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ARTICLES

An Endangered Species: Aboriginal Whaling and the Right to Self-Determination and Cultural Heritage in a National and International Context

by Jeremy Firestone and Jonathan Lilley

I. Introduction

Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere, and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith.

So stated Felix Cohen in his seminal article, *The Erosion of Indian Rights*.¹ It is through Cohen's lens that we examine the recent controversy over aboriginal whaling in the Pacific Northwest of the United States. On June 16, 1994, the federal government removed the eastern North Pacific stock of gray whales (also known as the California gray whale) from the endangered species list because it was no longer in danger of extinction; nor was it likely to become endangered in the foreseeable future.² That decision set in motion a domestic and international controversy³ that continues to this day that places solemn treaty obligations, a devotion to cultural diversity, and a trust in the scientific community's conclusion that gray whales will not be threatened or endangered by the Makah Indian Tribe's whaling in opposition to a whale's right not to suffer and its right to life, our regret that it will endure both fates, and concern over the effect of al-

lowing whaling in this instance on the global management of whaling.⁴

In Part II of this Article, we place Makah whaling within a cultural context. In Part III, we examine the legal framework within which the controversy arose: the Treaty of Neah Bay, tribal sovereignty, the trust relationship, and the international regime regulating whaling, including its provision for aboriginal subsistence whaling. Finally, in Part IV, we reflect on a number of issues raised by the controversy, including, subsistence need, cultural revival, animal welfare, and majoritarianism.

In light of the promises made at Neah Bay that are enshrined in a treaty between the Makah Indian Tribe and the United States; our fervent conviction that indigenous people possess the right to practice and revitalize their cultural traditions and customs; and the health of the eastern Pacific gray whale, we feel we neither have the right nor is it our place to determine for the Makah whether or not they should engage in a subsistence whale hunt. Indeed, for us, how we personally feel about whales, vegetarianism, and eating low down on the foodchain and whether or not we find whaling to be culturally incoherent, is immaterial.

While we support the Makah people's right to decide for themselves whether to engage in subsistence whaling, we reject the labeling of us as "pro-whaling." If we must have a label, labels such as "pro-indigenous rights," "pro-self-determination," or "pro-solemn promises" are apt.⁵ We likewise refuse to reflexively label all of those who come to a different conclusion than we do, with the pejorative "anti-indigenous" or "anti-Indian." We fully recognize that principled people of both sides of this debate can weigh the interests at hand and come to different conclusions. The aim of this Article is thus broader than the Makah. We look for messages in the Makah whaling controversy to reveal a principled way forward for nation states and indigenous peoples to engage cooperatively in the conser-

Jeremy Firestone is an Assistant Professor of Marine Policy, University of Delaware, College of Marine Studies. Jonathan Lilley is a Ph.D. student at the University of Delaware, College of Marine Studies. The authors acknowledge the comments of Howard Schiffman, Jennifer Sepez, and Peter Singer whose insights and wisdom have enriched the manuscript. The views expressed herein, however, are only those of the authors and do not necessarily reflect in whole or in part, the views of the reviewers. We dedicate this Article to Charles Wilkinson for sharing his ethic of people, place, and culture.

1. Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953*, 62 YALE L.J. 348, 390 (1953).

2. 59 Fed. Reg. 31094 (June 16, 1994).

3. It may be more accurate to say that the rising population of the eastern North Pacific stock of gray whales led separately to conversations within the Makah Indian Tribe about resuming whaling even before delisting and to the delisting process itself, both of which in turn led to the controversy. See Jennifer Sepez, Political and Social Ecology of Contemporary Makah Subsistence Hunting, Fishing, and Shellfish Collecting Practices 72-73 (2001) (unpublished Ph.D. dissertation, University of Washington) (on file with University of Washington and the authors).

4. See Matthew Dennis, *Makahs and Gray Whales: Not Black and White*, ECOTONE, Fall 1999, at 3, 4, available at <http://www.uoregon.edu/~ecostudy/resources/publications/ecotone/Web%20PDF%20Versions/Ecotone%20Fall%20%2799.pdf>.

5. We would also note that we support the existing moratorium on commercial whaling, which has allowed whale stocks to recover, and soundly reject whaling that uses "scientific" study as a pretext.

vation, sustainable use, and management of natural resources and biodiversity.

II. Culture

A. What Is Culture?

Culture is essential to human well-being. It functions to meet human needs, contributes to social stability⁶ and, in one form or another, pervades the lives of every person on the planet. Yet, as many anthropologists can attest, it can be difficult to define and to do so fully would require far more space than allowed for here. Fifty years ago there were over a hundred definitions of culture⁷ and this number has only increased since. The first such definition can be traced back to the British anthropologist Sir Edward Burnett Tylor. In 1871, Tylor defined culture as “that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society”⁸ and this concept of culture as being acquired, or learned, as opposed to being biologically inherited continues to influence our ideas of what culture is today. Since Tylor, numerous scholars have refined the concept of culture, with Franz Boas, Bronislaw Malinowski, Emile Durkheim, and Claude Levi-Strauss, to name but a few, all contributing greatly to our current understanding of what culture is. More recent definitions have a tendency to differentiate between people’s actual behavior and the more abstract values, beliefs, and perceptions that underpin their behavior. In other words, culture today is not predominantly seen as observable behavior, but instead “values and beliefs that people use to interpret experience and generate behavior, and which are reflected in their behavior.”⁹ These values are then shared by members of a given society and result in behavior which is acceptable to that particular society.¹⁰ This in turn provides the society with a level of stability.

The above definition, however, belies the potential for conflict that can arise from cultural differences. The obvious corollary of the above is that as people’s experiences differ, so do their values and belief systems. These then give rise to different interpretations of the world around them, which in turn shape their responses and behavior. Conflict can arise when the values, beliefs, and behavior of two, or more, different societies (or, for that matter, from differences among individuals or subgroups within cultures) come into contact with one another. Such a collision of cultures can result in seemingly intractable problems that lack a clear solution. It is within this context that the Makah whaling issue squarely lays.

B. Indigenous Culture in the International Sphere

Before focusing specifically on the Makah, it is worth investigating how indigenous groups are treated at the broader in-

ternational level. This is because there is a fundamental change occurring in the way in which indigenous people are viewed in international environmental law. Whereas before little was said concerning both the rights, and the role of indigenous communities with regard to environmental issues, recently a number of debates have emerged addressing just these issues.¹¹ Often these discussions are framed within the wider context of environmental justice, which, although not solely restricted to indigenous groups, can be applied to a number of indigenous issues.¹² In light of this concept, a number of nations have recognized indigenous claims to traditionally used environmental resources.¹³

A number of recent international agreements have addressed the issue of indigenous rights. The International Covenant on Economic, Social, and Cultural Rights (ICESR) states that “[a]ll peoples have the right to self-determination. By virtue of that right they shall freely determine their political status and freely pursue their economic, social, and cultural development.”¹⁴ In a similar vein the International Convention on Civil and Political Rights provides that States shall not deny religious, ethnic or linguistic minorities the “right, in community with the other members of their group, to enjoy their own culture. . . .”¹⁵ More recently the Rio Declaration declares that “[i]ndigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture, and interests and enable their effective participation in the achievement of sustainable development.”¹⁶

In addition to the above, the United Nations (U.N.) Draft Declaration on the Rights of Indigenous Peoples also clearly addresses the issue of culture as demonstrated by the following extracts:

Indigenous people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social[,] and cultural development.

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes

11. Benjamin J. Richardson, *Indigenous Peoples, International Law, and Sustainability*, 10 RECIEL 1-12, 1 (2001).
12. *Id.* Benjamin Richardson notes how for indigenous peoples, environmental justice “may be interpreted as requiring, at a minimum; the recognition of ownership of land and other resources traditionally utilized; allowing for their effective participation in resource management decision-making; and securing an equitable share of the benefits arising from the use of environmental resources.”
13. *Id.* at 2. Richardson comments how the Maori people in New Zealand, Australia’s aboriginal community, and the Sami people of Scandinavia have all had success in reasserting their traditional rights to hunt and fish.
14. International Covenant on Economic, Social, and Cultural Rights (ICESR), pt. 1, art. 1, 993 U.N.T.S. 3 (1966). The United States has signed but not yet ratified the ICESR.
15. International Covenant on Civil and Political Rights (ICCPR), art. 27, 999 U.N.T.S. 171 (1966). The United States ratified the ICCPR in 1992, albeit with a number of reservations, see Selected Human Rights Treaties and U.S. Status for a list of the reservations, *available at* <http://academic.udayton.edu/race/06hrights/UnitedNations/USStatus.htm> (last visited Oct. 10, 2003).
16. Rio Declaration on Environment and Development, United Nations (U.N.) Conference on Environment and Development, U.N. Doc. A/CONF. 151/5/Rev. 1, *reprinted in* 31 I.L.M. 874 (1992), princ. 22.

6. SERENA NANDA, *CULTURAL ANTHROPOLOGY* 50 (5th ed. 1994).

7. The literature review that yielded these definitions was conducted in the late 1950s by A.L. Kroeber and Clyde Kluckhohn. WILLIAM A. HAVILAND, *CULTURAL ANTHROPOLOGY* 30 (1993).

8. EDWARD BURNETT TYLOR, *PRIMITIVE CULTURE: RESEARCHES INTO THE DEVELOPMENT OF MYTHOLOGY, PHILOSOPHY, RELIGION, LANGUAGE, ARTS, AND CUSTOMS* (1871), *cited by* HAVILAND, *supra* note 7, at 30.

9. HAVILAND, *supra* note 7, at 30.

10. *Id.* at 29.

the right to maintain, protect[,] and develop the past, present[,] and future manifestations of their cultures. . . .

... Indigenous people have the right to maintain and develop their political, economic, and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

... Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas, and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.¹⁷

This shift in emphasis has not been restricted only to recognition of indigenous peoples' rights. Rather, there has been a growing appreciation that indigenous groups should be involved in the construction of international agreements and in the management of their traditionally owned resources. Prior to this shift in attitude, indigenous communities had little if any input into the management process. As one scholar has noted:

Not only did indigenous people not participate in the development of international legal norms, but international legal law is reflective and constitutive of norms which were imposed, typically by force, upon them. . . . International law is the product of states and as such reflects the core values and interests of states, rather than the indigenous peoples against whom it has been employed to effect their subordination.¹⁸

In light of the growing awareness surrounding the role of indigenous people in the international arena, their demands to be viewed as separate autonomous actors are increasingly being heard.¹⁹ This can be exemplified by a brief comparison in the construction of international environmental treaties during the 20th century. Whereas the older treaties, for example the Fur Seals Convention of 1911²⁰ and—perhaps more relevant here—the 1946 International Convention for the Regulation of Whaling (ICRW)²¹ treated indigenous peoples as being the responsibility of the nation state in which they were located, today indigenous groups are increasingly seen as being separate entities with their own voice in the decisionmaking process. This decolonization

process—stimulated to a large extent by the U.N. Charter²²—is reflected in two recent international agreements, the Convention on Biological Diversity (CBD) and the Arctic Council.

The CBD, which came into force on December 29, 1993, presently has 187 Member States, and, as a result, is one of the most widely ratified environmental conventions.²³ Although both the Preamble and Article 8(j) of the CBD backed away from using more specific language such as “rights” and “peoples” with regard to indigenous communities, the CBD does recognize the “close and traditional dependence of many indigenous local communities embodying traditional lifestyles on biological resources.”²⁴ The ambiguous language can be put down to the fact that, despite an increasing recognition of indigenous rights, the issue is still controversial²⁵ and it is unlikely that the CBD would have been so widely ratified had it been more direct on the subject of indigenous rights. However, of more interest to this discussion is the Ad Hoc Working Group, which has been established by the CBD's Conference of the Parties (COP) to investigate implementation of Article 8(j).²⁶ The Parties involved in the Working Group are encouraged to include representatives of relevant indigenous communities that wish to participate in the process. Although the Parties are only “encouraged” to include such groups and not obliged to, the COP is attempting to provide a forum for participation by indigenous groups. Such a forum will thus allow indigenous views to be included in the debate and will provide the opportunity for such groups to influence policy formulation.²⁷

The Arctic Council is another recent international development that allows for the input of indigenous groups at a high level. Established in 1996, the council comprises eight Member States and six “Permanent Participants.”²⁸ The cat-

17. Draft Declaration on the Rights of Indigenous Peoples, arts. 3, 12, 21, 25 (emphasis added).

18. William Bradford, *Save the Whales, Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes in the New International Economic Order*, 13 ST. THOMAS L. REV. 155, 212 ns. 232, 235 (2000).

19. Richardson, *supra* note 11, at 3.

20. Convention Between the United States, Great Britain, Russia, and Japan for the Preservation and Protection of Fur Seals (July 7, 1911) (no longer in force), 37 Stat. 1542, available at <http://fletcher.tufts.edu/multi/sealtreaty.html>.

21. International Convention for the Regulation of Whaling (ICRW) 161 U.N.T.S. 72, Dec. 2, 1946, 62 Stat. 1716. The International Whaling Commission (IWC) website is found on the Internet at <http://www.iwcoffice.org/>. For a comprehensive history of the global effort to conserve and regulate the hunting of great whales, see PATRICIA BIRNIE, *INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING* (1985). For a detailed history of the aboriginal subsistence exemption, see Alexander Gillespie, *Aboriginal Subsistence Whaling: A Critique of the Interrelationship Between International Law and International Whaling Commission*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 77 (2001).

22. Richardson, *supra* note 11, at 5. Richardson notes how the two most important concepts of the charter with regard to indigenous rights are Articles 1(2) (which, in pertinent part, addresses the need to show respect for the principles of equal rights and self-determination of people) and 1(3) (which, in pertinent part, discusses the issue of human rights and fundamental freedoms for all, without discrimination as to race, sex, language, or religion).

23. See <http://www.biodiv.org/world/parties.asp> (last visited Oct. 12, 2003). See also PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 568 (2002).

24. BIRNIE & BOYLE, *supra* note 23, at 580.

25. *Id.*

26. Article 8(j) in full reads that each contracting party shall, as far as possible and appropriate

[s]ubject to its national legislation, respect, preserve, and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices.

Article 8: In-Situ Conservation, available at <http://www.biodiv.org/convention/articles.asp?lg=0&a=cbd-08> (last visited Oct. 11, 2003).

27. BIRNIE & BOYLE, *supra* note 23, at 580.

28. The eight member states are: Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States. The permanent participants are the Aleut International Association, the Arctic Athabaskan Council, the Gwich'in Council International, the Inuit Circumpolar Conference, the Saami Council, and the Russian Association of Indigenous Peoples of the North. It should be noted, however, that the Arctic Council arises out of a “soft law” arrangement, and as such, its pronouncements are not binding on Member States.

egory of Permanent Participant provides for the “active participation and full consultation with the arctic indigenous representatives within the Arctic Council.”²⁹ One of the fundamental roles of the council is to “provide a means for promoting cooperation, coordination, and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.”³⁰ Although the Permanent Participants do not have quite the same level of authority as the Member States, they certainly have more input than they might otherwise have had if they had solely been represented by the nations within which they lie.

The above examples of the CBD and the Arctic Council demonstrate the paradigmatic shift that appears to be happening with regard to the role of indigenous peoples in the international sphere. Instead of being represented by nation states, there is a growing tendency for indigenous groups to represent themselves at the international level. However, this involvement of indigenous groups has yet to show any signs of affecting the International Whaling Commission (IWC), which is still strongly dominated by nation States. It is worth bearing in mind, however, that, in many cases, the trend appears to be moving in the other direction with an ever-increasing role being given to indigenous peoples. And thus, as we detail below, much of the debate over Makah whaling is an anachronism in that it is taking place in the language of the 20th century rather than in the language of the 21st century.

C. Historical Makah Whaling Culture

He is known as Thunderbird. When he flaps his wings the thunder rolls. When he blinks his eyes the lightening strikes. Upon his back is an immense lake, which pours down during thunderstorms. He sustains himself on whales. Thunderbird brought the first to the people. There was a bad storm, which made it difficult for the Makah to fish. The Makah could not go out in their canoes because the waters were too rough. The storm lasted for many days and the Makah had no food to eat. One morning the Makah found a whale on the beach. It had been caught by Thunderbird who left it there for the people to eat. The people in the village rejoiced and sung songs to honour the whale and Thunderbird.³¹

Whaling is central to Makah culture and the Makah way of life. The above extract highlights the importance of the whale to Makah religion and, as will be demonstrated below, whaling is of equal importance to social structures and hierarchies. Whaling was not only a vital subsistence and commercial activity for the Makah; but also, perhaps more

significantly, it “formed one of the most important organizing aspects of Makah culture” and was highly ritualized.³² The historic importance of whaling to the Makah is underscored by the findings at excavation of the ancient Makah village of Ozette, where whaling accounts for the lion-share of the faunal remains in the middens.³³ The fact that the Makah “were respected up and down the [Pacific] coast as the region’s most skilled whalers” also reflects the vital role that whaling played in Makah culture.³⁴

Detailed accounts of historical Makah whaling practices have been provided by other commentators³⁵ and need not be repeated here. However, it is worth mentioning a number of salient points about traditional practices in order to obtain a fuller picture of the Makah whaling culture. Data achieved from archaeological and ethnohistorical sources indicate that the Makah Indian Tribe hunted a number of different species of whales. In addition to the gray whale (*Eschrichtius robustus*)—the current subject of debate—when the opportunity presented itself the Makah would also hunt humpback (*Megaptera novaeangliae*), finback (*Balaenoptera physalus*), and right whales (*Eubalaena glacialis*).³⁶ It is also clear that the Makah have utilized whale products for a very long time. It is generally accepted that by the time the Makah ceased whaling in the 1920s, they had continuously used whale products for at least 1,500 years.³⁷ Indeed there is evidence to suggest their utilization of whale products far surpasses that time period. Data from the recently excavated Makah village of Wa-atch suggest that whalebones were present 3,850 ± 75 b.p. (before present) and there also exists evidence to suggest that California gray whales have been targeted by aboriginal peoples in the Pacific Northwest region for over 9,000 years.³⁸ Given the history of Makah whaling, and the extent to which the whales were used,³⁹ it is hard to overstate the importance of whales in the Makah

29. Arctic Council, *Permanent Participants*, at <http://www.arctic-council.org/page9.html> (last visited October 11, 2003).

30. Arctic Council, *Declaration on the Establishment of the Arctic Council*, at <http://www.arctic-council.org/establ.asp> (last visited October 11, 2003).

31. Charlotte Cote, “It’s Who We Are.” Makah and Nuu-chah-nulth Whaling—A History 27 (2002) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with University of California, Berkeley and the authors). A member of the Nuu-chah-nulth Indian Tribe—a tribe located on Vancouver Island closely related to the Makah—Charlotte Cote states how she grew up with this legend and how it has been passed down through generations by word of mouth. She notes how the story connects the mythical Thunderbird with the whale and comments how both are important to the Makah and Nuu-chah-nulth cultures.

32. Sepez, *supra* note 3, at 69. The headmen of elite families held whaling rights, while positions relating to the hunt, e.g., harpooner, were inherited.

33. *Id.* at 68.

34. *Id.*; NOAA-NMFS, *Final Environmental Assessment on Issuing a Quota to the Makah Indian Tribe for a Subsistence Hunt on Gray Whales for the Years 2001 and 2002*, at 46, at http://www.nmfs.noaa.gov/pr/PR2/Conservation_and_Recovery_Program/makah_EA.html [hereinafter Final EA].

35. Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165 (2000/2001). See also Ann M. Renker, *Whale Hunting and the Makah Tribe: A Needs Statement*, submitted by the United States to the IWC, IWC/54/AS2, Agenda Item 5.2 (Dec. 4, 2002).

36. *Id.* at 6.

37. Data from the excavations of the Ozette village in the 1960s and 1970s suggest a continuous use of whale products for 1,500 years. Located in a perfect position for intercepting gray whales during their migration, Ozette was a key Makah settlement that was inhabited for over 2,000 years. Approximately 500 years ago a mudslide buried the village, wiping out the settlement but allowing for the preservation of a large number of Makah artifacts that would otherwise have been lost. See Miller, *supra* note 35, at 187. Much of our current knowledge of traditional Makah whaling practices stems from this archaeological treasure trove. Renker, *supra* note 35, at 6 (citing David Huelsbeck, *Whaling in the Precontact Economy of the Central Northwest Coast*, 25 ARCTIC ANTHROPOLOGY 1 (1988)).

38. Miller, *supra* note 35, at 175.

39. *Id.* Very little of a landed whale was wasted. The whale meat was consumed, the blubber was either eaten or rendered into valuable oil which was both consumed and served as a valuable trading commodity, tools and weapons were crafted from the bones, the intestines and stomach made useful storage containers for the oil, and the sinew was skillfully transformed into harpoon ropes.

way of life. Indeed, one federal agent equated Makah whaling with the use of the buffalo by the Indian tribes who lived on the plains.⁴⁰

A typical whaling canoe was made from one cedar log,⁴¹ measured about 40 feet in length, 5 feet in width and held 8 men. Out of these eight, six would paddle, one would steer and one—the chief and owner of the canoe—would be the harpooner. Whaling voyages could last a number of days and the crew might travel 40 miles out to sea, aided by sails made from cedar bark.⁴² A well-developed system of fixed-point navigation and a detailed knowledge of the prevailing winds, currents, the shape of the waves, and the behavior of seabirds were all vital for the Makah to travel so far offshore.⁴³ The harpoons used by the Makah ranged from between 14 and 18 feet. They were made of wood and traditionally tipped with razor sharp mussel shells and barbed with elk antler. Whale sinew was used to tie the tips to the shafts. Floats made from sealskins were then attached in order to tire the whale and prevent it from diving. After the killing blow had been administered with a lance, one of the crew would then sew the whale's mouth shut to prevent water from entering and sinking the prized whale. Depending on distance from shore, the process of towing the whale back could itself take a number of days.⁴⁴ This delay in landing the whale could, on occasion, result in the meat decaying, making it unsuitable for human consumption. If this were to occur, then the meat would be lost, but the tribe would still use the blubber (which did not deteriorate in such a manner) and the rest of the whale.⁴⁵

Whaling was not a task to be undertaken lightly. Given the arduous nature of the hunt, the crew of a whaling canoe prepared for the hunt by going without sleep for days at a time and fasting to condition their bodies for the rigors they might face were the whale to tow the canoe far offshore.⁴⁶ In addition to physical conditioning, all members of the crew underwent spiritual preparations before commencing the voyage and it was held that the success of the trip was as much dependent on the proper observance of the various rituals as it was on the actual skill of the whalers.⁴⁷ The wives of the whaling crew also had to pay strict attention to the spiritual side of the hunt—particularly the wife of the chief whaler. When the crew was at sea, the failure of the chief's wife to behave in a certain way had the potential to adversely impact the hunt.⁴⁸ A large part of the reasoning behind these

rituals stems from the belief that humans are too insignificant to take a whale on their own. Given the size and the power of the whale, it would not be possible for a human to capture a whale if the whale did not want to be caught. The ceremonies that the whalers undertook prior to a hunt were intended to obtain the support of spirits or *tamanos*.⁴⁹ As the whaler alone did not have the strength to take a whale, the *tamanos'* power was vital in conducting a successful hunt. After a whale had been struck, the Makah would pray and sing to the whale pleading with its spirit to turn to face the shore where the members of the village were waiting to praise the whale as an honored guest of the tribe.⁵⁰ Indeed, the Makah saw the whale as being the most respected tribal member⁵¹ and an honorable hunt represented the height of Makah admiration for the whale.⁵² After being struck the whale would usually head for the open ocean. However, if the whaler had good *tamanos* and had sung his songs properly, then the whale would swim toward land. Conversely, if, in the process of the hunt, the whale either damaged or capsized the canoe, then it was held that the crew had not carried out their spiritual rituals correctly.⁵³

In addition to being an axiom of Makah religious beliefs, the whale hunt also provided for a means of social stratification in the village. The entire social order of the Makah culture was built around whaling. The chief of the whaling crew—the man who harpooned the whale—was also the head of a certain social group. This social group would reside in one longhouse that was owned—along with the canoe and all the whaling equipment—by the chief whaler. As noted above, this man also bore the greatest spiritual burden for the crew and it was predominantly his spiritual power that determined the success of the hunt. This combination of material wealth and a strong link with the spiritual world resulted in a large amount of power being accorded to the whaling crew chiefs.⁵⁴

As a result of this power, the chief whalers—or headmen—were situated at the top of the social pyramid, which was established in each longhouse. Each member of the longhouse was then socially linked to the headman in one way or another and the strength of these linkages determined the social hierarchy. A headman who was successful in hunting whales could offer prestige and resources to the members of his longhouse. On the other hand, one who consistently failed to land any whales would lose status in this group, which then resulted in a reduction in both his physical wealth and social standing.⁵⁵

The interrelationship between whale hunting and social standing also affected Makah women. Women played a crucial role in both the ceremonial and the practical aspects of the hunt, especially the wife of the chief whaler. The social status of women mirrored that of the men and the women

40. *Id.*

41. The seminal article on Makah whaling equipment is T.T. Waterman, *The Whaling Equipment of the Makah Indians*, 1 U. WASH. PUB. POL. SOC. SCI. 9 (1920), available at <http://content.lib.washington.edu/cgi-bin/htmlDoc.exe?CISOROOT=/lctext&CISOPTR=1564>.

42. *Id.* at 43; Miller, *supra* note 35 at 176.

43. Renker, *supra* note 35, at 7.

44. Miller, *supra* note 35, at 177.

45. Renker, *supra* note 35, at 9.

46. Miller, *supra* note 35, at 177.

47. Renker, *supra* note 35, at 9.

48. During the early part of the 20th century, Edward Curtis provided a first hand account of Makah whaling practices and noted that before a hunt "the whaler and his wife observe a long and exacting course of purification, which includes sexual continence and morning and evening baths at frequent intervals from October until the end of the whaling season . . . about the end of June." EDWARD CURTIS, *THE NORTH AMERICAN INDIAN: BEING A SERIES OF VOLUMES PICTURING AND DESCRIBING INDIANS OF THE UNITED STATES, THE DOMINION OF CANADA, AND ALASKA* (Frederick W. Hodge ed., 1911, reprinted 1970), cited by Renker, *supra* note 35, at 8. Renker

continues by stating that when the crew was at sea, one of the duties of the wife of the chief whaler was to lie perfectly still. Failure to do so could result in an undersized whale being caught or the whale heading out to sea when harpooned rather than toward land.

49. Miller, *supra* note 35, at 185. An alternative spelling—*tumanos*—is provided by Cote, *supra* note 31, at 42.

50. Miller, *supra* note 35, at 186.

51. *Id.* at 5.

52. Sepez, *supra* note 3, at 76.

53. Cote, *supra* note 31, at 42.

54. Renker, *supra* note 35, at 9.

55. *Id.*

who were married to the headmen sat atop the female equivalent of the social pyramid.⁵⁶

The important whaling positions were generally handed down from father to son. The roles of the harpooner, the steersman, and the diver who sewed the whales' mouths shut were all passed down on a heredity basis. The knowledge that accompanied these positions also was passed on to one's descendants and access to this knowledge was strictly controlled.⁵⁷ In the same way that a whaler was usually the oldest son of a whaler, so his wife would be the oldest daughter of another whaler. Such a union between two whaling families would improve the standing of both families in the village. The power obtained from such social maneuvering could then be consolidated by the newly married couple and passed down to the next generation, thereby allowing the family to maintain its position of importance in the community.⁵⁸

Despite the strict hierarchical nature of Makah society, whaling was of a benefit to all members of the community. Although only a few tribal members actually whaled, the village shared the whale's resources.⁵⁹ As with the other aspects of the hunt, a strict set of rules determined how the butchering process should be undertaken. The rules determined which parts of the whale had to be decorated and ceremonially treated, which parts of the whale those involved in the hunt received, and which parts were given to the rest of the village.⁶⁰ This process thus had the dual purpose of both strengthening the social hierarchy of the community and providing resources for the entire tribe.

A ceremonial feast, known as a potlatch, provided for a second means of wealth distribution within Makah communities. When a tribal headman had accumulated a substantial amount of wealth he might decide to hold a potlatch for the rest of the village. During the feast, he would then give away many of his possessions to other members of the tribe, gaining a great deal of respect in the process. Although from a non-Indian mindset this may seem rather unusual—obtaining wealth only to give it away—the practice was commonplace throughout the Pacific Northwest⁶¹ and played an important role in Makah culture. The potlatch served the dual purpose of enhancing the headman's standing within the tribe and redistributing wealth to those lower down the social hierarchy. In Makah communities, given that most of the wealth was obtained from whaling, it was generally the whalers who would hold potlatches.⁶² Potlatches are still held today when there is an event worth celebrating, such as the landing of a whale.⁶³

The above discussion demonstrates the importance of the whale hunt to the traditional Makah social order. In short, the Makah believe that the right to hunt whales was given to the Makah by Thunderbird. Whales were held to be too powerful for humans alone to take and spiritual powers were required for a hunt to be successful. The whale, when landed, was given great respect and treated as an honored

guest of the tribe. The whale hunt itself provided the village with a social structure that allowed for the community to function in a well-ordered manner.

Before progressing further, it is worth comparing the Makah's perception of the whale with that of many western environmentalists. Due to a general lack of understanding about the world's oceans,⁶⁴ there exists a certain mystery surrounding the biological, physical, and chemical processes of the oceans. It has been suggested that some environmental groups have capitalized on this lack of knowledge and created the image of a "super-whale."⁶⁵ By combining all of the positive characteristics of various different whale species, advocates of whale protection have been able to depict any whale as possessing a host of admirable qualities. In light of the fact that whales have existed for millions of years and display anthropomorphic qualities such as affection and playfulness, it is not hard to see why these mammals have achieved the status they have among much of the general population and within many environmental circles.

However, to state that all whale-preservationists view whales in this fashion would be a gross oversimplification of the issue and no doubt many of those who argue against whale hunting have a much more accurate understanding of the individual qualities that different whale species possess. To some—whether they see whales as "super" or not—the qualities that whales possess provide whales with the same standing—and therefore, the same right to live—that humans have. Such a viewpoint is possibly best summarized by Anthony D'Amato and Sudhir Chopra who posit that "[t]o be sure, whales are not human, but are they 'less' than human?"⁶⁶ Because the Makah people likewise associate whales with human traits, the crux of the debate is more over the "proper relationship between humans and whales" than over the specific traits of the gray whale.⁶⁷ Setting aside the legal arguments, for many people, the Makah whaling con-

64. THE OCEAN PROJECT, COMMUNICATING ABOUT OCEANS: THE RESULTS OF A NATIONAL SURVEY 24 (1999), available at http://www.theoceanproject.org/what_we_do/research.html#analysis. In a study of the American public, when asked five questions about the functions of the ocean, 69% of the respondents could answer no more than two of the questions correctly. Only 1 in 10 could answer four or more questions correctly.

65. Arne Kalland, *Whale Politics and Green Legitimacy*, 9 ANTHROPOLOGY TODAY 3, 4 (1993). Arne Kalland notes how by creating this concept of a super-whale, the diversity that exists among the various species is hidden. He continues by commenting that

we are told that "the whale" is the largest animal on earth (this applies to the blue whale); that it has the largest brain on earth (the sperm whale); that it has a large brain-to-body-weight ratio (the bottlenose dolphin); that it sings nicely (the humpback whale); that it has nurseries (some dolphins); that it is friendly (the gray whale); that it is endangered (the blue and right whales) and so on. By talking about *the* whale, an image of a single whale possessing *all* these traits emerges.

Id. (emphasis in original).

66. Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21-62, 27 (1991).

67. Jennifer Sepez, *Treaty Rights and the Right to Culture: Native American Subsistence Issues in U.S. Law*, 14 CULTURAL DYNAMICS 143, 154 (2002). As Jennifer Sepez notes, among hunter-gatherer societies anthropomorphism of animals is widespread. *Id.* As such, the Makah see the "right of humans and other animals to hunt for food" as "an inherent part of the order of nature in which the prey willingly succumbs to those hunters who demonstrate worthiness by their behavior." *Id.* For the Makah, moral behavior is not displayed by recognizing a whale's right to life, but rather, in the honor and respect accorded the whale. *Id.*

56. *Id.*

57. Sepez, *supra* note 3, at 69.

58. Renker, *supra* note 35, at 49.

59. Cote, *supra* note 31, at 45.

60. Renker, *supra* note 35, at 9.

61. Miller, *supra* note 35, at 174.

62. *Id.*

63. Sepez, *supra* note 3, at 120.

troverly simply boils down to this issue. Two very different cultures—two very different views.

III. The Legal Framework for Makah Whaling

A. Treaty of Neah Bay and the Pre-1995 History of Makah Whaling

The Makah Indian Tribe's ancestral lands are located in the state of Washington on the Olympic Peninsula. In 1855, the United States and the Makah entered into a treaty, known as the Treaty of Neah Bay. A treaty with an Indian tribe is a negotiated settlement between sovereigns—the United States and the tribe in question. A treaty establishes “not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”⁶⁸

Tribal chiefs negotiating on behalf of the tribe discussed the Makah's relationship with the ocean, expressing the sentiment that the Makah people considered the sea to be more important than the land. A Makah chief made this point eloquently: “I want the sea. That is my country.”⁶⁹ The Makah's close relationship with the sea mirrors their traditional dependence on it for subsistence as most of their food supply “came from the sea where they fished for salmon, halibut, and other fish, and hunted for whale and seal.”⁷⁰ As a result of the Makah's intimate relationship with the sea, Gov. Isaac Stevens (D-Wash.), the Territorial Governor and representative of the United States at the treaty negotiations, “found it necessary to reassure the Makah that the government did not intend to stop them from marine hunting and fishing but in fact would help them to develop these pursuits.”⁷¹

While the Makah ceded most of their ancestral lands to the United States in the Treaty of Neah Bay, the Makah, in pertinent part, *reserved* a right to hunt whales. Specifically, the treaty provided that the “right of taking fish and of *whaling* and sealing at usual and accustomed grounds and stations is further secured [to the Makah] in common with all citizens of the United States. . . .”⁷² The Treaty of Neah Bay is the only treaty between the United States and a Native American tribe in which a tribe explicitly secured the right to whale.⁷³ Although other tribes could assert a right to

whale under more general treaty reservations, such as a right to fish and hunt,⁷⁴ the fact that the Treaty of Neah Bay explicitly secures a right to whale “suggests the historic importance of whaling to the Makah.”⁷⁵

As has been discussed above, whaling played a vital role in both subsistence practices and social organization. However, “despite the central place of whaling in their lives,” the Makah ceased whaling in the 1920s.⁷⁶ A number of reasons have been advanced for why the Makah stopped whaling at that time, first and foremost among them; the widespread commercial exploitation of whales had placed the gray whale on the brink of extinction.⁷⁷ Other reasons include: a decline in the societal demand for whale oil; social and economic dislocation of the tribe; and opposition by federal authorities.⁷⁸ Indeed, government officials banned cultural and religious practices such as the potlatch and made repeated efforts to convert the Makah lifestyle from one based on hunting and fishing to one premised on agriculture.⁷⁹

Today, the Makah Indian Nation has approximately 2,390 members, with slightly more than one-half living on the Makah Indian Reservation.⁸⁰ The Indian reservation is comprised of slightly more than 27,000 acres in the northwestern corner of the Olympic Peninsula, 719 acres in and around the Ozette village, and two offshore islands.⁸¹

that the case was moot as the approval of the Makah whale hunt expired at the end of 2002 or, if not moot, that the hunt was otherwise exempted from the requirements of a federal law directed at marine mammal protection because the hunt was authorized pursuant to an international treaty. *See infra* notes 168-77 and accompanying text. The Makah also requested rehearing en banc, arguing that the case was moot, or, in the alternative, that the panel misapplied the conservation necessity standard. *See infra* note 212. In its June 7, 2004 order and opinion, denying the renewed request for rehearing en banc, the panel held that the case was not moot and addressed the mootness question by appending a lengthy footnote (number 27) to the end of the text of the opinion. As of June 14, 2004, neither the United States nor the Makah have announced whether or not they intend to file a writ of certiorari in the Court.

74. *See, e.g.*, Treaty With the Yakimas, 12 Stat. 951, 953 (1855) (securing the “right” of fishing and “privilege” of hunting); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 9 ELR 20517 (1979). While it is true that the Yakima Treaty distinguishes between a fishing “right” and a hunting “privilege,” the Court

has never used a distinction between rights and privileges to justify any differences in State regulatory authority [over Indian tribes]. Moreover, . . . the starting point for any analysis of these questions is the Treaty language itself. The Treaty must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians. There is no evidence that the Chippewa understood any fine legal distinctions between rights and privileges.

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 205-06, 29 ELR 20557 (1999) (citations omitted).

75. *Anderson*, 350 F.3d at 825.

76. *Id.* at 826.

77. *Metcalfe v. Daley*, 214 F.3d 1135, 1137, 30 ELR 20637 (9th Cir. 2000). *See also* Sepez, *supra* note 3, at 70.

78. *Anderson*, 350 F.3d at 826.

79. Sepez, *supra* note 3, at 37-39; Renker, *supra* note 35, at 12-15.

80. *See* <http://www.makah.com/community.htm> (last visited Aug. 11, 2003); Renker, *supra* note 35, at 17.

81. *Id.* The Treaty of Neah Bay established the primary reservation.

Subsequent expansion of the reservation boundaries to include villages other than Neah Bay occurred in 1872 and 1873 via three Executive Orders issued by the U.S. government. The village Ozette was not added to the reservation. Rather, another Executive Order in 1893 created a separate

68. *United States v. Winans*, 198 U.S. 371, 381 (1905).

69. Renker, *supra* note 35 (quoting George Gibbs, Treaty of Neah Bay [Transcript of Journal Proceedings] (U.S. National Archives, Records Relating to the Negotiation of Ratified and Unratified Treaties With Various Tribes of Indians, 1801-1869; microcopy No. T-494, roll 5 (1855)). *See also* *United States v. Washington*, 730 F.2d 1314, 1315 (9th Cir. 1984). Gov. Isaac Stevens (D-Wash.), the U.S. representative who negotiated the Treaty of Neah Bay “found the Makah not much concerned about their land, apart from village sites, burial sites, and certain other locations, but greatly concerned about their marine hunting and fishing rights.” *United States v. Washington*, 384 F. Supp. 312, 363 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

70. *Id.*

71. *Id.* *See also* Miller, *supra* note 35, at 195-99.

72. 12 Stat. 939, 940 (1855) (emphasis added).

73. *Anderson v. Evans*, 314 F.3d 1006, 1012 (9th Cir. 2002), *reh'g en banc denied and opinion amended*, 350 F.3d 815, 825 (9th Cir. 2003), *renewed request for reh'g en banc denied and opinion amended second time*, 371 F.3d 475 (9th Cir. 2004). Page citations herein will be to the first amended opinion unless our purpose is to highlight the procedural history of the case or a change in the reasoning of the panel. The first amended opinion invited the parties to file a second request for rehearing or rehearing en banc. 350 F.3d at 822. On or about February 10, 2004, the United States filed a petition requesting rehearing or rehearing en banc. The United States argued

B. Tribal Sovereignty and the Federal Trust

The rights reserved by the Makah Nation in the Treaty of Neah Bay raise several preliminary questions. From where does tribal authority originate? How does the Makah Nation fit within the U.S. constitutional system? What is the relationship between the Makah and foreign nations? And finally, what is the relationship between the federal government and the Makah Nation? The short answer to these questions is that the Makah have a "measured separatism"⁸² from the federal government and the states. To a large extent, the longer answers can be found in a series of opinions issued some 170 years ago, often referred to as the "Marshall Trilogy."⁸³ Felix Cohen, "the Blackstone of American Indian Law,"⁸⁴ aptly summed up these and other U.S. Supreme Court cases in 1942:

Perhaps the most basic principle of all Indian Law . . . is that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.* Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer safely be permitted to handle. The statutes of Congress, then must be examined to determine the limitations of tribal sovereignty rather than to determine its source or its positive content. What is not expressly limited remains within the domain of sovereignty.

... 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 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 by 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 a government.⁸⁵

Ozette Reservation to accommodate 64 Makahs who refused to move to Neah Bay. Today, the Makah Tribal Council is the official governing body of both the Makah Reservation and the Ozette Reservation; the U.S. Congress ratified the Makah Constitution in 1937 after the Tribe voted to accept the terms of the Indian Reorganization Act in 1936.

Id. (citations omitted).

82. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14 (1987).
83. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).
84. FELIX S. COHEN, *Preface to FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW* (Rennard F. Strickland & Charles F. Wilkinson eds., 1982) [hereinafter COHEN 1982].
85. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122-23 (1942) (emphasis in original) [hereinafter COHEN 1942].

Thus, although the U.S. Constitution subsequently acknowledged Indian tribes in the "Indian Commerce Clause,"⁸⁶ relations between Indian tribes and the federal government were crystallized in treaties, and tribal powers qualified over time by express language from the U.S. Congress, the "Marshall-Cohen" formulation⁸⁷ recognizes the centrality of tribal sovereignty and that such sovereignty pre-dates the settlement of the United States by the European colonists.

Also of direct relevance to the Makah dispute is the principle that Indian tribes lack power to engage foreign nations. Rather, in international fora, a tribe must rely on the trust relationship⁸⁸ that exists between it and the federal government as the impetus for the federal government to advocate on its behalf.⁸⁹ Thus, to the extent gray whales are regulated by international institutions (and they are), the Makah must look to the United States and "appeal to it for relief to their wants."⁹⁰

Related to the principle that tribes possess full sovereignty except as expressly limited by Congress is the notion that Congress has the power to unilaterally abrogate treaty rights.⁹¹ At the same time that the Court first recognizing the sweeping congressional power of abrogation, it also cautioned Congress against misuse of that power, stating that "presumably such power will be exercised 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."⁹²

Difficult questions of implied repeal (abrogation or modification)⁹³ of treaty rights arise in those instances when Congress has exercised its regulatory authority without openly mentioning the effect of the law on Indian tribes. The basic

86. Article 1, §8 of the Constitution grants Congress the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." See also Articles of Confederation, art. IX (U.S. 1777) (Congress has the "sole and exclusive right and power . . . of regulating the trade and managing all affairs with the Indians, not members of any of the States.").

87. WILKINSON, *supra* note 82, at 58.

88. The trust relationship was articulated by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 26-27 (1831):

It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.

89. *But cf. Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1997) (upholding the Secretary of State's failure to lodge an objection with the IWC after the IWC withdrew the aboriginal subsistence bowhead whale quota that had permitted Alaska Inupiat hunt. The quota was reestablished the following year.

90. *Cherokee Nation*, 30 U.S. at 27.

91. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

92. *Id.* at 566.

93. In the absence of an explicit statement "the intention to *abrogate or modify* a treaty is not to be lightly imputed to the Congress." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (emphasis added) (declining to construe the Termination Act as abrogating Indian hunting and fishing rights).

rule is that “absent explicit statutory language” courts are “extremely reluctant to find congressional abrogation of treaty rights.”⁹⁴ The need for explicit language, however, is not “a *per se* rule,” and in cases of implied repeal, the Court has considered the “face of the Act,” its legislative history and “surrounding circumstances.”⁹⁵ The evidence of such intent, however, must be “clear and reliable.”⁹⁶ In other words, the Court will not “construe statutes as abrogating treaty rights in a ‘backhanded way.’”⁹⁷ “What is essential is clear evidence that Congress actually considered the conflict between its intended action on one hand and Indian treaty right on the other, and chose to resolve that conflict by abrogating the treaty.”⁹⁸

C. The IWC and Aboriginal Subsistence Whaling (ASW)

The global conservation, management, and harvesting of great whales is governed by the 1946 ICRW and the commission it established, the IWC (or Commission).⁹⁹ Each nation that is a Party to the ICRW is a Member of the IWC.¹⁰⁰ The United States hosted the conference that led to the ICRW in Washington, D.C., and has been a Member of the IWC since its inception. The ICRW empowers the IWC to establish committees to assist it in performing its duties to manage whale stocks through a “Schedule,” which is amended, from time-to-time, usually on an annual basis.¹⁰¹ It is through the Schedule that the IWC sets the regulations for whaling, which participating nations must abide by. The Schedule is considered to be an “integral part” of the ICRW, and indeed, a reference to the ICRW is “understood as including the . . . Schedule either in its present terms or as amended. . . .”¹⁰² Since 1986, the IWC has maintained a moratorium on commercial whaling of all kinds.¹⁰³

To implement the ICRW, Congress enacted the Whaling Convention Act (WCA) of 1949.¹⁰⁴ The WCA prohibits whaling in contravention of the ICRW, including the Schedule, which sets forth conditions and manner of whaling for specific stocks; the WCA; and regulations promulgated pursuant thereto by the Secretary of Commerce.¹⁰⁵ The present regulations, consistent with the ICRW moratorium, prohibit whaling except for authorized aboriginal subsistence whaling.¹⁰⁶

The international community has long treated aboriginal hunting of marine mammals differently than commercial hunting. Indeed, the 1911 Fur Seal Treaty provided that it would not apply to “Indians, Ainos, Aleuts, or other aborigines” who carried out pelagic sealing in canoes.¹⁰⁷ A special exception for aboriginal whaling likewise has a long history and can be traced back to the 1931 Convention for the Regulation of Whaling (CRW), which provides in pertinent part:

The present Convention does not apply to aborigines dwelling on the coasts of the territories of the High Contracting Parties provided that:

- (1) They only use canoes, pirogues or other exclusively native craft propelled by oars or sails;
- (2) They do not carry firearms;
- (3) They are not in the employment of persons other than aborigines;
- (4) They are not under contract to deliver the products of their whaling to any third person.¹⁰⁸

This exception was not carried over to the 1946 (present day) convention, the ICRW, although the convention did recognize that whale stocks should not be stabilized so rapidly as to cause “widespread economic and nutritional distress.”¹⁰⁹ Instead, aboriginal whaling has been addressed in the ICRW Schedule. As noted above, the Schedule is part of the treaty in every meaningful sense.¹¹⁰ When the ICRW

94. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 9 ELR 20517 (1979) (refusing to find fishing rights of the Makah and other tribes of the Pacific Northwest were abrogated by a treaty between the United States and Canada). See also, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“Absent explicit statutory language . . . this Court accordingly has refused to find that Congress has abrogated Indian treaty rights.”).

95. *United States v. Dion*, 476 U.S. 734, 739, 16 ELR 20676 (1986).

96. *Id.* (quoting COHEN 1982, *supra* note 84, at 223).

97. *Dion*, 476 U.S. at 739 (1986) (finding a strong suggestion on the face of the Eagle Protection Act (authorizing the Secretary of the Interior to permit the taking of bald and gold eagles “for the religious purposes of Indian tribes,” 16 U.S.C. §668a), and supporting legislative history of the Eagle Protection Act that Congress intended to abrogate Indian rights to take eagles) (quoting *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968)).

98. *Dion*, 476 U.S. at 739.

99. ICRW 161 U.N.T.S. 72, Dec. 2, 1946, 62 Stat. 1716. The IWC website is found on the Internet at <http://www.iwcoffice.org/>.

100. ICRW art. III.1.

101. *Id.* arts. III.4 and V.

102. *Id.* art. I.1.

103. ICRW Schedule, §III, ¶ 10. Under the ICRW’s objection procedure, ICRW, Article V.III., Norway, despite being an ICRW member, has continued to engage in commercial whaling. See footnote to ICRW Schedule §III, ¶ 10, available at <http://www.iwcoffice.org/Schedule.htm#FOOTPARA10e>. Japan conducts “scientific research” whaling pursuant to Article VIII of the ICRW. On August 6, 2003, Iceland announced its intention to resume scientific research whaling. See <http://news.bbc.co.uk/2/hi/science/nature/3128863.stm> (last visited Aug. 11, 2003) and on August 18, 2003, harpooned a whale. See <http://www.nytimes.com/2003/08/19/international/europe/19BRIE1.html?ex=1062385274&ei=1&en=c50db361965cec7a>.

104. 16 U.S.C. §§916-916l, 64 Stat. 421 (1950).

105. *Id.* §916c(a)(1).

106. 50 C.F.R. §230.1.

107. Convention Between the United States, Great Britain, Russia, and Japan for the Preservation and Protection of Fur Seals (July 7, 1911) (no longer in force), 37 Stat. 1542, available at <http://fletcher.tufts.edu/multi/sealtreaty.html>. Article IV provides:

It is further agreed that the provisions of this Convention shall not apply to Indians, Ainos, Aleuts, or other aborigines dwelling on the coast of the waters mentioned in Article I, who carry on pelagic sealing in canoes not transported by or used in connection with other vessels, and propelled entirely by oars, paddles, or sails, and manned by not more than five persons each, in the way hitherto practiced and without the use of firearms; provided that such aborigines are not in the employment of other persons or under contract to deliver the skins to any person.

108. CRW, Sept. 24, 1931, I.N.T.S. CLU, No. 3586, art. 3, available at <http://www.oceanlaw.net/texts/whales31.htm>. There were 21 signatory nations to the 1931 Convention (also known as the 1935 Convention, as it did not become effective until 1935). See also NATIONAL TASK FORCE ON WHALING, A UNIVERSAL METAPHOR: AUSTRALIA’S OPPOSITION TO COMMERCIAL WHALING ch. 3 (1997), available at <http://ea.gov.au/coasts/species/cetaceans/whaling/index.html>.

109. ICRW pmbl. See also The 1937 International Agreement for the Regulation of Whaling, June 8, 1937, 52 Stat. 1460, I.N.T.S. No. 933, 190 L.N.T.S. 79, art. 4 (forbidding, in pertinent part, the taking or killing of gray whales), available at <http://www.oceanlaw.net/texts/whales37.htm>. Only nine nations were signatories to the 1937 Convention; NATIONAL TASK FORCE ON WHALING, *supra* note 108.

110. ICRW art. I.1.

was negotiated and came into force, it is notable that the Schedule explicitly provided an exception for aboriginal hunting of gray whales. And while the Makah Nation was not explicitly mentioned by name in the provision, the Schedule (like the present Schedule's gray whale aboriginal subsistence whaling provision) did not mention any aboriginal group by name.¹¹¹ The Schedule provided that "[i]t is forbidden to take or kill gray or right whales, except when the meat and products of such whales are to be used exclusively for local consumption by the aborigines."¹¹² Over the next several decades, subsequent requests for ASW of other whale species or stocks were handled in a similar fashion.¹¹³

In the early 1980s, the IWC created a special ad hoc workgroup to provide it with guidance on how to handle proposals for ASW. The workgroup reached agreement on the following three definitions, which are relevant to the question of the status of Makah whaling:

"Aboriginal subsistence whaling" means "whaling, for purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community, familial, social, and cultural ties related to a continuing traditional dependence on whaling and on the use of whales."

"Local aboriginal consumption" means "the traditional uses of whale products by local aboriginal, indigenous or native communities in meeting their nutritional, subsistence, and cultural requirements. The term includes trade in items which are byproducts of subsistence catches."

"Subsistence catches" are "catches of whales by aboriginal subsistence whaling operations."¹¹⁴

The efforts of the workgroup ultimately led the IWC to adopt a resolution in 1983 on ASW and to establish a more formal ASW Subcommittee. In the resolution, the IWC stated that it "recognizes the importance and desirability of accommodating, consistent with effective conservation of whale stocks, the needs of aboriginal people who are dependent upon whales for nutritional, subsistence, and cultural purposes."¹¹⁵ It also indicated that it believed it "appropriate and desirable to establish principles and guidelines for the management of aboriginal subsistence whaling which recognize and seek to accommodate conservation,

nutritional, subsistence¹¹⁶ and cultural needs."¹¹⁷ The terms of reference (jurisdiction) of the ASW Subcommittee are to "consider relevant information and documentation from the Scientific Committee," to "consider nutritional, subsistence, and cultural needs relating to aboriginal subsistence whaling" and to "provide advice on the dependence of aboriginal communities on specific whale stocks to the Commission for its consideration and determination of appropriate management measures."¹¹⁸ In sum, it is apparent that for at least 90 years the international community has recognized the special relationship between aboriginal peoples and marine mammals, with increasing attention over time dedicated to ensuring that the needs of aboriginal peoples and the conservation and proper management of whale stocks are ensured and accommodated.

D. Legal Proceedings in the United States

1. Introduction: The Regulation of the Gray Whale Under the Endangered Species Act (ESA)

In the United States, marine mammals that are threatened or endanger of extinction receive protection under two legal regimes: The ESA of 1973, as amended,¹¹⁹ and the Marine Mammal Protection Act (MMPA).¹²⁰ In 1970, the federal government designated the gray whale as an endangered species under a predecessor act to the ESA.¹²¹ However, because the population of eastern North Pacific stock of gray whales had recovered to almost its estimated original size,¹²² the National Marine Fisheries Service (NMFS) re-

116. For the purposes of Alaska natives, Congress has defined "subsistence uses" to mean the

customary and traditional uses by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §3113.

117. *Id.* (emphasis added). The U.S. Department of State uses a slightly different formulation: ASW is "whaling which is conducted by native whalers with a long history of whaling for cultural and nutritional purposes." U.S. DEPARTMENT OF STATE, U.S. INTERNATIONAL WHALING POLICY 9 (1995), quoted in Bradford, *supra* note 18, at 181 n.99. Curiously, according to *Anderson v. Evans*, 350 F.3d 815, 839 (9th Cir. 2003), the United States represented that the IWC adopted definition espoused by the ASW ad hoc workgroup, *supra* note 114, even though that definition requires a "continuing traditional dependence" on whaling.

118. Report of the Aboriginal Subsistence Whaling Sub-Committee [hereinafter ASW Report], 55-Rep3.doc, at 9 (June 15, 2003), available at [http://www.iwcoffice.org/2003%20Documents/Reports/55-Rep3\(AS\).pdf](http://www.iwcoffice.org/2003%20Documents/Reports/55-Rep3(AS).pdf) (emphasis added).

119. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

120. *Id.* §§1361-1421h, ELR STAT. MMPA §§2-409. Under the MMPA, marine mammals receive some degree of protection irrespective of the health of the population of a given marine mammal stock. Marine mammal stocks that are depleted, which by definition include those that are listed as threatened or endangered under the ESA, receive heightened protection. *Id.* §1362(1).

121. *Metcalf v. Daley*, 214 F.3d 1135, 1138, 30 ELR 20637 (9th Cir. 2000).

122. *But cf.* Joe Roman & Stepehn R. Palumbi, *Whales Before Whaling in the North Atlantic*, 301 SCIENCE 508-10 (2003), available at <http://www.sciencemag.org/cgi/reprint/301/5632/508.pdf> (July 25, 2003) (finding that the "genetic diversity of humpback, minke, and fin

111. However, the Final Act of the Washington Conference that led to the ICRW suggests that provision was included at the behest of the Soviet Union on behalf of the aborigines of Chukotsk and Korjaksk areas within the Soviet Union. Final Act of the International Whaling Conference (Dec. 2, 1946), art. X, reprinted in BIRNIE, INTERNATIONAL REGULATION OF WHALING, *supra* note 21, Vol. 2, 695, 697.

112. ICRW Schedule, ¶ 2. The ICRW, including the schedule as ratified and as it was when that convention was first binding international law, are reproduced in *Proclamation of President Harry S. Truman*, 62 Stat. 1716 1723 (Nov. 10, 1948).

113. Gillespie, *supra* note 21, at 80.

114. G.P. Donovan, International Whaling Commission, International Whaling Commission and Aboriginal/Subsistence Whaling: April 1979 to July 1981, Special Issue 4, International Whaling Commission, Cambridge, England, reporting on the Ad Hoc Technical Committee Working Group on development of management principles and guidelines for subsistence catches of whales by indigenous (aboriginal) peoples, available at <http://www.highnorth.no/Library/Culture/de-of-ab.htm>.

115. REPORT OF THE THIRTY-FIFTH MEETING OF THE INTERNATIONAL COMMISSION ON WHALING 38, app. III (Office of the Commission 1983).

moved that stock from the ESA list in 1994 and began a five-year monitoring program of the stock's viability.¹²³ The stock was so healthy that in the 1999 Status Review, 28 large-whale biology experts agreed that, "the stock was nearing its environmental carrying capacity."¹²⁴ In 2001, the NMFS received a petition requesting it to re-list the eastern North Pacific gray whale as threatened or endangered. The NMFS rejected the petition because it did "not present substantial scientific or commercial information" sufficient to warrant the listing.¹²⁵

2. The Makah and the IWC

In response to the removal of the gray whale from the ESA list, the Makah Nation approached the U.S. government—the U.S. Department of Commerce (DOC), the National Oceanic and Atmospheric Administration (NOAA), which is housed in the DOC, and the NMFS, which in turn is part of NOAA—and requested the U.S. government seek on its behalf an annual ASW quota from the IWC of up to five eastern North Pacific gray whales.¹²⁶ At the 1995 IWC annual meeting, the United States informed the IWC of its intent to submit a proposal on behalf of the Makah.¹²⁷ On March 22, 1996, NOAA and the Makah entered into an agreement that committed NOAA, through the U.S. Commissioner to the IWC, to make a "formal proposal to the IWC for a quota of gray whales for subsistence and ceremonial use by the Makah" provided the Makah first prepared an "adequate statement of need."¹²⁸ The agreement also provided that NOAA would cooperate with the Makah in harvest management and, in the event such a quota was approved by the IWC, that NOAA would revise its regulations to take account of subsistence whaling by the Makah.¹²⁹ Because of precedent that would be set if Makah whaling were approved—authorizing subsistence whaling where there had been a long hiatus in whale hunting by an aboriginal group—and in light of Japan's effort to gain IWC authorization for community-based coastal whal-

ing,¹³⁰ the U.S. proposal generated controversy among IWC Members. Ultimately, some IWC countries blocked the 1996 U.S. proposal.¹³¹

In June 1997, two nongovernmental organizations (NGOs)¹³² wrote a letter to NOAA and the NMFS alleging that those agencies had violated the National Environmental Policy Act (NEPA)¹³³ because they had authorized Makah whaling without first conducting an environmental assessment (EA) or an environmental impact statement (EIS). In response, a draft EA was issued on August 22, 1997, and a new written agreement between NOAA and the Makah was executed that October.¹³⁴ Four days after the parties entered into the new agreement, on October 17, 1997, NOAA/NMFS issued the final EA and made a finding of no significant impact (FONSI).¹³⁵ Thus, both the initial and new agreements were executed prior to the EA being finalized.

Previous to 1997, the gray whale quota was held only by the Russian Federation on behalf of its aboriginal people. As noted above, the 1996 request by the United States on behalf of the Makah Nation for a tribe-specific ASW quota was met with considerable controversy at the IWC. The United States thus took a different tack in 1997. The United States and the Russian Federation agreed to submit a joint request for a 5-year quota of 620 gray whales on behalf of their aboriginal peoples, with the understanding that the average annual harvest of the Chukotka people would be 120 whales while the Makah would be limited to an average of 4 whales per year.¹³⁶ Previous to 1997, only the Russian Federation held a gray whale ASW quota.¹³⁷ It is worth noting that 120 eastern North Pacific gray whales represent less than 27% of that portion of the whale stock that the IWC's Scientific Committee considers could be hunted sustainably.¹³⁸

The gray whale agreement was facilitated by a reciprocal decision by the United States to accommodate Russia's desire to gain an annual aboriginal subsistence quota of bowhead whales for its Chukotka people, a quota that had previously been allocated solely to Alaska natives. Thus, rather than approach the IWC with requests to increase the quotas of bowhead and gray whales to accommodate the needs of the Chukotka people and the Makah Nation—quota in-

whales is inconsistent with the low historical population sizes currently assumed"). The authors do note, however, that genetic and historic estimates "could both be true" if whale populations were "unusually low" when commercial whaling commenced. *Id.* at 509.

123. *Id.* See also 58 Fed. Reg. 3121 (1993). For a discussion of the current status of the stock see *infra* note 138. Because the "estimated annual level of human-caused mortality and serious injury" is less than the potential biological removal (PBR) level, the NMFS does not classify the stock as a "strategic stock" under the MMPA. NMFS, 2002 Stock Assessment Reports, Gray Whale (*Eschrichtius robustus*), Eastern North Pacific Stock, Stock 141, at [http://www.nmfs.noaa.gov/prot_res/PR2/Stock_Assessment_Program/Cetaceans/Gray_Whale_\(Eastern_N._Pacific\)/AK02graywhale_E.N.Pacific.PDF](http://www.nmfs.noaa.gov/prot_res/PR2/Stock_Assessment_Program/Cetaceans/Gray_Whale_(Eastern_N._Pacific)/AK02graywhale_E.N.Pacific.PDF) [hereinafter 2002 Gray Whale Stock Assessment Reports]. See also 16 U.S.C. §1362(19).
124. NMFS, Endangered and Threatened Wildlife and Plants: 90-Day Finding for a Petition to List Eastern North Pacific Gray Whales as Threatened or Endangered Under the Endangered Species Act (ESA), 66 Fed. Reg. 32305, 32309 (June 14, 2001).
125. *Id.* at 32310.
126. *Metcalf*, 214 F.3d at 1138.
127. *Id.*
128. *Id.* at 1139 (quoting Agreement between Makah and NOAA (Mar. 22, 1996)).
129. *Id.* In 1949, Congress enacted the Whaling Convention Act, 16 U.S.C. §916 et seq., to implement the ICRW. NOAA and the NMFS have promulgated implementing regulations at 50 C.F.R. pt. 230.

130. Japan's most recent attempt to win authorization for such local, albeit commercial, whaling was rejected at the 55th Annual Meeting of the IWC. IWC, Final Press Release (2003), available at <http://www.iwcoffice.org/FinalPressRelease2003.htm>.
131. *Anderson v. Evans*, 350 F.3d 815, 826 (9th Cir. 2003).
132. The NGOs are Australians for Animals and BEACH Marine Protection. *Metcalf*, 214 F.3d at 1139.
133. 42 U.S.C. §4332, ELR STAT. NEPA §102.
134. *Metcalf*, 214 F.3d at 1139.
135. *Id.* at 1139-40.
136. *Id.* at 1140.
137. NMFS, Whaling Provisions: Aboriginal Subsistence Quotas, 63 Fed. Reg. 16701, 16703 (Apr. 6, 1998).
138. "Last year, the Committee agreed that a take of up to 463 whales per year is sustainable for at least the medium term (~30 years) and no information was presented this year to change that advice." ASW Report, *supra* note 118, at 4. The NMFS' best estimate of the population size of the stock is at 26,635 animals (with a minimum population estimate of 24,477 and the PBR level of 575 animals, or even higher than that estimated by the ASW Committee). 2002 Gray Whale Stock Assessment Reports, *supra* note 123, at 137-38. "Moreover, the annual subsistence take averaged 97 whales during the 5-year period from 1996-00. This level of take is well below the 1968-93 average of 159 whales per year (IWC 1995b), during which time the population size increased." *Id.* at 141.

crease proposals that likely would have been very controversial—the United States and Russia effectively traded existing quotas.¹³⁹

Ultimately, at its October 1997 meeting, the IWC approved an ASW quota for gray whales and allocated that quota to aboriginal groups “whose traditional subsistence and cultural needs have been recognized.”¹⁴⁰ Although IWC Members reached broad consensus on the October 1997 ASW quotas, the gray whale quota decision was not without controversy. First, by agreeing to a joint quota, the IWC had effectively usurped the ASW subcommittee’s role in evaluating the merits of the U.S. request on behalf of the Makah. Second, the vague language chosen by the IWC to recognize the quota arguably left two open questions: which entity or entities had the authority to recognize such needs among aboriginal groups and which aboriginal groups had been recognized?¹⁴¹

With the IWC approval in hand, the Makah Nation approached its first whale hunt in 70 years with a sense of purpose and responsibility. It formed the Makah Whaling Commission, drafted physical and spiritual guidelines, trained prospective crew members and devised a whale hunt management plan. In 1998, NOAA formally authorized the Makah Nation to engage in subsistence whaling.¹⁴² After a 70-year hiatus, in 1999 the Makah once again went whaling and landed one gray whale.

3. The NEPA Hurdle to Makah Whaling

The coalition opposed to the Makah whale hunt coalition is led by the Sea Shepard Conservation Society and is comprised of marine conservation organizations, animal welfare organizations, and the whale-watching industry.¹⁴³ All told, approximately 250 animal welfare organizations and 27

conservation organizations have expressed opposition to Makah whaling,¹⁴⁴ however, several notable organizations, Sierra Club, Greenpeace, and the World Wildlife Fund (WWF) do not oppose the aboriginal subsistence whaling.¹⁴⁵ A portion of the coalition subsequently commenced suit in U.S. courts.

In *Metcalf v. Daley*,¹⁴⁶ the U.S. Court of Appeals for the Ninth Circuit considered whether NOAA failed to comply with NEPA when it authorized the Makah Indian Tribe to hunt California gray whales. The plaintiff-appellants argued that NOAA violated NEPA because the EA was untimely and inadequate and because NOAA decided against preparing an EIS.¹⁴⁷ Under NEPA, an EIS must be prepared whenever a “major Federal action significantly affect[s] the quality of the human environment.”¹⁴⁸ Because the “die had already been cast” by the time the EA was complete—that is, NOAA had already firmly committed to Makah whaling as witnessed by the 1996 agreement, the court, in a 2-1 decision, held that the government prepared the EA “too late in the decision-making process, i.e., after making an irreversible and irretrievable commitment of resources.”¹⁴⁹ The court required NOAA/NMFS to prepare a new EA “under circumstances that ensure an objective evaluation free of the previous taint” and opined that should the matter return to the courts, the agencies would bear the burden of demonstrating that the evaluation was done “objectively and in good faith.”¹⁵⁰

In light of the court’s decision in *Metcalf*, NOAA/NMFS abandoned, over the tribe’s objection, the 1997 agreement with the Makah and commenced the NEPA process anew.¹⁵¹ In January 2001, they issued the draft EA, which identified a subsistence whale quota of whales and placed limits on the location and time of year of the Makah hunt in an effort to ensure that only migrating whales were targeted.¹⁵² At that

139. Gillespie, *supra* note 21, at 88.

140.

The taking of gray whales from the Eastern stock in the North Pacific is permitted, but only by aborigines or a Contracting Government on behalf of aborigines, and then only when the meat and products of such whales are to be used exclusively for local consumption by the aborigines whose traditional aboriginal subsistence and cultural needs have been recognised.

ICRW Schedule, §III, ¶ 13.b(2). Presently, the IWC has established a quota for the eastern stock of the North Pacific gray whale for 2003-2007 of 620 whales, with the total also not to exceed 140 whales in any given year. *Id.*, available at <http://www.iwcoffice.org/Schedule.htm#CAPTUREIII> (last visited Aug. 11, 2003).

141. See Gillespie, *supra* note 21, at 88-89.

142. 63 Fed. Reg. 16701 (Apr. 6, 1998).

143. ALX DARK, THE MAKAH WHALE HUNT (National Council for Science and the Environment 1999), available at <http://www.cnsc.org/NAE/cases/makah/m3.html> (last visited Aug. 7, 2003). The economic interest of some organizations is clear. For example, the state of Washington whale-watching industry is an \$8-10 million industry. *Id.* Nor is whale-watching benign. Motorized vessel traffic can lead to collisions with whales, alter whale migration pathways and swim velocities, disrupt whale behavior as a result of noise, and diminish the experience of others seeking solitude and contribute air and water pollution. See, e.g., Gisela Heckel et al., *Issue Definition and Planning for Whalewatching Management Strategies in Ensenada, Mexico*, 31 COASTAL MGMT. 277 (2003); National Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 31 ELR 20436 (9th Cir. 2001); National Park Service, Final Environmental Impact Statement, Vessel Quota and Operating Requirements, Glacier Bay National Park and Preserve, Alaska (Oct. 2003), available at http://www.glba.ene.com/feis_2003.htm.

144. “Ironically, in 1999, protestor boats hit two gray whales and possibly injured them.” Miller, *supra* note 35 at 266.

145. *Id.* See also World Wildlife Fed’n (WWF), WHALES, WHALING, AND THE INTERNATIONAL WHALING COMMISSION (2003), available at <http://www.panda.org/downloads/species/wwfiwcposition2003final2.pdf>:

WWF recognises the human need for aboriginal subsistence whaling where it is carried out by aboriginal, indigenous, or native peoples with long-standing, strong social or cultural ties to whaling; where products are for local consumption only; and with a precautionary management scheme in place to ensure such activities are sustainable and do not threaten whale populations.

For Sierra Club’s and Greenpeace’s positions on aboriginal whaling, see <http://www.sierraclub.org/policy/conservation/marinemammals.asp> (ratified by the Board of Directors, February 5-6, 1972) and <http://whales.greenpeace.org/whaling/subsistence.html> (last visited Aug. 11, 2003).

146. 214 F.3d 1135, 30 ELR 20637 (9th Cir. 2000). See *supra* note 121. Rep. Jack Metcalf (R-Wash.), the lead plaintiff, has long opposed tribal treaty rights and referred to such rights as “special rights.” DARK, *supra* note 143.

147. *Metcalf*, 214 F.3d at 1135.

148. 42 U.S.C. §4332(2)(C).

149. *Metcalf*, 214 F.3d at 1143-44.

150. *Id.* at 1146.

151. *Anderson v. Evans*, 350 F.3d 815, 828 (9th Cir. 2003).

152. *Id.* One, among many, reasons that Makah whaling provoked controversy is that the hunt location includes ocean space within the boundaries of the Olympic Coast National Marine Sanctuary (OCNMS). The OCNMS runs from the U.S./Canadian Border to the Copalis River 135 miles south and extends on average 30 miles from shore.

time, similar limits on the hunt were contained in the Makah management plan.¹⁵³ The Makah, however, amended the management plan, and eliminated geographic limitations on the hunt, although the management plan did limit both temporally and geographically the number of “strikes—but not the number of takes¹⁵⁴—likely to affect nonmigrating whales.”¹⁵⁵ In July 2001, NOAA and the NMFS published the final EA. The final EA was based on the amended management plan and like the 1997 EA found no significant environmental impact. On December 13, 2001, NOAA and the NMFS established a quota of five landings of gray whales for the years 2001 and 2002.¹⁵⁶

In pertinent part, the EA found that while most California gray whales migrate to the Bering Sea and Chukchi Seas during the summer, some gray whales spend the summer months off of the coast of northern California up to southern Alaska. The EA denominated this group as the Pacific Coast Feeding Aggregation (PCFA), estimating their number at between 222 to 269 whales.¹⁵⁷ Although the PCFA is not genetically distinct from those whales that migrate, the EA analyzed the effect of the hunt on the PCFA separately.¹⁵⁸ Also at issue was an alleged smaller group of whales often referred to as “summer residents” or “local residents.” The EA concluded that such a group did not exist as “these whales: (1) move widely within and between areas on the Pacific coast to feed in the summer and fall; (2) are not always observed in the area each year; and (3) may have several year gaps between resightings in the studied areas. . . .”¹⁵⁹ As a result, NOAA concluded that it would assess the local effects of the hunt by considering the impacts on the PCFA rather than the so-called summer residents.

Once again, whale advocates challenged the Makah subsistence-whaling quota, contending the government decision violated both NEPA and the MMPA.¹⁶⁰ Turning first to the NEPA issue, the Ninth Circuit acknowledged that no one disputed that the Makah hunt would not significantly affect the “overall” California gray whale population. Rather, the dispute was over the localized effect on the whale population in the area where the Makah intended to hunt,¹⁶¹ with

the plaintiffs contending there is a definable “summer resident” group that would be impacted and the government contending otherwise. In the court’s view “the answer to this question . . . is sufficiently uncertain and controversial to require the full EIS protocol.”¹⁶² The panel also faulted the EA for failing to properly consider the effect of the decision to permit the Makah to whale on other Native American tribes that may wish to hunt whales as well as its affect on other IWC Member countries.¹⁶³

On March 6, 2003, NOAA and the NMFS notified the public of their intent, subject to a possible rehearing in *Anderson v. Evans*¹⁶⁴ challenging the Makah whaling quota, to prepare an EIS on the Makah annual gray whale subsistence quotas for the years 2003 through 2007.¹⁶⁵ This decision reflected both the Ninth Circuit’s initial *Anderson* opinion and the IWC’s approval of an aboriginal subsistence quota of 620 gray whales for those years.

162. *Id.* The court relied on NEPA regulations promulgated by the Council on Environmental Quality (CEQ). Those regulations specify that “significantly as used in NEPA requires considerations of both context and intensity.” 40 C.F.R. §1508.27. Context requires that the “significance of an action . . . be analyzed in several contexts, including the ‘locality.’” *Id.* §1508.27(a). An evaluation of “intensity” requires an assessment of the “degree to which the effects on the quality of the human environment are likely to be *highly controversial* [and] *highly uncertain* or involve unique or unknown risks.” *Id.* §1508.27(b)(4-5). By the language of the regulation, the mere existence of controversy or of uncertainty does not cause an action to be “significant”; rather the existence of those factors must be “considered” by an agency contemplating federal action. *Id.* §1508.27(b). Furthermore, by relying on the difference in opinion between government scientists and those employed by the plaintiffs as its basis for “uncertainty, the court appears to have substituted its judgment for that of NOAA’s,” as the “decision to prepare an EA rather than an EIS is reviewed under the APA’s arbitrary and capricious standard.” *Wetlands Action Network v. Corps of Eng’rs*, 222 F.3d 1105, 1116, 31 ELR 20051 (9th Cir. 2000). See also *Anderson*, 350 F.3d at 832 (stating that the court “must defer to the expertise of the agency in evaluating the scientific evidence”).

163. *Anderson*, 350 F.3d at 835-36. See also 40 C.F.R. §1508.27(b)(6) (requiring consideration of the precedential effects of a proposed action). There are 14 bands (tribes) in western Canada (for the most part on Vancouver Island), all of which are part of the Nuu-chah-nulth people, each of which may have an interest in whaling. Alma Soongi Beck, *The Makah’s Decision to Reinstate Whaling: When Conservationists Clash With Native Americans Over an Ancient Hunting Tradition*, 11 J. ENVTL. L. & LITIG. 359, 399 (1996). However, the total population of the Nuu-chah-nulth people is only 7,517, so that even in the event that Canada recognizes such a right in the context of treaty negotiations, which are presently ongoing with the Nuu-chah-nulth, a limited hunt would not upset the sustainability of the eastern North Pacific gray whale population. See http://www.gov.bc.ca/tno/negotiation/process/six_stage_process.htm#stage_4 (last visited Nov. 20, 2003); Indian Affairs and Northern Development, *Registered Indian Population by Sex and Residence 2001*, at http://www.aicn-inac.gc.ca/pr/sts/rip/rip_e.pdf. It should be noted that Canada is not a member of the IWC. While two Washington State tribes also have expressed an interest in whaling—the Quileute (approximate population of 500) and the Quinalt (2,200)—their historical connection to whaling is much less pronounced than that of the Makahs, and thus, to the extent either gains a quota, that quota presumably would be smaller than the Makah quota. Beck, *supra*, at 400. Finally, the IWC has had little difficulty distinguishing small-scale community-based coastal whaling from aboriginal indigenous whaling such as that engaged in by the Makah in that the former is for commercial purposes while the latter is not. See Gillespie, *supra* note 21, at 77, 84-85.

164. 350 F.3d 815 (9th Cir. 2003). On March 3, 2003, the Makah Indian Tribe filed for an initial petition for a rehearing en banc. On March 12, 2003, the United States filed a similar request. As noted earlier, *supra* note 73, those requests were denied and the opinion amended on November 26, 2003.

165. 68 Fed. Reg. 10703 (Mar. 6, 2003).

See <http://www.sanctuaries.nos.noaa.gov/oms/omsolympic/omsolympic.html> (last visited Aug. 5, 2003). Although the use of the word “sanctuary” suggests that Congress and NOAA have created a protected zone for living marine resources, in actual fact, multiple uses of the OCNMS are encouraged, including recreational and commercial uses. 16 U.S.C. §1431(b)(6); <http://www.sanctuaries.nos.noaa.gov/oms/omsolympic/omsolympicmanag.html#Mult> (last visited Aug. 5, 2003). Moreover, although the taking of marine mammals is generally prohibited within the OCNMS, NOAA explicitly authorized takings by Indian tribes that have treaty rights provided that any such right is “exercised in accordance with the MMPA, [and] ESA . . . to the extent that they apply.” 5 C.F.R. §922.152(5).

153. *Anderson*, 350 F.3d at 828.

154. The court appears to be using the term “take” in this context to mean “landed.” Both the MMPA [“take” means to “harass, hunt, capture, or kill”] or attempt the same. 16 U.S.C. §1362(13)] and the ESA [“take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”] *Id.* §1532(19)] define take considerably broader.

155. *Anderson*, 350 F.3d at 828.

156. 66 Fed. Reg. 64378 (Dec. 13, 2001).

157. *Anderson*, 350 F.3d. at 824, 833; Final EA, *supra* note 34, at 28, 57.

158. *Anderson*, 350 F.3d. at 832-35.

159. Final EA, *supra* note 34, at 23.

160. *Anderson*, 350 F.3d at 828.

161. *Id.* at 832.

4. The MMPA, Conservation Necessity, and the Abrogation or Modification of Treaty Rights

The more significant issue for the Makah is the MMPA issue. The plaintiffs alleged that the MMPA abrogated the Makah's treaty right to hunt whales or, in the alternative, that the "conservation necessity doctrine" otherwise required compliance with the MMPA. The *Anderson* panel, while finding it unnecessary to reach the question of whether the MMPA abrogated or modified the Makah's whaling rights,¹⁶⁶ held that the conservation necessity doctrine requires the Makah Indian Tribe to obtain a permit or waiver under the MMPA.¹⁶⁷

a. The MMPA Exemption

As an initial matter, the Judge Ronald M. Gould considered whether the Makah's whaling fell within an express exemption under the MMPA. In pertinent part, the MMPA provides an exception to the moratorium on the taking of marine mammals if the take is "expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before the effective date of this subchapter or by any statute implementing any such treaty, convention, or agreement."¹⁶⁸ The court found that this exception did not apply because: (1) the 1997 IWC action setting forth the gray whale quota occurred 24 years after the enactment of the MMPA and effectively amended the ICRW; (2) the Schedule does not "expressly" provide a quota to the Makah because (a) it fails to mention the Makah by name and (b) is ambiguous as to whether the IWC approved a quota for the Makah; and (3) the WCA fails to mention aboriginal subsistence whaling or quotas much less the Makah.¹⁶⁹

The reasons advanced by the *Anderson* panel to support its conclusion that the MMPA exemption does not apply to Makah whaling lack a firm foundation. To begin with, the panel failed to mention that when the ICRW was ratified by the United States and became effective in 1948 the Schedule expressly provided for aboriginal subsistence whaling of gray whales: "It is forbidden to take or kill gray . . . whales, except when the meat and products of such whales are to be used exclusively for local consumption by the aborigines."¹⁷⁰ Moreover, in our view, the 1997 Schedule should relate back to 1948, when the ICRW came into force. Indeed, "the incorporation of a Schedule of amendable regulations" into the ICRW as an integral part of it "was one of the major advances made by the Convention" over earlier efforts to regulate whales.¹⁷¹ The flexibility created—now typical of international instruments—should not now be used against the Makah.

Second, while as noted earlier, the ASW quota for gray whales refers to "aborigines whose traditional aboriginal subsistence and cultural needs have been recognized,"¹⁷² as Dr. Nicky Grandy, IWC Secretary (on behalf of the Chair of the IWC) made clear in a December 2000 letter, there was no need to mention the Makah by name: "The IWC catch limits agreed for the eastern North Pacific stock of gray whales does not mention the Makah specifically since, as explained above, catch limits are agreed for stocks and not for individual whaling operations or specified native peoples."¹⁷³

Third, despite the fact that the IWC did not mention the Makah by name, as Dr. Gandy once again proclaims, the IWC has sanctioned Makah whaling¹⁷⁴:

While the IWC did not explicitly sanction the Makah hunt, neither did it explicitly refuse to accept the Makah hunt as an aboriginal subsistence whaling operation. The IWC received a report of the 1999 kill by the Makah. There were no claims that an infraction had taken place. There is thus a de facto acceptance of this hunt as falling within the IWC's requirements for aboriginal subsistence whaling, although I might add that there is a degree of hesitation by some of the IWC members. . . . The onus on designating the Makah hunt an aboriginal subsistence hunt was ultimately left to the [United States].¹⁷⁵

172. ICRW Schedule, §III, ¶ 13(b)(2), available at <http://www.iwcoffice.org/Schedule.htm#CAPTUREIII>. While the Schedule does not identify home countries by name for other aboriginal subsistence rights, e.g., the West Greenland stock of minke whales, *id.*, the IWC's webpage devoted to aboriginal catch limits, <http://www.iwcoffice.org/Catches.htm#Aboriginal> (last visited July 31, 2003), does mention the home country by name, and in one instance identifies more than one aboriginal group—"Alaskan Eskimos and native peoples of Chukotka" (Russian Federation)—as the quota recipients.
173. Letter from Dr. Nicky Grandy, IWC Secretary (on behalf of the Chair of the IWC), to Rep. C.W. Bill Young, U.S. Congress (Dec. 12, 2000), appended in Appendix 10.1, Responses to Comments on the January 12, 2001, Draft EA, Environmental Assessment on Issuing a Quota to the Makah Indian Tribe for a Subsistence Hunt on Gray Whales for the Years 2001 and 2002, at http://www.nmfs.noaa.gov/pr/PR2/Conservation_and_Recovery_Program/makah_EA.html. See also ICRW art. 5, ¶ 2(c) (providing that the IWC shall not "allocate specific quotas to any factory or ship or land station or to any group of factory ships or land stations"). As noted earlier, the initial Schedule to the ICRW did not identify by name those aboriginal people who were entitled to the gray whale quota. The current practice in that regard is wholly consistent with historic practice. See also, e.g., 1983 Schedule as Amended, ¶ 13, reprinted in BIRNIE, *supra* note 21, Vol. 2, at 707, 717.
174. Moreover, at the time the gray whale quota was considered by the IWC, the United States and the Russian Federation "circulated a written explanation and delivered oral statements the [underlying] basis for" quota. 63 Fed. Reg. at 16703.
175. *Id.* Moreover, international environmental law would suggest that it is the coastal state—the United States—and not the relevant inter-governmental organization—in this instance the IWC—that has the power to recognize aboriginal subsistence needs. Indeed, as recognized by Principle 21 of the Stockholm Declaration of the United Nations Conference on the Human Environment (1972):

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction

(Emphasis added.) See also Principle 2 of the 1992 Rio Declaration on Environment and Development (same); 2002 Johannesburg Declaration on Sustainable Development, ¶ 8 (reaffirming Rio principles); 2002 World Summit on Sustainable Development (WSSD) Plan of Implementation, ¶ 6 ("each country has the primary responsibility for its own sustainable development and poverty eradication and the role of national policies and development strategies cannot

166. *Anderson*, 350 F.3d at 844.

167. *Id.* Oddly, the lead opinion, which was authored by Judge Marsha S. Berzon, recited the facts and discussed the NEPA issue, while Judge Ronald M. Gould in a "concurrency" wrote that portion of the opinion addressing the MMPA, although all three members of the panel joined in both opinions.

168. 16 U.S.C. §1372(a)(2).

169. *Anderson*, 350 F.3d at 839-44.

170. ICRW Schedule, ¶ 2. See Proclamation of President Harry S. Truman, 62 Stat. 1716, 1723 (Nov. 10, 1948).

171. BIRNIE, *supra* note 21, Vol. 1, at 190. See also SCRW art. I.1.

Given that the members of the international whaling governing body de facto accept the 1999 Makah hunt and that those same members granted a similar quota for 2003-2007 and used similar language, the courts (and the opponents of Makah whaling) should accept IWC acceptance of the hunt as well.

Fourth, the WCA, which implements the ICRW domestically, authorizes the Secretary of Commerce to promulgate regulations.¹⁷⁶ Under that authority, the Secretary has adopted regulations consistent with the global moratorium on commercial whaling. Those regulations prohibit whaling except for aboriginal subsistence whaling that is allowed by the IWC.¹⁷⁷ The WCA through regulations promulgated by the executive branch thus provides an express exception for aboriginal subsistence whaling, which is precisely the type of whaling the Makah strive to undertake. Thus, the WCA, like the ICRW, provides a basis for an exemption under the MMPA.

b. Conservation Necessity and Abrogation of Treaty Rights

The conservation necessity doctrine originated in the context of *state* regulation (and as we elaborate on below, it is only in that context that the doctrine has a principled basis). States, unlike Congress, do not have the power to modify or abrogate Indian treaty rights. However, in narrowly circumscribed circumstances, states are permitted to regulate the manner in which those rights are exercised “in the interest of conservation.”¹⁷⁸ In his analysis of the MMPA and the Makah treaty right to hunt whales, Judge Gould extended the “state-based” conservation necessity doctrine to federal regulation as well.¹⁷⁹ Relying on *United States v. Fryberg*,¹⁸⁰ Judge Gould concluded that applying the MMPA to Makah whaling “effectuate[s] the conservation purpose of the statute.”¹⁸¹ Moreover, its application “goes hand in hand with the principles embedded in the Treaty of Neah Bay itself.”¹⁸²

Turning first to the conservation purpose of the MMPA, Judge Gould noted that the “MMPA’s requirements for taking are specifically designed to promote” the objectives of maintaining marine mammals at their “optimum sustainable

population” and as “significant functioning elements in the ecosystem.”¹⁸³ He then stated:

Without subjecting the Tribe’s whaling to review under the MMPA, there is no assurance that the takes by the Tribe of gray whales, including both those killed and those harassed without success, will not threaten the role of the gray whales as functioning elements of the marine ecosystem, and thus no assurance that the purpose of the MMPA will be effectuated.

If the Tribe’s plans for whaling could proceed without regulation, we cannot be certain that future whaling by the Tribe will not *jeopardize* the gray whale population either through its current plan or through future expanded quotas.¹⁸⁴

As for the Treaty of Neah Bay, Judge Gould construed the Makah Indian Tribe’s reservation of hunting rights “in common with all citizens of the United States,” to support the inference that “the conservation purpose of the MMPA requires it be applied to the Tribe.”¹⁸⁵ More specifically, he concluded:

[T]he Makah cannot, consistent with the plain terms of the treaty, hunt whales without regard to processes in place [that are] designed to advance conservation values by preserving marine mammals or . . . whalewatching, scientific study, and other non-consumptive uses. . . . [T]o the extent there is a “fair share” of marine mammal takes by the Tribe, the proper scope of such a share must be considered in light of the MMPA through its permit or waiver process. . . . The procedural safeguards and conservation principles of the MMPA ensure that marine mammals like the gray whale can be sustained as a resource for the benefit of the Tribe and others.¹⁸⁶

As a consequence of the conservation purpose of the MMPA and the language of the Treaty of Neah Bay, Judge Gould

183. The phrase “functioning elements of the marine ecosystem” is taken from congressional declarations and findings related to the MMPA, 16 U.S.C. §1361(2):

[S]uch species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population.

From the full quote and the MMPA regulatory context, it becomes clear that Congress’ goal of maintaining marine mammal populations as functioning elements of an ecosystem is implemented by maintaining a stock above its optimum sustainable population.

184. *Anderson*, 350 F.3d at 841.

185. *Id.* at 842 (emphasis added). In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 684-85, 9 ELR 20517 (1979), the Court discussed what “in common with” meant. After a lengthy analysis, it concluded by stating that both tribal fishers and citizens of Washington State “have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.” In other words, “neither party may deprive the other of a ‘fair share’ of the runs.” *Id.* at 684. Judge Gould noted that, while

the “fair share” formula might be read to suggest that the Tribe’s treaty right gives the Tribe a right to a “fair share” of whales that are to be taken, . . . [it] does not provide a ready answer in this case, which involves now-protected marine mammals rather than salmon and other fish available, within limits, for fishing.

Anderson, 350 F.3d at 843.

186. *Id.*

be overemphasized . . .”); U.N. Convention on the Law of the Sea (LOS) arts. 56 and 61 (coastal states have “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living [and] shall determine the allowable catch of the living resources . . .”). *But see* 50 C.F.R. §230.1 (suggesting that only ASW that is “allowed” by IWC will be permitted under the Whaling Convention Act). *Cf.* LOS art. 65 (“States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management[,] and study.”). It should be noted that the United States has yet to ratify the LOS.

176. 16 U.S.C. §§916-916l.

177. 50 C.F.R. §230.1 *See also id.* §230.2-230.8.

178. *Puyallup Tribe v. Department of Game (Puyallup I)*, 391 U.S. 392, 398 (1968).

179. *Anderson v. Evans*, 350 F.3d 815, 839-40 (9th Cir. 2003) (citing *United States v. Fryberg*, 622 F.2d 1010, 1014-15 (9th Cir. 1980) and *United States v. Eberhardt*, 789 F.2d 1354, 1360 (9th Cir. 1986)).

180. 622 F.2d 1010, 1015 (9th Cir. 1980).

181. *Anderson*, 350 F.3d at 843.

182. *Id.* at 842.

thus held “that the MMPA *applies* to the Tribe.”¹⁸⁷ He went on to state that “[u]nlike other persons applying for a permit or waiver under the MMPA, the Tribe may urge a treaty right to be considered in the NMFS’ review. . . .”¹⁸⁸ Judge Gould’s opinion thus raises two fundamental questions. First, did the *Anderson* panel, in applying the conservation necessity doctrine and the MMPA to the Makah’s treaty rights, effectively modify those treaty rights without first applying the Court’s precedents on implied repeals? Second, did the panel misapply the conservation necessity doctrine given the facts at issue? We believe the answer to both questions is yes.

Turning first to the question of modification of treaty rights, it is true that the MMPA process envisioned by the Court will not necessarily result in a prohibition on the Makah hunt. Indeed, that process could culminate in a decision permitting the hunt to proceed as contemplated in the EA and Makah whaling management plan or allowing the hunt to go forward, but with additional geographic, temporal or other restrictions.¹⁸⁹ Yet, that is not the crux of the matter: if the MMPA “applies” in a “backhanded way”¹⁹⁰ to the Makah—as a result of the conservation necessity doctrine and/or because it sheds light on the meaning of the phrase “in common with” in the Treaty of Neah Bay¹⁹¹—Congress has effectively modified the Makah’s treaty right to hunt whales.

As enacted in 1972, Congress provided an exception to the moratorium on marine mammal takes for Alaska natives in specified situations:

The provisions of this Act shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—

- (1) is for subsistence purposes by *Alaska Natives who reside in Alaska*; or
- (2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing. . . .

Notwithstanding the preceding provisions of this sub-

section, when, under this Act, the Secretary determines any species or stock of marine mammal subject to taking by Indians, Aleuts, or Eskimos to be depleted, he may prescribe regulations upon the taking of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection.¹⁹²

As is plain from the face of this provision, it applies only to Alaska natives. Conspicuously absent is any mention of tribes that have rights to hunt marine mammals by virtue of treaties and treaty substitutes (treaty tribes). Because Alaska natives do not have treaty rights to hunt marine mammals, to the extent Congress desired to recognize the subsistence hunting practices of those Native Americans, it was necessary for Congress to provide Alaska natives with an exemption from the general moratorium. Because treaty tribes already had rights to hunt marine mammals, it was unnecessary for Congress to provide an exception for their continued hunt in the face of the moratorium. By only calling attention to Alaska natives, this provision demonstrates that Congress was aware of the potential conflict between tribal practices and the MMPA moratorium, and chose to exclude tribal treaty rights from its coverage altogether. A contrary interpretation would lead to the anomalous result that in the same breadth Congress created an exception to the moratorium for a group of Native Americans that did not have treaty rights, it abrogated and extinguished the treaty rights of other Native Americans.

To the extent there was any doubt as to its intentions in enacting the MMPA in 1972, Congress, albeit inartfully, attempted to reaffirm the notion that the MMPA was not intended to modify or abrogate treaty rights. It provided that “[n]othing in this Act, including any amendments to the [MMPA] of 1972 made by this Act— (1) alters or is intended to alter any treaty between the United States and one or more Indian tribes. . . .”¹⁹³ The Senate Report accompanying the 1994 Senate bill provides further support, stating that the bill “would reaffirm that the MMPA does not in any way diminish or abrogate existing protected Indian treaty fishing or hunting rights.”¹⁹⁴ In a similar vein, the accompanying House Report states that the House bill “reaffirms that nothing in this Act is intended to alter any treaties between the [United States] and Indian tribes.”¹⁹⁵

Moreover, interpreting the MMPA as abrogating or modifying the Makah’s right to hunt marine mammals cannot withstand the rigor of *United States v. Dion*.¹⁹⁶ In *Dion*, the Court considered whether Congress, in the Bald Eagle Protection Act,¹⁹⁷ modified or abrogated the Yankton Sioux In-

187. *Id.* at 844 (emphasis added).

188. *Id.* at 844 n.26. Although the statutory basis for this position is unclear, it suggests at least some recognition on behalf of the panel that the Treaty of Neah Bay places the Makah on a different plane than ordinary citizens when it comes to hunting marine mammals. Compare *Midwater Trawlers Coop. v. Department of Commerce*, 282 F.3d 710, 32 ELR 20532 (9th Cir. 2002) (relying on the statutory requirement that fishery management plans be consistent with “other applicable law” in the Magnuson-Stevens Fishery Act, 16 U.S.C. §1853(a)(1)(B), in its application of the Makah’s treaty rights). Moreover, by requiring the NMFS to consider the Makah’s treaty right in the MMPA process, the panel has provided some evidence that—while not deciding the abrogation issue—it would be unlikely to find that the MMPA abrogated the Makah’s treaty right. Whether or not the MMPA “modified” as opposed to “abrogated” the treaty right is a different matter for which the statement provides no indication.

189. *Anderson*, 350 F.3d at 844 n.26.

190. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968).

191. The fact that the United States decided to forego a “fair share” on behalf of its non-Indian citizens (as evidenced by the enactment of the MMPA and the agreement to be bound by the IWC commercial whaling moratorium) cannot serve to deprive the Makah of its treaty right to a “fair share” of gray whales absent the treaty being modified. If treaty tribes in the Pacific Northwest decided through tribal ordinances to forego fishing, one would not expect, for example, the Ninth Circuit to enjoin Washington State commercial fisherman solely on that basis. So it should be with the Makah.

192. MMPA of 1972, 92 Pub. L. No. 522, §101(b); 86 Stat. 1027, 1031 (Oct. 21, 1972), codified at 16 U.S.C. §1371(b) (emphasis added). In 1981, Congress amended this provision and, in pertinent part, inserted “who resides in Alaska” in the first sentence of the main clause between “Eskimo” and “who dwells” and deleted the reference to “by Alaska Natives who reside in Alaska” in the sub-clause (1) clarifying that reference to residing in Alaska applies to both the first and the second sub-clauses and thus the provision as a whole was intended not to be applicable to natives in other states. Pub. L. No. 97-58, §2 (Oct. 9, 1981), 95 Stat. 979; H. REP. No. 228, 97th Cong., reprinted in 1981 U.S.C.C.A.N. 1458, 1470.

193. Pub. L. No. 103-238, §14, 108 Stat. 532 (Apr. 30, 1994).

194. S. REP. No. 220, 103d Cong., reprinted in 1994 U.S.C.C.A.N. 518, 535.

195. H.R. REP. No. 439, 103d Cong. 41 (1994).

196. 476 U.S. 734, 16 ELR 20676 (1986).

197. 16 U.S.C. §§668 et seq.

dian Tribe's treaty right to hunt eagles.¹⁹⁸ Relying on both the plain language of the statute, which provides an exception to its moratorium on taking of eagles, "for the religious purposes of Indian tribes,"¹⁹⁹ and its legislative history, the Court concluded that Congress "considered the special cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statute, and provided a specific, narrow exception that delineated the extent to which Indians would be permitted to hunt the bald and golden eagle."²⁰⁰ In contrast, there is nothing in the MMPA or its legislative history to suggest that Congress considered the cultural interests of the Makah and other treaty tribes let alone balanced those interests against the conservation purposes of the MMPA.²⁰¹ In sum, the face of the MMPA and its legislative history document that Congress did not intend to modify or abrogate the Makah's treaty right to hunt whales and thus, by applying the conservation necessity doctrine and requiring the Makah to utilize the MMPA process, the Court has effectively modified the Makah's treaty right.²⁰²

Second, even assuming for the sake of argument that the panel did not effectively modify the Makah's treaty right to hunt whales and that such modification is not contrary to congressional intent, we believe that the conservation necessity doctrine does not apply under the facts presented by Makah whaling. To begin with, the hunt will not result in the population of the gray whale stock from "diminish[ing] below [its] optimum sustainable population" under the MMPA.²⁰³ Indeed, as experts in this area note, the eastern North Pacific stock of gray whale is "approaching its carrying capacity."²⁰⁴ As a result, conservation measures are not

"necessary" within the meaning of the doctrine.²⁰⁵ Second, neither *Fryberg*²⁰⁶ nor *United States v. Eberhardt*,²⁰⁷ upon which the *Anderson* panel relied, were decided under conservation necessity doctrine. *Fryberg* is a modification case,²⁰⁸ while *Eberhardt* was decided under the Administrative Procedure Act.²⁰⁹ As a consequence, the statements by the *Fryberg* or *Eberhardt* panels on the conservation necessity doctrine are dicta, and thus, not a proper basis on which the *Anderson* panel could rely. Indeed, *Eberhardt* took pains to contrast Congress' power of abrogation with state regulation under the conservation necessity doctrine (and with executive branch rulemaking power as well).²¹⁰ The effort by the *Eberhardt* Court is unsurprising given that the "conservation necessity" doctrine represents the [Court's] reconciliation of an "Indian tribe's treaty rights to hunt, fish, and gather . . . with a State's sovereignty over the natural resources in the State."²¹¹ In contrast, because Congress can modify or abrogate treaty rights legislatively, there is no need to judicially create and accommodate the federal government's interest in the conservation of marine mammals. Indeed, it makes little sense to apply the conservation necessity doctrine to the federal government because that lesser power, if it existed, would be entirely subsumed within a power held solely by Congress—that is, the power to modify or abrogate treaty rights.²¹² Finally, the judicial creation of a federal conservation necessity doctrine lacks a princi-

198. The Court considered, but did not resolve, whether the ESA also abrogated the treaty right to hunt. 476 U.S. at 745-46.

199. 16 U.S.C. §668a.

200. *Dion*, 476 U.S. at 743-44.

201. Compare also the MMPA, 16 U.S.C. §1371(b), with the Magnuson-Stevens Fishing Act, *id.* §1852(a)(1)(F) ["the Pacific Fishery Management Council (PFMC) shall include a voting member appointed from an Indian tribe with Federally recognized fishing rights from California, Oregon, Washington, or Idaho"], *id.* §1853(a)(2) (fishery management plans, which are prepared by councils such as the PFMC shall "contain a description of the fishery, including, . . . the nature and extent of . . . Indian treaty fishing rights") (emphasis added), *id.* §1853(a)(1)(B) [fishery management plans shall be consistent with "other applicable law," which includes the Stevens treaties, *Midwater Trawlers* (applying the Magnuson-Stevens Act to the Makah Indian Tribe)]. Given Congress' explicit consideration of treaty tribes in the context of fishing legislation and the requirement to apply "other applicable law," the Ninth Circuit's, 350 F.3d at 842 n.24, reliance on *Midwater Trawlers* is inapposite.

202. Moreover, we find it "difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation by destroying property rights conferred by treaty. . . ." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968).

203. 16 U.S.C. §1361(2). The panel's concern, 350 F.3d at 841, that, absent application of the MMPA, the Makah hunt could "jeopardize" the northern Pacific gray whale stock, also suggests that the panel confused the ESA "jeopardy" standard, 16 U.S.C. §1536(a)(2), with "conservation necessity."

204. 63 Fed. Reg. at 16704.

205. Moreover, the *Anderson* panel did not even consider other strands of the conservation necessity test such as: is application of the MMPA the least restrictive means by which the federal government could ensure the conservation of the gray whale and is tribal regulation and enforcement inadequate? See *United States v. Washington*, 384 F. Supp. 312, 415 (W.D. Wash. 1974).

206. 662 F.2d at 1010, *cert. denied*, 449 U.S. 1004 (1980).

207. 789 F.2d 1354 (9th Cir. 1986).

208. 662 F.2d at 1011 (the "sole question . . . is whether" the Eagle Protection Act "modified or abrogated treaty hunting rights"). Judge Gould's initial opinion in *Anderson*, 314 F.3d at 1026, uncritically relied on *Fryberg*. In response to arguments by the United States and the Makah, Judge Gould, 350 F.3d at 840 n.22, acknowledged that *Fryberg* is an abrogation case, yet implied that the conservation test enunciated in *Fryberg* was distinct from the abrogation analysis ("though the ultimate issue . . . was abrogation, *Fryberg* also articulated a test for the conservation statutes that affect treaty rights"). *Id.* (emphasis added). As a result, he concluded that "the conservation necessity test articulated by *Fryberg* has not been undermined by later cases and is supported by the [Court] authorities." *Id.*

209. *Eberhardt*, 789 F.3d at 1362.

210. *Id.* at 1361-62.

211. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204, 28 ELR 20183 (1999). See also *id.* at 204-05:

Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making. . . . This "conservation necessity" standard "accommodates both the State's interest in management of its natural resources and . . . federally guaranteed treaty rights."

212. See *id.* at 1361. Judge Gould's states that the "intent of Congress cannot be hostage to the goodwill or good judgment or good sense of the particular leaders empowered by the Tribe at present." That is true enough. And indeed, Congress is not hostage; Congress simply must make its will to modify the Makah's treaty rights clear. *United States v. Dion*, 476 U.S. 734, 739, 16 ELR 20676 (1986). Interestingly, the Makah's position is that the conservation necessity doctrine applies to the federal government and could conceivably trigger the application of the MMPA in some circumstances, but the high bar for regulation that it sets has not been reached, let alone cleared, in the case of Makah whaling. The Makah developed its position in the ocean fisheries context, where the Makah have argued that in determining the fish available for harvest within the Makah's usual and accustomed fishing grounds, the federal government should determine a harvestable surplus—that is, set the harvest as high as possible without harming the resource, rather than base its calculations on biomass. *Midwater Trawlers Coop. v. Department of Commerce*, 282 F.3d 710, 718-19, 32 ELR 20532 (9th Cir. 2002).

pled basis. Indeed, the *Anderson* panel's "no-modification" modification works at cross-purposes to the Court's goal of "ensuring legislative accountability for the abrogation [or modification] of treaty rights."²¹³

IV. Reflections

A. The Makah: Commercial or Subsistence Needs?

Makah-whaling opponents point to several 1995 writings in support of their concern over the commercial intentions of the Makah. Many of these voices are from principled opponents of whaling who understandably want to ensure an aboriginal hunt is not a mere pretext for commercial exploitation of gray whales and that the Makah hunt does not set a precedent that has implications for whale preservation at the global level.²¹⁴ In our view, however, the continued focus on the Makah's commercial intentions is an unnecessary distraction from the question of the merits of an aboriginal subsistence hunt for local consumption—the question on which we ought to focus.

In the first writing, the Makah Nation's lawyer acknowledged that the Japanese approached the Makah about whether the Makah would be willing to sell whale meat to Japan,²¹⁵ and in the second, the Makah discussed the possibility of establishing an international business based on the sale of marine mammal meat.²¹⁶ "When asked to comment, one of the documents' authors said that 'there were many ideas kicked around in those days' but that federal officials told the tribe selling whale meat would be illegal and the Makah agreed not to sell it."²¹⁷ Subsequent statements by

the Makah,²¹⁸ the Makah's gray whale hunting management plan²¹⁹ and the U.S. IWC petition are unambiguous: edible portions of the whales that the Makah harvest for subsistence or ceremonial purposes will not be sold.

In addition to the memoranda discussed above, in the lead-up to the first effort of the federal government on behalf of the Makah at the IWC, the Makah sent a letter to the U.S. government outlining its proposal for a subsistence and ceremonial harvest of up to five whales annually, which would correspond to one whale for each of the five ancestral villages.²²⁰ In the course of the letter, the Makah made the claim that by seeking U.S. government support for the Makah to receive an aboriginal subsistence quota from the IWC, it was not waiving or relinquishing any of its whaling rights secured by the Treaty of Neah Bay. In pertinent part, that letter provides:

It should be emphasized, however, that we continue to strongly believe that we have the right under the Treaty of Neah Bay to harvest whales not only for ceremonial and subsistence but also for commercial purposes. At treaty times, whale products clearly were the most important items for Makah trade and commerce. . . . [O]ur decision to seek IWC approval for an interim ceremonial and subsistence harvest only should not be construed in any way as a waiver or relinquishment of our treaty-secured whaling rights.²²¹

The reservation of rights appears to be standard legal fare—nothing more, nothing less. To underscore this point, as noted in the material just quoted, the Makah denominated its present request as "interim."²²² Might the Makah at some point in the future seek to engage in commercial whaling? Possibly. The statement quoted does correctly reflect historic Makah commercial practices.²²³ Moreover, if society is serious about multiculturalism and the ideals behind that concept and treats the Makah as a sovereign and a distinct

213. *Eberhardt*, 789 F.3d at 1361.

214. See Beck, *supra* note 163, at 394-98 (noting that while some fear the implications of a decision in favor of Makah whaling on Japan's advocacy for small-type coastal whaling, such whaling is readily distinguishable as it has an economic component; has a history of only 50 years; and Japan has conceded that such whaling is not aboriginal and that the crews of the vessels involved would not be Ainu (native peoples of Japan)); THE GOVERNMENT OF JAPAN, SMALL-TYPE WHALING IN JAPAN'S COASTAL SEAS 2, TC/38/AS2, The 38th Annual Meeting of the IWC, Malmö, Sweden (1986), available at http://homepage2.nifty.com/jstwa/pdf/hardcover/HC_38th.pdf (acknowledging that, although whaling has a long history in Japan, small-type coastal whaling for minke whales commenced in 1933); IWC, Chairman's Report of the Forty-First Annual Meeting, San Diego, June 12-16, 1989, §15, Small-Type Whaling, available at http://luna.pos.to/whale/iwc_chair89_15.html ("meat from these operations enters the commercial arena in a highly industrialised country"); Beck, *supra* note 163, at 399-400 (while concern has been raised over the precedent Makah whaling would set for other Pacific Northwest tribes, for many whaling was not central to their culture, and in any event, the total number of whales that might be taken would be small); *id.* at 389-90 (while some conservations fear that the United States may be forced to compromise on other matters that come before the IWC, concerns are overstated).

215. Memorandum from Michael Tillman, Deputy Commissioner, Southwest Fisheries Center, NMFS (Apr. 3, 1995), available at http://www.safepassing.org/govt/foia1_1.gif (last visited Aug. 11, 2003).

216. Notes from the discussion of treaty rights during the April 1995 Pacific Scientific Review Group meeting and hand-addressed and faxed To: MFT (Michael F. Tillman) From: RLB (Robert L. Brownell, NMFS Region 4) (Apr. 27, 1995), available at http://www.safepassing.org/govt/foia1_2.gif (last visited Aug. 11, 2003).

217. See <http://www.cnice.org/NAE/cases/makah/m5.html> (citations omitted).

218. "We will abide by federal laws which prohibit commerce in whale meat. Our tribal law also prohibits any sale of whale meat or whale products, except for artifacts made by Makah carvers out of whale bone." Whaling Questions and Answers, at <http://www.makah.com/whalingfaqs.htm> (last visited August 7, 2003). See also Keith Johnson, An Open Letter to the Public From the President of the Makah

Whaling Commission (Aug. 6, 1998), at 2, 6, available at <http://www.cnice.org/NAE/docs/makaheditorial.html>:

Although our Treaty guaranteed a commercial right, we have agreed to limit ourselves to non-commercial whaling. We are bound by Federal Law and our own Tribal Law not to sell any whale meat. We have no plan[s] to sell whale meat in the future. We also believe the Sea Shepherd [Conservation Society] is well aware of this but chooses to continue to accuse us of planning to sell whale meat. . . . We are committed to this [whaling] because it is our connection to our Tribal culture and because it is a treaty right—not because we see the prospect of money. We are willing to risk our lives for no money at all. The only reward we will receive will be . . . spiritual satisfaction.

219. "Whale products taken pursuant to this management plan shall be used exclusively for local consumption and ceremonial purposes and may not be sold or offered for sale. No member may receive money for participation in whaling." Management Plan for Makah Treaty Gray Whale-Hunting for the Years 1999-2002, as Amended April 2001, §VIII.A., 9, available at http://www.nmfs.noaa.gov/pr/PR2/Conservation_and_Recovery_Program/App%2010.3%20%20MAKAHPLAN.pdf (May 30, 2001) [hereinafter Makah Management Plan].

220. Letter from Hubert Markishtum, Chair, Makah Tribal Council, to NMFS (May 5, 1995).

221. *Id.*

222. *Id.*

223. See <http://www.cnice.org/NAE/cases/makah/m5.html> (citing Sea Shepherd Conservation Society, *Makah Gray Whale Hunt to Be First Step in Commercial Enterprise*, at <http://www.seashepherd.org/wh/us/mkfoi95.html>).

people, then the Makah would be permitted to decide for themselves when and under what conditions they exercise their treaty rights. We thus see the “essential task” for society as being to “construct a reconciliation” of the expectations of tribes which are embodied in treaties and treaty substitutes with the expectations of non-Indians, particularly those expectations that are grounded in federal law.²²⁴

B. Needs and Reviving a Cultural Practice

Despite the acceptance of a culture revival in numerous spheres of Makah life and the current celebration and recognition of multiculturalism more generally, the opponents of Makah whaling have had difficulty accepting the premise that a Makah whale hunt, in the face of a 70-year or so lapse between the Makah whale hunts of the 1920s and the culture revival of whaling in the 1990s, is a necessary “subsistence” activity. While we appreciate that difficulty, it is important to recognize that as a general proposition the courts have not held the passage of time against Indian tribes, that cultures in other contexts have revived and those revivals celebrated, and that the IWC itself has never had a hard and fast definition of “nutritional, subsistence, and cultural need.” Moreover, it seems particularly unfair to deny the Makah the right to revive subsistence whaling when that practice was cut short in large part because “widespread commercial whaling had devastated the population of gray whales almost to extinction.”²²⁵

Turning first to the IWC, the revival of Makah whaling fits in well with the traditions of the IWC. For example, the Chukotkas only revived their traditional whale hunting practices in 1994; prior to 1994 they relied on whale hunting efforts of the Soviet Union (and Russian Federation) on their behalf to fulfill the IWC quota, while Alaska natives revived their practices in the 1970s.²²⁶ Moreover, the IWC accepts the “need” of the aborigines of St. Vincent and the Grenadines” despite the fact that their whaling “tradition” only extends back a mere 100 years²²⁷ and is recognized as meeting cultural rather than nutritional needs.²²⁸ In contrast,

reviving a whaling practice of more than 1,000 years fits in well with the Makah’s successful revival of a number of cultural practices in the aftermath of the significant archaeological find at the Ozette excavation.

The Ozette excavation led the Makah to create the Makah Cultural and Research Center (MCRC) to manage the Makah Nation’s cultural resources and to preserve and pass on culture through “research, documentation, exhibition, and education.”²²⁹ Indeed, over the past 20 years, the Makah have reinstituted numerous “song, dance, and artistic traditions, and operated a program to restore the Makah language to spoken proficiency on the reservation.”²³⁰ And since the 1960s, and continually since 1981—that is, long before the gray whale was removed from the ESA, the Makah have provided their children with a whaling curriculum in the schools.²³¹ Moreover, as Jennifer Sepez notes, the experience of the Ahoust Band of Nuuchah-nulth, who abandoned whaling for four generations and temporarily revived whaling around the turn of the century, “foreshadows” the Makah experience—a temporary abandonment followed by a revival of indigenous whaling in response to species abundance and preservation of whaling cultural knowledge and ritual during the intervening times.²³²

Second, as Charles Wilkinson notes, although American Indian tribal powers have often gone “dormant,” and in particular “from 1880s to the 1960s,” for the most part, courts have refused to find tribes are prejudiced by nonuse.²³³ Indian fishing rights of the Makah and other Pacific Northwest tribes provide an apt example. Despite the fact that Indian fishers had harvested less than 10% of the 20th century salmon catch, that Indian fishing had ceased entirely at several traditional fishing locations, and that an important state promoted and regulated commercial and recreational fishery had developed in the interim, the Court affirmed a trial court’s allocation of approximately 50% of the catch to Indians based on their treaty rights.²³⁴

Finally, the claim that the Makah effectively slept on their right to whale is neither true to the history of U.S. government policy toward Indians, which has veered back and forth between assimilation and self-determination nor to the more general notions of cultural revival or renewal. One would be loath to suggest that long dormant religious practices of individuals should not be allowed to flourish after a period of oppression and religious intolerance ceases. Likewise, one would not contend that it is somehow improper for African Americans to explore long-dormant African cultural roots and practices. Nor would one claim that languages that have been in hibernation for decades or centuries—the Hebrew language comes to mind—should not be revitalized simply because they have been in disuse. In a similar vein, the environmental movement well knows the benefits of harking to back to earlier, older practices, as the

224. WILKINSON, *supra* note 82, at 23 (discussing the task facing the judiciary given the opening of reservations to non-Indians).

225. *Metcalf v. Daley*, 214 F.3d 1135, 1137, 30 ELR 20637 (9th Cir. 2000). The demise of the California gray whale thus arose for causes unlike that of the Cook Inlet stock of Beluga Whale, which has been designated as “depleted” under the MMPA. The most significant factor leading to the population decline of the Cook Inlet stock of Beluga Whale was Native Alaskan hunting. *See Cook Inlet Beluga Whale v. Daley*, 156 F. Supp. 2d 16 (D.D.C. 2001). The Beluga Whale, a small cetacean, is not regulated at the present time by the IWC. Despite its depleted status (and a belief on the part of at least some conservationists that it should be regulated under the ESA, *id.*) and the absence of any treaty, an agreement was reached that allocate to indigenous Alaskans a maximum of six Beluga strikes over a four-year period, provided that any such strikes must be authorized by a co-management agreement. *See In the Matter of: Proposed Regulation Governing the Taking of Cook Inlet, Alaska Beluga Whales by Alaska Natives*, Docket No. 000922272-0272-01, Recommended Decision of Administrative Law Judge Parlen L. McKenna, Mar. 29, 2002, available at <http://www.fakr.noaa.gov/protectedresources/whales/beluga/belugapr.htm>; Taking of Cook Inlet (CI), Alaska Stock of Beluga Whales by Alaska Natives, Final Environmental Impact Statement, available at <http://www.fakr.noaa.gov/protectedresources/whales/beluga/eis2003/final.pdf>.

226. Miller, *supra* note 35, at 257; IWC, FORTY-EIGHTH REPORT OF THE INTERNATIONAL WHALING COMMISSION 93-94 (1998).

227. *See* <http://www.cnie.org/NAE/cases/makah/me.html#18>; Beck, *supra* note 163, at 397.

228. Gillespie, *supra* note 21, at 115 (citations omitted).

229. Renker, *supra* note 35, at 15.

230. *Id.* *See also id.* at 14.

231. *Id.* at 15.

232. Sepez, *supra* note 3, at 70 (citing Philip Drucker, *The Northern and Central Nootkan Tribes*, BUREAU AM. ETHNOLOGY BULL. 144 (1951)).

233. WILKINSON, *supra* note 82, at 37-38.

234. *Id.* at 38-39, 164; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 9 ELR 20517 (1979); *United States v. Washington*, 384 F. Supp. 312, 358, 393 (W.D. Wash. 1974). The Makah’s treaty fishing rights, among other tribes’ treaty fishing rights were at issue in that litigation.

organic farming movement attests. Whether it is religion, cultural practices, language or food, each fulfills a need despite the fact that it was not employed for decades. The needs of the Makah likewise should be accorded respect.

C. Cultural Glue

Despite the 70-year hiatus in Makah whaling, it can be argued that present day Makah cultural needs strongly resemble those of yesteryear. Over the last 15 years, conditions on the reservation have deteriorated markedly. In 1989, the U.S. Air Force base that operated on the reservation was deactivated resulting in the loss of around 200 jobs.²³⁵ No substitute employer has emerged since then and fluctuations in the natural resources of the reservation, tourism, and commercial fishing have led to difficulties in establishing a reliable level of tribal income. Indeed, the unemployment rate hovers around the 50% mark and almost one-half of households on the reservation are below the federal poverty level. The average income for reservation households is \$5,000 in contrast to an average of \$40,000 in the state of Washington.²³⁶

The high degree of poverty on the reservation is compounded by a number of other social ills. According to the Needs Statement submitted to the IWC, the Makah community is still in a period of readjustment. The federal assimilation policies of the past along with various epidemics that decimated the region led to either the repression or eradication of entire social and cultural institutions that have not yet been properly replaced.²³⁷ The high levels of teenage pregnancies, high school drops-outs, substance abuse problems and juvenile crime that exist on the reservation are all indicators of such a loss of direction in the community.

The Makah strongly believe that a resumption of whaling practices will allow them to instill in the tribe the values traditionally associated with whaling. Given the community involvement in a hunt, a return to whaling should strengthen the linkages between the members of the tribe. The sharing of food from the whale, the cooperation needed to land the whale and the risks that accompany the hunt all help to increase the bonds between the tribe.²³⁸ Despite their abstinence from whaling during most of last century, the Makah have never forgotten their cultural heritage. In 1974, during the time of the Ozette excavation, it was clear that the youth of that generation were very proud of their history. They knew their traditional songs and dances and possessed a good knowledge of the ecology of their environment. In addition, they respected their elders and honored their grandparents.²³⁹ Thirty years later, there still exists a strong link-

age between spirituality and subsistence practices.²⁴⁰ Given that the Makah see whaling as both having the power to bring the community together and enriching their culture, it is no wonder that whaling has been described as the "cultural glue that holds the Tribe together."²⁴¹ In short, there seems little doubt that the Makah could use this cultural glue to attempt to regain the social order they once possessed.

D. Subsistence

Closely linked to the argument that the Makah have no cultural need or right to hunt whales given the passage of time is the contention that there is likewise no subsistence need. But, for us to accept the argument that Makah whaling does not fulfill a subsistence need, we would have to ignore the central role that subsistence activities play in Makah life and culture as well as the economic situation that the Makah people face. It is well-documented that historically, whale products comprised a large part of the Makah diet. The archaeological evidence found at Ozette indicates that, potentially, gray whales could have accounted for 100% of the Makah diet.²⁴² It could be argued these historical figures are precisely that—historical—and that they cannot act as a guide to a subsistence need in today's world. However, a recent survey and statistical analysis of Makah subsistence practices attests that 99% of Makah households participate in subsistence activities.²⁴³ Perhaps more importantly, among Makah tribal members, annual subsistence consumption of fin- and shell-fish, land and marine mammals, eggs, and birds totals 174 pounds per capita²⁴⁴ and accounts for between 59-71% of total meat in the Makah diet.²⁴⁵ Of the 51 animal species consumed, 42 are marine animals; and marine animals are used by a broader spectrum of Makah households than other animals.²⁴⁶ Moreover, based on estimates of intended use, a whale, as a subsistence good, will once again "take its place among the most important as delineated by both percent of households using the resource and quantities consumed."²⁴⁷

Furthermore, there still exist the historical reciprocal networks within the Makah community that allow for the distribution of subsistence goods. With regards to fish, all of the households on the reservation participate in some type of sharing²⁴⁸ and there is reason to believe that this will be the case with whale products. The combined yield of the meat

say that every time, the deer or whatever you're going after will sit still.

235. Renker, *supra* note 35, at 17.

236. *Id.* at 18.

237. *Id.*

238. Miller, *supra* note 35, at 271.

239. Madonna Moss, *Whale Hunt Honors Makah Way of Life*, ECOTONE, Fall 1999, at 4, available at <http://www.uoregon.edu/~ecostudy/resources/publications/ecotone/Web%20PDF%20Versions/Ecotone%20Fall%20%2799.pdf>.

240. Sepez, *supra* note 67, at 151. The recent study by Jennifer Sepez demonstrated that many contemporary Makah adhere to the traditions of old. In describing part of his hunting ritual one Makah commented:

[U]sually there's a little saying you say as you're pulling the trigger. You say, "Forgive me, I must take you." They're always saying it. And if you say it right, or you just remember to

241. Miller, *supra* note 35, at 272.

242. Renker, *supra* note 35, at 10. However, given the variety in the Makah subsistence diet it is unlikely that this was the case, although it does appear clear that gray whales provided an important food source.

243. Sepez, *supra* note 3, at 81.

244. *Id.* at 85, fig. 1.

245. *Id.* at 85-86.

246. *Id.* at 82. Deer and Elk also are important. *Id.*

247. *Id.* at 129. See also Renker, *supra* note 35, at 11, 19. Ann Renker found that 93.3% of those surveyed thought the tribe should continue to hunt whales, with 85.5 and 73.4 %, respectively, wanting their households to have whale meat and whale oil.

248. Renker *supra* note 35, at 18. In a 1988 study, Renker notes how 80.4% of the households receive fish which someone else caught; 85.3% of households give fish away to other tribal members; and 35.3% of households are given money or other goods by a fisherman when there is a good season.

and the blubber from the whale caught in 1999 was estimated at 7,000 pounds.²⁴⁹ The village consumed much of this during the course of a large potlatch to celebrate the whale's landing and the remainder was shared among the community. It is estimated that approximately 1,000 pounds of meat and 3,500 pounds of blubber were distributed throughout the tribe.²⁵⁰

The monetary value of subsistence goods is perhaps put into a clearer context when one considers the economic situation of the Makah. In addition to the low household income and high unemployment rate among the Makah, which we mentioned in the preceding section, 59% of their housing units are substandard.²⁵¹ It is thus clear that subsistence goods are of a fundamental economic importance to the Makah.

However, in saying this, the value of a subsistence lifestyle transcends simple monetary gain and there are at least three other ways in which the Makah accrue value from using locally derived food sources. First, there are a number of cultural benefits that are linked to the use of subsistence goods. In the above-mentioned 1999 study, factors such as strengthening tribal identity, upholding tradition, honoring ancestors, being a good steward of the environment and maintaining a sense of interdependency with nature were all elicited from the interviews with tribal members.²⁵² Second, there is a social aspect to obtaining subsistence foods. Often families and friends will both harvest and consume marine animals (such as gooseneck barnacles and chitons) together and the actual process of collection is as much a part of the social interaction as is the eating.²⁵³ Third, there appear to be certain health consequences for Indians when they move away from a subsistence diet. For example, a high proportion of the Makah, who have neither a historic nor cultural connection to cattle or other dairy animals, have been found to be lactose intolerant.²⁵⁴ Comparisons can be drawn here between the Makah and other Indian tribes which have experienced diet-related health problems and there is certainly grounds to suggest that a reintroduction of whale prod-

ucts—in particular whale oil and the essential fatty acids contained within it—may improve the health of the Makah.²⁵⁵

Without doubt, subsistence foods account for a substantial part of the contemporary Makah diet and, although these goods may be supplemented by visits to the general store, one should not underplay their importance. Given the economic, cultural, social, and health benefits described above—not to mention a lack of faith in “modern” agriculture with its accompanying pesticides, herbicides, and hormones²⁵⁶—it is not hard to see why this is the case. It is also apparent that the Makah treat whales as subsistence goods and believe that whale products could provide a valuable addition to their diet. In light of this, shouldn't the international community, the United States, and civil society consider Makah whaling as a subsistence activity as well?

E. Makah Whaling and Animal Liberation

An ethical objection to Makah whaling can be raised because in killing a whale, harm is done. “The question is not, Can they reason? nor Can they talk? but, Can they suffer?”²⁵⁷ As leading deontological animal rights philosopher Tom Regan notes, “fundamentally, it is not the number of animals that matters (though the numbers involved compound the wrong). Fundamentally, what matters is that animals . . . have their life brought to an untimely end.”²⁵⁸ To the extent whale meat and blubber substitute for other sources of meat (such as subsistence hunted deer or elk or farm-raised pig or cattle) and for seal blubber, however, the taking of whales may decrease the total number of lives involved, and, given their size and the freedom they enjoy while living, may decrease overall suffering as well. Indeed,

[a]part from taking their lives there are also many other things done to animals in order to bring them cheaply to our dinner table. Castration, the separation of mother and young, the breaking up of herds, branding, transporting, [raising of farm animals in close confinement,]

249. Sepez, *supra* note 3, at 120. The total yield of the whale is generally agreed upon although there is some discrepancy over the ratio of meat to blubber. At the time of landing, the whaling captain estimated that there were 2,000 pounds of meat and 5,000 pounds of blubber, whereas the NMFS put the figures at 3,000 and 4,000, respectively.

250. *Id.*

251. Renker, *supra* note 35, at 18 (citations omitted).

252. Sepez, *supra* note 3, at 130.

253. *Id.* at 132.

254. Renker, *supra* note 35, at 22. Moreover, Indians of the Pacific Northwest have the highest rate of digestive illnesses of all American Indians. *Id.* More generally, American Indians have a statistically higher chance of succumbing to a number of food-related illnesses and have the highest rates of diabetes in the world. *Id.* at 21. Renker's data are based upon studies by the Indian Health Service and the National Institutes of Health (citations omitted).

255. *Id.* at 22-23. Renker also notes that research conducted with the Pima Indians of Arizona has demonstrated that isolated populations in particular environments can evolve a genetic code that is uniquely suited to the food resources of that environment. This genetic code regulates the biological processes in the body that produce proteins, fatty acids and enzymes as well as thousands of other chemicals. This distinctiveness may help explain why the members of the Pima Indian Tribe who have adopted a western diet are more likely to succumb to illnesses such as diabetes and obesity. *Id.* at 22. Clinical studies also have suggested that there may be a link between the lack of essential fatty acids in the Makah diet and the high levels of Attention Deficit Disorder, Attention Deficit Hyperactive Disorder, read-

ing disabilities and dyslexia in Makah children, which approach a rate almost double that of the general population. *Id.*

256. Sepez, *supra* note 3, at 133. Sepez notes how many tribal members believe that local foods contain fewer contaminants than those produced commercially.

257. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 311 (1789).

258. See TOM REGAN, THE CASE FOR ANIMAL RIGHTS 336 (1985). See also CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? TOWARDS LEGAL RIGHTS FOR NATURAL OBJECTS (1974) (ascribing legal rights to animals). See also D'Amato & Chopra, *supra* note 66 (arguing for an international legal entitlement to inure to whales and be recognized as *opinio juris*). But see Bradford, *supra* note 18, at 212:

If the primary lesson to be drawn from the ASW issue is that the international legal regime is content to place Makah collective rights at the mercy of NGOs and establish the privilege of charismatic animal over indigenous human species as the guiding principle for state-indigenous relations, the future of the indigenous rights regime is less than bleak.

259. PETER SINGER, PRACTICAL ETHICS 64 (2d ed. 1993). Suffering during the process of dying may work against this argument to the extent that whales die more slowly or painfully than other sentient animals that the Makah would otherwise consume in the absence of whale meat and blubber. *Id.* at 120. The Makah Management Plan, *supra* note 219, does require the use of methods such as a high-powered rifle after the initial strike in order to minimize suffering. Yet, the time until death in the 1999 Makah hunt was still eight minutes. Final EA, *supra* note 34, at 50-51. There also may be negative effects of the

and finally the moments of slaughter—all of these involve suffering and do not take the animals' interests into account.²⁵⁹

Again, Regan:

[W]hen we must choose between overriding the rights of the many who are innocent or the rights of the few who are innocent, and when each affected individual will be harmed in a prima facie comparable way, then we ought to override the rights of the few in preference to overriding the rights of the many.²⁶⁰

If we assume 1:1 substitution—that is, for every pound of whale meat consumed, one pound of another species will not be consumed, then for every whale killed; approximately two cows, two pigs, two lambs, two chickens, two deer, two elk, two grouse, two ducks, and two seals will be saved.²⁶¹ Or looking at it in a slightly different way, in terms of meat, 1 whale is equivalent to at least 700 chickens or 100 seals or 31 bear or 28 deer or 15 pigs or 9 elk or 4 cows. In terms of blubber, 1 whale is the equivalent of 180 seals. If all are innocent, we ought to choose to override the rights of the few—that is, the whales.

Some whale conservationists and preservationists may contend that gray whales—so-called charismatic megafauna—are entitled to special treatment or protection by humans because whales²⁶² are highly intelligent, communal, and communicative creatures and have long gestation periods and low birth rates.²⁶³ While we appreciate the sincerity of the principled advocates of this claim who also show reverence and respect for indigenous peoples and culture, we have a number of responses.

To begin with, while humans “assume a lot of intelligence from whales” a recent study of harbor seals “shows that seals are quite bright little animals too.”²⁶⁴ Moreover, as the Humane Society of the United States (HSUS), one of the plaintiffs in the *Anderson* litigation, and the Seal Conserva-

tion Society, respectively remark, harbor seals are “amazingly graceful”²⁶⁵ and “gregarious.”²⁶⁶ In addition, while they tend to haul out in small groups, some harbor seal colonies number over 1,000 individuals.²⁶⁷ Seals also give birth to only one pup per year.²⁶⁸ In those instances where similarly sentient and intelligent creatures from two different species, e.g., gray whales and harbor seals, are harmed in a comparable fashion, an argument based on numbers is at its most compelling. Thus, to the extent the Makah would substitute whale meat and blubber for seal meat and blubber, the contention that whales should not be hunted because they are special falls apart.

Perhaps more damning to whale preservationist' argument, however, is the slippery slope that proponents find themselves on when they engage in comparisons of sentience and intelligence. For example, such an argument could justify differential intra-species treatment based on mental capacity. Moreover, as Peter Singer, a noted utilitarian ethicist and animal rights advocate,²⁶⁹ has stated, what is most important is not the relative intelligence²⁷⁰ or attractiveness of species, but rather, harping back to Jeremy Bentham, whether and the extent to which an individual within a species is made to suffer.

The traditional animal welfare organisations concentrate on trying to stop cruelty to animals of those species to which we most easily relate. Dogs, cats, and horses are high on their lists, because we keep these animals as pets or companions. Next come those wild animals that we find attractive especially baby seals, with their big brown eyes and soft white coats, the mysterious whales and the playful dolphins. Animal Liberationists are also, of course, opposed to the suffering and killing that is needlessly inflicted on dogs, cats, horses, seals, whales, dolphins, and all other animals. They do not, however, think that how appealing an animal is to us has anything to do with the wrongness of making it suffer. Instead they look to the severity of the suffering, and the numbers of animals involved.²⁷¹

Given that cows,²⁷² pigs, and chickens do not have the same degree of freedom as whales do during their lives, particularly when reared in a factory farm, a desire to minimize suffering during rearing also would support hunting of whales. In light of that suffering during rearing, Singer describes the

death of a whale on members of that whale's social group. SINGER, *supra*, at 120.

260. SINGER, *supra* note 259, at 305. Tom Regan terms this the “Miniride Principle.” This is not to suggest that Regan is pro-whaling. He long ago set forth his anti-whaling position. See, e.g., Tom Regan & D. Jamieson, *Whales Are Not Cetacean Resources*, in *ADVANCES IN ANIMAL WELFARE SCIENCE* (M.W. Fox & L.D. Mickley eds., 1984).
261. Pounds of available meat were obtained from Sepez, *supra* note 3, at 120 and app. I.B.; HOLLY BORN, *ALTERNATIVE MEAT MARKETING, LIVESTOCK TECHNICAL NOTE 6* (2000), available at <http://attra.ncat.org/attra-pub/PDF/Altmeat.pdf> (last visited July 31, 2003); Alaska.com, *Big-Game Weights*, at <http://www.alaska.com/akcom/trivia/trivcom/bio/story/786154p-860512c.html> (last visited July 31, 2003); and <http://www.askthemeatman.com/deer.htm> (last visited July 31, 2003).
262. For a description of the super-whale, see Kalland, *supra* note 65.
263. See, e.g., Howard Scott Schiffman, *The Protection of Whales in International Law: A Perspective for the Next Century*, 22 *BROOK. J. INT'L L.* 303, 320-323 (1996).
264. Volker Deecke, *quoted in* Tom Clarke, *Seals Learn Killers' Clicks*, *NATURE*, Nov. 14, 2002, available at <http://www.nature.com/nsu/021111/021111-6.html>. See also V.B. Deecke et al., *Selective Habituation Shapes Acoustic Predator Recognition in Harbour Seals*, 420 *NATURE* 171 (2002) (documenting the ability of harbor seals to distinguish between genetically distinct populations of killer whales: one which hunts seals; the other which hunts fish).
265. HSUS, *Seals*, at <http://www.hsus.org/ace/11735> (last visited Oct. 31, 2003).
266. Seal Conservation Society, *Harbour Seal (Phoca vitulina)*, at <http://www.pinnipeds.org/species/harbour.htm> (last visited Oct. 31, 2003).

267. *Id.*

268. HSUS, *Seals*, *supra* note 265.

269. Singer began to set forth his view in a book review in *The New York Review of Books* (Apr. 5, 1973).

270. Singer does contend nonetheless that to the extent animal species are composed of beings that are self-aware and see themselves as “existing over time and thus . . . aspire to a longer life,” it would be worse to kill one of those beings than a member of an animal species that lacks that capacity. SINGER, *supra* note 259, at 125.

271. PETER SINGER, *THE ANIMAL LIBERATION MOVEMENT: ITS PHILOSOPHY, ITS ACHIEVEMENTS, AND ITS FUTURE* (1985), available at <http://www.utilitarian.org/texts/alm.html> (last visited June 26, 2003). Compare Statement of Dr. William Aaron, Debate Continues Over Commercial Whaling as International Whaling Commission Puts Off Voting to Lift 12-Year Ban, National Public Radio (NPR), May 27, 1999 (transcript available from NPR), *quoted in* Bradford, *supra* note 18, at 197 n.161 (“We do feel . . . that killing a whale is not very different than killing a human being. In fact, to some people it's much worse. . .”).

272. *Anderson* plaintiff HSUS has large picture of a cow on its web homepage, with the motto: “Promoting the protection of all animals.” See <http://www.hsus.org> (emphasis in original) (last visited Oct. 30, 2003).

“moral necessity” of avoiding the products of animals that have been reared on factory farms as “the clearest case of all” in which humans ought to look beyond their narrow self-interests.²⁷³ Moreover, because one arranges for the coming into existence of farm animals, it can be argued that one “voluntarily acquire[s] duties to these animals one would not otherwise have.”²⁷⁴

While it is true that the above argument is premised on a 1:1 substitution, it may be that whaling increases the overall amount of meat in the diet of the Makah. Indeed, for an animal liberationist point of view, the worst outcome would be zero substitution with the result being that one additional creature (the whale itself) is killed for each whale taken.²⁷⁵ But even at a rate of 25%, the taking of 1 whale could spare 178 chickens or 25 seals or 8 bear or 7 deer or 2 elk. The point of this argument is not to reach a conclusion—that would take some careful surveying of the Makah—but rather, to show that when one scratches deeper, the animal welfare argument is not as clear cut as it is portrayed.

F. Methods Employed by the Makah Nation to Whale

The historical methods used by the Makah to whale have already been discussed above and need not be repeated here. Rather, this section will discuss current proposals to whale and address the methods that the Makah used in their 1999 hunt. The Makah’s modern day approach to whaling is evident from the tribe’s management plan for the hunting of gray whales.²⁷⁶ The plan sets forth specific guidelines for a hunt, the key points of which are listed here. A whaling team has to include at least one canoe (minimum 30 feet in length) with six paddlers and a harpooner along with at least one chase boat and at least one support boat. Within each chase boat there must be a pilot, a diver, a rifleman, and a harpooner. The diver or an additional crew member must act as a safety officer during the hunt. The rifle must be high powered (.458 caliber or higher) and after the initial strike on the whale the rifleman will kill the whale as quickly as possible. The rifleman will not fire if the safety officer deems it unsafe.²⁷⁷

It is clear from the above guidelines that there are a number of major differences between a modern day whale hunt and one that would have been conducted in the past, with the use of a rifle and motorized boats being perhaps the most obvious. For some critics of modern day Makah whaling this is

a clear statement that adherence to tradition is not important for the Makah and that Makah claims of reviving a traditional cultural practice are therefore unfounded.²⁷⁸ This is not the case however and the utilization of technological innovations should not be used as a reason for stating that an indigenous group is acting disingenuously in their attempt to revitalize old traditions. Throughout history, the Makah, as is the way of many native hunters, frequently made the most of the technology that existed at the time. In the early 1900s, at least one Makah whaler was using a metal head on the end of his traditional harpoon that was otherwise crafted from yew wood.²⁷⁹ Likewise, when steam power became more common, Makah whaling canoes would often accept tows from steamer to and from the whaling grounds to save paddling long distances.²⁸⁰ To state that the Makah should either whale exactly as they did 150 years ago or not at all demonstrates a total misunderstanding of aboriginal ways. Elsewhere, indigenous groups often see regulations that stipulate that only traditional hunting methods are to be used as being discriminatory and patronizing. With regard to aboriginal hunting issues in Australia, it has been noted that, “in determining whether [a hunting] activity is ‘traditional,’ attention should focus on the purpose of the activity rather than the method.”²⁸¹

In addition, it is highly unlikely that a hunt using only traditional methods would be considered humane in today’s world. It has already been noted above how a hunt could

and suggests that the use of the rifles may not be limited to shooting only whales; indeed, they note that

[t]he Makah Tribe of Western Washington will now use high-caliber military firearms against Gray whales during their planned “ceremonial” whale hunt in the spring of 1998. Recent reports indicate that members of the Makah Tribal Whaling Commission have obtained at least 4 of these weapons. It is believed that the military-grade ordinance could also be used to intimidate or threaten [NMFS] enforcement officers—and other environmentalists—from attempting to prevent any subsequent illegal whale hunting The Makah tribe claims they will simultaneously spear Gray whales with stainless steel harpoons, while also shooting at their skulls with these massive, .50-caliber assault rifles. Coincidentally, these are the weapons normally mounted on military assault helicopters and Navy gunboats—they can efficiently shatter a ship’s hull a mile away. There isn’t a trace of “ceremonial aboriginal whaling” in this plan—it’s blatant, undeniable whale warfare!

Breach Marine Protection, at <http://www.breach.org/page32.html> (last visited Oct. 9, 2003). Finally, The West Coast Anti-Whaling Society comments that

the news often fails to even show the weapon (a .50 caliber rifle) that these traditional hunters intend to use. This hunt is not traditional, it is not cultural and it is not even necessary. There is nothing romantically ceremonial about the intentions of severing an animals (sic) spinal cord with a high powered rifle.

Available at *A Foreword by Anna Hall*, <http://www.anti-whaling.com/foreward.htm> (last visited Oct. 9, 2003).

279. Renker, *supra* note 35, at 8.

280. *Id.*

281. 2 AUSTRALIAN LAW REFORM COMMISSION, *THE RECOGNITION OF ABORIGINAL CUSTOMARY LAWS* (Australian Government Pub. Serv. 1986) (cited by Richardson, *supra* note 11, at 8). Richardson notes that currently this view is not reflected in mainstream international law.

282. Renker, *supra* note 35, at 9. Renker cites writings from Frances Densmore who in 1939 reported that the Makah told him that, during the hunt, a long lance was used to “attack the whale, making it bleed profusely” and that the whole process could last “three to four days.”

273. PETER SINGER, *ANIMAL LIBERATION* 170 (2d ed. 1990).

274. REGAN, *supra* note 258, at 342.

275. See e.g., Sepez, *supra* note 3, at 117-19 (suggesting that demand for seal products outstrips supply).

276. Makah Management Plan, *supra* note 219.

277. For the safety officer to authorize the rifleman to shoot, the barrel of the rifle needs to be above and within 30 feet of the whale and that the rifleman’s field of vision must be clear from “persons, vessels, buildings, vehicles, highways and other objects of structure that if hit by a rifle shot could cause injury or harm to human life.” In addition, “[t]he whaling captain will suspend the hunt if the safety officer determines that visibility is less than 500 yards in any direction.” *Id.* at 6.

278. For example, the Whale and Dolphin Conservation Society (WDCS) states that “[t]he use of such a rifle highlights the incongruity of the customary with the contemporary.” *WDCS Briefing on the Hunt of Gray Whale by the Makah*, at <http://www.wdcs.org/dan/news.nsf/webnews/8A415D66D6E27ADA802568FB0063443F> (last visited Oct. 9, 2003). Breach Marine Protection voices similar concerns,

take a number of days and it was not only stressful for the crew but also no doubt for the whale. Killing a whale in the traditional manner could take up to three or four days,²⁸² far longer than the eight minutes that it took in 1999.²⁸³ Any criticism of present day Makah whaling based on this argument therefore defies logic, especially as the IWC and environmental groups encourage methods that result in as quick and humane a death as possible.²⁸⁴ The issue of modern methods in aboriginal whale hunts came before the IWC's Cultural Anthropology Panel in 1979 who, despite some opposition from a number of countries, decided that "the definition of subsistence whaling [did] not prevent the use of modern technology."²⁸⁵

Finally, it is worthwhile to return once more to the Treaty of Neah Bay and examine what light it sheds on the usage of modern technology. In *United States v. Washington*²⁸⁶ it was noted how, at the time the treaty was constructed, the U.S. government clearly intended the Makah to use any available technology in order to help them with fishing and whaling.²⁸⁷ To disallow the Makah the use of modern technology today would therefore not only be viewed as being inhumane and patronizing but it would also be in direct violation of spirit (if not the wording) of the Treaty of Neah Bay.

G. Majoritarianism and Native Societies

James Madison once cautioned that "[i]f a majority be united by a common interest, the rights of the minority will be insecure."²⁸⁸ Although majority rule may well be democratic, it is not always equitable. If a minority's interests consistently fall on deaf ears and if the views of a differently opinioned majority always prevail then, as Madison notes, the minorities' rights will be "insecure." As one commentator has noted, "indigenous groups experience the obstruc-

tive influence of majoritarianism most acutely when they attempt to engage in ethnodevelopmental strategies that are either culturally incoherent to dominant societies or threatening to the legal sovereignty of the states in which they reside."²⁸⁹ Whaling is no doubt "culturally incoherent" to many Americans—probably even to a majority of Americans—but should the fact that whales are not thought of as a food source by the majority mean that the minority (for whom whales provide a perfectly legitimate meal as well as a host of other useful products) cannot use them for that purpose either?

There is no question that the thought of the Makah going whaling saddens and angers many people and it has been argued here that much of this is due to differences in culture. Indeed, it appears that the Makah and their opponents wear different "Kulturbrille"—sets of cultural glasses that determine how people perceive the world around them.²⁹⁰ It is hard to view an event without these Kulturbrille, they do after all affect everything we look at, but perhaps it is time for people to take off their cultural glasses and see how different the world looks. At the start of the 21st century we live in a highly multicultural society. A respect for multiculturalism means that not only should different ethnicities, shades of skin and languages be respected but also, as the term implies, different cultures—even when, as in the case of the Makah, they are very different from our own.

V. Conclusion

While the procedural hurdles (NEPA) to its whaling tradition can be overcome, to the extent that the Makah's treaty rights have been abrogated or modified—either de jure or de facto—the promise to the Makah in 1855 (as well as to Indian tribes more generally) of a "measured separatism" has been compromised. Indeed, the panel's analysis of the MMPA and the conservation necessity doctrine has broad implications: it would impair not only the Makah Nation's prerogative to hunt whales, but also its sealing rights. Moreover, given the broad reach of the MMPA, the decision, as it stands, has ramifications for the wider Indian community as well.

In our view, the tribal treaty rights and the trust relationship established between the federal government and Indian tribes should require more than mere advocacy of tribal treaty rights.²⁹¹ Moreover, while we acknowledge the nation-states' recognition in the first half of the 20th century of indigenous peoples' use and dependence on marine wildlife, we must not forget that instruments such as the ICRW were conceived and crafted by dominant societies and imposed on indigenous peoples based on the val-

283. Sepez, *supra* note 67, at 152.

284. Miller, *supra* note 35, at 264.

285. Gillespie, *supra* note 21, at 98. See also *id.* n.103, in which Alexander Gillespie states that the panel also commented that "there is good reason to recommend improvement in weapons, powder and bombs currently employed to further reduce the struck but lost rate."

286. 384 F. Supp. 312 (W.D. Wash. 1974).

287.

The treaty commissioners were aware of the commercial nature and value of the Makah maritime economy and promised the Makah that the government would assist them in developing their maritime industry. Governor Stevens found the Makah not much concerned about their land, apart from village sites, burial sites, and certain other locations, but greatly concerned about their marine hunting and fishing rights. Much of the official record of the treaty negotiations deal with this. Stevens found it necessary to reassure the Makah that the government did not intend to stop them from marine hunting and fishing but in fact would help them to develop these pursuits. Article 13 of the Treaty with the Makah, however, did prohibit the tribe from trading at Vancouver Island. By his promises of kettles and fishing apparatus to the Makah, Governor Stevens clearly indicated that the treaty commissioners had no intention to restrict the Indians to aboriginal equipment or techniques. The Government's intent to aid the Makah in their whaling, sealing[,] and other fisheries continued after the treaty.

Id. at 363-64 (emphasis added).

288. LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 3 (1994). Lani Guinier continues by noting that Madison was concerned with the fact that in a heterogeneous community the assumption that the majority view is representative of the minority is "altogether fictitious."

289. Bradford, *supra* note 18, at 169-70.

290. Franz Boas—who is widely considered to be the father of American anthropology—coined this term in describing how culture affects the way in which people view an event. As people wear different cultural glasses, two people can interpret one event in two very different ways. JOHN MONAGHAN & PETER JUST, *SOCIAL AND CULTURAL ANTHROPOLOGY: A VERY SHORT INTRODUCTION* 38 (2000).

291. In the context of natural resource management, we are speaking of the responsibility of the United States to provide technical assistance, ease the transfer of technology, provide financial assistance, facilitate tribal co-management of shared natural resources, and last, but not least, advocate for and pursue the cause of the conservation of biological diversity.

ues, interests, and norms of those societies.²⁹² We believe that the Arctic Council and the CBD begin to move society in the right direction—toward a recognition of indigenous peoples' self-determination and sovereignty—and provide more principled models of how a pluralistic society and one based on the norm of culture diversity should accommodate indigenous culture, rights, and knowledge. Finally, we believe that the great whales would be better served by those advocates seeking their preservation and protection—the

broad objective we wholeheartedly endorse—if they focus their energies, talents, and worldwide attention on large anthropogenic threats to whales, namely climate change, habitat destruction, marine pollution, and fishing by-catch, rather than on preventing the Makah people from exercising their cultural heritage.²⁹³ Indeed, whaling conservationist and preservationist camps should see Indian treaties and tribes as allies in, not impediments to, the quest for the conservation of biological diversity.

292. It could be argued that we are being inconsistent in objecting to one form of domination—majority culture over indigenous culture—which if eliminated, would allow a segment of a dominant species, indigenous peoples, to impose its values on another species, whales. Yet, as we stated at the outset of this Article, regardless of our personal beliefs regarding the rightfulness or wrongness of whaling, we feel it is for the Makah people to decide for themselves whether or not to engage in subsistence whaling.

293. See Report of the IWC Scientific Committee, IWC/55/Rep1 (2003); WILLIAM C.G. BURNS & ALEXANDER GILLESPIE, *THE FUTURE OF CETACEANS IN A CHANGING WORLD* (2003). For example, climate change could result in a trophic cascade, where a decline in sea ice in the Antarctic results in decreased productivity of algae, which is the primary winter food source for krill, which in turn is the primary prey of whales in the Antarctic. William C.G. Burns, *Climate Change and the International Whaling Commission in the 21st Century*, in BURNS & GILLESPIE, *supra*, at 339-79, 349-50.