

The Never-Ending Struggle for Tribal Fishing Rights

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SUMMARY The World Trade Organization's 2022 Agreement on Fisheries Subsidies failed to acknowledge Indigenous rights. This is problematic, particularly in the United States where tribes have constitutionally recognized sovereignty. Three tribes located within California have taken it upon themselves to assert their sovereignty by creating the United States' first Indigenous Marine Stewardship Area (IMSA). While the tribes' jurisdictional power over the IMSA is unclear, the tribes are in the initial stages of co-managing the area with the state of California. Collaborations based upon mutual respect are likely to produce positive results for Indigenous Peoples, the surrounding jurisdiction, and the environment.

The World Trade Organization's (WTO) 2022 Agreement on Fisheries Subsidies does not address tribal fishing rights. Perhaps this is because when people think of traditional American Indian foods, they usually envision buffalo and corn. However, many North American tribes traditionally relied upon fish and other marine life as dietary staples. In addition to providing sustenance, fish served as raw material for production of goods.¹ For example, the Houma, located in rock-less south Louisiana, used gar fish scales for arrowheads. Coastal tribes also traded fish to inland tribes in commercial networks that stretched over a thousand miles.² In the Pacific Northwest, tribes developed governance institutions centered around salmon runs.³ Tribes also recognized private property rights in fishing sites and equipment.⁴ Some tribes even recognized private property rights in the Pacific Ocean.⁵

The institutions tribes developed lasted for generations and survived contact with Europeans and the United States. Manifest Destiny forced tribes to relinquish their homelands for smaller reservations in hundreds of treaties. Many treaties expressly preserved tribal fishing rights on those ceded lands.⁶ These nineteenth-century obligations became a frequent source of litigation during the twentieth century, most famously the Fish Wars in Washington state during the 1970s. This tribal-state conflict culminated in a 1974 federal district court case known as the Boldt Decision which determined tribes had the right to take half the fish caught within the state.⁷ Non-Indian fishermen fumed at the

decision, marching in the street while hanging effigies of Judge Boldt, and refused to abide by it.⁸ Describing Washington’s behavior five years after the Boldt Decision, the Supreme Court declared, “Except for some desegregation cases . . . the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.”⁹

Non-Indian resistance to tribal fishing rights has continued well after the Boldt Decision. Opposition to tribal fishing rights occurs because Indians are competing with non-Indians for a scarce resource—each fish Indians catch means one less fish for non-Indians. Power is another cause of conflict as states often resent having another internal sovereign within their borders. For example, the Mescalero Apache Tribe in New Mexico created eight artificial lakes on its reservation and stocked them with fish, creating a new fishery. Though New Mexico had absolutely nothing to do with the tribal fishery, the state still sought (unsuccessfully) to regulate it.¹⁰

Racism also motivates some non-Indian hostility to tribal fishing rights. For example, non-Indians protested against Chippewa spear fishing during the 1990s under mantras such as “Spear an Indian, save a walleye” and “Spear a pregnant s—, save two walleyes,”¹¹ while calling the Indians “welfare warriors,” “wagon burners,” and “timber n—.”¹² Commenting on the opposition to tribal fishing rights, the Seventh Circuit Court of Appeals noted, “[T]he stench of racism is unmistakable.”¹³

INDIGENOUS MARINE STEWARDSHIP AREA

In September of 2023, three federally recognized tribes located along the northern California coast—the Resighini Tribe of Yurok People, the Tolowa Dee-ni’ Nation, and the Trinidad Rancheria—created the United States’ first Indigenous Marine Stewardship Area (IMSA).¹⁴ The IMSA encompasses approximately 700 miles, stretching from the Oregon-California border to roughly 300 miles north of San Francisco along the California coast.¹⁵ Within this area, the tribes will apply their traditional ecological knowledge to protect culturally important species, including kelp, clams, and candlefish. The tribes made this declaration to demonstrate their sovereignty and to signal the significance of the marine ecosystem to their cultures. It is also a step towards co-management of the commons.

The effect of the declaration remains unclear; in fact, “the tribes involved are still establishing what actions will accompany the new designation . . .”¹⁶ This is partially because tribes have limited jurisdiction over non-Indians and are usually subject to generally applicable state laws when outside of their reservations.¹⁷ Limited jurisdiction means tribal regulations may be toothless. Moreover, the IMSA is concurrently governed by the tribe, by California, and by the federal government, so California and federal rules may preempt tribal authority. Thus, the IMSA may amount to little more than words on a page.

Although conflicting sovereign claims can lead to chaos, California has expressed an interest in collaborating with tribes to manage the state’s natural resources.¹⁸ Indeed, the tribes announced the IMSA from the California state capitol on California Native American Day.¹⁹ The spirit of cooperation is likely to result in better management than disputed governance, especially if the sovereigns share resources and information. Accordingly, the IMSA may result in a fruitful governance arrangement between tribes and the state.

RECOMMENDATIONS

Indigenous rights are a complex subject, and each country has a unique relationship with the Indigenous Peoples within its borders. For example, federally recognized tribes in the United States have a direct government-to-government relationship with the federal government. Hence, tribes have recognized sovereign powers. Contrarily, Aboriginal and Torres Strait Islanders in Australia do not have recognized governments.²⁰ This renders a one-size-fits-all approach to Indigenous rights infeasible.

That said, the WTO can take multiple steps to improve the rights of Indigenous sovereigns. Explicitly recognizing Indigenous fishing rights is the most obvious way for the WTO to promote Indigenous fisheries. By recognizing Indigenous rights, the WTO would merely be synchronizing with other multilateral organizations like the United Nations²¹ and the Organization of American States.²² Additionally, the recognition of Indigenous fishing rights must extend beyond sustenance and acknowledge Indigenous Peoples' right to engage in commerce.²³ After all, trade is a vital component of many Indigenous cultures.²⁴

To further support Indigenous fishing rights, the WTO can encourage countries to enter fisheries compacts with the Indigenous Peoples within their borders. In the United States, some tribes and states have already entered into compacts allocating fishing quotas in commons areas like the Great Lakes²⁵ and the Pacific Northwest salmon fisheries.²⁶ The WTO could advocate for tribal-state fish agreements where licensing fees and tax revenue are shared.

An indirect means of fostering tribal-state fishing collaboration is education. Many people in the United States view tribes as collections of people who are racially Indian rather than as sovereign governments. The failure to see tribes—as well as other Indigenous groups—as sovereigns contributes to the racial animus often present in Indigenous fishing disputes. Education can promote a better understanding of Indigenous nationhood, helping people see Indigenous Peoples as the independent sovereigns they have always been.

Education can also be used to encourage people to pay attention to and take into account Indigenous wisdom relating to the marine ecosystem. For example, some tribes in the Pacific Northwest ate primarily male salmon and released the females because they knew females are the limiting reagent in procreation.²⁷ Similarly, Indigenous Peoples have used property rights to manage shellfish fisheries, such as clam gardens in the Pacific Northwest.²⁸ Indigenous Peoples have many lessons to offer, and sharing knowledge can facilitate harmonious intergovernmental relationships that benefit all sovereigns and the marine ecosystem.

CONCLUSION

The Supreme Court has noted the United States has “moral obligations of the highest responsibility and trust.”²⁹ Nevertheless, the United States has often neglected tribal rights,³⁰ especially when tribal claims to valuable resources conflict with non-Indian interests. Adding language to the WTO's fisheries agreement that acknowledges Indigenous fishing rights could strengthen tribes' legal position in disputes with

larger political powers. By affirming the validity of tribal rights, tribes and states will be able to conduct negotiations over shared marine resources on a level playing field.

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ABOUT THE SERIES

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NOTES

1. Stefan Lovgren, "All Hail the Alligator Gar, a Giant and Primordial River Monster," *Texas Monthly*, May 31, 2023, <https://www.texasmonthly.com/travel/all-hail-the-alligator-gar-a-giant-and-primordial-river-monster>.
2. National Library of Medicine, "9000 BC: At Celilo, Trade Thrives as the Salmon Run," *Native Voices*, <https://www.nlm.nih.gov/nativevoices/timeline/167.html>.
3. D. Bruce Johnsen, "Salmon, Science, and Reciprocity on the Northwest Coast," *Ecology and Society* 14, no. 43 (2009), <https://www.ecologyandsociety.org/vol14/iss2/art43/>.
4. Harriet V. Kuhnlein and Murray M. Humphries, "Traditional Animal Foods of Indigenous Peoples of Northern North America," Centre for Indigenous Peoples' Nutrition and Environment, <http://traditionalanimalfoods.org/fish/searun-fish/page.aspx?id=6446>.
5. Robert J. Miller, "Economic Development in Indian Country: Will Capitalism or Socialism Succeed?," *Oregon Law Review* 80, no. 3 (2001).
6. See, e.g., Treaty with the Chippewa, Art. V, July 29, 1837, 7 Stat. 536, 537; Treaty of Point Elliott, Art. V, Jan. 22, 1855, 12 Stat. 927, 928; Treaty of Point No Point, Art. IV, Jan. 26, 1855, 12 Stat. 933.
7. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974).
8. Phil Dougherty, "Boldt Decision: *United States v. State of Washington*," *Historylink.org*, August 24, 2020, <https://www.historylink.org/file/21084>.
9. *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 n.36 (1979).
10. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983).
11. *Lac Du Flambeau Indians of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 843 F. Supp. 1284, 1289 (W.D. Wis. 1994).
12. *Lac Du Flambeau Indians* at 1288.
13. *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 991 F.2d 1249, 1264 (7th Cir. 1993).

14. Local Coast Outpost Staff, “Three NorCal Tribes Announce Nation’s First Indigenous Ocean Protection Area,” *Lost Coast Outpost*, September 22, 2023, <https://lostcoastoutpost.com/2023/sep/22/three-norcal-tribes-announce-first-us-indigenous-m/>.
15. Local Coast Outpost Staff, “Three NorCal Tribes Announce Nation’s First Indigenous Ocean Protection Area.”
16. Manola Secaira, “Tribes Designate a Marine Stewardship Area in Northern California,” *Capradio*, September 25, 2023, <https://www.capradio.org/articles/2023/09/25/tribes-designate-a-marine-stewardship-area-in-northern-california/>.
17. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-149 (1973) (“Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.”).
18. California Natural Resources Agency, *Pathways to 30x30 California: Accelerating Conservation of California’s Nature*, 2022, https://resources.ca.gov/-/media/CNRA-Website/Files/Initiatives/30-by-30/Final_Pathwaysto30x30_042022_508.pdf.
19. “Three California Tribal Nations Declare First U.S. Indigenous Marine Stewardship Area,” *Native News Online*, September 21, 2023, <https://nativenewsonline.net/environment/three-california-tribal-nations-declare-first-u-s-indigenous-marine-stewardship-area>.
20. Australian Human Rights Commission, *Voice Referendum: Understanding the Referendum from a Human Rights Perspective* (Sidney: Australian Human Rights Commission, 2023), 35–36.
21. See G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).
22. Organization of American States, *American Declaration on the Rights of Indigenous Peoples*, AG/RES. 2888 (XLVI-O/16), June 15, 2016 (Washington, DC: Organization of American States, 2016).
23. Nika Bartoo-Smith and Karina Brown, “Grand Ronde Hunting, Fishing Agreement with State Could Launch Litigation,” *Statesman Journal*, August 9, 2023, <https://perma.cc/B3VA-FWMG>.
24. E.g., Washington State Department of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1017 (2019) (Gorsuch, J., concurring) (“Travel for purposes of trade was so important to the ‘Yakamas’ way of life that they could not have performed and functioned as a distinct culture . . . without extensive travel.”).
25. Garret Ellison, “Judge OKs New Tribal and State Great Lakes Fishing Agreement,” *Mlive*, updated August 25, 2023, <https://perma.cc/UM7S-BVH5>.
26. “North of Falcon,” Washington Department of Fish and Wildlife, n.d., <https://perma.cc/D22J-J542>.
27. Dan Robitzski, “2,000-Year-Old Salmon DNA Reveals Secret to Sustainable Fisheries,” *The Scientist*, November 29, 2021, <https://www.the-scientist.com/news-opinion/2000-year-old-salmon-dna-reveals-secret-to-sustainable-fisheries-69466>.
28. Victor D. Thompson et al., “Ecosystem Stability and Native American Oyster Harvesting Along the Atlantic Coast of the United States,” *Science Advances* 6, no. 28, 1, 5 (July 10, 2020). DOI: 10.1126/sciadv.aba9; “Clam Gardens” at “Facts at Your Fingertips: Original Indigenous Economies,” *PolicyEd*, Hoover Institution, Stanford University, Stanford, California, <https://www.policyed.org/renewing-indigenous-economies/original-indigenous-economies/facts-your-fingertips>.
29. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).
30. Haaland v. Brackeen, 599 U.S. 255, 333 (2023) (Gorsuch, J., concurring) (“Often, Native American Tribes have come to this Court seeking justice only to leave with bowed heads and empty hands.”).