

1-1-2010

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Recommended Citation

Carol B. Koppelman, *Anderson v. Evans: the Ninth Circuit Harmonizes Treaty Rights and the Marine Mammal Protection Act*, 16 Hastings West Northwest J. of Env'tl. L. & Pol'y 353 (2010)
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Anderson v. Evans: the Ninth Circuit Harmonizes Treaty Rights and the Marine Mammal Protection Act

Carol B. Koppelman*

We have a treaty right to hunt and fish, but by God, that doesn't mean you go after king salmon when it is out of season.

-Makah Chief Tribal Judge Jean Vitalis

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I. Introduction

The Makah Indian Tribe, residing in the northwest corner of Washington State, has a 1,500-year tradition of hunting whales. The Makah's whaling customs and practices were extensively noted by James G. Swan, an Indian agent, who lived among the Makah from 1862 to 1865. In addition to his duties as Indian agent and school teacher, Swan was an amateur ethnologist who researched and documented many aspects of Makah life and culture, including their dwellings, familial structure, fishing, government, mythology, ceremonies, language, and whaling.¹ In regard to whaling, Swan noted that the tribal members excelled at the management of canoes and were ardent in their pursuit of whales.² He compared the Makah to the inhabitants of Nantucket as being the most expert and successful

1. James G. Swan, *The Indians of Cape Flattery, at the Entrance to the Strait of Fuca, Washington Territory*, in 220 THE SMITHSONIAN CONTRIBUTIONS TO KNOWLEDGE 1, 4 (1868), available at http://www.secstate.wa.gov/history/publications_view_pdf.aspx?i=SL_swanindians/SL_swanindians.pdf.

2. *Id.* at 4.

whalers of the west coast tribes.³ Swan also noted that the Makah lodges, normally containing only decorations identifiable to the owner, routinely shared three images in common: the thunderbird, the Ha-hék-to-ak (a mythological animal that the Makah said caused lightning), and the whale.⁴

By the early 20th century, the commercial whaling industry had decimated gray whale populations. This reduction in the number of gray whales available to be hunted, among other factors, led the Makah to suspend their whale hunting for approximately 70 years. By 1970, when the gray whale population was estimated at less than two thousand, the gray whales were listed as endangered.⁵ Under this protection, the number of gray whales steadily increased. With their population estimated at approximately twenty thousand, the gray whale was delisted in 1994.⁶

Since 1995, the Makah Tribe has been attempting to reassert their right to hunt whales. They have pursued their right through the International Whaling Commission (“IWC”) with the assistance of two U.S. federal agencies, the National Oceanic and Atmospheric Administration (“NOAA”) and the National Marine Fisheries Services (“NMFS”). While the Makah have gained these agencies’ support for their whaling efforts, the Makah have faced numerous legal challenges to their whaling rights brought by non-profit organizations and individuals. In its most recent court decision addressing the Makah’s whaling rights, the Ninth Circuit Court of Appeals held that the Makah’s whaling must comply with the Marine Mammal Protection Act (“MMPA”).⁷ The MMPA only allows takings of protected marine mammals, otherwise outlawed by the Act, under a permitting system.

While some commentators have argued that the Ninth Circuit’s decision to subject the tribe’s whaling to the MMPA abrogates the Makah’s whaling rights as reserved in the 1855 Treaty of Neah Bay, the court clearly stated in its holding that it was not making a decision about abrogation of treaty rights.⁸ Typically, abrogation of treaty rights may only be done by Congress, and the abrogation should be explicit.⁹ The Ninth Circuit recognized that the MMPA provides a mechanism for the regulation and oversight of the exercise of the Makah’s treaty right to whale.¹⁰ Requiring

3. *Id.*

4. *Id.* at 7.

5. Mary Jordan, *Gentle Giants of the Sea Return to Mexico Lagoon*, THE WASHINGTON POST, Feb. 20, 2005, at A01.

6. *Id.*

7. *Anderson v. Evans*, 314 F.3d 1006, 1009 (9th Cir. 2002), amended by 371 F.3d 475, 501 (9th Cir. 2004).

8. *Id.*

9. *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893).

10. *Anderson*, 371 F.3d at 501.

compliance with the Act does not prevent the Makah from whaling. Takings of whales by permit issued under the MMPA would allow the Makah to exercise their treaty right of whaling. Thus, the right to hunt whales that is reserved to the Makah Tribe in their 1855 treaty can be harmonized with the MMPA.

Section I of this article will provide background information on the Makah Tribe and the importance of whaling to the tribe. This section also will discuss the cessation of whaling by the tribe in the early 20th century. Section II will discuss international law that governs whaling, as well as domestic laws that impact the Makah's reassertion of their whaling rights. Section III will discuss the recent court cases that non-profit organizations and individuals have brought against the federal agencies for their support of Makah whaling, and the legal consequences of those decisions. Section IV will explore why complying with the Marine Mammal Protection Act does not abrogate the Makah's treaty rights, and concludes that the treaty rights should be exercised under the regulation of the MMPA.

II. The Makah and the Importance of Whaling

The Makah Tribe inhabits a reservation comprising 27,000 acres¹¹ at the extreme northwestern corner of Washington State. The Makah are the sole group of Nuu-chah-nulth people in the boundaries of the United States; other Nuu-chah-nulth peoples live on Vancouver Island and along the central British Columbia coast.¹²

Like most indigenous peoples, the Makah's way of life and culture were defined by their surroundings. The rich marine environment that the Makah lived alongside contrasted sharply with the poor arability of their land.¹³ The poor soil quality, extensive rainfall, and high humidity kept most crops from growing on their lands.¹⁴ Thus, it is no surprise that the Makah were highly dependent on the sea for their livelihood and survival.¹⁵ Most of their food was harvested from the sea.¹⁶

11. William Bradford, 'Save the Whales' v. 'Save the Makah': Finding Solutions to Ethnodevelopmental Disputes in the New International Economic Order, 13 ST. THOMAS L. REV. 155, 172 (Fall 2000).

12. RUTH KIRK, TRADITION AND CHANGE ON THE NORTHWEST COAST 8-9 (1986).

13. Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 173 (2002).

14. *Id.*

15. *Id.* at 172.

16. *Id.*

A. History of Makah Whaling

The Makah have hunted whales for at least 1,500 years.¹⁷ Archeological evidence from Ozette, Washington, radiocarbon-dated to approximately 440 A.D., includes whale remains and whaling hunting implements.¹⁸ Traditionally, whales were among the principal sources of food for the Makah, along with halibut.¹⁹ Whales were killed at sea by hunters, and carcasses of whales that washed ashore were salvaged for food and products.²⁰ Among the species of whales hunted or salvaged were sperm whales, right whales, black fish (melon-headed whales), fin whales, blue whales, killer whales (orca), and humpback whales, although the most commonly hunted were gray whales.²¹

Makah whaling crews consisted of eight men: the harpooner in the bow, the steersman in the stern, and six men to paddle the canoe.²² The harpoon had a barbed head mounted on heavy, spliced shafts of yew.²³ The shaft was spliced so that the blade stayed in the whale; it also allowed the shaft to break if the whale thrashed violently after being stuck, which lessened the danger that the shaft would strike the men in the canoe.²⁴ Once the whale was struck, the hunters paddled backwards to avoid the shaft striking the canoe's occupants.²⁵ Attached to the barbed harpoon head by a lanyard were buoys made of seal-skins turned inside out, with the apertures sewn up and the skin inflated like a bladder.²⁶ While only one buoy was attached to the harpoon head driven into the whale's head, the harpoons thrown into the whale's body had many buoys attached in order to hinder the whale from diving below the surface.²⁷ Unable to dive, the whale was killed with spears and lances.²⁸ In addition, the buoys helped keep the dead whale afloat.²⁹

17. NAT'L. OCEANIC AND ATMOSPHERIC ADMIN., DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR PROPOSED AUTHORIZATION OF THE MAKAH WHALE HUNT 1-5 (2008) [hereinafter DRAFT EIS]; Miller, *supra* note 13, at 175.

18. Beth Laura O'Leary, *Aboriginal Whaling from the Aleutian Islands to Washington State*, in THE GRAY WHALE, ESCHRICHITIUS ROBUSTUS 84, 84-85 (Mary Lou Jones & Steven L. Swartz eds., 1984); Miller, *supra* note 13 at 187-88.

19. Swan, *supra* note 1, at 19.

20. *Id.*; see also KIRK, *supra* note 12, at 8-9.

21. Swan, *supra* note 1, at 19; KIRK, *supra* note 12, at 133.

22. Swan, *supra* note 1, at 21.

23. Swan, *supra* note 1, at 19-20; KIRK, *supra* note 12, at 135.

24. KIRK, *supra* note 12, at 135-36.

25. *Id.*

26. Swan, *supra* note 1, at 20-21.

27. *Id.* at 21.

28. *Id.*

29. *Id.*

Once the whale was dead, one member of the whaling team dove into the water to sew the whale's mouth closed, to keep the whale from taking on water and sinking.³⁰ The whale carcass was towed to shore, and hauled as high on the beach as it could be floated.³¹ When the tide went out, the carcass was butchered, with the choicest part, the hump, taken by the harpooner³² and the rest distributed according to the instructions of the whaling captain.³³ Although the hump belonged to the harpooner, he typically did not eat it, but rather sold it or gave it away; the whaler never ate whale meat on the belief that eating the meat would make it more difficult for him to kill whales in the future.³⁴

B. Importance of Whaling to Makah Culture

The Makah's whaling tradition is an integral part of the tribe's culture. Whaling was more than just a means to obtain food or products; whaling influenced the Makah's social structure, religion, and interactions with the United States government. The Makah used every portion of the whale, except the vertebrae and offal.³⁵ The blubber and flesh were eaten; the sinew was made into ropes, cords and bowstrings; the stomach and intestines were used to store oil; and whale oil was used in the same manner as butter, as an accompaniment to other foods.³⁶ The whale oil was also traded to other tribes for other types of food and goods.³⁷

1. Social Structure

Whale hunts were directed by chiefs of the tribe.³⁸ Only chiefs had the wealth needed for ritual preparation and the resources to obtain the whaling equipment and 40-foot canoe.³⁹ The Makah did not have access to the best cedar wood necessary to build the seagoing canoes for whaling; their seagoing canoes were obtained in trade with tribes on Vancouver Island.⁴⁰ The whaling crew, which was captained by the harpooner, typically included other male relatives of the captain, or the captain's slaves.⁴¹ Moreover,

30. KIRK, *supra* note 12, at 136-37.

31. Swan, *supra* note 1, at 21.

32. *Id.* T.T. WATERMAN, THE WHALING EQUIPMENT OF THE MAKAH INDIANS 45 (1920).

33. KIRK, *supra* note 12, at 137-38.

34. WATERMAN, *supra* note 32, at 40-45.

35. Swan, *supra* note 1, at 22.

36. *Id.*

37. Miller, *supra* note 13, at 172.

38. KIRK, *supra* note 12, at 137.

39. *Id.*

40. Miller, *supra* note 13, at 176; WATERMAN, *supra* note 32, at 9.

41. KIRK, *supra* note 12, at 136-37.

whale hunting could only be performed by those with an inherited privilege.⁴² It also involved considerable physical strength, knowledge and skill.⁴³ Whale hunters were among the most respected tribal members.⁴⁴ Whalers were esteemed for their generosity in distributing whale meat and oil to other tribal members once a whale was harvested, and at potlatches.⁴⁵

2. Religion

Makah religion is more private and individualized than the Protestant and Catholic religions practiced by European-Americans. Although their traditional beliefs include a Supreme Being, there is no outward form of religious observation.⁴⁶ Each person prays and addresses the Supreme Being by himself and in private. Religious rituals were performed privately in the woods, with the goal of securing the aid of intermediary spirits to assist and protect the individual and to secure a long life or success.⁴⁷ Makah mythology includes a tale that Thunderbird, the most prominent of their mythological beings, delivered a gray whale to the beach at a time when the Makah could not venture onto the ocean because of terrific storms.⁴⁸ Whales also took a prominent place in tribal art, which often depicted whales and other marine mammals.⁴⁹ Whale bones and body parts were used as a medium for artistic works.⁵⁰

Rituals performed prior to conducting a whale hunt were conducted in secrecy, involving ritual bathing, abstinence,⁵¹ imitation of the movements of a whale,⁵² prayer, and the use of skeletons and corpses in the ceremonial preparation.⁵³ Human skulls and remains also decorated whaling shrines.⁵⁴

Bathing was the most important preparation for whaling.⁵⁵ In anticipation of a hunt, members of the whaling team would go each morning

42. Richard Kirk Eichstaedt, 'Save the Whales' v. 'Save the Makah': *the Makah and the Struggle for Native Whaling*, 4 ANIMAL L. 145, 147 (1998).

43. *Id.*

44. Miller, *supra* note 13, at 180.

45. *Id.* at 180-81.

46. Swan, *supra* note 1, at 61.

47. Miller, *supra* note 13, at 185.

48. Bradford, *supra* note 11, at 171.

49. Miller, *supra* note 13, at 182.

50. *Id.*

51. KIRK, *supra* note 12, at 137-38.

52. *Id.* at 86-87.

53. WATERMAN, *supra* note 32, at 39-40; KIRK, *supra* note 12, at 134, 138.

54. KIRK, *supra* note 12, at 134, 138.

55. WATERMAN, *supra* note 32, at 38.

to a freshwater lake or pond.⁵⁶ The hunter would begin with a long soak, and then, starting on the left side of the body, rub himself raw with bunches of hemlock twigs.⁵⁷ Once the needles on the hemlock twigs were worn away and the twigs covered with blood from the hunter's left side, the hunter would repeat this on his right side.⁵⁸

After this scrubbing, the hunter would dive into the water of the pond, staying under as long as possible.⁵⁹ This was done four times, even to the point of blood bursting from long submergence.⁶⁰ Each time the hunter came to the surface, he would imitate a whale by blowing a mouthful of water toward the center of the lake.⁶¹ The imitation of the whale was performed quietly and slowly, in order to induce the whale to act in the same way when it was hunted.⁶² If the whaler's wife participated in this ritual, she would hold the end of a rope tied around the hunter's waist; this rope represented the harpoon line.⁶³ Whaling songs were also sung by the hunter.⁶⁴

Prayers were offered for success in the hunt and for the safety of the whaling crew. Whalers prayed at night to deities, spirits, and the whales themselves.⁶⁵ Prayers were offered in preparation for whaling and after the whale was struck.⁶⁶ After the whale was harpooned, the prayers concentrated on asking the whale to come to shore easily.⁶⁷

Whalers used skeletons and fresh corpses in their preparation for whaling. One ritual involved taking a skull from its burial place, tying it to a rope around the whaler's waist, and trailing it through the water during the ritual bathing and whale imitation ceremonies.⁶⁸ Another ritual involved unearthing skeletons, reassembling them, and suspending them in the woods.⁶⁹ Prayers were offered to the suspended remains; the remains were then carried on the whaler's back as he bathed.⁷⁰ With the skeleton on his back, the bather dove into the water and spouted when reaching the

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 39.
63. *Id.*
64. *Id.*
65. *Id.* at 39-40.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 40.
70. *Id.*

surface.⁷¹ Waterman reports that fresh male corpses were used by the Makah whalers in a similar manner in times earlier than the 1920s.⁷² Sometimes a young boy was killed for the purpose.⁷³ The corpse might be skinned, with the whaler only using the skin during the bathing ritual.⁷⁴ Other times the corpse itself was used, although the lower part of the legs and forearms were cut off before it was placed on the whaler's back.⁷⁵

Although a whaler's wife might assist him with some aspects of the ceremonial bathing in preparation for whaling, sexual contact with women was considered taboo prior to a hunt.⁷⁶ Although a whaler's wife could help him with preparation, the two did not sleep together or have sexual relations.⁷⁷ The wife might even participate in the ceremonial bathing, including carrying the skeleton on her back.⁷⁸ But once the whaler set out on the hunt, the wife retired to her home.⁷⁹ She lay with a mat over her, and did not move, eat or drink until her husband returned from the hunt.⁸⁰

The evidence of these extensive rituals in preparation of whaling indicates that whaling was more than just acquiring food and products for the Makah; it was an important cultural and spiritual part of the tribe's existence. Further, the rituals indicate that whaling was not done casually or thoughtlessly. The intense and detailed preparation conducted by Makah whalers before and during a hunt is markedly different from the callous and clinical hunting and butchering that characterizes commercial whaling.

3. Interactions with the United States

Like many of the tribal treaties of Washington Territory, the Makah's 1855 Treaty of Neah Bay was negotiated by Washington Governor Isaac Stevens. Governor Stevens, who was also the territory's Superintendent of Indian Affairs, was appointed to both positions by President Franklin Pierce in 1853, and served until 1857.⁸¹ Alone among the tribes he negotiated with, Governor Stevens found the Makah more concerned with their right to hunt,

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. Washington State Historical Society, Isaac Ingalls Stevens, <http://stories.washingtonhistory.org/TreatyTrail/context/bios/isaac-stevens.htm> (last visited March 25, 2010).

fish and whale than with their land.⁸² This is likely because the Makah took most of their sustenance from the ocean, rather from their land.⁸³ At least five of the chiefs that negotiated with Governor Stevens expressed their interest in retaining the right of fishing and whaling and their desire to continue to live near the ocean.⁸⁴ The chiefs were agreeable to selling some of their land, as long as they retained their ocean-going culture and the ability to harvest fish, whales, and seals as they traditionally had.⁸⁵

Governor Stevens acknowledged the importance of whaling to the Makah when he proclaimed: “[the U.S. President] knows what whalers you are, how far you go out to sea, to take whales.”⁸⁶ Indeed, the Treaty of Neah Bay is the only treaty that the United States signed with an Indian tribe that specifically includes the right to whale. Article IV of the treaty states: “The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States”⁸⁷

C. Cessation of Whaling by the Makah in the Early 20th Century

By the later decades of the 19th century and first decades of the 20th century, the stock of gray whales in the north Pacific Ocean was dropping dramatically. Commercial whaling by vessels and crews from many countries, including the United States, drastically reduced the populations of all species of whales. Among other uses, whales were harvested for their oil, which was used for lighting, lubricants, margarine, gelatin, shoe polish, cosmetics, paint, soap, and glue, and the baleen was used in women’s clothing as stays.⁸⁸

The reduced whale populations affected the Makahs. James Swan reports that even by the early 1860s, when he lived among the Makah, the number of whales taken had dropped from previous years.⁸⁹ In his book “The Indians of Cape Flattery,” Swan wrote:

From information I obtained, I infer that formerly the Indians

82. Eichstaedt, *supra* note 42, at 148.

83. *Id.* at 147.

84. Miller, *supra* note 13, at 196-97.

85. *Id.* at 197.

86. Eichstaedt, *supra* note 42, at 148.

87. Treaty of Neah Bay, U.S.-Makah Tribe, Jan. 31, 1855, 12 Stat. 939 [hereinafter Treaty of Neah Bay].

88. Bagheera.com, Gray Whale: An Endangered Species, http://www.bagheera.com/inthewild/van_anim_grywhale.htm (last visited May 3, 2009).

89. Swan, *supra* note 1, at 22.

were more successful in killing whales than they have been of late years. Whether the whales were more numerous, or that the Indians, being now able to procure other food from the whites, have become indifferent to the pursuit, I cannot say; but I have not noticed any marked activity among them, and when they do go out they rarely take a prize.⁹⁰

Another source indicates that the Makah also reduced their whale hunting at this time. T. T. Waterman, writing in 1920, says that the Makah temporarily stopped whaling in about 1860 in order to concentrate on the more lucrative seal hunting trade.⁹¹ Then, in 1890, the Makah resumed whaling, largely because the United States' restrictions on fur seal hunting reduced their profits.⁹² The Makah continued to poach seals to profit from the demand for seal fur until the government's strict regulation made poaching impractical.⁹³ Waterman reported that the Makah were engaged in whale hunting at the time he wrote his book in 1920.⁹⁴

In the early decades of the 20th century, the Makah voluntarily suspended their whaling activities. The exact year that the Makah stopped whaling is debated, with some placing it at 1915,⁹⁵ and others as late as 1926.⁹⁶ There is no record of the exact reasons for this decision, but as James Swan speculated in the 1860s,⁹⁷ this decision could have been driven by several factors, including reduced whale stocks, availability of other foods that were easier to obtain, or simply loss of interest in the practice.

Although the Makah stopped whaling in the early decades of the 20th century, the tribe did not forget its whaling culture or practices. The whale, long a prominent depiction in Makah art, currently takes a prominent place in the tribe's flag.⁹⁸ Archaeological excavations during the 1970s at Ozette, Washington revealed whale bones and harpoon barbs, which further spurred interest in the tribe's whaling tradition.⁹⁹ Although whaling had not been practiced for more than 70 years, the tribe retained its whaling identity and culture.

90. *Id.*

91. WATERMAN, *supra* note 32, at 48.

92. *Id.*

93. *Id.*

94. *Id.*

95. Bradford, *supra* note 11, at 173.

96. Eichstaedt, *supra* note 42, at 149.

97. Swan, *supra* note 1, at 22.

98. See Makah Tribe's Flag, available at <http://navajocreation.com/makah.gif> (last visited May 9, 2009).

99. Makah.com, Ozette, <http://www.makah.com/ozette.htm> (last visited May 9, 2009).

III. Whaling Law

Internationally and domestically, concerns arose in the 20th century about the marked reduction in whale populations. These depletions in whale populations led to international gatherings in the 1930s to discuss how to preserve the resource. The first nations to join together were not interested in the conservation of whales for the sake of the species; rather, they were concerned about conserving the resource in order for whales to continue to be hunted and exploited for human use.¹⁰⁰

A. International Whaling Commission

In 1946, fifteen whaling nations gathered in Washington, D.C. to negotiate and sign the International Convention for the Regulation of Whaling ("ICRW").¹⁰¹ In order to implement the ICRW domestically, Congress passed the Whaling Convention Act ("WCA") in 1949.¹⁰² The WCA provides the framework for meeting the U.S.'s obligations arising from the ICRW and establishes that any whaling, transporting whales, or selling whales in violation of the ICRW is unlawful in the U.S.¹⁰³

Although the stated purpose of the ICRW was "to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks," the focus was on maintaining sufficient stocks for commercial whaling, rather than species preservation.¹⁰⁴ The ICRW allows nations to hunt whales, even those with depleted stocks, under a scientific exception.¹⁰⁵ The United States used this scientific loophole to continue hunting gray whales until 1970, the year that the gray whale was listed as endangered under the Endangered Species Conservation Act (the predecessor of the Endangered Species Act ("ESA")).¹⁰⁶

The International Whaling Commission ("IWC"), the administrative branch of the ICRW, is composed of a representative from every country that is a party to the ICRW. The IWC meets annually to amend whaling regulations as needed and to set quotas for whale harvesting.¹⁰⁷ Since its founding in 1946, the IWC has gradually evolved from being dominated by pro-whaling nations to being dominated by pro-whale nations - that is,

100. Miller, *supra* note 13, at 250.

101. *Id.* 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, 378 (1996).

102. Whaling Convention Act of 1949, 16 U.S.C. §§ 916-916l (2009).

103. *Id.*

104. Beck, *supra* note 101, at 379.

105. Miller, *supra* note 13, at 251.

106. *Id.*

107. Beck, *supra* note 101, at 380-81.

nations that want to preserve whale species.¹⁰⁸ This shift from pro-whaling to pro-whale was notably dramatic in 1982, when sixteen nations joined the IWC after the resignation of Canada from the organization.¹⁰⁹ Many of these new members are believed to have been recruited by the United States in order to gain a super-majority of preservationists on the commission.¹¹⁰ These new members passed a moratorium on commercial whaling in 1982, which went into effect in 1986.¹¹¹

Despite the dominance of pro-whale countries in passing the moratorium on commercial whaling, the pro-whaling countries forced the adoption of two compromise clauses that created exceptions to the moratorium: (1) scientific whaling and (2) aboriginal subsistence whaling.¹¹² Aboriginal subsistence whaling is defined as “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.”¹¹³ Amended § 13 of the IWC allows its member countries to contract with aboriginal groups, as long as they meet the aboriginal subsistence definition, for special permits conferring an exemption to hunt whales.¹¹⁴ The permit is subject to strict catch limits, local consumption requirements, and a prohibition against commercial gain.¹¹⁵ Once a member country’s request for an aboriginal subsistence exemption meets the facial requirements, the legal analysis shifts from international law to domestic law.¹¹⁶ It is the member country’s obligation to analyze the merits of the aboriginal group’s proposed hunting and the procedures under which they will conduct the hunt.¹¹⁷ The member country has the obligation to determine whether the hunt is consistent with the objects and purposes of the ICRW.¹¹⁸ Thus, the IWC allows member countries “to permit the taking of limited annual quotas of whales for . . . [aboriginal subsistence] purposes provided the claims . . . meet precise

108. Miller, *supra* note 13, at 251.

109. Beck, *supra* note 101, at 380-81.

110. *Id.*

111. *Id.*

112. Bradford, *supra* note 11, at 177.

113. *Id.* at 181; Int’l Whaling Comm., Special Issue 4: Aboriginal/Subsistence Whaling (G. P. Donovan ed., 1982).

114. Int’l Convention for the Regulation of Whaling, Schedule, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72, [hereinafter ICRW Schedule] (as later amended by the International Whaling Commission, available at http://iwcoffice.org/_documents/commission/schedule.pdf); Bradford, *supra* note 11, at 181.

115. Bradford, *supra* note 11, at 181.

116. Bradford, *supra* note 11, at 181.

117. *Id.* ICRW Schedule, sec. 13(a)5.

118. Bradford, *supra* note 11, at 181.

definitional and factual standards.”¹¹⁹

B. United States Law

The courts have analyzed Makah whaling under several domestic laws, including the National Environmental Policy Act (“NEPA”)¹²⁰ and the Marine Mammal Protection Act¹²¹.

I. National Environmental Policy Act

NEPA, passed in 1969, is not a regulatory act; rather, it directs policy and declares public values.¹²² NEPA focuses on the environmental impacts that are by-products of the actions of federal agencies and private entities that those agencies control or fund.¹²³ Rather than requiring the agencies to act a certain way, NEPA requires agencies to consider the potential impact of their actions on the environment.¹²⁴ Section 2 of NEPA establishes the Act’s purpose:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and nature resources important to the Nation; and to establish a Council on Environmental Quality.¹²⁵

In order to achieve these purposes, federal agencies are required to identify and list the environmental impacts of any of their proposed actions that *significantly* affect the human environment.¹²⁶ In order to do this, agencies must use a systematic and interdisciplinary process.¹²⁷ NEPA applies not just to actions by federal agencies, but also to federally sponsored projects, projects that are federally funded, and private projects

119. *Id.* at 182.

120. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 – 4370f (2006).

121. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361 – 1423h (2006).

122. 42 U.S.C. §§ 4321 – 4331 (2006). *See also* LYNTON K. CALDWELL, THE NATIONAL ENVIRONMENTAL POLICY ACT: AN AGENDA FOR THE FUTURE 23-24 (1998).

123. 42 U.S.C. § 4331; CRAIG JOHNSTON, WILLIAM FUNK & VICTOR FLATT, LEGAL PROTECTION OF THE ENVIRONMENT 91 (2nd ed. 2007).

124. 42 U.S.C. § 4332 (2006); JOHNSTON, *supra* note 123, at 91.

125. 42 U.S.C. § 4321.

126. 42 U.S.C. § 4332(C); JOHNSTON, *supra* note 123, at 92.

127. 42 U.S.C. § 4332(A); JOHNSTON, *supra* note 123, at 93.

that require federal approval or a federal permit.¹²⁸

The process begins with a determination by the agency that the procedural requirements of NEPA are applicable to the considered action.¹²⁹ NEPA may not be applicable to all actions; there is a list of statutory exclusions from NEPA, and agencies that are required to perform a certain action by Congress may be precluded from considering any options other than the one presented to them.¹³⁰ If it is not obvious whether there will be a significant environmental impact, an agency can prepare an Environmental Assessment ("EA").¹³¹ An EA assesses the possibility of significant environmental impacts by conducting a mini environmental analysis.¹³² If the agency finds that there is no significant impact on the human environment, it issues a Finding of No Significant Impact ("FONSI").¹³³ A FONSI must be supported by documentation that is sufficient to provide a record for judicial review.¹³⁴ If the agency finds that the action does involve significant environmental impact, it must proceed with preparing a full Environmental Impact Statement ("EIS").¹³⁵

An EIS involves more time, evaluation, process, notice, and documentation than an EA. An EIS is required if the action is a major action, if it is federal, and if it will significantly affect the quality of the human environment.¹³⁶ To begin the EIS process, the agency issues a notice of intent with the scope of the impacts identified and action alternatives that will be assessed.¹³⁷ The agency then prepares a Draft Environmental Impact Statement ("DEIS"), which is published in the Federal Register.¹³⁸ Public comments to the DEIS are solicited, which the agency must incorporate into the final EIS. The final EIS is also published in the Federal Register.¹³⁹

NEPA requirements can be enforced by citizens through lawsuits. Lawsuits typically claim that the agency did not follow procedures in preparing the EIS; that there was a significant impact to the environment as the result of an action and the agency did not prepare an EIS when it should

128. 42 U.S.C. § 4331; JOHNSTON, *supra* note 123, at 93.
129. JOHNSTON, *supra* note 123, at 93.
130. 40 C.F.R. § 1508.4 (2010); *see also* 23 C.F.R. §§ 771.115, 771.119 (2010); JOHNSTON, *supra* note 123, at 93-94.
131. 40 C.F.R. §§ 1501.3, 1508.9 (2010); JOHNSTON, *supra* note 123, at 98.
132. JOHNSTON, *supra* note 123, at 98.
133. 40 C.F.R. § 1508.13 (2010); JOHNSTON, *supra* note 123, at 98.
134. JOHNSTON, *supra* note 123, at 98.
135. *Id.*
136. 42 U.S.C. § 4332 (2006); JOHNSTON, *supra* note 123, at 100.
137. 40 C.F.R. §§ 1501.7, 1508.22 (2010); JOHNSTON, *supra* note 123, at 99.
138. 40 C.F.R. §§ 1502.9(a), 1503.1, 1506.6 (2010); JOHNSTON, *supra* note 123, at 99.
139. 40 C.F.R. §§ 1502.9(b), 1503.1, 1506.6 (2010); JOHNSTON, *supra* note 123, at 99.

have; or the EIS was inadequate because it did not follow the statutory requirements.¹⁴⁰

2. Marine Mammal Protection Act

The MMPA, passed by Congress in 1972, provides a broad moratorium against the killing of marine mammals.¹⁴¹ The Act was passed in response to findings that certain species and stocks of marine mammals were in danger of extinction or depletion due to human activity.¹⁴² Congress determined that these species and stocks should not cease to be a “significant functioning element of the ecosystem” and “should not be permitted to diminish below their optimum sustainable population.”¹⁴³ Further, marine mammals were found to be resources of great significance for aesthetic, recreational, and international reasons, and that they should be protected to the greatest extent feasible under sound resource management.¹⁴⁴ The objective of resource management was to “maintain the health and stability of the marine ecosystem.”¹⁴⁵

The MMPA creates numerous exemptions to the broad moratorium on takings, including an exemption for the taking by Alaskan natives for subsistence purposes.¹⁴⁶ The Act also allows the Secretary of Commerce to issue permits which authorize the taking of marine mammals consistent with the regulations of the Act.¹⁴⁷

The MMPA applies not just to endangered marine mammals; it applies to all marine mammals, even those with healthy populations. Along with NEPA, ICRW and WCA, the MMPA figures prominently in the recent legal challenges that have been raised against the renewal of Makah whaling.

IV. Case History

Legal controversy arose when the Makah decided to reassert their treaty rights to whale in the mid-1990s. This section will discuss the recovery of the species, the efforts of the Makah to obtain an aboriginal

140. Administrative Procedure Act, 5 U.S.C. § 551 et seq.; JOHNSTON, *supra* note 123, at 99.

141. 16 U.S.C. § 1371(a) (2006).

142. 16 U.S.C. § 1361(1) (2006).

143. 16 U.S.C. § 1361(2) (2006).

144. 16 U.S.C. § 1361(6) (2006).

145. 16 U.S.C. § 1361(6) (2006).

146. 16 U.S.C. § 1371(b)(1) (2006).

147. 16 U.S.C. §§ 1374(a), (b)(1) (2006); Nat'l Oceanic and Atmospheric Admin., Office of Protected Resources and the Marine Mammal Protection Act Fact Sheet, http://www.nmfs.noaa.gov/pr/pdfs/mmpa_factsheet.pdf (last visited April 25, 2009).

exemption under the IWC to hunt whales, and the lawsuits that resulted from the federal government's assistance to the Makah to reassert their whaling rights.

A. Petition for Renewed Whaling

By 1970, the diminished population of gray whales prompted the United States to designate them as endangered under the Endangered Species Conservation Act.¹⁴⁸ For a species to be listed as endangered, it must be "in danger of extinction throughout all or a significant portion of its range."¹⁴⁹ Once a species is listed as endangered, all federal agencies and departments must seek to conserve the species.¹⁵⁰ At the time of listing in 1970, gray whale populations were estimated to total less than two thousand individuals.¹⁵¹

Under the protection of the ESA, gray whale populations started to recover. With the population level estimated at 20,000, the gray whale was removed from the Endangered Species List in 1994.¹⁵² This population level was equivalent to the estimated original population size throughout all or a significant portion of their historical range.¹⁵³

Upon delisting, the Makah tribal council determined that the tribe was ready to start whaling again.¹⁵⁴ The tribe sought the help of the federal government to make their petition to the IWC to resume whaling. On March 22, 1996, NOAA signed a formal written agreement with the Makah to make a proposal to the IWC for the Makah to engage in subsistence and ceremonial hunting of gray whales.¹⁵⁵ The agreement acknowledged that the tribe and NOAA would cooperate in managing the harvest of gray whales.¹⁵⁶ NOAA agreed to monitor the hunt; to assist the Makah Tribal Council with collecting statistical information on the whales that were harvested or merely struck; and to collect specimen material from harvested whales, such as ovaries, baleen plates, stomach contents, and tissue samples.¹⁵⁷ The

148. *Metcalf v. Daley*, 214 F.3d 1135, 1138 (9th Cir. 2000).

149. Endangered Species Act, 16 U.S.C. 1532(6) (2006).

150. 16 U.S.C. § 1531(c)(1) (2006).

151. Jordan, *supra* note 5, at A01.

152. 50 C.F.R. §§ 17, 222 (1994); NAT'L OCEANIC AND ATMOSPHERIC ADMIN., ALASKA MARINE MAMMAL STOCK ASSESSMENT 2008, 156-57 (2008), available at <http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2008whgr-en.pdf>.

153. 50 C.F.R. §§ 17, 222 (1994); Nat'l Marine Fisheries Serv., Office of Protected Resources, Gray Whale, <http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/graywhale.htm> (last visited April 25, 2009).

154. Bradford, *supra* note 11, at 182.

155. *Metcalf v. Daley*, 214 F.3d 1135, 1139 (9th Cir. 2000).

156. *Id.*

157. *Id.*

agreement also stipulated that NOAA would revise its regulations to address the Makah's subsistence whale hunting, and that the Tribal Council would adopt a whale management plan.¹⁵⁸

In June 1996, the United States made its formal proposal to the IWC for the Makah to have an annual quota of whales.¹⁵⁹ Although some IWC members supported the proposal, other members expressed strong concerns about the proposal and indicated that they would vote against it.¹⁶⁰ Realizing that it did not have the three-quarters majority needed among the member countries to approve the proposal, the United States withdrew its 1996 proposal.¹⁶¹

In June 1997 the non-profits Australians for Animals and BEACH Marine Protection alleged that NOAA and NMFS had violated NEPA by supporting the Makah whaling proposal without preparing an EA or an EIS.¹⁶² The administrator of NOAA responded on July 25, 1997, informing the non-profits that an EA would be prepared. The draft EA was distributed for public comment 28 days later, on August 22, 1997.¹⁶³ NOAA and the Makah signed a new agreement on October 13, 1997.¹⁶⁴ This agreement was largely the same as the 1996 agreement, except that the 1997 agreement limited Makah whale hunting to the "open waters of the Pacific Ocean outside the Tatoosh-Bonilla Line."¹⁶⁵ The Tatoosh-Bonilla Line is a direct line drawn from Bonilla Point, Vancouver Island, to the lighthouse of Tatoosh Island, Washington, and essentially marks the entrance to the Strait of Juan de Fuca.¹⁶⁶ This provision was added in order to lessen the likelihood that summer resident whales, those gray whales that stayed in the Olympic Coast Marine Sanctuary waters rather than head further north to Canadian and Alaskan waters, were hunted.¹⁶⁷ Four days after the signing of the new agreement, on October 17, 1997, NOAA issued a final EA and a FONSI.¹⁶⁸

At the IWC meeting in 1997, held one day after the FONSI was issued, the U.S. and Russian Federation submitted a joint proposal to the IWC for a combined quota of gray whales for the Makah and the Chukotka.¹⁶⁹ The Chukotka are a Siberian aboriginal group that was granted a gray whale

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 1139-40.

166. 50 C.F.R. § 300.91 (2009). The line is between 48° and 49° N. latitude.

167. *Metcalf*, 214 F.3d at 1140.

168. *Id.*

169. *Id.*

quota previously by the IWC.¹⁷⁰ The joint proposed quota was for 620 whales taken by both groups over a five-year period.¹⁷¹ The quota assumed an average annual take of 120 whales by the Chukotka and an average annual take of four whales by the Makah.¹⁷² Because each whale struck is not actually taken, the NOAA EA admitted that the cumulative impact of Makah hunting would total not just twenty whales over five years, but actually 41 whales.¹⁷³ However, NOAA's EA did not mention the joint proposal to the IWC, which included the quota of 620 whales for the Chukotka.¹⁷⁴ Some members expressed doubts that the Makah qualified as aboriginal subsistence hunters.¹⁷⁵ In a compromise, the proposal was amended to allow the quota to be used only by aboriginal groups "whose traditional subsistence and cultural needs have been recognized."¹⁷⁶ This amendment allowed the proposal to gain the approval of the IWC for the joint quota.¹⁷⁷

B. *Metcalf v. Daley*

The IWC's approval of a whale quota for the Makah angered anti-whaling individuals and organizations. Jack Metcalf, Republican U.S. Representative from Washington, and George Miller, Democratic U.S. Representative from California, sponsored a resolution in the U.S. House of Representatives' Committee on Resources to oppose the whaling quota.¹⁷⁸ This resolution passed the committee unanimously.¹⁷⁹

On October 17, 1997, on the day the FONSI was released, Congressman Metcalf, Australians for Animals, BEACH Marine Protection, the Fund for Animals, and various individuals filed a complaint in the District of Columbia District Court against NOAA and NMFS.¹⁸⁰ The suit alleged that the federal agencies violated NEPA, the Whaling Convention Act, and the Administrative Procedures Act ("APA") by authorizing and promoting Makah whaling.¹⁸¹ The suit argued that the agencies did not objectively evaluate the environmental impact of the hunt because the

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 1139.
179. *Id.*
180. *Id.* at 1140.
181. *Id.*

decision had already been made to support the hunt.¹⁸² After the Makah's motion to intervene was granted, the D.C. District Court transferred the case to the Western District of Washington.¹⁸³

Both parties filed cross-motions for summary judgment on the merits, which were briefed and argued in spring and summer 1998.¹⁸⁴ On September 21, 1998, the Washington District Court granted the motion for summary judgment filed by NOAA, NMFS, and the Makah.¹⁸⁵ The district court deferred to the federal agencies, finding that the agencies gave the environmental consequences a hard look and chose to advance the whaling-hunting interest.¹⁸⁶ Metcalf and the other plaintiffs made a timely appeal of the district court's grant of summary judgment to the Makah and the agencies.¹⁸⁷

Meanwhile, with the district court ruling in their favor, the Makah began training for whaling. In response to protests by environmental groups against the whaling, the Coast Guard was brought in to protect Makah whaling parties.¹⁸⁸ Protests were led by non-profit organizations Sea Shepherd Society and Sea Defense Alliance, as well as whale-watching companies and kayakers.¹⁸⁹

The Makah did not conduct a successful whale hunt in 1998, despite their efforts.¹⁹⁰ Whaling hunting forays continued in 1999. On a day when the protesters were not on hand, the Makah whaling party, guarded by Coast Guard boats, conducted their first successful whale hunt in over 70 years.¹⁹¹ On May 17, 1999, the Makah harpooned a 30-foot female gray whale off Cape Alava near Ozette, Washington.¹⁹² The whale carcass was towed to shore and butchered.¹⁹³ For many members of the tribe, it was the first time that they had tasted whale blubber.¹⁹⁴ The whale hunt was praised by tribal members for reviving Makah culture.¹⁹⁵

Besides this one successful hunt in spring 1999, there have been no

182. *Id.* at 1143.

183. *Id.* at 1140.

184. *Id.* at 1141.

185. *Id.*

186. *Id.* at 1146-47.

187. *Id.* at 1141.

188. Bradford, *supra* note 11, at 205-06.

189. HistoryLink.org, Makah Whaling, http://www.historylink.org/index.cfm?DisplayPage=output.cfm&File_Id=5301 (last visited April 30, 2009).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* Bradford, *supra* note 11, at 206.

194. HistoryLink.org, *supra* note 189.

195. *Id.*

more sanctioned whale hunts by the Makah. In 2000, the Ninth Circuit Court of Appeals was considering the appeal by Representative Metcalf and the non-profit organizations. The Ninth Circuit Court of Appeals reviewed the district court's decision de novo, under the arbitrary and capricious standard of deference to agency decisions.¹⁹⁶ The circuit court noted that NEPA does not establish environmental standards, but rather is a procedural statute that requires the agency to perform certain actions to determine the environmental impact of government actions.¹⁹⁷ The court stated that an EA needs to be "prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made."¹⁹⁸ Although the court noted that the statute did not require agencies to be impartial, it did require the evaluation to be prepared at the stage of the planning process where there is still a decision to be made whether to support a project or not.¹⁹⁹ The circuit court stated: "In summary, the comprehensive 'hard look' mandated by Congress and required by the statute must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made."²⁰⁰

On June 9, 2000, the Ninth Circuit found that the federal government had violated NEPA by preparing the EA too late in the process.²⁰¹ Although the agencies prepared the EA and issued the FONSI, they did so only after they had already signed two agreements with the Makah, binding them to support the tribe's whaling proposal.²⁰² The court found that the agencies did not engage in the NEPA process "at the earliest possible time."²⁰³ Further, the court found that the agencies did not even look at the environmental consequences of the hunt until long after they had already committed in writing to support the whaling proposal.²⁰⁴ When NOAA signed the 1996 agreement with the Makah, the agency was already committing agency resources to support the whaling proposal.²⁰⁵ Thus, the decision to support the whaling proposal was made long before there was

196. *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000).
197. *Id.*
198. *Id.* at 1142 (quoting *Save the Yak v. Bock*, 840 F.2d 714, 717 (9th Cir. 1988); 40 C.F.R. § 1502.5 (1987)).
199. *Id.*
200. *Id.*
201. *Id.* at 1143-44.
202. *Id.* at 1143.
203. *Id.*
204. *Id.*
205. *Id.* at 1143-44.

any determination of the environmental impact of that proposal.²⁰⁶ Moreover, the court found that if the agencies had not issued a FONSI, they would have been in breach of the 1996 and 1997 agreements.²⁰⁷ The court also found that an EA prepared long after the agencies were already working with the tribe on the proposal certainly subjected that decision to a pro-whaling bias, and made the agencies more predisposed to issue a FONSI.²⁰⁸

The court determined that the federal agencies needed to complete a new EA that was prepared “under circumstances that ensure an objective evaluation free of previous taint.”²⁰⁹ Further, the court warned that if the new EA came under further court scrutiny, the burden was on the government to demonstrate that it complied with this requirement.²¹⁰

In response to the holding in *Metcalf*, the agencies dissolved the signed agreements with the Makah and prepared a new draft EA in January 2001.²¹¹ This draft EA, like the 1997 EA, presented as its preferred option a whaling quota that attempted to restrict Makah hunting to migratory whales.²¹² The EA again limited the hunt to west of the Tatoosh-Bonilla line and to months when the northward or southward migration was underway.²¹³ The tribe’s management plan also stated that whaling would only be allowed outside the Tatoosh-Bonilla line.²¹⁴ Before the final EA was issued but after comments were received on the draft EA, the tribe amended its management plan so that it did not include any geographic limitations on the hunt.²¹⁵ The Makah’s new plan stated that the tribe could take five whales in any calendar year with the aggregate number taken from 1998 to 2002 not to exceed twenty.²¹⁶ Further, no more than 33 whales could be struck in that time, and the number struck in the years 2000 and 2001 could not exceed fourteen.²¹⁷ In 2000 and 2001, the tribe’s plan limited five of the strikes to the time between June 1 to November 1, the period of migration, and did not allow strikes at any time in the Strait of Juan de Fuca.²¹⁸

On July 12, 2001, NOAA and NMFS published the final EA, finding no

206. *Id.*

207. *Id.* at 1144.

208. *Id.*

209. *Id.* at 1146.

210. *Id.*

211. *Anderson v. Evans*, 371 F.3d 475, 485 (9th Cir. 2004).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

significant environmental impact.²¹⁹ However, the draft EA did not evaluate the Makah's amended management plan, which was changed after the comments period on the draft EA was closed.²²⁰ The EA also did not include any scientific studies on the impact of the Makah's new plan on a hunt conducted within the Tatoosh-Bonilla line and in the Strait of Juan de Fuca.²²¹ Seemingly relying on the vague recognition language of the IWC's quota, NOAA and NMFS issued a notice in the Federal Register on December 13, 2001, announcing a quota of five gray whales in 2001 and 2002, and approval of the Makah's new Management Plan.²²²

C. *Anderson v. Evans*

The second EA, which resulted in a FONSI, and the renewed whaling quota prompted a new legal challenge by Will Anderson,²²³ the Humane Society of the United States and the Fund for Animals in January 2002. This lawsuit, filed against Donald Evans, then U.S. Secretary of Commerce, alleged violations of NEPA and the MMPA.²²⁴ The tribe intervened, and in April 2002 the plaintiffs moved for a preliminary injunction to prevent an anticipated whale hunt by the Makah.²²⁵ The district court denied the motion for the injunction.²²⁶ The court deferred to the agencies' decision, and found that the agencies had fulfilled their requirement of taking a hard look at the impacts of the whale hunt.²²⁷ Judge Franklin Burgess also stated that the Treaty of Neah Bay took precedence over MMPA's requirements.²²⁸ The plaintiffs appealed.

In 2002, a three-member panel of the Ninth Circuit again reversed the district court. In *Anderson v. Evans*, the panel held that an EIS, not merely an EA, was necessary to show the impact on local whales in Washington waters. The court based its reasoning on several grounds: the EA failed to resolve substantial questions about whether whaling could have a significant effect on the environment; the EA did not adequately address the possibility that the Makah's single action might have the precedent of allowing other countries to declare a substantive need to whale for their own aboriginal

219. *Id.*

220. *Id.* at 486.

221. *Id.*

222. *Id.*

223. For information about Will Anderson, see TerraMar Research, Board of Directors, Will Anderson, http://www.terramarresearch.org/about_us/will_anderson.html (last visited May 9, 2009).

224. *Anderson*, 371 F.3d at 486.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

groups;²²⁹ and any whale hunt by the Makah must be subject to the restrictions of the MMPA.²³⁰

Although most gray whales migrate from Mexico to the Bering and Chukchi Seas each summer, the coastal waters off Washington State attract a group of whales that have taken up residence during the summer. It is estimated that about sixty percent of these whales are returning whales.²³¹ These resident whales are recognizable by scientists and whale-watching organizations. The Ninth Circuit panel stated that only a full EIS could fully analyze the impact of whaling on these resident whales.²³² If there were outstanding questions that the EA had not answered about the impact on the resident whales that frequent the Strait of Juan de Fuca and the northern Washington coast, an EIS must be prepared.²³³ The court found that this critical issue was both uncertain and controversial within the meaning of NEPA.²³⁴

Moreover, the court found that the EA did not address the impact that the Makah's whaling quota would have on any other IWC countries. The court noted that an EIS is required if a single action establishes a precedent for other actions that could have a cumulative, negative impact on the environment.²³⁵ The court held that the purposefully vague language of the IWC quota could allow other countries to set their own subsistence quotas for their aboriginal groups.²³⁶ This could lead to an increase in whaling worldwide, which would have a significant impact on the environment.²³⁷ The quota that the IWC issued to the United States and Russia was limited to aboriginal groups "whose traditional aboriginal subsistence needs have been recognized."²³⁸ Because it was unclear what body would recognize the aboriginal subsistence needs or under what standards, this uncertainty could open the door for other countries to proclaim the subsistence needs of their own aboriginal groups.²³⁹ This in turn would make it easier for these groups to gain approval for whaling.²⁴⁰ If that resulted in more groups obtaining whaling quotas, it could have a significant impact on the

229. *Id.* at 494.

230. *Id.* at 501.

231. *Id.* at 490.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 493; 40 C.F.R. § 1508.27(b)(6) (2009).

236. *Anderson*, 371 F.3d at 493.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

environment.²⁴¹

Additionally, the Ninth Circuit panel held that the Makah needed to obtain a permit or exemption under the MMPA in order to conduct their whale hunts.²⁴² In their brief, the federal government and the tribe had argued that the MMPA did not apply to the tribe's quota because the quota was approved under the IWC, and alternatively, under the 1855 treaty.²⁴³

At the outset, the court rejected the federal defendants' argument that the MMPA exempted the Makah's whaling quota because it had been approved under the IWC. The federal government's argument was that § 1372(a)(2) of the MMPA²⁴⁴ exempted the Makah's whaling quota from the restrictions of the MMPA. Section 1372(a)(2) of the MMPA states that the blanket moratorium on taking marine mammals can be waived when the taking has been "expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before [1972] or by any statute implementing any such treaty, convention, or agreement."²⁴⁵

The Ninth Circuit panel rejected the argument that § 1372(a)(2) exempted the Makah from the restriction of the MMPA for several reasons. First, the panel noted a problem with timing. In order to have the IWC's 1997 whaling quota pre-date the MMPA of 1972, the defendants argued that the 1997 approval related back to the ICRW, which the U.S. signed in 1946.²⁴⁶ ICRW enacted a whaling regulations schedule and granted the IWC the power to amend this schedule.²⁴⁷ Whaling quotas were one of the allowed amendments to the schedule.²⁴⁸ Because the 1997 quota was one such amendment, the agencies argue that the 1997 quota should be considered a right under the 1946 Convention.²⁴⁹ The panel disagreed with this argument, stating that § 1372(a)(2) only exempts international treaties that pre-date the 1972 MMPA, not amendments to those treaties.²⁵⁰ Further, the panel stated that the defendants' argument was refuted by considering § 1372(a)(2) of the MMPA alongside § 1378(a)(4) of the MMPA.²⁵¹ Section 1378(a)(4) requires "the amendment of any existing international treaty for the protection and conservation of any species of marine mammal to which

241. *Id.*

242. *Id.* at 501.

243. *Id.* at 494.

244. 16 U.S.C. § 1372(a)(2) (2006).

245. *Anderson*, 371 F.3d at 494-95; 16 U.S.C. § 1372(a)(2).

246. *Anderson*, 371 F.3d at 495.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

the United States is a party in order to make such treaty consistent with the purposes and policies of this [Act].”²⁵² This section makes clear that Congress intended that “existing treaties be amended to incorporate the conservation principles of MMPA.”²⁵³ The court noted that Congress would hardly subordinate the United States’ marine mammal conservation, as required in the 1972 MMPA, to the arbitrary decisions of unknown future foreign delegates to international commissions.²⁵⁴

Second, the panel noted a problem with specificity. The panel stated that even if the 1997 quota could be related back to the 1946 Convention, § 1372(a)(2) would still not apply because the 1997 quota does not expressly provide a whaling quota to the Makah Tribe.²⁵⁵ Rather, the IWC schedule adopted in 1997 gave a quota for taking gray whales to “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 recognized.”²⁵⁶ The Makah Tribe is never specifically named by the IWC.

Third, the panel noted a problem with uncertainty. Because the IWC’s 1997 schedule only gave a quota to aborigines whose “subsistence and cultural needs have been recognized,” there is no indication that the IWC intended the quota for the Makah.²⁵⁷ The recognition language was inserted into the 1997 schedule because some IWC delegates had questioned whether the Makah qualified for an aboriginal quota.²⁵⁸ The IWC’s definition of aboriginal subsistence whaling requires that the aborigines have a *continuing* traditional dependence on whaling and the use of whales.²⁵⁹ The tribe and the federal agencies both acknowledge that the Makah have not engaged in whaling since the 1920s.²⁶⁰ Further, because it is unclear what party actually recognizes an aboriginal group’s subsistence and cultural needs, it is not clear that the IWC schedule was intended for the Makah.²⁶¹ Therefore, § 1372(a)(2)’s requirement that the take has been “expressly provided for by an international treaty” is not satisfied.²⁶²

Fourth, there is a problem of applicability. The second prong of §

252. *Id.* 16 U.S.C. § 1378(a)(4) (2006).

253. *Anderson*, 371 F.3d at 495.

254. *Id.*

255. *Id.* at 495-96.

256. *Id.* at 496.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

1372(a)(2) of the MMPA states that takes are exempted from the moratorium if those takes have been expressly provided for “by any statute implementing any such treaty, convention, or agreement.”²⁶³ No U.S. statute implementing the ICRW expressly permits the Makah’s whaling.²⁶⁴ While the Whaling Convention Act (“WCA”) implements the ICRW domestically, making it illegal to take whales without first obtaining a quota from the IWC, the WCA does not mention quotas or aboriginal subsistence whaling.²⁶⁵ Therefore, the WCA is not an implementing statute that expressly provides for an exemption to the MMPA’s moratorium on taking marine mammals.²⁶⁶

In considering the federal agencies’ alternative argument that the Makah have a treaty right protected by their 1855 treaty that is not affected by the MMPA,²⁶⁷ the Ninth Circuit panel first considered whether the MMPA should apply to the tribe to advance the conservation purpose of the MMPA. The three-part test for determining when reasonable conservation statutes affect Indian treaties was set out in *United States v. Fryberg*:²⁶⁸ the statute applies if “(1) the sovereign has jurisdiction in the area where the activity occurs; (2) the statute is non-discriminatory; and (3) the application of the statute to treaty rights is necessary to achieve its conservation purpose.”²⁶⁹

In its analysis, the court noted that the first prong of the test applied because the whaling would occur off the coast of Washington. The MMPA extends to any person subject to the jurisdiction of the U.S. and reaches 200 nautical miles out from the seaward boundary of each coastal state.²⁷⁰ The court also stated that the second prong was met because the MMPA is non-discriminatory; it applies to all persons except certain native Alaskans with subsistence needs.²⁷¹ The MMPA does not single out tribal members; it applies to tribal and non-tribal people in the lower 48 states.²⁷²

In assessing the third prong of the *Fryberg* test, the panel identified the critical issue as whether restraint on the Makah’s whaling under its treaty right was necessary to effectuate the conservation purpose of the MMPA. The panel pointed out that the MMPA’s major objective is to ensure that marine mammals continue to be “a significant functioning element in the ecosystem.”²⁷³ In order to ensure that marine mammals continue as a

263. *Id.* at 494-95.

264. *Id.* at 496-97.

265. *Id.*

266. *Id.*

267. *Id.* at 494.

268. *United States v. Fryberg*, 622 F.2d 1010, 1014-15 (9th Cir. 1980).

269. *Anderson*, 371 F.3d at 497.

270. *Id.* at 498; 16 U.S.C. §§ 1372(a)(1), 1362(15) (2006).

271. *Anderson*, 371 F.3d at 498.

272. *Id.*

273. *Id.*

functioning element, the Act states that their populations should not diminish below their optimum sustainable population.²⁷⁴ The permitting process, along with the blanket moratorium, establishes a system that reviews and authorizes any taking of marine mammals.²⁷⁵ Many factors are considered to determine if a waiver is authorized under the MMPA, including the “distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals.”²⁷⁶ The permit may be suspended if the take results in “more than a negligible impact on the species or stock concerned.”²⁷⁷ Thus, the Act is not just concerned with survival of the species, but also with optimum sustainable populations and that the mammals remain significant functioning elements of the ecosystem.

The panel found that “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.”²⁷⁸ The court held that without the regulation of the MMPA, there was no certainty that future whaling by the Makah would not jeopardize the gray whale populations under the current management plan or with future quotas.²⁷⁹ While the court recognized that the current Makah tribal council has sought a small quota, there was no guarantee that future councils might not seek to increase their quota or use a different hunting method that might have an impact on the whales that is currently unanticipated.²⁸⁰ The Act was intended to protect marine mammals from unanticipated future threats with its mechanism for review and provisions for permits to be suspended.²⁸¹

Further, the panel stated that if the Makah were not required to comply with the MMPA, there was no guarantee that other tribes might not use this precedent to also claim a right to hunt marine mammals outside of the restrictions of the MMPA.²⁸² While the panel acknowledged that only the Makah have a treaty right to whale, some tribes might use the more general language of “hunting and fishing” rights in their treaties to hunt marine mammals.²⁸³ This additional hunting would likely have an impact on the

274. *Id.*

275. *Id.*

276. *Id.*, 16 U.S.C. § 1371(a)(3)(A) (2006).

277. *Anderson*, 371 F.3d at 498; 16 U.S.C. § 1371(a)(5)(B)(ii) (2006).

278. *Anderson*, 371 F.3d at 498.

279. *Id.* at 498-99.

280. *Id.* at 499.

281. *Id.* at 498.

282. *Id.* at 499.

283. *Id.*

gray whales that could thwart the conservation purposes of the MMPA.²⁸⁴

Moreover, the panel held that the language of the 1855 Treaty of Neah Bay “supports our conclusion that the conservation purpose of the MMPA requires it be applied to the Tribe.”²⁸⁵ The treaty states that the right to fish and whale is held “in common with all citizens of the United States.”²⁸⁶ As recognized in *United States v. Washington* (the Boldt decision)²⁸⁷ this language “creates a relationship between Indians and non-Indians similar to a cotenancy, in which neither party may ‘permit the subject matter of [the treaty] to be destroyed.’”²⁸⁸ The “in common” clause protects the substance of Indians’ treaty rights, but also does not allow Indians to use their treaty rights to deprive other U.S. citizens of a fair share of a resource.²⁸⁹ The fair share of the whale resource is not just the fair share of hunting that resource. Other uses of the resource include whale watching, scientific study, and other non-consumptive uses.²⁹⁰ Thus, “the Makah cannot, consistent with the plain terms of the treaty, hunt whales without regard to the processes in place and designed to advance the conservation values” and other non-consumptive uses of whales shared by non-Indians.²⁹¹ Conservation values are recognized by the U.S. Supreme Court as a permissible reason for regulation, despite treaty rights.²⁹² The Ninth Circuit found that subjecting the Makah’s whaling to the review and regulation of the MMPA would allow the taking of gray whales in such a way that the resource would not be diminished for all citizens.²⁹³

Concluding that the federal agencies had violated federal law by issuing a gray whale quota to the tribe without complying with the MMPA, the court held simply that the agencies and the tribe needed to comply with the MMPA process before authorizing a take of gray whales.²⁹⁴ Importantly, the panel held that it did not need to decide whether the MMPA abrogated the tribe’s treaty rights.²⁹⁵ The court held that the MMPA procedures would ensure that the Makah’s whaling would not frustrate the conservation goals of the MMPA.²⁹⁶

284. *Id.*

285. *Id.* at 500.

286. Treaty of Neah Bay, *supra* note 87, art. IV.

287. *United States v. Washington* (Boldt Decision), 384 F. Supp. 312 (W.D. Wash. 1974).

288. *Anderson*, 371 F.3d at 500 (quoting *United States v. Washington*, 520 F.2d 676, 685 (9th Cir. 1975)).

289. *Anderson*, 371 F.3d at 500.

290. *Id.*

291. *Id.*

292. *Id.* at 500-01.

293. *Id.* at 501.

294. *Id.*

295. *Id.*

296. *Id.*

D. Post-Anderson

With the ruling from *Anderson*, the Makah have not been able to hold a sanctioned whale hunt. Despite requests from the tribe, the Ninth Circuit has refused any further petition for rehearing of *Anderson v. Evans*, and in June 2004, the circuit court refused a rehearing en banc.²⁹⁷ In February 2005, the Makah requested a waiver to hunt whales under the MMPA.²⁹⁸

Then, on September 8, 2007, five members of the Makah Tribe conducted an illegal whale hunt. Tribal member Andrew Noel obtained firearms, whaling equipment, and a 12-foot general purpose boat, all owned by the tribe, the previous day.²⁹⁹ However, there was no spiritual preparation performed by the five men prior to the hunt.³⁰⁰ On the morning of September 8, he and tribal member Wayne Johnson departed from the Makah marina in the 12-foot power boat, accompanied by tribal members William Secor, Theron Parker, and Frankie Gonzales, Jr. in a second boat, a 19-foot fishing vessel.³⁰¹ Not far from the marina, the two boats encountered a gray whale near Seal Rock, not far from Neah Bay.³⁰² Noel and Johnson pursued the whale, striking it several times with harpoons. In addition to attaching plastic buoys to the harpoon lines, the men also tethered the harpooned whale to the 12-foot power boat.³⁰³ Noel and Johnson then shot the whale at least sixteen times.³⁰⁴ Despite this, they failed to kill the whale, which was unable to dive, and swam on the surface for hours. The whale finally died twelve hours later, and sank to the bottom of the Strait of Juan de Fuca.³⁰⁵ From photographic evidence, a team of scientists from Cascadia

297. Brenda Hanrahan, *Neah Bay: Makah, Federal Government rebuffed in Bid for Reconsideration of Whaling Halt*, PENINSULA DAILY NEWS, June 7, 2004, available at <http://www.peninsuladailynews.com/article/20040608/NEWS/406080302>.

298. Jim Casey, *Public Meeting with Focus on Makah Whaling Impact*, PENINSULA DAILY NEWS, May 27, 2008, available at <http://www.peninsuladailynews.com/article/20080528/NEWS/805280306>.

299. Brief of Government at 3-4, *United States v. Johnson*, No. CR-7-5656JKA (W.D. Wash. 2008).

300. Paul Shokovsky, *Makah "Treaty Warriors": Heroes or Criminals?*, SEATTLE POST-INTELLIGENCER, Mar. 16, 2008, available at http://www.seattlepi.com/local/355205_makah17.html. Tribal member Joe McGimpsey, chosen by the Makah tribal council to boat out to the dying whale to recite sacred chants, stated that he was troubled because the hunt lacked the intense discipline and spiritual preparation that should precede a tribal whale hunt.

301. Brief of Government, *supra* note 299, at 4.

302. *Id.*

303. *Id.*

304. Shokovsky, *supra* note 300.

305. Mike Lewis & Paul Shukovsky, *Tribe Vows Prosecution for Killing of Whale*, SEATTLE POST-INTELLIGENCER, Sept. 10, 2007, available at http://www.seattlepi.com/local/331060_whale10.html; Shukovsky, *supra* note 300.

Research have identified the whale that was killed as CRC-175, a male gray whale that was a resident of the area.³⁰⁶ The whale, who had been spotted 143 times from northern California to Vancouver Island, was a frequent visitor to Neah Bay, having been spotted there seven times from 1995 to 2007.³⁰⁷

All five men were apprehended by the U.S. Coast Guard, and charged with violating the MMPA and the WCA, and conspiring to violate both Acts. Secor, Parker and Gonzales pled guilty, and were sentenced to a combination of supervised release and community service.³⁰⁸ Noel and Johnson both refused to plead guilty, and were tried before U.S. Magistrate Judge J. Kelley Arnold.³⁰⁹ Both were found guilty in a bench trial; Noel was sentenced to 90 days in prison, one year of supervised release, and 200 hours of community service, while Johnson, whom Judge Arnold described as unremorseful, was sentenced to five months in prison, one year of supervised release, and 175 hours of community service.³¹⁰

NOAA has since drafted a new EIS to discuss the impact of the whale hunt that encompasses all of the elements that the *Anderson* decision required.³¹¹ NOAA accepted public comments on the draft EIS starting in May 2008.³¹² A final EIS is pending.

V. Harmonizing *Anderson v. Evans* with the Treaty of Neah Bay

The ruling from *Anderson* that the MMPA is applicable to regulate Makah whaling can be harmonized with the 1855 Treaty of Neah Bay. While some have argued that the ruling from *Anderson* is a tacit abrogation of the 1855 Treaty of Neah Bay,³¹³ the court explicitly stated that it was not addressing the plaintiff's argument that the statute applied by virtue of

306. Rob Ollikainen, *Whale Killed in Illegal 2007 Hunt Identified*, PENINSULA DAILY NEWS, May 7, 2009, available at <http://www.peninsuladailynews.com/article/20090508/news/305089997>.

307. *Id.*

308. Paul Shokovsky, *Two Makah Whalers Sentenced to Prison*, SEATTLE POST-INTELLIGENCER, June 30, 2008, available at http://www.seattlepi.com/local/369019_makah01.html.

309. *Id.*

310. *Id.*

311. DRAFT EIS, *supra* note 17.

312. *Id.*

313. See, e.g., Zachary Tomlinson, *Abrogation or Regulation? How Anderson v. Evans discards the Makah's Treaty Whaling Right in the Name of Conservation Necessity* 78 WASH. L. REV. 1101 (2003); David L. Roghair, *Anderson v. Evans: Will Makah Whaling under the Treaty of Neah Bay Survive the Ninth Circuit's Application of the MMPA?* 20 J. ENVTL. L. & LITIG. 189 (2005).

treaty abrogation.³¹⁴ Unlimited treaty rights are not the norm; it is standard practice for the U.S. government and courts to impose restrictions that control the exercise of treaty rights.³¹⁵ The *Anderson* court painstakingly laid out their rationale for how the treaty right to whale, held in common as a cotenancy with the rest of the American people, was not a right reserved by the Makah that allows unlimited or exclusive rights in whales by the Makah.³¹⁶ Just as the Boldt decision held that the rights to fish must be shared by Indian and non-Indian fishermen,³¹⁷ so must the right to whales be shared by Indians and non-Indians. And just as there are restrictions for fishing that are imposed on Indians who have treaty rights to fish,³¹⁸ so may restrictions be placed on treaty rights to whale.

A. MMPA Provides an Ability to Take Whales Under its Permitting Process

First, waivers to the blanket moratorium of taking marine mammals are possible under the MMPA. The Act allows precisely what the Makah want, which is the right to hunt whales when other Americans are not allowed to hunt whales. The Act allows permits to be issued as exemptions from its widespread ban on hunting of all marine mammals.³¹⁹ The permit provides the mechanism for limited and regulated takes of marine mammals, while ensuring that marine mammals are protected and continue to be a functioning part of the environment.³²⁰ The permitting system ensures that any takes will not adversely harm marine mammals as a functioning part of the ecosystem.³²¹

Without this regulation under the MMPA permitting process, there may be no check on the Makah's whaling that would look at the species' continued survival on a regular basis in order to determine if there is an effect of the hunting that is harming the species. Without that check, the tribe could continue hunting, with no oversight or regulations that could rationalize and impartially assess the takings effect on the species. It would give a blank check to the tribe that might be exploited - maybe not by the current council, but it certainly could be exploited by unforeseen, future

314. *Anderson v. Evans*, 371 F.3d 475, 501 (9th Cir. 2004).

315. See, e.g., *United States v. Fryberg*, 622 F.2d 1010 (9th Cir. 1980); *United States v. Washington (Boldt Decision)*, 384 F. Supp. 312 (W.D. Wash. 1974); *United States v. Dion*, 476 U.S. 734 (1986).

316. *Anderson*, 371 F.3d at 500; Karol de Zwager Brown, *Truce in the Salmon War: Alternatives for the Pacific Salmon Treaty* 74 WASH. L. REV. 605, 619-20 (1999).

317. *Anderson*, 371 F.3d at 500

318. *Boldt Decision*, 384 F. Supp. at 333.

319. 16 U.S.C. § 1371(a) (2006).

320. 16 U.S.C. § 1371(a)(3)(A) (2006).

321. 16 U.S.C. § 1371(a)(3)(A) (2006).

councils or factions of the tribe. As demonstrated by the unauthorized whale hunt in September 2007 which resulted in the botched hunting and lingering death of a resident gray whale,³²² there should be regulation and oversight of Makah whale hunting to ensure that the species is not harmed by the hunting and possible abuses of hunting rights by the tribe or individual tribal members.

B. Limits Under the MMPA are Consistent with Limits Imposed by the IWC

Any quota that is granted through a waiver under MMPA that limits the number of whales that the Makah can take would be consistent with a quota issued by the IWC, which also limits the number of whales that can be taken under an aboriginal subsistence exemption. The IWC sets taking and strike limits for all aboriginal subsistence hunting.³²³ Quotas for aboriginal groups granted by the IWC are limited to local consumption by those aboriginal groups and strict catch limits.³²⁴ The need of those aboriginal groups is established and provided to the IWC by the national governments that are a party to the commission; the national governments need to provide evidence of the cultural and subsistence needs of their citizens.³²⁵ No commercial whaling is allowed under the aboriginal status,³²⁶ because aboriginal whaling is intended for local needs and culture, not for financial support.

This is consistent with the idea that an aboriginal group would need to whale in order to maintain its original way of life, rather than to make financial gain in the commercial economy. This restriction is necessary to keep aboriginal groups from using the guise of subsistence whaling to conduct commercial whaling. Aboriginal groups are not immune to the lure of profit-making enterprises. Indeed, the Makah themselves long traded in whale oil, and during the 1860s abandoned whaling to engage in the more commercially lucrative seal trade, returning to whaling when the United States restricted their profits from seal hunting.³²⁷

The aboriginal subsistence exemption is also intended to ensure that permitted whaling is done for limited reasons that have to do with

322. Lewis & Shukovsky, *supra* note 305; *see also* DRAFT EIS, *supra* note 17, at 1-40 and 1-41.

323. Int'l Whaling Comm'n, Catch Limits and Catches Taken: Information on Recent Catches Taken by Commercial, Aboriginal and Scientific Permit Whaling, <http://www.iwcoffice.org/conservation/catches.htm#aborig>, (last visited April 19, 2009).

324. Bradford, *supra* note 11, at 181.

325. Int'l Whaling Comm'n, Aboriginal Subsistence Whaling, <http://www.iwcoffice.org/conservation/aboriginal.htm#asw> (last visited April 19, 2009).

326. Bradford, *supra* note 11, at 181.

327. WATERMAN, *supra* note 32, at 48.

aboriginal groups' actual need to retain their cultures and indigenous diets. The aboriginal subsistence exemption was not developed to allow aboriginal groups to exploit a loophole in international law for financial gain by killing and selling animals that are off-limits to the rest of the world's exploitation.

C. The NEPA Process is Honored

The review that is required under MMPA to grant the waiver respects the NEPA process and the oversight of NEPA over federal actions that have a significant impact on the environment. The Ninth Circuit has repeatedly found that the Makah whaling request needs to comport with NEPA.³²⁸ The NEPA process is generally necessary whenever there is federal action involved that will have a significant impact on the environment.³²⁹ The involvement of NOAA and NMFS in the Makah whaling petition to the IWC and the use of Coast Guard resources to protect and enforce Makah whaling involves federal action. Nothing in the Act indicates that a federal action is exempted from the NEPA process because it also involves an Indian tribe.³³⁰ The Makah Tribe sought the help of the federal agencies in their renewed pursuit of whaling. The tribe knew or should have known that the federal agencies could not act outside federal law. By partnering with the federal agencies in the pursuit of whaling, the tribe's joint action with these federal agencies subjected them to the NEPA process.

D. Consistency with Equal Sharing Principles as Articulated in *United States v. Washington* (the Boldt decision)

Moreover, *Anderson* comports with the Boldt decision.³³¹ In this decision, Senior District Judge George Boldt stated that the phrase "in common with" the citizens of the United States means an equal sharing of the opportunity to take fish.³³² He found that in practical terms, this meant that nontreaty fisherman have the opportunity to take up to 50 percent of the harvestable number of fish that may be taken by all fishermen.³³³ Similarly, treaty right fishermen have the opportunity to take up to the same percentage of harvestable fish.³³⁴ The principles declared in the Boldt decision were upheld by the U.S. Supreme Court in its 1979 case, *Washington*

328. See *Metcalf v. Daly*, 214 F.3d 1135 (9th Cir. 2000); *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004).

329. 42 U.S.C. § 4332 (2006).

330. *Id.*

331. *United States v. Washington (Boldt Decision)*, 384 F. Supp. 312 (W.D. Wash. 1974).

332. *Id.* at 343.

333. *Id.*

334. *Id.*

*v. Washington State Commercial Passenger Fishing Vessel Association.*³³⁵

As stated in the 1855 Treaty of Neah Bay and recognized in the *Anderson* decision, the Makah do not have an exclusive right to whales.³³⁶ They have the right to whale in common with all citizens of the U.S.³³⁷ This creates a co-tenancy in the resource. The tribe cannot act arbitrarily to do whatever it wants with the resource. Nor does the tribe have an exclusive right to the resource. The non-Indian citizens of the U.S. have at least an equal right to the resource.

A whale's only value is not as a dead carcass. Whales have environmental, aesthetic and recreational worth that U.S. citizens hold valuable. The tenets of the MMPA give official and legal recognition to that value.³³⁸ The *Anderson* decision articulates regulations that the Makah must comport with in order not to damage or destroy the resource or the co-tenancy. The regulations also ensure that the Makah will not take more than their fair share of that common resource. Both tribal and non-tribal peoples need to understand their co-tenancy in the resource and need to respect the other's use of the resource. This shared and respected value in the same resource will do much toward reconciling the polarized feelings between pro- and anti-whaling factions within this country.

E. No Abrogation of Treaty Rights

The *Anderson* decision does not abrogate the Makah's treaty rights. As the decision stated, there was no decision made about abrogation, because that is up to Congress to decide. The *Anderson* decision does not abrogate the rights because it has not said that the Makah cannot whale; rather the Ninth Circuit said that the Makah's right to whale has to meet certain standards in order to balance conservation values.³³⁹

Unlike *United States v. Dion*,³⁴⁰ where the Supreme Court found that the language and legislative history of the Eagle Protection Act provided evidence that Congress intended to modify and abrogate treaty-based rights to hunt eagles,³⁴¹ there is no legislative history or language in the MMPA that indicates Congressional intent to abrogate the Makah's whaling rights.³⁴² Although the Act expressly provides an exemption for Alaskan

335. *Washington v. Wash. State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979).

336. *Anderson v. Evans*, 371 F.3d 475, 500 (9th Cir. 2004).

337. Treaty of Neah Bay, *supra* note 87, art. IV; *Anderson*, 371 F.3d at 500.

338. 16 U.S.C. § 1361 (2006).

339. *Anderson*, 371 F.3d at 500.

340. *United States v. Dion*, 476 U.S. 734 (1986).

341. *Id.* at 743.

342. 16 U.S.C. §§ 1361-1421(h) (2006).

natives to take marine mammals,³⁴³ there is no mention of treaty Indians in the Act.

Because the Makah have the possibility of receiving a permitted right to hunt whales under the regulation of the MMPA, the MMPA does not abrogate the Makah's treaty rights. In order to balance the responsibility to protect whales with the responsibility to honor the treaty right, it makes sense for the U.S. to place some restrictions on the tribe's whaling, and to keep it under regular review and consideration for the continuation of a waiver as provided for under the permitting process of the MMPA.

Although some commentators argue that the *Anderson* court did abrogate the Makah's treaty rights by stating that the MMPA applies to the tribe's whaling,³⁴⁴ this argument ignores the clear statement of the Ninth Circuit that it was not deciding if the MMPA abrogated the rights of the tribe to hunt whales.³⁴⁵ Further, the court recognized that the Makah have a treaty right to take whales.³⁴⁶ The requirement that the tribe prepare an EIS does not make the possibility of whaling "nearly impossible."³⁴⁷ Federal agencies prepare EAs and EISs frequently.³⁴⁸ The EIS process is not so onerous that NOAA and NMFS, which are preparing the EIS and have ample experience producing this type of document, would find it impossible to comply with NEPA requirements. These agencies have prepared similar documents many times previously. Indeed, the Makah have already filed an application for a permit under the MMPA to hunt gray whales. NOAA and NMFS have drafted an EIS that supports the Makah's whaling proposal. The EIS is currently in draft form, and the EIS process is on-going and supported by the federal government.

Moreover, there is no reason to believe that the Makah's treaty right should be unfettered by the MMPA. Treaty rights are often subject to regulation without those regulations amounting to abrogation.³⁴⁹ The

343. 16 U.S.C. § 1371(b) (2006).

344. See *e.g.*, Tomlinson, *supra* note 313; Roghair, *supra* note 313.

345. *Anderson v. Evans*, 371 F.3d 475, 501 (9th Cir. 2004).

346. *Id.* at 483.

347. Roghair, *supra* note 313, at 211.

348. A search of the U.S. Environmental Protection Agency's National Environmental Policy Act (NEPA) on-line database indicates that 2,934 draft or final EISs have been published since 2004. For the week ending May 1, 2009, four final EISs were published in the Federal Register and nine draft EISs were published. See <http://yosemite.epa.gov/oeca/web/eis.nsf/viEIS01?OpenView> (last visited May 2, 2009).

349. *United States v. Washington*, 384 F.Supp. 312, 333 (W.D. Wash. 1974). See also Indian Country News, *Incident over Whale Shot by Makah Members Angers Tribal Judge*, Sept. 2007, available at http://indiancountrynews.net/index.php?option=com_content&task=view&id=1459&Itemid=118. The article quotes Chief Tribal Judge Jean Vitalis saying, "We have a treaty right to hunt and fish, but by God, that doesn't mean you go after king salmon when it is out of season." *Id.*

MMPA identifies a conservation need to control the killing of marine mammals. The *Fryberg* decision states that Indian treaties can be restricted for conservation necessity. It is not an abrogation of a treaty right to make it comport with the conservation values that Congress has expressed. Nor does the *Anderson* decision make the treaty subordinate to the MMPA. It looks at the two together, and finds that they can coexist, and both can be honored without ignoring or contradicting the other. The requirement to comply with the MMPA merely means that the tribe must exercise their treaty right to hunt whales within the parameters of an Act that was specifically passed to conserve and protect the very species that the Makah want to hunt.

F. Consistent Reasoning with U.S. Supreme Court's *Dion* Decision

The *Anderson* decision is also consistent with *United States v. Dion*.³⁵⁰ In that case, the U.S. Supreme Court held that Dion, a member of the Yankton Sioux Tribe, did not have the right to kill eagles for religious reasons. The court stated that the Eagle Protection Act had specifically indicated Congress' intention to protect eagles by banning the killing of eagles or any sale or barter of eagle parts.³⁵¹ This case recognized that the legislative history and language of the Act considered the impact on eagle populations of Indian hunting and use of eagle parts by Indian tribes for religious purposes.³⁵² With this specific language and history, the U.S. Supreme Court held that the Act indicated Congress' "unmistakable and explicit legislative policy choice that Indian hunting of . . . eagle[s], except pursuant to permit, is inconsistent with the need to preserve [the] species."³⁵³ The *Dion* court held that the treaty right was abrogated by the Act because of the legislative history and statutory language of the Act.

In the case of the MMPA and its legislative history and language, it is not clear that Congress intended to abrogate treaty rights for hunting marine mammals. There is no specific language in the statute or the legislative history that indicates that Congress considered hunting of marine mammals by Indians to be a threat to the continued existence of marine mammals.³⁵⁴

However, the *Anderson* court's reasoning behind a statute's provisions for takings of protected marine mammals under a permitting process is similar to the U.S. Supreme Court's reasoning in *Dion*. As noted by the

350. *United States v. Dion*, 476 U.S. 734 (1986).

351. *Id.* at 741-43.

352. *Id.*

353. *Id.* at 745.

354. Eichstaedt, *supra* note 42, at 163.

Supreme Court in *Dion*, the Eagle Protection Act allows takings of eagles under permit for religious purposes from Indian tribes.³⁵⁵ Thus, the statute recognized that Indians were not exempt from the coverage of the statute, but they could obtain a permit under the statute to take an eagle for religious purposes. This reasoning is similar to the Ninth Circuit's reasoning regarding the MMPA and the Makah whaling proposal. The MMPA does not exempt Indians from its coverage; indeed, all U.S. citizens are covered by the MMPA. But the MMPA does allow parties to apply for a permit to take marine mammals. It provides a mechanism, just as the Eagle Protection Act does, to allow permitted takings of protected animals. The *Anderson* court recognized that the statute provides a means through its permitting process for the limited and regulated taking of protected marine mammals. Because the MMPA does allow some permitted takings of marine mammals, it does not abrogate treaty rights to hunt whales; rather it merely controls and regulates that taking through its permitting process, which allows those takings to be regulated in such a way that the conservation purposes of the statute are not defeated.

G. Whaling Quota from IWC was Granted to the United States, Not the Makah

The *Anderson* decision respects the structure of the IWC's quota-granting process. The United States is a party to the ICRW.³⁵⁶ The IWC grants quotas to signatories who make a request for a quota.³⁵⁷ In the area of aboriginal subsistence quotas, it is the responsibility of the country that is a party to the treaty to substantiate both the need and the status of its aboriginal citizens who are seeking a quota.³⁵⁸ In turn, the quota is granted to the country, not to a specific aboriginal group.³⁵⁹ Thus, the Makah only have a whaling quota because the United States made the request to and was granted the quota from the IWC. The Makah are not signatories to the ICRW, nor can they themselves be granted a quota. Their only possibility of an IWC quota is through the United States.³⁶⁰

As the party that received the quota, the U.S. has obligations to the ICW to make sure that the quota is adhered to and not violated.³⁶¹ Any violation of the quota and enforcement by the IWC will fall on the U.S. as the

355. *Dion*, 476 U.S. at 734; 16 U.S.C. § 668a (2006).

356. Int'l Whaling Comm'n, IWC Members and Commissioners, <http://www.iwcoffice.org/commission/members.htm> (last visited Apr. 19, 2009).

357. Bradford, *supra* note 11, at 181.

358. *Id.* Int'l Whaling Comm'n, Aboriginal Subsistence Whaling, <http://www.iwcoffice.org/conservation/aboriginal.htm#asw> (last visited Apr. 19, 2009).

359. Bradford, *supra* note 11, at 181; DRAFT EIS, *supra* note 17, at 1-23.

360. *See* Bradford, *supra* note 11, at 181.

361. *Id.* DRAFT EIS, *supra* note 17, at 1-21.

recipient of the quota and as the signatory to the ICRW; it will not fall on the Makah. The United States has the domestic obligation to ensure that its aboriginal group is meeting the restrictions imposed by the IWC.³⁶² It behooves the U.S. to take measures to ensure that the Makah adhere to the IWC quota, and that the tribe does not violate any obligations that the United States has to the IWC. Therefore, it makes sense for the United States to regulate, monitor and enforce the taking of whales by the Makah.

H. Respects Makah Tribe's Management Plan While Providing Necessary Oversight of That Plan

The *Anderson* decision respects the Makah's management of the resource. By incorporating the Makah management plan in the draft EIS,³⁶³ the U.S. agencies are according the Makah's management of whaling a central role in the process. Although the Makah have to abide by U.S. rules because the IWC whaling quota flows to the Makah from the U.S., the Makah have been and continue to be participants in the process. Their management plan will, under the regulation of the federal agencies, control whaling once the permit under the MMPA is granted.

While the management plan will control the Makah's whaling activities, the MMPA permit process will subject that plan to review and oversight. This oversight will ensure that the tribe does not arbitrarily change its management plan and the conditions of the hunt, like it did in 2001.³⁶⁴ Further, the oversight should reduce the chances of unauthorized and culturally devoid hunting of resident whales like that conducted by five members of the Makah Tribe on September 8, 2007.³⁶⁵ Since the Makah tribal courts have so far been unable or unwilling to enforce tribal charges against the five illegal hunters,³⁶⁶ some federal oversight of the hunting is

362. See Bradford, *supra* note 11, at 182; DRAFT EIS, *supra* note 17, at 1-25 and 1-26.

363. DRAFT EIS, *supra* note 17, at Appendix A.

364. *Anderson v. Evans*, 371 F.3d 475, 485 (9th Cir. 2004).

365. Vanessa Ho, *Makah Tribal Members Indicted in Whale Hunt*, SEATTLE POST-INTELLIGENCER, Oct. 4, 2007, available at http://www.seattlepi.com/local/334299_makah05.html?source=myspi. See Shukovsky, *supra* note 300. Tribal member Joe McGimpsey noted that the illegal hunt was conducted without the intense discipline and spiritual preparation that sanctioned tribal whale hunts should employ. See also Brief of Government, *supra* note 299, at 3-4, which indicates that power boats were used by the five hunters, rather than a hunt conducted in the traditional manner, with a crew of eight men in a unpowered cedar canoe.

366. Indian Country News, *Makah Court Defers Prosecution for 5 Who Killed Gray Whale*, May 2008, http://indiancountrynews.net/index.php?option=com_content&task=view&id=3497&Itemid=118, (last visited Apr. 30, 2009). After calling more than 200 potential jury members, tribal judge Stanley Myers was unable to seat a jury because most had strong opinions about the case or were related to the defendants.

necessary in order to ensure that it is the tribe, and not individuals, that exercise the right to whale. Without that federal oversight, there is no guarantee that the tribe will prosecute illegal hunts; due to limitations on seating juries and strong feelings among other tribal members about whaling, prosecutions in tribal court are unlikely. Without some non-tribal oversight, there may be no effective prosecution of illegal hunts.

I. The Decision Comports with the Canons of Treaty Interpretation.

The requirement for the Makah's treaty rights to be exercised under the MMPA is not inconsistent with the canons of treaty interpretation. Treaties with Indian tribes are interpreted by the courts under the following canons: (1) ambiguous expressions must be resolved in favor of the Indians;³⁶⁷ (2) Indian treaties must be interpreted in the way the Indians themselves would have understood them at the time they were signed;³⁶⁸ and (3) treaties must be liberally construed in favor of the Indians.³⁶⁹

First, there are no ambiguous expressions in Article 4 of the Treaty of Neah Bay concerning whaling. The treaty clearly states that the Makah retain, in common with all citizens of the U.S., the right of fishing and whaling at usual and accustomed places.³⁷⁰ These words indicate that there is no exclusive right to whale that is held only by the Makah - the right is held in common with all U.S. citizens. Second, this interpretation of a common right with other U.S. citizens would have been understood by the Indians at the time of the treaty signing. In 1855, the Makah would have known that citizens of the U.S. were also involved in whaling.³⁷¹ The tribe knew that they were not the only people along the Washington coast who were whaling. Thus, they would have understood that the right to hunt

Myers stated that he would dismiss all the charges in a year if the five hunters abided by the conditions set by the U.S. District Court in its sentencing.

367. See *McClanahan v. State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

368. See *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Starr v. Long Jim*, 227 U.S. 613, 622-23 (1913); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).

369. See *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *United States v. Walker River Irrig. Dist.*, 104 F.2d 334, 337 (9th Cir. 1939).

370. Treaty of Neah Bay, *supra* note 87, art. IV.

371. See also Swan, *supra* note 1, at 32 (stating at the time of his residence with the Makah (1862-1865) that the Makah had long traded with white traders in Astoria, Oregon, which involved long voyages by canoe down the Washington coast. Since hunting for gray whales is typically conducted close to shore because of the nature of the gray whale's migratory patterns, the Makah would have observed whaling vessels in their ocean journeys and off the shore of their reservation.).

whales was shared with others.

Third, the federal agencies' actions in supporting and advancing the Makah's whaling rights in the international arena is evidence of the treaty being liberally construed in favor of the tribe. The federal government and the courts are not prohibiting the tribe from exercising its treaty right. The court has acknowledged that the Makah have a treaty right to hunt whales, a right which is denied to all other U.S. citizens. Acknowledging that the Makah have a right that other U.S. citizens do not is a liberal construction in favor of the tribe. A non-Indian would not be able to get a quota from the IWC, nor would a non-Indian be free from prosecution under the MMPA. With a permit under the MMPA, the Makah tribe will have a right to not be prosecuted under the MMPA for killing a whale, something that no other U.S. citizen could get.

VI. Conclusion

The right to hunt whales that is reserved to the Makah Tribe in the 1855 Treaty of Neah Bay can be harmonized with U.S. law, including the MMPA. The retained right of the Makah to whale under the treaty and the possibility of obtaining a waiver from the blanket moratorium on taking marine mammals under the MMPA are not contradictory. Compliance with the MMPA does not abrogate the Makah's treaty rights. The MMPA does place the treaty right under oversight and regulation, but it does not abrogate it or make it impossible for the tribe to exercise that right.

The IWC quota was granted to the U.S., not to the Makah Tribe. That quota is reflected in the current draft EIS. Because the U.S. is the party that will be held responsible to the IWC if the quota is not adhered to, it makes sense for the U.S. to place oversight and restrictions over the Makah as they exercise a right that was not granted directly to them. The Makah are responsible for adhering to the IWC quota through the grant of that quota from the U.S.

The oversight of the MMPA honors the co-tenancy that is shared in whales between Indians and non-Indians, as articulated in the Treaty of Neah Bay. Since the Makah's right to hunt and whale is shared in common with the rest of the citizens of the U.S., it makes sense for there to be regulations that oversee the Makah's whaling to ensure that the co-tenancy is honored and adhered to.

Because waivers to take whales are possible under the MMPA, any whaling that the Makah conduct under such a permit will honor both the treaty and the MMPA. Both the treaty and the Act can be followed. The application for the permit, accompanied by the new EIS that is currently in draft form, will provide the basis for the agency to evaluate the Makah's request to conduct its whaling. This honors the NEPA process, as well as the MMPA. Since the EIS incorporates the Makah's management plan, it

also honors the Makah's management of the resource.

The *Anderson* court admirably balanced the protection of whales as required under the MMPA with the treaty rights of the Makah to whale. Still, whaling remains a controversial subject. As the public comments to the draft EIS indicate,³⁷² the public is divided in its support for Makah's whaling rights and strict adherence to the U.S. being a non-whaling nation. Short of Congressional action, courts and commentators will be left to continue in their analysis and interpretation of international and domestic law, as well as previous court decisions, concerning the Makah Tribe's treaty whaling rights.

372. Nat'l Oceanic and Atmospheric Admin., Nat'l Marine Fisheries Serv., Northwest Regional Office, Public Comments on Makah DEIS, *available at* <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/Makah-DEIS-cmnts.cfm> (last visited May 2, 2009).
