The Struggle to Exercise a Treaty Right: An Analysis of the Makah Tribe's Path to Whale

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INTRODUCTION

The Makah Nation secured its right to hunt gray whales over 150 years ago when the Tribe signed the Treaty of Neah Bay with the U.S. government.[1] Hunting gray whales (*Eschrichtius robustus*) was so imperative to the Tribe's cultural, religious and subsistence needs, the members were willing to give up their land in the Northwest corner of Washington State to secure their ability to whale.[2] Out of over 400 treaties the United States made with tribes, the Makah is the only tribe to have a treaty that specifically stipulates a right to whale.[3]

For seventy years after signing the Treaty of Neah Bay (Treaty), the Makah exercised their treaty right to hunt whales in the Pacific Ocean. In 1915, the Tribe made a critical decision to voluntarily cease whaling in order to revive the decimated gray whale population that had been hunted to near-extinction by the commercial whale industry.[4] While the Makah waited for the population to recover, whaling and environmental regulations changed dramatically. The international community created the International Whaling Commission (IWC)[5] to regulate whaling and the United States passed several domestic environmental laws, including the Whaling Convention Act (WCA), the Marine Mammal Protection Act (MMPA), the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA).[6] In 1970, the National Oceanic and Atmospheric Administration (NOAA), the agency responsible for marine mammals, listed the gray whale on the Endangered Species List (ESL).[7]

In 1994, NOAA removed the gray whale from the ESL and the Makah decided to once again exercise their treaty right to whale the species.[8] During the whaling hiatus, the Makah replaced the whale meat as the center of their diet, but the Tribe could not replace the whale as the center of their culture. With the gray whale population thriving again, the Tribe was eager to reinstate

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[1] Treaty of Neah Bay, Jan. 31, 1985, 12 Stat. 939.

[2] "The right of taking fish and of whaling . . . is further secured . . . ." *Id.* at art. 4.

[3] Anderson v. Evans, 314 F.3d 1006, 1012 (9th Cir. 2002). [Anderson I].

[4] William Bradford, *"Save the Whales" v. "Save the Makah": Finding Negotiated Solutions to Ethnodevelopment Disputes in the New International Economic Order,* 13 ST. THOMAS L. REV. 155, 173 (2000).

[5] International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

[6] Whaling Convention Act (WCA), 16 U.S.C.A. §§ 916-916l (2006); Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361-1423 (2006); Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (2006); National Environmental Protection Act (NEPA), 42 U.S.C. §§ 4321-4370(a) (2000).

[7] List of Endangered Foreign Fish and Wildlife, 35 Fed. Reg. 18,319 (Dec. 2, 1970).

[8] The gray whale exists in two subpopulations in the Pacific Ocean. The Eastern North Pacific gray whale population lives along the west coast of North America and it was de-listed. The other subpopulation, the Western North Pacific gray whale, is still endangered. For the purposes of this paper, the term "gray whale" will refer to the Eastern North Pacific subpopulation. The Final Rule to Remove the Eastern North Pacific population of Gray Whale from List of Endangered Wildlife, 59 Fed. Reg. 31,094 (June 16, 1994).

important cultural traditions and religious ceremonies that revolve around whaling. Through the support of NOAA and the IWC, the Makah hunted their first whale in seventy years in 1999.[9]

Unfortunately, the 1999 hunt may have been the Tribe's last. Animal rights activists sued NOAA twice over Makah whaling, alleging the Agency did not meet its responsibilities under NEPA, MMPA, and WCA.[10] In *Anderson v. Evans*, the Ninth Circuit held NOAA violated NEPA and the MMPA.[11] This decision effectively abrogated the Makah treaty right to whale by holding the Makah must get a MMPA waiver to exercise the right.[12] Despite losing in *Anderson*, the Makah did not appeal the decision to the U.S. Supreme Court. Instead, the Tribe followed the Ninth Circuit's direction and submitted a MMPA waiver application to NOAA in 2005.[13]

The Tribe has been waiting for the last three and a half years for NOAA's determination of the MMPA waiver application. In 2007, five Makah felt they had waited long enough and illegally hunted a whale. This fall, the United States criminally convicted the men, in *U.S. v. Gonzales*, and the decision is currently on appeal.[14] The decision will go before the Ninth Circuit in early 2009 and a civil suit over NOAA's application decision, regardless of the finding, will likely occur in 2009 as well.

At the heart of this conflict are the actors who are all trying to do what they think is right. The animal rights activists want to participate in the administrative system to ensure marine mammal protection, the Makah Tribe wants to exercise its treaty right to continue focal cultural and religious traditions, and NOAA wants to fulfill its administrative duty, including its fiduciary duty under the Neah Bay Treaty. Unfortunately, the combination of good intentions created a momentum that is no longer controllable by any one party and left the Makah with an indefinitely suspended treaty right.

The Tribe now faces a complex legal road, juggling the administrative action, the criminal case, and an imminent civil suit. The Tribe must act carefully in

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[9] *See* Metcalf v. Daley, 214 F.3d 1135, 1139 (9th Cir. 2000); Also MAKAH TRIBE, THE MAKAH INDIAN TRIBE & WHALING: QUESTIONS & ANSWERS 3 (2005), http://www.makah.com/makahwhalingqa.pdf.

[10] Animal rights activists sued NOAA first in Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000) and again in Anderson v. Evans, 314 F.3d 1006 (9th Cir. 2002). The plaintiffs in the suits included local, national, and international animal rights organizations, Washington State representative Jack Metcalf, and a whale watching company.

[11] *Anderson I*, 314 F.3d at 1030.

[12] *Id.* "[F]ederal defendants did not satisfy NEPA... [T]he Tribe must undergo the MMPA permitting process." *Id.* at 1009,1030.

[13] MAKAH TRIBAL COUNCIL, APPLICATION FOR A WAIVER OF THE MMPA TAKE MORATORIUM TO EXERCISE GRAY WHALE HUNTING RIGHTS SECURED IN THE TREATY OF NEAH BAY, submitted to NOAA (Feb. 11, 2005) [hereinafter WAIVER APPLICATION].

[14] [Order Affirming Judgments and Sentences at 1, United States v. Gonzales, No. 3:07-CR-05656 (W.D.Wash. 2008). ; Notice of Appeal at 1, United States v. Gonzales, No. 3:07-CR-05656 (W.D. Wash. 2008).

managing its actions and arguments so as not to foreclose any way to exercise its treaty right. The Makah have three main avenues of action: 1) follow the administrative agency MMPA waiver process defined by *Anderson v. Evans*; 2) re-assert issues from *Anderson* in criminal court; or 3) re-visit *Anderson*'s challenges after NOAA's waiver determination in a civil suit. Each path involves a different strategy and risk. However, all paths lead to the Ninth Circuit and ultimately the Supreme Court, the only place where this issue could finally be put the rest.

I. MAKAH WHALING HISTORY

The Makah Nation has lived on the Northwest corner of Washington State for over 1,500 years.[15] Cornered by the Pacific Ocean and the Strait of Juan de Fuca, the Tribe built a life around the bounty of the sea. Historically, the Makah were highly skilled mariners, proficient in fishing, sealing, and whaling.[16] They identified especially with whales and depended on whales for "providing a primary means of subsistence as well as essential social and cultural functions."[17] When Europeans came to the area, the Makah depended on their whaling skills to trade for goods or profit.

Whale hunting is the "symbolic heart of Makah culture."[18] The Tribe maintains that whaling is a more than 1,500-year tradition that is imperative to their religion and culture. "Whaling and whales have remained central to Makah culture. They are in our songs, our dances, our designs, and our basketry. Our social structure is based on traditional whaling families. The conduct of the whale hunt requires rituals and ceremonies which are deeply spiritual."[19] Further, the purpose and discipline that whaling gives the Tribe is irreplaceable. "The importance of whaling to the Makah culture, religion, economy, and way of life cannot be overstated."[20]

A. The Treaty of Neah Bay

In 1855, the Makah Nation and the United States signed the Treaty of Neah Bay.[21] The treaty negotiation took place in Chinook and English[22] to ensure

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[15] Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 170 (2000).

[16] *See* Ann M. Renker, *The Makah Tribe: People of the Sea and the Forest*, in University of Washington Libraries Digital Collections, *available at* http://content.lib.washington.edu/aipnw/renker.html.

[17] WAIVER APPLICATION, *supra* note 13, at 5.

[18] WAIVER APPLICATION, *supra* note 13, at 8.

[19] MAKAH TRIBE, THE MAKAH INDIAN TRIBE & WHALING: QUESTIONS & ANSWERS 5 (2005), http://www.makah.com/makahwhalingqa.pdf.

[20] Miller, *supra* note 15, at 176.

[21] Treaty of Neah Bay, *supra* note 1.

[22] Chinook was the language used on the West Coast by non-Indians and Indians to

certain tribal traditions like whaling were specifically defined. The Treaty states, "The right of taking fish and of whaling . . . is further secured."[23] The Makah were willing to make great sacrifices to protect their way of life. Ultimately, the Tribe ceded 91% of their land (300,000 acres) to the U.S. in order to retain their whaling rights.[24] This is the only treaty that the U.S. signed with a Native American tribe that specifically retains the right to whale.[25]

B. A Brief History of Whaling

Around the world, whaling is an ancient tradition dating back to prehistoric times.[26] The Makah maintain their people have whaled since the beginning of their time, at least 2,000 years ago.[27] When Europeans established trading along the West Coast of North America, the Makah Tribe used whale meat and bones as tradable commodities. When Europeans started whaling off the Pacific coast in the 18th century, the Makah competed in business with them as well.

European and American whaling ventures in the Pacific Ocean expanded rapidly in the 19th and 20th centuries, as the "transcontinental railways allowed for quicker access to the large markets of Europe and the eastern U.S.."[28] Whaling boomed until the early 20th century, when two factors brought the industry to a near stand-still. First, the market for whale products weakened as metals and petroleum replaced baleen and whale oil. Second, and more important, whaling methods had become so proficient and aggressive that processing ships "increased the slaughter to such a degree that world-wide attention began to focus on the possibility of hunting several species of whales to extinction."[29]

In the 1920s, international consensus found the gray whale was near extinction. In recognition of the consensus and out of respect for the species, the Makah Tribe voluntarily ceased whaling. "The fact that the tribe responsibly made this self-imposed decision about an issue as significant as whaling further

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communicate. It was the official treaty language, but not a language traditionally spoken by any one tribe. The Makah spoke the Makah Language, or Qwiqwidicciat. *See* Makah.com, Makah Language, http://www.makah.com/language.htm (last visited Feb. 26, 2009).

[23] Treaty of Neah Bay, *supra* note 1, at art. 4.

[24] MAKAH CULTURE & RESEARCH CENTER, OUR CULTURE: OUR HISTORY (2005), http://www.makah.com/history.html; *See generally* Russell D'Costa, *Reparations as a Basis for the Makah's Right to Whale*, 12 ANIMAL L. 71 (2005).

[25] *Anderson I*, 314 F.3d at 1012.

[26] University of Alaska Fairbanks, *Prehistoric Cultures Were Hunting Whales at Least 3,000 Years Ago*, SCIENCEDAILY, Apr. 8, 2008, http://www.sciencedaily.com/releases/2008/04/080404160335.htm.

[27] Makah.com, Makah Whaling Tradition, http://www.makah.com/whalingtradition.html (last visited Feb. 26, 2009).

[28] Murray Lundberg, *Thar She Blows! Whaling in Alaska and the Yukon*, EXPLORENORTH (2008), http://explorenorth.com/library/yafeatures/bl-whaling.htm.

[29] *Id.*

exemplifies the Makah's sincere desire to preserve the animals."[30] The international community soon followed suit.

In 1937, the international whaling community convened to manage whaling. In 1946, forty-two nations signed an agreement to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."[31] These nations created the International Convention for the Regulation of Whaling (ICRW) and established the International Whaling Commission (IWC) as the sole governing body.[32] The ICRW organizes whaling practice into commercial, scientific, & aboriginal subsistence.[33]

The IWC adopted a moratorium on commercial whaling in 1986, forty years after its inception.[34] The moratorium allows the opportunity to petition for an exception to the moratorium for scientific and aboriginal subsistence whaling.[35] The IWC meets annually to review and consider whaling requests.[36] The Commission is comprised of one voting representative commissioner from each member nation.[37] The annual meeting includes the Commissioners as well as others, such as non-party representatives, experts, advisors, and intergovernmental organizations.[38]

The petitioning country submits its request at the annual IWC meeting for the member nations to vote on the proposal. If the IWC approves the whaling activity, a whaling quota is issued specifying the type and amount of whales for a certain period of time. Currently the IWC allows Alaskan Natives to hunt bowhead whales (51 bowhead whales/year) and Makah to hunt gray whales (20 gray whales/year) in 2008-2012.

C. The Gray Whale (Eschrictus robustus)

The gray whale is a baleen whale, or filter feeder. The whale spends most of its time moving slowly through shallow coastal waters feeding on plankton. This slow movement made the species attractive to hunters. Adult whales average 45 feet in length, 35 tons, and can live for up to forty years. The species reaches maturity in five to eleven years and females bear a single calf about every two years. NOAA currently estimates the population at a healthy 30,000

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[30] Russell D'Costa, *Reparations as a Basis for the Makah's Right to Whale*, 12 ANIMAL L. 71, 79 (2005).

[31] ICRW, *supra* note 5.

[32] *Id.*

[33] IWC, *Conservation & Management*, http://www.iwcoffice.org/commission/iwcmain.htm#conservation (last visited Feb. 26, 2009).

[34] ICRW, *The Schedule*, § III.13.b.2.i (2007), http://www.iwcoffice.org/documents/schedule.pdf.

[35] *Id.* § III.13.a.

[36] *Id.* § III.b.1.i.

[37] ICRW, *supra* note 5, § III.1

[38] *Id.* § III.

individuals.[39]

The Makah hunt the Eastern North Pacific gray whale population. The gray whale originally lived in both the Atlantic and Pacific Ocean and existed in three separate sub-populations: North Atlantic, Western North Pacific, and Eastern North Pacific.[40] The North Atlantic population is now extinct due to commercial whaling and the Western North Pacific population is critically endangered. NOAA listed the Eastern North Pacific stock as endangered in 1970, but de-listed it in 1994 when the population fully recovered.[41] The Eastern North Pacific population migrates along the West coast of North America, from Alaska to Mexico every year (hereinafter "gray whales").

Some gray whales forage in the Straits of Juan de Fuca between Washington State and Canada instead of traveling further north to Alaska. This population is called the "Pacific Coast Feeding Aggregation" (PCFA).[42] Although some animal rights activists argue this is a separate population, research indicates no genetic difference between these whales and the rest of the stock.[43] NOAA and the IWC treat this group as the same stock, but recognize the existence of the PCFA. The Makah's whaling plan requires the Tribe to take measures to avoid hunting those whales.[44]

D. Laws Passed During Voluntary Makah Whaling Hiatus

Over the seventy years the Makah voluntarily restrained from whaling to enable the gray whale population to recover from commercial whaling, the United States and international whaling community passed several rules to protect ocean species. In 1946, the international whaling community, including the United States, created the International Whaling Convention Act (IWCA) and the International Whaling Commission (IWC).[45] To recognize the IWCA domestically, the United States passed the Whaling Convention Act in 1949 (WCA).[46] Two decades later, the United States passed a series of environmental

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[39] NOAA Fisheries Office of Protected Resources, *Gray Whale* , Population Trends, *http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/graywhale.htm#status* (last visited Mar. 1, 2009).

[40] NatureServe Explorer, *Eschrichtius robustus* (Gray Whale), http://www.natureserve.org/explorer/servlet/NatureServe?searchName=Eschrichtius+robustus (last visited Mar. 1, 2009).

[41] List of Endangered Foreign Fish and Wildlife, 35 Fed. Reg. 18,319 (Dec. 2, 1970); Final Rule to Remove the Eastern North Pacific population of Gray Whale from List of Endangered Wildlife, 59 Fed. Reg. 31,094 (June 16, 1994).

[42] CALAMBOKIDIS ET AL., GRAY WHALE PHOTOGRAPHIC IDENTIFICATION FROM 1998-2003: COLLABORATIVE RESEARCH IN THE PACIFIC NORTHWEST (2004), *available at* http:// http://www.cascadiaresearch.org/reports/rep-ER-98-03rev.pdf.

[43] Steeves, et al., *Preliminary Analysis of Mitochondrial DNA Variation in a Southern Feeding Group of Eastern North Pacific Gray Whales*, 2 Conservation Genetics 379, 379-384 (2001).

[44] WAIVER APPLICATION, *supra* note 13, at 25-7.

[45] ICRW, *supra* note 5.

[46] Whaling Convention Act (WCA), 16 U.S.C.A. §§ 916-916l (2006).

legislation, including the National Environmental Policy Act in 1969, the Marine Mammal Protection Act in 1972, and the Endangered Species Act in 1973.[47] Congress intended for these laws to help protect the environment, but not necessarily at the expense of Indian treaty rights.[48]

The National Environmental Policy Act of 1969 (NEPA) established a United States national policy to "encourage productive and enjoyable harmony between man and his environment."[49] NEPA is a procedural act that requires all federal government agencies to assess the environmental effects of proposed federal agency actions by preparing an Environmental Assessment (EA) or Environmental Impact Statement (EIS).[50] An agency usually starts the process with an EA. If the analysis results in a Finding of No Significant Impact, the agency duties are complete. If it does not, then the agency must proceed to the more in-depth EIS.[51]

The Marine Mammal Protection Act was enacted in 1972 (MMPA).[52] The MMPA protects all marine mammals in U.S. waters, regardless of population status.[53] The MMPA charges NOAA with ensuring stocks do not "fall below their optimum sustainable population level."[54] The Act also creates the Marine Mammal Commission, an independent agency that provides oversight of marine mammal conservation policies carried out by NOAA.[55] If an entity wishes to take whales, the entity must apply for a waiver to the no-take prohibition. The application is assessed by NOAA and the Commission.[56]

Neither the original MMPA language nor legislative history mentioned Indian treaty rights.[57] The 1994 amendments created an allowance for Alaska Native subsistence, but did not do so for tribes.[58] However, legislative history shows Congress never mentioned the Makah, making it almost certain Congress was not aware of the Neah Bay Treaty right to whale.[59] The 1994 amendment does

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[47] Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361-1423 (2006).

[48] *See, e.g., Hearings on H.R. 1450 Before the Subcomm. on Fisheries and Wildlife Conservation of the H. Comm. on Merchant Marine and Fisheries*, 87th Cong., 1 (1962); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 587 (1997); Andrus v. Allard, 444 U.S. 51, 56 (1979). Part B.2 discusses how the Dion abrogation standard was used by the court U.S. v. Dion, 476 U.S. 734 (1986).

[49] National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2000).

[50] 40 C.F.R. §§ 1500-08 (2008).

[51] For a more detailed description of NEPA analysis, *see* COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, CITIZEN'S GUIDE TO THE NEPA (2007), *available at* http://ceq.hss.doe.gov/nepa/Citizens_Guide_Dec07.pdf.

[52] MMPA, *supra* note 47.

[53] MMPA, 16 U.S.C. § 1371(a), (2006).

[54] MMPA, 16 U.S.C. §§ 1361-1423 (2006).

[55] MMPA, *supra* note 46, at 1402.

[56] 16 U.S.C. § 1371(a)(3)(A) (2006).

[57] United States v. Billie, 667 F.Supp 1485, 1489-90 (S.D. Fla. 1995).

[58] 16 U.S.C. § 1361(b) (2006). It also did not specifically exclude other tribes.

[59] *Billie*, 667 F.Supp at 1489-90. It appears neither the Makah nor a national tribal council discussed treaty rights with Congress and it is unclear why they did not.

state, "nothing in this Act . . . alters or is intended to alter any treaty between the U.S. and . . . Indian Tribes."[60] Congress expressed intent that the above statement was to "reaffirm that the MMPA does not in any way diminish or abrogate protected Indian treaty fishing or hunting rights."[61]

The Endangered Species Act of 1973 (ESA) was enacted as a successor of the U.S. Endangered Species Conservation Act of 1970 (ESCA).[62] The gray whale was listed as endangered under the ESCA in 1970 and recognition carried over to the ESA. In 1994, NOAA de-listed the gray whales after determining the population "recovered to near its estimated original population size and is neither in danger of extinction throughout all or a significant portion of its range, nor likely to again become endangered within the foreseeable future throughout all or a significant portion of its range."[63]

The IWCA, WCA, NEPA, MMPA, and ESA all relate to regulation of gray whales in some way. Therefore, they also relate to the Makah's efforts to exercise its treaty right to hunt gray whales. Only one regulation, the IWCA, actually provides a clear remedy for the Makah's desire to exercise their treaty right. The rest are ambiguous to their relationship to Makah whaling and may not actually apply at all. In the Makah Tribe's quest to exercise its treaty right to whale, it must decide whether to push the court to resolve the ambiguities or not. Currently, "the generic laws meant to help the whales – notably NEPA, ESA, and MMPA- are recruited to work against the treaty."[64]

II. THE MAKAH NATION GOES WHALING

A. The First Hunt in Seventy Years

NOAA de-listed the gray whale in 1994.[65] In response, the Makah Nation decided it was proper to reinstate ceremonial gray whale hunting. Aware of the new international whaling laws, the Makah took steps to comply with the IWCA. First, the Tribe promulgated its own whaling regulations and whaling plan.[66] Then the Tribe took steps to engage in the IWCA process and receive IWC approval to whale.

In 1995, the Tribe "formally notified the U.S. government of their interest in resuming treaty right ceremonial and subsistence harvest of gray whales," and asked NOAA to represent it in seeking approval from the IWC for an annual

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[60] MMPA Amendments of 1994, Pub. L. No. 103-238, § 14, 108 Stat. 532, 558-59 *amended by* 16 U.S.C. § 1361 (2000).

[61] S. Rep. No. 103-220, at 17 (1994), reprinted in 1994 U.S.C.C.A.N. 514, 534.

[62] Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544 (2006).

[63] Final Rule to Remove the Eastern North Pacific Population of the Gray Whale From the List of Endangered Wildlife, 59 Fed. Reg. 31,094 (June 16, 1994).

[64] WILLIAM H. RODGERS, ENVIRONMENTAL LAW IN INDIAN COUNTRY 106 (West 2005).

[65] Final Rule to Remove Gray Whale From ESA, 59 Fed. Reg. 31,094, 31,094 (June 14, 1994).

[66] WAIVER APPLICATION, *supra* note 13, at 10.

quota. [67] NOAA spent a year and a half conducting the environmental review required under NEPA to assess the proposed whaling action. In October of 1997, NOAA entered into an agreement with the Makah to request quotas from the IWC. The agreement included restrictions on time and area. NOAA also released its NEPA-required environmental review of the action, which included a final Environmental Assessment (EA) and Finding of No Significant Impact.

In response to the United States' request (on behalf of the Makah), the IWC granted the Makah a quota of 20 gray whales from 1998-2002. The following spring, NOAA issued regulations stating the WCA recognized the quota for 1999.[68] Animal rights activists promptly sued NOAA in *Metcalf v. Daley* for "granting the Makah authorization to resume whaling," but the U.S. District Court granted summary judgment for the Agency and the Makah proceeded to exercise its treaty right to whale.[69]

In 1999, the Makah Nation whaled for the first time in nearly eighty years. The Tribe successfully landed a gray whale, and did so by following protocol established by the Tribe and NOAA to ensure the most humane and traditional hunt possible. The Makah were finally able to perform traditional ceremonial events that "provide the Makah with a social framework that contribute to governmental, social, and spiritual stability."[70] Tribal member Micah McCarty summed up Makah sentiment: "Imperialism and colonialism have wreaked havoc on our culture and it has had devastating effects on our well-being for generations. Whaling . . . began to heal the old wounds of transgenerational trauma. It inspired our people to remember who they are and where they come from."[71]

B. The Makah Try to Exercise the Right to Hunt Again

1. Metcalf v. Daley

The plaintiffs in *Metcalf v. Daley* appealed to the Ninth Circuit.[72] In the appeal, the plaintiffs included various animal rights organizations such as Australians for Animals, Beach Marine Protection, and The Fund for Animals; individuals including Washington State Representative Jack Metcalf; and a

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[67] NOAA, CHRONOLOGY OF MAJOR EVENTS RELATED TO MAKAH TRIBAL WHALE HUNT, 2008, *available at* http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/upload/Makah-chronology.pdf [hereinafter NOAA CHRONOLOGY].

[68] Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701 (Apr.6, 1998).

[69] Metcalf v. Daley, No. CV-98-05289-FDB (W.D. Wash. Sept. 21, 1998) (see II.B.1 for more detailed analysis of this suit).

[70] WAIVER APPLICATION, *supra* note 13, at 6.

[71] Paul Shukovsky, *Makah 'treaty warriors': Heroes or criminals?*, SEATTLE POST-INTELLIGENCER, Mar. 16, 2008, http://www.seattlepi.com/local/355205_makah17.html.

[72] Metcalf v. Daley [Metcalf II], 214 F.3d 1135,1137.

whale watching company ("animal rights activists").[73] Plaintiffs were concerned with the government taking the appropriate legal steps to prevent inhumane whaling.[74] After years of established international and national protection that successfully bolstered whale populations, activists worried NOAA's actions would reverse these efforts and marine animal rights in general.[75] To prevent this from happening, the activists felt they had to sue NOAA.

In U.S. District Court, plaintiffs alleged NOAA violated NEPA, the APA, and the WCA, but the court only reviewed the NEPA claim.[76] On appeal, plaintiffs argued that, "in granting the Makah authorization to resume whaling," NOAA violated NEPA "by (1) preparing an Environmental Assessment that was both untimely and inadequate, and (2) declining to prepare an Environmental Impact Statement."[77] The crux of this argument rested in the fact that NOAA issued the EA four days after it entered into an agreement with the Makah to pursue a quota for the Tribe at the IWC annual meeting.[78]

The Ninth Circuit reviewed the district court's decision to deny a motion for summary judgment de novo and reviewed NOAA's decision concerning NEPA under the arbitrary and capricious standard.[79] The Ninth Circuit reversed and remanded the lower court's decision[80] and held that "by making such a firm commitment before preparing an EA, [NOAA] failed to take a 'hard look' at the environmental consequences of their actions, and therefore, violated NEPA."[81] The court was particularly concerned with a lack of significant research into possible harm to the Pacific Coast Feeding Aggregate (PCFA).

The court ordered NOAA's "finding of no significant impact for Makah Tribe's resumption of whaling set aside because environmental assessment not conducted until after federal government irretrievably committed to support tribe's position."[82] The court reasoned that, "although the doctrine of laches cannot defeat Indian rights recognized in a treaty, the Makah's seventy year hiatus in connection with whaling suggest that a modest delay occasioned by the need to respect NEPA's commands will cause no harm."[83]

Metcalf did not address NOAA's fiduciary obligations to advance the tribal cause before the IWC. Well-known Indian Law scholar William Rodgers

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[73] *Id.*

[74] Paul Shukovsky, *Makah Whale Hunt Bitterly Opposed: Hundreds of Groups Trying to Stop it*, SEATTLE POST-INTELLIGENCER, Aug. 13, 1998, at A1.

[75] *Id.*

[76] Metcalf I, *supra* note 69.

[77] *Metcalf II*, 214 F.3d at 1137.

[78] *See* NOAA CHRONOLOGY, *supra* note 67, for a timeline of events.

[79] *Metcalf II*, 214 F.3d at 1141.

[80] *Id.* at 1137.

[81] *Id.* at 1145.

[82] FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 816 (Lexis 2005).

[83] *Metcalf II*, 214 F.3d at 1146.

postulates that *Metcalf* "takes a tribal advantage (trust duty) and turns it against the tribe by detecting a subtle pro-whaling bias in [NOAA] that requires the agency to try again."[84] Whether the court would have made this decision if it knew the Makah would still be trying to legally exercise its treaty right nearly a decade later is unknown.

After a positive lower court decision and the first hunt in eighty years, the verdict was a significant set-back to the Makah and their treaty right.[85] In response to the decision, NOAA rescinded their 1997 agreement with the Makah to pursue quotas from the IWC while it performed another EA to assess the how the hunt would affect the gray whales.[86] The Makah chose to wait out NOAA's environmental review instead of appeal the decision.

A year later, in 2001, NOAA released the *Metcalf*-required EA. In the EA, NOAA determined that "the issuance of a quota of five gray whales taken or seven strikes . . . will have no significant impact on the eastern North Pacific gray whale population."[87] The preferred alternative also specifically limited hunting the PCFA. A year later, the IWC set another 20 whales/year catch limit for the Makah from 2003-2007.[88] The Makah started taking the steps to resume hunting. However, before the Makah could hunt again, more animal rights activists sued NOAA in *Anderson v. Evans*.[89]

2. *Anderson v. Evans*

The procedural history of *Anderson* is similar to *Metcalf*, but with significantly worse consequences for the Makah. In *Anderson*, plaintiffs sued NOAA again for violating NEPA with the *Metcalf*-required EA. The activists also alleged a new argument: NOAA violated the MMPA by not requiring the Tribe to comply.[90] The U.S. District Court granted summary judgment for NOAA but on appeal the Ninth Circuit reversed and issued a historic order.[91]

Additional plaintiffs joined the second suit, including private citizen Will Anderson and animal rights organizations Humane Society, Cetacean Society International, West Coast Anti-Whaling Society, and Peninsula Citizens for the Protection of Whales. The animal rights activists were concerned that NOAA's failure to "adequately study the ways in which the Makah whale hunt could set a

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[84] RODGERS, *supra* note 64, at 105.

[85] Indianz.com, Court Rules on Whaling, http://www.indianz.com/News/archive.asp?ID=lead/6122000&day=6/12/00 (last visited Mar. 4, 2009).

[86] NOAA CHRONOLOGY, *supra* note 67, at 2.

[87] U.S. DEPT. OF COMMERCE ET AL., ENVIRONMENTAL ASSESSMENT ON ISSUING A QUOTA TO THE MAKAH INDIAN TRIBE FOR A SUBSISTENCE HUNT ON GRAY WHALES FOR THE YEARS 2001 AND 2002 40 (2001).

[88] NOAA CHRONOLOGY, *supra* note 67, at 3.

[89] Anderson v. Evans [Anderson I], 314 F.3d 1006 (9th Cir. 2002).

[90] *Anderson I*, 314 F.3d at 1019.

[91] *Id.* at 1015, 1030.

dangerous precedent and adversely affect the environment."[92] Again, the activists were driven by the sense that this was the right thing to do to protect gray whales. The activists did not sue the Makah, but the Tribe intervened as defendant-interveners since the activists aimed to participate in the environmental assessment of the whale hunt.

In *Anderson v. Evans*, the Ninth Circuit held that NOAA violated NEPA and the MMPA in approving a whaling quota and plan.[93] NOAA should have prepared an EIS, instead of an EA, under NEPA and the Makah must comply with the MMPA to whale.[94] The decision focused on the animal rights activists' main concern: to ensure that NOAA considered the "significant impact on the environment."[95]

The court determined the *Metcalf*-required EA did not meet NEPA requirements. Instead, NOAA had to complete an EIS due to the "substantial uncertainty and controversy over the local impact of the Makah Tribe's whaling and its possible precedential effect."[96] The court specifically focused on possible impacts to the gray whale feeding group PCFA and the possibility of enabling other tribes to hunt."[97] The court reasoned an EIS would require NOAA to acknowledge and weigh significant negative impacts with positive objectives, as well as provide a longer period for public comment and additional scientific studies of the PCFA.[98]

In determining the MMPA applies to the treaty right, the court considered and rejected the defendant's two reasons why the Act did not apply. First, NOAA and the Makah argued that the MMPA does not apply because international treaty expressly provided the Tribe's whaling quota. Section 1372(a)(2) of the MMPA provides an exemption to the MMPA's blanket moratorium on whaling when takes are "expressly provided for by an international treaty, convention, or agreement to which the U.S. is a party."[99] However, the court found that this argument was precluded by three important factors: the timing of the International Whaling Committee agreement, the specificity of the IWC quota, and the uncertainty of who must recognize the Tribe's "subsistence and cultural needs" for the IWC quota to be valid.[100] The court was particularly concerned

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[92] Press Release, The Humane Society, Court Won't Reconsider Makah Whaling Ban (Dec. 1 2003), http://www.hsus.org/press_and_publications/press_releases/court_won146t_reconsider_makah_whaling_ban.html.

[93] *Anderson I*, 314 F:3d at 1030.

[94] *Id.*

[95] *Id.* at 1023.

[96] *Id.* at 1022.

[97] *Id.* at 1023. The court was concerned with other treaty language "reserving 'traditional hunting and fishing' . . .might be urged to cover hunt for marine mammals." *Id.*

[98] *Id.*

[99] 16 U.S.C. § 1372(a)(2) (2006).

[100] *See Anderson I*, 314 F.3d at 1023-6 for a more detailed analysis. As described in Part I.B, the IWC allows taking marine mammals for subsistence and cultural needs.

with the IWC requirement of "continuing traditional dependence," since the Tribe stopped whaling for seventy years.[101]

The court also rejected the argument that the treaty right is not affected by the MMPA. The court found the Makah must apply for a MMPA waiver to whale because the "Tribe has no unrestricted treaty right to pursue whaling in the face of the MMPA."[102] To make this determination, the court used the three-part test created in the 1980 case of *U.S. v. Fryberg*.[103] *Fryberg* extended the Supreme Court's recognition that states can regulate treaty rights for purposes of conservation to include federal statutes[104] and added a test to determine "when reasonable conservation statutes affect Indian treaty rights" to the consideration ("The *Fryberg* Test").[105]

The *Fryberg* Test maintains that a conservation statute may regulate any pre-existing treaty right if (1) the U.S. has jurisdiction where the activity occurs; (2) the statute 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.[106] The court developed the *Fryberg* test in its determination that the Puyallup Tribe treaty right to hunt the endangered bald eagle was limited by the Eagle Protection Act.[107]

Applying *Fryberg*, the court in *Anderson* "consider[ed] whether the MMPA must apply to the Tribe to effectuate the conservation purpose of the statute."[108] It held "the MMPA is applicable to regulate any whaling proposed by the Tribe because the MMPA [waiver] application is necessary to effectuate the conservation purpose of the statute."[109] The court found the major objective of the MMPA, to ensure that marine mammals continue to be 'significant functioning elements in the ecosystem,' required subjecting the Tribe to MMPA review. The court reasoned that, otherwise, "there is no assurance that the takes 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."[110]

Through the *Fryberg* test, the Ninth Circuit also determined that the Makah do not have an "unrestricted treaty right" and the MMPA waiver application "is consistent with the language of the Neah Bay Treaty."[111] The court based this finding on their 1975 holding in *U.S. v. Washington*, which found that, when a

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101 *Id.* at 1025.

102 *Id.* at 1029.

103 United States v. Fryberg, 622 F.2d 1010 (9th Cir. 1980).

104 *See Puyallup*, 391 U.S. at 398.

105 *Anderson I*, 314 F.3d at 1026.

106 *Fryberg*, 622 F.2d at 1015.

107 *Id.*

108 *Anderson I*, 314 F.3d at 1026.

109 *Id.* at 1029.

110 *Id.* at 1027.

111 *Id.* at 1029.

treaty right is conferred "in common with other citizens," the right is limited.[112] The court found the phrase meant the Makah are prevented from "relying on the treaty right to deprive other citizens a fair apportionment of a resource."[113] *U.S. v. Washington* said this phrase "creates a relationship between Indians and non-Indians similar to cotenancy, in which neither party may 'permit the subject matter of [the treaty] to be destroyed'."[114]

Anderson affected the Makah in two important ways. First, the decision cost the Makah several more years of delay by requiring NOAA to perform a third environmental review. Second, and more important, *Anderson* was the first time a court found the MMPA applied to a tribe's treaty rights.

Anderson required the Makah to apply for a waiver under the MMPA, which effectively abrogated the Tribe's treaty right to whale. However, the court was clear to address that, "because of our conclusion that the MMPA applies in light of conservation purpose of the statute and literal language of the treaty, we need not consider plaintiff's alternative argument that the MMPA applies by virtue of treaty abrogation."[115] Thus, *Anderson* does not technically abrogate the Makah treaty right to whale, but does so virtually by making the Makah's path to exercise the right inordinately difficult and out of the Tribe's control.

Many entities have expressed their dissatisfaction with *Anderson v. Evans*, including the Tribe, the U.S. Government, and conservation activists, based on the court's legal and factual analysis.[116] The decision has also been heavily criticized in papers and treatises.[117] The crux of most complaints stems from the belief that the court gave little consideration to important facts, like support the Tribe received from NOAA and the IWC, NOAA's fiduciary responsibilities to the Tribe, and ignoring applicable Supreme Court precedent set in cases like *U.S. v. Dion* and *Puyallup*.[118] *Dion* required Congress' intention to abrogate Indian treaty rights be clear and plain. *Puyallup* affirmed the "conservation necessity standard," that "States may issue and enforce those regulations of

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[112] United States v. Washington, 520 F.2d 676, 685 (9th Cir. 1975).

[113] *Anderson I*, 314 F.3d at 1028.

[114] *Washington*, 520 F.2d at 685.

[115] *Anderson I*, 314 F.3d at 1030.

[116] The U.S. Government and Makah tribe expressed their dissatisfaction with the holding in their briefs for the criminal case, Makah Tribe's Amicus Brief,United States v. Gonzales, No. 3:07-CR-05656 (W.D.Wash. Oct. 15, 2008) and Government's Brief in Response to Appellants' Appeal of Magistrate Judge Decision,United States v. Gonzales, No. 3:07-CR-05656 (W.D.Wash. Oct. 15, 2008). .

[117] *See* D'Costa, *supra* note 30, at 82; Zachary Tomlinson, *Abrogation or Regulation? How Anderson v. Anderson discards the Makah's Treaty Whaling Right in the Name of Conservation Necessity*, 78 WASH. L. REV. 1101 (2003); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW IN INDIAN COUNTRY 104 (West 2005); FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1160 (LexisNexis 2005).

[118] U.S. v. Dion, 476 U.S. 734 (1986) (holding that in order to determine that an Act abrogates a treaty right, there must be "clear and plain" evidence of Congressional intent); *Puyallup*, 391 U.S. at 398.

Indians' off-reservation usufructuary activities that are necessary in the interest of conservation."[119]

The Ninth Circuit subsequently denied two *en banc* rehearing motions and instead issued two amended opinions.[120] Although those opinions clarified some legal reasoning, the decision remains highly criticized for its analysis and practical results. The decision does not actually satisfy any party involved. As a result of *Anderson*, NOAA is in the midst of spending over ten years of Agency resources to review the same action for a third time. While NOAA works to fulfill its fiduciary duty, the Makah Tribe waits indefinitely to exercise its treaty right to whale and the animal rights activists wait to find out if the *Anderson* decision ultimately favors them.

3. The Makah Submit an MMPA Waiver Application

After two rejected *en banc* rehearing requests, the Tribe had to decide whether to appeal *Anderson* to the U.S. Supreme Court or follow the Ninth Circuit's direction. The Makah chose to forgo appeal and follow *Anderson*. The possibility of the Supreme Court affirming the decision and creating groundbreaking precedent against treaty rights for all tribes was too big of a risk.[121] Furthermore, following *Anderson* would not enjoin the Tribe from making the same legal arguments from *Anderson* in future suits. Therefore, the *Anderson* decision actually enabled the Tribe to explore more ways to exercise its treaty right.

The MMPA waiver process requires NOAA and the Marine Mammal Commission to work together and agree on a decision. NOAA may waive the MMPA moratorium whaling for a specific entity if [the Agency] determines that "on the basis of the best scientific information available . . . and having due regard for the distribution, abundance, breeding habits and times and lines of migratory movements" of the whale, a waiver is "compatible" with the MMPA.[122] If NOAA concludes the taking will not reduce the species below the Optimal Sustainable Population level, then NOAA must promulgate regulations to ensure the takings the waiver authorizes "will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies" of the MMPA.[123] After promulgating the regulations, NOAA then

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[119] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 222 (1999).

[120] Anderson v. Evans [Anderson II], 350 F.3d 815 (9th Cir. 2003) and Anderson v. Evans [Anderson III], 371 F.3d 475 (9th Cir. 2004).

[121] *See generally*, M. Fletcher, *The Supreme Court's Shrinking Indian Law Caseload*, INDIAN COUNTRY TODAY (Feb. 9, 2007), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1011&context=matthew_fletcher; *See also* similar arguments made for the recent case, Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008).

[122] 16 U.S.C. § 1371(a) (2006).

[123] 16 U.S.C. § 1373(a) (2006).

issues the permits.[124]

The MMPA requires added procedural complexity in promulgating the regulations for a waiver. Instead of standard agency "notice and comment" informal rulemaking, the MMPA requires hybrid rulemaking. This hybrid rulemaking includes procedures applicable to an adversarial administrative hearing, like including the right to cross-examine.[125] Further, the scope of the hearing actually covers the issuance of the waiver itself.[126] This effectively gives adversaries two bites at the apple to sue over the administrative decision.

Once NOAA promulgates the regulations, the Agency then also issues a permit.[127] The permit must be consistent with the regulations and NOAA must give the public thirty days to comment or request a hearing.[128] The permit applicant has the burden of demonstrating the proposed taking is consistent with the regulations and polices of MMPA.[129] NOAA's decision to grant a permit is subject to judicial review at the behest of the applicant or any opposing party.[130] Not surprisingly, the waiver process has rarely been used since Congress has established a very long list of lawful takings.[131]

In 2005, the Makah filed an application for a waiver of the MMPA's take moratorium.[132] The Makah is one of the few entities ever to apply for a waiver, and is the first tribe to do so. The forty-six page application explicitly explains the Tribe's request, the Tribe's need, the applicable law, gray whale population status, and impacts to the population.[133] NOAA issued a regulation recognizing the waiver and a Notice of Intent to prepare an EIS in response to the application.[134] Over three years after the Makah submitted the application, NOAA released a draft EIS in May 2008.[135] The Agency is currently in the

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[124] 16 U.S.C. § 1373(b) (2006).

[125] M. BEAN & M. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 119-121 (Praeger Publishers 1997).

[126] *Id.* at 120.

[127] 16 U.S.C. § 1374(d)(2) (2007).

[128] *Id.*

[129] *Id.*

[130] 16 U.S.C. § 1374(d)(4) (2006); *See* NOAA, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR PROPOSED AUTHORIZATION OF THE MAKAH WHALE HUNT 17 (2008), *available at* www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/upload/Makah-DEIS-Front.pdf [hereinafter DRAFT EIS].

[131] BEAN & ROWLAND, *supra* note 125, at 121.

[132] NOAA Marine Fisheries Service, Makah Request for MMPA Waiver, http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/Makah-Waiver-Request.cfm (last visited Mar. 7, 2009)..

[133] *See generally* WAIVER APPLICATION, *supra* note 13.

[134] 70 Fed. Reg. 49,911 (Aug. 25, 2005).

[135] Notice of Public Meetings for the Draft EIS on the Makah Tribe's Request to Hunt Eastern North Pacific Gray Whales, 73 Fed. Reg. 26375 (May 9, 2008); NOAA, DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR PROPOSED AUTHORIZATION OF THE MAKAH WHALE HUNT 14 (2008), *available at* www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/upload/Makah-DEIS-Front.pdf [hereinafter DRAFT EIS].

process of finalizing the document.

4. A Resolution By the Congressional Committee on Natural Resources

The Congressional Committee on Natural Resources is charged with ensuring "the responsible use and development of our natural landscape" and "the justice and vitality for Native Americans."[136] In November 2005, the Committee introduced a concurrent House-Senate resolution expressing Congress's support of Makah whaling.[137] The resolution, in direct response to *Anderson*, stated "Congress disapproves of requiring the Makah Tribe to obtain a waiver and permit under the MMPA and expresses its intent that the Government of the U.S. should uphold the treaty rights of the Makah Tribe."[138] Further, "the procedures . . . for obtaining a waiver are burdensome, costly, and contrary to the letter and spirit of the Tribe's treaty rights."[139]

While the Committee voted for the resolution 21-6, it "did not schedule it for consideration on the floor because the Makah decided not to ask for it."[140] The Committee did so based on opponents signaling a willingness to work out a compromise during reauthorization of the MMPA.[141] Thus, the resolution is technically not dispositive of Congress' intent or binding in any way.

Despite the lack of floor consideration, such Congressional action in response to a court holding is exceptional. The Committee "has general oversight responsibilities to determine whether laws and programs addressing subjects within its jurisdiction are being implemented in accordance with the intent of Congress and to determine whether they should be continued, curtailed or eliminated."[142] The clear language of the resolution evinces the Committee's view that the Ninth Circuit disregarded an express congressional treaty and the intent of the MMPA.[143] However, what weight, if any, a court would give to the resolution is uncertain.

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[136] CONGRESSIONAL COMMITTEE ON NATURAL RESOURCES, OFFICE OF INDIAN AFFAIRS, http://resourcescommittee.house.gov/index.php?option=com_frontpage&Itemid=63 (last visited Mar. 11, 2009).

[137] M. Daly, *House panel boosts Makah whaling effort*, SUSTAINABLE E-NEWS (Oct. 20, 2005).

[138] H.R. Con. Res. 267, 109th Cong. (2005).

[139] *Id.*

[140] Email from Chris Burroughs, Republican Staff, U.S. House of Representatives, Committee on Natural Resources to author (Oct. 27, 2008, 11:48 PST) (on file with author).

[141] *Id.*

[142] Oversight Plan for the Committee on Natural Resources U.S. House of Representatives, 110th Congress, *available at* http://resourcescommittee.house.gov/index.php?option=com_frontpage&Itemid=51; follow "Oversight Plan" hyperlink.

[143] This resolution was by Representative Richard Pombo, who, soon after this resolution, faced criminal allegations for corrupt dealings with tribes. This could have mired the resolution, as well. It is important to note that the Makah Tribe was never part of any allegation.

5. Five Makah Whale in Protest

In 2007, two and a half years after the Makah submitted the MMPA waiver application, NOAA had not yet issued an EIS, much less made a determination. Out of frustration over the lengthy process and virtual abrogation of the Tribe's treaty right, five members of the Makah Nation whaled in protest. The group caught a gray whale, but the Coast Guard arrested them before the hunt was complete. The unauthorized hunt astounded the public, the U.S. government, and the Makah Nation.

The illegal action put the Makah Tribe in an awkward position because the hunt required a response. The Tribe had to be careful not to jeopardize the administrative process it committed to but it also could not deny its empathy due to the frustration. The Tribal Council issued a formal statement denouncing the illegal action and distinguishing the law-abiding Tribe from the individual members.[144] The Council also announced the initiation of tribal criminal proceedings against the hunters. However, a Makah leader expressed he was "troubled because the surprise hunt lacked the intense discipline and spiritual preparation that mark tribally sanctioned whaling."[145] The Tribe is still in the process of conviction.

In April 2008, a U.S. District Court bench trial convicted all five men of conspiracy and unlawful taking of a marine mammal in violation of the MMPA in *U.S. v. Gonzales*. [146] The magistrate sentenced the men to three to five months of jail, one year supervised release, and 200 hours of community service. Although within the judge's discretion, the sentence upset tribal rights advocates in part because it was harsher than what the prosecution requested.

Two men, Johnson and Noel, appealed the decision.[147] The defendants-appellants put forth four arguments: 1) the criminal charges against them should be dismissed because the MMPA does not apply to Makah members; 2) the MMPA violates equal protection when applied to the Makah; 3) the sentences are unreasonable; and 4) taking a gray whale is a protected exercise of their religion under the Religious Freedom Restoration Act (RFRA).[148] The District Court upheld the ruling and sentence in October 2008. The defendants then appealed the decision to the Ninth Circuit and currently await argument.[149]

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[144] *Statement by the Makah Tribal Council*, THE SEATTLE TIMES, Sept. 9, 2007, *available at* http://seattletimes.nwsource.com/html/localnews/2003876780_webtribalstatement09.html.

[145] Shukovsky, *supra* note 71.

[146] Notice of Appeal at 1, United States. v. Gonzales, No. 07-5656, (D. Wash. Oct. 15, 2008).

[147] Because the magistrate judge made the sentencing determination, the defendants had to appeal to the District Court before they could appeal to the Ninth Circuit Court of Appeals.

[148] Order Affirming Judgments and Sentences at 3, United States v. Gonzales, No. 07-5656 (D. Wash. Oct. 15, 2008).

[149] Notice of Appeal at 1, United States v. Gonzales, No. 07-5656 (D. Wash. Oct. 15, 2008).

6. NOAA's Duty Under *Anderson*: The Draft EIS

During the middle of the criminal case, NOAA released a Draft EIS (DEIS) of the Makah Tribe's MMPA waiver application.[150] The thorough, thousand-plus page document lists six alternative actions.[151] Public comment was due August 18, 2008, and a final EIS is pending.

The Marine Mammal Commission publicly responded in support of NOAA's efforts.[152] The Commission determined the DEIS "meets the requirements of NEPA" and "believes the DEIS does a good job of analyzing the environmental consequences of the various issues that participants and decision-makers will need to consider . . . to authorize the proposed hunt."[153] NOAA is now starting the administrative process to consult with the Marine Mammal Commission and reach a determination.

Although the Tribe waits patiently, the conflict between the animal rights activists and the Tribe and NOAA is unlikely to be resolved when the determination is reached. Regardless of how NOAA finds, the decision is likely go to court. In the third round of civil suit, the arguments and stakes will escalate and the court will likely have to address the legal issue of abrogation.

III. WHAT HAPPENS NEXT: THE DIFFERENT BRANCHES TO EXERCISING THE TREATY RIGHT TO WHALE

The Makah's efforts to exercise their right to whale have led the Tribe down a legal road mired with an incredible mix of international, domestic, civil, criminal, and administrative law. For the last ten years, the Tribe made many difficult legal decisions based on calculated guesses for how best and most successfully to exercise its treaty right. The Tribe currently waits patiently for NOAA to review the waiver application, for the Ninth Circuit to review the criminal case against two of its members, and for animal rights activists to make another move in their quest to protect the gray whale, should either of the former actions be favorable to the Tribe.

There are three routes the Makah have to exercise its treaty right: civil, criminal, and administrative. Each path requires different legal arguments and has unique risk factors, but in the end, all paths lead to the Supreme Court's door. Whether the Tribe or NOAA or the animal rights activists will take it that far is yet to be determined, but Supreme Court review may be the only way to resolve the conflict.

The Ninth Circuit court left several issues unaddressed. Unfortunately, the conflict will likely continue until these issues are resolved. The Tribe does not

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[150] NOAA CHRONOLOGY, *supra* note 67.

[151] DRAFT EIS, *supra* note 135, at 112.

[152] Letter from Marine Mammal Commission to NOAA (Aug. 14, 2008), *available at* http://www.mmc.gov/letters/pdf/2008/Makah_DEIS_81408.pdf.

[153] *Id.*

want these questions addressed before the waiver process is complete, but *Gonzales* may force answers. If the issues are not resolved through that process, they will likely be addressed in a subsequent civil suit. These questions include:

1. Does the MMPA abrogate the treaty right?
   a. Is it Congress's clear and plain intent to require the Tribe to be subject to the MMPA, per *Dion*?
   b. Is the waiver required to uphold MMPA conservation objectives, per *Fryberg*?
2. Does the WCA abrogate the Makah treaty right and consequently moot the MMPA's applicability to Makah whaling?

Each possible path deals with the questions in a different way. Following the administrative path avoids the questions for the time being but does not preclude the Tribe from other options or from eventually addressing the questions in a later proceeding.

A. The Administrative Path: The Plan For Now

When the Makah decided to exercise its treaty right in 1997, the Tribe effectively chose the administrative path. The Makah recognized the international power of the IWC and asked NOAA to represent the Tribe on its behalf for a quota grant. When the Makah asked for NOAA's support, the Tribe was not asking for NOAA's permission. The Tribe was requesting the U.S. Government, through NOAA, to act upon its treaty duties and enable the Makah to exercise its right to whale.

In *Anderson*, the Ninth Circuit determined the Makah did, in fact, have to ask NOAA for permission to whale. However, NOAA's decision is not necessarily conclusive. If NOAA grants the waiver, animal rights activists will likely sue NOAA for a third time. Their allegations will consist of three arguments: 1) the EIS violates NEPA; 2) the waiver is invalid because the MMPA abrogates the treaty right; and/or 3) the waiver is invalid because the WCA abrogates the treaty right.

Despite the likelihood of raising these arguments in court again, pursuing the administrative path is the best option for the Makah because it puts the Tribe in the most powerful position possible. If NOAA grants the waiver, the Tribe will have the administrative action and court decision backing their action, as well as demonstration of their cooperative behavior and probable deference of judicial review. Further, the court will not have to address the abrogation issue, like in *Metcalf* and *Anderson*, because only the administrative action will be at issue.[154] Aware of these considerations, the Makah have taken every step along the administrative path carefully and thoroughly to ensure a proper process.

According to the MMPA waiver regulations, NOAA must grant the waiver

[154] Based on the theory of judicial restraint.

unless it finds the waiver inconsistent with MMPA conservation policies.[155] The Makah are relying on the healthy gray whale population and the insignificant percentage of the population the Tribe desires to hunt to support acceptance. The Tribe's forty-six page application painstakingly describes all scientific knowledge of the whale population and describes the great lengths the Tribe will take to avoid hunting the PCFA.[156] The application is very reasonable and thoroughly addresses all of the court's concerns. There is little room within the process for NOAA to deny the application.

If NOAA denies the application, the Makah will have to sue NOAA to exercise their treaty right. The Tribe will be in a worse situation than if it had gone straight to the Supreme Court because it will have lost over four years and NOAA will no longer support the action (as it did in *Anderson*). Judicial deference to administrative action will, in this case, work against the Makah's interest. The Tribe can argue that NOAA violated its fiduciary duty under the Treaty and the MMPA, but the Tribe will also have to argue the one argument the Makah want to avoid: that its treaty right has been illegally abrogated by the MMPA. The elements of this argument are detailed below in III.C.

B. The Criminal Court Path: Injudicious or Ingenious?

The criminal court may be the least advantageous arena in which to argue this conflict for every party. The animal rights activists and NOAA are excluded from the process and the Tribe is at a significant disadvantage. For the Makah, this path is the worst way to exercise its treaty right.

This path is the only option that does not enable participation of the instigators of the conflict, the animal rights activists. The organizations would not have standing. This path completely frustrates their original intent, to participate in NOAA's action of assessing the environmental impacts of the Makah treaty right. NOAA, the government agency responsible for fulfilling the government's fiduciary duty in the Neah Bay Treaty, also does not have a role in this path.

The Makah Tribe is involved in a criminal action against a member regarding a treaty right, because the Tribe holds its treaty right. Any determination made in a criminal case about a treaty right may affect the entire Tribe. However, the criminal case path eliminates the opportunity, like in a civil case, for the court to consider the treaty right solely in terms of NOAA's administrative action. Further, a criminal action against individual members garners little sympathy for an entire Tribe and is mostly out of the Tribe's control. The only advantage to this path is that it could bring the abrogation issue into court and resolve the conflict more quickly than the administrative path.

Makah Tribe was effectively forced to enter the criminal court path when five

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[155] DRAFT EIS, *supra* note 135, at 14.

[156] *See generally* WAIVER APPLICATION, *supra* note 13.

of its members decided to perform an unsanctioned hunt. After being free of legal action for two years, the illegal actors pushed the Makah Tribe back into the courthouse for *Gonzales*. Some speculated that, because of the length of time NOAA was taking to respond to the waiver application, this was the Tribe's way to revisit the issue. However, the Makah proved that was not their intention.[157]

The Makah Tribe was not a party in *Gonzales*, but the court allowed the Tribe to file an amicus brief. The Tribe acted out of deep concern for the abrogation argument put forth by plaintiff U.S. government. The defendants argued their treaty right was abrogated by the MMPA in *Anderson v. Evans*.[158] The U.S. government responded that the treaty right was abrogated by the WCA before Congress promulgated the MMPA, which eliminates the MMPA abrogation argument.[159] The Tribe wanted to establish its view on this issue in case it became relevant on appeal.

The Makah specifically did not appeal *Anderson* to the Supreme Court in order to avoid resolution of the abrogation argument. The last thing the Tribe wants now is for the issue to be decided before the waiver application determination, in a criminal setting, with full focus on the defendant's illegal activities. The determination would be based on the individual actions of tribal members but would apply to the entire tribe. The rouge hunters actually made the treaty right less certain as a result of their protest.

In order to avoid the abrogation issue, the Tribe had to take a humiliating and hypocritical stance in an amicus brief. The Tribe argued that "the defendant's appeal should be rejected solely on the basis of *Anderson*, and the court need not reach the Government's additional argument regarding the effect of the WCA on the treaty whaling right."[160] The Tribe based this argument on two reasons:. First, that "*Anderson* is controlling circuit precedent and is alone dispositive of [the MMPA issue]."[161] Second, "if the court addresses the abrogation issue, it should hold that the WCA and ICRW do not abrogate the Tribe's treaty whaling rights."[162]

Like the *Anderson* court, the *Gonzales* court decided not to address the abrogation issue. It found it did not have to consider this argument "in light of the clear and unambiguous statements made by the Ninth Circuit [in *Anderson*] that the Makah tribe and its members must comply with the MMPA permit process."[163] However, the government raised the argument again in every brief

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[157] SEATTLE TIMES, *supra* note 144.

[158] Brief of Defendant at 12, United States v. Gonzales, No. 07-5656 (D. Wash. Oct. 15, 2008).

[159] Brief of Plaintiff at 3, United States v. Gonzales, No. 07-5656 (D. Wash. Oct. 15, 2008).

[160] Brief for the Makah Tribe at 2, as Amici Curiae Supporting Plaintiffs, United States v. Gonzales, No. 07-5656 (D. Wash. Oct. 15, 2008).

[161] Brief for Makah Tribe, *supra* note 160, at 5.

[162] Brief for Makah Tribe, *supra* note 160, at 11.

[163] Order Affirming Judgments and Sentences at 4, United States v. Gonzales, No. 07-5656 (D.

filed thus far. The government will continue to do so as long as either a) defendants argue that they did not break the law because their treaty right is illegally abrogated by the MMPA or b) until the courts or Congress say otherwise. The only way to avoid the abrogation argument is to keep the criminal court decision based on *Anderson v. Evans* and convince the court not to consider the issue further.

A Ninth Circuit determination that the MMPA or WCA abrogates the treaty right would be detrimental to the Makah. Such a decision would void the waiver application and require the Makah to defend its treaty right in the Supreme Court under a criminal case out of their control. The discussion below sets up possible arguments and analysis that could be under consideration should the Ninth Circuit hold in this way.

C. The 9th Circuit Court of Appeals and Supreme Court Review: All Roads Lead Here

Animal rights activists successfully sued NOAA twice in civil court over the Agency's NEPA responsibilities.[164] Both cases concluded in the Ninth Circuit, but with holdings of different significance. *Metcalf* required NOAA to re-do the NEPA-required Environmental Assessment of the whaling action.[165] *Anderson* held the *Metcalf*-required EA was not sufficient to satisfy NEPA and the Agency needed to perform an EIS instead. *Anderson* also added that the Makah treaty right to whale was contingent on a waiver of the MMPA.[166]

The Makah chose not to appeal either decision to the U.S. Supreme Court. The Tribe did so mostly out of fear of the risks associated with an affirmance of the Ninth Circuit. Risks included a Supreme Court decision extending a holding to other tribal treaty rights or altering treaty doctrines, like the *Dion* "clear and plain intent" standard.[167]

Metcalf and *Anderson* are no longer appealable to the US Supreme Court.[168] However, the MMPA and WCA abrogation issues are still relevant. The Ninth Circuit will have the opportunity to address them either in *Gonzales* or in the third round of civil litigation after NOAA makes its waiver application determination. The abrogation issue will continue to be raised - by the animal rights activists, the Tribe, or the government, depending on the court case - until the federal court rules on it.

The pending *Gonzales* case and likely post-waiver determination case gives the Ninth Circuit a unique chance to reconsider its reasoning in *Anderson*. The

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Wash. Oct. 15, 2008).

[164] *Metcalf II*, 214 F.3d at 1135; *Anderson III*, 371 F.3d at 475.

[165] *Metcalf II*, 214 F.3d at 1146.

[166] *Anderson I*, 314 F.3d at 1030.

[167] *Dion*, 476 U.S. at 738-745.

[168] 28 U.S.C. § 2101(c) (2006) (Jud.Code § 243) (requiring that petitions for writs of certiorari be filed within 90 days after entry of judgment).

Ninth Circuit could come to three general holdings: 1) overrule *Anderson* by finding flawed reasoning and/or the Makah treaty right is not subject to the MMPA; 2) overrule *Anderson* by finding that the MMPA conservation goals are not applicable to the treaty right because the WCA abrogates the treaty right; or 3) uphold its determination and refuse to consider abrogation by either the MMPA or WCA. In considering the treaty right to whale, that court will need to consider the legal reasoning in *Anderson* and the abrogation issue itself. There are several main factors to consider in this analysis.

1. Factors the Court Could Re-Consider:

a. Technical Elements of the *Anderson* Decision

The court could consider several factors for revisiting the *Anderson* decision. For example, despite such a critical decision, the Ninth Circuit denied *en banc* rehearing requests twice, from both parties, and instead issued two amended opinions.[169] Further, *Anderson* did not appear to follow the canons of Indian treaty construction.[170] While it is possible that the Supreme Court is moving away from the canons, the Court currently supports respecting treaty obligations and considering sovereignty as a backdrop to a treaty conflict.[171] It appears that the Ninth Circuit breached all of the canons in *Anderson*, especially the canon to "interpret Indian treaties to achieve the intent of the parties."[172]

The court could also consider the Resolution by the Congressional Committee on Natural Resources.[173] The Committee created the Resolution after *Anderson*, therefore the Ninth Circuit has not had an opportunity to address it. Whether the court will do so depends on whether the Tribe raises the Resolution in its brief. Although the Resolution is non-binding, the Court should not overlook it completely. The Resolution directly voices the opinion of the Congressional Natural Resources Committee, which is charged with "ensuring justice and vitality for Native Americans."[174] In light of the resounding criticism regarding the analytical flaws of *Anderson*, the Court may consider these factors in its next opportunity. Congress has acted to legislatively reverse court decisions it disagrees with and the court may determine that was part of the Committee's motivation to draft the Resolution.

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[169] *Anderson II*, 350 F.3d at 815; *Anderson III*, 371 F.3d at 475.

[170] *See Dion*, 476 U.S. at 738 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 222-23 (LexisNexis 1982)).

[171] Tomlinson, *supra* note 117, at 1102; *See also* McClanahan v. Ariz. State Tax Comm'n, 484 P.2d 221 (Ariz. Ct. App. 1971).

[172] Robert J. Miller, *American Indian Treaty Glossary*, 106 OR. HIST. Q. 3 (2008).

[173] H.R. Con. Res. 267, 109th Cong. (2005).

[174] Committee on Natural Resources, About the Committee, http://resourcescommittee.house.gov/index.php?option=com_frontpage&Itemid=63 (last visited Mar. 7, 2009).

b. Conflation of Tests and Limited Consideration of Certain Facts

Many entities have expressed their dissatisfaction with *Anderson* regarding the court's legal and factual analysis.[175] Instead of following the Indian treaty canons of construction, established Supreme Court doctrine, relevant cases, and all of the facts, the Ninth Circuit considered pieces of information, partial arguments and selected language. Indian scholar Rodgers summed up a common sentiment that "a more condescending, detached, self-righteous, and ignorant decision would be hard to find."[176]

Regarding legal analysis, the Ninth Circuit gaffed by conflating two established Supreme Court doctrines.[177] These are the federal treaty abrogation principle established in 1986 in *Dion* and the state conservation necessity principle established in 1968 in *Puyallup*.[178] "The Ninth Circuit conflation of federal treaty abrogation principles with state conservation necessity principles is analytically indefensible and in direct contravention to established U.S. Supreme Court precedent."[179] The influential Cohen's Federal Indian Treatise states simply that the decision "cannot be reconciled with the Supreme Court's decision in *Dion*."[180]

Regarding factual analysis, the Ninth Circuit disregarded the reasons why the Tribe ceased whaling. The court also focused too much on "local" impacts to a specific group of whales and too little on "society as a whole."[181] While the court was greatly concerned with the Pacific Coast Feeding Aggregate (PCFA), a fluid group of whales that are part of the larger general population, but did not consider the copious congressionally sanctioned allowances for taking many gray whales, like by commercial fishing boats and shipping vessels.[182] Rodgers remarked that the courts "sympathy for Makah traditions and respect for their knowledge of whale populations is not detectable."[183] Further, the court effectively ignored the support the Tribe received from NOAA and the quota allowance from the International Whaling Commission. Lastly, the court relied too heavily on distinguishable cases.

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[175] *See* Final Rule, *supra* note 63.

[176] RODGERS, *supra* note 64, at 105.

[177] Tomlinson, *supra* note 117.

[178] *Dion*, 476 U.S. at 734; *Puyallup*, 391 U.S. at 392.

[179] Tomlinson, *supra* note 117.

[180] COHEN, *supra* note 82, at 1160.

[181] D'Costa, *supra* note 30, at 82. CEQ regulations for NEPA require the agency to analyze the context of the action, which includes consideration of both "local" and "society as a whole." 40 C.F.R. §1508.27(a) (year); *Anderson I*, 314 F.3d at 1016.

[182] These entities are given allowances for "taking" gray whales, which typically occur accidentally by ship strikes or net/gear entanglement.

[183] RODGERS, supra note 64, at 105.

c. Dependence on Distinguishable Cases

The Ninth Circuit's reasoning is too focused on less important elements of the conflict. Primarily, the decision relied on precedent set from factually distinct cases. Although there is little precedent on this specific conflict, the cases used to consider the legal issues do not apply well in this situation. Further, the court was under an apprehension of increased responsibility of their consideration. This is because the court believed there was a strong possibility that their decision might enable other tribes to whale. This heightened concern is misplaced and discredits the fact that the Neah Bay Treaty is the only treaty to grant the right to whale.

The Ninth Circuit relied heavily on several distinguishable cases to make its determination. First, instead of applying the *Dion* principle of "clear and plain" Congressional intent, the court relied on it's own 1980 opinion in *Fryberg v. U.S* when considering whether the MMPA applied to the treaty right.[184] *Dion* arguably overruled *Fryberg* and was therefore an inappropriate standard for the court to use.[185] Despite an applicable established principle, *Anderson* did not originally cite *Dion* and only addressed the *Dion* principle in one sentence of the second amended opinion.[186]

Second, no other circuit has followed *Fryberg* and extended the *Puyallup* state conservation principle to include federal law. However, other circuits have distinguished and narrowed *Puyallup* to make clear the case is about state conservation statutes and does not apply when the citizen has different rights to the natural resource than an Indian.[187] *Anderson* is the only federal case to follow *Fryberg.*

In support of the Ninth Circuit's concept that a tribal right can be managed while not stripped at the same time, the court heavily relied on *Washington v. Washington Commuter Passenger Fishing Vessel* and *Puyallup.*[188] However, these cases involved salmon fishing and the particularized nuances of the heavily regulated, contentious, and lucrative commercial salmon fishing industry. The cases are factually distinct from a single tribe wishing to exercise its unique treaty right to hunt a species that is no longer a U.S. commercial commodity or endangered.

In addition, courts have narrowed and distinguished *Washington Commuter* and *Puyallup* to state law and made clear that the regulations were permissible only if the state proved the regulations were the sole way to manage the runs.[189]

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[184] *Fryberg*, 622 F.2d at 1015.

[185] COHEN, *supra* note 82, at 1160.

[186] *Anderson III*, 371 F.3d at 475.

[187] United States v. Michigan, 471 F. Supp. 192, 267 (9th Cir. 1981); United States v. Bresette, 761 F. Supp. 658, 660 (8th Cir. 1991).

[188] Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); *See Anderson I*, 314 F.3d at 1028-9.

[189] *Washington*, 520 F.2d at 676; *See also* United States v. Michigan, 653 F.2d 277, 279 (6th

Dion identified that "Supreme Court cases dealing with treaty rights of Northwest Indians to take fish for commercial purposes are distinguishable" because those cases concern a critical commercially entity that is highly valuable to Indians and non-Indians alike.[190] Whaling, on the other hand, is not a valuable commercial entity to either Indians or non-Indians in the United States, nor do the Makah even want to financially profit off their hunt. The Tribe wants to hunt to bring back imperative cultural traditions. Therefore, the analysis from these cases is improper.

In the Makah's *Gonzales* amicus brief, the Tribe offered more relevant treaty abrogation cases, including *U.S. v. Bresette* and *U.S. v. Billie*.[191] In *Bresette*, the court determined that the Migratory Bird Treaty Act did not abrogate Indian treaty rights because, unlike the Eagle Protection Act considered in *Dion* and *Fryberg*, the Act did not indicate Congress considered Indian treaty rights and chose to abrogate them.[192] In *Billie*, the court found the Endangered Species Act did prohibit Indian treaty rights based on direct actions by Congress when enacting the law. This was primarily because the Act included Indian tribes within its definition of "person," while providing a narrow exception for Alaskan Natives, but also because the legislative history demonstrated Congress considered various exemptions before making its final decision.[193] These cases provide relevant examples of when courts used the *Dion* standard to determine abrogation and analyze federal conservation statutes.

The Ninth Circuit also expressed concern that if the Makah treaty right to whale was not regulated by the MMPA, whaling could become an all-tribe free-for-all.[194] In making this argument, the court completely ignored the unique language in the Neah Bay Treaty that specifically allocated for whaling and the Makah's unique dependence on whaling.[195] Further, the court discredits NOAA's capacity to agree to represent tribes to the IWC, regardless of the MMPA, and the IWC's own determination to grant the quota. This concern acutely devalues the very core of the Makah treaty right, the cultural significance to whaling, and the role of NOAA and the IWC.

By choosing to not appeal *Anderson* to the Supreme Court, the Makah temporarily side-stepped abrogation. The only way for this decision to work in

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Cir. 1981).

[190] *Dion*, 476 U.S. at 1265 (The court identified these cases, in 1986, to include the cases which *Anderson I* later relied on, including *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 665; Puyallup Tribe, Inc. v. Department of Game of Wash., 433 U.S. 165 (1977); Department of Game of Wash. v. Puyallup Tribe, 414 U.S. 44 (1973); and *Puyallup*, 391 U.S. at 392.

[191] Brief of Plaintiff *supra* note 159, at 16-19; *Bresette*, 761 F. Supp. at 663-63 (D. Minn. 1991); *Billie*, 667 F. Supp. at 1485.

[192] *Bresette*, 761 F. Supp. at 663.

[193] *Billie*, 667 F. Supp. at 1485.

[194] *Anderson I*, 314 F.3d at 1027.

[195] D'Costa, *supra* note 30, at 92; COHEN, *supra* note 82, at 1161.

favor of the Makah is if NOAA permits the waiver and the courts refuse to address the abrogation issue. If NOAA does not permit the waiver, then the Makah have merely put off until tomorrow what could have been decided yesterday. *Anderson* explicitly stated the court did not find the MMPA abrogated Makah treaty rights. Because *Anderson* effectively did so anyway, the decision put the Makah in the especially difficult position of having to follow the court's direction while continuing to be vulnerable to abrogation arguments in the future.

2. The Elephant in the Room: The WCA Abrogation Theory

The majority of the Makah's efforts to keep the abrogation issue out of a court opinion are based on avoiding the WCA abrogation theory. Animal rights activists and the government have both postulated that the WCA abrogates the treaty right, nullifying MMPA involvement completely. No court has found it necessary to consider this argument, but it is likely that one will have to in order to resolve this conflict.

Plaintiffs in *Metcalf* first brought the WCA argument to the courthouse, but the court did not consider it because found the allegation of a NEPA violation sufficient to make its determination. In *Anderson*, the plaintiffs did not bring the allegation. The U.S. government revived the WCA abrogation argument in *Gonzales* to defend against the allegation that the MMPA illegally abrogates the Makah treaty right. This provoked the Tribe to intervene in the suit and encourage the court not to address this argument or to explain its reasoning if the court does so.

The Makah argue that the WCA "does not extinguish the Makah Tribe's ceremonial and subsistence whaling rights under the Treaty of Neah Bay."[196] The Tribe references the preamble of the International Convention for the Regulation of Whaling (ICRW) which states its purpose to "provide for the conservation . . . and optimum utilization of whale resources . . . considering the interests of the consumers of whale products."[197] The Tribe reasons that the aboriginal subsistence exemptions in the ICRW and WCA are consistent with the right to whale and if the court applies *Dion* and other relevant abrogation cases, the court will come to this rational conclusion.[198]

A court decision on the issue of abrogation is highly likely, though not certain. Although the Makah will argue that consideration of the issue is not necessary, the animal rights activists and the federal government will continue to raise the issue as long as it remains unsettled. If a court does address abrogation, the Makah will have to convince the court to follow *Dion* and the principles of Indian Law Cannon Construction to find in the Makah's favor. If

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[196] Brief of Plaintiff, *supra* note 159, at 18.

[197] ICRW, *supra* note 5, at preamble.

[198] Brief of Plaintiff, *supra* note 159 at 17-19.

the court does not agree, the Makah's long path to exercise its treaty right to whale may quickly end.

D. Future Considerations

At the heart of this issue is the fact that every party involved is trying to do the right thing. The Makah Tribe is trying to exercise its treaty right to fulfill its cultural and religious needs. The animal rights activists are trying to protect a marine mammal species from hunt that would threaten its existence. NOAA is trying to fulfill its fiduciary duty under the Neah Bay Treaty. The U.S. government is trying to prosecute people who break federal law. The judiciary is trying to resolve the civil and criminal disputes as required by their code of judicial conduct. Yet, the result of all these actors trying to do the right thing is a frustrated mess. The situation entails ten years of litigation, including two civil cases and one criminal case, and administrative consultation, including three NEPA reports and a MMPA waiver application. A treaty right is paralyzed and there is no clear end in sight.

Our government process enables public input by providing forums for citizen grievances, like court rooms and public comment opportunities. The animal rights activists were taking advantage of this system when they filed a civil suit against NOAA in 1997. The organizations wanted to ensure NOAA appropriately considered the environmental impacts of Makah whaling and used the court system to do so. However, it is unlikely that they wanted to steer the issue to the present situation. Instead of balancing their right to participate in government agency action, they lost control of the situation to the courts. If the organization had focused on a bigger picture, not just the Makah, but general tribal treaty rights and NOAA regulation regarding species, then the organizations might have been able to have the positive and more direct involvement they likely wish they had now.

From this situation, it is likely that NOAA has learned a valuable lesson regarding its vulnerability to suit over NEPA requirements. It is arguable that in its hasty efforts to meet IWC meeting deadlines, the Agency pushed consideration through faster than was prudent. Further, NOAA could have been more straightforward with the U.S. public and international community in its agreements with the Makah. By working expeditiously to fulfill its obligation with the Makah to enable the treaty right, NOAA put the treaty right itself at risk.

If NOAA had more thoroughly prepared the original EA, or initially prepared an EIS, then the animal rights activists would not have had an opportunity sue in the first place. In regards to some lingering legal issues, NOAA still has the opportunity to discuss with the IWC their intent of the quota, which may impact a future court decision. Additionally, NOAA could host workshops with activists and Tribal leaders to discuss possible mutually beneficial actions. NOAA ought to reflect and consider this for the current situation and future

treaty right duty engagements.

The Makah Nation decided to celebrate the bounty of a species that sits at the core of its culture and religion by exercising its treaty right to hunt that species. Perhaps if the Makah had reached out to animal rights activists before the hunt or promulgated a more thorough whaling plan, their legal situation would be different today. Their counsel should consider the events leading to the present situation when determining how best to proceed.

For example, the Tribe could reach out with NOAA to the IWC, which may help resolve issues when the Tribe or NOAA is back in court again. The Tribe could also foster political action. It could pressure Congress to act more directly to clarify its intent under the MMPA or encourage the National Tribal Environmental Council to declare publicly that Tribes that do not currently have the explicit right to whale will not seek such a right. Given the concerns of the Ninth Circuit so far, these actions could factor into a court's later consideration. The Tribe's legal counsel is certainly preparing for future litigation, but additional steps that consider the global picture may ultimately save the Makah's treaty right to whale.

CONCLUSION

One hundred and fifty-three years ago, the Makah Nation gave up their right to live on most of their land in order to secure their right to whale. Ninety-eight years ago, the Tribe voluntarily ceased whaling in order to revive the decimated population of gray whales that was commercially hunted to near extinction. Eleven years ago, the Tribe decided to revive their right to whale after the gray whale population revived itself to a population that warranted removal from the Endangered Species List. Ten years ago animal rights activists sued over this decision and, despite support from NOAA, the IWC, and prior Supreme Court precedent, the Ninth Circuit found the treaty right contingent on a MMPA waiver. One year ago, members of the Tribe exercised their treaty right to hunt out of frustration with the effective abrogation and further jeopardized their right. In November, 2008, the Ninth Circuit decided to review the issues of this matter in a criminal case appeal. One day in the future, a federal court will decide whether the Makah can ever whale again, despite the federal government's contracted promise enacted 150 years ago.

It is doubtful that any party involved, from the Makah, to NOAA, to the activists, to the courts, could have predicted the long and complicated path the Makah have been through to this point. This situation, in and of itself, appears to be an effective treaty abrogation because the Makah have not been able to whale legally since 1999. But, by following the Ninth Circuit's direction in *Anderson* and sitting patiently while NOAA makes its waiver application determination, the Tribe is demonstrating its willingness to cooperate with the U.S. government and shaping the terms of the next possible court case.

Despite best intentions, the Tribe and the other actors in this conflict may

want to consider working outside litigation to more directly resolve the differences in their goals. After ten years of action with no final determination, no party has succeeded in doing the right thing. The Tribe has many paths to consider in its efforts to exercise its treaty right to whale and it may have to travel down all of them to find success.

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