

New Ways to Fulfill Old Promises:  
Native American Hunting and Fishing  
Rights as Intangible Cultural Property

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Pursuing wildlife resources through hunting and fishing has always been vitally important to many Native American tribes. Many tribes still depend on hunting and fishing as a source of food, income, and employment. Yet, for many tribal members hunting and fishing represents not only a livelihood, but a way of life. Often, these practices are fundamental to maintaining a tribe’s culture, traditions, and sense of community. Even the Supreme Court recognized that access to wildlife was “not much less necessary to the existence of the Indians than the atmosphere they breathed.”<sup>1</sup>

As a result of numerous treaties and statutes, Native Americans enjoy a federally protected right to hunt and fish.<sup>2</sup> Native American hunting and fishing rights are often more expansive than the rights of non-tribal members. Consequently, “[m]any non-Indians deeply resent Indian hunting and fishing rights, and few other areas of Indian law have created such bitter—and sometimes violent—”disputes.<sup>3</sup> However, tribes have every right to assert their federally protected

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<sup>1</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905).

<sup>2</sup> *See infra* Part II.

<sup>3</sup> STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 186 (4th ed. 2012).

hunting and fishing rights, as they often surrendered extensive landholdings to the government in return for such treaty guarantees.<sup>4</sup>

This Comment explores the origin, nature, and protection of Native American hunting and fishing rights in the United States. Part I explores Native Americans' unique relationship with wildlife resources through hunting and fishing. Pertinent background information on the origins of Native American hunting and fishing rights is offered in Part II. Part III provides a critique of the legal protection for tribal hunting and fishing rights—focusing on inconsistencies in treaty abrogation cases—which is followed by the assertion that Native American hunting and fishing rights are intangible cultural heritage in Part IV. Finally, Parts V and VI examine the international protections for intangible cultural heritage, their force in the United States, and how they could be employed to better protect Native American hunting and fishing as intangible cultural heritage.

Current law and policy in the United States has failed to develop a framework that accounts for the unique nature of intangible cultural heritage. Therefore, intangible cultural heritage, such as Native American hunting and fishing rights, lacks adequate protection. However, international laws—such as the United Nations Declaration on the Rights of Indigenous Peoples,<sup>5</sup> and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) Convention for the Safeguarding of Intangible Cultural Heritage<sup>6</sup>—can help United States lawmakers develop a framework that recognizes Native American hunting and fishing rights as intangible cultural heritage, and adequately protects them as such.

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<sup>4</sup> See discussion *infra* Part II.B.

<sup>5</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter U.N. Declaration], available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>6</sup> UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage art. 1, Oct. 17, 2003, 2368 U.N.T.S. 35 [hereinafter UNESCO Convention], available at <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>.

## I

HUNTING AND FISHING RIGHTS ARE AN INTEGRAL PART OF NATIVE  
AMERICAN CULTURE*A. The Native American Worldview and the Importance of Hunting  
and Fishing as a Spiritual Practice*

The importance of hunting and fishing to Native American culture cannot be overestimated.<sup>7</sup> To fully understand the importance of these rights, it is essential to first understand the Native American worldview.<sup>8</sup> Native Americans believe that they are part of the earth, and that the earth is part of them.<sup>9</sup> They believe the flora and fauna of the earth are their relatives,<sup>10</sup> and that all human and nonhuman objects possess a soul.<sup>11</sup> Accordingly, Native Americans view the world as a society, rather than a mechanism, that is made up of beings, rather than objects.<sup>12</sup> “Whether human or nonhuman, these beings are associated with and related to one another socially . . . in the same ways as human beings to one another. These patterns of association and relationship may be structured in terms of kinship, empathy, sympathy, reciprocity, sexuality, dependency” or any other ways humans interact with each other.<sup>13</sup> “Plants, animals, rocks, and stars are thus seen not as ‘objects’ governed by laws of nature, but as

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<sup>7</sup> SANDRA L. OLSEN, *Animals in American Indian Life: An Overview*, in STARS ABOVE EARTH BELOW: AMERICAN INDIANS AND NATURE 95, 95 (Marsha C. Bol ed., 1998).

<sup>8</sup> CALVIN MARTIN, KEEPERS OF THE GAME: INDIAN-ANIMAL RELATIONSHIPS AND THE FUR TRADE 33 (1978). Scholars and intergovernmental organizations, like the United Nations, have recognized that the special relationship among Native Americans, the earth, and its flora and fauna appears to be universal. See Gary D. Meyers, *Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada*, 10 UCLA J. ENVTL. L. & POL’Y 67, 79 (1991) (citing Darlene M. Johnston, *Native Rights as Collective Rights: A Question of Group Self Preservation*, 2 CAN. J.L. & JURISPRUDENCE 19, 32 (1989) (noting that a comprehensive study of indigenous peoples by a special U.N. Commission concluded that: “It is essential to know and understand the deeply spiritual and special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture”)).

<sup>9</sup> Meyers, *supra* note 8, at 80 (citing Annie L. Booth & Harvey M. Jacobs, *Ties That Bind: Native American Beliefs as a Foundation for Environmental Consciousness*, 12 ENVTL. ETHICS 27, 34 (1990).

<sup>10</sup> *Id.* at 80–81.

<sup>11</sup> *Id.* at 80 (quoting Scott Hardt, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court’s Free Exercise Analysis*, 60 U. COLO. L. REV. 601, 605 (1989)).

<sup>12</sup> MARTIN, *supra* note 8, at 33 (quoting Murray Wax, *Religion and Magic*, in INTRODUCTION TO CULTURAL ANTHROPOLOGY 225, 235) (internal quotation marks omitted).

<sup>13</sup> *Id.* at 34.

‘fellows’ with whom the individual or band may have a more or less advantageous relationship.”<sup>14</sup>

Native American hunting and fishing practices are inextricably intertwined within this complex spiritual framework.<sup>15</sup> Native Americans preserve their relationship with the prey species<sup>16</sup> by developing and observing specific rituals and taboos.<sup>17</sup> These rituals and taboos were designed to communicate reverence for their prey and to ensure successful capture of the prey species in the future.<sup>18</sup> If the relationship between the prey species and the Native Americans remained favorable by adherence to the rituals and taboos, the prey would cooperate and willingly submit itself to be taken by Native Americans.<sup>19</sup>

There are many examples of hunting and fishing rituals and taboos in Native American culture. The Zuni and Hopi tribes painted deer bones with red ochre and placed the bones in a pile as a small shrine “so that the deer would continue to let the tribe hunt them.”<sup>20</sup> The Pueblo had a specific song to accompany each step of a deer hunt.<sup>21</sup> There were separate songs to locate the deer trail, to track the deer, to establish first contact with the slain deer, to skin the deer, to butcher the deer, and to carry the meat home.<sup>22</sup> Before the Micmac kill a hibernating bear, they make a conciliatory speech to the animal.<sup>23</sup> After the bear is killed, the hunter sincerely apologizes to the bear for taking its life.<sup>24</sup> After the hunt, the Micmac treat the bear’s body with extreme reverence.<sup>25</sup> The parts of the bear that are not used are ceremonially disposed of, and the bear meat is consumed while

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

<sup>15</sup> *Id.* at 35.

<sup>16</sup> This term is used to describe the species for which Native Americans hunt or fish.

<sup>17</sup> MARTIN, *supra* note 8, at 35; Shelley D. Turner, *The Native American’s Right to Hunt and Fish: An Overview of the Aboriginal Spiritual and Mystical Belief System, the Effect of European Contact and the Continuing Fight to Observe a Way of Life*, 19 N.M. L. REV. 377, 382–83 (1989).

<sup>18</sup> OLSEN, *supra* note 7, at 97.

<sup>19</sup> See MARTIN, *supra* note 8, at 35–36; OLSEN, *supra* note 7, at 97; Turner, *supra* note 17, at 379–83.

<sup>20</sup> OLSEN, *supra* note 7, at 113.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 112; MARTIN, *supra* note 8, at 36.

<sup>24</sup> MARTIN, *supra* note 8, at 36.

<sup>25</sup> OLSEN, *supra* note 7, at 112.

adhering to specific rituals.<sup>26</sup> Many Native American tribes on the Pacific coast still practice the First Salmon Ceremony.<sup>27</sup> During this ceremony, Native Americans eat the first spring-run salmon, which is caught, carried, and cooked in a traditional manner.<sup>28</sup> After the salmon is eaten, the tribe returns the bones, and sometimes the blood, of the salmon to the river.<sup>29</sup>

Native Americans believe that failure to observe the rituals and taboos may offend the prey, which would strain the tribe's relationship with the entire prey species.<sup>30</sup> Tribes thought the offended prey could retaliate in a variety of ways.<sup>31</sup> For example, once the tribe ate the offended prey, the prey could make them sick.<sup>32</sup> It could also communicate the tribe's offense to its living companions and encourage them to either abandon the Native Americans' territories, or refuse to allow themselves to be taken by the tribe.<sup>33</sup>

### *B. The Evolution of Native American Hunting and Fishing Practices*

In addition to being inextricably linked to the spiritual practices and beliefs of Native Americans,<sup>34</sup> hunting and fishing traditionally played a fundamental role in Native American daily life.<sup>35</sup> Many tribes depended on hunting and fishing as a primary food source.<sup>36</sup> Hunting and fishing also provided Native Americans with the raw materials for functional objects like tools, weapons, clothing, and shelter.<sup>37</sup>

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<sup>26</sup> MARTIN, *supra* note 8, at 36.

<sup>27</sup> Katrine Barber, *The Cultural Context of Native Fisheries*, THE OR. HIST. SOC'Y (2006), [http://www.ohs.org/education/oregonhistory/narratives/subtopic.cfm?subtopic\\_ID=598](http://www.ohs.org/education/oregonhistory/narratives/subtopic.cfm?subtopic_ID=598); DENNIS M. GAWLIK, PUGET SOUND WILD SALMON FISHERIES: THE POSSIBLE APPLICATION OF CORPORATE SOCIAL RESPONSIBILITY (CSR) 14 (2010), available at <http://www.evergreen.edu/tribal/docs/Gawlik%20Puget%20Sound%20Salmon%20Fishes%2012%204%2010.pdf>.

<sup>28</sup> GAWLIK, *supra* note 27; Barber, *supra* note 27.

<sup>29</sup> Barber, *supra* note 27.

<sup>30</sup> See MARTIN, *supra* note 8, at 39.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> MARTIN, *supra* note 8, at 33–39; OLSEN, *supra* note 7, at 96–97; Turner, *supra* note 17, at 379–83.

<sup>35</sup> OLSEN, *supra* note 7, at 95–97; see also Turner, *supra* note 17, at 382.

<sup>36</sup> See OLSEN, *supra* note 7, at 95, 112, 114; Turner, *supra* note 17, at 382.

<sup>37</sup> See OLSEN, *supra* note 7, at 95; Turner, *supra* note 17, at 382.

For instance, Native Americans used animal hides to fashion clothing, footwear, tents, bedding, bags, and blankets.<sup>38</sup> They used animal tendons to make sinew thread, which was used for sewing animal hides, making bows, and securing arrow points.<sup>39</sup> Native Americans even used hooves and horns to make useful items, such as rattles and glue.<sup>40</sup> They also used animal bones to make awls, needles, rings, and hide scrapers.<sup>41</sup> Furthermore, nomadic tribes such as the Blackfeet, Flathead, Comanche, Gros Ventre, Kiowa, and Sarsi tribes migrated with the buffalo throughout the year.<sup>42</sup>

In addition, hunting and fishing was also linked to social hierarchy and status within some tribes. For instance, the Lubicon Cree elders and senior men drew their status from their expertise as hunters, while the women acquired status from their ability to prepare food and use hides from the hunt, and their capacity to tan furs and preserve food.<sup>43</sup> Hunting was also linked to Native American rites of passage into adulthood. For example, Kickapoo boys were considered adults after they killed their first game, and Micmac boys became adults after killing their first large game.<sup>44</sup> Maliseet-Passamaquoddy boys were allowed to sit at council with the older men and participate in public feasts after killing their first moose.<sup>45</sup>

Colonialism changed the Native Americans' relationship with nature by introducing diseases, Christian missionaries, and the fur trade.<sup>46</sup> Early European travelers introduced a host of alien diseases to the Native American populations, such as smallpox and influenza.<sup>47</sup> Native Americans were especially susceptible to these diseases because they had not developed adequate immune responses to them

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<sup>38</sup> OLSEN, *supra* note 7, at 95–96, 113.

<sup>39</sup> *Id.* at 95.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 113.

<sup>42</sup> *Id.* at 114.

<sup>43</sup> Andrew Huff, *Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian Nation of Canada*, 10 COLO. J. INT'L ENVTL. L. & POL'Y 161, 169–70 (1999).

<sup>44</sup> CAROL A. MARKSTROM, EMPOWERMENT OF NORTH AMERICAN INDIAN GIRLS: RITUAL EXPRESSIONS AT PUBERTY 162 (2008) (citing BARRY M. PRITZKER, NATIVE AMERICANS: AN ENCYCLOPEDIA OF HISTORY, CULTURE, AND PEOPLES vols. 1–2 (1998)).

<sup>45</sup> *Id.* (citing Vincent O. Erickson, *Maliseet-Passamaquoddy*, in 15 NORTHEAST 123, 130–31 (Bruce G. Trigger & William C. Sturtevant eds., 1978)).

<sup>46</sup> Turner, *supra* note 17, at 384.

<sup>47</sup> *Id.* at 384, 386.

as the Europeans had.<sup>48</sup> Some studies suggest that these diseases killed ninety to ninety-five percent of the Native American population in the first two hundred years after European contact.<sup>49</sup>

Native Americans' "reaction to disease is an important consideration in the study of aboriginal hunting and fishing and its interrelationship with the spiritual and religious structure of the native North American Indians."<sup>50</sup> Native Americans did not initially trace the emergence of disease to the arrival of the Europeans.<sup>51</sup> Instead, Native Americans believed that the rituals and taboos that they relied upon to maintain their relationship with nature had become ineffective.<sup>52</sup> Therefore, Native Americans, "who had always blamed offended wildlife for their sicknesses, now suspected that the contagion was the result of a conspiracy of the beasts."<sup>53</sup>

In an attempt to extricate themselves from the morbid grip of the conspiracy of the beasts, the Indians sought to destroy their wildlife tormentors by engaging in a war of revenge. The war of revenge soon gained momentum under the influence of the [Christian] missionaries who sought to change the spiritual edifice of the native Indians, as well as by the incentives and luxuries afforded by participation in the historic fur trade.<sup>54</sup>

However, Native Americans developed new hunting and fishing rituals throughout the colonial period, which suggests that their spiritual framework remained intact.<sup>55</sup> For example, the Micmac tribe removed the eyes of fish and other prey after they were killed.<sup>56</sup> This act was thought to blind the prey, so it could not observe the irreverent treatment of its carcass.<sup>57</sup> If the prey's eyes were left intact the prey would be offended and retaliate, which would frustrate future hunting or fishing of the prey species.<sup>58</sup> This practice has been interpreted as a way for Native Americans to "hide [their] guilt" for

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<sup>48</sup> *Id.* at 386.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 387.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

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

<sup>54</sup> *Id.*

<sup>55</sup> *See id.* at 391 n.79.

<sup>56</sup> *See id.* at 391.

<sup>57</sup> *Id.*

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

discontinuing certain hunting and fishing rituals and taboos, while also ensuring successful hunting in the future.<sup>59</sup>

*C. The Cultural Importance of Hunting and Fishing to Current Native American Tribes*

Although the lives of Native Americans today are substantially different than the lives of precolonial and colonial Native Americans, hunting and fishing remain a fundamental link to tradition, cultural identity, spirituality, and subsistence for many modern tribes.<sup>60</sup> Two examples of the current importance of hunting and fishing are Inupiat whale hunts and the Puget Sound tribes' salmon fishing. The Inupiat characterize the bowhead whale hunt as one of the most culturally significant activities in Eskimo life, which forms a "cornerstone" of Inupiat society.<sup>61</sup> Elaborate ceremonies and rituals accompany the beginning of the whale hunt and the killing and consuming of the whale.<sup>62</sup> Engaging in the whale hunt strengthens "kinship bonds and community ties."<sup>63</sup> Traditional sharing of the whale meat is a primary way for the Inupiat to "create a sense of social cohesion."<sup>64</sup> Similarly, salmon fishing is essential to the culture of many Puget Sound tribes.<sup>65</sup> For many tribal members, fishing is a way of life—not just a livelihood.<sup>66</sup> Members of the tribal community are brought together through traditional subsistence fishing, which strengthens the bond between the tribal community and its members.<sup>67</sup> In an interview with thirteen Puget Sound tribes, individual tribal members described the importance of salmon fishing to their tribal religion, culture, physical sustenance, and community well-being.<sup>68</sup> One tribal member stated, "[s]almon's role in ceremonial life for the tribe is unsurpassed and

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<sup>59</sup> *Id.*

<sup>60</sup> Jennifer Sepez, *Treaty Rights and the Right to Culture: Native American Subsistence Issues in U.S. Law*, 14 *CULTURAL DYNAMICS* 144 (2002).

<sup>61</sup> Elizabeth M. Bakalar, *Subsistence Whaling in the Native Village of Barrow: Bringing Autonomy to Native Alaskans Outside the International Whaling Commission*, 30 *BROOK. J. INT'L L.* 601, 601–02 (2005).

<sup>62</sup> *Id.* at 609.

<sup>63</sup> *Id.* at 602 (citing MILTON M.R. FREEMAN ET AL., *INUIT, WHALING AND SUSTAINABILITY* 31–32 (1998)).

<sup>64</sup> *Id.*

<sup>65</sup> GAWLIK, *supra* note 27, at 5.

<sup>66</sup> *Id.* at 23.

<sup>67</sup> *Id.* at 24.

<sup>68</sup> *See id.* app. A.

traditions surrounding salmon harvests are passed down from generation to generation. . . . Younger members of the tribe are taught the ways of our ancestors and the importance of salmon to our people.”<sup>69</sup> Another member declared, “I believe that traditional ways of life are critical to our survival. . . . [I]f the salmon die, we die. It is that simple.”<sup>70</sup>

Therefore, whether Native Americans lived in the Arctic, along the shores of the Pacific coast, among the Rocky Mountains, or within the vast central prairies, their livelihoods, religion, and culture are inextricably tied to fish and wildlife resources. The history of these peoples plainly documents that the pursuit of these resources for both physical and spiritual sustenance represents a heritage of hunting and fishing that is incredibly important to their cultures. The extent to which tribes rely on hunting and fishing to uphold their culture varies from tribe to tribe. However, hunting and fishing rights remain central to many modern tribes’ culture, and are one of the most hotly contested areas of legal battle for Native Americans.<sup>71</sup>

The reason these rights continue to be so hotly contested is partly due to the inconsistent and unpredictable nature of the jurisprudence, and partly because these rights are fundamental to many tribes’ cultural integrity and survival. A more predictable and consistent approach to Native American hunting and fishing rights could better protect these fundamental rights and demonstrate respect for the cultural heritage of Native Americans.

## II

### LEGAL BASIS FOR NATIVE AMERICANS’ CLAIMS TO HUNTING AND FISHING RIGHTS

Native American hunting and fishing rights derive from original occupation of the land, which includes “aboriginal rights” and treaty-guaranteed rights.<sup>72</sup> The U.S. Constitution vests the federal government with exclusive power to regulate Native American affairs,<sup>73</sup> such as hunting and fishing. Specifically, the Commerce Clause gives Congress the power “[t]o regulate Commerce with . . .

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<sup>69</sup> *Id.* app. A at 28.

<sup>70</sup> *Id.* app. A at 32.

<sup>71</sup> Turner, *supra* note 17, at 377.

<sup>72</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 18.01[1], at 1154–56 (Nell Jessup Newton ed., 2012) [hereinafter COHEN’S HANDBOOK]; Meyers, *supra* note 8, at 68.

<sup>73</sup> Meyers, *supra* note 8, at 94.

Indian Tribes.”<sup>74</sup> Article II assigns the President the power to make treaties with Native American tribes,<sup>75</sup> and the Supremacy Clause establishes that laws passed by Congress “and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land.”<sup>76</sup> In addition, the federal government has a “trust-like” relationship with Native American tribes.<sup>77</sup> In other words, the government has a fiduciary duty to “act in the best interest of the various [Native American tribes] . . . and protect both aboriginal and treaty-guaranteed rights.”<sup>78</sup> Consequently, states cannot legislate or regulate in ways that conflict with any federal law about, or treaty-guarantee related to, Native American hunting and fishing rights.<sup>79</sup>

### *A. Aboriginal Rights*

Native Americans hold aboriginal title to the land and retain certain aboriginal rights derived from their original occupation of the land.<sup>80</sup> One such right is the right to hunt and fish.<sup>81</sup> In *Mitchel v. United States*,<sup>82</sup> the Supreme Court explained the nature of aboriginal rights: “Indian possession or occupation was considered with reference to their habits and modes of life, their hunting grounds were . . . in their actual possession . . . and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected.”<sup>83</sup> Aboriginal title gives Native Americans “the sole right to occupy and use their ancestral lands, until that right is surrendered by the tribes or extinguished by the dominant sovereign.”<sup>84</sup> However, in general, the

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<sup>74</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>75</sup> U.S. CONST. art. II, § 2, cl. 2; *see also* *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 411 n.12 (1968).

<sup>76</sup> U.S. CONST. art. VI, cl. 2.

<sup>77</sup> Meyers, *supra* note 8, at 93; *see also* COHEN’S HANDBOOK, *supra* note 72, § 2.01[2], at 112 (“The field of Federal Indian law has been concerned centrally with protecting Indian tribes from illegitimate assertions of state power over tribal affairs.”). For a more detailed discussion of the creation and development of this characterization, *see* Meyers, *supra* note 8, at 89–93.

<sup>78</sup> Meyers, *supra* note 8, at 93.

<sup>79</sup> *See* COHEN’S HANDBOOK, *supra* note 72, § 2.01[2], at 112; Meyers, *supra* note 8, at 115.

<sup>80</sup> Meyers, *supra* note 8, at 68.

<sup>81</sup> COHEN’S HANDBOOK, *supra* note 72, § 18.01, at 1154.

<sup>82</sup> *Mitchel v. United States*, 34 U.S. 711 (1835).

<sup>83</sup> *Id.* at 746.

<sup>84</sup> Meyers, *supra* note 8, at 71; *see also* *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 543 (1832) (“It is difficult to comprehend the proposition, that the inhabitants of either quarter

government can extinguish aboriginal title at will, and by any means available, without compensating the tribes.<sup>85</sup> In *Tee-Hit-Ton Indians v. United States*,<sup>86</sup> the Supreme Court characterized aboriginal rights as “unrecognized” rights, or as permissive occupation of the land.<sup>87</sup> Specifically, it stated that “Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.”<sup>88</sup> If the government extinguishes aboriginal title, Native Americans’ right to hunt and fish on those lands would also be extinguished, unless preserved by a treaty or statute.<sup>89</sup>

Although both the federal courts and Native Americans recognize the existence of aboriginal rights, they disagree over the source and scope of these rights.<sup>90</sup> The Supreme Court characterizes aboriginal rights simply as property rights that arise from Native American occupation of the land.<sup>91</sup> Native Americans believe aboriginal rights are much more holistic than simple property rights.<sup>92</sup> They also view aboriginal rights as rights arising out of “natural law.”<sup>93</sup> Chippewa Chief Fred Plain explains:

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of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the preexisting right of its ancient possessors. . . . But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend.”); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 587-88 (1823) (“The power now possessed by the government of the United States to grant [Indian] lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. . . . The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments.”).

<sup>85</sup> Meyers, *supra* note 8, at 71; *see also* *Lac Courte Oreilles Band, Etc. v. Voigt*, 700 F.2d 341, 351 (7th Cir. 1983); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278–79, 285 (1955). *But see* *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247–48 (1985) (quoting *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346, 354 (1941) (noting that congressional intent to extinguish original title must be “plain and unambiguous,” and “cannot be lightly implied”).

<sup>86</sup> *Tee-Hit-Ton Indians*, 348 U.S. at 272.

<sup>87</sup> *Id.* at 278–79.

<sup>88</sup> *Id.* at 285.

<sup>89</sup> COHEN’S HANDBOOK, *supra* note 72, § 18.01, at 1155.

<sup>90</sup> Meyers, *supra* note 8, at 68.

<sup>91</sup> *Id.* at 82.

<sup>92</sup> *Id.* at 83.

<sup>93</sup> *Id.* at 82.

We aboriginal people believe that no individual or group owns the land, that the land was given to us collectively by the Creator to use, not to own . . . . The idea that land can be bought and sold, or that you can exercise some rights but not others in the land, is absolutely foreign to the Nishnawbe-Aski way of thinking. Yet this is the basis for all legislation that has been enacted since the coming of the Europeans to North America.<sup>94</sup>

Chief Plain also explains that hunting and fishing rights are aboriginal rights:

[T]he economy of [Native Americans] . . . living in this part of North America was based on the presence of animal, fish, bird, and plant life destined to give sustenance to the people. Hunting[] [and] fishing . . . were not separate issues to be dealt with at a political level by certain components of government; they were part of the socio-economic system of our people, and they are included in the overall definition of aboriginal rights.<sup>95</sup>

### *B. Treaty Rights*

The content and scope of rights protected by treaty are the same as those protected by aboriginal rights.<sup>96</sup> However, unlike aboriginal rights, treaty rights were formally negotiated and committed to writing.<sup>97</sup> Accordingly, treaty rights enjoy greater legal protection than aboriginal rights.<sup>98</sup> In fact, treaties between the government and a Native American tribe have the same legal force as treaties between the government and foreign nations.<sup>99</sup> In addition to having more legal force, treaty rights differ from aboriginal rights in two other ways. First, the government cannot terminate treaty rights at will, as it can for rights based on aboriginal title. If the government seeks to terminate treaty rights through legislative action, it must have the intent to do so.<sup>100</sup> Second, when the government abrogates treaty

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<sup>94</sup> Fred Plain, *A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America*, in *THE QUEST FOR JUSTICE: ABORIGINAL PEOPLES AND ABORIGINAL RIGHTS* 31, 34 (Menno Boldt, J. Anthony Long & Leroy Little Bear eds., 1985).

<sup>95</sup> *Id.* at 37.

<sup>96</sup> Meyers, *supra* note 8, at 88.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 94.

<sup>100</sup> *Id.* at 86; *see, e.g.*, *Mattz v. Arnett*, 412 U.S. 481, 505 (1973); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968); *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346–47 (1941). The standard for congressional intent to abrogate a tribe's rights is not well settled. *See infra* note 122 and accompanying text.

rights, the tribe that possesses those rights is entitled to compensation, because abrogation is considered a taking by the government.<sup>101</sup>

Most Native American tribes have some form of treaty or agreement with the federal government.<sup>102</sup> Many of these treaties specifically guarantee the continuance of Native American hunting and fishing rights. However, even where the right to hunt and fish is not expressly mentioned in the treaty, the Supreme Court has held that the treaty still includes the right to hunt and fish.<sup>103</sup> In addition, hunting and fishing rights are not necessarily limited to lands owned by the tribe; these rights can extend to both publicly and privately held lands.<sup>104</sup> When a treaty grants or reserves land to a tribe, tribal ownership of the land automatically includes full hunting and fishing rights.<sup>105</sup> Many treaties also “reserved” hunting and fishing rights on land granted to the government by the tribe.<sup>106</sup> Therefore, treaties can reserve tribal hunting and fishing rights on land that is not owned by the tribe. A tribe’s right to hunt and fish on land not owned by the tribe functions like an easement that runs with the land.<sup>107</sup>

### C. Treaty Interpretation

The Supreme Court established several canons of construction to guide analysis of Native American treaties.<sup>108</sup> First, a treaty must be understood the way Native Americans would have understood it.<sup>109</sup>

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<sup>101</sup> *Menominee Tribe of Indians*, 391 U.S. at 413; *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 105 (1949).

<sup>102</sup> Meyers, *supra* note 8, at 118 (citing CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 7-8 (1987)).

<sup>103</sup> *Menominee Tribe of Indians*, 391 U.S. at 406 (noting that lands reserved by the tribes, that are “‘to be held as Indian lands are held,’ include the right to fish and to hunt”); *see also* Meyers, *supra* note 8, at 94.

<sup>104</sup> *See* COHEN’S HANDBOOK, *supra* note 72, § 18.04[1], at 1163-64; Meyers, *supra* note 8, at 94; Turner, *supra* note 17, at 420.

<sup>105</sup> *See, e.g., Menominee Tribe of Indians*, 391 U.S. at 406.

<sup>106</sup> COHEN’S HANDBOOK, *supra* note 72, § 18.02, at 1156-57, 1156 n.5.

<sup>107</sup> *Id.* at 1157 (citing *United States v. Winans*, 198 U.S. 371, 381 (1905)). The treaty-reserved easements are considered property rights within the meaning of the Fifth Amendment, which is why government abrogation of treaty rights requires compensation. *Id.*

<sup>108</sup> *See id.*; Meyers, *supra* note 8, at 86; Turner, *supra* note 17, at 398-99.

<sup>109</sup> COHEN’S HANDBOOK, *supra* note 72, § 2.02[1], at 113-14; *see, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (“[W]e interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them.”); *Winans*, 198 U.S. at 380 (“[W]e have said we will construe a treaty with the Indians as [they] understood it . . .”).

Second, any ambiguities in the terms of the treaty must be resolved in favor of the Native Americans.<sup>110</sup> Lastly, treaties are liberally construed in favor of Native Americans.<sup>111</sup> Accordingly, to resolve ambiguity in the meaning or scope of a treaty, courts may consider the treaty's history and negotiations and the parties' practical understanding of the treaty's terms.<sup>112</sup>

These canons of construction are based on communication difficulties between Native American tribes and government negotiators, the imbalance of power between the tribes and the government, and the fact that tribes were unlikely to have understood the legal ramifications of the exact wording of the treaties.<sup>113</sup> For example, many tribes had strong oral traditions.<sup>114</sup> Accordingly, tribes often believed that the most important part of the treaty agreement was the promises and discussions that took place during treaty negotiations.<sup>115</sup> However, government negotiators believed the written text of the treaty determined its extent and meaning.<sup>116</sup> The different understandings of property ownership between the Native Americans and government negotiators also contributed to confusion about treaty terms.<sup>117</sup> Native Americans believed they were part of the Earth and not separate from it; thus, they could not "own" it.<sup>118</sup> Since government negotiators failed to understand this viewpoint, Native Americans were forced to define—in European legal terms—what was "essentially a country of the mind."<sup>119</sup> In addition, the history and circumstances of treaty negotiations, the fact that Native American negotiators rarely spoke English, and the fact that

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<sup>110</sup> COHEN'S HANDBOOK, *supra* note 72, § 2.02[1], at 113 (citing *Winters v. United States*, 207 U.S. 564, 576–77 (1908)); *see, e.g.*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("[It] is well established that treaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit.") (citations omitted); *Winters v. United States*, 207 U.S. 564, 576–77 (1908) ("By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.").

<sup>111</sup> COHEN'S HANDBOOK, *supra* note 72, § 2.02[1], at 113; *see, e.g.*, *Oneida Indian Nation*, 470 U.S. at 247.

<sup>112</sup> Meyers, *supra* note 8, at 88.

<sup>113</sup> COHEN'S HANDBOOK, *supra* note 72, § 18.02, at 1157; *see also* Meyers, *supra* note 8, at 86–87.

<sup>114</sup> Meyers, *supra* note 8, at 86.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 75–76.

<sup>119</sup> *Id.* at 76 (quoting PETER MATTHIESSEN, *INDIAN COUNTRY* 5 (1984)).

government negotiators transcribed the terms of the treaty, further justify the canons of construction.<sup>120</sup>

### III

#### INCONSISTENCIES IN ABROGATION CASES DIMINISH NATIVE AMERICAN HUNTING AND FISHING RIGHTS

Many Native American hunting and fishing claims turn on whether an act of Congress abrogates a tribe's right to hunt or fish.<sup>121</sup> The Supreme Court has been very clear in its language—to abrogate a tribe's right to hunt and fish, Congress must have the intent to do so,<sup>122</sup> and “the intent[] to abrogate or modify a treaty is not to be lightly imputed to the Congress.”<sup>123</sup> However, the practice is often quite different from the language. “[T]he existence of congressional intent may often be somewhat of a fiction, as [courts] ha[ve] often found intent when it is arguably non-existent and refused to find intent when it seems clear.”<sup>124</sup> One scholar suggests that courts' engagement in the “formality” of finding congressional intent demonstrates the strong “legitimizing element of congressional intent in diminishing Indian rights.”<sup>125</sup> In either case, the judiciary has failed to develop a coherent framework to determine congressional intent.<sup>126</sup> As a result, the abrogation case law is inconsistent and unpredictable.<sup>127</sup>

Courts have developed a multitude of standards to decide whether Congress intended to abrogate a tribe's hunting and fishing rights.<sup>128</sup>

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<sup>120</sup> *Id.* at 87 (citing George Cameron Coggins & William Modrcin, *Native American Indians and Federal Wildlife Law*, 31 STAN. L. REV. 375, 385–86 (1979)).

<sup>121</sup> *See, e.g.*, *United States v. Dion*, 476 U.S. 734 (1986); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *United States v. Bresette*, 761 F. Supp. 658 (D. Minn. 1991); *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987).

<sup>122</sup> COHEN'S HANDBOOK, *supra* note 72, § 18.07[1], at 1190.

<sup>123</sup> *Dion*, 476 U.S. at 739.

<sup>124</sup> Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, at 519 (2005).

<sup>125</sup> *Id.*

<sup>126</sup> *See Dion*, 476 U.S. at 739; COHEN'S HANDBOOK, *supra* note 72, § 18.07[1], at 1190–91; Jami K. Elison, *Tribal Sovereignty and the Endangered Species Act*, 6 WILLAMETTE J. INT'L L. & DISP. RESOL. 131, 137 (1998).

<sup>127</sup> *See COHEN'S HANDBOOK*, *supra* note 72, § 18.07[3], at 1194–95; Elison, *supra* note 126, at 137.

<sup>128</sup> *See Dion*, 476 U.S. at 739; COHEN'S HANDBOOK, *supra* note 72, § 18.07[1], at 1190–91.

### *A. Standards for Abrogating Aboriginal Rights*

Courts have developed three standards for abrogating hunting and fishing rights based on aboriginal title. In some cases, the Supreme Court determined that aboriginal title is only extinguishable by “plain and unambiguous” congressional intent.<sup>129</sup> However, in other cases, the Supreme Court held that aboriginal title could be extinguished at will and by any means available to the government.<sup>130</sup> The Vermont Supreme Court took yet another approach. In *State of Vermont v. Elliott*,<sup>131</sup> the court found that the Abenaki Tribe’s hunting and fishing rights, based on aboriginal title, were extinguished by the events surrounding Vermont’s admission to statehood.<sup>132</sup>

### *B. Standards for Abrogating Treaty Rights*

For abrogation of Native American hunting and fishing rights based on treaties, the Supreme Court requires some finding of specific intent to abrogate these rights.<sup>133</sup> In some cases, the Supreme Court requires “explicit statutory language.”<sup>134</sup> In other cases, the Court does not require explicit statutory language as long as Congress’s intent is “clear and plain.”<sup>135</sup> The Supreme Court also developed the

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<sup>129</sup> See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247–48 (1985) (quoting *United States ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 346, 354 (1941) (noting that congressional intent to extinguish original title must be “plain and unambiguous,” and “will not be ‘lightly implied’”).

<sup>130</sup> *U.S. ex rel. Hualpai Indians v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941) (noting that the power of Congress to abrogate aboriginal title is supreme and the manner and methods abrogation raises nonjusticiable political questions and “whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of [native] occupancy, or otherwise, its justness is not open to inquiry in the courts”); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 585 (1823).

<sup>131</sup> *State of Vermont v. Elliott*, 616 A.2d 210 (Vt. 1992).

<sup>132</sup> The court found that the tribe’s aboriginal title was abrogated by “the increasing weight of history.” *Id.* at 218; see also Cohen’s Handbook, *supra* note 72, § 18.01, at 1155. Many scholars have criticized this ruling. COHEN’S HANDBOOK, *supra* note 72, § 18.01, at 1155 n.11.

<sup>133</sup> See *infra* notes 134–37 and accompanying text.

<sup>134</sup> *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 690 (1979) (“Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . .”); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (“We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty . . . .”).

<sup>135</sup> *United States v. Dion*, 476 U.S. 734, 739 (1986); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203 (1999) (quoting *Dion*, 476 U.S. at 739–40).

consideration-and-choice doctrine,<sup>136</sup> which establishes that treaty rights are only abrogated if there is “clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.”<sup>137</sup> The consideration-and-choice doctrine is thought to be the “‘essential’ factor” in determining congressional intent.<sup>138</sup>

Nonetheless, applying the consideration-and-choice doctrine has led district courts to inconsistent results. For example, in *United States v. Billie*,<sup>139</sup> the district court determined that the Endangered Species Act abrogated the Seminole Tribe’s treaty right to hunt.<sup>140</sup> “The court held that the statute’s ‘general comprehensiveness, its non-exclusion of Indians, and the limited exceptions for certain Alaskan Natives’ constituted ‘clear evidence’ that Congress had considered the conflict between the statute and reserved treaty rights,” and had chosen to abrogate it.<sup>141</sup>

However, the district court in *United States v. Bresette*<sup>142</sup> found that the exception for Alaskan Natives in the Migratory Bird Treaty Act did not provide “clear evidence” that Congress had considered the conflict between the statute and the treaty right or that Congress chose to abrogate it.<sup>143</sup> Accordingly, the Migratory Bird Treaty Act did not abrogate the tribe’s reserved right to hunt and fish.<sup>144</sup>

The Ninth Circuit confused the jurisprudence even further in *Anderson v. Evans*<sup>145</sup> by rejecting the consideration-and-choice standard, created by the Supreme Court in *United States v. Dion*,<sup>146</sup> and creating a new three-part test. According to the Ninth Circuit, to decide whether a federal conservation statute affects a tribe’s treaty right to hunt and fish, the United States must first have jurisdiction

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<sup>136</sup> See COHEN’S HANDBOOK, *supra* note 72, § 18.07[1], at 1191; *see also* *Dion*, 476 U.S. at 739–40.

<sup>137</sup> *Dion*, 476 U.S. at 40.

<sup>138</sup> COHEN’S HANDBOOK, *supra* note 72, § 18.07[1], at 1191.

<sup>139</sup> *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987).

<sup>140</sup> *Id.* at 1492.

<sup>141</sup> COHEN’S HANDBOOK, *supra* note 72, § 18.07[3], at 1194 (quoting *Billie*, 667 F. Supp. at 1490).

<sup>142</sup> *United States v. Bresette*, 761 F. Supp. 658 (D. Minn. 1991).

<sup>143</sup> *Id.* at 663–64.

<sup>144</sup> *Id.* at 664.

<sup>145</sup> *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004).

<sup>146</sup> *United States v. Dion*, 476 U.S. 734 (1986).

over the area where the hunting and fishing takes place.<sup>147</sup> Second, the federal conservation statute must be non-discriminatory.<sup>148</sup> Third, abrogating treaty rights must be “necessary” to achieve the statute’s conservation purpose.<sup>149</sup> By creating this test, the Ninth Circuit completely avoided determining congressional intent.<sup>150</sup> And, the court restricted the tribe’s right to hunt,<sup>151</sup> despite clear congressional intent that the statute *not* affect treaty rights.<sup>152</sup>

“The Ninth Circuit’s decision in *Anderson* cannot be reconciled with the Supreme Court’s decision in *Dion*.”<sup>153</sup> In *Anderson*, the Ninth Circuit based its articulation of the three-part test on its earlier decision in *United States v. Fryberg*.<sup>154</sup> The Ninth Circuit based its decision in *Fryberg* on various Supreme Court cases, all of which involved *state* conservation statutes.<sup>155</sup> These Supreme Court cases all considered whether a state, lacking the treaty abrogation power of Congress, appropriately exercised its police power to regulate Indian and non-Indian hunting and fishing rights.<sup>156</sup> Six years after the *Fryberg* decision, the Supreme Court in *Dion* developed and applied the consideration-and-choice doctrine, without once referring to *Fryberg*.

In bypassing the question of congressional intent and only focusing on whether the statute was for conservation purposes, the Ninth Circuit concentrated on the wrong question and violated principles of *stare decisis*. The Supreme Court has firmly established that the defining question in abrogation cases is whether Congress intended to abrogate the tribe’s treaty rights.<sup>157</sup> Although the *Anderson* decision

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<sup>147</sup> *Anderson*, 371 F.3d at 497.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> COHEN’S HANDBOOK, *supra* note 72, § 18.07[3], at 1196.

<sup>151</sup> *Anderson*, 371 F.3d at 499–500.

<sup>152</sup> *See* COHEN’S HANDBOOK, *supra* note 72, § 18.07[1], at 1196 & n.59.

<sup>153</sup> *Id.* § 18.07[3], at 1196.

<sup>154</sup> *Anderson*, 371 F.3d at 497 (citing *United States v. Fryberg*, 622 F.2d 1010, 1015 (9th Cir. 1980)).

<sup>155</sup> *Antoine v. Washington*, 420 U.S. 194 (1975); *Dep’t of Game v. Puyallup Tribe (“Puyallup II”)*, 414 U.S. 44 (1973); *Puyallup Tribe v. Dep’t of Game*, 391 U.S. 392 (1968) (“*Puyallup I*”).

<sup>156</sup> *See supra* note 155.

<sup>157</sup> COHEN’S HANDBOOK, *supra* note 72, § 18.07[1], at 1190.

has been widely criticized<sup>158</sup> and at least one district court chose not to extend it,<sup>159</sup> the decision still remains good law.

The foregoing demonstrates that the canons of construction do little to guide judicial analysis or to protect Native American hunting and fishing rights.<sup>160</sup> Courts have been inconsistent in discussing or applying the canons of construction because “the canons appear to be the means to an end, which is congressional intent.”<sup>161</sup> For example, whenever the Supreme Court has declined to apply the canons of construction in favor of Native Americans, it has always “somehow” found congressional intent to diminish or abrogate Native Americans’ rights.<sup>162</sup> Furthermore, in recent years, the Supreme Court has become much more active in finding “clear” congressional intent even when that intent is arguably very unclear.<sup>163</sup> In other words, the Court has expanded its own discretion in determining congressional intent.<sup>164</sup>

Although courts have often upheld and enforced Native Americans’ right to hunt and fish, lack of a coherent framework for determining congressional intent and inconsistent application of the canons of construction diminish Native American hunting and fishing rights. Increasing consistency and predictability in abrogation case decisions would better protect a right that is fundamental to Native American culture.

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<sup>158</sup> See, e.g., *id.* § 18.07[1], at 1196.

<sup>159</sup> See, e.g., *United States v. Fiddler*, No. 2:10-cr-00052-RLH-LRL, 2011 WL 2149510, at \*7 (D. Nev. Mar. 11, 2011).

<sup>160</sup> See Hall, *supra* note 124, at 542–43.

<sup>161</sup> *Id.* at 542.

<sup>162</sup> *Id.* at 496 (citing Alex Tallchief Skibine, *The Chevron Doctrine in Federal Indian Law and the Agencies’ Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the “Tribes as States” Section of the Clean Water Act?*, 11 ST. THOMAS L. REV. 15, 25 (1998)).

<sup>163</sup> *Id.* If the intent is “clear” (meaning there is no ambiguity in the statute), then the canons of construction do not apply. COHEN’S HANDBOOK, *supra* note 72, § 2.02[1], at 115.

<sup>164</sup> Hall, *supra* note 124, at 496.

#### IV INTERNATIONAL LAW RECOGNIZES AND PROTECTS INTANGIBLE CULTURAL HERITAGE

Intangible cultural heritage, in a very general sense, refers to any cultural phenomenon that does not assume tangible form.<sup>165</sup> It is culture that people practice as part of their daily lives.<sup>166</sup> “It is often described as the underlying ‘spirit’ of a cultural group.”<sup>167</sup> Intangible cultural heritage is challenging to define, analyze, and protect under many countries’ existing legal systems.<sup>168</sup> Therefore, despite the importance of intangible cultural heritage, it is often unprotected and vulnerable to appropriation or extinction.<sup>169</sup>

Yet, within the past two or three decades, the international community has begun to recognize the importance and vulnerability of intangible cultural heritage and has taken steps to define and protect it.<sup>170</sup> Native American hunting and fishing rights are intangible cultural heritage under existing international declarations and treaties and, therefore, should be protected accordingly.

##### *A. Native American Hunting and Fishing Rights Are Intangible Cultural Heritage by Definition*

One of the primary reasons rights, like hunting and fishing, lack protection is because many legal systems have strict distinctions between protecting the intangible and tangible. For example, the United States protects the intangible primarily through intellectual property law, while property law protects the tangible. However, intellectual property law is not structured to protect cultural heritage like hunting and fishing rights.<sup>171</sup> And property law often focuses narrowly on individual ownership, which fails to sufficiently account

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<sup>165</sup> See JAMES A.R. NAFZIGER ET AL., CULTURAL LAW: INTERNATIONAL, COMPARATIVE, AND INDIGENOUS 614 (2010).

<sup>166</sup> Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT’L 66, 67 (2004).

<sup>167</sup> *Id.*

<sup>168</sup> See NAFZIGER, *supra* note 165, at 614–15.

<sup>169</sup> *Id.* at 615.

<sup>170</sup> *Id.* at 614.

<sup>171</sup> For a discussion about the inadequacy of intellectual property law to protect intangible cultural heritage, see Erin K. Slattery, *Preserving the United States’ Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law*, 16 DEPAUL-LCA J. ART & ENT. L. 201 (2006).

for the cultural importance of Native Americans' communal hunting and fishing rights.<sup>172</sup> Defining Native American hunting and fishing rights as intangible cultural heritage would help resolve these problems and be an important step in recognizing and protecting these fundamental rights.

The UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (“the Convention”) defines intangible cultural heritage as:

The practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts [*sic*] and cultural spaces associated therewith—that communities, groups and, in some cases individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purpose of this convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.<sup>173</sup>

The Convention also lists examples of intangible cultural property, which include “social practices, rituals and festive events” and “knowledge and practices concerning nature and the universe.”<sup>174</sup>

Several arguments support the idea that Native American hunting and fishing rights should be defined as intangible cultural heritage under the Convention's definition.<sup>175</sup> First, the Convention's definition recognizes that the intangible and tangible often overlap.<sup>176</sup> For example, the right to hunt and fish is intangible. However, this right is fundamentally dependent on various tangible things—the fish

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<sup>172</sup> For a discussion of the shortcomings of traditional property law to protect indigenous cultural heritage, see Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009).

<sup>173</sup> UNESCO Convention, *supra* note 6, at art. 2, § 1.

<sup>174</sup> *Id.* at art. 2, § 2(c)–(d).

<sup>175</sup> See Lyndel V. Prott, *Hunting as Intangible Heritage: Some Notes on Its Manifestations*, 14 INT'L J. CULTURAL PROP. 385, 394 (2007) (“By any test, hunting falls within the ambit set out in the Convention for the Safeguarding of the Intangible Cultural Heritage 2003. Indeed, the description is so broad as to include all the practices and skills of hunting anywhere in the world.”).

<sup>176</sup> UNESCO Convention, *supra* note 6, at art. 2, § 1. (“[T]he practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts [*sic*] and cultural spaces associated therewith—that communities . . . recognize as part of their cultural heritage.”).

and wildlife, the land and water where the fish and wildlife reside, boats, nets, guns, and other physical items required for hunting and fishing. Therefore, defining the right to hunt and fish as intangible cultural heritage more accurately reflects the holistic nature of the right, more so than defining the right solely as a tangible property right.

Second, the Convention's definition of intangible cultural heritage is subjective.<sup>177</sup> Meaning, if a Native American tribe recognizes hunting or fishing as part of its cultural heritage, then hunting and fishing rights are considered intangible cultural heritage. As discussed in Part I, many tribes recognize hunting and fishing as an integral part of their culture, traditions, and history.

Third, under the Convention, Native American hunting and fishing practices are "social practices, rituals and festive events," and "knowledge and practices concerning nature and the universe."<sup>178</sup> Many tribes view hunting and fishing as a way for the community to reconnect and be brought together.<sup>179</sup> Many Native American tribes have festive events that focus on hunting and fishing.<sup>180</sup> For example, Puget Sound tribes practice First Salmon Ceremonies.<sup>181</sup> In addition, many tribes still practice hunting and fishing rituals, such as the Inupiat who maintain elaborate rituals surrounding whale hunting.<sup>182</sup> Native American hunting practices also concern nature and the universe,<sup>183</sup> and require knowledge that is often passed down from generation to generation.<sup>184</sup>

Although its definition of cultural heritage is subjective,<sup>185</sup> UNESCO has already recognized some hunting and fishing rights and

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<sup>177</sup> *Id.* at art. 2, § 1 (defining intangible cultural heritage as "the practices, representations, expressions, knowledge . . . that communities, groups and, in some cases, individuals recognize as part of their cultural heritage").

<sup>178</sup> *Id.* at art. 2, § 2(c)–(d).

<sup>179</sup> See sources about whaling and salmon fishing, *supra* notes 63–64, 67–68.

<sup>180</sup> See Sepez, *supra* note 60.

<sup>181</sup> Barber, *supra* note 27; GAWLIK, *supra* note 27. For a discussion of First Salmon Ceremony, see *supra* notes 27–29.

<sup>182</sup> Bakalar, *supra* note 61. For an explanation of Inupiat whale hunting, see *supra* notes 61–64.

<sup>183</sup> For a discussion of the Native American worldview, see *supra* note 8 and accompanying text.

<sup>184</sup> See Deanna Kingston, *Walrus Hunting in a Changing Arctic*, in *TO HARVEST, TO HUNT: STORIES OF RESOURCE USE IN THE AMERICAN WEST* 15, 17 (Judith L. Li ed., 2007); see also GAWLIK, *supra* note 27, app. A at 28.

<sup>185</sup> UNESCO Convention, *supra* note 6, at art. 2, § 1.

rituals as intangible cultural heritage. In accordance with the Convention,<sup>186</sup> UNESCO created a “List of Intangible Cultural Heritage in Need of Urgent Safeguarding.”<sup>187</sup> The UNESCO Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (“the Committee”) manages the list.<sup>188</sup> The Committee continually updates the criteria for inclusion on the Urgent Safeguard List.<sup>189</sup> However, the first element that must be met for a right to be included on the list is that “[t]he element constitutes intangible cultural heritage as defined in Article 2 [quoted above] of the Convention.”<sup>190</sup> In 2009, the Committee included “the collective fishing rite of the Sanké” on the list.<sup>191</sup> This collective fishing rite incorporates many elements of social cohesion, ceremony, tradition, and ritual that are also present in Native American fishing practices, like the First Salmon Ceremony.<sup>192</sup> Additionally, in 2011, the Committee added “the Enawene Nawe people’s ritual for the maintenance of social and cosmic order” to the list.<sup>193</sup> This ritual is

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<sup>186</sup> *Id.* at art. 17, § 1 (“With a view to taking appropriate safeguarding measures, the Committee shall establish, keep up to date and publish a List of Intangible Cultural Heritage in Need of Urgent Safeguarding, and shall inscribe such heritage on the List at the request of the State Party concerned.”).

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

<sup>188</sup> *Id.* at art. 7. See also *Functions of the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage*, UNESCO.ORG (Dec. 8, 2013), <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00586>.

<sup>189</sup> *Id.* at art. 17.

<sup>190</sup> *Criteria and Timetable of Inscription on the Representative List of the Intangible Cultural Heritage of Humanity*, UNESCO.ORG (Dec. 2012), <http://www.unesco.org/culture/ich/index.php?pg=00173&lg=en#criteria-for-inscription-on-the-representative-list>.

<sup>191</sup> *Sanké Mon, Collective Fishing Rite of the Sanké*, UNESCO.ORG (2009), <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011&USL=00289>.

The Sanké mon collective fishing rite takes place in . . . Mali every second Thursday of the seventh lunar month . . . The collective fishing . . . takes place over fifteen hours using large and small mesh fishing nets. It is immediately followed by a masked dance on the public square . . . [where dancers] wear traditional costumes . . . and perform specific choreography to the rhythms of a variety of drums. Traditionally, the Sanké mon rite marks the beginning of the rainy season. It is also is [*sic*] an expression of local culture through arts and crafts, knowledge and know-how in the fields of fisheries and water resources. It reinforces collective values of social cohesion, solidarity and peace between local communities.

*Id.*

<sup>192</sup> See discussion *supra* notes 27–29.

<sup>193</sup> *Yaokwa, the Enawene Nawe People’s Ritual for the Maintenance of Social and Cosmic Order*, UNESCO.ORG (2011), <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00011&USL=00521>.

incorporated into the daily life of Native Amazonians and involves fishing and ritual fish offerings.<sup>194</sup> The “collective fishing rite of the Sanké” and the “Enawene Nawe people’s ritual” are similar to many Native American hunting and fishing rites, rituals, and practices. UNESCO’s recognition of these two specific practices as intangible cultural heritage suggests that Native American hunting and fishing rites, rituals, and practices also constitute intangible cultural heritage.

### *B. International Protection for Intangible Cultural Heritage*

The UNESCO General Conference adopted the Convention for the Safeguarding of Intangible Cultural Heritage on October 17, 2003.<sup>195</sup> The Convention entered into force on April 20, 2006, after thirty UNESCO member states ratified it.<sup>196</sup> The purpose of the Convention is to ensure respect and mutual appreciation of intangible cultural heritage; raise awareness at the local, national, and international level of the importance of intangible cultural property; and safeguard intangible cultural property.<sup>197</sup> The Convention also commits a

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The Enawene Nawe people live in . . . the southern Amazon rainforest. They perform the Yaokwa ritual every year during the drought period to honour the Yakairiti spirits, thereby ensuring cosmic and social order for the different clans. The ritual links local biodiversity to a complex, symbolic cosmology that connects the different but inseparable domains of society, culture and nature. It is integrated into their everyday activities over the course of seven months during which the clans alternate responsibilities: one group embarks on fishing expeditions throughout the area while another prepares offerings of rock salt, fish and ritual food for the spirits, and performs music and dance. The ritual combines knowledge of agriculture, food processing, handicrafts (costumes, tools and musical instruments) and the construction of houses and fishing dams.

*Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Text of the Convention for the Safeguarding of Intangible Cultural Heritage*, UNESCO.ORG (Oct. 17, 2003), <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00022>.

<sup>196</sup> *Intangible Heritage, Tenth Anniversary 2003-2013*, <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00482> (last visited Jan. 6, 2014). For the purpose of this Comment, the term “ratify” is meant to encompass ratification, acceptance, and approval. Substantively, there is no difference among these terms; their use differs because the constitutional procedures of different nations use different terms to describe the process of ratification.

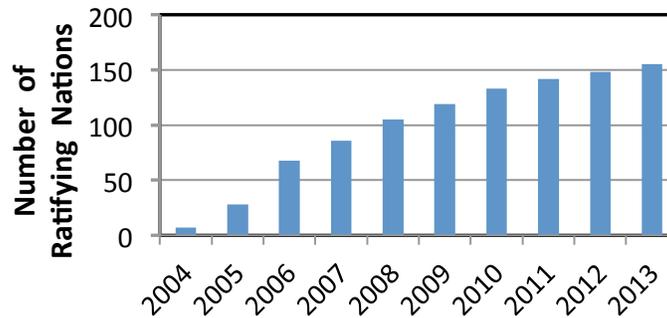
<sup>197</sup> UNESCO Convention, *supra* note 6, at art. 1. Article 1 provides:

The purposes of this Convention are:

- (a) to safeguard the intangible cultural heritage;
- (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;

ratifying nation to “take the necessary measures to ensure the safeguarding of intangible cultural heritage” within its borders.<sup>198</sup> More specifically, the Convention requires a ratifying nation to create inventories of its intangible cultural heritage<sup>199</sup> and promote awareness and education about this heritage.<sup>200</sup> In 2003, 120 UNESCO member states voted to adopt the Convention, and no member state voted against adoption.<sup>201</sup>

Every year, since it was adopted in 2003, more nations ratify the Convention.<sup>202</sup> The figure<sup>203</sup> below depicts the Convention’s rising support:



Although the United States has not ratified the Convention, as of July 27, 2013, 155 states have ratified it.<sup>204</sup>

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(c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;

(d) to provide for international cooperation and assistance.

*Id.*

<sup>198</sup> *Id.* at art. 11(a).

<sup>199</sup> *Id.* at art. 12, § 1.

<sup>200</sup> *See id.* at art. 14.

<sup>201</sup> Kurin, *supra* note 166, at 66. A few member states abstained from the vote including Australia, Canada, the United Kingdom, Switzerland, and the United States. *Id.*

<sup>202</sup> *See Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO.ORG (Oct. 17, 2003), <http://www.unesco.org/eri/la/convention.asp?KO=17116&language=E&order=alpha>.

<sup>203</sup> The data used to create this figure can be found at *Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO.ORG (Oct. 17, 2003), <http://www.unesco.org/eri/la/convention.asp?KO=17116&language=E>.

<sup>204</sup> *See id.*

The UNESCO Convention represents a commitment to acknowledge and protect a culture at its own level, rather than by a state.<sup>205</sup> For example, safeguarding by states must be done with the authorization, cooperation, and substantive decision-making involvement of the relevant community.<sup>206</sup> Richard Kurin helped draft the Convention<sup>207</sup> and explains its importance:

[The Convention] reinforces the idea that the practice of one's culture is a human right. It seeks government recognition and respect for the varied cultural traditions practised [*sic*] by people within its jurisdiction. It seeks to bolster the idea that all cultures give purpose and meaning to lives and thus deserve to be safeguarded. . . . It suggests that forms of safeguarding be integrated with legal, educational, and economic development efforts where appropriate so that culture retains its vitality and dynamism.<sup>208</sup>

In addition to the UNESCO Convention, the United Nations Declaration on the Rights of Indigenous Peoples (“the Declaration”) also protects intangible cultural heritage like hunting and fishing rights. The Declaration is the most comprehensive international assertion of indigenous rights.<sup>209</sup> The Declaration recognizes collective rights—rights that belong to a group rather than an individual.<sup>210</sup> While the Declaration does not use the phrase “intangible cultural heritage,” it definitely establishes indigenous peoples’ rights to such heritage. For instance, indigenous peoples have the right to:

- “[P]ractise [*sic*] and revitalize their cultural traditions and customs[,] . . . [which] includes the right to maintain, protect, and develop the past, present and future manifestations of their cultures”;<sup>211</sup>

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<sup>205</sup> NAFZIGER, *supra* note 165, at 628.

<sup>206</sup> See Kurin, *supra* note 166, at 71; see also UNESCO Convention, *supra* note 6, at art. 11(b).

<sup>207</sup> Kurin, *supra* note 166, at 66.

<sup>208</sup> *Id.* at 75.

<sup>209</sup> Rosemary J. Coombe, *First Nations Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law*, in PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM 247, 247 (Catherine Bell & Robert K. Paterson eds., 2009).

<sup>210</sup> U.N. Declaration, *supra* note 5. This is significant because many rights are viewed as held by an individual rather than a group, which makes it particularly hard for Native Americans to enforce their collective rights. See Carpenter, Katyal & Riley, *supra* note 172; Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 547 (2009).

<sup>211</sup> U.N. Declaration, *supra* note 5, at art. 11, § 1.

- “[M]anifest, practise, [*sic*] develop and teach their spiritual traditions, customs and ceremonies”;<sup>212</sup>
- “[B]e secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities”;<sup>213</sup>
- “[M]aintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources”;<sup>214</sup> and
- “[U]se . . . the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use.”<sup>215</sup>

Robert Coulter, a recognized authority on the Declaration,<sup>216</sup> interprets these rights to include indigenous peoples’ right to hunt and fish.<sup>217</sup>

In addition to establishing indigenous peoples’ rights to intangible cultural heritage, the Declaration also asserts that states owe certain legal duties to indigenous peoples. First, states must honor and respect treaties and agreements between indigenous peoples and the state by recognizing and enforcing the treaties and agreements.<sup>218</sup> Second, states “shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent . . . and transparent process, giving due recognition to indigenous peoples’ laws, traditions, [and] customs . . . to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those that were traditionally owned.”<sup>219</sup>

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<sup>212</sup> *Id.* at art. 12, § 1.

<sup>213</sup> *Id.* at art. 20, § 1.

<sup>214</sup> *Id.* at art. 25.

<sup>215</sup> *Id.* at art. 26, § 2.

<sup>216</sup> Robert Coulter is a practicing attorney admitted to the bar in three states: Montana, New York, and the District of Columbia. Coulter, *supra* note 210, at 539 n.\*. He graduated from Columbia University School of Law in 1969. *Id.* He is also a member of the Citizen Potawatomi Nation and is Executive Director of the Indian Law Resource Center. *Id.* Coulter has participated in the development of the draft U.N. Declaration since 1976. *Id.*

<sup>217</sup> Coulter, *supra* note 210, at 551 & n.80 (interpreting articles twenty and twenty-five of the U.N. Declaration as establishing a right to hunt and fish).

<sup>218</sup> See U.N. Declaration, *supra* note 5, at art. 37, § 1 (“Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour [*sic*] and respect such treaties, agreements and other constructive arrangements.”).

<sup>219</sup> *Id.* at art. 27.

The United Nations General Assembly adopted the Declaration on September 13, 2007.<sup>220</sup> In total, 143 member states voted in favor of adopting the Declaration, while four voted against adoption.<sup>221</sup> The member states that voted against adoption were the United States, Canada, Australia, and New Zealand.<sup>222</sup> Since 2007, Canada, Australia, and New Zealand changed their position on the Declaration,<sup>223</sup> and in 2010, President Obama announced the United States' support for the Declaration.<sup>224</sup>

Many legal systems, including the United States', have difficulty defining, analyzing, and protecting intangible cultural heritage within their established legal principles and rules,<sup>225</sup> which can lead to inconsistent or inadequate protection for intangible cultural heritage at the national, local, and regional level. However, the Convention and the Declaration can help the United States develop a more consistent application of existing law to intangible cultural heritage. A more uniform application of law would result in stronger, more consistent protection for intangible cultural heritage, including Native American hunting and fishing rights.

## V

### NON-BINDING INTERNATIONAL LAW CAN PLAY A SIGNIFICANT ROLE IN DEVELOPING UNITED STATES INDIAN LAW AND POLICY

Even when an international law is not directly enforceable in international forums or United States courts, the laws may still significantly impact Federal Indian law in three ways.<sup>226</sup> First, non-binding international law contributes to the development of customary international law.<sup>227</sup> Customary international law originates from

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<sup>220</sup> U.N. Declaration, *supra* note 5.

<sup>221</sup> Coulter, *supra* note 210, at 545.

<sup>222</sup> *Id.*

<sup>223</sup> Valerie Richardson, *Obama Adopts U.N. Manifesto on Rights of Indigenous Peoples*, WASH. TIMES (Dec. 16, 2010), <http://www.washingtontimes.com/news/2010/dec/16/obama-adopts-un-manifesto-on-rights-of-indigenous-/?page=all>.

<sup>224</sup> OFFICE OF THE SPECIAL REPRESENTATIVE FOR GLOBAL INTERGOVERNMENTAL AFFAIRS, U.S. DEPARTMENT OF STATE, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples 1* (2011) [hereinafter *Announcement*], available at <http://www.state.gov/documents/organization/154782.pdf>.

<sup>225</sup> NAFZIGER, *supra* note 165, at 615.

<sup>226</sup> COHEN'S HANDBOOK, *supra* note 72, § 5.07[5], at 484.

<sup>227</sup> *Id.* § 18.07[1], at 485.

international customs and norms not necessarily contained in any formal document.<sup>228</sup> Customary international law is usually determined by considering the practices of a community of nations.<sup>229</sup> However, not every common practice is customary international law—only those common practices that nations consider themselves legally obligated to follow.<sup>230</sup> Although it is sometimes difficult to determine the line between customary international law and “mere usage,”<sup>231</sup> customary international law is part of federal common law in the United States.<sup>232</sup> Courts should interpret acts of Congress in a way that does not conflict with customary international law whenever possible.<sup>233</sup>

Second, international law can serve as an “interpretive guide” in constitutional construction cases, and it can help shape policy by influencing legislation.<sup>234</sup> Early Supreme Court cases that established fundamental principles of Federal Indian law “extensively” relied on international law.<sup>235</sup> For example, the existence and scope of Native American title to property through aboriginal title, inherent tribal sovereignty, and the relationship between tribes and the federal government originated from the Supreme Court’s interpretation and adaptation of international law.<sup>236</sup> Although heavy reliance on international law faded by the twentieth century, evidence suggests that international law is again becoming a powerful tool to shape federal Indian law and policy.<sup>237</sup> For example:

[I]nternational organizations . . . have increasingly turned their attention to issues affecting indigenous peoples worldwide. This increased attention is just beginning to result in concrete legal tools that can be used to shape federal Indian law. Nevertheless, there are clear patterns of consensus emerging with respect to universal international norms that may affect the course of Indian law development in the United States.<sup>238</sup>

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.* § 18.07[1], at 453.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* § 5.07[1], at 453. Mere usage is a law that a nation follows “as a matter of courtesy,” while customary international law are rules that a nation believes it is “obligated” to follow. *Id.*

<sup>232</sup> *See id.* § 5.07[4][a][ii], at 482.

<sup>233</sup> *See id.*

<sup>234</sup> *Id.* § 5.07[5], at 484.

<sup>235</sup> *Id.* § 5.07[1], at 451.

<sup>236</sup> *See id.*

<sup>237</sup> *See id.* § 5.07[1], at 451–52.

<sup>238</sup> *Id.* § 5.07[1], at 452.

Third, examining the development of indigenous peoples' rights in international law "provides a basis for more fully understanding the factors that contribute to the development of our own federal Indian law, thereby facilitating positive changes to the law."<sup>239</sup>

Both the United Nations Declaration and the UNESCO Convention are non-binding in the United States. While the Convention is binding on nations that ratify it, the United States has yet to ratify. Accordingly, the Convention remains non-binding in the United States.<sup>240</sup> While the United States supports the United Nations Declaration, the Declaration is non-binding by nature.<sup>241</sup> Declarations are generally considered aspirational statements that are not legally binding or directly enforceable in the United States.<sup>242</sup>

Regardless of their enforceability, the United Nations Declaration and the UNESCO Convention on Intangible Cultural Heritage can positively impact the current development of Native American law and policy. The UNESCO Convention will likely be less significant in developing United States Indian law than the United Nations Declaration because the United States has taken no position on the Convention—neither supporting nor opposing it.<sup>243</sup>

#### *A. The Convention's Impact on Federal Indian Law and Policy*

In recent years, intangible cultural heritage has attracted growing attention among intellectuals and political stakeholders.<sup>244</sup> It is also gaining recognition in Western countries, like the United States, because of the increasing concern for the preservation of living cultures as an avenue for promoting cultural diversity.<sup>245</sup>

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<sup>239</sup> *Id.* § 5.07[5], at 485.

<sup>240</sup> See *supra* note 204 and accompanying text.

<sup>241</sup> See *supra* note 224; COHEN'S HANDBOOK, *supra* note 72, § 5.07[1], at 452.

<sup>242</sup> COHEN'S HANDBOOK, *supra* note 72, § 5.07[1], at 452.

<sup>243</sup> See *supra* note 204 and accompanying text. The United States has had a rocky relationship with UNESCO. Slattery, *supra* note 171, at 210. Although the United States was a founding member of UNESCO, it withdrew from UNESCO in 1984. *Id.* However, in 2002 the Bush administration announced that the United States would renew its commitment to the UNESCO organization. *Id.* The Bush administration specifically stated, "[a]s a symbol of our commitment to human dignity, the United States will return to UNESCO. This organization has been reformed and America will participate fully in its mission to advance human rights, tolerance, and learning." *Id.*

<sup>244</sup> Hugh C. Hansen, Michael Blakeney, Linda S. Lourie, Paul E. Salmon & Coenraad Visser, *Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 753, 780 (2002).

<sup>245</sup> *Id.*

Accordingly, the United States and many other countries are adopting intangible cultural heritage policies.<sup>246</sup> These policies are creating lively discussions and debates at the national and international level about intangible cultural heritage.<sup>247</sup> The UNESCO Convention is an important part of this ongoing discussion and debate about intangible cultural heritage. Furthermore, the Convention has widespread support in the international community, and it continues to gain the support of more nations every year since its adoption in 2003.<sup>248</sup> For all these reasons, the United States should not ignore the UNESCO Convention.

*B. The Declaration's Impact on Federal Indian Law and Policy*

The United Nations Declaration will have a significant impact on United States law and policy.<sup>249</sup> First, the Declaration plays a key role in establishing international norms.<sup>250</sup> “[I]t evidence[s] international law’s increasing recognition of the shortcomings of legal systems that define property rights solely in terms of land.”<sup>251</sup> In addition, the Declaration is consistent with this broader view of property, and expands “the scope of protection beyond the traditional rights of ownership and possession.”<sup>252</sup> As explained above, these international legal norms can influence the outcome of litigation and

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<sup>246</sup> WEATHERHEAD CENTER FOR INTERNATIONAL AFFAIRS, HARVARD UNIVERSITY, *Annual Reports 2004–2005, 2005–2006* 30–31 (2006), available at [http://dev.wcfia.harvard.edu/sites/default/files/WCFIAAR04\\_06.pdf](http://dev.wcfia.harvard.edu/sites/default/files/WCFIAAR04_06.pdf). For example, in 1965 Congress created the National Endowment for the Arts and Humanities. National Foundation on the Arts and Humanities Act, 20 U.S.C. § 951 (1965). The Act authorizes government financial support for the arts and humanities, and recognizes the importance of the arts and humanities to education and national cultural identity. *Id.* Additionally, in 1976, Congress created the American Folklife Center to “preserve and present American folk life.” Hansen et al., *supra* note 244, at 780 (quoting *About the American Folklife Center*, THE LIBRARY OF CONGRESS (Aug. 28, 2013), <http://www.loc.gov/folklife/aboutafc.html>).

The Center and its collections of folklife are continually growing, and the Center remains one of the oldest and largest folklife repositories in the world. *Id.* (citing *About the American Folklife Center*, THE LIBRARY OF CONGRESS (Aug. 28, 2013), <http://www.loc.gov/folklife/aboutafc.html>).

<sup>247</sup> Hansen et al., *supra* note 244, at 780 (citing *About the American Folklife Center*, THE LIBRARY OF CONGRESS (Aug. 28, 2013), <http://www.loc.gov/folklife/aboutafc.html>).

<sup>248</sup> *Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO.ORG (Oct. 17, 2003), <http://www.unesco.org/eri/la/convention.asp?language=E&KO=17116>.

<sup>249</sup> See COHEN’S HANDBOOK, *supra* note 72, § 5.07[3][a], at 468–70.

<sup>250</sup> See *id.*

<sup>251</sup> *Id.* § 5.07[3][c], at 477.

<sup>252</sup> *Id.*

the creation of new policy.<sup>253</sup> Second, international legal norms have the potential to become binding international customary law.<sup>254</sup> After the United States adopted the Declaration, it became a United Nations “consensus document”<sup>255</sup>—a document that represents an international consensus on the minimum legal rights of indigenous peoples and minimum legal duties states owe indigenous peoples.<sup>256</sup> If nations abide by the terms of this Declaration and believe they are obligated to do so, then the Declaration will become binding international customary law.

Coulter, one of the premiere experts on the Declaration,<sup>257</sup> confirms that the Declaration “expresses norms of customary international law binding on states by virtue of their observance of these norms as a matter of practice and the belief that such practice is required.”<sup>258</sup> It may be too soon to tell if nations will abide by the terms of the Declaration. However, it seems that all United Nations member states intend to abide by its terms because they supported the Declaration. In addition, because the Declaration represents an international consensus, nations may feel more obligated to abide by its terms. If this is true, the terms of the Declaration may be considered customary international law that binds United States courts.

Even if the Declaration is not customary international law, the United States intends to abide by its terms. The United States changed its position to support the Declaration based on a “comprehensive” interagency policy review and “extensive” consultation with Native American tribes.<sup>259</sup> The U.S. Department of State noted that the Declaration carries considerable “moral and political force.”<sup>260</sup> Furthermore, in 2010, when President Obama announced the United States’ support for the Declaration at the White House Tribal Nations Conference, he stated:

The aspirations [the Declaration] affirms—including the respect for the institutions and rich cultures of Native Peoples—are one[s] we

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<sup>253</sup> *Id.* § 5.07[4][a][i], at 479–80.

<sup>254</sup> *See id.* § 5.07[2][a], at 453.

<sup>255</sup> Richardson, *supra* note 223.

<sup>256</sup> *See Coulter, supra* note 210, at 546.

<sup>257</sup> *See supra* note 216.

<sup>258</sup> ROBERT T. COULTER, *NATIVE LAND LAW* § 6:12 (2012 ed.).

<sup>259</sup> *Announcement, supra* note 224, at 2, 3.

<sup>260</sup> *Id.* at 1.

must always seek to fulfill. . . . But I want to be clear: What matters far more than words—what matters far more than any resolution or declaration—are actions to match those words. . . . That’s what this conference is about. That’s the standard I expect my administration to be held to.<sup>261</sup>

This statement strongly suggests that the government intends to honor the Declaration in practice—through “actions,” not merely formal support.

Furthermore, in a detailed statement about the United States’ support for the Declaration,<sup>262</sup> the government discussed the Declaration’s effect on Native American law and policy.<sup>263</sup> This statement explains that the Declaration expresses aspirations “that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.”<sup>264</sup> In addition, “[t]he United States aspires to improve relations with indigenous peoples by looking to the principles embodied in the Declaration in its dealings with federally recognized tribes.”<sup>265</sup> This statement specifically discusses the implications of the Declaration for Native Americans’

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<sup>261</sup> Barack Obama, President of the United States, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010, 9:39 A.M. EST), *available at* <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.

<sup>262</sup> *Announcement*, *supra* note 224.

<sup>263</sup> *See id.*

<sup>264</sup> *Id.* at 1.

<sup>265</sup> *Id.* at 2. While this statement is encouraging to federally recognized Indian tribes, it also suggests that the government has no intention of following the principles of the Declaration in its dealing with federally unrecognized tribes. The process tribes must go through to acquire federal recognition has been widely and severely criticized. PEVAR, *supra* note 3, at 273. A tribe must show that it exercised *continuous* governmental control over its members, which seems unjust given that the U.S. government has a history of disrupting, displacing, and assimilating many tribes. *Id.* at 272. Tribes must also meet a steep burden of proof that requires producing documentation of meetings held up to a century ago. *Id.* at 272–73. Since many tribes traditionally focused on oral history, those tribes likely cannot produce such documentation. *Id.* at 273. The process is also lengthy and expensive. *Id.* Tribes sometimes wait up to ten years for a decision regarding their recognition and spend millions of dollars on the process. *Id.* Accordingly, many tribes that are well known to the federal government and that may even have a reservation and treaties with the government do not meet the standard for federal recognition. *See id.* at 273–74. Especially given the unreasonable recognition process, the government should “aspire[] to improve relations with indigenous peoples by looking to the principles embodied in the Declaration in its dealings with” all its indigenous peoples, not just “federally recognized tribes.” *Announcement*, *supra* note 224, at 2.

right to land, natural resources, and culture.<sup>266</sup> In regard to Native American land and natural resources, the statement explains:

The United States recognizes that some of the most grievous acts committed by the United States . . . against indigenous peoples were with regard to their lands, territories, and natural resources. For this reason, . . . the United States stresses the importance of the lands, territories, [and] resource[] . . . provisions of the Declaration in calling on all States to recognize the rights of indigenous peoples to their lands, territories, and natural resources. . . . [T]he United States understands these provisions to call for the existence of national laws and mechanisms for the full legal recognition of the lands, territories, and natural resources indigenous peoples currently possess by reason of traditional ownership, [or] occupation . . . . [T]he United States intends to continue to work so that the laws and mechanisms it has put in place to recognize existing, and accommodate the acquisition of additional, land, territory, and natural resource rights under U.S. law function properly and to facilitate . . . access by indigenous peoples to the traditional lands, territories and natural resources in which they have an interest.<sup>267</sup>

The statement is less specific about Native American culture. It declares only that “[t]he many facets of Native American cultures—including their religions [and] traditions . . . —need to be protected, as reflected in multiple provisions of the Declaration.”<sup>268</sup> Therefore, the United States intends to abide by the terms of the Declaration, at least in respect to the parts of the Declaration that relate to intangible cultural heritage. Accordingly, the Declaration will have a positive impact on Native American law and policy in the United States.

## VI

### INTERNATIONAL LAW CAN RESOLVE CONFLICTS IN THE LEGAL FRAMEWORK THAT DIMINISH NATIVE AMERICAN HUNTING AND FISHING RIGHTS

The UNESCO Convention and the United Nations Declaration can resolve inconsistencies in the current legal framework in three ways. First, defining Native Americans’ right to hunt and fish as intangible cultural heritage, under the Convention, accurately reflects the nature of these rights. Second, the Declaration could resolve inconsistencies and increase predictability in treaty abrogation cases involving Native American hunting and fishing rights. Third, the Convention and the

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<sup>266</sup> See *Announcement*, *supra* note 224.

<sup>267</sup> *Id.* at 6.

<sup>268</sup> *Id.* at 13.

Declaration both suggest that courts should give at least some consideration to the cultural significance of hunting and fishing to Native American tribes.

*A. Defining Native American Hunting and Fishing Rights as Intangible Cultural Property*

Defining Native American hunting and fishing rights as intangible cultural heritage, as opposed to mere tangible property rights, more accurately reflects the nature of these rights. One reason the legal framework remains capricious is because it creates a dichotomy between protecting tangible and intangible objects, and because it focuses on individual ownership.<sup>269</sup> Native American hunting and fishing rights do not fit this dichotomy. In the United States, intellectual property law protects certain forms of intangible property. However, the existing intellectual property regime in the United States only protects copyrights, patents, and trademarks.<sup>270</sup> Native Americans' right to hunt and fish does not fit within these legal concepts.<sup>271</sup> Furthermore, many scholars have discussed the inability of intellectual property to protect intangible cultural heritage.<sup>272</sup>

The United States employs a variety of property laws that protect tangible cultural heritage.<sup>273</sup> While Native American hunting and fishing rights are generally protected under property law, property law is often narrowly focused on individual ownership. Property laws focusing on individual ownership can devalue both collective rights and the cultural importance of hunting and fishing.<sup>274</sup> Tribal hunting and fishing inseparably combine the tangible and intangible. For example, hunting and fishing require the fish and game species, and the land they occupy. Yet, hunting and fishing also require knowledge of, and access to the land and species.

Defining Native American hunting and fishing rights as intangible cultural heritage under the Convention could help resolve these problems. It would recognize that hunting and fishing rights are fundamentally important to Native American culture and that

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<sup>269</sup> See Carpenter, Katyal & Riley, *supra* note 172, at 1027–29.

<sup>270</sup> See *id.* at 1041, 1065 (noting as an example that “most indigenous oral creations [are] considered to be in the public domain and [are] ineligible for protection under federal copyright law”).

<sup>271</sup> See generally NAFZIGER, *supra* note 165.

<sup>272</sup> Slattery, *supra* note 171.

<sup>273</sup> *Id.* at 214.

<sup>274</sup> See Carpenter, Katyal & Riley, *supra* note 172, at 1027–29.

protecting these rights requires protecting both intangible and tangible property. Furthermore, understanding and defining Native American hunting and fishing rights as intangible cultural property may lead to statutory and judicial common law that more adequately recognizes and protects the unique nature of intangible cultural heritage.

*B. Using the Declaration to Resolve Inconsistency and Predictability in Abrogation Cases*

In addition, the United Nations Declaration could resolve inconsistencies and increase predictability in abrogation cases involving Native American hunting and fishing rights. The declaration itself recognizes Native American rights to hunt and fish as a cultural and spiritual tradition and as an economic and subsistence activity.<sup>275</sup> The Declaration also establishes that states should “honour and respect” treaties made with tribes by recognizing and enforcing these treaties.<sup>276</sup> In addition, the Declaration stresses the importance of a fair, independent, and transparent process to recognize and adjudicate tribal rights like hunting and fishing.<sup>277</sup> It also requires that this process “give[] due recognition” to Native American traditions and customs.<sup>278</sup>

Currently, the process for adjudicating abrogation claims for Native American hunting and fishing rights is arguably not fair, transparent, or independent. As discussed in Part III, courts employ a variety of standards to determine if the tribes’ rights have been abrogated.<sup>279</sup> Furthermore, the outcome often hangs on the subjective discretion of the court determining congressional intent.<sup>280</sup> This inconsistent framework is not transparent or fair because it lacks consistency and predictability. Parties litigating an abrogation dispute are ultimately left to the whim of the particular court. In addition, these inconsistencies also indicate a lack of respect for Native American treaties.

When the United States government supported the Declaration, it released a statement that stressed the importance of the Declaration’s provisions about Native Americans’ rights to land and natural

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<sup>275</sup> See U.N. Declaration, *supra* note 5, at art. 12, 20.

<sup>276</sup> *Id.* at art. 37.

<sup>277</sup> *Id.* at art. 27.

<sup>278</sup> *Id.*

<sup>279</sup> See discussion *supra* Part III.

<sup>280</sup> See Hall, *supra* note 124, at 515–16.

resources.<sup>281</sup> The government also stated that it intends to continue working on the laws and mechanisms that recognize and accommodate tribal rights to land and resources, so that they “function properly” and “facilitate . . . access” to lands and resources.<sup>282</sup> As discussed above, the laws and mechanisms that recognize and accommodate Native Americans’ access to natural resources, like hunting and fishing, are not “functioning properly.”

Therefore, the terms of the Declaration and the Department of State’s announcement about the Declaration’s effect both provide strong support for judicial or statutory action to address the inconsistencies in abrogation litigation. The inconsistencies and lack of predictability in abrogation litigation could be resolved largely by applying the existing framework in a more precise and consistent way. For example, Congress or the Supreme Court could settle on a single test to determine congressional intent and create additional rules for applying the test that would promote consistency and decrease judicial discretion.<sup>283</sup> While determining congressional intent will usually require some judicial discretion, the Declaration urges development of a consistent and predictable framework for deciding abrogation cases.

### *C. Weighing the Cultural Significance of Native American Hunting and Fishing Rights in Court*

Finally, the Convention and the Declaration suggest that courts should give at least some weight and consideration to the cultural significance of hunting and fishing to tribes. It is unclear how heavily courts currently weigh such arguments. Some courts consider and recognize these cultural arguments. For example, in *United States v. Confederated Tribes of the Colville Indian Reservation*,<sup>284</sup> the Ninth Circuit noted that the Wenatchi tribe’s fishing area formed “the hub around which the Wenatchi’s cycle of life rotated.”<sup>285</sup> Similarly, in

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<sup>281</sup> *Announcement*, *supra* note 224.

<sup>282</sup> *Id.* at 6.

<sup>283</sup> For example, to determine congressional intent based on the consideration-and-choice doctrine, additional rules, such as the statute, must contain a statement that clearly shows that Congress considered the Native American right and chose to abrogate it. Congress could include a statement that says “this Act may conflict with Native American treaty rights in the following ways . . . To the extent that this Act interferes with Native American treaty rights, those rights should/should not be abrogated.”

<sup>284</sup> *United States v. Confederated Tribes of the Colville Indian Reservation*, 606 F.3d 698 (9th Cir. 2010).

<sup>285</sup> *Id.* at 701.

*Kandra v. United States*,<sup>286</sup> the district court denied a request from non-Indians to reduce the Klamath and Yurok Tribes' treaty-based fishing rights.<sup>287</sup> It explained these tribes "rely on fish as a vital component of the Tribes' cultures, traditions, and economic vitality," and reducing the tribes' access to fish would result "in a loss of food, income, employment opportunities, and sense of community."<sup>288</sup> However, other decisions make little to no mention of the cultural significance of hunting and fishing to tribes.

The Declaration recognizes Native Americans' right to maintain, practice, and revitalize their cultural traditions.<sup>289</sup> In addition, the Convention is a powerful testament to the growing awareness and support for safeguarding intangible cultural heritage. Together these documents suggest that courts should give at least some consideration and weight to Native Americans' cultural arguments.

#### CONCLUSION

Although the United States' legal system has many shortcomings when it comes to protecting Native American intangible cultural heritage, tribes have made significant progress in enforcing their right to hunt and fish. In the past forty years, many tribes enjoyed important victories that solidified their hunting and fishing rights and, in some cases, allowed the tribe to renew traditional hunting and fishing practices.<sup>290</sup> The concept of intangible cultural heritage is relatively new and protections for such heritage, at the national and international level, have only begun to take shape. The tribal victories in enforcing hunting and fishing rights, the United States' recent support for the United Nations Declaration, and the ongoing development of national and international intangible cultural heritage discussions all suggest, however, that the United States is moving in the right direction. Nevertheless, much remains to be done to adapt Indian law and policy to fully account for the unique nature of

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<sup>286</sup> *Kandra v. United States*, 145 F. Supp. 2d 1192 (D. Or. 2001).

<sup>287</sup> *Id.* at 1201.

<sup>288</sup> *Id.*

<sup>289</sup> U.N. Declaration, *supra* note 5.

<sup>290</sup> See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *United States v. Michigan*, 424 F.3d 438 (6th Cir. 2005); *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *modified* in part, 653 F.2d 277 (6th Cir. 1981); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

intangible cultural heritage. The United States should continue to take steps to protect intangible cultural heritage like Native American hunting and fishing rights. Such steps should include signing and ratifying the UNESCO Convention, and reforming existing law and policy to be more consistent with the principles established in the Convention and the Declaration.