá's reliance (in Mexico) on protections in the 1989 Convention on Indigenous and Tribal Peoples adopted by the International Labor Organization,¹⁵⁵ and the Māori's reliance (in New Zealand) on the 2007 U.N. Declaration.¹⁵⁶ The list of sources of international indigenous rights law that lends support to the right to maintain instream flows for fisheries is more extensive than these three sources.

As the late Professor David Getches of the University of Colorado School of Law noted in his article *Indigenous Peoples' Rights to Water under International Norms*, other sources of supportive international law include the 1977 Declaration of Principles for the Defense of Indigenous Nations and People in the Western Hemisphere (1977 Western Hemisphere Indigenous Declaration)¹⁵⁷ and the 2003 Indigenous Peoples Water Declaration.¹⁵⁸ Section 11 of the 1977 Western Hemisphere Indigenous Declaration (adopted at the 1977 Non-Governmental Organization Conference on Discrimination Against Indigenous Populations in Geneva, Switzerland) provides:

It shall be unlawful for any state to make or permit any action or course of conduct with respect to the territories of an indigenous nation or group which will directly or indirectly result in the destruction or deterioration of an indigenous nation or group through the effects of pollution of earth, air, water, or which in any other way depletes, displaces or destroys any natural resources or other resource under the domination of, or vital to the livelihood of an indigenous nation or group.¹⁵⁹

¹⁵⁴ International Covenant on Civil and Political Rights art. 27, Dec. 19, 1966, 999 U.N.T.S. 171.

¹⁵⁵ Getches, *supra* note 10, at 262.

¹⁵⁶ Declaration on the Rights of Indigenous Peoples, *supra* note 69.

¹⁵⁷ Getches, *supra* note 10, at 271.

¹⁵⁸ *Id.* at 287.

¹⁵⁹ INT'L INDIAN TREATY COUNCIL, DECLARATION OF PRINCIPLES FOR THE DEFENSE OF THE INDIGENOUS NATIONS AND PEOPLES OF THE WESTERN HEMISPHERE 26 (1977), at https://ipdpowwow.org/%201977_conference%20ITTC%20Report%20copy.pdf.

Principle 11 of the 2003 Indigenous Peoples Water Declaration (adopted at the Third World Water Forum in Japan) provides: “Self-determination includes the practice of our cultural and spiritual relationships with water, and the exercise of authority to govern use, manage, regulate, recover, conserve, enhance and renew our water sources, without interference.”¹⁶⁰

In regard to indigenous rights to fish and water recognized under international law, the experience of the Ainu people on the Saru River in Japan also suggests that when the cultural heritage and sacred religious ceremonies of indigenous people are on the line, providing monetary compensation for riverside lands taken and fishing income lost may not be sufficient.¹⁶¹ To provide meaningful protection of such indigenous rights to fish and water, international law may need to be interpreted or amended to provide for a right to injunctive relief to preserve the underlying resources from destruction. Similarly, as the experience with the Māori people and the Whanganui River in New Zealand reveals, passing domestic legislation that recognizes the symbolic and cultural connections between indigenous groups and rivers, but that fails to provide indigenous groups with substantive rights to ensure there is adequate instream flows to preserve the fisheries in such rivers, may not satisfy what international indigenous rights law requires.¹⁶²

Second, in addition to revealing the ways that instream rights can be grounded directly in international indigenous rights, these experiences also suggest how the indigenous relationship to fish and water can affect the ways we understand and implement other domestic non-indigenous sources of law.

For example, under environmental impact assessment laws such as the California Environmental Quality Act (CEQA)¹⁶³ and the federal National Environmental Policy Act (NEPA),¹⁶⁴ agencies are required to consider alternatives to avoid or reduce significant adverse environmental impacts. When injury to the cultural heritage of indigenous salmon-dependent people is understood as an “environmental impact” separate and distinct from the biological impact of projects on salmon stocks, we see how the indigenous right to fish and water can factor into traditional environmental impact assessment

¹⁶⁰ *Indigenous Peoples Kyoto Water Declaration*, Third World Water Forum, Kyoto, Japan, princ. 11 (Mar. 2003), at https://www.activeremedy.org/wp-content/uploads/2014/10/indigenous_peoples_kyoto_water_declaration_2003.pdf.

¹⁶¹ Levin, *supra* note 43, at 425, 428.

¹⁶² Collins & Esterling, *supra* note 133, at 207, 216, 218.

¹⁶³ CAL. PUB. RES. CODE § 21002 (Deering 1970).

¹⁶⁴ 42 U.S.C. § 4332 (1970).

laws.¹⁶⁵ Had NEPA been in force at the time The Dalles Dam was being considered, the U.S. Army Corps of Engineers might have been legally required to give more serious consideration to the Yakima proposal to relocate the dam a few miles upstream to avoid the significant adverse tribal culture impacts that would be caused by the loss of Celilo Falls.¹⁶⁶

As another example, in regard to domestic instream flow standards set by states for particular waterways, the Lummi Nation claims concerning the Nooksack River in the State of Washington reveal that there has been a problem with compliance.¹⁶⁷ Instream flow standards protective of salmon may be set, but some states (like the State of Washington) have demonstrated an unwillingness to effectively enforce such standards. The experience with the Lummi on the Nooksack River suggests that the federal government's defense of tribal fishing rights may be a mechanism to strengthen state enforcement of existing instream flow standards.¹⁶⁸

In terms of the interplay between public trust law and indigenous rights, as noted in the Introduction to this Article, salmon are recognized as a public trust resource under California public trust law.¹⁶⁹ The experience of the Karuk Tribe's efforts to reduce diversions on California's Stanshaw Creek reveals the ways that indigenous rights to fish and water can overlay and inform public trust law.¹⁷⁰ That is, when the public trust resources also happen to be indigenous resources, perhaps such public trust resources are properly entitled to a heightened level of protection under public trust law.¹⁷¹

Lastly, when it comes to national laws to protect indigenous rights to fisheries, we see that national governments may often be willing to prevent encroachment on such indigenous rights by private parties and non-federal governments, but are often willing to allow such encroachment by the federal government itself. This was illustrated by the federal government's willingness to proceed with construction of The Dallas Dam on the Columbia River despite the fact that the dam would result in the inundation and destruction of the sacred Celilo Falls fishing site.

¹⁶⁵ PUB. RES. § 21002; 42 U.S.C. § 4332.

¹⁶⁶ BARBER, *supra* note 7, at 90.

¹⁶⁷ Letter from Clifford Cultee, Chairman, Lummi Indian Business Council to Ken Salazar, *supra* note 80, at 2.

¹⁶⁸ *Id.* at 2–4.

¹⁶⁹ *Id.* at 1, 4.

¹⁷⁰ Brief for Karuk Tribe & Klamath Riverkeeper, *supra* note 117, at 9.

¹⁷¹ *Id.* at 5, 6, 11.

Perhaps one of the greatest values of framing instream rights as indigenous rights (under both domestic and international law) is that it makes the question of instream flow less abstract. It reframes instream flow as something that directly impacts not just people in general but particular persons whose ethnic identity is intimately linked to river waters and fisheries. As Section 18 of New Zealand's 2017 Te Awa Tupua Act explains, the indigenous people (Te Pou Tupua) with deep connections to the river are recognized as "the human face of Te Awa Tupua" (the Whanganui River).¹⁷² This human face reminds us that instream flows are not just about preserving fish stocks and riverine ecosystems. At times, they are also about preserving cultures and civilizations.

POSTSCRIPT

As this Article was being finalized for publication in August 2020, an important new development occurred in terms of Ainu claims to fisheries and water in Japan discussed above in Section I.B. This postscript provides an overview of this recent development.

On August 7, 2020, a lawsuit was filed against the Japanese federal government and the Hokkaido regional government by a group of ethnic Ainu people living in the town of Uraboro in Hokkaido.¹⁷³ The lawsuit, filed in Sapporo District Court, seeks judicial recognition of the Ainu's right to fish for salmon in the inland waters of the Uraboro-Toakachi River estuary.¹⁷⁴

Although a comprehensive review of the claims in the lawsuit is beyond the scope of this postscript, the plaintiffs' claims focus on provisions in the federal Fisheries Resources Protection Act and federal Fishery Act, and on provisions in the Hokkaido Inland Fisheries Coordination Regulations that generally prohibit the Ainu from salmon fishing in inland waters, and that only provided for relief from such prohibition pursuant to a limited permission that may be granted by the Hokkaido regional government for salmon fishing essential for "ceremonial" practices.¹⁷⁵ The August 7, 2020 document filed with the Sapporo District Court alleges that the provisions under these laws were violative of Japan's obligations to the Ainu under international law as set forth in the 2007 U.N. Declaration.¹⁷⁶

¹⁷² Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, § 18 (N.Z.).

¹⁷³ Filing by Ainu Plaintiffs (Purpose of the Request) with Sapporo District Court (August 7, 2020, English translation on file with Paul Stanton Kibel).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 8.

¹⁷⁶ *Id.* at 36–40,

According to the August 7, 2020 lawsuit:

Plaintiffs are a newly reunited community of the former Ainu groups that existed in the Basin in question, and they have inherited the fishing rights of the former Ainu groups that were unlawfully deprived and effectively unable to exercise their rights.

As mentioned above, it is an international trend for indigenous groups to regain the rights that had been taken away from them by the states that were the powers that be, as well as for the state that took away the rights from indigenous peoples to be seen as obligated to restore the rights of this group.

In September 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous People, which the Japanese government endorsed. The Declaration... “recognizes that indigenous peoples have been historically wronged as a result of, inter alia, colonization and deprivation of their lands, territories and resources.”¹⁷⁷

...

Specifically defined as indigenous peoples’ rights, such as the “right to self-determination” (Article 3), the right to land and natural resources is identified as an [indigenous] peoples’ right in Article 26. Article 26(1) states that “Indigenous peoples shall have the right to the land, territory, or territory traditionally owned, occupied, or otherwise used or acquired by them and natural resources” and paragraph 2 states that they “shall have the right to own, use, develop and manage” these lands and resources. And paragraph 3 states that “the State shall give legal recognition and protection to these lands, territories and resources.”

The rights of indigenous peoples enshrined in the Declaration are rights that have been recognized as a matter of judicial precedent in countries around the world (especially in relation to the relationship between the powerful countries and indigenous peoples) and that have been exercised in practice in North America and elsewhere. Therefore, the rights of the United Nations Declaration on the [] Rights of Indigenous Peoples, in particular Article 26(1), can be considered as customary international law[.]¹⁷⁸

¹⁷⁷ Filing by Ainu Plaintiffs (Purpose of the Request) with Sapporo District Court (August 7, 2020, English translation on file with author) 1, 36–38 (citations omitted).

¹⁷⁸ *Id.* at 38–39.

On this basis, the August 7, 2020 lawsuit alleged:

The [2007 United Nations Declaration] in this case indicates that the plaintiffs have the right to harvest, develop (process) and manage the salmon resources of the Tokachi River . . . The Government of Japan (defendant country) has an international obligation to recognize and protect the rights of the plaintiffs in the Tokachi River.¹⁷⁹

In a law review article in *The International Journal of Human Rights*, titled *An Examination of Arguments Over the Ainu Policy Promotion Act of Japan Based on the UN Declaration on the Rights of Indigenous People*, Professor Yuko Osakada (of Chukyo University School of Law in Japan) notes that the Japanese government may respond to the August 2020 Ainu lawsuit by alleging that the plaintiffs lack standing to assert collective rights because they are not part of an appropriate representative organization.¹⁸⁰ Professor Osakada writes:

[T]he Japanese government, which is responsible for the previous assimilation policies, should not deny the Ainu's collective rights based on the lack of a representative organization. Rather, various types of support, including financial ones, should be given to make it possible for the Ainu people to establish their own representative organisation. Meanwhile, the Raporo Ainu Nation insists that they took over aboriginal rights from their ancestors who lived in the Ainu villages, therefore they should be considered as holders of collective rights to fish salmon. Taking into account their claim, it could be said that several local Ainu groups should be regarded as holders of collective rights until the Ainu united to establish a common representative organisation for themselves. This approach, however, is merely one of the possible ways and any decision about their representative organisation should be made by the Ainu themselves, as required by Article 18 of the UN Declaration.¹⁸¹

As Professor Osakada's comments suggest, the August 2020 lawsuit filed by the Ainu will test whether Japan is prepared to acknowledge and comply with international human rights obligations set forth in the 2007 United Nations Declaration on Rights of Indigenous Peoples, or whether Japan will instead pursue arguments to try to evade such obligations and compliance.¹⁸²

¹⁷⁹ *Id.*

¹⁸⁰ Yuko Osakada, *An Examination of Arguments Over the Ainu Policy Promotion Act of Japan Based on the UN Declaration on the Rights of Indigenous Peoples*, INT'L J. HUM. RTS. (Sept. 2, 2020), <https://www.tandfonline.com/doi/full/10.1080/13642987.2020.1811692?scroll=top&needAccess=true>.

¹⁸¹ *Id.*

¹⁸² *Id.*