

THE LEGAL CONTEXT OF
NATIVE AMERICAN LAND AND
RESOURCE USE IN MOUNT
RAINIER NATIONAL PARK

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1998

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Prepared for

National Park Service
Columbia-Cascades Cluster
Seattle, Washington

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1998

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Abstract

This study outlines the ethnographic and historic materials referring to Native American uses of land and resources within Mount Rainier National Park. It further discusses these materials in relation to relevant treaties, legislation and law concerning Native American rights. It was found that the Confederated Tribes and Bands of the Yakama Nation, the Nisqually Indian Tribe, the Puyallup Indian Tribe, the Muckleshoot Indian Tribe and the Cowlitz Indian Tribe are the successors of rights to the tribes aboriginal to the Mount Rainier area. The Cowlitz Tribe has recently been determined eligible for federal recognition. Historic data, while sparse, suggests that Native American use of Mount Rainier National Park consisted of hunting, gathering plant foods and materials, perhaps fishing, and likely religious and spiritual uses. All of these uses are protected by treaty, legislation or law. There is no documentary evidence to suggest that Mount Rainier National Park has been used by Native Americans for these purposes for over thirty-five years. Nevertheless, the exercise of such rights is still feasible.

1.0 Introduction and Description of Study

In October 1996 the National Park Service, Columbia-Cascade Support Office in Seattle, Washington, contracted with the Bureau for Faculty Research, Western Washington University, to identify documented evidence of Native American land and resource use in Mount Rainier National Park. The principal investigator for this project was Daniel L. Boxberger, Ph.D., Professor of Anthropology at Western Washington University. He was aided in the research by Dennis St. George, J.D., M.A. (anthropology) and doctoral candidate in anthropology at Columbia University.

The objectives of this study were as follows:

1. To research and identify pertinent items in Mount Rainier National Park's archival and manuscript collections on documented incidents of Native American land and resource uses or claimed rights to such uses within park boundaries.
2. To research and identify pertinent legal instruments such as treaties, executive orders, federal and state land and resource use policies and case law concerning, but not limited to, activities such as hunting, fishing, and collection of natural materials.
3. To integrate and organize 1 and 2 into a body of reference materials that will become part of the Mount Rainier National Park archives.
4. To provide a written report that addresses the full range of documented Native American land and resource uses or claimed rights to such uses in the park for the historical period from the inception of the park in 1899 to the date of the completion of this report.

1.1 Research Strategy

In order to complete the stated objectives for this study a four-step process was followed.

1. A search of the published ethnographic and ethnohistoric data concerning the park-associated populations identified by Smith (1964).
 2. An exhaustive search of archival and other primary data to integrate into the material presented by Smith (1964).
 3. A review of legal instruments and case law to determine the nature of land and resource use rights Native Americans may possess within the park.
 4. An evaluation and assessment of the data base to provide a written overview for park managers.
1. A search of the published data included the compilation and evaluation of ethnographic sources and local histories. The ethnographic data was reviewed for specific reference to the Mount Rainier area. The local histories primarily focused on early attempts to climb to the summit of Mount Rainier. These early attempts often relied on Native American guides and therefore reference to Native American use of the Mount Rainier area may be gleaned from these accounts.
 2. A search of the archival and other primary sources focused on repositories known to contain information relevant to the Mount Rainier area. These repositories are listed below and were useful in providing park administrative records, records of the Bureau of Indian Affairs, records of the Indian Claims Commission, and European-

American reminiscences and oral histories. Copies of the materials accessed in 1 and 2 accompany this report. Materials that are already housed in the Mount Rainier National Park archives are not duplicated for this report.

3. A review of legal instruments and case law focused on the treaties, court cases and legal proceedings involving Native American land and resource use. While most of these cases did not involve tribes proximal to Mount Rainier National Park, the rights recognized or adjudicated are generally relevant to park-associated populations and present possibilities which may affect park management in the future.

4. The report which follows discusses the above materials in narrative form. This report follows an approach which presents an historical overview and assessment of the ethnographic and ethnohistoric literature, a review of Native American land and resource use rights practiced in the park in the past, a review of possible Native American land and resource use rights and a discussion of the utility of these materials in the decision-making process to meet federal management obligations and decisions.

The ethnographic research component commenced with a review of published materials. Ethnographies do not exist for all of the tribes in proximity to Mount Rainier National Park. Alan Smith (1964) provided the park with an ethnographic overview designed for use by archaeologists. While useful for that purpose Smith's report does not completely address later park uses as his report uses an arbitrary cut-off date of about 1850. As a result this report may be seen as a supplement to Smith in providing information on later park uses by associated Native tribes and a review of contemporary Native concerns as expressed through legal and political arenas.

During the course of this research the following libraries and archives were consulted.

National Archives and Records Administration, Seattle, WA
Mount Rainier National Park Archives, Longmire, WA
Pacific Northwest Collection, University of Washington, Seattle, WA
Wilson Library, Western Washington University, Bellingham, WA
Gallagher Law Library, University of Washington, Seattle, WA
Manuscripts and Special Collections, Washington State University, Pullman, WA

1.2 Organization of Report

The narrative which follows is organized into three main sections. First, a review of the ethnographic data building on Smith (1964). This discussion is organized geographically corresponding to the five tribes in proximity to Mount Rainier National Park. Second, the ethnohistoric data reviews early Native American and European-American encounters in the park area to glean what references there are to park uses. Third, a review of treaties and treaty rights, case law and administrative agreements relevant to federal land and resource use. This section is organized chronologically and discusses the rights of federally-recognized tribes to federal lands and the responsibility of federal land managers. Contemporary issues surrounding use and access of park resources is outlined and followed by a discussion of the implications of these uses for Mount Rainier National Park.

2.0 Ethnographic Overview

Established in 1899, Mount Rainier National Park is the nation's fifth national park and the first in Washington State. Consisting of 235,613 acres, Mount Rainier National Park is visited by more than 2 million people each year. At 14,410 feet Mount Rainier is the dominant geographic feature in the park.

Mount Rainier National Park lies across portions of land ceded to the United States by the Treaties of Medicine Creek, Point Elliott and Yakama. The Native peoples whose traditional use areas lie within these ceded lands utilized certain resources that now lie within park boundaries. Mount Rainier National Park is situated between two distinct Native American culture areas, the Plateau and the Northwest Coast. These groups spoke languages of the Salish and Sahaptin linguistic families. By contemporary designations these groups include the Yakama, Muckleshoot, Nisqually, Puyallup and Cowlitz. The following ethnographic works discuss some of these tribes: Haeberlin and Gunter (1930); M. Smith (1940); Ray (1966); Suttles and Lane (1990); Hunn (1990).

In 1964 Allan Smith of Washington State University prepared a report entitled *Ethnographic Guide to the Archaeology of Mount Rainier National Park* wherein he attempted to identify "those groups which in the protohistoric and early posthistoric period claimed portions of the present Rainier area, and the locations of those segments of their tribal limits which fall within the Park" (1964:95).

Smith identified nine "tribal" groups, the Yakima*, Kittitas, Wenatchi, Taidnapam, Meshal, Nisqually, Puyallup, Muckleshoot and Klikitat as the groups whose traditional territory lie across park boundaries. This designation was based on Spier (1936). While these designations have utility in identifying aboriginal tribes anthropologists have identified living in proximity to Mount Rainier National Park they add confusion to issues of contemporary tribal designation. Some of these tribes have consolidated and others are not recognized by the federal government. By contemporary usage the Yakama Tribe (Confederated Tribes and Bands of the Yakama Nation), is the political body which represents the contemporary interests of the Yakima, Kittitas, Wenatchi, and some of the Taidnapam, Meshal and Klikitat identified by Smith. The Nisqually, Puyallup and Muckleshoot are three separate contemporary tribal units and the Cowlitz (which includes Smith's Taidnapam or Upper Cowlitz) have recently been determined eligible for recognition by the federal government. As of November 1998 the Cowlitz petition for federal recognition is still waiting final approval. The Cowlitz have been determined eligible for federal recognition in a letter dated February 12, 1997 and signed by Assistant Secretary Ada Deer. The required response period has passed but final recognition is delayed pending decisions on injunctions sought by other tribes.

There needs to be a distinction made between aboriginal groups and recognized groups to clarify the differences between Smith's designations and the tribal groups discussed in this report. Since the establishment of Mount Rainier National Park

* Since 1994 the preferred spelling for the tribe has been Yakama. The Yakama Nation initiated the change to reflect the spelling in the 1855 treaty and to avoid confusion with the city of Yakima.

post-dates the ratification of the treaties and the establishment of reservations the use rights to ceded lands fall to the recognized tribes who are the successors of rights. By the time Mount Rainier National Park was created use rights to ceded lands had been established by treaty, and the groups who exercise those rights today are more germane than are the aboriginal groups identified by Smith.

This ethnographic overview consists of a brief summary of Smith's data on territory within Mount Rainier National Park and is followed by a review of historic park uses by associated tribal groups.

Following Spier (1936), Ray (1936) and Jacobs (1931), Smith concludes that the territory of the Yakama reached to the Cascade watershed and included the eastern slopes of Mount Rainier. While the Yakama, a Sahaptin-speaking people, are generally associated with territories east of the Cascade Mountains, there was a movement of Sahaptin speakers into the western foothills of the Cascades probably by the 1730s (Boxberger 1984). These groups established winter villages and frequented the foothills areas and mountain passes. Including the Taidnapam, Meshal, and Klikitat, these three groups used the separate territories near Mount Rainier. The Taidnapam claimed the Tatoosh Range on the southern border of the park to the summit of Mount Rainier (Smith 1964:101) and the Cowlitz River drainage. The Meshal claimed the upper Nisqually River valley reaching into the southwest portion of the park. The Meshal appear to have been a community of both Sahaptin and Salish speakers, and in recent times the Nisqually consider the Meshal a part of their tribe (Smith 1964:110). The Klikitat, according to Jacobs (1931:94), occupied territory south of the Taidnapam but he adds that the term "Klikitat has been used by whites to apply to Sahaptins living in and about the Cascades of Washington. In reality the term Klikitat covers no general Native language, cultural or tribal grouping" (Jacobs 1931:96). The Meshal and Taidnapam groups have been associated with the contemporary Yakama, Nisqually, Muckleshoot and Cowlitz tribes, primarily due to the wide-ranging territory that they utilized.

The other Sahaptin group, the Kittitas (or Pcwanapam), who resided on the upper Yakima River, utilized territory in the northeast portion of the park (Smith 1964:39). The Kittitas fall within the ceded area of the Yakama Treaty and are included in the contemporary designation "Yakama."

The Salish-speaking Nisqually, Puyallup and Muckleshoot, utilized territories that extended into Mount Rainier National Park. The Nisqually, Puyallup and White River valleys were claimed by the Nisqually, Puyallup and Muckleshoot respectively. Based on the ethnographies of M. Smith (1940) and Haeberlin and Gunther (1930), Smith notes that park lands and resources were used by these tribes, but none had permanent settlements within park boundaries (1964:138ff.). The Nisqually, Puyallup and Muckleshoot are contemporary reservation communities. The Nisqually includes the Nisqually proper as well as some Meshal and perhaps descendants of other bands. The Puyallup include the Puyallup and S'Homamish named in the Treaty of Medicine Creek. The Muckleshoot includes the Skopamish, Stkamish, Smulkamish named in the Treaty of Point Elliott as well as perhaps other bands. There was no aboriginal band known as the Muckleshoot. Those groups that were consolidated onto the Muckleshoot Reservation came to be known as the Muckleshoot Tribe. The term Muckleshoot is the place name of the area where the reservation was created but has, over time, come to be applied to the

people residing there regardless of their origins (Boxberger 1979:46). The contemporary Muckleshoot Tribe is unusual in that the reservation lies within the ceded lands of the Treaty of Medicine Creek but the residents were signatory to the Treaty of Point Elliott. This circumstance came about because the Muckleshoot Reservation was created after the treaties in response to the Indian wars of 1856 which followed the treaty negotiations.

Table 1. Park Associated Tribes

Contemporary Tribe	Federal Status	Ancestral Tribes
Yakama	Recognized by Treaty With the Yakama	Yakama Kittitas Wenatchi Taidnapam Meshal Klickitat
Muckleshoot	Recognized by Treaty of Point Elliott and Treaty of Medicine Creek	Skopamish Stkamish Smulkamish Taidnapam Meshal
Nisqually	Recognized by Treaty of Medicine Creek	Nisqually Meshal Taidnapam
Puyallup	Recognized by Treaty of Medicine Creek	Puyallup S'Homamish
Cowlitz	Recognition Pending	Meshal Taidnapam Salish Cowlitz Cowlitz Metis Sahaptin Cowlitz

Based on the above discussion the remainder of this section will focus on the ethnographic evidence for resource use of park lands. This evidence will apply to the contemporary heirs of the aboriginal groups whose use rights extended into Mount Rainier National Park – the Yakama, Nisqually, Puyallup, Muckleshoot and Cowlitz Tribes.

2.1 Ethnographic and Historic Account of Resource Use

Native American resource use of Mount Rainier National Park falls within four general categories – hunting, fishing, gathering plants and religious use. Based on ethnographic and ethnohistoric sources Smith concludes that “the Indians sought game and wild fruit on the mountain but maintained no permanent or even seasonal abodes of any substance or duration within Mt. Rainier National Park” (1964:149). Smith’s work was designed for use by archaeologists and therefore his focus was on traditional (pre-contact) culture. He elaborated on the location of villages and camp sites and specific resource use within the park. Because of this emphasis on ethnographic reconstruction no attention is given to treaty rights or other use rights Native Americans may have. A review of Smith’s material, which contains an overview of the ethnographic and historical literature, reveals consistent mention of certain types of uses of the park, most notably hunting game and picking berries. These uses are noted in ethnographic accounts and occur repeatedly in the historic sources. It appears that the principal species of game hunted included deer, mountain goat, elk, bear, marmots and grouse. Generally late summer would bring small groups of hunters and gatherers to the flanks of Mount Rainier where the men would hunt and the women would pick and dry huckleberries. Place names within the park, such as Indian Henry’s Hunting Ground, are suggestive of these uses.

Fish resources appear to be limited within park boundaries. Park Naturalist Floyd Schmoe (1925:3) notes rainbow, cutthroat and Dolly Varden trout and steelhead occurring in park streams. Apparently none of the species were abundant enough to support a fishery. The occurrence of fisheries resources within the park is unclear due to previous stocking activities (some undocumented) and the damming of streams which destroyed some spawning populations. Based on an analysis of maps of the riverine environment, Schalk (in Burtchard 1998:23-24) suggests that the Carbon, White, Ohanapecosh, Nisqually, Kautz, Tahoma, Puyallup and Mowich Rivers had the potential to support salmon populations within the park. Given the contemporary Native American interests in downriver fisheries, including concern for the watersheds that originate within the park and the potential for rehabilitation of former salmon producing streams, this issue deserves further consideration.

As mentioned, berry picking was an important use of park resources. Other food plant resources include “roots” of unspecified variety. It is likely that edible species were used opportunistically but no specific evidence was located. Plant resources were also used for technology. Bear grass, used in basketry, is found in the subalpine areas and it is likely other varieties of plants, such as cedar, were used but have escaped mention in the literature.

Fire was used by Native peoples in the Pacific Northwest as a tool to maintain or increase the productivity of plant and animal resources. Native peoples would often burn after the gathering season to open up lands to promote the growth of desirable plant species and provide forage for big game. Huckleberries especially increase after a burn. Smith (1964:170) notes several burns that were human in origin. Several observations of Indians starting fires within the park are noted in the historic documents (Plummer 1900:135; Landes 1925:1; and Schmoe 1925:162).

Last, religious practices of the Native peoples in proximity to Mount Rainier necessitate the use of certain types of areas. Often mountainous regions are desirable places for guardian spirit quests or for spiritual fasting and bathing. Two specific mentions of spiritual encounters within park boundaries are noted in Smith (1964:225). Undoubtedly other religious and ceremonial activities were carried out within the park but have gone undocumented since often these religious practices are conducted in secret.

Mount Rainier figures prominently in the mythology of Native peoples of the area. Thompson (1981:6-15) cites Lyman (1906), Meany (1930), Clark (1953), McWhorter (ms.), and others as recounting legends concerning the mountain. One theme that stands out in these oral traditions is the practice of spirit questing on Mount Rainier. It is not inconceivable that religious uses of Mount Rainier continued into the post-1899 period but no written record of such uses was uncovered.

Additional Native uses of park lands would have included travel along established trails. Some of the trails noted by Smith (1964:229ff.) are clearly marked on the General Land Office maps from surveys conducted between 1904 and 1912 (see copies attached to this report). Travel for access to resource procurement sites in addition to the well-documented trade between Plateau and Coastal peoples undoubtedly used many of the same routes of access that are in use today. The five mountain passes (Naches, Chinook, Carlton, Cowlitz and White) which lie to the east of Mount Rainier were certainly routes of access from the Plateau. Chinook Pass especially must have been important as it is a direct route to the Yakama country to the east as well as providing access to the White River Valley to the north and the Cowlitz River Valley to the south (via Cayuse Pass).

In summary, the ethnographic data on Native American use of Mount Rainier National Park lands and resources is sparse. Nevertheless it points to the conclusion that Native peoples frequented the Mount Rainier area for purposes of hunting, gathering, fishing and religious purposes. Each of these categories of uses is protected by treaty rights, legislation, executive orders or case law. The extent to which these use rights apply to the park today is discussed below.

3.0 Ethnohistorical Overview

Prior to the establishment of Mount Rainier National Park in 1899 there were repeated attempts to climb to the summit of Mount Rainier, some successful, some not. What virtually all of these early attempts had in common was the reliance on Native American guides to take them within distance of the final ascent. From the accounts of these expeditions we can glean certain information concerning Native American familiarity with the park and the use of park resources. References to hunting, gathering, and routes of access are especially noted in the historic sources. The first six attempts, from 1852 to 1883, depended upon Native American guides and two individuals, Sluskin and Indian Henry, appear to have been the most knowledgeable guides available. Both of these individuals are noted as frequenting the Mount Rainier area to engage in hunting and gathering. Sluskin was affiliated with the Yakama Tribe and Indian Henry was Klickitat. Indian Henry's Hunting Ground and Yakima Park are two areas specifically mentioned.

While the accounts of the attempts on the summit of Mount Rainier are not the only ethnohistorical sources from this era, they do give the most information on Native American activities. Specific mention is made of hunting and gathering plant foods. Additionally, of course, their knowledge of trails is why they were employed as guides. Early attempts on the summit of Mount Rainier are detailed in Thompson (1981) and Schullery (1987) and available archival sources for some of the ascents are appended to this report. In general the reports downplay the important role Native guides performed, often suggesting that the higher reaches of the mountain were feared, or at least held in awe. In contrast oral tradition recounts Native ascents of Mount Rainier in prehistoric and early historic times and at least one historic account discusses the attempt by eight Yakama to climb the mountain in 1886 (Haines 1962).

In 1887 James Longmire located a mineral claim at the present site of Longmire developed area. Eventually cabins and a hotel were constructed, as well as bathhouses which allowed visitors to utilize the mineral hot springs. It appears that after the establishment of Longmire Springs ascents of Mount Rainier depended upon the Longmires for guides.

In a letter to the park naturalist, A.L. Flint discusses his 1881 climb of Mount Rainier. His Yakama guide led him up the Tieton River to Cowlitz Pass, then along Summit Creek and Ohanapecosh River to Backbone Ridge and on to Cowlitz Park. Flint noted that his guide fed them dried mountain goat meat (letter of August 26, 1938 in Box 2 H14 Fldr 39A, NARA).

No mention of Native use of park resources could be located for the 1890s but soon after the establishment of the park in 1899 park reports suggest that use had been continual. In the 1905, 1906, 1913 and 1915 Annual Reports it was noted that Yakama, Puyallup and Cowlitz had been in or near the park hunting and picking berries. In 1906 it was specifically noted that Native people visited the park every fall hunting deer. Some specific places are mentioned in park records.

I have, however, reason to suspect that, in the absence of the ranger, deer were killed in the park near Mowich River, and that the Cowlitz Indians make occasional hunting expeditions up the Muddy Fork Ridge to the high alpine country between and below the Cowlitz and White River glaciers. (Superintendent Annual Report 1906:6)

Indians hunting in vicinity of Grand Park and Rainier Park... deer and mountain goat bones found at abandoned camp. (Letter of September 2, 1913, in Box 3 H22 Fldr 64, NARA)

Indians have been hunting during past seasons and have been told that they went up the basin of Klickitat Creek presumably heading for the Eastern side of the Cascade Mountains. (Letter of August 19, 1915, in Box 3 H22 Fldr 64, NARA)

While not evidence of specific use, circumstantial evidence of Native resource use comes from incidental reports of isolated artifacts found at the following locations:

East and Northeast of Buck Lake

East Northeast of Dege Peak

Trail to Deadwood Lakes at top of Cascade Crest

Rock overhang on Boulder Creek

Near stream between Sunrise Campground and Sunrise River Trail

In trench from Lodi to Frozen Lake

Upper Huckleberry Park

Berkely Park

Vernal Park

South of Northern Loop Trail

Small Cave on edge of Spray Park

Grand Park

(List of Archaeological Resources Found in Park, 1966-1978, in Box 3 H18

Fldr 78; see also Burtchard 1998:5)

A notable event occurred in 1915 when two park rangers came across Sluskin and a group of 30 Yakamas encamped at Sunrise. When told it was illegal to hunt deer in the park Sluskin produced a copy of the 1855 Yakama Treaty and asserted his treaty-protected rights to hunt at traditional locations (see Turek and Keller 1991).

Dumbfounded, the rangers referred the matter to Park Superintendent DeWitt Raeburn. In turn, Raeburn sought the advice of the Secretary of the Interior. What transpired resulted in attempts by the newly-formed National Park Service to legally define Native American hunting and fishing rights in National Parks. As will be discussed below, this issue remained unresolved but has reemerged in recent years in other places.

Sluskin's group returned to Sunrise in 1916 and 1917 when six Yakamas were arrested under authority of the park. While hunting rights were not clarified it appears that threat of arrest brought an end to further hunting forays as no further mention could be located in the records. Nevertheless Native people continued to return to the park each fall to pick huckleberries.

In 1924 the first park naturalist, Floyd Schmoe, commented that:

The Indian of today has lost much of his former picturesqueness. Although the women still carry their "papooses" in a shawl on their backs and use some very remarkable baskets made by their mothers from the local Squaw grass, it is more common to see them arrive in closed cars than upon wiry mountain ponies, and although some of them still employ the Chinook jargon, or tribal dialects, typical American slang phrases are as frequently heard. (1925:82-83)

The publication *Mount Rainier Nature Notes*, started in 1923, contains a few references to Native people picking berries in the Park in the 1920s.

...great quantities of blueberries are picked by Indians who come into the Park late each August to secure their year's supply (Schmoe 1925:162).

Huckleberry time as usual was heralded by the arrival of parties of Indians who come to the mountain each year to get a supply of the delicious fruit.... This annual pilgrimage has lost much of its picturesqueness. A few years ago they arrived on horseback in gayly colored attire. (Landes 1925:1).

...the Indians made summer pilgrimages into the high country to hunt and to gather wild berries (Schmoe 1926:2).

...local Indians come each season into the open parks and gather the years supply of berries (Schmoe 1926:3).

...the local Indians started their annual migration to the alpine berry fields to gather the ripening blueberries (Schmoe 1926:2).

...a band of Indians picking huckleberries in the manner of their forefathers who ventured upon Rainier's slopes each year about that time in search of these berries and to hunt. Now, of course, their activities are limited to picking berries. (Anderson 1929:4).

The fact that Native people were considered part of the park experience is illustrated by the practice of the Mount Rainier National Park Company, concessionaires at Paradise in the 1920s. In 1925 Yakamas were brought to Paradise to hold dances, race horses and demonstrate traditional crafts. This relationship did not last beyond the year. Catton (1996:14) suggests it was because they were unwilling to pose for photographs.

After the 1920s no mention of Native American use of the park could be located. Smith (1964:34) remarks that none of the people he talked to had visited the park in recent years due to "an asserted park proscription against Indian berry-picking within the Park limits." Smith further noted that this "proscription" had created some feeling of animosity within the Native community. No notice of an official action of this nature for the period from the 1920s to the 1960s was located in park records. Thompson (1981:26) states that "by the 1950s Indians had ceased arriving at the park in organized groups for the purpose of berry picking," but it is not clear exactly when this practice ceased. According to a former park archaeologist there are anecdotal accounts of Native use of park resources (Sullivan 1998, personal communication). Perhaps interviews of former and present park employees would lend insight into contemporary uses.

4.0 Native American Resource Rights

Hunting, fishing and gathering have been identified as important uses of the park resource base surrounding Mount Rainier. In the past the tribes in proximity to the park obtained their food this way and these activities continue to be of importance to contemporary Native peoples. These resources, however, are also coveted by other user groups and therein lies a major source of conflict between Natives and non-Natives. Public land managers in the United States have to respond to Native American rights of access and use. Few areas of Indian law have created more conflicts than hunting, fishing and gathering rights and National Parks have sometimes been at the center of these conflicts.

Native rights to natural resources must be considered in the context of federal Indian policy. An inherent right to land and resources exists (*New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 [1983]) but in a practical sense the exercise of resource rights is usually carried out under the protection of treaty.

The right to hunt and fish was expressly guaranteed to many tribes in their treaties with the United States. However, this right is presumed to exist even if the treaty does not mention it. As the Supreme Court explained in 1905, a treaty is not a grant of rights to the Indians but a taking of rights from them. Consequently if a treaty is silent on the subject of Indian hunting and fishing rights, then these rights are not limited by the treaty and still exist in full force. (Pevar 1992:190, citing *United States v. Winans*, 198 U.S. 371 [1905])

Mount Rainier National Park falls within the area ceded by the negotiation of three different treaties. As Prucha (1994:2) explains, a treaty is a contract between

sovereign nations. The Supreme Court first addressed tribal sovereignty in 1832 (*Worcester v. Georgia*, 31 U.S. 515 [1832]).

Indian nations are distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

The federal government has the authority to limit or extinguish tribal powers of sovereignty and so therefore tribes are considered “semi-sovereign,” or, as Chief Justice John Marshall said “domestic, dependent nations.”

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government. (Cohen 1942:123)

Outside of reservation boundaries tribal sovereignty is similarly limited like external powers. But if a tribe has an off-reservation treaty right it can regulate the exercise of that right by tribal members (*United States v. Washington* 384 F.Supp 312 [1974]).

The Constitution declares that treaties are the supreme law of the land, “the laws of any state to the contrary notwithstanding.” Specifically, Article 6, Section 2 of the Constitution states:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof: and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Between 1778 and 1868 the United States entered into 367 treaties with Native American tribes that were eventually ratified. The United States has generally held to the premise that Native peoples, by aboriginal possession, owned the land and resources. Some rights to land and resources were ceded to the United States by treaty and some rights to the ceded lands were retained. Exactly what these rights entail has been the subject of much litigation. Fishing and hunting rights to ceded lands has often been the focus of this litigation.

Mount Rainier National Park falls within the lands ceded by the Treaties of Medicine Creek, Point Elliott, and Yakama. The relevant clause of each of these treaties, generally known as the subsistence clause, follows.

Article III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together

with the privileges of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed land: *Provided, however*, That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and that they shall keep up and confine the latter. (*Treaty of Medicine Creek*, 26 December 1854, 10 Stat. 1132; the Treaty of Medicine Creek includes the Puyallup, Nisqually and Muckleshoot). Article IV. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Provided, however*, That they shall not take shellfish from any beds staked or cultivated by citizens. (*Treaty of Point Elliott*, 22 January 1855, 12 Stat. 927; the Treaty of Point Elliott includes the Muckleshoot, who were party to the Treaty of Point Elliott but whose reservation is located in lands ceded under the Treaty of Medicine Creek, they are thereby successor in interest to both the Treaty of Medicine Creek and the Treaty of Point Elliott, see Boxberger 1979:86). Article III. The exclusive right of taking fish in all streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land. (*Treaty with the Yakama*, 9 June 1855, 12 Stat. 951; the Treaty with the Yakama includes the Confederated Tribes and Bands of the Yakama Indian Nation).

There are some differences between these three clauses. The Point Elliott Treaty does not mention horses because the use of the horse was not important to most of the signatory tribes at the time of the treaty negotiations. Shellfish are not mentioned in the Treaty with the Yakama as this resource was not important to the inland tribes. Distinctions between the terminology regarding the different resources should also be noted. Particularly the fact that fishing rights are deemed a *right* whereas hunting and gathering is deemed a *privilege*. Generally a privilege does not have the same degree of protection as does a right.

The fishing right does not appear to have much importance in respect to Mount Rainier National Park as far as actual fishing activities in the park. However, the fact that several salmon streams originate within the park would suggest that Treaty Tribes have an interest in the watersheds. In Phase II of *United States v. Washington* it was determined that "The most fundamental prerequisite to exercising the right to take fish is the existence of fish to be taken" (*United States v. Washington*, Phase II, 506 F. Supp. 187 [1980]), this suggests that the Treaty Tribes have an implicit right to protect fisheries habitat.

In situations where usual and accustomed fishing sites are located in National Parks or other federal lands the treaty right to those resources can be exercised. The meaning of *usual and accustomed* was defined in *United States v. Washington*.

“Usual and accustomed,” being closely synonymous words, indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary locations. (*United States v. Washington*, 384 F. Supp. 312 [1974]) It is questionable if fishing locations could be verified within Mount Rainier National Park boundaries since the nature of the fisheries resource is in question and there exists no known documentation of Native American fishing locations in the park.

The rights exercised by tribes without treaty protection is less explicit. The Cowlitz Tribe has recently been determined eligible for federal recognition (Bureau of Indian Affairs, February 12, 1997) and as of November 1998 eligibility is still pending. If recognition is forthcoming the Cowlitz will be eligible for consideration of Federal services and benefits. At this point it is not clear what, if any, resource rights will accrue to the Cowlitz because their treaty status is confused.

The Cowlitz Indian Tribe is composed of members of the Salish Cowlitz, the Cowlitz Metis, and the Sahaptin Cowlitz. The Salish (or Lower) Cowlitz were present at the treaty negotiations on the Chehalis River in February of 1855 which did not result in a treaty (see Boxberger and Taylor 1991). Although the Chehalis Reservation was later created by Executive Order the Cowlitz never removed to the reservation. The Cowlitz Metis, descendants of the intermarriages of Cowlitz and Hudson's Bay Company employees, were not a viable group at the time of the treaty but later became affiliated with the Cowlitz Tribe. Some of the Sahaptin (or Upper) Cowlitz have been included with the Confederated Tribes and Bands of the Yakama Nation for various purposes, including land allotments and exercise of treaty rights. The Sahaptin Cowlitz have also affiliated with the Cowlitz Indian Tribe. Whether the Cowlitz Indian Tribe will attempt to exercise treaty resource rights based on this affiliation is unknown at this point. Regardless, it is likely the Cowlitz Indian Tribe will be a recognized tribal entity with historic ties to Mount Rainier National Park.

If determined to be non-treaty the Cowlitz Indian Tribe will not exercise treaty rights. In *Confederated Tribes of the Chehalis Indian Reservation and Shoalwater Bay Indian Tribe v. State of Washington*, a case which involved tribes also present at the Chehalis River treaty negotiations, it was determined that the tribes did not retain special fishing rights by virtue of refusing to sign the treaty. The tribes had argued that by refusing to sign the treaty they had retained all aboriginal rights to the fishery, an argument the court declined to accept. Therefore it is likely, given the similar circumstances of the Cowlitz Indian Tribe, that the same conclusion would be forthcoming if tested in the courts.

4.1 Treaty Resource Rights in National Parks

The subsistence clause in all three treaties provides that the signatory tribes would have “the privilege of hunting, gathering roots and berries on open and unclaimed land.” This language differs from that which secured fishing rights “at all usual and accustomed places” and, unlike the fishing rights language, has not yet been definitively interpreted in the courts.

There are few cases which attempt an interpretation of the meaning of “open and unclaimed land” as contemplated in the Stevens treaties. In *State v. Arthur*, (261 P.2d

135, 141 [1953]), an Idaho court ruled that it meant “such lands as were not settled and occupied by the whites under possessory rights or patents or otherwise appropriated to private ownership.” *Confederated Tribes of Umatilla Indian Reservation v. Maison*, (262 F. Supp. 871 [1966]), *Holcomb v. Confederated Tribes of Umatilla Indian Reservation*, (382 F.2d 1013 [1967]) and *Swim v. Bergland*, (696 F.2d 712 [1983]) stand for the proposition that National Forest lands are “open and unclaimed lands” to which hunting and other rights pertain. With respect to National Park lands, *United States v. Hicks*, (587 F.Supp. 1162 [1984]) is the only case involving an interpretation of a Stevens treaty. In that case, identical language in the Treaty with the Quinault (12 Stat. 971) was used in defense of two Quinault Indians charged with killing elk within the bounds of Olympic National Park. The federal district court concluded that the treaty language contemplated that the hunting privilege, and presumably the other usufructury rights in “open and unclaimed land,” was “self limiting” and “defeasible” (that is, capable of being rendered null and void) upon a change in the status of the land from “open and unclaimed” and the establishment of Olympic National Park. The establishment of the park changed the land from open and unclaimed.

The defendants argued for adoption of the interpretation in *State v. Arthur*, that “open and unclaimed” referred to lands unsettled by whites. Although the federal district court agreed that “open” status was not synonymous with open to entry under the now defunct public land laws, the court determined that when public lands had been set aside for uses inconsistent with treaty rights those lands ceased to be “unclaimed” and that “lands cease to be ‘open and unclaimed’ when they are put to uses incompatible with hunting.” The court concluded that the statutes establishing Olympic National Park and subsequently prohibiting hunting therein, when taken together, constituted withdrawal of the park lands from incompatible treaty based uses. The case was seen as distinguishable from National Forest lands because of the specific purposes for which the park was created. Presumably Mount Rainier National Park is similar.

The court determined that the defeasible nature of the hunting privilege, i.e. the lands available would diminish as settlement occurred, meant that the privilege could terminate without an express abrogation by Congress. The court further stated,

It is not logical to give the hunting privilege set forth in the treaty superior force [than the law prohibiting hunting] in the face of the purpose for the creation of the Olympic National Park when it was contemplated by the parties to the treaty that settlement of the northwest would occur and hunting lands would diminish.

Since there were no National Parks in 1855 it would seem arguable that diminution of hunting lands by *settlement* was contemplated by the parties to the treaty and it would follow that diminution by other means, not contemplated in the treaty, would require an abrogation of the privilege by Act of Congress. Congress has the power to abrogate treaty rights (*Lone Wolf v. Hitchcock* 187 U.S. 553 [1903]), but only when

...circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. (Cohen 1942:35)

Furthermore, *Hicks* is distinguishable from *Umatilla* and *Swim* by virtue of the statutory language prohibiting hunting on park lands. It is curious that the court opted not to address this case as an abrogation issue. After all, at the heart of the case is the question: which takes precedence, treaty rights or the statutory prohibition of hunting? It appears to have been an

abrogation issue. Perhaps it was skirted because, under Supreme Court precedents, the court could not find a basis for holding that hunting rights had, in fact, been abrogated.

Although Congress has the plenary power to abrogate any treaty or treaty provision, the intent to abrogate will not be lightly imputed to Congress (*Menominee Tribe of Indians v. United States*, (391 U.S. 404) [1968]). The intent to abrogate must be expressed clearly and unequivocally and doubts are to be resolved in favor of the Indians. There are specific rules established by the Supreme Court known as the “canons of treaty construction.” The three basic canons are: first, ambiguities in treaties must be resolved in favor of the Indians; second, Indian treaties must be interpreted as the Indians would have understood them; and third, Indian treaties must be construed liberally in favor of the Indians (Pevar 1992:40). These canons were reiterated in *United States v. Washington*.

Treaties with Indian tribes must be construed liberally in accordance with the meaning they were understood to have by the tribal representatives at the treaty council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. (*United States v. Washington*, 384 F. Supp 312 [1975])

To find an abrogation, it must be shown by clear evidence that Congress actually considered the conflict between its enactment and a treaty and chose to resolve that conflict through abrogation (*United States v. Dion*, 476 U.S. 734 [1986]). The *Hicks* decision is problematic for other reasons because it fails to follow established rules for construction of Indian treaties.

As discussed in *Antoine v. Washington*, (420 U.S. 194) [1975], *United States v. Washington* (969 F. 2d 752 [1974]) and *Squire v. Capoeman*, (351 U.S. 1) [1956]), all cases involving Washington State tribes, treaties are to be construed as they were understood by the Indians. Accordingly, evidence as to the Native American understanding of the term “open and unclaimed land” would be needed to render a decision consistent with the stated rules of construction. These rules do not seem to permit the court to reinterpret the terms of the treaty, as the *Hicks* court does, based on possible inconvenience to the government in discovering that much of its public land is subject to Indian hunting rights. Arguably, since the Indians and the federal negotiators were unaware of National Parks at the time of the treaty, the possibility of prohibiting hunting by enclosing lands in a park would not have been a consideration.

United States v. Dion is instructive as to how Congressional intent to abrogate a treaty may be analyzed. In that case, an Indian charged with killing a golden eagle in violation of the Eagle Protection Act (16 USC 1668) raised treaty hunting rights as a defense. The Supreme Court ruled that discussion of Indian activities in the legislative history and the statute’s explicit exemption of certain Indian religious activities constituted a sufficient basis for finding an intent to abrogate Indian hunting rights. Yet in a similar case (*South Dakota v. Bourland*, (508 U.S. 679 [1993]) the Supreme Court found an abrogation entirely by implication. *Bourland* did not expressly overrule *Dion* and may be distinguishable in that the former case dealt with the exclusive right of an Indian tribe to regulate hunting and fishing on lands to be managed under the Cheyenne River Act which provided another jurisdictional scheme. In other words, the issue of off-reservation hunting rights is muddled and thus far has been dealt with on a case by case basis.

If the statutes and legislative history pertaining to Olympic National Park are similar to those pertaining to Mount Rainier National Park, there is no evidence of Congressional consideration of Indian treaty rights. Since the *Hicks* court avoided the issue, it is virtually certain that no legislative history supporting an abrogation exists. The legislation creating Mount

Rainier National Park (30 Stat. 993 [1899]) provided that the Secretary of the Interior “shall provide against wanton destruction of the fish and game found within said park and against their capture or destruction for the purpose of merchandise or profit.” Presumably the exercise of treaty subsistence rights would not constitute a violation of that provision.

In 1915 a Solicitor of the Department of the Interior, in reaction to the Sluskin incident mentioned above, rendered an official opinion that the Mount Rainier National Park Organic Act of 1899 did not effect treaty rights (West to Secretary of the Interior 1915). Subsequently, the National Park Service Organic Act of June 30, 1916 (39 Stat. 244) prohibited “all hunting or the killing, wounding, or capturing at any time of any wild bird or animal” in the park and destruction of vegetation was also prohibited. Apparently the 1916 act was partially in response to the Sluskin incident. These statutes are silent as to treaty rights, and furthermore, the legislative history is quite sparse and contains no reference whatsoever to treaty rights or Indian activities. In fact, the only discussion of the prohibition on hunting is found in Volume 53 of the Congressional Record at page 9445 when certain legislators asked whether the prohibition extended to the Bull Moose, a jocular reference to Theodore Roosevelt and his possible participation in the coming election. House and Senate Reports are also silent on treaty rights. If Indian hunting in Mount Rainier National Park were litigated, the court would be unable to find a Congressional intent to abrogate the 1855 treaties. Nevertheless, if *Hicks* is instructive, it appears that treaty rights to hunting, and probably gathering, can be prohibited by park legislation.

We might consider the question of what “open and unclaimed land” meant to the Yakama, Nisqually, Puyallup, and Muckleshoot in 1855. As discussed above, in 1915, Sluskin and his hunting party, when confronted by rangers in Mount Rainier National Park, claimed the right to hunt there under the 1855 treaty. In 1855, the public lands of the United States were either sold for revenue (the second largest source after tariffs) or granted to states or other parties to subsidize public works (Gates and Swenson 1968). The grants to states or other parties were sold and the funds used to finance public improvements such as canals and railroads. Prior to the Civil War, the constitutionality of federal involvement in public works was questionable, and land grants were an indirect means of making transfer payments (Gates and Swenson 1968). The withdrawal of large tracts of land from entry and sale for public purposes would not come about until the 1870s with the creation of Yellowstone National Park. The term “open and unclaimed” did not appear in the public land laws of the time. It seems unlikely that either side of the treaty negotiations contemplated any large withdrawal of lands from settlement. It may even be argued that it was anticipated that some lands would not be suitable for settlement under the available technology and that such lands might remain “open and unclaimed” forever.

The purpose of the Stevens treaties as set forth in *United States v. Washington* (384 F.Supp. 312, 355 [1974]) was

to extinguish Indian claims to the land in Washington Territory and provide for peaceful and compatible coexistence of Indians and non-Indians in the area. The United States was concerned with forestalling friction between Indians and settlers and between settlers and the government... Settlers had taken up land claims under the Donation Act even though the Indians rights had not yet been extinguished by treaties.

Given this purpose, it appears that settlement was the only means whereby lands could, within the meaning of the treaty, cease to be “open and unclaimed.”

The Oregon Donation Act of September 27, 1850 (applied to Washington in the Organic Act of March 2, 1853) was unusual for its time in that it provided for grants of land free of

charge. It was designed to encourage settlement of the Northwest, then considered an undesirable area (Gates and Swenson 1968: 388-9). It was national policy in 1855 to promote settlement and development of Washington, and there is nothing in the treaty or the land laws of the United States then pertaining to suggest that withdrawal of lands for a park was contemplated by either Governor Stevens or the Treaty Tribes.

It is difficult to try to predict how the Supreme Court might resolve this issue should it arise. The outcome may well depend on the composition of the court when a case arises or on the prevailing political climate. Perhaps the court would find an abrogation by implication as it did in *Bourland*. While this would permit a ruling on very narrow grounds, it would necessitate overruling a century of developing precedent, something judges who preach “judicial restraint” may be loathe to do. More likely, but equally inconsistent with *Dion* and the line of cases leading to it, the court could rule that since Congress has affirmatively acted to preserve Indian treaty rights in other dispositions of public lands (16 USC 670m -- exemption of treaty rights in national wildlife refuge system; 10 USC 2671(d) -- hunting licenses on military reservations not affecting treaty rights; 16 USC 410qq-2(b) -- allowing traditional cultural and subsistence uses of National Park in Samoa; 16 USC 410aaa-75 -- requiring access to Death Valley and Joshua Tree for traditional cultural and religious purposes), its silence in the enabling legislation of Mount Rainier National Park could be seen indicative of its intent to abrogate. It is also conceivable that the court, following precedent, could find that Mount Rainier National Park remains “open and unclaimed land” and therefore subject to the exercise of treaty rights. Such a decision would have implications beyond hunting and gathering.

Some guidance as to the court’s leanings comes from the Supreme Court’s reluctance to review the recent decision in *Crow Tribe v. Repsis*, (73 F.3d 982 [1995]). In that case, a Crow Indian, accused of hunting without a license in the Big Horn National Forest, was defended on the basis of treaty rights to hunt on “unoccupied lands of the United States”. The court ruled that the treaty hunting rights no longer existed or were subject to regulation by Wyoming on three alternative bases:

1. the hunting rights, contemplated as temporary, were abrogated by the act admitting Wyoming into the union on an equal footing with other states;
2. the state licensing requirement was a reasonable conservation measure;
3. creation of the Big Horn National Forest and withdrawal of the land from settlement was an “occupation” of the land.

As in *Hicks*, no attempt was made to determine what the Indians thought “unoccupied lands” were at the time of the treaty. As discussed previously, the 9th Circuit has decided that National Forest lands may be “open and unclaimed” (see *Umatilla* and *Swim*), and a decision about the meaning of “unoccupied lands” may have no effect on those rulings. The second rationale depends on facts unique to the case and deals with the state’s authority to place burdens on treaty rights. The effect of admission to statehood on treaty rights was decided differently in *Umatilla* and in *United States v. Winans*, (198 U.S. 371 [1905]).

Ward v. Race Horse, (163 U.S. 504 [1896]), on which the court based the first rationale of its ruling in *Crow Tribe v. Repsis*, held that admission of Wyoming into the union on “an equal footing” with other states rendered the lands in the state occupied. The court noted that the treaty rights were subject entirely to the will of the United States, and a close reading of the decision indicates that it is predicated on a theory of abrogation rather than on a change in the status of the land in question. In contrast, in *Winans*, the court ruled that admission of

Washington to statehood did not cause an abrogation of treaty fishing rights. In *Crow Tribe v. Repsis*, in an attempt to reconcile *Race Horse* and *Winans*, the Crow hunting rights were distinguished from the fishing rights at issue in *Winans* by characterizing the former as “temporary and precarious” and the latter as continuing.

Crow Tribe v. Repsis also seems to conflict with the ruling of the Supreme Court in *Antoine v. Washington*, (420 U.S. 194 [1975]), in which it was held that Indian hunting rights under treaty were exempt, except in certain limited circumstances, from state regulation. In *Antoine*, the court relied on the Supremacy Clause of the Constitution to declare that treaty hunting rights “in common with all other persons” were the supreme law of the land. The court declined to construe the treaty language to the Indians’ prejudice and to adopt an interpretation that the rights were applicable only so long as the United States held land and allowed others to hunt on it. Such an interpretation, according to the court, would have provided the Indians with no benefits under the treaty and would imply bad faith on the part of the government. The decision did not hinge on the permanency or defeasibility of the rights at issue.

Race Horse, in contrast, depends in large measure on a finding that the treaty hunting rights were only an empty promise. Otherwise, it would appear that the United States had acted in bad faith in establishing Yellowstone National Park, where hunting was prohibited on lands ostensibly subject to treaty. The court did not address the implications for the faith of the United States in making a promise which it did not intend to keep. In effect *Race Horse* and *Crow Tribe v. Repsis* interpret an Indian treaty in a manner which renders the rights granted therein entirely subject to the whim of the United States. As in *Hicks*, no consideration was given to how the Treaty Tribes contemplated lands would be withdrawn from hunting grounds.

4.2 Native American Religious Uses of National Park Lands

The American Indian Religious Freedom Act (42 USC 1996) enunciates United States policy to recognize and protect American Indian religion. The Act directs federal agencies to provide for access to sacred sites for ceremonial uses. The Code of Federal Regulations does not contain any references to AIRFA except 28 CFR 548.10 et seq. which concerns the Bureau of Prisons and the religious rights of prisoners. Executive Order 13007, dated May 24, 1996, directs federal agencies managing public lands to accommodate access to and ceremonial use of sacred sites, to avoid “adversely affecting the physical integrity of such sacred sites”, and to maintain site confidentiality when appropriate. “Sacred site” is defined as “any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or individual Indian determined to be appropriately representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion.” Rights exercised under AIRFA are distinct from treaty rights and not limited to treaty tribes. Subsequently Executive Order 13007 attempted to strengthen AIRFA. A critical difference is that EO 13007 defines “Indian Tribe” as those tribes acknowledged by the Secretary of Interior (Section 1(b)(ii)).

Each agency is directed to implement procedures to notify Indians of actions or policies which may adversely affect access or use of sacred sites or their physical integrity. By May 24, 1997, each agency was to report to the President on implementation of the order and on changes needed to comply therewith. The Department of Interior *Implementation Report*, dated May 23, 1997, outlines the Department’s progress in developing and implementing internal policies and

procedures to comply with EO 13007. Pertinent to Mount Rainier National Park are the following sections.

Consistent with the mandates contained the (sic) Executive Order, it is the policy of the Department, to the extent practicable, permitted by law, and consistent with essential agency functions:

**to accommodate the right of American Indians and Alaska Natives in the free exercise of religion by ensuring access to and ceremonial use of Indian Sacred Sites;*
**to avoid adversely affecting the physical integrity of such Sacred Sites; and*
**to consult with American Indian and Alaska Native tribes on a government-to-government basis whenever the Department has reason to believe that its plans, activities, decisions, or proposed actions may compromise the physical integrity of, or access to Sacred Sites. (Implementation Report 1997:5)*

In accordance with the above stated policies the National Park Service has initiated draft implementation procedures. The draft implementation procedures will go through internal National Park Service review and then review by tribal representatives and the interested public before becoming final (Implementation Report 1997:20).

How the policies initiated by EO 13007 will affect park lands remains to be seen. To date the courts have construed AIRFA as conferring no greater rights on Indians than those enjoyed by any other person under the Free Exercise Clause of the Constitution. Nevertheless, properties that possess religious significance may be offered recognition and consideration under federal legislation, especially the *National Historic Preservation Act of 1966*. Section 101 (a) (2) of the *National Historic Preservation Act* outlines the criteria by which properties are eligible for inclusion on the *National Register of Historic Places*. While religious sites are generally ineligible for their religious significance alone, Native American sites are often considered under other criteria. Generally termed "Traditional Cultural Properties" this designation refers to specific properties that possess cultural significance to a particular community. A traditional cultural property is generally defined as one that is eligible for listing on the National Register based on criteria that demonstrate the significance of the property to a community's history, customs or practices. In respect to activities considered under the American Indian Religious Freedom Act federal recognition is not a requirement.

In *Native American Free Exercise Rights to the Use of Public Lands* (Ensworth 1983) two leading Indian religious exercise cases are analyzed (*Sequoyah v. Tennessee Valley Authority*, 480 F. Supp. 641 [1979] and *Badoni v. Higginson*, 455 F. Supp. 641 [1972]). The author attempts to reconcile these cases with *Wisconsin v. Yoder* (406 U.S. 205 [1972] in which the Supreme Court laid out a balancing test for adjudication of free exercise issues. The balancing test requires that the government show a compelling interest and the use of least restrictive means before imposing a substantial burden on religious exercise.

In *Sequoyah*, Cherokee Indians sought to prevent a dam from flooding sacred sites. The Circuit Court ruled that the sites were not "central" to Cherokee religion and the use of the sites was not "essential." Therefore Cherokee free exercise rights were not burdened, and it was unnecessary to consider whether the Tennessee Valley Authority's interests were compelling.

In *Badoni*, Navajos sought to enjoin flooding of sacred sites. The Circuit Court ruled that the government had a compelling interest in raising water levels and did not address whether Navajo free exercise rights would be substantially burdened.

Ensworth argues that under *Yoder*, the Indians ought to have prevailed in these cases. She asserts that agencies should be required to show that their interests could not be achieved without accommodating Indian religious interests.

Strambour in *Manifest Destiny and American Indian Religious Freedom: Sequoyah, Badoni, and the Drowned Gods*, reaches similar conclusions to Ensworth's but the author further argues that the tests for centrality and essentials are spurious and not required by *Yoder* and other precedents governing free exercise cases.

Hardt in *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis* discusses *Lyng v. Northwest Indian Cemetery Protective Association*, (108 S.Ct. 1319 [1988]). In that case, often referred to as the "G-O Road case," the Supreme Court confirmed that AIRFA provides no redress and grants no rights beyond those embodied in the Constitution. The article contains a discussion of the history of Indian free exercise cases and distinguishes between cases dealing with the possession of sacred objects and those dealing with sacred sites. The author, like Strambour, argues that the centrality requirement imposed in sacred site cases was a departure from long standing precedent.

In *Lyng*, Native Americans sought to enjoin logging and road construction on sacred land in a National Forest. The District and 9th Circuit Courts ruled in the Native's favor. The Supreme Court, however, ruled that the government's proposed actions did not violate free exercise rights because only those actions which are coercive or which penalize religious practice are recognizable under the free exercise clause. In essence, the actions of the government could destroy the Indians' religion but, because this result would be indirect and incidental, the free exercise clause would not be implicated. The author of the review article concludes that this is an extremely narrow interpretation of the Constitution.

The Supreme Court's approach to free exercise cases as set forth in *Lyng* was not limited to Indian religion. In several cases, the Court ruled that government action which was of general applicability and which did not penalize religion or coerce practitioners did not violate the free exercise clause even though it placed a substantial burden on religious belief or practice. This line of reasoning is consistent with the current court's view that the Constitution should be read literally and narrowly. Outrage over these rulings led to enactment of the Religious Freedom Restoration Act (42 USC 2000bb) in 1993. The statute explicitly recognizes that "laws neutral toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" (42 USC 2000bb(a)(2)). It recognizes and adopts the balancing test set forth in *Yoder* and prior Supreme Court rulings. Additionally, it specifically provides for suits to enforce rights. The Government is prohibited from imposing a substantial burden on religious exercise unless the action furthers a compelling interest and the least restrictive means are used (42 USC 2000bb-1). Additionally, this statute may change the complexion of Indian free exercise cases since it appears that courts are still imposing a centrality requirement (*Bryant v. Gomez*, 46 F.3d 948 [1995]). It is unclear whether a "substantial burden" on religious practice or belief will be interpreted as requiring that the practice or belief be central. One review article suggests that Chief Justice Rehnquist would find a way to rule against Indians in furtherance of his states' rights philosophy (Johnson and Martinis 1995).

Centrality, if it remains a requirement, may provide an easy out for courts in further litigation. A finding that a religious practice is not central or essential would be a finding of fact which would ordinarily be upheld on appeal. The standard for review of fact findings is much higher than for legal rulings.

4.3 Implications for Mount Rainier National Park

Presumably, National Park Service and other public land managers hope to avoid costly and controversial litigation by preparing for Native American land and resource uses within management guidelines. Native American use rights to national park lands are fairly explicit, recognizing the rights of tribes but also the purposes for which the parks were created.

The National Park Service, to the extent consistent with each park's legislated purposes, will develop and execute its programs in a manner that reflects knowledge of and respect for the cultures, including religious and subsistence traditions, of native American tribes or groups with demonstrated ancestral ties to particular resources in parks. (NPS Management Policies 1988)

Based on the materials presented by Smith and reviewed here it is clear that the Yakama, Puyallup, Nisqually, and Muckleshoot are the successors of rights to Native American groups that utilized the area of Mount Rainier aboriginally. These tribes continue to exercise treaty rights to resources and have rights to religious and sacred sites protected under the American Indian Religious Freedom Act. To what extent these rights exist within national park boundaries today is not entirely clear because use rights have been litigated piecemeal and no clear legislation exists which clarifies the issues. The Cowlitz Tribe has been determined as eligible for recognition by the Bureau of Indian Affairs. The Cowlitz petition for recognition is presently in the review process and assuming they will be recognized sometime soon it still remains to be seen what resource rights they will be able to exercise as a recognized tribe.

The following excerpts from National Park Service Management Guidelines (1988) enunciate park policy in relation to Native American access and use of park natural and cultural resources. Each of the areas identified in this report is treated in the Management Guidelines. The following commentary will discuss how these policies might relate to the treaty and other legal rights of park-associated Native American Tribes.

NPS general regulations on access to and use of natural and cultural resources in parks will be applied in an informed and balanced manner that is consistent with park purposes and does not reasonably interfere with native American use of traditional areas or sacred resources and does not result in degradation of park resources.

Hunting and gathering privileges within the park have been restricted by park legislation, especially the 1916 Act which prohibited hunting within park boundaries (39 Stat. 244, Section 4). The Act further prohibits the "damage, injury, or spoliation" to vegetation within the park and while berry-picking might not fall within this category it appears that, informally at least, the prohibition of plant gathering in the park was enforced in the past (Smith 1964:34). While these legislative actions are not explicitly intended to abrogate treaty rights they nevertheless have the same effect. Until such time

as the treaty tribes choose to contest this restriction it will remain in effect. It is unlikely that usual and accustomed fishing locations will ever be identified within Mount Rainier National Park boundaries. Decisions affecting the watersheds, however, trigger involvement of the respective tribes. Non-Treaty tribes have neither guaranteed hunting or gathering privileges nor fishing rights.

Gathering privileges are in the same treaty clause as hunting rights but have not been litigated. At the State level attempts to avoid costly litigation by the establishment of State and Tribal hunting agreements has resulted in nine agreements and three interim agreements. So far the Nisqually is the only tribe near Mount Rainier National Park to have an agreement in place with the State. These agreements establish a mechanism whereby tribal hunting regulations can establish agreed-upon openings, harvest levels and places hunting can take place. It is difficult to predict whether tribes would attempt to exert hunting or gathering rights within Mount Rainier National Park. The Nisqually Tribe has recently explored such rights through tribal self-governance discussions with the park but exercise of those rights has not yet occurred. The legal and legislative evidence suggests that such activity could be prohibited if it violates park regulations.

The use of park lands for religious purposes has broader implications. Specifically mentioned in the Management Guidelines, religious use is provided for.

This statute [AIRFA] does not create additional rights or change existing authorities, but as a matter of policy in keeping with the spirit of the law, the National Park Service will be as unrestrictive as possible in permitting native American access to and use of traditional sacred resources for customary ceremonies.

The National Park Service will permit members of native American tribes or groups to have access to park areas to perform traditional religious, ceremonial, or other, customary activities at places that have been used historically for such purposes.

The National Park Service will protect sacred resources to the extent practicable and in a manner consistent with the goals of the traditionally associated native American tribe or group.

The problem of defining historical use is limited by the lack of documentary evidence. Documented use of park resources by Native Americans does not appear for over a third of a century, there is, however, anecdotal evidence of Native American use of resources within the park. Arguably restrictions were imposed without proper attention to treaty stipulations or religious freedom. The ethnographic and historic data does not explicitly state what resources or areas were integral to Native American religious practices within the park but Native American presence would be sufficient to assume that some religious activity took place. If intent of associated Native American tribes to initiate religious practices within the park should arise, their access to park resources falls within park policy.

The National Park Service will regularly and actively consult with traditionally associated native American individuals or groups regarding planning, management, and operational decisions that affect subsistence activities, sacred materials or places, or other ethnographic resources with which they are historically associated.

Consultation with park-associated populations has been initiated by Mount Rainier National Park. It is hoped that the information and discussion contained within this report will aid in future discussions concerning Native American use of park resources. An outline summary of the major points follows.

5.0 Outline Summary

1. The Puyallup Indian Tribe, Nisqually Indian Tribe, Muckleshoot Indian Tribe and the Confederated Tribes and Bands of the Yakama Nation are the successors of rights to the groups aboriginal to the Mount Rainier National Park area.

2. The Puyallup Indian Tribe, Nisqually Indian Tribe, Muckleshoot Indian Tribe and the Confederated Tribes and Bands of the Yakama Nation are federally recognized tribes who exercise treaty rights.

3. The Cowlitz Indian Tribe may soon become a federally recognized Indian tribe.

4. The rights the Cowlitz Indian Tribe will exercise as a recognized tribe or as a treaty tribe remain to be determined.

5. Fishing is a right guaranteed by treaty. Protection of fishery habitat is an implicit right.

6. Hunting and gathering are privileges which may be restricted under certain circumstances.

7. Native Americans exercise religious freedom but do not exercise special religious rights.

8. Sacred sites are important to the exercise of Native American religions, thus far no sacred sites have been identified in Mount Rainier National Park.

9. The likelihood of religious uses of Mount Rainier National Park and the identification of sacred sites is high.

10. The National Park Service has established its responsibility to recognize and protect Native American rights in National Parks in consultation with park-associated tribes.

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