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## ***Anderson v. Evans: Will Makah Whaling Under the Treaty of Neah Bay Survive the Ninth Circuit's Application of the MMPA?***

*In the 1990s, because Congress removed the gray whale from the Endangered Species list, the Makah Indian Tribe sought to revive its centuries-old whaling tradition after nearly seventy years without a hunt. The National Marine Fisheries Service and National Oceanic and Atmospheric Administration assisted the Makah in obtaining a whaling quota from the International Whaling Commission. Citizens and conservation groups, however, filed an action against the federal agencies to prevent the Makah from harvesting whales, and the Makah intervened as defendant. The most recent lawsuit alleged violations of the National Environmental Policy Act (NEPA) and the Marine Mammal Protection Act (MMPA). The District Court for the Western District of Washington granted defendants' motion for summary judgment. On appeal, the Ninth Circuit held that 1) the federal government was required to prepare an environmental impact statement, and 2) the Makah's whaling rights under the Treaty of Neah Bay did not exempt it from the MMPA's permit requirements.*

*This Comment examines the Ninth Circuit's reasoning regarding the effects of the MMPA on the Makah's treaty rights, and concludes that the Ninth Circuit did not give adequate weight to the whaling rights reserved by the Treaty of Neah Bay.*

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## I INTRODUCTION

The Makah Indian Tribe hunted whales off the coast of Washington State for many centuries. After a seven-decade interruption, the Tribe resumed this traditional practice in the late 1990s, with the help of the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS). This renewed whale hunts were met with resistance from various citizens and conservation groups, who filed an action against the federal agencies, with the Tribe intervening as defendant. As a result, the Ninth Circuit Court of Appeals ordered the government agencies to prepare a more objective environmental assessment (EA) than the one previously submitted for the proposed Makah whale hunt.<sup>1</sup>

The agencies prepared a new EA, and a coalition of citizens and conservation groups then filed another action in federal court, *Anderson v. Evans*, against the same defendants.<sup>2</sup> The action alleged violations of the National Environmental Policy Act (NEPA) as well as the Marine Mammal Protection Act (MMPA).<sup>3</sup> Again, the Makah intervened as defendant, and the district court granted the defendants' motion for summary judgment.<sup>4</sup> On appeal, the Ninth Circuit held that: 1) federal agencies were required to produce an environmental impact statement (EIS), rather than a less detailed EA;<sup>5</sup> and 2) the Tribe is bound by the MMPA in pursuing its treaty rights.<sup>6</sup>

This Comment will analyze the Makah Tribe's rights under the Treaty of Neah Bay and argue that the Ninth Circuit should not have decided that the treaty was subordinate to the requirements of the MMPA. In its 1855 treaty, the Makah Tribe specifically preserved its whaling rights. In exchange, the United States acquired most of the Tribe's land.<sup>7</sup> The Tribe exercised these rights

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<sup>1</sup> *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000).

<sup>2</sup> *See* 371 F.3d 475, (9th Cir. 2004).

<sup>3</sup> *Id.* at 480.

<sup>4</sup> *Id.* at 486.

<sup>5</sup> *Id.* at 494.

<sup>6</sup> *Id.* at 501.

<sup>7</sup> Treaty Between the United States of America and the Makah Tribe of Indians, Jan. 31, 1855, art. IV, U.S.-Makah, 12 Stat. 939, 940 [hereinafter Treaty of Neah Bay]. *See also* *United States v. Winans*, 198 U.S. 371, 380-82 (1905) (holding that a Tribe ceded certain property rights and reserved others, such as fishing rights, through its treaty with the United States).

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into the 1920s, until American and European whalers had decimated gray whale stocks in the region.<sup>8</sup> The eventual recovery of the gray whale population spurred the Tribe's efforts to obtain a whaling quota in the 1990s.

The Ninth Circuit applied its own three-part test to determine whether the MMPA, as a conservation statute, applied to Indian treaty rights. For a conservation statute to affect treaty rights, the court said the following conditions must be met: "(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."<sup>9</sup> Although the United States has jurisdiction where the whaling occurs, satisfying part one of the test, this Comment argues that the second and third parts of the test were not satisfied because the statute discriminates between treaty and non-treaty persons, and applying the statute to treaty rights is not necessary to achieve the desired conservation purpose. In fact, as the gray whale population nears its carrying capacity, the largest number that can be supported by an ecosystem,<sup>10</sup> requiring the Makah Tribe's treaty rights to conform with the MMPA subverts the Act's definition of conservation—maintaining an "optimum sustainable population" of gray whales.<sup>11</sup>

Although the Ninth Circuit did not foreclose the possibility of future Makah whale hunts, its decision in *Anderson* has severely hindered the Tribe's efforts to maintain this aspect of its culture. Specifically, the court has applied the onerous standards of the MMPA to a long-standing treaty between the United States and the Makah Tribe. The legislative history of the MMPA indicates that it was intended to address mistreatment of marine mammal populations "in the interests of profit or recreation."<sup>12</sup> The Makah Tribe's traditional whaling practices are undertaken for neither profit nor recreation. This Comment will reexamine the Ninth Circuit's reasoning in applying these standards to the Tribe's whaling rights preserved by the Treaty of Neah Bay.

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<sup>8</sup> Robert Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 179–80 (2001).

<sup>9</sup> *Anderson*, 371 F.3d at 497 (citing *United States v. Fryberg*, 622 F.2d 1010, 1015 (9th Cir. 1980)).

<sup>10</sup> *Id.* at 481.

<sup>11</sup> Marine Mammal Protection Act of 1972, 16 U.S.C. § 1362(2) (2000).

<sup>12</sup> H.R. REP. NO. 92-707 (1972), reprinted in 1972 U.S.C.C.A.N. 4144, 4144.

## II BACKGROUND

### A. *Early Makah History*

The Makah's traditional lands are in the northwest Olympic Peninsula in Washington State, bordering the Strait of Juan de Fuca.<sup>13</sup> Very little of the land in this territory was arable,<sup>14</sup> and the Makah depended heavily on the sea for their livelihood, building seaworthy canoes and harvesting whales and fish from the waters of the Pacific Ocean.<sup>15</sup> This whaling culture was highly developed, existing for 1,500 years before the Makah's first contact with Europeans and Americans in the late eighteenth century.<sup>16</sup>

### B. *Makah Dealings with the United States: Commerce, Treaty, and the Interruption of Whaling*

The first great changes to the Makah way of life came with the arrival of European and American explorers. First charted in 1788, Neah Bay soon became an active harbor in the Pacific Northwest and a bustling center of the fur trade.<sup>17</sup> Throughout this period and into the nineteenth century, whaling remained at the forefront of Makah life, even eliciting comparisons to the role of the bison in the life of Plains Indian tribes.<sup>18</sup> The Makah primarily hunted the California gray whale,<sup>19</sup> and mainly hunted during the whales' springtime migration from the waters off of Mexico to the north Pacific.<sup>20</sup> Instead of hunting during the

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<sup>13</sup> *Anderson*, 371 F.3d at 483.

<sup>14</sup> James G. Swan, *The Indians of Cape Flattery*, in 16 SMITHSONIAN CONTRIBUTIONS TO KNOWLEDGE 4, 32 (1870).

<sup>15</sup> *United States v. Washington*, 384 F. Supp. 312, 363 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

<sup>16</sup> ALAN D. McMILLAN, *SINCE THE TIME OF THE TRANSFORMERS: THE ANCIENT HERITAGE OF THE NUU-CHAH-NULTH, DITIDAHT, AND MAKAH* 127-28, 187 (1999).

<sup>17</sup> *Id.* at 187; LEWIS & DRYDEN'S *MARINE HISTORY OF THE PACIFIC NORTHWEST* 3, 5-6, 55, 119, 276 (E.W. Wright ed., Antiquarian Press, Ltd. 1961) (1895).

<sup>18</sup> Carroll L. Riley, *The Makah Indians: A Study of Political and Economic Organization*, 15 *ETHNOHISTORY* 57, 72 (1968), available at <http://www.jstor.org> (follow "Search" hyperlink and type the article title into the search box).

<sup>19</sup> Swan, *supra* note 14, at 38.

<sup>20</sup> See Beth Laura O'Leary, *Aboriginal Whaling from the Aleutian Islands to Washington State*, in *THE GRAY WHALE: ESCHRICHTIUS ROBUSTUS* 79, 97 (Mary Lou Jones et al. eds., 1984).

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whales' southward migration in late fall, the Makah hunted during the springtime due to calmer seas.<sup>21</sup>

The Makah became well known as traders of whale oil along the Pacific coast, supplying other Native Americans as well as European and American ships that docked at Neah Bay. The whale-oil trade brought a certain degree of prosperity to the Tribe,<sup>22</sup> in addition to the Makah's trade in other marine mammals, fish, shellfish, and other goods.<sup>23</sup> In 1855, representatives of the Makah and the United States government signed the Treaty of Neah Bay.<sup>24</sup> Records indicate that the treaty was negotiated in English, with an interpreter translating the government representatives' English into "Chinook Jargon," a regional trade language with a limited vocabulary, which a member of the nearby Clallum Tribe ostensibly translated into Makah for the benefit of Tribe representatives.<sup>25</sup> As a result it is unclear how much of the treaty content Makah representatives understood at the time of the treaty signing.<sup>26</sup> The Treaty of Neah Bay stated that:

The said tribe hereby cedes, relinquishes, and conveys to the United States all their right, title, and interest in and to the lands and country occupied by it, bounded and described as follows, viz: [all of the Makah Tribe's traditional territory, excluding a tract of coastal land for a reservation] . . . . 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, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands: Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens.<sup>27</sup>

Records from the treaty negotiations, and other contemporary accounts, indicate that the Makah only agreed to relinquish much

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<sup>21</sup> *Id.*

<sup>22</sup> Swan, *supra* note 14, at 30. United States v. Washington, 384 F. Supp. 312, 364 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

<sup>23</sup> FRANCES DENSMORE, *NOOTKA AND QUILEUTE MUSIC* 10 (1939).

<sup>24</sup> FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 252 (1994).

<sup>25</sup> Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 553 (1991); *Washington*, 384 F. Supp. at 364.

<sup>26</sup> See *Washington*, 384 F. Supp. at 364.

<sup>27</sup> Treaty of Neah Bay, *supra* note 7, at 940.

of their traditional land in exchange for the retention of whaling and fishing rights in the waters near their future reservation.<sup>28</sup> Makah representatives seem to have made this clear during negotiations, and the United States Representative, Governor Isaac Stevens, recognized the importance of the sea to the Tribe's livelihood.<sup>29</sup>

Beginning in the 1840s, "foreign" (American and European) commercial whalers began to hunt in traditional Makah waters.<sup>30</sup> These new hunters proved to be especially harmful to the whale stocks upon which the Makah traditionally relied: after discovering the whales' calving grounds in the late 1840s, foreign whalers depleted the population in a relatively short period of time.<sup>31</sup> In the late 1920s, the Makah stopped whaling. Reasons given for the cessation of whaling have included: "the federal government's discouragement and lack of assistance; a decline in demand for whale oil; social and economic dislocation within the Tribe; and the drastic decline of the gray whale population."<sup>32</sup> The last recorded whale hunt for the Tribe before the 1990s appears to have occurred in 1928.<sup>33</sup>

### C. Resumption of Whaling

In the early 1990s, members of the Makah Tribe showed interest in resuming traditional whaling.<sup>34</sup> By that time, the California gray whale population had rebounded, and it was removed from the Endangered Species Act list in 1994.<sup>35</sup> During the seven-decade interval since the last hunt, however, the United States and other countries had formed the International Whaling Commission (IWC), pursuant to the International Convention for the Regulation of Whaling.<sup>36</sup> Under IWC regulations, subsistence whaling by aboriginal groups such as the Makah was permitted only under the IWC's quota system.<sup>37</sup>

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<sup>28</sup> *Washington*, 384 F. Supp. at 363-65.

<sup>29</sup> See 1 HAZARD STEVENS, *THE LIFE OF ISAAC INGALLS STEVENS* 475 (1900).

<sup>30</sup> See David A. Henderson, *Nineteenth Century Gray Whaling: Grounds, Catches and Kills, Practices and Depletion of the Whale Population*, in *THE GRAY WHALE: ESCHRICHTIUS ROBUSTUS* 159, 164 (Mary Lou Jones et al. eds., 1984).

<sup>31</sup> *Id.* at 173-74.

<sup>32</sup> *Anderson v. Evans*, 371 F.3d 475, 483 (9th Cir. 2004).

<sup>33</sup> ROBERT H. BUSCH, *GRAY WHALES: WANDERING GIANTS* 75 (1998).

<sup>34</sup> *Anderson*, 371 F.3d at 483.

<sup>35</sup> *Id.* at 481.

<sup>36</sup> *Id.* at 483.

<sup>37</sup> *Id.*

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Subsequently, the Tribe entered into an agreement with NOAA to secure a gray whale quota from the IWC, and the United States presented a quota proposal at the June 1996 IWC annual meeting.<sup>38</sup> Passage of the proposal was blocked by other IWC member nations, and opposed by the United States House of Representatives Committee on Resources.<sup>39</sup> The United States consequently withdrew its request.<sup>40</sup>

After the United States withdrew its request to the IWC, and before its second attempt at gaining IWC approval for a quota, NOAA received a letter from various whale-watching groups, conservation organizations, and citizens expressing concern over possible NEPA violations.<sup>41</sup> NOAA subsequently entered into a new agreement with the Makah.<sup>42</sup> The new agreement required the Tribe's management plan to include seasonal and geographic restrictions on proposed whale hunts to minimize the potential taking of nonmigratory whales.<sup>43</sup>

At the 1997 IWC meeting, the United States and the Russian Federation submitted a joint request for a California gray whale quota, combining the proposed Makah quota with a quota for the Chukchi people of Siberia.<sup>44</sup> The request would allow the taking<sup>45</sup> of 620 whales over a five-year period.<sup>46</sup> The IWC quota, however, used ambiguous wording.<sup>47</sup> Delegates of various nations disagreed as to whether the aboriginal-subsistence exception entitled the Makah to a quota.<sup>48</sup> To gloss over this disagreement, the schedule stated that aboriginal groups "whose traditional subsistence needs have been recognised" were enti-

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<sup>38</sup> *Id.* at 484.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 483–84.

<sup>41</sup> *Id.* at 484.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* Both the IWC Chairman's report and the Ninth Circuit in *Anderson* refer to the Chukchi as "the Chukotka." See *id.*; Int'l Whaling Comm'n, CHAIRMAN'S REPORT OF THE 49TH ANNUAL MEETING, § 10.3.1 (1997), available at [http://luna.pos.to/whale/iwc\\_chair97\\_10.html](http://luna.pos.to/whale/iwc_chair97_10.html). Both sources mistakenly use the term "Chukotka." The Chukchi are an aboriginal people for whom the Chukotka region of Siberia is named. JAMES FORSYTH, A HISTORY OF THE PEOPLES OF SIBERIA: RUSSIA'S NORTH ASIAN COLONY 1581–1990 71 (1992).

<sup>45</sup> *Anderson*, 371 F.3d at 484. "Taking" a whale is defined as flagging it or securing it to a craft in the water, while a "strike" is any blow from a harpoon, firearm, or other weapon that lands on a whale. *Id.* at nn. 8–9.

<sup>46</sup> *Id.* at 484; Int'l Whaling Comm'n, *supra* note 44, at § 10.3.2.2.

<sup>47</sup> *Anderson*, 371 F.3d at 484.

<sup>48</sup> *Id.*

tled to California gray whale quotas.<sup>49</sup> The schedule did not mention, however, who was required to “recognise” such needs: the IWC or the United States government.<sup>50</sup>

The NMFS issued a five-year quota for the Makah in March 1998, allowing them to take five gray whales in any one-year period, and to strike thirty-three whales in a five-year period.<sup>51</sup> Previously, the NMFS had issued a final EA and finding of no significant impact (FONSI) for the hunt.<sup>52</sup> In 1997, before the quota was announced, several conservation groups and citizens filed a complaint in the District Court for the Western District of Washington alleging violations of NEPA,<sup>53</sup> the Whaling Convention Act, and the Administrative Procedure Act, claiming that the EA was insufficient and not prepared objectively.<sup>54</sup> Following a grant of summary judgment for defendants, the Tribe began to hunt, killing one whale in 1999.<sup>55</sup>

On appeal, the Ninth Circuit held the EA to be invalid because it was prepared after the government’s agreement with the Tribe and was therefore not sufficiently objective.<sup>56</sup> The court ordered that a new EA be prepared, and the defendants dissolved their agreement with the Tribe and restarted the EA process.<sup>57</sup> The 2001 EA, like its 1997 predecessor, authorized a hunt restricted to particular areas and times of year to target migratory whales.<sup>58</sup> The Makah Management Plan, however, was modified to remove any geographic limitations on the Tribe’s whale hunting.<sup>59</sup> This change was not incorporated into the Draft EA made available for public comment, and was only added to the Final EA, which again resulted in a FONSI.<sup>60</sup>

The citizens and conservation groups filed another suit in January 2002, alleging NEPA and MMPA violations by the federal

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<sup>49</sup> Int’l Whaling Comm’n, *supra* note 44, § 10.3.2.2.

<sup>50</sup> See Miller, *supra* note 8, at 261 n. 499 (citing e-mail from Dr. Ray Gambell, IWC Secretary (Mar. 24, 2000)) (stating that “the onus” is on the United States to recognize a Makah subsistence need).

<sup>51</sup> *Anderson*, 371 F.3d at 484–85.

<sup>52</sup> *Id.* at 484. If an EA results in a FONSI, no EIS is required. 40 C.F.R. § 1508.13 (2005).

<sup>53</sup> *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000).

<sup>54</sup> *Id.* at 1140, 1142–43.

<sup>55</sup> *Anderson*, 371 F.3d at 485.

<sup>56</sup> *Metcalf*, 214 F.3d at 1143–46.

<sup>57</sup> *Id.* at 1146.

<sup>58</sup> *Anderson*, 371 F.3d at 485.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 485–86.



defendants.<sup>61</sup> As before, the Tribe intervened as defendant.<sup>62</sup> The district court granted summary judgment to defendants, which plaintiffs appealed along with the court's denial of a preliminary injunction intended to stop any further whale hunts.<sup>63</sup> The Ninth Circuit considered the summary judgment appeal and reversed the district court, holding that the government's failure to prepare an environmental impact statement constituted a NEPA violation, and that the MMPA governed the Tribe's whale hunts.<sup>64</sup> More specifically, the Ninth Circuit held that the Makah whaling rights reserved in the Treaty of Neah Bay were subject to the MMPA permit process.<sup>65</sup>

### III

#### THE TREATY OF NEAH BAY

##### A. *Negotiation and Signing*

The Treaty of Neah Bay is one of more than 370 treaties the United States signed with Indian tribes in the eighteenth and nineteenth centuries.<sup>66</sup> The United States typically initiated negotiations with the tribes to gain control over traditional Indian lands.<sup>67</sup> Like the Treaty of Neah Bay, other treaties were negotiated in English, with translations into tribal languages or trade languages such as Chinook Jargon.<sup>68</sup> Language barriers, in addition to the presence of legal advisors only on the U.S. government's side created a lopsided relationship between the tribes and the United States.<sup>69</sup>

The United States negotiated the Treaty of Neah Bay with the Makah in a typically one-sided fashion.<sup>70</sup> In 1855, Governor Isaac Stevens of the Washington Territory was the chief representative of the United States at the negotiations that produced the Treaty of Neah Bay.<sup>71</sup> After his appointment in 1853, Stevens

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<sup>61</sup> *Id.* at 486.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 480.

<sup>65</sup> *Id.* at 501.

<sup>66</sup> Miller, *supra* note 8, at 190.

<sup>67</sup> *Id.*

<sup>68</sup> *United States v. Washington*, 384 F. Supp. 312, 330–31 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

<sup>69</sup> FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 402, 403–04, 406–07 (1995).

<sup>70</sup> *Washington*, 384 F. Supp. at 364.

<sup>71</sup> PRUCHA, *supra* note 24, at 252.

was charged with surveying for a proposed railroad to the Pacific Ocean, as well as with negotiating treaties to dispose of tribal claims to land.<sup>72</sup> During his appointment as governor, Stevens negotiated over a dozen such treaties with tribes in Washington, Oregon, Montana, and Idaho, under circumstances similar to the negotiations with the Makah.<sup>73</sup>

### ***B. Federal Canons of Construction for Indian Treaties***

To address the relative disadvantages suffered by the Makah and other Indian tribes in negotiating treaties with the United States, federal courts developed “canons of construction” for Indian treaties which are favorable to tribes and implicitly recognize the one-sided nature of the original bargaining between the tribes and the federal government.<sup>74</sup> The canons are:

1) treaties are “grant[s] of rights *from*” Indians, rather than *to* them; 2) courts should construe treaties in the same manner tribes understood them at the time of signing; 3) ambiguous language or surrounding circumstances must be interpreted in favor of the tribes; and 4) “treaties in general are to be liberally construed in favor of tribes to accomplish their protective purpose because the treaties were allegedly for the benefit of the tribes.”<sup>75</sup>

These four canons must be applied to any federal legal dispute involving an Indian treaty. In fact, it was the federal government’s acknowledged responsibility to the Tribe that led the federal defendants to assist the Makah in their effort to resume whaling beginning in the 1990s.<sup>76</sup> Efforts by the United States government to honor its commitments, albeit several years late, were met with controversy. After commercial whalers intruded into the tribe’s waters and decimated California gray whale stocks, conservation groups thwarted the Makah’s attempt to resume their livelihood of over one-thousand years.<sup>77</sup> In applying the four canons of construction to the Treaty of Neah Bay, the Ninth Circuit did not grant much latitude to the Makah’s treaty rights.

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<sup>72</sup> PRUCHA, *supra* note 69, at 402, 403–04, 406–07 (1995).

<sup>73</sup> *Id.*

<sup>74</sup> Miller, *supra* note 8, at 192.

<sup>75</sup> *Id.* at 192–93 (emphasis added) (internal citations omitted).

<sup>76</sup> *Id.* at 230.

<sup>77</sup> See *e.g.*, Anderson v. Evans, 371 F.3d 475, 500 (9th Cir. 2004).

1. *First Canon: Treaties are Grants of Rights From the Tribes*

Under the first canon, a treaty must be construed as a grant of rights *from* the tribe *to* the government, not the other way around.<sup>78</sup> The Makah *granted* the United States most of their tribal lands with the intention of retaining their seafaring lifestyle, considering the sea to be their true “land.”<sup>79</sup> The Makah expressly retained their whaling and fishing rights “in common with”<sup>80</sup> citizens of the United States at a time when it was common for both Tribe members and Americans to harvest whales from the Makah’s traditional hunting waters.<sup>81</sup> Over time, as commercial whaling in the area ceased due to its effect on whale populations,<sup>82</sup> the Makah were unable to continue their traditional whale hunts.<sup>83</sup> The Treaty of Neah Bay lists a number of offenses forbidden to the Makah (such as importing liquor onto the reservation) and their penalties, but does not mention punishments for depleted whale stocks.<sup>84</sup> Neither the treaty nor supporting documents indicate that the United States intended to penalize the Makah for decreasing whale populations or that the Makah intended to reserve their whaling rights only in the absence of abuse of whaling rights and depletion of stocks by American whalers.

2. *Second Canon: Treaties are Construed as Tribes Understood Them*

Under the second canon, a court must construe a treaty using the understanding a tribe would have had at the time of negotiation and signing.<sup>85</sup> This is intended to mitigate the advantage that the United States had over the tribe during treaty negotia-

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<sup>78</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905). The Supreme Court held that Yakima treaty fishing rights on the Columbia River were not affected by state and federal grants of adjacent land to private owners, and such rights were part of a larger set of rights reserved by the Tribe. *Id.*

<sup>79</sup> STEVENS, *supra* note 29, at 475.

<sup>80</sup> Treaty of Neah Bay, *supra* note 7, at 940.

<sup>81</sup> *Id.*

<sup>82</sup> Miller, *supra* note 8, at 179–80.

<sup>83</sup> See *Anderson*, 371 F.3d at 483.

<sup>84</sup> Treaty of Neah Bay, *supra* note 7, at 940.

<sup>85</sup> *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). Here, the Supreme Court held that the Cherokee and Choctaw Nations were entitled to the minerals (and related royalty payments) under the Arkansas River bed because they would have understood the river bed to be part of their lands under their treaties with the United States. *Id.* at 631-32.

tions, including conducting the negotiations in English with legal advisors available only to the U.S. government.<sup>86</sup> Documentation of the treaty process reveals that the Makah placed a high importance on the preservation of their whaling and fishing lifestyle, and understood that the Treaty of Neah Bay preserved this lifestyle, as Governor Stevens assured them it would.<sup>87</sup> It is unlikely the Tribe understood the treaty to limit its whaling rights in what would turn out to be a fairly short time. Perhaps in 1855, no one could envision the near extinction of the California gray whale. However, it seems reasonable that the Makah would have understood the reservation of whaling rights “in common with” United States citizens as a license to continue whaling in perpetuity.<sup>88</sup> As it turned out, the industrious American whaling industry would cure the parties of any notion of “unlimited” whale stocks on the Pacific Coast.<sup>89</sup>

### 3. *Third Canon: Ambiguous Treaty Language is Interpreted in Favor of the Tribes*

Under the third canon, courts are required to interpret any ambiguous treaty language in favor of the tribe, because of the tribe’s disadvantaged position during treaty negotiations.<sup>90</sup> As a result, the “in common with” language assuming that both U.S. citizens and the Makah would take whales should be considered in light of the Tribe’s position.<sup>91</sup> Arguably, whaling was an integral part of the United States economy in the nineteenth century, but today it certainly is not. Whaling, however, is a vital part of Makah culture despite its seven-decade absence, as illustrated by the Tribe’s butchering and full use of a whale carcass that washed ashore in June 2001.<sup>92</sup> Because of the impact of lost whaling

<sup>86</sup> Miller, *supra* note 8, at 192–93.

<sup>87</sup> *United States v. Washington*, 384 F. Supp. 312, 363–64 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975).

<sup>88</sup> *See id.* at 363 (stating “the government did not intend to stop them from marine hunting and fishing but in fact would help them to develop these pursuits”).

<sup>89</sup> *See Henderson*, *supra* note 30, at 163, 165, 166–67, 173–76, 181 (detailing the decimation of gray whale stocks by commercial whalers in the nineteenth century).

<sup>90</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n.17 (1978). The Supreme Court held that, even when ambiguous language was interpreted in favor of the Tribe, the Suquamish Indian Provisional Court did not have criminal jurisdiction of non-Indians without a specific delegation from Congress. *Id.* at 208.

<sup>91</sup> *See Anderson v. Evans*, 371 F.3d 475, 500 (9th Cir. 2004).

<sup>92</sup> *See Paul Shukovsky & Mike Barber, “Resident” Gray Whales Now Fair Game for Makah*, SEATTLE POST-INTELLIGENCER, July 14, 2001, at A1, available at [http://www.seattlepi.com/local/31319\\_makah14.shtml](http://www.seattlepi.com/local/31319_makah14.shtml).

rights on the Tribe, federal courts must construe treaty rights with this cultural value in mind, suggesting that it is important to preserve whaling rights as an important part of the Treaty of Neah Bay and Makah culture in general.

#### 4. *Fourth Canon: Treaties are Construed Liberally*

The fourth and final canon requires courts to liberally construe treaties in order to achieve the treaties' protective purpose.<sup>93</sup> The protective purpose of the Treaty of Neah Bay was to explicitly "secure" whaling rights for the Makah.<sup>94</sup> The property rights protected by the treaty clearly belong to the Tribe, and it follows that the treaty clause recognizing whaling rights should be interpreted liberally. Courts must literally strain to protect such rights in order to safeguard the Makah's traditional lifestyle and livelihood.<sup>95</sup> While the Ninth Circuit examined the applicability of the MMPA to the Treaty of Neah Bay, it did not examine the treaty under the above four canons.<sup>96</sup>

### C. *Abrogation by Congress*

The Supreme Court has held that Congress has the ability to abrogate Indian treaty rights, although the Court has rarely found such abrogations.<sup>97</sup> If Congress intends to abrogate a treaty right, there must either be an "express declaration" in the text of the statute,<sup>98</sup> or other clear and plain evidence from the legislative history or "surrounding circumstances" of a statute.<sup>99</sup>

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<sup>93</sup> *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930). In this case, the Supreme Court held that tax exemptions secured by agreement between the Choctaw Tribe and the federal government were to be liberally construed. *Id.*

<sup>94</sup> Treaty of Neah Bay, *supra* note 7 at 940.

<sup>95</sup> See *Carpenter*, 280 U.S. at 367 ("Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.").

<sup>96</sup> *Anderson*, 371 F.3d at 497-501.

<sup>97</sup> *United States v. Dion*, 476 U.S. 734, 738-39 (1986). The Court reasoned that Congress would presumably only abrogate treaty rights when acting to protect the national interest and the interests of the treaty Indians. *Id.* at 738 (quoting *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903)).

<sup>98</sup> *Id.* at 739. An explicit declaration by Congress of the intent to abrogate is preferred "for the purpose of ensuring legislative accountability." *Id.*

<sup>99</sup> *Id.* (citing *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977)). While explicit language in a statute is favored, outside evidence is acceptable when it clearly shows that "Congress actually considered the conflict" between the statute and protected treaty rights. *Id.* at 739-40.

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In *United States v. Dion*, a unanimous opinion written by Justice Marshall, the Supreme Court held that the Bald Eagle Protection Act abrogated the rights of members of the Yankton Sioux Tribe to hunt eagles on the Yankton reservation under the Tribe's 1858 treaty with the United States.<sup>100</sup> Although the statute did not explicitly mention abrogation, the Court found clear and plain evidence of intent to abrogate from the statute's legislative history.<sup>101</sup>

Applying the Supreme Court's standard from *Dion*, there is no explicit mention of treaty abrogation in the text of the MMPA.<sup>102</sup> The legislative history of the MMPA at the time it was enacted in 1972, as well as subsequent amendments, scarcely mention Indian treaty rights. The 1972 House Report and Conference Report both mention exemptions for Alaska Natives, with whom the United States does not have treaties, but contain no reference to Indian tribes covered by treaties with the United States.<sup>103</sup> The 1981 House Report for Amendments to the MMPA, however, "clarif[ies] that the native exemption . . . does not apply to Indians, Aleuts or Eskimos who reside . . . in states other than Alaska."<sup>104</sup> This amendment reinforces that only qualified Alaska Natives are exempt from the MMPA permit process,<sup>105</sup> aside from any exemptions under international treaties.<sup>106</sup> The MMPA authorizes the secretary of commerce to issue permits for the taking of marine mammals of a certain number and species, with the location, method, time period, and other terms defined by the secretary.<sup>107</sup> The Makah did not apply for a permit under the MMPA requirement, but the Tribe did work closely with two federal agencies, the NOAA and NMFS, and began whaling under the impression that no permit was required.<sup>108</sup>

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<sup>100</sup> *Id.* at 737, 745.

<sup>101</sup> *Id.* at 743-44.

<sup>102</sup> See Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421(h) (2000). The MMPA does, however, provide exemptions for members of Native groups living in coastal areas of Alaska. *Id.* § 1371(b).

<sup>103</sup> H.R. REP. NO. 92-707 (1972), reprinted in 1972 U.S.C.C.A.N. 4144, 4160; H.R. CONF. REP. NO. 1488 (1972), reprinted in 1972 U.S.C.C.A.N. 4187, 4188.

<sup>104</sup> H.R. REP. NO. 97-228, at 20 (1981), reprinted in 1981 U.S.C.C.A.N. 1458, 1470.

<sup>105</sup> 16 U.S.C. § 1371(b).

<sup>106</sup> *Id.* § 1372(a)(2).

<sup>107</sup> *Id.* § 1374(a)-(b).

<sup>108</sup> *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004).

The Senate Report accompanying the 1994 amendments to the MMPA, however, contains language that is perhaps more relevant to the question of treaty abrogation. It states that the amendments “reaffirm that the MMPA does not in any way diminish or abrogate existing protected Indian treaty fishing or hunting rights.”<sup>109</sup> Given the absence of clear intent to abrogate in the text of the statute, this appears to be clear and plain evidence of Congress’s intent *not* to abrogate treaty rights through the MMPA. This legislative intent was even codified into the statute as an amendment stating that “[n]othing in this Act . . . alters or is intended to alter any treaty between the United States and one or more Indian tribes.”<sup>110</sup> Consequently, the only mention of Indian treaty rights in the MMPA’s text or legislative history shows that Congress did not intend to abrogate any treaty hunting rights—including the Makah’s whaling rights under the Treaty of Neah Bay. When Congress enacted the MMPA, the Makah had not gone whaling in over four decades, and would not attempt to resume whaling for over two more decades, during which various amendments to the MMPA were adopted. Still, the only mention of Indian treaty rights in the various iterations of the MMPA and its amendments makes clear that hunting and fishing rights protected by treaty are not impacted by the MMPA.

#### IV THE MARINE MAMMAL PROTECTION ACT AND CONSERVATION NECESSITY

The Ninth Circuit’s analysis of the MMPA focused on both its applicability to the International Whaling Commission and the Treaty of Neah Bay. The MMPA states that:

[I]t is unlawful: (1) for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas; (2) except as expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before the effective date of this title . . . to take any marine mammal in

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<sup>109</sup> S. REP. NO. 103-220, at 17 (1994), *reprinted in* 1994 U.S.C.C.A.N. 518, 535.

<sup>110</sup> Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, § 14, 108 Stat. 532, 558-59 (also reprinted in note following 16 U.S.C. § 1361).

waters or on lands under the jurisdiction of the United States.<sup>111</sup>

### A. *The Fryberg Test*

In order to determine whether or not the MMPA applied to the Makah's treaty rights, the Ninth Circuit applied its three-part test from *United States v. Fryberg*, stating that conservation statutes impinge on Indian treaty rights when:

1) the government enforcing the statute has jurisdiction over the territory in question, 2) the statute does not discriminate between treaty and non-treaty individuals, and 3) it is necessary for the statute to affect treaty rights to achieve a conservation purpose.<sup>112</sup>

The three-judge panel deciding *Anderson* held that the MMPA would regulate the Makah's treaty whaling rights if: "(1) the United States has jurisdiction where the whaling occurs; (2) the MMPA applies in a non-discriminatory manner to treaty and non-treaty persons alike; and (3) the application of the statute to regulate treaty rights is necessary to achieve its conservation purpose."<sup>113</sup>

### B. *Jurisdiction and Discrimination*

The *Anderson* court quickly discounted the first two prongs of the *Fryberg* test as it applied to the Makah treaty rights.<sup>114</sup> The Ninth Circuit reasoned that, under the first prong, the United States clearly had jurisdiction over Makah whaling,<sup>115</sup> given that the MMPA applied to "any person subject to the jurisdiction of the United States"<sup>116</sup> and that its reach extended 200 nautical miles from the coasts of the United States.<sup>117</sup> For the second prong, the court determined that the MMPA's prohibition on all persons, with the exception of a few Alaska Native groups, was not discriminatory.<sup>118</sup>

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<sup>111</sup> 16 U.S.C. § 1372(a).

<sup>112</sup> *United States v. Fryberg*, 622 F.2d 1010, 1015 (9th Cir. 1980). The defendant in *Fryberg* was convicted of killing a bald eagle in violation of the Eagle Protection Act. *Id.* at 1010. The Ninth Circuit held that the Act modified existing treaty rights to hunt eagles. *Id.* at 1016.

<sup>113</sup> *Anderson*, 371 F.3d at 497-98 (citing *Fryberg*, 622 F.2d at 1015).

<sup>114</sup> *Id.* at 498.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* (quoting 16 U.S.C. § 1372(a)(1)).

<sup>117</sup> *Id.* (citing U.S.C. § 1362(15)).

<sup>118</sup> *Id.*



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For the second prong of its *Fryberg* test (discrimination), the Ninth Circuit relied on the Supreme Court's holding in *Puyallup Tribe v. Washington Department of Game*.<sup>119</sup> The *Puyallup* Court indicated that an Indian tribe's fishing rights "may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians."<sup>120</sup> The Ninth Circuit extended this regulatory power to federal conservation statutes in *Fryberg*.<sup>121</sup>

According to the Ninth Circuit in *Anderson*, "[t]he MMPA cannot be said to discriminate between treaty and non-treaty persons because members of the Tribe are not being singled out any more than non-treaty people."<sup>122</sup> The court did not, however, take into account the central place that whaling occupies in Makah culture, or that only the Makah have a property interest in whaling. While it is true that treaty and non-treaty persons are equally forbidden from whaling without a permit, this comparison fails to recognize the impact felt by the Makah because the renewed whale hunts were an effort by the Makah to assert their cultural heritage after over a century of encroachment by the United States government.<sup>123</sup> While the Makah may not be "singled out" in their inability to take marine mammals without a permit, the Ninth Circuit's application of the *Fryberg* test leaves one with the impression that it is only the Makah, not non-treaty persons, who are being deprived of a long-standing cornerstone of their culture. The dictionary definition of "discriminate" includes the act of "[m]ak[ing] a distinction in the treatment of different categories of people or things, esp[ecially] unjustly or prejudicially *against* people on grounds of race, colour, sex, social status, age, etc."<sup>124</sup> It is at least arguable that the prohibition on whaling as applied to the Makah is either unjust or prejudicial. As a result, the Ninth Circuit's brief statement of the non-discriminatory nature of the MMPA is suspect. Whaling has long occupied a central place in Makah culture as a primary part of their traditional diet, with extensive ceremonies and art surrounding whaling, and with the tradition of passing whaling skills

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<sup>119</sup> 391 U.S. 392 (1968).

<sup>120</sup> *Id.* at 398.

<sup>121</sup> *United States v. Fryberg*, 622 F.2d 1010, 1015 (9th Cir. 1980).

<sup>122</sup> *Anderson*, 371 F.3d at 498.

<sup>123</sup> Miller, *supra* note 8, at 247–50.

<sup>124</sup> 1 SHORTER OXFORD ENGLISH DICTIONARY 697 (5th ed. 2002) (emphasis in original).

down from generation to generation.<sup>125</sup> Considering the centuries-long role whaling has played in the Makah culture, seventy years is not a significant cessation of whaling.<sup>126</sup>

### C. Conservation Necessity

The Ninth Circuit devoted the bulk of its analysis of Makah treaty rights to the question of conservation necessity, the third prong of the *Fryberg* test. “The *Fryberg* test requires that the application of the MMPA to the Tribe be necessary to achieve its conservation purpose.”<sup>127</sup> The court specifically examined whether curtailing the Tribe’s whaling rights under the Treaty of Neah Bay was necessary to achieve the conservation aims of the MMPA.<sup>128</sup> The Ninth Circuit concluded that the application of the MMPA to the Tribe was necessary for the statute’s conservation purposes.<sup>129</sup> The court’s reasons for applying the MMPA included the need to maintain an “optimum sustainable population” of California gray whales,<sup>130</sup> the existence of a cotenancy relationship with non-Indians under the Treaty of Neah Bay,<sup>131</sup> and the impossibility of a “fair share” arrangement under such a cotenancy when the Tribe claimed an exclusive right to hunt whales.<sup>132</sup>

#### 1. Population Impact of Whaling

Pointing out the importance in the MMPA of maintaining marine mammals at their “optimum sustainable population,” the Ninth Circuit stated that there was no guarantee that Makah whaling activities would “not jeopardize the gray whale population.”<sup>133</sup> At the same time, the court acknowledged NMFS determinations that California gray whale populations were near the carrying capacity of the species,<sup>134</sup> “the largest number of a

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<sup>125</sup> See ROBERT SULLIVAN, A WHALE HUNT 46–50 (2000).

<sup>126</sup> The resumption of whaling is part of an ongoing effort to preserve Makah cultural heritage, which includes the annual “Makah Days” festival and the establishment of the Makah Cultural and Research Center. MCMILLAN, *supra* note 16, at 219, 222–23.

<sup>127</sup> *Anderson*, 371 F.3d at 498.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 498–500.

<sup>130</sup> *Id.* at 500.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 498 (quoting 16 U.S.C. § 1362(2)).

<sup>133</sup> *Id.* at 498–99.

<sup>134</sup> *Id.* at 481.

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species that a given ecosystem can sustain.”<sup>135</sup> In its NEPA analysis, however, the court paid particular attention to the potential effects of whaling on gray whale populations in the local area of the Strait of Juan de Fuca. By the government’s own admission, around sixty percent of the whales in the area were repeat visitors from year to year, an unknown number of which were nonmigratory, and questions remained as to the impact of the proposed hunt on this population.<sup>136</sup>

The government argued that, because the local whale population was genetically similar to other California gray whales, a limited hunt would not have a significant environmental impact, an argument that the Ninth Circuit rejected.<sup>137</sup> The court reasoned that the whales’ disappearance from the local area would result in a significant impact, even if other genetically similar whales could be found along the rest of the Pacific Coast.<sup>138</sup> Similarly, the court pointed to scientific uncertainty as to the likelihood that, as the government asserted, whales from elsewhere along the Pacific Coast would replace whales taken from the local group by the Makah.<sup>139</sup> Due to the uncertainty, and the light treatment of the subject in the government’s EA, the court was not persuaded that new whales were certain to replace those taken by the Makah, keeping the local population constant.<sup>140</sup>

If, as the NMFS estimated, California gray whales numbered between 17,000 and 26,000,<sup>141</sup> and estimates of whales found in the area of the proposed Makah hunt during each summer ranged between thirty-five and seventy (with an unknown number of nonmigrating whales),<sup>142</sup> it is not likely that the Makah whaling quota of five whales per year would have had a large impact on the California gray whale population as a whole or on the local population in the waters around Neah Bay and the Strait of Juan de Fuca.

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<sup>135</sup> *Id.* at n.2.

<sup>136</sup> *Id.* at 483.

<sup>137</sup> *Id.* at 491.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 492–93.

<sup>141</sup> Whaling Provisions, Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701, 16,704 (Apr. 6, 1998); Endangered Fish and Wildlife; Gray Whale, 58 Fed. Reg. 3121, 3122 (Jan. 7, 1993).

<sup>142</sup> *Anderson*, 371 F.3d at 482–83.

Despite the number of whales observed in the Neah Bay area, the Ninth Circuit found a great deal of uncertainty and controversy regarding the effects of Makah whaling on the local whale population.<sup>143</sup> The court held that NEPA required the government to prepare a more thorough EIS, rather than the simpler EA, citing the possible cumulative environmental effects of whaling that may result from a precedent set for the Makah.<sup>144</sup> Assuming, however, that the government prepared an EIS per the Ninth Circuit's ruling, the court preemptively discounted any findings that would not conform to its reading of the MMPA. Because the Makah "could use evolving technology" in future whale hunts, the methods of which are not limited by the Treaty of Neah Bay, and because of the possibility of future damage to the species and ecosystem, the Ninth Circuit held that the Tribe's rights under the Treaty of Neah Bay must be subordinate to the requirements of the MMPA.<sup>145</sup> Under the court's reasoning, it appears that no EIS would satisfy the court. An EIS dispelling the uncertainty and controversy of the effects of whaling on the local whale population and allaying fears of cumulative environmental effects, regardless of its thoroughness or the conclusiveness of its results, would not suffice because of the dangers of future technological innovations or hypothetical population crises.

The experience of Alaska Native whaling is particularly illustrative in situations involving the effects of subsistence whaling. Alaska Native (Iñupiat and Yup'ik) whaling crews hunt with equipment that has remained largely unchanged since the beginning of the twentieth century.<sup>146</sup> After over a century with little such progress, the likelihood of "evolving technology" in the area of subsistence whaling seems remote. Similarly, a perceived population crisis caused the IWC to declare a one-year moratorium

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<sup>143</sup> *Id.* at 492–93.

<sup>144</sup> *Id.* at 494.

<sup>145</sup> *Id.* at 499–500.

<sup>146</sup> See BILL HESS, GIFT OF THE WHALE: THE IÑUPIAT BOWHEAD HUNT, A SACRED TRADITION 2 (1999). One notable advancement, however, came about for the benefit of whales: the introduction of penthrite grenades for quicker, more humane kills. See INT'L WHALING COMM'N, CHAIRMAN'S REPORT OF THE FIFTY-FIRST ANNUAL MEETING, § 9.1.1.2 (1999), available at [http://luna.pos.to/whale/iwc\\_chair99\\_9.html](http://luna.pos.to/whale/iwc_chair99_9.html). As a further illustration of the technology used in subsistence whaling, community members in Barrow, Alaska frequently towed bowhead whales ashore using a human-powered block and tackle system before safety concerns led to the exclusive use of tractors for this purpose beginning in the early 1990's.

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on subsistence hunting of the bowhead whale in Alaska in 1978.<sup>147</sup> Despite the bowhead's listing on the endangered species list and its protection by the IWC, the United States successfully pursued the reversal of the moratorium in order to honor its trust obligations to Alaska Native Groups.<sup>148</sup> Even in the absence of treaties with Alaska Native groups, the United States has acted to preserve the whaling aspect of Alaska Native culture. The United States has a similar responsibility to the Makah, bolstered by the rights reserved in the Treaty of Neah Bay.<sup>149</sup>

*2. Fair Share of Whale Stocks*

In interpreting Makah fishing rights under the Treaty of Neah Bay, the Supreme Court held that the Tribe as well as nontreaty fishermen have a right to a "fair share" of the fish supply.<sup>150</sup> The Ninth Circuit did not perceive an analogous solution to the Tribe's whaling rights under the treaty, because of the protected status of California gray whales under the MMPA.<sup>151</sup> The court reasoned that any such fair share could only be allocated under the permit and waiver processes of the MMPA.<sup>152</sup>

The Ninth Circuit recognized that the Tribe may have been entitled to a "fair share" of whale stocks, but the court failed to take into account the fact that commercial whalers had taken far more than their fair share in the nineteenth and early twentieth centuries,<sup>153</sup> and that the government's treatment of the Tribe for most of its history prevented the Tribe from exercising its cultural practice of whaling,<sup>154</sup> making it difficult to take a fair share even if the possibility had existed. After the government finally made good on its promises to the Makah, and the Tribe at last had the opportunity to partake in a cultural activity that it had long been

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<sup>147</sup> HESS, *supra* note 146, at 8.

<sup>148</sup> Miller, *supra* note 8, at 226–28.

<sup>149</sup> *Id.* at 228–30.

<sup>150</sup> *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 684–85 (1979).

<sup>151</sup> *Anderson v. Evans*, 371 F.3d 475, 500 (9th Cir. 2004).

<sup>152</sup> *Id.* at 501.

<sup>153</sup> See Henderson, *supra* note 89, at 164–74, 181 (describing the damage done by non-native hunting of gray whales in the nineteenth century).

<sup>154</sup> See ELIZABETH COLSON, *THE MAKAH INDIANS: A STUDY OF AN INDIAN TRIBE IN MODERN AMERICAN SOCIETY* 12–24 (1953) (describing efforts by the United States to assimilate the Makah into mainstream American culture).

denied, the Ninth Circuit seems to have punished the Makah for the past sins of the government and the whaling industry.<sup>155</sup>

## V CONCLUSION

The Tribe had one successful whale hunt since its efforts to resume whaling, landing a gray whale in 1999.<sup>156</sup> Litigation has prevented any further whaling, and while the Ninth Circuit did not rule out the possibility of the Tribe whaling under the auspices of the MMPA permit and waiver process,<sup>157</sup> it appears that another in a long series of hurdles has been placed in front of Makah efforts to assert their traditional culture.

The Ninth Circuit did not consider the canons of construction for Indian treaties outlined above, nor the deference given to such treaties under the rulings of the Supreme Court, nor the importance of preserving long-standing rights of the Makah Tribe. While the Ninth Circuit addressed the effects of conservation statutes in its *Anderson* opinion,<sup>158</sup> the absence of the Supreme Court's canons of construction prevented an adequate examination of the circumstances under which the government and Tribe negotiated and signed the Treaty of Neah Bay.

In its analysis of the MMPA, the Ninth Circuit was quick to decide that applying the MMPA to Makah whaling rights was not discriminatory, disposing of the argument quickly with two sentences of text among its six pages of MMPA analysis.<sup>159</sup> As noted above, however, it is not difficult to imagine the denial of whaling rights as discriminatory against the Makah, even though other American citizens are similarly forbidden to go whaling. The court did not take into account the higher value placed on whaling in Makah culture compared to American culture at large. As one Alaskan Iñupiat remarked during an earlier controversy over subsistence whaling rights, “[w]hat would you think if we came down to your country and told you you could only kill five cows, or five chickens?”<sup>160</sup> The right to go whaling could hardly have the same meaning for the average American as it

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<sup>155</sup> See *Anderson*, 371 F.3d at 483–86 (chronicling the assistance given by NOAA and NMFS to the Makah in their efforts to resume whaling).

<sup>156</sup> *Id.* at 485.

<sup>157</sup> *Id.* at 501.

<sup>158</sup> See *supra* Part IV.

<sup>159</sup> *Anderson*, 371 F.3d at 498.

<sup>160</sup> HESS, *supra* note 146, at 15.

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would for a member of the Makah Tribe, for whom whaling is a central part of their culture.

In addition to finding the application of the MMPA to be non-discriminatory, the Ninth Circuit held, after a more lengthy discussion, that its application to the Makah was necessary to achieve the MMPA's conservation goals. The court did not rule out a circumstance under which the Makah could go whaling again under the MMPA, but the court's decision seemed to make such an opportunity nearly impossible by requiring an EIS<sup>161</sup> and raising concerns over the potential future damage to whale populations and the lack of limits placed upon the Makah's hunting methods.<sup>162</sup> These latter concerns seem speculative and hypothetical, rather than the kind of imminent problem that would require an immediate cessation of whale hunting. The Ninth Circuit seems to have chosen to err on the side of killing no whales while not giving the Makah a chance to reclaim an important part of their heritage.<sup>163</sup>

In sum, after a window of opportunity opened briefly to allow the Makah to resume whaling after seventy years, the Ninth Circuit appears to have shut it indefinitely.<sup>164</sup> The Makah may, in theory, be allowed to go whaling as long as the court's extremely rigid standards are met; but compliance would leave the Tribe at the mercy of IWC politics, uncertain scientific data on whale populations, and an overzealous reading of the MMPA.

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<sup>161</sup> *Anderson*, 371 F.3d at 494.

<sup>162</sup> *Id.* at 499-500.

<sup>163</sup> The Makah are not unanimously in favor of the resumption of whaling, however, with some Tribe members seeing "no subsistence need for the whale or genuine revival of tradition in the hunt." Hal Bernton and Lynda V. Mapes, *Court Voids Approval of Makah Whale Hunt*, SEATTLE TIMES, June 10, 2001, at B1, available at <http://www.seattletimes.com> (type "Court Voids Approval of Makah Whale Hunt" into the search box and follow article link).

<sup>164</sup> The Makah have applied for a waiver to the MMPA, a process expected to take two years or more, and both Tribal and federal officials anticipate further controversy and litigation. James May, *Makah Seek Waiver on Whaling*, INDIAN COUNTRY TODAY, February 23, 2005, at B1, available at <http://www.indiancountry.com/content.cfm?id=1096410394>.

