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THE FEDERAL TRUST RESPONSIBILITY AND ESKIMO WHALING

Nathaniel M. Rosenblatt*

I. INTRODUCTION

The northern reaches of Alaska have become the setting for a peculiar twentieth century drama. Long the scene of life-or-death struggles between man and nature, the Arctic today stands as a backdrop for a controversy involving a dying animal and a dying way of life. The animal is the bowhead whale; the humans involved are Inupiat Eskimos. Although their relationship has lasted for centuries, it may soon be necessary to choose between the preservation of the whale and the preservation of the Eskimo culture.

Nine Eskimo villages along the Bering Sea and north coast of Alaska annually participate in bowhead whaling. The names of the villages are unfamiliar to most Americans—Barrow, Point Hope, Gambell, Savoonga, Wales, Kivalina, Wainwright, Kaktovik and Nuiqsut1 — yet the people in these towns have undertaken a major battle against what they feel is unwarranted interference with the Eskimo way of life.

Eskimos have long hunted bowheads as a source of food,2 consequently creating a cultural tradition unique to Alaska. Indeed, the bowhead permeates all facets of Eskimo life. Not only is the bow-
head important to the Eskimo diet,\(^3\) but the bowhead hunt itself plays a central role in the Eskimo culture, providing physical exercise, acting as a prime component of the village’s social, economic and political structure and shaping in many respects the Eskimo relationship with the non-native world.\(^4\) While it is understood within the Eskimo communities that a functioning relationship must be maintained with the “outside” and that some aspects of native life consequently have been altered, “there is strong resistance to change from a basically subsistence life to the non-native cash economy world.”\(^5\)

The Bering Sea stock of bowheads hunted by the Eskimos has been in critical danger of extinction since uncontrolled commercial whaling in the nineteenth century cut the population to a small fraction of its original size. Both the International Whaling Commission (IWC) and the United States have moved to protect the bowhead. As a result, they have threatened the Eskimo lifestyle.

This article will focus on the policy decisions that must be made and the balancing of interests that must be undertaken when examining the conflict between Eskimos seeking to preserve their subsistence culture and those people desiring to protect the bowhead whale. To fully analyze the problem, this article will first set forth a brief description of the bowhead whale and hunting practices, both past and present. International and domestic efforts to protect

\(^3\) Whale meat is a major component of the Eskimo diet. It is high in protein, vitamins and calories and appears irreplaceable, especially given Eskimo taste preferences. Each village itself consumes most of the bowhead catch, whale parts being distributed through the families of whaling crew members. Some meat is saved for village festivals in the fall and spring, while some is saved for Thanksgiving and Christmas. Meat and blubber are also used in trade, with an estimated 10,000 Eskimos and Indians in interior Alaska supplementing their diets with meat from marine mammals. See U.S. DEP’T OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT, INTERNATIONAL WHALING COMMISSION’S DELETION OF NATIVE EXEMPTION FOR THE SUBSISTENCE HARVEST OF BOWHEAD WHALES, Vol. I, at 47 (Oct. 1977) [hereinafter cited as 1 FEIS].

\(^4\) Traditionally, harpoons and lances made from stone, ivory and bone and the skin-covered vessel called an umiak, were the implements used to hunt the bowhead. However, the period of commercial hunting of the bowhead in the last century, during which Eskimos oftentimes assisted in the commercial catches, introduced the Eskimos to more modern hunting methods. Although the umiak is still the most common whaling vessel, Eskimos today hunt with the weapons and techniques of a more modern whaling era, characterized by the use of darting and shoulder guns. Each year three or four months are needed to gather and repair equipment, and considerable time is spent readying the umiaks. Ice camps located near the breaks in the ice through which the whales migrate become the center of village activity for the four or five weeks of the migration. One sign of change is that snowmobiles now do the work of dog teams. Id. at 36.

\(^5\) Id. at 56.
LOCATION OF MAJOR WHALING VILLAGES.

the bowhead will then be discussed, including the actions of IWC which established quotas for aboriginal hunting of the bowhead. Finally, the article will discuss the trust relationship which may exist between the United States and the Eskimos, and the potential breach by the United States of obligations stemming from that relationship in acting to protect the bowhead.

II. THE BOWHEAD WHALE

A. General Characteristics

Also known as the Greenland whale, the Greenland right whale, the Arctic right whale and the great polar whale, the bowhead (Balaena mysticetus) is a large balaenid cetacean whose head comprises one-third of its entire body. Adults average about sixty feet in length. The whales have a dark gray coloring, although they often have white marks on the underside or chin. The name “bowhead” is derived from the arch shape of the whale’s mouth, while the name “right” comes from the usage of past commercial whalers who believed the animal was the “right” whale to hunt due to its value, slowness and buoyancy after death. Scientists lack information concerning many important biological traits of the bowhead, including the whale’s mating season, its gestation, calving and lactation periods, and the longevity of members of the species. This scarcity of needed data results in uncertainty in estimating the health of a given bowhead stock. Further re-

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4 Baleen whales include the Balaenidae family of which the bowhead is a member. [They] are characterized by a double row of whalebone or baleen plates hanging from the roof of the mouth. These plates are used to strain the food from seawater, usually euphausid shrimps, copepods, or fish. There is a thick layer of oil-rich blubber beneath the skin.

D. GASKIN, WHALES, DOLPHINS AND SEALS 65 (1972).

7 1 FEIS, supra note 3, at 26.

8 Id. at 26-28.

9 The term “right” actually applied more specifically to the North Atlantic right whale or black right whale (B. glacialis) and was extended to include two closely related species, the bowhead and the southern right whale. See C. HAWES, WHALING 2-3 (1924).


11 See text at notes 27-32, infra. A whale “stock” is a “genetically distinguishable breeding unit within a species.” Scarff, supra note 10, at 334.
search may provide a more definite indication of the status of the bowhead, but the difficulties inherent in studying the population dynamics of whales in their natural habitat make only tentative results attainable in the near future. However, among the scientific community there is general agreement that the bowhead is "one of the most endangered species of large whales."\(^\text{13}\)

**B. The Bering Sea Bowhead Stock**

At the height of its population, the bowhead was fully distributed in the seas around the North Pole.\(^\text{14}\) Today, however, only four, or possibly five, principal arctic and subarctic bowhead stocks remain.\(^\text{15}\) The bowhead stock hunted by the Alaskan Eskimos winters in the waters of the Bering Sea and migrates north to the Chukchi and Beaufort Seas in the spring.\(^\text{16}\) The whales move with the ice, generally remaining near the loose edge of the ice pack, although sometimes they are found in open water.\(^\text{17}\) In the spring migration, the bowheads usually travel singly or in pairs, often in the company

\(^{12}\) These difficulties stem from the sheer size of most whales—thus making observation in captivity practically impossible—and the fact that many species of whale never come near land. See id. at 333.

\(^{13}\) 1 FEIS, supra note 3, at 6. A look at population statistics explains why. Very few bowheads remain in the Spitzbergen stock (initial size estimated at 25,000) and Okhotsk stock (initial size estimated at 6500). The Davis Strait stock presently is about 10 percent of its initial size of about 6000, while the newly recognized Hudson Bay stock numbers about 15 percent of an original stock estimated at 700. 2 FEIS, supra note 3, at App. C. The Bering Sea stock is at best near 20 percent of initial stock size (assuming a present population of 2264 out of an initial stock of 11,700). See notes 27 and 58, infra. International protection for whales from commercial harvesting begins at 54 percent of initial stock size. See note 50, infra. For an outline of the various bowhead stocks, see note 15, infra.

\(^{14}\) 1 FEIS, supra note 3, at 26.

\(^{15}\) These stocks are found in the following areas:

1. From Spitzbergen west to east Greenland;
2. In Davis Strait, Baffin Bay, Hudson Bay and adjacent waters (the Hudson Bay population may be a separate stock);
3. In the Bering, Chukchi, Beaufort and East Siberian Seas; and
4. In the Okhotsk Sea.

*Id.* This article deals solely with the Bering Sea stock of bowheads.

\(^{16}\) The bowhead's migration habits have been described as follows: The bowhead's spring migration route passes between St. Lawrence Island and the Chukchi Peninsula, through the Beaufort Sea to the Banks Island region and the Mackenzie River delta. Some may also migrate through the Bering Strait and then along the Siberian coast. The peak spring migration period is from March through July. . . . In autumn, the whales migrate westward along the north coast of Alaska to the vicinity of Wrangell Island, where they turn southward along the coast of the U.S.S.R. to the Bering Sea.

*Id.* at 27.

\(^{17}\) *Id.* at 26.
of smaller white whales, while in the autumn migration back to the Bering Sea, the bowheads are sometimes seen in groups numbering up to fifty animals.18

Commercial whaling of the Bering Sea population of bowheads, which began in 1848, decimated the stock.19 Catches in the mid-1880's averaged 200 whales per year20 from a stock that originally numbered somewhere between 11,700 and 18,000 animals.21 After the turn of the century, as the stock shrank, exploitation of the species slowed. The last recorded whaling voyage to the western Arctic occurred in 1916, although Alaskan trading companies continued to deal in whalebone for several more years.22

In 1931 all stocks of the bowhead received shelter from commercial expeditions by way of international agreement.23 Today, commercial hunting is banned on the international level by the 1946 International Convention for the Regulation of Whaling24 and on the domestic level by both the Marine Mammal Protection Act of 197225 and the Endangered Species Act of 1973.26

C. Present Status of the Bering Sea Bowhead

Because of the difficulty in studying the population dynamics of whales in general, it is impossible at this time to know either the actual status of the bowhead or the effect of Eskimo whaling on the future prospects of the species. Until further research and record keeping provide a sound statistical basis, any decision setting permissible levels of Eskimo hunting will be a result of an almost random selection of numbers, and will have little factual justification.

Three pieces of data are central to an adequate evaluation of the status of the Bering Sea bowhead stock. The first is an estimate of

18 Id. at 27.
19 See id. at 32-34, 43-44.
20 Id. at 43-44.
21 Id. at 34.
22 Id. at 44.
23 Convention for the Regulation of Whaling, Sept. 24, 1931, art. 4, 49 Stat. 3079, 155 L.N.T.S. 349. This was followed by the Agreement for the Regulation of Whaling, June 8, 1937, art. 4, 52 Stat. 1460, 190 L.N.T.S. 79.
present stock size. The only reliable estimate of Bering Sea bowhead 
stock size was made in 1978 and resulted in a figure of 2264 whales. This number is a starting point for future research. However, since 
there are no reliable past population figures for comparison, no con­
clusions can be drawn as to the health of the species. In other words, 
no way exists of knowing whether the present figure of 2264 repre­
sents an increase or decrease in the Bering Sea stock since the end 
of commercial whaling. Since no population trend can yet be ascer­
tained, the single 1978 population figure does not show whether the 
bowhead is slowly dying out or is gradually recovering from even 
lower population levels.

The next important piece of information necessary to ascertain 
the status of the stock is the net recruitment rate for bowhead 
whales. Net recruitment rate is defined as the rate at which juvenile 
animals enter the adult population minus the rate of natural mor­
tality among adults. The maximum net recruitment rate for baleen 
whales is estimated to be between four and five percent, which 
means that, with an estimated stock of 2264 animals, the number 
of bowheads will naturally increase in one year by between 90 and 
113 whales. Some scientists, however, think that the recruitment

\[ \text{Net recruitment rate} = \text{Rate at which juvenile animals enter the adult population} - \text{Rate of natural mortality among adults}. \]

Until the 1978 count the major uncertainty in bowhead studies was stock size. Prior 
estimates had ranged from 400 to 3000 whales and were a source of some confusion. During 
the spring migration in 1978, however, observers from the National Marine Fisheries Service 
sighted over 1700 whales moving northward. The estimate of 2264 animals is based on this 
sighting. U.S. DEP'T OF COMMERCE, BOWHEAD WHALES 2 (1978). This document is a good 
update of the 1977 Environmental Impact Statement, supra note 3. It provides a detailed 
account of the 1978 spring hunt and the bowhead research program presently underway.

**Hunting figures for 1973-77 are as follows:**

<table>
<thead>
<tr>
<th>Year</th>
<th>Known number landed</th>
<th>Known number killed</th>
<th>Known number struck</th>
<th>Known number lost</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973</td>
<td>37</td>
<td>0</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>20</td>
<td>3</td>
<td>28</td>
<td></td>
</tr>
<tr>
<td>1975</td>
<td>15</td>
<td>2</td>
<td>26</td>
<td></td>
</tr>
<tr>
<td>1976</td>
<td>48</td>
<td>8</td>
<td>35</td>
<td></td>
</tr>
<tr>
<td>1977 (spring)</td>
<td>26</td>
<td>2</td>
<td>77</td>
<td></td>
</tr>
</tbody>
</table>

*Id.* at 246. It is believed that about one-half of the whales that are struck by Eskimo hunters 
but lost subsequently die. *Id.* at 43.
rate drops dramatically as a whale stock approaches extinction, and cite a recent count which found calves to comprise less than one and one-half percent of the total bowhead population.30

The third piece of data necessary for an evaluation of the health of the bowhead stock is critical stock size, the population below which the bowhead cannot recover.31 If the present population is under critical stock size, even a total ban on Eskimo whaling will not save the bowhead from eventual demise.

Since a relatively reliable estimate of present stock size is now available, current research is focusing on estimates of net recruitment rate and critical stock size.32 Only after dependable figures are calculated can scientists determine the effect of Eskimo whaling on the present bowhead stock.

D. Eskimo Whaling Activities

Subsistence harvesting of the bowhead has continued for centuries. The annual harvest for Alaskan Eskimos33 averaged about ten whales for the years 1946 to 1970, but increased to twenty-nine during the period from 1970 to 1976.34 This increase in actual whale take during the 1970’s partially stemmed from a greater whaling effort by the Eskimos, as measured by the number of crews setting out each season.35 Several factors contributed to this increase in whaling effort. First, population in the Eskimo whaling villages has risen dramatically, almost doubling in the past twenty-five years.36 Second, even though the means of attaining status have been affected to some degree by the influence of western education and the introduction of a cash economy, the status of “whaling captain” still carries much prestige in the village community, being associated

30 The actual figure, calculated from sightings in the spring of 1978, was approximately 1.3 percent. U.S. DEP’T OF COMMERCE, BOWHEAD WHALES 29 (1978). “This value does not consider calf mortality and also should be viewed with extreme caution because of the bias associated with the difficulty of seeing calves swimming by beyond more than a few hundred yards.” Id.
31 See Scarff, supra note 10, at 389-90.
32 This research is being carried out by the National Marine Fisheries Service. See U.S. DEP’T OF COMMERCE, BOWHEAD WHALES 13 (1978).
33 Canadian Eskimos are not known to hunt the Bering Sea bowhead. Soviet Eskimos are believed to currently take about two bowheads a year. 1 FEIS, supra note 3, at 35.
34 Id. at 37.
35 See id. at 243.
36 There were 2048 people in the whaling villages (excluding Nuiqsut) in 1950, while in 1976 the figure stood at 4211—a change of over 100 percent. Id. at 38. The population of Nuiqsut, established recently, was 212 in 1976. Id. at 244.
with the attributes of skill, intelligence, energy and business ability. The increased availability of cash in the villages which resulted from the settlement of native land claims and the development of North Slope oil\textsuperscript{37} consequently has led more and more Eskimos to use their new-found resources to take to the icy water to hunt the bowhead.\textsuperscript{38} A third factor contributing to more whaling activity is the weather, which apparently was especially good in 1976.\textsuperscript{39} Finally, some argue that increased whaling efforts are related to a "crash" in the number of Alaska caribou, an alternative Eskimo food source.\textsuperscript{40}

Concomitant with the rise in whaling activity came an increase in the number of whales struck during the hunt but then lost before being killed. It is believed that about one-half of these bowheads die soon after they are lost.\textsuperscript{41} Most likely this development resulted from the lack of experience of many of the new whaling crews. Traditionally, a whale is struck first by a darting gun, the use of which involves considerable skill and courage. This gun fires a bomb into the whale and implants a harpoon attached to a line and float. A second bomb, if necessary, is usually fired almost immediately from another darting gun, but this time no harpoon or line is attached. If more bombs are needed, or if it is not safe to approach the wounded bowhead, the whalers use a shoulder gun to fire a large explosive charge into the animal. The newer, more inexperienced crews tended to use the shoulder gun first, resulting in a wounded animal which was unsecured by any harpoon and which frequently

\textsuperscript{37} The Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627 (1976), provided for the extinguishment of all native land claims. In return, Alaskan natives received fee title to 40 million acres of land and a total cash settlement of $962.5 million. $462.5 million of this settlement is to be paid directly from the United States Treasury, \textit{id.} § 1605, while the remaining $500 million is to be derived from a revenue sharing scheme involving mineral leases on Alaskan public lands. \textit{id.} § 1608. Revenues from mineral leases of native lands go to the native corporations organized under the Act. See United States v. Atlantic Richfield Co., 435 F. Supp. 1009, 1018 (D. Alaska 1977).

\textsuperscript{38} 1 FEIS, \textit{supra} note 3, at 39.

\textsuperscript{39} Id. at 40.

\textsuperscript{40} Since 1972, the number of caribou has plunged to only a quarter of prior levels. \textit{id.} at 65. The annual caribou harvest is presently limited by the State of Alaska. U.S. Dep't of Commerce, \textit{Bowhead Whales} 60 (1978). A recovery of the caribou herd to earlier levels, however, would not make all hunting of the bowhead unnecessary. Apart from the cultural significance of the whale hunt, whale meat plays a distinct role in the Eskimo diet and seemingly cannot be replaced completely. For a good update on the subsistence role of the bowhead in Eskimo life, see \textit{id.} at 55-61.

\textsuperscript{41} 1 FEIS, \textit{supra} note 3, at 43.
The Eskimo hunts of the mid-1970's took place at a time when the international community was finally taking some action to stop the commercial slaughter of many species of whale around the world. As general global sensitivity to the plight of whales increased, the particular case of the bowhead and its Eskimo hunter also received greater scrutiny.  

III. THE INTERNATIONAL WHALING COMMISSION AND THE BOWHEAD

The International Whaling Commission (IWC), established in 1946, has played a central role in the bowhead controversy. Presently composed of representatives of sixteen nations, IWC must carry out two seemingly contradictory missions: conserve whale stocks and ensure the orderly development of the whaling industry. The main annual work product of the Commission consists of a schedule regulating the whaling activities of its members. This schedule must provide for "the conservation, development and optimum utilization of whale resources" and, at the same time, consider "the interests of the consumers of whale products and the whaling industry." Initially, IWC emphasized the interests of the whalers, basically serving as a spokesman and coordinator for whaling interests. In recent years, however, IWC has assumed a more conserva-

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42 Id. at 42.

43 See text at notes 51-62, infra. Another possible danger to the bowhead has developed with the exploitation of the oil resources of northern Alaska. Barge and steamer traffic could disrupt bowhead migrations. Any oil spill from a vessel in Arctic waters, or from any future off-shore drilling activity, may pose a pollution hazard to the bowhead. Those who favor a total ban on bowhead hunting cite what they consider to be the inevitable environmental pressures the bowhead will have to face in the Arctic and believe that the bowhead stock should not be subjected to an additional strain in the form of Eskimo hunting. See 1 FEIS, supra note 3, at 30-31.

44 Fourteen nations were partners to the initial IWC convention—Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, South Africa, the U.S.S.R., the United Kingdom and the United States—while in 1977 there were seventeen members (Argentina, Iceland, Japan, Mexico and Panama having adhered to the convention while Chile and Peru had withdrawn). Mason, The Bowhead Whale Controversy: Background and Aftermath of Adams v. Vance, 2 HARV. ENVT'L L. REV. 363, 364 n.4 (1977) [hereinafter cited as Mason]. Panama withdrew from IWC as of June 30, 1978. 77 DEP'T STATE BULL. 919 (1977).


47 For a brief history of IWC regulation of whaling, see Scarff, supra note 10, at 358-73.
tionist approach to whaling. The Commission’s Scientific Committee suggests proper catch levels on a scientific basis, utilizing a new approach to whale management known as the New Management Procedure.

IWC's concern with the particular predicament of the bowhead has continued since 1972 when the Scientific Committee first asked the full Commission to request that Denmark, the United States and the Soviet Union collect data on aboriginal hunting of the bowhead. The Committee especially requested that IWC “urge the United States to take steps to reduce the waste due to lost whales of all species in its aboriginal fishery.” In 1973 the Scientific Committee noted that all of the thirty-seven bowheads taken during the previous year were taken by American Eskimos, and repeated its...

This is to be expected as more and more IWC members cease whaling and global whale populations decline.

It is generally quite difficult to separate the science from the politics when analyzing any IWC action. This stems from the friction between the world’s two major whaling nations—Japan and the Soviet Union—and the conservationist camp generally led by the United States.

In late 1978, the Soviet Union announced its intention to retire its whaling fleet in the next few years. N.Y. Times, Dec. 10, 1978, at 9, col. 1. The decision was an economic one. Soviet whaling ships are aging and it has most likely been determined that replacement is not worthwhile or, in other words, that whaling is no longer profitable to the extent that replacement is justifiable. The result of this Soviet decision is that, unless the developing countries that presently account for a small proportion of world whaling catches join IWC, the Commission will become an international body dedicated mainly to the control of the Japanese whaling industry.

While an IWC member may send several representatives to the Scientific Committee, each member state has only one vote to cast in Scientific Committee decision making. The Committee sets quotas and monitors whale stocks by reviewing catch data and research reports submitted by member nations. See Scarff, supra note 10, at 355.

For a detailed discussion, see id. at 369-70, 387-400. Briefly, the New Management Procedure is based on an optimum whaling population which will theoretically produce the largest whale harvest indefinitely. From this theoretical population, which is 60 percent of original stock size and is called the Maximum Sustainable Yield (MSY) level, other population categories are established. For example, a whale stock reaches “protection” levels when it drops more than 10 percent below the MSY level (to 54 percent of original stock size). Commercial harvesting of that stock is then halted. See 1 FEIS, supra note 3, at 9, 19. The United States was instrumental in promoting the New Management Procedure, intending it to place IWC quotas on a sound scientific footing. The system has, as a practical result, made it more difficult for a nation to oppose an IWC action, since by doing so that nation is disregarding current scientific judgment. See Mason, supra note 44, at 366.


Id.
request that IWC “urge the United States to continue to study the problem [of the loss of whales in its aboriginal fishery], and in addition to take steps to determine both the actual kill and the number of bowhead whales as well as the [present] status of this stock. . . .”53 During the following year the Committee again expressed “its continuing concern on lack of information on the status of this stock, on the reported high loss rate and on the increase in catch in the last two seasons.”54 And, although noting in 1975 that a recently available report on the bowhead in Alaska included new data on Eskimo catches, the Committee continued to stress that “[t]he size of the stock and its present condition are still unknown and the Committee recommends to the Commission that steps be taken to obtain better biological data and also to minimize the loss rate with the aim of reducing total mortality.”55

In 1976 the Scientific Committee once again expressed its concern over the bowhead problem, recommending “that [the] necessary steps be taken to limit the expansion of the fishery and to reduce the loss rate of struck whales (without increasing total take).”56 Finally, the plenary session of IWC responded, recommending that member states take “all feasible steps” to reduce the waste and limit the expansion of aboriginal bowhead whaling.57

In 1977 the Scientific Committee moved toward a total halt to aboriginal hunting of the bowhead. Considering recent statistics on the status of the stock58 and the environmental risks of oil develop-

57 TWENTY-SEVENTH REPORT OF THE IWC 33, reprinted in NOAA Memo, supra note 51, at 4 and in 1 FEIS supra note 3, at 17.

The 1976 IWC schedule, under the New Management Procedure, classified the bowhead as a Protection Stock and then further provided, “the taking of gray or right whales by aborigines or a Contracting Government on behalf of aborigines is permitted but only when the meat and products of such whales are to be used exclusively for local consumption by the aborigines.” IWC 1976 Schedule, para. 7, reprinted in 1 FEIS, supra note 3, at 7. The term “right whales” in these provisions includes the bowhead. IWC 1976 Schedule, para. #1(1), reprinted in 1 FEIS, supra note 3, at 7.

58 The Committee’s action was based on an estimate of bowhead stock size of 600-1000 whales with an upper limit of 1200-1600. It believed the initial size of the Bering Sea bowhead stock was between 11,700 and 18,000 whales. Relating these figures, the Committee noted that
ment in the Arctic,59 the Committee stated that on “biological grounds the exploitation of this species must cease . . .”60 and recommended to the full Commission that all aboriginal bowhead harvesting be stopped.61 On June 24, 1977, IWC voted to ban all aboriginal hunting of the bowhead. All members of IWC voted for the ban except for the United States, which abstained.62

Under the rules of IWC, a member has ninety days after being officially notified of a Commission action to file an objection with the Commission. Once a member nation objects, that particular IWC action becomes ineffective for that member, and the other members have an additional ninety days to file further objections.63 This rule thus gave the United States until October 24, 1977 to file an objection with IWC in order to render the June decision ineffective. However, a decision to object would have run counter to considerable international pressure to work within the IWC structure; in fact, no objection had been filed by any member with the Commission since 1973.44

The decision whether the United States should file an objection was evaluated in an Environmental Impact Statement (EIS) prepared by the Department of Commerce.65 On October 20, 1977, the State Department, which has the final decision-making authority in such situations, stated its intention not to object.66 Immediately a suit was filed on behalf of the Eskimos seeking an order from the United States District Court for the District of Columbia requiring the United States to object.67

the present estimated bowhead stock was well below protection level, which begins at 54 percent of initial stock size. NOAA Memo, supra note 51, at 5-6.

59 Id. at 5. See also note 43, supra.

60 1977 Scientific Committee Report, reprinted in NOAA Memo, supra note 51, at 4 and in 1 FEIS, supra note 3, at 17.


62 1 FEIS, supra note 3, at 19.


64 See Adams v. Vance, 570 F.2d 950, 956 (D.C. Cir. 1977).

65 See generally 1 FEIS, supra note 3. “The proposed action under consideration is whether the United States should accept the International Whaling Commission’s action to delete the native exemption for the killing of bowhead whales. The alternatives are to object or not object.” 1 FEIS, supra note 3, at 3.

66 77 DEP’T STATE BULL. 740 (1977).

IV. ADAMS v. VANCE

In Adams v. Vance, the Alaskan Eskimos sought to require the United States to object to the IWC ban on bowhead whaling, basing their complaint on three grounds. First, the plaintiffs alleged that the EIS failed to identify and discuss alternative actions available to the United States, thereby violating the National Environmental Policy Act. Next, the Eskimos claimed that the decision not to object violated a fiduciary duty owed by the United States to the Eskimos. Finally, the complaint stated that the decision not to object violated the Marine Mammal Protection Act; the plaintiffs alleged that the government failed to follow statutory procedures in eliminating the exemption for Alaskan natives from the moratorium imposed by the Act on the taking of marine mammals. The Eskimos requested a temporary restraining order (TRO), claiming its issuance would not harm the United States since, after a proper decision had been made, the objection to the IWC action could be withdrawn if warranted. On the other hand, the complaint alleged irreparable harm to the plaintiffs if no objection were filed, since the IWC ban would deprive the Eskimos of “food, fuel, and materials necessary for survival in the Arctic.”

The government offered several responses to the request for a TRO. First, it claimed that the decision not to object to the IWC action was a foreign affairs issue and therefore not subject to judicial review. Next, the government maintained that plaintiff’s motion for a TRO was in fact a petition for mandamus to perform a discretionary act and thus could not be granted. Third, the answer alleged that the plaintiffs had not met the tests for a TRO. (a) The United States claimed that no irreparable harm would come to the Eskimos. Since the United States intended to ask IWC in the December 1977 meeting to “allow a well managed whale hunt, based on a program developed cooperatively between the Alaskan natives and

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48 570 F.2d 950 (D.C. Cir. 1977).
49 An excellent discussion of the Adams case may be found in Mason, supra note 44.
the Government, and since the next whaling season did not begin until the spring of 1978, it was alleged that sufficient time existed for plaintiffs to seek judicial relief if IWC rejected the American proposal. (b) The United States also claimed that an objection would cause substantial injury to its international conservation efforts because the Commission could break down if other nations also began to file objections to IWC actions which adversely affected them. (c) The government argued also that the public interest lay on the side of a viable IWC. (d) Finally, the government asserted that there was little likelihood that the Eskimos would prevail on the merits of the case since the question involved was nonjusticiable: the United States owed no duty to assure aboriginal hunting of an endangered marine mammal and the Marine Mammal Protection Act states that its provisions are to apply only "in addition to and not in contravention of" existing treaties.

On October 21, 1977, District Judge John Sirica ordered the Secretary of State to object to the IWC ban on bowhead whaling. The court asserted that the Eskimos would not be able to "meaningfully present their claims" if an objection were not filed and that "defendants will suffer no substantial harm through the issuance of a temporary restraining order."

The government moved for summary reversal in the United States Court of Appeals for the District of Columbia. Its motion was granted on October 24, 1977. The appeals court accepted the argument pressed by the government that the relief granted by the District Court was in effect a mandatory injunction and thus appealable. The court did not address the justiciability issue but said that the foreign policy aspects of the case were such as to require that the Eskimos make an "extraordinarily strong showing to succeed." Plaintiffs failed in this respect, the court finding that the

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74 Id. at 7.
75 Id. at 15, citing 16 U.S.C. § 1383 (1976).
77 Id.
United States would suffer severe injury in filing an objection with IWC, while the Eskimos would not suffer harm of sufficient magnitude to force an objection. On the same day as this decision, Justice Burger, as Circuit Justice, denied plaintiff's application for a stay of the order of the Court of Appeals.82

Following its victory in court, the United States proposed at the December meeting of IWC that the Eskimos be allowed a bowhead quota of fifteen whales landed or thirty whales struck.83 Whaling methods would be supervised to limit waste84 and an extensive research program conducted.85 The American proposal seemed reasonable, especially in light of a study by the Department of Health, Education and Welfare which concluded that the nine Eskimo whaling villages needed twenty-four average size whales to satisfy a significant portion of their basic protein needs.86 On the other hand, the Scientific Committee of IWC was still committed to a moratorium on bowhead harvesting and reiterated its position "that taking of any bowhead whales could adversely affect the stock and contribute to preventing its eventual recovery, if in fact such recovery is still possible."87 However, the Committee did recognize "that the Commission may wish to discuss other considerations (subsistence and cultural needs, etc.). These are beyond the expertise of the Scientific Committee."88 Ultimately, IWC adopted a compromise position whereby it set a quota of twelve whales landed or eighteen whales struck.89

After the Commission's decision the United States had to give the quota domestic effect. Two possible avenues were available: either the government could regulate Eskimo whaling using the Marine

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83 Under such a quota whaling would stop whenever one of those numbers was reached. Mason, supra note 44, at 381. Of course, "landed" whales are also considered as having been "struck" so Eskimo hunters could not strike and lose 30 whales and land 15 more.
84 For example, the use of a shoulder gun would not be allowed before a whale had been harpooned. Id. at 381 n.107.
85 Id. at 381.
86 Id.
89 Eleven nations supported this quota. Australia, Canada and the Netherlands opposed the change to allow limited hunting, while Brazil and Panama were not represented. Mason, supra note 44, at 382.
Mammal Protection Act of 1972 (MMPA),90 or it could implement the quota as it did any other IWC action using the Whaling Convention Act of 1949.91 MMPA allows Eskimos to hunt marine mammals for certain purposes despite the national moratorium which the Act generally imposes on such hunting. Section 101(b)92 of the Act does, however, provide that the Department of Commerce may designate a certain whale species as “depleted” and thereafter issue regulations to control or prohibit the hunting of that “depleted” species by Alaskan natives; such regulations can become effective only after a public hearing process.93 On the other hand, regulations promulgated by the Department of Commerce under the Whaling Convention Act pursuant to an IWC action become effective immediately upon publication in the Federal Register; no hearing process is required.94

Less than a month before the December 1977 IWC meeting, the Department of Commerce had, pursuant to its authority under MMPA, designated the bowhead as a “depleted” species and proposed regulations to limit the Eskimo hunt to fifteen bowheads landed or thirty struck, the same level suggested by the United States at the December IWC meeting.95 On January 30, 1978, after IWC passed the compromise quota of twelve landed and eighteen struck, the proposed regulations were withdrawn as being “not appropriate”.96 The government then chose to implement the compromise quota as it would any other IWC action. Consequently, the Department of Commerce, pursuant to its authority under the Whaling Convention Act, issued regulations implementing the compromise quota passed by IWC.97 These regulations were subse-

93 Id.
95 The bowhead was designated as a “depleted” species in 42 Fed. Reg. 60,149 (1977) and the proposed regulations may be found in 42 Fed. Reg. 60,185 (1977).
The Eskimos did not acquiesce to the IWC quotas, but filed a complaint in the United States District Court for the District of Alaska requesting that the regulations promulgated under the Whaling Convention Act\textsuperscript{99} be declared void. This suit, \textit{Hopson v. Kreps},\textsuperscript{100} was brought on behalf of “the approximately 4,500 Eskimos who are dependent on Bowhead whale hunting to obtain food, fuel, materials, and cultural and social fulfillments.”\textsuperscript{101} The complaint focuses primarily on the inadequate amount of whale meat available in the whaling villages as a result of observance of the quotas\textsuperscript{102} and the consequent physical, social and psychological disruptions.

The \textit{Hopson} complaint offers three grounds for invalidating the Whaling Convention Act regulations. First, it asserts that neither the 1946 whaling agreement nor the Whaling Convention Act authorizes the regulation of aboriginal whaling. Next, the plaintiffs claim that the regulations violate the government’s trust responsibility to the Eskimos. Finally, the Eskimos argue that the regulations were promulgated in violation of the Marine Mammal Protection Act of 1972 (MMPA)\textsuperscript{103} and the Endangered Species Act of 1973 (ESA),\textsuperscript{104} statutes which allegedly pre-empt any authority to regu-
late aboriginal whaling under the Whaling Convention Act.

Both parties moved for partial summary judgment on the question of whether the 1946 whaling agreement and the Whaling Convention Act authorize the regulation of Eskimo whaling. In January 1979, the court on its own motion dismissed the action in its entirety, holding that "the regulations promulgated to enforce the Schedule of the International Whaling Commission are so directly linked to the conduct of U.S. foreign relations that this court lacks the subject matter jurisdiction to review their validity." Hopson is now on appeal.

The Hopson complaint raises many fascinating questions with respect to the jurisdiction of IWC, the relationship of the Whaling Convention Act to both MMPA and ESA and the scope of the federal trust responsibility to the Eskimos. While the issue of whether the matter is a "political question" has raised a jurisdictional bar to a court decision on any of these questions, it is interesting to speculate about the proper resolution of the case on its merits. The balancing of interests that must be undertaken when deciding what levels of Eskimo whaling may be allowed must include a consideration of any federal trust responsibility to the Eskimo people. In addition, if trust duties are found to exist the United States will be in a precarious position if the future efficacy of IWC depends upon a breach of its responsibilities to the Alaskan Eskimos. The trust issue is thus an important dimension of the entire bowhead problem. While a resolution of any trust questions may not dictate what the United States should do about regulating Eskimo whaling, the scope of federal fiduciary duties to the Eskimo can eliminate those options which are not available to the federal government.

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105 Partial summary judgment is simply summary judgment on one issue in a case involving multiple issues. See M. Green, Basic Civ. Procedure 119 (1972).


107 Id. at 1383.

108 No arguments have yet been heard by the Ninth Circuit Court of Appeals.

109 This article focuses on the trust responsibility of the United States to the Eskimos; the questions of the jurisdiction of IWC and the relationship of the Whaling Convention Act to MMPA and ESA are beyond its scope.

Another case raising the trust issue is People of Togiak v. United States, recently decided by the United States District Court for the District of Columbia. No. 77-0264 (D.D.C. filed Feb. 11, 1977). Togiak centers on Section 109 of MMPA, 16 U.S.C. § 1379 (1976), which pre-empts state laws and regulations relating to the taking of marine mammals. The section provides, however, that state laws and regulations concerning the conservation of marine mammals may be reinstated if consistent with MMPA. The MMPA moratorium on the
VI. THE GENERAL TRUST RESPONSIBILITY OF THE UNITED STATES TOWARDS NATIVE CULTURES

The plaintiffs in the Adams and Hopson cases alleged, inter alia, that the federal government violated a special relationship existing between the United States and the Eskimos when it moved to regulate hunting of the bowhead whale in response to the action of IWC.

Any discussion concerning the existence of such a relationship between the United States and the Inupiat Eskimos must, however, first examine the general pattern of treatment of native cultures by the United States. A fiduciary relationship has long been recognized between Indian tribes of the lower forty-eight states and the federal government. While many aspects of Indian law admittedly do not apply to Eskimos because of historical and ethnological distinctions between Indians and Eskimos, it is nonetheless logical to assume that aspects of the basic fiduciary relationship established for the benefit of Indian tribes extend to Eskimo villages.110

Over the years three lines of cases have dealt with different aspects of the relationship between the United States and the Indian tribes. The first line of cases, written by Chief Justice John Marshall, lays the basis of the government’s fiduciary relationship to-
taking of marine mammals has been waived for only one animal, the Pacific Walrus (Odobenus rosmarus) and state laws and regulations relating to the walrus have been approved for only one state, Alaska. The waiver resulted in a federal regulation providing that all hunting of the walrus must be in accordance with Alaska state law and regulations. Following this federal action, Alaska moved to regulate native hunting of walruses. In Togiak, the plaintiffs argued in a class action that the freedom to hunt marine mammals granted in MMPA cannot be restricted by allowing the re-institution of state conservation laws. They alleged that Congress pre-empted any state regulation of native hunting of marine mammals by providing a native exemption in MMPA, and that this exemption can only be narrowed according to the terms of Section 101(b) of the Act, id. § 1371(b), which allows regulation of native hunting in case a species has been designated “depleted.” The plaintiffs supported their argument by asserting that the federal government has a trust obligation to Alaskan natives and, “by administratively terminating the statutory exemption for Natives and surrendering power to control Native hunting to the state, defendants have violated . . . their duty to act as trustee for Alaskan Natives, and violated the Supremacy and Due Process Clauses of the U.S. Constitution.” Memorandum in Opposition to Defendants’ Motion to Dismiss at 3, People of Togiak v. United States, No. 77-0264 (D.D.C., filed Feb. 11, 1977). It is this trust aspect of Togiak that makes the case a potential vehicle for judicial analysis of the federal trust responsibility to Alaskan natives. The case is also important in determining the ways in which the MMPA exemption for Alaskan natives can be restricted. On April 3, 1979, the district court denied the defendants’ motion to dismiss, holding the MMPA exemption does in fact pre-empt the regulation of aboriginal walrus hunting by the state of Alaska. [1979] 9 ENVIR. REP. (BNA) 2367.

110 See text at notes 136-76, infra.
ward the Indian tribes. The second set of cases deals with the powers of Congress in Indian affairs. The third line of cases concerns the duties owed by the executive branch to the Indians. Over the years this entire body of case law has repeatedly described the tie between the federal government and the Indians as "resembling" a guardian-ship, a guardian-ward relationship, a fiduciary relationship and a trust responsibility.111

A. Marshall's Decisions

Two opinions of the Supreme Court, Cherokee Nation v. Georgia112 and Worcester v. Georgia113 were written by Chief Justice Marshall in the early 1830's and establish the basis for the trust responsibility. The Court in Cherokee Nation found that Indian tribes were not "foreign states" in the context of Article III of the United States Constitution:

[The Indian tribes] may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them would be considered by all as an invasion of our territory, and an act of hostility.114

Although Justice Marshall did use the wardship label, his opinion can be interpreted as an assertion of some degree of tribal sovereignty. Marshall said that Indian tribes resembled wards of the

111 Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 STAN. L. REV. 1213, 1213-14 (1975) [hereinafter cited as Chambers]. In this article, Chambers presents an excellent overview of how the trust responsibility has evolved and where it stands today. The conceptual framework he sets out is the basis for the present analysis. The guardian-ward relationship is a judicial creature having its basis in early Supreme Court decisions which also emphasized a certain sovereignty retained by the Indian tribes. See text at notes 112-18, infra.
United States, but did not assert that individual Indians actually were wards of the federal government. Over the years, however, Marshall's views have been interpreted as a source of federal power over the Indian tribes. Perhaps the true basis for the decision lies in an attempt to place Indian land within the American land system of the 1830's. In the words of one recent commentator:

A treaty was in essence a land transaction whereby the tribe ceded some lands in return for federal protection and sovereign recognition of Indian occupancy of the retained lands. By concluding treaties with and submitting to the protection of the United States, the tribe acknowledged that it was a sort of federal vassal or loyal subject. A guardian-ward relationship can thus be seen as a natural incident of such land tenure; since Indians were not citizens, the guardianship concept provided a way in which their ownership of real property could be acknowledged and protected.

The next time the Supreme Court addressed the issue of the trust relationship, over fifty years had passed and the geography of the United States had changed radically. Marshall's views then were interpreted as a source of federal authority over Indian affairs, not merely over their rights to the land. Not surprisingly, the case law of this period confirmed the use of federal power, primarily congressional power, even sanctioning the authority to abrogate treaty rights.

**B. Congressional Power in Indian Affairs**

In *United States v. Kagama,* the Court upheld the constitutionality of the Major Crimes Act and applied federal criminal law to certain crimes committed by Indians against Indians in Indian country. The fiduciary relationship was a central basis for the holding:
These Indian tribes are the wards of the nation. . . . Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.121

In another Supreme Court decision members of the Kiowa and Comanche tribes attempted to halt the enforcement of a statute which allotted tribally-owned reservation land to individual tribe members and which authorized the sale of reservation lands left unallotted. The suit, Lone Wolf v. Hitchcock,122 was based on an 1867 treaty expressly prohibiting cession of reservation land without tribal consent.123 Citing a "plenary" power held by Congress over Indian property, the Court upheld the statute, saying that the treaty could not "materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and . . . deprive Congress, in a possible emergency . . . of all power to act, if the assent of the Indians could not be obtained."124 The Court viewed the congressional power to abrogate the 1867 treaty as political, and "not subject to be controlled by the judicial department of the government."125 The Court assumed a somewhat paternalistic attitude, presuming that treaties may be abrogated "in the interest of the country and the Indians themselves . . . ."126 and concluded that any injury resulting from congressional abrogation could only be remedied by an appeal to Congress.127

The holdings of Kagama and Lone Wolf remain basically unchanged today. The trust responsibility of Congress towards the Indians is viewed as being based on a moral obligation and generally there are no enforceable standards for the courts to use when scrutinizing a congressional action relating to Indians. A recent case,128 however, suggests that Congress' seemingly plenary powers are not absolute. Descendants of a group of Delaware Indians, who had

122 187 U.S. 553 (1903).
125 Id. at 565.
126 Id. at 566.
127 Id. at 568.
become American citizens and dissolved their relationship with their tribe under an 1866 treaty, challenged the congressional distribution scheme for the payment of funds to two Delaware Indian tribes as compensation for the government's breach of an 1854 treaty. The plaintiffs alleged that their exclusion from the distribution plan violated the due process clause of the Fifth Amendment. The Supreme Court upheld the congressional plan. However, the Court did state in dictum that not all federal legislation concerning Indians is necessarily immune from judicial scrutiny:

The statement in *Lone Wolf* . . . that the power of Congress 'has always been deemed a political one, not subject to be controlled by the judicial department of the government,' however pertinent to the question then before the Court of congressional power to abrogate treaties . . . has not deterred this court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment.

C. The Duty of the Executive Branch

Although the Supreme Court has recognized a broad congressional power in Indian affairs, it has nonetheless imposed tight limits on the power of executive officials in their dealings with Indians, recognizing "the distinctive obligation of trust incumbent upon the Government [i.e. executive officials] in its dealings with these dependent and sometimes exploited people." The Court has stated that "the acts of those who represent the United States in dealings with the Indians should . . . be judged by the most exacting fiduciary standards." Examples of what these "exacting fiduciary standards" entail

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129 U.S. CONST. amend. V.
132 Id. at 297. Seminole was preceded by three cases which explicitly extended a trust obligation to federal officials. In 1919, the Interior Department was enjoined from disposing of tribal lands under the general public land laws in the case of *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919). The Court stated that the plenary congressional power outlined in *Lone Wolf* "[c]ertainly . . . would not justify . . . treating the lands of [the] Indians . . . as public lands of the United States and disposing of the same under the public land laws." Such a move "would not be an exercise of the guardianship, but an act of confiscation." Id. at 113. Two later cases, *Cramer v. United States*, 261 U.S. 219 (1923), and *United States v. Creek Nation*, 295 U.S. 103 (1935), similarly protected Indian land rights from executive encroachment.
have been set out in case law. In general, the courts impose two distinct obligations on officials of federal agencies. First, courts interpret statutes in the Indians' favor. Unlike the Congress, the executive branch has no independent moral obligation to the Indian tribes. Instead, the executive must strictly follow the judicial version of standards set by Congress, with the general rule being "that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Second, courts often hold federal officials to their trust obligations as defined by traditional trust standards, finding a "duty in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."

133 See Chambers, supra note 111, at 1231-32.
134 Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). See also Antoine v. Washington, 420 U.S. 194, 199 (1975). The Supreme Court has not undertaken a thorough analysis of the trust responsibility and its various facets, so it is often helpful to look to lower federal courts for further explanation of trust issues. For example, in an opinion involving a dispute over the enforceability of a county zoning ordinance and building code on Indian reservation lands, the Court of Appeals for the Ninth Circuit stated:

This principle [that ambiguities in treaties or statutes dealing with Indians must be resolved favorably to the Indians] is somewhat more than a canon of construction akin to Latin maxim, easily invoked and as easily disregarded. It is an interpretative device, early framed by John Marshall's legal conscience for ensuring the discharge of the nation's obligations to the conquered Indian tribes. The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian—a status accompanied by fiduciary obligations. While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, attribute to Congress an intent to exercise its plenary power in the manner most consistent with the nation's trust obligations.

Santa Rosa Band v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975).

This is not to imply that Indians prevail in every court action they file because of the trust responsibility. In a case bearing some similarity to the whole bowhead issue, the Supreme Court held that state powers to pass and enforce wildlife conservation laws overrode certain Indian hunting and fishing rights as guaranteed by treaty. Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165 (1977). Discussion of the lengthy litigation leading to this decision may be found in Dein, State Jurisdiction and On-Reservation Affairs: Puyallup Tribe v. Dep't of Game, 6 ENV. AFF. 535 (1978).


Two lower federal courts have followed this Supreme Court lead. In one case, an Indian band sought damages for the alleged failure of federal officials to properly administer funds held in trust for the band. The district court stated that it was "unquestioned that the United States has a solemn trust obligation to the Indian people." Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238, 1243 (N.D. Cal. 1973). Further, the trust relationship was to be measured "by the same standards applicable to private trustees." Id. at 1245. The Court of Claims, in Coast Indian Community v. United States, 550 F.2d 639
In summary, the three lines of case law interpreting the trust responsibility owed to the Indians by the United States present three important points. First, some kind of special relationship exists between the United States and the Indian tribes. Whether described as a wardship, trusteeship or guardianship, there necessarily results some fiduciary obligation assumed by the United States. Second, Congress is the body that determines the scope and purpose of the trust relationship. Few, if any, constitutional guidelines exist for this congressional determination. Third, executive officials must strictly comply with any trust terms. Such compliance is gauged both by close executive adherence to congressional mandates and by resort to private trust concepts.

VII. THE TRUST RESPONSIBILITY AND THE ESKIMOS

Major impediments exist to the wholesale application of traditional trust theory to Alaskan natives due to the differences between Indian and Eskimo history. First, the 1867 treaty transferring Alaska from Russian to American sovereignty made no distinction between native Alaskan and non-native Alaskan. However, the treaty did distinguish between “civilized tribes” and “uncivilized tribes,” the former being treated as United States citizens while the latter were to be treated in the same manner as other aboriginal tribes within the United States (that is, like the Indian tribes). Second, no westward migration of white civilization displaced the Alaskan natives as it did the Indian tribes. In fact, Congress created...
only one reservation in Alaska,\textsuperscript{138} so that the vast majority of natives never experienced reservation life. Third, Eskimo culture centers around the village rather than the tribe, an important ethnological distinction from the Indians.\textsuperscript{139} Fourth, the United States never concluded any treaties with Alaskan natives.\textsuperscript{140} Thus, no specific agreement exists which could form the basis of any trust relationship between the Eskimos and the United States. Finally, traditional trust theory as applied to Indians dealt mostly with land rights and the administration of property in general. Little precedent exists for applying that theory to non-property concepts, such as cultural survival and environmental matters.\textsuperscript{141} The presence of all these factors therefore makes the application of trust theory to the Eskimos by no means automatic.

However, two other factors militate in favor of applying the trust responsibility of the United States toward native peoples to the Eskimos of northern Alaska. First, some aspects of the fiduciary


\textsuperscript{140} The government had only four years within which to conclude treaties with Alaskan natives, for the Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566 (current version at 25 U.S.C. § 71 (1976)), prohibited the use of treaties in dealing with the Indian tribes. Apparently no attempt at drawing up treaties with Alaskan natives was ever made. See Atkinson v. Haldane, 569 P.2d 151, 154 (Alaska 1977).

\textsuperscript{141} One case which does suggest that the trust relationship extends to non-property concepts is Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973). Here a federal district court enjoined a land reclamation project which had the effect of diverting water from an Indian reservation downstream. The diversion violated no statute or treaty. The court stated that the Secretary of the Interior had to justify diversions of water from the reservation and found that there was no showing that the fiduciary obligation to the tribe had been considered by Interior. Id. at 256-57. This case could be read as saying that federal projects must avoid interfering with the federal trust responsibility to the Indians. Chambers, supra note 111, at 1234. Such a reading would extend the trust relationship to include such intangibles as general Indian welfare and perhaps cultural survival, as well as land and money.

But see Donahue v. Butz, 363 F. Supp. 1316 (N.D. Cal. 1973), in which it was found that the trust responsibility does not require the affirmative exercise of discretionary powers. The court held that failure of the Interior and Agriculture Departments to set aside lands in the Klamath National Forest for the plaintiffs and the Karuk tribe did not violate the federal trust responsibility. In distinguishing other cases ordering federal action in accordance with the trust responsibility, the court said:

All these cases have invoked or at least referred to the trust responsibility doctrine in the contest of particular, recognized Indian rights, which were being interfered with or not sufficiently protected . . . . In the pending case we find no comparable contest of particular, recognizable rights of plaintiffs upon which to invoke the doctrine of trust responsibility.

Id. at 1324.
relationship that exists between the United States and the Indians likely extend to Alaskan natives as well. Both Indians and Eskimos are included in the more modern "Native American" term which appears to denote a group of people to which the United States has a certain responsibility. Like the Indians, Eskimos are apt to suffer as the encroachment of the American version of civilization continues. If the trust relationship is to encompass any element of cultural-protection, it logically must extend to Alaskan natives.

A second basis for extending federal fiduciary obligations to the Eskimos lies in the long history of relations between the United States government and the Alaskan natives. By its actions, the United States has essentially recognized the existence of such a trust responsibility. President Theodore Roosevelt articulated this governmental concern for the Eskimos in 1904, demonstrating his sensitivity to the predicament in which many Alaskan natives found themselves:

The Alaskan natives are kindly, intelligent, anxious to learn and willing to work. Those who have come under the influence of civilization, even for a limited period, have proved their capability of becoming self-supporting, self-respecting citizens, and ask only for the just enforcement of law and intelligent instruction and supervision. Others living in more remote regions, primitive, simple hunters and fisher folk, who know only the life of the woods and the waters, are daily being confronted with twentieth-century civilization with all of its complexities. Their country is being overrun by strangers, the game slaughtered and driven away, the streams depleted of fish, and hitherto unknown and fatal diseases brought to them, all of which combine to produce a state of abject poverty and want which must result in their extinction. Action in their interest is demanded by every consideration of justice and humanity.

These words of President Roosevelt were supported by several laws then in effect which, at least on their face, provided some degree of protection to Alaskan natives. The Treaty of Cession provided that "uncivilized" tribes would be subject to "such laws and regulations as the United States may . . . adopt in regard to..."
aboriginal tribes of that country."

An 1884 statute extended federal mining laws to Alaska with the exception "[t]hat the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. . . ." The Homestead Act was extended to Alaska in 1898 with the provision "[t]hat the secretary of the interior shall reserve for the use of the natives of Alaska suitable tracts of land along the water front of any stream, inlet, bay or sea shore for landing places for canoes and other craft used by such natives." In 1900, the legislation providing for a detailed structure of civil government in Alaska stated that "[t]he Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation. . . ."

Over the years courts have interpreted these statutes as demonstrating some congressional concern for the welfare of Alaskan natives. For example, as one court stated in 1902:

The prohibition contained in the act of 1884 against the disturbance of the use or possession of any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tide lands as well as lands above the high-water mark. Nor is it surprising that congress, in first dealing with the then sparsely settled country, was disposed to protect its few inhabitants in the possession of lands, of whatever character, by means of which they eked out their hard and precarious existence.

Moreover, in 1942 the Interior Department concluded that any regulations purporting to permit control by non-Indians of areas in Alaska that may be shown to have been subject to aboriginal occupancy would be unauthorized and illegal.

In Tee-Hit-Ton Indians v. United States, the Supreme Court confirmed congressional authority in Eskimo affairs by extending to such matters the Kagama-Lone Wolf principle that Congress pos-

145 See note 137, supra.
147 Act of May 14, 1898, ch. 299, § 10, 30 Stat. 409, 413.
149 Heckman v. Sutter, 119 F. 83, 88 (9th Cir. 1902).
sesses plenary power in all Indian matters. The Tee-Hit-Tons, a Tlingit Indian clan living in southeastern Alaska, alleged that they had an aboriginal claim to lands within the Tongass National Forest and to all timber harvested on the land. Citing the 1884 and 1900 statutes as a basis for recovery, the Tee-Hit-Tons sued for the value of the timber harvested. The government responded by citing a 1947 Congressional resolution which provided that "the Secretary of Agriculture . . . [may sell] timber growing on any vacant, unappropriated and unpatented lands within the exterior boundaries of the Tongass National Forest in Alaska, notwithstanding any claim of possessory rights." In its decision, the Court rejected the Alaskan native claim, finding that the 1884 and 1900 statutes granted no permanent land rights, but merely granted permissive occupation—a right to a preserved status quo until further congressional or judicial action was taken. Such a right of occupancy served only to protect against intrusion by third parties and could be constitutionally terminated by the sovereign without compensation to the natives. Thus, the Court, consistent with the Kagama-Lone Wolf principle, measured the rights of natives by congressional action and not by broad interpretations of any moral trust relationship, thereby reinforcing the plenary power of Congress to control the scope of federal trust obligations. Tee-Hit-Ton relegated native rights to mere rights to undisturbed use and occupancy, capable of being extinguished or expanded only through Congressional action.

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152 See text at notes 119-27, supra.
153 See text at notes 146 and 148, supra.
154 Joint Resolution of August 8, 1947, ch. 516, § 2(a), 61 Stat. 920, 921. "Possessory rights" were defined as:

all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes, native villages, native individuals, or other persons, and which have not been confirmed by patent or court decision or included in any reservation.


155 "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." Id. at 285.
156 See text at notes 119-27, supra.

Tee-Hit-Ton is to be distinguished from cases involving Indian land issues in the lower 48 states in which treaty interpretation is most important. Whether non-Alaskan Indians only have a right to undisturbed use and occupancy is certainly open to dispute. Congressional power over Alaskan native land rights is the key point of Tee-Hit-Ton.
The Alaska Statehood Act of 1958 maintained the status quo. Alaska abandoned all claims to lands held in trust for natives by the United States and to lands subject to native rights of occupancy and use, thereby permitting future control of these lands by Congress. Since the Statehood Act did not permit Alaska to select those lands in which natives could prove aboriginal rights based on use and occupancy, and since the Act did not contain formal federal recognition of any such native rights, congressional flexibility for the future remained.

This uncertain state of native land rights ended in 1971 with the passage of the Alaska Native Claims Settlement Act. In return for a grant to the natives of fee simple title to forty million acres of land and a payment of over $950 million, the Act extinguished all land claims based on aboriginal use or occupancy. Whether any trust responsibility to the Eskimos survived the Alaska Native Claims Settlement Act is uncertain. Since discussion of the trust issue by the courts often centered around a dispute relating to land, much

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160 Section 4 of the Statehood Act includes the following:
As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

162 The Act states:
All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

163 All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

164 § 1603(c).
prior judicial language becomes inapplicable. Inquiry must now focus on the type of trust responsibility that can exist independent of land issues. In the bowhead situation, that entails determining whether there exists a federal obligation to protect a subsistence culture for the benefit of the Eskimos living in the nine Alaskan whaling villages.

Arguably, the Alaska Native Claims Settlement Act uses language that extinguishes all aboriginal land-related claims, and effectively terminates any trust obligation to Alaskan natives if that trust obligation is dependent on aboriginal claims to land. The Act therefore can be viewed as a repudiation of the entire trust philosophy and as a vehicle promoting Alaskan natives from the status of “aborigine” to American citizen. Yet, the termination of a federal trust responsibility with respect to land does not necessarily extinguish a trust relationship based on subsistence and cultural needs. Indeed, the Conference Report on the Alaska Native Claims Settlement Act stated that the bill “provided for the protection of the Native peoples’ interest in and use of subsistence resources on the public lands.” Legislative actions since 1971 also support the continuation of some trust obligation to Alaskan natives. However, these same actions also have sought to balance Eskimo subsistence

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163 The House Report on the Act contained the following:

The section extinguishing aboriginal title and claims based on aboriginal title is intended to be applied broadly, and to bar any further litigation based on such claims of title. The land and money grants contained in the bill are intended to be the total compensation for such extinguishment.


It is the clear and direct intent of the conference committee to extinguish all aboriginal claims and all aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska.


164 Cases discussing what was and what was not extinguished by the Alaska Native Claims Settlement Act include: Aleut Community of St. Paul Island v. United States, 480 F.2d 831 (Ct. Cl. 1973) (Aleut group claims title to Aleutian island, citing Russian law, and alleges title has been extinguished without compensation); United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977) (United States, on behalf of North Slope Eskimos, sues State of Alaska and 140 corporations and private parties for trespass on native land prior to passage of Alaska Native Claims Settlement Act); Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973) (inhabitants of North Slope Eskimo villages assert title to aboriginal land selected by the State of Alaska and challenge lease of certain lands for oil development). All three cases are important reading for those interested in the effects of the Act.

needs with the survival of endangered species of wildlife.

The major piece of legislation which seeks to protect the Eskimo way of life, while at the same time assuring that subsistence hunting does not wipe out an endangered species, is the Marine Mammal Protection Act of 1972 (MMPA). This statute establishes a ten-year moratorium on the taking of any marine mammal without a permit, yet excepts from that moratorium the taking of marine mammals by any Alaskan Indian, Aleut or Eskimo so long as the taking is not wasteful and is for subsistence purposes only. However, if it is determined that a species of marine mammal hunted by natives is "depleted", the taking of that animal may be curtailed by regulations restricting native hunting; such regulations must pass through a public hearing process and must be removed when they are no longer necessary to preserve the endangered species.

In enacting MMPA, Congress carefully considered the impact which curtailment of marine mammal hunting would have on the


Permits are granted on a small scale, generally for takings related to scientific research and public display. See generally 50 C.F.R. Part 18 (1977).

Section 101(b) of MMPA reads as follows:

The provisions of this [Act] shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—

(1) is for subsistence purposes by Alaskan natives who reside in Alaska, or
(2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing: Provided, That only authentic native articles of handicrafts and clothing may be sold in interstate commerce: And provided further, That any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption. For the purposes of this subsection, the term "authentic native articles of handicrafts and clothing" means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting; and
(3) in each case, is not accomplished in a wasteful manner.

Notwithstanding the preceding provisions of this subsection, when, under this [Act], the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. Such regulations may be established with reference to species or stocks, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the purposes of this [Act]. Such regulations shall be prescribed after notice and hearing required by section [103] of this title and shall be removed as soon as the Secretary determines that the need for their imposition has disappeared.

16 U.S.C. § 1371(b) (1976). See also text at notes 92 and 93, supra.
subsistence activities and cultural patterns of Alaskan Eskimos. During three days of hearings held in Alaska, a Senate subcommittee found that marine mammals served not only as food and clothing, but also as a basis for a small cash economy. It was determined that crafts and clothing created from marine mammals "are a continuing manifestation of ancestral cultural patterns, and must not be extinguished by act of Congress." However, when a particular species nears extinction, MMPA unequivocally chooses protection of a marine mammal over such subsistence and cultural activities. This basic policy choice may aid in gauging the limits of any trust responsibility that may still survive with respect to the Eskimo.

The Endangered Species Act of 1973 (ESA) was enacted to protect all species of wildlife from extinction. The Act contains an exemption for Alaskan natives similar to that found in MMPA, thereby further supporting the proposition that congressional policy seeks to protect Eskimo subsistence and cultural interests while insuring that such action does not lead to the extinction of a species of wildlife.

Congress recently readdressed the issue of native subsistence needs as it dealt with the problem of the future of Alaska's vast areas of public land. Although no bill dealing with Alaskan lands emerged from Congress in 1978, both houses did consider such legis-
Each proposed bill had a section protecting subsistence use of public lands and sought to preserve Alaskan native cultural patterns as much as possible. However, the proposed legislation did not seek to artificially perpetuate native culture, but rather to permit individual Eskimos the choice of following traditional or modern lifestyles.

Thus, the scope of federal trust responsibility to the Eskimos of Alaska appears to include the following elements: (1) a basic obligation to consider Eskimo interests and to construe statutes in favor of the Eskimos; and, (2) an intent to permit Eskimos to continue their subsistence way of life and to allow individual Eskimos to decide for themselves the extent to which they want to follow traditional lifestyles, provided, however, that such subsistence activities do not result in the extinction of any animal.

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175 The bill reported out by the Senate Committee found that:

in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents . . .

Proposed Alaska National Interest Lands ("d2") bill, § 801(4) (reported out of Senate Committee on Energy and Natural Resources on Oct. 5, 1978). See [1978] 9 Envir. Rep. (BNA) 1130. The House bill stated that one of its purposes was to:

provide the opportunity for people engaged in a genuinely subsistence-oriented life style to continue to do so if they desire and to allow such people to decide for themselves their own degree of subsistence dependency and the rate at which acculturation or adjustment to a non-subsistence way of life may take place . . .


176 The House report stated:

This legislation recognizes the long-standing and historic use of the Alaska Native people of large areas of land around their historic villages for hunting, fishing, trapping, berry gathering and other subsistence use purposes. This Act is not, however, predicated on the philosophy that the historic way of life of the Native people of Alaska can, or will, or should be perpetuated into the future for all time by the actions taken by this Congress; western "civilization" came to Alaska and to virtually all of the Native people many years ago.

This legislation recognizes, but makes no value judgment concerning the processes and the forces of social change which are transforming the historic culture of the Native people of Alaska. Congress can, however, give Native people the opportunity to decide for themselves the rate at which acculturation will take place. Furnishing protection of subsistence patterns of existence will allow Native peoples, especially the older generation, the opportunity to make that choice.

VIII. The Future of the Bowhead Controversy

The court in *Hopson v. Kreps*\(^1\) faced the task of balancing the interests of the United States in maintaining a viable IWC and in assuring the survival of the bowhead against the trust obligation of the United States to protect the Eskimo subsistence way of life. The district court deemed the entire issue to be a matter of foreign policy, declared it lacked jurisdiction, and dismissed the case. If the appellate court reverses this decision and remands for consideration of the issue of trust responsibility, the district court can analyze the situation on the basis of either traditional trust concepts or the congressional policy toward Eskimos and the bowhead as demonstrated in recent federal legislation.

The fundamental duty of a trustee is strict loyalty to the beneficiaries of the trust in the management of the trust res.\(^2\) The trustee in this case is the federal government, while the beneficiaries of the trust are the present and future generations of Eskimos. The trust res does not encompass money or land, but the more abstract entity of a subsistence culture. In such a context, the trustee is obliged to preserve the subsistence way of life for the Eskimos currently inhabiting the nine whaling villages and for any of their children who choose to continue that lifestyle. Thus, the United States must act not only to allow present Eskimo hunting of the bowhead, but must also ensure the continued survival of the animal for the use of future generations. Preserving the bowhead from extinction would fulfill the requirements of the traditional trust concept mandating the use of care and skill in the preservation of trust property.\(^3\)

Alternatively, the court could interpret congressional policy as expressed in recent legislation to require protection of the subsistence needs and cultural patterns of Alaskan natives, while at the same time avoiding the extinction of any animal species.\(^4\) To rationalize such a policy goal, the court could determine that the duty of the United States as trustee for the Eskimo subsistence culture requires that the federal government ensure that the animals which play a part in that culture do not vanish. On the other hand, the court could reason that the duty of the United States to protect the

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\(^{2}\) 2 A. Scott, Trusts § 170 (3d ed. 1967).

\(^{3}\) Id. § 176.

\(^{4}\) See text at notes 166-76, supra.
Eskimo subsistence way of life becomes secondary when the survival of a species is at stake, permitting a "justifiable breach" of the duty to preserve Eskimo culture in the name of saving an endangered animal. Under either analysis actions to protect the bowhead would be proper. Indeed, if such actions entailed implementing the IWC bowhead quotas through regulations issued under MMPA, no breach of trust could, by definition, exist in any case. Congress, through such statutes as MMPA, defines the parameters of its trust responsibility so that actions limiting Eskimo whaling which are taken in conformance with these statutes simply cannot be a breach of any trust duty.181

Assuming that the court determines that the United States must act to preserve both the Eskimo lifestyle and the animals on which it depends, it then must fashion an appropriate remedy. A long-term halt to all Eskimo harvesting of the bowhead would, according to the Commerce Department, result in a "deleterious impact on the culture, economy, and perhaps the health of the Eskimo."182 Indeed, the Interior Department recommended that the United States object to the total elimination of aboriginal bowhead whaling by IWC on the grounds that such an objection was required to fulfill the nation's trust responsibility to the Eskimos.183 Yet a reasonable restriction on bowhead whaling would appear to be within the realm of the trust responsibility and comport with present United States initiatives in IWC to limit, rather than ban, Eskimo whaling.

A finding that the trust responsibility permits a restriction of Eskimo whaling activities does not in itself ratify actions taken by IWC. Until intensive scientific study establishes the condition of the bowhead stock and the effects of Eskimo hunting on the chances of the bowhead's survival, all that can be hoped for is a wise policy decision that will be least harmful both to the bowheads and the Eskimos. The present set of quotas satisfy neither the Eskimos nor the conservation community—the scientific basis for choosing between a quota of twenty whales and a quota of forty whales is meager indeed and of little consolation to the Eskimos, while a quota of twenty whales is unjustifiable to those who argue that any Eskimo hunting may make the difference between the slow regeneration of the bowhead and the destruction of the species.

181 See text at notes 151-57, supra.
182 1 FEIS, supra note 3, at 66.
183 Mason, supra note 44, at 372.
The intention of some Eskimos appears to be to ignore the IWC and federal regulations and violate the 1979 quota. Such a move would lead to either federal enforcement action against the Eskimos or an embarrassed United States in IWC. Many Eskimos believe that the bowhead has become a political football with the Commission and that IWC decisions on bowhead whaling are not dictated by scientific findings. Their conclusion is not inconceivable. Most IWC business relates to establishing the levels of commercial harvesting of whales, notably sperm whales, by Japan and the Soviet Union, with the United States leading a drive to cut this commercial whaling. Some nations believe that the American zeal for a reduction in commercial whaling levels will itself diminish when the United States must defend the hunting of an endangered species of whale by its own citizens. If the IWC quotas on bowhead harvesting simply result from a political ploy to make the United States limit its conservationist demands, and are not based on the best scientific data available, then the Eskimos are bearing an unfair burden and the United States may be breaching its trust responsibilities by implementing such ill-conceived restrictions. Eskimo violations of the 1979 quota certainly could be more easily rationalized if IWC members are, in fact, twisting evaluations emanating from the Scientific Committee in order to serve political ends.

The United States plans to present a proposal to IWC which would create an independent regime to deal solely with aboriginal whaling. Such a mechanism could effectively depoliticize the issue, although the question remains whether enough IWC members can be convinced of the merits of the scheme.

The many facets of the Eskimo-bowhead drama create such complexity that no easy course of action exists. It is tempting to abandon a paternalistic view of the trust responsibility—"we are imposing hardships on you now for your own good and for the good of your children"—and to let the judgment of the Eskimos, who know the bowhead best, prevail. The Alaskan natives have themselves proposed a program of self-regulation whereby the Eskimos set the

185 Id.
harvest limit before the hunt begins and their hunting methods are closely supervised.\textsuperscript{187} Although all mankind suffers to an incalculable degree when a species of life disappears from our planet, perhaps the interrelationship between the bowhead and the Eskimo demands that the future of the bowhead be left in knowledgeable Eskimo hands.

However, permitting self-regulation by the Eskimos is not now the answer. An attempt must be made to solve the problems of the Eskimo and the bowhead within the established IWC structure. For the United States to allow IWC to become an empty shell could lead to the destruction of many species of whales around the world. In order to achieve the proper resolution of this conflict, justice demands both increased scientific research on the bowhead and a fair IWC structure for decision-making. The American proposal for an independent body within IWC that would oversee aboriginal whaling satisfies these requirements and deserves international support.

IX. Conclusion

The Inupiat Eskimos inhabit the northern and western coasts of Alaska where for centuries they have hunted the bowhead whale. The whale hunt has long been both a source of food and a unique cultural activity. However, the bowhead was almost exterminated by commercial whalers during the latter part of the nineteenth century, and the present health of the whale stock is not known. Eskimo whaling activities have increased during the 1970's, causing concern for the future survival of the bowhead.

The International Whaling Commission (IWC) has slowly moved to protect threatened whale species. In June 1977, IWC voted to halt all aboriginal hunting of the bowhead. IWC later changed this total ban to a limited quota for the years 1978 and 1979, although the Eskimos challenged federal implementation of the IWC decisions, arguing that the United States is violating its trust obligation to the Eskimo villagers when it restricts their whaling activities.

The trust responsibility to the Eskimos has a basis in the fiduciary relationship between Indians and the federal government. Congress determines the scope of this relationship, and federal officials must strictly observe the fiduciary duties recognized by Congress. A special trust duty to the Eskimos can be found in recent

congressional actions expressing a desire to protect the Eskimo subsistence culture, but not at the expense of the extermination of a species of wildlife. Thus, federal regulation of Eskimo whaling is not in violation of the government's trust responsibility toward the Alaskan natives, provided unrestricted hunting poses a marked threat to the bowhead's survival.