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ARTICLES

CATHERINE A. O'NEILL*

Protecting the Tribal Harvest: The Right to Catch and Consume Fish

I thank the Confederated Tribes of the Umatilla Indian Reservation for welcoming us to their homeland and for inviting me to speak at this Summit. It is an honor to be here.

The call to protect the tribal harvest—to ensure healthy and robust fisheries—is at the core of the sovereign compact between

* Associate Professor of Law, Seattle University School of Law. I would like to thank Barbara Harper for sharing her experience and expertise, on which this paper relies throughout. This paper transcribes a presentation delivered at the EPA-Tribal Leaders Summit, hosted by the Confederated Tribes of the Umatilla Indian Reservation, August 21-25, 2006.

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the United States and the various Native nations. The United States is, in fact, legally obligated to uphold this compact, manifested prominently in the treaties. The United States and the states are also legally bound to remedy a long history of attempts to assimilate and discriminate against Native peoples and their land- and resource-based cultures. These legal obligations mean that federal and state agencies' work must be different when Native peoples—rather than just the general population—are among those affected by environmental contamination.

I

BACKGROUND

A. Contamination and Exposure

Many of the waters and fish species relied upon by tribal peoples are contaminated. Dioxins, PCBs, methylmercury, and a litany of pollutants toxic to humans and other living things have compromised the health of the Columbia River Basin,[1] where we are gathered, as well as other watersheds throughout the Pacific Northwest.

This widespread contamination poses a particular threat to many Native peoples. Historically and in contemporary times, members of these fishing peoples consume more fish, at greater frequency, and in accordance with different cultural practices than the general population. Because fish consumption is the primary route of exposure to many of these toxic contaminants, Native peoples are among the most highly exposed.

[1] *See, e.g.*, U.S. ENVTL. PROT. AGENCY, COLUMBIA RIVER BASIN FISH CONTAMINANT SURVEY, at E-1 to -4 (1996-1998), *available at* http://yosemite.epa.gov/r10/oea.nsf/0703bc6b0c5525b088256bdc0076fc44/c3a9164ed269353788256c09005d36b7/$FILE/Fish%20Study.PDF.

TABLE 1[2]
FISH CONSUMPTION RATES RELEVANT TO THE COLUMBIA RIVER BASIN

FCR	Derivation
6.5 g/day	Former EPA default (1980); average of general population
17.5 g/day	EPA default (2000); 90th percentile of general population
63.2 g/day	CRITFC (1994); average of current tribal consumption
142.4 g/day	EPA subsistence default (2000); 99th percentile of general population
389 g/day	CRITFC (1994); 99th percentile of current tribal consumption
540 g/day	Harris and Harper (1997); average of CTUIR traditional and subsistence fishers
620 g/day	*U.S. v. Washington* (1974); average salmon consumption
972 g/day	CRITFC (1994); maximum value, current tribal consumption
1000 g/day	Walker (1985); pre-dam rates for Columbia Plateau Tribes

A review of fish consumption rates (FCRs) relevant to the Columbia River Basin tribes illustrates several points. The Environmental Protection Agency (EPA) formerly recommended that states and tribes assume that humans eat fish at a rate of 6.5 grams/day—just twelve fish meals per year—and that states and tribes set water quality standards protective of consumption up to this level.[3] This value was based on data from a national survey conducted in the 1970s.[4]

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[2] I wish to credit Barbara Harper and Stuart Harris for the conceptual framework for this table.

[3] Guidelines and Methodology Used in the Preparation of Health Effect Assessment Chapters of the Consent Decree Water Criteria Documents, 45 Fed. Reg. 79,318, 79,347, app. C (1980).

[4] HAROLD JAVITZ, U.S. ENVTL. PROT. AGENCY, SEAFOOD CONSUMPTION DATA ANALYSIS (1980); *see also*, Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L. J. 3, 43-44 (2000) (discussing fish-consumption rates) [hereinafter O'Neill, *Variable Justice*].

As of 2000, the EPA now recommends a rate more than twice that—17.5 grams/day—for the general population default value.[5] This revised rate is based on the 90th percentile value from a national survey conducted in the mid-1990s.[6] Note, however, that many states' water quality standards are still based on the former FCR of 6.5 grams/day, Washington among them.[7]

Surveys of the general population, however, fail to register the circumstances of many of the most exposed, including members of the fishing tribes, and especially tribal elders and other traditional or subsistence fishers.[8] This is so for a variety of reasons. General survey methods are likely, for example, to miss those who may not respond to mail contact or written questionnaires, those who may lack a phone or car, those for whom English is a non-preferred language, those who may distrust studies that have even the appearance of government or official association, and those who may feel it inappropriate or ill-advised to reveal traditional or cultural practices.[9]

In 1994, the Columbia River Inter-Tribal Fish Commission (CRITFC) published its own survey of member tribes' consumption.[10] This survey of contemporary consumption rates produced a mean value of 63.2 grams/day, a 99th percentile value of 389

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[5] U.S. ENVTL. PROT. AGENCY, METHODOLOGY FOR DERIVING AMBIENT WATER QUALITY CRITERIA FOR THE PROTECTION OF HUMAN HEALTH, 4-24 to 4-29 (2000) *available at* www.epa.gov/waterscience/criteria/humanhealth/ method/complete.pdf [hereinafter AWQC METHODOLOGY].

[6] *Id.* at 4-24 (referencing the U.S. Department of Agriculture 1994–1996 Continuing Survey of Food Intake by Individuals).

[7] Amendments to the Water Quality Standards Regulation to Establish the Numeric Criteria for Priority Toxic Pollutants Necessary to Bring All States into Compliance with Section 303(c)(2)(B), 56 Fed. Reg. 58,420, 58,428 (Nov. 19, 1991) (to be codified at 40 C.F.R. pt. 131) (promulgating the "National Toxics Rule").

[8] *See generally,* NAT'L ENVTL. JUSTICE ADVISORY COUNCIL, U.S. ENVTL. PROT. AGENCY, FISH CONSUMPTION AND ENVIRONMENTAL JUSTICE 24-42 (2002), *available at* http://www.epa.gov/compliance/resources/publications/ej/fish_consump_report_1102.pdf [hereinafter NEJAC FISH CONSUMPTION REPORT]; STUART G. HARRIS & BARBARA L. HARPER, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, EXPOSURE SCENARIO FOR CTUIR TRADITIONAL SUBSISTENCE LIFEWAYS app. 3 (2004), *available at* http://www.hhs.oregonstate.edu/ph/tribal-grant/CTUIR-Scenario.doc [hereinafter CTUIR TRADITIONAL EXPOSURE SCENARIO].

[9] NEJAC FISH CONSUMPTION REPORT, *supra* note 8, at 50-54; CTUIR TRADITIONAL EXPOSURE SCENARIO, *supra* note 8, app. 3, at 5-8, 11.

[10] COLUMBIA RIVER INTER-TRIBAL FISH COMM'N, A FISH CONSUMPTION SURVEY OF THE UMATILLA, NEZ PERCE, YAKAMA, AND WARM SPRINGS TRIBES OF THE COLUMBIA RIVER BASIN, TECHNICAL REPORT 94-3 (1994), *available at* http://www.critfc.org/tech/94-3report.pdf.

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grams/day, and a maximum value of 972 grams/day.[11] These numbers portray contemporary tribal consumption at rates vastly greater than that of the general population.

However, as Stuart Harris and Barbara Harper have documented, even these rates may not fully capture the contemporary consumption patterns of tribal elders, traditional members, and subsistence fishing families.[12] Harris and Harper found 540 grams/day to be the *average* of this population among the Confederated Tribes of the Umatilla Indian Reservation (CTUIR).[13]

Moreover, these contemporary consumption rates can be said to be *suppressed* from the original rates for fishing peoples along the Columbia River and its tributaries—largely as a consequence of depletion and contamination of the fisheries, inundation of fishing places, and denial of access to aboriginal lands.[14] Thus, rates that describe historic fish consumption levels are important to understanding consumption consonant with treaty protections.[15] Various lines of evidence document historic consumption at much higher rates: 620 grams/day, 650 grams/day, and 1000 grams/day.[16]

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[11] *Id.* at 29.

[12] CTUIR TRADITIONAL EXPOSURE SCENARIO, *supra* note 8, app. 3, at 5-15.

[13] Stuart G. Harris & Barbara L. Harper, *A Native American Exposure Scenario*, 17 RISK ANALYSIS 789, 792 (1997).

[14] *See, e.g.*, CTUIR TRADITIONAL EXPOSURE SCENARIO, *supra* note 8, app. 3, at 1. For early documentation of the concept that contamination and depletion of aquatic environments and the fisheries they support may lead to an FCR artificially decreased or "suppressed" from an appropriate baseline for a given population, see PATRICK C. WEST ET AL., SCH. OF NATURAL RES., UNIV. OF MICH., ANN ARBOR, MICHIGAN SPORTS ANGLERS FISH CONSUMPTION SURVEY 91-102 (1989), *available at* http://www.epa.gov/ncea/pdfs/efh/references/AB.PDF. For an elaboration of the evidence for and implications of suppression effects, see NEJAC FISH CONSUMPTION REPORT, *supra* note 8, at 43-49.

[15] *See, e.g.*, NEJAC FISH CONSUMPTION REPORT, *supra* note 8, at 44, 49 (citing Moses Squeochs, Director, Environmental Program, Fourteen Confederated Tribes and Bands of the Yakama Nation, for the point that, for the Yakama and other treaty tribes, 1855 constitutes the relevant baseline by which to assess tribal harvest and consumption practices).

[16] CTUIR TRADITIONAL EXPOSURE SCENARIO, *supra* note 8, app. 3, at 2 tbl.1 (citing, respectively, United States v. Washington, 384 F. Supp. 312 n.151 (W.D. Wash. 1974); D.E. WALKER & LAWRENCE W. PRITCHARD, ESTIMATED RADIATION DOSES TO YAKAMA TRIBAL FISHERMEN (1999); and D.E. WALKER, THE KUTENAI FISHERY: A COMPARATIVE VIEW (1985), *cited in* ALLAN SCHOLTZ ET AL., E. WASH. UNIV., COMPILATION OF INFORMATION ON SALMON AND STEELHEAD TOTAL RUN SIZE, CATCH AND HYDROPOWER RELATED LOSSES IN THE UPPER COLUMBIA RIVER BASIN, ABOVE GRAND COULEE DAM (1985)).

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B. Regulatory Responses

How have government regulators responded to this widespread contamination and the resulting threat of exposure? Although tribal, state and federal efforts all have a role to play under our tripartite system of environmental regulatory authority, much of the responsibility lies with state and federal agencies. These agencies are directed under the Clean Water Act, the Clean Air Act and other environmental laws to reduce risks to human and ecological health and to protect the resources on which tribes and others depend. However, these agencies have largely delayed or denied the full measure of protection intended to be afforded by these laws.

Instead, particularly in the current administration, health and environmental agencies have often presided over a shift in the opposite direction, replacing risk reduction with what I term "risk avoidance."[17] Risk reduction measures require polluters to clean up, limit, or prevent contamination in the first place. Risk avoidance approaches shift the burden from the sources to the receptors of pollution. Agencies ask those exposed to alter their practices or lifeways in order to protect themselves. For example, fish consumption advisories or shellfish harvesting restrictions direct people to reduce or eliminate fish in their diets—thereby avoiding contact with the dioxins, PCBs, mercury, and other contaminants that are permitted to remain in the environment unabated.

The EPA's recent rule governing mercury emissions from coal-fired utilities provides a particularly bold example of agencies' embrace of risk avoidance. When it proposed the Clean Air Mercury Rule, the EPA unflinchingly acknowledged that it would leave Native Americans, Southeast Asian Americans, and others—and particularly women and children in these groups—underprotected.[18] "In response" to this admitted shortcoming, the EPA referred these people to fish consumption advisories.[19]

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[17] *See* Catherine A. O'Neill, *Risk Avoidance, Cultural Discrimination, and Environmental Justice for Indigenous Peoples*, 30 ECOL. L. Q. 1, 2 (2003); Catherine A. O'Neill, *No Mud Pies: Risk Avoidance as Risk Regulation*, 31 VT. L. REV. 273, 276-77 (2007).

[18] Proposed National Emissions Standards for Hazardous Air Pollutants, 69 Fed. Reg. 4652, 4709 (proposed Jan. 30, 2004).

[19] Standards of Performance for New and Existing Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,642 (May 18, 2005) ("In response to potential risks of consuming fish containing elevated concentrations of [mercury], EPA

This reliance on risk avoidance also occurs less explicitly, for example, when states adopt—and are permitted to adopt—water quality standards that leave many within their borders unprotected, or when agencies set cleanup standards that fall short of supporting the bountiful fisheries and shellfisheries of which preceding generations partook and to which future generations might aspire.

C. Different Impacts

Such lackluster regulatory efforts may leave unaddressed a host of adverse impacts on human and ecological health. When fishing peoples are among those affected, however, the impacts will be not only different in degree, but also different in kind from those felt by the general population.

The following illustrations provide a sense of the disparate impact. First, consider the disparity in current excess cancer risk, illustrated by data from the Columbia River Basin Contaminant Survey depicting fish from a sampling site between the John Day and McNary Dams.[20] Whereas someone consuming at the general population average rate (here, 7.5 grams/day) is currently exposed to excess cancer risks ranging from 1 in 100,000 to 1 in 10,000, a tribal member consuming at subsistence rates as documented by Harris and Harper (540 grams/day) is currently exposed to cancer risks up to nearly 1 in 100. The disparity is stark, with tribal members facing risks perhaps 100 times that of the general population. As well, the absolute level of risk is sobering.

Second, consider the disparity in exposure to methylmercury for a woman consuming fish at the level of the EPA's general population default (17.5 grams/day) and a woman consuming fish at the level of CRITFC's 99th percentile (389 grams/day) or at tribal subsistence rates (540 grams/day). Assume the current average level of methymercury in Umatilla walleye (0.16 ppm) as measured by the Columbia River Basin Contaminant Survey by way of example. Whereas a woman in the general population is

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and the [FDA] have issued a joint fish consumption advisory which provides recommended limits on consumption of certain fish species. . . . This joint EPA and FDA advisory recommends that women who may become pregnant, pregnant women, nursing mothers, and young children avoid some types of fish . . . and check[ ] any local advisories that may exist for local rivers and streams.").

[20] 1 U.S. ENVTL. PROT. AGENCY, COLUMBIA RIVER BASIN FISH CONTAMINANT SURVEY app. N, at 2-3, 6 fig.6-25.

exposed well under 0.1 μg/kg bodyweight/day, the level deemed "safe" by the EPA[21] (at 0.043 μg/kg bodyweight/day), a woman consuming at tribal rates is exposed to methylmercury at levels nine to thirteen times the EPA's reference dose (at 0.96 μg/kg bodyweight/day, assuming an FCR of 389 grams/day or at 1.33 μg/kg bodyweight/day, assuming an FCR of 540 grams/day).[22] Given methylmercury's potent neurodevelopmental effects, the adverse impacts of contamination at this level will extend to future generations.

Third, frequent fish consumption has been shown to have a variety of health benefits, including reduced risk of stroke,[23] reduced risk of Alzheimer disease,[24] and slower rate of cognitive decline with age.[25] Whereas fish is widely recognized to provide important health benefits for all, regular consumption of fish and other traditional foods is particularly important to those for whom fish forms a staple of a traditional diet. As a recent study of one of the fishing tribes in California observes, "[t]he loss of traditional food sources is now recognized as being directly responsible for a host of diet related illnesses among Native Americans including diabetes, obesity, heart disease, tuberculosis, hypertension, kidney troubles and strokes."[26] This health-protective function is vital, considering the high rate of diabetes

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[21] EPA's reference dose (RfD) for methlymercury is 0.1 μg/kg bodyweight/day. U.S. Envtl. Prot. Agency, Integrated Risk Information System, Toxicological Profile for Methyl Mercury, CASRN 22967-92-6, http://www.epa.gov/iris/subst/ 0073.htm (last visited March 14, 2007). This RfD represents the amount of methylmercury that EPA believes can be safely ingested each day over the course of a lifetime without adverse health effects. *Id.*

[22] *Id.* tbl.2. These figures assume that the average woman weighs 65 kg.

[23] *E.g.*, Richard F. Gillum et al., *The Relationship Between Fish Consumption and Stroke Incidence: The NHANES I Epidemiologic Follow-Up Study*, 156 ARCHIVES OF INTERNAL MED. 537, 537 (1996); Hiroyasu Iso et al., *Intake of Fish and Omega-3 Fatty Acids and Risk of Stroke in Women*, 285 J. AM. MED. ASS'N 304, 309 (2001); S. O. Keli et al., *Fish Consumption and Risk of Stroke: The Zutphen Study*, 25 STROKE 328 (1994); and A. J. Orencia et al., *Fish Consumption and Stroke in Men: 30-year Findings of the Chicago Western Electric Study*, 27 STROKE 204, 204 (1996).

[24] *See* Martha Clare Morris et al., *Consumption of Fish and n-3 Fatty Acids and Risk of Incident Alzheimer Disease*, 60 ARCHIVES OF NEUROLOGY 940 (2003).

[25] Martha Clare Morris et al., *Fish Consumption and Cognitive Decline with Age in a Large Community Study*, 62 ARCHIVES OF NEUROLOGY 1849, 1849 (2005).

[26] KARI MARIE NORGAARD, KARUK TRIBE OF CAL., DEP'T OF NATURAL RES., THE EFFECTS OF ALTERED DIET ON THE HEALTH OF THE KARUK PEOPLE: A PRELIMINARY REPORT 5 (Aug. 2004) (documenting the dramatic shift in diet of the Karuk people since European contact due to denied access to, and diminished quality and quantity of, a significant percentage of their traditional foods, including salmon, and noting the resulting high incidence of diabetes (at 12%, nearly twice the

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among American Indians and Alaska Natives—two to three times that of all other racial/ethnic populations combined.[27]

The adverse impacts to the fishing peoples are, importantly, also different in kind. The affront is not only to tribal members' physiological health, but also to the tribes' social, economic, political, cultural, and spiritual health—indeed, to their very identity as fishing peoples. The inestimable value that these peoples place on fish, fishing, and fish consumption is marked in language, story, and ceremony; in treaties negotiated with the settler populations; in past and present fisheries management practices; in contemporary leadership in monitoring, protecting, and restoring the ecosystems on which fish depend; and in the ongoing political and legal struggle for the survival of the fish and the flourishing of their fishing cultures.

And whereas someone in the general population might, in the face of fish consumption advisories, look to substitute food sources with relatively modest accommodations, a member of the fishing tribes might view such risk avoidance as *impossible*. As Del White, Nez Perce, has explained: "People need to understand that the salmon is part of who the Nez Perce people are. It is just like a hand is a part of your body."[28]

D. Unique Obligations: The Example of Oregon's Water Quality Standards

Where Native peoples are among those affected by contamination, a unique web of legal obligations comes into play. As Professor Mary Wood has emphasized, environmental laws must be interpreted in concert with other legal commitments—among them a robust understanding of agencies' trust responsibilities.[29]

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national average) and heart disease (at 39.6%, nearly three times the national average) among the Karuk. *Id.* at 1, 26.

[27] *Health Disparities Experienced by American Indians and Alaska Natives*, MORBIDITY & MORTALITY WKLY. REP. (Ctrs. for Disease Control, Dep't of Health and Human Servs.), Aug. 1, 2003, at 1.

[28] DAN LANDEEN & ALLEN PINKHAM, SALMON AND HIS PEOPLE: FISH & FISHING IN NEZ PERCE CULTURE 156 (1999).

[29] *See* Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 ENVTL. L. 733, 735 (1995); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471; Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109. *But see*, Mary Christina Wood, *Restoring the Abundant Trust: Tribal Litigation in Pacific Northwest Salmon Recovery*,

I would like to focus on two other sources of legal obligations that govern agencies' work: the treaties and the civil rights protections.

Consider, by way of illustration, agencies' work in conjunction with Oregon's recent revision of its water quality standards. This is an emerging and critical issue for tribes in the Northwest and elsewhere, given that many states are due to revise their water quality standards.

Under the Clean Water Act, water quality standards are the touchstone for numerous regulatory efforts,[30] from setting pollutant limits in National Pollutant Discharge Elimination System permits[31] to establishing Applicable or Relevant and Appropriate Requirements for cleanups under the Comprehensive Environmental Response, Compensation, and Liability Act.[32] These water quality standards are comprised, among other things, of human health criteria, which are designed to ensure that the waters will support various human "uses," including fishing and swimming.[33] The Clean Water Act requires states and tribes to review and update their water quality standards every three years;[34] it then directs the EPA to approve or disapprove the standards under the Act.[35]

The FCR is the linchpin of human health criteria. In 2000, the EPA updated its guidance to states and tribes for setting human health criteria. In its Ambient Water Quality Criteria Methodology, the EPA replaced its former recommended default assumption regarding fish intake with a new, four-part directive.[36] The EPA recommends, in order of preference, that states and tribes base their criteria first on local data regarding fish consumption practices.[37] In the absence of local data, the EPA recommends that states and tribes base their criteria, second, on data reflecting similar geography or population groups; third, on states' or tribes' own analysis of national data; and, last, on the EPA's na-

36 ENVTL. L. REP. 10,163, 10,179-85 (2006) (discussing narrower interpretations of the trust responsibility offered by the Ninth and D.C. Circuits and pending litigation potentially clarifying agencies' obligations under the trust doctrine).

30 33 U.S.C. § 1313 (2006).

31 *Id.* § 1342 (2006).

32 42 U.S.C. § 9621(d) (2006).

33 33 U.S.C. § 1313(c)(2)(A).

34 *Id.* § 1313(c)(1).

35 *Id.* § 1313(c)(3); EPA Water Programs, 40 C.F.R. § 131.6 (2006).

36 AWQC Methodology, *supra* note 5, at 4-24 to 4-28.

37 *Id.*

tional default values.[38] The EPA "strongly emphasizes" that states and tribes "should consider developing criteria to protect highly exposed population groups and use local or regional data over the default values as more representative of their target population group[s]."[39]

The EPA further states that it views an excess cancer risk level of 1 in 1,000,000 to be an appropriate basis for regulating water quality; that is, standards are to be set to ensure that the risks from toxic contaminants do not exceed this level.[40] The EPA suggests, however, that it will approve water quality standards that are less protective of human health and allow risks as high as 1 in 10,000 for "highly exposed populations."[41]

The Oregon Environmental Quality Commission recently adopted revisions to its water quality standards.[42] Oregon, of course, had local data, including the CRITFC survey and the Harris and Harper data, and so was in the position to adhere to the EPA's first preference. In fact, the Oregon Department of Environmental Quality (ODEQ) had constituted a Technical Advisory Committee, which endorsed the use of the values from the CRITFC survey.[43] Specifically, the Technical Advisory Committee formally recommended that ODEQ assign values to the various regulated waters in Oregon depending on the intensity of fishing activity in those waters: it recommended an FCR for low-intensity use at 17.5 grams/day—the EPA's default for the general population; an FCR for intermediate-intensity use at 142.4 grams/day—the EPA's default for subsistence fishers; and an FCR for high-intensity use at 389 grams/day—the 99th percentile value from the CRITFC survey.[44]

The ODEQ, however, rejected the recommendations of its own Technical Advisory Committee. Instead, it opted for the least protective—and least preferred—option, a statewide FCR

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38 *Id.*

39 *Id.* at 4-24 to 4-25.

40 *Id.* at 2-6.

41 *Id.* at 2-6 to 2-7.

42 OR. ADMIN. R. 340-041-0033 (2007).

43 *See* Martin S. Fitzpatrick, *Changes in Oregon's Water Quality Standards for Toxics*, 20 J. ENVTL. L. & LITIG. 71, 78 (2005) [hereinafter Fitzpatrick, *Changes in Oregon's WQS*].

44 MARTIN S. FITZPATRICK, OR. DEP'T OF ENVTL. QUALITY, TOXIC COMPOUNDS CRITERIA H-36, H-38 to H-41 (2004), http://www.deq.state.or.us/about/eqc/agendas/attachments/May2004/5.20.04.ItemB.AttchH.pdf.

at the EPA's national default of 17.5 grams/day.[45] By way of justification, ODEQ claimed that this was a "logical policy choice" because: (1) it was likely to be approved by the EPA; (2) it avoided the "equity issues" among pollutant sources within a category (e.g., pulp and paper mills) that would be subject to more or less stringent standards depending on whether they had located on a low-, intermediate-, or high-intensity waterbody; and (3) subsistence populations would at least be better off than they had been under the prior Oregon standards, which assumed an FCR of 6.5 grams/day.[46] Oregon finalized its revised standards in May of 2004;[47] the EPA has yet to approve or disapprove them.[48]

If only members of the dominant society were affected, the ODEQ's and the EPA's work would be judged chiefly against the relevant environmental laws. But where tribes and their members are among those affected, the legal landscape changes. A unique web of legal obligations constrains agencies' discretion.

Among the sources of law unique to tribes are treaties. No other "subpopulation" within the United States is a sovereign government, with rights to self-determination. The United States did not treat with other subgroups. As well, tribal members are protected under the Equal Protection Clause of the Constitution and civil rights statutes. These protections have been extended to Native Americans given their particular history of discrimination—discrimination of a sort unique among protected groups. I will sketch each of these sources of obligation in turn.[49]

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[45] *Id.* at H-76.

[46] *Id.*

[47] *See* Fitzpatrick, *Changes in Oregon's WQS*, *supra* note 43, at 71.

[48] *See* Memorandum from Stephanie Hallock, Or. Dep't of Envtl. Quality; Ron Kreizenbeck, U.S. Envtl. Prot. Agency; and Antone Minthorn, Confederated Tribes of the Umatilla Indian Reservation to Or. Envtl. Quality Comm'n 1 (Oct. 2, 2006), *available at* http://www.deq.state.or.us/about/eqc/agendas/attachments/2006oct/B-FishConsumptionRate.pdf (discussing Oregon's revisions to Oregon Administrative Rules governing water quality criteria for toxics and noting EPA's inaction on the rule). Note that since this presentation was delivered, Oregon has agreed to hold a series of workshops to revisit and, potentially, revise upward the FCR incorporated in its water quality standards. *Id.* at 2; Or. Dep't of Envtl. Quality, *Oregon Fish Consumption Rate Project*, http://www.deq.state.or.us/wq/standards/toxics.htm (last visited March 17, 2007).

[49] A complete, nuanced discussion of the legal obligations that flow from the relevant treaties, the Equal Protection Clause, civil rights statutes, and other sources of law is beyond the scope of this presentation. Even the brief sketch provided here, however, should suffice to raise issues important to state and federal agencies' work affecting tribal rights and resources.

II

TREATY GUARANTEES

A. Treaty Language, Logic

The language of the treaty guarantee secured by tribal negotiators throughout the Pacific Northwest is familiar. In exchange for cessions of vast tracts of land, the tribes retained certain rights, among them: "the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations . . . ."[50]

As the district court in Phase II of *United States v. Washington* recognized in interpreting nearly identical language in treaties with the fishing peoples in the Puget Sound and elsewhere, a treaty-secured right to take fish is rendered meaningless if the ecological conditions necessary to support the fish are permitted to be degraded.[51] The court concluded, "implicitly incorporated in the treaties' fishing clause is the right to have the fishery habitat protected from man-made despoliation . . . . The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken."[52] The opinion in Phase II was ultimately vacated on procedural grounds.[53] While this decision therefore has no precedential force, its logic remains unassailable.

In a similar vein, a district court in Wisconsin recognized that the protections afforded by comparable treaty language guaranteeing the rights of the Chippewa to "fish, hunt, and gather[ ]" in ceded territory anticipated that tribal fishers would not only catch fish but also *consume* the fish that they caught or sell it to others for consumption.[54] As such, the court explicitly recognized that the purpose of the treaty protections was to provide a

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[50] Treaty Between the Cayuse, Umatilla & Walla Walla Tribes, Acting in Confederation, and the United States, art. 1, June 9, 1855, 12 Stat. 945 (1859).

[51] United States v. Washington, 506 F. Supp. 187, 205 (W.D. Wash. 1980) (Phase II) *vacated by* United States v. Washington, 759 F.2d 1353 (9th Cir. 1985).

[52] *Id.* at 203.

[53] *Washington*, 759 F.2d at 1370.

[54] Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 653 F. Supp. 1420, 1426 (W.D. Wis. 1987) (finding that, by dint of the 1837 and 1842 treaties, the Chippewa were "guaranteed the right to make a moderate living off the land and from the waters in and abutting the ceded territory and throughout that territory by engaging in hunting, fishing, and gathering as they had in the past and by consuming the fruits of that hunting, fishing, and gathering, or by trading the fruits

living for tribal fishers and their families.[55] By sheer force of logic, if fish in the ceded areas are allowed to become so contaminated as to be unfit for human consumption, the treaty-guaranteed rights of fishing and of "consuming the fruits of that . . . fishing" are greatly compromised.[56]

While the courts have not yet discussed the precise contours of state and federal obligations not to permit the depletion and contamination of treaty-protected fisheries,[57] the treaties—and the logical implications of the treaty language—remain. From the perspective of the Native peoples, such treaties constitute a sacred commitment; from the perspective of the United States, they are the supreme law of the land. Courts have usefully elaborated that treaty fishing rights cannot be balanced away by competing interests and concerns.[58] The federal trust responsibility, moreover, reinforces federal agencies' authority and obligation to give treaty rights their full effect.[59]

B. Treaty Obligations and Oregon's Water Quality Standards

How do the legal obligations that flow from treaties bear on Oregon's water quality standards? First, it is necessary to recognize that the proper baseline for analysis here is the level of fish consumption common to tribal members at the time of the treaties. This is the level of consumption the treaty makers intended to protect; this is the level consonant with the lifeways the treaties secured and with the rights they reserved.

As noted earlier, FCRs depicting contemporary tribal consumption are *suppressed* from these treaty-protected rates, and often fail to capture accurately traditional and subsistence prac-

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of that activity for goods they could use and consume in realizing that moderate living.") (emphasis added).

[55] *Id.*

[56] *Id.*

[57] Note that, since this presentation was delivered, the Ninth Circuit heard oral argument on this question. *Joint Status Report* at 1, United States v. Washington, No. C70-9213, Subproceeding No. 01-1 (Culverts) (W.D. Wash. Mar. 14, 2007).

[58] *See, e.g.*, Cappaert v. United States, 426 U.S. 128, 138-39 (1976); United States v. Adair, 723 F.2d 1394, 1413 (9th Cir. 1983); Swim v. Bergland, 696 F.2d 712, 717-18 (9th Cir. 1983); New Mexico v. Aamodt, 537 F.2d 1102, 1113 (10th Cir. 1976). *See also* United States v. Michigan, 471 F. Supp. 192, 281 (D.C. Mich. 1979) ("[T]he right of the . . . tribes to fish in ceded waters of the Great Lakes is . . . distinct from the rights and privileges held by non-Indians and may not be qualified by any action of the state . . . except as authorized by Congress.").

[59] *See supra* note 29 and accompanying text.

tices.[60]. If agencies such as the ODEQ and the EPA set and approve water quality standards that are not designed to support fish consumption at even these contemporary tribal consumption levels—let alone treaty-based levels—they run afoul of their duties under treaty law.[61] Agencies' reliance on risk avoidance in the form of fish consumption advisories, moreover, works precisely contrary to tribes' treaty-guaranteed rights to catch and consume fish.

Further, such agency actions may set in motion a downward spiral.[62] If fish are permitted by the ODEQ and the EPA to be contaminated to the point at which humans cannot eat more than two fish meals per month, many in Oregon may reduce their consumption to this level or lower in accordance with fish consumption advisories. If the ODEQ then undertakes future rounds of revisions to its standards, and keys these standards to new, even lower levels of consumption, it will thereby permit the fish to be even more contaminated, and so on.

As a consequence, tribal members are placed in an untenable position. If tribal members reduce their consumption in the face of widespread contamination, they may risk inadvertently undermining treaty rights. They may be deemed to have "voluntarily" abandoned consumption of fish at treaty-protected levels—irrespective of the anguish that might accompany their decision. Alternatively, if tribal members continue to eat fish—because they are loathe to give up their lifeways or because they are aware that non-Indian society has been quick to invoke a "use it or lose it" approach to diminish the scope of treaty rights—these tribal members may be sentenced to a toxic body burden that few humans can withstand. As Joseph Dupris, Kathleen Hill, and Professor Bill Rodgers have recently documented in *The Si'lailo Way*, non-Indians and their governments have over the years used a wide array of means to erode rather than honor the trea-

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[60] *See supra* notes 13-15 and accompanying text.

[61] In an analogous context, the U.S. Supreme Court has emphasized that the obligations imposed by the treaties must be understood in light of the treaty-secured baseline and not an artificially suppressed or altered baseline: "The impact of illegal regulation and of illegal exclusionary tactics by non-Indians in large measure accounts for the decline of the Indian fisheries during this century and renders that decline irrelevant to a determination of the fishing rights the Indians . . . secur[ed] by initialing the treaties . . . ." Wash. v. Wash. St. Comm'l Passenger Fishing Vessel Ass'n, 443 U.S. 658, 669 n.14 (1979) (citations omitted).

[62] NEJAC FISH CONSUMPTION REPORT, *supra* note 8 at 43-49.

ties.[63] Depletion and contamination are perhaps more subtle than the barrel of a gun, but they are no less threatening to treaty rights.

Finally, Oregon's proffered justifications for its adoption of the 17.5 grams/day FCR do not stand up in the face of treaty-protected rights. Recall that the ODEQ claimed that it rejected the Technical Advisory Committee recommendation in part because of "equity" concerns raised by the polluters.[64] But treaty rights, properly understood, are not susceptible to balancing away against even this sort of competing concern. And, note that the level playing field desired by the polluters could also have been secured if the ODEQ had adopted an FCR reflective of tribal consumption, appropriately determined, across the entirety of the state's waters.

III

PROTECTIONS AGAINST DISCRIMINATION: EQUAL PROTECTION AND CIVIL RIGHTS STATUTES

The U.S. Constitution and the civil rights statutes protect members of those groups that have historically been subjected to discrimination, Native Americans among them. The discrimination experienced by Native Americans, of course, has different contours than that experienced by other protected groups.[65] Professor James Anaya has identified two sorts of discrimination that may be relevant here: "exclusionary discrimination" and

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[63] *See generally* JOSEPH C. DUPRIS ET AL., THE SI'LAILO WAY: INDIANS, SALMON AND LAW ON THE COLUMBIA RIVER (2006).

[64] *See supra* notes 44-46 and accompanying text.

[65] Thus, the analysis that follows cannot be understood apart from the unique histories and circumstances relevant to tribes and their members. *See, e.g.*, Charles F. Wilkinson, *To Feel the Summer in the Spring: The Treaty Fishing Rights of the Wisconsin Chippewa*, 1991 WIS. L. REV. 375, 378 (1991). As Professor Wilkinson explains, "Indian issues veer away from other questions of race. The most cherished civil rights of Indian people are not based on equality of treatment under the Constitution and the general civil rights laws. These special Indian rights derive from different sources and take on different definitions." *Id.* These rights stem, among other things, from treaties recognizing special tribal prerogatives, including fishing and other rights; from a unique trust relationship with the United States; and from the principle of tribal sovereignty. *Id.* "One barrier that American Indians have long faced, then, is that public understanding of their distinctive issues comes slowly. Their special rights are complex and history-based . . . ." *Id.*

"cultural discrimination."[66] Exclusionary discrimination impedes group members from full realization of the benefits commonly enjoyed by members of the dominant or majority society.[67] Discrimination of this sort may involve excluding some groups from full participation in public life and decision making, even as they bear the brunt of decisions made without them.[68] Cultural discrimination works to suppress or obliterate cultural bonds, by stifling expression of a non-dominant group's culture.[69] Discrimination of this sort often involves efforts to assimilate the group, where abandonment of the group's cultural identity cannot fairly be said to be desired by that group.[70] While U.S. law is perhaps more familiar with discrimination of the first sort, both exclusionary and cultural discrimination arguably should inform the courts' analysis when Native people are among those affected by contamination.

A. Equal Protection

The Equal Protection Clause of the U.S. Constitution prohibits federal and state agencies from denying to "any person within [their] jurisdiction the equal protection of the laws."[71] A decision or provision that is neutral on its face may nonetheless violate the Equal Protection Clause; however, in these instances, the Clause has been interpreted to require a showing of intentional discrimination on the part of the governmental entity.[72] Although disparate impacts are therefore not sufficient in and of themselves to show discrimination, the fact that an agency's decision disproportionately burdens members of a protected group is among the factors courts consider relevant to a finding of discriminatory intent.[73] In practice, the inquiry is highly contextual, and courts may be especially troubled where it can be shown that

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66 S. James Anaya, *On Justifying Special Ethnic Group Rights: Comments on Pogge*, *in* ETHNICITY AND GROUP RIGHTS 227-29 (Ian Shapiro & Will Kymlicka eds., 1997).

67 *Id.* at 227.

68 *Id.*

69 *Id.* at 228-29.

70 *Id.*

71 U.S. CONST., amend. XIV, § 1. Although the Fourteenth Amendment applies specifically to state governmental action, the Due Process Clause of the Fifth Amendment is understood to extend this prohibition to federal governmental action as well. *See* Washington v. Davis, 426 U.S. 229 (1976).

72 Vill. of Arlington Heights v. Metro. Hous. Dev. Co., 429 U.S. 252, 270 (1977).

73 *Id.* at 266-68.

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the government acted in full awareness of stark disparities.[74] In addition to evidence of significant disparate impact, courts will consider, among other things, the "historical background [for] the decision," and whether there were procedural or substantive departures from normal practice.[75]

Although discriminatory intent cases are notoriously difficult to prove, groups burdened by environmental injustice arising from the unequal provision of government services have had some recent successes under equal protection theories. These successes have been realized particularly in instances in which the disparate impact was considerable and there was a history of governmental indifference to the impacts on those affected.[76]

B. Civil Rights Statutes

Similarly, Title VI of the Civil Rights Act of 1964 prohibits state environmental agencies, as recipients of federal funds, from administering their programs in a way that discriminates against "American Indians" and other groups.[77] Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin . . . be denied the benefits of, or be subjected to discrimination under any program . . . receiving Federal financial assistance."[78] Title VI envisions both judicial and administrative avenues for enforcement. The judicial route has been interpreted to be a narrow one, again likely restricted to cases of discriminatory intent.[79]

Under the EPA's implementing regulations, a showing of discriminatory intent is not necessary.[80] Those affected can bring an

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[74] Telephone Interview with Michael Daniel, attorney for the plaintiffs in *Miller v. City of Dallas* and *Lopez v. City of Dallas* (July 2006). See discussion *infra* note 77 and accompanying text.

[75] *Vill. of Arlington Heights*, 429 U.S. at 266-68 (enumerating a non-exhaustive list of factors to be considered by courts).

[76] *See, e.g.*, Michael Daniel, *Urging the Fourteenth Amendment to Improve Environmental Justice*, 30 HUMAN RIGHTS 15 (Fall 2003), *available at* http://www.abanet.org/irr/hr/fall03/fourtheenthamendment.html (discussing *Miller v. City of Dallas, Tex.*, 2002 WL 230834, at *4-6 (N.D. Tex. 2002), in which plaintiffs survived summary judgment following the district court's analysis of the *Arlington Heights* factors); *see also* Lopez v. City of Dallas, 2006 WL 1450520, at *8 (N.D. Tex. 2006).

[77] Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006); 40 C.F.R. § 7.25 (2006) (EPA regulations enumerating the groups to which Title VI's prohibition applies).

[78] 42 U.S.C. § 2000d.

[79] *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (finding no private right of action to enforce Title VI's implementing regulations prohibiting disparate impact).

[80] 40 C.F.R. § 7.35(b) (2006).

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administrative complaint before the EPA in instances where agencies' actions have a disparate impact—that is, a discriminatory effect.[81] Although the EPA, especially in this administration, has given a crabbed interpretation to the protections afforded via the complaint process,[82] the obligation remains.

C. Civil Rights Obligations and Oregon's Water Quality Standards

How might these civil rights protections play out in this context? In its water quality standards, Oregon has adopted a cancer risk level of 1 in 1,000,000.[83] As a matter of equality, a member of the fishing tribes could argue that she is entitled to no less protection than a comparable member of the general population—contrary to a claim that so-called "lower yet adequate" protection should suffice.[84] In order to ensure that water quality standards and criteria secure no less protection to tribal members, Oregon would need to account accurately for their exposure, among other things by adopting an FCR that is reflective of tribal consumption practices. This might be viewed as a claim for a remedy to exclusionary discrimination, inasmuch as tribal members are entitled to receive at least the same benefits and risk reduction services as members of the general population.

But there is a second analytical step. A member of the fishing tribes might further emphasize that according her no less protection than a member of the general population would require Oregon to adopt an FCR that is reflective of *unsuppressed*, treaty-secured tribal consumption rates, given that these rates are most consonant with cultural practices free from assimilative efforts. This might be viewed as a claim for a remedy to cultural discrimi-

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[81] The Confederated Tribes of the Umatilla Indian Reservation brought just such a complaint, challenging ODEQ's water quality standards. Office of Civil Rights, U.S. Envtl. Prot. Agency, Title VI Complaints Listing 2, http://www.epa.gov/ocr/docs/t6csmar07.pdf (rejecting Complaint No. 05R-05-R10 as "[u]ntimely") (last visited Apr. 4, 2007).

[82] *See, e.g.*, Clifford Rechtschaffen, *Using California's Anti-Discrimination Law to Remedy Environmental Injustice*, 2003 A.B.A. SEC. OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, *available at* http://www.abanet.org/irr/committees/environmental/newsletter/dec03/Civilrights.html (observing that "[a]dministrative complaints filed to enforce Title VI have languished for years at EPA").

[83] *Supra* note 44, at H-75.

[84] The reference to "lower yet adequate" protection here is to the Ninth Circuit's formulation in *Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1524 (9th Cir. 1995). For an extensive critique of this decision, see O'Neill, *Variable Justice*, *supra* note 4.

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nation, inasmuch as tribal members—like members of dominant cultural groups—are entitled to determine for themselves their cultural practices.

Importantly, neither Oregon nor the EPA can take refuge in the EPA's Ambient Water Quality Criteria Methodology, which suggests that states may permit a cancer risk level as high as 1 in 10,000 for "highly exposed populations."[85] Whereas this might be legally permissible where the highly exposed subpopulation does not comprise a protected class—for example, if children or low-income individuals made up this group—the *identity* of the highly exposed group may, as here, render this impermissible. The EPA cannot suspend operation of the Constitution by means of a guidance document; nor can it insulate its actions or those of the states from constitutional challenge.

When one considers the sizeable disparity in the level of protection provided by the ODEQ's standards to members of the fishing tribes, and takes this together with the fact that Oregon and the EPA clearly are aware that Native Americans are the ones left under-protected by the ODEQ's standards, it is possible that these agencies would be viewed as running afoul of this constitutional mandate. Additionally, the long history of these governments' role in eroding the treaty protections, including by means of permitting depletion and contamination of the fisheries, would likely weigh in a court's assessment. Finally, procedural and other irregularities, such as Oregon's failure to follow the recommendation of its own Technical Advisory Committee, might be influential.

In the end, whether or not the environmental laws would be viewed as preventing Oregon's choice, the Equal Protection Clause and the civil rights statutes may well prohibit Oregon's or the EPA's ability to sanction the provision of "lower yet adequate" protection to the Native Americans within Oregon's borders.

CONCLUSION

In closing, I would like to suggest that agencies labor under not only legal commitments, but moral commitments as well—commitments to ensure environmental justice, to fulfill their calling

[85] AWQC Methodology *supra* note 5, at 2-6 to 2-7.

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as trustee and steward, to honor the treaty promises, and to support tribal aspirations to restore to health the ecosystems on which their tribal harvests depend.

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