International Opportunities for the Protection of the Yukon River Watershed

A Handbook of Strategies

Prepared by the Indian Law Resource Center for the use of the Tribes and First Nations of the Yukon River watershed, and the Yukon River Inter-Tribal Watershed Council.

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Map and photos provided by Yukon River Inter-Tribal Watershed Council

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August 19, 2003

LETTER OF TRANSMITTAL

Pursuant to Articles II and III of the Yukon River Watershed Inter-Tribal Accord, signed on the 9th day of August 2001 by the Tribes and First Nations of the Yukon River watershed, it is my pleasure to present to you this handbook of international strategies for the protection of the waters of the Yukon and its tributaries.

Articles II and III of the Accord commit the signatory indigenous governments to cooperate and communicate in their efforts to protect the environmental integrity of the Yukon River watershed. This handbook outlines the opportunities available at the international level for Tribes and First Nations, if they so choose, to engage in advocacy for the protection of the Yukon River watershed. This handbook will also be available on the website of the Indian Law Resource Center, at www.indianlaw.org, and on the website of the Yukon River Inter-Tribal Watershed Council, at www.yritwc.com.

Although there exists a vast array of international agreements, laws and procedures that impact the Yukon River watershed, this handbook concentrates on the following:

- The 1985 and 1999 Pacific Salmon Treaties
- The 2002 Yukon Salmon Agreement
- The 1992 North Pacific Salmon Treaty
- The Boundary Waters Treaty of 1909
- The Jay Treaty of 1794
- The North American Free Trade Agreement
- The North American Agreement on Environmental Cooperation
- The World Trade Organization
- Human rights treaties and procedures in the United Nations and the Organization of American States

These treaties create a variety of avenues for effective and creative advocacy that are not available at the domestic level. It is my sincere hope that the Tribes and First Nations of the Yukon River watershed are able to use this handbook in the furtherance of their important work of protecting the Yukon and its tributaries for future generations.

Sincerely,

Andrew I. Huff

Executive Summary

International law offers a variety of procedures and forums through which the Tribes and First Nations of the Yukon River watershed may engage in advocacy to clean up and protect the River and its tributaries. The treaties and procedures described in this handbook form a large part of the international law that is specific to the Yukon region or to the issues affecting the region. The *Yukon River Inter-Tribal Watershed Council* may present information and make recommendations regarding the management of the Yukon watershed to the governments of Canada and the U.S., using the mechanisms established pursuant to these treaties. As with most international law, these treaties offer little in terms of hard enforcement mechanisms to compel a nation to alter its behavior when its actions are in violation of the language of an international agreement. Rather, the effective implementation of these agreements depends upon the mutual self-interest of Canada and the United States to fulfill the terms of their promises to each other. The *Watershed Council* could play a vital role in making it clear to the governments of Canada and the United States that it is in their self-interest to abide by these agreements and to protect the integrity of the Yukon River watershed.

This handbook can be divided into four broad sections: (1) international laws regarding salmon; (2) international laws regarding transboundary issues; (3) international trade laws; and (4) international laws protecting human rights. In discussing the treaties in each area, the handbook gives (1) the historic and political background of the treaty; (2) a description of how the treaty works; and (3) the opportunities presented by the treaty for protecting the Yukon River watershed. Contact information is included for each treaty as well as for key individuals and organizations that may be of some assistance to the *Watershed Council* in its work.

Summarized below is the core information about each treaty discussed in the handbook.

The Pacific Salmon Treaty—The Pacific Salmon Treaty (PST) is an agreement between Canada and the United States to manage the harvest of salmon in a sustainable manner. Although the PST offers no direct mechanism for the *Watershed Council* to address issues regarding the Yukon, developing relationships with the indigenous organizations that have great influence on salmon management through the PST is strongly recommended. These organizations include the Northwest Indian Fisheries Commission , the Columbia River Inter-Tribal Fish Commission, and the British Columbia Aboriginal Fisheries Commission.

The Yukon River Salmon Agreement—The Yukon River Salmon Agreement (Yukon Agreement) is technically an annex to the Pacific Salmon Treaty. In reality, however, the Yukon Agreement is its own treaty between Canada and the U.S. with procedures for the management of Yukon salmon that are entirely separate from the PST. The *Watershed Council* can participate directly in the management of Yukon watershed through the Yukon Agreement. For example, the *Watershed Council* could push for a seat on the Yukon River Panel or the Yukon River Joint Technical Committee as well as submit information and make recommendations to these bodies, which were established pursuant to the Yukon Agreement. There are also grants available to organizations like the *Watershed Council* for projects to improve and protect salmon habitat.

The 1992 North Pacific Salmon Treaty—The 1992 North Pacific Salmon Treaty is an agreement between Canada, the U.S., Russia and Japan that prohibits the harvest of salmon on the high seas of the North Pacific. The *Watershed Council* could submit information and make recommendations to the *North Pacific Anadromous Fish Commission*, which was established pursuant to the treaty to study salmon on the high seas and to facilitate enforcement of the harvest ban.

The Boundary Waters Treaty of 1909—The Boundary Waters Treaty of 1909 is an agreement between Canada and the U.S. for the purpose of managing and settling disputes regarding transboundary lakes and rivers. The *Watershed Council* could submit information and make recommendations to the *International Joint Commission*, which was established pursuant to the Treaty to hear disputes and study transboundary issues. In order for the IJC to consider issues regarding the Yukon watershed, either the government of Canada or the U.S. government must first take action to refer the matter to the IJC.

The Jay Treaty of 1794—The Jay Treaty of 1794 is not directly related to watershed protection, but may be of some use to the *Watershed Council*. The Jay Treaty protects a right of free passage across the U.S.-Canadian border for those Tribal and First Nation members whose territories have been bisected by the border. Canada and the U.S. interpret the Treaty differently so there are different rules for who has the right of free passage and how to cross the border. The Treaty may be useful for facilitating the attendance of elders and others who may not have passports or other identification at biennial meetings of the *Watershed Council*.

The North American Free Trade Agreement—NAFTA is a comprehensive agreement between Canada, the U.S. and Mexico regulating international trade between those countries. In certain trade disputes that may affect indigenous lands or rights, procedures are available to indigenous peoples for the submission of legal briefs. The NAFTA trade experts who review and decide trade disputes may accept or reject such briefs at their discretion.

The North American Agreement on Environmental Cooperation—NAAEC is an agreement between Canada, the U.S. and Mexico to effectively enforce their own respective environmental laws. The NAAEC establishes an elaborate process to accept and review submissions by citizens alleging that their country is not enforcing its own environmental laws. This process could be used by the *Watershed Council* to make transparent the failures of the governments of Canada and the U.S. to effectively enforce their own laws related to the environmental integrity of the Yukon River watershed.

The World Trade Organization—The World Trade Organization is increasingly becoming more open to sharing and accepting information from organizations like the *Watershed Council*. The WTO has trade dispute resolution processes that are similar to the procedures established under NAFTA. Under new WTO procedures which are constantly in the process of evolving, the *Watershed Council* may submit legal briefs in trade disputes between Canada and the U.S. that have implications for indigenous rights. The WTO may accept or reject such briefs at its discretion.

Human Rights Treaties—The United Nations and the Organization of American States administer a variety of international treaties protecting human rights. International human rights law increasingly recognizes the unique rights and interests of indigenous peoples from throughout the world. The *Watershed Council* may make submissions to the many committees and commissions that implement these treaties and laws, including the UN Human Rights Committee, the UN Committee for the Elimination of Racial Discrimination, the UN Working Group on Indigenous Populations, the UN Permanent Forum on Indigenous Issues, the UN Working Group on the Draft Declaration on the Rights of Indigenous Peoples, or the OAS Inter-American Commission on Human Rights.

International law offers new avenues of advocacy to indigenous peoples. Often, the domestic laws that are forced upon indigenous peoples limit rather than assist us in our efforts to protect our cultures and lands. The Indian Law Resource Center offers this handbook to the Tribes and First Nations of the Yukon River watershed in the hope that the international procedures and forums summarized herein may bolster your important work of protecting the watershed for future generations.

Salmon Law

The Pacific Salmon Treaty and the Yukon Agreement

Since their creation, the *Pacific Salmon Treaty* and its annex, the *Yukon River Salmon Agreement*, have been strongly influenced by Native peoples. The Pacific Salmon Treaty (PST), signed in 1985, is a treaty between the governments of Canada and the United States, primarily for the purpose of controlling the commercial harvest of salmon in the Pacific Ocean. The "Agreement on Mutual Acceptance of Oenological Practices"—or as it is more commonly known, the *Yukon River Salmon Agreement* (Yukon Agreement)—is an annex to the Pacific Salmon Treaty and deals only with the salmon of the Yukon River watershed. Native peoples have had a direct role in the formation of these agreements and will continue to play a critical role in their effective implementation. Salmon, of course, depend upon pristine waters in which to spawn. The YRITWC could, if it so chose, become a powerful voice through the Yukon Agreement for the purpose of improving salmon habitat in the Yukon watershed.

The *Yukon Agreement*, signed on December 4, 2002, is essentially a treaty within a treaty. Although the Yukon Agreement is formally part of the Pacific Salmon Treaty, it sets out entirely separate procedures for salmon management and protection in the Yukon River watershed. A temporary version of the Yukon Agreement has been in operation since 1995. This temporary version of the Yukon Agreement came to an end in 1998. Although cooperation continued between Canada and the U.S. regarding salmon management, the interim agreement was not renewed because of lack of progress on long-term management issues. Eventually, negotiations between Canada and the United States resulted in the formal signing, in December of 2002, of a new permanent agreement on Yukon River salmon management and protection.

The Pacific Salmon Treaty and the Yukon Agreement are primarily procedural treaties. They establish panels and committees which look at information regarding salmon and make recommendations to Canada and the U.S. as to how they should effectively manage salmon and salmon habitat. There is no rigid enforcement mechanism created by the treaties to levy punishment or force compliance if a country harvests too much salmon or refuses to remove a dam. The primary utility of the treaties is in obtaining accurate data and convincing the fishery management agencies of Canada and the U.S. to rationally manage salmon based on this data

The best means for the First Nations and Tribes of the Yukon River watershed to exert influence on the management of the watershed will be through the Yukon Agreement. In order to fully understand the Yukon Agreement, however, it is necessary to understand the creation and evolution of both the Pacific Salmon Treaty and the Yukon Agreement.

The Pacific Salmon Treaty

Background

When the Pacific Salmon Treaty was signed by the governments of Canada and the United States in 1985, it was hailed as a groundbreaking solution to the problem of managing the harvest of salmon across international boundaries. The life cycle of a salmon does not correspond with the principle of exclusive national territorial jurisdiction—salmon live and travel throughout many national and international waters and jurisdictions. No country can be said to own or control salmon. Many countries, including the U.S., Canada, Russia, Japan and others, have therefore felt free to allow the overfishing of salmon, pushing them towards extinction. The collapse of the commercial salmon fishery, which generates hundreds of millions of dollars per year, would mean the loss of an industry of critical importance to both Canada and the U.S. The Pacific Salmon Treaty attempted to resolve this problem of overfishing by establishing a "Pacific Salmon Commission" to set harvest limits on salmon.

Generally, salmon spawn and are "intercepted"—or caught by fishermen of another country—in the following patterns:

- Chinook that spawn in the rivers of Washington and Oregon, mainly in the Columbia and Snake Rivers, become the prime target of commercial fishermen operating in the seas off of Southeast Alaska and British Columbia.
- Sockeye, pink and chum salmon from the Fraser River of British Columbia are caught by U.S. fishermen in the Puget Sound and Strait of Juan de Fuca. Sockeye, pink and chum originating in other rivers in British Columbia are caught primarily by U.S. fishermen from Southeast Alaska.
- Chinook, coho and chum originating in the Puget Sound area are caught by Canadian fishermen off of Vancouver Island.
- Chinook and chum salmon that spawn in the Canadian portion of the Yukon River are caught primarily by subsistence and commercial fishermen in Alaska.

Developments in international and national law in the 1970s and 80s, as well as a sharp decline in chinook stocks in the early 1980s, compelled Canada and the United States to adopt the Pacific Salmon Treaty in 1985. The primary developments leading up to the signing of the Pacific Salmon Treaty include:

1930—Prior to the PST, the only agreement exclusively between Canada and the U.S. regarding salmon was the 1930 Fraser River Convention. The Fraser River Convention, though effective in rehabilitating and protecting certain salmon runs, was limited to the sockeye and pink salmon originating in the Fraser River of British Columbia.

1974—In 1974, a U.S. federal court held that 24 Tribes in the Pacific Northwest of the United States had a treaty-

protected right to 50% of the harvestable salmon passing through their traditional salmon harvesting sites. After the "Boldt decision"—as the 1974 U.S. federal court decision is called—it became clear that salmon numbers would have to increase in order to maintain profitable commercial harvest levels.

1976—In 1976, the U.S. passed the Fishery Conservation and Management Act (the "Magnuson Act"), extending its fishery management jurisdiction to 200-miles off its shores and purporting to extend U.S. management jurisdiction over U.S.-origin salmon throughout their *entire migratory route*. Canada, Russia, and Japan followed suit in 1977, setting the stage for management conflicts.

1981—By 1981, it had become clear to Canadian and U.S. fishery managers that Chinook stocks were in danger of complete collapse due to overfishing and freshwater habitat destruction.

1982—In 1982, the United Nations opened for signature the Convention on the Law of the Sea (UNCLOS). Article 56(1)(a) of UNCLOS essentially confirms the 200-mile zones previously established by the major countries-of-origin of Pacific salmon as "exclusive economic zones," and extends these zones to all coastal states signatory to the Convention. Within their 200-mile economic zone, states have an exclusive sovereign right to manage all resources, living or non-living. Article 66 of UNCLOS establishes that "states in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks," and mandates that in situations where anadromous fish stocks migrate through the 200-mile economic zones of another country, the neighboring country "shall co-operate with the State of origin with regard to the conservation and management of such stocks." Although Canada and the U.S. have not signed the UNCLOS, they recognize the Convention as a codification of customary international law that is binding upon them.

Following these legal and biological developments, Canada and the U.S. negotiated and signed the Pacific Salmon Treaty in 1985. The PST incorporated elements of the UNCLOS, particularly the idea that states-of-origin have a primary interest in the management of their salmon stocks. Article III of the PST states, "[E]ach Party shall conduct its fisheries . . . so as to: (a) prevent overfishing and provide for optimum production; and (b) provide for each Party to receive benefits equivalent to the production of salmon originating in its waters." In meeting the goals of preventing overfishing and providing national harvest benefits that are proportional to the numbers of fish spawned in national streams, the PST included several articles and "annexes" which set specific ceilings for the number of salmon that could be harvested from certain regions and rivers. Article VIII of the PST addresses the Yukon River. The Yukon is recognized as a river with "unique characteristics" that needs a separate agreement for cooperative management. Article VIII of the PST directs Canada and the United States to create an organizational structure to cooperatively develop research programs, enhancement opportunities, and exchanges of biological data regarding the Yukon River salmon.

Although the PST is quite basic in its policy goals of conservation and equity to be achieved through mutually agreed-upon harvest ceilings, implementing the PST has proven to be difficult. The original harvest ceilings established by Canada and the United States expired in 1994. Theoretically, a body created by the PST called the "Pacific Salmon Commission," composed of U.S. and Canadian members, was to have annually reviewed data and set new harvest ceilings. However, following the expiration of the original harvest limits, Canada and the U.S. never established new ceilings. Between 1994 and 1999, therefore, Canadian and U.S. fishermen harvested Pacific salmon without any limitations agreed upon by Canada and the U.S., exacerbating the already serious crisis with the integrity of many salmon runs.

The failure to agree upon new limits came about as a result of several factors:

- The poor management of the major salmon producing rivers in Washington and Oregon resulted in a decline in salmon available for Canadian fishermen.
- Alaskan commercial fishermen were harvesting salmon originating in Canadian waters at a greater rate than Canadians were harvesting salmon originating in U.S. waters. Without healthy salmon migrations from Oregon and Washington to harvest, Canadian fishermen could not balance their catch with the catch of Alaskan fishermen—a violation of the principle of the PST that a country should benefit from its salmon harvest in proportion to the number of salmon that are spawned within its boundaries.
- The fixed catch-ceilings established pursuant to the PST did not account for fluctuations in salmon populations and encouraged fishing to the limits established by the Commission rather than fishing limited by the actual abundance of the salmon. This resulted in overfishing in times of low salmon abundance.
- The U.S. membership of the Pacific Salmon Commission, which is supposed to set harvest ceilings through consensus with the Canadian membership of the Commission, is composed of one representative from Alaska, one treaty-Tribe representative, one representative for both Washington and Oregon, and one federal representative. The ability of the U.S. section of the Commission to agree to harvest ceilings was stalemated by the Alaska representative, who consistently refused to agree to the lower ceilings proposed by other Commission members. It was Alaska's view during this time that their fishermen should not bear the costs of the poor river management of Washington, Oregon and British Columbia.

The lack of harvest ceilings after 1994 resulted in a "Salmon War." Canadian fishermen attempted to catch most of the Fraser River sockeye and pink salmon before they could be caught by U.S. fishermen. Alaskan fishermen accelerated their catch of fish originating in the Alsek, Stikine and Taku

rivers. Canadian fishing boats blockaded an Alaskan fishing vessel and a ferry and on one occasion burned an American flag. In 1995, the U.S. treaty-Tribes sued the state of Alaska in federal court, alleging that Alaskan over fishing was hurting their treaty protected salmon fishing rights. The court temporarily suspended the state of Alaska from continuing with its over harvest of chinook salmon. British Columbia sued the U.S., as well as Washington and Alaska, alleging hundred of millions of dollars in financial losses. Alaska filed suit against Canadian boat owners who blockaded Alaska ships and ferries. Attempts to mediate the impasse failed.

The disputes, recriminations, huge financial losses to both Canada and the U.S., and the continuing rapid decline of the salmon runs eventually led to renewed negotiations in 1999. On June 3, 1999, Canada and the U.S. signed a revised Pacific Salmon Treaty. The main feature of the 1999 PST is the "abundance-based management" principle, which replaces the old equity principle. Under the abundance-based management principle, the Pacific Salmon Commission sets harvest limits according the health of the various salmon runs and can change these limits as necessary. The lower the number of salmon, the lower the allowable harvest. Thus, the conservation principle of the old PST has assumed primary importance in the 1999 PST, and the equity principle has been discarded. The procedures for establishing harvest limits, rather than requiring periodic consensus, are fixed for ten to twelve years. These fixed procedures avoid the problems brought about by the state of Alaska's obstructionist strategies under the old PST. Finally, the 1999 PST creates two large funds that will be used to improve salmon data, *restore habitat*, and enhance *wild* salmon stock populations. The revised 1999 PST does not alter Article VIII the 1985 PST dealing with the Yukon River.

How the Pacific Salmon Treaty Works

The 1999 Pacific Salmon Treaty revises and updates the 1985 Treaty, but does not entirely replace the 1985 Treaty. Much of the organizational structure created by the 1985 Treaty, namely the Pacific Salmon Commission, the various geographic Panels, and the Technical Dispute Settlement Board, remains in place. The 1999 revisions focus primarily on the methodology of establishing salmon harvest levels, replacing fixed harvest ceilings with an abundance-based management methodology. The 1999 PST also establishes a new Committee on Scientific Cooperation and two new "Funds" containing a total of US$140 million, which are to be used for projects that rehabilitate and restore salmon habitat.

Pacific Salmon Commission—The Pacific Salmon Commission is the central management mechanism of the PST. The Commission's main function is to analyze information and make recommendations to fishery managers in Canada and the U.S. regarding salmon harvests. Theoretically, Canada and the U.S. are to adopt these recommendations, write them into their domestic fishing regulations, and enforce them under their respective domestic laws.

The Commission is composed of two national sections, a Canadian section and a United States section, each with four members. These eight commissioners are to reach decisions on harvest levels through consensus—thus, if one commissioner decides to block the process the entire Commission is blocked. The four Canadian commissioners are appointed by the Canadian federal government. The four U.S. commissioners are as follows: one commissioner represents the U.S. federal government; one commissioner represents the states of Washington and Oregon; one commissioner represents the 24 U.S. treaty-Tribes; and one commissioner represents Alaska. The current Canadian commissioners are Dr. John Davis (Chair), Mr. Ron Fowler, Mr. Hubert Haldane, and Mr. Gerry Kristianson. The current U.S. commissioners are Mr. Ron Allen (Vice-Chair), Mr. Larry Rutter, Mr. Kevin Duffy, and Mr. Larry Cassidy.

The Northern Panel, the Southern Panel, the Fraser River Panel, the Transboundary River Panel, and the Yukon River Panel—The "Panels," which are made up of Canadian and U.S. fishery experts and other experts, are the source of information relied upon by the Commission to make recommendations regarding salmon harvest to the U.S. and Canada. Each Panel is composed of 12 members, 6 from Canada and 6 from the United States. The Northern Panel analyzes data about salmon that spawn between Cape Suckling in Alaska and Cape Caution in British Columbia. The Southern Panel analyzes data about salmon that spawn in rivers to the south of Cape Caution. The Fraser River Panel is unique in that it has responsibility for both analyzing data and managing pink and sockeye salmon that spawn in the Fraser River. The Transboundary River Panel analyzes data about salmon that spawn in the Alsek, Stikine, and Taku River systems. The Yukon River panel, newly established pursuant to the 2002 Yukon Agreement, analyzes data about salmon that spawn in the Yukon River. As discussed in the next section, the Yukon River Panel follows its own internal procedures and does not report to the Commission like the other panels.

The Panels analyze data having to do with salmon stocks – primarily information submitted to them from their respective domestic fishery management agencies, private organizations and from a variety of technical committees – and make recommendations regarding management to the Commission. The Panels attempt to determine, inter alia: (a) the estimated size of the salmon runs; (b) the interrelationship between salmon stocks; (c) the spawning escapement required; (d) the estimated total allowable catch; (e) the intentions of the respective fishery management agencies concerning fisheries in their national waters; and (f) the objective of respective salmon-origin states in terms of allocation of salmon. Under the 1999 revised PST, the Panels will also have to convey information to the Commission on: (a) naturally spawning stocks subject to the Treaty for which agreed harvest controls alone cannot restore optimum production; (b) non-fishing factors affecting the safe passage of salmon as well as the survival of juvenile salmon which limit productions of salmon; (c) options for addressing non-fishing constraints and restoring optimum production; and (d) the progress of Canada and the U.S. to protect and restore habitat and achieve high levels of natural production.

Technical Dispute Settlement Board—Disputes between the U.S. and Canada regarding the accuracy of salmon data and the extent of salmon interceptions are referred to the Chairman of the Commission (currently Dr. John Davis), who then refers the dispute to the Technical Dispute Settlement Board. The Board is empowered only to make finding of fact, which are considered to be final. These findings of fact are then relied upon by the Commission to make recommendations to the parties.

Committee on Scientific Cooperation—The 1999 PST established a new Committee on Scientific Cooperation. This committee replaces the Committee on Research and Statistics created under the 1985 PST. Each national section of the Pacific Salmon Commission nominates four members of the Committee on Scientific Cooperation, drawn from governmental and non-governmental scientific organizations. This Committee assists the technical committees which operate under the Panels, monitors the progress of Canada and the U.S. in data methodologies and exchange, undertakes tasks as assigned by the Commission on habitat and restoration issues, and makes recommendations regarding scientific consultation between the parties.

The Northern Boundary and Transboundary Rivers Restoration and Enhancement Fund, and the Southern Boundary Rivers Restoration and Enhancement Fund—The 1999 PST establishes two "Funds" which are to be used for rehabilitation and restoration of salmon habitat as well as for improving information for salmon management. A Northern and Transboundary Fund Committee and a Southern Fund Committee now exist within the Pacific Salmon Commission to review and approve of proposals for the use of the funds. The Fund Committees make their recommendations to the Pacific Salmon Commission, which then disburses the money.

Opportunities for Watershed Protection under the PST

The 24 U.S. treaty-Tribes of the Pacific Northwest are directly represented on the Pacific Salmon Commission by Ron Allen. These Tribes have, effectively, veto power over the other members of the Commission if they strongly disagree with the management decisions of the Commission. These Tribes also have legally enforceable treaty rights to harvest 50% of the salmon which migrate through their traditional fishing areas. During the "Salmon Wars" the treaty-Tribes took the state of Alaska to federal court pursuant to a special legal agreement called the "Baldridge Stipulation." During this time, the state of Alaska was refusing to control the overfishing of its commercial fleet in Southeast Alaska and blocking the efforts of the Pacific Salmon Commission to establish reasonable harvest ceilings. The court agreed with the Tribes that Alaska's actions were threatening their treaty-protected harvest rights, and temporarily prohibited the state from authorizing further Chinook fishing off the coast of SE Alaska.

Thus, these tribes have direct legal leverage over the state of Alaska. Developing strong ties with these tribes, which are represented by the Northwest Indian Fisheries Commission and the Columbia River Inter-Tribal Fish Commission, will put Alaska and Canada on notice that their actions regarding salmon management in the Yukon are being closely monitored not only by the YRITWC, but by the Tribes of the Pacific Northwest.

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Columbia River Inter-Tribal Fish Commission
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The Yukon Agreement

Background

As the drama of the Salmon Wars unfolded off the coasts of British Columbia, Southeast Alaska, Washington and Oregon, a second drama was unfolding along the banks of the Yukon River. The 1985 PST directed Canada and the U.S. to cooperatively develop research programs, enhancement opportunities, and exchanges of biological data regarding Yukon River salmon. Not until December 2002, 17 years after the signing of the PST, did a permanent agreement on the management of the Yukon River finally emerge.

A 1985 Memorandum of Understanding between Canada and the U.S. attempted to implement many of the general provisions of the 1985 PST. Part "C" of the 1985 MOU was an attempt to implement Article VIII of the PST, dealing exclusively with the Yukon River watershed. Part "C" required that Canada and the U.S. meet before the end of 1985 to analyze the status of Yukon salmon stocks, recommend harvest percentages and escapement goals, and establish a technical committee to compile data and research ideas for future salmon management.

Although the 1985 MOU is clear in expecting swift action on cooperative management of the Yukon River, a permanent management agreement was not signed until 2002. Between 1985 and 1995, Canadian and U.S. negotiators failed to reach any agreement as required by the PST. Only

one plan, the 1991 draft Strategic Plan for the Conservation, Management and Enhancement of Yukon River Salmon Fisheries, was created during this time period. The 1991 plan, which in fact was only a plan for obtaining better data about salmon rather than a management plan, was never implemented.

In 1995, Canada and the U.S. at last signed an *interim* agreement for the management of Yukon River salmon. The 1995 interim agreement would eventually become the model for the 2002 permanent agreement. The 1995 interim Yukon Agreement established the "Yukon River Panel," made up of representatives from Canada and Alaska, as well as the "Yukon River Joint Technical Committee." The Committee collects and evaluates data regarding salmon in the Yukon, and makes recommendations to the Panel regarding habitat and escapement objectives. A special fund, called the "Yukon River Salmon Restoration and Enhancement Fund," was established to develop restoration and enhancement programs. The Panel then makes recommendations to U.S. and Canadian management agencies based on their information and expertise. The 1995 interim agreement expired in 1998. The significance of the interim agreement was its emphasis on salmon *habitat*. Unlike the 1985 PST, which concentrated almost exclusively on regulating ocean harvest of salmon, the 1995 interim Yukon Agreement made protection of freshwater salmon habitat a priority.

Major declines in the Yukon salmon runs after 1998 provided a new urgency to the negotiation of a permanent international management plan for the Yukon. These salmon declines were in fact so severe that the U.S. federal government provided disaster relief assistance to communities along the Yukon River. A draft agreement on the management of Yukon River salmon was reached by Canadian and U.S. negotiators in Whitehorse, Yukon Territory, in March of 2001. The final Yukon River Salmon Agreement was signed in Washington, D.C., on December 4, 2002. The final Yukon Agreement is quite similar to the interim Yukon Agreement of 1995 in that it provides for the creation of a Yukon River Panel and a Yukon River Joint Technical Committee. The 2002 Agreement also introduces the idea of "precautionary abundance-based management" of salmon —a reform very similar to the revised 1999 PST. The 2002 Agreement creates a $1.2 million fund for restoration and enhancement projects throughout the Yukon River watershed.

How the 2002 Yukon Agreement Works

The 2002 Yukon Agreement is organized in a manner very similar to the 1999 PST: it provides for a Yukon River Panel, a Yukon River Joint Technical Committee, and a Yukon River Salmon Restoration and Enhancement Fund. The Yukon Agreement is unique, however, because it is entirely separate from the PST. The Panel, Joint Technical Committee and Restoration Fund that it establishes follow their own internal procedures, have separate funding, and do not report to the Pacific Salmon Commission as do the other regional panels and committees under the 1999 PST. The Yukon River Agreement is particularly important from a Native perspective because it recognizes in its first paragraph that subsistence fisheries in Alaska have priority over other fisheries in Alaska, and that aboriginal fisheries in the Yukon Territory have priority over other fisheries in the Territory.

The First Nations and Tribes of the Yukon River watershed could have, therefore, great influence in how fisheries will be managed in the Yukon. In recognition of the importance of the Native harvest and in order to begin remedying the recent declines in Yukon salmon populations, the Agreement bans altogether new fisheries within the Porcupine River drainage until December 2006. If for some reason the 1999 PST once again becomes mired in controversy and is terminated by Canada and the U.S., the Yukon River Agreement will not be terminated along with the PST. Instead, by agreement of Canada and the U.S., the Yukon Agreement will become a freestanding treaty, to be called the Yukon River Salmon Treaty.

The Yukon River Panel—The Yukon River Panel makes recommendations to the respective management agencies—the ADF&G and the DFO—concerning the conservation and coordinated management of the salmon originating in the Yukon River in Canada. The Panel may recommend spawning escapement objectives and revise these objectives as needed. The Panel must also annually review the fishery programs of Canada and the U.S. and make recommendations for their improvement. Finally, the Panel manages the Yukon River Restoration and Enhancement Fund, discussed below.

Yukon River Joint Technical Committee—The Yukon River Joint Technical Committee reports to the Yukon River Panel a wide variety of information regarding Yukon salmon, including:

(a) information about migratory patterns, extent of exploitation, optimum spawning escapement objectives, the improvement of fishery management programs, the status of Canadian-origin chum, chinook and coho stocks, and predictions for salmon runs with proposed in-season management strategies;

(b) information on the condition of salmon habitat, including recommendations for measures to protect or enhance salmon habitat; and

(c) information on proposed restoration and enhancement programs, including identifying restoration and enhancement opportunities and evaluating proposed restoration and enhancement programs for funding through the Yukon River Restoration and Enhancement Fund.

The Yukon River Restoration and Enhancement Fund—This Fund of US$1.2 million, renewed annually, is to be used for projects directed at the restoration, conservation and enhancement of Canadian-origin salmon and for developing stewardship of salmon habitat, according to the following priorities:

(a) restoring habitat and wild stocks;

(b) conserving habitat and wild stocks;

(c) enhancing habitat; and

(d) enhancing wild stocks.

The Yukon River Joint Technical Committee is to make recommendations to the Yukon River Panel regarding projects that fulfill the priorities listed above. The Yukon River Panel will manage and disburse the funds according to its own internal procedures.

Opportunities for Watershed Protection under the Yukon Agreement

The 2002 Yukon Agreement offers direct opportunities for participation in the management of the Yukon River. The Yukon Agreement identifies subsistence and aboriginal use of Yukon salmon as its priority management concern. The YRITWC is the only organization of Tribes and First Nations that encompasses the entire watershed with the mission of improving water quality and overall watershed health in order to maintain traditional Native ways of life. The objectives of the YRITWC closely match two of the main objectives of the Yukon Agreement—the restoration and enhancement of salmon habitat in order to protect subsistence and aboriginal fisheries.

The Yukon River Panel and the Yukon River Joint Technical Committee are the two bodies that implement the Yukon Agreement. The Yukon River Inter-Tribal Watershed Council could, if it so chose, establish direct ties with both of these committees, submit information to them (for example, the JTC might be interested in seeing the Yukon River Unified Watershed Assessment), and perhaps request a seat on the Joint Technical Committee. The Panel and the JTC were established under the interim Yukon salmon agreement of 1995 and were carried forth, essentially unchanged, in the 2002 Yukon Agreement. Under U.S. law, one of the U.S. members of the Yukon Panel must be an Alaska Native. The 2002 Yukon Agreement does not, however, establish any procedures for whom may sit on the JTC, how they are to be selected, or how long they serve. Mary Pete, Chair of the U.S. section of the Panel, has stated in a telephone interview (July 3, 2003) that the membership of the JCT is chosen at the discretion of the Panel.

In addition to submitting information to the Panel and the JCT regarding the health of the river, and perhaps sitting on the JCT, the YRITWC could submit proposals to the Yukon Panel for the improvement of salmon habitat in the watershed. The Yukon River Restoration and Enhancement fund was established specifically for restoring and conserving salmon habitat and wild stocks of salmon. If, for example, the Watershed Council identifies a serious problem with an abandoned mine or with sewage disposal from a particular site, it could submit a proposal to the Yukon Panel to begin the clean-up of such hazards, thereby restoring salmon habitat.

The Yukon River Panel is currently calling for 2004 project proposals. Conceptual proposals are due October 10, 2003, and should be submitted to the Executive Secretary of the Yukon River Panel:

Hugh J. Monaghan
Executive Secretary
Yukon River Panel
Box 20973
Whitehorse, Yukon
Y1A 6P4

Finally, two organizations—the Yukon River Drainage Fisheries Association and the Yukon Salmon Committee—have a direct role in implementing the Yukon Agreement. The YRDFA has a seat on the JCT. The YSC is the lead organization in the Yukon Territory dealing with salmon issues and forms the Canadian section of the Yukon River Panel. Developing strong ties with these organizations will increase the influence of the YRITWC in the management of the Yukon River watershed.

Contact information:

The ***Yukon River Panel*** is currently composed of the following members:

United States

Ragnar Alstrom
Panel Member
(907) 238-3819

Francis Thompson
Panel Member
(907) 438-2932

Gilbert Huntington
Panel Member
(907) 656-1435

Julie Roberts
Panel Member
(907) 366-7170

Mary Pete
Chair
State of Alaska Official
(907) 465-4147

Laverne Smith
U.S. Fish and Wildlife Service
(907) 786-3447

Canada (Yukon Salmon Committee)

Carl Sidney
Gerry Couture
Clyde Blackjack
Chuck Hume
Llewellyn Johnson
William Josie
Joni MacKinnon
Stanley Njootli
Steve Taylor
Frances Wellar

The ***Yukon River Joint Technical Committee*** is currently composed of the following members:

United States

Linda Brannian, Co-chair, ADF&G
Jeff Adams, USFWS
Fred Andersen, NPS
Dan Bergstrom, ADF&G
Bonnie Borba, ADF&G
Jeff Bromaghin, USFWS
Fred Bue, ADF&G
Jim Finn, USGS-BRD
Karen Gillis, BSFA
Toshihide Hamazaki, ADF&G
Russ Holder, USFWS
Jennifer Hooper, AVCP
Bob Karlen, BLM
Jill Klein, YRDFA
Steve Klosiewski, USFWS
Tracy Lingnau, ADF&G
Mike McDougal, YRDFA
Susan McNeil, ADF&G
Chris Stark, BSFA
Charles Swanton, ADF&G
Tom Vania, ADF&G
Dick Wilmot, NMFS
George Yaska, TCC

Canada

Sandy Johnston, Co-chair, DFO
Bev Brown, Habitat Steward, Little Salmon-Carmacks
Ian Boyce, DFO
Jake Duncan, Habitat Steward, Dawson
Mary Ellen Jarvis, DFO
Pat Milligan, DFO
Carl Sidney, Teslin-Tlingit Council
Al von Finster, DFO

Other contact information

Yukon River Panel, Executive Secretary
Box 20973, Whitehorse, Yukon Territory Y1A 6P4
Tel: (867) 393-1900. Fax: (867) 633-8677
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725 Christensen Drive, Suite 3-B, Anchorage, AK 99501
Tel: (907) 272-3141Fax: (907) 272-314
www.yukonsalmon.com

Yukon Salmon Committee
100-419 Range Road, Whitehorse, Yukon Y1A 3V1
Tel: (867) 393-6725. Fax: (867) 393-6738
www.yukonsalmoncommittee.ca

The 1992 North Pacific Salmon Treaty

The *1992 North Pacific Salmon Treaty* ("1992 Treaty") prohibits all harvest of salmon by vessels registered to Russia, Japan, Canada or the United States, on the high seas of the North Pacific. Under customary international law and the U.N. Convention on the Law of the Sea, Russia, Japan, Canada and the United States each claim jurisdiction over "exclusive economic zones" which extend 200 miles off their territorial shores. The term "high seas" means international waters that lie beyond the 200-mile exclusive economic zones claimed by these and other countries. The Pacific Salmon Treaty regulates salmon harvest within the Canadian and American economic zones. Beyond these zones the 1992 North Pacific Salmon Treaty controls. The 1992 Treaty is substantially less complex than the Pacific Salmon Treaty or the Yukon Agreement because it is an outright prohibition on high seas salmon fishing rather than an attempt to determine and enforce fair harvest allocations.

Although the 1992 Treaty does not at first seem to offer any useful role for the Tribes and First Nations of the Yukon River watershed, the Treaty does establish scientific research committees that the YRITWC may be able to contribute to and benefit from. For example, the health of salmon stock in the Bering Sea, which is of direct relevance to the Yukon River watershed, is a major subject of study under the 1992 Treaty.

Background

Tensions over the presence of Japanese fishing vessels off of the coast of Alaska led to the development of the first treaty attempting to limit salmon fishing on the high seas. Beginning in the 1930's, Japanese fishing vessels regularly appeared in the Bristol Bay region of Alaska hoping to profit from the extremely rich salmon harvest. Although there were attempts to limit the Japanese take of salmon, a cessation of the harvest did not occur until World War II. After World War II, negotiations concerning salmon resumed and the 1952 International Convention for the High Seas Fisheries of the North Pacific (the "1952 Convention") was eventually signed by Canada, the U.S. and Japan. The 1952 Convention barred Japanese vessels from fishing east of a certain longitude in order to make sure they were not able to intercept salmon migrating from Canadian and U.S. spawning grounds. In the years following 1952, renegotiations of the Convention moved the line further and further west, severely limiting the extent to which Japanese vessels could intercept any salmon originating in Canada or the U.S.

At the same time the Soviet Union barred Japanese vessels from fishing for Soviet-origin salmon on the high seas. The U.S., Japan and Canada claimed similar rights to manage salmon originating in their national waters throughout their migratory range, including on the high seas. By 1977 the stage was set for some sort of common agreement amongst the major salmon-producing nations—Japan, Russia, the U.S. and Canada—for the common management of high seas salmon fishing. Following the negotiation of a specific bilateral agreement between the U.S. and Canada regarding salmon interceptions in their 200-mile exclusive economic zones (the 1985 PST), these nations turned toward negotiating with Japan and Russia the *North Pacific Salmon Treaty* regarding high seas salmon fishing, which was completed in 1992.

How the 1992 North Pacific Salmon Treaty Works

The 1992 Treaty consists of two main parts: (a) enforcement of the high seas salmon fishing ban and (b) scientific study in order to better conserve salmon and improve enforcement on the high seas. Enforcement of a total ban on salmon fishing in the North Pacific is of course an enormous task. In addition to vessels from Japan, Russia, the U.S. and Canada that may be illegally fishing in the area, vessels from Taiwan, North & South Korea and elsewhere may be plying the waters of the North Pacific for illegal salmon. The area covered by the 1992 Treaty stretches roughly from southern California all the way to the top of the Bering Sea, exclusive of the 200-mile zones. Studying the movement and biology of salmon in the high seas also presents enormous challenges. The 1992 Treaty has established a committee called the "North Pacific Anadromous Fish Commission" to facilitate and coordinate enforcement activity and scientific studies.

Enforcement

Article III of the 1992 Treaty states:

> **In the Convention Area:**
>
> - directed fishing for anadromous fish shall be prohibited;
> - incidental taking of anadromous fish shall be minimize to the maximum extent practicable . . . .
> - the retention on board of a fishing vessel of anadromous fish taken as an incidental taking in a fishing activity directed at non-anadromous fish shall be prohibited and any such anadromous fish shall be returned immediately to the sea. . . .
>
> The Parties shall take appropriate measures, individually or collectively, in accordance with international law and their respective domestic laws, to prevent trafficking in anadromous fish taken in violation of the prohibitions provided for in this Convention, and to penalize persons involved in such trafficking.

Thus, the Treaty prohibits trafficking in illegally caught salmon as well as illegal fishing on the high seas.

The parties to the Treaty are empowered, under Article V, to forcibly stop and board vessels from each others nation if such vessels are suspected of illegally fishing for salmon. Vessels may be seized and fishermen arrested if they are in

violation of Article III. Boats and fishermen seized and arrested are to be delivered to their country of origin for investigation and prosecution. Only the authorities of the nation to which the offending person or vessel belongs may try the offense and impose appropriate penalties.

The North Pacific Anadromous Fish Commission (NPAFC) coordinates high seas enforcement between Japan, Russia, the U.S. and Canada. The Committee on Enforcement (ENFO), which is a subcommittee of the NPAFC, brings representatives from the parties together to improve enforcement. Current enforcement agencies include the Department of Fisheries and Oceans Canada, the Fisheries Agency of Japan, the State Fisheries Committee of the Russian Federation, the Russian Federal Border Service, the United States National Marine Fisheries Service, and the United States Coast Guard.

All of these agencies have ships and aircraft that are able to patrol some of the Treaty area. The sheer size of the North Pacific, however, ensures that illegal fishing will continue to occur. In the last two years, there have been no detections of illegal fishing in the North Pacific. In 1998—the year which represents the highest level of detections and apprehensions since the initiation of the Treaty—a total of nine vessels were detected fishing illegally for salmon. Only four of those nine vessels were actually apprehended. It is safe to guess that there are a greater number of illegal vessels operating on the high seas than is indicated by the detection and apprehension rate of the enforcement agencies.

In addition to enforcement measures at sea, the 1992 Treaty provides for enforcement on land. Article II (3) prohibits trafficking in illegally caught salmon. Article IX (7) obligates the North Pacific Anadromous Fish Commission to "consider and make proposals to the Parties for the enactment of a program for certificates of origin attesting that products of anadromous fish are from fish which were lawfully harvested." Theoretically, an official certificate from a salmon-origination state would verify that the fish was caught legally, within the 200-mile zones. Fish without such certificates would be assumed to be illegally caught and their entry into domestic markets barred. The Treaty is silent as to how such a program would be structured and enforced. The website of the North Pacific Anadromous Fish Commission is also silent as to the existence of any certification program. A law review article written in 1994 indicates that initial efforts by the U.S. Congress and the U.S. Departments of State and Commerce to begin the process of negotiating certificate-of-origin programs with Japan, Russia and Canada have not been successful. The difficulty of negotiating certificate-of-origin programs between the signatories has slowed the implementation of this aspect of enforcement under the Treaty.

Science

Articles VII, VIII and IX of the 1992 Treaty deal in large part with establishing cooperative scientific programs. Article VII states,

> The Parties shall cooperate in the conduct of scientific research in the North Pacific Ocean and its adjacent seas beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, for the purpose of the conservation of anadromous stocks including, as appropriate, scientific research on other ecologically related species. . . . With respect to fisheries and scientific research in the Convention Area the Parties shall cooperate, as appropriate, in collecting, reporting and exchanging biostatistical information, fisheries data, including catch and fishing effort statistics, biological samples and other relevant data....

Articles VIII establishes the North Pacific Anadromous Fish Commission to "promote the conservation of anadromous stocks in the Convention Area." In addition to reviewing and evaluating enforcement actions and strategies, the Commission is to promote the exchange of catch and effort information in respect of activities of Parties and, as appropriate, any State or *entity not party to this Convention* for conducting scientific research and for coordinating the collection, exchange and analysis of scientific data regarding anadromous stocks and ecologically related species, including data to identify the location of origin of anadromous stocks, and provide a forum for cooperation among the Parties with respect to such anadromous stocks and ecologically related species.

In fulfillment of its scientific mandate the Commission has established a Committee on Scientific Research and Statistics. This Committee is divided into the Working Group on Stock Assessment, the Working Group on Salmon Marking, the Working Group on Stock Identification and the BASIS Working Group. These working groups undertake a variety of research tasks, including:

- a Bering Sea salmon research program
- a juvenile salmon research program
- a winter salmon research program

These programs focus on many common objectives, including a better understanding of migration patterns and climatic and oceanographic factors affecting salmon growth rates and mortality. There is also a fish tagging program conducted by the University of Washington in Seattle. Salmon are tagged and later caught in their migration route by research and fishing vessels. The tags contain data regarding migration routes, the depth and temperature of the water where salmon spend most of their time, predation, and other information.

Opportunities for Watershed Protection

The emphasis of the 1992 Treaty on scientific research to promote the conservation of salmon as they migrate through the high seas is of great potential importance to the Tribes and First Nations of the Yukon River watershed. There has been a significant amount of theorizing as to the reasons for the collapse of the salmon runs in the Yukon

in 1998. Ocean conditions have become a primary target of suspicion. Changes in the temperature of the Bering Sea due to global warming and massive algae blooms have been discussed as probable causes for the salmon collapse.

Article VIII of the 1992 Treaty has two specific provisions that may be useful to the YRITWC. Under Article VIII, the North Pacific Anadromous Fish Commission is to

- cooperate, as appropriate, with relevant international organizations, inter alia, to obtain the best available information, including scientific advice, to further the attainment of the objectives of this Convention;
- where appropriate, invite any State or entity not party to this Convention to consult with the Commission with respect to matters relating to the conservation of anadromous stocks and ecologically related species.

Article VIII directs the North Pacific Anadromous Fish Commission, and the various committees and working groups underneath it, to consult with international organizations and with non-State entities for the purpose of improving the conservation of salmon. The YRITWC is an international organization with direct and increasing knowledge about the health of the Yukon River, and about the health of the salmon runs in the Yukon. This information is vital to the research programs being conducted under the 1992 Treaty, and in particular to the Working Group on Stock Assessment and the Bering-Aleutian Salmon International Survey. Only with a complete picture of salmon habitat, both in the ocean and in spawning rivers, will the Committee on Scientific Research and Statistics be able to understand the enormous fluctuations in salmon stocks that have occurred in recent years. It may be, for example, that these fluctuations can be explained only by illegal salmon fishing on the high seas. If it became apparent that low salmon runs were attributable to illegal salmon fishing taking place in the Bering Sea, then the YRITWC could have a role in advocating for much more stringent enforcement at sea, and for the implementation of an effective certificate-of-origin program between Japan, Russia, Canada and the U.S. If it became apparent that low salmon runs were attributable to poor inland river habitat, then the YRITWC would have a direct role in improving salmon habitat and water quality, supported by the research and conclusions of the Committee on Salmon Research and Statistics.

The Working Group on Stock Assessment is developing a database on catch and escapement levels, as well as on hatchery production of salmon. Importantly, it is also developing techniques for measuring the abundance of wild salmon. The Tribes and First Nations of the Yukon could contribute valuable information to the Working Group regarding wild salmon in the Yukon, especially escapement levels. Facilitating the flow of timely information regarding the health of the salmon runs in the Yukon will enable the Committee on Scientific Research and Statistics to better understand the effects of ocean conditions on the salmon runs. If unhealthy salmon runs are not explainable by ocean conditions or by poor river habitat, it may be that there is a great deal of undetected illegal salmon harvesting occurring on the high seas. Such information would be of great use to the enforcement agencies of Japan, Russia, Canada and the U.S.

The BASIS Working Group also presents a good opportunity for involvement by the YRITWC. BASIS stands for Bering-Aleutian Salmon International Survey. The BASIS Working Group is essentially a committee to coordinate the research plans of each individual nation and implement joint research projects on Bering Sea salmon. The health of salmon in the Bering Sea will determine, in part, the health of the salmon runs in the Yukon River. The YRITWC could monitor and contribute certain information to this committee.

The Canadian representatives on the North Pacific Anadromous Fish Commission are:

Guy Beaupre
Department of Fisheries and Oceans, Ottawa

Russ Jones
Consultant

Gerry Kristianson
Sport Fishing Institute, Sidney

The U.S. representatives on the North Pacific Anadromous Fish Commission are:

James Balsiger
NOAA/NMFS, Juneau

Guy McMinds
Quinault Indian Nation

Fran Ulmer
State of Alaska

The contact information for the NPAFC is as follows:

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Canada

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Trans-boundary Law

The Boundary Waters Treaty of 1909 and the Jay Treaty of 1794

The *Boundary Waters Treaty of 1909* and the *Jay Treaty of 1794* present limited opportunities to the YRITWC for protection of the Yukon River watershed. The Boundary Waters Treaty, signed between Canada and the United States, is for the purpose of resolving inter-state disputes regarding waters bisected by the U.S.-Canadian border. The treaty sets up an "International Joint Commission" for the review and resolution of certain transboundary water disputes. However, as explained below, the IJC's usefulness is severely constrained by the unwillingness of the governments of Canada and the U.S. to rely on it as a real forum for dispute resolution. The Jay Treaty of 1794 covers a multitude of subjects. Article III of the Jay Treaty protects the right of members of Indian nations to move freely across the U.S.-Canadian boundary. Although Article III of the Jay Treaty is not directly related to the protection of water resources, it is included in this section because many tribal and First Nation members have expressed an interest in knowing more about the treaty and its modern implications.

The Boundary Waters Treaty of 1909

Background

The Boundary Waters Treaty of 1909 is one of the first international treaties of its kind—a transboundary environmental agreement. Article IV of the Treaty states, "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." This sentence of the treaty, although perhaps an afterthought in 1909, has become a central aspect of the continuing vitality of the Boundary Waters Treaty and the International Joint Commission (IJC).

The Treaty was drafted largely for the purpose of assisting the governments of Canada and the U.S. to manage transboundary watercourses for: (1) domestic and sanitary purposes; (2) for navigation, including the service of canals for the purpose of navigation; and (3) for power and irrigation purposes. The Treaty and the IJC have evolved over the decades to devote serious attention to transboundary pollution problems, especially in the Great Lakes region.

The International Joint Commission has a fairly successful history of contributing to the resolution of difficult transboundary water conflicts between Canada and the United States. For example:

1931—The IJC made recommendations to Canada and the U.S. for the reduction of emissions from a smelter in British Columbia that was polluting communities in the U.S. Aspects of these recommendations were incorporated into the agreement for resolution of the problem.

1944–1959—The IJC studied power generation, flood control and water apportionment issues along the Columbia River. The information and recommendations developed by the IJC were used in the development of the *Columbia River Development Treaty* of 1961.

1972—Since 1972 the IJC has had a significant role in assisting Canada and the U.S. in cleaning up the Great Lakes. The IJC has continuing responsibility for monitoring "lakewide management plans that propose actions to improve the quality of the water in Lakes Superior, Huron, Michigan, Erie and Ontario."

Some commentators have argued that these successes are due to the independence and neutrality of the IJC. The IJC does not operate as a governmental agency. Rather, it is an independent body of experts sworn to impartiality. The IJC is made up of an equal number of Canadians and Americans that make decisions through a process of consensus. The IJC is therefore insulated to a great degree from outside political pressures and can look at facts and disputes in a neutral manner.

Other commentators argue that the IJC has a far more successful history studying issues and making recommendations than as a forum for dispute resolution. The controversy surrounding the Tulsequah Chief mine in British Columbia provides an instructive example regarding the limits of the IJC as a dispute resolution body. The Taku River is a renowned salmon river with its headwaters in British Columbia and its mouth in Alaska, just south of Juneau. The proposal to reopen an abandoned mine next to the river in B.C., and to build a road through the territory of the Taku River Tlingit First Nation, has generated an enormous controversy. Both environmentalists and First Nations oppose the project as a grave threat to the environmental integrity of the region and as a threat to the cultures of First Nations peoples.

The State of Alaska, in the person of Governor Tony Knowles, also opposed the project. If the mine contaminated the Taku with heavy metals and other contaminants, the health of the salmon runs would be in serious question. A collapse of the Taku salmon stocks would severely harm the commercial fishery of Southeast Alaska. Governor Knowles strongly advocated that the U.S. State Department refer the matter to the IJC for investigation, but the government of British Columbia refused to agree to a referral. Although there is a procedure under the Treaty for one country to unilaterally refer a matter to the IJC for consideration, unilateral referral is impractical. The IJC requires information from both sides of a dispute in order to review a situation impartially. Without full access to data from both sides, making useful recommendations becomes virtually impossible. The State Department did not therefore pursue a unilateral referral. Because of the lack of cooperation from B.C., the federal government of Canada has refused to pursue a bilateral referral of the matter to the IJC. The procedural limitations of the IJC therefore undermine its usefulness in highly contentious situations like

the Tulsequah Chief mine dispute. Never in the history of the IJC has there been either a unilateral or bilateral referral of a dispute to the IJC for investigation or resolution. These procedural limitations are discussed more fully in the next section.

How the Boundary Waters Treaty of 1909 Works

The central mechanism for implementing the Boundary Waters Treaty is the International Joint Commission. The IJC consists of six individuals, three appointed from the U.S. and three from Canada, who are charged with several duties. As described by the Commission in its strategic plan,

> [T]he Commission rules upon applications for approval of projects affecting boundary or transboundary waters and may regulate the operation of these projects; it assists the two countries in the protection of the transboundary environment, including implementation of the Great Lakes Water Quality Agreement and the improvement of transboundary air quality; and it alerts the governments to emerging issues along the boundary that may give rise to bilateral disputes.

Articles III and IV—These articles of the Treaty outline the function of the IJC in approving or denying proposed projects on transboundary waters that will alter the flow of water in either country. Under these articles the IJC is empowered to stop proposed projects, such as the construction of a dam or other major diversion, which will change the flow of a transboundary river or lake. The decisions of the IJC with regard to these kinds of projects are binding and not subject to appeal in the judicial systems of Canada or the U.S. The commissioners also enjoy immunity from the judiciary of both countries with regard to their position on the IJC.

Article IX—Article IX of the Treaty outlines what has become the most important function of the IJC—to study specific concerns referred to it by Canada or the U.S., issue reports and make recommendations. The major successes of the IJC have come under its Article IX function. For example, the expertise of the IJC with regard to environmental issues affecting the Great Lakes region is well known and respected. The reports and recommendations of the IJC are not decisions and are not binding on the governments of Canada or the U.S. Further, the IJC is not empowered to issue reports except at the request of Canada or the U.S.—the commission cannot study issues of its own choosing or at the request of non-governmental entities.

Articles X and XII—These articles outline the dispute resolution function of the IJC. Under Article X, the governments of Canada and the U.S. may jointly refer disputes to the IJC for binding resolution. Before such a referral is made, "on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor General in Council." Under Article X, a dispute is settled upon a majority vote of the Commissioners. If the Commissioners split evenly on a dispute jointly referred to the IJC, then the matter goes to an international umpire empowered to render a final decision under the Hague Convention of 1907. In the entire history of the Treaty, no dispute has been jointly referred to the IJC for binding resolution under Article X.

Article XII empowers the IJC to hold hearings on matters referred to it, with the power to administer oaths to witnesses, take evidence under oath, afford all interested parties the right to be heard including non-governmental parties, issue subpoenas and compel the attendance of witnesses. The ability to hold hearing is not limited to Article X disputes. Hearings can be held "in any proceeding, or inquiry, or matter within its jurisdiction under this treaty, and all parties interested therein shall be given convenient opportunity to be heard." This provision of Article XII presents an excellent opportunity for organizations like the YRITWC to present information in matters that are before the IJC. Unfortunately, a matter must first be referred to the IJC by either the government of Canada or the U.S. Absent this initial referral, the IJC cannot investigate or hold hearings with regard to a particular dispute. In the case of the Taku River, a referral was never made due to the reluctance of the U.S. State Department to proceed without the cooperation of the governments of British Columbia and Canada.

Opportunities for Watershed Protection under the Boundary Waters Treaty of 1909

The Boundary Waters Treaty of 1909 offers only limited opportunity for organizations like the YRITWC to independently influence state action. If, for example, the YRITWC desired the IJC to review and make recommendations regarding the City of Dawson's dumping of raw sewage into the Yukon river, it would first have to convince either the government of Canada or the government of the U.S. to refer the matter to the IJC for study and recommendations. Achieving a referral would require intensive lobbying in Washington, D.C., and Ottawa. Once the matter is referred to the IJC, the YRITWC would be able to make submissions and be heard during any hearing held by the IJC with regard to the dispute. However, as is illustrated by the Taku River controversy, convincing a government to make a unilateral referral to the IJC is exceedingly difficult. The Taku River dispute was never referred to the IJC by the U.S. State Department, even though a referral had the strong support of the Alaska Governor Tony Knowles and former Secretary of State Madeline Albright. Convincing both governments to make a *joint* referral to the IJC for *binding* resolution—something which has not yet occurred under the Treaty—would be far more difficult than pushing for a unilateral referral merely to study the matter.

Given the procedural hurdles for gaining access to the IJC, a more useful and direct path for achieving the same results is through the Citizen Submission Process under the North American Agreement on Environmental Cooperation, described in the international trade law section of this Handbook.

International Joint Commission Commissioners

United States

Dennis L. Schornack
Irene B. Brooks
Allen I. Olson

Canada

The Rt. Hon. Herb Gray
Robert Gourd
Jack P. Blaney

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The Jay Treaty of 1794

Background

The Jay Treaty of 1794 is not directly related to watershed protection. The Treaty may, however, be of some use to Tribal and First Nation communities split by the U.S.-Canadian border in facilitating travel for elders and others who may not have a passport or other identification issued by non-Indian governments.

The Jay Treaty, or as it is technically know, the "treaty of amity, commerce and navigation between His Britannic Majesty and the United States of America," followed the Treaty of Paris which ended the Revolutionary War between England and the United States. The Jay Treaty of 1794 addressed many of the details of U.S.-British relations left unresolved by the Treaty of Paris.

Article III of the Jay Treaty states that,

> It is agreed that it shall at all times be free . . . to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries or the two parties, on the continent of America, and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with each other . . . . [N]or shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.

England and the U.S. went to war again in 1812. The Treaty of Ghent ending the War of 1812 preserved the right of free passage for the Indian nations. As stated by that Treaty,

> The United States of America engage . . . to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in 1811, previous to such hostilities . . . . And His Britannic majesty engages . . . to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled, to in 1811, previous to such hostilities.

The U.S. and Canada have approached the right of free passage first referred to in the Jay Treaty and retroactively maintained by the Treaty of Ghent, in fundamentally different ways. The U.S. made the right of free passage a part of its immigration laws and regulations. Section 289 of the Immigration and Naturalization Act states that, "Nothing is this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race." 8 U.S.C. Sec. 1359 (Westlaw 2003). Canada never codified the right of free passage, but has developed a body of law in its federal courts regarding the right.

Generally, the United States has given the right of free passage a fairly literal meaning. Indians from Canada are able to pass into the United States upon presentation of evidence that they have 50 per centum or more of Indian blood. Theoretically, upon presentation of such evidence, an Indian person from Canada may pass into the United States, without a passport and without having to pay any duties on their personal possessions. Once in the United States, Canadian Indians cannot be deported in the same way that other immigrants can be deported and are eligible for permanent residency status based solely on their blood quantum. Furthermore, the classification is based on race, not on politics. Generally, Indians who do not possess tribal status or who have lost tribal status under the laws of Canada, but who are nonetheless 50 per cent or more Indian and can present evidence attesting to their blood quantum, continue to have a right of free passage into the United States. Non-Indian persons adopted into tribes do not possess the right of free passage.

Canadian courts have developed a much more restrictive interpretation of the right of free passage. According to the Canadian courts, in order for an Indian person born in the United States to pass freely into Canada, evidence must be presented that the person is from a Tribe with an historical connection to land in Canada. The Canadian courts have thus put a fairly strict geographic restriction on the right of free passage into Canada. Essentially, in order for U.S. Indians to take advantage of the right, they must prove they are from a tribe that was bisected by the border. Canadian courts have also severely restricted what U.S. Indians can bring into Canada, thereby undermining the Jay Treaty's protection of inter-tribal trade. For U.S.-born Indians, therefore, it is easier to present a U.S. passport than to attempt entry into Canada on the basis of the Jay Treaty right of free passage.

How the Right of Free Passage Works

Exercising the right of free passage is simple for Indian people born in Canada wishing to enter the United States. The rules for Indian people born in the United States and wishing to enter Canada are substantially less clear, mainly because they arise from cases that have been decided in Canadian courts that are confusing and sometimes contradictory.

Canadian-born Indians wishing to enter the United States—According to the Canadian Department of Indian Affairs and Northern Development, "Registered Indians must present an identification card (Indian status card) at the border crossing. If they do not have a card, a written statement from the band council is required along with other documentation which proves possession of lineage derived from at least 50 per cent North American Indian people."

U.S.-born Indians wishing to enter Canada—There is no single set of Canadian regulations that govern entry into Canada of U.S.-born Indians. Apparently, documentation proving that an Indian individual is from a tribe that has an historical nexus to certain lands in Canada is necessary. It is

unclear, however, what such documentation would consist of, or how a Canadian border agent would react to the presentation of such evidence. For example, some sort of hearing may be necessary in order to confirm the legitimacy of the evidence. The process may prove to be more trouble than it is worth. However, many tribal members possess no non-Indian identification and refuse to obtain a passport. For such people, reliance on the Jay Treaty right of free passage will be necessary, no matter how inconvenient.

Opportunities for Watershed Protection under the Jay Treaty of 1794

The Jay Treaty presents no direct opportunities for watershed protection. It may prove useful, however, in facilitating large meetings of the YRITWC, like the biennial summit. There may be First Nations elders, for example, that desire to attend a meeting in the United States but have no passport or identification. In such a case, reliance on the Jay Treaty (technically, 8 U.S.C. Sec. 1349) would enable elders and others without identification to attend meetings in the United States. Further, the Jay Treaty right of free passage could facilitate greater cross-border contact and cooperation amongst environmental personal from tribes and First Nations split by the U.S.-Canada border.

Trade Law

The North American Free Trade Agreement, The North American Agreement on Environmental Cooperation, and the World Trade Organization

International trade law offers several procedures that can be used in innovative ways to bring world attention to regional or local environmental issues. Although NAFTA, the WTO and other international trade agreements have been the focus of intense criticism from environmental and other organizations, these treaties do offer forums to organizations like the YRITWC for the consideration of controversial environmental issues. Like the human rights treaties and mechanisms discussed in the next section, these forums are able to make transparent the wrongful actions of nations largely through information gathering and dissemination procedures. The ability of these forums and procedures to shape the decisions of nations comes not from any legal power to compel state action. Rather, the influence of these forums stems from the unwillingness of most nations to suffer embarrassment on the world stage over actions they have taken that are clearly illegal or exploitative.

NAFTA

Background

The North American Free Trade Agreement (NAFTA) is a comprehensive treaty regulating trade between Canada, the U.S. and Mexico. Theoretically, free trade agreements are designed to decrease barriers to trade—like tariffs or unfair governmental subsidies—thereby increasing the flow of goods and services between countries. Proponents of free trade argue that increasing the flow of goods and services across international boundaries increases the mutual wealth of the countries engaged in free trade. The general purpose of NAFTA is to build upon previous trade agreements, like the General Agreement on Tariffs and Trade (GATT) and the Canada-U.S. Free Trade Agreement (CFTA), in a region-specific context—North America. The impetus for creating a North American free trade zone came from a perceived need to compete with other regional free trade zones in Asia (ASEAN) and in Europe (the European Union).

NAFTA incorporates many of the specific agreements on trade as well as many of the procedures that were established under the GATT and the CFTA. The dispute resolution mechanisms under the old GATT agreements were considered by most countries to be slow and ineffectual. These ineffectual dispute resolution processes were a major reason for the development of NAFTA. The drafters of NAFTA relied extensively upon the 1989 Canada-U.S. Free Trade Agreement. The institutions and dispute resolution processes of the CFTA became the model for NAFTA. NAFTA now supercedes the CFTA. Because the WTO and NAFTA were negotiated almost simultaneously, they have similar language with regards to many issues and procedures. In many disputes, the signatory parties can elect to resolve their differences through either the WTO process or through the NAFTA dispute resolution process.

The website of the WTO proclaims that removing trade barriers results in a "more prosperous, peaceful and accountable economic world. . . . [T]he risk of disputes spilling over into political or military conflict is reduced." Unfortunately, the entry into force of NAFTA seems to have had the opposite effect. On January 1, 1994, the day NAFTA officially took effect, the Zapatista rebellion began in the Chiapas region of Mexico. The Zapatistas deliberately launched their rebellion on the day NAFTA entered into force because of the plan of the Mexican government to undermine indigenous communal title to land as a "barrier to trade." Since that day NAFTA and the WTO have been protested throughout the world as undemocratic shadow governments that undermine workers' rights, destroy the environment and that are totally unconstrained by national law or international human rights standards.

Article 103 of NAFTA would seem to justify the claims of critics worried about the undemocratic supremacy of the treaty. Article 103 states that in the event of a conflict between the application of NAFTA and the application of some other international agreement, NAFTA is to prevail. However, Article 104 and its annex list several treaties which will prevail over NAFTA in the event of a conflict:

- the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended June 22, 1979;
- the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as amended June 29, 1990;
- the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States;
- the Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste, signed at Ottawa, October 28, 1986; and
- the Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, signed at La Paz, Baja California Sur, August 14, 1983.

The NAFTA therefore exempts from its supremacy several treaties having to do with environmental issues of international scope. There are no other treaties exempted from NAFTA in this way. Further, Article 915 of NAFTA specifically recognizes protection of the environment and sustainable development as "legitimate objectives" in the regulation of trade goods and services. Finally, Article 1114 of NAFTA states,

> The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

Article 1114, however, is a general principle rather than a rule that is enforceable under Chapter 20 dispute resolution procedures (discussed below)

How NAFTA Works

Chapters 19 and 20 of NAFTA deal exclusively with dispute resolution. Chapter 19 covers disputes over Antidumping (AD) measures and Countervailing Duties (CVD). "Dumping" is international trade lingo for the practice of flooding another country's markets with goods or services that are so inexpensive by comparison to the same goods and services in the importing country, that the importing country's domestic industry in that area is substantially harmed. Antidumping measures are actions that a country takes in order to slow the mass importation of cheap products into the country. Countervailing Duties are duties that an importing country imposes upon an exporting country's goods because the exporting country has unfairly subsidized that industry, enabling the exporting country to out-compete the importing country with regard to a particular industry or good. Most trade disputes arise over the application of AD and CVD measures. For example, the Canadian-U.S. trade dispute over softwood lumber involves U.S. countervailing duties on Canadian lumber, which the U.S. believes is unfairly subsidized by the Canadian government. Antidumping measures are aimed at private industry, whereas countervailing duties are aimed at governments. NAFTA allows Mexico, Canada and the U.S. to continue with their existing AD and CVD laws and policies, subject to previous GATT regulation of these measures (incorporated by NAFTA).

Chapter 19—Most NAFTA disputes arise under Chapter 19. Although countries may impose AD and CVD measures against one another pursuant to their own laws and policies, conflicts which arise regarding the application of these measures must be settled through the NAFTA Chapter 19 process rather than through domestic judicial or administrative avenues. When an AD or CVD disput arises between two countries, these countries are first expected to resolve the dispute through consultations. If the dispute is unresolved after an initial consultation period, the dispute is reviewed by a "panel" of experts from the two countries chosen by these countries according to special procedures. The decision of the panel is final except in certain rare circumstances where it is alleged that members of the panel have acted unethically or inappropriately. When such an allegation is made, the decision of the panel may be appealed to an "Extraordinary Challenge Committee." The Extraordinary Challenge Committee reviews allegations of gross panel misconduct, conflicts of interest, derogations from the rules of procedures, and allegations that the panel has exceeded its powers. Each panel establishes its own rules of procedure and applies the laws and standards of review of the importing country in the dispute.

Chapter 20—Chapter 20 covers all other disputes arising under NAFTA. NAFTA mandates that trade conflicts involving domestic standards related to the environment, health, safety, conservation measures or environmental treaties be resolved only through the Chapter 20 process, rather than through the WTO dispute resolution procedures. Only the governments of Canada, Mexico or the U.S. may appear in Chapter 20 dispute resolution procedures. These procedures do not result in decisions that are considered "binding," but if a Party refuses to implement the recommendations of the Panel, the complaining Party may implement retaliatory trade measures without infringing the NAFTA.

Chapter 20 takes effect when a state party alleges that there has been either a "nullification" or an "impairment" of benefits that it could reasonably expect under NAFTA. As with Chapter 19, the process begins with consultations. If consultations fail, then the NAFTA "Free Trade Commission" mediates the dispute. The Free Trade Commission (FTC) is made up the cabinet-level environmental ministers of Canada, the U.S. and Mexico. In mediating the dispute, the FTC may be assisted by experts from the NAAEC staff. If a dispute involves issues that are particularly technical it may be referred to a scientific review board to sort through factual issues.

If the FTC fails in mediating the dispute, a special arbitration panel begins its review of the conflict. The panel must issue a final report on the matter within 120 days of initiating its review. The panel may recommend elimination of the measure in dispute or compensatory measures. If the country that is the focus of the disputed action does not implement the panel's recommendations, the complaining party may implement retaliatory trade measures so long as such measures are not "manifestly excessive."

Procedures for Non-Governmental Action—There are three avenues that non-governmental organizations or individuals can take to challenge state action under the NAFTA. The first avenue is provided for under Article 1116 of the NAFTA. Article 1116 allows citizens of one NAFTA country who are invested in a company incorporated in another NAFTA country to bring the country in whose jurisdiction the company is incorporated (an enterprise that is a "juridical person" under the domestic corporate laws of the country) to arbitration when that country is in violation of the investment chapter of NAFTA. Under this provision, an individual investor can force a nation into binding arbitration.

Less formal procedures exist for non-governmental organizations or individuals to challenge state action under Chapters 19 and 20. Chapter 19 procedures for resolving AD or

CVD disputes empower review panels to establish their own rules of procedure. Although there is no specific language in NAFTA regarding the submission of *amicus curia*e briefs, the open procedural requirements of dispute resolution panels leaves room for non-governmental organizations to submit *amicus* briefs regarding specific inter-state trade disputes. There is no guarantee, however, that a panel will accept *amicus* briefs from non-state parties.

In a groundbreaking decision, the NAFTA panel established to review the softwood lumber dispute between Canada and the U.S. recently granted permission to the *Indigenous Network on Economics and Trade* to file an *amicus* brief in that dispute. The submission of the *INE*T *amicu*s was strongly opposed by the governments of Canada, British Columbia, Manitoba, Ontario, Saskatchewan, Quebec, the Northwest Territories, and the Yukon Territory, as well as the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association and the Quebec Lumber Manufacturers Association. Despite this opposition, the NAFTA review panel, in an order dated March 5, 2003, allowed the submission of the *amicu*s. The brief argues that the government of Canada, in ignoring the aboriginal title of First Nations to vast tracks of land and allowing indigenous lands to be claimed and exploited by lumber corporations without first compensating the indigenous owners, is subsidizing the timber industry in violation of the NAFTA. Press reports have just began appearing which state that Canada and the U.S. may have reached a settlement of the dispute, although no details are yet available.

Finally, non-state entities may have some indirect influence over potential Chapter 20 disputes. Although Chapter 20 disallows direct participation by non-state actors, the office of the U.S. Trade Representative accepts comments from interested persons and organizations on existing or potential trade disputes. Whether or not the Trade Representative chooses to pursue suggested challenges under NAFTA is entirely discretionary.

Opportunities under NAFTA for Watershed Protection

NAFTA offers two avenues that could be used by the YRITWC in protecting the watershed. Under Chapter 19, NGO's like the YRITWC may submit *amicu*s briefs concerning anti-dumping and countervailing duty disputes, similar to the brief submitted by *INE*T in the softwood lumber dispute. A less direct avenue of participation is in submitting information to the office of the U.S. Trade Representative and to the appropriate Canadian trade office for inclusion in their briefs to NAFTA dispute resolution panels, under Chapters 19 and 20. It is unlikely that the Article 1116 process set up for individual investors could be used by the YRITWC.

Although these avenues for advocacy under NAFTA are of uncertain value, the *INET amicu*s demonstrates that NAFTA procedures can be used to successfully make transparent the illegal actions of a nation. Canada argued in its NAFTA softwood lumber submissions that it did not own the trees at issue and that the stumpage fees paid to the government of Canada by lumber companies were not payments for the trees. Rather, Canada argued, its low stumpage fees were more akin to a governmental tax on the activities of the timber corporations. The *INET amicu*s highlighted Canada's hypocrisy in asserting in international trade forums that it did not own the trees on Crown lands, while at the same time asserting in domestic legal forums that it owned the underlying title to the lands and resources of indigenous peoples, which are also considered by Canada to be "Crown lands."

NAAEC

Background

The intense scrutiny and criticism of the negotiations leading up to the creation of NAFTA led directly to the creation of NAAEC. NAAEC is a separate treaty between Canada, the U.S. and Mexico, essentially committing the three nations to enforce their own environmental laws. The NAAEC was created in order to calm the fears of the environmental lobby in Canada, the U.S. and Mexico, over the lack of serious environmental protection provisions in NAFTA. NAFTA and NAAEC are separate treaties, but they are made up of very similar procedural mechanisms and institutions. Indeed, in disputes involving highly technical environmental issues, NAFTA trade experts may consult with NAAEC environmental experts.

Although NAAEC calmed the fears of environmentalists and allowed the NAFTA process to move forward, it remains unclear whether it is a treaty taken seriously by Canada, the U.S. and Mexico. First, the NAAEC only commits the signatory nations to enforcing their own existing environmental laws. If, for example, a country passes a law significantly reducing protections for salmon or brown bears, its actions are not challengeable under the NAAEC as long as it enforces the law, no matter how weak or ineffective. Second, the treaty provides enforceable dispute resolution procedures for conflicts between nations, but no enforceable mechanism for private parties alleging violations of environmental law. Thus far, no environmental dispute between Canada, the U.S. or Mexico has arisen for which a country has initiated use of the enforceable dispute resolution procedures. The mechanisms that are in place for *private* organizations to bring claims under NAAEC consist of information gathering procedures which may or may not result in the eventual publication of a "factual record" by the NAAEC Secretariat (discussed below). These factual records have a mixed history in terms of the extent to which they influence state action. Third, the process for private organizations to allege violations of environmental law under the NAAEC is severely restricted in terms of the kinds of disputes that can be reviewed. Challenges involving laws whose primary purpose is to manage the *commercial* or *aboriginal* harvest of natural resources are specifically excluded from the kinds of complaints that can be reviewed under the NAAEC procedures.

The NAAEC, however, is a new treaty that will inevitably undergo evolutionary changes. The procedures in place for private organizations and individuals to bring claims challenging a country's infringements of its own environmental laws may become a critical forum through which to change and improve state action. There are several claims now before the NAAEC regarding Canada's inaction in enforcing its environmental laws. One of the first claims filed under the NAAEC was a submission by the *British Columbia Aboriginal Fisheries Commission* alleging damage to salmon due to Canadian non-enforcement of the *Fisheries Act*. The NAAEC published an extensive factual record in that case (discussed below).

How the NAAEC Works

The NAAEC establishes as its central institution a "Commission for Environmental Cooperation." The Commission consists of a "Council of Ministers" made up of the cabinet-level environmental ministers of Canada, the U.S. and Mexico; a Secretariat located in Montreal, Quebec; and a Joint Public Advisory Committee of experts that advises the Council of Ministers.

Inter-State Dispute Resolution—Article 24 of the NAAEC provides dispute resolution procedures for trade-related environmental conflicts that arise between the governments of Canada, the U.S. and Mexico. To initiate the NAAEC's dispute resolution process, the complaining country must allege that another NAAEC country is guilty of a persistent pattern of failure to effectively enforce environmental laws related to situations involving work places, firms, companies or sectors that produce goods or provide services:

a) traded between the territories of the Parties; or

b) that compete in the territory of the Party com plained against, with goods or services produced or provided by persons of another Party.

As with NAFTA, the countries are expected to first engage in consultations. If consultations fail, the Council of Ministers (parallel to NAFTA's Free Trade Commission) may convene a special session to consider the matter and make recommendations, which may be made public. If the Council of Ministers fails to resolve the dispute then, upon a 2/3 vote, the Council may forward the dispute to an arbitration panel of 5 members, selected according to special procedures. If the panel finds a persistent pattern of non-enforcement, then it may develop an "action plan" for resolution of the conflict. If the disputing countries do not implement the action plan, then the panel may impose monetary penalties on the country refusing to implement the plan. These penalties may be up to .007% of the total worth of the trade in goods between the two disputing countries —a potentially vast amount of money. It the penalty is not paid, then the complaining Party may raise its tariffs to collect the equivalent amount of the penalty. In Canada, the monetary penalty issued by the panel is enforceable in Canadian domestic courts, thus negating the need for retaliatory trade action in the event Canada refuses to pay a panel fine.

Citizen Submissions—The process for non-governmental organizations and citizens to make submissions under the NAAEC is governed by Articles 14 and 15. Under Article 14, a private person or organization may send to the Secretariat of the Commission for Environmental Cooperation (CEC) a written submission alleging that a NAAEC country is in violation of its own environmental laws. For the submission to be acceptable to the CEC, it must fulfill the following requirements:

- the submission must not be a challenge to legislation which amends or suspends environmental laws;
- the submission must not concern matters which are currently before domestic judicial or administrative bodies;
- the submission must allege an on-going, current vioation of environmental laws;
- the submission must be filed in a timely manner;
- the submission must not allege violations of international environmental treaties, unless the alleged vioations are of the domestic legislation implementing such treaties;
- the submission must not involve laws and regulations that exist to regulate the commercial development of natural resources; and
- the submission must not involve laws and regulations that exist to regulate the aboriginal harvest of natural resources.

The term "environmental law" is narrowly defined by the treaty to mean any statute or regulation the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health. Article 45 (2)(b) states,

> For greater certainty, the term "environmental law" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest of exploitation, or subsistence or aboriginal harvesting of natural resources.

Thus, the CEC will review citizen submissions that meet fairly strict requirements. The violation of laws and regulations that are for the protection of plants and animals—for example the *Fisheries Act* or the *Endangered Species Act* —is a proper subject for a citizen submission. Submissions regarding the violation of laws for the management of natural resources—for example the *Federal Land Policy and Management Act* (FLPMA)—will not be accepted for review. Further, submissions regarding violations of laws which purport to manage *aboriginal harvesting or subsistence activities* will not be accepted for review.

The process once a citizen submission is accepted for review is as follows. First, the Secretariat requests a response from the government being accused of violating its own environmental laws. After the government responds, the Secretariat decides whether the development of a "factual record" is warranted. If the Secretariat believes a factual record should be developed, then it submits a draft factual record to the Council of Ministers. The governments of

Canada, the U.S. and Mexico then have an opportunity to comment on the draft factual record. A final factual record is then prepared by the Secretariat and again submitted to the Council of Ministers. Upon a two-thirds vote of the Council, the factual record is made public and the process is over. At anytime the Secretariat may terminate the review process.

If a factual record finds that a government is indeed violating its own laws there is no punishment or consequence provided for under the citizen submission process. The value of the process is to make transparent on an international level the wrong-doing of a nation with regard to specific environmental issues or conflicts. Since 1996, the CEC has published 5 factual records. There are currently 13 active submissions. Twenty-two submissions have been terminated at some point during the review process.

One of the five published factual records is a submission by the *British Columbia Aboriginal Fisheries Commission* (SEM-97-001). The *BCAFC* alleged that the government of Canada was failing to enforce the *Fisheries Act* against the B.C. Hydro and Power Authority. The submission details how B.C. Hydro, a corporation owned by the Province of British Columbia, has destroyed and continues to destroy fish habitat in violation of the *Fisheries Act*. In response, Canada argued that the NAAEC treaty contemplates a very broad definition of "environmental enforcement," and that the activities they had undertaken to ensure B.C. Hydro's compliance with the *Fisheries Act* were sufficient to fulfill the language of the treaty. The factual record is a detailed recitation of the *BCAFC's* allegations and the responses of the government of Canada.

Opportunities for Watershed Protection under the NAAEC

NAAEC offers two primary means for the YRITWC to engage in advocacy related to the protection of the watershed. The firsts method—the citizen submission process—may prove to be very useful to the YRITWC. If, for example, the U.S. or Canadian federal governments fail to effectively enforce environmental laws and these failures contribute to the degradation of the Yukon River, the YRITWC could bring the case to the Secretariat of the NAAEC for review. This review could eventually result in the publication of an extensive and highly accurate factual record supporting the arguments of the YRITWC and embarrassing the governments of Canada and the U.S. In addition to making transparent the lack of enforcement on the Yukon, such a factual record could become powerful evidence in domestic law suits, in media campaigns and in other advocacy strategies.

In addition to the citizen submission process, there exists under NAAEC a "North American Fund for Environmental Cooperation (NAFEC)." The NAFEC supports community-based environmental projects in Canada, the U.S. and Mexico. The website of the NAFEC states that the NAFEC supports projects that:

- are community based;
- lead to a concrete result;
- reflect cooperative partnerships between organizations from different countries;
- meet the objectives of the NAAEC;
- build capacity of local people and organizations; and
- emphasize sustainability and link environmental, social and economic issues.

These guidelines are a close match for the YRITWC and the watershed council has in fact already received a grant from the NAFEC. The North American fund could be used in the future for a variety of different YRITWC projects, although it should be noted that the NAFEC funds cannot be used for the biennial summit meetings of the YRITWC due to certain restrictions in the NAFEC guidelines.

WTO

Background

The World Trade Organization (WTO), which recently began functioning in 1995, is an international institution which exists to implement trade agreements negotiated under the General Agreement on Tariffs and Trade (GATT), to assist in the negotiation of new trade agreements, and to provide a forum for the resolution of trade disputes between nations engaged in the GATT. The GATT is simply many agreements between countries developed since 1947 in discussions called "rounds," regarding specific trade barriers like tariffs and unfair governmental subsidies. The most recent round of GATT discussions—the Uruguay Round—took place from 1986 to 1994 and resulted in the creation of the World Trade Organization. Because the WTO and the NAFTA were negotiated and took effect simultaneously, the share many similar agreements on trade issues and are made up of similar institutions for implementing these agreements. The main difference between the WTO and NAFTA is that the WTO applies to countries throughout the world that have participated in the GATT rounds, and the NAFTA applies specifically to Canada, the U.S. and Mexico.

The WTO supercedes the old GATT system. According to the WTO's website, its main activities include: (1) administering trade agreements (those signed under the old GATT negotiation system); (2) acting as a forum for new trade negotiations; (3) settling trade disputes; (4) reviewing national trade policies; (5) assisting developing countries in trade policy issues through technical assistance and training programs; and (6) cooperating with other international organizations. Decisions on trade are made by member countries through a process of consensus. The WTO provides for stronger and faster dispute resolution than under the old GATT procedures, which were regarded as slow and ineffectual.

Much of the controversy surrounding the GATT and the WTO is rooted in high profile cases pitting environmental interests against trade interests. In 1991, a GATT dispute resolution panel decided that U.S. import bans on Mexican

tuna violated the terms of GATT trade agreements. The U.S. placed an embargo on Mexican tuna because the methods used by commercial Mexican fishing boats were killing dolphins in large numbers. This decision, by an unelected panel of "trade experts," outraged U.S. environmentalist and raised serious concerns about the power of trade agreements like GATT to supercede the sovereign will of national law-making bodies. Similarly, a 1988 GATT panel ruled that Canadian export restrictions on salmon and herring for the purpose of conserving those species violated the GATT. Since it took effect in 1995, the WTO has been closely watched and widely protested due largely to the same concerns that were present in the tuna and salmon disputes. Huge protests greeted the 1999 Ministerial meeting of the WTO in Seattle and at every ministerial meeting since Seattle. The Fifth Ministerial Conference of the WTO will be held in Cancun, Mexico, in September 2003.

How the WTO Works

The World Trade Organization has been severely criticized as being undemocratic and secretive, especially with regard to its procedures for settling trade disputes between nations. The Uruguay Round of trade negotiations set up a dispute settlement process limited to GATT/WTO member-nations only. The panels and appellate bodies established under these procedures held closed hearings and did not release governmental submissions to the public. Only member-nations could participate in the process. The closed and secretive nature of these deliberations outraged environmental and human rights advocates and contributed to the formation of massive protests of the WTO in Seattle and elsewhere. The WTO has since taken limited steps to open their dispute resolution process up to NGO's and other non-state actors, and to make more transparent their decision-making process.

Inter-State Dispute Resolution—The WTO was formed in part to remedy the shortcomings of the previous GATT system, particularly with regard to its dispute settlement procedures. The new dispute settlement procedure (officially called the "Dispute Settlement Understanding (DSU)") requires resolution of conflicts within a set time table. The process begins with a 60-day period of member-to-member consultation. If consultations fail to resolve the conflict, then a 3 to 5 member panel of experts is established to review the issues. This review can last up to 9 months. If the disputing countries do not accept the panel's decision, then they may take the case to the Appellate Body. The Appellate Body reviews the panel's findings and issues a report within 60 to 90 days. The losing country must agree to comply with the Appellate Body's findings within 30 days of the issuance of the report. If the losing country does not want to comply, it may compensate the winning country in some other way. Finally, if the losing country refuses to cooperate in anyway, then the WTO may authorize the winning country to retaliate through restrictive trade practices. The adoption of the panel and Appellate Body reports by WTO-member nations is automatic unless there is a consensus not to adopt (details on these procedures are available at www.genevabriefingbook.com).

***Amicus Curiae* Briefs** — Article 12.1 of the DSU empowers panels to develop their own working procedures in consultation with the parties to the dispute. Under Article 13 of the DSU, panels and Appellate Bodies may seek out and rely on any source of information they see fit to arrive at a decision in their review process. In 1998 the World Wide Fund for Nature and the Center for International Environmental Law took advantage of these open procedures and submitted *amicus* briefs in a trade dispute involving shrimp imports to the U.S. The panel reviewing the dispute rejected the *amicus* briefs, reasoning that it could not accept unsolicited materials. It did, however, allow the U.S. government to incorporate the *amicus* information into its own briefs. The Appellate Body then reviewed the issue of unsolicited *amicus* briefs during its review of the dispute. The Appellate Body decided that WTO panels and appellate bodies could indeed accept unsolicited *amicus* briefs, but that they could also reject such briefs at their own discretion. Thus, NGO's may submit stand-alone *amicus* briefs in WTO proceedings, or they can submit information for incorporation into U.S., Canadian or Mexican submissions to the WTO.

The WTO recently accepted the first ever *amicus* submission on behalf of indigenous peoples, in the U.S.-Canada softwood lumber trade dispute. The *Indigenous Network on Economies and Trade* submitted the brief, which is essentially the same brief as was submitted by *INET* to the NAFTA dispute panel concerning the softwood lumber dispute. Submissions were made at both the panel and Appellate levels. Recently, the U.S. and Canada reached an accommodation concerning the dispute, although the details have not yet been made public.

Opportunities for Watershed Protection under the WTO

The WTO procedures for participation by NGO's in trade disputes are in fact more open than the procedures under NAFTA. Under NAFTA, NGO's may submit *amicus* briefs only in antidumping and countervailing duty disputes. Under the WTO procedures, NGO's may submit *amicus* briefs to any dispute resolution panel regarding any trade dispute. Of course, the dispute resolution panels and appellate bodies under both the NAFTA and the WTO reserve the right to reject *amicus* briefs at their discretion. As is evident from the *INET* submissions to the NAFTA and the WTO, NGO's can submit *amicus* briefs to both trade regimes simultaneously.

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Human Rights Law

International Human Rights Treaties and Procedures: An Overview

The Tribes and First Nations of the Yukon River watershed could effectively use the human rights treaties and procedures that exist in the United Nations and the Organization of American States to bring international attention to issues affecting the watershed. In contrast to a generation ago, there are now dozens of international legal processes and mechanisms that can be used by Indians to protect a broad range of interests, including human rights, self-determination, lands, resources and the environment. The purpose of this section is to provide a summary of the more important of these processes and mechanisms and to comment on how these might be used effectively by the Tribes and First Nations of the Yukon River watershed.

For Indian nations in the United States and Canada there are several international bodies where useful rights protection work can be done:

- The United Nations itself, including the Human Rights Commission, the Sub-Commission, and the Permanent Forum on Indigenous Issues.
- The treaty-created bodies, particularly the Human Rights Committee and the Committee on the Elimination of Racial Discrimination.
- The Organization of American States, particularly the Inter-American Commission on Human Rights and the Working Group on the draft American Declaration on the Rights of Indigenous Peoples.
- The UN Educational, Scientific and Cultural Organization (UNESCO).

Each of these major areas of possible work deserves description, because each body presents unique procedures and opportunities. There are in addition, regular conferences of the parties of the Convention on Biological Diversity (31 I.L.M. 818 (1992)) (http://www.biodiv.org) and the UN Framework Convention on Climate Change (31 I.L.M.849 (1992)) (http://unfccc.int/index.html), at which indigenous peoples' issues are regularly considered. These and many other international activities are available to interested advocates for Indian rights, but they will not be discussed in this section.

The United Nations System

Written and Oral Statements

For many years it has been possible for individuals and organizations to bring issues of human rights to the attention of the United Nations through its Commission on Human Rights and through the Sub-Commission on Promotion and Protection of Human Rights. The Human Rights Commission was created by the United Nations Charter as a subordinate body of the Economic and Social Council. The Sub-Commission is subordinate to the Commission, and it is made up of independent human rights experts elected in their personal capacity. The General Assembly, made up of all UN member states, is the highest body. Human rights issues reach the General Assembly though the Human Rights Commission and the Economic and Social Council.

Non-governmental organizations (NGOs) accredited by the Economic and Social Council, including a number of Indian organizations, are permitted to make both written and oral statements to the Commission and the Sub-Commission at their annual sessions in Geneva, Switzerland. (The participation of NGOs is governed by ECOSOC Resolution 1996/31, E/RES/1996/31.) These brief oral and written statements, called interventions, continue to be one of the most important means for bringing international attention to serious human rights issues of all kinds. Effective advocacy work at the UN always includes the use of such interventions to bring factual information to the attention of the Commission and Sub-Commission and to make recommendations and requests for UN action.

There is a practical problem that only accredited non-governmental organizations can make such written and oral statements. It can take as long as two years to gain accreditation, but no Indian rights advocate should let this be an impediment. There are now more than a dozen Indian organizations with NGO status, including the Indian Law Resource Center. These organizations and many other human rights organizations can be counted on to assist Indian advocates who wish to work in the Commission and Sub-Commission. Serious, professional contact with human rights NGOs will almost always result in gaining NGO credentials to carry on needed work. The Indian Law Resource Center stands ready to assist the Yukon River Inter-Tribal Watershed Council in obtaining ECOSOC accreditation if the Watershed Council desires such assistance.

1. The Sub-Commission Working Group on Indigenous Populations. This body, proposed by the Sub-Commission and authorized by ECOSOC in 1982 (E/RES./1982/34, 7 May 1982), provides a good opportunity for publically raising Indian rights issues and for recommending UN action to address or study these issues. NGO credentials are *not* required to participate. Any Indian or other indigenous person can attend, speak, and submit documents to the Working Group at its week-long (five-day) session at the end of July in Geneva. This body is made up of five members of the Sub-Commission, and it has a mandate to review developments affecting the human rights of indigenous "populations" and to consider possible new legal standards for protecting indigenous rights.

The Working Group, with the participation of hundreds of indigenous representatives, drafted the UN Declaration on the Rights of Indigenous Peoples between 1983 and 1994. Report of the Working Group on Indigenous Populations on its eleventh session, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, E/CN.4/

Sub.2/1993/29 (23 August 1993). The text of the draft Declaration is included in the Appendix to this Handbook. The Working Group has forwarded the text of the draft Declaration to the Commission on Human Rights for further consideration and drafting. The Working Group is now conducting various studies, including one on treaties and one on indigenous sovereignty over natural resources. The Working Group is the most accessible entry point for initiating new UN activity concerning Indian rights.

2. The Commission Working Group on the Draft Declaration. This Working Group of the Commission on Human Rights . devoted entirely to considering and debating the draft Declaration on the Rights of Indigenous Peoples. The work of debating and considering proposals for changing and adding to the Declaration is perhaps the most difficult and most important of all the activities in the UN affecting indigenous peoples. The Declaration, when it is finally approved by the Commission, then the Economic and Social Council, and is ultimately adopted by the General Assembly, will create new international law for the protection of indigenous peoples. Technically, the Declaration will be non-binding, but because it will be adopted by consensus of all the member states of the UN, it will as a practical matter be an authoritative statement of universally accepted legal norms.

Because the Declaration covers practically all aspects of indigenous rights, from self-determination to cultural rights and treaty rights, the Working Group is an opportunity to educate and persuade states about all aspects of the relationships between indigenous peoples and countries. The focus of the meetings is the language of the Declaration, but the debate and discussion include extensive dialogue about practically all issues and many factual situations.

The Working Group on the Draft Declaration meets once each year, usually in the fall, in Geneva. Special rules have been adopted to permit indigenous organizations (and indigenous Nations) to participate without full NGO accreditation. Accreditation for participation in this working group can be obtained with a relatively simple application. See Commission Resolution 1995/32, E/CN.4/RES/1995/32, and ECOSOC Resolution 1995/32, E/RES./1995/32. The Working Group meets for two weeks. Additional information about accreditation and participation can be obtained through the UN website http://www.unhchr.ch/. The website gives the following contact for information concerning participation and accreditation for the Commission working group: eortado-rosich.hchr@unog.ch.

3. The UN Permanent Forum on Indigenous Issues. The Permanent Forum is the first and only international body in the United Nations having indigenous persons as members. The Permanent Forum is made up of eight indigenous individuals appointed by the President of the Economic and Social Council and eight members nominated by governments and elected by the Economic and Social Council. *See* ECOSOC Resolution 2000/22, E/RES/2000/22 (July 28, 2000). The Permanent Forum has a mandate to discuss indigenous issues relating to economic and social development, culture, the environment, education, health, and human rights. The Permanent Forum will provide expert advice and recommendations on indigenous issues to the Economic and Social Council and to the various programs, funds, and agencies of the United Nations. The Permanent Forum is also empowered to "(r)aise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system" and to "[p]repare and disseminate information on indigenous issues." Economic and Social Council Resolution 2000/22, para. 2. The members of the Forum serve as independent experts in their personal capacities. They serve for three-year terms.

Indigenous organizations, including Indian nations and tribes, can attend and participate as observers. NGO credentials are not required for indigenous tribes and organizations, and it is not necessary to receive accreditation in advance. Before attending it would be advisable to check the UN website for the Permanent Forum for information about attendance. (http://www.unhchr.ch/indigenous/forum.htm) There will be very strict security procedures in effect for all persons entering the UN building. In addition to indigenous groups, all United Nations bodies and organs, intergovernmental organizations, and non-governmental organizations in consultative status with ECOSOC also may participate as observers.

Human Rights Complaints

1. The 1503 Procedure. The UN has created a formal procedure for considering complaints of gross violations of human rights by member states. ECOSOC Resolution 1503 (XLVIII) (1970). This is important because the Commission and Sub-Commission will not permit a direct, formal complaint, *as such*, to be made as a public statement during their sessions. Actually, complaints can sometimes be made in oral statements provided they are artfully worded and not too harsh or polemical.

A complaint under the 1503 procedure must allege a "consistent pattern of gross violations" of human rights. Such a complaint may be submitted in writing by anyone. NGO credentials are not needed. Complaints are submitted to the UN High Commissioner for Human Rights and may be as simple as a letter. It is advisable, however, to prepare a thorough statement of the facts, supported by documentary materials, showing that there is a *consistent pattern of gross violations* and that domestic remedies have been exhausted or are not effective. Detailed guidance for preparing such complaints is available, and it is usually wise to consult an experienced NGO when preparing such a complaint. An excellent and detailed description of the procedure with useful guidance for practitioners is contained in D. Weissbrodt, J. Fitzpatrick, and F. Newman, *International Human Rights: Law, Policy, and Process*, 3rd edition, Chapter 6 (2001).

Complaints under 1503 are considered confidentially, that is, in closed sessions. While this creates some problems, these are not insurmountable. Under the procedures in effect since 2000, complaints are first considered by the Working Group on Communications, made up of five members of

the Sub-Commission. The Chair of the Working Group determines whether a complaint merits an answer from the accused government. ECOSOC Resolution 2000/3, UN Doc. E/RES/2000/3 (2000). Most governments respond to complaints. To be considered in a particular yearly cycle, a complaint must be received by the last week of May, at least 12 weeks prior to the meeting of the Working Group on Communications. The Working Group meets in closed sessions and decides by vote which complaints will be referred for consideration by the Working Group on Situations of the Human Rights Commission. This Working Group, made up of five Commission members, decides whether to refer a complaint to the full Commisson or to hold the complaint for further consideration the following year. The Commission considers complaints referred by the Working Group on Situations in closed sessions, during which the accused country has the opportunity to respond to the written materials and to answer questions posed by Commission members. The Commission, later in its session, decides whether to drop the matter, keep the matter pending for another year, or to take some other action. As with practically all international human rights work, it is the political and moral impact of the process, the attention, the debate, and the comment by other countries that may alter states' behavior and states' policies.

The principal feature of the 1503 procedure is its confidentiality, and this feature limits its effectiveness as a political, attention-getting mechanism. On the other hand, nothing prevents the complainant from publicizing the complaint and the states' offending conduct. Moreover, it is now possible for advocates attending the meetings of the Human Rights Commission to learn about the status of a complaint and to speak with Commission members about it. As a result the confidentiality is less an obstacle than it appears. In any event, this procedure can be a useful part of a broader campaign involving other activities aimed at correcting a gross pattern of violations.

2. The Human Rights Committee. This committee is the monitoring body created by the International Covenant on Civil and Political Rights. It is made up of 18 independent experts from around the world, and it meets three times per year either in Geneva or New York City. The Committee reviews the reports filed by the parties to the Covenant, makes "general comments" regarding compliance with the Covenant, and also considers formal individual complaints against state parties that have accepted the Optional Protocol to the Covenant. The United States has not accepted the Optional Protocol, and therefore individual complaints cannot be considered against the United States. Canada has accepted the Optional Protocol to the Covenant.

The Covenant on Civil and Political Rights includes a very broad range of fundamental human rights. Article one of both the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights establishes the right of self-determination, a right of central importance to Indian nations and tribes. The Article reads as follows:

> 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 principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Other rights contained in the Covenant include rights to equality under the law, to freedom of expression and association, freedom of religion, freedom from arbitrary government action, and rights to enjoy, in community with others, one's culture and language.

Reports on compliance with the Covenant are to be submitted by parties every five years detailing all of the legal, administrative and other measures taken by the country to protect and promote the rights set forth in the Covenant. Problems relating to the enjoyment of the rights specified are also to be discussed. When reports are submitted to the Committee, they are reviewed in sessions that are open to the public. Usually a country representative is present to make a statement about the report and to respond to questions from Committee members. Additional information may be requested by the Committee. Committee members may make comments about the report. At the conclusion of the review, the Committee prepares "concluding observations" and recommendations, which are published and which can be very influential in shaping practices and policies of countries.

In the report review process, the Human Rights Committee encourages organizations, and this would include Indian nations and tribes, to submit written information to be considered in connection with a country's report. The Committee also consults with interested organizations during breaks or outside the formal meetings. Such meetings can be requested by interested organizations, and individual members can be approached and met with as well. In this way, Indian representatives and other interested advocates can present information, make observations about the government's report, discuss problems with the government's compliance with the Covenant, and suggest inquiries by Committee members. It is not possible for observers to make oral statements during the actual meetings of the Committee, but this is relatively unimportant in view of the open access to the Committee members and the opportunity to submit written reports and information. Further detailed information about the Human Rights Committee and its procedures is available on the UN website. *See also, Guide to International Human Rights Practice,* 177-201.

Another important function of the Human Rights Committee, one that can be of importance to Indian representatives, is the preparation of "General Comments." Covenant on Civil and Political Rights, Art. 40. These general comments arise from the Committee's review of the states' reports, and they constitute the Committee's formal interpretations of the Covenant's obligations. The Committee has issued 29 such general comments covering important aspects of the treaty, including for example the scope of the right of self-determination. These general comments are all available on the UN website at http://www.unhchr.ch/tbs/doc.nsf. The Committee announces in its annual report what new general comments it is considering, and the process of drafting a general comment usually takes several sessions. Indian governments and organizations can participate in the process of considering and drafting general comments by submitting written information and recommendations to the Committee. Of course, personal meetings to discuss general comments can be arranged outside the Committee's official meetings.

3. The Committee on the Elimination of All Forms of Racial Discrimination. This Committee, often just called "CERD," monitors compliance with the Convention of the same name. It is the oldest of the treaty monitoring committees and has been very active in recent years in dealing with issues concerning indigenous peoples. *See,* for example, CERD's notable response to Aboriginal land rights issues in Australia. CERD Committee Decision on Australia, CERD/C/54/Misc. 40/Rev. 2 (18 March 1999). Like the Human Rights Committee, CERD is made of 18 members elected by the parties to the Convention. CERD meets twice each year for four weeks each session, always in Geneva. Parties to the Convention report every two years: comprehensive reports and brief updates in alternate two-year periods.

CERD can consider complaints by individuals and groups alleging violations of the Convention, but only if the country concerned has formally declared that it recognizes the Committee's competence to do so. CERD can also consider communications from a party to the Convention asserting that another party is not giving effect to the provisions of the Convention. This procedure has never been used.

The Convention is broad and noble in its provisions. "Racial discrimination" is defined in Article 1 to mean:

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The parties to the Convention undertake to eliminate racial discrimination in all its forms, to ensure the right of everyone to equality before the law, and, among other things, to ensure that there are effective legal remedies against racial discrimination and that effective measures are taken in the fields of education, culture and information to combat prejudices that lead to racial discrimination.

CERD reviews country reports in a manner much like the Human Rights Committee. CERD appoints one of its members as special rapporteur to report on each country, and that member has lead responsibility for reviewing materials and preparing questions. The meetings to review the reports are open, but observers are not permitted to speak in the meetings. CERD welcomes reports and information from indigenous representatives and organizations concerning reports that are under consideration. Members of CERD are also quite open to having briefing sessions sponsored by indigenous advocates and to meeting individually with indigenous representatives to discuss issues relating to a country report.

The willingness of CERD to consider information from indigenous peoples was dramatically demonstrated a few years ago when it considered the report of Australia. Aboriginal representatives from the Aboriginal and Torres Strait Islanders Commission undertook a major campaign to stop and discredit the reactionary legislation that had recently been put in place to restrict and undermine Aboriginal land rights. A massive compilation of legal and historical materials was prepared, showing in detail the racially discriminatory legal treatment of Aboriginal land rights. These materials were submitted to CERD. **Aboriginal and Torres Strait Islander Peoples and Australia's Obligations under the UN Convention on the Elimination of All Forms of Racial Discrimination: Report Submitted by the Aboriginal and Torres Strait Islander Commission (**1998). The report is available on the website www.atsic.gov.au. Many Aboriginal representatives and their lawyers attended the CERD meeting when Australia's report was reviewed. These representatives met extensively and repeatedly with CERD members to press their case. The result was a strong condemnation of Australia's action on Aboriginal land rights —a condemnation that had a powerful political impact through the public media in Australia. *See*, Report of the Committee on the Elimination of Racial Discrimination: 29/09/99, A/54/18.

At the time, no such campaign to use the CERD review process had been attempted, at least not on such a scale. The episode illustrates the many opportunities that exist at the international level for innovative, ground-breaking, and effective advocacy.

Analogous to the Human Rights Committee's "General Comments," CERD prepares "General Recommendations" based upon its review of state reports. These recommendations are reported and form an important body of authoritative interpretations of the Convention. *See, for example,* General Recommendation XXI on self-determination, CERD/48/Misc. 7/Rev. 3 (1996), and General Recommendation XXIII (51) concerning Indigenous Peoples, CERD/C/51/Misc. 13/Rev. 4 (1997). The UN website contains complete texts and citations for the General Recommendations. Indigenous and other human rights advocates can participate in the consideration of future general recommendations.

4. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. In 2001, the UN Commission on Human Rights decided to appoint a

"Special Rapporteur" who would gather information and prepare studies for the Commission on an on-going basis. Commission Resolution 2001/57, E/CN.4/Res./2001/57 (24 April 2001). The Commission has a number of such "thematic" special rapporteurs covering such topics as torture, violence against women, and internally displaced persons. Mexican academic Rodolfo Stavenhagen was appointed to this position, and he was allocated a part-time staff person to assist him. The Special Rapporteur has an extremely broad mandate, limited mainly by his time, staff, and budget. He is authorized to gather information and prepare recommendations on practically any topic concerning the human rights of indigenous peoples. Within the scope of the Special Rapporteur's mandate, indigenous representatives are entirely free to speak and submit information to him. Suggestions for future studies are welcome, as well as information, materials and recommendations relevant to current studies.

Organization of American States (OAS) System

In some respects, the OAS presents the most important opportunities for advocacy on behalf of indigenous peoples in the United States. The OAS has an effective, formal process for considering and reporting on complaints of human rights violations. The OAS is also actively considering adoption of a draft American Declaration on the Rights of Indigenous Peoples, a process that is easily accessible to participation by indigenous representatives. Perhaps most important for United States nations and tribes, most OAS activities take place in Washington, D.C. The OAS is much smaller and less complex than the United Nations. There are 35 member countries, all of the countries of the Americas, and most or all of them have missions or embassies in Washington, D.C.

The Inter-American Commission on Human Rights (IACHR)

The IACHR is an organization of the OAS, and its principal function is to promote the observance and protection of human rights and to serve as a consultative organ of the OAS in human rights matters. *See*, OAS, Inter-American Commission on Human Rights, Inter-American Court of Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System* (May, 2001) (OEA/Ser. L/V/1.4 rev. 8), hereinafter, *Basic Documents*. This is available online at http://www.cidh.org. This is an indispensable reference for all human rights work in the Inter-American system.

The Inter-American Commission on Human Rights is of signal importance, because it is empowered to consider individual complaints alleging that a member country (including the United States) has violated or is violating human rights. The IACHR has considered many such complaints concerning indigenous peoples over the past 23 years, and has developed a significant body of jurisprudence on the human rights of indigenous peoples. *See*, OAS, Inter-American Commission on Human Rights, *The Human Rights Situation of Indigenous People in the Americas* (2000). Thus far, the IACHR has considered only one case brought on behalf of Indians in the United States. *Carrie and Mary Dann and the Dann band of Western Shoshone Indians v. United States* (IACHR, No. 11.140). The Commission has recently issued a final report in that case finding that the United States violated at least some human rights relating to Western Shoshone lands. The Report is available at www.indianlaw.org .

The Commission is composed of seven members, who are elected in their personal capacity by the General Assembly to serve four-year terms. The Commission meets in regular sessions at least two times per year in Washington, D.C., where it has a permanent staff or secretariat.

The rules for the submission and consideration of complaints or "communications" are contained in the Commission's Rules of Procedure adopted December, 2000. *Basic Documents, supra.* Cases are begun by submitting a petition. The Commission's rules, Article 23, provide:

> Any person or group of persons or nongovernmental entity legally recognized in one or more of the member states of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, ... [and other Inter-American human rights instruments] in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure. The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in another writing.

The American Declaration of the Rights and Duties of Man sets forth a comprehensive array of civil and political rights along with various economic, social and cultural rights. American Declaration on the Rights and Duties of Man, adopted by the Ninth International Conference of American States (March 30 - May 2, 1948), OAS Res. 30, OAS Doc. OEA/Ser.L./V./I.4, rev. (1965). The Inter-American Court of Human Rights has determined that the Declaration states human rights obligations that are binding on all members of the OAS by reason of their ratification of the OAS Charter. *See*, Inter-American Court of Human Rights, Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A. No. 10 (1989), paragraphs 35-45; IACHR, James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, September 22, 1987, Annual Report 1986-1987, paragraphs 46-49, Rafael Ferrer-Mazorra et al. v. United States, Report N° 51/01, Case 9903, April 4, 2001. **Basic Documents, supra**, at 5. The United States has not become a party to the later American Convention on Human Rights (adopted 22 Nov. 1969, entered into force 18 July 1978, OAS Treaty Ser. No. 36, 1144 U.N.T.S. 123) and is therefore not strictly bound by it. It is nevertheless bound by the American Declaration, by customary international

law, and by the general international human rights treaties it has ratified, namely, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Torture Convention.

The Commission's Rules spell out in detail the requirements for petitions (Article 28) and the requirements for admissibility (Articles 31-34). In summary, domestic legal remedies must first be exhausted, petitions must be filed within six months of the exhaustion of domestic remedies (with some exceptions), petitions must not be merely duplicative of other proceedings, and the petition must properly allege a violation of rights enunciated (in the case of the United States) in the American Declaration of the Rights and Duties of Man. After requesting and considering information from the accused government and from the petitioner, the Commission will make a determination on admissibility and, if the petition is found admissible, proceed to consideration of the merits.

The Commission has evolved to function increasingly like a court. The Commission, on request, will conduct hearings in Washington, DC, to receive evidence, hear witnesses, and to hear argument from the petitioner, the country, and their attorneys. In some important respects, the Commission is not like a court. The Commission has a "friendly settlement procedure" that may be initiated either by the Commission or by one of the parties. Rules, Article 41. The aim is to secure a negotiated or amicable resolution of the problem, and there have been some notable successes. The Commission may also conduct an on-site investigation, usually with the consent of the state concerned. *See*, Rules, Article 40. Obviously, a visit can have a powerful hygienic impact on state policies and practices. The Commission has, for example, visited Maya Indian communities in Belize to examine land rights and environmental issues and has visited Indian communities in Brazil to examine conditions there.

When the Commission concludes that it cannot achieve a friendly settlement or otherwise resolve the case, it makes a decision on the merits and prepares a written report. Where the Commission finds a violation of a human right, a preliminary report with proposals and recommendations is forwarded confidentially to the country. If the matter still is not resolved after three months, the Commission may decide to issue and publish a final report. These reports are then made public and provided to the petitioner. The Commission may sometimes follow-up a published report with hearings or requests for information about compliance with its recommendations. The publication of a critical report by the Commission and the attendant political embarrassment can be serious matters for most countries.

In addition to considering petitions concerning human rights violations, the IACHR also prepares reports and recommendations concerning the status of human rights in particular countries. Statute of the Inter-American Commission on Human Rights, Article 18. These reports can be either general or specific, and they may involve the holding of hearings. This function of the Commission can provide opportunities to investigate and report on broad situations involving important human rights issues. There is no formal role provided for organizations or other human rights advocates, but nothing restricts the right to submit information and reports to the Commission through its secretariat. Each country is assigned to a particular staff attorney in the secretariat, and it is advisable to contact that individual to learn what activities the Commission may be undertaking in regard to any particular country.

The Inter-American Court of Human Rights

Where the country is a party to the American Convention on Human Rights and has accepted the jurisdiction of the Court, the case may be referred to the Inter-American Court of Human Rights. Neither the United States or Canada is a party to the Convention, and therefore this procedure cannot be used in cases against them. However, it is useful to know that the Court has recently issued a major, precedent-setting decision on Indian land rights in a case arising in Nicaragua. Inter-American Court of Human Rights, *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001. The decision is available in English translation on the Indian Law Resource Center website, www.indianlaw.org.

Human Rights Standard-Setting: the Draft American Declaration on the Rights of Indigenous Peoples

The General Assembly of the OAS requested the Inter-American Commission on Human Rights to prepare a draft declaration on the rights of indigenous peoples in 1989.

Resolution AG/RES. 1022 (XIX-)/89. The Commission submitted its draft in 1997, and the draft is now under review by the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples. *See, Report of the Chair, Special Meeting of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples,* OAS GT/DADIN/doc.23/01 (11 May 2001).

The draft American Declaration is much like the draft UN Declaration, though there are significant differences. The draft American Declaration contains no explicit right of self-determination, but does include strong provisions for "self-government" and for recognizing indigenous law and indigenous legal systems. (Article XV.) The draft includes important provisions for recognizing the collective rights of indigenous peoples and tribes, including rights to land, cultural rights, and rights under treaties made with them. (Articles VII, XIV, XVIII, XXII) Most indigenous observers agree that the draft needs improvement, but with such improvement it would be a great advance in the legal position of indigenous peoples in the Americas.

The OAS work to develop and adopt an American Declaration on the Rights of Indigenous Peoples may well have

the greatest practical and long-term impact of all the international activities relating to Indian nations and tribes in the United States and Canada. The declaration will be especially relevant because it will be limited in its scope to indigenous peoples in the Americas, and it will come with an accessible and already-exiting monitoring and complaint mechanism, namely the Inter-American Commission.

Participation in the OAS process is entirely open to indigenous representatives without restriction. The comments and recommendations of indigenous participants are included in the reports, and there is little doubt that they are having a very favorable effect on the consideration of the draft. See, Report of the Chair, Special Meeting of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, OAS GT/DADIN/doc.23/01 (11 May 2001). Documents relating to the review of the draft are on the internet at www.oas.org. An important reference for all work relating to the draft American Declaration is OAS, Inter-American Commission on Human Rights, *Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples* (2001).

It is likely that the OAS draft Declaration will continue under consideration for at least another year or two, but it is the debate and education about Indian issues that contributes most to the improvement of government policy and law. Active and informed participation by Indian governments in the process of debating the draft American Declaration can be an important part of a total strategy for Indian rights protection.

The Human Rights Complaint Procedure of UNESCO

The United Nations Educational, Scientific and Cultural Organization (UNESCO), based in Paris, has long had a formal process for receiving and considering complaints of human rights violations within UNESCO's fields of competence, from any individual or group, and concerning any country. While this procedure is little used, it may prove useful in particular situations and therefore should not be overlooked. The procedure is described in a 1978 decision of the Executive Board of UNESCO, 104 EX/Decision 3.3. The text of the decision and a brief discussion of the procedure is on the UNESCO website: www.unesco.org/human_rights/hrda.htm .

The procedure is essentially confidential, except that the complainant will eventually receive notification of the action taken on the complaint. Complaints must concern violations of human rights in UNESCO's fields of competence: education, science, culture, and information. Complaints may be submitted in any form, even as a simple letter, by any person or group, whether a victim of the violation or merely having reliable knowledge of the alleged violation.

The rights falling under UNESCO's competence are essentially the following (each article mentioned hereunder refers to the Universal Declaration of Human Rights):

1. The right to education (Article 26);
2. The right to share in scientific advancement (Article 27);
3. The right to participate freely in cultural life (Article 27);
4. The right to information, including freedom of opinion and expression (Article 9).
5. The right to freedom of thought, conscience and religion (Article 18)
6. The right to seek, receive and impart information and ideas through any media and regardless of frontiers (Article 19);
7. The right to the protection of the moral and material interests resulting from any scientific, literary or artistic production (Article 27);
8. The right to freedom of assembly and association (Article 20) for the purposes of activities connected with education, science, culture and information.

Complaints are to be addressed to the Director-General of UNESCO. Unless the complainant objects, the complaint will be forwarded to the government concerned advising the government that the complaint will be referred to the Committee on Conventions and Recommendations along with any information the government may wish to submit. The Committee then considers the complaint confidentially, and the government concerned may attend meetings of the Committee to provide information and answer questions about the complaint. Efforts may be made to reach a negotiated resolution, but failing that, the Committee reports to the Executive Board on its activities related to the complaint. The complainant eventually receives notice of the actions taken.

This procedure has been criticized as antiquated and obscure. Nevertheless, the issues of culture and intellectual property, especially, are sometimes of extraordinary importance to Indian nations and tribes. These are issues very much within UNESCO's particular fields of competence, and this may suggest that this procedure could be used to good effect in certain situations. It would be essential to consult the UNESCO website and perhaps the *Guide to International Human Rights Practice* to evaluate whether to use this procedure.

Concluding Observations

The international treaties and procedures reviewed here are the principal means for advocating Indian rights at the international level. As mentioned above, there are many other international-level activities that play a role in indigenous rights advocacy as well, but they are more specialized or limited in their usefulness. These include the indigenous working group dealing with traditional and indigenous knowledge and practices under the Convention on Biological Diversity, work with the Conferences of the Parties to the Framework Convention on Climate Change, the policy review processes of the World Bank and other multilateral development banks, the periodic Summits of the Americas, various meetings relating to intellectual property and the World Intellectual Property Organization

(www.wipo.org), and follow-up to the World Conference Against Racism. Still other procedures for complaints and other forms of human rights advocacy are available when dealing with situations in other countries. In this respect, mention must be made of the International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (entered into force Sept. 5, 1991). It does not apply to the United States, but it is an international treaty creating human rights standards applicable to indigenous peoples and binding on the countries that have ratified it. These other mechanisms and processes are mentioned in order to demonstrate that this is an emerging and rapidly growing field of legal practice that offers a great number of opportunities for innovative advocacy.

Bibliography

S.J. Anaya, Indigenous Peoples in International Law (1996)

H. Hannum, Ed., Guide to International Human Rights Practice, 3rd Edition (1999)

H. Steiner, P. Alston, *International Human Rights in Context: Law, Politics, Morals,* 2nd edition (2000)

D. Weissbrodt, J. Fitzpatrick, and F. Newman, *International Human Rights: Law, Policy, and Process,* 3rd edition (2001)

D. Weissbrodt, P. Parker, *Orientation Manual: The UN Commission on Human Rights, Its Sub-Commission, and Related Procedures* (1993), available from Minnesota Advocates for Human Rights, 310 Fourth Avenue South, #1000, Minneapolis, MN 55415-1012; www.mnadvocates.org.

OAS, Inter-American Commission on Human Rights, Inter-American Court of Human Rights, *Basic Documents Pertaining to Human Rights in the Inter-American System* (May, 2001)

OAS, Inter-American Commission on Human Rights, *Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples* (2001)

OAS, Inter-American Commission on Human Rights, *The Human Rights Situation of Indigenous People in the Americas* (2000)

United Nations, Office of the High Commissioner for Human Rights, *Guide for Indigenous Peoples*, available in printed format and available on line at www.unhchr.ch.

Internet Resources

United Nations, Office of the High Commissioner for Human Rights: www.unhchr.ch.

Organization of American States: www.oas.org

OAS, Inter-American Commission on Human Rights: www.iachr.org

World Intellectual Property Organization: www.wipo.org

Convention on Biological Diversity, Secretariat: www.biodiv.org

Framework Convention on Climate Change: unfccc.int/index.html

Indian Law Resource Center: www.indianlaw.org

DoCip (Geneva-based organization providing support and services for indigenous peoples working at the UN and other international agencies.): www.doCip.org

University of Minnesota Human Rights Library: www.umn.edu/humanrts/