

New Zealand Maori and Alaskan Native Fishery Rights In the context of Market-Based Conservation

by

Philip S. Traynor

I. INTRODUCTION

The indigenous populations of New Zealand and Alaska have both traditionally relied on fishing as a major food source. Both populations have had their ancestral lands occupied by foreigners, and both groups signed treaties with their occupiers that purported to offer strong protections of the indigenous populations fishing rights. In New Zealand, the Maori were granted full control over the fishery, and in Alaska, the Natives were guaranteed subsistence fishing rights, with the promise that such rights could not be infringed upon by commercial interests. However, time has shown that neither of these treaties offers the protection of native interests that they first appeared to. The Maori find themselves with a small fraction of their fishing rights and more outside pressure and oversight than they would prefer. Alaskan Natives, on the other hand, struggle to feed their families while commercial fishing fleets discard many times more fish than the villagers could ever hope to catch.

This paper will examine the Maori and Alaskan Native treaties, negotiations, and subsequent decisions that have lead to a degradation of native fishing rights. Part II will consider Maori fishing rights within the context of evolving New Zealand fishery management while Part III will examine the conflict between subsistence users and commercial fishermen in Alaska. Part IV will discuss the considerations for an equitable allocation of scarce resources in light of the rights of indigenous people and prior users of the resource, question the wisdom of New Zealand and the United States implementing the United Nation Declaration on the Rights of

Indigenous Peoples, and consider an international convention on indigenous fishing rights as an appropriate solution for preserving these cultures' ancestral rights.

II. THE MAORI OF NEW ZEALAND

Prior to the arrival of European colonists in the early Nineteenth Century, New Zealand was inhabited by numerous small tribes of Maori, concentrated mainly on the coasts of the islands. The Maori culture was a combination of land based and sea based, with fishing holding an important role not just as a dietary staple, but also holding key cultural roles.¹ The Maori cultural traditions include large feasts for the iwi, or tribe for a number of occasions.² At these gatherings, it is customary for the host to provide food for all of the guests, with a special importance placed on shellfish. The Maori have also traditionally used seafood as a currency, trading fish among coastal tribes, as well as trading for items between coastal tribes and landlocked iwi.³ When British colonists arrived in New Zealand, however, they were more concerned with the resources the land had to offer. The colonists introduced sheep and goats to the islands, and began an economy focused on grazing livestock and the trade in both meat and dairy products. This focus was evident in the first treaty signed by the representatives of the Crown and the Maori.

¹ Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, Wai 22, S1.5 (1988).

² Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, Wai 22, S1.5 (1988).

³ Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, Wai 22, S1.5 (1988).

A. Treaty of Waitangi

The Treaty of Waitangi was the first treat between New Zealand's indigenous population and European colonists, and served as the founding document for New Zealand.⁴ Signed in 1840, the brief treaty outlined the relationship between the Crown and the Maori in three articles.⁵ Article I granted the Crown sovereignty over all Maori lands.⁶ Article II guaranteed the Maori the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties, as well as obligating the Maori to sell land only to the Crown.⁷ Article III stated only that the Maori would enjoy the same rights and privileges as all other British subjects.⁸ As with many treaties entered into between colonial powers and indigenous populations, the treaty was written in both English and Maori, and the two versions did not feature a perfect translation.⁹ One of the most important differences arises from the use of the word "sovereignty." The Maori did not have a word for sovereignty as the British understood it; the treaty instead granted "governorship" to the Crown, and "chieftainship" to the Maori.¹⁰ Statements from the Maori at the time indicate that they did not fully understand the extent of

⁴ R.A. Sandrey, *Maori Fishing Rights in New Zealand: An Economic Prospective*, ISSN 0110-7720 Agricultural Economics Research Unit Lincoln College, Canterbury, New Zealand (1986).

⁵ REPORT OF THE WAITANGI TRIBUNAL ON THE MURIWHENUA FISHING CLAIM, Wai 22, S1.1 (1988).

⁶ R.A. Sandrey, *Maori Fishing Rights in New Zealand: An Economic Prospective*, ISSN 0110-7720 Agricultural Economics Research Unit Lincoln College, Canterbury, New Zealand (1986).

⁷ Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, Wai 22, S1.1 (1988).

⁸ R.A. Sandrey, *Maori Fishing Rights in New Zealand: An Economic Prospective*, ISSN 0110-7720 Agricultural Economics Research Unit Lincoln College, Canterbury, New Zealand (1986).

⁹ Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, Wai 22, S1.1 (1988).

¹⁰ Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, Wai 22, S1.1 (1988).

what they had granted to the Crown. At the time, a Maori chief, Nopera Panakareao, is recorded as stating, "The shadow of the land is to the Queen, but the substance remains to us."¹¹

In addition to the obvious language problems, the Maori also did not have a system of property rights equivalent to the British.¹² The Maori did not distinguish between physical property, real property, intellectual property, and attributes such as pride, honor, prestige and respect. Scholars believe that the Maori word for "properties" in the treaty encompassed all of these ideas, casting doubt on what exactly the Maori thought they were giving up.¹³ Because the Maori society was much more oral than literal at the time, scholars have also suggested that the Maori negotiators would have put much more stock in what was said before the signing, than in the actual words of the contract.¹⁴ One can only speculate as to what various Maori were told by the British who travelled around New Zealand collecting signatures to the treaty. As one might guess, several disputes arose from the treaty in the years following, but nearly all involved land sales of governance.¹⁵ It was not until much later that fishing rights became an issue. As mentioned above, New Zealand's economy was centered around grazing livestock and exporting its products for the European market. With the advent of refrigerated ships in 1926, livestock was further solidified as the dominant industry in New Zealand.

B. The Rise of New Zealand's Fishing Industry

Through the 1970s, little interest was expressed in New Zealand's fishing industry. The Maori continued their traditional harvests without interference, and very few settlers had

¹¹ Jonathan Mane-Wheoki, *From Zero to 360 degrees: Cultural Ownership in a Post-European Age* University of Canterbury, International Council of Museums, Council for Education and Cultural Action Conference, New Zealand.

¹² R.A. Sandrey, *Maori Fishing Rights in New Zealand: An Economic Prospective*, ISSN 0110-7720 Agricultural Economics Research Unit Lincoln College, Canterbury, New Zealand (1986).

¹³ Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, Wai 22, S1.2 (1988).

¹⁴ JAMES BELICH, *MAKING PEOPLES: A HISTORY OF THE NEW ZEALANDERS FROM POLYNESIAN SETTLEMENT TO THE END OF THE NINETEENTH CENTURY, 195-96* (1996)

¹⁵ R.A. Sandrey, *Maori Fishing Rights in New Zealand: An Economic Prospective*, ISSN 0110-7720 Agricultural Economics Research Unit Lincoln College, Canterbury, New Zealand (1986).

attempted fishing on commercial scale. That all changed, however, in the late 1970s. Increased fuel prices caused by the newly formed OPEC combined with a general economic downturn caused the government to shift its focus from livestock to the as of yet undeveloped fishery.¹⁶ The interest in the fishery was further encouraged by the Exclusive Economic Act of 1977, which expanded New Zealand's exclusive economic zone out to 200 miles, so long as the country took steps to establish economic use of the seas. The government realized that it must encourage its citizens to establish a commercial fishery, and began offering a number of incentives, including interest free loans and production incentives, as well as allowing New Zealanders to enter into joint ventures with foreign corporations, greatly reducing the financial risk of attempting to start a commercial fishery.¹⁷ Within a few years, a few large corporations had secured the largest market shares, and had left the small-scale fishermen, including many of the Maori, far behind. In 1981, the most successful 5% of boats accounted for 67% of the harvest, while the bottom 75% combined brought in less than 10% of the total catch.¹⁸ Around this same time, the state began to realize that the fishery was being depleted and steps must be taken to preserve a sustainable harvest.

C. Allocation of the Fishery

In 1986, the government introduced a system of Individual Transferable Quotas. This system allocated to each fisherman a percentage of the total allowable catch.¹⁹ The percentage

¹⁶ R.A. Sandrey, *Maori Fishing Rights in New Zealand: An Economic Prospective*, ISSN 0110-7720 Agricultural Economics Research Unit Lincoln College, Canterbury, New Zealand (1986).

¹⁷ R.A. Sandrey, *Maori Fishing Rights in New Zealand: An Economic Prospective*, ISSN 0110-7720 Agricultural Economics Research Unit Lincoln College, Canterbury, New Zealand (1986).

¹⁸ R.A. Sandrey, *Maori Fishing Rights in New Zealand: An Economic Prospective*, ISSN 0110-7720 Agricultural Economics Research Unit Lincoln College, Canterbury, New Zealand (1986).

¹⁹ R.A. Sandrey, *Maori Fishing Rights in New Zealand: An Economic Prospective*, ISSN 0110-7720 Agricultural Economics Research Unit Lincoln College, Canterbury, New Zealand (1986).

was based on the fisherman's harvest for the last three years.²⁰ This type of system offers a number of advantages over other systems in that it is able to maintain a sustainable level of fish by capping the total harvest, while at the same time remaining economically efficient.²¹ In a system in which the total harvest is set, and the fishing season is open until this number is reached, fishermen are in a constant race with each other to catch their fish before their neighbors harvest enough to prompt the closure of the fishery. This encourages risky behavior in the form of overloading ships, and fishing in poor weather conditions.²² The system is also inefficient in that each boat wants to be able to harvest as fast as possible, so the boats continue to grow in size and speed, requiring more crew and fuel to harvest each pound of fish.²³ Although the larger ships are able to harvest more fish, and thus make more money, an inverse relationship exists between the size of the ship and the return per pound of fish. However, under the ITQ system, each fisherman is guaranteed his allotment, and is able to harvest at his leisure.²⁴ In most situations, the ITQ system is a vast improvement over other methods of allotment. They system faced one problem in New Zealand, however, that was not encountered in other areas.

D. The Muriwhenua Claim

In New Zealand, the ITQ system was based on the faulty assumption that the Crown controlled the fishery.²⁵ In response to the introduction of the ITQ plan, a group of Maori from the Muriwhenua region in the far north of New Zealand filed a claim with the Waitangi Tribunal,

²⁰ Elizabeth Burleson, Tribal, State and Federal Cooperation to Achieve Good Governance, 40 AKRON L. REV. 207, 246-47 (2007).

²¹ Elizabeth Burleson, Tribal, State and Federal Cooperation to Achieve Good Governance, 40 Akron L. Rev. 207, 246-47 (2007).

²² Elizabeth Burleson, Tribal, State and Federal Cooperation to Achieve Good Governance, 40 Akron L. Rev. 207, 246-47 (2007); Robert N. Stavins, Taking Fish to Market: Why Not Trade Fishing Rights the Way Business Trades Pollution Credits?, FORBES, Apr. 28, 2003, available at <http://forbes.com/forbes/2003/0428/040.html>.

²³ Robert N. Stavins, Taking Fish to Market: Why Not Trade Fishing Rights the Way Business Trades Pollution Credits?, FORBES, Apr. 28, 2003, available at <http://forbes.com/forbes/2003/0428/040.html>.

²⁴ Robert N. Stavins, Taking Fish to Market: Why Not Trade Fishing Rights the Way Business Trades Pollution Credits?, FORBES, Apr. 28, 2003, available at <http://forbes.com/forbes/2003/0428/040.html>.

²⁵ Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, Wai 22, (1988).

challenging Crown control over the fishery, claiming that the Treaty of Waitangi granted all fishing rights to the Maori.²⁶ The Waitangi Tribunal is a permanent commission of inquiry formed in 1975 to hear claims by the Maori alleging violations of the Treaty of Waitangi. The Muriwhenua claim was the first instance of a claim based on fisheries being brought before the Waitangi Tribunal. The Tribunal held that: 1) the fisheries were owned by the Maori in the same way as land, and the Crown therefore was required under the Treaty to negotiate for a right of commercial use; 2) the Treaty protected Maori interests in the fishery, and their right to develop it along traditional or modern lines; 3) in terms of the Treaty, the Crown's only interest in that fishery at present is the full protection and promotion of tribal fishing activities; and 4) the Quota Management System, as currently applied is in fundamental conflict with the Treaty's principles and terms, apportioning to overwhelmingly non-Maori the full, exclusive and undisturbed possession of the property in fishing that was guaranteed to the Maori. To resolve the conflict, the Tribunal recommended negotiations between the Crown and the Maori, however, the Crown completely ignored all of the Tribunal's recommendations. In response, the tribes of Maori who filed the initial complaint applied to the High Court for restraining orders precluding the Crown from implementing the ITQ program. In 1987, the restraining orders were granted, bringing fishing to a halt, and sparking negotiations.

The tribes entered the negotiations claiming they were granted 100% of New Zealand's fishing rights, but in the interest of settlement, they would concede 50% to the Crown. The Crown, having already allocated much of the available fishing rights, claimed that it could not renege on its commitment to other fishermen. Negotiations quickly broke down and the High Court soon granted the Crown's request to lift the restraining order, allowing fishing to resume, unimpeded. The Crown did realize that the Maori claims would need to be addressed, however,

²⁶ Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim, Wai 22, (1988).

and negotiations soon resumed with the goal of agreeing on a settlement that would be implemented through legislation. Many different proposals were considered during these negotiations, but the competing interests of the commercial fisherman, the Crown, and the Maori were not easily resolved. The Maori and the Crown at one point had agreed that the Maori would initially be granted 10% of the available fishing rights, but that this number would increase by 2.5% every year in which the Maori “substantially fulfilled” their quota from the previous season. Eventually, this proposal would allow the Maori to control 50% of the allotments, but only if they were fully utilizing the resource. This agreement was agreeable to the Maori, as it would result in considerable income and would allow for any allotments not being used directly by the Maori to be sold to commercial fishermen, who could capitalize on them. The crown was also in favor of this proposal, as it would settle the Maori claim, while at the same time ensuring that the resource was fully developed and that someone was maintaining New Zealand’s claim to the 200 mile Exclusive Economic Zone. Not surprisingly, however, the opposition came from the companies whose quotas would be cut to provide an allotment to the Maori. These objections eventually won out, and the final settlement provided only 10% of the existing allotment to the Maori, with no opportunity to increase their quota in the future.

The Maori’s 10% quota was divided between individual Maori fishermen and a corporation established to pursue the Maori’s interest in commercial fishing. For the task, the corporation was also endowed with \$10 million to establish the industry for the Maori. Finally, the Maori Fisheries Act of 1989, which codified the agreement, essentially turns a blind eye to traditional Maori fishing practices. The Maori may harvest seafood from the coasts and estuaries in traditional fashion for celebrations and limited traded between iwi with no interference from the Crown.

III. ALASKA NATIVES

Alaskan Natives have also had conflicts over fishing rights with non-Natives. However, to fully understand the conflict in Alaska, one must first know a bit of the history of the region. Partly because of its geographical isolation, and partly because of the extreme climate, Alaska was never colonized in the same way as New Zealand. The area was home to a few Russian fur trading villages and missions, but no real development occurred prior to 1898. In 1896, gold was discovered in the Klondike region of Canada, sparking the legendary gold rush.²⁷ Some of these miners travelled to the Klondike via the Yukon River through interior Alaska, but little interest was expressed in Alaska until Felix Pedro discovered gold near what would become the city of Fairbanks in 1898.²⁸ Another “stampede” followed and more discoveries were soon made. Investors from New York constructed railroads and financed exploratory mines, and the first large scale migration of non-Natives moved into Alaska.²⁹

It was not until 1912, however, that Alaska was even declared a U.S. territory, and by that time, the gold rush was already winding down, with the best claims bought up by larger operations, and commercial mining camps doing the bulk of the mining.³⁰ As many of the miners realized their claims would never pan out, they slowly returned home.³¹ After the gold rush, Alaska sank back into obscurity and was largely forgotten until the United States was drawn into World War II, when Dutch Harbor, located in the Aleutian Islands became an

²⁷ TERRANCE COLE, *CROOKED PAST: THE HISTORY OF A FRONTIER MINING CAMP* (1991).

²⁸ *Id.*

²⁹ WALTER R. BORNEMAN, *ALASKA: SAGA OF A BOLD LAND* (2004).

³⁰ *Id.*; COLE, *supra* note 27.

³¹ Borneman, *supra* note 29.

important strategic base in the northern Pacific.³² After the war, Alaskans returned to mining and fur trapping, still very sparsely populated. Even Statehood in 1959 did little to change the landscape or spark much interest in a mass migration to Alaska.³³ Throughout all of this time, the Alaskan Natives continued to lead a subsistence lifestyle relatively undisturbed, owing mainly to the low numbers of non-Natives and lack of invasive hunting or fishing regulations. This was all to change, however, when non-Natives began to flood north in 1968.

A. The Alaska Native Claims Settlement Act

It was in 1968 that oil was discovered at Prudhoe Bay and large scale development began in Alaska.³⁴ It was quickly determined that the most cost effective way of getting the North Slope oil to the markets in the lower 48 would be to run a pipeline from the North Slope oil fields to the Port of Valdez on Alaska's southern coast.³⁵ However, the pipeline would inevitably run through Native ancestral lands, and a treaty would have to be worked out before construction could begin.³⁶ After much negotiation, President Nixon signed the Alaska Native Claims Settlement Act ("the Act"), in which the Alaska Natives relinquished all land claims in exchange for 44 million acres (12% of the land in the state) and \$963 million.³⁷ The Act also guaranteed the Natives subsistence fishing, hunting and trapping rights that could not be infringed upon by any commercial interests.³⁸ The Act was intended to ensure the Natives could continue their subsistence lifestyle without interference or competition from outside interests. Unlike in New Zealand, however, Alaskan Natives were not granted any commercial interest in

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Keith E. Sealing, Civil Procedure in Substantive Context: The Exxon-Valdez Cases 47 ST. LOUIS U. L.J. 63, 83 (Winter 2003).

³⁷ Stephen Colt, Alaska Natives and the "New Harpoon": Economic Performance of the ANCSA Regional Corporations 25 J. LAND RESOURCES & ENVTL. L. 155, 157 (2005).

³⁸ Danny L. Eidson, Why Congress Should Grant Wilderness Status to the Coastal Plain of the Arctic National Wildlife Refuge 7 S.C. ENVTL. L.J. 209 251-52 (Fall 1998).

the state's wildlife. Subsistence uses of wild resources are defined as 'noncommercial, customary and traditional uses' for a variety of purposes. These include: "Direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation, for the making and selling of handicraft articles out of nonedible by-products of fish and wildlife resources taken for personal or family consumption, and for the customary trade, barter, or sharing for personal or family consumption."³⁹ Unfortunately, the unforeseen conflicts between Native users' subsistence needs and commercial interests have led to numerous clashes over the resources of Alaska.

B. Yukon River King Salmon

While the plain language of the Act indicates that subsistence users shall not have to compete with commercial interests to harvest fish, the way that fisheries are regulated in Alaska does place these users at odds. The Yukon River runs from British Columbia, Canada, through interior Alaska, and empties into the Bering Sea at the Yukon-Kuskokwim Delta in the western coast of Alaska.⁴⁰ The length of the Alaskan portion of the river is dotted with small Native subsistence villages that depend in large part on the annual salmon runs to provide them with food through the winter. Additionally, a sizable commercial fishery has harvested salmon from the mouth of the river. However, in recent years, king salmon runs have been dangerously low, forcing the Alaska Department of Fish and Game to close the commercial fishery entirely. Subsistence users were still allowed to harvest fish as usual. Then, in 2009, fish counts at the mouth of the river were still lower than even previous years, prompting the Alaska Department of Fish and Game to severely restrict the window of time in which subsistence users may harvest

³⁹ Robert J. Wolfe and Robert J. Walker, Subsistence Economies in Alaska: Productivity, Geography, and Development Impacts 24 *Arctic Anthropology* 56, 61 (1987).

⁴⁰ Eric Smith, The Tribal Status of Alaska Natives 61 *U. COLO. L.REV.* 455 (1999).

fish to such a point that Native villagers were not able to harvest enough fish for the winter.⁴¹ In addition to ensuring that enough salmon are allowed to spawn to maintain the stock, Fish and Game also must consider the Pacific Salmon Treaty between the United States and Canada, which provides for a minimum number of fish that must be allowed to escape upstream into Canada. The Natives, however, argued that the Department of Fish and Game was reducing subsistence harvest while still allowing commercial fishing fleets to catch more salmon than the villagers would ever need.

Although the commercial salmon fishery had been closed, commercial pollock fishermen were still allowed to fish, and were allowed a quota of king salmon bycatch.⁴² In 2009, the pollock fishery hauled in a record king salmon bycatch of over 58,000 fish.⁴³ Because the fleet is not permitted to harvest king salmon, these fish are largely wasted.⁴⁴ In contrast, Alaskan Natives estimate that the villages along the Yukon River need a combined total of 5,000-10,000 fish to sustain them through the winter.⁴⁵ Native frustration with the Department of Fish and Game's policies that allowed for the bycatch came to a head in June, 2010, when several Native fishermen decided to disregard the Department of Fish and Game's regulations and harvest king salmon while the season was closed.⁴⁶ The Native fishermen have framed their actions as a form

⁴¹ Along the Yukon River, Alaskan Natives harvest king salmon through the use of fish wheels, which resemble paddlewheels with baskets on the blades. The fish wheels rotate in the current, scooping the salmon from the river as the fish migrate upstream, and depositing the salmon in a collection vessel off to the side. Because of the style of fishing used, the number of fish caught is directly proportional to the amount of time the Natives are allowed to fish.

⁴² David Witherell, David Ackley and Cathy Coon, An Overview of Salmon Bycatch in Alaska Groundfish Fisheries 9 ALASKA FISHERIES RESEARCH BULLETIN 1 (Summer 2002) *available at* http://www.adfg.state.ak.us/pubs/afrb/vol9_n1/withv9n1.pdf.

⁴³ YUKON RIVER SALMON 2009 SEASON SUMMARY AND 2010 SEASON OUTLOOK, Regional Information Report No. 3A10-01, *available at* <http://www.sf.adfg.state.ak.us/FedAidPDFs/RIR.3A.2010.01.pdf>.

⁴⁴ David Witherell, David Ackley and Cathy Coon, An Overview of Salmon Bycatch in Alaska Groundfish Fisheries 9 Alaska Fisheries Research Bulletin 1 (Summer 2002) *available at*: http://www.adfg.state.ak.us/pubs/afrb/vol9_n1/withv9n1.pdf.

⁴⁵ Yukon Fishermen Ignore Closure, Catch Kings, ANCHORAGE DAILY NEWS, June 29, 2009, <http://community.adn.com/node/142094> (last visited November 21, 2010).

⁴⁶ Yukon Fishermen Ignore Closure, Catch Kings, Anchorage Daily News, June 29, 2009, <http://community.adn.com/node/142094> (last visited November 21, 2010).

of protest against the regulations and have sparked a heated debate on the conflict between commercial and subsistence users.⁴⁷ Many people are sympathetic to the plight of the Natives, and feel as though the fishermen were only doing what was necessary to feed their families.⁴⁸ On the other hand, many recreational fishermen and conservationists have condemned the “protest” fishing as simply poaching and disregard for the law.⁴⁹ These Alaskans are further angered that the State only cited one individual for illegal fishing, and has elected not to fine him.⁵⁰ In response to the large bycatch numbers and possibly the protest fishing, the Department of Fish and Game has imposed new restrictions on the Bering Sea pollock fleet, limiting the king salmon bycatch to 48,000 fish.⁵¹

IV. PRIVATE PROPERTY RIGHTS IN THE COMMONS

Alaska and New Zealand are not unique in seeing conflicts between indigenous fishing rights, commercial fisheries, and conservation. Anytime that a government attempts to close a commons, numerous, often unanticipated externalities come into play when determining the initial allocation of property rights. This challenge is compounded many times over when the property rights of indigenous peoples must also be considered. Countries all over the world have been forced to experiment with different methods of efficient property rights allocation as they have attempted to close the commons that is the world’s oceans. Prior to the early 20th century,

⁴⁷ Yukon Fishermen Ignore Closure, Catch Kings, Anchorage Daily News, June 29, 2009, <http://community.adn.com/node/142094> (last visited November 21, 2010).

⁴⁸ Yukon Fishermen Ignore Closure, Catch Kings, Anchorage Daily News, June 29, 2009, <http://community.adn.com/node/142094> (last visited November 21, 2010) (See Comments).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ David Witherell, David Ackley and Cathy Coon, An Overview of Salmon Bycatch in Alaska Groundfish Fisheries 9 Alaska Fisheries Research Bulletin 1 (Summer 2002) *available at*: http://www.adfg.state.ak.us/pubs/afrb/vol9_n1/withv9n1.pdf.

the seas were generally considered inexhaustible, and as such, were an unregulated commons.⁵² But as the world's populations has grown, and technology has made fishing ever more efficient, states have been tasked with balancing equity, conservation, and existing property rights in allocating limited resources. Before a country may allocate its resources, however, it must determine what goal it is trying to accomplish.⁵³ Countries may try to maximize employment in the fishing industry, seek the highest sustainable yield, protect resources above all else, minimize social conflict, maximize profits, or attempt to accomplish several of these goals at once.⁵⁴ Once an actor has determined the goal of fisheries management, the focus must then turn to methods of achieving this goal. Economists have long advocated some method of private property rights in allocating fish stocks.⁵⁵ Methods such as Individual Transferable Quotas ("ITQs") have gained much popularity in recent years and are praised for increasing efficiency while at the same time protecting the resource by setting a maximum level of total harvest.⁵⁶

In New Zealand, for example, before the implementation of ITQs, every fishing season was a race to collect the most fish in the shortest amount of time because the fleets had no property rights in the fish before they are captured.⁵⁷ The commercial fishermen knew that the season would be of limited duration as it would close when the harvest limit was reached. In response the fishermen invested in more labor, bigger boats and larger nets to allow them to capture a greater harvest of fish as quickly as possible.⁵⁸ The fishermen also pushed constantly

⁵² R.A. Sandrey, *Maori Fishing Rights in New Zealand: An Economic Prospective*, ISSN 0110-7720 Agricultural Economics Research Unit Lincoln College, Canterbury, New Zealand (1986).

⁵³ Katrina M. Wyman, *The Property Rights Challenge in Marine Fisheries*, 50 *Ariz. L. Rev.* 511, 535 (Summer 2008).

⁵⁴ Katrina M. Wyman, *The Property Rights Challenge in Marine Fisheries*, 50 *ARIZ. L. REV.* 511, 535 (Summer 2008).

⁵⁵ *Id.* at 527.

⁵⁶ Robert N. Stavins, *Taking Fish to Market: Why Not Trade Fishing Rights the Way Business Trades Pollution Credits?*, *FORBES*, Apr. 28, 2003, available at <http://forbes.com/forbes/2003/0428/040.html>.

⁵⁷ Sandrey, *supra* note 4.

⁵⁸ *Id.*

higher harvest limits, as larger harvest provided greater profits.⁵⁹ As mentioned above, New Zealand's old system also encouraged unsafe behavior by the fleet. Because captains knew that the fishery would close quickly, they were hesitant to waste time travelling back and forth to the fishing grounds and would overload the holds of their boats to allow for fewer trips back to port and more time spent fishing.⁶⁰ This same mentality also encouraged fishing in weather conditions that should have kept ships in the harbor.⁶¹ When weather conditions were unfavorable, captains would normally choose not to fish, unless they knew that the fishery could close at any time, and they might not have the opportunity to fish tomorrow.⁶² With regard to the above considerations, New Zealand's ITQ system has been a success. Fishermen know that they are guaranteed a certain harvest, so there is no race to capture the fish. In response, they have started using smaller, more efficient boats, using fewer crew members, and generally slowing down the harvest. If the goals of the system were maximum sustainable yield and/or the highest profits, the system has worked. If, on the other hand, the goals were to minimize social conflict over the resource, or to maximize employment in the fishing industry, the ITQs have not worked as hoped.

For a system of private property rights to decrease social conflict, especially between indigenous and non-indigenous populations, an efficient and equitable initial allocation of rights is crucial. In recent years, human rights advocates have made great strides in securing rights for indigenous people, culminating in the adoption of the United Nations Declaration on the Rights of Indigenous Peoples ("the Declaration") in 2007. This instrument recognizes the specific needs of indigenous populations, and that these rights were largely ignored in the 1948 Universal

⁵⁹ Stavins, *supra* note 22.

⁶⁰ Sandrey, *supra* note 4.

⁶¹ Burleson, *supra* note 22.

⁶² *Id.*

Declaration of Human Rights.⁶³ These rights of Indigenous peoples include: enjoyment of all human rights under customary international law; self-determination; including self-government; equality with all other peoples; recognition and enforcement of treaties; the right to live in freedom, peace and security; traditions, customs and cultural heritage; subsistence and development; lands, territories and resources; education; and environmental protection and conservation.⁶⁴ The Declaration also mandates that states establish a legal remedy for indigenous people to use in resolving conflicts relating to lands and other property of which indigenous populations have been disposed.⁶⁵ Presumably, the Declaration would be of considerable assistance to native populations of Alaska and New Zealand in fighting for their fishing rights. However, New Zealand and the United States were two of only three countries to vote against the Declaration.⁶⁶ These countries have not adopted the Declaration because of fears that they would then be forced to relinquish title to ancestral lands, or pay their respective indigenous populations for those lands.⁶⁷ Article 28 reads:

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.⁶⁸

Obviously, the prospect of indigenous groups laying claim to nearly all of the land within New Zealand and the United States is troubling to their governments, and has thus far prohibited these states from implementing what otherwise would be a very important piece of policy. Of the 144 countries that voted for the Declaration, most had the luxury of doing so at little or no

⁶³ Paul Joffe, UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation 26 Nat'l J. Const. L. 121 (2010).

⁶⁴ *Id.* at 124-25.

⁶⁵ *Id.* at 125.

⁶⁶ Canada also voted against the Declaration. *Id.* at 127.

⁶⁷ Viniyanka Prasad, The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations 9 CHI. J. INT'L L. 297, 315-17 (Summer 2008).

⁶⁸ General Assembly Res No 61/295, UN Doc A/61/L.67 art 28, cl 1 (2007).

cost.⁶⁹ For the most part, only countries in the new world have sizable indigenous populations, and the United States and New Zealand are founded nearly entirely upon lands forcibly taken from indigenous peoples. Even if these governments desired to relinquish all ancestral lands to their respective indigenous populations, entire countries have formed in the time since the indigenous peoples were dispossessed of their land, and an entire society of property owners also have property rights that must be taken into consideration.⁷⁰ As such, it is simply not possible, nor desirable, for the United States or New Zealand to implement the Declaration as it is currently written.

It is quite unfortunate that this one provision has kept countries with some of the world's largest indigenous populations from adopting the Declaration, and perhaps the international community should consider another instrument. While the Declaration would have done much good for the indigenous populations of New Zealand and the United States, it will never be implemented in the countries where it would do the most good. The weakness of the Declaration is what many touted as its greatest strength—the declaration addresses every area of concern for indigenous populations.⁷¹ In what has unfortunately become all too common, the UN issued an idealistic declaration with little or no thought as to what would actually be required for its implementation. It is easy for old European countries to declare that indigenous people should be guaranteed more rights, and that land taken unfairly should be returned, because these countries do not have indigenous populations and do not have to consider the consequences of actually trying to implement these requirements. As a result, the countries that would be actually affected by the Declaration refused to vote for it and will not implement it, likely preventing the

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ United Nations, Press Release, General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ towards Human Rights for All, Says President, UN Doc GA/10612 (Sept. 13, 2007).

Declaration from becoming long lasting international custom and frustrating the purpose of the entire declaration.⁷²

V. RECOMMENDATIONS

Instead, the international community should focus on smaller, more achievable goals. While a sweeping declaration that addresses every concern indigenous peoples could have, it is useless if it is not implemented. An applicable treaty on indigenous fishing rights would be much more useful to the Maori and Alaska Natives than a dream of a farther reaching custom. The less controversial provisions of the Declaration should be extracted and adopted universally, rather than throwing the baby out with the bath water. It may even be possible to secure the votes of the United States and New Zealand if the objectionable land provisions were removed, a considerably better alternative to the current situation. If the UN is unwilling to compromise this point, as is likely the case, an international treaty dealing only with the fishing rights of indigenous populations would accomplish much. Such a treaty should encourage, but not mandate an ITQ system of allocating the resources of the fishery because of this system's unique ability to provide economic efficiency, resource conservation, and equitable allocation. What should be mandated, however, is that a portion of each country's total harvest be set aside for indigenous populations in a way similar to New Zealand's system. However, unlike New Zealand's current system, the indigenous populations share should not simply be allocated to one large group purported to represent the interests of diverse tribes. The ITQ system is especially useful in this regard, as individual tribes may be allocated shares that would be too small to actually harvest efficiently, but the tribes may then trade the shares as they see fit, consolidating many smaller shares in the hands whoever can harvest most efficiently, but always leaving the

⁷² Viniyanka Prasad, *The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations* 9 *Chi. J. Int'l L.* 297, 315-17 (Summer 2008).

choice to the individuals. For example, if one tribe prefers to simply have one or two members harvest a small share from a small, traditional boat, they would have that option.

Additionally, the instrument should mandate that native fishing rights take precedence over all other interests in a stronger fashion than is currently used in Alaska. While the language of the Alaska Native Claims Settlement Act should insure that villagers are allowed to harvest subsistence fish, it is apparent that the application of the policy must be improved. If the pollock fleet is unable to harvest their fish without negatively impacting the subsistence users of the resource, then the pollock fleet should not be allowed to fish. It is unlikely that a closure of the pollock fishery would actually be necessary, but the existence of such a policy would likely encourage the fishermen to take great care to avoid harvesting king salmon. Currently there is no incentive for the pollock fleet to limit their bycatch, other than very loose regulations that have clearly not worked in the past. Because of the way in which the Alaska Department of Fish and Game currently manages the Yukon River, such a radical policy change is necessary to protect the interests of Alaska Natives. Finally, the treaty on indigenous fishing rights should establish an international body to hear disputes arising under the treaty. While many would argue that it would be sufficient to have each nation establish their own such commission, we have seen that such organizations are ineffective. The Waitangi Tribunal's recommendations on the Muriwhenua claim illustrate the ease with which Native concerns may be brushed aside when there is no organization with any real power to represent those interests. Finally, an international commission with binding authority should be established to ensure that the interests of indigenous populations are properly represented, and to avoid a conflict of interests or maintenance of the status quo that may otherwise result if only participants from one country were involved.

VI. CONCLUSION

The recent movement towards ITQs in fishery management has the potential to provide for conservation, economic efficiency and the protection of indigenous rights, but special care must be taken to ensure that the allocation of those resources is equitable for all parties involved. While the United Nations Declaration on the Rights of Indigenous Peoples has the potential to do much good for native populations, it is simply too ambitious and idealistic to ever be effective. If the international community would instead focus in smaller, more achievable goals in the short term, then a lot of long term good could be accomplished. One method of doing so would be to implement an international treaty on indigenous fishing rights that Alaska and New Zealand would vote for, and that would provide for a more equitable initial allocation of the total harvest. If the treaty mandated that indigenous fishing rights took precedence over other users, and provided a forum for complaints to be heard, then the indigenous populations could be confident that their rights would not be infringed upon in the future.

For centuries, indigenous populations have been persecuted, their lands forcibly taken, unfair treaties forced upon them and then broken, their natural resources pillaged and their culture destroyed. While the United Nations Declaration on the Rights of Indigenous Peoples sets admirable goals for the international community, I am sure some fishermen on the Yukon River would much rather be able to feed their families this winter, and work towards more rights in the future.