

# REPARATIONS AS A BASIS FOR THE MAKAH'S RIGHT TO WHALE

By  
Russell C. D'Costa\*

*The grant of whaling rights to the Makah Native-American tribe may be interpreted as a form of reparations owed to the tribe from the United States government. History details the many wrongs inflicted on the Makah by the government, and these wrongs therefore serve as the basis for reparations. Considered first is a brief review of recent attempts by the federal government to compensate Native Americans for past wrongs. Next, an examination of the history and culture of the Makah tribe provides a greater understanding of the significance of whaling to the Makah. The essay then expounds on why permitting the tribe to engage in whaling is an acceptable form of reparations. Finally, arguments against the Makah's whaling are examined and critiqued.*

I. INTRODUCTION .....	72
II. REPARATIONS TO NATIVE AMERICANS .....	72
A. What Reparations Represent .....	72
B. Attempts to Address Past Wrongs to Native Americans .....	74
1. Establishment of the Indian Claims Commission .....	74
2. Formal Apologies .....	75
3. Restoration of Lands to Native Americans .....	76
III. THE MAKAH AND WHALING .....	77
A. Historical Background of the Makah Tribe .....	77
B. The Whaling Culture of the Makah .....	78
C. The Impacts of the International Whaling Commission's Whaling Moratorium on the Makah .....	79
1. The International Regulation of Whaling .....	79
2. The Rebound of the Gray Whale .....	79
3. The "Uncertainty" of the Makah's Hunt .....	81
IV. PERMITTING WHALING AS A FORM OF REPARATIONS TO THE MAKAH .....	83

---

\* © Russell C. D'Costa 2005. Mr. D'Costa earned his J.D. and M.S. in Environmental Law from Vermont Law School in 2004. Prior to that, he earned his B.A. and Honors in General Education from Binghamton University in 2001. Mr. D'Costa previously served with the White House Office of Environmental Initiatives under the Clinton Administration and the New York State Department of Environmental Conservation's Legal Affairs Division. The New York State Unified Court System selected Mr. D'Costa to participate in the 2005–2006 Legal Fellows Program, where he is clerking for the Hon. Dianne T. Renwick, Supreme Court Justice, Bronx County. The author wishes to express his deepest gratitude to his family for their patience and support, and to Tseming Yang, Vermont Law School Professor of Law, for his eternal guidance.



A.	<i>Wrongs Inflicted by the Federal Government upon the Makah</i> .....	83
1.	<i>The Treaty of Neah Bay Negotiations</i> .....	83
2.	<i>Federal Cultural Oppression and Assimilation</i> .....	85
B.	<i>Why Allowing the Makah to Whale is an Acceptable Form of Reparations</i> .....	86
1.	<i>Enhancing the Makah's Cultural Determination through Whaling</i> .....	86
2.	<i>Improving the Makah's Sense of Community through Whaling</i> .....	87
C.	<i>The Makah's "Legal Right" to Whale</i> .....	89
1.	<i>The Treaty of Neah Bay</i> .....	89
2.	<i>The Trust Responsibility Owed to the Makah</i> .....	89
V.	EXISTING OPPOSITION TO THE MAKAH'S WHALING .....	90
A.	<i>Argument That Allowing Whaling Will Not Enhance the Makah's Culture</i> .....	91
B.	<i>The Floodgates Argument</i> .....	92
C.	<i>Conservationists vs. The Makah—A Need for Cultural Understanding</i> .....	92
1.	<i>Who Gets to Decide?</i> .....	93
2.	<i>Aboriginal Whaling vs. Commercial Whaling</i> .....	94
a.	<i>The Makah's Sustainable Hunt</i> .....	95
VI.	CONCLUSION .....	97

## I. INTRODUCTION

In order to comprehend why permitting the Makah to whale is an acceptable form of reparations to the tribe, one must understand the significance of whaling to the Makah. Whaling is a traditional component of the tribe's culture, which the Makah themselves voluntarily ceased because of the past dwindling populations of the gray whale species. In seeking to resume this custom, the Makah face vehement opposition from those seeking to conserve the whales; this resistance continues to arise despite the fact that the tribe explicitly reserved a right to whale in a treaty between the Makah and U.S. government. Regardless of the treaty right to whale owed to the tribe, a resumption of the Makah's whaling can also be interpreted as a form of reparations owed to the Makah because of the dreadful past treatment of the tribe at the hands of the United States government.

## II. REPARATIONS TO NATIVE AMERICANS

### A. *What Reparations Represent*

"Reparations" has generally referred to compensation for some past wrong.<sup>1</sup> Although reparations are often thought to imply compensation in monetary form, the term can to have a much broader conno-

---

<sup>1</sup> John Torpey, *Politics and the Past* 3 (John Torpey ed., Rowan & Littlefield Publishers, Inc. 2003).



tation.<sup>2</sup> Here, with regard to the Makah, the reparations are not in monetary form; instead, their reparations are the outward recognition of the Makah's existent legal right to whale as reserved in the Treaty of Neah Bay.<sup>3</sup> Some regard this outward recognition to be the most important aspect of any form of reparations.<sup>4</sup> In the well-known argument for reparations for descendants of African-American slaves, this recognition element is also vital: "Reparations are *recognition* of the severe economic harm inflicted on blacks."<sup>5</sup> Human Rights Watch has also identified reparations in this regard, noting that "[b]y 'reparations' we mean not only compensation but also *acknowledgement* of past abuses . . . ."<sup>6</sup> Likewise, by recognizing the Makah's right to whale, the federal government would attempt to compensate the Makah for past wrongs.<sup>7</sup>

It is important to compare the slave descendants' argument and that of the Makah, who do not seek a monetary compensation. In detailing what is owed to slave descendants, it has been argued that "African-American reparations are due—indeed long overdue—on the debt owed to African Americans for centuries of racially motivated wrongs committed during the periods of slavery and Jim Crow."<sup>8</sup> The Makah are similarly owed for the racially motivated wrongs that were committed against them.<sup>9</sup> In detailing an approach to reparations, Human Rights Watch has stated,

We recognize that there is a certain legal redundancy in translating the duty to make reparations for past racist practices into a duty to uphold economic and social rights . . . . However, in our view, there is something to be gained from speaking of this same duty as arising not only from [International Covenant on Economic, Social, and Cultural Rights], but also from

---

<sup>2</sup> *Id.* at 4.

<sup>3</sup> See *infra* pt. IV(C)(1) (noting that the treaty contains an explicit provision that guarantees the Makah the right of fishing and whaling).

<sup>4</sup> Karabekir Akkoyunlu, *The Watson Institute for International Studies of Brown University, Summary: "The Law and Politics of Reparations for Human Rights Abuses,"* [http://www.watsoninstitute.org/events\\_detail.cfm?id=551](http://www.watsoninstitute.org/events_detail.cfm?id=551) (Feb. 8, 2005) (website of Brown University's Watson Institute for International Studies summarizing a presentation of the law and politics of reparations for human rights abuses).

<sup>5</sup> Adrienne D. Davis, *The Case for United States Reparations to African Americans*, 7 No. 3 Human Rights Brief 11 (2000) (emphasis added).

<sup>6</sup> Human Rights Watch, *An Approach to Reparations*, <http://hrw.org/english/docs/2001/07/19/global285.htm> (accessed Nov. 13, 2005) (emphasis added) [hereinafter *An Approach to Reparations*].

<sup>7</sup> See *infra* pt. IV(A) (discussing the U.S. government-forced assimilation of American culture upon the Makah and the deliberate attempts to culturally oppress the tribe).

<sup>8</sup> Alfreda Robinson, *Troubling "Settled" Waters: The Opportunity and Peril of African-American Reparations*, 24 B.C. Third World L.J. 139, 147 (2004).

<sup>9</sup> See *infra* pt. IV(A)(2) (noting that examples of the oppression include the attempt to eradicate the Makah language, the removal of children from tribal culture, and banning tribal ceremonies).

*the distinct obligation to remedy past racist practices.* That is, we would provide another reason for doing the right thing.<sup>10</sup>

Therefore, following the view of Human Rights Watch, recognizing the tribe's right to whale and allowing the Makah to whale would be an acceptable form of reparations, as it would be the "right thing to do" because of the past racist practices against the tribe.

The function of reparations has also been expressed as to "render justice by removing or redressing the consequences of the wrongful acts . . . ."<sup>11</sup> As applied to the Makah, the past wrongful acts by the United States government of eradicating the tribe's culture<sup>12</sup> will be redressed through acknowledgment and support of the tribe's whaling, which is a traditional component of their culture.<sup>13</sup>

The phenomenon of victims of historical injustices stepping forward to seek compensation is on the rise. In some instances these groups are also looking for new rights:

Victims of imperialism, from Native Americans in the United States to numerous groups in the Fourth World, are demanding compensation for past injustices and have added dimensions to the notion of restitution by calling for new rights in place of lost traditions. These new rights run the gamut from casinos to mineral extraction and fishing treaties.<sup>14</sup>

It is essential to note that the Makah are not seeking new rights at all, but simply want to reinstate the cultural tradition of whaling, a legal right reserved to the tribe.<sup>15</sup>

## B. *Attempts to Address Past Wrongs to Native Americans*

### 1. *Establishment of the Indian Claims Commission*

One attempt by the United States to address the wrongs suffered by Native Americans came in the form of a congressionally created "quasi-judicial tribunal" to deal with specific claims of Native Americans.<sup>16</sup> "[I]n 1946, Congress created the Indian Claims Commission . . . to adjudicate the Indian tribe lawsuits pending against the federal government."<sup>17</sup> Although the Commission "had authority to award

<sup>10</sup> Human Rights Watch, *An Approach to Reparations*, *supra* n. 6 (emphasis added).

<sup>11</sup> Antonio Buti & Melissa Parke, *International Law Obligations to Provide Reparations for Human Rights Abuses*, 6 Murdoch U. Elec. J. of L. 4, ¶ 7 (Dec. 1999), <http://www.murdoch.edu.au/elaw/issues/v6n4/buti64.html> (citation omitted).

<sup>12</sup> See *infra* pt. IV(A) (discussing the U.S. government-forced assimilation of American culture upon the Makah and deliberate attempts to culturally oppress the tribe).

<sup>13</sup> See *infra* pt. III (discussing the thousands of years of whaling that influenced tribal ceremonies, art, and spiritual beliefs).

<sup>14</sup> Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* 338 (Johns Hopkins U. Press 2001).

<sup>15</sup> See *infra* pt. IV(C) (discussing how the Makah's right to whaling stems from a treaty, cultural recognition, and scientific findings that there will be no significant threat to the grey whale population).

<sup>16</sup> Roy L. Brooks, *Reflections on Reparations*, in *Politics and the Past* 103, 109 (John Torpey ed., Rowan & Littlefield Publishers 2003).

<sup>17</sup> *Id.*

*monetary relief*" to the tribes, it has been criticized as inherently flawed because "the Commission was structurally precluded from offering redress for the most important Indian claim—the return of Indian lands."<sup>18</sup> This fact clearly emphasizes the importance Native Americans place on possessing what they once had, versus receiving a mere monetary payment.<sup>19</sup> It has been observed that the Commission's "decision to equate justice with money . . . was the most serious flaw in the Commission's design and implementation."<sup>20</sup> The Commission eventually dissolved in 1978, and many believe a fatal flaw was Congress's failure to incorporate the Native American's view into the Commission's enabling legislation.<sup>21</sup> This view, "the *victim's perspective*," held the relationship of people to land in the highest regard.<sup>22</sup>

Beyond the failure to meet the expectations of the victims, the Commission was ineffective for other reasons. The Commission was overly formalistic and "results oriented" at the expense of developing an understanding of the cultural considerations impacting meaningful reparation.<sup>23</sup> For example, the Commission sometimes "engaged in formalistic analysis even with respect to moral claims."<sup>24</sup> This misguided approach led to "some decisions [calling for] redress in ways that were actually more harmful than helpful to [the] claimants."<sup>25</sup> Ultimately, attempts were made to assimilate the Native Americans into mainstream society.<sup>26</sup> Collectively, the inefficiency of the Commission stems from its attempt to impose a formalistic system on a culture that it did not understand. This lack of understanding of the cultures and beliefs of Native Americans also applies to the Makah's situation.<sup>27</sup>

## 2. *Formal Apologies*

Native Americans have successfully persuaded Congress to formally apologize for past egregious crimes as a form of legislative restitution.<sup>28</sup> The establishment of the Chief Big Foot National Memorial Park and the Wounded Knee National Memorial are examples of such apologies.<sup>29</sup> In these instances, the government "'apologized' for the

---

<sup>18</sup> *Id.* (emphasis added).

<sup>19</sup> See *infra* n. 39 and accompanying text (illustrating the importance the Sioux place on land by their refusal of over five hundred million dollars in monetary damages).

<sup>20</sup> Brooks, *supra* n. 16, at 109 (footnote omitted).

<sup>21</sup> *Id.* at 109.

<sup>22</sup> *Id.* at 109 (emphasis in original).

<sup>23</sup> *Id.* at 109.

<sup>24</sup> *Id.* at 109.

<sup>25</sup> *Id.* at 109.

<sup>26</sup> Brooks, *supra* n. 16, at 109.

<sup>27</sup> See *infra* pt. V(C) (discussing that a better understanding between the environmental and Makah cultures may lead to a compromise).

<sup>28</sup> *Indian Reorganization Act of 1934*, 25 U.S.C. § 461 (2000); *American Indian Religious Freedom Act of 1978*, 42 U.S.C. § 1996 (2000); *Native American Graves and Repatriations Act of 1990*, 25 U.S.C. § 3001 (2000).

<sup>29</sup> Barkan, *supra* n. 14, at 181.

'incident' that 'occurred' on December 29, 1890, in which U.S. soldiers wounded or killed more than three hundred Indians even though, as the legislation states, they were 'unarmed and entitled to protection of their rights.'<sup>30</sup> Unfortunately, the tribe's economic claims for restitution were ignored because "the apology limited compensation to the establishment of the memorial and park."<sup>31</sup> In this instance, the tribe's benefit is limited to the outward recognition of the past wrongs; any current needs or wants of the tribe are ignored. In the Makah's case, a formal apology would be insignificant to the tribe because it would not provide the tribe with the same opportunity for cultural revival in the way that whaling does.<sup>32</sup>

### 3. *Restoration of Lands to Native Americans*

More recently, the federal government has attempted to compensate Native Americans for past wrongs by restoring land to them. Over 540,000 acres of public domain have been restored to various tribes since 1970.<sup>33</sup> The Taos Pueblo tribe of New Mexico, for example, had the Blue Lake restored to them because Congress recognized the significant religious value to the tribe.<sup>34</sup> The significance of whaling to the Makah should be recognized in similar fashion and thereby serve as an analogous form of reparations.

Compensation in the form of restoration of lands to Native Americans is an important form of recognition because it "enables tribal people to retain their distinctiveness."<sup>35</sup> Thus, restoration of land provides the opportunity for recognition of the tribe's traditional identity. Also, regaining these lands allows the tribe to feel a sense of understanding and reconciliation.<sup>36</sup> This recognition is vital to many tribes whose identity was historically sought to be extinguished through the federal government's assimilation policy.<sup>37</sup> Regaining cultural tradition is a key element in the argument that whaling, rather than land restoration, can serve as a form of reparations to the Makah.

The Sioux Nation's predicament in the Black Hills case serves as an example of the federal government's failure in awarding a *monetary compensation* rather than land for past wrongs.<sup>38</sup> Here, the Sioux Nation was originally awarded a seventeen million dollar judgment that

---

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See *infra* pt. IV(B) (explaining why allowing the Makah to whale would be an appropriate form of reparations).

<sup>33</sup> Nell Jessup Newton, *Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System*, in *When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice* 261, 266 (Roy L. Brooks ed., N.Y.U. Press Books 1999).

<sup>34</sup> *Id.*

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

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

<sup>37</sup> See *infra* pt. IV(A)(2) (detailing federal oppression and attempts at assimilation).

<sup>38</sup> *U.S. v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

was augmented by one hundred million dollars for interest damages that accrued up to the date of the decision.<sup>39</sup> To date, the compensation judgment has grown to over five hundred million dollars, yet the Sioux have still refused to accept the money and continue to argue that “only a solution that returns some land in the Black Hills will ever be acceptable.”<sup>40</sup> The Sioux Nation’s desire to have the Black Hills land restored to them, rather than to accept a monetary payment, exemplifies how significant the land is to the tribe. Therefore, in the Sioux’s situation, no amount of money can restore to them what was lost. Similarly, monetary compensation in exchange for denying the Makah the right to whale would also prove unsatisfactory.<sup>41</sup>

Thus, different attempts by the federal government to make up for the harm suffered by Native Americans have not proven to be completely satisfactory or effective.<sup>42</sup> If the respective form of reparations is to be effective, an understanding of the history, culture, and beliefs of the tribe seeking reparations is a fundamental necessity.<sup>43</sup> Permitting whaling is an acceptable form of reparations to the Makah.<sup>44</sup>

### III. THE MAKAH AND WHALING

In order to fully appreciate why the Makah’s desire to resume hunting whales has become such a controversial issue, one must first understand the tribe’s history; a historical and cultural background of the tribe clearly demonstrates the significance of whaling to the tribe.

#### A. *Historical Background of the Makah Tribe*

The Makah currently live on a reservation at Cape Flattery in Washington State.<sup>45</sup> They have resided in this region for thousands of years as the resources acquired from the Pacific Ocean have helped sustain the tribe.<sup>46</sup> The tribe has been traditionally described as “a seafaring people,” whose livelihood came from the ocean.<sup>47</sup>

Historical evidence suggests that whaling played a significant role in the Makah’s history.<sup>48</sup> Archaeological data has found whalebones in ancient villages over 4,000 years old, and the data also suggests that

---

<sup>39</sup> *Id.* at 371–72.

<sup>40</sup> Newton, *supra* n. 33, at 267.

<sup>41</sup> See *infra* pt. IV(B) (discussing whaling as a source of cultural self-determination and sense of community for the Makah Tribe).

<sup>42</sup> See Brooks, *supra* n. 16, at 109 (noting the question of whether governmental attempts to redress claims have been unresponsive to the claims themselves).

<sup>43</sup> See *id.* (noting the failure of Congress to direct the Indian Claims Commission to consider the perspective of the Indians).

<sup>44</sup> See *infra* pts. III(C)(2)–(3), IV–VI (discussing arguments in favor of the Makah whale hunt and flaws in arguments against it).

<sup>45</sup> Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 Am. Indian L. Rev. 165, 170 (2000–01).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (quoting *U.S. v. Wash.*, 384 F. Supp. 312, 363 (W.D. Wash. 1974)).

<sup>48</sup> *Id.* at 175.

the tribe's whaling occurred continuously from 1,500 years ago up through the twentieth century.<sup>49</sup>

### B. *The Whaling Culture of the Makah*

Aside from its historical significance as a resource for food and other essentials, whaling is also a significant element in the cultural fabric of the Makah society.<sup>50</sup> With regard to the Makah's exercise of self-determination, the importance of whaling to the Makah culture has been explained: "Whaling forms the core of the Tribe's culture and is 'an integral part of the world view, heritage, and identity of the Makah.'"<sup>51</sup>

The tribe has a high degree of reverence for the whales because of the crucial role the whales have played in supporting their people.<sup>52</sup> The tribe's respect for whales is exemplified through their acts of naming entire constellations of stars after whales,<sup>53</sup> saving prized pieces of whale meat for ceremonies,<sup>54</sup> using whale remains in art,<sup>55</sup> and creating numerous songs, ceremonies, and legends devoted to whales and whaling.<sup>56</sup> Whaling also played an educational role for the Makah, as families "passed down the hunting skills and traditions to their children,"<sup>57</sup> and it was found that "children were actually learning and practicing whaling, which in turn demonstrates the central role of whaling in Makah life."<sup>58</sup>

The Makah also have religious and spiritual beliefs that stem from whales and from the tribe's whaling practice.<sup>59</sup> Before setting out on a whaling trip, members of the tribe would undergo intense ritual preparation, including abstaining from contact with family members and sexual abstinence.<sup>60</sup> It is also significant that after harpooning a whale, the Makah would "pray to the whale and sing to it, begging its spirit to turn toward the shore where the people 'stood ready to give it praise' and to honor it as a guest of the village with ceremonies and rituals."<sup>61</sup> The outward devotion to the whales is indeed a genuine expression that cannot be overlooked by those anti-whaling groups who

---

<sup>49</sup> Lawrence Watters & Connie Dugger, Student Authors, *The Hunt for Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling*, 22 Colum. J. Envtl. L. 319, 341-42 (1997).

<sup>50</sup> Miller, *supra* n. 45, at 180-88.

<sup>51</sup> *Id.* at 180 (quoting Watters & Dugger, *supra* n. 49, at 325).

<sup>52</sup> *Id.* at 180-86.

<sup>53</sup> *Id.* at 181.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 182.

<sup>56</sup> Miller, *supra* n. 45, at 181-82.

<sup>57</sup> *Id.* at 182.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 184-86.

<sup>60</sup> *Id.* at 185-86.

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



advocate that the Makah are insincere and seek to whale solely for economic gain.<sup>62</sup>

The history and culture of the Makah exemplify the close relationship and respect the tribe has historically had for whales, as well as the tribe's tradition of whaling. This age-old bond is a cornerstone in the Makah's way of life, and the tribe looks forward to once again taking part in the experience.<sup>63</sup> Therefore, the argument that the Makah should be permitted to engage in whaling because of its cultural significance to the tribe proves convincing.

### C. *The Impacts of the International Whaling Commission's Whaling Moratorium on the Makah*

#### 1. *The International Regulation of Whaling*

The natural whale population throughout the world became devastated with the growth of commercial whaling in the early twentieth century.<sup>64</sup> The Convention for the Regulation of Whaling in 1931, which was convened to address the disaster caused by the unlimited exploitation of whales, created The International Whaling Commission (IWC).<sup>65</sup> With this great depletion of whale stocks, the Makah decided to temporarily cease whaling.<sup>66</sup> The tribe voluntarily suspended whaling in 1915, before any other group.<sup>67</sup> The fact that the tribe responsibly made this self-imposed decision about an issue as significant as whaling also further exemplifies the Makah's sincere desire to preserve the animals.

Although initially ineffective, the policy of the IWC has become successful as member nations who previously supported whaling changed their stance to one of conservation.<sup>68</sup> Presently, there is a complete IWC moratorium on whaling with two exceptions: the first for scientific research, which is very controversial, and the second is an aboriginal subsistence whaling exemption, also controversial, which includes the Makah.<sup>69</sup>

#### 2. *The Rebound of the Gray Whale*

It is significant to acknowledge that at the time the moratorium was imposed, the gray whale population was estimated to be fewer

---

<sup>62</sup> See *infra* pt. V(B) (discussing the Makah's eligibility for the aboriginal subsistence whaling (ASW) exemption).

<sup>63</sup> Miller, *supra* n. 45, at 167.

<sup>64</sup> *Id.* at 250.

<sup>65</sup> Watters & Dugger, *supra* n. 49, at 326.

<sup>66</sup> Richard Kirk Eichstaedt, "Save the Whales" v. "Save the Makah": *The Makah and the Struggle for Native Whaling*, 4 Animal L. 145, 146 (1998).

<sup>67</sup> William Bradford, "Save the Whales" v. *Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes in the New International Economic Order*, 13 St. Thomas L. Rev. 155, 173 (2000).

<sup>68</sup> Watters & Dugger, *supra* n. 49, at 328.

<sup>69</sup> *Id.* at 329.

than five thousand whales, whereas now it is believed that there are more than twenty-one thousand gray whales.<sup>70</sup> This number is even greater than the total population of gray whales believed to have existed *before* the commercial whaling of the mid-1800's.<sup>71</sup> In this respect, the IWC's moratorium may be seen as a success because the numbers of this whale species have reached a non-threatened and indeed abundant level.<sup>72</sup>

In response to the Ninth Circuit's holding in *Metcalfe v. Daley*,<sup>73</sup> the National Oceanic and Atmospheric Administration (NOAA) completed an environmental assessment on how gray whales would be affected by the Makah's hunts.<sup>74</sup> This environmental assessment found that "[t]he 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, which is estimated at more than 26,600 whales."<sup>75</sup> NOAA's finding is especially illuminating because it completely defeats the claims of conservationists that argue the Makah's hunting will decimate the gray whale population.<sup>76</sup> To the contrary, the assessment continues, "Even if the gray whale population has declined below the estimated population of more than 26,635 whales, it would not have declined enough to cause any concerns for the minimal level of takes or strikes . . . by Makah whalers."<sup>77</sup> Therefore, NOAA's finding of no significant impact demonstrates that the gray whale population has rebounded and is not threatened by the Makah's limited whaling.

Due to the fact that whale populations have risen to such sustainable levels,<sup>78</sup> any hunting performed under the Makah's aboriginal subsistence exemption would pose no threat to today's whale populations. This point has been duly noted by Watters and Dugger: "By banning commercial killing of gray whales for several decades, the species has recovered to the point where, in theory, it could become available for hunting in small numbers without endangerment of extinction."<sup>79</sup> The scientific community also acknowledges that, "given [the] rebound in gray whale populations, the taking of twenty whales over five years

---

<sup>70</sup> *Id.* at 323–24.

<sup>71</sup> *Id.* at 324.

<sup>72</sup> See *infra* nn. 75–77 and accompanying text (discussing NOAA's finding of no significant impact on current population levels).

<sup>73</sup> 214 F.3d 1135 (9th Cir. 2000).

<sup>74</sup> U.S. Dept. of Commerce, Natl. Oceanic & Atmospheric Administration, & Natl. Marine Fisheries Service, *Environmental Assessment on Issuing a Quota to the Makah Indian Tribe for a Subsistence Hunt on Gray Whales for the Years 2001 and 2002* § 5.1 (July 12, 2001) (available at <http://www.animalrights.net/archives/year/2005/000109.html>) [hereinafter *NOAA Environmental Assessment*].

<sup>75</sup> *Id.* (emphasis added).

<sup>76</sup> See *infra* pt. V(B) (discussing the Makah's eligibility for the aboriginal subsistence whaling (ASW) exemption).

<sup>77</sup> *NOAA Environmental Assessment, supra* n. 74, at § 5.1.

<sup>78</sup> *Id.*

<sup>79</sup> Watters & Dugger, *supra* n. 49, at 335.

would have no effect on global populations.”<sup>80</sup> The Makah, therefore, exemplify the fact that the quota granted under the aboriginal subsistence whaling (ASW) exemption is effective because “the Makah plan is consistent with the IWC’s conservation regulations and existing subsistence exceptions . . . .”<sup>81</sup> Since the gray whale population has more than rebounded, evidenced by today’s large numbers, the Makah’s whaling will not threaten the gray whale species with the possibility of extinction. Therefore, this fact defeats the argument that the Makah should not be permitted to resume whaling because they will threaten the species’ existence.

### 3. *The “Uncertainty” of the Makah’s Hunt*

Despite NOAA’s finding detailed above, in the recent case of *Anderson v. Evans*, the Court of Appeals for the Ninth Circuit held that the Makah’s whaling plan could not be implemented because the federal government failed to prepare an environmental impact statement (EIS) pursuant to the National Environmental Policy Act of 1969 (NEPA).<sup>82</sup> The court’s NEPA analysis was based on “the ‘context’ and the ‘intensity’ of the action.”<sup>83</sup> Within the court’s further analysis of “intensity” considerations, the major deciding factor was the “uncertainty” of the environmental assessment (EA).<sup>84</sup> Elaborating on the uncertainty problem, the court found that the EA performed by the government was deficient because it did not scrutinize the effect the Makah’s whaling would have on a local whale population.<sup>85</sup> The court held,

[T]he EA simply does not adequately address *the highly uncertain impact* of the Tribe’s whaling on the *local* whale population and the local ecosystem. This major analytical lapse is, we conclude, a sufficient basis for holding that the agencies’ finding of no significant impact cannot survive the level of scrutiny applicable in this case.<sup>86</sup>

However, the court’s rationale was based on a very specific migrating whale population located “in and around the Marine Sanctuary waters and within the Strait of Juan de Fuca.”<sup>87</sup>

A closer examination of *Anderson* raises concerns regarding the court’s rationale. The court emphasized, for example, that “[o]f great importance for the purposes of this case, the context of the action includes ‘society as a whole (human, national), the affected region, the

---

<sup>80</sup> Robert R.M. Verchick, *Feathers or Gold? A Civic Economics for Environmental Law*, 25 Harv. Envtl. L. Rev. 95, 143 (2001).

<sup>81</sup> Watters & Dugger, *supra* n. 49, at 338.

<sup>82</sup> 371 F. 3d 475, 480 (9th Cir. 2002).

<sup>83</sup> *Id.* at 487.

<sup>84</sup> *Id.* at 494.

<sup>85</sup> *Id.* at 492.

<sup>86</sup> *Id.* (emphasis added).

<sup>87</sup> *Id.* at 481.

affected interests, and *the locality*.”<sup>88</sup> It is obvious that the court chose to emphasize “the locality” factor here in order to argue for the “uncertain” effect that the specific group of whales may experience.

It is less clear, however, as to why the court failed to emphasize, or even briefly discuss, the “society as a whole (human, national)” factor.<sup>89</sup> Perhaps an explanation lies in the fact that the “society” before the court here involves two contradictory groups: the Makah, who want to revive a traditional component of their culture, and those who seek to stop the whaling.<sup>90</sup> On a more philosophical level, issues may also arise with the “national” factor, depending on one’s perception of the Makah as even being a part of America’s “national” society. Nonetheless, it is perplexing why, despite explicitly stating the importance of the “society as a whole” factor, the court then failed to address this very element.

An additional noteworthy exclusion in the court’s opinion concerns its reasoning as to why the Makah ceased their whaling practices. The reasons the opinion lists include “the federal government’s discouragement and lack of assistance; a decline in demand for whale oil; social and economic dislocation within the Tribe; and the drastic decline of the gray whale population.”<sup>91</sup> This excludes the Makah’s point of view altogether. The tribe voluntarily decided to cease whaling because they were concerned about the threat of bringing a species that has been so intimate to their culture to extinction.<sup>92</sup> Therefore, regardless of the tribe’s own sincere desire to preserve the whale, leading to their cessation of whaling, the court primarily lists only socio-economic reasons. A lack of understanding of the Makah’s culture may have contributed to this omission.<sup>93</sup>

Finally, in bolstering its reasoning that the Makah’s hunt may deplete the local whale population, the court quotes a study that found, “[The whales’] fidelity to specific locations could subject them to differential harvests and potential depletions if there are *unregulated local takes*.”<sup>94</sup> It is crucial to recognize that the Makah’s whaling is not the equivalent of someone fishing in a backwoods pond without a license. Indeed, there was much fanfare surrounding the tribe’s 1999 hunt as “the small reservation and its surrounding waters were teeming with

---

<sup>88</sup> *Anderson*, 371 F.3d at 487 (quoting 40 C.F.R. § 1508.27(a) (2002) (emphasis added)).

<sup>89</sup> *Id.*

<sup>90</sup> See *infra* pt. V(C) (discussing the difficulty of the Makah in having their culture and traditions recognized by American society).

<sup>91</sup> *Anderson*, 371 F.3d at 483.

<sup>92</sup> Bradford, *supra* n. 67 at 173.

<sup>93</sup> See *infra* pt. V(C) (discussing the difficulties and the need for cultural understanding of the Makah’s whaling).

<sup>94</sup> *Anderson*, 371 F. 3d at 490 (quoting Natl. Marine Fisheries Serv. & Natl. Oceanic and Atmospheric Administration, *Review of Studies on Stock Identity in the Gray Whale (Eschrichtius robustus)* 15 (2000)) (emphasis added).

news helicopters and protest groups.”<sup>95</sup> Since the Makah’s “takes” would be highly regulated and do not pose a threat of unregulated takings,<sup>96</sup> any suggestion by the Ninth Circuit that the Makah may covertly and excessively hunt the gray whale is simply unfounded. Additionally, it is preposterous that the court would base its decision regarding the Makah’s overtly regulated plan on the potential harms of unregulated third parties.

Although the Ninth Circuit’s *Anderson* ruling does not support the Makah’s whaling efforts, the opinion’s reasoning raises some concerns. It seems incomplete in its discussion of the “society as a whole” element in regard to analyzing the context of the action. It also tends to discount the tribe’s voluntary decision to cease whaling for the benefit of the species, and bases part of its decision on an inapplicable fear of unregulated whaling.

#### IV. PERMITTING WHALING AS A FORM OF REPARATIONS TO THE MAKAH

The notion of allowing whaling as a form of reparations can be fully appreciated after one learns of the negative historical treatment endured by the Makah at the hands of the United States government.

##### A. Wrongs Inflicted by the Federal Government upon the Makah

###### 1. The Treaty of Neah Bay Negotiations

The treaty negotiations that led to the Treaty of Neah Bay did not commence under fair conditions by any stretch of the imagination. Governor Isaac Stevens was the Washington Territory Governor and Superintendent of Indian Affairs.<sup>97</sup> Stevens was notorious for his devious acts of “creating a tribe” and selecting a “chief” to negotiate with, and even bribing tribe members to sign treaties.<sup>98</sup> During the Treaty of Neah Bay negotiations, Stevens also selected his own “head chief” to negotiate with after the Makah refused because they believed all chiefs were equal.<sup>99</sup> Additional questions are raised by the fact that the negotiations were solely held and written in English, even though no Makah member read, wrote, or spoke English.<sup>100</sup> There was a three-way translation into Makah that began with a US officer translating Stevens’ English into Chinook, which was then translated by a Clallam Indian into Makah.<sup>101</sup> This suspect bargaining by the federal gov-

---

<sup>95</sup> Sarah Kershaw, *In Petition to Government, Tribe Hopes for Return to Whaling Past*, N.Y. Times A12 (Sept. 19, 2005).

<sup>96</sup> See *infra* pt. V(C)(2)(a) (quelling any concerns about inadequate regulation and detailing the Makah’s self-enforcement, including criminal penalties).

<sup>97</sup> Miller, *supra* n. 45, at 193.

<sup>98</sup> *Id.* at 194.

<sup>99</sup> *Id.* at 195.

<sup>100</sup> *Id.* at 193.

<sup>101</sup> *Id.* at 196.

ernment must therefore be rectified, especially since the government broke many of the promises made during the negotiations.<sup>102</sup>

Regardless of the language barriers, the Makah still sought to make it clear that, although they would be losing their land, they did not want to also lose their age-old custom of whaling:

The Makah made abundantly clear the importance to them of retaining, in any treaty they might sign, the tribal rights to whale and fish which they already owned. One Makah chief said: "He thought he ought to have the right to fish, and take whales, and get food where he liked." Two other chiefs expressed agreement with that statement and both also added that they "did not want to leave the salt water." A fourth chief and then a fifth also spoke up demanding to retain their rights and reemphasizing the importance to the Makah of ensuring that they were reserving to themselves the right to continue whaling, fishing and living off the ocean as they had always done. They were "willing to sell land. All [they] wanted was the right of fishing." The tribe wanted to retain all their rights to the sea and to whaling because that "was [their] country."<sup>103</sup>

The Makah's demand clearly expresses their intent to continue whaling, although later they would eventually be prohibited from doing just that. Besides the agreement to permit whaling, Stevens also promised the Makah that "the United States would support them in the future in those endeavors, protect their interests, and provide them with newer, modern equipment to become more effective whalers and fishers."<sup>104</sup> Indeed, the United States also failed to keep this commitment as the new whaling equipment was never delivered to the tribe, and "the trade goods promised in the treaty that were finally presented to the tribe many years later did not equal the full price promised in the treaty."<sup>105</sup>

Despite the ambiguous negotiations process, the Makah clearly expressed their desire for continued whaling to the government; yet the government proved to eventually ignore the tribe's primary demand and oppress the tribe.<sup>106</sup> In regard to responsibility for past treaty violations, it has been argued that:

Political societies have an obligation to keep their promises. This principle, so basic to the relations of nations, depends on members passing down responsibility for keeping a commitment from one generation to another. Treaties are made possible by this transgeneration moral practice . . . . In many cases, there never was any intention that agreements with indigenous communities would be kept. From the start governments failed to act in the good faith that is morally required of promise makers. Since legitimate excuses for nonperformance or bad faith did not exist in the case of most (if not all) of these violations, we have to count them as injustices. Are

---

<sup>102</sup> See *infra* pt. IV(A) (discussing the Makah's treaty rights and the actions taken by the U.S. government nullifying those treaty rights).

<sup>103</sup> Miller, *supra* n. 45, at 196-97 (footnotes omitted).

<sup>104</sup> *Id.* at 198.

<sup>105</sup> *Id.* at 199.

<sup>106</sup> *Id.* at 199-200.

those who admit that this is so but reject claims for reparations guilty of moral inconsistency?<sup>107</sup>

Therefore, by permitting whaling as a form of reparations to the Makah, the government will indeed keep the obligations it committed to in the Treaty of Neah Bay. The failure to endorse the Makah's whaling efforts, however, would seem to place the federal government in this realm of "moral inconsistency," especially in light of the harms the government brought upon the Makah.<sup>108</sup>

## 2. *Federal Cultural Oppression and Assimilation*

Specific federal actions that sought to control and even eradicate the Makah's culture have been detailed.<sup>109</sup> The Makah faced cultural and religious oppression from the federal government through the Neah Bay Indian Agency's efforts to "wipe out the Makah language"<sup>110</sup> and through the agency's attempt to "withdraw the children from their culture and families and raise them as 'white' children."<sup>111</sup> Federal agents also discouraged the tribe's longhouse style,<sup>112</sup> encouraged the Makah to dress like whites, selected men to serve as chiefs (similar to Steven's actions at the Treaty of Neah Bay negotiations), and suppressed numerous cultural activities, including dances, because they were considered "heathenish and barbarous."<sup>113</sup> The tribe's secret religious and curing societies' ceremonies were also banned;<sup>114</sup> therefore, some Makah were forced to travel to an island off the tip of Cape Flattery in order to hold these ceremonies.<sup>115</sup> Today, such a forced "exodus" due to federal restrictions would undoubtedly raise vehement public opposition. The tribe must have recourse for these past wrongs.

In addition, the federal government historically attacked the structure of Makah families through assimilation and oppression efforts. Federal agents sought to segregate elder tribal members ages fifty-five and up so that the younger Makah could no longer be influenced by these elders, thereby leaving them more susceptible to learn the "civilized" American ways.<sup>116</sup> Furthermore, Makah parents were arrested if they did not send their children to boarding school.<sup>117</sup> Ultimately, the Makah children endured a great deal. They were routinely

---

<sup>107</sup> Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* 24–25 (Blackwell Publishers, Inc. 2002).

<sup>108</sup> See *infra* pt. IV(A)(2) (discussing the deliberate attempts to eradicate the Makah cultural traditions).

<sup>109</sup> Miller, *supra* n. 45.

<sup>110</sup> *Id.* at 202.

<sup>111</sup> *Id.*

<sup>112</sup> See generally Makah.com, *Longhouses*, <http://www.makah.com/longhouses.htm> (accessed Nov. 12, 2005) (for more information about Makah longhouses).

<sup>113</sup> Miller, *supra* n. 45, at 202-03.

<sup>114</sup> *Id.* at 203.

<sup>115</sup> *Id.* at 203-04.

<sup>116</sup> *Id.* at 204.

<sup>117</sup> *Id.* at 204-05.

punished if they spoke their native tongue,<sup>118</sup> they were required to dress in American clothing, and forced to accept the Christian religion.<sup>119</sup> Unfortunately, these attacks proved successful as Makah children became alienated from both their families and culture.<sup>120</sup> Collectively, the government efforts sought to exterminate the Makah's identity; hence, these past injustices to the tribe must be remedied.

The history of the Makah oppression highlights how permitting the tribe to whale, regardless of the legal right they possess under the Treaty of Neah Bay, may serve as a form of cultural reparations. The reparations notion is clearly supported in the argument that "the U.S. Government has a moral, if not quite legal, duty to provide restitution to the descendents of the tribal nations it destroyed and oppressed."<sup>121</sup> Permitting the tribe to whale is an acceptable form of reparations for the past harsh treatment because of the many benefits whaling provides to the Makah.

*B. Why Allowing the Makah to Whale is an Acceptable Form of Reparations*

*1. Enhancing the Makah's Cultural Determination through Whaling*

Aside from providing the Makah with a sense of justice, to allow the Makah to resume whaling also enhances the tribe's perception of its cultural self-determination. The value of enhancing the Makah's culture may appear intangible to some, yet it is vital to the tribe because it recognizes the cultural significance of whaling to the Makah. As Verchick explains,

[E]nvironmental problems cannot be successfully or completely addressed without a firm commitment to understanding each problem's social setting. The Makah unearthed their once-proud whaling tradition for social and spiritual reasons; one should not doubt this, but there was more to it than that. The Makah are one of so many native tribes that have been swindled, insulted, ignored, and economically impoverished, and they were staging an act of political defiance. In Deweyan terms, the Makah's right to whale was both an end in itself, and a means to yet another set of ends, in this case self-rule and cultural identity. From the day the Makah rooted their arguments in the tribe's treaty rights, it should have been clear that whatever else this debate would be about, it would be about the Enlightenment goals of emancipation and self-realization.<sup>122</sup>

Therefore, the practice of whaling will benefit the Makah because they would have the opportunity to "control their own destiny" with regard to an activity that has traditionally played an essential role in

---

<sup>118</sup> *Id.* at 204.

<sup>119</sup> Miller, *supra* n. 45, at 205.

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

<sup>121</sup> Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 Mich. J. Intl. L. 1, 71 (2000).

<sup>122</sup> Verchick, *supra* n. 80, at 144.



their culture. The Makah's act of engaging in whaling expresses the tribe's own cultural identity; the same identity that the government previously attempted to eradicate. Miller elaborates:

The determination of the Makah Tribe to pursue its ancient whaling custom is an excellent example of a distinct group of people and a separate political state defining its culture and exercising cultural self-determination by practicing that culture according to its traditions . . . . It is important to the Makah to stay separate and distinguishable from the Anglo-American society that tried so hard to destroy Makah culture and to assimilate its people into the American "melting pot." The Makah have shown that they will fight to keep their own "personality" as a nation, race, and people and will teach this culture to their children.<sup>123</sup>

In essence, re-commencement of whaling both symbolizes and makes tangible the Makah's historic struggle to preserve their way of life; it is the most visible expression of the Makah's valiant attempt at cultural revival.

## 2. *Improving the Makah's Sense of Community through Whaling*

The Makah's present quality of life will likely rise as the Makah revive their whaling tradition. The tribe currently endures the harsh living conditions that plague many other Native American tribes; this includes a fifty percent unemployment rate, drug abuse, and alcoholism.<sup>124</sup>

Household incomes of members of the tribe average about only seven thousand dollars per year, and a rise in juvenile crime has also been reported.<sup>125</sup>

However, many Makah believe these harsh conditions will soon change because of the tribe's whaling. "Makah leaders believe that a return to whaling will not only contribute to the Tribe's subsistence and economic needs, but it will also help to revive a sense of community, self-worth and spirituality."<sup>126</sup> The sense of community, for example, will undoubtedly be strengthened because the sharing of food and work related to whaling will serve to help bond the community.<sup>127</sup>

In addition, the Makah's sense of spirituality will improve with the whaling rights as many of the tribe's traditional beliefs, customs, and ceremonies will be revived. For example,

Part of the spirituality of hunting cultures around the world includes honoring and respecting the animals that preserve their lives and families. These cultures emphasize the mutual dependence animals and humans have on each other and they strive to gain the favor or good will of animal souls by observing appropriate rituals and etiquette . . . .<sup>128</sup>

---

<sup>123</sup> Miller, *supra* n. 45, at 206–08.

<sup>124</sup> Bradford, *supra* n. 67, at 173.

<sup>125</sup> Watters & Dugger, *supra* n. 49, at 324.

<sup>126</sup> *Id.*

<sup>127</sup> Miller, *supra* n. 45, at 235.

<sup>128</sup> *Id.* at 237.

An increase in economic and market opportunities should emerge within the Makah community as a result of the economic benefits derived from the various exchanges and dealings that stem from the whale meat transactions. Whaling would therefore play a vital part in reviving the Makah's weak native economy as members exchange the whales' meat and bones. It is critical to acknowledge, however, that the extent of the Makah's economic benefit from, and harm to, the species greatly differs from that of the commercial whaling industry.<sup>129</sup>

This new meat source might also benefit the Makah tribe's overall nutrition and health. Scientific research has found marine mammal fats to be especially healthy, as they can prevent cardiovascular disease.<sup>130</sup> A return to this traditional source of protein may be especially essential since "the Makah and other American Indians are suffering with an epidemic of diabetes that is also partly attributable to western foods replacing traditional diets. Perhaps a return to their historical diet would help improve the health of the Makah Tribe."<sup>131</sup>

Regardless of the enhancement of the Makah's culture and quality of life that would be realized from whaling, it has been argued that monetary compensation from the government to the tribe could benefit the Makah just as well.<sup>132</sup> This argument advocates that "by offering compensation to the tribe in lieu of the treaty right to whale," the federal government could "acknowledge the Makah's treaty rights, fulfill any trust obligations to the Indians, and provide the Makah with the financial resources to explore alternative, nonlethal means of preserving their cultural whaling traditions."<sup>133</sup>

The monetary compensation argument is inherently flawed, however. Most importantly, it fails to account for the great cultural significance whaling has to the Makah<sup>134</sup> and instead focuses on the tribe's potential economic gain. This proves ironic because it demonstrates that, even today, many believe they can impose their own beliefs and values on the Makah, as happened years ago through the federal government's assimilation policy.<sup>135</sup>

Collectively, whaling will acknowledge and strengthen the Makah's identity, facilitate a spiritual revival, serve as a catalyst for economic growth, and improve the overall health of the tribe. For these reasons, allowing whaling as a form of reparations to the Makah will

---

<sup>129</sup> See *supra* pt. III(C)(2) (discussing the impact of whaling and the rebound of the gray whale).

<sup>130</sup> Watters & Dugger, *supra* n. 49, at 240.

<sup>131</sup> *Id.* at 241.

<sup>132</sup> Lee Steffy Jenkins & Cara Romanzo, *Makah Whaling: Aboriginal Subsistence or a Stepping Stone to Undermining the Commercial Whaling Moratorium?* 9 Colo. J. Intl Env'tl. L. & Policy 71 (1998).

<sup>133</sup> *Id.* at 103.

<sup>134</sup> See *supra* pt. III(B) (discussing the whaling culture of the Makah).

<sup>135</sup> See *supra* pt. IV(A)(2) (discussing the deliberate attempt to eradicate and oppress the Makah culture).

benefit the tribe in ways that a simple monetary compensation could never accomplish.

### C. *The Makah's "Legal Right" to Whale*

In the 1997 IWC meeting, the United States sought approval for the Makah to resume whaling based on three grounds: (1) the 1855 treaty rights of the tribe, (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.<sup>136</sup> These factors have been addressed above, and further examination of (1) and (2) proves that these are undoubtedly justifiable grounds for permitting the Makah to whale.

#### 1. *The Treaty of Neah Bay*

The Makah tribe has a treaty with the United States government dating back to 1855 that openly allows the tribe to whale.<sup>137</sup> The Makah's legal claim arises from this treaty:

In the 1855 Treaty of Neah Bay, the Makah Tribe explicitly reserved "the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations." Although the Makah Tribe had not hunted gray whale for seventy years prior to 1998, the United States must still uphold the Treaty of Neah Bay . . . . The United States Supreme Court affirmed the validity of treaties such as this one . . . in *Board of Commissioners v. United States* . . . .<sup>138</sup>

The treaty contains an explicit provision that guarantees the Makah the "right of taking fish and whaling."<sup>139</sup> Regardless of the federal government's recognition of the validity of the treaty, the tribe's resumption of this right to whale may also be justified as a form of reparations for the many harms committed against the tribe by the United States government.<sup>140</sup>

#### 2. *The Trust Responsibility Owed to the Makah*

The historic treatise negotiations with Native American tribes, in order to obtain their lands, created a trust responsibility for the federal government; the government owes educational, medical, and financial support for tribal members.<sup>141</sup> The Supreme Court supports

<sup>136</sup> Eichstaedt, *supra* n. 66, at 155.

<sup>137</sup> *Treaty of Neah Bay* art. IV (Jan. 31, 1855), 12 Stat. 939 ("The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians . . . .").

<sup>138</sup> Rosemary Fowles, Metcalf v. Daley: *Consideration of the Significant Impact on the Gray Whale Population in an Environmental Assessment*, 6 *Ocean & Coastal L.J.* 397, 398 (2001).

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

<sup>140</sup> See *supra* pts. IV(A)(1)–(2) (discussing the deliberate attempt to oppress the Makah culture).

<sup>141</sup> Miller, *supra* n. 45, at 216.

the trust responsibility theory and has held that, “in exercising its broad authority in Indian affairs, Congress and the Executive Branch are charged with the responsibilities of a guardian acting on behalf of the dependent tribes and individual Indians.”<sup>142</sup> Therefore, the federal government should support whaling as a form of reparations to the Makah because the benefits the tribe will receive from whaling is consistent with the trust responsibility the government owes to the Makah. This trust responsibility, as Miller writes,

[R]equires the United States to manage and handle tribal lands and assets as a guardian. The United States has repeatedly recognized this trust duty and has acted in various ways to enhance and strengthen the authority of tribes and their practical ability to govern and to manage tribal resources. The federal government, through recognition of government-to-government relations with tribes and through many statutes that protect and support tribal governments, is pursuing a well-established modern day official Indian policy of “fostering tribal self-government.” . . . In fact, the United States expressly stated that the trust duty played an important role in its decision to support the Makah’s cultural right to resume whaling.<sup>143</sup>

To allow the Makah to engage in whaling, therefore, fulfills this policy of allowing the tribe to “manage tribal resources,” as the Makah will once again hunt whales in a sustained fashion and satisfy the needs of the tribe.<sup>144</sup>

The government would effectively exercise the trust responsibility by allowing the Makah to whale because, as Bradford notes,

The judicially-constructed doctrine known as the “trust responsibility” creates an explicit duty binding the U.S. to uphold Indian treaty obligations and act as trustee in promoting the economic and political development of the Indian tribes . . . . Thus, for the Makah the trust responsibility mandated the legal conclusion that the U.S. was obligated to protect and advance their interests in whaling as a subsistence economic pursuit harmonious with the social and cultural aspects of Makah tribal life notwithstanding the views of whaling of U.S. officials or of the domestic public.<sup>145</sup>

Therefore, the trust responsibility owed to the Makah supplements the reparations argument and proposes that the government owes the tribe the right to engage in whaling.

## V. EXISTING OPPOSITION TO THE MAKAH’S WHALING

It is significant to note that many of the positions against the Makah whaling indeed fail to take the Makah’s culture and history into account. Overlooking such important factors is an enormous defi-

---

<sup>142</sup> *Id.* at 217.

<sup>143</sup> *Id.* at 217–18.

<sup>144</sup> See *infra* pt. V(C)(2)(a) (discussing the Makah management plan for sustainable whaling).

<sup>145</sup> Bradford, *supra* n. 67, at 190.

ciency because a total understanding of the tribe is vital to the reparations through whaling argument.

A. *Argument That Allowing Whaling Will Not Enhance the Makah's Culture*

Some feel that allowing modern day whaling will not benefit the tribe in any meaningful way.<sup>146</sup> On the contrary, whaling provides many benefits to the tribe as examined above.<sup>147</sup> Proponents of this argument claim the Makah do not qualify for the IWC's exemption because,

(1) the temporal continuity of the Makah ASW tradition had been broken by the failure of the Makah to hunt whales since 1915, and whaling was no longer central to the Makah's culture; (2) the Makah did not have a subsistence or nutritional need for whales because their physical and economic survival had not been dependent upon whaling for more than eighty years; and (3) the planned use of modern whaling methods further demonstrated that the Makah intended to engage in commercial, rather than subsistence, whaling, which was not within the scope of the ASW Clause.<sup>148</sup>

The Makah's response to this argument is centered on the widespread ignorance towards the Makah's culture and on the majority of American society's own ethnocentrism. The Makah have stated, "We can only hope that those whose opposition is most vicious will be able to recognize their ethnocentrism - subordinating our culture to theirs."<sup>149</sup> Dr. William Bradford details the Makah's counterargument in a writing on the Fifth Annual Tribal Sovereignty Symposium: "The Makah countered by excoriating the cultural narcissism, arrogance, and racism of a dominant society that for centuries had pillaged the natural environment for financial gain . . . ." <sup>150</sup> Bradford further noted the aspect of cultural revival,

The very prospect of resuming whaling, a collective project . . . had sparked a renaissance in traditional cultural and religious observance. When their whalers ultimately took to the sea to risk their lives for nothing more than the spiritual satisfaction of bringing food to their people the entire Makah tribe would be "reaching back in time and holding hands with [their] great-grandfathers."<sup>151</sup>

The counterargument exemplifies the difficulty the Makah still encounter today in having their culture and traditions recognized.

<sup>146</sup> *Id.* at 192-93.

<sup>147</sup> See *supra* pts. IV(B)(1)-(2) (discussing the cultural benefits the Makah receive from whaling).

<sup>148</sup> Bradford, *supra* n. 67, at 192.

<sup>149</sup> Native Americans and the Environment, *The Makah Indian Tribe and Whaling: A Fact Sheet Issued by the Makah Whaling Commission*, "14. Are you aware that your whaling plan has aroused intense opposition around the United States and abroad?" <http://www.cnie.org/NAE/docs/makahfaq.html> (July 21, 1998).

<sup>150</sup> Bradford, *supra* n. 67, at 195.

<sup>151</sup> *Id.*

### B. *The Floodgates Argument*

The floodgates argument supports the idea that allowing the Makah an ASW quota will pave the way for other nations, like Japan, who also have a history of whaling, to seek ASW exemptions. There are also concerns that the Makah's quota "would establish a precedent for similar claims from increasingly sophisticated, activist, and well-funded aboriginal groups worldwide against whom the moratorium has been operating to inflict serious economic deprivation."<sup>152</sup>

The Makah have provided three valid counterarguments to these claims. First, the Makah note that the potential ASW quota assigned for the Nuu-chah-nulth, an indigenous tribe from Canada, "would not impact whale population dynamics or sustainability."<sup>153</sup> Next, the Makah also emphasize how the Nuu-chah-nulth's history made them an unlikely candidate for an ASW exemption because whaling was not historically an essential part of their culture.<sup>154</sup> Finally, the Makah express how they are entitled to whale "based on their reserved sovereign right under the Treaty."<sup>155</sup>

The Makah's counterarguments demonstrate that the floodgates argument is not as concrete as many believe. This failing argument may perhaps be based on the deeper fear that the whales may become endangered again—a fear the recent NOAA environment assessment proves is unfounded.<sup>156</sup> Ultimately, it seems that many of the anti-whaling arguments stem from a lack of understanding of the Makah's culture and the true minimal impact the tribe would have on the whale population, which, as stated below, is considerably less damaging than that of commercial whalers.<sup>157</sup>

### C. *Conservationists vs. The Makah—A Need for Cultural Understanding*

Constant tension and disagreement exist between environmental groups and the Makah tribe. The environmental groups that seek to protect and conserve the whales stand in opposition to the Makah who want to hunt them: an obvious conflict. Yet, it seems that a lack of understanding of the Makah's culture and history also plays a major part in this tension: "According to the Makah, environmental organizations, rather than attempt to understand the cultural importance of whaling to the tribe and exhibit a modicum of multicultural tolerance,

---

<sup>152</sup> *Id.* at 196.

<sup>153</sup> *Id.* at 197.

<sup>154</sup> *See id.* at 197 (noting that "most of the Nuu-chah-nulth had only a peripheral connection to whaling").

<sup>155</sup> *Id.*; *see also supra* pt. IV(C)(2) (discussing the treaty that guarantees the Makah whaling rights).

<sup>156</sup> *See supra* pts. III(C)(1)–(2) (discussing the finding of no significant impact in the NOAA Environmental Assessment).

<sup>157</sup> *See infra* pt. V(C)(2) (discussing the difference between the impact of commercial whaling and the Makah whaling).

were interested only in dictating the terms of continuing cultural oppression."<sup>158</sup> In spite of this, efforts to preserve the Makah's cultural self-determination continues:

Notwithstanding an aggressive one-hundred and fifty-year program to eradicate their culture, the Makah still persist and thrive today. The Makah continue to identify themselves as a separate society with traditional cultural aspects separate from the dominant American society. In fact, their dormant whaling traditions played a key role in keeping their culture distinct, separate, and alive. Whales and whaling traditions have always played a major role in the lives and culture of the Makah and are common themes in their songs, legends, art, dance, geographic names and thoughts.<sup>159</sup>

The environmentalists' ignorance towards the Makah has also been recognized. As Verchick states, "The environmentalists, correctly concerned with the welfare of oppressed species, showed little awareness of their oppressed brothers and sisters on the Makah reservation."<sup>160</sup>

An understanding of each group's desires is critical if there is ever to be a mutual agreement between these groups. If this understanding is not reached, then either of the groups' positions can easily dominate the other. In writing about indigenous people and the international environmental community, Rupa Gupta notes,

Environmentalists have advocated a right to life for whales by pointing to scientific evidence of the whale's sentience, intelligence and social propensities. Without disputing the merits of their argument, this is, at best, only one vision of the environment. A competing indigenous vision favors the hierarchy of cultural survival over physical survival. To the extent that the protection of whales promotes "a social environment congenial to the majority, it cannot amount to a right" that extinguishes an indigenous minority's equally plausible worldview.<sup>161</sup>

Therefore, although an understanding between the two groups may lead to a compromise, the very fact that a conflict exists between a hunting culture and those who seek preservation also raises the controversial issue of which group ultimately gets to decide the issue.

### 1. *Who Gets to Decide?*

As mentioned above, the Makah and conservationists are innately opposed to each other on the whaling issue, but it seems that the stance of the environmentalists mimics what the U.S. government attempted to do to the Makah culture years ago, namely to impose a new

---

<sup>158</sup> Miller, *supra* n. 45, at 270.

<sup>159</sup> *Id.* at 195.

<sup>160</sup> Verchick, *supra* n. 80, at 144.

<sup>161</sup> Rupa Gupta, *Indigenous Peoples and the International Environmental Community: Accommodating Claims through a Cooperative Legal Process*, 74 N.Y.U. L. Rev. 1741, 1765 (1999) (quoting Michael Hartney, *Some Confusions Concerning Collective Rights*, in *The Rights of Minority Cultures* 202, 212 (Will Kymlicka ed., 1995)).



set of values on them. The actions by animal rights groups have been described as,

[T]rying to impose their “culture,” a belief or value system that humans should not kill animals, onto ancient cultures whose values, customs and traditions rely on utilizing whales . . . . It appears to be the height of ethnocentric presumption for a relatively modern value system, the animal rights movement, to tell the Makah and other hunting cultures how they should live.<sup>162</sup>

There appears to be no easy solution to this difficult situation, and perhaps these interests will always conflict. Miller concludes,

Decisions either way will inevitably clash with various interests. As difficult as it might seem, decisions on these issues will have to be made, whether by society at large, or by law making bodies, courts, or international organizations, because distinct cultures and political entities will increasingly exercise cultural self-determination on a whole range of subjects in the future.<sup>163</sup>

The ASW exemption created by the IWC may be interpreted as a decision by an international organization to address this issue. Although the IWC may not offer the perfect solution, it is a helpful starting point because it takes into account both the threat posed by excessive whaling as well as the need to permit whaling for those who have traditionally whaled. The fact that the Makah will *not* have the same destructive impacts on whale populations as the commercial whaling industry had in the past is a significant factor that cannot be overstated.

## 2. *Aboriginal Whaling vs. Commercial Whaling*

Perhaps the Makah’s whaling would become less controversial if it was understood that: (1) the impacts of aboriginal whaling on whale populations are significantly less than that of commercial whaling practices, and (2) that hunting whales is not as immoral as generally perceived when done in a sustainable manner. Aboriginal whaling is defined as,

[W]haling 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 traditional dependence on whaling and the use of whales.<sup>164</sup>

Research was recently conducted on the subsistence economy of the Makah, which found that “many households received foods from hunters such as meat (50% of households) and fish (90% of house-

---

<sup>162</sup> Miller, *supra* n. 45, at 245.

<sup>163</sup> *Id.* at 246.

<sup>164</sup> Whale and Dolphin Conservation Society, *ASW and the IWC*, <http://www.wdcs.org/dan/publishing.nsf/allweb/991DF40C645001BF80256F3500551514> (accessed Nov. 12, 2005).



holds . . .).<sup>165</sup> This study went on to find that 82% of Makah households would like to try whale meat if a whale was caught, and suggests “gray whale meat will fit into an existing pattern of subsistence hunting.”<sup>166</sup>

The difference between the Makah and commercial whalers is that “[t]he Makah may be a more sympathetic claimant for a whaling exemption because the reservation *lacks any significant industry*.”<sup>167</sup> The fact that the Makah’s whaling is sustainable and not controlled solely by an economic driving force is also significant, as noted by Paul: “What truly distinguishes the Makah is the conjunction of their economic dependence and their aboriginal status . . . . ‘[A]boriginal subsistence’ transforms an argument about economic self-interest into an assertion of cultural sovereignty.”<sup>168</sup> The non-commercial nature of the ASW exception also guarantees that the Makah will not abuse their exempt status for economic gain because the hunting tribe is “not under contract to deliver the products of their whaling to any third person.”<sup>169</sup> There is also the requirement that “the meat and products of such whales . . . be used exclusively for local consumption by aborigines.”<sup>170</sup>

#### a. *The Makah’s Sustainable Hunt*

After understanding that the Makah’s hunt is not fueled by the desire to make a profit as commercial whalers, but instead by the tribe’s culture and tradition, this desire to hunt becomes much more acceptable. The fact that the Makah’s actions take place on a sustainable level, absent the threat of extinction, also justifies the tribe’s exemption to the IWC’s whaling moratorium. An additional question frequently posed to the tribe asks if their whaling will be regulated and, if so, by whom.<sup>171</sup> In response, the Makah state they have adopted “a highly detailed whale management plan” that was developed in part with the National Marine Fisheries Service, who will also

---

<sup>165</sup> Native Americans and the Environment, *The Makah Whaling Conflict: Arguments Against the Hunt*, <http://www.cnie.org/NAE/cases/makah/m5.html> (accessed Nov. 12, 2005).

<sup>166</sup> *Id.*

<sup>167</sup> Paul, *supra* n. 121, at 72 (emphasis added).

<sup>168</sup> *Id.*

<sup>169</sup> Alexander Gillespie, *Aboriginal Subsistence Whaling: A Critique of the Interrelationships between International Law and the International Whaling Commission*, 12 *Colo. J. Intl. Envtl. L. & Policy* 77, 106 (2001) (quoting *Convention for the Regulation of Whaling* art. 3(4) (Sept. 24, 1931) (available at <http://www.wdcs.org/dan/publishing.nsf/allweb/0AF25C30FC2DD768802569EC004B79D5>) (superseded by *International Convention for the Regulation of Whaling* (Dec. 2, 1946)).

<sup>170</sup> *Id.* at 80 (quoting Ray Gambell, *The Bowhead Whale Problem and the International Whaling Commission*, Report of the International Whaling Commission, Special Issue No. 4 at 1, Office of the Commission 1982) (emphasis added).

<sup>171</sup> Native Americans and the Environment, *supra* n. 149, at “15. Will Whaling be regulated and if so, by whom?” <http://www.cnie.org/NAE/docs/makahfaq.html>.

help regulate the whaling.<sup>172</sup> The fact that their hunt will be enforced by regulation provides additional safeguards.

In thinking of a way to counter the opposition to the Makah's whaling, it has been suggested that:

[I]f an EIS is prepared, and the determination is made that the proposed whaling will proceed with adequate safeguards, then likely opposition to the hunt will be decreased . . . . The EA ensures that scientific analysis and supporting data would be released to the public informing them of the report's findings and any safeguards in place. Informed opinions rather than emotional outcries might result, allowing the Makah Tribe to resume a cultural practice in a manner "consistent with conservation of natural resources."<sup>173</sup>

NOAA's recent EA, mentioned above, has come to this very result.<sup>174</sup> Therefore, if the EA receives widespread attention, it has the potential to inform many of the fact that the Makah's hunt would be sustainable, and thereby serve to calm many fears.

The Makah themselves have also publicly detailed "adequate safeguards" that are incorporated into their whaling management plan. Besides limiting whale harvests to five gray whales per year,<sup>175</sup> the agreement contains additional requirements pertaining to the number of strikes, management, utilization and enforcement, and inspection and reporting.<sup>176</sup>

With respect to the use of meat and whale products, the management plan requires that, "[w]hale products taken pursuant to this management plan *shall be used exclusively for local consumption* and ceremonial purposes and may not be sold or offered for sale. No member may receive money for participation in whaling."<sup>177</sup> The requirement for local consumption helps to prevent any of the whaling from being utilized in a traditionally commercial and exploitative way.

In addition, the management plan considers enforcement. The plan holds that "[a]ny member found whaling in violation of this management plan or the terms of a whaling permit issued by the Commission and approved by the Council shall be subject to prosecution in Tribal Court for a Class AA criminal offense . . . ."<sup>178</sup> The Makah's inclusion of criminal sanctions for violation of the management plan demonstrates the tribe's dedication to the plan and to whaling in a responsible, sustainable manner.

---

<sup>172</sup> *Id.*

<sup>173</sup> Fowles, *supra* n. 138, at 411 (quoting The Makah Nation, *Makah Whaling*, <http://www.makah.com/whaling.htm> (accessed Nov. 12, 2005)).

<sup>174</sup> *See supra* pt. III(C) (discussing the rebound of the gray whales).

<sup>175</sup> Makah Whaling Commission, *Makah Management Plan for Makah Treaty Gray Whale Hunting for the Years 1998-2002*, <http://www.enie.org/NAE/docs/makahplan.html> (accessed Nov. 12, 2005) (a website created by Native Americans for the Environment that provides the Makah's whaling management plan).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (emphasis added).

<sup>178</sup> *Id.*

## VI. CONCLUSION

After reviewing the history and culture of the Makah, the significance of whaling to the tribe becomes obvious. The history of the Makah, like many other Native American societies, is unfortunately stained with great injustices committed by the United States government. Therefore, the argument may be made that the federal government should permit the Makah to whale as a form of reparations to the tribe to help compensate them for past wrongs. In opposition to the many anti-whaling arguments, it is critical to emphasize both the cultural significance of whaling to the Makah and the fact that their hunting is limited and will take place at a sustainable level with no significant impact on the gray whale population. To permit the resumption of whaling is, therefore, deserved as a form of reparations. This is a small price to pay for the horrendous past treatment of the Makah by the federal government.

