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Lawsuit for Declaratory Judgment on
Salmon fishing rights

"We want to take back the river, take
back the salmon, and take back our
lives."

--Masaki Sashima, Raporo Ainu Nation
(December 17, 2020, Statement of Opinion
for Second Oral Argument)

I am acting as the honorary representative of the Raporo Ainu Nation. The Raporo Ainu Nation was formerly known as the Urahoru Ainu Association, for which I served as Chairman for many years. In July of this year (2020), the Urahoru Ainu Association changed its name to the Raporo Ainu Nation, and I became its Honorary Chairman. Raporo is derived from Ōraporo, the original name of Urahoru in the Ainu language. The reason we changed the name is because our ancestors created a community, or *kotan*,¹ which possessed the right to catch salmon from the Tokachi River, and we their descendants decided to become an organization with the goal of seeking recognition of this right to catch salmon. We changed the name due to our resolve to become an organization with the

¹ Ainu language word meaning "village community".

² Japanese word meaning "official family register".

right to catch salmon and the right to self-determination, as the former *kotan* was.

It was when I graduated from high school that I first understood with certainty that I was Ainu. When I sent for the *koseki*² required for entrance into a university, I saw that that my grandparents' names were Ekoshippu and Monnosupa. I asked my mother who these people were, but she would not tell me anything. My parents tried to hide that they were Ainu. But they could not hide it. Although my father had obtained the right to catch salmon using a fixed shore net, he was harassed by the other Wajin³ fishermen, who took many of the best fishing spots. I was also being bullied, and thought there was something strange about this. Even before high school, I had suspected that I might be Ainu. When I was in middle school, anything considered Ainu was violently bullied. As a child, I thought this was outrageous, but I couldn't do anything about it. When I entered into my forties, however, I decided to stop hiding my Ainu-ness and to declare, once and for all, that I am Ainu. In so doing, I found that those who had been harassing me up until then had begun to no longer harass me. My mother is Tokachibuto Ainu and my father is Shiranuka Ainu. And now my heart swells with pride to know that I am genuinely Ainu.

Over the past five years, we have secured the return of 102 of our ancestors' remains, which were exhumed from the cemeteries of various *kotan* along the lower reaches of the Tokachi river, such as Aiushi and Tokachibuto, and carried away by researchers to Hokkaido University, Sapporo Medical University, and Tokyo University, along with additional artifacts from Tokachibuto that were excavated

³ Japanese word meaning "ethnic Japanese person".

during the Edo period and were being held by the Historical Museum of Urahoro. It was when I participated in an *icarpa* memorial service in front of the Hokkaido University ossuary that I began to think that our ancestors' remains should be returned to us. Through my role in the Tokachi branch of the Ainu Association of Hokkaido, I made the statement that all Ainu remains should be returned to their places of origin, but I was laughed at by the executives of these organizations, who said such a thing would be impossible. However, believing that the return of our ancestors' remains was our right as Ainu, I filed a lawsuit and succeeded in recovering the remains. We became convinced that, without raising our voices, nothing could move forward.

Three years ago, I visited a Native American tribe in the US state of Washington to study salmon fishing rights. In the 1960s, there had been a struggle between the state and the tribe over salmon fishing that came to be known as the Fish War. The tribe was victorious in asserting their rights in US Federal District Court in 1974, and later in the US Supreme Court. I learned that our predecessors were working tirelessly to protect their rights in the US, as well. Today, Native Americans are working with both state and federal governments to maintain riparian ecosystems and preserve salmon stocks. I too believe that we must conserve the Tokachi River's ecosystem and protect its rich natural environment, beginning with salmon stocks.

I am following in my father's footsteps as the leader of the fixed-net fishers' cooperative. Although fixed-net fishing is more often done at sea, as Ainu, we nevertheless insist on fishing for salmon in the river. When we secured the return of our ancestors' remains, we also received the return of grave goods, including a handmade

netting needle, an implement used for repairing nets. Based on the size of the netting needle, we think it was likely used as a tool for repairing gill nets used to catch salmon in the river. We learned that our ancestors were practicing gill net fishing in the river. I believe our ancestors lived plentiful lives, supporting their families by catching, processing, and trading salmon.

Today, the river where our ancestors fished is known as the Urahorotokachi River. The Tokachi River of today flows to Toyokoro town in Ōtsu due to watershed development projects, but the Urahorotokachi River was originally the main stream of the Tokachi River. Although it used to be more than 200 meters wide, the Urahorotokachi has become a narrow river of only 50 meters wide since its division from the upper reaches of the Tokachi River. The Tokachi River is now used as a water transport route and, at most, discharges only nine cubic meters of water per second. As a result, salmon of the Urahorotokachi watershed rarely use the Tokachi River to migrate upstream. Even still, for us, the salmon are a precious inheritance from our ancestors. Someday, I hope to make the Urahorotokachi River into a place where more salmon will return.



We want to catch salmon, not only as a lifestyle, but as an economic activity. In so doing, we wish for the Ainu to be able to

live independently. We want to take back the river, take back the salmon, and take back our lives.



Raporo Ainu Nation Lawsuit for Declaratory Judgment on Salmon Fishing Rights

Purpose of the claim (Excerpt, August 17, 2020)

Date of filing: August 17, 2020

Plaintiff: Raporo Ainu Nation

Defendants: National Government of Japan
and Prefectural Government of Hokkaido

Plaintiff seeks Declaratory Judgment that:

- 1) The Plaintiff possesses the fishing rights listed in the attached catalog of fishing rights.
- 2) Court costs shall be borne by the Defendants.

Reason for the Request:

This case is a lawsuit seeking confirmation that the Plaintiff, as the only Ainu organization in Urahoro town, has the right to catch salmon at the mouth of the Urahorotokachi River.

Until the Meiji period, each small group of Ainu (called *kotan*) who lived in Hokkaido, the Kurile Islands (Chishima), and Sakhalin (Karafuto) had their own respective territory (called *iwor*), in which they possessed exclusive and monopolistic rights to use and benefit from natural resources, including

salmon. Of these resources, salmon was a primary food source and was used in trade with Wajin, making it an important resource for economic activity.

In 1873, the Meiji government banned seine fishing for salmon in the main rivers of present-day Sapporo, and in 1878, completely banned salmon and trout fishing in Sapporo district. This ban would later expand to prohibit salmon and trout fishing in all of Hokkaido and, in 1897, to also prohibit the capture of salmon and trout by private individuals for home use. Today, as described below, salmon fishing in rivers is prohibited by both the national government and the prefectural government of Hokkaido as a general rule applying not only to Ainu, but also to Wajin. The only exception with respect to the Ainu is that the Hokkaido prefectural government allows a designated number of salmon to be caught for the purpose of cultural transmission.

While the legal basis for the prohibition against salmon fishing for various Ainu groups since the Meiji period was never clarified in the first place, it is nevertheless considered illegal. In other words, the legal basis for each law and ordinance prohibiting various Ainu groups from catching salmon has never been clarified.

With regard to Ainu rights, in a 1993 lawsuit before the Sapporo District Court (High Court Miscellaneous Case No. 9, also known as the Nibutani Dam Case), the Court recognized for the first time that the right to enjoy Ainu culture was one of the losses caused by the construction of the dam, based on an examination of the requirements of Article 20, Section 3 of the Land Expropriation Law. According to the Court's decision, the right to enjoy Ainu culture is guaranteed by Article 27 of the International Covenant on Civil and Political Rights

(although this agreement is generally known as Agreement B in Japan, we refer to it here by its internationally recognized acronym, ICCPR), as well as Article 13 of the Constitution of Japan. However, based on the wording of the ICCPR, this right to cultural enjoyment is interpreted as an individual right (Article 2, Clause 1: "to all individuals"; Article 26: "all persons"; Article 27: "persons belonging to ethnic minorities"), and Article 13 of the Constitution is likewise understood to provide rights to individuals. Recently, the theory that Article 27 of the ICCPR also includes a collective right to cultural enjoyment has been floated, but based on the text of the law it is understood to be an individual right.

In the current case, the Plaintiff is not seeking recognition of the right to catch salmon as Ainu individuals who are members of the Plaintiff's party, but rather is seeking Declaratory Judgment to confirm that the Plaintiff's party possesses a collective right to catch salmon as a discrete group of Ainu. This type of collective right is what is academically known as an "Indigenous right." The Plaintiff asserts to have inherited the exclusive and monopolistic right to catch salmon in the territories of several *kotan* that have existed in Urahoro town since the Edo period, and has filed this lawsuit.

The Defendants (National Government of Japan and Prefectural Government of Hokkaido) are avoiding admitting the facts.

December 17, 2020, Second Oral Argument

The following remarks were given at the Plaintiff's press conference and debriefing session after adjournment of the Second

Oral Argument on December 17, 2020, which took place at the Hokkaido Senior High School Faculty Center:

Morihiro Ichikawa (Plaintiff's representative): At the previous session of the First Oral Argument, the Defendants' side had said they would make their argument, so today in court they issued a brief. However, in the content of their argument, they wrote that they "neither admitted nor denied" what was written in the complaint; in other words, they did not answer whatsoever the question of whether or not they admit the facts of the case as written in the complaint. The Defendants commented on existing laws in force—such as the Fisheries Act, the Fisheries Resources Protection Act, and the Road Ordinance—and demanded that the Plaintiff give an explanation to "clarify the basis for salmon fishing rights under current law." Our claim of this right is based on the fact that, up until the Edo period, each Ainu group (*kotan*) possessed an exclusive and monopolistic right to its own hunting and fishing territory and had the exclusive right to fish there, which is what is academically known as an "Indigenous right." We argue that the Plaintiff still possesses that right and authority, but will the Defendants not even tell us, first of all, whether they admit or deny that each *kotan* had this right during the Edo period? The Defendants' side is completely ambiguous and neither confirm nor deny anything, and they don't even mention it. Since the proceedings will have to be stopped if the Defendants will "neither admit nor deny" the facts, the presiding judge ordered the Defendants to make a proper admission or denial. The government's side is trying to skirt the issue. In this case, immediately following the Meiji Restoration, the land was dispossessed and the rights to access various natural resources, including salmon fishing rights,

were snatched away. Do you admit or deny these facts? Is there some justifiable basis for stripping the Ainu of these rights? We believe the government's side has an obligation to answer these questions. Although the government may be reluctant to talk about it, we would like a more detailed argument next time.

Masaki Sashima (Rapporo Ainu Nation Honorary Chairman): In my testimony today, I stated that our ancestors caught salmon in the Tokachi River estuary and that, consequently, we also desire to catch salmon as they did, and insist that our right to catch salmon be recognized.

Floor: I am Tsunoda from the *Hokkaido Shinbun*. I have a question for the legal team. How do you plan to respond to the opposing party's request for clarification?

Attorney Morihiro Ichikawa: Since the request for clarification asks us to "show the basis under current law" of the Rapporo Ainu Nation's right to catch salmon in the Urahorotokachi River estuary, we intend to answer that "there is no such thing." After all, since the rights that existed in the Edo period were no longer recognized thereafter, today's laws, such as the Fisheries Act and Fisheries Resources Protection Act which were created after WWII, can hardly be expected to provide a basis for Indigenous rights. Going forward, the legal team will be having a detailed meeting to prepare our response.

Floor: Concerning the facts that are laid out in the complaint, the government's side has said only that they neither admit nor deny those facts. Do you have any thoughts on the government's position?

Masaki Sashima: Hokkaido is the land where our ancestors lived since time

immemorial. That's why we call it *iwor*, and we want the government to recognize the scope of our territory and our livelihoods. We live in the Tokachi River estuary, and we want the government to recognize our territory in the Tokachi River estuary, one way or another.

Floor: How did it make you feel when the government came back and told you that it "neither admitted nor denied" the facts?

Masaki Sashima: No matter what the government says, we nevertheless demand the right to catch salmon.

Attorney Morihiro Ichikawa: In a certain sense, today's response from the Defendants—that is, the government—was within expectations. If one were to take this lawsuit seriously, one would have to ask how we see 150 years of history, and in some cases, this would involve turning the conventional view of history on its head, so perhaps they can't give as simple an answer as to whether they "admit or deny" it. Nevertheless, we want to make sure that the government has a proper understanding of the 150 years of history since the Meiji period. Even now, various "experts," such as scholars at Hokkaido University, describe the Ainu's Indigenous rights as if they had disappeared naturally, even though they existed prior to the Meiji period. The question is: what happened in the early years of the Meiji period? Was it an invasion? The government cannot give a simple answer to that, and would like to avoid answering it as much as possible. We won't let this go, but it's a challenge to get them to budge on this.

Floor: I'm from Kyodo News. If and when the Court decides to grant the Plaintiff's request for Declaratory Judgment, what kind of legal backing for rights might it be expected to grant?

Attorney Morihiro Ichikawa: When we talk about rights, we're not talking about something that is recognized by law or by the constitution. The basis of these rights revolves around whether or not the exercise of these rights is recognized as something that should be respected in the context of history. The Japanese government, and especially their legal researchers, are awful; they always tend to first want to talk about whether a given right exists or not. This is a uniquely Japanese way of doing things. For instance, even in a nuclear power plant lawsuit, the first thing they do is to confirm that "people have rights," before issuing a request for an injunction against restarting. They first of all want to discuss whether or not a right exists—which is Japanese legal scholars' unique way of doing things—but instead of this way of thinking, we ought to be asking questions of historical fact, like "what happened?" and "what kinds of rights were exercised?" If those rights don't exist now, why did they disappear? Is there a legitimate basis for the process through which they were made to disappear? This is what we are asking. For example, in the UN Declaration on the Rights of Indigenous Peoples, "the rights to land and access to natural resources" are provided, but even so, just because the Declaration exists doesn't mean the rights have been realized. With or without the Declaration, the rights originally existed. The Declaration only confirms that this is the case. We want to raise these questions through this lawsuit. What we're asking is how we can get Japanese legal scholars and judicial officials to understand the framework of such inductive legal logic. That's why the Plaintiff won't do the burdensome work of searching through the law and the constitution to find where these rights are stipulated.

Floor: If the opposing party recognizes that these rights existed for *kotan* in the Edo Period, that becomes the first step, and from there comes the responsibility to establish why they disappeared, wouldn't you say?

Attorney Morihiro Ichikawa: Yes, I would. And then the Defendants would be expected to come up with a legal justification for the invasion. It's the same for the land. It's the same for the natural resources. After all, in the Edo Period, Ezochi—as the Japanese called it—was a foreign country. How is it that it suddenly became part of Japan? This is a trial that raises those questions. What kind of argument will the other side make? So, it will be difficult. In some cases, there is the possibility that testimony and Court judgments may upset 150 years of history. The other side is also being very cautious.

Floor: I am Yoshigaki from the *Asahi Shinbun*. This question is for Mr. Sashima. In the courtroom today you made a statement based on your own personal experience. Could you tell us a bit more about how you are feeling?

Masaki Sashima: Why are we made to feel worried and to suffer on account of our ancestry, or who we are? Based on our own childhood experiences and for the sake of our own children, our relatives, our parents, and our siblings, we have regrettably stayed silent. But we always wanted to press our claim before you all, one way or another. Why have we today lost the right to catch salmon that our ancestors had? Nowadays, if we catch a single fish from the river, we will be arrested for poaching. Why has this happened? I wanted to lay bare my experiences before you all, and in so doing, make the argument that I always wanted to make when I was growing up.

Floor: I am Hirata, a freelance journalist. I was very impressed by your declaration, Mr. Sashima, in which you expressed that not only do you desire the right to catch salmon, but also that, from an environmental perspective, you wish for wild salmon to return to the river.

Masaki Sashima: I think you all have probably read about this in the newspapers, but regarding salmon fishing, catches have been continually poor. I am wondering if perhaps the reason for this is that juvenile salmon fry are not reproducing well. Why is this happening? What is the present condition of the river? When the juvenile salmon migrate from the river to the ocean, what kind of environment do they leave behind? I have been thinking, don't we need to reconsider what is happening right before our eyes and think back on what we have done to the salmon fry? For example, every year, we salmon fishermen release salmon fry into the river, but since these are artificially released fry, they can be completely wiped out after a single rain. Even so, salmon fry still swim from the river to the ocean one after another. I have been watching the river intently, wondering if these fry might be naturally-spawned fry. It may have been beneficial to artificially manage the entirety of salmon production up until now, but I think those of us living along the coast should now be discussing what to do in the future.

Floor: I am Matsumoto, a supporter. The Japanese government stubbornly refuses to take responsibility for its colonial rule, even regarding the use of Korean forced laborers. So, my question is: does this mean that countries like Canada and the United States, which have returned various rights to Indian territory, have done so after recognizing their responsibility for colonial rule?

Attorney Morihiro Ichikawa: When Europeans "discovered" the American continent, thousands of American Indian tribes—or groups that we would call "*kotan*" in Ainu—existed as independent nations, and it is said that they even waged war upon one another. When Europeans came in, the first European country to "discover" them—let's say, England—held the understanding that they could buy land directly from each tribe to the exclusion of other European countries—for example, France and Spain. This came to be known as the "Doctrine of Discovery". It was a convenient logic for the Europeans, but even under that doctrine, there was a basic assumption that the internal sovereignty and self-rule of the Indian tribes that existed as independent nations would not be conceded. As a result, the US federal government signed treaties with each tribe to buy land. In this way, the colonial development of the US could be advanced. In terms of foreign relations, there was the Louisiana Purchase of 1803, for example, in which Louisiana—which had been a French colony covering a wide area of land—was purchased from Napoleon for millions of dollars; or the Mexican-American War of 1846-1848, through which Arizona, California, Colorado, et cetera, were acquired. In 1868, when the Meiji Restoration was occurring in Japan, the United States was solidifying its federal boundaries as they are today (with the exception of the state of Hawai'i). Even though these boundaries were created, there was still land under Indian control. So, the US government signed treaties with Indians and bought land. The legitimacy of this practice was gradually confirmed through legal precedent set by the US Supreme Court during the 1820s and 1830s. In the case of the US federal government, there was never seen to be a need to define what a colony was in the first place. This is because of the premise that American Indian tribes

have a sovereign existence. Well, what about Japan? After the Meiji Restoration, the *kaitakushi*⁴ hired foreign advisors and summoned them to Hokkaido. Among them was the former US Commissioner of Agriculture, Horace Capron. Capron issued a written report to the Vice Chairman of the *kaitakushi*, Kiyotaka Kuroda, introducing him to US laws which granted surplus land to whites.⁵ In his report, Capron wrote that the surplus land being targeted for sale to whites was to be sold as "public allotments." Capron explained to the *kaitakushi* that the surplus land being targeted for sale was "public land." What is public land? Land held by Indian tribes was not considered public land, but the land that the federal government had purchased from tribes via treaty was considered public land. The *kaitakushi* fully understood (based on Capron's report) the kinds of Indian policy that the whites used to colonize the US, and that federal land was not considered public land unless it was legitimately purchased from the Indians. They understood it, but they disregarded it. For this reason, I contend that it was an invasion. They knew what they ought to do, but they ignored it and unilaterally declared that "Ezochi" was now "Hokkaido," established the *kaitakushi*, and declared every district throughout the country to be state-owned land. This is what we would generally call an invasion, isn't it? I don't know if I will mention these things about North America next time, but I would like to make this argument.

Attorney Masue Nagaoka (member of Plaintiff's legal team): In North America, Indians possessed the right to use their own land to hunt, fish, and harvest various plants, as Indigenous people living in that place since time immemorial. In the same way, the

⁴ The *kaitakushi* was the Japanese colonial administration in Hokkaidō from 1869 to 1882.

Ainu people also lived in groups called *kotan*, and they had the right to use the land, to hunt, to fish, to harvest plants, and they sometimes fought over control of particular fishing grounds. In the way Attorney Ichikawa has described, that right was disavowed and revoked by the Meiji government. Whether or not to properly recognize and openly admit the history and the facts of the case—which is also related to the recent remarks about "coddling" by members of Hokkaido Prefectural Assembly members—and, in this proceeding, that the government who, "without admitting or denying," won't say a thing about whether or not they recognize this historical process, and is feigning ignorance and trying to get through it with a blindfold on—I think all of these things are related.



(Introducing the salmon motif, Raporo Ainu Nation's new logo. Illustrated by Yūko Tonohira.)

Utaspano uoupekare

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⁵ Kiyotaka Kuroda later became the Chairman of the *kaitakushi* in 1874, and 2nd Prime Minister of Japan in 1888.