

SHOULD A NATIVE HAWAIIAN RIGHT TO TAKE GREEN SEA TURTLES BE RECOGNIZED UNDER THE ENDANGERED SPECIES ACT?

Foreword

Dear Reader:

The Endangered Species Act ("ESA") and the Hawaiian Green Sea Turtle have been controversial since the listing of the Green Sea Turtle as a threatened species in 1978. Many have raised concerns that the ESA unreasonably interferes with Native Hawaiian cultural practices. Those with concerns would like to see a better integration of their particular community interests with the goals of the ESA. Since the listing of the Green Sea Turtle in 1978, the Hawaiian Green Sea Turtle population has flourished. To see what lessons could be learned for Hawai'i and whether Native Hawaiians should be granted a cultural use exemption to the ESA, I chose to take an empirical look at the ESA and its impact on Native Hawaiian cultural uses for the Green Sea Turtle.

As a result of my original approach and quality of research, this paper is now viewed as a significant contribution to the scholarly literature on Native Hawaiian cultural takes of the Green Sea Turtle.

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I. Introduction

In recent years, the Hawaiian Green Sea Turtle population has flourished due to the protection and enforcement offered by the federal Endangered Species Act ("ESA").^[1] The number of nesting female Green Sea Turtles in Hawaii has tripled since listing.^[2] Following the growth of the Green Sea Turtle population, some Native Hawaiians are interested in reviving their cultural, religious, and subsistence practices to harvest the turtles.^[3] This paper explores whether the ESA should allow Native Hawaiians to perform cultural, religious, or subsistence takes of the Green Sea Turtle.

The Green Sea Turtle (*Chelonia mydas* or *Honu* in Hawaiian) is listed as a threatened species under the veil of protection offered by the ESA.^[4] The Secretary of the Interior and the Secretary of Commerce promulgated regulations, 50 C.F.R. § 223.102(d)^[5] and § 223.205(a),^[6] that prohibit the taking of Green Sea Turtles, while 16 U.S.C. § 1540(a) and (b) provide civil and criminal penalties for violations of the ESA. Section 9(1)(A)-(F) of the ESA, 16 U.S.C. § 1538 (a) (1) (A)-(F), prohibits "any person subject to the

jurisdiction of the United States” from importing, exporting, taking, possessing, selling, offering for sale, delivering, carrying, transporting, or shipping a species classified as endangered. The blanket prohibition set forth by Section 9 of the ESA is not without exemptions.^[7] One important exemption to the ESA allows Native Alaskans to take “any endangered species or threatened species . . . if such taking is primarily for subsistence purposes.”^[8]

The federal courts, however, have refused to recognize a Native Hawaiian right to take Green Sea Turtles for subsistence purposes. The United States District Court of Hawaii addressed the issue of whether Native Hawaiians possessed an aboriginal right to take endangered animals in spite of the ESA in USA v. Daryl Nuesca, 773 F. Supp. 1388 (D. Haw. 1990).^[9] Federal District Judge David Ezra found no Native Hawaiian subsistence exemption to take the Green Sea Turtle because Native Hawaiians are not dependent on the turtles for food or subsistence. Judge Ezra’s ruling is now ten years old. Since his ruling, the population of female nesting Green Sea Turtles has increased dramatically, and there has been a strong resurgence in the interest of Native Hawaiians in traditional and cultural rights.^[10] Hence, the issue of a Native Hawaiian right for cultural or subsistence takes should be revisited.

Subsequent to Judge Ezra’s ruling in Nuesca, a series of events transpired reinvigorating the traditional rights of Native Hawaiians that are enshrined in Hawaii’s constitution and statutes.^[11]

In 1993, to mark the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, Congress adopted a Joint Resolution apologizing for the actions of the American government that resulted in the takeover of Hawaii by American interests.^[12]

The Hawaii Supreme Court elucidated the rights of Native Hawaiians in PASH, holding “all government agencies undertaking or approving development of undeveloped land are required to determine if Native Hawaiian gathering rights have been customarily and traditionally practiced on the land in question and explore the possibilities of preserving them.”^[13] In light of the expanding Native Hawaiian cultural and traditional rights acknowledged and upheld by Congress and the Hawaii courts, some members of the Native Hawaiian community have expressed a desire for an exemption to take Green Sea Turtles under the ESA.

II. THE GREEN SEA TURTLE, THE ENDANGERED SPECIES ACT AND NATIVE HAWAIIAN CULTURAL USES

The sweeping authority of the ESA has profoundly impacted Native Hawaiian uses of the Green Sea Turtle. Prior to 1973, the Native and local people of Hawaii enjoyed the Green Sea Turtle as an island delicacy. Thirty years ago, hotels and restaurants in Hawaii served “turtle steak” as exotic food.^[14] Commercial harvest fueled by this demand inevitably led to the decline of turtle stocks.^[15]

The decline of the Green Sea Turtle population throughout the world prompted the Secretary of the Interior and the Secretary of Commerce to list the Green Sea Turtle as a threatened species on July 28, 1978.^[16] Upon listing, it became illegal to

take Green Sea Turtles, thus forcing Native Hawaiian cultural and traditional uses for the Green Sea Turtle either underground or into dormancy.

A. The Green Sea Turtle

The Green Sea Turtle, named after the color of its subdermal fat, is found worldwide in warm seas.[\[17\]](#) The turtles are found along the coasts of Hawaii and the Northwestern Hawaiian Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, San Diego California, and Alaska.[\[18\]](#)

Adult Green Sea Turtles can measure more than three feet long and weigh over 220 pounds.[\[19\]](#) The Green Sea Turtle is the only exclusively herbivorous marine turtle, grazing on pastures of sea grasses or algae.[\[20\]](#) Although Green Sea Turtles lay egg clutches numbering into the hundreds, only two out of every one hundred baby turtles will survive to the age of sexual maturity, 25-50 years old.[\[21\]](#)

Sexually mature Green Sea Turtles periodically migrate between their foraging pastures and distant sites, where copulation and egg laying take place.[\[22\]](#) Adult females breed once every two or more years, while adult males migrate annually to breed.[\[23\]](#) In the Hawaiian Islands, Green Sea Turtles migrate distances of 1300 km from foraging in pastures of seaweed around the Main Hawaiian Islands to the French Frigate Shoals and Northwestern Hawaiian Islands where they nest.[\[24\]](#)

The greatest cause of decline in the Pacific Green Sea Turtle populations is commercial harvest for eggs and food.[\[25\]](#) Turtle parts are used for leather and jewelry throughout the Pacific region.[\[26\]](#) Smaller turtles are sometimes stuffed for curios or kept as pets. Incidental catches during commercial fishing and shrimp trawling in the Pacific region is also a threat to the turtle population.[\[27\]](#) Turtles also eat a variety of marine debris like plastic bags, styrofoam pieces, tar balls, balloons, and plastic pellets. The marine debris affects the consumption and metabolic efficiency of the turtles leaving them malnourished, and eventually leading to death.[\[28\]](#)

The major current threat to Hawaii's Green Sea Turtle population is the disease known as fibropapilloma, which causes tumors along the turtle's epidermis.[\[29\]](#) Fibropapilloma differs from human impacts because it cannot be readily identified or mitigated because the cause of the disease is still unknown.[\[30\]](#) Hawaii is the only area in the Pacific region where direct take is not the primary threat to the Green Sea Turtle population.[\[31\]](#) The success of Hawaii's conservation efforts to restrict directed take is due to effective enforcement of the ESA, public education outreach and research, protecting adult turtles and eggs from harvest, and the establishment of protected areas.[\[32\]](#)

B. Traditional Native Hawaiian Uses For The Green Sea Turtle

Green Sea Turtles were once a food source for Native Hawaiians. The meat, viscera, and eggs supplemented the more common food sources like fish, birds,

shellfish, coconuts, breadfruit and taro.[33] Native Hawaiians valued the adult female turtle as a delicacy because of its high amount of green body fat.[34]

Native Hawaiians also incorporated Green Sea Turtles into religious and traditional ceremonies.[35] For example, some Native Hawaiian families considered the Green Sea Turtle to be a personal family deity or *aumakua*. [36] Turtles were often reserved exclusively for men during Native Hawaiian feasts.[37] Native Hawaiians used the green fat for medicinal purposes to treat burns and other skin disorders.[38]

Noted Hawaiian historian David Malo, wrote, “[t]he *honu* is excellent eating.”[39] Robert Palakiko Kamaka, Sr. (1900?-1978), a Native Hawaiian from Lana’i, consumed turtle meat in accordance with Native Hawaiian custom and regarded it as a delicacy.[40] Traditionally, Native Hawaiians regulated the use of Green Sea Turtles by the *kapu* system (a control system implemented by the island chief).[41] Women were forbidden to eat *honu*, and the punishment for breaking this *kapu* was death.[42] Captain James Cook, the white man credited with the “discovery” of Hawaii, reported that women would swim out to his ship and partake in eating bananas and pork, both of which are prohibited by the *kapu* system. Cook noted that the women would not however, eat *honu*. [43]

Native Hawaiians had many uses for Green Sea Turtle shells. Native Hawaiians created haircombs from the turtle shell and transformed the shell into an instrument useful in scraping *olana* bark.[44] Rebecca Nu’uhiwa, a Native Hawaiian, used the turtle shell as an ancient Hawaiian medicinal ingredient.[45]

Currently, as the number of *honu* increases throughout the Pacific, some Native Hawaiians desire to resume cultural uses of the turtles.[46] William Aila, a Native Hawaiian fisherman and harbor master and member of the Native Hawaiian Rights Task Force of the Western Pacific Fisheries Management Council, has noticed a growing number of Green Sea Turtles and feels it is time to reintegrate the turtle into Native Hawaiian culture.[47] Over one hundred *kupuna* (Hawaiian elders) from across the state have expressed to Aila their desire to take Green Sea Turtles for cultural purposes.[48] Aila believes that traditional Hawaiian culture is losing an understanding of what the turtle represents. Generations of Native Hawaiians have lost the knowledge of how to prepare and incorporate *honu* into their lives.[49] He resents the environmentalists’ characterization of *honu* as “warm and fuzzy.” For Aila, this characterization of *honu* as charismatic megafauna, is a form of brainwashing Native Hawaiian children because the turtle was a respected and required part of the Native Hawaiian diet.[50]

Before they pass away many surviving *kupuna* also want the turtle returned to Native Hawaiians as a source of food.[51] Buffalo Keaulana, a Native Hawaiian, used to extensively hunt Green Sea Turtles to feed his family and friends before the enactment of the ESA.[52] Keaulana, now 64 years old, wants to teach his grandchildren how to harvest turtle as part of their culture.[53] Charles Kauluwehi

Maxwell Sr., a Native Hawaiian cultural specialist, believes that eating *honu* honors the Native Hawaiian spiritual link with the ocean.^[54] According to Maxwell, consuming *honu* is not only for subsistence purposes but also for spiritual and cultural association with the god *Kanaloa*.^[55]

C. The Endangered Species Act and Cultural Exemptions

The ESA is known as one of the most powerful environmental laws enacted by Congress.^[56] Congress enacted the ESA in 1973 to provide a comprehensive program for conservation of rare species through regulating trade in them, providing authority to acquire “critical habitat” for their survival, and requiring federal agencies to consider harmful impacts upon the species.^[57]

Section 4^[58] allows the Secretary of the Interior and the Secretary of Commerce to classify species as either “endangered”^[59] or “threatened.”^[60] In determining whether a species is “endangered” or “threatened,” the Secretary cannot consider the economic impacts of the listing.^[61] Rather, the Secretary must consider the species’ habitat destruction, overutilization, disease or predation, the inadequacy of existing regulatory mechanisms, or other factors.^[62] Under Section 4, the Secretary must designate the critical habitat of an endangered or threatened species, to the “maximum extent prudent and determinable.”^[63] The Secretary must also develop and implement a Recovery Plan for the conservation and survival of endangered and threatened species.^[64]

Section 9 of the ESA prohibits “any person subject to the jurisdiction of the United States” from importing, exporting, taking, possessing, selling, offering for sale, delivering, carrying, transporting, or shipping a species classified as endangered.^[65]

1. The Native Alaskan Exemption Under the ESA for Subsistence Takes

The ESA, however, is not without exemptions. Section 10 of the ESA creates an exemption for “any Indian, or Eskimo who is an Alaskan native or who resides in Alaska” or “any non-permanent resident of an Alaskan native village” provided the taking is for subsistence purposes.^[66] “Non-permanent resident” means that anyone residing in a Native Alaskan Village, regardless of race, will fall under the subsistence provision.^[67] Congress granted the Section 10(e) exemption for Native Alaskans because they continue to depend on certain endangered species to survive.^[68] Many parts of Alaska are still wilderness areas and sometimes the only viable food source comes from endangered species such as the Arctic Polar Bear, the Walrus, Bowhead whales and other endangered species.^[69] Native Alaskans may also take endangered species to create “authentic native articles of handicrafts and clothing” for interstate commercial sale.^[70] The exemption, however, has its limits. Congress gave authority to the Secretary of the Interior and the Secretary of Commerce to impose restrictions upon native Alaskans if the takings “materially and negatively affect . . . the threatened or endangered species.”^[71] Section 10(e)(2) prohibits takings

accomplished in a wasteful manner. Because Section 10 is an exemption to the ESA, no permitting system is necessary to regulate subsistence takes by Native Alaskans.[\[72\]](#)

The Fish and Wildlife Service (“FWS”) has never developed a regulatory structure to implement the exemption and therefore FWS has no permit, licenses, or other limits on taking under Section 10.[\[73\]](#) Sue Detwiler, Endangered Species Coordinator for the Alaska Region of the FWS, said the Alaska Natives have cooperated with FWS and whatever takings have occurred did not “materially and negatively affect” any of the listed species.[\[74\]](#)

2. NMFS’ Rejection of a Native Hawaiian Exemption

In light of the Native Alaskan exemption, the State of Hawaii in 1981 requested the National Marine Fisheries Service (“NMFS”) to consider authorizing take of Green Sea Turtles for home consumption.[\[75\]](#) Along with the State, a Native Hawaiian group requested that NMFS recognize Native Hawaiians’ aboriginal right to take Green Sea Turtles.[\[76\]](#)

On April 20, 1983, NMFS announced it would review Special Rule 50 C.F.R. Part 227, Subpart D, Regulations Concerning the Taking of Sea Turtles for Subsistence Purposes,[\[77\]](#) to determine whether the taking of sea turtles for subsistence purposes should be allowed in areas of the central and western Pacific other than the already-allowed subsistence take of Green Sea Turtles in the Trust Territory of the Pacific Islands (“TTPI”).[\[78\]](#) At the State’s request, NMFS conducted public hearings in the Hawaiian Islands and the TTPI to collect information on the justification for subsistence exemptions.[\[79\]](#) NMFS reviewed the various cultural dependencies on Green Sea Turtles throughout the central and western Pacific. NMFS also reviewed the status of the listed sea turtle stocks to determine if subsistence takes could be sustained.[\[80\]](#)

NMFS proposed two criteria to authorize subsistence takes: 1) traditional uses of sea turtles must exist, and 2) the status of the Green Turtle stocks must be adequate to support the exemption.[\[81\]](#) Therefore, a subsistence authorization would be allowable “only if an existing culture is dependent on the taking of sea turtles for its continued existence and that the turtle stock involved would not be jeopardized by the subsistence take.”[\[82\]](#)

After careful review of the cultural practices outside the TTPI, NMFS concluded that no existing native cultures in the Pacific are dependent on the taking of Green Sea Turtles.[\[83\]](#) NMFS reasoned that creating an exemption to the ESA when existing native cultures no longer depend upon the turtle for subsistence is not consistent with the purposes of the ESA.[\[84\]](#) Therefore, NMFS specifically rejected Hawaii’s request for an exemption and concluded “home use and commercial use can be authorized only after Green Sea Turtle stocks have recovered and are delisted.”[\[85\]](#) NMFS determined that the requests for subsistence takes from the State of Hawaii were not made on behalf of any particular cultural group, therefore,

unlike the Native Alaskan exemption, the State could not be considered under a subsistence exemption.^[86]

III. IS A NATIVE HAWAIIAN EXEMPTION UNDER THE ESA FACTUALLY OR LEGALLY WARRANTED?

Whether a Native Hawaiian exemption to the ESA is factually warranted based upon the longstanding relationship between the Native Hawaiians and *honu* is a matter of controversy. The possibility of a Native Hawaiian exemption allowing for cultural take of *honu* sparked heated discussion in the local newspapers.^[87] Several Hawaii residents expressed their disdain for a cultural right to take the Green Sea Turtle through newspaper editorials.^[88] These Hawaii residents felt there was no apparent need to take Green Sea turtles for consumption in the modern day.^[89]

Moreover, Native Hawaiians are distinguishable from Native Americans and lack the political status necessary for an exemption. Ten years ago, the federal courts addressed whether a Native Hawaiian exemption is legally warranted and have reasoned there is no pressing need to take the Green Sea Turtle for survival in Hawaii.^[90] This paper argues, however, that these views need reconsideration. The courts' and agencies' overly restrictive analysis of a Native Hawaiian exemption as only proper for strictly subsistence use omits important consideration of possible cultural consequences.

A. *Is an Exemption for Native Hawaiians Feasible Due to the Growing Numbers of Green Sea Turtles?*

Traditionally, Native Hawaiians possessed a cultural, historical, and biological link to *honu*. This special relationship with *honu* was altered by the adoption of the ESA. A once-common part of everyday life, *honu* was arguably forever stolen from Native Hawaiian culture. The ESA, however, saved *honu* from extinction and is credited for the increase in Green Sea Turtle stocks.^[91] Therefore, it can also be said that the ESA actually preserves the long-term link between *honu* and the Native Hawaiian community. This “see but no touch” argument is open to attack because it protects *honu* from any harvest, and prevents Native Hawaiians from perpetuating their cultural practices thereby hindering the Native Hawaiian link to *honu*. The commercial over-harvest of the Green Sea Turtle for “exotic” foods in restaurants and hotels across the State — not Native Hawaiian cultural takes — caused the dramatic decline in the turtle population.^[92] As a result, Native Hawaiians believe they are being unfairly punished for the actions of the western commercial culture.^[93]

Native Hawaiians, as an aboriginal group similar to Alaskan Natives, are not given equal treatment under the ESA because Congress and the Secretary of Commerce place a greater importance on subsistence taking than cultural or religious takes. The Alaskan exemption is characterized as necessary for “subsistence,” however, this subsistence exemption also has deep cultural underpinnings.^[94] Desiring an opportunity to rekindle their cultural relationship with *honu* to preserve

the Native Hawaiian link with the land, Native Hawaiians should be allowed the same statutory exemption as Native Alaskans.

The Native Hawaiian cultural need for *honu* has been criticized; some argue that Native Hawaiian cultural takes are presently unnecessary and will lead to the extinction of *honu*. In its 1998 Recovery Plan for the Green Sea Turtle, NMFS states that the alteration and modernization of the Native Hawaiian culture have reduced the cultural importance of Green Sea Turtles.[\[95\]](#) Negative public sentiment towards Native Hawaiian cultural takes focuses on the evolution of the Hawaiian culture and Native Hawaiian methods of gathering food. Clay W. Valverde, in an editorial to the *Honolulu Advertiser*, said there is no need to kill turtles to feed oneself or one's family.[\[96\]](#) Valverde made an analogy to Pacific cultures that used to practice cannibalism: "if cannibalism was okay then, is it okay now?"[\[97\]](#) Joe McLary, a resident of Waianae, does not believe the use of modern equipment to hunt turtles can be considered cultural or traditional.[\[98\]](#) Valverde opposes a Native Hawaiian exemption to the ESA and feels that the cultural bond between Native Hawaiians and the Green Sea Turtle for sustenance is now too attenuated.[\[99\]](#) Valverde,[\[100\]](#) McClary,[\[101\]](#) and NMFS[\[102\]](#) believe Native Hawaiians are no longer dependent upon the turtle for survival and therefore should not be allowed a taking exemption. Those opposing Native Hawaiian taking of the Green Sea Turtle believe that cultural survival does not outweigh the lives of the rare turtles.

The opponents of a Native Hawaiian exemption do not recognize that to the Native Hawaiian community, *honu* is not just another creature to be eaten. The whole process of capture and preparing *honu* for consumption is a ritual that perpetuates the Native Hawaiian culture.[\[103\]](#) The loss of the cultural practice of catching and preparing *honu* has harmed many Native Hawaiian families by removing another cultural experience from their lives.

Although Congress has not created a Native Hawaiian exemption, it created a subsistence exemption to the ESA for Native Alaskans in reaction to the growing political pressure to preserve the social, cultural, and economic aspects of Alaska Native Societies.[\[104\]](#) The term "subsistence" is defined as a "means necessary to support life."[\[105\]](#) Subsistence in Alaska, however, is known as "a class of hunting and fishing rights that, under complementary federal and state laws, enjoy a legal preference over competing sports, commercial or personal use rights."[\[106\]](#)

Native Alaskans define subsistence as a political and cultural union linking the complex web of cultural, religious and social relationships associated with subsistence rights.[\[107\]](#)

Subsistence activities require special skills and an understanding of the local environment that enables the native culture to live in harmony with the land.[\[108\]](#) Subsistence activities, however, encompass cultural values and attitudes such as "mutual respect, sharing, resourcefulness" and the intricate relationship between humans, animals and the environment.[\[109\]](#) Subsistence hunting and fishing is necessary for many Alaskan Natives' survival, and it links them to their history by

binding them to traditional lands.[\[110\]](#) Thus, any subsistence regulation will adversely affect subsistence practices and the native culture. Similarly, a regulation prohibiting the “subsistence” or cultural use of the Green Sea Turtle inhibits the cultural growth of Native Hawaiians.

In construing the statutory subsistence exemption NMFS and Nuesca applied the strict dictionary definition of the term “subsistence.”[\[111\]](#) They contrast Native Hawaiian subsistence with Alaskan subsistence, noting that Hawaiians do not live in remote villages or possess no other means of attaining sustenance.[\[112\]](#) Not all Native Alaskans, however, have difficulty finding food necessitating an exemption to hunt endangered animals. Congress, nonetheless, created the Native Alaskan exemption to promote Native self-determination.[\[113\]](#)

Similarly, a Native Hawaiian exemption to promote self-determination could be allowed as a “subsistence” exemption. The word “subsistence” is a term of art and should not be construed overly literally to protect Native Alaskan cultural practices and simultaneously deny other aboriginal cultures (like the Native Hawaiians) a right to take under the ESA. Factually, the situations of the Native Alaskans and Hawaiians are similar. The government and court system, however, improperly choose to treat them differently.

B. Is There a Legal Basis for a Native Hawaiian Exemption?

Native Hawaiians and Native Americans are similar because both groups are comprised of an indigenous culture whose lands were taken and then ceded by the American government. Although factually similar, the Federal District Court in Nuesca addressed whether Native Hawaiians were legally similar to Native Americans.

Native Alaskan communities possess similar attributes to the Native Hawaiian community, however, the former has an exemption to the ESA. Allowing one group to be treated differently from a similarly situated group poses a possible Equal Protection violation of the Fourteenth Amendment. This section will address whether Native Hawaiians are legally similar to Native Americans and whether the Native Alaskan exemption can withstand an Equal Protection challenge.

1. Are Native Hawaiians Legally Similar to Native Americans?

In 1990, Judge David Ezra addressed whether Native Hawaiians possess aboriginal rights to hunt Green Sea Turtles in spite of the ESA.[\[114\]](#) Daryl Nuesca, a Native Hawaiian fisherman, was convicted of the misdemeanor of taking two Green Sea Turtles in violation of 16 U.S.C. § 1538 (a)(1)(G)[\[115\]](#) and § 1540 (b)[\[116\]](#) of the ESA. Nuesca based his aboriginal rights defense upon United States v. Dion.[\[117\]](#)

In Dion, the Supreme Court of the United States recognized the Yankton Sioux tribe’s right to shoot and hunt bald eagles, but held that the right was abrogated by the Bald Eagle Protection Act.[\[118\]](#) The Supreme Court reasoned that, although the

Yankton Sioux possessed a treaty right to hunt eagles on tribal lands, Congress's intent to abrogate the treaty was "clear and plain" in the Bald Eagle Protection Act.[\[119\]](#) Nuesca claimed that Native Hawaiians, like the Sioux, possess an aboriginal right to hunt endangered species.[\[120\]](#) He further argued that the "aboriginal right" to hunt endangered species can be abrogated only by the "clear and plain intent" of Congress.[\[121\]](#)

Judge Ezra refused to treat Native Hawaiians the same as Native Americans because the former lacked treaty or statutory rights to take Green Sea Turtles.[\[122\]](#) According to Judge Ezra's reasoning, Native Hawaiians are not similarly situated to Native Americans because they lack treaty rights with the government and an aboriginal right to take Green Sea Turtles.[\[123\]](#) The lack of treaty rights legally distinguishes Native Hawaiians from Native Americans and, therefore, arguably Native Hawaiians are not entitled to the same rights and privileges offered to Native Americans.

2. Can Native Hawaiians Be Treated Differently from Native Alaskans Under the Equal Protection Clause of the 14th Amendment?

Nuesca challenged the Alaskan exemption on equal protection grounds. He argued that Congress' failure to include Native Hawaiians in the exemption was a violation of equal protection.[\[124\]](#)

Judge Ezra refused to accept Nuesca's argument that Native Alaskans and Native Hawaiians are "similarly circumstanced" and therefore should be treated alike under the statute.[\[125\]](#) Although both groups of indigenous people surrendered vast amounts of land to the United States and suffered great hardship, he concluded that these similarities are not relevant to an exemption from the ESA.[\[126\]](#) The key difference between Native Alaskans and Native Hawaiians for determining an ESA exemption is that Native Alaskans depend upon hunting certain endangered species for subsistence purposes. Nuesca failed to show that Native Hawaiians depend upon Green Sea Turtles for subsistence.[\[127\]](#)

Whether the Alaskan and Hawaiian situations are parallel depends upon the definition of "subsistence." Judge Ezra applied the strict dictionary meaning of the word "subsistence" to differentiate between the Native Alaskan and Native Hawaiian situations.[\[128\]](#) This "need-based" approach to defining subsistence ignores the cultural, traditional, and spiritual ramifications underlying the entire "subsistence" process. In *Nuesca*, Judge Ezra differentiated between the two definitions and used the narrow definition to create a bright-line difference between Native Hawaiians and Native Alaskans; Alaskans take for strictly "subsistence" purposes while Hawaiians take for cultural reasons not covered within Judge Ezra's narrow definition.[\[129\]](#)

Accordingly, Judge Ezra reviewed the Native Alaskan exemption under the "rational basis" test because it is facially beneficial to a suspect class, Native Alaskans.[\[130\]](#) Although a suspect class is generally reviewed under strict scrutiny, rational basis review is given for programs that are facially beneficial to Native

Americans.^[131] Native Americans are not a racial classification; instead, they are deemed a political group. The United States has a guardian/ward relationship with Native Americans.^[132] In *Nuesca*, the government need only have proven there was a rational basis for creating an exemption to the ESA for Native Alaskans. The exemption passed the rational basis test because it was rational for Congress to conclude that Native Alaskans depended on certain endangered species for subsistence purposes.^[133]

Presently, any statutory exemption for Native Hawaiians would raise the issue of *Rice v. Cayetano*, decided ten years after the holding in *Nuesca*^[134], in which the Supreme Court of the United States finally addressed the political status of Native Hawaiians.^[135] Unfortunately for Native Hawaiians, the Supreme Court reversed the Ninth Circuit Court of Appeals' decision and held that, unlike Native Americans, Native Hawaiians lack political status.^[136] Native Hawaiians, therefore, are distinguishable from Native Americans because they are now a suspect racial classification instead of a political one. Native Hawaiians, as a suspect classification, are not afforded the luxury of rational basis review for facially beneficial laws. In the wake of the Supreme Court ruling, "affirmative action" programs for Native Hawaiians will be reviewed under strict scrutiny.

Following the rationale of the Supreme Court in *Rice*, Native Hawaiians can be treated differently from Native Alaskans or Native Americans. Thus, the judicial branch of the government is not the proper forum for Native Hawaiians to pursue an exemption to the ESA; Native Hawaiians must now turn to the legislature or NMFS. An exemption to the ESA for Native Hawaiians may also be subject to constitutional attack. If the legislature or agency's actions do not pass constitutional muster, the exemption can be struck down.

C. NMFS Should Create a Permitting System for Native Hawaiian Takes

In addition to the exemptions listed in Section 10 of the ESA, NMFS should create a cultural permitting system for Native Hawaiians. Currently under Section 10, the Secretary may issue permits for prohibited actions if they are for scientific purposes or result in takings that are incidental to otherwise lawful activities.^[137] A cultural take would not fit under the current version of Section 10, however, a proper permitting system could ensure the survival of the Green Sea Turtle while allowing Native Hawaiians to practice traditional and cultural activities.

Biologists from NMFS and Native Hawaiians throughout the Hawaiian Islands should create a quota system that would not harm the sustainable population of turtles. A proper permitting scheme will allow Native Hawaiians to take Green Sea Turtles for cultural purposes without severely harming the species. Since the enactment of the ESA in 1973, the total nesting population of the Green Sea Turtle has increased three-fold.^[138] This population increase has been constant over a twenty-year period in Hawaii and is one of the recovery objectives of the NMFS Recovery Plan.^[139]

A “cultural use” permit for Native Hawaiians can mirror the regulatory exemption created for the Native people living in the U.S. Trust Territory of the Pacific Islands (which no longer exists because none of the island nations remain part of the trust territory today).^[140] NMFS allowed only turtles less than 30 inches to be taken from below the high-tide mark for non-commercial sustenance purposes.^[141] Taking turtles less than 30 inches ensured that only adolescent Green Sea Turtles and not sexually mature nesting females were taken. William Aila suggests taking only younger male turtles because not many males are needed to service the female for reproductive purposes.^[142] Since nesting females lay egg clutches into the hundreds, protecting them creates a greater chance for species survival.

Aila suggested that the Native Hawaiian community start with very limited cultural takes for ceremonies. A limited cultural take for Native Hawaiians would be the proverbial ice-breaker,^[143] while limiting the “gold rush mentality” to over-harvest *honu*. Time plays an important factor in granting permits because there is a pressing need to allow the aging *kupuna* to use *honu* for cultural purposes before they pass on. Under this proposed exemption permit, Native Hawaiians will also be required to take responsibility for their actions. Ultimately the permitting process should be based upon what the Green Sea Turtle stocks can handle. William Aila believes that Native Hawaiians should limit takes to only what is necessary and only what the Green Sea Turtle stocks will allow.^[144] The population of Green Sea Turtles is currently unknown and therefore, some would argue whether a permitting system could even be considered without knowledge of what sustainable yield the Green Sea Turtle population can sustain.^[145] Aila believes the Green Sea Turtle population is plentiful enough to allow a limited take based upon his own experiences observing turtles across the Hawaiian Island chain via helicopter, and from countless *kama’āina* testimony from other Native Hawaiians.^[146] For some, *kama’āina* testimony is not enough and only a threshold scientific assessment can determine if the Green Sea Turtle stock is healthy enough to allow for cultural takes. Threshold scientific assessments take time, however, when the continued existence of the Green Sea Turtle hangs in the balance. There is no way for the *kama’aina* to distinguish between male and female turtles just by appearance, especially from a helicopter.^[147] What the people see are a lot of turtles, however, they do not necessarily know the sex or age of the Green Sea Turtles they are observing. A scientific assessment may be the only reliable measurement of the Green Sea Turtle population. The one pressing concern of the scientific assessment is that the *kupuna* will probably not have the opportunity to experience *honu* before an assessment is completed, thereby losing this generation’s individual cultural knowledge to pass onto generations of Native Hawaiians.

Assuming NMFS would consider a narrowly tailored exemption for Native Hawaiian cultural purposes, an enforcement system will be required to ensure strict compliance. NMFS, in conjunction with the Fish and Wildlife Service, could conduct regular patrols of beaches to monitor takes. The counter argument is that the NMFS is

limited by budget constraints and would be unable to adequately patrol beaches for possible violations. Another enforcement option would be to allow the Native Hawaiian community to regulate takes as they did in the *ahupua'a* system (land ranging from the mountains to the ocean). This self-regulatory scheme could be attempted as a pilot program along the Waianae coast. NMFS could work with the community council or *ahupua'a* community to come up with an effective way to regulate cultural takes. After implementation of the pilot program NMFS could then observe the community and turtle population for a period of six months to determine whether the Green Sea Turtle stocks in the Waianae area have been damaged. An *ahupua'a*-like self-regulatory scheme would further cultural and community development by allowing Native Hawaiians to resume cultural regulatory practices (maintenance of the *ahupua'a*) and cultural takes (*honu*).

Along with proper regulations and enforcement, NMFS needs to ensure that only legitimate users of the Green Sea Turtles receive cultural take permits. The main challenge would be determining whether the applicant is truly a Native Hawaiian. NMFS could require that those seeking permits must prove that they are descended from any of the races inhabiting the Hawaiian islands previous to 1778. Proof of lineage from 1778 increases the likelihood that true Native Hawaiian descendants receive permits for cultural take.[\[148\]](#) The proposed Native Hawaiian cultural use is the only type of take that the existing Green Sea Turtle population can sustain without significantly affecting the species.[\[149\]](#)

Eventually, non-Hawaiians should be allowed to take Green Sea Turtles when the turtle stocks have recovered. William Aila believes that the requirements for delisting in the NMFS Recovery Plan are too unrealistic and non-Hawaiian takes will probably only be allowed when the Green Sea Turtle is delisted.[\[150\]](#) First, the requirement of 5,000 nesting females is unreasonable because there is not enough room on French Frigate Shoals to hold that many nesting females.[\[151\]](#) Second, NMFS has no way of counting the Green Sea Turtles to determine whether or not they should be delisted.[\[152\]](#) NMFS acknowledges that it has no firm record of the existing Green Sea Turtle population,[\[153\]](#) therefore the Green Sea Turtle will probably remain listed as a threatened species until NMFS makes population measurement a priority.

IV. CONCLUSION

Native Hawaiians should be allowed a cultural exemption to the ESA because the turtle stocks in the Hawaii region have grown substantially. NMFS acknowledges that the conservation plan is working in Hawaii and that direct take is not a primary threat to the Green Sea Turtle. An exemption for Hawaii is warranted because Hawaii is the only area in the Pacific where turtle populations have increased.

The Native Alaskan “subsistence” exemption is actually based on cultural value and not just need-based sustenance. The United States District Court of Hawai'i and the Ninth Circuit applied a narrow definition to the word “subsistence” when deciding

whether the Native Hawaiian situation can be compared to Native Americans. A Native Hawaiian cultural exemption should be read under the broad definition of “subsistence,” allowing Native Hawaiians a similar exemption to perpetuate their cultural beliefs in the modern world.

Although the Supreme Court, in the landmark decision of Rice, held that Native Hawaiians are different from Native Americans based on treaty rights, Native Hawaiians still possess a special political status. NMFS may possess the authority to create a permitting scheme to ensure the survival of the Native Hawaiian culture and its unique relationship with the ocean. In Hawaii, the Green Sea Turtle has made a comeback from possible extinction with government assistance. Now that the turtle stocks in Hawaii are on the road to recovery, it is time the government and its agencies act to prevent the possible cultural extinction of the Native Hawaiian people.

[1] National Marine Fisheries Service and U.S. Fish and Wildlife Service. Recovery Plan for U.S. Pacific Populations of the Green Turtle (*Chelonia mydas*) 13 (1998) [hereinafter “Recovery Plan”].

[2] Id., at 14.

[3] Bunky Bakutis, *Hawaiians Want Turtles Back on Cultural Menus*, HONOLULU ADVERTISER, June 7, 1998, at A1.

[4] 16 U.S.C. §§ 1531-1544 (1988).

[5] 50 C.F.R. § 223.102 lists the Green Sea Turtle as a threatened species.

[6] 50 C.F.R. § 222.205(d) prohibits the take of Green Sea Turtles under section 9 of the ESA.

[7] Exemptions to the ESA include: 16 U.S.C. § 1536(o) (1988). (federal actions for which the Endangered Species Committee grants exemptions do not constitution prohibited takings); 16 U.S.C. § 1539(a)(1) (1988). (the Secretary may issue permits for otherwise prohibited actions if they are for scientific purposes or if they result in takings that are incidental to otherwise lawful activities); 16 U.S.C. § 1539(b)-(i) (1988). (the Act establishes the circumstances under which subsistence takings, articles made from endangered or threatened species, noncommercial transshipments, and activities that would cause undue economic hardship if prohibited may be exempt from prohibition.).

[8] 16 U.S.C. § 1539(e) (1988).

[9] United States of America v. Daryl Nuesca, 773 F. Supp. 1388 (D. Haw. 1990), aff'd United States v. Nuesca, 945 F.2d at 256. (Daryl Nuesca's appeal was consolidated with the appeal of Daniel Kaneholani for killing a Hawaiian monk seal.)

[10] Recovery Plan, supra note 1, at 14.

[11] Nuesca, 773 F. Supp. at 1389.

[12] 107 Stat. 1510 (1993).

[13] Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n (U), 79 Haw. 425, 903 P.2d 1246 (1995).

[14] Charles Kauluwehi Maxwell Sr., Eating honu honored special link with ocean, HONOLULU ADVERTISER, August 6, 1998 at A1.

[15] Telephone Interview with William Aila, Waianae Harbor Master, in Honolulu, Hawaii (Nov. 27, 1999).

[16] 16 U.S.C. §§ 1531-1544.

[17] Recovery Plan, supra note 1, at 8.

[18] U.S. Fish and Wildlife Service, Threatened and Endangered Species (visited October 20, 2000) <<http://www.pacific.fws.gov/wesagrnturtindex.htm>>.

[19] Id.

[20] Lori Tighe, *Honolulu Star-Bulletin* (visited October 25, 2000) <<http://starbulletin.com/2000/09/09/news/story5.html>>

[21] National Marine Fisheries Service, *Office of Protected Resources: Green Sea Turtle (Chelonia mydas)* (visited October 25, 2000) <[wysiwyg://330/http://www.nmfs.noaa.gov/prot_res/species/turtles/green.html](http://www.nmfs.noaa.gov/prot_res/species/turtles/green.html)>

[22] Recovery Plan, supra note 1, at 14.

[23] Id. at 15.

[24] Id.

[25] National Marine Fisheries Service, *Office of Protected Resources: Green Sea Turtle (Chelonia mydas)* (visited October 25, 2000)

<wysiwyg://330/http://www.nmfs.noaa.gov/prot_res/species/turtles/green.html>

[26] Id.

[27] Id.

[28] Id.

[29] Recovery Plan, supra note 1, at 22.

[30] Id.

[31] Id.

[32] Id. at 15.

[33] U.S. Fish and Wildlife Service, *Threatened and Endangered Species* (visited October 20, 2000) <<http://www.pacific.fws.gov/wesagrnturtindex.htm>>.

[34] Id.

[35] Recovery Plan, supra note 1, at 6.

[36] DAVID MALO, HAWAIIAN ANTIQUITIES (MOOLELO HAWAII) 47-48 (N.B. Emerson trans., Bishop Museum Press 2d ed. 1971) (1951).

[37] Recovery Plan, supra note 1, at 6.

[38] Id.

[39] MALO, supra note 37.

[40]

Audio tape of Interview with Robert Palakiko Kamaka, Sr., Native Hawaiian, on the lanai of Hulihee cottage at Kailua, Kona, Hawaii (October 7, 1961) (transcript available at Bishop Museum).

[41] MALO, supra note 37.

[42] Id.

[43] JOCELYN LINNELEN, SACRED QUEENS AND WOMEN OF CONSERVANCE: RANK, GENDER AND COLONIZATION IN THE HAWAIIAN ISLANDS 15 (The University of Michigan Press, Ann Arbor 2d ed. 1993).

[44] MALO, supra note 37.

[45]

Audio tape of Interview with Rebecca Nu’uhiwa, Native Hawaiian, in Maui, Hawaii (Mar. 29, 1960) (transcript available at Bishop Museum)

[46] Bakutis, supra note 3.

[47] Id.

[48]

Telephone Interview with William Aila, Waianae Harbor Master, in Honolulu, Hawaii (Nov. 27, 1999).

[49] Bakutis, supra note 3.

[50] Id.

[51] Id.

[52] Bunky Bakutis, Buffalo Keaulana Tells of Turtle Hunt, HONOLULU ADVERTISER, June 7, 1998 at A3.

[53] Id.

[54] Charles Kauluwehi Maxwell Sr., *Eating Honu Honored Special Link With Ocean*, HONOLULU ADVERTISER, August 6, 1998 at A1.

[55] Id.

[56] TVA v. Hill, 437 U.S. 153 (1978).

[57] 15 U.S.C. § 1531(a)(4) (1988).

[58] 15 U.S.C. § 1533(a)(1) (1988).

[59]

16 U.S.C. § 1532(16) (1988) (“Endangered species” refers to any species that is in danger of extinction throughout all or a significant portion of its range).

[60]

16 U.S.C. § 1532(20) (“Threatened species” refers to any species that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range).

[61] Id.

[62] 16 U.S.C. § 1532(a)(1) (1988).

[63] 16 U.S.C. § 1533(a)(3) (1988).

[64] 16 U.S.C. § 1533(f) (1988).

[65] 16 U.S.C. § 1538(a)(1) (A)-(F) (1988).

[66] 16 U.S.C. § 1539 (e)(1) (1988) and 16 U.S.C. § 1538 (1988).

[67] Id.

[68] Id.

[69] 36 C.F.R. § 13.40 et seq.

[70] 16 U.S.C. § 1539(e)(1)(b) (1988).

[71] 16 U.S.C. § 1539(e)(4) (1988).

[72]

E-mail from Sue Detwiler, Endangered Species Coordinator, Alaska Region, *U.S. Fish and Wildlife Service*, to Jaime Ushiroda, Second Year Student, William S. Richardson School of Law (Dec. 2, 2000).

[73] Id.

[74] Id.

[75]

Review of Regulations Concerning the Taking of Sea Turtles for Subsistence Purposes, 50 Fed. Reg. 278 (1985).

[76] Id.

[77]

Review of Special Rule 50 C.F.R. § 227(d), 48 Fed. Reg. 169255 (1983).

[78] 50 C.F.R. § 227.72(f) (1985).

[79] 50 C.F.R. § 227 (1985).

[80]

Review of Regulations Concerning the Taking of Sea Turtles for Subsistence Purposes, 50 Fed. Reg. 278 (1985).

[81] 50 C.F.R. § 227(d).

[82] 50 C.F.R. § 227

[83] Review, supra note 80.

[84] Id.

[85] Id.

[86] Id.

[87] Bakutis, supra note 3.

[88] Clay W. Valverde, *No Cultural Right To Green Sea Turtles*, HONOLULU ADVERTISER, June 11, 1998 at A5. Joe McLary, *Green Sea Turtles Must Stay Protected*, HONOLULU ADVERTISER, June 15, 1998 at A9.

[89] Id.

[90] Nuesca, 773 F. Supp. at 1389.

[91] Recovery Plan, supra note 1, at 13.

[92]

Telephone Interview with William Aila, Waianae Harbor Master, Honolulu, Hawaii (Nov. 27, 1999).

[93] Id.

[94] Jeremy David Sacks, *Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights*, 12 ALASKA L. REV. 247, 250 (1995).

[95] Recovery Plan, supra note 1, at 6.

[96] Valverde, supra note 88.

[97] Id.

[98] McLary, supra note 88.

[99] Valverde, supra note 88.

[100] Id.

[101] McLary, supra note 88.

[102] Recovery Plan, supra note 1, at 6.

[103] Bakutis, supra note 3.

[104] David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice?"* 60 U. COLO. L. REV. 1024 (1989).

[105] WEBSTER'S NEW COLLEGIATE DICTIONARY 1161 (8th ed. 1974).

[106] Case, supra note 104 at 1009.

[107] Id. at 1032.

[108] Id.

[\[109\]](#) Id.

[110] Id.

[\[111\]](#) Nuesca, 773 F. Supp. at 1389.

[112] Id.

[113] PUB. PAPERS, 1970, 564-76 (1971).

[114] Nuesca, 773 F. Supp. at 1388.

[115]

16 U.S.C. § 1538(a)(1)(G) (1988) (it is unlawful to violate any regulation pertaining to endangered or threatened species of fish or wildlife).

[\[116\]](#)

16 U.S.C. § 1540 (b) (1988) (provides criminal penalties for violations of the ESA).

[117] United States v. Dion, 476 U.S. 734 (1985).

[118] Id.

[119] Id.

[\[120\]](#) Nuesca, 773 F. Supp. at 1390.

[121] Id.

[122] Id.

[\[123\]](#) Id.

[124] Id. at 1391.

[\[125\]](#) Id.

[126] Id.

[127] Id.

[128] Id.

[129] Id.

[130] Id.

[131] Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474 (1974).

[132] Id.

[133] Nuesca, 773 F. Supp. at 1392.

[134] Rice v. Cayetano, 120 S. Ct. 1044 (1999).

[135] Id.

[136] Id. at 1059.

[137] 16 U.S.C. §1539(a)(1) (1988).

[138] Recovery Plan, supra note 1, at 14 (Turtle population increased from less than 100 in 1973 to over 350 in 1998).

[139] Id. at 52. (Recovery Criteria 3 -- Nesting populations as “source beaches” are either stable or increasing over a 25-year monitoring period).

[140] Recovery Plan, supra note 1, at 13.

[141] Id. at 13 (No island nation presently belongs to the Trust Territory).

[142] Aila, supra note 93.

[143] Id.

[144] Id.

[145]

Telephone Voicemail from National Marine Fisheries Service, in Honolulu, Hawaii (Nov. 22, 1999).

[146] Aila, supra note 93.

[147] Id.

[148] HAW. CONST. art. XII, § 10-2 (definition of Hawaiian).

[149] Aila, supra note 93.

[150] Id.

[151] Id.

[152] Id.

[153] Telephone Voicemail from National Marine Fisheries Service, supra
note 145.