

“ENVIRONMENTAL JUSTICE” FOR INDIGENOUS PEOPLES:
A CASE STUDY OF THE LOUDEN TRIBAL COUNCIL

by

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A Thesis
Submitted in partial fulfillment
of the requirements for the degree
Master of Environmental Studies
The Evergreen State College
August 2013

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ABSTRACT

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This thesis is a critical study of how “environmental justice” has been used as a framework for federal relations with tribal governments in the United States. The thesis specifically compares (a) the federal government’s trust and treaty obligations along with concomitant laws and regulations; (b) tribal perspectives and expectations regarding such practices; and (c) a wider set of literature about the impacts of federal environmental regulation on tribes, especially in Alaska. This thesis argues that environmental justice is a faulty tool for tribes that can have adverse environmental, social, and political impacts, because environmental justice laws and policies frame Native Americans as racial minorities, instead of approaching environmental issues through the unique relationship that has been historically established between the federal and tribal governments.

The Louden Tribe (federally-recognized as the Louden Tribal Council) of Alaska was used as a case study. The tribe has faced contamination of subsistence resources and loss of land rights. Louden Tribal Council members perceive that the Department of Defense (DoD) is responsible for much of the contamination. Although federal agencies, such as the DoD, are mandated to work on a government-to-government basis with tribes, this thesis shows that this has not always been the case in practice. This case study shows that reliance on an environmental justice policy framework instead of a government-to-government relationship has resulted in negative environmental and socio-cultural impacts.

An interdisciplinary approach was taken in this research, incorporating legal and policy analysis, cultural anthropology, political science, geography, and biological sciences. The findings of this research show that, while there is a place for the environmental justice framework in relation to Native Americans, reliance on this policy framework as a substitute for government-to-government relations could create a precedent for Alaska Natives and all Native Americans to be defined by race and not by their sovereign political status.

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Acknowledgements

First, I would like to express my sincerest gratitude to the Louden Tribal Council and the community of Galena. My position as the Environmental Director at Louden permitted me to know the human community in a way that I could never have imagined – whether by sorting through trash in the dump as part of a waste stream analysis, cutting and jarring fish with Mary Stickman, ice fishing and dissecting burbot for contaminant testing, learning how to make a *bets'eghe hoolaane* from Erica Cleaver and Allison Esmailka, or attending a potlatch and dancing the night away at a fiddle dance. I was inspired and moved by so many. Special thanks must go to some extraordinary people that I am ever so grateful to have called colleagues and friends: Peter Captain, Sr.; Ragine Attla; Cindy Pilot; Phil Koontz; Dorothy Yatlin; Eleanor Yatlin; Joe Wright; and Eileen Jackson. Thank you to Jean Gamache and Lisa Gover for simply being themselves – smart, strong, Native American women with heart who provided me with guidance in times of need and with the motivation to make my own journey through the murky halls of the legal profession. And, my deepest love and appreciation to Darcie Warden who was with me in Galena from the day I started to the day I left – her passion, patience, intelligence and simple sense of joy in life is unmatched.

Thank you to Ted Whitesell and The Evergreen State College for never giving up on me. While there were occasions where I was lost in thesis-land – writing, re-writing, quitting and going to law school, writing and re-writing some more – Ted and Evergreen gave me the opportunity to finish my thesis and produce a work of which I can be proud. Additionally, Evergreen was the impetus for my move to Alaska. Without MES and its awesome faculty – Gerardo Chin-Leo, Ralph Murphy, Cherie Lucas-Jennings, Martha Henderson, and John Perkins – I may not have found my home. I, also, would not have found my soul sisters – Theresa Nation, Jennifer Guimaraes, and Debora Holmes. They too never gave up on me and for 12 years with every conversation they would ask, “So, have you finished your thesis yet?” I now happily can say, “Yes!”

Finally, thanks to my Mom who thought I was crazy for moving to Alaska but visited me in Galena anyway. Her unflagging support through too many degrees and too few (in my opinion) travels has given me the ability to be nurtured and inspired by life and to find the place where I belong: Alaska.

Chapter 1
ENVIRONMENTAL SELF-DETERMINATION:
An Introduction

Environmental degradation is occurring on a global scale. Global climate change is real. The increased toxicity of our foods is real. Suicide is real. Oppression of indigenous peoples is real. These are not separate and disparate issues. The philosophy that drives people to be discriminated against drives reckless disregard for the land, air and water. One way to stop environmental destruction is to halt subjugation of indigenous people.

On many levels indigenous peoples worldwide are struggling for environmental preservation. They struggle locally, nationally and internationally for clean water, air, land and the recognition of their sovereignty to protect these valuable resources. They face hazards to their health and welfare from outside sources through such operations as natural resource extraction and the siting of toxic waste incinerators. They are not, however, the only subaltern group to suffer from disproportionate exposures to environmental hazards. Communities of color and economic hardship have historically born the brunt of toxic materials. This disproportionate shouldering of exposure to environmental hazards (such as DDT and mercury) has become part of our structural reality through zoning and regulations.

Environmental racism by definition is a state of powerlessness with respect to exposures to environmental hazards for marginalized people. Many subaltern groups, however, have been able to use this apparent state or condition

of impotency as a catalyst for change. Their shared, impoverished condition has become, ironically, a place of power. Growing momentum in the environmental justice movement exacts the power to organize the masses and make incremental steps towards a restructuring of the dominant society's institutional mechanisms. Is it, however, the movement for indigenous peoples? Are they just another marginalized group of people dealing with the impacts of structural racism, which allows for toxic waste incinerators and military bases to be placed in economically depressed or rural locations? I argue that while the location and continued contamination of indigenous lands may be based on racism, using environmental justice as a tool disempowers tribes, which are sovereign domestically-dependent nations with a right to environmental self-determination.

In coming to this conclusion, I addressed one key question: Is federal environmental regulation in the United States always in compliance with federal treaty obligations and federal trust responsibility to sovereign tribes and, if not, are there observable consequences, as a direct result of such violations? In this work, I will be reporting on a historical set of practices, and analyzing them in comparison with (a) the federal trust responsibility and associated federal mandates and court decisions; (b) tribal perspectives and expectations regarding such practices; and (c) a wider set of literature about the impacts of federal environmental regulation on tribes.

The Loudon Tribe will serve as a case study. Although federal agencies are mandated to work on a government-to-government basis with tribes, the data will show that, in practice, this does not always occur, and that there can be

environmental and sociocultural impacts of using the wrong process. Although, this thesis focuses on a single indigenous group in Alaska, aspects of its politics and analysis are applicable to indigenous peoples across the United States.

This paper is laid out in five chapters. The second chapter will review the literature available on the topics of indigenous environmental struggles, federal responsibility to tribes, and Alaska Native-specific laws. The third chapter will attempt to put the Louden Tribe's experience in perspective. It will be an examination of the tribe and its struggles, briefly delving into the history of the area, the stories and the landscape. In chapter four, I include examples of some of the work that is being done by the Louden Tribe to analyze the health of its local environment. On behalf of the tribe, I conducted a round of sampling of burbot (*Lota lota*), a resident fish species. The methodology, findings and analysis are presented. And finally, in chapter five, I will present a discussion of the results of Louden's work, analyzing contributions and shortcomings in the context of the larger indigenous struggle and then provide recommendations that may aid the tribe's battle in the future.

First-hand field experience was integral to my research. Carl Sauer believed that the best way to learn was through active apprenticeship, fieldwork and observation.¹ Working as the environmental director for the Louden Tribal Council allowed the opportunity to do all three. It also leant a level of access that would otherwise not have been attained. I examined documents pertaining to the Louden Tribal Council and the Department of Defense (DoD) at the United States Fish and

¹ Peter Jackson, *Maps of Meaning* (London: Unwin Hyman, 1989).

Wildlife Service (USFWS) Koyukuk Refuge District office and the Galena City School Library. Alaska Interlibrary Loan and online databases were also helpful in providing needed documentation from such sources as the Rasmusson Library in Fairbanks. Besides archival work, I interviewed Louden Tribal members, U.S. Air Force (USAF) employees, and attended various meetings and conferences to gain insight into indigenous struggles.

Chapter 2

ENVIRONMENTAL JUSTICE AND TRIBAL SOVEREIGNTY: A Literature Review

Indigenous environmental struggles occur across the globe as well as within the borders of the United States. While legal standing and recognized sovereign rights differ from country to country and state to state amongst indigenous populations, there are some common lessons that can be learned and shared across borders. This literature review will first examine the body of knowledge that exists about environmental justice. It will then review indigenous environmental struggles across the globe. It will next focus on the United States and the federal government's responsibility to tribes. And, finally, it will review the laws and policies that are specific to Alaska Native tribes.

A. ENVIRONMENTAL JUSTICE

Environmental justice is defined by Robert D. Bullard in *Unequal Protection: Environmental Justice and Communities of Color* as a condition that exists when:

Some individuals, groups, and communities receive less protection than others because of their geographic location, race, and economic status...pollution presents potential threats to public health that individuals with affluence or political clout are unwilling to accept. Risk burdens are localized, yet the benefits are generalized across all segments of society...Over the years, disparities have been created, tolerated, and institutionalized by local, state, and federal action.²

² Robert D. Bullard, *Unequal Protection: Environmental Justice & Communities of Color* (San Francisco, CA: Sierra Club Books, 1994).

Low-income and minority populations often face “disproportionately high environmental risks.”³ According to proponents of the environmental justice framework, the only way to have justice restored is for the rights of these marginalized peoples to be returned.⁴

Further discussion of what constitutes “marginalized peoples” is required. Marginalized peoples are groups that can be described as less powerful assemblages who are “excluded from resources over which dominant groups exert control and to which they have privileged access.”⁵ According to Jackson, “racism refers to the assumption, consciously or unconsciously held, that people can be divided into a distinct number of discrete ‘races’ according to physical, biological criteria and that systematic social differences automatically and inevitably follow the same lines of physical differentiation.”⁶ It implies a collection of thoughts and attitudes that carry the influence of power. These beliefs are encapsulated in regulations and the application of those regulations.⁷ This often means that the groups who are most in need of technological, scientific and legal resources to solve the problem of contamination at home have the least access.⁸ Marginalized groups face adversity from all angles. This is evident in environmental policies, zoning regulations and in the attitudes of governmental agencies.⁹ One place that groups would hope for support is their local

³ Environmental Justice Office, *Reviewing for Environmental Justice: E.I.S. And Permitting Resource Guide* (US Environmental Protection Agency Region 10, 1998).

⁴ Stella M. Capek, "The Environmental Justice Frame: A Conceptual Discussion and an Application," *Social Problems* 40, no. 1 (1993).

⁵ Jackson, 54.

⁶ *Ibid.*, 132-33.

⁷ *Ibid.*, 54.

⁸ Capek, "The Environmental Justice Frame: A Conceptual Discussion and an Application."

⁹ Bullard.

community. Often this is also lacking. Local governments are not always supportive of grassroots efforts to expose contamination and spur remediation. It is frequently cited that such activities could harm the areas' image.¹⁰ It is perceived that property values could be lowered and tourist opportunities might be lost.¹¹

The above discussion is the very reason for the existence of an environmental justice (EJ) framework. In the U.S., various studies have found a disparity in the pace, cleanup methods and penalties between white communities and communities of color. It has been found that the EPA has been 22% more likely to order cleanup over containment in white communities as compared to their actions in communities of marginalized groups.¹² In order to restore some sort of equilibrium, the EJ framework details the rights of marginalized peoples. Many of these rights are common to all and, in the United States, are bound in law. These rights include the right to factual information. The Freedom of Information Act (FOIA) is one tool that disadvantaged communities can use to achieve the first right. Second, when citizens lodge a complaint regarding contamination, the claimants should have a quick, unbiased hearing. The EJ framework also specifies that claimants should have equal participation in deciding the fate of the polluted area. Finally, it states that those who have suffered due to contamination should receive compensation for their injuries.¹³

¹⁰ Celene Kraus, "Community Struggles and the Shaping of Democratic Consciousness," *Sociological Forum* 4, no. 2 (1989).

¹¹ Michael F. Gearheard (Director, Environmental Cleanup Office, EPA) in discussion with the author, 2002.

¹² Bullard.

¹³ Capek, "The Environmental Justice Frame: A Conceptual Discussion and an Application."

This framework provides invaluable information to marginalized groups needing direction and also allows for organized grassroots groups to show a pattern to their complaints.¹⁴

Groups become more than just a lone voice; they join hundreds of other communities striving for a clean place to live, work and play. A nationwide sense of community exists among disenfranchised groups that are looking for a solution to contamination and restitution for those who have suffered.¹⁵ Furthermore, the labeling of a problem as an environmental justice issue lends credence and power to a group's claim of chemical contamination. This extends to varying levels of government, including the local community government, and allows for more effective community mobilization.¹⁶ This power is described by Peter Jackson in reference to race relations: "It is racism that sets the limits on their social actions, simultaneously comprising the structural determinant of their subordination and the medium through which they can most readily challenge the subordination."¹⁷

On February 11, 1994, President Clinton issued Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations."¹⁸ The Executive Order (EO) instructs federal agencies to address programs, policies, and activities that have a disproportionate, significant impact on the health and/or environment of minority and low-income communities. Federal agencies are directed to apply environmental laws equally.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Jackson, 52.

¹⁸ Exec. Order No. 12,898, 59 C.F.R. 7629 (Feb. 16, 1994).

The discussion about environmental justice in relation to indigenous peoples will be developed further in Chapter 5.

B. GLOBAL INDIGENOUS ENVIRONMENTAL STRUGGLES

“The cultural is political.”¹⁹

There are many ways to characterize a people’s fight for their way of life. One could describe it as a struggle for cultural preservation. In some cases it may be labeled as a civil rights case. For indigenous peoples, this struggle often comes down to sovereignty issues, and the environment is tied into it all.²⁰ Many authors agree that a common element among indigenous groups globally is their natural world-based ethos.²¹ For example, the Sami of Scandinavia use one word, *Duovda*, to describe land as a provider of physical and spiritual sustenance.²² This ethos has been described by activists and academics as demonstrating the profound respect indigenous peoples have for all aspects of nature.²³ Each aspect of nature, whether it be flora or fauna, has its own spiritual standing.²⁴ As LaDuke states, “Native rituals are frequently based on the reaffirmation of the relationship of humans to the Creation.”²⁵ Unfortunately, too often this relationship is disturbed by outside influences.

¹⁹ Jackson., 2.

²⁰ Brian Myers, "Indigenous Peoples, the Environment and the Law," *Georgetown International Environmental Law Review* 17, no. 3 (2005).

²¹ Mary Christina Wood and Zachary Welker, "Tribes as Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement," *Harvard Environmental Law Review* 32, no. 2 (2008): 374.

²² Brian Myers, "Indigenous Peoples, the Environment and the Law," *Georgetown International Environmental Law Review* 17, no. 3 (2005): 6.

²³ Wood and Welker, "Tribes as Trustees Again," 374.

²⁴ *Ibid.*, 379-80.

²⁵ *Ibid.* (quoting Winona Laduke, *Recovering The Sacred: The Power of Naming and Claiming*, (Cambridge: South End Press, 2005), 4.)

Indigenous environmental struggles are not new. The early days of struggle were heralded by vast numbers of animals being killed for their fur or for sport by European immigrants, and thus removing valuable resources from the indigenous resource base.²⁶ These European immigrants then moved into the taking of land for mining and military exploitation.²⁷ Now, indigenous peoples deal with the reality of limited resources (e.g., terrestrial and marine species, land), years of hazardous waste disposal in their traditional use areas, along with confronting often-unforgiving political challenges. Figure 2.1 illustrates just a few of the threats – from oil and gas development to mining – confronting indigenous peoples in the Western United States. This leads to the question “What is the best way for indigenous peoples to confront these challenges?”

²⁶ Tim Flannery, *The Eternal Frontier: An Ecological History of North America and Its People* (New York.: Grove Press, 2001).

²⁷ Donald Fixico, *The Invasion of Indian Country in the Twentieth Century: American Capitalism and Tribal Natural Resources* (Boulder, CO: University Press of Colorado, 1998).

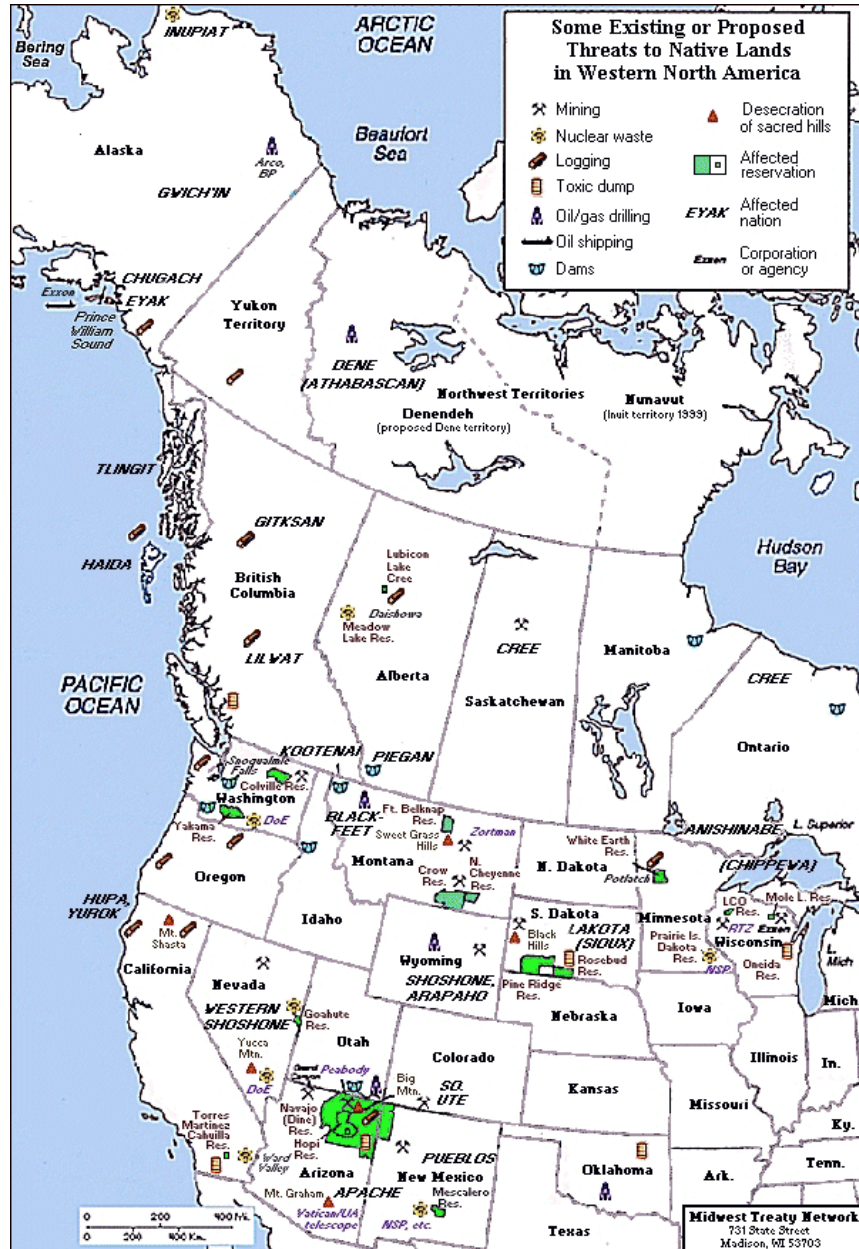


Figure 2.1: Map of existing or proposed threats to Indian lands in the Western U.S.²⁸

In order to fully explore that question, it seems appropriate to provide some context for the discussion. First, I will provide a definition for “indigenous.” Then I will define “culture” for purposes of this thesis. Finally, I

²⁸ Created by the Indigenous Environmental Network (IEN). The map is now about ten years out-of-date and no longer available on the Internet. Unfortunately, the existing and proposed threats have quadrupled in that time due to increased oil and gas activities.

will examine what the international community is doing to address indigenous struggles. Several declarations have been signed and working groups have been formed. What have they accomplished and how does their work apply to individual tribal groups?

1. Term “indigenous” in an international context

According to the Webster’s Ninth New Collegiate Dictionary, “indigenous” means “having originated in and being produced, growing, living, or occurring naturally in a particular region or environment.”²⁹ UN Special Rapporteur Jose Martinez Cobo produced the “Study of the Problem of Discrimination against Indigenous Populations” for the Subcommission on Prevention of Discrimination and Protection of Minorities. His report defined indigenous peoples, communities and nations as:

[T]hose which have a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.³⁰

The only legally binding definition of indigenous peoples is found in the International Labour Organization’s (ILO) Convention 169, adopted in 1989.³¹

²⁹ *Merriam-Webster’s Collegiate Dictionary*, Ninth ed. (Cambridge, MA: Merriam-Webster, 1983).

³⁰ Report of the Special Rapporteur, Mr. José Martínez Cobo, on the problem of discrimination against indigenous populations (E/CN.4/Sub.2/1986/7/Add.4).

³¹ Renee Sylvain, "Land, Water and Truth: San Identity and Global Indigenism," *American Anthropologist* 104, no. 4 (2002): 1075.

This definition, which is binding only upon the convention's signatories, states that indigenous peoples are:

1(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) Peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion.³²

Thus, a discussion of indigenous includes “non-dominant elements,” within “ancestral territories,” or “populations, which inhabited a geographic region... at the time of conquest.”

Rebecca Tsosie, professor and executive director of the Indian Legal Program at Arizona State University College of Law, argues that there is an increasing recognition at various levels (i.e., political and cultural) that indigenous peoples are unique and that their rights must be recognized as distinct from other groups.³³ She bases her assertion on several criteria that are similar to the ILO definition: (1) that indigenous peoples are native to the lands that they inhabit; (2)

³² International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169, <http://www.refworld.org/docid/3ddb6d514.html>.

³³ Rebecca Tsosie, "Indigenous People and Environmental Justice: The Impact of Climate Change," *University of Colorado Law Review* 78, no. Fall (2007): 1653.

they continue to engage in traditional practices; and (3) they maintain a separate political and cultural character.³⁴

Benjamin J. Richardson, the Canada Research Chair in Environmental Law and Policy at the University of British Columbia, also contends “the international system is increasingly recognizing non-state entities such as indigenous peoples.”³⁵ One symbolic example of this recognition is the two United Nations Decades for Indigenous Peoples (1995-2004 and 2005-2015).³⁶

2. Culture Does the Environment Good

“Culture” is not something that is easily defined.³⁷ As this work is not meant to be a critique under the rubric of cultural anthropology, for discussion purposes, I will use a common dictionary definition. *The Oxford English Dictionary* defines “culture” as “the customs, arts, social institutions, and achievements of a particular nation, people, or other social group.”³⁸ Cultural harm occurs when indigenous peoples are prevented from participating in their traditional practices (i.e., hunting, gathering, beading, spiritual practices). As Professor Wood from the University of Oregon Department of Law, explains, tribal culture is inextricably linked to the land.

Specific landscapes reaffirm an interconnected worldview. Tribal communities continue to have a deep relationship with ancestral homelands for sustenance, religious communion and comfort, and to maintain the strength of personal and interfamilial identities.

³⁴ Ibid., 1653-54.

³⁵ Benjamin J. Richardson, "Environmental Law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum," *The Colorado Journal of International Law and Policy* 11, no. 1 (2000).

³⁶ Dorothy L. Hodgson, "Introduction: Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas " *American Anthropologist* 104, no. 4 (2002).

³⁷ *Dictionary of Anthropology*, s.v. "Culture."

³⁸ *Oxford Dictionaries*, s.v. "Culture."

Through language, songs, and ceremonies, tribal people continue to honor sacred springs, ancestral burial places, and other places where ancestral communities remain alive. Particular landscapes and sacred sites are the “holy lands” of Native communities.³⁹

This is important when discussing environmental conservation in relation to tribes, because the spiritual base of a Native American land ethos inspires moderation in resource utilization.⁴⁰ It also includes a responsibility to practice conservation in the present so that resources are available for future generations.⁴¹

One example of cultural harm that demonstrates the interrelatedness of elements, such as language and land, was the federal government’s practice of forcing Native children to attend boarding schools far from their reservations. The children were prohibited from speaking their language and practicing their religion.⁴² This practice of “assimilation” occurred from the 1880s through the 1920s in the contiguous United States.⁴³ This practice, however, was continued in Alaska long after the demise of the federal government’s assimilation policy, well into the 1970s. Not only were Alaska Native children sent to boarding schools within Alaska far from their families; they were also sent to BIA-run schools in the lower 48 states.⁴⁴ This forced removal deprived generations of practicing their religion, learning and speaking their language, and nurturing a relationship

³⁹ Wood and Welker, "Tribes as Trustees Again," 381.

⁴⁰ Ibid., 377.

⁴¹ Ibid., 385-86. (See also the oft-quoted Iroquois Maxim “In our every deliberation, we must consider the impact of our decisions on the next seven generations.” (circa 1700-1800))

⁴² Tsosie, "Indigenous People and Environmental Justice," 1650.

⁴³ Carolyn J. Marr, "Assimilation through Education: Indian Boarding Schools in the Pacific Northwest", University of Washington Digital Collections <http://content.lib.washington.edu/aipnw/marr.html> (accessed August 26 2013).

⁴⁴ Jim LaBelle and Stacy L. Smith, "Boarding School: Historical Trauma among Alaska's Native People," *Voices of Our Elders* (2006). http://elders.uaa.alaska.edu/reports/yr2_2boarding-school.pdf (accessed August 26, 2013).

with the land. Although such blatant cultural harm has ceased in the United States, a more subversive harm continues with the exclusion of indigenous peoples from lands that were formally part of tribal lands but now lie outside reservation boundaries or when a sacred site is destroyed or contaminated.⁴⁵

There have been cases litigated as claims for “religious freedom.”⁴⁶ In *Lyng v. NW Cemetery Protective Ass’n*, mentioned below, the Supreme Court presumed that the government’s development of a road through a Native American sacred site would “virtually destroy” the religious traditions of the affected indigenous peoples, but the Court explained that road construction on public lands was not the sort of forcible government action that prompts First Amendment scrutiny.⁴⁷ The indigenous peoples’ beliefs were unfettered, and that was of primary concern, according to the Court.⁴⁸ The Court found no trust responsibility on the part of the U.S. government that would dictate protection of sacred sites.

This disconnect also occurs in cases where indigenous peoples bring claims for environmental damage that have also caused cultural harm. The Exxon Valdez oil spill in Alaska serves as a good example. In 1989, the oil tanker, “Exxon Valdez,” ran aground off the coast of Alaska spilling an estimated 11

⁴⁵ Tsosie, "Indigenous People and Environmental Justice," 1650.

⁴⁶ See, e.g., *Lyng v. NW Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (refusing to apply Free Exercise clause of U.S. Constitution or the American Indian Religious Freedom Act to protect Native sacred site from development by U.S. Forest Service on federal land); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980) (similar result with attempt to protect Navajo sacred sites within the Rainbow Bridge National Monument).

⁴⁷ Tsosie, "Indigenous People and Environmental Justice," 1650 (citing *Lyng*, 485 U.S. at 451, 457 (internal citations omitted)).

⁴⁸ *Ibid.*

million gallons of oil and affecting over 1,000 miles of coastline.⁴⁹ Alaska Natives attempted to recoup damages for the injury to their lands and natural resources and also for the cultural harm that they experienced from the failure to be able to engage in their traditional customs.⁵⁰ Ultimately, the Ninth Circuit Court of Appeals affirmed the district court's holding that cultural harm is an insufficient ground for compensation.⁵¹ The Court determined that the impacts from the oil spill on the subsistence lifestyles of the affected Alaska Natives were not markedly divergent from the effects on other rural Alaskans.⁵² According to the district court, "one's culture—a person's way of life—is deeply embedded in the mind and heart. Even catastrophic cultural impacts cannot change what is in the mind or in the heart unless we lose the will to pursue a given way of life."⁵³ In sum, the court found that the sacred site itself wasn't important. It was people's beliefs that were important rather than any connection to the land that might support those beliefs.⁵⁴ Within Indian Country (e.g., reservations), tribal sovereignty has real value in the management of the environment.⁵⁵ As demonstrated with the above two examples, outside of Indian Country tribal concerns are often mutated into the same as those of other "citizens."

⁴⁹ Alaska Oil Spill Commission, "Spill: The Wreck of the Exxon Valdez" <http://www.evostc.state.ak.us/facts/details.cfm> (accessed August 23 2013).

⁵⁰ *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997).

⁵¹ *Ibid.*

⁵² *Ibid.*, at 1198.

⁵³ *In re Exxon Valdez*, No. A89-0095-CV, 1994 WL 182856, at *4 (D. Alaska Mar. 23, 1994), *aff'd sub nom Alaska Native Class*, 104 F.3d 1196 (Alaska Ct. App. 1997).

⁵⁴ The court attempted to explain its decision in many ways: (1) Alaska Natives have already been impacted by the incursion of Western cultural and this is no different; (2) rural users won't understand if we recognize Alaska Natives over them; (3) the court had already awarded over a billion dollars in criminal sanctions; (4) this was basically a loss of enjoyment of life claim, which would require that bodily harm be shown. *Ibid.*

⁵⁵ *Ibid.*

Unfortunately, most of Alaska is defined as “outside of Indian Country,” thus cultural harm is too often the norm.

3. International Indigenous Rights

During the first United Nations Decade for Indigenous Peoples, strides were made towards asserting indigenous rights. This is demonstrated in various forums and documents. Additionally, according to Svein Jentoft, professor at the Norwegian College of Fishery Science, University of Tromsø, a significant achievement of the Decade occurred during the United Nations (UN) World Summit on Sustainable Development.⁵⁶ For the first time in UN history, the phrase “indigenous peoples” was used unqualifiedly in an official document.⁵⁷ The United Nations Conference on Environment and Development (UNCED) initiatives clearly recognized the role of indigenous peoples. Five major documents were signed at UNCED: Agenda 21, a set of forest principles, a Biodiversity Convention, the Rio Declaration, and a convention on climate change.⁵⁸

The Agenda 21 text on Indigenous People and Their Communities, paragraph 26.1, recognizes the “holistic tradition of scientific knowledge of their lands, natural resources and environment” of indigenous groups who represent a

⁵⁶ Svein Jentoft, *Indigenous Peoples: Resource Management and Global Rights* (The Netherlands: Eburon Academic Publishers, 2004).

⁵⁷ “We reaffirm the vital role of indigenous peoples in sustainable development.” World Summit on Sustainable Development. *Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development: The Final Text of Agreements Negotiated by Governments at the World Summit on Sustainable Development*, 26 August-4 September 2002, Johannesburg, South Africa. (New York: United Nations Department of Public Information), Sept. 4, 2002, <http://www.un-documents.net/jburgdec.htm>.

⁵⁸ See more at: <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/brazil/indigenous-peoples-after-unced#sthash.WewkQF8b.dpuf>.

significant percentage of the global population. The text also refers to economic, social and historical factors that have hindered indigenous peoples' "ability to participate fully in sustainable development practices on their lands" and advocates that they "shall enjoy the full measure of human rights and fundamental freedoms without hindrance of discrimination."⁵⁹

Principle 22 of the Rio Declaration on Environment and Development recognizes that:

Indigenous Peoples and their communities... have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in achieving their sustainable development.⁶⁰

These documents mention traditional knowledge and ways of knowing and sense of place inherent to all indigenous peoples. Principle 22 goes beyond acknowledgement and suggests that individual countries should not only recognize indigenous peoples and the value of their ways of knowing, but also support their inherent sovereignty. The agenda for sustainable development adopted at the Rio Summit promotes complete cooperation and recognition of indigenous peoples, including acknowledging their traditional resource management practices, resolving their land claims, and safeguarding them from

⁵⁹ United Nations Conference on Environment and Development. Agenda 21, *Rio Declaration, Forest Principles*. (New York: United Nations), June 13, 1992, <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=52>.

⁶⁰ Located at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en>.

projects that would impair the environment of their lands or that would be regarded as incongruous under indigenous cultural norms.⁶¹

The ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries provides a more significant articulation of the rights of indigenous peoples.

The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of programs for national and regional development which may affect them directly.⁶²

ILO Convention 169 stretches further than Principle 22's suggestions and states that indigenous peoples have "rights."⁶³ Those "rights" include having control over their own development in whatever facet that may apply. A "right" as defined by Black's Law Dictionary is "[s]omething that is due to a person by just claim, legal guarantee, or moral principle...a power, privilege, or immunity secured to a person by law."⁶⁴ The Working Group on Indigenous Populations,

⁶¹ Report of the United Nations Conference on Env't & Dev., Rio de Janeiro, June 3-14, 1992, U.N. Doc. A/CONF.151/26/Rev. 1 (1993): 387; Tsosie, "Indigenous People and Environmental Justice," 1667.

⁶² International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169, <http://www.refworld.org/docid/3ddb6d514.html>.

⁶³ Some have argued that "rights" is a word that is not culturally appropriate in the context of indigenous peoples. According to Rebecca Tsosie, "Rights are, after all, a distinctively Western concept and may not really reflect the interests of indigenous peoples at all. Moreover, some might question whether forcing indigenous peoples to phrase their concerns as 'rights' may actually perpetuate a form of forcible assimilation or colonization." Tsosie, "Indigenous People and Environmental Justice," 1652-53. She goes on to say, "Although these points are valid, insofar as rights are used to protect human values, including the basic needs and interests at the heart of a group's distinctive cultural or political identity, they are useful and allow indigenous peoples to participate equally in the national and international discourse about human rights." *Ibid.*

⁶⁴ *Black's Law Dictionary* 7th ed.

established by the UN in 1982, worked for more than twenty years drafting the Declaration on the Rights of Indigenous Peoples.⁶⁵ With an overwhelming majority of 143 votes in favor, four negative votes cast (Canada, Australia, New Zealand, and United States) and 11 abstentions, the United Nations General Assembly (GA) adopted the Declaration on the Rights of Indigenous Peoples on September 13, 2007. The Declaration recognizes:

the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, which derive from their political, economic and social structures and their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.⁶⁶

These powerful statements, though, have limited authority. They only go as far as “the extent and in the structure and format that the international community of States has recognized them.”⁶⁷ Despite the labor and time that goes into formulating and ratifying international conventions, the laws and constitutions of individual nation-states, virtually whenever they come into conflict with sovereign intranational rights, have legal precedence.⁶⁸

The ILO Convention has only been ratified by twenty states⁶⁹ taking over two decades for the ratification of this non-binding Declaration on the Rights of

⁶⁵ Hodgson, "Comparative Perspectives."

⁶⁶ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, <http://www.refworld.org/docid/471355a82.html>.

⁶⁷ Siegfried Wiessner, "United Nations Declaration on the Rights of Indigenous Peoples" http://untreaty.un.org/cod/avl/ha/ga_61-295/ga_61-295.html (accessed August 23 2013).

⁶⁸ Hodgson, "Comparative Perspectives."

⁶⁹ Argentina (2000); the Plurinational State of Bolivia (1991); Brazil (2002); Chile (2008); Columbia (1991); Costa Rica (1993); Denmark (1996); Dominica (2002); Ecuador (1998); Fiji (1998); Guatemala (1996); Honduras (1995); Mexico (1990); Nepal (2007); Netherlands (1998); Norway (1990); Paraguay (1993); Peru (1994); Spain (2007); Bolivarian Peninsula of Venezuela (2002) (ILOLEX: Database of International Labour Standards, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO).

Indigenous Peoples due to various governments' concerns that it would motivate indigenous groups to secede.⁷⁰ While these documents may have little power with states, they do presage the growing national and perhaps international power of the indigenous rights movement. They also cement into the global consciousness the connection between indigenous peoples, their lands, and sovereignty. An international indigenous movement has begun. Disparate indigenous groups have for the most part come together recognizing each other's claims for certain rights and have moved from what previously was internal state bickering⁷¹ to global assertions for representation, recognition, resources and rights.⁷²

The Committee on the Elimination of Racial Discrimination (CERD), for example, has largely affirmed the land rights of indigenous peoples.⁷³ The voices of the San in Botswana, for one – dispossessed from their aboriginal homeland and their traditional lifeways for decades – are now being heard.⁷⁴ In 2002, CERD released a report condemning Botswana's treatment of the San as racist.⁷⁵ The report criticized both Botswana's eviction of the San from their ancestral land

⁷⁰ Richardson, "Environmental Law in Postcolonial Societies."

⁷¹ Unfortunately, some internal dissent continues as illustrated by the disputes generated around the BIA's draft rules overhauling the requirements for federal recognition of tribes. Recognized tribes fight against the recognition of previously-unrecognized tribes because of limited resources. Surrounding non-Native community members fight against recognition because they don't understand how peoples who have played in the "local little league and joined local churches should have the same standing as others." (See Michelle Melia, "U.S. Overhauls Process for Recognizing Indian Tribes," *Time* (2013). <http://nation.time.com/2013/08/25/u-s-overhauls-process-for-recognizing-indian-tribes/> (accessed August 30, 2013).)

⁷² Hodgson, "Comparative Perspectives."

⁷³ Prosper Nobirabo Musafiri, *The Dispossession of Indigenous Land Rights in the Drc: A History and Future Prospects* (England: Forest Peoples Programme, 2009).

⁷⁴ Sylvain, "Land, Water and Truth: San Identity and Global Indigenism."

⁷⁵ United Nations, *Report of the Committee on the Elimination of Racial Discrimination* 2002. Supplement No. 18 (A/57/18), 53-6.

in the Central Kalahari Game Reserve, and government officials' prejudice towards all Bushman tribes. It has also established the direct connections that exist for indigenous peoples between their lands, culture and economic practices. For example in 2006, CERD asked the Government of Botswana to: "pay particular attention to the close cultural ties that bind the San/Basarwa to their ancestral land; [and] ... protect the economic activities of the San/Basarwa that are an essential element of their culture, such as hunting and gathering practices, whether conducted by traditional or modern means (...)" Then, in 2006, after the longest court battle in Botswana's history, the San won a major case in Botswana's High Court, allowing them to return to their homelands and continue their hunter-gatherer lifestyle.⁷⁶ There have been setbacks. For instance, while the San won the 2006 court case, Botswana's interpretation of the ruling is extremely narrow. The government continues to read the ruling as only allowing the 189 actual applicants and their spouses and minor children to return to the Central Kalahari Game Reserve.⁷⁷ The U.S. State Department's 2012 Human Rights Report on Botswana suggests that Botswana has continually neglected to implement its anti-discrimination policies in regard to the San: "...the San remained economically and politically marginalized and generally did not have access to their traditional land. The San continued to be geographically isolated, had limited access to education, lacked adequate political representation, and were

⁷⁶ David Beresford, "Bushmen Win Rights over Ancestral Lands," *The Guardian*, December 13 2006.

⁷⁷ United States' State Department, *Country Reports on Human Rights Practices for 2012: Botswana* 2013

not fully aware of their civil rights.”⁷⁸ Botswana’s official policy is that there are no “indigenous peoples” within its borders. All are “Batswana.”⁷⁹ This lack of recognition of indigenosity has in many ways nullified the favorable court decisions. Many of the San have not been able to return to their lands, though international pressure continues for recognition of the San’s indigenous rights.⁸⁰

Tsosie argues that for indigenous peoples to make real strides toward environmental self-determination they must have “equal right to self-determination as ‘peoples.’”⁸¹ She argues that indigenous peoples should utilize international human rights law to advance their environmental self-determination efforts.⁸² There are hurdles to such an approach. For purposes of the International Covenant on Civil and Political Rights,⁸³ indigenous peoples have been recognized as holders of “minority rights” under Article 27⁸⁴ of the Covenant instead of “peoples” under Article 1.⁸⁵ According to Tsosie, this is an important

⁷⁸ Ibid.

⁷⁹ Laura Clarke, "The Diversity of Culture: Recognising the Rights of Southern Africa's San Peoples", Consultancy Africa Intelligence http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1062:the-diversity-of-culture-recognising-the-rights-of-southern-africas-san-peoples-&catid=91:rights-in-focus&Itemid=296 (accessed August 23 2013).

⁸⁰ Survival International is an NGO that advocates for tribal peoples through the recognition of the UN Declaration on the Rights of Indigenous Peoples, and the Indigenous & Tribal Peoples Convention (ILO 169). They have worked for years to raise awareness about the plight of the San. See <http://www.survivalinternational.org/tribes/bushmen>.

⁸¹ Tsosie, "Indigenous People and Environmental Justice," 1664.

⁸² Ibid.

⁸³ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 5 August 2013]

⁸⁴ “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.” Ibid.

⁸⁵ “1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the

difference.⁸⁶ Under Article 27, indigenous peoples as ethnic, religious, and linguistic minorities may only have a right to protest state policies that would prohibit them from enjoying their culture, practicing their religion, or speaking their language. They do not, however, have the right to freely seek their own economic, cultural and political development as guaranteed by Article 1. Notably, Article 3 of the Declaration on the Rights of Indigenous Peoples uses identical wording describing self-determination as Article 1 of the Covenant on Civil and Political Rights.⁸⁷

Tsosie asserts that “such a right should include the right to survive as a distinct people and the right to restrain national governments from undertaking policies that would jeopardize their continued physical or cultural survival.”⁸⁸ While Tsosie urges that the Declaration provides a jumping off point for indigenous peoples’ right of environmental self-determination, it is important to keep in mind that countries with the highest concentration of indigenous peoples did not adopt it and the document is non-binding to the parties that did sign. In fact, the document itself proclaims that it is only “a standard of achievement to be pursued in a spirit of partnership and mutual respect.”⁸⁹ The mirroring of language, however, in Article 3 of the Declaration on the Rights of Indigenous

principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.” Ibid; see also Tsosie, "Indigenous People and Environmental Justice."

⁸⁶ Ibid., 1664.

⁸⁷UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html> [accessed 5 August 2013] (“Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”)

⁸⁸ Tsosie, "Indigenous People and Environmental Justice," 1665.

⁸⁹ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: <http://www.refworld.org/docid/471355a82.html> [accessed 5 August 2013].

Peoples with the language in Article 1 of the Covenant on Civil and Political Rights has the potential of highlighting the problem with indigenous peoples being recognized as a holder of “minority rights” under Article 27 of the Covenant. This emphasis could urge movement toward a more universal acceptance of indigenous peoples’ right of environmental self-determination.

C. FEDERAL RESPONSIBILITY TO TRIBES

As discussed earlier, international conventions are one piece of a multi-faceted tool to enact change on a global stage. However, it is the laws and regulations of individual nation-states that hold precedence. So, where do indigenous peoples stand in the eyes of the United States federal government? This is a complicated question. Federal Indian law is something that is constantly evolving.

In this section, an overview of the United States fiduciary responsibility to Native Americans will be presented. Court cases abound and so do regulations. What impact do they have on Indian Country? The United States has plenty of indigenous work groups, as well. What have they accomplished?

1. Indian Law in the United States

“Law is a social institution and an instrument for social change and social continuity. It shapes and forms social, political, and economic relationships and allocates the consequences of technological development. Law plays a central role in facilitating the process that began in other social institutions and within other academic disciplines...[L]aw has an important social function,

including dispute resolution, shaping the choice of conduct and teaching values, and building social consensus...”⁹⁰

The U.S. Constitution contains a lone phrase – six words – mentioning the Federal-tribal relationship.⁹¹ This phrase grants Congress the power to “regulate Commerce...with the Indian Tribes.” From this phrase and the international rule of discovery, which states that in the New World the first discovering nation has dominion over the land and occupants residing on that land discovered, Congress and the Supreme Court formulated their vision of the relationship between the indigenous peoples of this land and those who “discovered” it.⁹² Above all, the principle rule of the Federal-Native relationship is the acknowledgement of indigenous peoples’ inherent sovereignty.⁹³ This is the basis of Federal Indian Law. This is the condition that allows for specific Native institutions and rights. The historical political status of Native Americans permits activities such as permitting a hiring preference for Native Americans,⁹⁴ which would otherwise be impermissible, if they were racially defined.

To understand the quest for Indian environmental self-determination, a few court cases along with environmental statutes and regulations must be explained. Some concepts of Federal Indian law to be covered from the outset

⁹⁰ Robin Morris Collin and Robert William Collin, "Where Did All the Blue Skies Go? Sustainability and Equity: The New Paradigm," *Journal of Environmental Law and Litigation* 9, no. 2 (1994): 453.

⁹¹ U.S. Constitution, art. 1, sec. 8, cl. 3.

⁹² David S. Case and David A. Voluck, *Alaska Natives and American Laws* 2nd ed. (University of Alaska Press, 2002).

⁹³ *Ibid.*

⁹⁴ *See Morton v. Mancari*, 417 U.S. 535, 553-54 (1974) (“this preference does not constitute ‘racial discrimination.’ Indeed, it is not even a ‘racial’ preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government.”)

include “Indian Country;” “aboriginal title;” plenary power; and fiduciary responsibility. Indian Country is a term that is defined under 18 U.S.C.A. § 1151 as:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same

Black’s Law Dictionary provides a definition that is simpler, though less helpful.

Indian Country is defined as a “part of public domain set apart for use, occupancy and protection of Indian peoples.”⁹⁵ The presence or absence of Indian Country is a very contentious issue because it is often used by governmental entities to define a tribe’s jurisdictional authority.

“Aboriginal title” is referred to as “Indian title” or “Indian right of occupancy” and is defined as group or tribal title.⁹⁶ This affords a tribe the right to be the sole occupants of a land but precludes them from being able to sell the land to anyone but the federal government. This was determined in a case that came before the Supreme Court, *Johnson v. M’Intosh*.⁹⁷ Chief Justice John Marshall, the “first American jurist to define the essential principles of the aboriginal title doctrine,” determined that the United States held dominion over all

⁹⁵ *Black’s Law Dictionary* .

⁹⁶ Case and Voluck, 36.

⁹⁷ *M’Intosh*, 21 U.S. 543, 595 (1823).

land within its domain including that occupied by Indian tribes.⁹⁸ In a case where both the U.S. government and a tribe sold a particular parcel of land, Chief Justice Marshall decided that the Indians had no right to sell land unless they sold it to the federal government. The federal government, however, had the power to dispose of land, occupied by Indians or not, in any manner they wished.

Chief Justice Marshall fleshed out more of the intricacies of aboriginal title in *Worcester v. Georgia*,⁹⁹ in which he concluded that states held no authority on tribal lands. The federal government alone had the right to interfere with aboriginal possession. “Unless the United States or the Natives themselves extinguish title to aboriginal lands, state governments (and private persons) deal with such lands without legal authority and under the peril of becoming trespassers.”¹⁰⁰

These cases illustrate the foundation of the government-to-government relationship between the federal government and tribes. It is an unequal relationship as shown by the fact that the federal government can dispense of property as they wish but indigenous peoples cannot. It is, nevertheless, an acknowledgement of inherent tribal sovereignty, which sets the relationship between Native Americans and the federal government apart from other relationships.¹⁰¹ Chief Justice Marshall in *Cherokee Nation v. Georgia*,¹⁰² described this relationship as unlike any other but stated that it resembled the relationship between a guardian and a ward. This description depicts “tribes” as

⁹⁸ Case and Voluck, 36.

⁹⁹ *Worcester v. Georgia*, 31 U.S. 515 (1830).

¹⁰⁰ Case and Voluck, 38.

¹⁰¹ *Ibid.*, 19.

¹⁰² *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

weaker nations needing the protective umbrella of a stronger nation, the United States. The federal government then has a duty to protect Indian tribes from outside malevolent interests. This, according to Case, is the source of federal plenary power.¹⁰³

Plenary power is defined as “authority and power as broad as is required in a given case.”¹⁰⁴ Case defines plenary power more specifically as Congress having full power over Indian affairs.¹⁰⁵ Congress, with its infinite power (if not always wisdom), has exercised its plenary powers to extinguish aboriginal rights for specific tribes and to pass such laws as Public Law 280, which limits tribal jurisdiction in certain states. The U.S. Supreme Court, however, can hold Congress in check. The Supreme Court has issued opinions in several cases holding that the federal government has a responsibility to treat indigenous peoples fairly or with a fiduciary responsibility.

“Fiduciary” is defined in Black’s Law Dictionary as “a person having duty, created by his undertaking, to act primarily for another’s benefit in matters connected with such undertaking. As an adjective it means of the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust or confidence.”¹⁰⁶ Some academics opine that while the federal fiduciary responsibility is partially founded on the federal government’s duty to hold lands and other resources in trust for Native American tribes, the

¹⁰³ Case and Voluck, 23.

¹⁰⁴ *Black's Law Dictionary* .

¹⁰⁵ Case and Voluck, 2.

¹⁰⁶ *Black's Law Dictionary* .

fundamental intention is to safeguard tribal self-governance.¹⁰⁷ Recent court cases reflect the evolution and reality of the judiciary's interpretation of this trust responsibility.

*Williams v. Lee*¹⁰⁸ has been called the first case in the modern era of U.S. Indian law.¹⁰⁹ The U.S. Supreme Court held that tribal courts had exclusive jurisdiction over civil disputes arising in Indian Country involving tribal members as defendants. In *Central Machinery Co. v. Arizona State Tax Commission*,¹¹⁰ the U.S. Supreme Court held that the State of Arizona had no authority to impose a tax on a corporation's sale to a tribe. The holding affirmed that federal Indian law preempts a state's imposition of taxes on business activities in Indian Country. These cases are important to demonstrate the U.S. Supreme Court's recognition of tribal sovereignty in the modern era, reaffirming a hundred years of jurisprudence.

In *United States v. White Mountain Apache Tribe*,¹¹¹ the court ruled 5-4 in favor of the White Mountain Apache Tribe, stating that the U.S. government did have a fiduciary responsibility to maintain a building held in trust for the Tribe. This case, however, was the beginning of a divergence in the Supreme Court's interpretation of Indian law. The crux of the issue was that the fiduciary responsibility owed by the U.S. government was only upheld due to explicit acknowledgement of it in a 1960 act instead of upholding it under the basic tenets of federal Indian law. While some, such as Tracy Labin, Director of the Tribal

¹⁰⁷ Collin and Collin, "Where Did All the Blue Skies Go? Sustainability and Equity: The New Paradigm," 487.

¹⁰⁸ *Williams v. Lee*, 358 U.S. 217 (1959).

¹⁰⁹ Matthew L.M. Fletcher, "The Supreme Court and the Rule of Law: Case Studies in Indian Law," *The Federal Lawyer* 55, no. 3 (2008): 28.

¹¹⁰ *Central Machinery Co.*, 448 U.S. 160 (1980).

¹¹¹ *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

Supreme Court Project and the Native American Rights Fund in Washington, felt that the White Mountain case was a victory for Tribes in asserting fiduciary responsibility, others were not so optimistic.¹¹²

It became more apparent that the court was attempting to limit the federal government's trust responsibility in *United States v. Navajo Nation*.¹¹³ In 2003, the Supreme Court rejected the Navajo Nation's claim against the United States under the Indian Tucker Act,¹¹⁴ for breach of fiduciary responsibility for not expeditiously authorizing a royalty rate increase under a coal lease to which the tribe was a party. The Indian Tucker Act waives the U.S. government's sovereign immunity in certain circumstances, giving the Court of Federal Claims jurisdiction to hear claims against the United States by any tribe. The Supreme Court held in *United States v. Navajo Nation* that the Indian Tucker Act does not create substantive rights; it simply waives the government's sovereign immunity from lawsuits. The Court further stated that, without a statutory basis for the tribe's fiduciary duty claim against the United States, its claim must fail. The case was remanded to the Court of Federal Claims, where the tribe attempted to use different federal statutes to support its claim. On April 6, 2009, the Supreme Court again rejected the tribe's claim, holding that neither the Navajo-Hopi Rehabilitation Act of 1950¹¹⁵ nor the Surface Mining Control and Reclamation

¹¹² E.S. Dempsey, "Finding Meaning in the Decisions of the U.S. Supreme Court," *Indian Country Today*, March 17 2003.

¹¹³ *United States v. Navajo Nation*, 537 U.S. 488 (2003).

¹¹⁴ *Indian Tucker Act*, U.S. Code. Vol. 28, sec. 1505 (1992), "confers a like waiver for Indian tribal claims that "otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe." *White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (quoting § 1505).

¹¹⁵ *Navajo-Hopi Rehabilitation Act of 1950*, U.S. Code, vol. 25, secs. 631-640c-3 (1950).

Act of 1977¹¹⁶ could be the foundation for a claim against the United States. Additionally, the Court rejected the tribe's assertion that the government's "comprehensive control" over coal on Indian lands creates a common law fiduciary duty in favor of tribes. The Court emphasized that the Indian Tucker Act allows only claims arising under "the Constitution, laws or treaties of the United States, or Executive orders of the President." Only if a federal statute creates a fiduciary duty can a tribe rely on it for a claim under the Indian Tucker Act. According to the Court, common law claims must then necessarily fail. This was a stark illustration of how far the Supreme Court had moved from the common law understanding of tribal trust responsibility and its own precedent.

2. Federal Trust Responsibility in Action.

The courts may be attempting to limit the federal government's responsibility to tribes but, as it stands, federal agencies continue to acknowledge the responsibility. For example, the United States Fish and Wildlife Service has a Native American policy, developed in 1994 and still touted today.¹¹⁷ It explicitly recognizes tribal sovereignty and "favors empowering Native American governments."¹¹⁸ Likewise, the Environmental Protection Agency (EPA) has an American Indian Environmental Office, which "leads EPA's efforts to protect human health and the environment of federally recognized Tribes by supporting implementation of federal environmental laws consistent with the federal trust

¹¹⁶ *Surface Mining Control and Reclamation Act of 1977, U.S. Code*, vol. 30, secs. 1201-1328 (1977).

¹¹⁷ USFWS, "The Native American Policy of the U.S. Fish and Wildlife Service," ed. U.S. Fish and Wildlife Service (1994).

¹¹⁸ *Ibid.*, 3-4. (cf. *Ibid.*, 2. "The Policy does not suggest recognition of tribal authority that does not currently exist, however, the Service need not wait for judicial recognition of tribal authority over fish and wildlife when such authority is already supported by law.")

responsibility, the government-to-government relationship, and EPA's 1984 Indian Policy."¹¹⁹

More broadly, though, the federal trust relationship can often be viewed as a double-edged sword. According to attorney Larry Leventhal, writing for the *Hamline Law Review*, "the trust relationship evolved judicially and survived occasional congressional attempts to terminate the government's obligations to Indians. In theory, the trust relationship exists to protect tribes and individual Indians. However, in practice, the federal trustee has at times not worked in the best interests of the intended beneficiaries."¹²⁰

Despite current attempts to deny federal fiduciary responsibility, Native American activists and lawyers maintain that the federal government has a trust obligation to not only federally-recognized tribal governments but also indigenous peoples¹²¹ in the United States.¹²² While the courts seem to be distancing themselves from the idea of the common law concept of fiduciary responsibility and relying on substantive statutory provisions, there are key pieces of legislation on which tribes can rely.

¹¹⁹ A.I.E.O., "A.I.E.O. Mission", U.S. Environmental Protection Agency <http://www.epa.gov/tp/aieo/index.htm> (accessed August 24 2013).

¹²⁰ Larry B. Leventhal, "American Indians-the Trust Responsibility: An Overview," *Hamline Law Review* 8, (1985). See *Cobell v. Salazar*, 573 F.3d 808 (D.C.Cir. 2009) as a literal example of the federal government mishandling Indian trust accounts – this was a class-action lawsuit brought by Native American representatives against two departments of the United States government. The plaintiffs claimed that the U.S. government has incorrectly accounted for the income from Indian trust assets, which are legally owned by the Department of the Interior, but held in trust for individual Native Americans (the beneficial owners).

¹²¹ As individuals and as non-federally recognized tribes.

¹²² Jean Gamache, Tribal Coordinator EPA's Alaska Operations Office, conversation with author, 2002; see also, generally, the Native American Rights Fund at <http://www.narf.org>.

Public Law 67-85, commonly referred to as the Snyder Act, allows for Bureau of Indian Affairs (BIA) expenditures as “Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States.”¹²³ This may include providing funds for education, health, welfare, economic development and other human services such as retaining employees for tribal governance. This is extremely important legislation for all tribes because it provides for a majority of the funding that runs tribal governments. And according to Case, it serves as another example of the federal government’s recognition of the inherent sovereignty of the indigenous nations in the United States.¹²⁴

The Indian Reorganization Act of 1934, also known as the “Wheeler-Howard Act,” is another key piece of legislation.¹²⁵ This halted the federal allotment process of Indian lands; gave the Secretary of the Interior authority to acquire new lands in trust for landless Indians or existing reservations; provided funds for economic development; permitted indigenous groups to formulate their own government institutions under federal constitutions; and allowed tribes to establish federally-chartered businesses or cooperatives. There was debate about whether this piece of legislation applied to Alaska Natives until the issue was put to rest by a 1936 amendment that specifically recognized Alaska Native issues. The Secretary of the Interior at the time, Harold Ickes, supported reservations in Alaska because they could, “define Alaskan tribes by identifying particular groups with the land they occupied;” define “geographical limits of jurisdiction so

¹²³ *The Snyder Act of 1921, U.S. Code*, vol. 25, sec. 13 (1921).

¹²⁴ Case and Voluck.

¹²⁵ *The Indian Reorganization Act of 1934, U.S. Code*, vol. 25, secs. 461-479 (1934).

that Alaska Native communities” could exercise powers of local government; and enable the U.S. to “fulfill its moral and legal obligations to protect the ‘economic rights’ of Alaska Natives”¹²⁶

Six reservations were created in Alaska through the authority of this amendment.¹²⁷ In part, reserves were created to protect the subsistence resources of the tribes.¹²⁸ One case arose that, despite being a partial victory in the U.S. Supreme Court, halted the forward motion of creating protected lands for indigenous peoples in Alaska. In *Hynes v. Grimes Packing Co.*,¹²⁹ the Department of Interior (DOI) attempted to stop non-natives from fishing on reservation property (i.e., waters surrounding the Karluk Reserve). This case was brought by the Kodiak salmon packers who were outraged that prime fishing grounds would be placed off-limits to anyone but the indigenous peoples occupying the reserve. The Supreme Court found that the DOI could not create a permanent reserve and that it had no authority to enforce exclusive Native

¹²⁶ Case and Voluck, 84.(citing H.R. Rep. No. 2244, 74c:2s, 4 (1936)).

¹²⁷ For a more detailed discussion of reservations in Alaska, see *ibid.*, 65-98. In sum, according to Case, at 68-69, “Prior to 1936 and the IRA, there were four methods of creating Alaska Native reserves:

Treaty reserves:	available until 1871, but none were created in Alaska.
Statutory reserves	only two were created in Alaska; Metlakatla in 1891 and Klukwan in 1957.
Executive order Indian reserves:	before 1919 approximately 150 of these were created in Alaska.
Public purpose reserves:	five of these were established between 1920 and 1933 by executive order...”

The IRA reserves were the ones most similar to the reservations in the Lower 48 states. And the agreements created between the six IRA tribes and the Secretary of Interior were the most analogous to the treaties negotiated for Native Americans in the lower 48 prior to 1871. *Ibid.*, 92.

¹²⁸ Case asserts that the main purpose behind the reservation policy was “ultimate extinguishment of aboriginal title” but that it also intended to provide a large enough resource base so that Alaska Natives would be able to continue to support themselves. *Ibid.*, 86.

¹²⁹ *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949).

fishing.¹³⁰ This case essentially made the DOI impotent and stymied the implementation of the Indian Reorganization Act (IRA) in Alaska. DOI was neither able to create permanent reserves nor could it enforce exclusive fishing privileges for Alaska Natives.

Public Law 83-280 (1953) and its subsequent amendment, Public Law 85-615 (1958),¹³¹ provided the state governments of Alaska, Wisconsin, Oregon, California, Minnesota and Nebraska with partial civil and full criminal jurisdiction in Indian Country. This limitation in sovereignty impeded tribes from practicing traditional forms of justice and issuing culturally appropriate modes of punishment. Some commentators believe that it has also given rise to a lack of respect from other law enforcement entities and the general public in regard to tribal laws.¹³² Many tribal leaders react to this by arguing that tribes need to act as sovereigns in order to be regarded in that way.¹³³ The next section addresses environmental laws that have specific application in tribal communities.

The Resource Conservation and Recovery Act (RCRA) was passed in 1976.¹³⁴ It was intended to promote the protection of health and the environment

¹³⁰ The Court found in *Hynes*, that the IRA of 1936 was important “for the reason that a statute that authorizes permanent disposition of federal property would be most strictly construed to avoid inclusion of fisheries by implication. [DOI] argues for a holding that the power granted covers water as well as land. If that power were broad enough to enable the Secretary to designate nonrevocable or permanent reservations of all Alaska fishing grounds for the sole benefit of natives living in villages adjacent to the fisheries, it might place in his hands the power to grant the natives the right to exclude all other fishermen from the fisheries.” *Hynes*, at 104-5. The Court did find that the Department of Interior could temporarily create a reserve. *Hynes*, at 110.

¹³¹ *Act of August 15, 1953, U.S. Code*, vol. 18, sec. 1162, vol. 25, secs. 1321-1326, vol. 28, sec. 1360 (1994).

¹³² Vanessa J. Jimenez and Soo C. Song, "Concurrent Tribal and State Jurisdiction under Public Law 280," *The American University Law Review* 47, (1998).

¹³³ Tribal Leaders, comments made during proceedings at EPA’s Region 10 Tribal Leaders Summit, 2002.

¹³⁴ *Resource Conservation and Recovery Act, U.S. Code*, vol. 42, secs. 6901-6992k (1976).

and to conserve valuable material and energy resources by creating a “cradle-to-grave program” to track hazardous wastes. It was amended in 1992 to ensure that federal agencies were subject to the requirements of federal, state, and local solid and hazardous waste laws in the same manner as any private party. This strong piece of legislation does not exempt federal facilities as many other pieces of legislation do. Tribes have been able to use RCRA to clean up facilities that otherwise may have remained, continuing to contaminate the land, water and air.

The Clean Water Act (CWA)¹³⁵ is an oft-attacked piece of legislation that undergoes constant reinterpretations. The original intent of this legislation was to restore and maintain the chemical, physical, and biological integrity of U.S. waters. This, however, is not as simple and clear as it may first appear. Recent Supreme Court rulings have called into question what constitutes protected wetlands under CWA.¹³⁶ Under the *Rapanos* ruling “isolated wetlands” are not protected.¹³⁷ Isolated wetlands, according to the Court, include anything not connected to a surface body of water such as a river.¹³⁸ Bogs and potholes would thus be excluded from protection. The EPA, at a conference in 2002, advised tribes that they needed to fill the gap for protection of such wetlands with their own water quality standards and tribal regulations.¹³⁹ This would be a way of asserting tribal environmental self-determination while covering areas

¹³⁵ *Clean Water Act, U.S. Code*, vol. 33, secs. 1251-1376 (1977).

¹³⁶ *See Rapanos v. U.S.*, 547 U.S. 715 (2006) (divided 4-1-4 opinion creating two tests for what is defined as “waters of the U.S.” – Scalia’s “continuous water connection” test and Kennedy’s “significant nexus” test; *see also, Solid Waste Agency v. U.S. Army Corps*, 531 U.S. 159 (2001) (holding “Migratory Bird Rule” exceeds authority of USACE).

¹³⁷ *Rapanos*, 547 U.S. at 717.

¹³⁸ *Ibid.*

¹³⁹ Tribal Leaders, comments made during proceedings at EPA’s Region 10 Tribal Leaders Summit, 2002.

unprotected by federal jurisdiction. The extent of that authority may be limited however.

Although tribes may be happy to devise their own water quality standards, there are many obstacles that require navigating before this can actually happen. Tribes are required to apply to the EPA for “Treatment as a State” (TAS).¹⁴⁰ Statutory requirements for TAS consideration include:¹⁴¹ being a federally recognized tribe, possessing a governing body, having adequate jurisdiction (defined by land status), and being able to complete all proposed activities.¹⁴² This can be a long and arduous process, possibly calling into question tribal jurisdiction if on a checkerboard reservation. After the Supreme Court decision in *Alaska v. Native Village of Venetie*, discussed below, Alaska Native tribes have been described as “sovereigns without territorial reach”¹⁴³ – meaning they have

¹⁴⁰ See Judith V. Royster and Michael C. Blumm, *Native American Natural Resources Law: Cases and Materials* (Durham, NC: Carolina Academic Press, 2002), 227-229; 239-240. “The [CWA] Amendments of 1987 provide that [the Environmental Protection Agency (EPA)] shall treat tribes as states for most purposes and programs of the Act...[including]: setting water quality standards for waters within reservations; administering the National Pollutant Discharge Elimination System permit program; assuming permitting authority for the § 404 program; granting or denying certification for federally permitted activities that may result in discharges of pollutants into the waters; and developing management programs for nonpoint source pollution...A tribal government that assumes responsibility for programs under the [CWA] may exercise its authority over water resources held by the tribe, by the [US] in trust for the tribe or member, or ‘otherwise within the borders of an Indian reservation.’...The EPA has stated that it considers ‘trust lands formally set apart for the use of Indians’ to be reservation lands...The CWA also contains a provision for federal settlement disputes between states and tribes sharing common bodies of water. The EPA is required to ‘provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water.’”

¹⁴¹ See Requirements for Indian Tribes to Administer Water Quality Standards Program, 40 C.F.R. 131.8 (1991-1994).

¹⁴² U.S. E.P.A., “Authorization for Tribes to Administer Water Quality Standards Program,” *Water: State, Tribal, and Territorial Standards* (2013). <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/auth.cfm> (accessed August 30, 2013).

¹⁴³ 522 U.S. 520, 526 (1998) (finding that lands assigned to Native Villages under the Alaska Native Claims Settlement Act (ANCSA), 85 Stat. 339, 43 U.S.C. §§ 1601-28, could not constitute dependent Indian Communities under 28 U.S.C. § 1151, the Indian Country statute).

no land base (i.e., reservation)¹⁴⁴ over which to exercise tribal jurisdiction. Land base is the distinguishing characteristic that allows tribes to apply for TAS. While any tribe can draw up its own water quality standards, if a tribe lacks reservation lands, lands that it owns in fee simple, or lands held in trust by the U.S. government, the water quality standards will hold very little or no legal authority over anyone who is not a member of the individual tribe.

While Alaskan tribes may not be able to apply for TAS because of lack of a land-base, the CWA specifically provides that all tribes should be treated similar to states for purposes of the Act.¹⁴⁵ This provision includes providing for grants to tribes for establishment of nonpoint source programs, development of waste treatment management plans, and for the construction of sewage treatment works.¹⁴⁶ The CWA, specifically, addresses Alaska Native organizations by providing:

No provision of this chapter shall be construed to—

- (1) grant, enlarge, or diminish, or in any way affect the scope of the governmental authority, if any, of any Alaska Native organization, including any federally-recognized tribe, traditional Alaska Native council, or Native council organized pursuant to the Act of June 18, 1934 (48 Stat. 987), over lands or persons in Alaska;
- (2) create or validate any assertion by such organization or any form of governmental authority over lands or persons in Alaska; or
- (3) in any way affect any assertion that Indian country, as defined in section 1151 of title 18, exists or does not exist in Alaska.¹⁴⁷

¹⁴⁴ Metlakatla, the only remaining reservation in Alaska, is the one exception to the general rule.

¹⁴⁵ *CWA, U.S. Code*, vol. 33, sec. 1377.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*, 1377(g).

Case points out that such provisions are representative of federal legislation passed in the 1980s. It was typical for legislation to disavow any significance in relation to the Alaska sovereignty debate.¹⁴⁸

The Clean Air Act (CAA)¹⁴⁹ suffers from many of the same problems (in reference to tribes) that plague the Clean Water Act. As one of the nation's best pieces of environmental legislation, it was enacted to protect and enhance the quality of the nation's air resources in order to protect public health and welfare. It has suffered many attacks over the years, from the Bush Administration's Clear Skies Initiative to more recent congressional challenges to limit its regulation of greenhouse gasses. Much like the CWA, the CAA permits tribes to be designated with TAS status.¹⁵⁰ Many of the same issues that arise with TAS for CWA come

¹⁴⁸ Case and Voluck, 415.

¹⁴⁹ *Clean Air Act, U.S. Code*, vol. 42, secs. 7401-7671g (1963).

¹⁵⁰ Royster and Blumm, 227-229; 239-240. "[T]he EPA has interpreted the [CAA] as a delegation of federal authority to tribes to administer programs with respect to all air resources within the tribe's reservation. ... The EPA's approach is based primarily on the language of the CAA, which authorizes the EPA to grant TAS if 'the functions to be exercised by the Indian tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribe's jurisdiction.' ... Because the CAA is a congressional delegation to tribes, Indian tribes seeking TAS with respect to air resources within the exterior boundaries of their reservations are not required to demonstrate jurisdiction over reservation lands. However, tribes seeking TAS with respect to 'other areas within the tribe's jurisdiction' must establish their jurisdiction over those areas under the same principles that govern tribal authority under the Water Acts.

The CAA places with the tribes the exclusive authority to redesignate air quality for attainment-area reservations. The Act provides that '[l]ands within the exterior boundaries of reservations of federally-recognized Indian tribes may be redesignated only by the appropriate Indian governing body.' ... The 1990 CAA amendments include a [TAS] provision, under which the EPA is charged with promulgating rules 'specifying those provisions of this Act for which it is appropriate to treat Indian tribes as states...[for] the management and protection of air resources within the exterior boundaries of the reservation or other areas within the tribes jurisdiction...' ... The EPA rules treat tribes as states for virtually all purposes of the act, with limited exceptions such as deadlines for submittal of various plans and criminal enforcement. ... In addition, the CAA now expressly permits tribes to develop tribal implementation plans (TIPs, equivalent to state implementation plans) for the implementation, maintenance, and enforcement of reservation air quality standards.

Tribal authority under a TIP will extend to all lands within the reservation, notwithstanding the issuance of fee patents...In addition, the Act provides for federal resolution of disputes between

into play when applying TAS to CAA. Tribes remain at a distinct disadvantage, especially those on checkerboard reservations and Alaska Natives.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁵¹ was passed in 1980 and amended in 1986. CERCLA provides broad federal authority for critical decisions regarding contaminated sites including cleanup levels, the remedy or type of cleanup to be used, and the timeline for cleanup. EPA is the agency charged with carrying out CERCLA. Section 126 of CERCLA affords the governing body of a tribe essentially the same treatment as states for many response-related purposes, which include:

- notification of releases,
- consultation on remedial actions,
- access to information, and
- roles and responsibilities under the National Contingency Plan (NCP).¹⁵²

Section 104 permits EPA to enter into cooperative agreements with eligible tribes to implement or cooperate in Superfund-eligible site response actions. When EPA is compelled to bring forth a remedial action, CERCLA states that they must attain all Applicable and Relevant or Appropriate Requirements (ARARs) of other federal environmental laws, more rigorous state

tribal governments and states where either government objects to redesignation by the other or to a permit for a new emission source that would cause or contribute to air pollution in excess of that allowed by the tribal or state government. Either government may request the EPA to enter into negotiations with the governments involved, and to make recommendations to resolve the dispute. If the parties do not reach agreement, however, the EPA 'shall resolve the dispute,' and the federal determination then becomes a part of the governments' air quality plans."

¹⁵¹ *CERCLA, U.S. Code*, vol. 42, secs. 9601-9675 (1980).

¹⁵² Office of Solid Waste and Emergency Response, "Consulting with Indian Tribal Governments at Superfund Sites: A Beginner's Booklet," ed. United States Environmental Protection Agency (2006).

or tribal environmental laws, and state or tribal environmental laws that oversee the placement of facilities.¹⁵³ This is one place where the power of tribal regulations is written in statute. CERCLA was amended in 1986 to provide even greater participation for tribes in the cleanup process.

Superfund Amendments and Reauthorization Act of 1986 (SARA)¹⁵⁴ afforded tribes the opportunity to apply to EPA for help in responding to contaminant releases into the environment. It also provided the mechanism for tribes to enter into a Cooperative Agreement with the EPA when they respond to a contaminated site and specified that tribes should be given the same respect as states or other federal agency consultation.

The National Environmental Policy Act (NEPA),¹⁵⁵ was enacted to promote measures for the prevention or elimination of damage to the natural environment and the biosphere. NEPA requires federal agencies to include environmental protection in decision-making and prepare Environmental Impact Statements (EIS) before any major federal actions significantly affecting the quality of the human environment. NEPA may require that the natural environment be taken into consideration when a possibly harmful activity is going to occur, but it does not require that any action be taken after the EIS and comment period. Alaskan tribal leaders have spoken bluntly to the U.S. EPA's Region 10 Regional Administrator about the efficacy of the EIS process. In a

¹⁵³ Office of Emergency and Remedial Response, *A.R.A.Rs Q's & A's: General Policy, R.C.R.A., C.W.A., S.D.W.A., Post-R.O.D. Information, and Contingent Waivers* 1991. Publication 9234.2-01/FS-A, 3.

¹⁵⁴ *Superfund Amendments and Reauthorization Act of 1986*, Pub. Law No. 99-499, 100 Stat. 1613 (1986).

¹⁵⁵ *NEPA, U.S. Code*, vol. 42, secs. 4321-4370f (1969).

tribal meeting in 2003, tribal leaders from Arctic Village and the Alaska Inter-Tribal Council (AITC)¹⁵⁶ expressed their frustration with the EIS process. Issues of primary concern were the short comment period, the lack of knowledge among tribal staff members to adequately comment, the lack of adequate consultation between the federal government and tribes, and a lack of authority to stop an action that is shown in the EIS to negatively impact the environment.¹⁵⁷

These are common problems with many of the federal government's initiatives. Tribes are frequently sent letters requesting comments on issues such as permitting or strategic plans. Due to remote locations of many Alaskan Native villages, the normal 30-day comment period is reduced to a ten- or fifteen-day response. Moreover, Alaska tribal government environmental staff often lack formal Western training, resulting in confusion and lack of comprehension in the process and/or the substance of the reports.¹⁵⁸ This, along with the short comment period, creates an unreasonable burden on tribal government staff. There is also the feeling that the efforts made to submit comments are unrewarded with any action from the responsible agencies.¹⁵⁹ NEPA, as well as many other federal

¹⁵⁶ A regional intertribal organization formed in 1972 to help disseminate information to tribes throughout Alaska.

¹⁵⁷ Tribal Leaders and staff, comments made during proceedings at the Alaska Forum on the Environment, Anchorage, AK, 2003.

¹⁵⁸ Tribal Leaders and staff, comments made during proceedings at the Alaska Forum on the Environment, Anchorage, AK, 2003.

¹⁵⁹ When the Trans-Alaska Pipeline System (TAPS) permit came up for renewal in 2002, a draft EIS was prepared and fast-tracked for a quick resolution. Many tribes commented and expressed a strong desire for the comment period to be extended and that the new permit should be for a shorter time period, taking into consideration the age of the TAPS. These requests and concerns were ignored.

regulations, call for process without any real change. This is a great frustration for tribal government staff and leaders.¹⁶⁰

The Endangered Species Act (ESA)¹⁶¹ – one of the most powerful pieces of environmental legislation, yet one that is often misunderstood and disliked – was created for the conservation of endangered and threatened species. The key to protecting these endangered and threatened species is to protect the ecosystems upon which they depend. Some tribes have been able to use the ESA not only for the benefit of ecosystems and species preservation but also for the preservation of their cultural heritage. The Nez Perce Wolf Recovery Project is an example of such an enterprise.¹⁶² In 48 states, the gray wolf is listed as an endangered species though, during the summer of 2013, the U.S. Fish and Wildlife Service (USFWS) is considering delisting it.¹⁶³ The Nez Perce, after much work preparing an EIS and receiving a congressional appropriation, were awarded concurrent jurisdiction over wolf management in Idaho. They have been working as co-managers with the USFWS to reintroduce gray wolves to historic roaming areas in Idaho and to preserve critical habitat. Jaime Pinkham, a Nez Perce tribal member, stated, “Restoring the wolf to its rightful place provides an opportunity for the Tribe to rekindle its cultural ties to the wolf.”¹⁶⁴

¹⁶⁰ Tribal Leaders and staff, comments made during proceedings at the Alaska Forum on the Environment, Anchorage, AK, 2003.

¹⁶¹ *ESA, U.S. Code*, vol. 16, secs. 1521-1543 (1973) (The ESA exempts subsistence uses from its restrictions (sec. 1539(e))).

¹⁶² J. Holyan et al., *Wolf Conservation and Management in Idaho: Progress Report 2010* (Lapwai, Idaho: Nez Perce Tribe Wolf Recovery Project, 2011).

¹⁶³ USFWS, "News, Information and Recovery Status Reports," in *Gray Wolves in the Northern Rocky Mountains* (USFWS, 2013).

¹⁶⁴ Crystl Murray, "Nez Perce Wolf Recovery Has Friends & Foes" <http://www.buffalogirlsproductions.com/idahonatives/nez/wolf.html> (accessed August 26 2013).

As indigenous peoples across the globe work to halt overfishing, damming of rivers, extinction of wildlife, and contamination of their air, water and land, they are working for something beyond a clean environment. They are working to preserve their culture. They are striving to maintain tribal self-determination. They are fighting for indigenous rights. As Coeur d'Alene tribal leader David Matheson observes, “[t]ribal sovereignty is more than a legal doctrine, it is our existence and our continued survival.”¹⁶⁵

So when you talk about what tribal sovereignty is, I think it goes much deeper than language can ever say. Sovereignty is our existence, it is our survival. Our old folks said that the only way to express the words, the feelings and the thoughts of the heart from the deepest, most tender places, where our most powerful feelings and knowledge are kept, are with song. So our people sang songs, and they did dances, and they did ceremonies saying that there is no difference between everyday life and religion, no difference between religion and ceremony. Our culture is tied up in all the things that we do.¹⁶⁶

Additional Executive Orders and Memos

Executive orders and memos are official documents through which the President communicates to his appointees and agency heads directives about the management of the federal government. In many cases, they are not enforceable and can be rescinded at any time.¹⁶⁷ They are often used, as are Supreme Court appointments, to steer policy for an administration. In the past, executive orders have been used to create reservations, guide environmental justice issues and

¹⁶⁵ David Matheson, "Tribal Sovereignty: Preserving Our Way of Life," *Arizona State Law Journal* 34, no. 3 (2002): 20.

¹⁶⁶ *Ibid.*, 18.

¹⁶⁷ *Defend Our Health: The U.S. Military's Environmental Assault on Communities* (Military Toxics Project and Environmental Health Coalition, 2001).

establish policy in regard to tribes. To preserve the message of a particular order, a new administration will often reaffirm the executive order by signing on to it.

Executive Order 12580,¹⁶⁸ issued in 1987 and amended by EO 13016 in 1996,¹⁶⁹ delegates to the Department of Defense the authority to determine CERCLA response actions at DoD facilities, thus permitting DoD to regulate itself at sites that are not on the National Priorities List (NPL). Under EO 12580, the EPA cannot take legal action against another federal agency, such as ordering a cleanup at a military facility, without the approval of the U.S. Attorney General. CERCLA requires EPA and the military to negotiate a “Federal Facility Agreement” (FFA) governing cleanup when a site is listed on the NPL. These pieces of legislation are the ones that will prove most relevant to the question of what sorts of hazards and impediments the Louden Tribe faces in Galena, Alaska and what possibilities it has for a remedy. While FFAs generally include penalty and dispute-resolution provisions, this executive order limits the EPA’s ability to negotiate aggressive agreements with the services. It is not clear that FFAs are enforceable in court by citizens or states.¹⁷⁰

Executive Order 13175,¹⁷¹ issued in November 2000 and reaffirmed by President Obama in 2009, allowed then-President Clinton to engage in “Consultation and Coordination with Indian Tribal Governments.” This is an often-cited executive order by tribal governments when holding agencies accountable for policies with tribal implications. This order lays out broad

¹⁶⁸ Exec. Order No. 12,580, 52 Fed. Reg. 2923 (Jan. 29, 1987).

¹⁶⁹ Exec. Order No. 13,016, 52 Fed. Reg. 45871 (Aug. 30, 1996).

¹⁷⁰ *Defend Our Health: The U.S. Military's Environmental Assault on Communities*, 12.

¹⁷¹ Exec. Order No. 13,175, 65 Fed. Reg. 67249 (Nov. 6, 2000).

guidelines that agencies are to consider when drafting policies that may affect tribes. The first guideline that agencies need to consider when making policy is that they “shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.”¹⁷²

Executive Order 13007,¹⁷³ issued on the 24th of May, 1996, addresses the “Protection and Accommodation of Access to ‘Indian Sacred Sites.’” This order was passed primarily to protect and preserve the religious customs of Native Americans following the decision in *Lyng v. NW Cemetery Protective Ass'n*,¹⁷⁴ where the U.S. Supreme Court refused to apply the Free Exercise clause of the U.S. Constitution or the American Indian Religious Freedom Act to protect a Native sacred site from development by the U.S. Forest Service on federal land. Each agency that manages federal lands was ordered to “accommodate access to and ceremonial use of Indian sacred sites...” and to “avoid adversely affecting the physical integrity of such sacred sites...”¹⁷⁵ Despite this order, problems persist, as the complex situation at Yucca Mountain, Nevada, illustrates.

Yucca Mountain borders the territories of the Western Shoshone and Southern Paiute peoples. Yucca Mountain is a sacred site for the Western Shoshone. Researchers at Catholic University in Washington D.C. performed experiments that suggested that “heated Yucca Mountain water might dissolve

¹⁷² Ibid.

¹⁷³ Exec. Order No. 13,007, 61 Fed. Reg. 26771 (May 24, 1996).

¹⁷⁴ *Lyng*, 485 U.S. 439 (1988).

¹⁷⁵ Exec. Order No. 13,007, 61 Fed. Reg. 26771 (May 24, 1996).

minerals and form an acidic vapor...that could corrode the metal alloy containers holding the waste.”¹⁷⁶ Seventy-seven thousand tons of radioactive waste had been approved to be entombed 100 miles northwest of Las Vegas beginning in 2010. This waste would not only hold the potential to contaminate the surrounding environment but the very existence of the nuclear waste repository would desecrate a sacred site and prevent the traditional religious practices of hundreds of Native Americans.¹⁷⁷ The Department of Energy, against the many objections of the Shoshone and the State of Nevada decided with Congressional approval that Yucca Mountain would be a nuclear waste repository.¹⁷⁸ Executive Orders 13175 and 13007 were ignored for over twenty years until 2009.

President Obama, finally, put the project on hold by defunding the program in his 2010 budget proposal stating, “[t]his proposal implements the Administration’s decision to terminate the Yucca Mountain program while developing disposal alternatives.”¹⁷⁹ Senator Harry Reid applauded President Obama’s decision on his website and agreed with the President’s search for alternatives: “I was pleased when President Obama and Energy Secretary Steven Chu ... announced the creation of the Blue Ribbon Commission on America’s Nuclear Future. ... On January 26, 2012, the Commission released its final report on recommendations to alternatives to Yucca Mountain ... this report makes

¹⁷⁶ Associated Press, "Researchers Say Nuclear Canisters May Corrode in Yucca Mountain," *Citizen's Center for Nuclear Non-Proliferation*, December 13 2002.

¹⁷⁷ See Update to the Committee on the Elimination of Racial Discrimination on the Early Warning and Urgent Action Procedure Decision 1(68), para. 10, Aug. 8, 2006; Update to the Committee on the Elimination of Racial Discrimination on the Early Warning and Urgent Action Procedure Decision 1(68), para. 7 (Feb. 7, 2007).

¹⁷⁸ See Andrew J. Butcher, "In Search of a Remedy to the Nuclear Storage Conundrum: Western Shoshone National Council V. United States," *Energy Law Journal* 28, (2007).

¹⁷⁹ "Termination Yucca Mountain Repository Program," at <http://www.reid.senate.gov/issues/upload/Termination-Language-for-the-Website.pdf>.

abundantly clear that no state, tribe, or community should be forced to store spent nuclear fuel or high-level waste without its consent.”¹⁸⁰ Unfortunately for the Shoshone, Senator Reid (alone) and President Obama do not represent all branches of the federal government. The judicial branch in the form of the D.C. Circuit Court of Appeals weighed in on August 13, 2013 in *In re: Aiken County*, stating “[t]his case raises significant questions about the scope of the Executive’s authority to disregard federal statutes... It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law... But unless and until Congress authoritatively says otherwise or there are no appropriated funds remaining, the Nuclear Regulatory Commission must promptly continue with the legally mandated licensing process [at Yucca Mountain].”¹⁸¹

D. ALASKA-NATIVE-SPECIFIC LAWS

While previous sections spoke generally of international indigenous law and federal Indian law, this section will specifically evaluate the areas of the law that are unique to Alaska Natives.

An important definition to flesh out prior to discussion of Alaska-Native-specific laws is that of “subsistence.” “Subsistence” has been defined in various ways. David S. Case differentiates between two common interpretations of the term. The first is rooted in Anglo-European usage and “connotes the bare eking

¹⁸⁰ See Harry Reid, "Yucca Mountain", Harry Reid, U.S. Senator for Nevada <http://www.reid.senate.gov/issues/yucca.cfm> (accessed September 1 2013).

¹⁸¹ *In re: Aiken County*, 2013 WL 4054877 (Aug. 13, 2013).

out of an existence, a marginal and generally miserable way of life.”¹⁸² In contrast, an Alaska Native understanding of subsistence is quite different:

Subsistence living, a marginal way of life to most, has no such connotation to the Native people of southeast Alaska. The relationship between the Native population and the resources of the land and the sea is so close that an entire culture is reflected...Traditional law...was passed from generation to generation, intact, through repetition of legends and observance of ceremonials which were largely concerned with the use of land, water, and the resources contained therein. Subsistence living was not only a way of life, but also a life-enriching process. Conservation and perpetuation of subsistence resources was part of that life and was mandated by traditional law and custom.¹⁸³

1. Alaska Native Claims Settlement Act¹⁸⁴

Typically, the aboriginal title of Indian tribes in the contiguous forty-eight states was abrogated by treaty with the United States but Congress took a new tact with Alaska Natives.¹⁸⁵ In December 1971, the Alaska Native Claims Settlement Act (ANCSA) granted Alaskan Natives title to surface and subsurface rights of 44 million acres and compensation of \$962.5 million dollars in exchange for the extinguishment of aboriginal land claims in Alaska.¹⁸⁶ All reservations, with the exception of Metlakatla, were eliminated by section 19 of ANCSA. Although it does not expressly terminate tribes in Alaska, it is often called assimilation

¹⁸² See David S. Case, "Subsistence and Self-Determination: Can Alaska Natives Have a More 'Effective Voice'?", *University of Colorado Law Review* 60, (1989): 1009-12.

¹⁸³ Annika Ord, "Cultural Importance of Salmon," (2012). apps.carleton.edu/curricular/posc/assets/Ord_Cultural_Importance_of_Salmon.pdf (accessed September 1, 2013). (quoting Nelson Frank, a Haida from Southeast Alaska).

¹⁸⁴ *Alaska Native Claims Settlement Act*, 43 USC §§ 1601-1629 (1994 & Supp. III 1997).

¹⁸⁵ Robert T. Anderson, "Alaska Native Rights, Statehood and Unfinished Business," *Tulsa Law Review* 43, (2007): 20.

¹⁸⁶ See H. R. Rep. No. 92-746 (1971) (Conf. Rep.): "[T]he conference committee does not intend that lands granted to Natives under this Act be considered 'Indian reservation' lands for purposes other than those specified in this Act. The lands granted by this Act are not 'in trust' and the Native villages are not Indian 'reservations.'"

legislation.¹⁸⁷ For example, some say that ANCSA encourages assimilation by placing Alaska Native lands under Alaska Native regional and village business corporations that encourage free enterprise, rather than placing the lands under the direct management of tribal governments.

While ANCSA appears to only apply to land, it impacts everything relevant to Alaska Natives, albeit indirectly.¹⁸⁸ Section 2(b) is often cited to support termination of the federal relationship, even though that interpretation has been rejected by the courts. It reads:

The settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the U.S. government and the State of Alaska.¹⁸⁹

Section 4 of ANCSA defines the settlement solely in terms of the extinguishment of titles and claims based on aboriginal rights, titles, use, or occupancy of land and water resources. The legislation does not include resolution of human services or questions of Alaska Native governance. The legislation did, however, extinguish Alaska Native hunting and fishing rights, implying resolution of Native subsistence questions.¹⁹⁰ In 1988, however,

¹⁸⁷ Paul Ongtooguk, "A.N.C.S.A. At 40: Where Are We and Where Are We Going?," *Alaska Dispatch*, March 16 2012.

¹⁸⁸ Case, "Subsistence and Self-Determination."

¹⁸⁹ *Alaska Native Claims Settlement Act*, 43 USC § 1601(b) (1971).

¹⁹⁰ *Alaska Native Claims Settlement Act*, 43 USC § 1603 (1971) ("Aboriginal title and claim extinguishment").

ANCSA was amended to specify that Alaska Natives were to remain eligible for federal Native services specific to Native Americans.¹⁹¹

Following the passage of ANCSA, the presence or absence of Indian Country in Alaska was open to much debate. The presence of Indian Country would allow Alaskan tribes to perform the basic duties of a government agency – taxing, zoning, exercising civil and criminal jurisdiction over non-tribal members (exception stated under P.L. 280), managing fish and game resources, and regulating land uses. As mentioned previously, this is a contentious issue.

With *State of Alaska v. Native Village of Venetie*,¹⁹² the Supreme Court ended a long and arduous battle over whether Indian Country existed in Alaska and in what form. ANCSA revoked Alaska Native reservations but gave village corporations the option of taking fee title to their former reservation lands. In 1974, the Neets'aiti Gwich'in attempted to exercise this option. The United States conveyed to the Venetie and Arctic Village corporations, as tenants in common, fee simple title to reservation lands. In 1979 tribal members, acting through the two village corporations, reconveyed their reservation lands to the Native Village of Venetie and then the two village corporations dissolved. Following the transfer, the State of Alaska entered into a joint venture with a private contractor to construct a public school in Venetie in 1986. After the contractor and the state refused the tribe's taxation demand for conducting business on tribal land, the tribe brought a collection action in tribal court. The state then sought an

¹⁹¹ *Alaska Native Claims Settlement Act*, 43 USC § 1626(d), as amended (1988).

¹⁹² *Native Village of Venetie v. State of Alaska*, 101 F.3d 1286 (9th Cir. 1996); rev'd 522 U.S. 520 (1998)

injunction in federal district court, arguing Venetie lacked authority to tax nonmembers of the tribe because Venetie's ANCSA lands were not Indian Country. The Supreme Court determined that ANCSA, "[a]ttempted to preserve Indian tribes, but simultaneously attempted to sever them from the land; it attempted to leave them as sovereign entities for some purposes, but as sovereigns without territorial reach."¹⁹³ The U.S. Supreme Court ultimately decided the issue and ruled unanimously that ANCSA lands are not Indian Country, regardless of ownership by a tribal government or an ANCSA corporation.¹⁹⁴

This long history of personal, governmental and legal battles set the stage for Alaska's next challenge to the U.S. government – implementation of the federal land withdrawals permitted by section 17(d)(2) of ANCSA.

2. Subsistence Provisions of the Alaska National Interest Lands Conservation Act (ANILCA)¹⁹⁵

The fight for land use is one of the defining features of Alaskan culture and jurisprudence. Commercial and subsistence users are often pitted against each other in a struggle to gain priority over resources to which access is limited.¹⁹⁶

ANILCA was passed in 1980 to effectuate the ANCSA 17(d)(2) land withdrawals – allowing the Secretary of Interior to withdraw up to 80 million acres for inclusion in national parks, national forests, national wild and scenic rivers, and national wildlife refuges. As part of the legislative debate, Alaska

¹⁹³ *Venetie*, 522 U.S. 520, 526 (1998) (quoting Judge Fernandez' concurrence in the 9th Cir. Decision).

¹⁹⁴ *Venetie*, 522 U.S. 520, 531-34 (1998).

¹⁹⁵ *Alaska National Interest Lands Conservation Act*, 16 USC §§ 3111-3126 (1980) (commonly referred to as "Title VIII").

¹⁹⁶ David G. Shapiro, "Jurisdiction and the Hunt: Subsistence, Regulation, A.N.I.L.C.A., and Totemoff," *Alaska Law Review* 14, (1997).

Natives exchanged support for conservation-based provisions with environmentalist support for subsistence provisions.¹⁹⁷ Through Title VIII of ANILCA, Congress gave rural residents a special subsistence preference over other fish and game users. Specifically, it provides a preference and protections for subsistence uses of wild, renewable resources by “rural Alaska residents” on federal lands within Alaska. Interestingly, it did not differentiate between Native and non-Native, the preference was based on a rural versus urban divide.¹⁹⁸ ANILCA also required that, anytime federal funds or public lands were to be involved in management decisions, potential impacts to subsistence activities must be considered.

Due to the Alaska State Supreme Court ruling in *McDowell v. State*¹⁹⁹ that Alaska’s implementation of the ANILCA preference violated provisions of the State Constitution, the federal government took over the administration of the subsistence preference on federal public lands (including reserved water associated with federal parks, refuges, and other conservation unit land withdrawals).²⁰⁰ Federal responsibility to manage subsistence fisheries was subsequently added following the Ninth Circuit decision in *Alaska v. Babbitt* (“Katie John I”).²⁰¹ This decision resulted in federal management of subsistence fisheries in waters associated with federal lands where the federal government has

¹⁹⁷ Case and Voluck, 288.

¹⁹⁸Ch. 8, section III.D, ANILCA provides the same fishing and hunting rights to Natives and non-Native rural residents alike.

¹⁹⁹ *McDowell*, 785 P.2d 1, 12 (Alaska 1989).

²⁰⁰ *McDowell* had challenged whether the state could restrict the subsistence opportunity to rural people because the Alaska Constitution calls for “equal access to fish and wildlife resources by all Alaskans.” The court found in his favor, which placed the state out of compliance with ANILCA. Pending the state’s resolution of its constitutional conflict, the federal government, since 1990, has administered the rural subsistence priority for wildlife resources on all federal lands in Alaska.

²⁰¹ *Katie John I*, 72 F.3d 698 (9th Cir. 1995).

reserved water rights. According to David Case, this “federal takeover of subsistence regulation on federal lands and reserved waters has perhaps opened up opportunities for tribal co-management of these resources.”²⁰² Despite Case’s hypothesis, this has not yet come to pass, but it is a strategy potentially available for Alaska Natives.

Administrative Order No. 186 (September 29, 2000)²⁰³

In 2000, Governor Tony Knowles, with Administrative Order (AO) No. 186, announced a new state policy recognizing Alaska Native governments and calling for a government-to-government relationship with all federally-recognized tribes. This was a departure for the state. Since 1991 and Governor Hickel’s Administrative Order 125, the state had expressly denied the existence of tribes and Indian Country in Alaska (i.e., the “one country, one people” philosophy).²⁰⁴

After *Venetie* and AO 186, Alaska Native tribes continue to be recognized, but without a land base upon which tribal power over non-tribal members could be exerted.²⁰⁵ There was a period when it was questioned whether or not Alaska tribes could even have power over their own members without a land base, but that question was put to rest with the Alaska Supreme Court’s decision in *John v. Baker*.²⁰⁶

In *John v. Baker* the Alaska Supreme Court addressed the issue of how broad a reach a tribal government’s power has post-*Venetie*. The court found:

Today we must decide for the first time a question of significant

²⁰² Case and Voluck, 33.

²⁰³ Admin. Order No. 186 (Sept. 29, 2000).

²⁰⁴ Admin. Order No. 125 (July 1, 1991).

²⁰⁵ Anderson, "Alaska Native Rights and Unfinished Business," 39.

²⁰⁶ *John v. Baker*, 982 P.2d 738 (Alaska 1999).

complexity and import: Do Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members? After examining relevant federal pronouncements regarding sovereign power, we hold that Alaska Native tribes, by virtue of their inherent powers as sovereign nations, do possess that authority. ...

Through the 1993 tribal list and the 1994 Tribe List Act, the federal government has recognized the historical tribal status of Alaska Native villages like Northway. In deference to that determination, we also recognize such villages as sovereign entities.²⁰⁷

While *John v. Baker*, in combination with other court cases, seems to have settled the question of whether or not tribes exist in Alaska, there still remains the question of the extent of territorial jurisdiction.²⁰⁸ Professor Robert Anderson of the University of Washington and Harvard Law School concedes that territorial jurisdiction of Alaska tribes is limited to Native allotments,²⁰⁹ defined as Indian Country under 18 U.S.C. § 1151(c), and restricted Native townsite lots,²¹⁰ similar to native allotments. He suggests that tribes could also assert territorial jurisdiction over any land taken in trust for Alaska Native tribes under the Indian Reorganization Act, which had previously been in dispute in *Hynes v. Grimes*

²⁰⁷ *John v. Baker*, 982 P.2d 738, 748-49 (Alaska 1999).

²⁰⁸ Anderson, "Alaska Native Rights and Unfinished Business," 40.

²⁰⁹ The Alaska Allotment Act provided that Alaska Natives not living on a reservation were allotted land of the United States to be held in trust by the United States, but for the sole benefit and use of the Native allottee. The Act authorized the BIA to oversee the program. With this authorization, the BIA issued Native Allotment Certificates. The Indian Self-Determination Act, 25 U.S.C. 450j, permitted the BIA to contract out with Regional Nonprofit Corporations to oversee these allotted trust lands. ANCSA, 43 U.S.C. 1603c, extinguished all interests in land based on federal statute at that time. Therefore, Natives covered by ANCSA, or their descendants, are not eligible for further allotment. 43 U.S.C. 1617. However, allotments existing in 1971 are still valid due to express language in ANCSA, 43 USC 1617, recognizing then existing (1971) allotments but precluding further allotments to ANCSA eligible Natives. Subsequently, ANILCA amended ANCSA to approve Native allotment applications pending on or before the enactment of ANCSA. 43 U.S.C. 1634.

²¹⁰ In 1926, Congress authorized the Federal townsite trustee to issue restricted deeds in trust to Alaska Natives living in Federal townsites. In 1948, Congress authorized the townsite trustee to issue unrestricted deeds upon approval by BIA. In 1976, Congress repealed the Townsite Act.

Packing.²¹¹

Recall that, under the Indian Reorganization Act (IRA) of 1934, the Secretary of the Interior (DOI) may take land into trust for Indian tribes for the purpose of providing land for Indians, without the consent of the state.²¹² The Secretary's acquisition of land into trust for Indians results in the land becoming "Indian Country."²¹³

Due to *Hynes*, for years the Bureau of Indian Affairs (BIA) excluded Alaska tribes from the IRA land-into-trust process. The BIA argued that the Alaska Native Claims Settlement Act of 1971 extinguished Indian Country in Alaska and any future claims to Indian Country. In *Akiachak Native Community v. Salazar*,²¹⁴ the U.S. District Court for the District of Columbia rejected this argument on March 31, 2013 and held that the Secretary of the Interior retains statutory authority to take land into trust for the benefit of Alaska Natives.²¹⁵ Thus, for the first time since 1949, Alaska Native tribes may have the ability to petition the Secretary of Interior for land to be placed into trust. Thus, tribes have the potential to attain the requisite land base to assert tribal jurisdiction over non-Natives. This would not be something easily attained but it is legally possible.²¹⁶

²¹¹ *Hynes*, 337 U.S. 86 (1949).

²¹² Section 5 of the IRA: Congress has authorized the Secretary "in his discretion" to acquire and take into trust for Indian tribes "any interest in lands ... within or without existing reservations ... for the purpose of providing land for Indians." 25 U.S.C. § 465. The Secretary may take land into trust for these purposes, without the consent of the State.

²¹³ 18 U.S.C. § 1151.

²¹⁴ *Akiachak Native Community v. Salazar*, 2013 WL 1292172 (March 31, 2013).

²¹⁵ An order for additional briefing on the appropriate remedy was issued and that decision is still outstanding.

²¹⁶ See "Sen. Begich Supports Land-into-Trust Decision for Alaska Tribes," *Indianz.com*, April 23 2013. ("I have long believed that Alaska tribes are no different from tribes in the Lower 48 and should be able to take part in the land-into-trust application process." Begich said. "This ruling affirms that the Secretary of the Interior does not have the authority to discriminate against Alaska tribes." Begich is the only member of Alaska's Congressional delegation to speak publicly about

As described above, Congress and the courts have not always fulfilled their trust responsibility while acting in their role as “guardian” to Indian tribes. On many occasions they have done their best to exterminate tribes and dispose of trust resources. Congress has abrogated treaties, sold off tribal lands to non-Indians, broken up communal property and distributed it to individual Native Americans, removed tribes from their own lands placing them on less desirable pieces of property far from their homeland, and has withdrawn federal recognition from formerly recognized tribes. Congress has not only meddled in the realm of tribal lands and natural resources but also in tribal governments’ relationship to the people who reside on their remaining lands. From the early 1800s on, Congress has sought to restrict tribal government authority in relation to civil and criminal cases within their reservation boundaries. They began by excluding non-Indians from tribal government jurisdiction, expanded it to non-member Indians and, finally, they have regulated even the jurisdiction that tribes can exercise over their own membership. These limitations on tribal sovereignty can have a real impact on the daily lives of tribal members as evidenced in the case study of the Loudon Tribal Council.

the landmark decision. Sen. Lisa Murkowski (R-Alaska), who was re-elected with the help of Native voters, hasn't said anything, while Rep. Don Young (R-Alaska) has made it clear that he opposes land-into-trust for Alaska.)

Chapter 3

THE LOUDEN TRIBE IN PERSPECTIVE

This is a case study of one Alaskan village. In many ways it is similar to any other village. In other ways it is completely unique. The story of Galena and especially the Louden Tribal Council²¹⁷ is one that presents many lessons. First, there are the challenges presented by the complex web of relationships and legislation that even small villages must not only understand but also master. Secondly, those outside of Alaska or even those Alaskans who are only familiar with urban Alaska do not easily comprehend issues faced by indigenous peoples in a remote village, off the road system, in the middle of Alaska (see Figure 3.1 for location of Galena with respect to the major towns of Anchorage and Fairbanks and the road system). Third, one cannot separate the people from the land, or the culture. This chapter presents the historic and geographic landscape that shapes the Louden Tribal Council. In chapter four, the environmental challenges faced by the tribe will be addressed.

²¹⁷ “Louden Tribal Council” is the federally-recognized name of the tribe and does not refer, specifically, to the governing council.

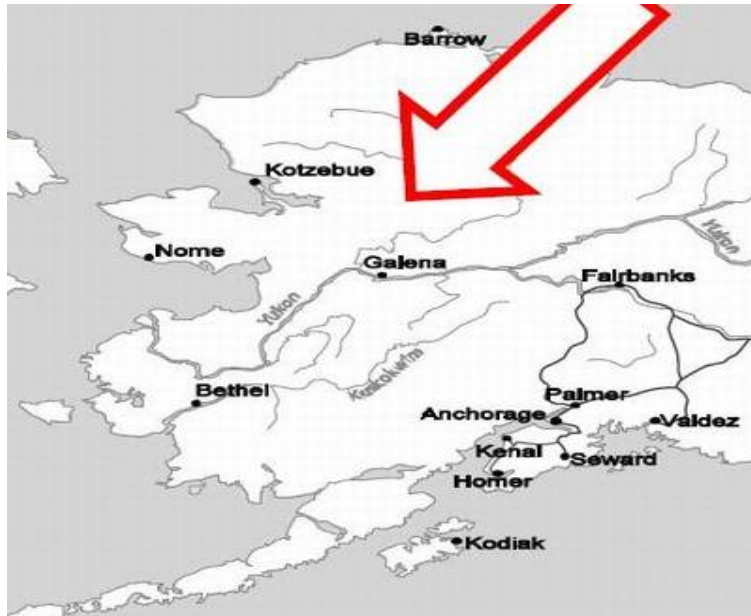


Figure 3.1 – Map showing the location of Galena.

The Louden Tribal Council has faced contamination of subsistence resources and loss of land rights. The central argument of this work is that only through the assertion of tribal sovereignty will indigenous peoples be able to protect their land and resources. Although this thesis focuses on a single indigenous group in Alaska, aspects of its politics and analysis are applicable to indigenous peoples across the globe.

The Louden Tribal Council (the federally-recognized name for the Louden Tribe or LTC) is composed of Koyukon Athabaskan Indians. (see Figure 3.2). And, as alluded to in Chapter 2, it is no stranger to cultural harm caused by loss of a land base and harm to the environment. As stated before, Alaskan Natives and their surrounding environment have grown up around each other. To understand the people, one must understand the place; they are inextricably intertwined. This is no different for the Athabascans and, particularly for this case study, LTC.

They have developed social, cultural and religious practices alongside the rivers and sloughs that dominate the landscape. They are a water-dependent people. With this said, it is often the case that families and social groups are defined by where they live along what river. This tie to the environment isn't limited to the river. It extends to the animals, plants and fish, which are the basis of Athabaskan economy.²¹⁸ Even today, the traditional life of hunting, trapping, fishing and gathering is the focus of village economic life, augmented by store-bought goods. Seasonal traditional subsistence activities still take place. People rely on the moose and fish to survive the eight long months of winter. For those community members that are unable to hunt or fish, it is not uncommon to find that their neighbors, friends and family from Galena or the surrounding villages will pitch in to ensure that their cache²¹⁹ is full for this dark interim. Along with subsistence resources that contribute to the economy, there are arts and crafts. Woodworking, beading, sewing of cloth and furs, and birch bark basketry are some of the more common crafts practiced. With such reliance upon the land, it is not surprising that there is a great concern with activities that may cause ill effects to the moose, fish, land and water.

A. The Middle Yukon Valley in Perspective

Alaska, the last frontier, is described as an unspoiled land. The mere name awakens visions of giant icebergs, crystal blue water, monumental mountain peaks, polar bears and great herds of caribou roaming a vast, unpopulated

²¹⁸ Ryan Madden, *On-the-Road Histories: Alaska* (Northampton, MA: Interlink Books, 2005), 21-22.

²¹⁹ A cache in Alaska is a small shed elevated on poles above the reach of animals and used for storing food, and equipment.

landscape. If people enter the vision, they are quaint, storybook Eskimos outfitted in fur-trimmed parkas, dwelling in picturesque igloos. Rarely, do people come to know the real Alaska beyond their cruise ship vacations, Discovery channel specials or National Geographic articles.

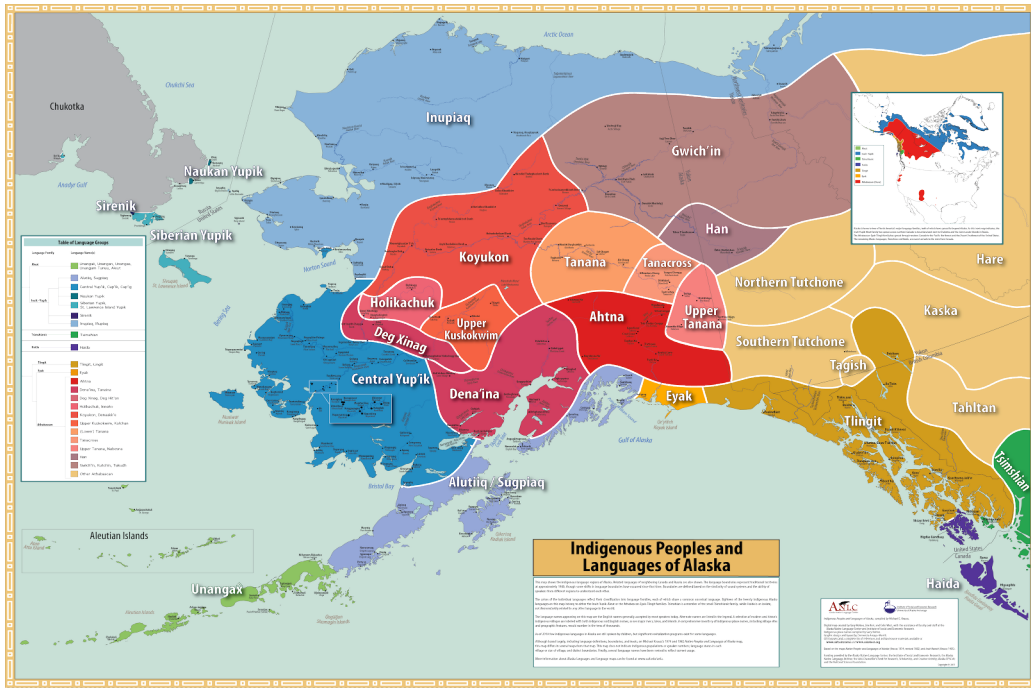


Figure 3.2: Map of Indigenous Peoples and Languages, compiled by Michael E. Kraus and created by Alaska Native Language Center and Institute for Social and Economic Research.²²⁰

With 570,640.95²²¹ square miles of landmass, the highest mountain in North America, active volcanoes, twelve major river systems, three million lakes, innumerable islands, nineteen distinct Native languages, six language families, and 229 federally-recognized Tribes, Alaska is more than igloos and polar bears. Athabaskans occupy the immense Interior of Alaska,²²² which is a landscape

²²⁰ Available at <http://www.uaf.edu/anla/collections/map/anlmap.png>.

²²¹ U.S. Census Bureau, "State and County Quickfacts: Alaska", U.S. Department of Commerce <http://quickfacts.census.gov/qfd/states/02000.html> (accessed August 27 2013).

²²² There are several spellings of Athabaskans, Athapaskans, and Athapasqans.

dominated by boreal forests, the Yukon, Tanana and Kuskokwim Rivers, and swampy lowlands. The Interior is a place of extremes, made of rolling hills and low mountains: vast expanses of space with small populations of humans and animals, temperature ranges from -60°F to 80°F , three hours of daylight in the winter and twenty hours of daylight in the summer.²²³ The area known as the Koyukuk Flats area covers approximately 4,000 square miles surrounding the juncture of the Koyukuk and Yukon rivers.²²⁴ Boreal forests predominate the landscape with spruce, aspen, willow and alder. Within this landscape is a lowland of swampy wetlands and a complex system of sloughs and lakes connected to the Koyukuk and Yukon rivers. Despite temperature extremes and a low average annual precipitation of 12.7 inches, the area supports an amazing variety of wildlife. Moose, black and brown bear, snowshoe hare, grouse, ptarmigan, waterfowl, beaver, muskrat and fish provide food and materials for clothing and other cultural items.²²⁵ The lowland forest and upland tundra alternate for as far as the eye can see. There are no major fault breaks. The mountains (several thousand feet above sea level) are made up of monotonous sequences of gray, Mesozoic, sedimentary rocks that crumble easily.

Since time immemorial, Koyukon Athabascans followed the natural migration patterns of fish and wild game in the Middle Yukon Valley.²²⁶

²²³ The amount of daylight, of course, varies with latitude.

²²⁴ Dames & Moore and University of Washington Urban Design and Planning Studio 508, *Galena Comprehensive Plan: 1998 Update* (Anchorage, AK: City of Galena, 1999).

²²⁵ James R. Marcotte, *Subsistence Harvest of Fish and Wildlife by Residents of Galena, Alaska* 1985. Technical Paper No. 155, 128.

²²⁶ Julie E. Sprott and Loudon Tribal Council, *We Work Together, We Help Each Other: The Story of Loudon Tribal Council's Self-Governance Process 1993-2000* (Anchorage, AK: University of Alaska Anchorage, 2000), 7.

Traditionally, family groups moved from camp to camp with the seasons (i.e., spring, summer and fall camps corresponding with fishing, trapping, moose hunting, berry picking, etc.).²²⁷ These family groups would trade with coastal Yup'ik and Inupiaq peoples, meeting at pre-designated areas, trading beaver and marten furs for items such as seal oil or sea lion skins, which were impossible to obtain otherwise.²²⁸ Contemporary Athabascans still engage in seasonal activities such as trapping in the spring, fishing in the summer, moose hunting and berry picking in fall and ice fishing in winter.²²⁹

The first contact with non-Natives came in the form of Russian fur trappers in the 1800s, followed by missionaries, and then the U.S. military.²³⁰ Much like in the lower 48 states, non-Natives brought with them disease, decimating Native populations.²³¹ After the onslaught of newcomers and illness, surviving Native family members began to move from seasonal camps to more permanent settlements.²³² The outsiders, who had come to exploit the vast fur and mineral resources, began naming the places that they “discovered.” This “discovery” of the land and the resources, and the naming of places such as Mt. McKinley (instead of the Native name “Denali”) established a proprietary claim for the dominant power (i.e., not Alaska Natives). Pat Sweetsir, former Tribal Administrator for the Loudon Tribal Council, related a story that his Grandfather had told him. Pat’s Grandpa said that when the first white man came an Indian

²²⁷ Ibid.

²²⁸ <http://www.akhistorycourse.org/articles/article.php?artID=150>

²²⁹ Sprott and Council, 7.

²³⁰ Ibid., 8.

²³¹ Ibid.

²³² Ibid.

man asked him to sit down on the log with him and share the beauty of the view. The white man came and pushed the Indian out of the way and took his seat. A second white man came and the Indian said the same thing: “Come sit down with me on this log and enjoy the beauty of the view.” The second man came over and pushed himself between the Indian and the other white man and nearly knocked the Indian off the log. Pat’s Grandpa said that if you keep inviting the white man to sit and share the log with you, he’d soon knock you off.²³³ This is how the “dominant power” is often viewed by Alaska Natives.

B. Galena – A Historical View

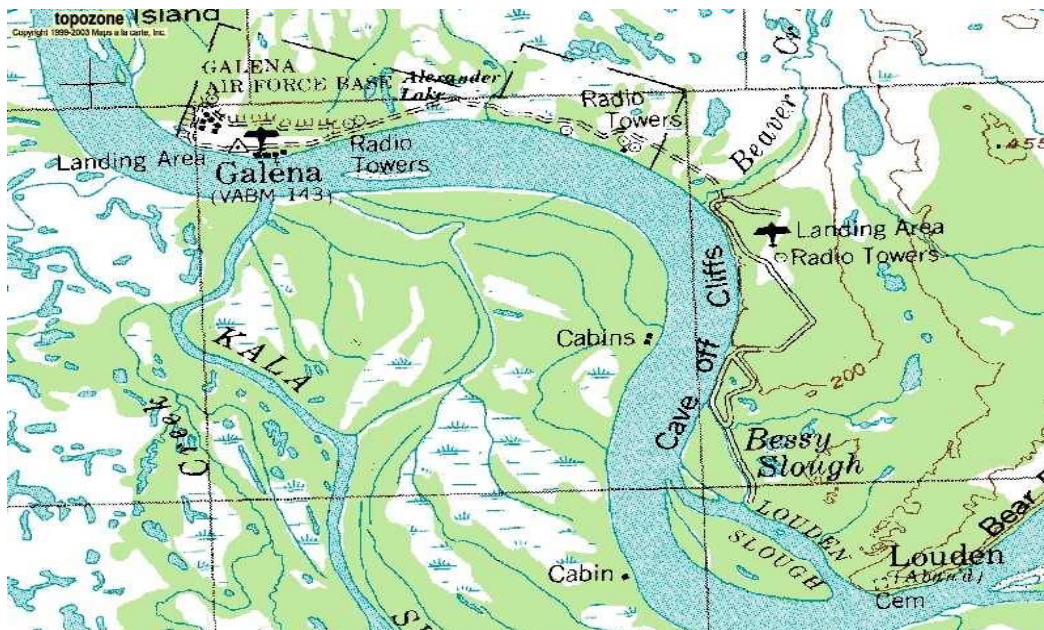


Figure 3.3: This large-scale topographic map (one inch to two miles) shows where the Campion Air Force Station (near the Cave off Cliffs) was relative to Galena and the Galena Air Force Station. A road connected the two Air Force installations.

²³³ Pat Sweetsir, conversation with the author, 2003.

The first activities of the U.S. military along the Yukon River occurred in 1884 in order to “acquire such information of the country traversed and its wild inhabitants as would be valuable to the military authorities in the future.”²³⁴ The only foreign invasion and occupation of U.S. soil occurred in 1942 when the Japanese navy bombed Dutch Harbor and occupied the outermost Aleutian Islands, Attu and Kiska. This propelled large-scale development throughout Alaska. Army and air bases were built. Anchorage, Fairbanks, Sitka, Fort Greely, Galena, Whittier and Kodiak were only a few locales that housed some of the thousands of military personnel shipped to the territory. One of the greatest feats accomplished during this military build-up was the construction of the Alaska Highway in 1942. In only eight months and twelve days, 1,520 miles of road were completed, providing the first overland route from the contiguous United States to Alaska.²³⁵

Termination of the war did not end Alaska’s dependence on the military. Military spending continued to grow during the 1950s and throughout the Cold War era, bringing more people and resources to the territory. Many of the military personnel who were stationed in Alaska stayed after the end of the war. Many more who had visited during wartime returned to set up residence. These people made up the core of supporters pushing for statehood.²³⁶ In 1959, Alaska became the 49th state to join the Union. Many more milestones mark Alaska’s

²³⁴ Lt. Fred Schwatka, *Exploring the Great Yukon: An Adventurous Expedition Down the Great Yukon River, from Its Source in the British North-West Territory, to Its Mouth in the Territory of Alaska*. (Art and Science Publishing Society, 189_), 9.

²³⁵ Claus M. Naske and Herman E. Slotnick, *Alaska: A History of the 49th State*, 2nd ed. (University of Oklahoma Press, 1987).

²³⁶ Stephen W. Haycox and Mary Childers Mangusso, *An Alaska Anthology: Interpreting the Past* (University of Washington Press, 1996), xxvi-xxvii.

history. Notably, oil deposits were discovered underneath Prudhoe Bay in 1968. There was, however, no way to transport the oil due to unresolved Native claims. The Alaska Native Claims Settlement Act (ANCSA) passed in 1971 and cleared the way for an oil pipeline to be constructed.

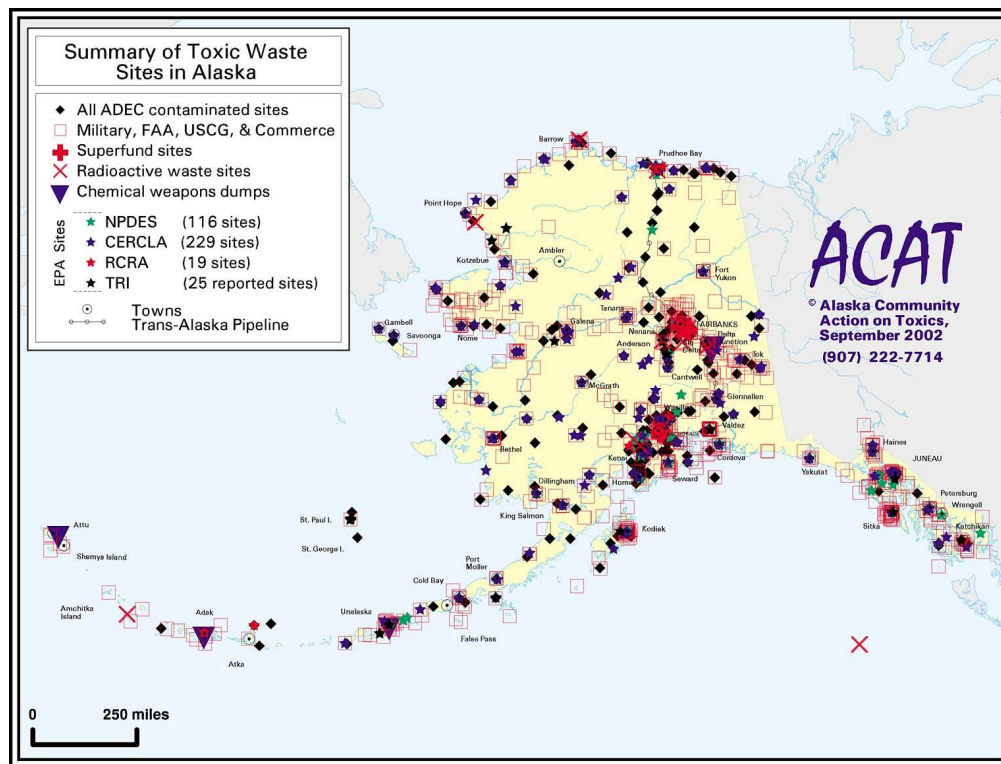


Figure 3.4: Map provided by Alaska Community Action on Toxics as an overview of toxic waste sites in Alaska

With the onslaught of WWII, the U.S. military began to strategically locate air stations throughout Alaska. The first airstrip in Galena was completed in 1942, with base facilities constructed in 1950. Galena became the northernmost air station for F-15 fighter jets in the United States. Over 50 years of use, the Galena and Campion Air Stations, along with the Kalakaket Radio Relay Station, have affected the peoples of Galena and the Interior in many ways. The resources brought by the military allowed the village to become the hub for

the Middle Yukon Valley. The airport is the largest in the area, which permits sizeable cargo planes (e.g., C-46 and C-6's) along with smaller single- and double- prop aircraft to enter the village, bringing supplies for Galena and the surrounding villages. The site of the Galena Air Station (Figure 3.3) base also allowed for a regional boarding school to become a vital part of the community. There are, of course, concerns about the Air Force's dominant presence in the region. Galena is predominately Athabascan, mostly members of the Loudon Tribal Council, who practice a subsistence lifestyle. Concerns about environmental contamination of subsistence resources and the concomitant loss of traditional practices are at the top of the list of community concerns. LTC's efforts to address the environmental and cultural harms to its community through environmental self-determination are discussed in the next chapter.

Chapter 4
LOUDEN'S CHALLENGES: A CASE STUDY

“We wanted the contamination cleaned up yesterday, the Air Force wants to clean it up tomorrow, let's compromise and clean it up today.” -Theresa Clark, Louden Tribal member



Figure 4.1: Aerial view of Galena, Alaska.²³⁷

The Louden Tribal Council has faced many challenges in the last twenty years. As previously mentioned, the village of Galena is a “bush” community, i.e., off the road system, located in the Interior of Alaska. Situated 270 air miles west of Fairbanks and 325 miles north of Anchorage along the Yukon River, the only way in and out of this rural village is by boat, air, snow machine, foot or dog sled. It is the largest community in the Middle Yukon Region and is governed by three entities: the Louden Tribal Council, the City of Galena and the U.S. government (primarily in the form of the Department of Defense (DoD, or more specifically the USAF) and the U.S. Fish and Wildlife Service (USFWS)). These

²³⁷ Photo credit to the City of Galena,
<http://www.ci.galena.ak.us/index.asp?Type=GALLERY&SEC=%7BB4024136-66A1-4EBA-B1D2-71EB174BCF94%7D>.

three governments have played pivotal roles in the formation of this large rural community.

According to the 2003 LTC roll, there are 643 Louden tribal members. The majority of tribal members reside in Galena along the Yukon River.²³⁸ They make up approximately 63% of the population of Galena, estimated at 470 in the 2010 census.²³⁹ Prior to 1920, the village of Louden²⁴⁰ was located approximately 14 miles upriver from the present city of Galena. The cemetery is still located in this spot. Around the same time, galena (lead sulfide) was discovered in the area and the village of Galena developed into a principal supply and shipping point for the ore. Thus, in the 1920s, miners moved into the area, as did missionaries. A school and church were offered to local residents if they moved into this new locality.²⁴¹ The tribe moved its winter camp to the area while still occupying fish camps and other camps in other regions of the river. Many changes came to the region. As promised by the BIA, a school and church were constructed as well as a post office. And, as mentioned above, with World War II the military entered the region. First, they constructed an airstrip in Galena and then, in 1950, the United States Air Force established a full-scale installation. Both Galena Air Station and Campion Air Station were constructed and placed in full operation. As part of ANILCA, the USFWS established the Koyukuk National Wildlife

²³⁸ A devastating flood destroyed much of the village in May 2013. This information is applicable to Galena pre-flood.

²³⁹ U.S. Census Bureau, "American Factfinder: 2010 Demographic Data", Department of Commerce <http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (accessed September 1 2013).

²⁴⁰ Galena was formerly known by Alaska Natives as *Nataagheleel Denh* or *Notalee Denh*. The non-Native people of the area named it Henry's Point after Chief Henry whose traditional fish camp was located in the same spot. *See, Sprott and Council, 8, FN 13.*

²⁴¹ There are several theories for why the villagers moved to the City of Galena. *See, ibid., 8.*

Refuge. Koyukuk consists of 3.5 million acres, which were traditionally used by Athabascans for hunting and gathering.²⁴² This is consistent with how Indian lands have been disposed across the United States. “In an effort to build a national cultural identity, the United States government converted many federal and formerly Native American lands into federal parks and monuments.”²⁴³ These areas are now for the most part closed off to cultural activities.

Aside from the loss of lands due to the creation of federal reservations, many traditional activities have been hindered due to the presence of the military and the activities of war. Traditional harvest areas, for example, have been placed off-limits and contaminants polluting the soil and groundwater have raised concerns for those plant and animals that are harvested. There is fear that subsistence foods have been impacted as well as the Yukon River, which is sacred to the LTC.

Hydrocarbons such as trichloroethylene (TCE) (an industrial solvent), jet fuel, gasoline, and diesel fuel, along with DDT and heavy metals, contaminate the groundwater and the soil. This has created many environmental concerns for residents who stay in the region, including indoor air quality issues for one of the residential school’s buildings. Consistently, too, local perception holds that health problems (e.g., high incidents of cancer), loss of berry picking areas, low fish yields, moose meat with cysts, burbot with blackened livers and salmon with pus sacs are linked to the contamination from the Galena Air Station, Campion

²⁴² U.S. Fish and Wildlife Service, "Koyukuk National Wildlife Refuge: History ", U.S.F.W.S. <http://www.fws.gov/refuges/profiles/History.cfm?ID=75615> (accessed September 1 2013).

²⁴³ Erik B. Bluemel, "Accommodating Native American Cultural Activities on Federal Public Lands " *Idaho Law Review* 41, (2005): 476.

Air Base and Kalakaket Radio Relay Station, all in close proximity to the City of Galena.²⁴⁴

A. Addressing Contamination: First Steps

The soil and groundwater in the Galena area are contaminated with chlorinated solvents, DDT, heavy metals, jet fuel, gasoline, and diesel fuel.²⁴⁵ These toxic substances are a result of USAF activities. The U.S. Air Force has been working on a remedial investigation of the contaminants left at the Galena and Campion Air Stations for over 20 years.²⁴⁶

Much of the contamination outside of the Galena Air Station was detected because of LTC's efforts. For years there was concern that soil and groundwater, along with flora and fauna, were contaminated from the decades of military activity in the area at Galena Air Station, Campion Air Station, and Kalakaket Radio Relay Station. This contamination led to LTC's concern over traditional food safety. Community members' concerns were keeping them from having community gardens, gathering berries at traditional sites, and, generally, conducting activities in sites that were traditionally used for hunting and gathering

²⁴⁴ See, Agency for Toxic Substances and Disease Registry, "Galena Airport: Health Consultation", U.S.A. <http://www.atsdr.cdc.gov/HAC/pha/pha.asp?docid=903&pg=1> (accessed September 1 2013) (for additional history of the bases. "The former Galena Air Station (GAS) is now known as the Galena Airport, located on the north bank of the Yukon River. The former Campion Air Station (CAS) is also located on the north bank of the Yukon approximately six miles east-southeast of the Galena Airport. The site facilities, now removed, were situated on a river terrace at above the general level of the Yukon floodplain. The former Kalakaket Creek White Alice System (KCWAS) site is located about 22 miles south of Galena, across the Yukon River. The station facilities are located on a mountaintop at elevation of about 1,950 feet. Kalakaket Creek is a north-flowing creek about 2 miles west of the site. Kalakaket Creek drains to Kala Creek which is tributary to the Yukon.")

²⁴⁵ See, Spill Prevention and Response, "Contaminated Sites Database: Galena A.F.S./Airport Sitewide", Alaska Department of Environmental Conservation http://146.63.9.103/applications/spar/ccreports/Site_Report.aspx?Hazard_ID=563 (accessed September 1 2013).

²⁴⁶ Ibid.

but were now regarded as hazardous. Thus, LTC requested that the USAF address these concerns. The USAF, however, was hesitant to investigate possible contaminant issues off base (some contaminants had already been identified on base) such as possible drinking water well contamination and reports of abnormalities in traditional food sources.

This hesitation inspired LTC to initiate its own investigation with the help of partner governments and organizations. First, the tribe decided to organize itself and its membership for this purpose. In 1992, tribal leaders held a number of community planning sessions to ensure the Council was moving in the right direction and to strengthen the tribe's governmental capacity. From these sessions, the tribe developed a mission statement called "To Govern Ourselves."²⁴⁷ Tribal members also developed a theme that would help to steer their actions: "Neel ghul neets niy," meaning "We work together, we help each other."

LTC then applied for an Administration for Native Americans (ANA) Environmental Mitigation Grant in 1994-95.²⁴⁸ The tribe used the funds to interview elders about traditional land use and environmental conditions pre- and post-military occupation of the area. Then the tribe contracted with an environmental engineering firm to test for possible contaminants. The contractor discovered 64 sites that had possible contaminants and deserved further study.²⁴⁹

²⁴⁷ Ash Center for Democratic Governance and Innovation, "Yukaana Development Corporation - 2000 High Honors: Loudon Tribal Council", Harvard University Kennedy School of Government <http://www.innovations.harvard.edu/awards.html?id=6464> (accessed September 1 2013).

²⁴⁸ Sprott and Council, 15.

²⁴⁹ Ibid.

One of the most visible impacts from the USAFs activities cited by the contractor were thousands of 55-gallon drums that had been left behind by the military and then scattered along the Middle Yukon Region after a 100-year flood event in 1945.²⁵⁰ It was estimated that 250,000 barrels filled with oil and other hazardous substances had been left to rust and leak into the soil and waters along the Yukon River.²⁵¹ The tribe again asked the USAF to take responsibility for its actions. The military continued to resist. So, in 1996, the tribe called a meeting, which included representatives from 27 state and federal agencies, to discuss the military's part in the environmental contamination of the area. The meeting, along with pressure from Alaska's congressional delegation, convinced the military to accept responsibility. According to one commentator, "The Loudon Tribe chose to take a cooperative approach, operating from the standpoint that they, as a de facto sovereign government, would interact with USAF on a government-to-government basis to effect environmental remediation and drum removal."²⁵² In 1999, the USAF and LTC signed a Memorandum of Agreement (MOA) that helped define the relationship between the two governments (Figure 4.3). Some of the major elements are:

- All parties agree to engage in open and timely communication by working together to enhance and foster communication;
- USAF agrees to consult with the LTC prior to reaching decisions on matters that may have the potential to affect protected Tribal resources, Tribal rights, or Tribal lands;
- USAF recognizes the LTC is a sovereign Tribe, with the right to set its priorities, develop and manage Tribal and Trust resources

²⁵⁰ Ibid., 16.

²⁵¹ Ibid.

²⁵² Ibid.

and be involved in Federal decisions or activities which have the potential to affect these rights; and

- USAF commits to search for ways to involve the LTC in programs, projects, and other activities that build economic capacity and foster abilities to manage LTC resources while preserving its cultural identity.²⁵³



Figure 4.2: MOA signing ceremony with the USAF and Louden Tribal Council, December 1999.²⁵⁴

With that last bullet point in mind, in 1999 the USAF contracted with LTC's for-profit Yukaana Development Corporation to undertake a \$2.7 million project to clean a 10-mile radius surrounding the Galena Air Force Station, successfully removing 12,000 55-gallon drums and 3,200 barrels of tar products from the area (Figure 4.4).²⁵⁵

Up until this point, LTC and its members had been afforded no special consideration. Their arguments for cleanup had been essentially that they deserved to be protected equally and fairly as outlined by the environmental laws. That is the environmental justice argument. Nothing happened. Barrels filled

²⁵³ U.S.A.F., *Galena Village/Louden Tribal Council and the 11th Air Force Elmendorf -- Anchorage: An Alaska Model 2000*.

²⁵⁴ Sprott and Council, 20. (Chief Peter Captain is pictured in the traditional vest.)

²⁵⁵ Innovation.

with hazardous waste continued to dot the landscape. Soil, water, and subsistence foods off of Galena Air Station continued to be untested and community concerns unaddressed. It was LTC's assertion of self-determination – “We govern ourselves” – that served as a reminder to the government agencies that they had a trust responsibility to the tribe. It was that trust responsibility that permitted the USAF to enter into an MOA with Louden and to fund the barrel cleanup. It is this special relationship between federal and tribal governments that holds the power for environmental protection and cleanup.



Figure 4.3: Yukaana Development Corporation and USAF remove barrels around Galena.²⁵⁶

LTC did not stop with the drum removal effort though. While LTC still was trying to address persistent worries about additional USAF contamination and effects on subsistence resources, the tribe identified that an educational effort for Galena and surrounding communities was also integral to moving forward with tribal environmental self-determination. The tribe applied for and received a one-

²⁵⁶ Ibid.

year Indian General Assistance Program (IGAP) grant from the Environmental Protection Agency (EPA). With the funding, LTC began to work with surrounding villages (Ruby, Koyukuk, Nulato, Kaltag, and Huslia), to do environmental assessments. They subsequently formalized their relationship by forming the Yukon Koyukuk Inter-Tribal Environmental Consortium (YKI-TC).²⁵⁷ By utilizing the expertise of the Alaska Department of Environmental Conservation (ADEC) and the EPA, the tribes built capacity in grant-writing, environmental assessments, and environmental planning. LTC and the tribal governments from the YKI-TC villages recognized that, in order to get their environmental concerns addressed, they had to be knowledgeable, active partners in the process.²⁵⁸ And, they determined the only way to do that was on a government-to-government basis.

From the six-village consortium, LTC spread its message of environmental self-determination by calling a summit of tribal leaders from along the Yukon River and its watershed in Canada and Alaska. The first summit was held in Galena in 1997. From there, the Yukon River Inter-Tribal Watershed Council (YRI-TWC) was formed with the aim of providing environmental education, addressing solid waste issues in the villages, and expanding and supporting environmental self-determination efforts along the river.²⁵⁹

Within Galena, LTC formalized its relationship with the city government by signing a formal Memorandum of Agreement (MOA) in 1998. The tribe and

²⁵⁷ Sprott and Council, 16.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

the city divided the environmental responsibilities for the village with the tribe taking responsibility for the broad, long-range environmental issues and the city focusing on solid waste plus water and sewer.²⁶⁰ As education is key, the tribe also developed an MOA with the Galena School District and the USFWS to provide in-service programs for classes on environmental issues.²⁶¹ LTC worked with the USFWS to develop curriculum for a summer science camp, combining traditional ecological knowledge with Western science. LTC also holds a separate summer spirit camp, where youth and elders come together in a camp outside of Galena to learn Native arts and crafts, plant identification, songs, fish cutting, and other traditional cultural activities.

B. LTC – Addressing the Harder Questions

In 2001, when I arrived in Galena, the tribe had been working for ten years to have its environmental concerns met. Great inroads had been made, as described above, but there was still a lot of work to be done. First, while some of the drums along the Yukon River had been collected, there were still hundreds of thousands remaining. Closer to home, there was still concern about fuel leaks and contaminant plumes from the Galena and Champion Air Stations, along with concerns about PCBs and other pollutants at Kalakaket. Community members believed that these unaddressed contaminants could be befouling drinking water wells along with subsistence foods, leading to higher incidences of cancer in the area. These issues were more difficult to address than the drums because they were obviously not so clearly visible and easily identified.

²⁶⁰ Ibid., 19.

²⁶¹ Ibid., 27.

While the tribe participated in community meetings and Regional Advisory Board meetings²⁶² with the USAF and DEC asserting its government-to-government relationship, there was often the feeling that the tribe wasn't taken seriously by those two agencies. Community meetings and Regional Advisory Board meetings tended to be forums where community members were heard but little action was taken to follow up on their complaints. And, in these forums, it seemed that the tribe and tribal members were viewed the same as any other community members. The term "environmental justice" was bandied about in these meetings, with little effect.

The EPA, on the other hand, was more respectful of the tribe's sovereignty. Thus, the tribe set up meetings with EPA department (i.e., the contaminated sites program) heads and with EPA's Region 10 Tribal Program.²⁶³ "Government-to-government"²⁶⁴ meetings were held with agency staff and the

²⁶² Restoration Advisory Boards (RABs) are a tool used by DEC and DoD to engage with the community during environmental restoration at contaminated federal facilities. According to the DEC, "The Department of Defense gives each community the option of forming one of these advisory boards to share community views with the installation decision-makers." Spill Prevention and Response, "Alaska Restoration Advisory Boards ", Alaska Department of Environmental Conservation <http://dec.alaska.gov/spar/csp/rabs.htm#top> (accessed September 1 2013).

²⁶³ EPA has ten regional offices across the country, each of which is responsible for several states and in some cases, territories or special environmental programs. Alaska is in Region 10.

²⁶⁴ A true "government-to-government" meeting would be between, at least, the Region 10 Administrator and the tribal chief. A meeting between EPA staff and a chief is not a true "government-to-government" meeting. Unfortunately, while this sentiment is expressed by tribal chiefs and tribal governments, it is not shared by the federal government. For instance, the Bureau of Reclamation has a policy on tribal consultation. It instructs: "When dealing with tribes, maintaining a government-to-government relationship frequently requires the federal government to ensure that appropriate senior level officials and managers are present at initial and necessary follow-up meetings with tribal governmental officials." Native American and International Affairs Office, *Protocol Guidelines: Consulting with Indian Tribal Governments* 2012. Also see, Office of Superfund Remediation and Technology Innovation, *Consulting with Indian Tribal Governments at Superfund Sites: A Beginner's Booklet* 2006. OSWER-9200.3-42. ("the Division Director (or higher) meets with the tribal Chairperson").

tribal chief and environmental program director²⁶⁵ with the focus on determining how best to gain the respect and cooperation from DoD and DEC for the tribe's environmental claims. Additionally, the tribe's second chief was selected as a representative for the EPA's Regional Tribal Operations Committee (RTOC) along with the National Tribal Operations Committee (NTOC).²⁶⁶ The RTOCs and NTOC were designed primarily for tribal representatives to work alongside the EPA to further tribal environmental objectives at the regional and national levels.²⁶⁷ The Louden Tribe used its position at the RTOC and NTOC to raise issues about contamination at federal facilities in Alaska and the need for greater respect as sovereigns between the federal and tribal governments. It also consulted with representatives from tribes in the lower 48 states to help determine a path forward.

As a result of these consultations, it was decided that LTC would ask the EPA to determine whether or not Galena qualified for the National Priorities List (NPL). Qualification for the NPL is one of the first steps for being listed for Superfund cleanup. The tribe acknowledged immediately that Galena would never be placed on the NPL list because of the politics involved. The NPL listing requires a Hazard Ranking System (HRS) score, public comments, and the opinion of the state governor (though the policy of EPA was to obtain *approval*

²⁶⁵ I was the environmental program director attending the meetings from April 2001 to September 2003.

²⁶⁶ As the environmental program director, I was selected as the alternate and most often attended the regional and national meetings along with participating in regular workgroups.

²⁶⁷ For more information about the RTOC and NTOC, *see*, Region 10: E.P.A., "Region 10 Tribal Operations Committee (Rtoc) ", U.S. E.P.A. [http://yosemite.epa.gov/R10/TRIBAL.NSF/webpage/region+10+tribal+operations+committee+\(RTOC\)](http://yosemite.epa.gov/R10/TRIBAL.NSF/webpage/region+10+tribal+operations+committee+(RTOC)) (accessed September 2 2013).

by the governor, not just his or her opinion).²⁶⁸ In this case, then-Governor Murkowski would never have approved the addition of a Superfund site in “pristine” Alaska.²⁶⁹ LTC, however, wanted to raise awareness of Galena and assert its power. Thus, the tribe requested a Preliminary Assessment (PA) and Site Inspection (SI). The results of the PA and SI led to an HRS score that verified there was a high potential that contaminants from Galena and Campion Air Stations might pose a threat to human health and the environment. While the score was high enough to pursue formal NPL listing, the tribe decided to use the information instead, informally, in its negotiations and communications with the DoD.

Along with the NPL request, LTC also requested assistance from the Agency for Toxic Substances and Disease Registry (ATSDR). The tribe asked ATSDR to perform a human health consultation for Galena and evaluate health impacts from the contamination left by the military installations. A human health consultation outlines environmental issues and health concerns that ATSDR will use for future public health assessments (PHA). In 2003, the agency published its results, announcing that it “did not identify issues that pose an imminent public health threat, but did identify several waste disposal issues and community concerns that will be addressed in the PHA.”²⁷⁰ ATSDR identified a number of concerns including:

- Contaminated drinking (ground) water

²⁶⁸ Interview with EPA Contaminated Sites program staff, 2002.

²⁶⁹ Ibid.

²⁷⁰ Agency for Toxic Substances and Disease Registry, "Health Consultation Conducted in Galena, Alaska ", U.S.A. <http://www.atsdr.cdc.gov/news/displaynews.asp?PRid=2047> (accessed September 1 2013).

- Indoor air issues
- Petroleum, oil and lubricant releases
- Possible harmful health effects from the previous use of pesticides
- Benefits derived from the use of traditional subsistence foods versus the potential adverse health effects from environmental contamination of those food sources
- High cancer rates.²⁷¹

The PHA was completed in 2007. The PHA made conclusions based on existing data, mainly gathered by the USAF, supplemented with some sampling of subsistence foods by LTC and USFWS. The ultimate conclusion of the PHA was that there were no legitimate human health concerns from USAF environmental contaminants.²⁷²

For its part, the tribe launched its own investigation into the health of subsistence foods. Along with the Tanana Chiefs Conference and the Agency for Toxic Substances and Disease Registry (ATSDR), LTC worked on identifying foods that people eat, in what quantities, and concerns people may have regarding wild and traditional foods. Hunting, fishing, preparing and consuming these traditional foods are all integral to LTC's culture and tribal members' livelihoods. This collaboration resulted in the *Final Report on the Alaska Traditional Diet Survey*.²⁷³ As pointed out in the report, “[f]or Alaska Natives, harvesting and eating subsistence foods are essential to personal, social, and cultural identity...rural Alaskans consume large quantities of subsistence foods and are

²⁷¹ Ibid.

²⁷² Federal Facilities Assessment Branch, *Public Health Assessment for Galena Airport 2007*.

²⁷³ I collected survey data as part of the project for LTC. See, Carol Ballew et al., *Final Report on the Alaska Traditional Diet Survey* (Anchorage, AK: Alaska Native Epidemiology Center Alaska Native Health Board, 2004).

therefore at potential risk of exposure to contaminants that may be in those foods.”²⁷⁴

C. Sampling a Traditional Food Source

In practicing environmental self-determination, the Loudon Tribe identified one food of high concern to test, burbot (*Lota lota*). For years, there had been reports of abnormalities in burbot livers,²⁷⁵ a delicacy among the peoples of the Middle Yukon Valley. It was a good candidate for a study because it is a resident fish that prefers shallow waters. Its diet consists of other fish. It is a popular subsistence fish, particularly in the fall and winter months for ice fishing, with big, oil-rich livers that people like to consume. In addition, while LTC had limited capacity for testing, its sampling results could be compared to those of other agencies that were also testing burbot on the Yukon River.

Additionally, LTC determined that fish contamination due to mercury or organochlorine pollution is a significant threat to the health and welfare of tribal members. Because tribal members consume fish in much greater quantities than the general population,²⁷⁶ there is an increased vulnerability to mercury and

²⁷⁴Ibid., iv.

²⁷⁵ See, David B. Anderson et al., *Traditional Ecological Knowledge and Contemporary Subsistence Harvest of Non-Salmon Fish in the Koyukuk River Drainage, Alaska* 2004. Final Report for Study 01-100-3. (For example, one comment from a Huslia resident expressed concern about a large number of burbot caught in the fall of 2002 that had spots or areas of discoloration on their livers, and appeared sick: “You know what I notice, last fall we couldn’t eat it [burbot]. Look like it’s all sick inside, and they are all poor. I didn’t find no good ones. Lots of people give us some but look like they’re all sick. I tried them. I cook it...but it’s...it’s different. All of them was that way. The liver...it’s all dots. Its liver is pretty shrunk, like it’s sick...it’s all sick. I don’t think I want it now ‘cause look like it’s all sick.”) Ibid., 55.

²⁷⁶ But see, ATSDR Report where the agency determined that since burbot was consumed at such low levels that even though contaminant levels were high, there was no real concern with burbot consumption. The agency’s data on consumption rates, however, may have assumed unrealistically low consumption rates. Additionally, the agency failed to take into account that consumption may have dropped due to fear of contamination. It also failed to recognize that the fish themselves were an indication that the river was contaminated. Branch, 64.

organochlorine toxicity. As a consequence, tribal members would bear a disproportionate share of the negative environmental consequences resulting from any bioaccumulation of mercury and organochlorines in aquatic ecosystems. Thus, LTC's environmental program collected mercury and organochlorine contamination data at lakes and sloughs that were prioritized by their importance to tribal member's fishery utilization. Fish were then collected and analyzed to determine the levels of mercury and organochlorine contamination.

Six burbot samples were collected in October 2002. Local fishers cooperated in the study by identifying normal fishing holes for burbot, setting the lines, and contacting the LTC Environmental Department when the fish were caught. The fish were then collected, stored on ice and transported to the LTC tribal office that had been cleaned and prepared to act as a laboratory.

The fish collection sample kit consisted of baby diapers soaked in fixative for fish livers; and clean glass jars for soaking ½ of each fish liver, spleen sample, kidney sample, and heart samples overnight prior to returning them to the diapers for shipment – these samples were never frozen. It also included clean glass jars for filling ¾ full of skinless fillet fish muscle tissue collected from the same location from each fish (right side, dorsal muscle segment, excised 1-inch behind the head and extending backward above the lateral line); and clean glass jars for placing the other ½ of each fish liver into for chemical analysis.

Sample Handling: As soon as the fish were removed from the collection device they were identified by species. Non-target species or specimens that did not meet the size requirements were returned to the water. The target species

were identified, with the species name and all appropriate information recorded on the field record forms. Individual fish were rinsed in ambient water to remove any foreign material from the external surface. Large fish were stunned with a sharp blow to the base of the skull. Care was taken to keep the stunning instrument clean to prevent contamination. Small fish were put on ice to stun them.

The burbot were grouped by general size class and placed in clean holding trays to prevent contamination. All fish were inspected to ensure that the sampling equipment had not damaged their skin and fins; damaged specimens were discarded. Each fish was measured to determine total length (mm) and weighed. Each fish was also assessed for external anomalies. This information was recorded on respective field records, sample identification labels, and sample custody labels.

Sample Processing and Packaging: Collection was done with hook and line and a fishing lure. The work area and hands were rinsed with distilled water before beginning fish processing and, in between, each fish was rinsed with distilled water before removing the tissue sample. The fish sample was filleted using a clean, stainless steel knife. A piece of muscle tissue (about 2 inches by 1 inch by 1 inch) was cut off from the thick part of the fillet on top of the back and right behind the head. Then, while wearing the gloves, the muscle tissue was sliced into four small French-fry-shaped pieces using a stainless steel fillet knife. The tissue pieces were placed into a pre-labeled glass vial. The vial was sealed

and placed in a Ziplock bag, along with completed Forms 2 and 3. Each sample was placed in an iced cooler.

When all samples had been processed, the sample custody and distribution records were completed for all fish samples to be shipped in each cooler. A copy of each sample custody record was placed in a watertight bag and the bag was taped to the inside cover of the respective cooler. Care was taken for the fish to be frozen overnight and then the frozen samples to be placed with dry ice and any necessary packing material into the cooler, then sealed with reinforced tape for shipment.

Bait: This project was intended to be a baseline study to assess tissue contaminant levels in one of LTC's traditional food sources, burbot. Black fish is the bait used for catching burbot. The best time for blackfish collection is during the fall, around October, and the burbot was collected during the same time period.

All burbot collected were examined macroscopically (necropsy) and tissue samples were collected for histology following standard veterinary necropsy guidelines. Sample collection method and storage protocols for toxicological assessment of biological specimens as provided by George Gardner, of the U.S. EPA Environmental Research Laboratory, were used. Chemical analysis tests were run at the U.S. EPA Region 10 lab in Port Orchard, WA. Burbot tissue samples (i.e. liver, kidney, spleen, muscle tissue) were tested for organochlorines (i.e., DDT, HCB and chlordane), PCBs (PCB screen), toxaphene (toxaphene

screen) and heavy metals (complete heavy metal screen). The U.S. EPA Narragansett Laboratory in Rhode Island did the histopathology of the burbot livers.

Protocol: The steps below were followed as part of the sampling protocol:

1) The selected candidate fish were numbered and photographed with the number clearly visible in the photo. The three worst (largest, oldest, most diseased) fish were selected. One healthy appearing fish was selected as a control. A clean workplace was setup in the LTC tribal office, free of chemical contamination (exhaust, fuels and lubricants, cigarette smoke). The fish were measured and the weight, fork length, total length, and any abnormalities including atypical fin rays, erosion of fins, skin lesions, obvious parasites, discoloration, etc. were recorded.

2) Gloves were worn during the sampling process and changed between each fish sample. Fish were dissected in accordance with Dr. Gardner's protocol. The liver was then removed and inspected for nodules. The color, surface and texture of the liver were recorded in the lab notes.

3) The liver was cut in half. The less nodular half of the liver was placed into a clean sample jar from the kit for chemical analysis, while ensuring that the jar was not filled more than $\frac{3}{4}$ full. The jar was labeled with the fish number and added to the ice chest for freezing prior to shipment. The other half of the liver was taken for histopathology. It was wrapped in a fixative-soaked diaper for twenty minutes to harden.

4) During the 20-minute period, the spleen was located and a piece the size of a dime was placed into one of the clean jars from the sample kit. The jar was labeled with the fish number. A fixative-soaked diaper was wrung out into the jar with the spleen tissue. The liver was sliced with a scalpel into quarter inch thick slices, paying attention to slice through any nodules, if present.

5) The liver slices were added into the jar filled from the wrung-out diaper. Permeation was allowed to continue overnight. Before shipment, the fixative and liver tissues were transferred back into the diapers and sealed in the Ziploc bag the diaper was shipped in. The Ziploc bag was then labeled with the fish sample number.

6) These samples were kept at room temperature.

7) From the same fish, a skinless filet of muscle tissue was collected for chemical analysis from the right side, dorsal muscle segment, excised 1-inch behind the head and extending backward above the lateral line. Enough tissue was collected to fill a clean sample jar from the sample kit about $\frac{3}{4}$ full. Nothing was added to this jar – no water or fixative – just the skinless muscle tissue. The jar was labeled with the fish number and placed with the samples to be frozen.

8) The head of the fish was then cut off and placed into a Ziploc plastic bag. The bag was labeled with the fish number and added to the ice chest with samples to be frozen. The heads were used to determine the age of the fish using otolith analysis. The fixed livers and spleen tissues were kept in the fixative

soaked diapers at room temperature. The frozen tissues were kept frozen until transport via Northern Air Cargo.

Sample Shipping: All samples were shipped to the respective laboratories within twenty-four hours of sample collection.

Laboratory Custody Procedures: Laboratory custody was acknowledged on the sample custody and distribution record and through the logging in of fish samples on the laboratory sample log. Each sample was logged into the lab sample log using a unique number recorded on the custody and distribution record. When analyses were completed, the custody and distribution records were forwarded with the analytical results to me, the Environmental Director of LTC.

Sample Results: Mercury, arsenic, and PCBs were detected in all six samples. DDT was detected in two of the samples. The highest concentrations were found in the livers, where contaminants tend to bioaccumulate. The ATSDR used EPA's Region 3 risk-based concentration (RBC) values to determine what was a "safe" or acceptable amount of a contaminant for its studies. I have used the same RBC values here. The RBC for arsenic was 0.0021mg/kg; for mercury it was 0.14 mg methylmercury/kg; for DDT 0.0093 mg/kg; and for PCBs it was 0.0016 pg/g.²⁷⁷ As illustrated in the Table 4.1, many of the samples exceeded the acceptable risk limit. ATSDR used Loudon's sampling round when doing its public health assessment for Galena. It determined that the small sample size was an issue when determining how much credence to give the study.²⁷⁸ ATSDR also

²⁷⁷ Ibid., 82..

²⁷⁸ Ibid., 54.

felt that the number of burbot subsistence users was small and therefore the high levels of contamination were not a cause of concern.²⁷⁹

At about the same time as I collected samples for Louden, USFWS and USGS sampled burbot on the Yukon River as well. In 1998 and 1999, the U.S. Fish and Wildlife Service collected burbot liver samples from the Tanana River below Fairbanks, Kanuti National Wildlife Refuge at Bettles (Koyukuk River), Tetlin National Wildlife Refuge (Tanana River), and Yukon Flats National Wildlife Refuge at Beaver (Yukon River).²⁸⁰ The report found that there were greater contaminant concentrations of DDT and its metabolites from sites below Fairbanks and Yukon Flats Refuge than at Tetlin and Kanuti Refuges. The authors of the report concluded that the greater concentrations were probably attributable to the historical use of DDT within the city of Fairbanks and at nearby military bases.²⁸¹ The mean concentrations of DDT and PCBs for this study were: DDT – 0.18-2.76mg/kg; and PCBs – 10-3.70 mg/kg.²⁸²

In 2002, the U.S. Geological Survey in partnership with the USFWS, collected burbot, along with other fish, to measure environmental contaminants and evaluate physiological, morphological and histological responses of contaminant exposure in fish within the Yukon River Basin.²⁸³ The report ultimately concluded that “[o]verall fish health was generally good and the

²⁷⁹ Ibid.

²⁸⁰ Keith A. Mueller and Angela C. Matz, *Organochlorine Concentrations in Burbot (Lota Lota) Livers from Fairbanks, Alaska, and Kanuti, Tetlin and Yukon Flats National Wildlife Refuges, Alaska* 2000. NAES-TR-00-01.

²⁸¹ Ibid., 32.

²⁸² Ibid., 29.

²⁸³ Jo Ellen Hinck, *Fish Health and Contaminant Assessment in the Yukon River Basin, Alaska* 2005.

concentrations of most chemical contaminants were low” compared to concentrations found in fish in the Mississippi, Rio Grande, and Columbia Rivers.²⁸⁴ Concentrations of pesticides, such as DDT, and total PCBs were found to be low in all samples. Mercury and selenium were the only contaminants discovered that exceeded thresholds for ecosystem health. Both had been identified as contaminants of concern in previous studies within the Yukon River, according to the authors.²⁸⁵

ATSDR reviewed all of the above studies when evaluating its conclusion in regard to Louden Tribal Council members concerns about the health of burbot near Galena. The agency ultimately determined that the results of the studies were inconclusive, and possibly not “even indicative of a problem.”²⁸⁶ And, the agency concluded, “considering the relatively small contribution burbot...make to the total fish subsistence diet of the Galena residents, ATSDR has no basis on which to conclude that these fish species should be excluded from the diet.”²⁸⁷

Exclusion of burbot from the diet, however, was not the question posed by LTC and its community members. The tribe wanted to know if there was a reason to believe that contamination from the USAF had reached the Yukon River and was affecting traditional subsistence resources. While the data set was small, it indicates that further study is warranted.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Branch, 55.

²⁸⁷ Ibid.

Table 4.1: Results of LTC burbot sampling.

Sample #	Sample Weight (kg)	Sample Type	Arsenic (mg/kg)	Mercury (mg/kg)	DDT (mg/kg)	PCBs (pg/g)
Sample 1	5.81	Tissue	17.9	.11	ND ²⁸⁸	0.0
		Liver	2.4	.16	.25	4.5
Sample 2	4.08	Tissue	.4	.22	ND	0.0
		Liver	.3	.12	.38	4.4
Sample 3	3.99	Tissue	.6	.20	ND	0.0
		Liver	.8	.43	ND	2.4
Sample 4	.998	Tissue	ND	.11	ND	0.0
		Liver	.2	.09	ND	.7
Sample 5	1.996	Tissue	2.7	.19	ND	0.0
		Liver	.4	.15	ND	.9
Sample 6	.91	Tissue	ND	.06	ND	.1
		Liver	2.0	.04	ND	1.0

²⁸⁸ “ND” means that no DDT was found at or above detection limits, which were at 0.01 mg/kg.

Outcome: Though ultimately the ATSDR PHA resulted in no significant findings the use of that tool, along with the tribe's sampling rounds, the HRS, its strategic use of government-to-government meetings with various agencies (e.g., the EPA) and its contacts with tribes in the Lower 48 who were able to provide information and use their influence at the national level, the tribe provided enough pressure on DoD that it began to do more than just have meeting-after-meeting, discussing the contaminants in Galena. This increased attention led to the formation of a Technical Project Team (TPT) in 2002. The TPT is comprised of the LTC, City of Galena, Galena City Schools, USAF, and ADEC. The TPT allows the concerned governments to move together as equal partners in determining what needs to be studied and the proper remediation methods for cleaning up contaminants. While LTC does not have veto authority like USAF and ADEC, the goal of the TPT is to reach consensus in decision-making.

With the advent of the TPT, USAF did a comprehensive study of contaminants at Galena and Campion Air Stations, finding numerous contaminated sites (Figure 4.4). And while some of these sites had previously been identified, the USAF's principle remediation method was natural attenuation – meaning leave the contaminants in place and they will eventually degrade. This was not good enough for LTC, which was convinced that there were environmental and human health impacts and that the contaminants were reaching the sacred Yukon River.

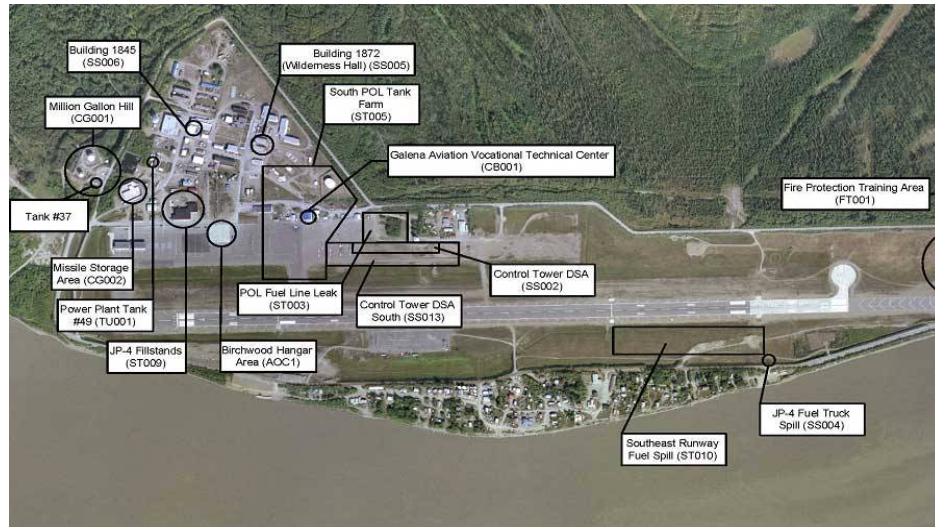


Figure 4.4: Map of contaminated sites at Galena Air Station.²⁸⁹

LTC pushed for sentry (monitoring) wells to be placed along the Yukon River’s edge, despite protests over the years by the USAF that there was no way contaminants could be reaching the river. Finally, in 2005, ADEC and DoD admitted that contamination of the Yukon River was a real possibility. “Potential pathways for contaminant exposure include contaminated groundwater migrating to drinking water wells or to the Yukon River, vapors migrating from subsurface contamination into buildings, direct contact with contaminated subsurface soils, and accumulation of contaminants in wildlife harvested for subsistence.”²⁹⁰

Studies have also confirmed that there are the following:

- Petroleum-contaminated soil and groundwater at several locations around the airport, such as the two fuel tank farms (Million Gallon Hill and the Petroleum, Oils, and Lubricants [POL] Tank Farm), the Fire Protection Training Area, the JP-4 Fillstands, and the Southeast Runway Fuel Spill area;

²⁸⁹ Photo courtesy of DEC, available at:

<http://dec.alaska.gov/spar/csp/images/interior/galenaairportblur.jpg>.

²⁹⁰ Spill Prevention and Response, "Galena Air Force Station ", Alaska Department of Environmental Conservation <http://dec.alaska.gov/spar/csp/sites/galena.htm#database> (accessed September 1 2013).

- Chlorinated-solvents in groundwater beneath maintenance shops (Buildings 1845 and 1700); and
- Pesticide-contaminated soil around the airport.²⁹¹

As of April 2013, monitoring wells were still being installed, soils were being removed and treated, more drums and buildings were being removed, and risk assessments were ongoing.²⁹² While the bigger issues still remain, more finite concerns have been addressed. There had been concerns that one of the school buildings on base was suffering from poor indoor air quality due to infiltration of diesel fumes from a contaminated groundwater plume that was directly under the building. The USAF tested the building and retrofitted it with air filters to ensure that no fumes would be impacting the children and teachers who occupied the space daily. Additionally, the USAF tested and removed contaminated soil on a site near the Galena Air Station so that community members could re-establish a community garden that had been abandoned previously due to contaminant concerns. Cleanup of Kalakaket and Campion allowed tribal members to return to previously abandoned harvest areas for berries, moose, and fur-bearing animals such as muskrat.²⁹³ While, on paper, LTC has no land beyond the village townsite plot, it has worked to establish what Charles Wilkinson has coined “workable islands of Indianness within the larger society.”²⁹⁴ Through LTC’s assertion of environmental self-determination, even without a land base, the tribe was able to rectify some of the cultural harm that

²⁹¹ Ibid.

²⁹² Response, "Contaminated Sites Database: Galena A.F.S./Airport Sitewide".

²⁹³ Through conversations by the author with residents of Galena, it was related that some, but not all, people hesitated or completely avoided certain areas due to fear of contaminants.

²⁹⁴ Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* (New Haven and London: Yale University Press, 1987), 122.

occurred from its earlier reliance on environmental justice principles and the concomitant ignoring of those principles by the federal government.

On May 28, 2013, Galena was nearly destroyed after an ice jam backed up the Yukon River (Figure 4.9). Nearly 90% of Galena's buildings were damaged or destroyed. All but 76 residents were evacuated. The town was declared both a state and national disaster area, making disaster funding available to residents. Damage estimates exceed \$10 million. The regional nonprofit corporation, Tanana Chiefs Conference wrote in a letter on June 2, 2013: "Galena is a hazardous place at this time due to diesel, sewage, and ice damage,' citing sewage spills, hazardous materials, spilled fuel, destroyed dump, loose power lines, downed and falling trees, heavy-equipment traffic and limited infrastructure as factors making it 'dangerous to visit.'"²⁹⁵ Following the flood, the future of environmental mitigation specific to the USAF contamination is uncertain.²⁹⁶

²⁹⁵ I.C.T.M.N. Staff, "Galena, Alaska Struggles to Rebuild after Yukon River Ice Jam Causes Devastating Flood " *Indian Country Today* (2013).
<http://indiancountrytodaymedianetwork.com/2013/06/17/galena-alaska-struggles-rebuild-after-yukon-river-ice-jam-causes-devastating-flood-149945> (accessed September 1, 2013).

²⁹⁶ Ibid.



Figure 4.5: In this May 27, 2013 photo released by the National Weather Service, homes and other buildings are shown flooded in Galena, Alaska. (AP Photo/National Weather Service, Ed Plumb)

Chapter 5

RECOMMENDATIONS MOVING FORWARD

Environmental justice is a faulty tool for tribes. It can have adverse environmental, social, and political impacts, because environmental justice laws and policies frame Native Americans as racial minorities, instead of approaching environmental issues through the unique relationship that has been historically established between the federal and tribal governments.

The Louden Tribal Council has faced contamination of subsistence resources and loss of land rights. Louden Tribal Council members perceive that the Department of Defense (DoD) is responsible for much of the contamination of their lands and waters. Although federal agencies, such as the DoD, are mandated to work on a government-to-government basis with tribes, this thesis shows that this has not always been the case in practice. This case study demonstrates that reliance on an environmental justice policy framework instead of a government-to-government relationship resulted in negative environmental and socio-cultural impacts.

A. Lessons Learned about Environmental Justice

As is evident, many of the elements of the environmental justice frame could be applied to indigenous populations. According to the Military Toxics Project and the Environmental Health Coalition, “Environmental justice is a principle and a movement closely aligned with communities and tribal peoples

fighting the impacts of military toxics.”²⁹⁷ This, however, is similar to the argument used by cultural geographers when discussing the use of the term “race” over “ethnicity.” Peter Jackson insinuates a “minority status without recognizing the centrality of power to the social relations implied by such a status.”²⁹⁸ Claiming that something is an environmental justice issue lends a minority status but ignores the power of the unique relationship that native populations have. In the United States, as outlined by legal arguments discussed previously, tribes are acknowledged to have “inherent jurisdiction over their people and territory.”²⁹⁹ And, while the EPA discusses environmental justice in relation to indigenous peoples, it also acknowledges that indigenous tribes are due more than protection under environmental justice concepts as memorialized in EO 12898. In addition to following its own mandates, the EPA recognizes that every federal agency is subject to the United States’ trust responsibilities and not simply the concepts of equality promoted by environmental justice advocates.³⁰⁰

Despite assertions by the United States, tribal governments are constantly battling attempts by the federal government and non-Natives to deny their rights to self-governance.³⁰¹ By citing a case as an environmental justice issue, tribes are arguably playing into the sovereignty deniers’ hands and playing a “race” game. This game denies the power that tribes have as semi-sovereign

²⁹⁷ *Defend Our Health: The U.S. Military's Environmental Assault on Communities*, 6.

²⁹⁸ Jackson, 153.

²⁹⁹ Case and Voluck, 14.

³⁰⁰ U.S. Environmental Protection Agency, Response to Tribal Consultation & Coordination Comments on Plan EJ 2014 Strategy and Implementation Plans, 5-6, <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-tribal-consult-responses.pdf> (accessed on September 5, 2013).

³⁰¹ Wood and Welker, "Tribes as Trustees Again," 393.

governments.³⁰² Several U.S. Supreme Court cases have reaffirmed that “unique Native institutions and rights are based on the historical political status of Natives and are not, therefore, racially defined.”³⁰³ This is extremely important in the maintenance and development of programs and benefits for Native Americans and especially Alaska Natives. If Native Americans were simply defined by their “race” and not their political status, then the programs and benefits they retain could be dismantled.³⁰⁴ “[T]hat differential treatment of Indians in federal law is constitutionally permissible is a significant difference between Indians and other ‘communities’ that comprise the environmental justice movement.”³⁰⁵ Dean Suagee, an enrolled member of the Cherokee Nation and legal expert on environmental and Indian law argues that “[t]he general approach ... to authorize tribes to be treated in the same manner as states...makes tribes fundamentally different from other kinds of minority communities that are involved in the environmental justice movement.”³⁰⁶ Thus, the use of the environmental justice framework, defining indigenous peoples of North America by their “race” and not their political status, is inapposite with respect to tribal goals of environmental self-determination.

³⁰² Tribes have been described as "quasi-sovereign tribal entities" *Morton v. Mancari*, 417 U.S. (1974); "quasi-sovereign nations" *Iron Crow v. Oglala Sioux Tribe*, 231 F. 2d 89 (8th Cir. 1956); "dependent nations" *Colliflower v. Garland*, 342 F. 2d 369 (9th Cir. 1965); "residual sovereignty" *Long v. Quinalt*, No. C75-677 (W.D. Wash., Sept. 2, 1975); and "semi-sovereign existence" *Quechan Tribe of Indians v. Rowe*, No.72-3199 (9th Cir. Feb.2, 1976).

³⁰³ Wood and Welker, "Tribes as Trustees Again," 393.

³⁰⁴ "Because of the status of tribes as sovereign governments that are subject to the plenary power of Congress, the Supreme Court has ruled that it is constitutionally permissible for Congress to enact laws that result in differential treatment of Indians." Office, (citing *Covolo Indian Community v. FERC*, 895 F.2d 581 (9th Cir. 1990)).

³⁰⁵ Dean Suagee, "Turtle's War Party: An Indian Allegory on Environmental Justice," *Journal of Environmental Law and Litigation* 9, (1994): 472.

³⁰⁶ *Ibid.*

Environmental justice advocates extol the power of civic participation. They argue it is the key to protecting groups who live in communities affected by contamination.³⁰⁷ Civic participation means collecting and incorporating various views of the general citizenry into the decision-making processes that affect them.³⁰⁸ In the case of LTC, the tribe tried to go the route of the “general citizenry” participating in the civic process, attending public meetings, writing comment letters from 1985 until 1996, but with little result. The first specific mention of LTC in the spill database (other than as “concerned citizens”) was in 2002, when Chief Peter Captain asked to meet with the head of the 611th Squadron, Lt. Col. Chamberlain.³⁰⁹ It took many years and many meetings before LTC was regarded as a partner in the cleanup process and that was only because the tribe used its sovereign power, reminding the federal government agencies of their trust responsibilities.

While LTC borrowed from the environmental justice toolbox by doing its own sampling of subsistence foods, this was more than the simple citizen involvement promoted by EJ activists. LTC borrowed from the EJ toolkit and

³⁰⁷ Luke Cole, “The Theory and Reality of Community-Based Environmental Decisionmaking: The Failure of California’s Tanner Act and Its Implications for Environmental Justice” *Ecology Law Quarterly*, 25 (1999): 734-36.

³⁰⁸ *Ibid.*

³⁰⁹ *See, ibid.*, 472. “January 24-24, 2002, staff attended a meeting with Loudon Tribal Council (LTC) and the Air Force in Galena. In a July meeting sponsored by LTC Colonel Chamberlain and the First Chief Peter Captain agreed to meet quarterly to discuss Galena issues. Curt Black from EPA was connected by teleconference. Also, present at the meeting was Tanana Chiefs Conference (TCC), BIA and DOT. Comments made by DEC, EPA, and LTC on the monitoring program for the POL and TCE plumes were discussed. The AF said they planned to prepare responses to the comments and have a comment resolution meeting. The AF is in the process of hiring independent consultants to review the reports and comments. The AF is also planning to have a peer review to determine the best solutions for the site. The AF could not give dates of when these events will occur. The Department has also hired a hydrologist with Shannon and Wilson to review documents, recommend improvements in site characterization, and evaluate suitable remedial technologies.”

gained the knowledge needed to take water quality samples and fish samples and used it in their charge that the Yukon River is contaminated. It wasn't the sample taking alone, however, that mattered. It was the tribe exercising its sovereignty, establishing legitimacy in the eyes of the other governments by deploying Western science and its own traditional ecological knowledge as a tool to prove its case, that was the real import of the sampling effort.

While ATSDR and the federal government may not have been convinced by LTC's burbot sampling because of the small sample size and the purported low consumption rates of burbot, it was empowering to the tribe and its members. The burbot were contaminated. Tribal members had seen the contamination before in the burbot livers and had reduced their intake. The fear of contamination made at least some hesitate before eating their traditional food, burbot livers. And not only the burbot, but moose, caribou, or any other animal that appeared to have a deformity became suspect of suffering from contamination. People questioned the health of their traditional foods. That is a cultural harm. LTC identified the harm. They took action and quantified the type and amount of contamination in the burbot. And then LTC pushed for clean up. Contamination of the resident fish meant that the river, which was sacred to LTC, was contaminated. It meant that tribal members were going to change their customary practices. If LTC had followed the environmental justice rubric, little else would have been done. A health advisory may have been deemed good enough by ATSDR due to the small population and relative remoteness of Galena. But, as Elizabeth Hoover found in her article "Cultural and Health Implications of

Fish Advisories in a Native American Community,” “[h]uman health in Native American communities ... is intimately tied to the health of the environment. Fish advisories should not be used as an institutional control to protect humans from exposure to contaminants.”³¹⁰ As it is, LTC has pushed for cleanup of contaminated groundwater and soils along with monitoring wells to help detect plume movement. The tribe is dedicated to ensuring a clean environment for its people through environmental self-determination.

Some of the challenges faced by many people who fall under the “environmental justice” umbrella are the same for tribes, though tribes have different and stronger tools available to them. Being a sovereign dependent nation carries with it a power that would be a fallacy to neglect. In the case of LTC, it used its power under the CWA as a sovereign nation and leveraged the expertise of USFWS to help bridge the gaps between Western science and TEK in developing water quality sampling protocols and water quality standards. It also joined forces with ATSDR to help gain an understanding of traditional diets as they evolve. LTC also accessed the unique sources of money available only to tribal governments to fund training and tribal positions (e.g., ANA and IGAP).

Bullard has written that, “[t]he goal of an environmental justice framework is to make environmental protection more democratic.”³¹¹ For tribal governments, the goal is not to bring democracy to environmental protection. The goal is to ensure that tribes are in the lead when it comes to environmental

³¹⁰ Lucie Laurian, "Public Participation in Environmental Decision-Making." *Journal of the American Planning Association* 70, no. 1 (2004): 56-7.

³¹¹ Robert D. Bullard, "Environmental Justice for All: It's the Right Thing to Do " *Journal of Environmental Law and Litigation* 9, no. 2 (1994): 307.

protection of their lands. Wood and Welcker explain that, “[t]raditional Native sovereignty is inextricably connected to [a] spiritual conservation mandate. In effect, tribes use their sovereignty to exercise their spiritual duty to protect the interests of beneficiaries in distant generations.”³¹² And that is exactly why environmental justice is the wrong tool for tribes to use.

B. Pursuing Environmental Self-Determination

It is the federal government’s trust responsibility to protect the right of tribes to carry on self-government.³¹³ EPA has worked hard, despite resistance from other government agencies, to fulfill the mandates of executive orders and the statutory provisions that apply to tribes. More can be done, however. LTC and other tribal governments can push through the RTOCs and NTOC for more provisions in environmental statutes and regulations to help tribes assume roles like those of the states. Especially for Alaska, it is imperative that provisions are made for the EPA to carry out the federal trust responsibility where tribes have not yet assumed roles like those of states, or cannot due to land status.³¹⁴ In April 1994, representatives of the NTOC submitted a document to EPA entitled “Completing the Picture: A Tribal Submittal to Address the U.S. EPA Strategic Plan.” Under the heading “Environmental Justice,” this document states, in part: “Environmental justice for tribes must include funding and program participation on an equal basis with states. Those individuals living within tribal environmental jurisdiction must be given the same opportunities as everyone else

³¹² Wood and Welker, "Tribes as Trustees Again," 385.

³¹³ Suagee, "Turtle's War Party," 487.

³¹⁴ *Ibid.*, 488.

to live in a safe and clean environment.”³¹⁵ Here, tribes blurred the lines between environmental justice and tribal environmental self-determination. A clean environment for tribes is not about “democracy,” and to lose sight of that confuses the issue for Indians and non-Indians alike. In order for the message of tribal sovereignty and environmental self-determination (i.e., tribes are different and must be respected as separate sovereign governments) to resonate, it cannot be mixed with the message that tribes are different because of their race or socioeconomic status and deserve to be treated equal to the affluent whites in society.

Compared to others in the dominant society, a Native American’s way of life depends more directly and to a greater extent on land and resources. Lands and resources are not limited to tribal reservations. Too often, though, tribal jurisdiction is only recognized within reservation boundaries. While the EPA can ask tribes to fill in gaps of federal oversight by developing water quality standards that include wetlands, for example, those standards will carry little weight when a tribe has no recognized land base in which to apply its standards. For example, LTC developed water quality standards for the Yukon River. The tribe wished the DoD to consider its standards when outlining the applicable or relevant and appropriate requirements (ARARs) for cleanup of the USAF’s contamination. The DoD, while recognizing LTC as a sovereign tribal nation, did not do so because LTC had no jurisdiction over the Yukon River. Thus, LTC and other tribes without a land base must come up with ways of extending jurisdictional

³¹⁵ National Tribal Operations Committee, “Completing the Picture: A Tribal Submittal to Address the U.S. EPA Strategic Plan.”

boundaries.³¹⁶ One suggestion by Wood and Welker is that tribes promote land restoration proposals. These proposals would provide for land previously occupied by a tribe to be purchased either in fee or in trust and returned to the tribal land base.³¹⁷ She acknowledges that this would require a great amount of private funding or congressional legislation and appropriations.³¹⁸ And, for LTC and other Alaskan tribes, they would be sure to meet resistance at least as far as congressional approval.

Another recommendation is that tribes may contract with state and federal agencies to advance cooperative programs on lands outside of reservation boundaries.³¹⁹ This is a viable option for LTC and other Alaskan tribes as long as funding could be provided for tribal staff. LTC could work in cooperation with USFWS in the Koyukuk National Wildlife Refuge. LTC has effectively used MOAs in the past and this is another avenue where the tribe could enter into an MOA with an agency. An MOA could be drafted that would recognize LTC's environmental and/or wildlife regulations. It could also include shared enforcement on the refuge lands. Both of these options would give LTC the

³¹⁶ Wood and Welker, "Tribes as Trustees Again," 393.

³¹⁷ See, for example, "Confederated Tribes of the Coos, Lower Umpqua, and Siuslaw Indians Ancestral Lands Restoration Proposal " http://ctclusi.org/system/files/ANCESTRAL%20LANDS%20RESTORATION%20CONCEPT%20MARCH%202013_0.pdf (accessed September 1 2013).

³¹⁸ Wood and Welker, "Tribes as Trustees Again."

³¹⁹ *Ibid.*, 394. (citing, Steve Nadeau, *Wolf Conservation and Management in Idaho: Progress Report 2006 (2007)*, available at http://www.nezperce.org/Wolf/Idaho_2006_annual_report-1.pdf (describing cooperative wolf management effort involving the Nez Perce Tribe, State of Idaho, and federal agencies); Cooperative Conservation America, *Olympia Oyster Restoration Project*, <http://www.cooperativeconservationamerica.org/viewproject.asp?pid=725> (describing a tribal partnership with the State of Washington, federal government agencies, and private parties); U.S. Dep't of Energy, *Environmental Management: Tribal Programs*, <http://www.em.doe.gov/tribalpages/initiatives.aspx> (describing tribal partnerships with the Department of Energy).

opportunity to expand its environmental self-determination. With this expansion, LTC could eventually create its own natural resource departments and cultural resource departments, as well as codifying its tribal laws. Many tribes in the contiguous Lower 48 states have made such strides and so too can Alaskan tribes.³²⁰ One limitation may be the small size of many tribes in Alaska. In that case, a regional approach may be more appropriate. LTC has already taken the first step in developing the YKI-TC. A path forward may be to use this organization to address environmental and natural resource issues regionally. There are many instances in the Lower 48, in which tribes have effectively used this regional approach.³²¹ Such efforts have helped many tribes in the Lower 48 to gain legitimacy with local, state, and federal agencies.³²²

Finally, while the tribe can try to work around the limitations imposed by a lack of a land base, ultimately that lack of land is central in the interpretation of U.S. environmental statutes and federal Indian law. LTC should closely watch the final determination in *Akiachak vs. Salazar*. If the case holds that the Secretary of Interior has the authority to take land into trust for Alaska tribes, then LTC would benefit from such a petition.

The case study of the Loudon Tribe demonstrated that, although federal agencies are mandated to work on a government-to-government basis with tribes,

³²⁰ Ibid., 395.

³²¹ See, *ibid.*, referencing the Inter-Tribal Bison Cooperative, Columbia River Inter-Tribal Fish Commission, Great Lakes Indian Fish and Wildlife Commission, and the Northwest Indian Fisheries Commission who all collaborate with federal, state, and county agencies on resource issues throughout their aboriginal territory.

³²² Ibid., (citing, See 25 U.S.C. § 458cc(c) (2000) (Funding agreements with tribes may “include other programs, services, functions, and activities, or portions thereof, administered by the Secretary of the Interior which are of special geographic, historical, or cultural significance to the participating Indian tribe requesting a compact.”)).

in practice, this does not always occur. While recognition of tribal sovereignty has not been perfectly implemented by government agencies, it is still a stronger tool than the environmental justice framework, which could lead to environmental and sociocultural impacts, as evidenced by the situation in Galena, Alaska.

In *God is Red*, Vine Deloria, Jr. wrote:

The future of humankind lies waiting for those who will come to understand their lives and take up their responsibilities to all living things. Who will listen to the trees, the animals and birds, the voices of the places of the land? As the long-forgotten peoples of the respective continents rise and begin to reclaim their ancient heritage, they will discover the meaning of the lands of their ancestors. That is when the invaders of the North American continent will finally discover that for this land, God is red.³²³

I would assert that is especially true for Interior Alaska; for that land, God is red and it is just waiting for the “invaders” to recognize it.

³²³ Vine Deloria, Jr. *God is Red*: 451-52.

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