



Co-Management, Negotiation, Litigation. Questions of Power in Traditional Use Studies

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Introduction: Questions of Power

In this paper we want to take a step back from traditional use studies and ask some questions about their implications. How useful are these studies? Do they meet the demands put upon them in the different arenas where First Nations interact with non-Native organizations? More importantly, do they meet First Nations' needs in defining and supporting claims to Aboriginal rights? We will ask these questions by exploring the use of these studies along the spectrum from potentially cooperative interaction with non-Native agencies in resource management, through treaty negotiations, to openly adversarial conflict with the state in litigation.

Traditional Use Studies in Resource Management

There are advantages for First Nations communities and the Provincial government to conduct cooperative, comprehensive traditional use studies as an approach to resource management. First, a comprehensive study coordinated by a First Nations community can help define areas where potential conflict in resource use may occur. If studies of contemporary and historical traditional use are considered prior to establishing a resource development plan, along with the results of other natural and cultural resource inventories, First Nations communities will have an opportunity to participate more meaningfully in consultation without having to react to plans already set in motion. In turn, non-Native resource managers are provided with a series of detailed, comprehensive maps which show areas of traditional use, which can be used so that costly plans are not developed only to be put into turmoil by unexpected assertions by First Nations communities of their Aboriginal rights in the development area.

In addition, detailed, comprehensive traditional use studies provide an additional means of protecting heritage sites by compiling information on traditional use sites which may qualify for protection under the Provincial Heritage Conservation Act. If used in conjunction with detailed and comprehensive archaeological inventories, First Nation's historic and cultural sites can be afforded legal protection.

Furthermore, the results of a traditional use study can provide common ground on which consultation, negotiation and collaboration between First Nations, Provincial and Federal governments, and third-party interests can be situated. Ideally, when a land-use plan is noted by Provincial resource managers to be in conflict with a traditional land use, they would either immediately alter their plans, or notify the First Nation's government of the need to discuss alternate development proposals. The First Nation then would be provided with adequate funds for research, be given access to available information on the resource development in question, and be allowed a fair amount of time in which to develop a response to it. This response would take into consideration the concerns of community members and the investigations and recommendations of the First Nation's natural and cultural resource managers. How and if the development should proceed would then be negotiated. The parties planning the development would take into consideration factors such as negotiation of business partnerships with Aboriginal organizations, mitigation of impacts upon important traditional cultural or resource use locations, or compensation for lost resource use or access. Such a process is built on a common understanding that Aboriginal rights are to be upheld in good faith.

However, we see several problems and cautions which need to be kept in mind when considering traditional use studies as a tool for resource management. The problem of the "completeness" of a traditional use inventory will always plague resource managers. Not every traditional land or resource user from Aboriginal communities can be interviewed in the time frames contracted for traditional use study projects. For example, only 2% of the Stó:lo community was interviewed over the course of first year of the Stó:lo Nation traditional use study. Realistically, not all of the community's knowledge of historical and contemporary traditional uses of the land and resources can be ever recorded. Riewe has characterized asking

a 70-year old hunter to mark all of his campsites as "comparable to asking a 70-year old traveling salesman to list every gas station and hotel he has ever used" (Riewe 1991:291).

Massive depopulation due to contact additionally skews what can be recorded or inferred of pre-contact use. In Aboriginal communities where, for various historical reasons, traditional access to and use of the land is now far less than it once was, resource managers must ensure that there will be land and resources for growing and populations and future generations wishing to exercise their Aboriginal rights.

There is a danger in focusing on traditional use activities on a site-specific basis - limiting the First Nation's perspective of their relationship to the land and resource use to simple circles on the map. Traditional uses of the land are not like archaeological sites - they can not always be simply summarized as points, lines or polygons on maps. In instances where small-scale, non-comprehensive "traditional use studies" have been conducted under the guise of considering the traditional use of a particular area in order to meet provincial obligations to consult First Nations, these studies have failed to provide adequate information to determine the presence of Aboriginal rights in the areas in question (see Oliver 1997a, 1997b for examples of these kinds of studies).

Patterns of use focus at a larger level than the site and involve complex, interacting social and ecological dynamics. For instance, where the Central Coast Salish (and likely other cultural groups) are concerned, wilderness areas in general provide important places for interaction between the human and non-human worlds (Suttles 1981). Many of these places can not simply be mapped and "logged-around". The complex nature of the relation of First Nations people to the land and resources must be placed in context in traditional use studies, weaving together factors of practice, tradition, custom, and belief. First Nations must maintain control of the interpretation of their traditional use studies in resource management.

First Nations' organizations conducting traditional use studies need to be explicit in describing the ownership of the data and the process for decision-making with it in the information sharing agreements they negotiate with the Province. Current interim information sharing agreements between the First Nations who are conducting traditional use studies and the Government of B.C. allow resource management decisions to be made before the studies are completed (Ministry of Forests 1996, 1997:5).

Present Ministry of Forests policy on evaluating land use conflicts with Aboriginal rights utilizes the very strict standards of evidence indicated in the Vander Peet, Gladstone, and Sparrow court cases (Ministry of Forests 1997). These standards are extreme to the point of being unmeetable, and cannot form the basis of cooperative resource management.

Of course court tests are continually changing, and the standards by which traditional use study research will be judged will also change. Researchers need to be up-to-date with and informed by these court tests but they should not let them be their sole guide in documenting Aboriginal rights and traditional uses of the land. The community should set its own standards for these processes and keep their long term interests in the forefront.

Because of these concerns, ownership and control of traditional use study data must remain with the First Nation. Information about a First Nation's historical and contemporary use of the land can not be used out of context by Provincial resource managers to make decisions without input from the First Nations concerned. Traditional use studies are not an end to consultation, they are only the beginning, and though they can provide a common ground for resource management, their application remains a difficult process of negotiation over competing interests. As the recent Royal Commission on Aboriginal Peoples stated, in the pre-treaty environment, the consultation process over resource management is by no means satisfactory, even if a comprehensive traditional use study has been completed:

...there is no certainty for Aboriginal people in the current relationship. They are forced to rely on the grace and favour of government and industry for development benefits, and governments can create new third-party interests both before and during [treaty] negotiations." (Canada 1996:683)

The process is thus a fragile one, balanced in the hands of Provincial and Federal governments who can be swayed by third-party or other political and economic interests.

Treaty Negotiation

It is fitting that our discussion of traditional use studies proceeds from resource management to treaty negotiations, because those negotiations have always been motivated, at their core, by conflicts over the disposition of resources. What is the experience in other jurisdictions? The use of such studies in treaty negotiations seems to have evolved from a period when studies were used to attempt to "prove" that Natives occupied territories, as with the Inuit Land Use and Occupancy Study (Freeman 1976), to more focused research used to document specific sites for activities such as hunting, fishing, and spiritual uses, as with the Council for Yukon Indian (C.Y.I.) land use mapping projects of the late 1970's (Cruikshank, personal communication 1997).

Representatives from First Nations in the Yukon state that the traditional use research done by C.Y.I. was used in their treaty negotiations largely for their own internal reference. The research represented a process of consultation with the community, in which members identified those areas that were of importance to them. They were a way of formalizing oral testimonies to enable the process of land selection, and were not put to any tests by territorial or federal negotiators. At the same time, however, everyone we have spoken to acknowledges that formalized data and visual reports of traditional activities give authority to arguments for joint resource management that would not be present if the studies had not been done.

However, the Yukon experience will not necessarily carry over directly to British Columbia. There is a much wider range of demands on land and resources in British Columbia than in the Yukon, and land selection processes or negotiations over resource co-management will inevitably be made more adversarial by conflict with third party interests. As a result, when treaty lands are selected and negotiated over in stage 4 of the BC Treaty Process, traditional use research may be put to more stringent tests than it was in the Yukon - tests similar to those applied in court cases surrounding Aboriginal rights, which we will describe in a moment.

At present in British Columbia, there is no standard for the assessment of traditional use data in treaty negotiations, because no treaty table has yet reached a point where such a critique might take place. The province has clearly stated in its land claims policy that it has no intention of analysing the evidence in support of Statements of Intent (Ministry of Aboriginal Affairs 1996). However, it does state that

As negotiations reach the point where the parties are coming to agreement on the boundaries of the Treaty Settlement Land, more rigorous analysis will be necessary to ensure that these boundaries are appropriate to represent a translation of historic rights of the First Nation into contemporary terms. (Ministry of Aboriginal Affairs 1996, emphasis added)

The treaty policy earlier states that "Aboriginal rights flow from activities that were integral to the distinct society or culture of the aboriginal group, " which suggests that the province is ready to apply tests to claims to Aboriginal rights which are similar to those outlined in the Vander Peet decision. The federal Comprehensive Claims Policy (Department of Indian Affairs 1986) appears to envision equally stringent tests of Aboriginal rights, though again the Yukon treaty processes do not reflect this.

In addition, it appears that the tests to which traditional use data are put will depend on the nature and the location of the treaties negotiated. In the north of the province, where there is still a relatively large amount of crown land available for land selection, First Nations may find themselves negotiating for title to land as well as allocations of resources and a share of decision making power over resource management. In the urban southwest, where there is little crown land not already under some form of disposition, First Nations may be negotiating more for cash settlements than for land title. In these latter cases, discussions of compensation for lands lost may mean that the historical component of traditional use studies will become a more significant, critically debated source of information in negotiations.

In either case, it is obvious that First Nations need to do careful research to support their land selection arguments. While traditional use studies will be useful to gain an understanding of a community's interests in and relationships to the land and resources, their methodologies and time frames as developed at present may not be sufficient to meet the research needs of land selection, if those selections are put to rigorous tests. In the long run, researchers are not doing First Nations a favour if they build arguments based on moral advocacy where facts of law are required.

However, the need for exacting site specific research must not overshadow the more important demands of arguments in support of Aboriginal rights in general. The complex nature of land use is such that all arguments cannot be reduced to "facts" about "sites," though the state may attempt to determine both the burden of proof required and those aspects of land use which are deemed significant. In treaty negotiations, as in resource management, there is a constant pressure to simplify First Nations' relationships with land and resources into some sort of congruence with Western notions of instrumental practices such as hunting, fishing and gathering which happen on delimited sites. First Nations must be careful that by engaging in traditional use studies they do not facilitate that process of delimitation, by ensuring that their studies reflect their own philosophy and relationship to the land and resources. The traditional use study process may do a disservice to the protection of First Nation's Aboriginal rights, if those rights are associated with specific sites rather than whole territories. Aboriginal rights are best seen as associated with activities and relationships between peoples and their territories.

Litigation

So what of our "worst case scenario," when studies are used to push claims to contested lands and resources, and resource co-management or treaty negotiations breakdown and are replaced by litigation? We argue that all traditional use research should proceed with this scenario in mind; research methods should follow the standards of the law of evidence in the pursuit of data integrity, and research strategies should aim to meet the tests that courts have applied to aboriginal claims to rights and title cases. As many Elders who lived through the period in Canada when it was illegal for Native people to hire lawyers to initiate land claims would say, a different relationship with the state may only be an election away.

The question of research methods is a straightforward one, and we will not discuss it here except to say in passing that rigorous research methods which both ensure data integrity and integrate Aboriginal perspectives in the results should be a priority. First Nations may need to develop methods to standards beyond those described in the current Traditional Use Study Program (T.U.S.P.) guidelines (Ministry of Forests 1996), though following stricter methods will make the process of collecting comprehensive traditional use information a more resource intensive, time consuming process. Research, as always, will be a balance of time and money against the need for information.

The question of court tests of Aboriginal claims is more complex, and it is worth exploring it in more detail to see what its implications are for traditional use studies. Elias (1993) has investigated the tests applied by the courts in various Aboriginal rights cases in Canada, and he offers a summary of these in the form of questions which provide us with a good place to start this exploration. Since his research predates the recent Vander Peet outcome, we have updated his questions where appropriate, in parentheses. The questions are:

1. What is the specific territory in which an existing aboriginal interest is claimed?
2. What is the significance to the claimants of the current occupation of lands and use of resources?
3. On what grounds may the claimants be said to constitute an organized society?
4. What is the historical relationship between the claimants and those who in the (period prior to European contact) occupied the lands in which an interest is presently claimed?

5. Are the practices currently claimed as recognized and protected rights consistent with traditional practices (ie., integral to a specific Aboriginal societies in the period prior to European contact)?

6. Has the claimant group retained exclusive occupation of the territory claimed?

As we can see, traditional use studies as they have been described here today have the ability to provide partial answers to a number of these questions (most notably to question one, through the development of map biographies), but certainly not all of them. First Nations obviously need to engage in various other sorts of research in addition to traditional use studies if they are to be prepared to answer such questions before the courts. Although broadening the scope of these studies while under contract with the Provincial Traditional Use Study Program may not allow for in-depth research into land use and the patterns of social organization, First Nations would be well advised to consider combining their traditional use research with genealogical investigations (to help answer questions four and three) and harvest studies (to answer questions two and five), and to include in their traditional use research an emphasis on thorough examination of the social relations of production, distribution and consumption of resources (again in support of question three). In short, First Nations need to document not just their use of specific points on the land, but also the character and quality of their relationship to their entire territories.

The consultative value of traditional use studies that has been pointed out for the treaty process is also of value for preparation for litigation. Identifying through research those traditional activities and territories which are close to abandonment can lead to the development of strategies for their revitalization, through subsistence support programs, culture camps, and other approaches. Identifying the economic importance of subsistence activities, a question that can be at least clarified if not answered through these studies, would be an important source of information for arguments for the balance of convenience in applications for court injunctions against resource development.

Again it is worth noting that different First Nations may be able to more readily answer these court tests than others. In cases where social and territorial disruption have been severe, evidence for continued historical occupancy and use of resources may be hard to come by, and arguments about alienation and destruction of resources may become more important.

Conclusions: Balance the Power

Traditional use studies are carried out in the complex and inherently political areas of resource management, treaty negotiations and litigation. Researchers conducting these studies need to be aware of the important implications their studies have on defining and possibly delimiting Aboriginal rights. We believe that by acknowledging the many contexts for the use of traditional use studies, and taking care to consider their implications, First Nations will be better able to balance their research needs in support of Aboriginal rights with the demands of non-Native resource managers.

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