

# Ocean Law Memo

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## THE BOWHEAD WHALE CONTROVERSY: A Crisis for U.S. Whale Policy

In June, 1977, the International Whaling Commission (IWC) voted to delete from its Schedule of Regulations the exemption for subsistence killing of bowhead whales by native peoples. Hardest hit by this deletion were Alaskan Eskimos who have historically hunted these whales for subsistence. The Bowhead, whose habitat is the northern Pacific arctic and subarctic waters, is crucial to the Eskimo culture. The Eskimos' dependence on these animals and the hunt itself is far-reaching, providing villages with food, social order, cultural identity and some measure of economic independence. In the words of an Inupiat Eskimo, "without the whale, there is no Eskimo."

Since June of 1977, the Inupiat Eskimos have attempted to resist deletion of the bowhead exemption and subsequent IWC action in U.S. courts. The Eskimos' situation, and the litigation they initiated, raised a complex of issues having legal, international, political and environmental significance which have yet to be fully resolved. At stake is a species threatened with extinction, and a culture totally dependent on that species for survival.

### THE IWC

The IWC was established under the 1946 International Convention (treaty) for the Regulation of Whaling to provide for the conservation, development and optimum utilization of whale resources. The IWC meets at least yearly, and currently is composed of 20 contracting governments. It establishes in its schedule of regulations proper whaling procedures and whale-take quotas which are reviewed and, depending on current information, amended annually.

Until recent years, the IWC has not taken a conservationist stance. By all accounts, it rather juggled conflicting economic interests to produce immediate gain for whaling nations, until many whale species were dangerously depleted. The Scientific Committee of the IWC, originally composed of biologists who were natural historians, became increasingly concerned as whale populations declined. The Committee needed more quantitative data on whale populations, specifically statistics describing a species' ability to respond to the commercial harvest, and established a subcommittee of popula-

tion dynamicists in 1961. A trend placing more emphasis on quantitative information continues within the Committee to the present day. The Committee is composed of scientists from whaling and non-whaling nations. Although each member nation may send scientists, not all nations are represented. In recent years, the IWC has attempted to make its decisions more objective and less susceptible to political trade-offs by relying on Scientific Committee recommendations in formulating IWC regulations.

IWC efforts at conservation have been further weakened by the terms of the treaty itself. Any member nation objecting to an IWC regulation is not bound by it. Hence, the IWC's only method of enforcement is publication of objections by member nations, and of violations of its regulations by members and non-members. Until 1973, whaling nations made liberal use of the objection provision.

### The Controversy

The IWC regulations prohibit the general taking of Bowheads but, until 1977, contained an exemption allowing hunting for subsistence use. In 1973, the Scientific Committee began requesting the U.S. to report the Eskimo kill of Bowheads, and to make the native hunt more efficient, specifically by reducing the number of whales struck by the Eskimos, but not landed. The Committee's concern centered on the small size of the Bowhead population, and the threat presented not only by the subsistence hunt, but also by the threat of potential harm caused by oil development in the North American Arctic. The U.S. did not comply with the Scientific Committee's requests. The Committee repeated these requests yearly through 1976, but the government neither responded nor informed the Eskimos of the Committee's position. Finally, in June of 1977, the Scientific Committee recommended deletion of the subsistence exemption and the IWC adopted its recommendation 16-0, with only the U.S. abstaining.

The IWC decision placed the government in a precarious position. The U.S. is required by the Marine Mammal Protection Act of 1972 (MMPA) to facilitate effective conservation and protection of whales on a global scale. Within the IWC, the U.S.



was an aggressive conservationist force, and had consistently urged strict reliance on recommendations of the Scientific Committee in formulating regulations, stressing the need for objectivity in IWC decisions. The U.S. had strongly urged other countries to withhold objections in spite of any adverse domestic impact, and no objection to an IWC regulation had been filed by any nation since 1973. The symbolic international impact of the U.S. being the first to break this pattern could be grave, and could precipitate objections to other regulations by whaling nations.

But the U.S. also has a trust obligation to its native citizens, the Eskimo whalers severely affected by the deletion of the Bowhead exemption. This long-recognized obligation requires the government to meet a high standard of protection of Eskimo interests. The Eskimos view the exemptions for native Alaskan subsistence hunting in the MMPA and the Endangered Species Act of 1973 (ESA) as implicit recognition of the trust obligation. An international body was denying the Eskimos the domestically recognized right to hunt for subsistence. Did the government's trust obligation therefore require that the U.S. object to the IWC regulation? Acting Secretary of the Interior James Joseph believed it did, and so indicated in a letter to Secretary of State Cyrus Vance. But because of the serious threat to U.S. credibility as a leader in whale protection, and the fear of resulting setbacks to IWC efforts at conservation, the government decided otherwise. On October 20, 1977, four days before expiration of the 90 day objection deadline, the Secretary announced that the U.S. would not object, but would instead attempt to work out a compromise at the upcoming December, 1977, meeting of the IWC. The next day, in an effort to gain additional time to challenge the government's decision, the Eskimos brought suit in U.S. District Court in Washington, D.C., seeking a temporary order directing the government to object.

#### Adams v. Vance

District Court Judge John Sirica balanced the harm to the Eskimos if the objection was not filed against harm to the government if it was. He concluded that, since failure to object foreclosed any opportunity for the Eskimos to argue the merits of their claims, and since the U.S. could withdraw its objection at any time, the scales tipped in the Eskimos' favor. Judge Sirica ordered the Secretary to object.

The government immediately appealed this order. On April 24, 1977, the last day to file an objection with the IWC, the Court of Appeals reversed the District Court, and the U.S. Supreme Court refused to review that decision. The Court of Appeals assumed, without deciding, that the "political question doctrine," which denies courts jurisdiction to rule on matters which are committed by the Constitution to another branch of government, did not preclude review in this case. Because even a temporary order to object would intrude substantially into the concerns of the Executive branch, the court required the Eskimos to make extraordinary showing of the need for such an order. Although the Eskimos had raised serious questions of law on the trust obligation issue, they had not proved with certainty that irreparable

harm would ensue, particularly since the government planned to propose a compromise at the December IWC meeting. The crux of the decision, however, rested on the severe harm to U.S. efforts at maintaining an effective international whale conservation program through the IWC. The Court of Appeals found clearly erroneous Judge Sirica's finding that an objection, even one that could be subsequently withdrawn, did not cause substantial harm to the U.S. On balance, the harm to U.S. foreign policy outweighed the harm to the Eskimos.

In compliance with the Court of Appeals decision, the Secretary did not file an objection and the U.S. was bound by the IWC regulation.

#### Subsequent IWC Action

At the IWC meeting in December, 1977, the U.S. negotiated a compromise between the nations advocating a ban on bowhead whaling and those advocating controlled, but continuing, subsistence hunting. The IWC, despite the Scientific Committee's recommendation of a complete moratorium, set a 1978 quota at 18 whales struck or 12 landed, whichever occurred first. The Eskimos were outraged by what they considered to be a low quota, and initially announced they would not comply. They later decided, in a show of good faith, to stay within the 1978 quota for the spring hunt.

In response to the IWC's actions, the United States, in cooperation with the Eskimos, developed a research program implemented by the National Marine Fisheries Service (NMFS), under the auspices of the National Oceanic and Atmospheric Administration (NOAA) of the Department of Commerce. The program was aimed at increasing knowledge of the Bowhead, most immediately by obtaining a more accurate population estimate upon which to base quotas. (The Bowhead research effort continues to the present.)

At the June, 1978 IWC meeting, the U.S. presented its newly calculated "best estimate" of 2,264 whales migrating past Eskimo hunting grounds, compared with an estimate of 1,300 previously used by the Scientific Committee. Based on this new estimate, the U.S. recommended a maximum take of 2 percent of the best estimate of the population size, or 45 whales for 1979. Along with this recommendation, the U.S. agreed to maintain a research effort to detect any detrimental effect on the population and reduce the quota accordingly. The U.S. was supported in this proposal by the Alaska Eskimo Whaling Commission (AEWC), a group of Eskimo whalers formed in September, 1977, to protect Eskimo interests on the Bowhead issue.

The Scientific Committee again recommended a zero take. The IWC did not adopt either proposal, but set a 1979 quota of 18 whales landed or 27 struck, and increased the 1978 quota for the fall hunt by 2.

The AEWC representatives demonstrated their disgust with the IWC actions by walking out of the meeting. The group later issued a statement of intent to remove itself from IWC jurisdiction, and to ignore IWC quotas. Although the AEWC has maintained this stance, no confrontation has occurred with NMFS which enforces IWC regulations

domestically. At the close of the 1979 hunt, the Eskimo take was just within the IWC quota. (The quota had been reduced to 18/26 at the June, 1979 meeting, again over the Scientific Committee recommendation of a zero take.)

Hopson v. Kreps

The subsistence hunt issue is not yet resolved. The AEWC believes the Eskimos possess more intuitive knowledge of the Bowhead and have a better feel for its numbers than a scientific study alone can produce. The AEWC contends that it should regulate the hunt, and that its regulation will insure the survival of the species. The Eskimos have now returned to court, this time to the U.S. District Court in Anchorage, in an attempt to remove themselves from the reach of IWC regulation.

The Eskimos challenge domestic implementation of the IWC subsistence hunt regulations. The IWC treaty--the 1946 International Convention for the Regulation of Whaling--was made law in the U.S. by the Whaling Convention Act of 1946. Under this act, the Secretary of Commerce issues domestically the regulations adopted by the IWC, so that they become U.S. law, and are enforceable by U.S. authorities. In their suit, the Eskimos asked the court to rule on one issue alone: does the 1946 treaty, and hence the Whaling Convention Act, authorize the IWC's regulation of Eskimo subsistence whaling?

The Eskimos cite the history of the treaty and ask for a declaration that it does not authorize IWC regulation of subsistence whaling because its drafters did not so intend. Furthermore, since the treaty does not authorize regulation of subsistence whaling, the Whaling Convention Act cannot authorize the IWC subsistence regulations issued domestically by the Department of Commerce, and they are therefore invalid.

The government requested a ruling that the subsistence regulations were authorized by the treaty, hence by U.S. law, and are valid. The government claims that the very existence of the subsistence exemption in the treaty proves the drafters' intention to regulate subsistence whaling, but the Eskimos claim the exemption was only meant to apply when adverse conditions caused an insufficient aboriginal take and factory ships had to supply whales to villages for subsistence use.

Neither party was granted its requested ruling. The court, on its own motion, applied the political question doctrine, holding that the regulations issued by the Secretary of Commerce to enforce the IWC regulations were so closely linked to the conduct of the U.S. foreign relations that the judiciary lacked jurisdiction to rule on their validity. The court dismissed the Eskimos' suit.

The Eskimos have appealed to the U.S. Court of Appeals for the Ninth Circuit, but a ruling is not expected for another year or so. The Ninth Circuit Court of Appeals commented on the Hopson case recently in United States v. Decker. The court stated its disagreement with the District Court's conclusion in Hopson that the standard for application of the political question doctrine does not vary even where treaties are implemented domestically and involve criminal penalties. Since the

IWC regulations are implemented domestically and do involve criminal penalties, the Court of Appeals may reverse the District Court on the political question issue, or it may return the case to that court for application of a different test.

If the judiciary finds that the political question doctrine does not preclude judicial interpretation of the treaty, then it will either find that the IWC has jurisdiction of subsistence whaling or that it does not. If the court finds for the Eskimos, and rules the quota regulations invalid because not authorized by law, then in all likelihood the Secretary of Commerce will institute procedures to regulate the Eskimo take under the Marine Mammal Protection Act and the Endangered Species Act. The Bowhead is protected domestically by a general moratorium on both hunting and importing under the MMPA and the ESA. Both Acts contain exemptions for Alaskan native subsistence hunting, but both give the Secretary of Commerce power to regulate the take upon a determination that the species has reached a depleted or endangered stage.

For government to exercise this power to regulate the Eskimo take, it would have to follow certain procedural steps which would give those affected opportunity to participate. The Eskimos argued in Adams v. Vance that the government's unilateral adoption of IWC regulations side-steps these procedural requirements and denies them due process of law by preventing an Eskimo challenge to the regulations and their evidentiary basis. Although the Eskimos would still be faced with a quota under the MMPA and the ESA they may be more willing to cooperate if they had opportunity to participate in the process by which these quotas, and other regulatory measures, are determined.

A domestic regulatory scheme may be more satisfactory to the Eskimos, but the benefit of Eskimo cooperation must be weighed against the alleged harm to U.S. influence and effectiveness on the IWC. Although a decision from the judicial branch may get the Executive branch out of its predicament by allowing it to disclaim responsibility for judicial invalidation of the subsistence hunt regulations at home, the government has consistently argued that it is irrelevant which branch makes the decision. To other nations, it remains the U.S. government which is taking the action.

If the judiciary rules against the Eskimos and decides that the IWC regulations implemented domestically are valid, then it might consider the Eskimos' trust obligation arguments. The Eskimos maintain that the U.S., in its dealings with the IWC, has not adequately protected Eskimo interests. A ruling in the Eskimos' favor seems unlikely in view of the considerable efforts directed toward Bowhead research and U.S. efforts on the Eskimos' behalf within the IWC.

The fates of the Bowhead and of the Eskimo culture seem inextricably bound. The Eskimo is in the paradoxical position of having the most immediate stake in maintaining the species, and also having the most immediate need to continue a hunt which, by most estimates, threatens the species' survival. The tragedy of the situation is further

magnified by its origins; it was commercial exploitation of the population in the past, not the subsistence hunt, which depleted the Bowhead stock and left both culture and species threatened.

Imposition of a quota on the Eskimos forces them to pay for excesses in which they took no part. It is without doubt an unfair situation. But if the Bowhead and the culture are to survive, it seems a quota is the price the Eskimos must pay.

Meg Reeves  
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