

TREATY RIGHTS AND THE RIGHT TO CULTURE

Native American Subsistence Issues in US Law

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ABSTRACT

The interplay of treaty rights with the right to culture has produced a variety of results for Native American subsistence hunting and fishing rights in the United States. Where allocation and conservation measures fail to account for cultural considerations, conflict ensues. This paper discusses three examples: waterfowl hunting in Alaska, Northwest salmon fishing, and Inuit and Makah whaling. Each demonstrates that treaty rights are a more powerful force than cultural rights in the law, but that both play important roles in actual policy outcomes. A more detailed examination of whaling indicates how the insertion of needs-based criteria into a framework of cultural rights shifts the benefit of presumption away from indigenous groups. The cultural revival issues and conflicting paradigms involved in Makah whaling policy debates indicate how notions of tradition, authenticity, and self-determination complicate the process of producing resource policies that recognize cultural diversity.

Key Words ◇ cultural revival ◇ hunting ◇ Inuit ◇ Makah ◇ whaling

Hunting and fishing rights have been a major source of conflict for indigenous groups seeking to maintain or regain access to natural resources. The right to culture is one of the bases for asserting these rights, but frequently it has been insufficient to protect them from encroachment by state and national governments. This paper compares the controversy over whaling by the Makah Indian tribe with similar conflicts to elucidate some of the common difficulties Native American resource users face in enacting the right to culture, and the treatment these issues have received under US law. It also examines some issues specific to Makah whaling that reveal how cultural revival is an important aspect of the right to culture which presents special challenges. Treaty rights emerge as a powerful legal force in shaping subsistence rights for tribes in the United States, with strong influences on and interplay with the concept of cultural rights.

Subsistence hunting and fishing involves the harvest of local resources for local consumption. These activities are extremely important to many Native American groups, for whom they provide a critical source of food, connection to the land, maintenance of traditions and cultural institutions, economic benefits, and strong sense of identity. Unfortunately, many resources which have been relied upon for thousands of years are in decline because of a variety of pressures unrelated to subsistence use. Management and regulation are needed to ensure the long-term viability of certain species and associated cultural practices. Native American groups have a vested interest in maintaining populations of the species they utilize, but their needs have not always been recognized in natural resource management efforts.

The intuitive appeal and analytical vagueness of a right to culture, as noted by Robert Winthrop (2000), bump headlong into each other when limited resources are at stake. The management of many wide-ranging animal species, essential to fostering biodiversity in the modern world, is an arena in which conflicts over cultural diversity issues are particularly likely to arise. In this context, the framework of cultural rights can become a tool for inserting native concerns that might otherwise be ignored into policy-making processes. It can also become a new battleground for competing claims over allocation, tradition, and sovereignty.

Because migrating and other wide-ranging animal species occur in a variety of territories, the possibility for culturally based conflicts over use and management is greater than with other types of organisms. This paper will examine conflicts over three types of migrating animals which are utilized by Native Americans: geese, salmon, and whales. Biologists and politicians entrusted with making decisions regarding wildlife management are not always sensitive to the concerns of minority cultural groups. Policy decisions based on biological considerations alone—migration patterns, reproductive seasons, sustainable yield, etc.—can, at best, overlook the legitimate concerns of regional cultural groups, and can, at worst, be employed intentionally to ‘undermine a group’s cultural integrity’ (Winthrop, 2000) under the guise of science-based management. In addition, attempts to eliminate the subsistence practices of minority cultural groups, whether they are challenges to treaty rights or to more general cultural rights, can generate increased conflict, which ultimately may be more detrimental to the sustainability of the resource.

Migratory Waterfowl Hunting

An example of the difficulties these situations can present, as outlined by Huntington (1992) and by Bean and Rowland (1997), is the conflict created by the Migratory Bird Treaty Act of 1918 (16 USC Sections 703–12). The Treaty Act implements several migratory bird treaties, including one

Sepez-Aradanas: Treaty Rights and the Right to Culture 145

between the USA and Canada. Using the accepted management principle of protecting game species from harvest during the reproductive season, the Treaty Act prohibits duck and goose hunting during the nesting season, from March to September. However, this period also comprises the time during which these waterfowl are found in the northern latitudes, where they have been an important subsistence resource for Inuit families for many centuries. Waterfowl often provide the first fresh meat of spring for native subsistence hunters in Alaska. No hunting during nesting season meant no Inuit hunting.

Over the years a variety of tactics have been employed by the US agencies responsible for managing the resource to try to accommodate Alaskan Inuit concerns. In the 1920s, the Territory of Alaska permitted hunting by those in 'absolute need', but this exception included natives and non-natives alike and therefore was more of a concession to the region's sometimes unfor-giving environmental and economic conditions than a recognition of a right to continued cultural practices. Stricter enforcement of the Treaty Act in the 1960s and early 1970s led to the arrest and prosecution of native hunters. Due to the tensions created by these arrests, and their dubious contribution to species conservation, the US Fish and Wildlife Service began a policy of non-enforcement in 1975.

In the 1980s, a cooperative agreement between concerned parties from Alaska and California, where key waterfowl wintering grounds are located, created a framework within which native subsistence hunting could be accommodated while also addressing the need to preserve bird populations. In 1984 and 1985, the Fish and Wildlife Service entered into agreements with natives to manage the northern harvest. In reaction, environmental and non-native hunting groups sued the US government for allowing natives to hunt in violation of the Treaty Act (*Alaska Fish and Wildlife Fed'n and Outdoor Council v. Dunkle* 829 F. 2d 933 (9th Cir. 1987) *cert. denied*, 485 US 988 (1988)). The court affirmed that the Treaty Act did not permit subsistence hunting by Alaska Natives, but also indicated that the Fish and Wildlife Service could not be compelled to take enforcement actions. As a result, subsistence waterfowl hunting in the spring continued, but remained technically illegal.

Several attempts to find a legal accommodation for the native subsistence harvest have failed. The result was that the harvest continued without any effective management. Protocol amendments to the original treaty between the United States and Canada were signed in 1979, but were never ratified and therefore did not take effect. Recently, new amendments to permit a legally managed spring hunt in Alaska were approved (16 USC Sec. 712), with final ratification procedures completed in 1999. Management regulations were expected to be in place by 2001.

During the period of strict enforcement, many natives felt that they bore the brunt of conservation efforts while other regions and cultural groups

bore the higher responsibility for population declines through wetlands degradation and development. By failing to recognize the importance of spring waterfowl hunting to the lifeways of Inuit people, the Migratory Bird Treaty Act created a situation in which native peoples had to risk arrest in order to continue their cultural practices. The failure of the original law to recognize cultural considerations created an unmanageable situation for more than 80 years. The new approach will employ cooperative management techniques that recognize Alaska Natives as ongoing stewards of the resource (US Fish and Wildlife Service, 1999).

Indian Fishing

Another important example of the culturally blind application of wildlife management principles concerns the management of salmon fishing on the north-west coast of the United States (American Friends Service Committee, 1970; Cohen, 1986). The salmon fishery is critical to north-west tribes as a subsistence and commercial resource, invested with both symbolic and material importance as a central aspect of ancient and contemporary culture. Indian treaties of the north-west reserve to the tribes the right to continue fishing at all 'usual and accustomed' places. This right has been challenged repeatedly, particularly by state governments and non-Indian fishermen, but has been upheld by the courts since 1905 (US v. Winans 198 US 371). When efforts to extinguish or curtail treaty fishing rights failed in the courts, the states began a strategy of limiting Indian fishing by other methods, including the use of biological management principles to mask inequitable allocation schemes (Sepez, 2001).

For example, in the 1960s Washington State resource managers halted all net fishing in rivers for steelhead, citing the need to ensure adequate escapement for future returns. A sound management technique from a purely biological perspective, the gear-type regulations failed to recognize—or in many estimations, recognized and took political advantage of—the fact that most natives fished this species with nets, while non-native fishermen used rod and reel and so were not restricted by the regulations. In another example, salmon conservation was implemented by closing the upper parts of the Columbia River because, by the time the fish reached those areas, they were needed to reach escapement goals. Since Indian fishermen predominated in the upper areas, the measure had the effect of reserving the salmon for downstream non-Indian fishermen. A critical examination of fisheries management in Washington indicated that

... the state is engaged not primarily in conservation of fish, but rather in the allocation of fish to sportsmen and commercial fishermen. There appears to be a pattern of legislation and administration to eliminate the Indian stream fishermen. (American Friends Service Committee 1970: 84)

Sepez-Aradanas: Treaty Rights and the Right to Culture 147

At best, native fishermen and their families felt they were being unfairly called upon to bear the brunt of conservation regulations. In the context of an era in which the official US government policy had been to pursue termination of all tribal rights, the notion that the regulations served far more than a biological management purpose was not unreasonable. The courts recognized that the states were using conservation measures to engage in covert allocation and struck down regulations that discriminated against Indian fishermen (*Maison v. Umatilla*, 314 F. 2d 169 (1963), *US v. Oregon*, 302 F. Supp 899 (1969), *Washington v. Puyallup*, 414 US 44 (1973)). The Supreme Court noted that even if a regulation is 'facially neutral' it is 'invalid if its effect is to discriminate against Indian fishermen' (*Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 433 US 658 (1979)).

The tribes, commercial and sports fishing associations, the states of Oregon and Washington, and the US government, battled over the issue of Indian fishing in a series of court cases that eventually delineated the rights of the various parties, culminating in *United States v. Washington* (384 F. Supp. 312 (WD Wash. 1974) and 506 F. Supp. 187 (WD Wash. 1980) appeals citations omitted), known widely as the Boldt decision. The courts determined that Washington's fishing regulations constituted illegal discrimination against Indians, and that the treaties guaranteed these tribes the right to an equitable amount of the available fish. The decisions applied to both commercial and subsistence fishing. Since the resolution of *United States v. Washington*, the tribes have partnered with state government in fisheries management and have been allocated 50 percent of the harvestable fish. The Boldt decision has impacted conflict over other resource rights, as with shellfish litigation decided in the 1990s (*US v. Washington* 135 F. 3d 618 (9th Cir. 1998)).

The differences in the waterfowl controversy and the fishing struggles are a direct result of the legal power of treaty rights in US law. Both conflicts concern the fair distribution of limited natural resources between groups with differing cultural identities. But the group with a written treaty of reserved rights is in a far stronger legal position. Although Alaska Natives are considered to have some aboriginal rights despite the absence of treaties (Bean and Rowland, 1997), Inuit waterfowl hunters have not received the same consideration given to the Northwest Treaty Tribes in fishing issues. In fact, the courts found that the Migratory Bird Treaty Act, which denied Alaskans their spring hunt, had no effect on the hunting rights of treaty tribes (*US v. Bressette* 761 F. Supp. 658 (D. Minn. 1991)). The notion of a right to culture clearly influences the process with a moral suasion, but it is the legally recognizable and definable power of treaty rights that prevails under the law.

Aboriginal Whaling

In the field of international whaling policy, a kind of right to culture has been recognized from the beginning by policies which accommodate aboriginal whaling efforts differently from large-scale commercial whaling operations. The 1931 Convention for the Regulation of Whaling (Sept. 24, 1931, [1934] 49 Stat. 3079, TS No. 880) included a general exemption for coastal aborigines who were engaged in subsistence whaling. The 1946 agreement (December 2, 1946, [1948] 62 Stat. 1716, TIAS 1849), which established the current International Whaling Commission (IWC), continued this exemption in regard to gray and right whales, which were otherwise protected. These exemptions recognized that the impact of subsistence whaling on whale populations was substantially different from commercial impacts, and that the groups engaged in these practices had a certain right to access these resources that superseded other rights to access. The underlying basis for this right was not specifically explicated, but there were hints at a recognition for a right to culture as enacted through subsistence.

The right of coastal indigenous groups to continue whale hunting under the Convention was implicitly predicated on the idea that even depressed populations of whales were not in danger of becoming extinct through aboriginal whaling. When this underlying assumption was challenged by a perceived drop in bowhead whale populations targeted by Alaska Natives, combined with an increased subsistence hunting effort, the IWC eliminated the aboriginal exemption for bowhead whales. Alaska Native whaling practices became a violation of law. An epic battle ensued in which the cultural rights of local native communities were pitted against international efforts to preserve threatened species and, in some cases, to eliminate all whale hunting regardless of stock status. The IWC was forced to rethink its approach to subsistence whaling. Recognizing that a total prohibition was unacceptable to indigenous groups, the IWC devised a new management scheme for aboriginal whaling (Sepez-Aradanas, 1998).

Under the new IWC policy adopted in 1982, cultural, subsistence, and nutritional factors are to be taken into account to assess an aboriginal community's need (IWC, 1982). This need must then be balanced with the need to preserve the targeted species. Native communities can continue hunting depressed whale populations, but a limited quota can be set by the IWC to ensure that the population continues growing toward recovery. For healthy whale populations, up to 90 percent of the sustainable yield can be available for subsistence take. Under these guidelines, the IWC has granted a subsistence quota for bowhead whales every year and the population is steadily increasing under the management of the Alaskan Eskimo Whaling Commission.

The IWC's moratorium on commercial whaling has not been extended to subsistence whaling, which is treated as a fundamentally different arena of

Sepez-Aradanas: Treaty Rights and the Right to Culture 149

whaling with different obligations, incentives, and impacts. As with the original exemptions for aboriginal whaling in the 1931 and 1946 Conventions, the IWC again recognized the importance of cultural rights. However, as will be discussed below, the needs-based guidelines for subsistence whaling represent an important shift in the basic presumption of a right to culture.

Makah Whaling

The Makah Indian tribe is the only indigenous group in the United States with a treaty that specifically reserves the right to hunt whales. At the insistence of tribal members, the words ‘and of whaling or sealing’ (Treaty with the Makah, Jan. 31, 1855 12 Stat. 939) were inserted into the standard language used in Northwest treaties concerning ‘the right of taking fish at usual and accustomed grounds and stations’ (Treaty with the Nisqually, Puyallup, etc. (Medicine Creek), Dec. 26, 1854, 10 Stat. 1132). This insistence reflected the importance of whaling and sealing in millennia-old Makah cultural and economic practices, as well as a political astuteness regarding the importance of the written word in US law on the part of Makah treaty negotiators.

In response to the decimating effects of European and American commercial whaling operations on whale populations, the Makah tribe discontinued whale hunting in approximately the 1920s. Many cultural attributes associated with whaling, such as whaling songs and dances, traditional stories, training practices, and spiritual values remained active in local life. Whale meat and oil from other sources was consumed by some families on the reservation through at least the 1940s (Sepez, 2001), and attempts to harvest from beached whales occurred through the 1980s. Subsistence use of other local resources, such as fish, shellfish, deer, and elk continued as an important part of reservation life (Sepez, 2001; Sepez-Aradanas and Tweedie, 1999).

By the 1970s, as some marine mammal populations were beginning to rebound, the United States used enforcement agents to confiscate seal meat and oil from Makahs, and to ensure that beached whales and whales accidentally entangled by local fishermen were not consumed (Sepez, 2001). In 1994, Congressional clarification that the Marine Mammal Protection Act was not intended unilaterally to abrogate Indian treaty rights (Pub.L. No. 103–238, para. 14, 1994, 108 Stat. 532) led to agreements between the tribe and the National Marine Fisheries Service which allowed for regulated seal hunting. When the Eastern Pacific gray whale was removed from the endangered species list in 1994 because its population had recovered to near-historic levels, the Makah tribe began preparations to resume hunting this species, in consultation with the National Marine Fisheries Service. Because the IWC’s policies had changed following the bowhead crisis from

the general exemption for aboriginal subsistence whalers to the needs-based policy, Makahs were not automatically given the presumption of a right to this cultural practice in that international forum.

While there were many issues brought out during the controversy that developed over the Makah proposal and their successful taking of a single gray whale in May of 1999, two of these are particularly relevant to the idea of a right to culture in wildlife management. After approximately seven decades without active whale hunting by Makahs, what rights remained for the tribe to revive this practice? And in the face of a growing international movement promoting whales as a class of creatures that should not be hunted under any circumstances, what right does a minority ethnic group have to act upon a different belief?

The Right to Cultural Revival

Given the history of cultural repression of indigenous groups worldwide, including native language suppression and the banning of certain religious practices, combined with the tenacity of many cultural identities, any contemporary discussion of cultural rights is bound to include issues concerning cultural revival. Cultural revival movements can be a welcomed part of intercultural relations when the practices in question are non-threatening to the dominant society, such as with native dance groups. The issue becomes more complex when the resumed practice challenges dominant worldviews, subverts current resource allocations, or conflicts with other established rights. In these cases, the right to culture receives much greater scrutiny. Does it matter if the lapse in practice was due to forced discontinuation or to circumstances beyond the group's control? How long a lapse need there be to extinguish a legitimate claim to a cultural practice? Is it relevant to consider how important the practice was to the culture or if associated practices and values have continued? Under what circumstances does self-determination override other concerns?

Under US law, these questions have been determined for those rights secured by treaty. According to the Supreme Court's ruling (*US v. Dion*, 476 US 734 (1986)), a treaty right cannot be extinguished by the absence of exercising that right. For the Makah, the inclusion of the right to whale in their treaty with the United States guarantees that right for as long as the treaty is in place and has not been abrogated, whether or not any whales are actually taken. Treaties are not abrogated by the passage of time or a change in circumstances. Only specific congressional expression of intent to abrogate is recognized by the courts. The other questions are not relevant from a legal perspective. Again the strength of the treaty in US law is a powerful determinant of rights that might otherwise go unrecognized.

The debate over Makah whaling in international bodies and in popular

Sepez-Aradanas: Treaty Rights and the Right to Culture 151

opinion was not concerned with the principles of treaty interpretation under US law and so the above questions were, in fact, relevant to these discussions. Because the IWC had previously developed its aboriginal whaling guidelines based on balancing the cultural and subsistence need of an indigenous group with the need to continue whale population recoveries, the issue of 'need' became a topic of debate (Sepez-Aradanas, 1998). In the case of gray whales, the population has an estimated sustainable yield of 407–670 individuals per year (IWC, 1990, 1996), and the Makah request for up to five whales per year was estimated to have no measurable impact on the population growth (National Marine Fisheries Service, 1997). With the healthy size of the population for this species of whale not in question, much of the debate focused on whether the Makah had a legitimate claim to a cultural 'need'.

The shift from a framework of rights to a framework of needs alters the parameters of assessment but puts the question of cultural practices in no less slippery territory. For those opposed to whaling, the fact that tribal members were not starving and the amount of time elapsed since the previous whale hunt were key factors. In the tribe's statement to the IWC regarding needs, the marginal economic and nutritional status of the tribe, the long history of whaling, and the present importance of whaling-related practices in the culture were clear evidence in their favor (Renker, 1997).

A needs justification, as required by the IWC, may be a way to assess various factors in a cultural revival movement, but it can also serve to undermine aspects of self-determination and sovereignty. Fundamentally, the focus on needs, as opposed to rights, shifts the onus onto minority culture groups to justify why they should be permitted to engage in a practice, rather than onto the regulating authority to show why they should not. In a court of law, this subtle shift can determine the outcome of a case. If a group has a presumed right to culture, the other party has the burden of overcoming this presumption with some compelling evidence as to why the right should not be enacted. In the face of uncertainty, the side with the presumption in their favor will prevail. Outside of the courtroom, the benefit of the presumption is also a clear advantage. In requiring aboriginal groups to present proof of 'need', the IWC removes the presumption of a right to culture from indigenous groups which were originally protected in the 1931 and 1946 agreements.

Underlying the debate over Makah whaling at the international level was the concern by some anti-whaling groups that, while the Makah effort was not in and of itself a threat to whale populations, it could lead to increased whaling activities by other groups that could pose a threat. This theme resonates with the concern of native groups in the wildlife management dilemmas already outlined that the burden of conservation efforts is unfairly placed on native peoples who have not been the major contributors to species declines. It resonated particularly with some Makah people, who

felt that not only were they being asked to bear this burden unnecessarily, but that they were being persecuted additionally for having followed the environmentally responsible pathway of waiting to resume hunting until the population had recovered.

Tradition, Technology, and Self-Determination

Another issue raised by the debate over Makah whaling also indicates that a common understanding of cultural rights is yet to be generally accepted, particularly where cultural revival is concerned. Cultural rights may be seen as consisting of, or at least including, the right to carry on traditions. The evidence that Makahs have a long whaling tradition is incontrovertible. This fact could be considered a necessary condition to asserting a cultural right; however, many people did not consider it sufficient in and of itself to validate that right, opening the door to questions about the parameters of cultural revival.

One of the flashpoints in the popular debate over tradition has been the use of new technologies. Many people subscribe to a simplified notion of tradition that locks practices into an early contact-era snapshot of native lifeways, while many natives, anthropologists, and others consider innovation to be a legitimate and inherent aspect of carrying on traditions, as well as an important dimension of self-determination and sovereignty. Nowhere did these notions conflict more than over the Makah's use of a high-powered rifle as part of their 1999 whale hunt.

The US courts have recognized that Native Americans cannot be limited to only those harvest technologies that were employed at the time of the treaty while other groups are free to innovate (*US v. Winans*, 198 US 371 (1905), *Williams v. Seufert Brothers*, 251 US 566 (1916)). But the assertion of whaling as a cultural right by way of tradition, and not just a treaty right, made the issue more complex outside of the legal arena. Many protestors viewed the use of guns and other modern technologies as undermining the claim that the whale hunt was traditional. Many Makahs recognized that their ancestors were quick to adopt new technologies that suited their purposes, such as metal harpoon heads, and just as quick to reject those that did not.

At the beginning of the whaling initiative, there was no consensus among the tribe as to how the hunt should be carried out. In the end, it was the IWC's policies on humane killing, as measured by the time from strike to death, which decided the issue. The 1999 whale hunt began with a harpoon thrown from a dugout canoe and ended eight minutes later with shots from a high-powered rifle which was specially developed for the hunt.

The established legal principle that technological innovation is not limited by treaty rights, and the fact that the tribe contracted the development of a

Sepez-Aradanas: Treaty Rights and the Right to Culture 153

specialized weapon for the whale hunt, did not assuage the concerns of those who considered the use of a gun to be antithetical to tradition. In fact, many Makah tribal members believed that the use of a gun made the hunt less traditional. However, this did not make the whale hunt less of a Makah tradition, in much the same way that the use of electric safety lights on a Christmas tree makes that practice less traditional, but no less of a tradition. The question of tradition hinges on the conditions that produce authenticity and who determines how it shall be produced. Must authentic cultural revival involve exact replication of a former practice, or may cultural revival include practices that revive traditions in a manner determined by those who come out of that tradition? Since the historical, political, economic, social, and other conditions in which traditional practices were embedded cannot be re-established, the standard of exact replication can be a difficult one to meet, and is not necessarily the appropriate measure of successful cultural revival. Tradition, and the authenticity it produces, cannot be entirely separated from issues of self-determination.

Subsistence resources that rebound to harvestable populations present special opportunities for cultural revival. Because treaty rights cannot be extinguished legally by a lapse in practice, they are a strong mechanism for ensuring the right to revive former customs. However, a requirement to justify cultural practices in terms of 'need' can serve to subvert this matter of sovereignty, as can static notions of tradition.

Battle of the Ethnobiological Paradigms

In the controversies over Inuit waterfowl hunting and Indian fishing, conservation burden and harvest allocation were the fundamental dimensions of the cultural rights issue. The idea that geese, ducks, and fish, should or could be harvested and consumed under specified conditions was never in question. The decline of these resources and the need to enact conservation measures was the source of conflict. In contrast, it was the increase in the whale population that sparked the Makah revival of whaling. Therefore, much of the controversy was not over the population impact of the hunt, but over the propriety of hunting whales at all.

Stemming from a popular conservation movement to prevent the extinction of whale species, the 'Save the Whales' agenda was transformed for some adherents from overall species protection to protection of all individual whales. As various aspects of some whale species became more well known—specifically the complicated communication systems of humpback whales, known as songs, the trainability of dolphins evidencing intelligence, and the strong family groupings of orcas—whales in general became elevated to a point where killing them is considered by some to be the equivalent of murder (Kalland, 1994).

If one can consider this perspective to be a culturally based understanding of the nature of the biological world and human relations with it, what transpired in the Makah whaling debate is partly a result of conflicting ethnobiological paradigms. Interestingly, the conflict is not based on a Makah belief that whales lack the traits that elevated them to superstatus in the eyes of whale rights advocates, but rather on a different view of the proper relationship between humans and whales, and the parameters of appropriate action.

Hunter-gatherer societies frequently ascribe human-like qualities to most animals and Makahs were no exception, as evidenced by their rich oral tradition. The idea that such ascriptions were unfounded and constituted unscientific anthropomorphism has its roots in the European Enlightenment. Thus the idea that whales, like humans, have thoughts, feelings, and family ties appears to be a new and radical rethinking of animal existence, but it actually corresponds to long-held beliefs of Makah tribal members. The key difference then is not in the characterization of whales.

Where the ethnobiological paradigms truly conflict is on the issue of rights, rather than on the issue of attributes. For whale rights advocates, the human-like qualities of some whales give them a kind of right to life. Historically, for Makahs, as with many hunter-gatherer societies, the right for humans and other animals to hunt for food is an inherent part of the order of nature in which the prey willingly succumbs to those hunters who demonstrate worthiness by their behavior (Tanner, 1979). As expressed by Makahs on the 1999 whaling crew, the whale 'gave itself up' to them when the time was right and was treated as the 'Guest of Honor' when landed on the beach (Johnson, 1999).

The complicated views of those involved on both sides of the whaling issue cannot be monolithically encapsulated in these two perspectives. Just as contemporary Makahs do not all share the same ethnobiological paradigm (at least one tribal member became well known for embracing the whale rights viewpoint, while some others who supported the hunt were not inclined to the traditional spiritual orientation), opponents of the whaling do not possess a unified view of whale rights either. Nonetheless, the view that whaling is somehow a morally offensive activity underlay much of the popular debate. In this context, the issue was not about conservation or allocation of a resource as with waterfowl hunting and fishing, but about incompatible views of morality and rights. This puts the conflict in a class with other cultural activities that offend dominant sensibilities and arouse activist passions, such as female circumcision in Africa (see Shell-Duncan and Herndlund, 2000) and the use of peyote in the Native American Church.

Within this framework, the clash of ethnobiological paradigms over whale hunting took on similarities to historical clashes over culture, religion, and language. Interestingly, this aspect of the controversy served to enhance

Sepez-Aradanas: Treaty Rights and the Right to Culture 155

the dedication of some Makahs to the cause, for whom it was almost a badge of honor to be disparaged by non-natives for continuing their cultural traditions. The whale hunters felt a connection to their ancestors who had been arrested for engaging in potlatches, beaten for speaking Indian languages in government boarding schools, or vilified by Christian missionaries as culturally inferior savages (Johnson, 1999). With protests and other attempts to block the tribe's efforts seen as an extension of ongoing processes of colonization, whaling and the activities surrounding it became a form of resistance to a larger history of cultural oppression.

Treaty Rights versus Cultural Rights

Where the issues of tradition and revival intersect with conflicting cultural paradigms, there is ample ground for intractable conflict. Approaching these conflicts from a perspective of cultural rights does not necessarily yield clear solutions. The courts have found that Congress has obligation to 'protect Native American culture' (Rupert v. Fish and Wildlife Service, 957 F.2d 32 (1st Cir. 1992)), which implies a recognition of some kind of right to culture. This obligation stems from the government's long-recognized 'trust responsibility' in regard to its relations with Native American tribes (Cherokee v. Georgia, 30 US 1 (1831)), which could be seen as a legal basis for protecting the right to culture.

The federal trust responsibility involves the duty of the government to protect trust properties, to act justly and in good faith with the tribes, and to act on behalf of the interests of Native Americans as a trustee would for a beneficiary. In practice, the government has frequently abandoned this duty, and the courts have been reluctant to find any enforceable aspect of the trust responsibility outside of the realms of property and procedure (Morisset, 1999). As such, the government cannot be compelled to protect cultural rights on the basis of the trust responsibility. Nonetheless, the idea of the trust responsibility does have some effect on government actions, and is cited often in policy decisions.

The evidence indicates that the assertion of treaty rights is a much stronger avenue for securing hunting and fishing activities by Native Americans than claims to cultural rights. However, the recognition of some kind of right to maintain cultural traditions does have an effect on policy decisions and popular opinion. Even without a treaty reserving their rights, Inuit people have been able to continue whaling and waterfowl hunting—although not without controversy. Conversely, as Indian salmon fishing and Makah whaling demonstrate, the presence of a treaty in no way eliminates the propensity for controversy when allocation or propriety issues are at stake.

In some ways, treaty rights may undermine the recognition of a more

general right to culture because they are more clearly definable. The courts have dealt with treaty rights more consistently and with greater enforceability than they have the trust responsibility. Wildlife harvesting rights asserted on the basis of general cultural rights could be seen as having lesser validity because they have had less legal enforceability. The right to culture is most functional in the legal arena when it is embedded in specific law, such as in the Native American Graves Protection and Repatriation Act (25 USC 3001 et seq.).

On the other hand, the presence of treaty rights may help to bolster the cultural rights claims of non-treaty groups. One of the basic principles of treaty interpretation in US law, established in the landmark Supreme Court case of *US v. Winans* (198 US 371 (1905)), is the reserved rights doctrine. The Court found that treaty rights were not granted to Indians by the US, but were rights that the tribes already possessed, and reserved for themselves by treaty while granting other rights to the federal government. The flow of rights in a treaty is not to the tribes, but from them. By recognizing these autochthonous rights of the tribes, the reserved rights doctrine establishes a basis for non-treaty tribes and other indigenous groups to assert claims for prior possession of rights not otherwise secured. While these rights may be more difficult to litigate, the doctrine indicates some need to show how and why these rights were extinguished if they are to be denied.

Both treaty rights cases and the trust responsibility have helped to establish native people in the United States as partners to wildlife policy and management decision processes. This has affected non-treaty tribes as well. By bringing native voices to the table, treaty rights, and the cultural rights they support, have enhanced the processes by which decisions are made and created a system that is more likely to produce effective conservation measures by incorporating cultural considerations.

Subsistence Policy and the Right to Culture

In the three examples of Native American subsistence practices examined here—waterfowl hunting, fishing, and whaling—the right to culture emerges as a concept which influences policy. The whaling conventions which started with a recognition of aboriginal rights, the Indian fishing rights struggle, and the attempts to accommodate Inuit waterfowl hunters, indicate that cultural factors can be an important consideration in the management of biological resources.

The examples also indicate that biology-based management without reference to cultural considerations can create conflict which is ultimately less productive for the regulation of a resource. The nesting season prohibitions on migratory birds, the river net bans for steelhead, and the elimination of bowhead whale hunting were ideas which neglected to take into

Sepez-Aradanas: Treaty Rights and the Right to Culture 157

account the needs and rights of minority cultural groups. A combination of litigation, based on treaty rights, and negotiation, based on cultural rights, have worked to preserve each of these practices and, in some cases, enhance effective management of the resource.

However, all three cases make it clear that the presence of established treaty rights has a strong influence on the outcome of policy processes. With no clearly enforceable trust responsibility in this realm, it is questionable whether Makahs would have had the support of the federal government in their efforts to revive subsistence whaling had their treaty negotiators not insisted on including specific whaling language. The treaty rights cases in the Northwest, decided definitively in favor of the tribes, established their rights to half of the harvestable fish and continue to influence case law and policy. The waterfowl hunting problem in Alaska would not have become such an issue if the cultural right to this subsistence harvest had been reinforced by treaty.

The interplay between the legal arena and the processes of policy and public opinion is complex and multifaceted. It would be erroneous to conclude that treaty rights reign supreme in court while cultural rights are most important in public opinion. Both factors have influence in both settings. In contentious issues, the side with the benefit of the presumption will have a distinct advantage. The idea of a right to culture tends to give minority cultural groups that presumptive benefit, which can be an important factor when negotiating activities and identities within the dominant society.

Furthermore, while the courts have played an important role in resolving resource conflicts, legal decisions are only one factor in an array of influences on policy and outcomes. Alaska Natives hunted geese for 80 years without legal protection. Treaty tribes are still in court arguing over fisheries allocations and access to other resources, even though the Boldt decision was in their favor. Bowhead whale hunting, which was never litigated, is now managed by the Alaskan Eskimo Whaling Commission and the population is steadily increasing. The Makah tribe has formally agreed to conduct subsistence whaling only, although their treaty right probably includes some commercial rights in line with the Boldt decision. Each of these situations shows how the legal parameters are only a part of the overall policy context in which cultural and subsistence activities are enacted.

A more detailed look at Makah subsistence whaling indicates that there are additional problems raised when the exercise of a cultural right offends the sensibilities of the larger society, and when issues of cultural revival are involved. In both situations, a minority group faces added challenges in maintaining or reinstating a practice. If the practice is itself controversial, as with whaling, conflicting worldviews can manifest as a battle between incompatible rights. As conflict increases, the practice may become more entrenched as a form of resistance to long histories of oppression. If cultural

revival is involved, then static notions of tradition, calls for justification via need, and questions of authenticity and self-determination can entangle already complicated struggles over power, identity, and resource allocation.

Wildlife harvest issues often become sources of conflict because certain resources require management or regulation to ensure their continued availability. When the importance of subsistence activities to contemporary Native American identities is overlooked or when Native Americans are required to bear a disproportionate burden of conservation measures, the concept of a right to culture can play an important role in creating satisfactory resolutions. Recognition of cultural considerations, including cultural revival and respect for differing cultural paradigms, can contribute to realistic and effective harvest regulation. Treaty rights are one of the strongest mechanisms for ensuring that indigenous practices are not discounted, but they are only one of many factors that influence the intersection of the right to culture with resource management.

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Sepez-Aradanas: Treaty Rights and the Right to Culture 159

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BIOGRAPHICAL NOTE

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