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RURAL ELECTRIC COOPERATIVES: A MODEL FOR INDIGENOUS PEOPLES' PERMANENT SOVEREIGNTY OVER THEIR NATURAL RESOURCES

by *Melissa A. Jamison*[†]

I. INTRODUCTION

After enduring centuries of a unique form of colonization, the 300-500 million indigenous peoples of the world continue to live as marginalized peoples.¹ One of the most significant and enduring aspects of their marginalization is the deprivation of indigenous control over their land and natural resources. This disruption adversely affects a fundamental element of their identity:

[T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.²

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1. JASMINE BRUCE, *INDIGENOUS YOUTH*, 83-84 (2003), *available at* http://www.iyp.oxfam.org/campaign/documents/youth_COMMISSION_report/Indigenous_Youth.pdf (last visited Mar. 22, 2005) (showing that indigenous people are approximately 5% of the total global population).

2. *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (2001), *available at* http://www.corteidh.or.cr/seriec/pdf/seriec_79_esp.pdf (last visited Mar. 16, 2005).

Maintaining this integral relationship with their land requires several components, including the right of indigenous peoples to control their natural resources. Despite its importance to their cultures, indigenous efforts to control their land and natural resources often face a significant obstacle: the principle of state sovereignty.³ Admittedly, this principle is important for states, and circumstances often justify assertion of sovereignty rights. For instance, governments may need to assert their sovereignty to prevent other states from invading their territory. Similarly, the exercise of their sovereign power enables states to protect their citizens against threats such as exploitation by foreign investors.⁴

Unfortunately, states have not limited their reliance on sovereignty to protection against such outside threats. Instead, they have extended the principle to justify their suppression of internal dissension, including that arising out of the paramount interests of indigenous peoples. Under claims of sovereignty, states assert an exclusive right to control the natural resources within their boundaries, without regard for indigenous interests.⁵ In fact, states often consider indigenous land claims to be a serious threat against their sovereignty and respond to them with measures having disastrous results.

International law has responded to this over-reliance on state sovereignty by increasingly limiting the scope of the principle. By imposing obligations such as human rights norms on states, international law is moving toward a better balance between state sovereignty and other interests internal to the state.⁶ However, these changes have been gradual, and indigenous peoples remain in a position of alienation and denial of their right to control their land and natural resources. This article proposes a unique solution: applying the system of rural electric cooperatives (RECs) in the United States as a model for protecting the rights of indigenous peoples, especially their right to control their natural resources.

To understand how this model could apply, parts II and III provide an overview of indigenous peoples. Part II discusses the history of indigenous peoples and the importance of their relationship with their land and natural resources. Part III explores the basis under international law for asserting the right of indigenous peoples to control their natural resources, a right known as

3. HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 19 (rev. ed. 1996).

4. Erica-Irene A. Daes, *Indigenous Peoples and Their Relationship to Land: Final Working Paper Prepared by the Special Rapporteur*, U.N. Sub-Commission on the Promotion and Protection of Human Rights, 53d Sess., Provisional Agenda Item 5, at ¶ 67, U.N. Doc. E/CN.4/Sub.2/2001/21 (2001) [hereinafter *2001 Final Working Paper*]; see also NICO SCHRIJVER, *SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES* 22-23 (1997).

5. SCHRIJVER, *supra* note 4, at 22-23.

6. HANNUM, *supra* note 3, at 19-20.

permanent sovereignty. Setting up the model of rural electric cooperatives, part IV describes the history and development of the cooperatives in the United States. Finally, part V proposes a transfer of the REC model to ensure the indigenous right of permanent sovereignty.

II. THE FUNDAMENTAL RELATIONSHIP BETWEEN INDIGENOUS PEOPLES AND THEIR LAND AND NATURAL RESOURCES

Developing a system for ensuring the rights of indigenous peoples first requires an understanding of the fundamental connection between the peoples and their land and natural resources. This provides the context for considering and properly applying any model for protecting indigenous rights. To that end, this section considers the essential relationship between indigenous peoples and their lands and natural resources, both through a brief description of indigenous peoples and by discussing two countries as examples. A discussion of the broader history of indigenous peoples further establishes the ongoing interference in their integral relationship with their land and natural resources.

A. Defining Indigenous Peoples

As a preliminary matter, establishing an understanding about which groups qualify as indigenous peoples is important. International law has yet to adopt a universally accepted definition. In fact, indigenous peoples often object to any such efforts out of their desire to retain the important right of self-definition.⁷ While respecting that right, a definition will be helpful in this article to the extent that it shows some of the unique aspects shared by indigenous peoples. Accordingly, this article refers to indigenous peoples as including those peoples who:

[O]n account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.⁸

7. See, e.g., *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the Concept of "Indigenous People,"* Sub Committee on Prevention of Discrimination and Protection of Minorities, 14th Sess., at ¶¶ 9, 35–36, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996) [hereinafter *1996 Working Paper*]; see also HANNUM, *supra* note 3, at 88–91; Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 110–15 (1999).

8. International Labour Organization [ILO] Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382, art. 1(1)(b), (entered into force Sep. 5, 1991) [hereinafter ILO Conv. 169].

B. The Deprivation of their Land and Resources: Two Country Examples

As this definition suggests, indigenous peoples around the world have faced similar experiences of colonization. However, all indigenous peoples have unique circumstances. The following discussion, which considers indigenous peoples in Nigeria and Canada, demonstrates the diversity of indigenous peoples, both in their history and in their current relationships with their respective governments. The uniqueness of each indigenous peoples is important for considering how to apply the proposed cooperative model, as certain aspects of a particular people may either limit or prevent its application.

1. Nigeria

The most populous nation in Africa is Nigeria, with approximately 120 million people.⁹ Perhaps because of this large size, Nigeria has an extremely diverse culture representing most native races of Africa. Between 250 and 400 ethnic groups descend from these native races, bringing a variety of cultures and political structures to modern Nigeria.¹⁰ As with many other countries in Africa, the modern state of Nigeria is largely a result of European colonialism. That colonial history created the circumstances resulting in the mistreatment of certain indigenous peoples, such as the Ogoni, which continues to present day.

a. History of Nigeria and Its Peoples

The earliest native occupants to settle into the Niger Delta region arrived as early as three thousand years ago.¹¹ From the very beginning, the region developed as a multitude of empires divided along ethnic lines.¹² As a result, the inhabitants of the region lived separately in their own unique traditions, rather than through one peoples or culture.¹³ Some ethnic groups did dominate various regions of the Niger Delta. For example, beginning in the 9th Century and continuing for more than a millenium, the Eastern region developed complex political and social systems under the Kanem-Borno and Igbo empires.¹⁴ The

9. *History and Profile: Nigeria*, CONSULATE GENERAL OF NIGERIA: NEW YORK, at http://www.nigeria-consulate-ny.org/This%20is%20Nigeria_files/m_history_people.htm (last visited Mar. 22, 2005) [hereinafter CONSULATE].

10. FEDERAL RESEARCH DIVISION, LIBRARY OF CONGRESS, NIGERIA: A COUNTRY STUDY ch.1 (Helen Chapin Metz ed., 1992), available at <http://lcweb2.loc.gov/frd/cs/ngtoc.html#ng0050> (last visited Mar. 1, 2005) [hereinafter NIGERIA: A COUNTRY STUDY]; see also CONSULATE, *supra* note 9 (noting that despite this large diversity, most of the ethnic groups are small, and four ethnic groups constitute sixty percent of the population).

11. CONSULATE, *supra* note 9, at 1; see also NIGERIA: A COUNTRY STUDY, *supra* note 10, ch.1.

12. CONSULATE, *supra* note 9.

13. See NIGERIA: A COUNTRY STUDY, *supra* note 10, ch.1.

14. See CONSULATE, *supra* note 9; see also NIGERIA: A COUNTRY STUDY, *supra* note 10, ch. 1; *Federal Republic of Nigeria*, CARTAGE.ORG, at

Western region flourished during a similar period under the Hausa-Fulani and the Yoruba empires.¹⁵ Though these empires dominated in their particular regions, other regions supported numerous cultures without centralized monarchies.¹⁶

The groundwork for changing this multitude of empires began with the first European contact, when the Portuguese came to trade with and to proselytize the native inhabitants.¹⁷ By the 16th Century, Africa attracted additional European powers, including the Netherlands, France, and Great Britain.¹⁸ All came to serve one primary interest: the slave trade.¹⁹ Great Britain soon joined Portugal as the dominant Europeans in the Niger delta.²⁰

Two events during the 19th Century brought Great Britain into more significant involvement in the region. First, an Islamic holy war between the years of 1804-08 led Great Britain to fight against the Niger Muslims.²¹ Then, after declaring the slave trade to be illegal in 1807, the British also began to intervene, in order to bring an end to that practice in the Niger Delta.²² Eventually, this intervention resulted in a more firm entrenchment of the British in the region, as shown by their designation of the Lagos Island Colony in 1861.²³

British imperialist ambitions soon began to surface, especially after their European rivals expanded further into Africa.²⁴ Great Britain began to enter into treaties with native chiefs. This led to the establishment of the British Oil Rivers Protectorate in southern Nigeria.²⁵ The primary purposes for establishing the Protectorate were to control trade and to protect the Lagos Colony.²⁶ British domination of the region became complete when Great Britain proclaimed a new Protectorate of Northern Nigeria in 1900.²⁷

<http://www.cartage.org.lb/en/themes/GeogHist/histories/history/hiscountries/N/nigeria.html> (last visited March 3, 2005) [hereinafter CARTAGE].

15. CARTAGE, *supra* note 14; *see also* CONSULATE, *supra* note 9 (noting that the strength of the Yoruba prevailed during the sixteenth and seventeenth centuries).

16. CONSULATE, *supra* note 9.

17. NIGERIA: A COUNTRY STUDY, *supra* note 10, ch.1.

18. *Id.*

19. *Id.*

20. *See generally* CARTAGE, *supra* note 14.

21. NIGERIA: A COUNTRY STUDY, *supra* note 10, ch.1.

22. *Id.*

23. CONSULATE, *supra* note 9.

24. NIGERIA: A COUNTRY STUDY, *supra* note 10, ch.1.

25. CARTAGE, *supra* note 14 (noting that Great Britain renamed it the Niger Coast Protectorate in 1893 and, finally, the Protectorate of Southern Nigeria in 1900).

26. *See* NIGERIA: A COUNTRY STUDY, *supra* note 10, ch.1.

27. CARTAGE, *supra* note 14.

Initially, the two Protectorates were significant because their creation established British sovereignty over the territory, vis-à-vis other European powers. However, their existence also had another effect: they brought all of the Niger inhabitants under one central government. The centralization process became complete in 1914, when Great Britain merged the administration of the two Protectorates into the Colony and Protectorate of Nigeria.²⁸

Though Great Britain consolidated its control of the Nigerian peoples, they continued to exploit regional cultural divisions by grouping the Colony along regional and ethnic lines.²⁹ Despite this imperial effort to maintain power by reinforcing internal divisions among the colonized peoples, the people of Nigeria finally united to demand self-government and independence from colonial control. As early as the 1920s, Nigerians put aside their cultural differences to fight for independence.³⁰ Their struggle escalated after World War II, resulting in the initial successes of the Constitution in 1947 and of an evolving federalization.³¹ On October 1, 1960, Nigeria gained independence.³²

However, with independence came renewed internal divisiveness. Numerous ethnic, religious, and political tensions fractured the country.³³ Though they successfully formed a Republic in 1963, the internal pressure continued to increase. In 1967, the divisions escalated and civil war broke out.³⁴ When the war ended two and a half years later, Nigeria finally appeared to be on the road toward unification and increasing prosperity.

In the early 1970s, the country began to realize the economic benefits of its large oil reserves, becoming the world's fifth largest oil producer.³⁵ Some leaders attempted to translate this economic success into countrywide development programs, targeting such concerns as agricultural productivity.³⁶ Such progress promised to unite Nigeria. That promise ended in the early 1980s, when the decrease in the oil market brought more economic instability and political unrest.³⁷ Several *coups d'état* took place over the next decade and a half, intermingled with periods of military rule.³⁸ The increasing structural division of the state was one sign of cultural tensions: the federal structure,

28. *Id.*

29. *See id.*

30. NIGERIA: A COUNTRY STUDY, *supra* note 10, ch.1.

31. CARTAGE, *supra* note 14.

32. NIGERIA: A COUNTRY STUDY, *supra* note 10, ch.1.

33. *See* CARTAGE, *supra* note 14; *see also* NIGERIA: A COUNTRY STUDY, *supra* note 10, ch.1.

34. NIGERIA: A COUNTRY STUDY, *supra* note 10, at ch.1.

35. CARTAGE, *supra* note 14; *see also* NIGERIA: A COUNTRY STUDY, *supra* note 10, ch.1.

36. CARTAGE, *supra* note 14.

37. *Id.*

38. CARTAGE, *supra* note 14.

which began with three regional governments, continued to fragment along racial lines, resulting in a federation with thirty-six states.³⁹

b. Hostility Toward the Ogoni

Another sign of the decreasing unity was the negative impact of government policies on particular groups. The plight of one such group, the Ogoni, gained international attention in 1995. The Ogoni are an indigenous people of southern Nigeria who have inhabited their territory for approximately 500 years.⁴⁰ Their territory, known as Ogoniland, is roughly 100,000 square kilometers and is the home of approximately 500,000 Ogoni members.⁴¹

Ogoniland became a source of special tension in Nigeria because of the oil in the territory – it was the site of the first oil discovery in Nigeria in 1958.⁴² Since then, the Ogoni have suffered significant incursions onto their lands in an effort by the government and private corporations to profit from the oil reserves. The Nigerian government has supported oil companies in overrunning the territory to extract the oil, without any consultation of or approval from the Ogoni people.⁴³

The impact of this exploitative process⁴⁴ has been devastating for the Ogoni and other indigenous peoples in the area. These peoples have faced terrible loss, beginning with government actions to strip them of their land, without consultation, compensation, or consent.⁴⁵ The government continued to injure them by authorizing corporate extraction policies, resulting in significant pollution of their remaining land. For example, oil spills and gas flares contaminated the drinking water, fishing grounds, farmlands, and air. Evidence of this pollution is overwhelming. The CIA estimates that oil spills resulted in the dumping of two and one-half million barrels of oil into the Niger Delta between the years of 1986 and 1996 – an amount that is equivalent to one Exxon

39. CONSULATE, *supra* note 9.

40. *Ogoni*, UNREPRESENTED NATIONS AND PEOPLES ORGANISATION, at <http://www.unpo.org/member.php?arg=43> (last visited Mar. 22, 2004) [hereinafter UNPO].

41. LEGBORSI SARO PYAGBARA, THE OGORI OF NIGERIA: OIL AND EXPLOITATION, available at <http://www.minorityrights.org/admin/Download/pdf/NigeriaMicro.pdf> (last visited Mar. 22, 2005); see also Paul Lewis, *Blood and Oil: A Special Report: After Nigeria Represses, Shell Defends Its Record*, N.Y. TIMES, Feb. 13, 1996, at A1.

42. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* ¶ 30, 49, ACHPR/COMM/A044/1 (March 14, 1996) [hereinafter *SERAC Communication*] (noting that the government of Nigeria did not contest the facts as presented in the Communication).

43. *Id.* ¶ 4.

44. This article uses forms of “exploitation” to refer to the development of natural resources. However, the word can also mean abuse or unfair treatment. Though both may accurately describe the situation faced by indigenous peoples, this article intends the application of the first meaning.

45. PYAGBARA, *supra* note 41.

Valdez disaster per year during that ten-year period.⁴⁶ By their own admission, oil companies spilled at least 100,000 barrels in 1997 and 1998 alone. Gas flares, which have burned off eight million cubic feet of natural gas, further contribute to the environmental pollution and to global warming.

These government and corporate policies have devastated the Ogoni and their land. The most obvious harm is the destruction of the land itself. The Ogoni rely on their land to provide for their physical needs, but they also look to it as the source of their culture: their connection with the land is so close that the Ogoni worship the land as a god.⁴⁷ Beyond the harm to their physical and cultural reliance on the land are additional harms to the Ogoni people. According to the CIA study, the continuing pollution of their land has resulted in increasing poverty and declining quality of life for the Niger inhabitants.⁴⁸ More specifically, the Ogoni suffer from insufficiencies in infrastructure, healthcare, and education.⁴⁹

Perhaps the most egregious aspect of the actions of the government and extractive corporations is that they have not returned any of the monies to the Ogoni, even though they are making immense profits.⁵⁰ For example, one company, Shell Nigeria, has extracted oil worth more than \$30 billion from Ogoniland since 1958.⁵¹ As a result, local indigenous peoples are unable to invest any of the profits into their local communities, even to compensate for the harm of the extraction process to those communities.⁵² In addition, the Ogoni suffer the depreciation of the value of their land, as their resources are exported without any return of the profits to the community. Combined with the original deprivation of land, this extraction of their natural resources leaves the Ogoni economically incapable of building an infrastructure to provide for, among other things, healthcare and education for their children.

In response to these continuing threats to their society, the Ogoni formed a resistance, the Movement for the Survival of the Ogoni People (MOSOP).⁵³ At the same time, however, the government was forcefully suppressing all political opposition.⁵⁴ Despite this policy, MOSOP tried to negotiate a common

46. Douglas Farah, *Nigeria's Oil Exploitation Leaves Delta Poisoned, Poor*, WASH. POST, Mar. 18, 2001, at A22.

47. PYAGBARA, *supra* note 41.

48. Farah, *supra* note 46.

49. PYAGBARA, *supra* note 41.

50. Mas Achmad Santosa, *The Right to a Healthy Environment*, in CIRCLE OF RIGHTS: ECONOMIC, SOCIAL & CULTURAL RIGHTS ACTIVISM: A TRAINING MANUAL 286, 293 (2000); see also PYAGBARA, *supra* note 41, at 3; Farah, *supra* note 46.

51. Santosa, *supra* note 50, at 293.

52. PYAGBARA, *supra* note 41.

53. UNPO, *supra* note 40.

54. CARTAGE, *supra* note 14.

resolution with the government.⁵⁵ The government responded severely, sending security forces to attack Ogoni villages, burning and destroying homes and killing some villagers.⁵⁶ In the 1990s, after their diplomatic efforts failed, MOSOP began to retaliate by sabotaging the oilfields.⁵⁷ Government abuse further escalated, coming to a head in 1995 when military “security” forces physically subdued MOSOP and executed nine of their leaders for the oilfield attacks.⁵⁸

Following the executions, international outrage spurred the Nigerian government to reform their policies toward the Ogoni resistance. Though their official policy toward the Ogoni has since changed, the government forces have not altered their practices. The African Commission on Human and Peoples’ Rights found that abuse continues to be a reality.⁵⁹ According to the Commission, these abuses include continued exploitation by the Nigerian government and its corporate partners of the oil resources of Ogoniland, in violation of the right of the Ogoni to “freely dispose of their wealth and natural resources.”⁶⁰

2. Canada: An Evolving Relationship with Its Indigenous Peoples

The indigenous peoples of Canada have a history that in many ways parallels that of the Ogoni of Nigeria. One similarity is that upon arrival, European settlers began exploiting their territory. However, an important difference is that Canada did not endure anything similar to the recent decolonization that Nigeria experienced in the 1960s. Perhaps more important than these historical comparisons is the current status of indigenous peoples in Canada.

*a. History of Indigenous Peoples in Canada*⁶¹

The first contact between European explorers and the indigenous peoples of Canada occurred as early as the 1400s.⁶² The relationship between these groups

55. PYAGBARA, *supra* note 41.

56. *SERAC Communication*, *supra* note 42, ¶¶ 7-9; *see also* PYAGBARA, *supra* note 41.

57. Lewis, *supra* note 41.

58. PYAGBARA, *supra* note 41; *see also* Lewis, *supra* note 41.

59. *See SERAC Communication*, *supra* note 42 (noting that misconduct has continued, with criticisms of police misconduct arising through 2004); *see, e.g., Ogoni: Shell and Police Instigate Violence in Ogoni*, UNREPRESENTED NATIONS AND PEOPLES ORGANISATION, at http://www.unpo.org/news_detail.php?arg=43&par=1162 (last visited Mar. 22, 2005).

60. *SERAC Communication*, *supra* note 42, ¶ 55 (citing to African (Banjul) Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (entered into force Oct. 21, 1986), art. 21(1)).

61. In addition to the phrase “indigenous peoples,” this article may also incorporate the terms used in Canada to refer to their indigenous peoples, including Aboriginal peoples and First Nations.

initially remained informal. As more settlers began to arrive in the 18th Century, Great Britain sought to preempt the competing claims of other European powers by establishing its own sovereignty in the territory. One method the British pursued was formalizing its relationship with the indigenous peoples.⁶³

The Royal Proclamation of 1763⁶⁴ established a formal relationship with the indigenous peoples in the "Indian Provisions," through which Great Britain claimed sovereignty over the lands of the indigenous peoples. However, the Proclamation also reserved the lands "for the use of the said Indians," thereby retaining a right of Aboriginal ownership and authority over the territories.⁶⁵ Only the Crown could attain ownership of the Aboriginal lands and then only through treaty negotiations.⁶⁶ Thus, the British government recognized indigenous ownership of the land and natural resources and only asserted its own sovereignty vis-à-vis other European powers.

Despite its apparent respect for the indigenous peoples of Canada, a significant limitation of the Proclamation later became apparent: its provisions covered only those territories within British control at the time of its issuance, and the government did not extend its protections as it added new territories.⁶⁷ This temporal and geographic limitation of the Proclamation excluded a significant amount of territory, including the region now known as British Columbia.

62. See INDIAN AND NORTHERN AFFAIRS CANADA, REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES 1, § 5, at 1 (1996), available at http://www.ainc-inac.gc.ca/ch/rcap/sg/cg_e.html (last visited Mar. 22, 2005) [hereinafter REPORT OF THE ROYAL COMMISSION]. As stated in the report, the mandate of the Royal Commission on Aboriginal Peoples, established on August 26, 1991, was comprehensive:

The Commission of Inquiry should investigate the evolution of the relationship among aboriginal peoples . . . , the Canadian government, and Canadian society as a whole. It should propose specific solutions, rooted in domestic and international experience, to the problems which have plagued those relationships and which confront aboriginal peoples today. The Commission should examine all issues which it deems to be relevant to any or all of the aboriginal peoples of Canada.

Id. § 1, at 23.

63. A primary tool in this effort was the ROYAL PROCLAMATION OF 1763, available at <http://www.gov.ns.ca/abor/pubs/1763proc.PDF> [hereinafter ROYAL PROCLAMATION]; see also *First Nations Historical Timeline*, BRITISH COLUMBIA TEACHERS' FEDERATION, at <http://www.bctf.ca/social/AboriginalEd/timeline.html> (last visited Mar. 22, 2005) [hereinafter *Historical Timeline*].

64. ROYAL PROCLAMATION, *supra* note 63.

65. *Id.*

66. *Id.*; see also *Historical Timeline*, *supra* note 63.

67. The Proclamation applied to the territories of Quebec, East Florida, West Florida, and Grenada. ROYAL PROCLAMATION, *supra* note 63; see also *Calder v. British Columbia*, [1973] S.C.R. 313, 323, 325.

The territory of British Columbia did not experience migration until late in the eighteenth and nineteenth centuries. Even at that point, European settlers had little effect on the 40,000–50,000 indigenous peoples in the territory.⁶⁸ Though Great Britain did establish its sovereignty by formally settling the colony of Vancouver Island in 1849, the number of settlers in the region remained insignificant. That changed with the gold rush of the 1850s, during which more than 30,000 Europeans settled into the territory. With such a growing presence of its subjects in the region, Great Britain established the colony of British Columbia in 1858.⁶⁹

The increasing British presence in the region soon began to affect the indigenous peoples. Since the geographic and temporal limitations of the Royal Proclamation did not extend to the indigenous peoples in the new colony, the relationship between the British and the indigenous peoples was informal. Initially, the colony adopted an official policy that was similar to the protections of the Proclamation, recognizing Aboriginal title and undertaking to enter into treaties with the indigenous peoples.⁷⁰ This official policy never developed into reality, for the colonial government was unable to pay the compensation that treaties usually required. Growing impatient with the government inaction, the settlers ignored the rights of the indigenous peoples and began to settle the indigenous land.⁷¹

The relationship between the government and the indigenous peoples worsened in 1871, when British Columbia joined the newly created confederation of Canada.⁷² At that time, the federal government assumed responsibility for the indigenous peoples, but the provincial government of British Columbia retained control of all land and resources within its territory, including those of the indigenous peoples.⁷³ By separating the legal responsibility for the indigenous peoples from the legal right to the land and resources, British Columbia could decide land issues without regard for its indigenous inhabitants. This reality soon surfaced when the provincial leaders deviated from previous practice, and officially denied indigenous rights to the land or resources.⁷⁴ With this denial of legal rights to the land, British Columbia

68. *Canadian Confederation: Provinces and Territories: British Columbia*, LIBRARY AND ARCHIVES CANADA, at <http://www.collectionscanada.ca/confederation/h18-2185-e.html> (last visited Mar. 22, 2005) [hereinafter *British Columbia*].

69. *Id.*

70. MARY C. HURLEY, *THE NISGA' A FINAL AGREEMENT 2* (Library of Parliament, Pub. No. PRB 99-2E) (2002); see also ROYAL PROCLAMATION, *supra* note 63.

71. See REPORT OF THE ROYAL COMMISSION, *supra* note 62, § 6, at 10-11.

72. *British Columbia*, *supra* note 68 (noting that the British North America Act provided the terms for the creation of Canada four years earlier, in 1867).

73. HURLEY, *supra* note 70, at 3.

74. *Id.* at 2-3.

faced no legal impediment when it began removing the indigenous peoples to small reserves.⁷⁵

The federal Canadian Government offered no protection against such provincial policies. Instead, the central government joined the provinces by engaging in their own discriminatory practices. For example, the governments justified the establishment of the McKenna-McBride Commission (the Commission) as a method for resolving differences between the indigenous peoples and the provincial governments. In reality, the Commission acted only to negotiate the size of the reserves to which the government removed the indigenous peoples.⁷⁶ By participating in the activities of the Commission, the federal government contributed to the efforts by the provincial governments to strip the indigenous peoples of their native lands and natural resources.

The federal government also undertook its own autonomous efforts to undermine the culture of the indigenous peoples, especially through the provisions of its Indian Acts (the Acts).⁷⁷ Canada promulgated the Acts to use as the legal tool in its effort to "civilize" its indigenous peoples.⁷⁸ Accordingly, the Acts included several policies aimed at assimilation. For example, the Indian Acts disenfranchised all indigenous peoples, except those who submitted to "voluntary enfranchisement" by disavowing their native heritage.⁷⁹ By doing so, persons qualified for full legal protection because the law no longer considered them indigenous. The Indian Acts further attacked the indigenous peoples of Canada by formally adopting the practice of removing them from their lands and placing them on reserves, despite preexisting treaties to the contrary.⁸⁰ Challenges to such removal were illegal under the Acts, which prohibited organization and fundraising related to indigenous land claims.⁸¹ A third way in which the Indian Acts worked to assimilate the indigenous peoples was by criminalizing their participation in significant cultural traditions, including the *potlatch*, traditional attire, and dances.⁸²

75. *Id.* at 3.

76. *Id.*

77. See REPORT OF THE ROYAL COMMISSION, *supra* note 62, § 6, at 48-52.

78. *Id.* § 6, at 50.

79. *Id.* § 6, at 11.

80. *Id.* § 6, at 46.

81. *Fact Sheet: The Nisga'a Treaty*, INDIAN AND NORTHERN AFFAIRS CANADA, at http://www.ainc-inac.gc.ca/pr/info/nit_e.html (last visited Mar. 22, 2005) [hereinafter *Treaty Fact Sheet*].

82. REPORT OF THE ROYAL COMMISSION, *supra* note 62, § 6, at 53. The *potlatch* is "a ceremonial feast . . . at which the host distributed his possessions as gifts to his guests." The feasts included several days of singing, dancing, praying, and other ceremonies. *Links: Potlatch*, NATIVE AMERICAN ASSOCIATION OF GERMANY E.V. (NAAOG), at <http://www.naaog.de/englisch/glossary.html> (last visited Mar. 22, 2005).

Canada adopted an even harsher policy through collaboration with religious educational institutions. The goal of this joint venture was to raise a new generation untainted by the indigenous culture. To that end, the government sent indigenous children to boarding schools, which forbade any semblance of their indigenous culture and trained them according to the European lifestyle. The government justified the practice by calling indigenous families a “deleterious” atmosphere from which they had to remove the children to improve their views and habits.⁸³

Despite such justifications, the schools provided little advantage for the children. Rather, they had to attend school in poorly designed buildings, suffer through unsanitary conditions, and endure physical and other abuses. In addition, the children received a grossly insufficient education, especially when compared to schools for non-Aboriginal children. However, these abuses could not compare to the trauma of being removed from their families and denied “their identity through attacks on their language and spiritual beliefs.”⁸⁴ The government was bold in its efforts, blatantly declaring its assimilationist purpose of “tak[ing] over the parenting of Aboriginal children so that they ‘could take their place anywhere among the people of Canada.’”⁸⁵ Had they been successful, the policies and practices under the Indian Acts would have effectively removed all aspects of indigenous culture from the land and from the people of Canada.

b. A Process of Restoring Indigenous Rights: Negotiations Based on the Right of Aboriginal Title

Canada has made continual efforts in recent decades to overcome and compensate for its inexcusable history. One primary method in its pursuit of reconciliation is the negotiation of modern-day treaties. The Nisga’a, an indigenous people of the Nass River Valley in British Columbia, provide a successful example of the outcome of this process.

i. The Nisga’a

The Nisga’a, with approximately 5,500 members today, are indigenous to Northwestern British Columbia.⁸⁶ Though they share the history of injustice at the hands of the Canadian and British Columbian governments, their century-long struggle to realize their rights also sets them apart from many other indigenous peoples.⁸⁷ The recent success of their efforts provides a striking contrast to the situation of the Ogoni in Nigeria. Despite that success, however,

83. REPORT OF THE ROYAL COMMISSION, *supra* note 62, § 6, at 57.

84. *Id.* § 6, at 58.

85. *Id.* § 6, at 57.

86. *Treaty Fact Sheet*, *supra* note 81.

87. HURLEY, *supra* note 70, at 1.

the Nisga'a story also shows the enduring threat to the rights of indigenous peoples regarding their land and natural resources.

a. Nisga'a History

When Europeans first settled into Nisga'a territory in the 1860s,⁸⁸ they immediately recognized the Nisga'a culture as both advanced and distinctive. Observers noted the unique aspects of the Nisga'a society, including their organization along kinship lines into four clans – the Killer Whale, Raven, Wolf, and Eagle.⁸⁹ The settlers also considered the Nisga'a code of laws, known as *Ayuukhl Nisga'a*, to be very noteworthy. The *Ayuukhl Nisga'a* was remarkable because of its complexity and breadth, which covered matters as diverse as education, marriage and divorce, ownership and succession of land, trade, restitution, membership in the Nisga'a tribe, appointment of chieftains and the matriarch, and war and peace.⁹⁰

The initial admiration of these aspects of Nisga'a culture did not instill respect for their rights, and settlers invaded their territory in vast numbers. The Nisga'a acted quickly, sending their first representatives in protest to the provincial government in 1881.⁹¹ When British Columbia failed to respond to that effort, or a subsequent effort in 1885, the Nisga'a turned to other methods of asserting their claim.⁹² As with the efforts of MOSOP on behalf of the Ogoni, the Nisga'a tactics were more forceful, and perhaps even hostile. For example, in 1886 they forcefully refused access within their territory to the provincial survey crews. However, they also continued the diplomatic path by organizing their own land claims process. Through this process, they again attempted to negotiate issues of land and self-government in 1887. After pursuing a public inquiry on these issues in 1887-88, both the provincial and the federal governments dismissed the Nisga'a claim.⁹³

In fact, government oppression began to escalate as the central and provincial governments both grew more determined to complete a reserve land system for all indigenous peoples.⁹⁴ Though necessary for several tribes whose

88. *Id.* at 3 (noting that the first settlers were missionaries, but fishers, farmers, and loggers soon followed).

89. *Treaty Fact Sheet*, *supra* note 81.

90. Lisa Dufraimont, *Continuity and Modification of Aboriginal Rights in the Nisga'a Treaty*, 35 U. BRIT. COLUM. L. REV. 455, 466 (2002) (referring to one description of the *Ayuukhl Nisga'a* as "an ancient code of laws that will stand comparison to any modern constitution or declaration of statehood and nationality").

91. HURLEY, *supra* note 70, at 3.

92. *Id.* at 3-4.

93. *Id.*

94. Douglas Sanders, "We Intend to Live Here Forever": *A Primer on the Nisga'a Treaty*, 33 U. BRIT. COLUM. L. REV. 103, 106 (1999).

lands had not been reserved, including the Nisga'a, the process was faulty because the government finalized the reserves without consulting the indigenous peoples.⁹⁵ In order to influence the decision regarding their land, the Nisga'a formed a political organization in 1907.⁹⁶ This Land Committee acted hastily, petitioning the Judicial Committee of the British Privy Council in 1913.⁹⁷ The Nisga'a asserted rights under the Royal Proclamation, including rights to compensation for surrendered lands and to reservation of other territories for their traditional use.⁹⁸

The government never responded to the Nisga'a Petition.⁹⁹ Instead, the McKenna-McBride Commission handled the Nisga'a land issue in 1924. The Commission granted the Nisga'a only seventy-six square kilometers of reserve land.¹⁰⁰ Though the reserve land was within their original territory, it was a minuscule portion of the 25,000 square kilometers that originally formed the Nisga'a homeland.¹⁰¹ After designating this small territory as the Nisga'a reserve, the Indian Acts foreclosed further consideration of the land issue by criminalizing land claims-related political activity.¹⁰² The government did not lift this prohibition until 1951. Faced with such drastic government opposition to their efforts, the Nisga'a claim lay dormant for twenty-five years.

b. Gaining Legal Victory: From the Promise of Calder v. British Columbia¹⁰³ to the Nisga'a Final Agreement

The Nisga'a revived their land claim in 1949. At that time, Frank Calder, the son of the original founder of the Land Committee, won an election to the British Columbia legislature.¹⁰⁴ Relying on his position, Calder revived the discussion of indigenous issues by bringing it before the legislature, and by renewing the Land Committee and the Nisga'a Tribal Council. He also sued the government of British Columbia, on behalf of the Nisga'a, for violation of their

95. HURLEY, *supra* note 70, at 4.

96. *Id.*; *see also id.* at 11 (noting that other sources indicate the Committee may have been formed as early as 1890); *Treaty Fact Sheet*, *supra* note 81.

97. *Petition to His Majesty's Privy Council, In the Matter of the Territory of the Nisga'a Nation or Tribe of Indians*, GOV'T OF CAN., May 21, 1913, available at <http://www.schoolnet.ca/aboriginal/nisga1/petit-e.html> (last visited Mar. 18, 2005) [hereinafter Nisga'a Petition]; *see also* HURLEY, *supra* note 70, at 4.

98. HURLEY, *supra* note 70, at 4.

99. Sanders, *supra* note 94, at 106.

100. HURLEY, *supra* note 70, at 5.

101. *Irwin Warns of Problems if Nisga'a Deal Falls Through*, CAN. PRESS NEWSWIRE, Jan. 28, 1996 (on file with author) [hereinafter *Irwin Warns of Problems*].

102. HURLEY, *supra* note 70, at 5.

103. [1973] S.C.R. 313.

104. HURLEY, *supra* note 70, at 5.

right of Aboriginal title.¹⁰⁵ This latter effort resulted in the first major victory for Nisga'a land claims: *Calder v. British Columbia*. Eventually, *Calder* would prove to be a milestone for all indigenous peoples in Canada.

The Nisga'a limited their claim of Aboriginal title to 1,000 square miles of the original Nisga'a territory.¹⁰⁶ They asserted a right to this territory on the grounds that the Nisga'a never agreed to forfeit the land through a treaty or any other means. Having never willingly relinquished their lands, the Nisga'a maintained that their title arising out of aboriginal occupation continues today.¹⁰⁷

After dismissal by the trial court, the Nisga'a appealed the case through the courts of British Columbia and to the Supreme Court of Canada.¹⁰⁸ The Supreme Court considered two questions in the appeal: whether the Nisga'a originally possessed Aboriginal title over the land at issue and whether the government ever extinguished that title. As to the first matter, the Court affirmatively recognized the original right of Aboriginal title, which derives from the historic presence of indigenous peoples on their homelands.¹⁰⁹ In recognizing the right of Aboriginal title for the first time, the Court articulated that the basis of the right is:

[T]he fact . . . that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.¹¹⁰

Furthermore, the Court found that the Nisga'a qualified as owners of Aboriginal title because "their ancestors occupied [the lands at issue] since time immemorial."¹¹¹

The Court then held that modern land claims could not be based on Aboriginal title alone, but must also prove that the government never exercised its counter right of extinguishment.¹¹² Any government exercise of that right – whether by treaty, war of conquest, purchase, or adverse possession – would have ended the rights associated with Aboriginal title.¹¹³ The Court concluded that British Columbia extinguished the Nisga'a claim through an act of adverse possession. "[T]he sovereign authority elected to exercise complete dominion

105. *Calder*, [1973] S.C.R. ¶ 1.

106. *Id.* ¶ 2.

107. *Id.* ¶ 4.

108. *Id.* ¶ 1.

109. *Id.* ¶¶ 26, 390, 393; see also *Guerin v. The Queen*, [1984] 13 D.L.R. (4th) 321, 335.

110. *Calder*, [1973] S.C.R. ¶ 26.

111. *Id.* ¶ 79.

112. *Id.* ¶ 46.

113. *Id.* (relying on *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877)).

over the lands in question . . . when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation."¹¹⁴ Thus, the government allocation of the Nisga'a reserve limited their land rights to those particular lands, and the subsequent adverse use of the remaining territory lawfully extinguished all other Nisga'a rights.¹¹⁵

On its face, the *Calder* holding appears to be a loss for the Nisga'a claim, but the decision was a victory because it provided for a right of Aboriginal title upon which other tribes could base their land claims. The Nisga'a thus considered it their victory, even if it did not result in a positive resolution of their own claim. The case did trigger a process that would ultimately lead to success for the Nisga'a: at the conclusion of the case, the governments of Canada and British Columbia both agreed to negotiate a resolution with the Nisga'a.¹¹⁶

To begin the negotiation process in 1991, the three parties – the Nisga'a, Canada, and British Columbia – entered into a preliminary agreement that provided a framework for the negotiations.¹¹⁷ Under this agreement, the parties clearly identified the ownership and unimpeded control of Nisga'a land and resources as one of the primary issues of concern for the Nisga'a.¹¹⁸ At this initial stage, the parties also provided for interim measures to protect Nisga'a interests from further detrimental government actions during the negotiations.¹¹⁹

After more than two decades of negotiating, the Nisga'a were able to claim a successful end to their struggle when the parties signed the Final Agreement on April 27, 1999.¹²⁰ Of all the provisions, those guaranteeing their ownership and

114. *Id.* ¶ 74.

115. *Id.* ¶¶ 74-76.

116. *Treaty Fact Sheet*, *supra* note 81.

117. *Nisga'a Comprehensive Land Claims Agreement*, GOV'T OF CAN., May 20, 1991, available at <http://www.schoolnet.ca/aboriginal/nisga1/frame-e.html> (last visited Mar. 18, 2005) [hereinafter *1991 Agreement*].

118. *Nisga'a Land Claims*, GOV'T OF CAN., available at <http://www.schoolnet.ca/aboriginal/nisga1/claims-e.html> (last visited Mar. 18, 2005) [hereinafter *Nisga'a Land Claims*]; see also *1991 Agreement*, *supra* note 117, art. 5.1.

119. *Nisga'a Comprehensive Land Claims Interim Protection Measures Agreement*, GOV'T OF CAN., July 31, 1992, available at <http://www.schoolnet.ca/aboriginal/nisga1/ipma-e.html> (last visited Mar. 18, 2005) [hereinafter *1992 Interim Measures*].

120. NISGA'A FINAL AGREEMENT, GOV'T OF CAN., APR. 27, 1999, pmb1. at 1, available at http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex12_e.pdf [hereinafter, NISGA'A AGREEMENT] (In the text, this article will refer to it as both the Nisga'a Agreement and the Final Agreement.); see also Greg Joyce, *Nisga'a Approve Treaty by 61% Margin*, CAN. PRESS NEWSWIRE, Nov. 12, 1998 (on file with author) (discussing that the Nisga'a Agreement entered into force in 2000, after ratification by all of the parties, during which members of the Nisga'a Nation voted by a margin of 61% to approve the agreement in November 1998); Scott Sutherland, *First Modern-Day Treaty in BC Passes in Legislature*, CAN. PRESS NEWSWIRE, Apr. 22, 1999 (on file with author) (noting that British Columbia approved the agreement in April 1999); *Landmark Nisga'a Treaty Ratified by the House of Commons*, CAN. NEWSWIRE, Dec. 13, 1999 (on file with author) (noting that it was

control of 1,992 square kilometers of land and resources are among the most important.¹²¹ One such provision specifies that the Nisga'a have exclusive authority over their mineral resources.¹²² Through this and similar provisions, the Nisga'a are enjoying their right to control their land and natural resources.

ii. The Gitxsan and Wet'suwet'en: *Delgamuukw v. Her Majesty The Queen*¹²³

Not all indigenous peoples of Canada have enjoyed the success of the Nisga'a. For example, the Gitxsan and Wet'suwet'en continue to struggle for full recognition of their land rights. Their story also differs from the Nisga'a because they have proceeded primarily by relying on their right of Aboriginal title. Due to their unique history, the government has recognized the existence of their title. However, they continue to struggle for the full control of their land and natural resources.

a. *The History of the Gitxsan and Wet'suwet'en*

The Gitxsan and Wet'suwet'en, whose original territory consisted of 58,000 square kilometers in Northwestern British Columbia,¹²⁴ share a history similar to the Nisga'a. Explorers in the region, who began arriving around 1822, found both tangible and intangible evidence of the indigenous connection to the territory.¹²⁵ The more tangible indicators included totem poles and large feast halls.¹²⁶ The less tangible proof primarily consisted of the oral tradition of each tribe, known as their *adaawk* (Gitxsan) and *kungax* (Wet'suwet'en).¹²⁷ Despite that evidence, the European explorers rendered the same fate upon their tribes as the Nisga'a. Relying on their *adaawk* and *kungax* to preserve and continue their indigenous cultures into new generations, the Gitxsan and Wet'suwet'en have also engaged in a battle to preserve their legal rights as indigenous peoples.

approved by the Canadian federal government after ratification by the House of Commons in December 1999 and by the Senate in April 2000); *Senate Approves Nisga's Treaty*, THE NAT'L CAN. BROADCASTING CORP., Apr. 13, 2000, available at http://vancouver.cbc.ca/regional/servlet/View?filename=bc_nisgaa000413 (last visited Mar. 23, 2005).

121. See NISGA'A AGREEMENT, *supra* note 120, at 31, 167-68.

122. *Id.* at 34-35.

123. [1997] 3 S.C.R. 1010.

124. *Delgamuukw*, [1997] 3 S.C.R. ¶ 7.

125. John Borrows, *Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia*, 37 OSGOODE HALL L.J. 537, 540 (1999).

126. *Delgamuukw*, [1997] 3 S.C.R. ¶¶ 13-14.

127. *Id.* ¶ 13 (noting that the *adaawk* "is a collection of sacred oral tradition" about the history, ancestors, and territories of the Gitxsan, and the *kungax* "is a spiritual song or dance or performance" that connects the Wet'suwet'en to their land).

*b. A Starting Place for Negotiations: The Right of
Aboriginal Title*

The fight of the Gitksan and Wet'suwet'en culminated with a case before the Supreme Court of Canada, *Delgamuukw v. Her Majesty the Queen*.¹²⁸ In asserting their claim over their land and natural resources, the Gitksan and Wet'suwet'en relied on the right of Aboriginal title. At the outset, the greatest difficulty in asserting this claim was proving their Aboriginal title and the lack of extinguishment by the government. The Gitksan and Wet'suwet'en had one primary tool: their *adaawk* and *kungax*. Though the lower courts considered these traditions to be insufficient to establish a right of Aboriginal title, the Supreme Court took a remarkable step by declaring that indigenous peoples may use oral traditions, such as the *adaawk* and *kungax*, as evidence to prove their land claims.¹²⁹ The Court held that such a fundamental tradition requires consideration, especially to the extent that it establishes the cultural significance and historical use and occupation of the land.¹³⁰ Furthermore, the Court found that the cultural method of preserving the oral tradition ensured a degree of authenticity by incorporating a process of allowing for objections based on factual inaccuracy.¹³¹

Accordingly, the Court ordered a new trial for considering the evidence of the Gitksan *adaawk* and the Wet'suwet'en *kungax*.¹³² While the Court affirmed the right of Aboriginal title, even elaborating on its content, it held that any decision regarding the Gitksan and Wet'suwet'en must fully consider the facts presented through the oral tradition. At the same time, the Court strongly urged the parties to pursue a resolution through negotiation rather than continued litigation.¹³³ The Court believed that negotiated settlements would ultimately lead to the most harmonious result. The parties heeded the advice of the Court and are currently negotiating treaties that honor the Aboriginal title of the Gitksan and Wet'suwet'en.¹³⁴

128. [1997] 3 S.C.R. 1010.

129. *Id.* ¶¶ 93-108.

130. *Id.* ¶¶ 93-94 (finding it error to consider the oral history only as corroborating evidence).

131. *Id.* ¶ 93.

132. *Id.* ¶¶ 107-08.

133. *Id.* ¶ 186 (citing *R. v. Van der Peet*, [1996] 2 S.C.R. 507).

134. *See, e.g., First Nations and Tribal Councils in the Treaty Process: Gitksan Treaty Society*, PROVINCE OF BRIT. COLUM.: TREATY NEGOTIATIONS OFF., at http://www.gov.bc.ca/tno/negotiation/First_Nations_in_the_process/gitksan.htm (last visited Mar. 23, 2005); *see also First Nations and Tribal Councils in the Treaty Process: Wetsuweten*, PROVINCE OF BRIT. COLUM.: TREATY NEGOTIATIONS OFF., at http://www.gov.bc.ca/tno/negotiation/First_Nations_in_the_process/wetsuweten.htm (last visited Mar. 23, 2005) (noting that both tribes are currently in stage four of a six-stage treaty process, and that in stage four, the parties negotiate an agreement in principle by identifying and defining the rights and obligations of the parties, which will form the basis of the final treaty).

C. Beyond Country Examples: A Global Deprivation of Indigenous Land and Natural Resources, and the Ongoing Struggle to Regain Control

Indigenous peoples worldwide share the historical and ongoing struggle of the indigenous peoples of Nigeria and Canada. In fact, the emergence of the modern nation-state in the 1600s moved social development in a direction that threatened the culture of many indigenous peoples.¹³⁵ At that point, the law shifted to protect only individuals and the sovereign state.¹³⁶ Collective entities other than the state, such as indigenous peoples, received protection only for "their *individual* constituents" and not "as distinct communities."¹³⁷

With the emerging principle of state sovereignty, the new nation-states further threatened indigenous peoples.¹³⁸ States exerted the principle at the expense of collective entities, such as indigenous peoples, especially when the right to control land and resources was at issue. Asserting their rights as sovereigns, European states relied on a policy of *terra nullius* under which the first European state to discover indigenous lands asserted control over those lands, without conquest of, or entering into treaties with, the indigenous inhabitants.¹³⁹

Even after centuries of such mistreatment, which led to the near-destruction of their cultures and societies,¹⁴⁰ indigenous peoples continue to assert their rights, especially to their land and natural resources. As with the Ogoni, the struggle may even be increasing in intensity. This renewed fervor is best understood by considering how governments, such as Nigeria, have adopted development policies that are increasingly harmful to indigenous peoples. Upon discovering the value of resources in indigenous lands, such as Ogoni oil, governments have again asserted their sovereignty as justification to exclude the indigenous peoples from any policy- and decision-making regarding the resource extraction.¹⁴¹

By failing to consult the indigenous peoples, these governments ignore indigenous interests and freely engage in policies of exploitation based on only one set of values. The policies do not incorporate "[t]he cultures of indigenous peoples [which] typically differ in significant ways from the liberal Western perspective."¹⁴² Even in countries such as Nigeria, Western values infiltrated

135. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 13-14 (1996); *see also* HANNUM, *supra* note 3, at 5-6.

136. ANAYA, *supra* note 135, at 15.

137. *Id.*

138. ANAYA, *supra* note 135, at 19; *see also* Wiessner, *supra* note 7, at 76, 98.

139. ANAYA, *supra* note 135, at 22; *see also* HANNUM, *supra* note 3, at 93.

140. ANAYA, *supra* note 135, at 24, 26; *see also* HANNUM, *supra* note 3, at 74-75.

141. PYAGBARA, *supra* note 41, at 3.

142. Ann Blyberg, *Cultural Rights*, in *CIRCLE OF RIGHTS: ECONOMIC, SOCIAL & CULTURAL RIGHTS ACTIVISM: A TRAINING MANUAL* 329, 340 (2000).

governments and placed capitalist exploitation of resources at the forefront of their priorities.

Indigenous peoples are now challenging states to re-evaluate their priorities and to consider that “[a]t times, ecosystem management requires weighing additional considerations, including even cultural and religious factors when a specific natural resource . . . is a necessary element in the preservation of a group’s culture.”¹⁴³ A primary factor for indigenous peoples, which must become a priority for states, is the fundamental relationship between indigenous lands and their cultural identity:

[T]he relationship between indigenous peoples and the land is an essential tie which provides and maintains the cultural identity of those peoples. One must understand that the land is not a mere instrument of agricultural production, but part of a geographic and social, symbolic and religious space, with which the history and current dynamics of those peoples are linked.¹⁴⁴

Thus, preservation of indigenous land and natural resources is necessary for the very survival of the indigenous peoples involved.

Another priority of indigenous peoples, considering that their survival requires survival of the collective entity, is that the ownership of the land and natural resources must belong to the group.¹⁴⁵ By rearranging their priorities to ensure the collective right of indigenous peoples to their land and natural resources, states can help guarantee the survival of indigenous peoples as a collective group.¹⁴⁶ If they continue to ignore indigenous peoples, states will perpetuate the colonial philosophy and sentence their indigenous peoples to certain extinction. Such a loss would negatively impact the social and economic development of the world.

143. EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE 106 (2002); see also Tracey A. LeBeau, *Symposium: The State of Native America and Its Unfolding Self-Governance: Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Developments*, 12 STAN. L. & POL’Y REV. 237, 239 (2001).

144. The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of Aug. 31, 2001, Inter-Am. Ct. H.R. (ser. C) No. 79, at 24 (2001), available at http://www.corteidh.or.cr/seriecpdf/seriec_79_esp.pdf (last visited Mar. 16, 2001).

145. Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615, 658-61 (1992).

146. See WORLD COMMISSION ON CULTURE AND DEVELOPMENT, OUR CREATIVE DIVERSITY, REPORT OF THE WORLD COMMISSION ON CULTURE AND DEVELOPMENT ch. 2.6 (1995), at http://kvc.minbuza.nl/uk/archive/report/chapter2_6.html (last visited Mar. 4, 2005) [hereinafter OUR CREATIVE DIVERSITY].

III. PROTECTING INDIGENOUS PEOPLES: THEIR RIGHTS UNDER INTERNATIONAL LAW

When considering the fundamental role of their land in the lives and cultures of indigenous peoples, it is almost unimaginable that states could persist in denying them any rights to control their land and natural resources. Even international law failed, until very recently, to provide the most basic protections for indigenous land rights. This section explores the development of such protection, from the right of self-determination of "peoples" to the right of permanent sovereignty for indigenous peoples.

A. A 20th Century Solution for Indigenous Peoples: Self-Determination

The 20th Century brought a seed of change that would ultimately limit state sovereignty.¹⁴⁷ This change involved an increased focus on individuals and citizen groups, including indigenous peoples.¹⁴⁸ While state sovereignty remained extremely important, international law developed principles for protecting individuals and groups from arbitrary assertions of the rights of sovereignty. For colonized and indigenous peoples, perhaps the most important principle to emerge was self-determination.

1. The Right of "Peoples" to Self-Determination

Self-determination developed as a principle of international law during the period between World War I and World War II.¹⁴⁹ At this early stage, however, states applied it only within the limited context of redrawing state boundaries after World War I. Self-determination emerged in this effort because the prevailing states, known as the Great Powers, redrew the state boundaries based on national identity. However, the states recognized self-determination as a mere principle and applied it as a basis for independent statehood in only two very narrow circumstances. First, a "nation" could attain independent statehood only if it existed within the territory of a defeated empire. Second, granting such independence had to be consistent with the interests of the Great Powers.¹⁵⁰ In essence, this initial principle of self-determination served merely as a tool for dismantling harmful regimes.

The atrocities committed under the assertion of ethnic supremacy during World War II brought the importance of self-determination to the forefront.¹⁵¹ As a result, international law began to develop toward recognizing self-

147. ANAYA, *supra* note 135, at 39; *see also* Wiessner, *supra* note 7, at 99-100.

148. ANAYA, *supra* note 135, at 40; *see also* HANNUM, *supra* note 3, at 22-23.

149. HANNUM, *supra* note 3, at 27-28.

150. *Id.* at 28-29.

151. Wiessner, *supra* note 7, at 99-100.

determination as a right of peoples.¹⁵² The culmination of all efforts in this regard was the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples (Declaration on Colonial Countries), which declared a "right to self-determination"¹⁵³ for "all peoples."¹⁵⁴ Despite the proclamation of the right, the Declaration on Colonial Countries failed to clarify the breadth of self-determination as a right or to define many of the terms crucial to its application. For example, the Declaration failed to provide any definition of who qualifies as "peoples," thus leaving the glaring uncertainty of who are "all peoples" entitled to the right.¹⁵⁵ In the face of such ambiguity, states adopted their own limited definitions of the "peoples" to whom the right would extend.¹⁵⁶ According to state practice, then, the right of self-determination extended only to peoples of a colonial territory located outside the sovereign state.¹⁵⁷ This limited the right of self-determination to the context of decolonizing distant territories.¹⁵⁸

2. Extending the Right of Self-Determination to Indigenous Peoples

With this initial limitation, self-determination offered little support for indigenous rights. The emergence of such a right was still important because it showed an ideological shift toward balancing the interests of groups within the state with those of the state. This philosophical extension of international law into the realm of internal concerns opened the doors for protecting the rights of indigenous peoples through a right of self-determination.

a. Developing an International Norm of Indigenous Self-Determination

To extend the right of self-determination to indigenous peoples, proponents first had to disprove the claim that indigenous peoples do not qualify as "peoples."¹⁵⁹ In 1957 the International Labor Organization (ILO) started the initiative to overcome this obstacle when it declared a right of self-determination

152. HANNUM, *supra* note 3, at 33.

153. G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961) [hereinafter Declaration on Colonial Countries].

154. *Id.*

155. HANNUM, *supra* note 3, at 34-35 (discussing G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971), and noting that subsequent declarations failed to clarify the definition of "peoples").

156. ANAYA, *supra* note 135, at 43; *see also* HANNUM, *supra* note 3, at 36-38.

157. ANAYA, *supra* note 135, at 43 (referring to the blue water, or salt water, thesis).

158. *Id.*; *see also* HANNUM, *supra* note 3, at 48-49.

159. 1996 Working Paper, *supra* note 7, ¶ 58.

for indigenous peoples in its Convention Number 107 (Convention 107).¹⁶⁰ Although Convention 107 ultimately failed because it assumed an assimilationist perspective, the inclusion of a right to self-determination for indigenous peoples successfully brought the issue of indigenous rights into the forefront of international legal debate.¹⁶¹

The ILO continued to be an important player in this debate, especially when it adopted Convention Number 169 (Convention 169) in 1991.¹⁶² Through this new Convention 169, the ILO revised its previously assimilationist perspective and shifted toward a position acknowledging the need to return some control to indigenous peoples by “[r]ecognising the aspirations of these [indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.”¹⁶³ With this philosophy, Convention 169 provides extensive protection of indigenous rights, including cultural integrity¹⁶⁴ and control over indigenous land and natural resources.¹⁶⁵

Despite its significant advancement of indigenous rights, Convention 169 revealed additional hurdles for attaining full recognition of an indigenous right to self-determination. The first indication of these problems arose during the drafting process. States resisted any reference to indigenous “peoples” because they feared such usage would confer a right to self-determination that included a right of secession to independent statehood.¹⁶⁶ To reduce opposition to Convention 169, the final text adopted a meaning of “peoples” and explicitly disclaimed that the usage conferred any rights associated with the term under international law. What states failed to understand was that indigenous peoples relied on self-determination “as an expression of their desire to continue as distinct communities free from oppression, while in virtually all instances denying aspirations to independent statehood.”¹⁶⁷

160. Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247 [hereinafter ILO Conv. 107]; *see also* ANAYA, *supra* note 135, at 44 (noting that the ILO is a specialized agency that is affiliated with the United Nations, even though it actually predates that organization).

161. ANAYA, *supra* note 135, at 44-45; *see also* HANNUM, *supra* note 3, at 77-78 (noting that, despite its failures, Convention 107 was a positive step toward recognizing the rights of indigenous peoples).

162. ILO Conv. 169, *supra* note 8, art. 1(1)(b).

163. *Id.* pmbl.

164. *Id.* art. 5.

165. *Id.* arts. 13-19.

166. ANAYA, *supra* note 135, at 48.

167. *Id.*

Even with such extensive provisions for indigenous rights, Convention 169 may not protect most indigenous peoples because only seventeen countries have ratified it.¹⁶⁸ Therefore, indigenous peoples in non-party states, such as the countries discussed above, Nigeria and Canada, cannot assert rights against their governments under Convention 169. Arguably, however, Convention 169 does contain certain minimum standards for protecting the land rights of indigenous peoples. These standards apply even to non-party states because even those governments have “confirm[ed] general acceptance of at least the core aspects of the land rights norms expressed” in its provisions.¹⁶⁹ Beyond those core provisions, Convention 169 continues to be important because it is “international law’s most concrete manifestation of the growing responsiveness to indigenous peoples’ demands.”¹⁷⁰

The United Nations has also responded increasingly to the claims of indigenous peoples. The groundwork for its efforts began decades before Convention 169, in 1971, when the Economic and Social Council authorized the “Study on the Problem of Discrimination against Indigenous Peoples.”¹⁷¹ In addition to producing extensive information regarding indigenous peoples, the study proved valuable in ensuring that the issue of indigenous rights remained at the forefront of international consideration.¹⁷² The United Nations continued to consider indigenous issues, and in 1982, they established the Working Group on Indigenous Populations.¹⁷³ All of this activity eventually culminated in the Draft United Nations Declaration on the Rights of Indigenous Peoples, which promises to be the most progressive protection of indigenous rights in international law.¹⁷⁴

168. *Convention No. C169@ref was ratified by 17 countries*, INT’L LABOUR ORG., at <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169> (last visited Mar. 23, 2005).

169. James S. Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L. 13, 40 (2004).

170. ANAYA, *supra* note 135, at 47.

171. ANAYA, *supra* note 135, at 51; *see also* HANNUM, *supra* note 3, at 82 (noting that the U.N. Subcommittee on Prevention of Discrimination and Protection of Minorities conducted the study).

172. ANAYA, *supra* note 135, at 51; *see also* HANNUM, *supra* note 3, at 82.

173. ANAYA, *supra* note 135, at 51 (noting that “[t]he working group is an organ of the Subcommittee” and is comprised of human rights experts, and that its expanded mandate includes reviewing developments concerning indigenous peoples, developing international standards to address these concerns, and studying “treaties between indigenous peoples and states”).

174. *United Nations Draft Declaration on the Rights of Indigenous Peoples*, Subcommittee on Prevention of Discrimination and Protection of Minorities, 46th Sess., Prov. Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994) [hereinafter *Draft Declaration*]. The working group completed the first *Draft Declaration* in 1988. After discussion in several subsequent sessions, the Working Group submitted its final revision of the *Draft* in 1993 to its parent bodies within the United Nations. The Subcommittee on Prevention of Discrimination and Protection of Minorities

The Draft Declaration boldly protects the rights of indigenous peoples to self-determination, including control over their land and natural resources:

Indigenous 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.¹⁷⁵

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.¹⁷⁶

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment . . . and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.¹⁷⁷

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including . . . land and resources management, [and] environment . . .¹⁷⁸

Through such provisions, the Draft Declaration clearly incorporates the interests of indigenous peoples. Perhaps this improvement over previous instruments results from the enlightened drafting process, which engaged indigenous peoples and their representatives in order to avoid any bias.¹⁷⁹

Although it remains a draft declaration, understating its importance for protecting indigenous rights would be a mistake. Though not binding,¹⁸⁰ the provisions show an important "convergence of international opinion about the

adopted the Draft and submitted it to the U.N. Commission on Human Rights in 1994. ANAYA, *supra* note 135, at 52; *see also* HANNUM, *supra* note 3, at 85.

175. Draft Declaration, *supra* note 174, art. 3.

176. *Id.* art. 25.

177. *Id.* art. 26; *see also id.* arts. 27-30.

178. *Id.* art. 31; *see also id.* arts. 32-36.

179. ANAYA, *supra* note 135, at 52; *see also* HANNUM, *supra* note 3, at 84-85.

180. One court in the United States has rejected the distinction between binding and non-binding international instruments as the sole justification for denying an obligation under an international instrument. In *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (1980), the Court stated that "U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter."

content of indigenous peoples' rights."¹⁸¹ The Draft Declaration may have even greater weight than that of generally accepted opinion. One scholar suggests that the Draft Declaration may be binding, to the extent it proves that indigenous rights have reached the status of customary international law.¹⁸² He bases this claim on the concept that "explicit communication among authoritative actors . . . is a form of practice that builds customary rules."¹⁸³ Under this theory, development of the customary norm does not require conforming conduct, although such conduct will serve to strengthen the customary nature of the norm.

b. Content of the Right of Indigenous Peoples to Self-Determination

Regardless of the degree to which the Draft Declaration may be binding, it clearly shows a growing consensus that indigenous peoples have a right to self-determination. In fact, the Special Rapporteur for the United Nations Working Group has taken a position in support of this conclusion. In one submission to the Working Group, she stated that there is no "distinction between 'indigenous' peoples, and 'peoples' generally."¹⁸⁴ When combined with the provisions in the Draft Declaration on self-determination, this statement offers an answer to the question left open by ILO Convention 169: that indigenous peoples are "peoples" with a right to self-determination.¹⁸⁵ However, the Draft Declaration goes further by also providing some guidance as to the meaning of the right to self-determination for indigenous peoples. For instance, the Draft Declaration explicitly provides that the right of self-determination necessarily includes a right to self-government.¹⁸⁶ The Draft Declaration also protects the rights to cultural integrity and to indigenous control over their land and natural resources.¹⁸⁷

Through its provisions, the Draft Declaration seems to articulate a right of self-determination for indigenous peoples that includes a range of human rights necessary to protect their special interests. Whereas the right of self-determination as it developed during decolonization was defined by a right of

181. ANAYA, *supra* note 135, at 55.

182. ANAYA, *supra* note 135, at 50 (stating that a norm becomes one of customary law when two elements are met: (1) a uniform state practice, that is (2) followed out of a sense of a legal obligation).

183. *Id.*

184. *1996 Working Paper, supra* note 7, ¶ 72.

185. Erica-Irene A. Daes, *The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples: Reflections on the Making of the United Nations Draft Declaration*, in OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION 67, 74 (Pekka Aikio & Martin Scheinin eds., 2000) [hereinafter *The Spirit and Letter*].

186. Draft Declaration, *supra* note 174, art. 31.

187. *See, e.g., id.* arts. 4, 25-30.

secession, the right to self-determination for indigenous peoples must be defined by those rights that are necessary to ensure their control over their own destinies within the existing state. Through the drafting of the Declaration, states have come to understand how the right of self-determination is adjustable to meet the particular aspects of indigenous claims without conferring a right to secession. When such distinctions became clear, the states participating in the drafting process showed an increased willingness to acknowledge the existence of an indigenous right to self-determination.¹⁸⁸ Thus, rather than linking self-determination forever with a right of secession, the Draft Declaration shows how international law is developing to recognize a right of indigenous peoples to self-determination that consists of such rights as nondiscrimination, cultural integrity, and control of their land and natural resources.¹⁸⁹

B. The Right of Indigenous Peoples to Permanent Sovereignty over Their Natural Resources – A Right Interconnected to Self-Determination

The right of indigenous peoples to self-determination naturally leads to an indigenous right to permanent sovereignty over their natural resources.¹⁹⁰ This section will explore the right of permanent sovereignty, beginning with a brief history of the right as it applied in the context of decolonization. It will then consider how international law is expanding that right to indigenous peoples. Understanding the right to permanent sovereignty will help clarify how rural electric cooperatives can serve as a model for fulfilling the right.

1. History of the Right of Permanent Sovereignty

The principle of permanent sovereignty over natural resources began as a principle of decolonization and an essential aspect of self-determination.¹⁹¹ Accordingly, it evolved after World War II as a principle that “underscore[d] the claim of colonial peoples and developing countries to the right to enjoy the benefits of resource exploitation and in order to allow ‘inequitable’ legal arrangements . . . to be altered or even to be annulled *ab initio*, because they

188. ANAYA, *supra* note 135, at 80, 86-87 (discussing how the Australian and United States delegates, before meeting with the Working Group, expressed increasing acceptance of the concept of the right to self-determination); *see also* Wiessner, *supra* note 7, at 93, 116.

189. ANAYA, *supra* note 135, at 97-112 (elaborating on each of these rights); *see also* HANNUM, *supra* note 3, at 91-103 (discussing the claims of indigenous peoples to land rights and self-determination).

190. SCHRIJVER, *supra* note 4, at 1-3.

191. Erica-Irene A. Daes, *Statement on “Indigenous Peoples’ Permanent Sovereignty over Natural Resources” before the Second Session of the Permanent Forum on Indigenous Issues*, INT’L INDIAN TREATY COUNCIL, May 20, 2003, at http://www.treatycouncil.org/section_2113151111422211111.htm (last visited Mar. 25, 2005) [hereinafter *Daes Statement*].

conflicted with the concept of permanent sovereignty.”¹⁹² Just as with the right of self-determination, this early concept of permanent sovereignty applied to all “peoples.” In its Resolution on Permanent Sovereignty over Natural Resources, the United Nations General Assembly declared it as a right in 1962: “The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”¹⁹³ A few years later, the General Assembly declared that the right to development is an inalienable human right, the full realization of which requires “the exercise of [a people’s] inalienable right to full sovereignty over all their natural wealth and resources.”¹⁹⁴ In fact, more than eighty resolutions have covered the right to permanent sovereignty.¹⁹⁵ As with self-determination, however, the right to permanent sovereignty was initially limited to “peoples” in the context of decolonization.

2. Extension to Indigenous Peoples

Recent years have seen another similarity between the rights of self-determination and permanent sovereignty: the extension of the right to indigenous peoples. The Special Rapporteur to the United Nations Working Group considers the right of indigenous peoples to control their land and natural resources to be “a critical and necessary step for the advancement of the rights of indigenous peoples.”¹⁹⁶ The Rapporteur further believes “that meaningful political and economic self-determination of indigenous peoples will never be possible without indigenous peoples’ having the legal authority to exercise control over their lands and territories.”¹⁹⁷

In a statement before the United Nations Permanent Forum on Indigenous Issues, the Special Rapporteur elaborated on her position and offered five reasons why the basic principle of permanent sovereignty should extend to indigenous peoples:

192. SCHRIJVER, *supra* note 4, at 1.

193. G.A. Res. 1803, U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1962).

194. G.A. Res. 41/128, U.N. GAOR, 41st Sess., Annex, Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).

195. *Indigenous Peoples’ Permanent Sovereignty Over Natural Resources, Working Paper by Erica-Irene A. Daes, former Chairperson-Rapporteur of the Working Group on Indigenous Populations*, U.N. Subcommission on the Promotion and Protection of Human Rights, 54th Sess., at Prov. Agenda Item 5(b) ¶ 6, U.N. Doc. E/CN.4/Sub.2/2002/23 (2002) [hereinafter *2002 Working Paper*].

196. *Preliminary Report of the Special Rapporteur, Erica-Irene A. Daes*, Subcommission on the Promotion and Protection of Human Rights, 55th Sess., at ¶ 4, U.N. Doc. E/CN.4/Sub.2/2003/20 (2003) [hereinafter *2003 Preliminary Report*].

197. *Id.* ¶ 6.

- (a) Indigenous peoples are colonized peoples in the historical, economic and political sense;
- (b) Indigenous peoples suffer from unfair and unequal economic arrangements typically suffered by other colonized peoples;
- (c) The principle of permanent sovereignty over natural resources is necessary to level the economic and political playing field and to provide protection against unfair and oppressive economic arrangements;
- (d) Indigenous peoples have a right to development and actively to participate in the realization of this right; sovereignty over their natural resources is an essential prerequisite for this;
- (e) The natural resources originally belonged to the indigenous peoples concerned and were not freely and fairly given up.¹⁹⁸

Thus, an indigenous right of permanent sovereignty is necessary both: (1) as a remedy of past and continuing denial of the "prior and paramount rights" of indigenous peoples over their land and natural resources; and (2) as a tool for the future advancement of indigenous peoples and their cultures.¹⁹⁹ To accomplish these dual goals, indigenous peoples must enjoy a sovereignty that includes "legal, governmental control or management authority over natural resources."²⁰⁰

a. Source of the Permanent Sovereignty of Indigenous Peoples

Even in the face of such compelling justifications for the permanent sovereignty of indigenous peoples, states may claim that no international legal obligation exists to support such a right. This argument fails to consider that, from the very beginning, permanent sovereignty has developed as a corollary of the right to self-determination. As shown by the following instruments, international law has developed significant protections for indigenous peoples, including their right to self-determination and the related rights of nondiscrimination, cultural integrity, and property.

198. Daes *Statement*, *supra* note 191.

199. 2003 *Preliminary Report*, *supra* note 196, ¶ 4.

200. Daes *Statement*, *supra* note 191.

i. Universal Declaration of Human Rights (Universal Declaration)²⁰¹

The Universal Declaration is the primary document in which the United Nations established subsequent human rights norms.²⁰² As such, it addresses all of the rights related to indigenous peoples' permanent sovereignty, except self-determination. Despite that omission, the Universal Declaration recognizes the rights of property, cultural integrity, and nondiscrimination: Article 17 guarantees to everyone "the right to own property alone as well as in association with others"²⁰³ and protects all persons against arbitrary deprivation of that right; Article 27 affirms the right of everyone "freely to participate in the cultural life of the community";²⁰⁴ Article 7 states that "[a]ll are equal before the law," and as such, "are entitled to equal protection against any discrimination."²⁰⁵

ii. International Covenant on Economic, Social, and Cultural Rights (ICESCR)²⁰⁶

As one of the two primary documents flowing from the Universal Declaration, the ICESCR filled the gap regarding self-determination. Article 1 proclaims that "[a]ll peoples have the right of self-determination," including the right to "freely dispose of their natural wealth and resources."²⁰⁷ The ICESCR goes further in this protection, confirming in Article 25 that no other rights in the Covenant "shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."²⁰⁸ In

201. *A Universal Declaration of Human Rights*, G.A. Res. 217 (III), U.N. GAOR, 3rd Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*]; see also LOUIS HENKIN ET AL., HUMAN RIGHTS DOCUMENTARY SUPPLEMENT 41 (2001) (noting that the Declaration was essentially adopted without objection: forty-nine states voted in favor of the Declaration; eight abstained; and none voted against).

202. *Human Rights Here and Now: Celebrating the Universal Declaration of Human Rights*, at <http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Intro/using.htm> (last visited Mar. 6, 2004) [hereinafter *Human Rights Here and Now*] (noting that as a resolution, states would generally consider its provisions nonbinding; however, states have come to respect it so much that it now represents customary international law).

203. *Universal Declaration*, *supra* note 201, art. 17.

204. *Id.* art. 27.

205. *Id.* art. 7.

206. International Covenant on Economic, Social, and Cultural Rights, Oct. 5, 1977, art. 1, 993 U.N.T.S. 3 [hereinafter ICESCR]; see also OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (Nov. 2, 2003), available at <http://www.unhcr.ch/pdf/report.pdf> (last visited Mar. 23, 2005) [hereinafter STATUS OF RATIFICATIONS] (noting that states have shown significant support for the ICESCR: as of November 2, 2003, 148 states have become parties); *id.* (showing that both of the country examples used in this article, Nigeria and Canada, are parties to the ICESCR).

207. ICESCR, *supra* note 206, art. 1.

208. *Id.* art. 25.

addition to the right of self-determination, the ICESCR also recognizes the rights to cultural integrity and nondiscrimination. Thus, Article 15(1)(a) asserts "the right of everyone . . . [t]o take part in cultural life,"²⁰⁹ while Article 2(2) prohibits "discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²¹⁰

iii. International Covenant on Civil and Political Rights
(ICCPR)²¹¹

The ICCPR shares at least two protections with the ICESCR, including their common Article 1 recognizing the right of self-determination and a similar nondiscrimination provision in Article 2(a). However, the ICCPR goes further in protecting the right of cultural integrity, ensuring in Article 27 that "persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."²¹²

iv. ILO Convention Number 169 Concerning Indigenous and
Tribal Peoples in Independent Countries (Convention
169)²¹³

Perhaps the most comprehensive instrument to date is one already discussed: ILO Convention 169. This Convention extends these rights of property, cultural integrity, and self-determination to indigenous peoples. Moreover, it explicitly recognizes indigenous rights over their land and natural resources. Article 14 protects "[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy," requiring states to "take steps as necessary . . . to guarantee effective protection of their rights of ownership and possession."²¹⁴ Similarly, Article 15(1) requires states to safeguard "[t]he rights of the peoples concerned to the natural resources pertaining to their lands."²¹⁵ This provision specifically requires that "[t]hese rights include the right of these peoples to participate in the use, management

209. *Id.* art. 15.

210. *Id.* art. 2.

211. International Covenant on Civil and Political Rights, Oct. 5, 1977, art. 1, 999 U.N.T.S. 171 [hereinafter ICCPR]; *see also* STATUS OF RATIFICATIONS, *supra* note 206 (noting that, as with the ICESCR, the number of states party to the ICCPR show overwhelming support: as of November 2, 2003, the ICCPR had entered into force for 151 states); *id.* (showing that both country examples used in this article are also parties to the ICCPR).

212. ICCPR, *supra* note 211, art. 27.

213. ILO Conv. 169, *supra* note 8.

214. *Id.* art. 14.

215. *Id.* art. 15(1).

and conservation of these resources.”²¹⁶ Though the Convention allows for states to retain ultimate control, Article 15(2) obligates the states that do so to “establish or maintain procedures through which they shall consult these peoples . . . before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.”²¹⁷

The Convention makes clear that these rights to land and natural resources are closely related to the right of cultural integrity. Article 13(1) establishes that the protections of land and natural resources are necessary to “respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories.”²¹⁸ This cultural importance requires that states allow indigenous peoples “to decide their own priorities for the process of development” in order to ascertain how it will affect their culture.²¹⁹ However, their rights to property extend beyond the right to decide cultural priorities to include a right to the economic benefits of their property ownership. Accordingly, Article 15(2) requires that, where possible, states must ensure that indigenous peoples “participate in the benefits of such activities, and . . . receive fair compensation for any damages” resulting from the exploitation of their lands and natural resources.²²⁰

Convention 169 goes beyond these elaborate protections of the property and cultural rights of indigenous peoples. Thus, for example, Article 3(1) requires that states ensure indigenous peoples receive “the full measure of human rights and fundamental freedoms without hindrance or discrimination.”²²¹ By bringing together all of these principles and providing such broad protections, the Convention provides a standard for protecting the rights of indigenous peoples.

v. United Nations Draft Declaration on the Rights of Indigenous Peoples (Draft Declaration)²²²

The Draft Declaration goes even further to protect the rights necessary to ensure permanent sovereignty: “Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies.”²²³ Accordingly, the Draft Declaration incorporates all of the rights protected by the above instruments, including the

216. *Id.*

217. *Id.* art. 15(2).

218. *Id.* art. 13(1).

219. ILO Conv. 169, *supra* note 8, art. 7(1).

220. *Id.* art. 15(2).

221. *Id.* art. 3(1).

222. Draft Declaration, *supra* note 174.

223. *Id.* pmb1.

rights of property (Articles 10, 25-30), cultural integrity (Articles 4, 6-9, 12-14), self-determination (Article 3), and nondiscrimination (Article 2). In the property provisions of Part VI, the Draft Declaration clearly draws these protections together. For example, Article 25 connects property rights to cultural integrity, recognizing the right of indigenous peoples "to maintain and strengthen their distinctive spiritual and material relationship with the lands . . . and other resources which they have traditionally owned or otherwise occupied or used."²²⁴ Another provision declares that, "as a specific form of exercising their right to self-determination, [indigenous peoples] have the right to autonomy or self-government in matters relating to their . . . land and resources management."²²⁵

To ensure the realization of these rights, the Draft Declaration empowers indigenous peoples with:

the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including *the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources*, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.²²⁶

The protections of the Draft Declaration even go so far as to require positive state assistance for indigenous peoples' development, including conservation and restoration of their land and environment.²²⁷ Through these protections, the Draft Declaration provides a basis for the right of indigenous peoples to permanent sovereignty.

b. Content and Measurement of the Right

These international legal instruments show that international law is moving to protect the right of indigenous peoples to permanent sovereignty. Though many states cling to the historical limitation of permanent sovereignty to sovereign states, developments in recent decades are moving to recognize it as a

224. *Id.* art. 25.

225. *Id.* art. 31.

226. *Id.* art. 30 (emphasis added); *see also id.* art. 26 (noting that states are required to protect indigenous land rights against "any interference with, alienation of or encroachment upon these rights").

227. Draft Declaration, *supra* note 174, art. 27; *see also id.* art. 38 (clarifying that "assistance" includes both technical and financial assistance, and is in addition to the requirement of restitution of indigenous lands); *id.* art. 27 (providing for the restitution of land and resources that have been "confiscated, occupied, used or damaged without . . . [the indigenous peoples'] free and informed consent"); *id.* (stating that such restitution should involve the return of the land or resources, or where return is not possible, giving just and fair compensation in the form of other "lands, territories and resources equal in quality, size and legal status").

right of indigenous peoples.²²⁸ This international recognition is based largely on the notion that, as the possessors of the land from “time immemorial,” indigenous peoples have an ownership right that takes priority over that of the state.²²⁹ However, this emerging norm of permanent sovereignty for indigenous peoples does not remove indigenous resources from ultimate state control: the sovereign state retains the final power of deciding issues concerning the land and resources in its territory, including those belonging to indigenous peoples.²³⁰ Thus, for example, Article 15(2) of ILO Convention 169 recognizes that some states may choose to “retain[] the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands.”²³¹

Despite this retention of ultimate sovereignty with the state, the provisions discussed above establish a minimum standard for the right of indigenous peoples to permanent sovereignty. The most basic element flows from the right of all peoples to be treated equally, free of any discrimination. Pursuant to the principle of nondiscrimination, which virtually every instrument of international law has guaranteed to all human beings, states cannot exercise their authority against indigenous peoples in a way that is discriminatory.²³² Thus, a state must respect indigenous peoples’ permanent sovereignty with the same protections extended to all other property owners. Accordingly, the Committee on the Elimination of Racial Discrimination forcefully calls upon States to act by:

[P]rotect[ing] the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.²³³

Beyond this basic principle, international law has evolved to extend even greater protection for indigenous peoples’ permanent sovereignty. Even while acknowledging state sovereignty, both ILO Convention 169 and the Draft Declaration require states to consult the affected indigenous peoples, “with a view to ascertaining whether and to what degree their interests would be

228. 2002 Working Paper, *supra* note 195, ¶¶ 2-3; see also SCHRIJVER, *supra* note 4, at 8-9; 2003 Preliminary Report, *supra* note 196, ¶¶ 11-21; ANAYA, *supra* note 135, at 107; HANNUM, *supra* note 3, at 465-66.

229. Roger Plant, *Land Rights*, in CIRCLE OF RIGHTS: ECONOMIC, SOCIAL & CULTURAL RIGHTS ACTIVISM: A TRAINING MANUAL 349, 356 (2000).

230. 2003 Preliminary Report, *supra* note 196, ¶ 11.

231. ILO Conv. 169, *supra* note 8, art. 15(2).

232. *General Recommendation 23: Rights of Indigenous Peoples*, U.N. GAOR, 52d Sess., Supp. No. 18, at 122, U.N. Doc. A/52/18, Annex V (1997) [hereinafter *Recommendation 23*]; see also ANAYA, *supra* note 135, at 106.

233. *Recommendation 23*, *supra* note 232, ¶ 5.

prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands."²³⁴ Through these provisions, international law has developed to require that states balance their own sovereign interests with the permanent sovereignty of indigenous peoples. In doing so, states must, at a minimum, consult the indigenous peoples and obtain their consent for any exploration or exploitation of natural resources, either on indigenous lands or in a way that will affect indigenous lands and natural resources.²³⁵

*c. Fulfilling the Right of Indigenous Peoples' Permanent Sovereignty:
A Cooperative Effort*

For indigenous peoples to realize their permanent sovereignty, the international community must pull together all of its constituent actors. The Draft Declaration articulates this need, considering international cooperation essential to realizing "the conservation, restoration, and protection" of indigenous peoples' permanent sovereignty.²³⁶ At the outset, the most important step may be government efforts to set up systems for involving the indigenous peoples at every stage in the decision-making process. Specific programs that states can adopt include complaint mechanisms for indigenous peoples and monitoring strategies that ensure development activities do not go beyond the scope of indigenous consent.²³⁷ States can also contribute by supporting the Draft Declaration and by ratifying other instruments that protect indigenous rights.²³⁸

However, state action is not enough for true success. Non-governmental actors must also cooperate. Corporations can get involved by engaging in dialogue with indigenous peoples and incorporating their interests into official corporate policies and practices. Non-governmental organizations (NGOs) can also help, especially by promoting indigenous peoples' rights to all of the parties involved, including states, private companies, and indigenous peoples themselves.²³⁹

Some organizations are leading the way in these efforts. In fact, the World Bank has been very active. One example of its efforts is Operational Directive

234. ILO Conv. 169, *supra* note 8, art. 15(2); *see also* Draft Declaration, *supra* note 174, art. 30 (providing for the right of indigenous peoples "to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources").

235. 2003 Preliminary Report, *supra* note 196, ¶ 6; *see also* HANNUM, *supra* note 3, at 466.

236. Draft Declaration, *supra* note 174, art. 28.

237. Santosa, *supra* note 50, at 293.

238. BRUCE, *supra* note 1, at 91.

239. *Id.* at 91-92.

4.20 (the Directive), entitled “Indigenous Peoples.”²⁴⁰ The objectives of the Directive are to ensure that indigenous peoples benefit from Bank projects, and to avoid the adverse effects of those projects on indigenous peoples.²⁴¹ The Directive also establishes guidelines for starting development plans, particularly by including indigenous peoples in the creation and implementation of the projects, and for protecting their land and other rights.²⁴²

IV. OVERVIEW OF RURAL ELECTRIC COOPERATIVES: SETTING UP THE MODEL

The Rural Electric Cooperatives (RECs) of the United States provide a model for implementing the necessary cooperation of all parties involved in the development of indigenous land and natural resources. In fact, the RECs have actively applied the principle of cooperation throughout their long history. Through multiple stages of continuing development and collaboration, the RECs show how parties with apparently divergent interests may participate in a cooperative system that benefits all.

Initially, RECs began as a system involving only the United States government and the rural residents of America, especially farmers. However, as time passed, private corporations also became involved, especially through processes such as the “Cardinal Concept.” By considering the progression of RECs through these relationships, first with the government and later with profit-motivated utilities, this section provides a background for understanding the similarity of interests between the RECs and indigenous peoples.

240. *The World Bank Operational Manual: Operational Directive 4.20: Indigenous Peoples*, WORLD BANK, September 1991, available at

<http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/0/0F7D6F3F04DD70398525672C007D08ED?OpenDocument> (last visited Mar. 24, 2005) [hereinafter *World Bank Operational Manual*].

241. *Id.* ¶ 2.

242. *Id.* ¶¶ 14, 15. Recently, the World Bank acted even more boldly. After a review of its participation in extractive industries such as mining, the World Bank is contemplating withdrawal from projects that do not adequately respect the right of indigenous peoples to control their land and natural resources. Press Release no. 2005/50/IFC, World Bank Group, World Bank Group Board Agrees Way Forward on Extractive Industries Review (Aug. 3, 2004), at <http://www.ifc.org/ifcext/eir.nsf/content/pressrelease2> (last visited Mar. 24, 2005); see also EMIL SALIM, STRIKING A BETTER BALANCE: THE FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW VOL. I ix-xii (2003), available at <http://www.worldbank.org/ogmc/files/eirreport/volume1english.pdf> (last visited Mar. 24, 2005) (suggesting that the World Bank participate only in those projects that will contribute to the global reduction of poverty and noting that this will require, among other things, respecting the human rights of indigenous peoples).

A. A Description of Rural Electric Cooperatives

Rural Electric Cooperatives have imported the cooperative form, which has been used for many other purposes, into the public utility industry.²⁴³ Generally, a cooperative is “an enterprise or organization owned by and operated for the benefit of those using its services.”²⁴⁴ An electric cooperative is one “incorporated under state law as a private and independent, not-for-profit business that is owned by the members it serves and governed by a board of directors that is elected by the membership.”²⁴⁵ Based on this description, RECs have five distinct structural features: (1) private, independent, nonprofit electric utility businesses, (2) incorporated under laws of the state of operation, (3) established to provide at-cost electricity, (4) owned by the consumers they serve, and (5) governed by a board of directors elected by and from the membership.²⁴⁶ The two most distinct of these characteristics are that the purpose of the RECs is to provide at-cost electricity to its members and that consumers own the

243. The term “public utility” describes an industry that supplies vital services to society, subject to rate and other regulations, which derives benefit from additional regulation that protects them from competition. PUBLIC UTILITIES REPORTS, INC., *ELECTRIC COOPERATIVES: ON THE THRESHOLD OF A NEW ERA* 4 (1996) [hereinafter PURI]. Examples include water, gas, and transportation utilities, but this article focuses on the supply of electricity. Regulations protect public utilities in this regard because they are “natural monopolies,” meaning that the costs associated with production and distribution are so high that the government has supported monopolies in order to protect the utilities. *Id.* at 5; *but see*, e.g., *id.* at 113-14 (noting that the 1990s brought a change with deregulation of many of the public utilities); *id.* at 114-15 (explaining that the changes of the 1990s were not universal and generally excepted rural electric cooperatives); Greg Kline, *UI Prof Warns of Downside of Electric Deregulation*, THE NEWS-GAZETTE CHAMPAIGN, Nov. 13, 2000, at A1.

244. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 255 (10th ed. 1995); *see also* PURI, *supra* note 242, at 3. The purpose of forming a cooperative is to increase the members’ buying power: “[m]ost commonly, consumers join together to purchase something that otherwise is not cost-effectively available to them.” National Rural Electric Cooperative Association, 2002 Orientation Session for new First-Term Distribution System Directors 1 (2002) (unpublished training manual on file with author) [hereinafter NRECA].

245. NRECA, *supra* note 243, at 4.

246. *About Electric Cooperatives*, TOUCHSTONE ENERGY COOPERATIVES, at http://www.touchstoneenergy.com/TouchstoneEnergy.com/who_we_are/who_about.html (last visited Mar. 24, 2005) [hereinafter TOUCHSTONE, *About Electric Cooperatives*]; *see also* 64 AM. JUR. 2D *Public Utilities* § 4 (2003) (explaining the factors that distinguish a cooperative from a public utility). Elections are guided by the regulation of the individual cooperatives, which always preserve the principle of one vote per member. *See, e.g.*, Firelands Rural Electric Cooperative, Inc., Code of Regulations, art. II, § 7 (2003) (unpublished business regulations on file with author) [hereinafter FREC, Code of Regulations].

RECs.²⁴⁷ As a result, the RECs must return any “profits” not used to improve or maintain operations to the consumer-owners.²⁴⁸

RECs are also distinct because of their seven guiding principles:²⁴⁹

- (1) *Voluntary and Open Membership*: membership is voluntary and open to all persons who are willing to accept membership responsibilities and who are located within the cooperative’s operating territory;
- (2) *Democratic Member Control*: members elect representatives to their REC Board;²⁵⁰
- (3) *Members’ Economic Participation*: members contribute equally to the cooperative’s capital;
- (4) *Autonomy and Independence*: cooperatives are autonomous and member-controlled;
- (5) *Education, Training, and Information*: cooperatives will educate and train the members, elected representatives, managers, and employees;
- (6) *Cooperation Among Cooperatives*: cooperatives improve both the cooperative movement and service to their members by working together on local, state, regional, and national levels; and
- (7) *Concern for Community*: cooperatives work to promote sustainable development and to further other community interests.²⁵¹

247. TOUCHSTONE, *About Electric Cooperatives*, *supra* note 246 (noting that investor-owned utilities (IOUs), on the other hand, operate to maximize shareholder profits); *see also* FREC, Code of Regulations, *supra* note 246, art. VII.

248. TOUCHSTONE, *About Electric Cooperatives*, *supra* note 246; *see also* PURI, *supra* note 243, at 83-84.

249. *Cooperative Principles*, TOUCHSTONE ENERGY COOPERATIVES, at http://www.touchstoneenergy.com/TouchstoneEnergy.com/who_we_are/who_principles.html (last visited Mar. 24, 2005) [hereinafter TOUCHSTONE, *Cooperative Principles*]; *see also* NRECA, *supra* note 244, at 3; PURI, *supra* note 243, at 4.

250. Each member has one vote in the elections. *See, e.g.*, PURI, *supra* note 243, at 7.

251. Pursuant to this last principle, RECs are very active in community development and revitalization projects, assisting in efforts to develop small businesses, create new jobs, improve water and sewer systems, and deliver health care and educational services. TOUCHSTONE, *About Electric Cooperatives*, *supra* note 246; *see also* *Commitment to Communities*, TOUCHSTONE ENERGY COOPERATIVES, at http://www.touchstoneenergy.com/TouchstoneEnergy.com/who_we_are/who_commitment.html (last visited Mar. 24, 2005) [hereinafter TOUCHSTONE, *Commitment to Communities*].

B. *The History of Rural Electric Cooperatives*²⁵²

As already suggested, the RECs have developed through different stages. Each stage presents a different aspect that is valuable in applying this model to indigenous peoples' permanent sovereignty. The first, which began with the Rural Electrification Act of 1936, is important because it shows cooperation between a government and a segment of its citizenry to which it has previously given little regard. Through that relationship, the United States government actually empowered rural America to move to the second phase. In that phase, the RECs extended their partnerships to include not only the government, but also profit-motivated corporations.

1. Government Creation: The Rural Electrification Act of 1936

In 1935, less than twenty percent of Ohio farms had electricity, and most of those were close to towns and existing power lines.²⁵³ Investor-owned utilities (IOUs)²⁵⁴ were reluctant to extend service into rural areas without a serious financial commitment from the rural residents, who were primarily farmers.²⁵⁵ They had two reasons for their reluctance. First, such investment would be costly because there were so few customers per mile of electrical line. Second, the IOUs believed farm families would neither use enough electricity to justify the expense, nor be able to afford such use if it was available.²⁵⁶ Relying on these factors, IOUs determined that such investment was not within the economic interest of their stockholders.

When Franklin D. Roosevelt became President, he decided that the government would step in where the IOUs refused to act. The first effort to this end was the Tennessee Valley Authority Act (1933), which authorized the building of electric lines "to serve 'farms and small villages that are not otherwise supplied with electricity at reasonable rates.'"²⁵⁷ President Roosevelt then brought the cooperative movement fully to life by establishing the Rural

252. This section, as well as the analysis below, focuses on RECs in the state of Ohio. Though Ohio has had some unique experiences, it is generally representative of the cooperative movement throughout the United States. See generally OHIO RURAL ELECTRIC COOPERATIVES, INC., *THE LIGHT AND THE POWER: COMMEMORATING 50 YEARS OF ELECTRICITY IN RURAL OHIO* iii-v (1985) [hereinafter OREC] (discussing the history of RECs).

253. *Id.* at iii.

254. Investor-owned utilities are utilities privately owned by shareholders. See PURI, *supra* note 243, at 8. They are distinct from cooperatives in this aspect, as well as in the fact that shareholders need not live in the company's service area or purchase power from the company. *Id.*

255. OREC, *supra* note 252, at iii. The IOUs would only provide such services if farmers would pay costs of construction, which at the time, could be as high as \$2,000 per mile. Farmers could not afford such amounts. *id.* at 15.

256. *Id.*; see also PURI, *supra* note 243, at 13.

257. OREC, *supra* note 252, at iii (quoting from the Tennessee Valley Authority Act of 1933, 16 U.S.C. § 831(i) (2003)).

Electrification Administration (REA) in 1935.²⁵⁸ As part of the New Deal, Roosevelt originally established the REA to help create jobs and relieve unemployment. As the need for rural electrification became more apparent, the REA shifted its focus to electrifying rural America as an end in itself.²⁵⁹ Congress came aboard with this policy initiative, making the REA a permanent agency with the Rural Electrification Act of 1936 (REAct).²⁶⁰ The REAct promoted rural electrification by establishing a government funding source through which rural electric cooperatives could obtain loans for building electric transmission lines in rural areas.²⁶¹

After the REAct established a firm basis of government support, proponents turned to the task of getting farm families to join the RECs.²⁶² Membership required the farmers to sign a membership certificate, pay a five dollar membership fee, and grant a right-of-way for the cooperative to place transmission lines on their property.²⁶³ Because many farmers were eager to get electricity, supporters recruited members quickly.²⁶⁴ After sufficient numbers joined, the farmers organized their RECs as nonprofit corporations under state law.²⁶⁵ The RECs then applied to the REA for federal loans, which they used to construct the lines that brought electrification to rural America.²⁶⁶

The process was a remarkable success. From 1935 to 1937, electrification on Ohio farms doubled, increasing from 18.7% to 36.6%. By 1950, almost every farm in Ohio had electricity. Although the government loans provided the capital for bringing electrification to these farms, the commitment of the individual REC members – the farmers – was “the dynamic, irrepressible force

258. *Id.* at 13 (noting that President Roosevelt established the REA through Executive Order 7037 on May 11, 1935).

259. *Id.* at 13-14.

260. Rural Electrification Act of 1936, 7 U.S.C. § 901 (2003) [hereinafter REAct]; *see also* OREC, *supra* note 252, at iv (explaining that the REAct made permanent the previously temporary REA Administrator).

261. OREC, *supra* note 252, at iv; *see also* PURI, *supra* note 243, at 14.

262. OREC, *supra* note 252, at 12-13.

263. As compared to the capital investment that the IOUs demanded, the \$5 membership fee was minimal. OREC, *supra* note 252, at 15-16. The IOUs demanded the farmers cover the \$2,000 cost of building the lines. One of the reasons the RECs were able to require less up-front investment from the farmers was the cooperatives used techniques that reduced the cost of installing lines to \$600-900 per mile. *Id.*

264. *Id.* at 12-13.

265. *Id.* at 14.

266. *Id.* at 12. At this early stage, Ohio established thirty cooperatives that borrowed \$5.5 million in REA loans. The cooperatives used those loans to construct more than 5,000 miles of electrical lines throughout rural Ohio. *Id.* at 13. By the year 1985, the REA had loaned \$20 billion to RECs nationwide; perhaps even more astonishing than this high amount was the fact that the RECs had repaid all but \$44,000 of those loans. *Id.* at 121.

behind the program.”²⁶⁷ Without their commitment, the loan program would have remained an untapped resource.

2. Private-Sector Expansion: the “Cardinal Concept”

Despite the early success of the RECs, they served a limited role during this initial stage of electrification, operating as distribution-only cooperatives.²⁶⁸ Providing electricity requires two other functions besides distribution: generation and transmission.²⁶⁹ Initially, RECs had to contract with other utility companies to obtain electricity.²⁷⁰ Because they had nothing to offer these other companies, the RECs had little power with which to bargain for wholesale electricity at reasonable rates.²⁷¹

Of all the problems the RECs faced, the issue of rates was their primary concern.²⁷² Initial efforts to increase their buying power concentrated on banding individual cooperatives together into larger organizations, such as the Ohio Rural Electric Cooperatives, Inc. (OREC). OREC’s mission is “[t]o aid, promote and assist a program of rural electrification in the state of Ohio . . . [and] to engage in any activity necessary, convenient and proper to the economic distribution of electric energy to the inhabitants of rural areas in the State of Ohio.”²⁷³ With this mission, OREC operated under the belief that cooperatives could increase their buying power by working together in large numbers, thereby, obtaining cheaper electricity rates from their suppliers.²⁷⁴

After some initial success of increasing their buying power through such collaborative efforts, the RECs soon realized they could maintain low-cost electricity supplies over the long-term only if they became power generators, and not just distributors.²⁷⁵ With this in mind, Ohio’s RECs began to research the

267. OREC, *supra* note 252, at 60.

268. *Id.* at 18.

269. PURI, *supra* note 243, at 9 (explaining that the steps involved in electrical power distribution are: (1) generation, or the production of electricity, (2) transmission, in which companies send the generated electricity from the generating source to distribution facilities in the geographic area where it will be used, and (3) distribution, where utilities deliver the electricity to their consumers).

270. NRECA, *supra* note 244, at 1 (noting that they turned mostly to IOUs and municipal utilities, which are owned by city governments who usually sell the services to persons within the city); *see also* OREC, *supra* note 252, at 17.

271. OREC, *supra* note 252, at 18.

272. *Id.* at 62; *see also id.* at 61 (explaining that other problems included personnel concerns, training for employees and management, and labor relations).

273. *What is OREC?: The history of the Ohio Rural Electric Cooperatives, Inc. (OREC)*, BUCKEYE POWER, at http://www.buckeyepower.com/about_orec_history.asp (last visited Mar. 25, 2005) [hereinafter BUCKEYE, *What is OREC?*].

274. OREC, *supra* note 252, at 62, 66.

275. *Id.* at 73-74.

viability of building their own generating plant.²⁷⁶ Their research led to the creation of “a statewide generation and transmission cooperative,” Buckeye Power, Inc., in 1959.²⁷⁷ Buckeye Power’s primary goal was to either purchase an existing source of power for OREC, or build a generating plant of its own for that purpose.²⁷⁸ Either outcome would help the Ohio RECs continue to provide their members with low-cost electricity by allowing them to generate their own power rather than having to meet the price demands of other suppliers.

IOUs resisted the REC efforts to find or develop their own source of generation because, if successful, the IOUs would lose the profits from selling their electric surpluses to the RECs. In addition, IOUs might lose further profits if other companies switched and began purchasing electricity from generation RECs. One utility, Ohio Power Company, along with its parent corporation, American Electric Power (AEP), proved to be more of a visionary than its competitors when it entered negotiations with Buckeye Power in 1961.²⁷⁹ AEP acknowledged that rural electric cooperatives were permanent players in the utility industry, and therefore, was able to see the potential for a mutually beneficial relationship.²⁸⁰ The negotiations between the two entities continued for several years, until they finally resulted in the Cardinal Concept in 1963.²⁸¹

The Cardinal Concept was one of the first and best examples of cooperation between RECs and IOUs. The partnership was revolutionary because it was the first time a profit-motivated private utility agreed to collaborate with a REC to build a generating facility.²⁸² Also, the fact that both groups were willing to come to the negotiating table with a good faith commitment to understanding, problem-solving, and mutual respect for each other’s rights and interests was remarkable.²⁸³ This attitude allowed the parties to negotiate a final agreement that would prove beneficial for both sides.²⁸⁴ The parties announced the final agreement on October 28, 1963.²⁸⁵

276. *Id.* at 67.

277. *What is Buckeye Power?: History*, BUCKEYE POWER, at http://www.buckeyepower.com/about_bp_history.asp (last visited Mar. 24, 2005) [hereinafter BUCKEYE, *History of Buckeye Power*]; see also OREC, *supra* note 252, at 67.

278. OREC, *supra* note 252, at 73.

279. *Id.* at 67.

280. *Id.* at 75.

281. *Id.* at 72; see also PURI, *supra* note 243, at 54.

282. OREC, *supra* note 252, at 72. The Cardinal Concept was also revolutionary because AEP required Buckeye Power to obtain funding from private sources rather than through the federal loan program. Historically, cooperatives had been unable to obtain private financing. *Id.* at 72-73. American Electric Power helped overcome this hurdle by pledging its own credit to secure funding from private sources. *Id.* at 78.

283. *Id.* at 75.

284. *Id.* at 76. The benefits that both parties enjoyed were not just economical; they also learned from one another’s practical successes. For example, AEP realized the value of reaching out to

Until that point, the Cardinal Concept existed primarily as a theory for cooperation between RECs and IOUs. With the groundbreaking of the Cardinal Power Plant on November 4, 1963,²⁸⁶ the Cardinal Concept took physical shape. The Cardinal Power Station included two identical generating units, with Ohio Power and Buckeye Power each owning one unit.²⁸⁷ Buckeye Power could use its unit to supply Ohio's RECs with the electricity they required, ensuring low-cost rates for the cooperative members.

Although assuring affordable consumer rates was an important result, the enduring lesson of the Cardinal Concept is its standard for industry cooperation. Thus, many considered Cardinal the dawn of "a new era" in which rural electric cooperatives and investor-owned utilities worked together in mutually beneficial relationships.²⁸⁸ Such cooperation among previous industry antagonists proved that groups with divergent interests could work together toward a common goal. The RECs have continued to thrive as a result: since Buckeye Power built the first generation cooperative in Ohio, RECs have expanded to include 867 distribution cooperatives and sixty-four generation and transmission cooperatives in forty-seven states.²⁸⁹ Now called the Rural Utilities Service, the REA continues to administer government programs that assist the RECs.²⁹⁰ The ongoing importance of the RECs to rural Americans shows how RECs became one of the greatest successes of the New Deal era.²⁹¹

C. The Benefits of Rural Electric Cooperatives for Rural America

The effects of electrification on rural life in the United States further demonstrate the success of the RECs. Having electricity in their homes and on their farms clearly improved the lives of rural Americans. The most obvious benefits were directly related to electrification and included conveniences such

meet a social and economic need, despite the possibility that it may not bring the highest short-term return for the shareholders. On the other side, Buckeye Power learned from AEP, who set the industry standards for power generation. *Id.* at 76-77.

285. OREC, *supra* note 252, at 77.

286. *Id.* at 73.

287. *Id.* at 77. AEP's Service Corporation built the plant, transferring Unit 2 to Buckeye Power after construction was complete. *Id.* at 78. In 1977, the companies added a third unit, which Buckeye Power fully owns. *Id.* at 82-83.

288. *Id.* at 83 (quoting from an editorial in *Electrical World* on the groundbreaking for the Cardinal plant in 1963).

289. NRECA, *supra* note 244, at 13 (providing the membership statistics for year ending 2002).

290. PURI, *supra* note 243, at 22-23. This change occurred in 1994, as a result of reorganization within the Department of Agriculture. *Id.* Only one year earlier, Congress had passed the Rural Electrification Loan Restructuring Act of 1993, 7 U.S.C. § 901 (2003) [hereinafter RELRA]. The primary effect of the Act was to alter the interest rates for electrification loans. PURI, *supra* note 243, at 20-21.

291. PURI, *supra* note 243, at 3.

as refrigeration, improved lighting and ventilation, and new farm technology.²⁹² With such advancements, farm life became less hazardous. New technology resulted in fewer farming accidents.²⁹³ Homes were also safer as a result of improved lighting and the elimination of such dangers as kerosene lanterns.²⁹⁴

Rural Americans also enjoyed less obvious benefits. One significant effect was that the process of electrification created more jobs.²⁹⁵ Initially, these jobs were directly related to the electrification process, such as those of installing and maintaining the cooperative electrical lines.²⁹⁶ Later, jobs increased in other industries to meet increased demand of certain products, such as household electrical appliances. Perhaps the greatest benefit was an overall improvement in the quality of rural life. Electricity allowed more work to be done with less human labor. The need for less labor allowed the farmers and their families to participate in leisure activities they were previously unable to enjoy, including community activities and education.²⁹⁷

Beyond these benefits of electrification, RECs have enhanced their communities in many other ways. For instance, they contribute to the economic stability of their communities through programs such as Operation Round Up®, which is a charitable trust fund.²⁹⁸ Through this program, members may choose to have their monthly bills “rounded up” to the next whole dollar. The proceeds are then distributed to local charitable organizations and individuals in the community with special needs.

The RECs also benefit rural Americans by bringing them into the larger political community. To this end, RECs established the National Rural Electric Cooperative Association (NRECA) to serve as a type of grassroots organizer and lobbyist.²⁹⁹ The organization monitors Washington politics and notifies REC representatives when issues arise that are relevant to the concerns of their members. The representatives then act to inform the members and call upon them to get involved by contacting their Senators or Congressional

292. OREC, *supra* note 252, at 5-6, 34-35.

293. *Id.* at 6.

294. *Id.* at 35.

295. *Id.* at 17, 34.

296. *Id.* at 39.

297. *Id.* at 29, 34-35 (pointing out that after electrification, children were able to finish school because less labor was required on the farms).

298. Firelands Rural Electric Cooperative, Inc., Member Handbook 9 (1995) [hereinafter FREC, Member Handbook] (unpublished customer manual, on file with author).

299. OREC, *supra* note 252, at 51. The cooperatives established the NRECA in 1942. *Id.* Today, the “NRECA provides effective legislative, regulatory, education, training, consulting, marketing/communications and employee benefits programs.” NRECA, *supra* note 244, at 16; PURI, *supra* note 243, at 24.

Representatives.³⁰⁰ Through these and other programs, the RECs have developed into an invaluable part of rural life in the United States.

V. INDIGENOUS PEOPLES' PERMANENT SOVEREIGNTY OVER THEIR NATURAL RESOURCES: APPLYING THE MODEL OF RURAL ELECTRIC COOPERATIVES

The benefits of RECs need not be limited to the rural United States. In fact, the United Nations recognizes the cooperative structure as a major factor needed to "promote the fullest possible participation in the economic and social development of all people."³⁰¹ The remainder of this article suggests that RECs can serve as a model for protecting indigenous peoples' permanent sovereignty.

Like indigenous peoples, rural America in 1935 faced a government and a utility industry that had little interest in considering its needs. Though they encountered this indifference in the context of electrification, rural Americans shared with indigenous peoples a government alienation and denial of benefits extended to the rest of society. In this context, the problems of rural Americans serve as a valuable tool for the Ogoni, Nisga'a, Gitksan, Wet'suwet'en, and other indigenous peoples:

If the Western historical experience is to be of any guide at all, the issues have to be traced further back to the plight and predicaments of those common lots in the rural sectors who were forced to be dislocated and alienated in the process of technological advancement and industrialization.³⁰²

Indigenous peoples need a system for ensuring their core right – participation through which they may extend or withhold their consent to exploitation of natural resources. RECs provide a model for such participation. This section considers how the model of RECs extends to indigenous peoples' permanent sovereignty by first attempting to show how the structure and guiding principles of RECs can translate to a similar system for indigenous peoples. It is important to consider obstacles to implementing the model, including the political atmosphere that indigenous peoples face and the willingness of all parties to participate in the model. Finally, this section will briefly discuss how the model will realize indigenous peoples' permanent sovereignty.

300. OREC, *supra* note 252, at 51.

301. *See, e.g.*, G.A. Res. 49/155, U.N. GAOR, 49th Sess., Supp. No. 49, at 171, U.N. Doc. A/49/49 (1994); G.A. Res. 56/114, U.N. GAOR, 56th Sess., 3d Comm., Agenda Item 108, ¶ 2, U.N. Doc. A/RES/56/114 (2002).

302. Ann Blyberg, *Cultural Rights*, in CIRCLE OF RIGHTS: ECONOMIC, SOCIAL & CULTURAL RIGHTS ACTIVISM: A TRAINING MANUAL 329, 344-45 (2000).

A. *Adaptation of the Cooperative Model*

Utilizing the RECs as a model for the indigenous right to permanent sovereignty will require adaptation of the cooperative model to the specific needs and interests of indigenous peoples. This process, which would result in what might be called "Indigenous Cooperatives," would be no different than the adjustments of the cooperative model to serve such varied endeavors as agricultural production, tourism, housing, and utilities.³⁰³ However, some of the unique circumstances faced by indigenous peoples may require atypical alteration of the structure.

1. The Cooperative Structure

Previous efforts to apply the REC model to Native American utilities show the difficulty in developing Indigenous Cooperatives. Those attempts have failed largely because the structure was not properly adapted for the unique interests of indigenous peoples.³⁰⁴ This failure is important because it shows that the REC structure cannot be exactly translated, but must be altered to meet those special interests. More specifically, the failure shows that Indigenous Cooperatives must both limit membership to tribal members and preserve the rule of one vote per member.³⁰⁵

At least three additional factors may dictate the need for a different structure for Indigenous Cooperatives. First, indigenous peoples already own their land and natural resources – by right, even if not in fact. Therefore, the cooperatives will not require any capital investment from their members, as the RECs required. Second, indigenous peoples may choose to exploit their natural resources to enrich their tribes, especially considering the long-term economic oppression they have faced. As such, Indigenous Cooperatives may be profit-based, as opposed to the nonprofit RECs. Finally, Indigenous Cooperatives will be unique in that the interest represented is a collective one; although individual tribal members will participate in decision-making, the interest in the land and natural resources is ultimately a collective one held for current and future tribal members.

Keeping these distinctive features of indigenous peoples in mind, the structural features and guiding principles of RECs can still serve as a model for establishing Indigenous Cooperatives. Considering the above factors, these cooperatives might generally have the following structural features:

303. *Five Good Reasons for Co-operatives*, INT'L CO-OPERATIVE INFO. CENTRE, Sept. 13, 1995, at <http://www.wisc.edu/uwcc/ficic/def-hist/def/five.html> (last visited Mar. 25, 2005) [hereinafter *Good Reasons*].

304. LeBeau, *supra* note 143, at 240.

305. *Id.* (noting that, where these principles are not protected, non-indigenous peoples are often able to gain membership and destabilize the cooperative in such a way that it no longer represents the indigenous interests).

- (1) they are private business organizations;
- (2) incorporated under domestic law;
- (3) for the purpose of representing the tribe;
- (4) regarding its collective interest in the land and natural resources; and
- (5) through an elected governing board.³⁰⁶

In addition to these adjustments, each Indigenous Cooperative would have to further tailor its features to account for the special interests and circumstances of the tribe involved.

2. The Cooperative Principles

Indigenous Cooperatives might also need to adjust the cooperative principles that the RECs follow. Although they would be similar, Indigenous Cooperatives might need to alter those guiding principles as follows: (1) closed membership that is limited to, and automatic for, each member of the tribe; (2) democratic representation through elections pursuant to the one member, one vote principle; (3) autonomy, both from other tribal governing bodies and from the state; (4) training and education for the representatives and cooperative members, as relevant to protecting their permanent sovereignty; (5) cooperation with NGOs and other indigenous peoples, with the aim of increasing their bargaining power and developing a network of support; and (6) emphasis on tribal values in making decisions on proposed projects of exploitation, which will include a balance of cultural integrity with the needs of economic development.

B. Potential Difficulties in Implementing the Cooperative Model

Even with specific changes to the REC model, the fact remains that certain circumstances may not permit implementation of the cooperative model for protection of the right of indigenous peoples to permanent sovereignty. At least two possible circumstances could threaten the implementation of this model. The first involves a political environment that is hostile to indigenous rights, making it impossible to integrate any program that respects those rights. The second involves the willingness of all involved parties to commit to participate in adopting the model.

306. The Board would have many tasks, including representing the interests of the tribe in discussions with the government and private corporations regarding development projects. However, its duties would also include internal decisions, such as how to distribute profits from the exploitation of their natural resources. Several distribution options are available, such as: disbursement of equal shares to all individual tribal members; retention in a tribal account; or some combination of both.

1. Political Environment

Many indigenous peoples are still fighting for the most basic recognition of their rights under domestic law. Like the Ogoni, they continue to suffer at the hands of a government that oppresses them and refuses to even consider indigenous concerns. In such circumstances, it will likely be impossible to implement the REC model. Even where a small chance of implementing the model exists, the most pressing need of those indigenous peoples is the legal recognition of their rights. No model of implementing those rights will be effective without government acknowledgment of such rights and commitment to their protection. Thus, RECs present a model for including the indigenous peoples in the decision-making process that will be best implemented where the state already recognizes an ownership right, and the only issue remaining is how to best realize the indigenous peoples' right to control and participate in decision-making.

Considering this limitation, application of the REC model to develop an Ogoni Cooperative, may not be the best option at this point in time. Even with the government's most recent efforts to alter their policy toward respecting the Ogoni, the political atmosphere is still such that an Indigenous Cooperative may not be the most important or effective tool for realizing the most pressing of the Ogoni needs.

At the other end of the spectrum, the REC model is inappropriate for application to the Nisga'a, as they have achieved actual ownership and control over their designated land and natural resources. In contrast to the Ogoni, the situation of the Nisga'a renders the model inapplicable because it is no longer necessary. These indigenous peoples had the success of fully realizing their right to permanent sovereignty over their natural resources.

Where the model may work best is with indigenous peoples such as the Gitksan and Wet'suwet'en. Although both are working toward a treaty that they hope will bring them the same control as the Nisga'a enjoy, they could implement the REC model during the negotiation period as a method of protecting their interests. Just as the Nisga'a entered into an agreement for interim measures,³⁰⁷ the Gitksan and Wet'suwet'en could propose the implementation of an Indigenous Cooperative to protect their land and resources from further detrimental government actions during the negotiations. Indigenous peoples who enjoy similarly amicable relationships with their governments may also benefit from the model, though those relationships need not include a process of treaty negotiations. Rather, the important feature of the Gitksan and Wet'suwet'en example is the cooperation and mutual respect between the indigenous peoples and their government.

307. 1992 *Interim Measures*, *supra* note 119.

2. Incentives for Participation

Where the political atmosphere does not render the REC model useless, another important consideration will be whether all of the parties involved are willing to participate in a proposed Indigenous Cooperative. RECs provide a model with benefits for all of the parties interested in exploiting the natural resources. This includes the indigenous peoples, as well as their governments and the private companies who are contracted to perform the work of exploiting the resources.

Although special incentives will appeal to each category of participants, some benefits of the cooperative model should appeal equally to all. For example, as community enterprises, the cooperatives contribute to the economic development of the community. When applied to indigenous peoples and their natural resources, the community will include not only the indigenous community, but also the larger state.³⁰⁸ Another important benefit is that, through participation in the cooperative structure, the people involved learn democratic principles that can open a market economy and translate into the political development of the country. Finally, cooperatives contribute to a goal that should be a concern of all humankind: raising human dignity.³⁰⁹

a. The Indigenous Peoples

In addition to these common benefits, Indigenous Cooperatives also present valuable incentives for each of the parties involved. Identifying the indigenous incentives for implementing such a model may be the most fundamental. Initially, the indigenous rights at issue appear distinct from those of the rural United States in the 1930s. Whereas the rural farmers and other residents sought the provision of the basic service of electricity, indigenous peoples are not asking that anything be provided to them. Rather, they are searching for recognition of their land and resource ownership and for involvement in decisions that affect that interest.

This distinction does not diminish the applicability of RECs as a model for indigenous permanent sovereignty. Instead, it requires consideration of the REC model as a multistage development of liberation and empowerment of rural America. Although this development began with obtaining the basic service of electrification, it grew into much more, until the RECs were no longer requesting electricity, but were generating and supplying it to others.³¹⁰ At that point in their development, RECs were interested not in obtaining a new service, but

308. *Good Reasons*, *supra* note 303.

309. *Id.*

310. This is part of the Cardinal Concept: the increased power and position of RECs within the electric industry. See *supra* notes 266-88 and accompanying text. Another aspect is that the RECs began to gain greater political power. See *supra* notes 291-92 and accompanying text.

rather in retaining their position in the utility industry and ensuring that their members received the full benefits available to customers of IOUs.

The transition of the RECs during the 1960s into a full participant in the utility industry, as culminated in the Cardinal Concept, provides the incentive for indigenous peoples to adopt this model: as shown by the Cardinal Concept, indigenous peoples can use the cooperative model to place themselves firmly in the decision-making process. Participation is fundamental to indigenous peoples because their land is so crucial to their identity, and only the indigenous peoples, themselves, can properly assess how certain development programs will affect those unique interests. Thus, only through their direct and powerful participation can decisions regarding exploitation of natural resources properly weigh their interests and prevent a bias and discriminatory outcome. Just as the RECs were able to turn their initial efforts toward electrification into a process for gaining greater industry and political power, indigenous peoples can use this as a "liberating tool" for transforming the system to ensure their full participation and consent.³¹¹

b. Governments

Governments, like Nigeria, have the same incentive for carrying out an Indigenous Cooperative as did President Roosevelt for creating the RECs: recognition of the need to protect all sectors of the state's population, especially those that have been previously ignored. Failure to adhere to this standard could subject states to actions from the international community. In fact, Nigeria is facing a 2002 decision in which the African Commission on Human and Peoples' Rights found Nigeria in violation of the Ogoni right to control their land and natural resources.³¹² Other states may face similar pressure, not only on grounds of international law, but also through assertion of domestic laws that protect indigenous rights. These states acknowledge that their indigenous peoples have rights to ownership over their land and natural resources, but face the problem of how to involve their indigenous peoples in the decisions that affect that ownership right. For example, pursuant to *Delgamuukw* and the right of Aboriginal title, Canada must respect the rights of its indigenous peoples to control their land and natural resources. The RECs can serve as a model for all states to extend that protection, just as they helped to electrify rural America and to include rural residents as powerful participants in the utility industry.

311. Blyberg, *supra* note 302, at 344-45.

312. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, No. 155/96, ACHPR/COMM 11, ¶ 55 (2002) (Comm'n report) (finding Nigeria in violation of the African Charter on Human and Peoples' Rights, art. 21(1), June 26, 1981, 21 I.L.M. 59 (1982)).

In fact, implementing RECs as a model for permanent sovereignty may be an inexpensive route for states to take. In implementing Indigenous Cooperatives, governments need not provide the capital involved in electrifying rural America because the indigenous peoples already possess such capital in the form of their land and natural resources. Although some capital loans or investments may initially be required for establishing the cooperative structure, the state's primary role would be limited to involving established cooperatives as equal partners in decisions on the development of land and natural resources. Thus, states have an incentive to promote this model because it provides such an inexpensive means for adhering to their domestic and international human rights obligations.

c. Private Corporations

Thus far, this article has only briefly mentioned the role of the third party who is primarily involved in the exploitation of natural resources: private corporations contracted by states to exploit natural resources, such as Shell's extraction of oil in Ogoniland. Ultimately, the obligation to respect indigenous peoples' permanent sovereignty lies with the state whose obligation requires the state also protect indigenous rights from outside interference.³¹³ Despite this, corporations often play a vital role in the decision-making processes surrounding government efforts in this realm. As such, use of the REC model requires consideration of corporate interests as the third primary actor involved in decisions regarding development of land and natural resources.

At first glance, the fact that many corporations are motivated solely by profit may make it appear as though they have no incentive for supporting and participating in a cooperative system for indigenous peoples. However, that conclusion fails to consider the fact that corporate actions violating international human rights standards can negatively affect the corporation.³¹⁴ For example, companies suffer as a result of a poor public image, which may lead to responses such as consumer boycotts and social unrest that may place the company's investments at risk.³¹⁵ Shell's presence in Ogoniland clearly shows the reality of these effects: after increasing battles between the MOSOP resistance and the government's security forces, Shell faced not only damage to its physical investments in Nigeria, but also to its reputation among its consumers in Western

313. See, e.g., Draft Declaration, *supra* note 174, art. 28 (recognizing the right of indigenous peoples "to effective measures by States to prevent any interference with, alienation of or encroachment [sic] upon these rights").

314. See, e.g., Peter F. Drucker, *The New Meaning of Corporate Social Responsibility*, 26 CAL. MGMT. REV. 53 (1984); see also Gerald P. Neugebauer, *Indigenous Peoples as Stakeholders: Influencing Resource-Management Decisions Affecting Indigenous Community Interests in Latin America*, 78 N.Y.U. L. REV. 1227 (2003).

315. Neugebauer, *supra* note 314, at 1231.

countries.³¹⁶ These negative impacts show that, contrary to what many believe, corporate profits and promotion of human rights are not mutually exclusive.³¹⁷ Rather, corporations will likely achieve higher levels of long-term profitability by adhering to international human rights standards.³¹⁸ As one author stated, corporations must “do good in order to do well.”³¹⁹ As such, corporations have a clear incentive for promoting programs that respect human rights.

In addition to this incentive, the REC model also gives corporations a short-term incentive. This is proved by the Cardinal Concept: when it partnered with Ohio’s RECs, the private utility AEP entered a highly profitable relationship.³²⁰ This phase of REC development shows that private companies that are solely profit-motivated can enter relationships with cooperative entities without negatively affecting their bottom line. In fact, the unique opportunities presented by such partnerships may be extremely profitable. Due to this development, corporations can support application of the REC model to indigenous peoples’ permanent sovereignty because such a partnership will be profitable both in the short-term and the long-term.

The investment required for corporations to enjoy such profits is relatively small: they need only to commit to involving established Indigenous Cooperatives in the decision-making process for projects involving exploitation. Corporations must invite the cooperatives to the bargaining table, while also abandoning their preconceived notions so that all parties can determine how best to meet their collective interests.³²¹ Initially, this may require corporations to take more initiative in developing exploitation programs that fully consider indigenous concerns. However, by developing programs that are mutually beneficial, corporations will soon begin to realize short-term profits that, in the long-term, will surely cover any initial cost for engaging in this process.

C. Success in Realizing the Right of Indigenous Peoples’ Permanent Sovereignty

Through the application of this REC structure, indigenous peoples may be able to overcome their current “lack of consultation about, or participation in, the design of development projects of which they are the supposed beneficiaries.”³²² The REC system was successful for the rural United States because it worked from the foundational principle “that the best way to . . . [electrify rural

316. Lewis, *supra* note 41.

317. Drucker, *supra* note 314, at 59-62; *see also* Neugebauer, *supra* note 314, at 1231.

318. Drucker, *supra* note 314, at 59-62; *see also* Neugebauer, *supra* note 315, at 1231, 1242-46.

319. Drucker, *supra* note 314, at 59.

320. *See supra* notes 268-88 and accompanying text.

321. PURI, *supra* note 243, at 54.

322. PYAGBARA, *supra* note 41.

America] was to work with the rural Americans themselves."³²³ The same system can serve as a model to empower indigenous peoples such as the Ogoni and the many First Nations of Canada. By giving indigenous peoples the opportunity to participate in exploitation of natural resources, they can become valuable players in such efforts.

Indigenous Cooperatives can go even further by ensuring that indigenous peoples reap the economic benefits of the exploitation of their natural resources. The reality is that indigenous peoples, besides being excluded from decision-making, also bear a significant and disproportionate amount of the harm resulting from such projects. As with the Ogoni, the state and extracting corporation often fail to share the wealth resulting from extraction. The indigenous peoples are the ones who need it the most, for they face the resulting degradation of their lands and other natural resources, which are adjacent to the extractive projects.

The model of RECs provides a solution by involving indigenous peoples during the early stages of the decision-making process, thereby allowing their input to affect the development project in a way that prevents the most harmful results of such projects. Moreover, by ensuring that indigenous peoples receive their share of the profits from the development programs, Indigenous Cooperatives will provide the indigenous peoples with the resources necessary to deal with any negative effects that could not be prevented. In this way, the cooperative model that brought benefits other than electrification to the rural United States³²⁴ could reap numerous rewards for indigenous peoples.

VI. CONCLUSION

International law is increasingly recognizing the right of indigenous peoples to permanent sovereignty over their natural resources. However, indigenous peoples often suffer from state practices that continue to ignore their interests. RECs present a model for implementing the right of indigenous peoples' permanent sovereignty. Applying this model will empower indigenous peoples to enter a relationship with states and private corporations, which will lead to true benefits for all involved.

323. PURI, *supra* note 243, at 3.

324. *Supra* notes 292-300 and accompanying text.