

LAW JOURNAL
FOR SOCIAL JUSTICE
SANDRA DAY O’CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY

Volume 6 **Spring** **2016**

CONTENTS

Zoning and Regulating for Obesity Prevention and Healthier Diets: What Does the South Los Angeles Fast Food Ban Mean for Future Regulation?..... <i>Kim Weidenaar</i>	1
Eating Mascots for Breakfast: How Keeping Native Faces off Labels Can Grow Tribal Economies <i>Leah K. Jurss</i>	27
Utilizing Electronic Monitoring to Enhance Domestic Violence Victim Safety..... <i>Alex D. Ivan</i>	47
Constitutional Protection of Domestic Violence Victims Reinforced by International Law..... <i>Marina Kovacevic</i>	69
Devastating Effects of the International Failure to Recognize Refugees of Gender Based Persecution..... <i>Sara Movahed</i>	87
Kennedy’s Law: The Hidden Constitutionally-Protected Classification <i>Nicole Fries</i>	111
My Nurse is a Pornstar: Should Discrimination Law Protect Moonlighting in the Adult Industry? <i>Erin Iungerich</i>	137
Secrecy, Espionage, and Reasonable Efforts Under the Uniform Trade Secrets Act – An Unbalanced Mass <i>Peter L. Krehbiel</i>	151



Law Journal for Social Justice is supported by the Sandra Day O'Connor College of Law at Arizona State University. The *Law Journal for Social Justice* mailing address is: Law Journal for Social Justice, P.O. Box 877906, 1100 S. McAllister Ave., Tempe, AZ 85287. The *Law Journal for Social Justice* email address is: LawJSocJust@gmail.com.

Subscription: *Law Journal for Social Justice* is an online journal. Editions are accessible through the URL: <http://www.law.asu.edu/ljsj/>, and <http://www.ljsj.wordpress.com/journal>

Copyright: © Copyright 2016 by Law Journal for Social Justice. All rights reserved except as otherwise provided.
Cite as 6 LAW J. SOC. JUST. __ (2016).

LAW JOURNAL FOR SOCIAL JUSTICE

SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY

Volume 6

Spring

2016

2015 – 2016 EDITORIAL BOARD

EDITOR-IN-CHIEF

Asha McManimon

MANAGING EDITOR

Nicole Fries

SENIOR ARTICLES EDITORS

Wayne Freeland

PJ Judd

ONLINE MEDIA EDITOR

Kyle Ewing

SYMPOSIUM EDITOR

Michelle Young

MANAGING EDITORS

Lindsey Carpenter

Darick Holden

Zachary Reedy

John Yankovich

Jane Ahern
Aisha Alcaraz
Christina Arregoces
Rebecca Banes
Brenna Carpenter
Kaitlyn Carr
Virginia Chorenky
Ashwini Dhas
Alexandra Evans
Elisabeth Friedman

Chrisanne Gultz
Jannifer Hancock
Heather Ivery
Hannah Malinski
Brandon Mouw
Jose Oliveros
Ektaa Prasher
Angela Schultz
Tiffany Setters
Devon Suarez

FACULTY ADVISOR: Zachary Kramer

ARIZONA STATE UNIVERSITY
SANDRA DAY O'CONNOR COLLEGE OF LAW FACULTY
2015-2016

- MICHAEL M. CROW, B.A., PH.D.
President of the University
- DOUGLAS J. SYLVESTER, J.D.
Dean, Sandra Day O'Connor College of Law; Professor of Law; Faculty Fellow, Center for Law, Science, and Innovation
- KENNETH W. ABBOTT, A.B., J.D.
*Jack E. Brown Professor of Law
Faculty Co-Director, Center for Law and Global Affairs; Faculty Fellow, Center for Law, Science and Innovation; Professor of Global Studies, School of Politics & Global Studies; Senior Sustainability Scholar, Global Institute for Sustainability*
- RAYMOND E. ANDERSON
Professor of Practice
- JENNIFER BARNES, B.S., J.D.
Director of the Externship Program
- ROBERT D. BARTELS, B.A., J.D.
Charles M. Brewer Professor of Trial Advocacy
- PAUL BENDER, A.B., LL.B.
Professor of Law; Dean Emeritus
- MICHAEL A. BERCH, B.A., J.D.
Emeritus Professor of Law
- Daniel BODANSKY, A.B., J.D.
*Foundation Professor of Law; Center for Law and Global Affairs' Faculty Co-Director
Affiliate Faculty Member, Center for Law, Science & Innovation; Affiliate Faculty Member, Global Institute of Sustainability, School of Sustainability, ASU*
- SARAH BUEL, B.A., J.D.
Clinical Professor of Law
- GUY A. CARDINEAU, A.B., B.S., PH.D.
Emeritus Professor of Law
- CHARLES R. CALLEROS, B.A., J.D.
Professor of Law
- ANDREW CARTER B.A., J.D.
Associate Clinical Professor of Law
- SUSAN CHESLER, B.A., J.D.
Clinical Professor of Law
- ADAM CHODOROW, B.A., M.A., J.D., LL.M.
Willard H. Pedrick Distinguished Research Scholar
- ROBERT N. CLINTON, B.A., J.D.
Foundation Professor of Law; Faculty Fellow, Center for Law, Science & Innovation
- LAURA COORDES B.A., J.D.
Associate Clinical Professor of Law
- EVELYN H. CRUZ, B.A., J.D.
Clinical Professor of Law; Director, Immigration Law and Policy Clinic
- JAIME DAHLSTEDT, B.A., J.D., LL.M.
Associate Clinical Professor of Law; Founding Director, Juvenile & Family Justice Clinic
- M. ROBERT DAUBER, B.A., J.D.
Clinical Professor of Law
- LINDA DEMAINE, B.A., J.D., PH.D.
Professor of Law; Willard H. Pedrick Distinguished Research Scholar; Faculty Fellow, Center for Law, Science & Innovation; Affiliated Professor of Psychology; Director, Law and Psychology Graduate Program
- BETH DiFELICE, M.L.S., J.D.
Assistant Director, Ross-Blakley Law Library & Head of Public Services
- IRA MARK ELLMAN, B.A., M.A., J.D.
Charles J. Merriam Distinguished Professor of Law; Affiliate Professor of Psychology; Faculty Fellow, Center for Law, Science, & Innovation
- AARON X. FELLMETH, A.B., M.A., J.D.
Professor of Law; Willard H. Pedrick Distinguished Research Scholar; Faculty Fellow, Center for Law, Science, & Innovation; Faculty Fellow, Center for Law and Global Affairs
- PATRICIA FERGUSON-BOHNEE, B.A., J.D.
Faculty Director, Indian Legal Program; Director Indian Legal Clinic; Clinical Professor of Law
- JULIA FROMHOLZ
Professor of Practice; Director, Rule of Law and Governance Program
- DALE BECK FURNISH, A.B., J.D., LL.M.
Emeritus Professor of Law
- JOEL GARREAU
Professor of Law, Culture and Values, Sandra Day O'Connor College of Law; Founding Director, The Prevail Project: Wise Governance for Challenging Futures; Founding

ARIZONA STATE UNIVERSITY
SANDRA DAY O'CONNOR COLLEGE OF LAW FACULTY
2015-2016

Co-Director, Emerge: Artists + Scientists Redesign the Future; Founding Director, The Seven Horizons Project; Affiliate Faculty Member, ASU School for the Future of Innovation in Society (SFIS)

DAVID GARTNER, A.B., J.D., PH.D.
Professor of Law; Associate Dean; Faculty Co-Director, Center for Law and Global Affairs; Faculty Affiliate, School of Public Affairs; Senior Sustainability Scholar, Global Institute of Sustainability

TERRY GODDARD
Professor of Practice

KEVIN GOVER, A.B., J.D.
Professor

BETSY GREY, B.A., J.D.
Professor of Law; Alan A. Matheson Fellow; Faculty Fellow, Center for Law, Science, & Innovation; Fellow, ASU Lincoln Center for Applied Ethics, 2015-2016

MICHELLE L. GROSS, B.S., J.D.
Director, Lisa Foundation Patent Law Clinic; Professor of Practice

ZACHARY J. GUBLER, B.A., J.D.
Professor of Law

SANFORD GUERIN, J.D., LL.M.
Emeritus Professor of Law

ANNE HERBERT, A.B., J.D.
Director for Undergraduate Education; Senior Lecturer in Law

TAMARA HERRERA, B.A., J.D., MASTERS OF INFORMATION AND LIBRARY SCIENCE
Clinical Professor of Law; Coordinator, Legal Writing Curriculum

ART HINSHAW, A.B., J.D., LL.M.
Director of the Lodestar Dispute Resolution Program; Clinical Professor of Law

JAMES G. HODGE JR., B.S., J.D., LL.M.
Professor of Public Health Law and Ethics; Director, Network for Public Health Law - Western Region; Director, Public Health Law and Policy Program

KIMBERLY HOLST, B.A., J.D., MLIS
Clinical Professor of Law

DIANE J. HUMETEWA, B.A., J.D.
Professor of Practice

DAVID KADER, B.A., J.D., LL.M.
Emeritus Professor of Law Sandra Day O'Connor College of Law; Arizona State University Member; ASU Melikian Center Advisory Board Member; NAU Martin-Spring Institute Advisory Council

MARCY KARIN, B.A., J.D., LL.M.
Clinical Professor of Law; Director, Work-Life Law and Policy Clinic

DENNIS S. KARJALA, B.S.E., M.S., PH.D., J.D.
Jack E. Brown Chair, Professor of Law; Faculty Fellow, Center for Law, Science, & Innovation

DAVID H. KAYE, B.S., M.A., J.D.
Emeritus Professor of Law

ORDE KITTRIE, B.A., J.D.
Professor of Law; Faculty Fellow, Center for Law, Science, & Innovation; Faculty Fellow, Center for Law and Global Affairs

ZACHARY KRAMER, B.A., J.D.
Professor of Law

JON KYL
O'Connor Distinguished Scholar of Law and Public Service, Professor of Practice

AMY LANGENFELD, B.A., J.D.
Clinical Professor of Law

RHETT LARSON, B.A., J.D., M.Sc.
Associate Professor of Law; Faculty Fellow, Center for Law and Global Affairs; Faculty Fellow, Center for Law, Science, & Innovation; Senior Sustainability Scientist, Global Institute of Sustainability; Senior Research Fellow, Kyl Center for Water Policy at the Morrison Institute for Public Policy

GARY T. LOWENTHAL, A.B., J.D.
Emeritus Professor of Law

ERIK LUNA, B.S., J.D.
Foundation Professor of Law

MYLES V. LYNK, A.B., J.D.
Peter Kiewit Foundation Professor of Law and the Legal Profession; Faculty Fellow, Center for Law, Science & Innovation; Senior Sustainability Scientist, Julie Ann Wrigley Global Institute of Sustainability; Honors Faculty, Barrett, the Honors College; Affiliated Faculty in Justice and Social Inquiry, School of Social Transformation, College of Liberal Arts & Sciences

ARIZONA STATE UNIVERSITY
SANDRA DAY O'CONNOR COLLEGE OF LAW FACULTY
2015-2016

GARY E. MARCHANT, B.Sc, Ph.D. M.P.P., J.D.
Regents' Professor of Law
Professor of Law; Faculty Director and Faculty Fellow, Center for Law, Science & Innovation; Lincoln Professor of Emerging Technologies, Law and Ethics; Senior Sustainability Scientist, Global Institute of Sustainability, ASU

ALAN A. MATHESON, B.A., M.S., J.D.
Sum/Wtr Faculty Teaching

KAIPONANEA T. MATSUMURA, B.S., J.D.
Associate Professor of Law

ERIC W. MENKHUS, B.S.E., M.B.A., J.D.
Associate Dean, New Education Initiatives; Clinical Professor of Law; Faculty Fellow, Center for Law, Science & Innovation

ROBERT J. MILLER, B.S., J.D.
Professor of Law

JEFFRIE G. MURPHY, B.A., Ph.D.
Regents' Professor of Law, Philosophy, and Religious Studies

CHAD L. NOREUIL, B.A., J.D.
Clinical Professor of Law

SANDRA DAY O'CONNOR, B.S., J.D.
Faculty

KATHERINE A. PUZAUSKAS.
Supervising Legal Clinic Attorney

JONATHAN ROSE, B.A., LL.B.
Emeritus, Professor of Law; Faculty Fellow, Center for Law, Science, & Innovation

TROY A. RULE, B.S., J.D.
Faculty Director, Program on Law and Sustainability; Associate Professor of Law; Senior Sustainability Scholar, Global Institute of Sustainability; Faculty Fellow, Center for Law, Science, and Innovation

MICHAEL J. SAKS, B.S., B.A., M.A., Ph.D., M.S.L.
Regent's Professor of Law and Psychology; Faculty Fellow, Center for Law, Science, & Innovation

ERIN A. SCHARFF, B.A., J.D.
Associate Professor of Law

GEORGE SCHATZKI, A.B., LL.M., LL.B.
Emeritus Professor of Law

MILTON R. SCHROEDER, B.A., J.D.
Emeritus Professor of Law

MARY SIGLER, B.A., M.A., J.D., Ph.D.
Associate Dean of Faculty; Professor of Law; Willard H. Pedrick Distinguished Research Scholar

RODNEY K. SMITH
Professor of Practice

YVONNE STEVENS, B.A., LL.B., LL.M.
Instructor (FSC)

ANN M. STANTON, B.A., Ph.D., J.D.
Professor of Law; Faculty Fellow, Center for Law, Science, & Innovation

JUDITH M. STINSON, B.S., J.D.
Associate Dean of Academic Affairs; Clinical Professor of Law

BONNIE P. TUCKER, B.S., J.D.
Emeritus Professor of Law

VICTORIA TROTTA, B.A., M.L.S. J.D.
Associate Dean for the Ross-Blakley Law Library

REBECCA TSOSIE, B.A., J.D.
Regents' Professor of Law; Vice Provost for Inclusion and Community Engagement; Professor of Law, Indian Legal Program; Faculty Fellow, Center for Law and Global Affairs; Distinguished Sustainability Scientist, Global Institute of Sustainability; Affiliate Professor, American Indian Studies Program; Affiliate Professor, Mary Lou Fulton Teacher's College

JAMES WEINSTEIN, B.A., J.D.
Amelia Lewis Professor of Constitutional Law; Faculty Fellow, Center for Law, Science & Innovation; Associate Fellow, Centre for Public Law, University of Cambridge

MICHAEL J. WHITE, B.A., M.A., C. PHIL., Ph.D.
Professor

CLINT WILLIAMSON
Professor of Practice

LAURENCE H. WINER, B.A., M.A., Ph.D., J.D.
Professor of Law; Faculty Fellow, Center for Law, Science, & Innovation

ROSELLE WISSLER, B.A., M.A., Ph.D.
Research Director, Lodestar Dispute Resolution Program; Faculty Fellow, Center for Law, Science & Innovation

GLENN WONG
Distinguished Professor of Practice Sports Law

EDITOR INTRODUCTION

The 2016 Law Journal for Social Justice Symposium, “Promising Practices in Criminal Justice” focused on current programs regarding re-entry and rehabilitation. Discussions ranged from specialty court programs like the Veteran’s Court and Homeless Court, victim-oriented rehabilitation for trafficking victims, and re-entry programs. Panelists included judges, practicing attorneys, and community organizers.

Social justice is an evolving, broadening concept, finding new meaning throughout the academic community. This journal, and the articles found herein, is designed to present these emerging concepts in a manner that allows both the jurist and the layperson to engage them. The issue begins with *Zoning and Regulating for Obesity Prevention and Healthier Diets: What Does the South Los Angeles Fast Food Ban Mean for Future Regulation?*, written by Kim Weidenaar, an article commenting on local zoning ordinances as tools for preventing obesity in disproportionately affected populations. However, with the second article, *Eating Mascots for Breakfast: How Keeping Native Faces off Labels Can Grow Tribal Economies*, Leah K. Jurss concentrates on food sovereignty in tribal communities and labeling of Native food products. Alex D. Ivan then shifts the focus by studying how electronic monitoring may be used to empower victims while reducing burdens of imprisonment spending in *Utilizing Electronic Monitoring to Enhance Domestic Violence Victim Safety*. Next, in *Constitutional Protection of Domestic Violence Victims Reinforced by International Law* Marina Kovacevic argues ratification of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) in the United States. Sara Movahed, in *Devastating Effects of the International Failure to Recognize Refugees of Gender Based Persecution*, then examines legal shortcomings resulting when asylum based solely on a history of gender-based persecution is not considered. Through *Kennedy’s Law: The Hidden Constitutionally-Protected Classification*, Nicole Fries explores the necessity of Supreme Court action to provide lower courts the ability “to apply a suspect class framework to non-marriage sexual orientation laws.” Next, Erin Iungerich, in *My Nurse is a Pornstar: Should Discrimination Law Protect Moonlighting in the Adult Industry?*, considers protections for at-will employees participating in adult industry activities after-hours. Finally, *Secrecy, Espionage, and Reasonable Efforts Under the Uniform Trade Secrets Act – An Unbalanced Mass* by Peter L. Krehbiel concludes the issue by analyzes concerns that shifting costs related to trade secrets may undermine public policy and society at large. Collectively, the unique perspectives of these articles present important domestic and international issues that must be examined in today’s changing landscape.

Special thanks to the Law Journal for Social Justice Editorial Board for their hard work and dedication.

Asha McManimon
2015-2016 Editor-in-Chief
Law Journal for Social Justice

EATING MASCOTS FOR BREAKFAST: HOW KEEPING NATIVE FACES OFF LABELS CAN GROW TRIBAL ECONOMIES

By Leah K. Jurss, JD*

INTRODUCTION

Food sovereignty is the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems Food sovereignty prioritises local and national economies and markets and empowers peasant and family farmer-driven agriculture, artisanal- fishing, pastoralist-led grazing, and food production, distribution and consumption based on environmental, social and economic sustainability. Food sovereignty promotes transparent trade that guarantees just incomes to all peoples as well as the rights of consumers to control their food and nutrition.¹

The concept of food sovereignty as an articulated term of art is relatively recent,² but harkens to an original understanding of feeding and nourishing tribal communities. The concept of food sovereignty is not

* Fellow, Indigenous Law & Policy Center, Michigan State University College of Law; J.D. 2015, Michigan State University College of Law; B.A. 2012, University of Minnesota. Chi-miigwetch to the Hon. Bryan Newland for his comments during the development of this essay.

¹ Declaration of Nyéléni, *Declaration of the Forum for Food Sovereignty*, Selingue, Mali (Feb. 27, 2007), available at <http://nyeleni.org/IMG/pdf/DeclNyeleni-en.pdf>. The Declaration of Nyéléni arose out of a delegation of 500 representatives from 80 countries meeting in Selingue, Mali to “strengthen a global movement for food sovereignty.” *Id.*

² See Hannah Wittman et al., *The Origins & Potential of Food Sovereignty*, in *FOOD SOVEREIGNTY: RECONNECTING FOOD, NATURE & COMMUNITY* 1, 2 (Hanna Wittmen et al. eds., 2010) (noting that the term “food sovereignty” was coined by the Via Campesina movement in 1996); see also *Food Sovereignty—Interest Over Time*, GOOGLE TRENDS, <http://www.google.com/trends/explore#q=food%20sovereignty> (last visited Nov. 11, 2015) (showing no news headlines featuring the phrase “food sovereignty” until 2007); *Food Sovereignty—Ngram Viewer*, GOOGLE BOOKS, https://books.google.com/ngrams/graph?content=food+sovereignty&year_start=1800&year_end=2015&corpus=15&smoothing=3&share=&direct_url=t1%3B%2Cfood%20sovereignty%3B%2Cc0 (last visited Nov. 11, 2015) (showing no use of the phrase “food sovereignty” in print books until 1980, with a steep rise only after 2000).

limited to tribal communities, as “[c]orporations, governments, international institutions, and social movements all use the[] term[] to argue how the production, distribution, and consumption of food should change.”³ Food sovereignty in tribal communities is a movement towards both the consumption of a tribe’s local, culturally traditional foods, and the cultivating and harvesting of those foods on tribal lands.⁴ Tribes and national organizations are continually hosting conferences and symposia to generate ideas and methods to help tribal governments achieve food sovereignty.⁵ This movement works to allow tribal members access to foods that are culturally appropriate, and tries to ensure tribal members “grow, gather, hunt, and fish in ways that [are] maintainable over the longer term . . . [and] [d]istribute foods in ways so people can get what they need to stay healthy.”⁶ From an economic standpoint, the food sovereignty movement also includes an objective that tribes and consumers will work together to “[a]dequately compensate the people who provide the food.”⁷ This movement has resulted in a growing number of tribally owned and operated food businesses expanding into the global market,⁸ feeding both tribal members’ and consumers’ desires for sustainably grown, local foods.⁹

The move towards food sovereignty is coming at a crucial time, considering the increased concerns over the health of Native peoples in the United States.¹⁰ The importation of “mainstream” foods into indigenous

³ Nathan Bellinger & Michael Fakhri, *The Intersection Between Food Sovereignty and Law*, 28 NAT. RESOURCES & ENV’T 45, 45 (Fall 2013). Bellinger & Fakhri note that the terms food politics, food security, food justice, and right to food are also used to discuss this issue. *Id.*

⁴ *Food Sovereignty*, NWIC TRADITIONAL PLANTS AND FOODS PROGRAM, <http://nwicplantsandfoods.com/food-sovereignty> (last visited Nov. 11, 2015); *Food Sovereignty on Tribal Lands*, OR. PUB. BROAD., <http://www.opb.org/radio/programs/thinkoutloud/segment/food-sovereignty-tribal-lands/> (last updated Apr. 2, 2015, 6:23 a.m).

⁵ See generally *Food Sovereignty Summit*, FIRST NATIONS DEVELOPMENT INST., <http://www.firstnations.org/conferences/2014/food/summit.html> (last visited Nov. 11, 2015).

⁶ *Food Sovereignty*, *supra* note 4.

⁷ *Id.*

⁸ *Where to Purchase Traditional Foods of the Indigenous Peoples of North America*, RENEWING AMERICA’S FOOD TRADITIONS (RAFT), CTR. FOR SUSTAINABLE ENV’T OF N. AZ. U. (2007), <http://www.nativeland.org/download/RAFTDirectory.pdf> [hereinafter *Where to Purchase Traditional Foods*].

⁹ Kristine Hansen, *Fresh Living: Farmers Markets Connect Urban Consumers to the Earth*, USA TODAY GREEN LIVING MAG. (May 6, 2014, 1:58 p.m.), <http://www.usatoday.com/story/life/2014/05/03/farmers-markets/8621883/>.

¹⁰ JOHN MOHAWK, *Wild and Slow: Nourished by Tradition*, in THINKING IN INDIAN: A JOHN MOHAWK READER 20, 21 (Jose Barreiro ed., 2010).

diets is largely credited for the increase of chronic health problems, including the most prevalent disease within Indian country, diabetes.¹¹ The adoption of these foods into tribal households increased dramatically during the Allotment and Relocation Eras, when Native peoples began receiving government food subsidies to make up for the lack of agricultural resources on many reservations.¹² These government subsidies, or “comods” as they are colloquially known, are often highly processed and lacking in nutrition: white flour, white sugar, powdered milk, and pasteurized “cheese product.”¹³

Compounding the problem, the relative remoteness of many tribal communities often leads to very few full-service grocery stores.¹⁴ These “grocery deserts,” or “food swamps,”¹⁵ result in a lack of healthy, affordable foods for many Native peoples.¹⁶ Many tribes and tribal members are working to get healthier and combat the grocery desert problem by eating traditional cultural foods.¹⁷ The development of food sovereignty can dramatically increase the prevalence of lower-cost, healthful foods.¹⁸ The traditional foods that once nourished can again keep Native peoples healthy,¹⁹ as “in this high-tech age, the low-tech plant continues to be the key to nutrition and health.”²⁰

¹¹ See *id.*; Emily Dwyer, *Farm to Cafeteria Initiatives: Connections with the Tribal Food Sovereignty*, URB. & ENV'T POL. INST. 9 (2010), http://www.uepitestsite.dreamhosters.com/wp-content/uploads/2012/11/Pub-Farm_to_Cafeteria_Initiatives.pdf.

¹² WINONA LADUKE, *RECOVERING THE SACRED: THE POWER OF NAMING AND CLAIMING* 191 (2005).

¹³ *Id.* at 194.

¹⁴ See generally Dolores Stegelin & Forrest Stegelin, *Food Deserts, Sustainable Food Hubs, Pre-School Aged Native American Indian Children, and Childhood Obesity*, W. AGRIC. ECON. ASS'N (2013), <http://www.waeonline.org/UserFiles/file/StegelinDolores-FoodDesertsSustainableFoodHubs.pdf>.

¹⁵ The term “food swamps” has recently begun to replace “grocery deserts” as more accurate, because while there is a lack of fresh fruits and vegetables, there is an “abundance of processed, high caloric, energy dense foods.” *Diné Food Sovereignty: A Report on the Navajo Nation Food System and the Case to Rebuild a Self Sufficient Food System for the Diné People*, DINÉ POL. INST. 53 n. 38 (2014), <http://www.dinecollege.edu/institutes/DPI/Docs/dpi-food-sovereignty-report.pdf>.

¹⁶ The Navajo Nation, which is equal in size to the state of West Virginia, has only ten full service grocery stores. *Id.* at 54.

¹⁷ MAUREEN TRUDELLE SCHWARZ, *FIGHTING COLONIALISM WITH HEGEMONIC CULTURE: NATIVE AMERICAN APPROPRIATION OF INDIAN STEREOTYPES* 127 (2013).

¹⁸ MOHAWK, *supra* note 10, at 266.

¹⁹ MOHAWK, *supra* note 10, at 20-21.

²⁰ JACK WEATHERFORD, *INDIAN GIVERS: HOW THE INDIANS OF THE AMERICAS TRANSFORMED THE WORLD* 115 (1988).

The movement towards food sovereignty is gaining ground in tribal communities,²¹ but the success of this movement requires food-centered organizations and businesses to generate enough profit to continue their mission.²² These profits and the well-being of both tribal and non-tribal members can be detrimentally impacted by non-Native businesses using labeling techniques that appropriate Native imagery to lure consumers away from foods that are actually produced by Native businesses. This appropriation upsets the power balance between food creation and consumption that the food sovereignty movement is attempting to restore.²³ Using and expanding existing labeling legislation is a way consumers everywhere can be confident in what they are buying, and ensures the future success of businesses working to improve both tribal economies and the health of tribal members.²⁴

Part I of this essay will explore several tribally owned businesses working towards food sovereignty, and their competition: non-tribally owned businesses that are appropriating Native imagery as marketing strategies. Part II will explore the current law as it relates to food labeling and how it can be expanded to protect Native food businesses from their non-Native, appropriating counterparts to ensure that consumers know what they are buying, whether Native or not. Part III will explore other holistic options that tribal businesses can use to increase sales of their products, including consumer education and grass roots intra-community efforts.

I. TRIBAL BUSINESSES AND THEIR NON-NATIVE APPROPRIATORS

A. Native Owned and Operated Businesses

The expansion of tribal food businesses is not limited to one geographic area or foodstuff, but rather expands from the Maple Syrup and Clambake Nations in the East to the Salmon and Acorn Nations in the West.²⁵ Just as there is no one Native American culture or identity, there

²¹ See *supra* note 8 and accompanying text.

²² See Maggie Ellinger-Locke, *Food Sovereignty is a Gendered Issue*, 18 BUFF. ENVTL. L.J. 157, 181 (2010-2011) (noting that food sovereignty “focuses not just on access to food but on all of the processes involved from planting to plate”).

²³ *Id.* at 177-78 (quoting Raj Patel, *Raj Patel on Food Sovereignty and Women’s Rights*, DIG LN! FOOD SOVEREIGNTY IN CANADA (Jan. 15, 2009), https://www.youtube.com/watch?v=cI_F9n_c4yY (“[W]hat food security fails to talk about is control and power. And that’s what food sovereignty does.”)).

²⁴ See *infra* text accompanying note 133.

²⁵ See *Where to Purchase Traditional Foods*, *supra* note 8, at 12.

also is no one specific business model for supplying Native foods.²⁶ These businesses range from inter-tribal co-operations to small, farm-to-table cafes, to businesses especially created to sell Native foods wholesale to tribal and community members.²⁷

One of the most well-known Native foods businesses, Native Harvest, is based on the White Earth Indian Reservation in northern Minnesota.²⁸ Native Harvest was created as part of the White Earth Land Recovery Project, dedicated to “continu[ing], reviv[ing], and protect[ing] our native seeds, heritage crops, naturally grown fruits, animals, wild plants, traditions and knowledge of our indigenous and land-based communities.”²⁹ Native Harvest produces a wide variety of products, including both food and non-food items, such as wild rice, teas, maple syrup, soups, jewelry, and textiles.³⁰ These products are manufactured and packaged on the White Earth Indian Reservation,³¹ and the company employs tribal members and offers internships and volunteer opportunities.³² The company also operates the Minwanjige Café, which serves many of the products produced.³³ The foods are sold within the reservation, through an online catalog, and are shipped to brick and mortar retailers across the country.³⁴ In only a few years, the company has sold over \$300,000 of Native food products,³⁵ each with a label containing the face of a Native woman, unadorned, without the pan-Indian turquoise or feathers found on many appropriated Native products.³⁶

Another business, Lakota Foods, is based out of the Lower Brule Sioux Indian Reservation in South Dakota and markets itself as “the first and only Native American owned and operated organization producing,

²⁶ See Dwyer, *supra* note 11, at 14.

²⁷ See *supra* note 8 and accompanying text.

²⁸ LADUKE, *supra* note 12, at 205-06.

²⁹ WHITE EARTH LAND RECOVERY PROJECT, <http://www.nativeharvest.com> (last visited Nov. 11, 2015).

³⁰ *Catalog*, WHITE EARTH LAND RECOVERY PROJECT, <http://nativeharvest.com/catalog> (last visited Nov. 11, 2015).

³¹ Kevin Taylor, *Eating Indigenously Changes Diets and Lives of Native Americans*, ALJAZEERA AMERICA (Oct. 24, 2013, 5:00AM), <http://america.aljazeera.com/articles/2013/10/24/eating-indigenouslychangesdietsandlivesofnativeamericans.html>.

³² *Internship & Volunteer Opportunities*, WHITE EARTH LAND RECOVERY PROJECT, <http://nativeharvest.com/node/13> (last visited Nov. 11, 2015). These internship opportunities have been a way for the business to teach non-Native students and individuals about both sustainable food practices and the Ojibwe culture. *Id.*

³³ *Native Harvest*, WHITE EARTH LAND RECOVERY PROJECT, http://nativeharvest.com/native_harvest (last visited Nov. 11, 2015).

³⁴ *Catalog*, *supra* note 30.

³⁵ LADUKE, *supra* note 12, at 206.

³⁶ See e.g., *Wild Rice*, WHITE EARTH LAND RECOVERY PROJECT, http://nativeharvest.com/catalog/1/wild_rice (last visited Nov. 11, 2015).

processing, packaging, and marketing popcorn celebrating its Native American origin.”³⁷ This tribally owned corporation has been heralded as a model tribal business by the U.S. Department of Agriculture, one that has the potential to create a “‘transformative’ effect on Indian reservations because of [its] potential to add jobs and pump money into the local economy.”³⁸ Lakota Foods produces nearly 15 million pounds of popcorn each year, and ensures almost every step of the production process is done by hand in order to increase the opportunities for jobs within the factory.³⁹

The Inter Tribal Buffalo Council is a collection of over fifty-three member tribes⁴⁰ working together to reintroduce the buffalo to Indian country.⁴¹ The Council has over 15,000 buffalo in its herd, spread across nineteen states.⁴² While each tribe chooses to use its buffalo in different ways, including selling buffalo meat to consumers and marketing buffalo herd sightseeing trips,⁴³ all member tribes benefit, both commercially and culturally, from having buffalo back on their lands. Another major goal of the Inter Tribal Buffalo Council is the introduction of buffalo meat to school lunch programs.⁴⁴ This particular expansion provides the opportunity for job creation and economic growth within tribes, while at the same time teaching tribal children about traditional foods.⁴⁵

These three companies are only a fraction of the Native food companies that exist today,⁴⁶ and the number continues to grow. The First Nations Development Institute and the Notah Begay III Foundation have partnered with Seeds of Native Health to administer \$2.5 million in grants to food-system projects in Native American communities, aimed at

³⁷ *Lakota Foods*, AMERICAN INDIAN FOODS, <http://www.americanindianfoods.com/products/lakota-foods/> (last visited Nov. 11, 2015).

³⁸ Chris Mueller, *USDA Official Lauds Lower Brule Plant*, THE DAILY REPUBLIC (Feb. 28, 2013, 10:00 p.m.), <http://www.mitchellrepublic.com/content/usda-official-lauds-lower-brule-plant>.

³⁹ Bridget Bennett, *Made in South Dakota: Lakota Foods Popcorn*, KSFY (Apr. 30, 2013), <https://web.archive.org/web/20130502222544/http://www.ksfy.com/story/22125013/made-in-south-dakota-lakota-foods-popcorn>.

⁴⁰ *Member Tribes*, INTER TRIBAL BUFFALO COUNCIL, <http://itbcbuffalo.com/node/15> (last visited Nov. 11, 2015).

⁴¹ *Who We Are*, INTER TRIBAL BUFFALO COUNCIL, <http://itbcbuffalo.com/node/3> (last visited Nov. 11, 2015).

⁴² *Id.*

⁴³ *See Marketplace*, INTER TRIBAL BUFFALO COUNCIL, <http://itbcbuffalo.com/marketplace/list> (last visited Nov. 11, 2015).

⁴⁴ *See generally, Incorporating Buffalo Meat into the Schools’ Lunch Menu*, INTER TRIBAL BUFFALO COUNCIL (Spring 2014), http://itbcbuffalo.com/itbc_main_files/itbc_school_lunch_newsletter.pdf.

⁴⁵ *Id.* at 8 (noting that the buffalo meat used in the school lunch program is purchased from the tribal herd).

⁴⁶ *See Where to Purchase Traditional Foods*, *supra* note 8.

helping tribally owned food businesses succeed.⁴⁷ While these companies are focused on the production and distribution of healthy foods, their existence is tied to the promotion and strengthening of tribal sovereignty.⁴⁸ The heart of tribal sovereignty today centers around the daily existence of a tribal economy and community, something that is threatened by competition for consumers.

B. Butter and More: Non-Native Appropriating Businesses

In contrast to these tribal member owned and operated business are the myriad of businesses that appropriate Native imagery to sell their products. The examples of Native imagery appropriation in food packaging are endless; one blogger noted that she could cook an entire breakfast using foods contained in packaging with appropriated Native imagery.⁴⁹ The most ubiquitous and far-reaching of these appropriating companies is Land O' Lakes butter. In an effort to portray wholesome butter, made with natural ingredients, the company uses a logo featuring an Indian maiden, adorned with fringe and feathers, kneeling in a Great Lakes forest.⁵⁰ The company's only explanation of the Indian maiden logo is that she began as a painting "[r]eflecting the Native American heritage of the Upper Midwest."⁵¹ Land O' Lakes is not a tribally owned company, nor did it begin with a group of Native farmers—it is a member-owned cooperative.⁵² While the company does have an admirable goal of increasing diversity in the work place, Native Americans are curiously left out of the specialized "Employee Resource Groups" and diversity initiatives within the company.⁵³ Although considered a "benevolent

⁴⁷ *Grant Recipients*, SEEDS OF NATIVE HEALTH, <http://seedsofnativehealth.org/grant-recipients/> (last visited Nov. 11, 2015).

⁴⁸ LADUKE, *supra* note 12, at 206-07 ("You cannot determine your destiny if you cannot feed your community.").

⁴⁹ Adrienne Keene, *I Eat Stereotypes Like You for Breakfast*, NATIVE APPROPRIATIONS (July 24, 2012), <http://nativeappropriations.com/2012/07/i-eat-stereotypes-like-you-for-breakfast.html>. Thank you to Ms. Keene for inspiring the title of this essay.

⁵⁰ LAND O'LAKES, <http://www.landolakes.com> (last visited Nov. 11, 2015) (depicting many of the products Land O' Lakes offers, each with the Indian maiden featured prominently on the packaging).

⁵¹ *Corporate History*, LAND O' LAKES, INC., <http://www.landolakesinc.com/careers/whylandolakes/ECMD2-0016724> (last visited Nov. 11, 2015).

⁵² *Performance, Capability, Value*, LAND O' LAKES, INC., <http://www.landolakesinc.com/HomeStoryBC/ECMP2-0183387> (last visited Nov. 11, 2015).

⁵³ *Diversity*, LAND O' LAKES INC., <http://www.landolakesinc.com/company/corporateresponsibility/diversity/default.aspx> (last visited Nov. 11, 2015). A search for the words "Native American" or "Indian" reveal nothing but a short blurb paragraph on

stereotype,”⁵⁴ the continued inclusion of the Indian maiden on all of Land O’ Lakes packaging does little to improve the representations of Indian women today.⁵⁵

One company’s use of Native imagery and themes goes beyond the benevolent stereotype. The Thunderbird Energetica energy bar company uses a pacific-northwest thunderbird image as its logo, but the appropriations go far beyond the picture.⁵⁶ Their newest flavor line is called “Gather” and is “inspired by the life sustaining diets of our ancient ancestors,” yet offers no detail as to the ingredients featured in those diets or which of *our* ancient ancestors’ diets they are, exactly.⁵⁷ Other flavors include “Almond Cookie Pow Wow,” for use “[w]hether you call upon the strength of the buffalo spirit or wisdom of the honey badger,” “Sweet Lemon Rain Dance,” and “Superseed Spirit.”⁵⁸ The history of the company notes that the inspiration to use Native imagery came after

the company’s Corporate History page. *See supra* text accompanying note 51.

⁵⁴ DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 214 (3d ed. 2010) (explaining the many Native stereotypes, from the Ecological Indian to the Noble Savage).

⁵⁵ The only exposure many children receive about Native Americans comes from non-Indian representations, including the pilgrims and Indians Thanksgiving story and the Land O’ Lakes butter package.

The design of the box changed a bit over time but the lady always wore a buckskin dress and beaded belt. Always her hair was raven and lit with a feather. Always, she held a box of sweet cream butter in her hands, offering it up with such reverence that the very idea of butter became a religious offering.

With her fair skin and rosebud mouth, she didn’t look like any Indian maiden we’d ever known, and we’d known plenty during our time on the reservation near Buffalo, large women with golden skin and smiles ten times wider than the woman kneeling in the meadow—but who could be picky where butter boxes were concerned? Maidens were big in the 70s, the culture helping itself to headbands and beadwork, but feeling progressive because, for the most part, everyone had learned not to say squaw. Other than a fascination with Mohammed Ali, the Bermuda Triangle, and the general rise in the popularity of horror films (and the related preoccupation with Ouija boards) nothing marks my childhood so much as a distorted affection for all things native.

Sonja Livingston, *Our Lady of the Lakes*, BELLINGHAM REVIEW, <http://bhreview.org/our-lady-of-the-lakes/> (last visited Nov. 11, 2015).

⁵⁶ THUNDERBIRD ENERGETICA, <http://thunderbirdbar.com> (last visited Nov. 11, 2015).

⁵⁷ *Id.*

⁵⁸ *Products*, THUNDERBIRD ENERGETICA, <http://thunderbirdbar.com/products/html> (last visited Nov. 11, 2015).

seeing a peregrine falcon, but offers no representations that Native peoples are involved in any step of the production process, which would otherwise help to explain the company's name.⁵⁹ Before a media attack from outraged Native peoples, the company website featured far more offensive language and images "trivializing . . . Native spiritual practices and sacred naming ceremonies."⁶⁰

While Thunderbird Energetica's misappropriations are offensive to Native activists, most harmful to tribal food businesses are those non-Native companies that use names and logos that may trick consumers into believing they are buying from Native businesses. The Sue Bee Honey corporation, formerly the Sioux Bee Honey corporation, features a logo with a smiling, little Indian girl wearing a feather on her head.⁶¹ As part of the Sioux Honey Association, the Sue Bee Honey Corporation is not tribally owned and operated, but rather has its origins in Sioux City, Iowa.⁶² The company has no explanation for why their logo is a little Indian girl, but with over 40 million pounds of honey produced annually, the confusing name travels the world.⁶³

Similarly, the Pemmican Beef Jerky company markets its products using a discussion of the historical roots of pemmican and a stately looking Native man wearing a headdress.⁶⁴ The company has no association with any tribe, other than "establish[ing] its identity with a Native American name and symbol, in order to create a strong association to the heritage of and respect for the great outdoors."⁶⁵ The name and packaging of the brand can be confusing to the consumer, especially when placed in stores next to Tanka, a buffalo jerky product produced by Native American Foods, a company operated by tribal members on the Pine Ridge Reservation.⁶⁶ Tanka is marketed using only a photo of a buffalo.⁶⁷

⁵⁹ *The Origins*, THUNDERBIRD ENERGETICA, <http://thunderbirdbar.com/about.html> (last visited Nov. 11, 2015).

⁶⁰ Adrienne Keene, *Thunderbird Energetica: When Good Intentions Go Wrong*, NATIVE APPROPRIATIONS (Mar. 6, 2012), <http://nativeappropriations.com/2012/03/thunderbird-energetica-when-good-intentions-go-wrong.html>. The company previously created a contract for interested individuals to join the "Thunderbird Tribe," which required saluting to buffalo, following spirit eagles, and searching for one's spirit animal. *Id.*

⁶¹ *Sioux Honey Association*, SUEBEE, <http://suebee.com/sioux-honey-association-2/> (last visited Nov. 11, 2015).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Pemmican Beef Jerky History*, PEMMICAN, <http://pemmican.com/history> (last visited Nov. 11, 2015).

⁶⁵ *Id.*

⁶⁶ *A Native American Way of Wellness*, TANKA, <http://www.tankabar.com/cgi-bin/nanf/public/mission.cvw?sessionId=aa57fa8cfe3648f1157548d7a354b9328f592a32f9>

The name and logo confusion extends to ice cream, as well. Many products carry the “Umpqua” name in Oregon, but Umpqua Dairy takes it a step further and places a large Indian warrior in a headdress on all of its packaging.⁶⁸ This labeling is something that neither Umpqua Oats⁶⁹ nor the Umpqua Bank,⁷⁰ both Native owned companies, chose to do for their marketing purposes. The use of Native imagery by Umpqua Dairy, when it is neither owned nor operated by Natives,⁷¹ has the potential to take away sales from nearby Native owned and operated food companies—sales that are desperately needed to grow tribal economies.⁷² During the course of time that this essay was in production, the Umpqua Indian Foods company, previously owned and operated by the Cow Creek Band of Umpqua Tribe of Indians, was forced to close due to both increases in “costs and competition.”⁷³

These companies are just a small sampling of all of the food labels appropriating Native imagery. The Hornell Brewing Company has been in a decades long litigation battle over the use of Crazy Horse’s name and likeness on malt liquor and beer bottles, products Crazy Horse himself denounced.⁷⁴ Calumet Baking Powder and AriZona Tea’s Piña Colada flavor both feature headdresses prominently on their label, with no other connection to Native peoples.⁷⁵ Hopi Blue Corn,⁷⁶ along with many other indigenous seeds, have been patented and sold, making it impossible for

24e9 (last visited Nov. 11, 2015).

⁶⁷ *Id.*

⁶⁸ UMPQUA DAIRY, <http://umpquadairy.com> (last visited Nov. 11, 2015).

⁶⁹ UMPQUA OATS, <http://umpquaoats.com> (last visited Nov. 11, 2015).

⁷⁰ UMPQUA BANK, <https://umpquabank.com> (last visited Nov. 11, 2015).

⁷¹ *About Us*, UMPQUA DAIRY, <http://umpquadairy.com/about-us> (last visited Nov. 11, 2015).

⁷² See Charles Michael Ray, *Growing Pains Hurt Native American Food Company*, NAT’L PUB. RADIO (Aug. 15, 2011, 8:01 AM), <http://www.npr.org/2011/08/15/138785476/growing-pains-hurt-native-american-food-company>.

⁷³ UMPQUA INDIAN FOODS, <http://www.umpquaindianfoods.com/> (last visited Nov. 11, 2015).

⁷⁴ Elizabeth Stawicki, *Crazy Horse Dispute Settled*, MINN. PUB. RADIO (Apr. 26, 2001), http://news.minnesota.publicradio.org/features/200104/26_stawickie_crazyhorse/?refid=0.

⁷⁵ *Frequently Asked Questions: What is the History of Calumet Baking Powder*, KRAFT FOODS, http://kraftfoods.custhelp.com/app/answers/detail/a_id/286 (last visited Nov. 11, 2015); *AriZona Piña Colada Virgin Cocktail Natural Flavored Beverage*, DRINK WHAT (June 14, 2011), <http://www.drinkwhat.com/arizona-pina-colada-virgin-cocktail-natural-flavored-beverage/>.

⁷⁶ ANDREW GULLIFORD, *PRESERVING WESTERN HISTORY* 126-27 (2005); JEFFREY M. PILCHER, *PLANET TACO: A GLOBAL HISTORY OF MEXICAN FOOD* 203-04 (2012).

some Native peoples to grow their traditional crops without paying for the seeds.⁷⁷

Not only do these labels continue Native stereotypes, but they “unfairly commodify . . . Native American people . . . especially since the profits rarely get shared with the subject people.”⁷⁸ The companies detailed above offer names, labels, and products so similar to actual Native food businesses that it is not surprising many Native food businesses are not making a profit.⁷⁹ With the growing trend of buying locally sourced, sustainable, or handmade foods,⁸⁰ consumers would welcome the opportunity to purchase foods produced from Native companies that support tribal communities, if they could only tell the difference.⁸¹ While the commercialized marketing of non-Native foods with Native imagery is not the only reason some tribal food companies struggle to turn a profit,⁸² a change in marketing and advertising regulations would promote tribally owned businesses, putting more money into tribal economies and making the goal of food sovereignty more attainable for tribal communities.

II. LEGAL HELP: FROM THE FDA TO STATE LEGISLATURES

A. The Federal Government

Food labeling is controlled in the United States by the Food & Drug Administration (FDA).⁸³ This agency is housed within the U.S. Department of Health and Human Services and is responsible for “the safety and security of our nation’s food supply.”⁸⁴ The Food, Drug &

⁷⁷ Dwyer, *supra* note 11, at 10-11; LADUKE, *supra* note 12, at 177.

⁷⁸ *Products and Advertising: Selling the “Indian” through Stereotypes*, BURKE MUSEUM, http://www.burkemuseum.org/truth_vs_twilight/imaginary-03.php (last visited Nov. 11, 2015).

⁷⁹ See LADUKE, *supra* note 12, at 206; Mueller, *supra* note 38; Ray, *supra* note 72.

⁸⁰ Caspar Van Vark, *Sustainable Food Chains Make Business Sense and Consumers Happy*, THE GUARDIAN (Dec. 4, 2013, 2:00), <http://www.theguardian.com/sustainable-business/sustainable-food-chains-make-business-sense>.

⁸¹ LADUKE, *supra* note 12, at 170 (noting that rice produced off reservation, “grown from patented seeds on diked paddies, nourished with chemical additives” may still be called wild rice).

⁸² *Id.* at 169 (specifically for wild rice production, difficulties come from a decline in water quality and the prevalence of the wage economy).

⁸³ *U.S. Food and Drug Administration*, FDA, www.fda.gov (last visited Nov. 11, 2015).

⁸⁴ Press Release, U.S. Food and Drug Administration, FDA Proposes Updates to Nutrition Facts Label on Food Products (Feb. 27, 2014), *available at* <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm387418.htm>.

Cosmetic Act gave the authority for the FDA to oversee the safety of many products, including manufactured and processed food.⁸⁵ This Act specifically includes a prohibition of “[t]he introduction . . . into interstate commerce of any food . . . that is . . . misbranded.”⁸⁶ This is expanded upon in 21 U.S.C. § 343, which details when a food is considered to be misbranded, and what manufacturers must do to ensure their product is not misbranded.⁸⁷ The first subsection of this part states that “a food shall be deemed to be misbranded” if there is a “[f]alse or misleading label” or “its advertising is false or misleading in a material respect.”⁸⁸

As it currently exists, this statute could be used by tribal businesses if it was possible to show that the combination of a company’s name, along with the description of the product and its logo, were enough to amount to misbranding via a misleading label. Tribal companies would have a more difficult time proving that a product’s advertising was materially misleading.⁸⁹ For example, the presence of Native imagery on the Pemmican brand of beef jerky lends itself to being a misleading label for a lay consumer interested in purchasing Native-made goods.⁹⁰ However, because the company does not make any direct claims about being Native owned, it is unlikely to break through the “materially” misleading threshold required for misbranding in advertising.⁹¹ A tribal food business selling the same types of products as the non-Native appropriating company likely has the best chance of advancing the argument, such as if Tanka and Pemmican were on the shelves side-by-side, or if the now-defunct Umpqua Indian Foods company had sold ice cream and dairy products.⁹²

The Federal Trade Commission Act also works to ensure that there is truth in advertising.⁹³ This Act focuses in part on the substance of claims made regarding food—such as a food’s nutritional value and other quasi-health claims.⁹⁴ There have been many recent consumer attacks on corporations that use phrases like “all natural”⁹⁵ or “organic”⁹⁶ in their advertising. These cases could be used as precedent in attempts to extend

⁸⁵ 21 U.S.C. § 301 et seq. (2012).

⁸⁶ 21 U.S.C. § 331 (2012).

⁸⁷ 21 U.S.C. § 343 (2012).

⁸⁸ *Id.* at § 343(a).

⁸⁹ *Id.*

⁹⁰ *See supra* note 64 and accompanying text.

⁹¹ *See supra* note 65 and accompanying text.

⁹² *See supra* note 73 and accompanying text.

⁹³ 15 U.S.C. §§ 41-58 (2012).

⁹⁴ 15 U.S.C. §§ 52, 55 (2012).

⁹⁵ *See Brazil v. Dole Food Co.*, 935 F. Supp. 2d 947 (N.D. Cal. 2013).

⁹⁶ *See Jones v. ConAgra Foods, Inc.*, 912 F. Supp. 2d 889 (N.D. Cal. 2012).

the Federal Trade Commission Act to Native food labels. While it might be difficult to argue that the positioning of an Indian maiden on a butter container makes an unlawful assertion of its origin, when combined with company statements and other advertising, such as those used by the Thunderbird Energetica company,⁹⁷ a tribal business may be able to show that the non-Native corporation, through its labeling, is engaging in statutorily prohibited “unfair methods of competition.”⁹⁸

Another avenue for controlling the use of Native imagery on food labels is the Indian Arts and Craft Act of 1990. This Act was created with the purpose of ensuring that arts and craft that are marketed as American Indian or Native American are actually sold by a Native American company or individual.⁹⁹ The Act creates a cause of action that can result in a more than \$1,000 per day fine for any non-Indian individual or business marketing products as being Indian made, with criminal penalties of up to five years in prison.¹⁰⁰ The misrepresentation can be something as simple as calling a piece of jewelry “Indian Jewelry” when it is not made by an Indian.¹⁰¹ The Act describes covered items as “Indian products,”¹⁰² a term usually applied to goods such as baskets, jewelry, and pottery.¹⁰³ The formal definition of what an “Indian product” includes is determined by regulations written by the Secretary of the Interior.¹⁰⁴ It could be possible for the Act to be expanded in the future to include food products, should the Secretary of the Interior be persuaded to change the regulations. If changed, this could funnel sales from the “Indian Harvest Wild Rice” company¹⁰⁵ and the recipe for “Cranberry Nut Bread, Native American Recipe”¹⁰⁶ to actual Native companies selling these products.

⁹⁷ See *supra* text accompanying note 57.

⁹⁸ 15 U.S.C. § 45 (2012).

⁹⁹ See *generally*, 25 U.S.C. § 305 et seq. (2012); 18 U.S.C. § 1159 (2012).

¹⁰⁰ 18 U.S.C. § 1159 (2012).

¹⁰¹ *The Indian Arts and Crafts Act of 1990*, U.S. DEP’T OF THE INT., <https://www.doi.gov/iacb/act> (last visited Nov. 11, 2015) (“[P]roducts sold using a sign claiming ‘Indian Jewelry’ would be a violation of the Indian Arts and Crafts Act if the jewelry was produced by someone other than a member, or certified Indian artisan, of an Indian tribe”).

¹⁰² 25 U.S.C. § 305(e)(a)(2) (2012).

¹⁰³ *The Indian Arts and Crafts Act of 1990*, *supra* note 101 (“Some traditional items frequently copied by non-Indians include Indian-style jewelry, pottery, baskets, carved stone fetishes, woven rugs, kachina dolls, and clothing”).

¹⁰⁴ 18 U.S.C. § 1159(c)(2) (2012).

¹⁰⁵ LADUKE, *supra* note 12, at 174 (noting that this company produces nearly three-quarters of the wild rice in America, but is “an operation with few ‘Indians’ today”).

¹⁰⁶ GaGirlNaturals, *Cranberry Nut Bread, Native American Recipe*, ETSY, https://www.etsy.com/listing/163197524/cranberry-nut-bread-native-american?ref=sr_gallery_9&ga_search_query=native+food&ga_ship_to=US&ga_search_type=all&ga_view_type=gallery (last visited Nov. 11, 2015).

A final federal avenue that an enterprising tribal food business might explore is the federal trust responsibility to Indian tribes. The trust responsibility is a “fundamental concept” within federal Indian law, existing to ensure that the promises made hundreds of years ago by the federal government to Indian tribes are kept today.¹⁰⁷ As the trust responsibility can be created by a treaty, those Indian tribes who have treaties signed by the United States entitling them to an adequate food supply¹⁰⁸ might have the leverage needed to argue that the trust responsibility requires federal agencies, such as the Food and Drug Association and the United States Department of Agriculture, to do something about the appropriation of Native imagery on food labels. Indian law scholars have been arguing for many years that the trust responsibility extends beyond a mere fiduciary duty¹⁰⁹ and into all aspects of treaty rights, including cultural uses of water,¹¹⁰ traditional land resources,¹¹¹ and the cultural effect of coal development.¹¹² It is not too far of a leap to suggest that the federal government also has a trust responsibility to ensure tribal businesses have the resources they need to provide tribally produced food for their communities. In many cases, these are the same communities that were guaranteed both food support from the federal government and the ability to gather food for themselves in the original treaties that created the trust responsibility.¹¹³

B. State Governments

The federal government is not the only means for combating the effects of appropriation of Native imagery on food. The State of Minnesota has passed a statute that requires clarity in labeling for any wild

¹⁰⁷ Stephen L. Pevar, *The Federal-Tribal Trust Relationship: Its Origin, Nature, and Scope*, in 4 REFERENCES GUIDE: CALIFORNIA WATER PLAN UPDATE 2009, at 1-2, available at http://www.waterplan.water.ca.gov/docs/cwpu2009/0310final/v4c19a05_cwp2009.pdf.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (arguing, in part, for enforceability of nonproprietary obligations towards Indian tribes under the federal trust responsibility).

¹¹⁰ Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RESOURCES J. 399 (2006).

¹¹¹ Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355 (2003).

¹¹² Adele Fine, *Off-Reservation Enforcement of the Federal-Indian Trust Responsibility*, 7 PUB. LAND L. REV. 117, 122 (1986).

¹¹³ See, e.g., Treaty with the Sioux Nation of Indians art. V, Feb. 28, 1877, 19 Stat. 254.

rice sold within the state. This statute was developed in part to ensure consumers were able to know when they were buying natural wild rice and when they were buying cultivated paddy rice, which “may be grown commercially using fertilizers, herbicides or insecticides.”¹¹⁴ According to the statute, any wild rice grown within Minnesota that is cultivated, rather than hand harvested, must be clearly labeled as “cultivated” or “paddy.”¹¹⁵ Additionally, all wild rice sold within Minnesota must include a label naming the lake of origin and whether it was cultivated or harvested naturally.¹¹⁶

The statute includes a subdivision directly related to misbranding on product labels, noting that any label that “implies” the rice is hand harvested by Native peoples is “misbranded unless the package contains only 100 percent natural lake or river wild rice harvested by Indians.”¹¹⁷ This portion of the statute leaves a lot of discretion to a reviewing judge because a wide range of text and images could potentially be interpreted as “implying” the rice is hand harvested. The Land O’ Lakes Indian maiden, should she be placed on a bag of wild rice and holding a rice knocking stick in her hand, could be “implying” that the rice was harvested by Native peoples. The existence of this statute reflects the cultural importance of foods and the impact that mislabeling can have on Native communities. “Native rice is about doing it right, about community pride and the essence of being Anishinaabeg,”¹¹⁸ while paddy rice is about nothing more than making a profit.

Although it does not cover every possible scenario,¹¹⁹ the Minnesota Wild Rice Labeling statute can serve as a helpful model for other states and other products. Tribally owned companies selling products traditionally associated with an Indian image, including wild game, smoked fish, and herbal teas, could all benefit from an Indian Truth-in-Labeling statute that requires products to be clearly labeled as “Indian produced.”¹²⁰ Similar to Minnesota’s statute, a labeling statute targeting foods would be most effective if it included a clause forbidding any implication that a product was produced or harvested by Native peoples if it was not.¹²¹ Written broadly enough, a statute of this type could forbid

¹¹⁴ *Wild Rice: Ecology, Harvest, Management*, GREAT LAKES INDIAN FISH AND WILDLIFE COMMISSION, http://www.glifwc.org/publications/pdf/Wildrice_Brochure.pdf.

¹¹⁵ MINN. STAT. § 30.49 (2015).

¹¹⁶ *Id.* § 30.49(2).

¹¹⁷ *Id.* § 30.49(5).

¹¹⁸ LADUKE, *supra* note 12, at 170.

¹¹⁹ *Id.* at 173.

¹²⁰ *See supra* Part I.

¹²¹ *See supra* text accompanying note 117.

the use of the Umpqua Dairy Chief¹²² and the Thunderbird Energetica energy bar product names.¹²³

An individual tribal business alone is unlikely to have the political or monetary capital necessary to move a piece of legislation like this through a state legislature. However, if tribal business and tribes worked together, an Indian Truth-in-Labeling statute could become a reality in every state.¹²⁴ There is both academic and consumer support for truth in advertising and labeling,¹²⁵ knowing where a food came from and who produced it is an important consideration in many consumer purchases.¹²⁶ Educated properly, these consumer decisions could be leveraged to increase sales for tribal food businesses, leading to an expansion of tribal economies.

III. CONSUMER EDUCATION AND INTRA-COMMUNITY EFFORTS: EXTRA-LEGAL SOLUTIONS

Moving beyond courtrooms and political arenas is an important strategy for tribal food businesses looking to increase their profits. Educating consumers about the difference between tribally owned and operated food companies and those companies that only appropriate Indian imagery is an important component in the growth of tribal economies. Educated consumers can help by both making the choice to purchase tribal goods and leading a call for the elimination of Native imagery on food packaging. If a simple blog post was able to completely change the attitude of the Paul Frank corporation regarding Native-themed parties,¹²⁷ and a short Facebook status from the Ojibwe language teacher Anton Treuer was able to spark enough discussion to get a baking

¹²² See *supra* text accompanying note 68.

¹²³ See *supra* text accompanying note 58.

¹²⁴ Although often fraught with ideological differences, tribal organizations have been able to come together in the past to accomplish political goals. See *Native Organizations: Working Together for Our Common Benefit*, NAT'L CONG. OF AM. INDIANS (2010), http://www.ncai.org/news/tribal-communicators-resources/Native_Orgs_Working_Together_for_Our_Common_Benefit.pdf.

¹²⁵ Leah A. Satine, *Is My Yogurt Lying? Developing and Applying a Framework for Determining Whether Wellness Claims on Probiotic Yogurts Mislead*, 63 FOOD & DRUG L.J. 537 (2008).

¹²⁶ Margaret Sova McCabe, *Loco Labels and Marketing Madness: Improving How Consumers Interpret Information in the American Food Economy*, 17 J.L. & POL'Y 493 (2009).

¹²⁷ Kate Crowley, *After Offensive Fiasco, Paul Frank Collaborates With Native Designers*, JEZEBEL (Aug. 28, 2013, 1:00 PM), <http://jezebel.com/after-offensive-fiasco-paul-frank-collaborates-with-na-1209376546>.

company to rename its “Squaw Bread,”¹²⁸ tribal businesses working to educate consumers about Native imagery on food labels could be enough to drastically reduce the number of appropriations.

Many national organizations are well suited to extend educational campaigns to consumers. The Intertribal Agricultural Council’s American Indian Foods program includes a campaign to expose tribal food businesses to more consumers, as a way to “showcase their products and share tribal cultures with the world.”¹²⁹ This showcase of tribal food businesses already includes a goal “to provide export education and to facilitate global market penetration.”¹³⁰ This could be expanded even further to provide information to consumers about how many tribal food businesses are selling the products they need, and how purchasing from a tribal food business creates more than just a profitable company.

Similarly, the Indigenous Food Systems Network already uses a networking platform to spread information about food sovereignty research and sustainable economies throughout Indian Country.¹³¹ This could be expanded further to provide information to consumers about tribal food businesses that sell the products they need, and how purchasing from tribal food businesses and the differences between Native and non-Native foods, such as why “paddy” rice is of a lower quality than hand-harvested wild rice.

In addition to national organizations that can educate consumers, tribes themselves can take on the goal of educating their own members and those who live in their communities. Tribes could model their intra-community efforts on the popular “Eat Local” campaigns that encourage community members to purchase and eat local foods.¹³² These intra-community grassroots efforts could be particularly effective in encouraging tribal members to buy local and eat traditional, cultural foods, both in support of tribal businesses and in an attempt to decrease purchases of products

¹²⁸ Neil Nisperos, *Old Town Baking Company in Rancho Cucamonga to Rename its Squaw Bread*, DAILY BULLETIN (Feb. 19, 2013, 12:01 AM), <http://www.dailybulletin.com/social-affairs/20130219/old-town-baking-company-in-rancho-cucamonga-to-rename-its-squaw-bread>.

¹²⁹ AMERICAN INDIAN FOODS, <http://americanindianfoods.com> (last visited Nov. 11, 2015).

¹³⁰ *About Us*, AMERICAN INDIAN FOODS, <http://www.americanindianfoods.com/about-us/> (last visited Nov. 11, 2015).

¹³¹ INDIGENOUS FOOD SYSTEMS NETWORK, <http://www.indigenousfoodsystems.org/> (last visited Nov. 11, 2015).

¹³² See, e.g., *The Eat Local Challenge*, ECOTRUST, <http://eatlocal.net> (last visited Nov. 11, 2015); *Eating Local*, CENTRAL OHIO RIVER VALLEY, <http://www.eatlocalcorv.org/why-eat-local/> (last visited Nov. 11, 2015); *Take the Challenge*, EAT LOCAL MILWAUKEE, <http://eatlocalmilwaukee.org/elcchallenge.html> (last visited Nov. 11, 2015).

containing stereotypical Native imagery. Increasing purchases from tribal food companies provides the opportunity for growth by creating new jobs and ensuring more money stays within tribal economies.¹³³ This community education should also be expanded to include the many non-tribal members living within tribal communities.¹³⁴ Explaining to non-tribal members that purchases from tribally owned businesses, rather than major corporations, will help their communities grow in a way that will benefit them should be incentive enough to get them to put down the Orville Redenbacher's and pick up a bag of Lakota Foods popcorn.¹³⁵

A focus on purchasing foods produced by tribal businesses spills over into the broader food sovereignty movement that many tribes are working towards.¹³⁶ A movement to streamline packaging and remove Native imagery from non-Native food products could re-focus tribal members on eating more healthful foods. Tribal governments could look to organizations like the Harvard Food Law Society¹³⁷ and Michelle Obama's Let's Move! campaign¹³⁸ for additional guidance in these intra-community efforts.

CONCLUSION

Decreasing the use of Native appropriated text and imagery on non-Native products will encourage the support of tribal businesses producing

¹³³ Stephen Cornell, *Tribal-Citizen Entrepreneurship: What Does it Mean for Indian Country, and How Can Tribes Support It?*, COMMUNITY DIVIDEND: FEDERAL RESERVE BANK OF MINNEAPOLIS (Jul. 1, 2006), https://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=2260&.

¹³⁴ See, e.g., *Tribal Statistics*, LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS 2 (2010), available at <http://witribes.wi.gov/docview.asp?docid=5629&locid=57> (noting that just under a third of all individuals living on their reservation are non-tribal members).

¹³⁵ See *supra* note 37.

¹³⁶ See *supra* Introduction.

¹³⁷ The Harvard Food Law and Policy Clinic recently released a toolkit dedicated towards enhancing the food policies and sovereignty of the Navajo Nation. *Good Laws, Good Food: Putting Food Policy to Work in the Navajo Nation*, HARVARD L. SCH. FOOD L. & POL. CLINIC, ET. AL (2015), <http://www.chlpi.org/wp-content/uploads/2013/12/Navajo-Food-Policy-Toolkit-May-2015.pdf>.

¹³⁸ Michelle Obama's Let's Move! campaign features a section specifically created to encourage healthful eating and exercise within Indian country. See *Let's Move! in Indian Country*, INDIAN HEALTH SERV., <http://www.doi.gov/letsmove/indiancountry/index.cfm> (last visited Nov. 11, 2015); *The Facts for American Indian/Alaska Natives*, LET'S MOVE! (2014), http://www.letsmove.gov/sites/letsmove.gov/files/Let%27s_Move_Fact_Sheet_for_American%20Indian_Alaska%20Native.pdf.

those food products.¹³⁹ What would the state of the butter industry look like if the Land O' Lakes logo actually featured lakes, while a tribally owned and operated dairy farm had a logo featuring an image of a respected elder from the tribe, sans headdress? Especially within tribal communities, the average consumer would likely prefer to buy products from tribally owned and operated businesses, rather than mass producers;¹⁴⁰ this informed purchase would be made easier if there were clear marketing and labeling requirements.¹⁴¹

An increase of support for tribal businesses creating food products can improve tribal communities by creating jobs and keeping more money within the tribal economy.¹⁴² The growth of tribal food businesses can also lead to traditional foods being both cheaper and more widely available, making the movement towards food sovereignty and healthful eating easier.¹⁴³ Despite scientific achievements making genetically modified foodstuffs cheaper, Native peoples themselves "remain the developers of the world's largest array of nutritious foods."¹⁴⁴ Keeping Native faces off non-Native food labels through advertising and labeling requirements in conjunction with consumer education can put more money into tribal businesses, increasing the health of all Native peoples.

¹³⁹ See *supra* Part I.

¹⁴⁰ See *supra* text accompanying note 126.

¹⁴¹ See *supra* Part II.

¹⁴² *Sustainable Tribal Economies: A Guide to Restoring Energy and Food Sovereignty in Native America*, HONOR THE EARTH 3 (2009), http://apps1.eere.energy.gov/tribalenergy/pdfs/sustainable_tribal_economies_hte.pdf; see also, *supra* text accompanying note 133.

¹⁴³ See *supra* Introduction.

¹⁴⁴ WEATHERFORD, *supra* note 20, at 115.

