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COOKING FOOD CUSTOMS IN THE POT OF SELF-GOVERNANCE: HOW FOOD SOVEREIGNTY IS A NECESSARY INGREDIENT OF TRIBAL SOVEREIGNTY

*Kate Ricart**

I. Introduction to Food as Related to an Indian Nation's Sovereignty

Food is one of the essential ingredients of life, and humans consume it not only as a requirement for survival, but also as a social activity. Beyond that, food has become a marker of social class, community, and culture. In every corner of the world, food exists in different forms based on the availability of food resources in a community's region. This has created independent "food cultures," as regional specialties, spices, cooking methods, and eating styles have developed over time. As food production became more industrialized in the early 1900s¹ and a commercial industry emerged, certain regulations were introduced to ensure food that was being largely produced, sold, and shipped would be safe for consumption. Some of these regulations, however, restricted communities from producing foods they believe are safe for their own consumption. Under these circumstances, the food sovereignty movement began.

"Food sovereignty" is the name of a movement that began in 1996 at the World Food Summit;² it refers to a community's right to grow, manage, process, and sell its food in ways that are beneficial to its local constituents. Many Native Americans have acutely adopted the food sovereignty movement because they wish to regain control over their food processes and stay in touch with ancestral food traditions. These traditions have developed over hundreds and thousands of years, but these traditions often conflict with federal regulations and new technologies.

At the core of an indigenous nation's sovereignty is its ability to feed its people based on traditions and ancestral customs. Tensions have been high between Indians and colonizers ever since white settlers first discovered North America, but since the American Revolution and the birth of the United States, tribes have endured a long and often vicious relationship with the federal government. The government sought to regulate Indian

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1. *See infra* Part IV. *See also* Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768 (1906) (repealed 1938).

2. Michael Windfuhr & Jennie Jonsén, *Food Sovereignty* 11 (ITDG Publ'g Working Paper, 2005), http://www.ukabc.org/foodsovereignty_itdg_fian_print.pdf.

authority by limiting their sovereignty and displacing tribes with the Indian Removal Act. Later, however, certain protections were returned to the tribes by the Indian Civil Rights Act and with the Reserved Rights Doctrine. Over time, the relationship between the tribes and the government evolved into one that recognizes tribes as having their own sovereignty, lands, and recognition from the government. This historically difficult and sometimes rocky relationship between the tribes and the federal government is the bedrock on which issues with food sovereignty lie. While the government imposes regulations on food for the safety of the states and tribes, sometimes those regulations have adverse effects on the ancestral food practices that the tribes seek to protect.

Tribes exercise their sovereignty in many ways. One such way is the push to protect reservations from outside environmental harms. For example, the Yurok Tribe in California has deep cultural ties to the Klamath River and the salmon that swim in it.³ The Tribe is concerned with water quality in the Klamath river because the Yurok people consume the salmon from the river just as their ancestors did before them: traditional and unmodified.⁴ The development of genetically engineered salmon required the Tribe to take action to establish its own food system free of modified salmon, as well as other contaminants that pollute the water.⁵ Similarly, the Diné Tribe has taken up the fight to establish its ability to grow and consume food according to the Tribe's traditions, which are threatened by environmental advancements such as pesticides, and obstructive federal regulations.⁶ The ability of tribes to develop their methods for maintaining food sovereignty under their tribal sovereignty is necessary for them to be truly sovereign.

This Comment will first discuss the history of legislation and regulations that regulated Indian nations: originally restrictive and discriminatory but growing in tolerance and acceptance. Then, this Comment will discuss the evolution of tribal sovereignty and how tribes have exercised their ability to govern themselves, specifically regarding their ability to govern their own food growth and processing. While legislation and regulations have been put in place to ensure the safety of food products, some of these restrictions can hinder a tribe's ability to govern its own food practices. The Yurok and Diné Tribes both established themselves as being food sovereign in response to environmental dangers

3. *See infra* Section IV.B.

4. *See infra* Section IV.B.

5. *See infra* Section IV.B.

6. *See infra* Section IV.C.

and governmental pressures, and this Comment will discuss the stories and paths these Tribes took to get there.

II. Background and Government Acts Regulating Indian Nations

After the Framers drafted and ratified the United States Constitution, the new government was faced with the issue of how to establish relationships with indigenous peoples who lived on the land. When settlers established the first colonies under English rule, there were violent encounters with the Native Americans, resulting in contentious relations between certain tribes and the new government.⁷ However, this was not a new problem. In 1754, when the French and Indian War began, the French and the Indians fought against the English for control over North American territory.⁸ This conflict was also called the “Seven Years War,” and it ended with an English victory.⁹ The English gained large claims over North American lands while forcing France further toward the French colonization of Canadian territory.¹⁰ The expenses from the war caused England to raise taxes on the thirteen colonies, which fueled the colonies’ resentment of its imperial guardian and eventually pushed the colonists to seek independence, starting the American Revolution.¹¹

Native Americans fought on both the British “loyalist” side and the Revolutionist “patriot” side during the American Revolution.¹² Some tribes, such as the Six Nations Iroquois Confederacy and Western Nations, sought neutrality and largely stayed out of the war,¹³ while other tribes took advantage of the war to seek revenge on colonists of both sides for stealing their land.¹⁴ This split amongst the tribes created conflict, and, as a result,

7. *Native American Clashes with European Settlers*, W. VA. DEP’T OF ARTS, CULTURE & HIST., <http://www.wvculture.org/history/archives/indians/indland.html> (last visited Apr. 14, 2020).

8. *Id.*

9. *French and Indian War/Seven Year’s War, 1754-63*, U.S. DEP’T OF ST.: OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1750-1775/french-indian-war> (last visited Mar. 4, 2020).

10. *Id.*

11. *Id.*

12. Collin G. Calloway, *Stories from the Revolution: American Indians and the American Revolution*, NAT’L PARK SERV., https://www.nps.gov/revwar/about_the_revolution/american_indians.html (last updated Dec. 4, 2008).

13. Sam Bleiweis, *The Downfall of the Iroquois*, in 5 EMORY ENDEAVORS IN HISTORY: THE AGE OF GUNPOWDER 84, 91 (2013), <http://history.emory.edu/home/documents/endeavors/volume5/gunpowder-age-v-complete.pdf>.

14. *Id.*

some Indian tribes went to war against other Indian tribes.¹⁵ When the patriots gained independence in 1783, they were not inclined to show mercy to the Indian tribes who supported England during the war.¹⁶ The British gave up all Indian lands in the Treaty of Paris to the newly founded nation, which then began to push the Indians out of their newly won “American” territory.¹⁷

The rest of the eighteenth century consisted of brutal territorial battles caused by vast American westward expansion, resulting in massive loss of life and land for Native American tribes.¹⁸ These battles and losses set the stage for President Andrew Jackson’s 1830 Indian Removal Act—the first of many government acts that sought to control the number and location of Native Americans—which became a precursor to the eventual legislation that would grant more freedoms to Indian tribes, and garner support for Native American self-determination and self-governance.¹⁹

A. Limiting Sovereignty and Displacing Tribes Via the Indian Removal Act

President Andrew Jackson signed the Indian Removal Act in 1830.²⁰ This Act gave parcels of land back to the tribes as a “trade” for the lands that the Americans had taken during westward expansion.²¹ The American economy of the time consisted predominantly of agriculture, so Jackson wanted to remove the Indians from the south to free up land to grow cotton and other crops.²² Forcing removal, the Americans sabotaged Indian camps by stealing their livestock, burning their houses, and murdering them.²³ State governments were not shy to displace the Indians, and they attempted to pass laws to limit the scope of Indian sovereignty.²⁴ Despite the Supreme

15. Calloway, *supra* note 12.

16. *Id.*

17. *Id.*

18. *Indian Treaties and the Removal Act of 1830*, U.S. DEP’T OF ST.: OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1830-1860/indian-treaties> (last visited Mar. 4, 2020).

19. *Id.*

20. Pub. L. No. 21-148, 4 Stat. 411 (1830).

21. *Id.*

22. *Indian Treaties and the Removal Act of 1830*, *supra* note 18; see also *Trail of Tears*, HISTORY.COM, <https://www.history.com/topics/native-american-history/trail-of-tears> (last updated Feb. 21, 2020) [hereinafter *Trail of Tears*, HISTORY.COM].

23. *Id.*

24. *Id.*

Court barring these laws in *Worcester v. Georgia*,²⁵ the Americans persisted in pushing Indians out of the lands they wanted for themselves.

When the Indian Removal Act was signed, roughly 50,000 Native Americans populated millions of acres east of the Mississippi River.²⁶ Within ten years of the signing of the Act, that number decreased to nearly zero, as any Indians that refused to relocate were eventually forced to Indian Territory in what is now Oklahoma.²⁷ Tribes that were removed from the southern states consisted primarily of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole, but they would eventually be joined by many other tribes throughout the removal era.²⁸ The removal process forced the tribes to march over 1000 miles to their new territory, and became known as the “Trail of Tears”; it was a violent and destructive journey that cost the lives of thousands of Native Americans.²⁹ As the Indians arrived over the next decade, they discovered their new land was barren and flat.³⁰ While the federal government promised the Indians that the land would “remain unmolested forever,” the federal government regularly broke that promise, and Indian territory continued to shrink as the land became valuable to settlers.³¹ Displacement was a scarring event that set the negative tone between the federal government, which seeks to regulate the tribes, and the tribes’ ability to regulate themselves.

B. Indian Civil Rights Act Granting and Imposing Rights on Indians

The Fourteenth Amendment grants citizenship to all persons naturalized in the United States; it applies to former slaves and grants a guarantee of “equal protection of the laws” to all citizens.³² However, only the federal and state governments were bound by the United States Constitution at the time of the Fourteenth Amendment’s ratification.³³ The hundreds of federally recognized Indian tribes were not bound because they were not part of the creation or ratification of the Constitution, and therefore viewed

25. 31 U.S. (6 Pet.) 515 (1832).

26. *Indian Treaties and the Removal Act of 1830*, *supra* note 18.

27. Andrew K. Frank, *Trail of Tears*, OKLA. HIST. SOC’Y, <https://www.okhistory.org/publications/enc/entry.php?entry=TR003> (last visited Mar. 4, 2020).

28. *Id.*

29. *Id.*

30. *Trail of Tears National Historic Trail*, NAT’L PARK SERV., <https://www.nps.gov/places/trail-of-tears-national-historic-trail.htm> (last visited Mar. 4, 2020).

31. *Trail of Tears*, HISTORY.COM, *supra* note 22.

32. U.S. CONST. amend. XIV, § 1.

33. *Id.*

the Constitution as merely a “social contract.”³⁴ In 1968, one hundred years after the ratification of the Fourteenth Amendment, President Lyndon B. Johnson signed the Indian Civil Rights Act (ICRA) in an effort to “protect individual Indians from arbitrary and unjust actions of tribal governments.”³⁵ The main purpose of the Act was to authorize federal courts to enforce constitutional rights over Indians.³⁶ ICRA allows the courts to enforce constitutional rights if tribal governments pass laws that violate certain enumerated individual rights.³⁷

The second purpose of ICRA was to provide for habeas corpus review in federal courts, allowing tribal members to be arrested and brought before federal courts and giving the federal government the ability to impose its own judgments in tribal affairs.³⁸ This operates alongside Congress’s plenary power over federal affairs with the Indian tribes.³⁹ Plenary power provides that “[s]tates [have] a duty to negotiate in good faith with an Indian tribe . . . and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty.”⁴⁰ This exclusive power strips the tribes of their ability to obtain meaningful judicial review when Congress enacts legislation that is harmful to the tribes. The restrictions and requirements that the federal government has imposed on Indian tribes have set the stage for modern tribal law, which seeks to give rights back to the tribes and allow them a level of autonomy.

C. Reserving Rights to the Tribes and Preserving Sovereignty

The Reserved Rights Doctrine was established in *United States v. Winans*, a seminal Supreme Court case regarding Indian land rights and

34. Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 374 (1989).

35. 1968: *President Johnson Signs the Indian Civil Rights Act*, NATIVE VOICES, <https://www.nlm.nih.gov/nativevoices/timeline/516.html> (last visited Nov. 2, 2019); *see also* 25 U.S.C. § 1302 (2018).

36. Collins, *supra* note 34, at 385; *see also* 25 U.S.C. § 1302.

37. *Id.* These rights included the right to free speech, press and assembly; protection from unreasonable search and seizures, right to a speedy trial, equal protection, due process, the right to hire an attorney in a criminal case, protection against self-incrimination, protection from cruel and unusual punishment, protection against double jeopardy, and the right to a jury trial when imprisonment is on the line; *see also* 25 U.S.C.A. § 1302

38. Robert D. Probasco, *Indian Tribes, Civil Rights, and Federal Courts*, 7 TEX. WESLEYAN L. REV. 119, 128 (2001).

39. *Seminole Tribe v. Florida*, 517 U.S. 44, 61–62 (1996).

40. *Id.* at 47.

sovereignty.⁴¹ In this case, the Yakima Nation brought suit regarding the Treaty of 1859, which states that the right to take fish from the Columbia River, among other places, survived the private acquisition of lands.⁴² The Court held that any rights that were not specifically addressed or given to the Tribe in a treaty are reserved for the Tribe to determine and grant by its own authority.⁴³ The Reserved Rights Doctrine allows tribes to make decisions that are not preempted by the United States government.⁴⁴ This works in conjunction with congressional plenary power; if the government has spoken to an issue that involves Indian affairs, a tribe must follow it. However, where the federal government has not spoken on an issue, the tribe retains autonomy, and Congress's plenary power does not apply.

III. Tribal Sovereignty

Native Americans are guaranteed certain rights by the Constitution and by treaties between tribes and the federal government.⁴⁵ While these governing authorities protect tribes, obstacles to true self-governance remain, such as “(1) outmoded bureaucratic processes; (2) lack of federal agency coordination; and, (3) regulations and laws that prevent tribal governments from equitable access to federal programs.”⁴⁶ Specifically, the president's treaty-making power and Congress's regulatory power over the United States territory threaten tribal self-governance.⁴⁷

There are many terms that are interchanged inaccurately when talking about a nation's right to govern and make decisions for itself: country, nation, and sovereign.⁴⁸ While there is overlap, recognizing each term's separate meaning is crucial to understanding the differences in authority. A country is mainly a consequence of a political geography; it may be

41. 198 U.S. 371 (1905).

42. *Id.* at 379.

43. *Id.* at 381 (stating that a treaty is “not a grant of rights to the Indians, but a grant of right from them”).

44. *Id.*

45. Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* (Harvard Univ. John F. Kennedy Sch. of Gov't, Working Paper No. RWP04-016, 2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=529084.

46. *Tribal Governance*, NAT'L CONG. OF AM. INDIANS, <http://www.ncai.org/policy-issues/tribal-governance> (last visited Mar. 4, 2020).

47. NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION 16 (rev. Feb. 2020), http://www.ncai.org/tribalnations/introduction/Tribal_Nations_and_the_United_States_An_Introduction-web-.pdf.

48. *Tribal Governance*, *supra* note 46.

sovereign or a part of a larger sovereign state.⁴⁹ Sovereignty is defined by numerous factors, including the ability to exercise control over citizens and land, as well as legal recognition by surrounding governments.⁵⁰ A nation is a community of people who are bound together by sharing a language, land, culture, and history.⁵¹ When looking at a nation, one should consider the kinds of people, not the land.⁵² The United States has 573 federally recognized Indian nations that each have a unique cultural identity.⁵³ Just because they are Indian nations, however, does not mean they are sovereign states.⁵⁴

Sovereignty is the “self-sufficient source of political power, from which all specific political powers are derived.”⁵⁵ The United States is a sovereign state, run by the federal government, with a congressional body that has allocated certain rights and powers to the states.⁵⁶ The federal government cannot encroach upon state rights unless there is a constitutional basis for interference.⁵⁷ For instance, the Commerce Clause is the basis upon which many congressional acts have affected the states; in order to constitutionally impede upon state sovereignty, the federal government must only prove that intrastate activities affect interstate commerce.⁵⁸ This separation of powers, known as “federalism,” plays an important role between federal, state, and tribal governments.

Federalism in the United States recognizes three distinct sovereigns: the federal government, state governments, and Indian tribes. In *Worcester v. Georgia*, the Supreme Court addressed, in dicta, the relationships between tribes, states, and the federal government.⁵⁹ Chief Justice John Marshall declared first that the federal government inherited from England the sole right to interact with tribes.⁶⁰ Justice M’Lean in a concurring opinion discussed state sovereignty, writing that while the power given to

49. *Federal Recognition*, NAT’L CONG. OF AM. INDIANS, <http://www.ncai.org/policy-issues/tribal-governance/federal-recognition> (last visited Mar. 4, 2020).

50. *Sovereignty*, BLACK’S LAW DICTIONARY (11th ed. 2019).

51. *Nation*, BLACK’S LAW DICTIONARY (11th ed. 2019).

52. *Tribal Governance*, *supra* note 46.

53. *Id.*

54. *Id.*

55. *What Is SOVEREIGNTY?*, LAW DICTIONARY, <https://thelawdictionary.org/sovereignty/> (last visited Mar. 4, 2020).

56. *Id.*

57. *Id.*

58. *Wickard v. Filburn*, 317 U.S. 111 (1942).

59. 31 U.S. (6 Pet.) 515 (1832).

60. *Id.* at 548.

states is limited by the supreme powers of the federal government, any power that is not limited by the federal government is given to the state as supreme; state sovereignty cannot be “invaded by the action of the general government.”⁶¹ A state is sovereign to the extent that the federal government has allowed it to be sovereign.⁶² The powers that come with being sovereign are only exercised in areas where the federal government is constitutionally restrained or has not defined.

This power is a distinguishing factor when considering the difference between tribal and state sovereignty. Justice M’Lean wrote that the federal government does not recognize Indians as having sovereignty, but recognizes that they do have attributes that are similar to sovereignty.⁶³ Some of these attributes include “the rights which belong to self government . . . [t]heir right of occupancy . . . [and] a present right of possession,” but that right is limited because “the fee in the soil” belongs to the government.⁶⁴ Recognizing a tribe’s right to self-governance is important because *Worcester* defines a treaty as “a compact formed between two nations or communities, having the right of self government.”⁶⁵ Recognition of tribal self-government allows tribes to enter into treaties with the federal government.⁶⁶ States are not given treaty-making powers, and so they are not able to make treaties with Indians on their land. States must instead rely on the federal government to enter into treaties on their behalf.⁶⁷

Tribes are not considered “foreign states” because they cannot be supreme to the United States. However, Justice M’Lean recognized that tribal powers are analogous to that of a state because “[i]n the management of their internal concerns, they are dependent on no power. They punish offences under their own laws, and, in doing so, they are responsible to no earthly tribunal. They make war and form treaties of peace.”⁶⁸ *Worcester* recognizes that Indians hold great power and have a “distinct character as a people,” yet are still prevented from wholly owning any land they possess.⁶⁹

61. *Id.* at 570 (M’Lean, J., concurring).

62. *Id.* at 591 (M’Lean, J., concurring).

63. *Id.* at 580 (M’Lean, J., concurring).

64. *Id.*; see also *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

65. *Worcester*, 31 U.S. at 581 (M’Lean, J., concurring).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

Preemption refers to the federal government's ability to act as "supreme law of the land" and assert its judgment on certain subject matters over the judgments of the states and Indian nations. This power stems from the Supremacy Clause in the Constitution, which states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."⁷⁰

Tribal sovereignty exists separately from federal and state sovereigns.⁷¹ However, tribal separation began to break down when the United States moved west toward the Pacific Ocean and American pioneers sought to remove tribes from their new lands.⁷² The United States has sovereign authority over the Indian nations within its borders. However, the Supreme Court has continuously reaffirmed that there is an "inherent nature of tribal sovereignty."⁷³ In sum, because tribes were their own sovereign nations before the creation of the new nation, they have a presumed right to act, except where limited by Congress.⁷⁴

Chief Justice Marshall, in *Cherokee Nation v. Georgia*, considered whether tribal members and reservation lands were subject to state law.⁷⁵ The Court held that the Cherokee Nation was not a "foreign nation" within the meaning of the Constitution, but instead was "a distinct political society, separated from others, capable of managing its own affairs and governing itself."⁷⁶ The Court held that state law could not govern Indian affairs because Indian tribes were "domestic dependent nations."⁷⁷

Although *Cherokee Nation v. Georgia* allowed tribes to assert jurisdiction over non-members who entered their reservations, the Supreme Court continued its trend of reducing tribal power over non-Indians. Cases such as *Oliphant v. Suquamish Indian Tribe*⁷⁸ and *Montana v. United*

70. U.S. CONST. art. VI.

71. Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 501 (1994).

72. *Id.*

73. *Historical Tribal Sovereignty & Relations*, NATIVE AM. FIN. SERVS. ASS'N, <https://nativefinance.org/historical-sovereignty-relations/> (last visited Mar. 4, 2020).

74. *Id.*

75. 30 U.S. (5 Pet.) 1, 22 (1831).

76. *Id.* at 16–17.

77. *Id.* at 13.

78. 435 U.S. 191, 212 (1978).

*States*⁷⁹ removed civil and criminal jurisdiction from tribal authority. In addition, tribes have since lost the ability to assert power over non-Indian landowners regarding zoning laws, certain taxes, and investigation of off-reservation crimes.⁸⁰ The notion that tribes remain treated as “domestic dependent nations,” however, is still accurate.⁸¹

In a paper entitled *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, Joseph P. Kalt and Joseph William Singer define “[t]ribal Sovereignty [as] recognized and protected by the Constitution, legal precedent, and treaties, as well as applicable principles of human rights.”⁸² Kalt and Singer considered what Indian nations would be without the right to self-govern.⁸³ At the most extreme, if Indian nations were still required to assimilate and erase their ancestral roots, there would be virtually no sovereignty or nationhood—tribes would cease to exist. However, the federal government recognizes that a tribe’s rights to control its own people are different than the rights afforded to any other group. Kalt and Singer also view sovereignty more narrowly as the right to self-rule.⁸⁴ Kalt and Singer took the following into consideration for their definition:

As applied to Indian Country, sovereignty boils down to: Who is going to decide what constitution we will operate under? Who will decide what environmental rules will govern? Who will decide whether that natural resource gets developed? Who decide if a gaming casino is opened? Who will decide what is taught in the reservation high school? Who will decide what taxes are collected and from whom? Who can regulate and enforce contracts, provide remedies for negligent conduct, and adjudicate disputes over property? Who will decide the speed limit on the road into the tribal headquarters? Who will decide how to decide questions such as these? When the answer to questions of these types—and particularly the last question—is

79. 450 U.S. 544, 545–46 (1981).

80. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 430 (1989) (regarding the imposition of zoning laws on non-Indians); see also *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980) (regarding imposition of taxes on non-Indians); *Oliphant*, 435 U.S. at 212 (regarding criminal jurisdiction).

81. *Cherokee Nation v. Georgia*, 30 U.S. at 16–17.

82. Kalt & Singer, *supra* note 45.

83. *Id.* at 4.

84. *Id.* at 5.

“the Tribe” (i.e., the tribal government), an Indian tribe has sovereignty.⁸⁵

Tribal sovereignty, at least in the modern context, refers mostly to a tribe’s ability to manage its own affairs. Under the Reserved Rights Doctrine, any rights that are not addressed by treaty are reserved to the tribe, giving Indian nations the opportunity to govern themselves and control certain tribal matters. Consequently, the relationship between the United States and the tribes is not unlike “a ward [and its] guardian.”⁸⁶

Recognition of a tribe’s sovereignty and its ability to actually exercise its authority is a steppingstone to its ability to have dominion over its food practices. Tribal sovereignty exists separately from the state and federal governments to allow tribes the ability to exercise control over their citizens and land: this includes control over managing citizens who want to celebrate their traditional food culture as a part of their nationhood, and controlling land upon which food is grown, and how it is grown. Sovereignty allows a tribe to push policies that protect these food traditions and can only be preempted by the supreme powers of the federal government. This recognition is given special consideration in relation to other groups, as mentioned in Kalt and Singer’s paper.

IV. Federal Agriculture Departments

One way in which Congress has expressed its supremacy over states and Indian nations is by passing legislation regulating food production. This legislation came in response to poor food quality that had adverse effects on the population in the eighteenth and nineteenth centuries. Upton Sinclair wrote the novel “The Jungle” in 1906,⁸⁷ which was based in part on his undercover experience in a meat packing plant in Chicago, Illinois.⁸⁸ The book is fictional, but Sinclair relied on his experience to tell his story of the gruesome meat industry practices during the early twentieth century.⁸⁹ The general public was so horrified by what they read that President Theodore Roosevelt demanded an investigation of Chicago slaughterhouses. The report was so revolting that substantial federal laws were put in place to

85. *Id.* at 5–6.

86. *Cherokee Nation v. Georgia*, 30 U.S. at 17.

87. UPTON SINCLAIR, *THE JUNGLE* (Doubleday, Page & Co. 1906), <https://archive.org/details/jungle01sincgoog/page/n9/mode/2up>.

88. *The Jungle*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/The-Jungle-novel-by-Sinclair> (last visited May 5, 2020).

89. *Id.*

regulate food quality.⁹⁰ This response led to the eventual creation of many food quality regulating agencies, including the United States Department of Agriculture and the Food and Drug Administration.

The United States Department of Agriculture (USDA) administers federal laws related to agriculture.⁹¹ President Lincoln created the USDA in 1862 to prevent diseased animals from harming consumers.⁹² The agency has since grown to establish regulations that restrict export and import procedures, ensure quality of meat, and define inspection standards for services provided by butchers and producers.⁹³ In a modern context, the USDA oversees alterations to products, ensures the accuracy of labels, and investigates diseases related to agricultural products.⁹⁴

The Food and Drug Administration (FDA) “is responsible for protecting the public health by ensuring the safety, efficiency, and security of human and veterinary drugs, biological products, and medical devices.”⁹⁵ While the FDA’s power is broad, the FDA primarily regulates dietary supplements, food additives, and certain aspects of meat, poultry, and egg products.⁹⁶ One of the most significant pieces of legislation administered by the FDA is the Food and Safety Modernization Act (FSMA), which President Obama signed into law in 2011. The FSMA is focused on preventing foodborne illnesses through “clear specific actions” that are necessary to prevent contamination.⁹⁷ Some of these actions include accredited third-party satisfaction, risk-prevention controls for human food,

90. Theodore Roosevelt, *June 4, 1906: Message Regarding Meatpacking Plants*, UNIV. OF VA.: MILLER CTR., <https://millercenter.org/the-presidency/presidential-speeches/june-4-1906-message-regarding-meatpacking-plants> (last visited May 5, 2020) (transmitting the report of the special committee tasked with investigating the Chicago stockyards).

91. *Food and Nutrition*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/topics/food-and-nutrition> (last visited Mar. 4, 2020).

92. Wayne D. Rasmussen, *Lincoln’s Agricultural Legacy*, USDA NAT’L AGRIC. LIBR., <https://www.nal.usda.gov/topics/lincolns-agricultural-legacy> (last visited May 14, 2020).

93. See *Mission Areas*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/our-agency/about-usda/mission-areas> (last visited May 14, 2020); see also *Health and Safety*, U.S. DEP’T OF AGRIC., <https://www.usda.gov/topics/health-and-safety> (last visited May 14, 2020).

94. *Id.*

95. *What We Do: FDA Mission*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/about-fda/what-we-do> (last updated Mar. 28, 2018).

96. *What Does FDA Regulate?*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/about-fda/fda-basics/what-does-fda-regulate> (last updated Mar. 28, 2018).

97. *Food Safety Modernization Act (FSMA)*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/food-safety-modernization-act-fsma> (last updated Apr. 9, 2020).

mitigation strategies to protect food against intentional adulteration, sanitary transportation, and standards for the production of food.⁹⁸

Taken together, the USDA and FDA create regulations for public safety that all producers—both individual and corporate—must abide by to sell food products to consumers. Applying this to tribal populations, there are issues on reservations with whether tribal members are properly educated about the regulations or if this information is accessible to them. For example, if an Indian producer wants to butcher a sheep to sell in a shop, that producer needs to be aware of the USDA and FDA requirements to maintain food safety. Without proper education regarding compliance with federal regulations, producers may face fines or have their operations shut down. Producers are discouraged from farming the land and participating in the economy absent proper education.

One significant case where the Supreme Court supported Congress's authority to impose agricultural regulations was in *Wickard v. Filburn*.⁹⁹ *Wickard v. Filburn* is a landmark Supreme Court case that decided the scope of congressional power under the Commerce Clause.¹⁰⁰ In *Wickard*, the Court reviewed the Agricultural Adjustment Act of 1938, which controlled how much of a commercial crop a producer could keep for personal use.¹⁰¹ Filburn, a local food producer, grew wheat for commercial sale, but he kept some under the Act to feed his family and livestock—twelve acres over his allowance.¹⁰² Under the Agricultural Adjustment Act, the USDA penalized Filburn for those twelve acres.¹⁰³ Filburn argued that the Act was unconstitutional because the wheat grown for personal use did not affect interstate commerce, as he was only using it to feed his livestock and family.¹⁰⁴ The Supreme Court disagreed.¹⁰⁵ In a unanimous opinion, the Court used the Commerce Clause as its vehicle to hold that Congress did not overstep its constitutional authority to regulate the production of wheat, even when the wheat is for personal use.¹⁰⁶

98. *Id.* (referencing the “Rules and Related Programs” dropdown menu).

99. 317 U.S. 111 (1942).

100. *Id.*

101. *Id.* at 114–16.

102. *Id.*

103. *Id.*

104. *Id.* at 118.

105. *Id.* at 130.

106. *Id.* at 127–28.

Justice Jackson, writing for the Court, used what is known as the “effects test” to evaluate the case and reach the Court’s conclusion.¹⁰⁷ The effects test considers whether Congress can regulate local intrastate activities based on how they affect interstate commerce.¹⁰⁸ Even though the wheat that Filburn produced for personal use was not circulating in interstate or intrastate commerce, it was still subject to the Commerce Clause; Filburn’s personal use of the crop substantially affected interstate commerce because it removed the crop from the stream of commerce.¹⁰⁹ Since Filburn kept his wheat on the farm, he was not buying wheat and engaging in commerce. If enough farmers kept their wheat instead of buying it, the lack of market participation would have a substantial effect on interstate commerce.¹¹⁰

Wickard v. Filburn is significant and controversial because of the Supreme Court’s decision to stretch the effects test to reinforce the constitutionality of the Agricultural Adjustment Act. Under *Wickard*, any activity affecting interstate commerce falls under federal regulation, and this keeps state governments from regulating commerce that falls outside of a state’s borders.¹¹¹

The scope of *Wickard* has since been narrowed and modified by cases like *United States v. Lopez*, which found the Gun Free School Zones Act to be unconstitutional,¹¹² and *United States v. Morrison*, which found that parts of the Violence Against Women Act were unconstitutional.¹¹³ In *Lopez*, a teenager in Texas brought his gun to school and was charged with violating the Gun Free School Zones Act, which made the possession of a gun in a school zone illegal.¹¹⁴ The Gun Free School Zones Act was found to be unconstitutional under the Commerce Clause because possession is not an economic activity that has a substantial effect on interstate commerce.¹¹⁵ In *Morrison*, a woman was raped while attending Virginia Tech and sued her attackers and the University under the Violence Against Women Act.¹¹⁶ Similar to *Lopez*, the Supreme Court held the part of the Act providing a civil remedy for her attacker’s conduct was unconstitutional

107. *Id.* at 124.

108. *Id.* at 124–25.

109. *Id.* at 128–29.

110. *Id.*

111. *Id.* at 125.

112. 514 U.S. 549, 567 (1995).

113. 529 U.S. 598, 627 (2000).

114. *Lopez*, 514 U.S. at 551–52.

115. *Id.* at 566–67.

116. *Morrison*, 529 U.S. at 602–03.

because the statute was not regulating an economic activity that substantially affected interstate commerce.¹¹⁷ While the Supreme Court has narrowed the decision in *Wickard*, the case has never been overturned.¹¹⁸

Wickard is significant because the Supreme Court ruled that not only can Congress control products that leave the state and enter into interstate commerce, but it may also control products that stay in the state and indirectly affect interstate commerce. This case sets the precedent that for any state or tribe that has an agricultural business that goes outside of their borders, the federal government can control how much food product is allowed to be grown for personal use. This power regulates the ability of certain farmers to produce food for their family and is an example of how the federal government can set limitations on local and personal food growth and processing.¹¹⁹

V. Food Sovereignty

Various towns, cities, and tribes have been fighting against federal food regulations by declaring themselves “food sovereigns.” These communities claim they have a right to produce, sell, consume, and buy food that was prepared in culturally significant ways, even if those ways do not conform to the FDA and USDA rules. Food sovereignty is defined as “the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems.”¹²⁰ This puts local producers and consumers at the forefront of the food industry, setting an example for how food processes should function.¹²¹

The term “food sovereignty” was coined by *La Via Campesina*, an international organization that began in 1993 and kickstarted the food sovereignty movement; it is now mainly comprised of farmers, indigenous peoples, and food producers.¹²² The organization strives to give agricultural

117. *Id.* at 627.

118. *Lopez*, 514 U.S. at 556–58.

119. *See, e.g., Gonzales v. Raich*, 545 U.S. 1 (2005).

120. *Food Sovereignty*, U.S. FOOD SOVEREIGNTY ALL., <http://usfoodsovereigntyalliance.org/what-is-food-sovereignty/> (last visited Mar. 4, 2020) (quoting the Declaration of Nyéléni, *the first global forum on food sovereignty*).

121. *See Food Sovereignty*, LA VIA CAMPESINA: INT’L PEASANT’S MOVEMENT (Jan. 15, 2003), <https://viacampesina.org/en/food-sovereignty/>.

122. *The International Peasant’s Voice*, LA VIA CAMPESINA: INT’L PEASANT’S MOVEMENT, <https://viacampesina.org/en/international-peasants-voice/> (last visited Mar. 16, 2020).

decision-making power back to local farmers and support local agriculture as a primary source of food, replacing the predominant agricultural system which relies on importing foods from large corporations.¹²³ *La Via Campesina* has seven primary principles of food sovereignty: food as a basic human right, agrarian reform, protecting natural resources, reorganizing food trade, ending the globalization of hunger, social peace, and democratic control.¹²⁴

The first principle, food as a basic human right, is defined as “safe, nutritious and culturally appropriate food in sufficient quantity and quality to sustain a healthy life with full human dignity.”¹²⁵ As identified by this description, food safety is a main priority for producers selling it on the market.¹²⁶ In addition to safety, it is also important that food is “culturally appropriate,” prioritizing the local and communal need for food to have significance in local cultures.¹²⁷ While the globalization of food has allowed for more options on grocery store shelves, it has diminished the value of culturally significant foods.¹²⁸

The second principle calls for agrarian reform and seeks to give power back to those who farm and maintain the land.¹²⁹ The third principle focuses on the need to protect natural resources.¹³⁰ Sustaining natural resources is necessary since food resources keep communities alive and food is one of the most basic human needs.¹³¹ The fourth principle expounds on food as a trade product. Though trade is necessary in the food industry, *La Via Campesina* sees it as secondary to the production of food for “domestic consumption and food self-sufficiency [because] . . . [f]ood imports must not displace local production.”¹³²

The fifth and sixth principles illustrate a larger goal: ending global hunger by prioritizing local food processes that promote social peace.¹³³ According to *La Via Campesina*, multilateral institutions such as the

123. *Id.*

124. *Via Campesina's Food Sovereignty Principles*, WOMIN, <https://www.womin.org.za/images/impact-of-extractive-industries/land-grabs/La%20Via%20Campesina%20-%20Food%20Sovereignty%20Principles.pdf> (last visited May 5, 2020).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

International Monetary Fund and the World Trade Organization act contrary to food sovereignty because they control economic policies that affect agriculture without considering the effect they have on local farmers and workers; their control over agricultural policies must be regulated and taxed.¹³⁴ This principle suggests that stricter regulation of political and economic food control by corporations brings about social peace and prevents food from ever being used as a weapon.¹³⁵

The final principle, democratic control, provides that “everyone has the right to honest, accurate information, and open and democratic decision-making.”¹³⁶ By giving power back to small farmers, local community members who are affected by agricultural regulations will have greater input in agricultural policies. Farmers who spend every day working the land have the best understanding of how a regulatory scheme will impact production.

These principles support the idea that a local community should be able to control its own food sources and products because members are in a better position to decide what their community needs.¹³⁷ This maintains self-reliance and preserves traditions and customs. Indeed, tribes, for example, have sought this self-reliance and ability to preserve their culture by growing and producing food the way in which they choose. While various communities have now asserted their food sovereignty against federal government regulations and neighbors, the movement first occurred in a community in Sedgwick, Maine.

A. States Asserting Food Sovereignty

In Sedgwick, Maine, a group of local farmers wanted to butcher chickens outside in the open, but they were prohibited from doing so under regulations imposed by the Maine Department of Agriculture.¹³⁸ This event started a food sovereignty movement in Sedgwick, Maine, which spread to other towns across the United States and inspired them to seek more control over food production and consumption.¹³⁹ The goal was for producers to

134. *Id.*

135. *Id.*

136. Rebekah Wilce, *Local Ordinances and Land Grabs: Democracy Convention Panels Discuss Food Sovereignty*, PR WATCH (Sept. 8, 2011, 12:50 PM), <https://www.prwatch.org/news/2011/09/10995/local-ordinances-and-land-grabs-democracy-convention-panels-discuss-food-sovereig>.

137. *See id.*

138. Allison Condra, *Food Sovereignty in the United States: Supporting Local and Regional Food Systems*, 8 J. FOOD L. & POL'Y 281, 302–04 (2012).

139. *Id.*

regain control over food production and use this as a means to provide for their immediate communities.¹⁴⁰ The movement led the city of Sedgwick to pass the Local Food and Community Self-Governance Ordinance.¹⁴¹ This ordinance sought to resolve federalism and preemption issues in food production by exempting local producers from state and federal regulations and requiring the transaction to occur directly between the local producer and the consumer.¹⁴² Additionally, this required the transaction to occur solely for the purpose of at-home consumption in order for the exemption to apply.¹⁴³

The Local Food and Community Self-Governance Ordinance would exempt local food producers and processors in Sedgwick from certain federal requirements, such as licensing and inspections, when food is prepared for a “patron’s home consumption” or for a “community social event.”¹⁴⁴ The ordinance, which stated that it was “unlawful for the state or federal governments to adopt laws or regulations that interfere with the rights recognized in the ordinance,”¹⁴⁵ was reinterpreted by the Supreme Judicial Court of Maine when local farmer Dan Brown was sued by the State of Maine for violating state food-selling licensing laws.¹⁴⁶ The government claimed that the ordinance was dangerous because it undermined the nationwide regulatory scheme over food production.¹⁴⁷ To protect the ordinance from preemption issues, the court decided to “reasonably construe the ordinance so as to avoid an interpretation that would render it unconstitutional.”¹⁴⁸ This reconstruction of the ordinance means that the ordinance is read as to exempt local food producers and processors only from requirements of the municipality, not the state or federal government.¹⁴⁹

The Maine Food Sovereignty Act incorporates many of the same principles advocated for by *La Via Campesina*.¹⁵⁰ The purpose of the statute

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 305.

144. *Id.*

145. *Id.*

146. *Maine v. Brown*, 95 A.3d 82, 84–85 (Me. 2014).

147. *Id.*

148. *Id.* at 91.

149. *Id.*

150. *See* Maine Food Sovereignty Act, ME. REV. STAT. tit. 7, § 283 (2020), <https://legislature.maine.gov/legis/statutes/7/title7sec283.pdf>.

is to “encourage food self-sufficiency for its citizens.”¹⁵¹ It declares departmental support for local control, small-scale farming, food production, health and wellness, self-reliance, personal responsibility, and rural economic development.¹⁵²

Local control allows communities to manage food production in a manner that is best for their people. The Maine Food Sovereignty Act focuses on small family farms and protects their ability to operate.¹⁵³ The purpose of this structure is to improve Maine’s health and wellness by allowing local farmers to grow food that better suits the needs of the people who live in the community.¹⁵⁴ This structure also encourages members of the community to pick healthy and nutritious options.¹⁵⁵ Local farming options allow communities to become self-reliant by growing their own food. Farmers can control every step of the production process from cultivation to the marketing and sale of the final product.¹⁵⁶ This will also lead to the development of rural communities; resources will continue to grow, practices will continue to develop, and farmers will reap the benefits of their work as their practices and operations become more successful.¹⁵⁷

Maine law allows local farmers to forgo certain food regulations. According to Section 284 of the Maine Food Sovereignty Act, “a municipality may adopt ordinances regarding direct producer-to-consumer transactions and the State shall recognize such ordinances by not enforcing those state food laws with respect to those direct producer-to-consumer transactions that are governed by the ordinance.”¹⁵⁸ Through this Act, the Sedgwick community was able to legislate and administer rules over its food processes in a way that was tailored to its needs.

As discussed in Part III, Kalt and Singer’s strict definition of sovereignty as the right to self-rule begs the question of how food ties into a nation’s right to self-governance. While not explicit in the authors’ factors for determining “sovereign” status, the right to food production is still relevant to the ability to self-rule. In the context of federal Indian law, who should determine how a tribe eats? The right to feed one’s community is integral not only to the goal of sustaining life, but also to providing local resources

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *See id.*

158. *Id.* § 284.

and focusing on regional food customs and needs. Further, the right to traditionally feed a community ensures a rich common culture that keeps people together. Preserving a common culture helps a community grow and evolve in a natural and progressive way. A nation's ability to feed its own people based on traditions and ancestral customs is an important factor that impacts the heart of a tribe's culture, even if it might not be the sole determinant of a tribe's sovereignty. In addition to the Sedgwick community in Maine, the Yurok Tribe and the Diné Tribe are two communities that have fought for their own food sovereignty.

B. The Yurok Tribe's Fight for Food Sovereignty Along the Klamath River

A tribe's ability to feed its people is a significant way that a nation can establish and exercise its sovereignty. This is because many tribes follow traditions that dictate what they eat, how their food is produced, where they grow their food, and how they cook, prepare, and eat their food. Food culture influences how tribal members view themselves as a community, and allows them to celebrate ancestral customs, which are a vital part of a nation's identity.

For example, consider the Yurok Tribe in California.¹⁵⁹ The Yurok Tribe is the largest tribe in California, with a reservation that spans roughly forty-four miles by two miles along the Klamath River.¹⁶⁰ The Klamath River is regularly referred to as the Tribe's "grocery store, church, and highway" and has been that way since the fourteenth century. Due to the location of the Yurok Reservation and the Tribe's ancestral roots in the Klamath River, fishing is more than just a significant part of Yurok Tribe tradition—fishing is at the very heart of its culture.¹⁶¹

1. Regaining Fishing Rights in the Pacific Northwest

In the 1970s, the Yurok Tribe challenged the United States Fish and Wildlife Service, local police, and other government agencies in order to continue fishing in the Klamath River—something the Tribe was doing long before its land became a part of the United States but was prohibited from doing in the early 1900s when white settlers wanted exclusive access

159. Kalt & Singer, *supra* note 45.

160. NCAI PARTNERSHIP FOR TRIBAL GOVERNANCE, TRIBAL GOVERNANCE INNOVATION SPOTLIGHT (NATURAL RESOURCE MANAGEMENT): YUROK TRIBE (2019), <http://www.ncai.org/ptg/Yurok.Tribe.Case.Study.pdf> [hereinafter NCAI YUROK CASE STUDY].

161. *Id.*

to fishing in the river.¹⁶² Before this challenge, Yurok members were not allowed to fish for salmon in the river, and were arrested when they continued the practice; this forced them to fish quietly and secretly to avoid legal repercussions.¹⁶³ Encounters between Tribal members and government officials became violent, and tensions rose as illegal fishing on the Klamath River continued.¹⁶⁴

In a pivotal case known as the “Boldt Decision,” the United States, on behalf of sixteen tribes, brought an action against the State of Washington for restricting the tribes’ right to fish.¹⁶⁵ Federal District Judge George Boldt ruled that under the Stevens Treaties, certain tribes retained rights to half of the salmon in Washington.¹⁶⁶ This required the tribes to act in conjunction with the State in managing the salmon resources. This holding gave tribes extensive power to control salmon harvest, even after the tribe transferred millions of acres back to the state.¹⁶⁷ By reserving this right, tribes were again able to harvest most of the fish in the Washington Puget Sound area.¹⁶⁸

This result angered many non-tribal fishermen who did not want a tribe exercising this much control over fishing.¹⁶⁹ The Boldt Decision court had to give “special standing” to the governing law because it stemmed from a treaty, and thus, the right was recognized as reserved by the tribes.¹⁷⁰

Following the decision, members of the tribes were allowed to fish off of the reservations, where they were previously not allowed by the state.¹⁷¹ While tribal members were no longer prohibited from fishing, this decision did not cure all of the problems caused by the Fish Wars: violence between tribal and non-tribal fishermen occurred when non-tribal fishermen

162. Tove Danovich, *After Decades, Native American Tribes Are Regaining Their Fishing Rights. But Are There Any Fish Left?*, COUNTER (Sept. 11, 2018, 8:00 AM), <https://thecounter.org/yurok-tribe-klamath-river-salmon-fish-wars/>.

163. *Id.*

164. *Id.*

165. *United States v. Washington*, 520 F.2d 676, 682 (9th Cir. 1975). The case was nicknamed the “Boldt Decision” after the presiding judge, George Boldt.

166. *Id.* at 688 (stating that in the Stevens Treaties of 1855, treaty negotiators secured the Indian Tribe’s preexisting right to fish).

167. *See id.*

168. *See id.* at 685.

169. *Id.*

170. *Id.*

171. *Id.* at 688–89.

intercepted the salmon upstream before they reached the reservation, which severely limited the amount of salmon the tribal members could harvest.¹⁷²

In *Mattz v. Arnett*, the Supreme Court addressed a challenge to tribal sovereignty in the context of a tribe's ability to govern itself.¹⁷³ Mattz was a Yurok Indian who was arrested for fishing with gill nets.¹⁷⁴ Gillnetting is a type of fishing that Yurok Tribe members use, but the practice is illegal in California.¹⁷⁵ Mattz would often fish at night when he felt safe to do so without detection.¹⁷⁶ During Mattz's arrest, the nets were confiscated and the State refused to return them.¹⁷⁷ Mattz sued the State, claiming the nets were seized in Indian Country, and therefore, the California civil forfeiture statutes did not apply.¹⁷⁸ The Supreme Court ruled that it was Indian land and that tribes were capable of governing themselves.¹⁷⁹ Notably, the Yurok Tribe had a treaty that allowed it to fish by traditional means, and the legal classification of the land as Indian Country allowed the Tribe to exercise self-governance.

2. *The Impacts of Climate Change and Other Environmental Dangers*

After the Boldt Decision and *Mattz*, the Yurok Tribe finally regained the right to fish in its homeland. However, the Tribe found that the Klamath River had suffered serious impacts from climate change and human abuse. In 2002, the Klamath River and other affected areas experienced the largest fish kill in United States history.¹⁸⁰ The Yurok Tribal Fisheries Program and other fishery agencies received reports of large amounts of dead fish in the Lower Klamath River around the middle of September of that year. Within a week, over 34,000 fish were dead along a thirty-mile stretch of the river.¹⁸¹ This large fish kill was detrimental to the Yurok Tribe, which valued the salmon as a source of food, culture, and spirit.¹⁸² There was

172. *Id.*

173. *See* 412 U.S. 481, 484–85 (1973).

174. *Id.*

175. *Id.* at 484 (citing CAL. FISH & GAME CODE §§ 8664, 8686, 8630).

176. Anna V. Smith, *How the Yurok Tribe Is Reclaiming the Klamath River*, HIGH COUNTRY NEWS (June 11, 2018), <https://www.hcn.org/issues/50.10/tribal-affairs-how-the-yurok-tribe-is-reclaiming-the-klamath-river>.

177. *Id.*

178. *Id.*

179. *Mattz*, 412 U.S. at 505.

180. Smith, *supra* note 176.

181. *Id.*

182. *Id.*

never a fish kill so traumatic in the Yurok's history, and the Yurok tribal members began looking for an explanation.¹⁸³

Through investigation, the Tribe found that the biological catastrophe started below the convergence of the Trinity River and the Klamath River.¹⁸⁴ The California Department of Fish and Game reported that the fish kill occurred because of a parasitic infection.¹⁸⁵ The specific parasite feeds off of the fish's gills and skin, and in the right conditions—warmth, stressed fish, and dense populations—it can spread easily.¹⁸⁶ Mature fish are more susceptible to the parasite, and the loss of these fish was particularly damaging to the Yurok Tribe that depended on mature fish as its food source.¹⁸⁷ While fish kills can happen because of a variety of reasons, they are exacerbated by poor water quality, a dense population of fish, and a drop in river flow.¹⁸⁸

While river level drops can occur naturally because of drought conditions, the 2002 drop occurred because the federal government gave in to public pressure from local farmers in the Klamath Basin to use river water to irrigate nearby fields.¹⁸⁹ If the government had not allowed this irrigation, the river likely would not have dropped to the level that caused the parasites to multiply and harm the salmon population to such a devastating degree.¹⁹⁰ Although the Bureau of Reclamation now retains an excess of 50,000 acre-feet of water to keep waters flowing in the Klamath River during the salmon migration to prevent this parasitic outbreak from reoccurring, the 2002 fish kill left a scar on the Yurok Tribe that remains nearly twenty years later.¹⁹¹

183. Will Houston, *Klamath River Fish-Kill Preventative Dam Releases Challenged by Farmers, Water Districts*, TIMES STANDARD (Eureka, Cal.) (Mar. 14, 2018), <https://www.times-standard.com/2018/03/14/klamath-river-fish-kill-preventive-dam-releases-challenged-by-farmers-water-districts/>.

184. MICHAEL BELCHIK ET AL., YUROK TRIBAL FISHERIES PROGRAM, THE KLAMATH RIVER FISH KILL OF 2002; ANALYSIS OF CONTRIBUTING FACTORS: FINAL REPORT 1 (Feb. 2004), https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/exhibits/docs/PCFFA&IGFR/part2/pcffa_155.pdf [hereinafter FINAL REPORT].

185. *Id.* at 8.

186. *Id.*

187. *Id.*

188. *Id.*

189. Smith, *supra* note 176.

190. See FINAL REPORT, *supra* note 184, at 42.

191. Houston, *supra* note 183.

The excess water used to keep the river flowing only fixes one issue on the Klamath River—but there are many more that still need to be resolved.¹⁹² Two other issues that need to be addressed are the overallocation of the river and the poor water quality caused by dams.¹⁹³ Current legal fights pertain to reclaiming governance of the river for tribes that have considerable interest in the health of the river, not only as a food source but as a part of their historical and cultural roots.¹⁹⁴

A current case in the Ninth Circuit is *Yurok Tribe v. U.S. Bureau of Reclamation*.¹⁹⁵ This case pits the Yurok Tribe, the Hoopa Valley Tribe, and commercial fishermen against the Bureau of Reclamation, water districts, and irrigators.¹⁹⁶ The tribes argued that the agency’s water plan, which sought to fix the water-level issue in the Klamath, was inadequate to keep the Klamath River flowing at an appropriate level to prevent disease, endangering the salmon population the plan is supposed to protect.¹⁹⁷ The Bureau, water districts, and irrigators claimed they could not give up any more water because it would hurt farmers who need the water for their lands, threatening their livelihood.¹⁹⁸ A district court judge ruled that the Klamath River salmon were entitled to “prioritized protection under the law,” which was a major victory for the Yurok Tribe who fought to protect its food source.¹⁹⁹ The victory meant that the Bureau was required to give the Klamath River more water to ensure the salmon population was protected because the court ruled that the salmon enjoyed special protection.

3. Genetically Engineered Salmon and the GEOO

In 2015, the FDA declared genetically engineered salmon safe to eat, which resulted in large-scale farming of this type of fish.²⁰⁰ Two years later, in Puget Sound, Washington, just over 500 miles north of the Klamath River, a netted enclosure with tens of thousands of genetically engineered salmon came loose; the salmon began swimming south towards the

192. *Id.*

193. *Id.*

194. *Id.*

195. Complaint for Declarator and Injunctive Relief at 1, *Yurok Tribe v. U.S. Bureau of Reclamation*, No. 3:19-cv-04405 (9th Cir. July 31, 2019).

196. Smith, *supra* note 176.

197. *Id.*

198. *Id.*

199. *Id.*

200. NCAI YUROK CASE STUDY, *supra* note 160.

Klamath River.²⁰¹ This incident risked the genetically engineered salmon from the Puget Sound breeding with the genetically modified salmon of the Klamath River and creating hybrids between the two.²⁰²

The influx of genetically engineered salmon in the Klamath River had nearly irreversible effects for the tribes along the river that rely on ancestral customs to catch their fish to eat.²⁰³ In fact, the invasion was classified as a state of emergency for Washington tribes.²⁰⁴ The tribes along the Klamath River were fearful because their ancestral customs of harvesting salmon from the river were at risk of being tarnished forever.²⁰⁵ In response to these events, the Yurok Tribe established the Genetically Engineered Organism Ordinance (GEOO) and the Pesticide Ordinance (PO), which aimed to protect the river's fish from contamination as well as the ideals, customs, and traditions of the Tribe.²⁰⁶

There are five main purposes behind the GEOO. The first is to “maintain and protect food sovereignty and Tribal control, free from outside corporate interests and unnecessary and overreaching preemption by any outside governments, of the agriculture, environment, Tribal health, welfare, and economy as they pertain to genetic contamination from genetically engineered organisms.”²⁰⁷ Through this purpose, the Yurok people seek to exercise their sovereign ability to harvest the salmon in ways that reflect their ancestral customs. To achieve this goal, the Tribe needs the ability to protect its food source from contamination by outside actors. Genetically engineered organisms in the environment pose a danger to the Tribe's food source because they prevent the Yurok people from “ensur[ing] [their] spiritual, cultural and physical health.”²⁰⁸ According to Yurok leadership, agriculture that relies on herbicides, pesticides, and antibiotics is not in the best interest of the Yurok Tribe because it modifies foods in a way that diverges from the food source's traditional meaning.²⁰⁹

The second purpose behind the ordinance is to “[p]rohibit any person, corporation, or entity from propagating, raising, growing, spawning,

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Genetically Engineered Organisms Ordinance, YUROK TRIBAL CODE tit. 21, § 21.15.030(a) (2019) (adopted Dec. 10, 2015), <https://yurok.tribal.codes/YTC/21.15>.

208. NCAI YUROK CASE STUDY, *supra* note 160.

209. *Id.*

incubating, or releasing genetically engineered organisms within the territory of the Tribe.”²¹⁰ This prohibition is necessary to the Tribe’s sovereignty because if the tribal members and outside communities do not respect the natural environment, the Tribe’s entire food source will be at risk.²¹¹ With cross-pollination, for example, if one genetically engineered plant pollinates another, it can contaminate entire fields. The new hybrid breed will spread quickly, making eradication of the genetically modified plant nearly impossible. This example is similar to the genetically engineered salmon that were accidentally released in Puget Sound. If the modified salmon had not been captured in time, the results would have ruined the ability of the Yurok to fish only non-biologically-altered salmon, and the Yurok Tribe would have struggled to ever cleanse the salmon population of the Klamath River.

The third purpose of the ordinance is to “[e]ducate and protect the Yurok community as to the health and environmental hazards of genetically engineered foods, and to work towards labeling and/or phasing out the sale and provision of such foods on Tribal lands.”²¹² Education related to food safety and protection of natural food sources is pivotal for a community in exercising its food sovereignty.²¹³ Tribal members need education related to food safety so they are familiar with the regulations they need to follow.²¹⁴ This will detrimentally impact tribal members in the food producing business, which will damage both the economy and the community’s access to local foods.²¹⁵ It will be easier for communities to see what is natural and what is engineered when they are correctly labeled as such.²¹⁶ In the Yurok Tribe, if a Yurok member wishes to eat only the natural salmon, they can know in a store what is natural and what is modified.²¹⁷ Additionally, if the Tribe desires to cut out modified foods entirely, it can do so under its food sovereign authority.²¹⁸

The ordinance’s fourth purpose is to prohibit genetically engineered and modified plants and animals in order to “preserve a healthy and safe place for our traditional seeds, plants, animals, and fish, as well as for our

210. YUROK TRIBAL CODE tit. 21, § 21.15.030(b).

211. See NCAI YUROK CASE STUDY, *supra* note 160.

212. YUROK TRIBAL CODE tit. 21, § 21.15.030(c).

213. See NCAI YUROK CASE STUDY, *supra* note 160.

214. See *id.*

215. See *id.*

216. *Id.*

217. *Id.*

218. YUROK TRIBAL CODE tit. 21, § 21.15.030(d).

children and future generations to thrive within the boundaries of our territory in health, strength, and harmony.”²¹⁹ This broad declaration protects the future of the environment around the river and establishes the importance of not only the natural resources, but the preservation of cultural identity for future generations. If the lands are affected now, the results will be irreversible; future generations of Yurok members will not be able to source their food in the same way that it was done by their ancestors.

The fifth and final purpose of the ordinance is to “[e]nable the Tribe to enforce the genetically engineered organism prohibitions and recover the costs of such enforcement.”²²⁰ The Yurok Tribe must be able to enforce its right to keep the Klamath River and Yurok territory free of animals and plants that are a danger to the Tribe’s ancestral customs. When the Puget Sound incident occurred, the Tribe acted to prevent immediate damage to its primary food source, as well as prevent future damage.

4. Pesticides and the PO

In addition to the GEOO, the Yurok Tribe’s PO also establishes similar principles. The Yurok Tribe has a no-drug policy, including medical marijuana.²²¹ Recently, however, many marijuana grow operations using pesticides have appeared on the reservation.²²² These toxic pesticides seep into the waterways and accumulate in salmon populations, affecting the health of the Yurok people.²²³ This becomes a larger problem with members who have a weaker immune system, such as the elderly and children, who eat salmon from the river and unknowingly consume the pesticides.²²⁴ In addition to the health risks, these marijuana farms have interfered with Yurok ceremonies and sacred areas, as well as discouraged tribal members from hunting and gathering in their regular places because they fear cannabis growers who may be violent.²²⁵

5. Further Steps for the Yurok Tribe to Exercise Sustainable Food Sovereignty

After ratifying the GEOO and PO, the Tribe worked to implement the ordinances in a way that would educate tribal members, continue research

219. *Id.*

220. *Id.* § 21.15.030(e).

221. NCAI YUROK CASE STUDY, *supra* note 160.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

on the best way to maintain the land, and hold firm against outside companies that did not want to phase out chemicals.²²⁶ As opposed to combining the ordinances, the Tribe made the PO its own ordinance so that it would emphasize the seriousness of the pesticide-runoff situation.²²⁷

These ordinances are a step toward the Tribe exercising its food sovereignty to its full ability. Food sovereignty is important for tribes, such as the Yurok, to allow them to choose what is best for the members. The Tribe values the salmon in the Klamath River for more than just its nutritional value; the Tribe values the salmon for its historical significance, as traditions related to fishing, cooking, and eating have been passed down for generations. Similarly, tribes have a right to protect their communities from chemicals and pesticides that affect their vegetation and wildlife, as well as the right to protect these traditional choices that embody the connection between the tribal members and their ancestors from outside influences. The Yurok Tribe passed the GEOO and PO to assert this power, and, by protecting its food sources, the Tribe protected its right to feed its community based on its own ancestral customs—which is an extension of its tribal sovereignty.

C. The Cultural Significance of Food Sovereignty in the Diné Tribe

The Diné Tribe—the largest tribe in the United States—is commonly known as the Navajo Tribe, and is located across parts of Arizona, New Mexico, and Utah.²²⁸ Food is a cornerstone of Diné culture; traditional farmed foods include vegetables, squash, corn, and beans.²²⁹ Additionally, animals such as sheep and goats are an important source of meat, wool, cheese, and milk.²³⁰

1. The Benefits of Growing Local Food in a Food Desert

Despite its traditional food resourcing, the Diné Tribe's land is considered a "food desert."²³¹ This means that there are environmental or economic bars to a community having the ability to access healthy foods.²³²

226. *See id.*

227. *Id.*

228. *Fast Facts*, NAVAJO NATION DIVISION OF ECON. DEV., <http://navajobusiness.com/fastFacts/LocationMap.htm> (last visited May 5, 2020).

229. *See Miss Navajo: Navajo Culture > Food*, PBS: INDEP. LENS, <https://www.pbs.org/independentlens/missnavajo/food.html> (last visited Apr. 28, 2020).

230. *Id.*

231. *See* DINÉ POLICY INST., *DINÉ FOOD SOVEREIGNTY* 8, 53 (Apr. 2014), <https://www.dinecollege.edu/wp-content/uploads/2018/04/dpi-food-sovereignty-report.pdf>.

232. *Id.*

Focusing on local farming and food production provides healthier options because traditional foods are primarily meats and vegetables, which are needed for a balanced meal.²³³ This is contrasted with not only the number of fast-food franchises on the reservation land, but also the grocery stores that import and sell “junk food” which can be up to eighty percent of food available at the store.²³⁴

One issue faced by many tribes is the lack of access to healthy food, which has caused an epidemic of obesity and diabetes on reservations.²³⁵ In the Diné Tribe, the percentage of tribal members with diabetes is estimated to be close to fifty percent, and has been on an upward trend since 1990.²³⁶ Preventing diseases through healthy food practices is a benefit of food sovereignty. The Diné Tribe, as it grows stronger in its food production and agricultural practices, will be able to wean itself off of the junk food that it currently relies on and be able to make healthier food more accessible. Not only will the accessible food be healthier, but it will also have a positive cultural impact.

By reclaiming the ability to produce food on their lands, indigenous people like the Diné ensure ancestral traditions are continued, and they remain close to the grounds they hold sacred.²³⁷ A tribe’s ability to exercise growing, gathering, and eating techniques that are unique to them is pivotal and must be maintained to allow tribes a better chance at self-sufficiency. When tribes are allowed to grow their own food, it provides greater self-sufficiency and solidifies their individual identity.²³⁸ Food and culture are closely intertwined, as are culture and identity.²³⁹ Additionally, it gives a tribe the ability to grow what it wants based on its community’s needs.²⁴⁰ Giving indigenous people control over their food is necessary to a tribe’s ability to exercise its own sovereignty.²⁴¹

Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples states that

[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and

233. *Id.* at 39–40.

234. *Id.* at 54.

235. *See id.* at 52–59, 65–66.

236. *Id.* at 52.

237. *Id.* at 8.

238. *Id.*

239. *Id.*

240. *Id.* at 63.

241. *Id.*

traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including . . . seeds, medicines, knowledge of the fauna and flora²⁴²

Maintaining control over and participating in food production directly relates to the ability to be self-sufficient and sovereign.

Similar to the Yurok Tribe, the Diné Indians released a “Declaration of a GMO- and Pesticide-Free Zone” in the Diné Tribe Territory. In this declaration, the Diné Tribe declares its “traditional homelands to be a zone that will be kept free from genetically modified seeds, plants and animals as well as toxic pesticides.”²⁴³ The intention behind this declaration is to restore the land to how it was farmed historically.²⁴⁴ Not only does this affect the environment physically, but also the process of farming and harvesting the land.²⁴⁵ The Diné people have decided to assert their right to grow food the way they choose to preserve the traditional methods and “spiritual, cultural, physical, social and environmental health, identity and survival.”²⁴⁶

2. Food Sovereignty and the Diné People

As with many other tribes, there is a close relationship between food and culture in the Diné Tribe, which developed from traditional stories that were passed down through generations related to producing, harvesting, and consuming food.²⁴⁷ “Our creation story began alongside our first foods – our siblings – and our fates are intimately tied For thousands of years, Indigenous communities crafted relationships with our environments, our foods, and created an intimate language cultivated in culture and ways of being.”²⁴⁸ As this quote suggests, movements toward food sovereignty are not just a reaction to outside forces. Movements are driven by community

242. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples art. 31 (Sept. 13, 2007).

243. *Declaration of a GMO- and Pesticide-Free Zone, Diné Nation Territory*, INT’L INDIAN TREATY COUNCIL (Sept. 21, 2013), <https://www.iitc.org/wp-content/uploads/2013/09/Before-there-were-human-beings-Resolution-web.pdf>.

244. *Id.*

245. *Id.*

246. *Id.*

247. DINÉ POLICY INST., *supra* note 231, at 36–37.

248. FIRST NATIONS DEV. INST., INDIGENOUS FOOD SYSTEMS: TRANSFORMATIVE STRATEGIES TO PERPETUATE NATIONHOOD 3 (2018), <https://www.firstnations.org/wp-content/uploads/publication-attachments/Indigenous%20Food%20Systems%20Transformative%20Strategies%20to%20Perpetuate%20Nationhood%20July%202018%20print%20FINAL.pdf>.

needs, and these needs include a lesson on history and how tribal food practices developed.

These traditions provided practical knowledge of not only food processes, but also the environment, food history, cultural history, and wellness.²⁴⁹ Food sovereignty is essential to continue these traditions. If a tribe cannot practice its unique food rituals, a key element of culture is lost, inhibiting the ability of the tribe to continue its ancestral customs. This loss affects its tribal sovereignty because it cannot sufficiently feed its members using these traditions. Without this ability, tribes are forced to assimilate with a different culture, and they risk losing generations of tribal history.

A traditional oral narrative representing the connection between food and a tribe's spirituality says:

plants being placed on the earth in a sacred and holy way by the Diyin Diné'é (Holy People) to provide for the sustenance and well being of the Diné people. These plants predated human beings, and were placed for the people with laws and rules to guide the people to interact in an appropriate manner with the sacred life beings. It is said that the blessings of sacred food plants were given by Changing Woman to feed the Diné people.²⁵⁰

In Diné culture, the creation of Earth began with food; to interfere with the plants that the Diné people see as sacred would interfere with the cultural and spiritual aspects of a Diné member's life.²⁵¹ The right to be sovereign includes the right to exercise religious customs.²⁵²

Corn, specifically, is an important food to the Diné people, because they believe that corn makes up the form of the physical person.²⁵³ Growing and preparing corn is incredibly important to the Diné culture because of the meaning behind the food source.²⁵⁴ They are connected to food in ways beyond mere sustenance.²⁵⁵

The Diné people believe that plants and animals are living beings and a part of a greater family of the Diné people.²⁵⁶ They are personified and

249. DINÉ POLICY INST., *supra* note 231, at 36–37.

250. *Id.* at 37.

251. *Id.* at 37–38.

252. *Id.* at 36–40.

253. *Id.* at 37.

254. *Id.*

255. *Id.*

256. *Id.*

considered “alive” with an “inner spirit,” and are capable of thinking, feeling, and communicating like human beings.²⁵⁷ Since these food sources are seen as a part of the greater family of the Tribe, they are closely cared for and treated with respect.²⁵⁸ The Diné people believe that plants and animals were put on Earth for a specific purpose.²⁵⁹ Accordingly, the Diné do not own or alter them, just as they would not do so to their own families.²⁶⁰

Finally, while corporations may genetically alter food to suit their needs, the Diné people culturally require their food to be unaltered.²⁶¹ Thus, it is important for the Diné Tribe, among other tribes, to protect its food sources and grow them free of alterations, including genetically modified animals and plant pesticides.²⁶²

The Diné Tribe is deeply tied to the concept of food sovereignty because food is a significant part of its culture. Each aspect of the food system, from planting, growing, cooking, and eating the food, is tied to ancient traditions. Food production has spiritual magnitude, social influence, and plays a part in the Tribe’s identity. Before technology made it possible to genetically alter plants and animals, people made use of what existed on their land. Technological advancements have allowed changes to the food system, but tribes have a right to limit interference from modern developments to remain truly sovereign.

VI. Conclusion

The ability of a tribe to feed its people based on its ancestral and cultural customs is directly tied to a tribe’s exercise of sovereignty. Food sovereignty is a movement that many communities have chosen to embody in their ordinances and laws. Communities such as that in Sedgwick, Maine, and Indian tribes such as the Yurok and Diné, have taken large strides in reclaiming their food processes to best serve individual community needs. While the food sovereignty movement is still growing and developing, a community’s ability to govern itself and make its own decisions is important to the culture of that community. This is especially true in tribal communities.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

Tribes have deep roots in their traditions and cultures on American soil; many tribes carry on traditions today that are hundreds of years old. During the formative years of the United States, many tribes struggled to maintain these traditions as they were forced out of their homelands and moved across the country. Today, tribes are pushing to exercise sovereignty related to food production.

Threats from outside contaminants, such as pesticides and genetically engineered plants and animals, threaten the sovereignty that people, such as the Yurok Tribe members, value. Nations like the Diné are deeply tied to their food traditions and find it necessary to regulate their own reservations to be free of these potential contaminants so their culture is not disturbed. A tribe cannot be truly sovereign unless it can control its culinary customs and traditions to maintain a vital part of tribal culture and identity.