The Federal Duty to Protect Subsistence

By DAVID CASE

It is sometimes alleged that the subsistence way of life is already dead.

This allegation is frequently the premise for the argument that preservation of subsistence values should have no priority in Alaskan fish and game management policy. The fact that a majority of Alaska's 60,000 Natives are still nutritionally dependent and culturally attached to the subsistence lifestyle discredits both the premise and the argument.

There may be a legitimate question of how long Native subsistence culture in its present form can withstand the rapid pace of technological development. In twentieth century America, that question should only be answered with the agreement of the Native communities most affected by the result.

If nineteenth century American Indian policy has taught us anything, it is that the heedless, uncontested alteration of Native American cultural foundations is in large part responsible for the social disasters and economic poverty from which the first Americans are just now recovering.

Contrary to present trends, one would hope that the Alaska equivalents of the nineteenth century buffalo slaughter will not be permitted to continue. Beginning in the 1860's, the rapid development of the transcontinental railroads provided the incentive for the decimation of the primary subsistence resource of the Plains Indians.

The rapid development of transportation corridors for the extraction of Alaska's mineral wealth along with other intensive development of activities will have similar effects here.

Federal Legal Obligations

We might well ask, "Is this right?" There is only one moral answer, but as the first Chief Justice of the United States Supreme Court said of Indian lands, "Power, war, conquest, give rights which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend." In short, the legitimate moral expectations of Native Americans can and frequently have been frustrated by the cold facts of life in an alien majority society.

That same society, on the other hand, has sometimes recognized in law its unique moral and political obligations to the descendants of this continent's first inhabitants.

These legal obligations are based on the historical fact that at one time all the lands and other resources of North America were the communal property of the original inhabitants. Although these resources could be acquired by outright conquest, the dominant societies of North America chose on principles to acquire them by purchase.

Reservations

Federal efforts to protect Native subsistence have usually been confined to the creation of reservations. Reservations were initially established by treaties ratified by Congress. After the abolition of Indian treaty-making in 1871, new reservations were created either by Congressional statute or executive order. Metlakatla is an example of a still-existing Alaska statutory reserve, but all the Alaska executive order reserves were abolished by Section 19 of the Alaska Native Claims Settlement Act (ANCSA).

Reservations usually carry with them the implied right of the Native inhabitants to the exclusive use of the fish, game and other renewable resources for subsistence purposes.

In that respect, Federal Native reservations constitute Federal protection for Native subsistence activity within the geographic limits of the reserve. One problem is that unless the reserve is very large or very rich in fish and game resources, off-reservation taking of migratory animals and fish might well prevent those resources from reaching the reserve.

Pre-emptive Law

As early as 1855, the Indian people of what is now Washington State sought to protect off-reservation fishing rights by reserving to themselves the right to fish off their reservations at their usual and accustomed places "in common with" the non-Native citizens of the Territory.

After bitter and still-continuing court battles, the Native beneficiaries have had confirmed to them the right to 50% of the total Washington fish harvest.

In this respect, the Federal treaties on which the fishing rights rest pre-empt State jurisdiction over Washington State Native subsistence fishing and protect Native subsistence interests.

Since ANCSA has abolished Native reserves, there are, with the exception of Metlakatla, no Native reserves in Alaska. Alaska Natives must therefore rely either on the good will of the State of Alaska, or failing that, pre-emptive Federal laws to protect their subsistence way of life.

There are already several Federal laws on the books which give special consideration to Alaska Native subsistence, but due to their own ambiguity, these laws offer little real protection and in some cases pose an outright threat to subsistence values.

The Migratory Bird Treaty is perhaps the worst of these. The Act is designed to implement three international treaties between the United States and Canada (Great Britain), Mexico and Japan.

The Canadian Treaty prohibits the hunting of migratory birds between March 10 and September 1 except for puffins and other non-game birds of limited subsistence value. Since most migratory birds do not reach Alaska prior to March 10 and fly south before September 1, the prohibition prevents subsistence hunting of migratory fowl in Alaska.

The Mexican Treaty is more liberal and the Japanese provides an outright Native exception for all birds. However, the more restrictive Canadian Treaty provisions govern because there is no way to separate birds migrating through Canada from those migrating from or through Mexico and Japan.

The Fur Seal Act provides a clear exception for Native subsistence hunting of fur seals, but only if the hunting is done with non-motorized craft and hand-held harpoons. This exception permits Native subsistence seal hunting only by the riskiest and least successful methods. It is of limited value.

The Marine Mammal Protection Act (MMPA) is perhaps the best example of Federal pre-emptive legislation clearly designed to protect Alaska Native subsistence.

Enacted in 1972, the MMPA placed an indefinite moratorium on all marine mammal hunting in U.S. waters unless done on a Federal permit. Alaskan Native subsistence hunting for food and handicrafts was one of the few exceptions permitted for both the moratorium and permit requirements.

The MMPA Congressional debates clearly established that protecting Native subsistence culture was the purpose behind the Native exception.

The Native exception provides that only in the event the Secretary of Interior or Commerce (depending on the mammal species involved) determines that a particular species is being "depleted" shall Native taking of that species be regulated. Unfortunately, this clear protection of Native subsistence is arguably negated in another section of the MMPA which permits jurisdiction over marine mammals to be returned to the State of Alaska.

At best, existing Federal efforts to protect Alaska Native subsistence must be classified as spotty, inconsistent and ineffective. Other relevant Federal game laws do not even purport to protect Native subsistence and have even been used to threaten present subsistence practices. The International Whaling Convention is the most obvious example of this sort of Federal law. The Federal government's advocacy of at least a limited bowhead whale quota before the International Whaling Commission seems to be a recognition of Federal responsibility to protect Alaska Native subsistence. The bowhead whale controversy illustrates the kinds of international political considerations which restrict the Federal government's ability to protect Alaska Native subsistence needs.

"As with motherhood, most everyone is for subsistence. But our question is: what good is it without strong protection for that uniquely, fragile, easily damaged landscape without which subsistence will die?'

Jim Kowalsky, Friends of the Earth