COMMENTS

"SAVE THE WHALES" V. "SAVE THE MAKAH": THE MAKAH AND THE STRUGGLE FOR NATIVE WHALING

By
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The Makah tribe is going whaling!

George Bowechop, Makah Whaling Commission[1]

I. Introduction

In the past several decades the Pacific Northwest has been a hotbed for Indian hunting and fishing rights cases. In the 1970's and 1980's, several significant cases were heard over the exercise of fishing rights by the tribes of Washington.[2] Many of these cases were significant in shaping federal Indian law.

Often, these conflicts were the result of treaties with Northwest tribes negotiated in the 1850's by the former Superintendent of Indian Affairs and Territorial Governor of Washington, Isaac Stevens.[3] In addition to other provisions, these treaties gave explicit consideration to the tribes' hunting and fishing subsistence needs using language that provided for the

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[1] Courtenay Thompson, *Makahs Get International OK to Revive Whale Hunts*, Oregonian, Oct. 24, 1997, at A1.

[2] *See, e.g.*, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *aff'd sub nom.* Washington v. Washington State Commercial Passenger Fisheries Ass'n., 443 U.S. 658 (1979) (discussing tribal use of salmon in Western Washington); United States v. Washington, 459 F. Supp. 1020 (W.D. Wash. 1978) (discussing treaty based rights to collect shellfish in non-reservation areas); United States v. Washington, 476 F. Supp. 1101 (W.D. Wash. 1979), *aff'd*, 641 F.2d 1368 (9th Cir. 1981) (discussing whether certain tribes qualify as treaty tribes for fishing purposes); United States v. Washington, 626 F. Supp. 1405 (W.D. Wash. 1985) (approving the 1985 Puget Sound Management Plan).

[3] *See, e.g.*, Treaty with the Nez Perces, June 11, 1855, U.S.-Nez Perces, 12 Stat. 957, 958.

"exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory."[4]

More recently, a new issue has emerged out of the treaty negotiated between Governor Stevens and the Makah Nation of Neah Bay (the Tribe or the Makah) regarding the exercise of the treaty's right to whale.[5] In October of 1997, the Makah was granted a quota by the International Whaling Commission (IWC) which allows the resumption of the Tribe's practice of hunting gray whales.[6] After voluntarily giving up the practice in the 1920's, the Tribe will now be allowed to take up to four gray whales per year.[7]

Part II of this comment explores both the historic developments and the legal issues the Makah have faced in the past, and continue to face, including the historic and cultural background of Makah whaling and the treaty giving the Makah the right to whale. Part III discusses the IWC and the aboriginal whaling exception, as well as the events surrounding the IWC resolution granting the Makah a quota of gray whales. Part IV analyzes several of the legal challenges facing the Makah, such as the Marine Mammal Protection Act and the Whaling Convention Act of 1949, and the arguments they create. Part V discusses the aftermath of the Makah's efforts to whale.

II. The Makah and Whales

Whaling is more than just a method of obtaining food or accumulating wealth to the Makah. Whales have served as a foundation of many aspects of Makah culture. To truly understand the motivation of the Makah in seeking IWC approval for the resumption of whaling, one must understand the importance of whales in Makah culture and the events which initially granted the Makah the right to whale and which now call for a resumption of the practice.

A. The Makah and the Tradition of Whaling

The 2,200-member Makah Nation is located at the northwest end of the Olympic Peninsula in Washington. A rich ocean environment sur-

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[4] *Id.* at art. 3. For more treaty language pertaining to hunting and fishing subsistence needs, *see also id.* ("[t]he . . . right . . . of erecting temporary building for curing, together with the privilege of hunting, gathering roots and berries, and pasturing horses and cattle upon open and unclaimed land"); Treaty with the Makah, Jan. 31, 1855, U.S.-Makah, art. 4, 12 Stat. 939 [hereinafter Makah Treaty] ("[t]he 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").

[5] Makah Treaty, *supra* note 4, art. 4.

[6] Thompson, *supra* note 1, at A1.

[7] *Id.*

rounds the Olympic Peninsula, and has played a major role in the development of Makah culture allowing for a long tradition of whaling dating back at least 1,500 years.[8]

The importance of Makah whaling practices prior to European contact was realized by the uncovering of the village of Ozette. Ozette is a Makah village that was buried in the 1750's by a massive mudslide.[9] This village served as "perhaps the most important sea mammal hunting site for thousands of miles along the West Coast."[10] This importance has been substantiated by the discovery of a variety of artifacts such as harpoons, decorated whale fins, and whaling hunting kits.[11] Large-scale whaling was conducted from this site as demonstrated by the 3,400 whalebones discovered, including "whale bones with embedded harpoon shell blades."[12] The discovery of this village helped to fuel the revived interest in whaling amongst the Makah.[13]

A thriving maritime economy shaped Makah culture, creating a dependence upon the sea for subsistence and cultural needs including fishing for salmon and halibut, and hunting for seals and whales.[14] Whaling and seal hunting practices required considerable knowledge and skill, including the ability to navigate on open ocean and "the ability to interpret the activities of the prey prior to the kill"[15] Traditionally, the Makah hunted whales using only 26-foot canoes and hand-held harpoons.[16] Unlike seal hunting which had no tribal imposed restrictions, whaling developed a set of complex ritualized activities that could only be performed by those with an inherited privilege.[17] Rituals that surrounded the whaling endeavor included periods of fasting, sexual abstinence, and other purification ceremonies.[18] Only when the leader of the whale hunt experienced a vision did the whaling begin.[19] The importance of whaling helped to shape the treaty negotiated between the United States and the Makah and was documented therein.

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8 Ann M. Renker & Erna Gunther, *Makah*, *in* 7 Handbook of North American Indians 422 (William C. Sturtevant ed., 1990); ANN M. RENKER, WHALE HUNTING AND THE MAKAH TRIBE: A NEEDS STATEMENT 6 (1997) (Hereinafter NEEDS STATEMENT).

9 BRIAN M. FAGAN, ANCIENT NORTH AMERICA 204 (1991).

10 *Id.*

11 *Id.*

12 NEEDS STATEMENT, *supra* note 8, at 6.

13 Nicholas Schoon, *Tribe Split over Reviving Custom*, The Independent-London, June 25, 1996, at 5.

14 United States v. Washington, 384 F. Supp. 312, 363 (W.D. Wash. 1974).

15 Renker & Gunther, *supra* note 8, at 423.

16 High North Alliance Home Page (visited May 20, 1998) [hereinafter HNA Homepage 1] <http://www.highnorth.no/th-ma-in.htm> (citing *The Makah Indians: Keeping Their Culture Alive*, THE INTERNATIONAL HARPOON 1995).

17 Renker & Gunther, *supra* note 8, at 423.

18 High North Alliance Home Page (visited May 20, 1998) [hereinafter HNA Homepage 2] <http://www.highnorth.no/a-wh-pe.htm> (citing Paula Bock, *A Whaling People: The Makah Hunt for Tradition and Memories of Whaling*, Seattle Times Magazine, Nov. 26, 1995).

19 *Id.*

B. *The Treaty*

The treaty signed with the Makah is unique in that it is the only treaty between the United States and a tribe which contains an explicit provision for the right to whale. Article Four of the treaty states: "The right of taking fish and *of whaling* or sealing at usual and accustomed ground and stations is further secured to said Indians in common with all citizens of the United States."[20]

When Governor Stevens arrived to negotiate a treaty with the Makah during the 1850's, he found that the Makah were more concerned with their right to hunt and fish and less so with their land (except village sites, burial areas, and other areas of tribal importance.)[21] Klachote, a Makah chief present at the treaty negotiations, demanded that the treaty protect the Makah "right to fish, and take whales and get food when he liked."[22] The final version of the treaty, signed by the parties, expresses this concern.

In addition to the explicit treaty provision, Stevens reassured the Makah that the government would not interfere with their marine hunting and that it was the government's intent to aid the Makah in their whaling practices.[23] Stevens assured the Makah stating:

> I saw the Great Father a short time since and [he] sent me here to see you and give you his mind. The Whites are crowding in upon you and the Great Father wishes to give you your homes. He wants to buy your land and give you a fair price but leaving you enough to live on and raise your potatoes. He knows what whalers you are, how far you go out to sea, to take whales. He will send you barrels in which to put your oil, kettles to try it out, lines and implements to fish with . . . [T]his will be done if we sign it [the treaty]. If it is good I shall send it to the Great Father, and if he likes it he will send it back with his name. When it is agreed to it is a bargain.[24]

During the later part of the 1800's, the United States attempted to turn the Makah away from their traditional practices and direct them to "western values and practices."[25] Whaling amongst the Makah finally ceased when the population of gray whales was largely depleted by commercial whaling and the Bureau of Indian Affairs (BIA) increased pressure on the Makah to turn to farming.[26] Although the Makah ceased the practice of

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[20] Makah Treaty, *supra* note 4, art. 4 (emphasis added). In 1994, the Makah resumed seal hunting without incident. HNA Homepage 1, *supra* note 16.

[21] United States v. Washington, 384 F. Supp. 312, 363 (W.D. Wash. 1974).

[22] Treaty with the Makah, Official Record of Proceedings, Jan. 31, 1855, National Archives Transcribed Copy, 5 [hereinafter Treaty Proceedings Record].

[23] *Washington*, 384 F. Supp. at 363-64.

[24] Treaty Proceedings Record, *supra* note 22, at 5.

[25] NATIONAL MARINE FISHERIES SERVICE, U.S. DEP'T OF COM., FINAL ENVIRONMENTAL ASSESSMENT OF THE MAKAH TRIBE'S HARVEST OF UP TO FIVE GRAY WHALES PER YEAR FOR CULTURAL AND SUBSISTENCE USE (1997) [hereinafter FINAL EA].

[26] Schoon, *supra* note 13, at 5.

whale hunting, the Tribe never forgot their heritage of whaling.[27] The last recorded exercise of the Makah's treaty right to whale occurred in 1926.[28]

C. *Recent Efforts to Resume Whaling*

Even after the Makah ceased their whale hunts and whaling began to be regulated by international and domestic laws, hunting of gray whales by native people continued. During the 1980's, native groups in the Soviet Union took 169 whales per year.[29] Although the whale population had been devastated by years of unregulated commercial hunting, the protections that did exist allowed the whale population to grow at a rate of 2.5 percent per year.[30]

The resumption of the Makah's right to hunt gray whales was not considered until the whales were de-listed from the Endangered Species Act on June 16, 1994.[31] With a population of more than 21,000 (double that of the 1930's), the gray whale became the first marine species to be removed from the Endangered Species List.[32] The current population level indicates that the gray whale has fully recovered from the whaling practices of the 1800's and "is thought to be at or near 'carrying capacity.'"[33]

On September 19, 1995, the Makah voted seventy-six to twenty-eight in favor of resuming gray whale hunting for ceremonial and subsistence purposes beginning after the fall of 1996.[34] On May 5, 1996, the Makah Tribal Council Chair, Hubert Markishtum, wrote to the Secretaries of the Departments of Commerce and State asking them to represent the Makah before the 1996 meeting of the International Whaling Convention (IWC) in a request for approval of a "ceremonial and subsistence harvest" of five gray whales per year.[35]

III. The International Whaling Convention and Native Whaling

The first step that the Makah faced in resuming the exercise of their treaty right was to seek a quota from the IWC. As part of its trust responsibility to tribes, the United States presented the Makah request for a whal-

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27 Final EA, *supra* note 25, at 1.

28 *Makah's Whaling Tradition*, Oregonian, Oct. 16, 1997 at F9.

29 Final EA, *supra* note 25, at 4.

30 *Id.*

31 Final Rule to Remove the Eastern North Pacific Population of the Gray Whale From the List of Endangered Wildlife, 59 Fed. Reg. 31,094 (1994) (to be codified at 50 C.F.R. pts. 17 & 22). The decision to de-list the species was based in part by the request of the Northwest Indian Fisheries Commission. Will Anderson, *Tribal Whaling Poses New Threat* (visited June 9, 1998) <http://www.paws.org/activists/makah.htm>.

32 Frank Clifford, *Gray Whale Removed from Endangered List*, L.A. Times, June 16, 1994, at A1. The gray whale is only the 22nd species to be removed from the Endangered Species List. *Id.*

33 Final EA, *supra* note 25, at 4.

34 Roberta Ulrich, *Makah Tribe Votes to Resume Gray Whale Hunting*, Oregonian, Sept. 21, 1995, at C4.

35 Anderson, *supra* note 31.

ing quota to the IWC.[36] The United States has been an important leader in the development of the IWC and its efforts to ban commercial whaling by nations such as Japan and Norway. For only the second time since the ban on commercial whaling was enacted, the United States sought a whaling quota.[37]

A. The International Whaling Convention

In 1931, the United States signed the Convention for the Regulation of Whaling, which was amended in 1937 by the International Agreement for the Regulation of Whaling.[38] Although a good beginning, this Convention provided only limited protection against the extreme wastes of whaling, such as preventing the killing of calves and nursing mothers. This protection was greatly expanded by the development of the International Convention for the Regulation of Whaling (1946 Convention).[39]

To this day, the 1946 Convention governs the world's whales through the establishment of the International Whaling Commission (IWC). The IWC is composed of one representative from each member nation, each of whom has one vote. To accomplish the goal of regulated whaling, the IWC has power to issue quotas, decree moratoria on the hunting of certain stocks or species of whales, and establish hunting seasons. These actions require approval by three-quarters of the forty member nations and "shall be based on scientific finding."[40] However, a nation may choose to exempt itself from an IWC action by filing an objection within ninety days of its adoption. This allows an easy escape for any nation that finds compliance too difficult.

The United States has played an important role in enforcing the policies of the IWC.[41] To aid in enforcement, the United States has: (1) imposed sanctions against non-complying nations and (2) proposed conservative policies aimed at protecting whale populations.[42] To influence the compliance of the various member nations, the United States has passed laws such as the 1971 Pelly Amendment to the Fishermen's Protec-

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[36] *See generally* United States v. Mitchell, 463 U.S. 206, 226 (1983) (federal government should be liable in damages for breach of fiduciary duty); Cramer v. United States, 261 U.S. 219, 232 (1923) (the United States has standing to assert fishing rights on behalf of a tribe by virtue of its position as guardian). The federal trust responsibility arises out the tribes' status as "domestic dependent nations." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[37] The United States receives a quota for whaling for the Inuit people in Alaska. International Convention for the Regulation of Whaling, Dec. 2, 1946, T.I.A.S. No. 1849, 161 U.N.T.S. 72, sched., para. 2 [hereinafter 1946 Convention].

[38] Stephen M. Hankins, *The United States' Abuse of the Aboriginal Whaling Exception: A Contradiction in United States Policy and a Dangerous Precedent for the Whale*, 24 U.C. Davis L. Rev. 489, 490 (1990); PETER J. STOETT, THE INTERNATIONAL POLITICS OF WHALING 57 (1997).

[39] *See generally* 1946 Convention, *supra* note 37.

[40] *Id.* at art. V, para. 2(b). However, "scientific findings" are not always the reason for some of the actions.

[41] Hankins, *supra* note 38, at 497.

[42] *Id.* at 498.

tive Act of 1967,[43] the 1979 Packwood Amendment to the Fishery Conservation and Management Act,[44] and the Marine Mammal Protection Act of 1972.[45]

In 1972, the United States proposed a global ban on commercial whaling. Although this proposal failed, the United States continued to propose the ban at subsequent meetings and sought modification of the IWC to provide for species protections. Finally, in 1982, three-quarters of the member nations agreed, and the moratorium was established on all commercial whaling. This moratorium provided two exceptions: (1) scientific research[46] and (2) aboriginal hunting.

B. The Aboriginal Subsistence Exception

The IWC has allowed quotas for aboriginal subsistence based upon cultural and subsistence needs. Quotas must be set low enough to allow the whale population to recover if it has been depleted by previous commercial whaling.[47]

During the 1980 meeting of the IWC, the ad hoc working group of the IWC Technical Committee defined "aboriginal subsistence whaling" as "whaling, for the purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties related to a continuing dependence on whaling and on the use of whales."[48]

Under the exception, gray and right whales can be taken only by native groups "when the meat and products of such whales are to be used exclusively for local consumption by the aborigines."[49] In order to qualify for the aboriginal hunting exception, there must be a demonstration of an ongoing subsistence need by the indigenous group requesting it. In addition, the exception is generally granted only when consistent with the other mandates of the IWC to "safeguard" and "conserve" whale stocks,

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[43] 22 U.S.C. § 1978 (1994).

[44] 16 U.S.C. § 1821(e)(2) (1994).

[45] 16 U.S.C. § 1361-1407 (1994) (through the moratorium on takings and the ban of importation of marine mammal products). *See also* Hankins, *supra* note 38, at 498-99 (discussing the imposition of non-discretionary sanctions for violations of the MMPA); Dean M. Wilkinson, *The Use of Domestic Measures to Enforce International Whaling Agreements: A Critical Perspective*, 17 Denv. J. Int'l L. & Pol'y 271, 280 (1989). The Packwood Amendment is a good example of the influence the United States has on IWC compliance. It provides mandatory sanctions against any nation identified as diminishing the effectiveness of the IWC. 16 U.S.C. § 1821(e)(2) (1994).

[46] It is interesting to note that under the "scientific research exception" any member nation may grant itself a special permit authorizing hunting regardless of other regulations. 1946 Convention, *supra* note 37, at art. VIII, para. 1. The Japanese took about 400 whales in 1996 for "research gauging whale populations and migration." *U.S. Supports Makah Whaling Request but Will Fight Japan's*, Seattle Post-Intelligencer, June 25, 1996 at A4.

[47] FINAL EA, *supra* note 25, at 2-3.

[48] Greg Donovan, *The International Whaling Commission and Aboriginal/Subsistence Whaling: Apr. 1979 to July 1981*, Rep. Int'l Whaling Comm'n 83 (Special Issue 4) (1981).

[49] 1946 Convention, *supra* note 37, at sched., para. 2.

and thus will typically be applied when it will not endanger the existence of a whale population.[50]

The IWC has approved subsistence hunts of various species of whales by several indigenous groups, including the Aleuts in Russia, native Greenlanders, and the Bequians of St. Vincent. Currently, the IWC permits 124 gray whales to be taken under the exception by Russian and Alaskan indigenous groups.[51]

C. The Alaska Inuit Exception

In 1977, the IWC adopted a resolution placing a total ban on the hunting of bowhead whales, a species very important to certain North Slope Inuit whaling communities (in particular, the Inupiats).[52] The bowhead whale forms "the basis of the social and cultural existence" of many of these communities and is essential to the subsistence economy of these people.[53] Implementation of the ban would have destroyed a subsistence culture developed over thousands of years.[54] However, research from the Scientific Committee of the IWC indicated that the bowhead whales were dangerously close to extinction and that further research should be conducted before permitting hunting.[55]

The Alaskan native whaling groups responded to the threat against their whaling practices by forming the Alaska Eskimo Whaling Commission (AEWC) as a nonprofit corporation under the laws of Alaska. The AEWC responded to the ban by suing the Secretary of State in an effort to force him to object to the ban, thus exempting its implementation by the United States.[56] The court denied the injunction holding that the court did not have the authority to interfere with the conduct of foreign affairs because such an issue is a political question.[57]

The AEWC turned its efforts from the courts to direct political pressure and with federal support was able to negotiate a limited harvest quota with the IWC.[58] For 1978, the IWC approved a limited hunt of twelve landed or eighteen struck whales. The work of the AEWC has led to the

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[50] Hankins, *supra* note 38, at 507-08.

[51] Press Release, United States Delegation to the International Whaling Commission, June 27, 1996 (on file with author) [hereinafter IWC Press Release].

[52] DAVID S. CASE, ALASKA NATIVES AND AMERICAN LAWS 283 (1984). The ban had been unanimously approved at the 1977 IWC meeting with the United States abstaining. *Id.*

[53] David S. Case, *Subsistence and Self-Determination: Can Alaska Natives Have a More "Effective Voice"?*, 60 U. Colo. L. Rev. 1009, 1026 (1989).

[54] *Id.* at 1027.

[55] Michael L. Chiropolos, *Inupiat Subsistence and the Bowhead Whale: Can Indigenous Hunting Cultures Coexist with Endangered Animal Species?*, 5 Colo. J. Int'l Envtl. L. & Pol'y 213, 221 (1994). The Scientific Committee of the IWC advises the main body "on subjects including whale populations, seasons, sanctuaries, and quotas." *Id.*

[56] Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1977).

[57] *Id.*

[58] Chiropolos, *supra* note 55, at 222-23. The federal government was eager to aid in these negotiations because the other options of objecting to the ban would undermine the United States' position on the 1982 moratorium and its enforcement and to do nothing could be viewed as a violation of the trust responsibility to the native groups. *Id.*

establishment of a subcommittee within the IWC designed to review aboriginal subsistence whaling and to make advisory opinions regarding an increase in the level of subsistence takes.

In 1979, the Panel Meeting of Experts on Aboriginal Subsistence Whaling met in Seattle to examine subsistence whaling among Alaskan natives. The group was split into three panels: wildlife, nutrition, and cultural anthropology.[59] These panels met and examined the issue from the three perspectives. The Wildlife Panel concluded that the population of whales was too small to allow any hunting. The Nutrition Panel examined the nutritional requirements of the natives and found that a diet of western foods could adequately sustain the Inuit. The Cultural Anthropology Panel concluded that whaling was an essential element of Inuit culture and that alternatives could not adequately replace the role whales play in their society. These reports were made to a Technical Committee which recommended a continued whaling quota.[60]

Whaling continues under this quota system. Research conducted with the assistance of the AEWC has indicated that whale population levels have increased or were not at the critical level indicated by previous studies.[61] In 1981, the AEWC negotiated a cooperative agreement with the National Oceanic and Atmospheric Administration (NOAA) which allowed the AEWC to manage the Inuit hunt under the IWC quota with the assistance of NOAA.[62] The development of the AEWC and its accomplishments toward Inuit whaling represents "probably the first time since before the American Revolution that Native Americans have been direct participants in international negotiations affecting their rights."[63]

D. The 1996 International Whaling Convention

The Makah believed that the 1855 Treaty presented sufficient legal rights to resume whaling. However, in an effort to limit controversy, they sought approval from the United States and the IWC.[64] Based upon an agreement in 1995 between NOAA and the Makah, the Tribe prepared a needs statement which detailed the historic, cultural, and ceremonial importance of whaling to the Tribe, as well as the methods of hunting.[65] During the summer of 1996, the Makah prepared for the IWC meeting in Aberdeen, Scotland.[66] When the meeting convened, seven Makah leaders joined the United States delegation in an effort to secure the right to hunt five gray whales.[67]

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59 *Id.* at 223-24.

60 *Id.*

61 *Id.*

62 *Id.* at 225-226.

63 Case, *supra* note 53, at 1030.

64 Paul Shukovsky, *Makah Whale Hunt Plan Alarms Animal Activists*, Seattle Post-Intelligencer, June 6, 1995, at B1.

65 Letter from the Makah Nation to NOAA and IWC Commissioner (Nov. 22, 1995).

66 Schoon, *supra* note 13, at 5.

67 *Id.*

Prior to and during the June 1996 meeting of the IWC, many groups expressed opposition to the whaling, including a group of Makah tribal elders who traveled to the meeting.[68] The outspoken elders claimed that whaling has lost its true meaning as a deep cultural and religious activity of the Tribe.[69] They argued that the traditional ceremonies that are part of whaling, including fasting, abstinence, and other rituals would not be followed, thus violating the sacred nature of the hunt.[70]

Congressional leaders also spoke out against the petition to resume whaling. On June 26, 1996, the House Committee on Resources, led by Representatives Jack Metcalf of Washington and Jack Miller of California, unanimously passed a resolution in opposition to the Makah.[71]

Critics of the Makah plan raised many allegations, including charges that the Tribe was involved in dealings that would allow the whales to be sold to the Japanese at a profit.[72] However, Ben Johnson, president of the Makah Whaling Commission, denied such involvement, stating, "Japan wanted to give us money, to help us buy boats, to show us how to kill the whales, everything. We said no because we knew it would be very controversial, and we want to do everything by the book."[73]

On June 27, 1996, the United States delegation, led by D. James Baker, deferred consideration of the request for Makah whaling until the 1997 meeting in Monaco, but affirmed the "U.S. commitment to uphold the rights of native people."[74] The delegation stated that the whaling had the support of many countries, but concerns over "whaling crew training and plans to combine traditional whaling practices with modern humane hunting methods" had yet to be resolved.[75]

After the United States delegation withdrew its request, the Makah Tribal Council stated that it would start whaling regardless of the outcome of the 1997 IWC meeting in Monaco.[76] Despite the withdrawal of the delegation request, the Tribe continued to have the support of the Clinton administration, which promised to work toward acquiring a whaling quota for the Tribe at the October 1997 meeting.[77]

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[68] *Id.*

[69] Linda Hogan, *Silencing Tribal Grandmothers*, Seattle Times, Dec. 15, 1996, at B9.

[70] HNA Homepage 2, *supra* note 18.

[71] Press Release, House of Representatives, June 26, 1996 [hereinafter House Press Release]. Metcalf, a Republican, has been described as an "Indian fighter" and opposed the assertion of salmon fishing rights by tribes in the 1970's. Rob Carson, *Makahs Face Familiar Foes at Whale Conference*, Tacoma News Trib., Oct. 15, 1997, at B1.

[72] House Press Release, *supra* note 71.

[73] Danny Westneat & Jim Simon, *Commercial Groups Aid Whale-Hunt Plan*, Seattle Times, Apr. 13, 1997, at A1. Ironically, during the 1996 IWC meeting, the United States fought against Japanese attempts to gain a whaling quota. *U.S. Supports Makah Whaling Request but Will Fight Japan's*, *supra* note 46, at A4.

[74] IWC Press Release, *supra* note 51.

[75] *Id.*

[76] Ben Johnson, *Makah Whaling: Tribe Has Inalienable Right to Harvest Gray Whales*, Seattle Times, Jan. 1, 1997, at B7; Anderson, *supra* note 31.

[77] Westneat & Simon, *supra* note 73, at A1.

E. The 1997 International Whaling Convention

Prior to the next IWC meeting, debate over the whaling issue continued.[78] The outspoken Representative Metcalf vowed to prevent the resumption of whaling and took a protest letter signed by forty-four members of Congress and a delegation of anti-whaling supporters, including two tribal elders, to the October 1997 meeting in Monaco.[79] Metcalf said that allowing the Makah to hunt whales "is a step we must not take" and that he would "do [his] best to see that it is not [taken]."[80]

On October 17, 1997, the Office of Protected Resources of the National Marine Fisheries Service (NMFS) released a final environmental assessment (EA)[81] prepared pursuant to the requirements of the National Environmental Policy Act (NEPA).[82] The EA concluded that United States support of the efforts of the Tribe to whale "would not significantly affect the quality of the human environment, provided that such whaling is conducted in accordance with the IWC Schedule, NOAA regulations, and the agreement between NOAA and the Makah Tribal Council."[83]

Will Martin, deputy assistant secretary for international affairs at NOAA and the leader of the United States delegation to the 1997 IWC meeting, stated that the United States position in seeking approval for a Makah quota was based upon three factors: (1) the 1855 treaty rights; (2) recognition of the cultural significance of whaling to the Makah; and (3) the scientific finding that the gray whale population would not be significantly affected.[84]

Despite protests and accusations, the Makah persisted and on October 23, 1997 finally won approval from the IWC to take four gray whales per year for five years.[85] The IWC resolution granted a joint whale quota of 124 eastern Pacific gray whales to the Inuit of Alaska and the Chucki of eastern Siberia.[86] Under an agreement between the United States and Russia, the Makah would get the right to take four gray whales from the Russian quota of 124 for subsistence purposes.[87]

Tribal officials state that the first resumed hunt will be in October of 1998 using a combination of traditional and modern techniques.[88] Tribal

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78 Danny Westneat, *Republican is Ally of Whaling Foes*, Seattle Times, Mar. 17, 1997, at B1.

79 Thompson, *supra* note 1, at A1; Carson, *supra* note 71, at B1.

80 143 Cong. Rec. H7354-02 (daily ed. Sept. 16, 1997) (statement of Rep. Metcalf).

81 FINAL EA, *supra* note 25, at 49.

82 42 U.S.C. §§ 4321-4370b (1994).

83 FINAL EA, *supra* note 25, at 49.

84 Courtney Thompson, *Washington Tribe Wants Approval to Start Whaling*, Oregonian, Oct. 16, 1997, at F1.

85 *Worldview Whales: Int'l Commission OKs Hunting by WA Indian Tribe*, American Pol. Network - Greenwire, Oct. 24, 1997, at 22.

86 *Id.*; Thompson, *supra* note 1, at A1.

87 *American Tribe Wins Back Right to Harpoon Whales*, The Independent - London, Oct. 24, 1997, at 12. Under the IWC resolution, the total number of gray whales to be hunted has actually declined from 140 annually to 124 annually. Danny Westneat, *Save-the-Whales Movement Failed to Rally Opposition to Makah Hunt*, SEATTLE TIMES, Oct. 24, 1997, at A1.

88 Thompson, *supra* note 1, at A1.

members will incorporate "cedar canoes, harpoons and rituals along with a very modern .50-caliber rifle and exploding ammunition to kill the huge mammals quickly and humanely."[89]

IV. The Legal Challenges Facing the Makah

Although the Makah successfully obtained a quota from the IWC, they still face domestic legal challenges to the exercise of the whaling right. After the IWC decision was announced, one member of the Makah Whaling Commission stated, "I would imagine our fight has just started."[90]

Laws governing whale hunting have changed over time to reflect the concerns regarding the management of whales. Historically speaking, the law of whaling was governed by the custom of the district where the whaling occurred.[91] For example, courts ruled that the property rights in a whale belonged to the ship from which "first iron was placed" and not the ship of the vessel whose crew actually killed the whale.[92] But since the 1940's, many laws, including the IWC, have been regulating and, in certain cases, outright prohibiting the hunting of whales.

Although this is the first time the Makah have been forced to defend their right to whale, they did face an early challenge to their right to hunt seals. In 1892, the Federal District Court for the Western District of Washington was asked to review the Makah right to seal hunt in *United States v. The James G. Swan*.[93] After a sealing vessel owned by a Makah was seized because of unauthorized seal hunting within the waters of Alaska, the Makah argued that their treaty right to seal allowed them to take seals despite the restriction on sealing within the waters of Alaska.[94] The court held that the treaty with the Makah gave the Tribe no rights or privileges superior to those of any other citizen, and thus the Makah were subject to the sealing restriction.[95] Fortunately for many tribes, this rule was overruled by the Supreme Court in 1905 in *United States v. Winans*.[96]

Most recently, reacting to the approval of the Makah whaling quota, Representative Metcalf along with several animal rights groups filed suit against the Department of Commerce.[97] The suite alleges that NMFS failed

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89 *Id.*

90 Scott Sunde & Ed Penhale, *Makahs Hail Go-Ahead for Whale Hunts but Legal and Other Shoals Lie Ahead*, Seattle Post-Intelligencer, Oct. 24, 1997, at A1.

91 35 Am. Jur. 2d *Fish and Game* § 4 (1967).

92 *Id.* (citing Ghen v. Rich, 8 F. Supp. 159 (D. Mass. 1881)).

93 50 F. 108 (W.D. Wash. 1892). When Alaska was obtained by the United States, the Russian policy of restricting seal hunting to the native Alaskans was retained, with violators of the restriction facing the penalty of forfeiture of their vessel. *Id.* at 109, 112.

94 *Id.* at 111.

95 *Id.*

96 198 U.S. 371 (1905). *Winans* held that a treaty was not a grant of rights to the tribe, but rather was a grant of right from them. The right to take fish at a usual and accustomed fishing place was found to be a special right to take fish and such a right imposes a servitude upon land. *Id.*

97 First Amended Complaint for Declaratory and Injunctive Relief at 2-3, Metcalf v. Daley, Civ. No. 97-2413(HHG) (Filed Nov. 7, 1997). To stop the exercise of the treaty right to hunt whales, any legal challenge must show either (1) that a federal law exists to regulate

to comply with several laws including the Marine Mammal Protection Act (MMPA),[98] the Whaling Convention Act of 1949,[99] the Marine Protection, Research, and Sanctuaries Act (MSA),[100] the Endangered Species Act (ESA),[101] and the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES).[102] This legal effort was still under way when this article went to press.

Generally speaking, federal or state governments are limited in their power to regulate Indian hunting or fishing rights to those cases where conservation is necessary to ensure the continued survival of a species.[103] In *Tulee v. Washington*,[104] the Supreme Court overturned the conviction of a Yakima Indian for a violation of state fishing regulations holding that the State could regulate Indian fishing only if regulation is "necessary for the conservation of fish."[105] Such regulations must meet "appropriate standards and . . . not discriminate against the Indians."[106] The Ninth Circuit emphasized that this standard can only be met if a regulation is necessary to create a "reasonable margin of safety" against extinction.[107]

Although the federal government is limited in regulating hunting and fishing rights, Congress possesses the power to unilaterally abrogate a treaty right.[108] Abrogation or modification of a treaty right will not be lightly construed and requires that "Congress' intention to abrogate Indian rights be clear and plain . . . . What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[109] In *United States v. Grey Bear*,[110] the Eighth Circuit provided that congressional intent to abrogate could be determined using (1) the face of a relevant act; (2) events surrounding its

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whaling and is necessary to protect the continued existence of the gray whale or (2) that legislation passed subsequent to the 1855 treaty has abrogated the right to whale. *Id.* at 26-29. The Complaint also alleges that NOAA failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370b (1994). *Id.* at 14-15. However, in order to focus this discussion on marine mammal conservation laws, any discussion of NEPA will be avoided.

98 16 U.S.C. §§ 1361-1407 (1994).

99 16 U.S.C. §§ 916-916l (1994).

100 16 U.S.C. §§ 1431-1445 (1994).

101 16 U.S.C. §§ 1531-1544 (1994).

102 Convention on the International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

103 Tulee v. Washington, 315 U.S. 681 (1942); Makah Indian Tribe v. Schoettler, 192 F.2d 224 (9th Cir. 1951); Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968); Anatoine v. Washington, 420 U.S. 194 (1975); United States v. Oregon, 718 F.2d 299 (9th Cir. 1983). Although these cases generally apply to state governments, courts have found that the federal government is subject to the same restrictions. United States v. Williams, 898 F.2d 727, 730 (9th Cir. 1990); United States v. Fryberg, 622 F.2d 1010, 1015 (9th Cir. 1980).

104 315 U.S. 681 (1942).

105 *Id.* at 684-85.

106 *Puyallup Tribe*, 391 U.S. at 398.

107 *Oregon*, 718 F.2d at 305.

108 Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Dion, 476 U.S. 734 (1986).

109 *Dion*, 476 U.S. at 738-40.

110 828 F.2d 1286 (8th Cir. 1987).

passage including legislative history; and (3) subsequent treatment.[111] These concepts are critical in analyzing the validity of challenges to the resumption of whaling based upon the MMPA, the Whaling Convention Act, ESA, CITES, and the MSA.

A. The Marine Mammal Protection Act of 1972

One of the possible legal obstacles the Makah may encounter in seeking to resume whaling is the Marine Mammal Protection Act of 1972 (MMPA).[112] The United States Government has taken the position that the MMPA does not effect the Makah right to whale;[113] however, the provisions of the MMPA seem ambiguous on the subject.

The MMPA was drafted in an effort to protect marine mammals that, at the time, were in great danger of being hunted to extinction.[114] To accomplish conservation goals, the MMPA established a moratorium on the taking and importing of marine mammals, their parts and products. This moratorium provides protection for polar bears, whales, seals, sea otters, walruses, manatees, dolphins and other mammals that rely on a marine habitat.[115]

The MMPA makes it unlawful to (1) take any marine mammal; (2) import any marine mammal or marine mammal product; (3) use any United States harbor or port for an unlawful taking or importation; (4) possess any unlawfully taken marine mammal; (5) transport, purchase, sell or offer to purchase or sell any marine mammal; and (6) take any species of whale for commercial purposes.[116] Jurisdiction for enforcement and implementation of the MMPA is divided between NMFS, the Fish and Wildlife Service (FWS), individual states (for management of local populations), and the Marine Mammal Commission (charged with monitoring implementation and recommending policies for the management of populations).[117]

The MMPA provides for civil penalties of up to $10,000 and criminal penalties of $20,000 or one year imprisonment, or both, for violations of the prohibitions.[118] Under the enforcement scheme, only the implementing authorities can bring a cause of action. Unlike the Endangered Species Act, there is no citizen suit provision allowing citizen enforcement by an independent cause of action.[119] The MMPA does provide limited exemptions from its prohibition for public display of marine mammals (*i.e.*, Free

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111 *Id.* at 1289.

112 16 U.S.C. § 1361-1407 (1994).

113 FINAL EA, *supra* note 25, at 6. The Environmental Assessment states, "After careful analysis, the Departments of Commerce and Interior concluded [t]hat the MMPA does not abrogate Indian treaty rights to harvest marine mammals." *Id.*

114 16 U.S.C. § 1361.

115 *Id.* § 1362(5).

116 *Id.* § 1372.

117 *Id.*

118 *Id.* § 1375.

119 16 U.S.C. § 1540(g) ("[A]ny person may commence a civil suit on his own behalf - (A) to enjoin any person, including the U.S. . . . who is alleged to be in violation [of the ESA]").

Willy), scientific research, incidental takes in commercial fishing, and for Alaskan natives.[120]

1. The Alaskan Native Exemption

Although the MMPA does not address Indian treaty rights to whale, it specifically provides an exemption for Alaskan natives. This exemption allows "the taking of any marine mammal by an Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking—(1) is for subsistence purposes; or (2) is done for purposes of creating and selling native articles of handicrafts and clothing . . . (3) in each case, is not accomplished in a wasteful manner."[121] However, the Secretary is authorized to promulgate regulations to control the taking of any marine mammal stock if such a stock is determined to be depleted.[122]

In 1990, the Ninth Circuit, in *United States v. Clark*,[123] viewed the purpose of the native Alaskan exemption "as protecting subsistence hunting and the use of mammal parts for a limited cash economy, so long as neither is wasteful."[124] While the exception is broad, it is still possible for native Americans to violate the act. In this case, three Alaskan natives and one non-native had been charged with, and convicted of, violating the MMPA.[125] The group allegedly shot nine walruses, managing to completely butcher only one of the nine, but taking a few parts from all of them, including the flippers, the head and the oosik (the penis bone).[126] Clark alleged that a Department of Interior Regulation, which defined "wasteful" as a use "which results in the waste of a substantial portion of the marine mammal,"[127] was beyond the scope of the statutory authority of the MMPA and was unconstitutionally vague.[128] The court rejected both claims and affirmed the conviction.[129]

The exemption provides a very broad exception for takings of marine mammals by Alaskan natives. The Secretary may promulgate regulations

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120 *Id.* § 1371(b).

121 *Id.*

122 *Id.*

123 912 F.2d 1087 (9th Cir. 1990).

124 *Id.* at 1089.

125 *Id.* at 1088.

126 *Id.*

127 50 C.F.R. § 18.3 (1989). The regulation has since been changed to provide a clear definition of "wasteful." The definition now reads:

> any taking or method of taking which is likely to result in the killing or injuring of marine mammals beyond those needed for subsistence purposes or for the making of authentic native articles of handicrafts and clothing or which results in the waste of a substantial portion of the marine mammal and includes without limitation the employment of a method of taking which is not likely to assure the capture or killing of a marine mammal, or which is not immediately followed by a reasonable effort to retrieve the marine mammal.

50 C.F.R. § 18.3 (1998).

128 *Clark*, 912 F.2d at 1088.

129 *Id.*

requiring "marking, tagging, and reporting" of catches.[130] Other regulations of native takings are not allowed unless there is a finding that a specific population or species is deemed to be "depleted."[131] In fact, native groups have successfully challenged federal regulations that would have allowed the state of Alaska to resume regulation of walrus management practices, which in effect would have prohibited certain walrus hunts by the native groups.[132]

In that challenge, the community of Togiak alleged that the MMPA exemption for Alaskan natives preempted any state regulation.[133] The court agreed, finding that the exemption was an exercise of federal authority in the furtherance of the special trust responsibilities toward native peoples. In describing this responsibility, the court stated:

> These various responsibilities impose fiduciary duties upon the United States, including the duties to regulate as to protect the subsistence resources of Indian communities and to preserve such communities as distinct cultural entities against interference by the States. It is presumably to implement these various powers and duties that Congress adopted the Native exemption from the general moratorium established by the MMPA, and an abandonment of those responsibilities should not be lightly presumed.[134]

The court held the federal government to a strict standard, requiring more than a "light presumption" to abandon its trust responsibilities toward the native groups.[135]

In the aftermath of this suit, Alaska abandoned its attempts to regulate the walrus. In 1981, Congress passed amendments to the MMPA that explicitly allowed Alaska to assume marine mammal jurisdiction, so long as protection is provided for subsistence takings for "customary and traditional uses by rural Alaskan residents."[136]

More recently, amendments to the MMPA passed in 1994 expanded the native exception by placing a more stringent burden of proof upon the Secretary prior to implementing regulations.[137] Under this new standard, the Secretary must show that a decision to regulate native takings because of depletion is supported by "substantial evidence on the basis of the records as a whole."[138] With these new amendments, the MMPA affords Alaskan natives an almost unregulated right to continued subsistence use of marine mammals.

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130 16 U.S.C. § 1379(1).

131 *Id.* § 1362(1). Depletion relates to the "optimum sustainable population" described in 16 U.S.C. § 1362(8).

132 People of Togiak v. United States, 470 F. Supp. 423 (D.D.C. 1979).

133 *Id.* at 424.

134 *Id.* at 428.

135 *Id.* at 429-30.

136 16 U.S.C. § 1379(f)(2). This transfer of management authority expands the exception to include those who may not be Alaska native, but are taking for "customary and traditional uses." *Id.*

137 Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, 108 Stat. 544 (1994) (codified as amended in scattered sections of 16 U.S.C.).

138 George A. Chmael II et al., *The 1994 Amendments to the Marine Mammal Protection Act*, 9 Nat. Resources & Env't 18, 20 (1995).

2. Abrogation

Although the effect of the MMPA on the rights of the Alaskan native is relatively clear, the MMPA does not explicitly state its effect on the Makah treaty right to whale. Further, no court has ruled on whether the MMPA acts to abrogate the whaling right.

In 1986, the Supreme Court held in *United States. v. Dion*,[139] that abrogation of a treaty right will be found only if there is clear and plain evidence that Congress actually considered the conflict between its intended action and the treaty right, and chose to resolve the conflict by abrogating the right.[140] The Court found that the Bald Eagle Protection Act,[141] which imposes a ban on the hunting of bald and golden eagles except with a permit from the Secretary of Interior, had abrogated a treaty right of the Yankton Sioux Tribe to hunt.[142] A narrow exception in the Act allowed the hunting of bald eagles only for religious purposes. The Court found that intent to abrogate was strongly suggested on the face of the Act as indicated by that narrow exception.[143]

Similarly, in 1987, in *United States v. Billie*,[144] the U.S. District Court for the Southern District of Florida found that Congress must have known that a limited exception to the Endangered Species Act (ESA) for Alaskan natives would be interpreted to show congressional intent not to exempt other Indians.[145] The ESA provides a narrow exception from its prohibitions for "any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska" for the taking of endangered or threatened species "if such taking is primarily for subsistence purposes."[146] The court found that the Seminole Indian Tribe's right to hunt was not expressly mentioned in their treaty, but was instead part of "their larger rights of possession."[147] Where conservation of wildlife is necessary, the court stated that the government can interfere with the treaty rights on behalf of other federal interests if such measures are reasonable and nondiscriminatory as allowed under *Puyallup Tribe v. Department of Game of Washington*.[148] The court determined that the ESA's narrow exception had been reasonable and nondiscriminatory in that it "considered Indian interests, balanced them

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139 476 U.S. 734 (1986).

140 *Id.* at 734.

141 16 U.S.C. §§ 668-668d (1994). Like the MMPA, the Bald Eagle Protection Act provides a general moratorium on the taking, possession, sale, purchase, and other transactions involving eagles. *Id.*

142 *Dion*, 476 U.S. at 745.

143 *Id.* at 746.

144 667 F. Supp. 1485, 1491 (S.D. Fla. 1987).

145 *Id.*

146 16 U.S.C. § 1539(e).

147 *Billie*, 667 F. Supp. at 1489.

148 *Id.* at 1490 (stating the rule presented in, Puyallup Tribe v. Department of Game of Washington, 391 U.S. 392 (1968)). In *Puyallup Tribe*, the Supreme Court held that Washington could regulate the manner of tribal fishing, the size of the take and the extent of commercial fishing provided such regulations were not discriminatory against the tribes. *Pullyallup Tribe*, 391 U.S. at 392.

against conservation needs, and defined the extent to which Indians would be permitted to take protected wildlife."[149] Additional evidence of legislative intent to abrogate was found in the fact that an earlier unpassed version of the ESA had broader exceptions allowing takings of species by Indian tribes pursuant to a "treaty, executive order, or statute."[150]

In 1991, in *United States v. Nuesca*,[151] the Ninth Circuit rejected an argument by Hawaiian natives that limiting the ESA exception to Alaskan natives violates equal protection and that all native groups should be provided such an exception.[152] The court rejected that argument, holding that the native Alaskan exception does not extend to other native groups because "Congress had ample reasons to create exceptions to certain laws for the benefit of native Alaskans, and to refrain from creating exceptions for other groups."[153] Because Hawaiian natives are not "similarly situated to Native Alaskans," the protections afforded to one group and not another can be different.[154]

Abrogation of treaty rights by conservation laws is not a fully settled issue. In 1991, the U.S. District Court in Minnesota, in *United States v. Bresette*,[155] held that the inclusion of an exception for Alaskan natives under the Migratory Bird Treaty Act is irrelevant to the issue of abrogation of treaty rights because Alaskan natives have no treaty rights.[156] Like the MMPA and the Bald Eagle Protection Act, the Migratory Bird Treaty Act places a general moratorium on the taking, capturing, killing, sale of any birds including bird parts, and other transactions involving migratory birds.[157] The defendants, members of the Chippewa Tribe, were accused of violating the Migratory Bird Treaty Act by selling dream catchers containing feathers from birds protected by the Act.[158] The court found that the treaties with the Chippewa, guaranteeing a right to hunt and gather, would have been understood by the Tribe to include the right to take migratory birds and feathers for crafting dream catchers.[159] The court further held that attempting to use Alaskan native rights to determine a statute's effects on treaty rights was "disingenuous," because federal policy has differed significantly between the two.[160] The legislative history of the Act, while considering Alaskan native issues, did not consider, much less indicate, an intent to eliminate treaty rights.[161] Given the absence of

149 *Billie*, 667 F. Supp. at 1490.

150 *Id.*

151 945 F.2d 254 (9th Cir. 1991).

152 *Id.* at 257.

153 *Id.*

154 *Id.*

155 761 F. Supp. 658, 663 (D. Minn. 1991).

156 *Id.* at 663.

157 16 U.S.C. § 703 (1994).

158 *Bresette*, 761 F. Supp. at 659.

159 *Id.* at 662.

160 *Id.* Indicating that "[f]ederal policy since the acquisition of Alaska has been to make no treaties with Native Alaskans." *Id.* at 663.

161 *Id.*

statutory language or other evidence, the court concluded that the Act did not abrogate the treaty right to take migratory birds and feathers.[162]

In addition to alleging abrogation, the government contended that the Act establishes a "nondiscriminatory conservation measure under *Puyallup*."[163] This argument also was rejected because the measures in *Puyallup* applied to the right to fish in common with other groups, and therefore all groups were regulated equally. Further, the regulation in *Puyallup* was designed to forbid the fishing of steelhead to the brink of extinction, while "[m]igratory birds of Northern Minnesota and Wisconsin are not faced with extinction due to the [defendants]."[164]

Given the split in the circuit courts, it is unclear how the Ninth Circuit, or the Supreme Court, would rule regarding the issue of abrogation under the MMPA for the Makah. As discussed, the MMPA explicitly refers to an Alaskan native exemption. The court in *Billie* used such an exception in the ESA to find abrogation, but the court in *Bresette* found a similar exception in the MBTA irrelevant to the issue. However, the court in *Billie* did refer to the legislative history of an earlier unpassed version of the ESA, which considered the impacts on treaty rights as evidence of congressional intent to abrogate.[165] An examination of the legislative history of the MMPA, however, does not reveal any consideration of Indian treaty rights. When intent of a statute is unclear, the Supreme Court has opted to preserve the treaty right.[166] Given the lack of consideration by Congress, it is arguable that the MMPA does not abrogate the Makah treaty right to whale. However, in 1994, Congress amended the MMPA in a manner that attempted to resolve the issue of abrogation.

3. The Ambiguous 1994 Amendment

Section 14 of the 1994 Amendments to the MMPA, entitled "Indian Treaty Rights; Alaska Native Subsistence" states: "Nothing in this Act, including any amendments to the [MMPA] of 1972 made by this Act . . . alters or is intended to alter any treaty between the United States and one or more Indian tribes."[167]

Although the intent of this amendment may have been to provide that the MMPA as a whole, on its face does not abrogate Indian treaty rights,[168] the amendment's language is ambiguous as to its effects. On the one hand, the amendment could be read to apply to the original Act, stating that the entire MMPA has no effect on existing treaty rights including abrogation of

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162 *Id.* at 664.

163 *Id.*

164 *Id.*

165 United States v. Billie, 667 F. Supp. 1485, 1490-91 (S.D. Fla. 1987).

166 Menomonee Tribe v. United States, 391 U.S. 404 (1968). The Court held that the Termination Act effecting the Menomonee Tribe, which did not address hunting or fishing rights, did not abrogate such rights. *Id.* at 412-13.

167 Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, § 14, 108 Stat. 532, 558 (1994). For some reason, Congress did not place this amendment in an existing section of the MMPA and thus it is referred to only in a note to 16 U.S.C. § 1361.

168 Telephone interview with Richard Reich, Quinult Tribal Attorney (Apr. 18, 1997).

any rights. Conversely, the amendment could also be read to provide that no right is affected by the 1994 Amendments, thus leaving the question of the original Act's effects unanswered. Legislative history indicates a desire to construe this amendment to "reaffirm that the MMPA does not in any way diminish or abrogate existing protected Indian treaty fishing or hunting rights."[169] It is unclear, however, from the Senate Report whether that statement refers to the current amendment or an unpassed version.[170] A House draft of the amendment, which was not adopted, lacked the ambiguity stating: "Nothing in these amendments alters or is intended to alter any treaties between the United States and Indian tribes."[171] The meaning conveyed here is clear, that the amendment does not alter the treaty, but still leaves the question of the effects of the original act unanswered.

In *Montana v. Blackfeet*,[172] the Supreme Court stated that the unique trust relationship between the United States and the Indians directed that canons of statutory construction be employed in the interpretation of statutes affecting tribes.[173] The Supreme Court has stated that statutes passed for the benefit of Indian tribes are to be liberally construed, and that any ambiguous statement should be resolved in favor of the tribes.[174] However, this rule has been applied to statutes that deal with Indians, but were not passed for their benefit.[175] In *Lower Brule Sioux Tribe v. United States*,[176] the Eighth Circuit stated that, although the rules of construction mandate that ambiguous statutes be interpreted in favor of the tribes, "an examination of the legislative history and surrounding circumstances may reveal congressional intent and resolve the ambiguity, obviating the need to resort to these rules."[177]

Given the express intent of Congress, the legislative history alone should be sufficient to decide this issue in favor of the Makah. But even assuming that the legislative history refers to another unpassed version of the amendment, which might be construed as abrogating Indian treaty rights, the statutory rules of construction mandate that the ambiguity be found in favor of the tribe and that the MMPA does not abrogate the Makah treaty right to whale.

Unanswered is the question of what regulatory effects the MMPA has on the treaty right, if any. Are the Makah subject to the same sort of regulations as the Alaskan natives or something completely new? Arguably, a system similar to the statutory scheme of the Alaskan native exemption would be desirable, allowing virtually unregulated whaling, unless the Sec-

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169 S. REP. No. 103-220, at 38 (1994) *reprinted in* 1994 U.S.C.C.A.N. 518.

170 The Senate Report pre-dates the House Report in which the amendment clearly refers only to the amendments themselves and not to the MMPA as a whole. *Id.* (dated Jan. 25, 1994); H.R. Rep. No. 103-439, at 61 (1994) (dated Mar. 21, 1994).

171 H.R. Rep. No. 103-439, at 61 (1994).

172 471 U.S. 759 (1985).

173 *Id.* at 764.

174 Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918).

175 Bryan v. Itasca County, 426 U.S. 392, 392-93 (1976) (The rule for statutory construction was used in construing Public Law 280).

176 712 F.2d 349, 352 (8th Cir. 1983).

177 *Id.* at 352.

retary of Commerce deems the stock of gray whales to be depleted, in which case regulations would restrict such hunting.[178]

B. *The Whaling Convention Act of 1949*

Another legal argument possibly preventing the exercise of the Makah treaty right is a claim that it would violate the Whaling Convention Act of 1949. To implement the 1946 Convention and the schedules established by the IWC, the United States passed the Whaling Convention Act of 1949.[179] This Act makes it unlawful for any person to "engage in whaling in violation of the [IWC]," or any regulation promulgated by the Secretary of Commerce,[180] or to "engage in whaling without first having obtained an appropriate license or scientific permit."[181] In addition, the Act requires that every whaling vessel be equipped in accordance with IWC requirements and that crew members not be compensated on the basis of the number of whales taken.[182] The Act authorizes fines of $10,000 or one year imprisonment, or both, for any violation of its provisions.[183] The Whaling Convention Act has no citizen's suit provision to allow for independent enforcement.

Legislative history of the Whaling Convention Act indicates no congressional intent to abrogate any Indian treaty rights. A House Report on the Act indicates that its purpose is to protect whale stocks for the purpose of the whaling industry, stating, "[w]hale products are important to the world for economic and nutritional reasons."[184]

In 1979, in *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*,[185] the Supreme Court ruled that the Pacific Salmon Convention did not abrogate any tribal treaty fishing rights.[186] The Convention was an agreement designed to regulate the commercial harvest of salmon through regulations implemented by the International Pacific Salmon Fisheries Commission (IPSFC). In rejecting the argument that the international agreement abrogated fishing rights, the Court stated, "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights, and there is no reason to do so here."[187]

The Whaling Convention Act, like the Pacific Salmon Convention, does not broadly prohibit the taking of marine resources, but rather serves as a vehicle through which to implement regulations passed by the IWC.[188]

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178 Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968). *Puyallup Tribe* indicates that even with a treaty right, the Makah will not be allowed to hunt the last gray whale. *Id.* at 402 (holding that the Puyallup Tribe could not fish salmon and steelhead trout in a manner that would lead to extermination).

179 16 U.S.C. §§ 916-916l (1994).

180 *Id.* § 916c(a).

181 *Id.* § 916d.

182 *Id.* § 916d(d).

183 *Id.* § 916f.

184 H.R. Rep. No. 81-2514, *reprinted in* 1950 U.S.C.C.A.N. 2938.

185 443 U.S. 658 (1979).

186 *Id.* at 690-91.

187 *Id.*

188 16 U.S.C. § 916c (1994).

As discussed, the quotas and other regulations passed by the IWC are not binding without the consent of the member nations.[189] This allows considerable discretion by the United States and other nations in deciding whether to implement the protections provided. The flexibility in implementing the IWC regulations does not demonstrate the type of complete prohibition on "taking" which the ESA presents, thus preventing a finding of implicit abrogation as occurred in *United States v. Billie*.[190]

Further, the federal agencies enforcing the Act have allowed for the exercise of native hunting. Regulations promulgated by NOAA and NMFS grant a whaling license to any Native American whaling captain, provided that captain is designated by a Native American whaling organization and the organization has entered into a cooperative agreement with NMFS.[191]

Because the Whaling Convention Act does not address native whaling, and the legislative history does not indicate any intent to abrogate treaty rights, the Makah right to whale is secure under it. It may be possible to argue that the Whaling Convention Act creates the authority to limit the exercise of the right when "necessary for the conservation" of whales, however, the current population of whales does not to warrant such protection.[192]

C. The Endangered Species Act and CITES

The Endangered Species Act (ESA) has been raised as a possible legal challenge to the resumption of whaling. The ESA is "designed to conserve endangered and threatened species and the ecosystems they depend on."[193] To achieve this goal, the ESA authorizes the Secretary of Interior (or the Secretary of Commerce when marine mammals are involved) to promulgate lists of threatened or endangered species and to designate protected habitat.[194] Under the ESA, federal agencies are prohibited from taking actions, that are "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[195]

Additionally, the ESA prohibits the import, taking, possessing, selling, or transport of any endangered species by any person or entity.[196] Like the MMPA, the ESA explicitly provides for an exception for "any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska . . . if such taking is primarily for subsistence purposes."[197] As discussed above, this limitation has been interpreted as abrogating treaty rights, while protecting the right of Alaskan natives to "take" endangered species.

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189 *See supra* notes 38-46 and accompanying text.

190 667 F. Supp. 1485, 1485 (S.D. Fla. 1987).

191 50 C.F.R. § 230.5 (1997).

192 Tulee v. Washington, 315 U.S. 681, 684-85 (1942).

193 Rick Eichstaedt, *The Struggle of the Redband Trout*, The Riverkeeper, Jan. 1998, at 5, 6.

194 Henry Cohen, *Federal Animal Protection Statutes*, 1 Animal L. 143, 151 (1995).

195 16 U.S.C. § 1536(a)(2) (1994).

196 *Id.* § 1538.

197 *Id.* § 1539(e).

Supplementing its domestic regulation, the ESA authorizes under federal law the enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).[198] The ESA conserves species to the extent practicable according to the purposes of CITES.[199] CITES provides for the protection of endangered species through restriction in international trade.[200] To implement its protection, CITES establishes three appendices under which species are classified depending upon the level of protection required. Species that are the most endangered are classified under Appendix I and are protected from any type of international commercial trade.[201] If the gray whale was listed under this appendix, the ESA could be a powerful legal tool to prohibit implementation of the Makah treaty right. However, gray whales are now listed in Appendix II, which only regulates trade of whale products.[202]

Because CITES does not outright prohibit the taking of gray whales, there is little legal force behind the ESA requirements. The ESA could be used to implement restrictions in the international trade of whale products by the Makah, but it cannot stop the Makah from hunting.

D. The Marine Sanctuaries Act

The Marine Sanctuaries Act (MSA),[203] may be raised as a possible challenge to Makah whaling due to the Tribe's proximity to a protected sanctuary (the Olympic Coast National Marine Sanctuary). The MSA serves to recognize and protect "special areas of the marine environment" which "will contribute positively to marine resources conservation, research, and management."[204] To accomplish its goal, the MSA establishes procedures designed to identify, establish, and manage National Marine Sanctuaries.[205] The MSA makes it unlawful to "destroy, cause the loss of, or injure any sanctuary resources managed under law or regulations for that sanctuary."[206]

In addition to its prohibitions, the MSA provides a review process for agency action. All federal agencies engaging in "actions internal or external to a national marine sanctuary, including private activities authorized by license, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resource" are required to consult with the Secretary of Commerce.[207] The agency is required to submit a written statement describing the proposed action and describe the effects the action has on

198 *Id.* § 1531(b).

199 *Id.* § 1531(a)(4)(F).

200 CITES, *supra* note 102.

201 *Id.* at art. III.

202 *Id.*

203 16 U.S.C. §§ 1431-45 (1994).

204 *Id.* § 1431.

205 *Id.*

206 *Id.* § 1436(1).

207 *Id.* § 1434(d)(1)(A).

the sanctuary no later than forty-five days before final approval of the action.[208]

The Secretary of Commerce is required to review, within forty-five days, the information submitted by the action agency and determine whether the proposed action is "likely to destroy, cause the loss of, or injure a sanctuary resource."[209] For any action that may harm a sanctuary, the Secretary is required to "recommend reasonable and prudent alternatives" that provide for the protection of sanctuary resources.[210] The agency, in turn, must consult with the Secretary regarding implementation of the proposed alternatives.[211] This essentially creates a procedural duty on an action agency to consult with the Secretary before a potentially damaging action is taken.

In 1993, under the authority of the MSA, the National Oceanographic and Atmospheric Administration (NOAA) established the Olympic Coast National Marine Sanctuary.[212] Under the regulations promulgated to manage this sanctuary, NOAA prohibited the "taking of any marine mammal . . . except as authorized by the Marine Mammal Protection Act . . . or pursuant to any treaty with an Indian tribe to which the United States is a party, provided that the treaty right is exercised in accordance with the MMPA, ESA, and MBTA, to the extent they apply."[213]

As discussed above, the MMPA and the ESA do not prevent the exercise of the Makah right to whale, therefore, under the rules promulgated by NOAA, the MSA likewise does not prevent a valid exercise of the treaty right. Any other requirements under the MSA are simply procedural, and although failure to comply with these requirements may delay action, they do not prevent the resumption of whaling.

V. The Aftermath

Although the Makah will benefit from the successful exercise of the IWC quota, there are many difficult issues that have surfaced as a result. Many fear that the granting of a quota will clear the path for the resumption of whaling by countries such as Japan and Norway.[214] The Japanese argue that many of its own people, like the Makah, have a long history of whaling and thus should be entitled to a hunting quota by means of the aboriginal subsistence exception.[215] The Japanese delegate to the 1997 meeting of the IWC stated "[i]f we can eat whale, why should we eat some-

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208 *Id.* § 1434(d)(1)(B).

209 *Id.* § 1434(d)(2).

210 *Id.* § 1434(d).

211 *Id.*

212 Olympic Coast National Marine Sanctuary Regulations, 56 Fed. Reg. 47,836, 47,843 (to be codified at 15 C.F.R. pt. 925).

213 15 C.F.R. § 925.5(a)(6).

214 Thompson, *supra* note 1, at A1. In a written statement, Rep. Metcalf said, "This will now open the door for more quota increases . . . Japan has already stated the desire to allow four villages on the Taiji Peninsula with no subsistence need to be granted a quota. Iceland, Norway, China . . . where will it end?" *Id.*

215 *Id.*

thing raised on artificial feed and fertilizer?"[216] The United States has fought any attempts to re-establish legitimate hunting.[217]

Recently, the IWC has come under attack for banning all whaling rather than implementing management plans allowing for the sustainable harvest of whales.[218] During the 1997 meeting, IWC deputy chairman Michael Canny proposed that limited commercial whaling be reinstated which would allow the Japanese and Norwegians to whale provided the whales are hunted in their coastal waters and the meat is eaten locally.[219] In exchange for a limited quota, the scientific exception would be eliminated, thus allowing for a reduction in the overall level of hunting.[220] The United States stands opposed to the proposal and "[s]imply put, we [the United States] are opposed to commercial whaling in any form."[221] This proposal was shelved for consideration until the next meeting of the IWC in Oman in 1998.[222]

Other native groups have stated their intention to resume whaling. During the summer of 1996, thirteen tribal groups in Canada stated their intention to whale if the Makah requests before the IWC are granted.[223] More recently, the Nuu-Chah-Nulth Indians have stated that they plan to resume hunting gray whales near Vancouver Island as early as the fall of 1998.[224] Unlike the Makah, the Canadian tribes have been openly working with Japan and Norway, forming the World Council of Whalers, an organization to support sustainable whaling, and accepting foreign funding to pursue whale hunting.[225] The Makah Tribe itself has not ruled out the possibility of commercial whaling in the future, which would raise a whole new series of issues.[226]

The recreation industry in Washington has expressed concern regarding the effects of whaling within sight of the Washington shoreline. The whale watching industry is fearful that the hunt will severally damage the $8-10 million income generated by the business.[227]

It is unclear whether the Tribe requires further approval or whether federal agencies are required to develop regulations for the hunt, thus

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216 John-Thor Dahlburg, *Global Conference on Whales Debates 'To Hunt or Not to Hunt?'*, Los Angeles Times, Oct. 22, 1997, at A12.

217 *U.S. Supports Makah Whaling Request but Will Fight Japan's*, *supra* note 46, at A4.

218 *Whale-Hunting Ban Questioned/Lack of Change May Kill Regulating Body*, Newsday, Oct. 25, 1997, at A13.

219 Dahlburg, *supra* note 216, at A12.

220 *Id.*

221 *Id.*

222 Anne Swardson, *Whales Dwarfed by Larger Forces: Lobbyists and Politics*, Wash. Post, Oct. 24, 1997, at A36.

223 *Id.*

224 Westneat & Simon, *supra* note 73, at A4.

225 *Id.*

226 Bock, *supra* note 18 (noting that he IWC aboriginal exception allows whaling only for subsistence purposes and that the MMPA also prohibits commercial whaling).

227 Thompson, *supra* note 1, at A1.

opening the door for the possibility of further legal challenges.[228] Many of the issues raised as a result of the Makah quota will serve to shape the future of both native and commercial whaling. The United States may find itself in the difficult position of trying both to defend native whaling and striving to continue the total ban on commercial whaling.

VI. CONCLUSION

Whaling is a politically charged issue. The popular sentiment regarding whaling is demonstrated by the fact that "[w]hales are revered in America more than any animal except dogs and cats."[229] If the Makah do exercise their right, the hunt would be the first legal harvest in the lower United States since the last whaling station closed in California in the 1970's.[230]

Although technically the Makah have the right to whale, exercising that right may have dangerous political repercussions. Already the Tribe faces a lawsuit filed by a member of Congress who has openly condemned the Makah's actions on several occasions before the House of Representatives.[231] In addition to the threat of legal or political challenge, the Makah face the threat of direct action. Almost immediately after the announcement of the IWC decision, Paul Watson, the outspoken head of the Sea Shepherd Conservation Society, a group responsible for the destruction of more than a dozen whaling vessels stated, "[i]f the Makah Indians actually do go whaling—which I doubt they ever will—we will be there with two ships and a submarine to try to stop them."[232]

To lessen the political impact of whaling, the Makah should follow the example of the Inuit whalers and work closely with the IWC, while soliciting the input of tribal elders, environmental groups and other non-governmental organizations to reach a plan which meets both Makah cultural needs and considers the concerns of others.

Whaling is important to the Makah, and the victory won before the IWC is an important milestone in the revitalization of the Makah people. Tribal leaders hope that the reintroduction of the whale hunt will help with the struggle against unemployment, chemical abuse, and crime by rebuilding the fabric of Makah society.[233] One Makah stated, "This revives

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228 Sunde & Penhale, *supra* note 90, at A1. In an earlier case, the Ninth Circuit determined that the Makah's usual and accustomed whaling areas extend forty miles into the Pacific. United States v. Washington, 730 F.2d 1314 (9th Cir. 1984).

229 Westneat, *supra* note 78, at B1.

230 Sunde & Penhale, *supra* note 90, at A1.

231 142 Cong. Rec. H6853-03 (daily ed. June 26, 1996); 142 CONG. REC. H7102-10 (daily ed. June 27, 1996); 143 CONG. REC. H7354-02 (daily ed. Sept. 16, 1997); 143 CONG. REC. H8986-01(daily ed. Oct. 22, 1997); 143 CONG. REC. H9476-05 (daily ed. Oct. 23, 1997). Metcalf raised allegations against the Makah Tribal Council before Congress stating, "I am aware of questions being asked the Bureau of Indian Affairs to investigate accusations made by the Makah elders who oppose the whale hunt that have alleged that the Makah tribal constitution has been violated." 143 CONG. REC. H9476-05.

232 Sunde & Penhale, *supra* note 90, at A1.

233 Thompson, *supra* note 1, at A1.

our culture. It brings it back to us."[234] Although they successfully acquired a whaling quota, the Makah still face a legal fight before they will once again be able to search the seas for the gray whales as Makah people have done for more than a thousand years.

[234] Sunde & Penhale, *supra* note 90, at A1.