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Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling

Robert J. Miller

Arizona State University School of Law

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EXERCISING CULTURAL SELF-DETERMINATION: THE MAKAH INDIAN TRIBE GOES WHALING

Robert J. Miller*

Save a Whale, Harpoon a Makah¹

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*Assistant Professor, Northwestern School of Law of Lewis & Clark College; B.S., 1988, Eastern Oregon University; J.D. 1991, Northwestern School of Law of Lewis & Clark College; Judge Pro Tem, Northwest Intertribal Court System; Board Member National Indian Child Welfare Association, Inc. and Oregon Native American Business Entrepreneurial Network. Member, Eastern Shawnee Tribe of Oklahoma. The author thanks Professors Ed Brunet, Bill Funk, and Holly Doremus for reviewing drafts of this Article and Steve Wehling for his research assistance. This Article is dedicated to Hazel L. Miller.

1. The slogan was worn by whale hunt protesters and carried on placards at demonstrations in Washington. Patrick O'Callahan, *Whales vs. People*, NEWS TRIBUNE (Tacoma, Wash.), May 26, 1999, at E10; Alex Tizon, *E-mails, Phone Messages Full of Threats, Invective*, SEATTLE TIMES, May 23, 1999, at B4 (stating that protesters entreated people to "Save a whale, harpoon a Makah"). This saying is similar to the "Save a Fish, Spear a Squaw" slogan used by groups fighting tribal fishing rights in the Great Lakes region in the 1970s. See Weston Kosova, *Race Baiting*, NEW REPUBLIC, June 11, 1990, at 16; DONALD L. FIXICO, *THE INVASION OF INDIAN COUNTRY IN THE TWENTIETH CENTURY: AMERICAN CAPITALISM AND TRIBAL NATURAL RESOURCES* 117 (1998) (stating that bumper signs and posters in the Great Lakes protests read "Spear an Indian" and "Spear a Squaw").

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I. Introduction

American Indian tribes and Alaskan and Hawaiian natives have long suffered under the cultural oppression of European and American societies. As a result many tribal traditions, cultures, and languages have disappeared from the North American continent and Hawaiian Islands. Today, American

Indian tribes and native individuals are still forced to fight to preserve and to exercise their remaining traditions and cultural practices.² These entities are fighting to overcome the influence of the dominant American society and to avoid being assimilated into the American "melting pot." This struggle will continue into the foreseeable future as these native societies and individuals try to maintain their cultures and strive to set the agenda for their own cultural practices, or in other words, as they strive to exercise cultural self-determination.

The challenge to preserve a practicing tribal culture on its own terms is well exemplified by the recent Makah Indian Tribe whale hunts. In recent years, the Makah Tribe determined to renew its long dormant cultural, religious and legal rights regarding whales by reviving its traditional hunts. The Makah plan to continue this cultural tradition into the future. In this effort, the Tribe has become an excellent example of a culture which preserved its important ancient traditions within its own culture and withstood the effects of time, assimilation by American society, and outright official federal oppression, and then revived its cultural, religious, and legal rights by resuming its traditional whale hunting.

In May 1999, after years of legal, cultural and religious preparations, a Makah tribal whaling crew harpooned and killed a California gray whale. The 1999 hunt was the first for the Tribe in over seventy years. The uproar of media coverage, the outrage of some animal rights groups, and the outpouring of support for the Makah was intense. The Tribe continued to hunt gray whales, albeit unsuccessfully, in the spring of 2000. A federal appeals court decision in June 2000, however, raised some question whether the Tribe would be allowed to continue whaling.³

The Makah situation demonstrates that the effort to exercise cultural self-determination is an ongoing struggle. Tribes and native peoples have to remain ever vigilant and always ready to defend and to exercise their cultural practices and to preserve them by teaching them to their children and grandchildren if their cultures are to survive. This Article examines Makah whaling to study how a tribe or separate people can keep a dormant cultural

2. See, e.g., Robert J. Miller, *Speaking with Forked Tongues; Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 544 nn.6-7, 556-63 (1991) [hereinafter Miller, *Speaking with Forked Tongues*] (discussing seventy years of litigation about tribal treaty fishing rights in the Pacific Northwest, which included violent demonstrations, threats against Indian fishers, and political actions, and years of litigation, demonstrations, and violence in the Great Lakes region about tribal treaty fishing rights).

3. *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000). On July 13, 2001, the United States issued an environmental assessment which will allow the Makah whaling to proceed on an expanded scale. Nat'l Oceanic & Atmospheric Ass'n, U.S. Dep't of Commerce, Marine Mammals: Environmental Assessment on Allocating Gray Whales to the Makah Tribe for the Years 2001 and 2002, 66 Fed. Reg. 37,641 (July 19, 2001); see also Postscript at *infra* text accompanying notes 562-63.

practice alive over time and how it can exercise cultural self-determination to revive dormant customs and to set the agenda for how its traditions will be practiced. Perhaps the most important lesson to be learned, which is well exemplified by the Makah, demonstrates that a tribe or people has to first struggle to keep its culture and traditions alive within its own cultural and political system; only then will the challenge of keeping the cultural practices alive despite outside pressures ever arise.⁴

In exercising their cultural whaling rights, however, several questions arise about Makah and other native whaling: Do the Makah have the legal and moral right to determine what their cultural rights are and to pursue them even if they conflict with the views of the dominant non-Makah society or the views of some animal rights groups? Do the Makah have the right to revive dormant cultural practices and to resume hunting whales which were only recently removed from the United States endangered species list?

Some people would answer these questions in the negative either because they are whale preservationists who think whale rights to life trump human cultural rights or because they fear Makah whaling is the first step down a "slippery slope" to the resumption of worldwide commercial whaling.⁵ Many protesters and commentators also bemoan the weakening of the United States' leadership role in the fight against whaling because the United States promotes both the Makah and other native whale hunts.⁶ These issues, and

4. Some Makahs dissented against resuming whaling. Hal Bernton & Lynda V. Mapes, *Court Voids Approval of Makah Whaling*, SEATTLE TIMES, June 10, 2000, at B1; Lawrence Watters & Connie Dugger, *The Hunt for Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling*, 22 COLUM. J. ENVTL. L. 319, 333-36 nn.101, 110 (1997) (stating that two anti-whaling Makah elders accompanied animal welfare organizations to the 1996 IWC meeting; seven Makah elders put their names in a newspaper ad in 1996 speaking against the Tribe asking for a quota); Nicholas Schoon, *Tribe Split over Reviving Custom*, INDEPENDENT-LONDON, June 25, 1996, at 5 (stating that Makah elders traveled to IWC meeting to protest Makah reviving whaling). One of the plaintiffs suing to stop the whaling was a Makah tribal member. *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000).

5. See *Resolution Could Remove Whaling Ban*, OREGONIAN (Portland), July 6, 2000, at A10 (reporting that the IWC passed a resolution to complete a management plan for consideration next year to resume limited commercial whaling).

6. See, e.g., Lydia v. Mapes, *Feds Have Whale of Conflict — Makah Hunt Puts Some Government Agencies in a Dilemma*, SEATTLE TIMES, Oct. 15, 1998, at A1 (stating that U.S. IWC delegates were aware that many nations were angered by U.S. seeking Makah gray whale quota); *Review of the 32d International Whaling Commission Meeting: Hearing Before the Subcommittee on International Organizations of the House Committee on Foreign Affairs*, 96th Cong. 63 (1980) [hereinafter *Review of the 32d IWC Meeting*] (statement of the Humane Society) (stating that the United States' stance on Alaska Native bowhead subsistence hunt changed its leadership role from ending whaling to a confused need to obtain a quota on the most endangered whale stock); PETER J. STOETT, *THE INTERNATIONAL POLITICS OF WHALING* ix, 85, 117, 119-21, 136 (1997) (questioning American ethics and inconsistency of supporting aboriginal subsistence whaling and arguing for hunts of endangered whales, and alleging the U.S. has lost credibility); JEREMY CHERFAS, *THE HUNTING OF THE WHALE: A TRAGEDY THAT MUST END* 160 (1988) (stating that every bowhead obtained for Alaska Natives turned into 146 whales killed in other oceans).

the cultural and subsistence aspects of aboriginal whaling, will continue to be of paramount importance for years to come because the Makah and other native peoples will continue hunting whales every year.⁷ Furthermore, various Canadian Indian tribes are currently seeking whaling rights in light of the success of the Makah.⁸ The questions raised by these cultural rights will have to be addressed in many different settings by governments and courts which will have to determine the extent that unique minority cultures can set a cultural course that deviates from the norm, even if they adversely affect dominant societies.

In Part II, this Article examines the cultural, religious, governmental and treaty interests of the Makah Tribe focusing on its whaling cultural traditions. Part III discusses the definition of culture and cultural self-determination as refined by the United States' policy of "self-determination" for American Indian tribes and its trust responsibility to protect and support tribes. Part IV addresses the Makah and United States application to the International Whaling Commission for a quota to take gray whales, how it was approved, the 1999 and 2000 Makah whale hunts, and the Ninth Circuit decision in June 2000 which casts some doubt on future Makah hunts. The Article concludes with the author's thoughts that Indian tribes and other distinct cultures should have the right of cultural self-determination to decide what their cultures are and how to practice them unless they cause unreasonable harm to majoritarian societal interests. In the case of American Indian tribes and Indian people, however, it is also the duty of the United States, under its official Indian policy of self-determination and its trust responsibility to tribes and individual Indians, to support tribal cultural practices as strongly as possible within any applicable legal boundary. Specific treaty rights regarding cultural issues which an individual tribe might possess also bear on the responsibility of the United States to support the cultural practices. Finally, perhaps the most important lesson to be learned from the Makah is that for tribes or other distinct cultures to practice cultural self-determination they must first and foremost preserve and exercise their cultural practices within their own group.

7. See Michael Rollins, *Kill Revives Makah Whaling Tradition*, OREGONIAN (Portland), May 18, 1999, at A1 [hereinafter Rollins, *Kill Revives Tradition*] (stating that Alaskan Eskimo, Greenland, Russian natives and others have IWC quotas and take hundreds of whales each year); ROBERT H. BUSCH, GRAY WHALES: WANDERING GIANTS 118 (1998) (reporting that the IWC grants whaling quota of bowheads to Alaska Natives, minke and finbacks for Greenland Natives, grays for Russian and Alaska Natives, and humpbacks for the Bequians of St. Vincent and the Grenadines in the Caribbean); INT'L WHALING COMM'N, 19TH REPORT OF THE INTERNATIONAL WHALING COMMISSION 36 (1986) (stating that Japan has long sought a subsistence whale hunt for its small coastal villages and its indigenous people, the Ainu).

8. Watters & Dugger, *supra* note 4, at 337 & n.114 (stating that thirteen Canadian tribes are currently claiming treaty rights to whale); *Inuit Want to Hunt Endangered Whale*, INDIAN COUNTRY TODAY, May 3, 2000, at A6 (reporting that a Canadian Inuit community in eastern Canada has requested to revive its whaling tradition by hunting the endangered bowhead whale).

Only then will the issue ever arise of whether the "outside" world will tolerate the exercise of unique cultural rights.

II. The Makah Whaling Culture, Religion, and Treaty

The Makah Indian Tribe is located on its reservation on the northwestern tip of Washington State at Cape Flattery. The reservation is bordered by the Pacific Ocean to the west, and to the north by the Strait of Juan de Fuca, which separates the United States from Canada. The Tribe has been located here for thousands of years and has primarily looked to the ocean as its "land" and for its food, tools and clothing.⁹ The Makah were first and foremost "a seafaring people" who lived close to the shore, were expert at sailing their canoes on the open sea, and took their livelihood from the ocean.¹⁰

9. United States v. State of Washington, 730 F.2d 1314, 1315 (9th Cir. 1984) (quoting a Makah chief at the 1855 treaty negotiation as saying that "he wanted the sea — that was his country"); Carroll Riley, *The Makah Indians: A Study Of Political And Economic Organization*, 15 ETHNOHISTORY 71, 77-78 (1968) (stating that the Makah were not greatly interested in the inland area because they were ocean-oriented, and that the Makah are "almost exclusively maritime"); United States v. Washington, 384 F. Supp. 312, 363 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (stating that the Makah were primarily a seafaring people who spent their lives on the water or close to the shore, and that most of their subsistence came from the sea, salmon, halibut, whale, and seal); Herbert C. Taylor, Jr., *Anthropological Investigation of the Makah Indians, in COAST SALISH AND WESTERN WASHINGTON INDIANS III*, at 29, 40 (David Agee Horr ed., 1974) (stating that Makah territory included land and water and their economy placed great reliance upon the sea) ("The old people value the water more than the land.").

10. United States v. Washington, 384 F. Supp. at 363; James G. Swan, *The Indians of Cape Flattery*, in 16 SMITHSONIAN CONTRIBUTIONS TO KNOWLEDGE 4, 92 (1870) [hereinafter *Indians of Cape Flattery*] (stating that the Makah excelled in managing canoes and were very knowledgeable of the sea and weather because "their time is in great measure passed upon the water . . . [and] their only means of travel is by canoes" and they are "venturesome, hardy, and ardent in their pursuit of whales, and in going long distances from the land for fish"). Swan's report "remains the basic study of the Makah in aboriginal times." Taylor, *supra* note 9, at 52, 77 (stating that the Makah "were outstandingly good sea mammal hunters particularly utilizing the whale and seal"). Swan lived with the Makah in 1862-66 as an employee of the United States Indian Service serving as a teacher and lay doctor. Norman H. Clark, *Introduction to JAMES G. SWAN, THE NORTHWEST COAST, OR, THREE YEARS' RESIDENCE IN WASHINGTON TERRITORY* xii, xvi-xix (1969 ed.) (1857) [hereinafter Clark, *Introduction to Swan*] (describing Swan's life in Washington Territory and his extensive diaries; his service as secretary and interpreter to Washington Territory Governor Stevens, who negotiated the Makah treaty; and his four years at Neah Bay with the Makah, teaching school, doctoring, learning language, and observing customs); FRANCES DENSMORE, *NOOTKA AND QUILUTE MUSIC* 9 (1939) (stating that Swan lived at Neah Bay on the Makah Reservation for several years teaching and distributing medicine, and in 1855 accompanied Stevens to treaty with Makahs); JAMES G. SWAN, *ALMOST OUT OF THE WORLD: SCENES FROM WASHINGTON TERRITORY: THE STRAIT OF JUAN DE FUCA 1859-1861*, at 76 (William A. Katz ed., 1971) [hereinafter SWAN, *ALMOST OUT OF THE WORLD*] (stating that in 1859 the Makah "means of subsistence are almost entirely drawn from the ocean, and their principal food is whale blubber and oil"); Riley, *supra* note 9, at 15, 57, 71 (stating that the Makah economy was based on "sea hunting and fishing . . . [and a] vastly important cult of

The Makah lived in large permanent wooden houses up to thirty-five feet wide and one hundred feet long in loosely related family groups of forty or more people.¹¹ The houses were full of whaling implements and other evidence of whaling's importance to the Makah. The Makah used stone and mussel shell tools, animal horn fish hooks and elk antler barbs for their harpoons and made war clubs, knives, and combs from whale bones.¹²

A. Culture and Religion

The Makah are closely related culturally and linguistically to the Nootka Indian people of Vancouver Island, Canada.¹³ The Makah whaling culture and life style was well established and thriving long before contact with Europeans and Americans in the late 1700s.¹⁴ The only significant and

whaling," and that a federal agent in 1865 stated, "What the buffalo is to the Indians on the plains, the whale is to the Makah"; GORDON W. HEWES, *ABORIGINAL USE OF FISHERY RESOURCES IN NORTHWESTERN NORTH AMERICA* 132 (1947) (stating that the "primary orientation of the Makah was toward the open sea"); ELIZABETH COLSON, *THE MAKAH INDIANS: A STUDY OF AN INDIAN TRIBE IN MODERN AMERICAN SOCIETY* 4-5 (1953) ("Most of their subsistence came from the sea where they fished for salmon, halibut, and hunted for whale and seal."); ALICE HENSON ERNST, *THE WOLF RITUAL OF THE NORTHWEST COAST* 6 (1952) (stating that the Makah were famous for their skill in hunting whales and in handling great seagoing canoes; pursuit of marine animals carried them many miles out into the Pacific, and up and down the coast); GEORGE GIBBS, *INDIAN TRIBES OF WASHINGTON TERRITORY* 35 (1972 reprint ed.) (1854) [hereinafter GIBBS, *INDIAN TRIBES*] (stating that the Makah were an ocean-going and whaling culture).

11. *Indians of Cape Flattery*, *supra* note 10, at 4-7 (stating that homes were split cedar planks sixty feet long, thirty feet wide, and ten to fifteen feet high for several families, and were decorated with drawings of the family totems or legendary characters like Thunderbird and whales; cooking pots, equipment and food hung from ceiling); JAMES G. MCCURDY, *INDIAN DAYS AT NEAH BAY* 50-51 (Gordon Newell ed., 2d ed. 1981) (noting, from the point of view of an 1877 observer, that Makah communal lodges were sixty to eighty feet square and built of rough hewn cedar logs, and that the primary food was fish, seal, whale, berries, and shell fish); GIBBS, *INDIAN TRIBES*, *supra* note 10, at 35 (stating that the Makah had large wooden houses fifty to 100 feet long, and strongly built); George Gibbs, *Tribes of Western Washington and Northwestern Oregon*, in 1 U.S. DEP'T OF THE INTERIOR, *CONTRIBUTIONS TO NORTH AMERICAN ETHNOLOGY* 174 (1877) [hereinafter Gibbs, *Tribes of . . .*] (stating that many Makah families lived in each house, and some houses were over 100 feet in length).

12. *Indians of Cape Flattery*, *supra* note 10, at 36; DENSMORE, *supra* note 10, at 10, 181 & plate 11; Robin K. Wright, *A Collection History: Washington Native Art, in A TIME OF GATHERING: NATIVE HERITAGE IN WASHINGTON STATE* 105, 111-12 (Robin K. Wright ed., 1991) (stating that Makah used whale bone cedar bark shredders and whale bone war clubs); Makah Cultural & Research Center, Neah Bay, Wash., July 17, 2001 (notes on file with author).

13. Taylor, *supra* note 9, at 33, 35 (stating that linguistically and culturally the Makah are closely allied to the central Northwest Coast tradition represented by the Nootka people of Vancouver Island, Canada); Beth Laura O'Leary, *Aboriginal Whaling from the Aleutian Islands to Washington State*, in *THE GRAY WHALE: ESCHRICHTIUS ROBUSTUS* 84 (Mary Lou Jones et al. eds., 1984) [hereinafter *THE GRAY WHALE*] (stating that Gibbs thought the Makah were a subtribe of the Nootkas); DENSMORE, *supra* note 10, at 1 (stating that the Makah belong to the linguistic stock of the Nootka branch of the Wakashan language).

14. ALAN D. MCMILLAN, *SINCE THE TIME OF THE TRANSFORMERS: THE ANCIENT HERITAGE*

sudden change of any magnitude in Makah life over a thousand years was the arrival of European and American explorers as new trading partners with new trade goods.¹⁵ The Makahs were already very experienced at trading whale oil and other products to other tribes before the coming of the white man.¹⁶

The Makah occupied five major villages and usually held their feasts and ceremonies in the winters when there was less work to do and when they were more densely congregated.¹⁷ In the spring, summer and fall, many of the Makah scattered out to smaller camps and villages which were nearer the whaling and fishing sites.¹⁸ The marine environment around the Makah lands was very rich and the Tribe became wealthy and prominent while living a comfortable life harvesting from the ocean.¹⁹ They also procured a great

OF THE NUU-CHAH-NULTH, DITIDAHT, AND MAKAH 126-91 (1999).

15. Neah Bay was known as one of the best harbors in the Strait of Juan de Fuca in 1854. LEWIS & DRYDEN'S MARINE HISTORY OF THE PACIFIC NORTHWEST 3, 5-6, 55, 119, 276 (1961 reprint) (E.W. Wright ed., 1895) [hereinafter LEWIS & DRYDEN] (stating that Neah Bay was first put on a chart in August 1788; in 1792, the Spanish built a fort at Neah Bay; Captain James Cook named Cape Flattery where the Makah live; news of lucrative trading with natives for sea otter skins and other furs, for example, \$8000 worth of sea otter skins for \$100 in chisels, led New Yorkers in 1787 to send two ships to trade with the Makah); Riley, *supra* note 9, at 59, 61, 63 (stating that numerous Spanish, English, French, Russian and American ships explored the Pacific Northwest and traded with the Makah from the 1770s forward; the Spanish built a small fort at Neah Bay in 1792); COLSON, *supra* note 10, at 6-7 (stating that from 1788, the Makah had lots of contact and trade with whites).

Regrettably, the white man also brought devastating epidemics to the Makah and their population suffered a serious decline. GIBBS, INDIAN TRIBES, *supra* note 10, at 35 (stating that the Makah numbered 550 until small pox hit in 1853 and reduced them to a reported 150); RUTH KIRK, TRADITION & CHANGE ON THE NORTHWEST COAST: THE MAKAH, NUU-CHAH-NULTH, SOUTHERN KWAKWIKUTL AND NUXALK 226, 228-33; 245-46 (1986) (stating that the Makah suffered from small pox epidemics brought ashore by a crewman from a San Francisco ship and two Makah men returning home); MCMILLAN, *supra* note 14, at 192 (stating that Makah oral traditions tell of small pox victims covering the beach in the early 1850s while the survivors fled).

16. MCCURDY, *supra* note 11, at 108 (stating that the Makah traded whale oil to other northwest tribes); DENSMORE, *supra* note 10, at 10 (stating that the Makah traded great amounts of dentalium, whale blubber and oil, dried halibut, and slaves with the Chinooks at the Columbia River and into Canada).

17. COLSON, *supra* note 10, at 4; MCMILLAN, *supra* note 14, at 22 (stating that the major ceremonies occurred during the rainy days of winter when large numbers of people were in the permanent villages); KIRK, *supra* note 15, at 70 (stating that winter was the preferred time for feasts and ceremonies as spirits gathered close to villages in winter).

18. United States v. Washington, 384 F. Supp. 312, 364 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (stating that the Makah moved to other villages for spring, fall and summer fishing and whaling activities); SWAN, ALMOST OUT OF THE WORLD, *supra* note 10, at 76 (stating that the Makah moved to other villages in the summer to fish and whale); MCMILLAN, *supra* note 14, at 12, 17, 86 (stating that the Makah lived in five permanent villages of large cedar houses and used temporary housing at short-term fishing and whaling camps).

19. *Indians of Cape Flattery*, *supra* note 10, at 22-30 (stating that the Makah had a rich culture and an easy economic life, important foods include whale, halibut, seals, shellfish, roots

surplus of marine items to trade to other tribes for other types of food and goods.²⁰ In fact, the Makah "were the middlemen in an extensive coastwide trade which ran from the Columbia River north to Nootka Sound" and into the interior of present day Washington State to Puget Sound.²¹

The Makah were not farmers because very little of their land was arable, and the extreme rains and humidity of their climate prevented most crops from growing and prevented cereal grains from ripening.²² In fact, James Swan recommended that the United States would be better off encouraging the Makah to continue whaling and taking their living from the sea, rather than to try and turn them into farmers because farming was doomed to fail.²³

The Makah held slaves which were either captured or purchased from other tribes.²⁴ Only the wealthy, such as the chiefs or whaling captains could

and berries) ("The ease with which these Indians can obtain their subsistence from the ocean makes them improvident in laying in supplies for winter use . . . they can procure, in a few hours, provisions enough to last them for several days."); Norman H. Clark, *Introduction to Swan*, *supra* note 10, at xii, xvi-xix (stating that the tribe was rich in ocean resources and rich in leisure and aesthetic sensibilities); RICHARD D. DAUGHERTY, *THE OZETTE ARCHAEOLOGICAL EXPEDITION 3* (1983) (stating that marine products created the wealth of the Makah economy, the elaborate culture and complex social and ceremonial life, and made them a ranking group in the Northwest); *United States v. Washington*, 384 F. Supp. at 363 (stating that Makah wealth, power and maintenance of Northwest Coast culture were achieved by and dependent upon a thriving commercial maritime economy).

20. *Indians of Cape Flattery*, *supra* note 10, at 30-32 (stating that the Makah were well located as a market for southern to northern exchange; that they traded north for canoes, dentalium shells for money, cedar bark, slaves, salmon, blankets, guns, and beads which they paid for with halibut, whale blubber and oil, and traded south with the Chinooks at the Columbia River for canoes, whale oil, halibut and dentalium, sea otter skins, vermilion or cinnabar, and with tribes even further south and east into Oregon; that they traded with whites for blankets, flour, bread rice or money; and that Swan thought the tribe's yearly oil trade was 5000 gallons in his time, and thought they traded 16,000 gallons annually before his time).

21. COLSON, *supra* note 10, at 5; *see also* SWAN, *ALMOST OUT OF THE WORLD*, *supra* note 10, at 27, 67-68 (stating that in 1859 when Swan arrived at Neah Bay there was already a white trader living there getting fish, furs, and whale oil from the Makah; that Swan arrived via a Makah canoe which had been to Port Townsend trading whale oil and fish for flour, bacon and blankets; and that on the trip back to Neah Bay the Makahs stopped at Victoria to trade whale blubber to Canadian Indians for blankets and other items).

22. *Indians of Cape Flattery*, *supra* note 10, at 2, 32; SWAN, *ALMOST OUT OF THE WORLD*, *supra* note 10, at 71 (stating that the land was rocky and the soil was thin and poor).

23. *Indians of Cape Flattery*, *supra* note 10, at 33 (stating that the Makah "prefer[red] the products of the ocean to the farina of the land," and that it would cost government lots of money and time "to induce these savages to abandon their old habits of life . . . Indians . . . should be encouraged in their fisheries, and taught to prepare fish for sale, to make barrels to hold their stock and oil and helped, by means of the white men's experience, to take more whales and fish than they do now."); Riley, *supra* note 9, at 71-72 (stating that a federal agent in 1865 opposed forcing farming on Makah because their waters "teem with life — whales, seals, halibut, cod").

24. *Indians of Cape Flattery*, *supra* note 10, at 10-11 (stating that the Makah practice a mild form of slavery; slaves mostly drew water, cut wood and pursued other avocations same as tribal members); DENSMORE, *supra* note 10, at 10.

afford slaves.²⁵ However, the Makah treaty with the United States in 1855 required the Tribe to release all slaves and to stop taking slaves.²⁶

The great cultural ceremony of the northwest coast Indians was the potlatch.²⁷ Once tribal leaders gained wealth, it would be given away at a potlatch to gain the respect and dignity of a chief.²⁸ Non-Indians often have trouble perceiving the value of giving away most of one's possessions, but in the northwest native cultures the tribal member holding the potlatch would gain esteem and respect in the tribe. The potlatch also operated as a mechanism of economic or social welfare for tribal members as it was a means of "resource redistribution."²⁹ In the Makah world it was mostly the whaling families that were wealthy enough to hold numerous and elaborate potlatches.³⁰

In what appears to be ethnocentric thinking, Swan could not detect an official tribal religion or an outward form of religion in the Makah.³¹ Yet he reported that the Makah believed in a Supreme Being and directed prayers to the sun as the representative of the Great Spirit.³² He also recorded that the Makah practiced private religious rites in the woods and that much of their spirituality centered around finding and securing the aid of intermediate spirits

25. See McMILLAN, *supra* note 14, at 17.

26. Treaty with the Makah, Jan. 31, 1855, art. 12, 12 Stat. 939, reprinted in 2 INDIAN AFFAIRS: LAWS & TREATIES 682 (Charles J. Kappler ed., 1904) [hereinafter KAPPLER].

27. The potlatch is almost a form of competitive gifting. See *Washington v. Wash. State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 665 n.7 (1979); IVAN DOIG, WINTER BROTHERS: A SEASON AT THE EDGE OF AMERICA 31 (1980) (stating that potlatches were the gifting away of one's possessions to increase standing in the Tribe); DENSMORE, *supra* note 10, at 70-86 (stating that the Makah had numerous potlatch songs and traditions); see also *Native American Cultural Protection and Free Exercise of Religion Act of 1994: Hearing on S. 2269 Before the Comm. on Indian Affairs United States Senate*, 103d Cong. 136-44 (1994) (describing a modern-day Alaska Athabascan funeral and memorial potlatch and the paramount importance of these ceremonies).

28. *Indians of Cape Flattery*, *supra* note 10, at 13.

29. McMILLAN, *supra* note 14, at 42 (stating that the rich chiefs accumulated lots of goods from the service of the commoners and would distribute them to the people at potlatches).

30. *Id.*; Linda J. Goodman, *Traditional Music in Makah Life*, in A TIME OF GATHERING: NATIVE HERITAGE IN WASHINGTON STATE, *supra* note 12, at 223, 224, 230 n.2 (stating that the Makah had a hereditary ranked system, with royalty and chiefs, chiefs were probably heads of extended families; chiefs owned family wealth, songs, dances, masks, shellfish grounds, salmon and halibut fishing grounds and berrying tracts; most important potlatch of all was the whale oil potlatch where a family demonstrated its wealth by pouring whale oil on guests and into fire); O'Leary, *supra* note 13, at 95 (stating that the amount of oil you had indicated wealth; people would throw some into the fire to impress others with their wealth).

31. *Indians of Cape Flattery*, *supra* note 10, at 61; SWAN, ALMOST OUT OF THE WORLD, *supra* note 10, at 192 (stating his belief that other Washington tribes' observances "bore no resemblance to any form which we denominate worship," but not supposing they had no religion because they were always aware of the presence of tamanos).

32. *Indians of Cape Flattery*, *supra* note 10, at 61, 76.

or tamanos, spirits which guarded the destinies of individuals.³³ Many Makahs engaged in winter time ceremonies to find their tamano or animal spirit, talisman, or protector, and even when young, boys would begin fasting and seeking their guardian tamano.³⁴ The Makah also sought these guardian spirits to give them power for certain occupations as there was "some degree of specialization into whale hunters, seal hunters, doctors, gamblers, warriors and fishermen."³⁵ This very brief review of some of the cultural and religious aspects of the Makah demonstrate the complexity and richness of life in the Makah Tribe.

B. Makah Whaling

The importance of whaling to the Makah culture, religion, economy, and way of life cannot be overstated.³⁶ In 1865, a federal agent compared the importance of whales to the Makah as the buffalo was to the plains tribes.³⁷ Whaling was the preeminent Makah activity and becoming a successful whaler was the highest social status and prestige a Makah could attain.³⁸ Whales and whaling also played the major role in the culture and religious beliefs of the Tribe.³⁹ Non-Indian authorities accept that the Makah have whaled for over 1500 years, but there is evidence that California gray whales have been hunted by natives in the Pacific Northwest for over nine thousand years.⁴⁰

33. *Id.* at 61.

34. *Id.* at 62-66; COLSON, *supra* note 10, at 4.

35. COLSON, *supra* note 10, at 4; *see also id.* at 249-50 (stating that the Makah sought power from supernatural beings, and that whalers, fishers, and doctors held rituals at a secret forest or on ocean sites to seek and receive power for different purposes).

36. Archaeological evidence demonstrates that the Makah's "primary food source was the whale." Herbert C. Taylor, Jr. & James Bosch, *Makah Whalers*, in WESTERN WASHINGTON INDIAN SOCIO-ECONOMICS 133 (Herbert C. Taylor, Jr. & Garland F. Grabert eds., 1984) (discussing ceremonial and supernatural aspects of whaling); STEPHEN DOW BECKHAM, ETHNOHISTORICAL CONTEXT OF RESERVED INDIAN FISHING RIGHTS: PACIFIC NORTHWEST TREATIES, 1851-1855, at 153 (1984) (stating that whaling was an integral part of Makah culture); DALE R. CROES, THE HOKO RIVER ARCHAEOLOGICAL SITE COMPLEX 1, 5-6, 14, 70-71, 76 (1995) (stating that archaeological explorations in the Straits of Juan de Fuca at the eastern edge of Makah territory shows gray whales and seals were a major resource); Eugene Y. Arima, *Notes on Nootkan Sea Mammal Hunting*, in 25 ARCTIC ANTHROPOLOGY 16, 23 (1988) (stating that the ability of the Makah to live in their historic homeland was due to their mastery of effective whaling techniques).

37. Riley, *supra* note 9, at 72 (quoting a federal agent in 1865 as stating that "[w]hat the buffalo is to the Indians on the plains, the whale is to the Makah").

38. Whalers were the most honored of Makah men. RUTH KIRK & RICHARD D. DAUGHERTY, HUNTERS OF THE WHALE 20 (1974); Goodman, *supra* note 30, at 230 (stating that whalers "gained status, prestige, and wealth").

39. The Makah were "the most expert and successful in the whale fishery of all the coast tribes." *Indians of Cape Flattery*, *supra* note 10, at 33.

40. Archaeological deposits on Makah territory over two thousand years old include gray whale bones and harpoon barbs. MAKAH CULTURAL & RESEARCH CTR., MUSEUM EXHIBIT

1. Whaling Methods and Trade

The Makah hunted many types of whales but the California gray whale, one of which they captured in May 1999, is the whale they most commonly harvested.⁴¹ They mainly whaled in the spring during the gray whale northern migration when the seas are calmer instead of during the late fall and winter when the grays migrate south.⁴² The Makah hunted with eight man crews in specialized forty-foot cedar canoes.⁴³ The Makah made some of their own canoes and purchased others from the Vancouver Island tribes where larger cedar trees grew.⁴⁴ They also fashioned sails out of cedar bark.⁴⁵ They made all of their whaling and fishing gear out of marine mammal parts and materials found in their surroundings.⁴⁶

The crew consisted of six paddlers, one harpooner and one steersman, and they would venture forty or more miles out to sea for days at a time.⁴⁷ The

LEAFLET 2 (1979); BUSCH, *supra* note 7, at 67, 69-72 (describing evidence of west coast British Columbia native gray whaling dating back 9100 years); Nat'l Marine Fisheries Serv., U.S. Dep't of Commerce, Environmental Assessment of the Makah Tribe's Harvest of Up to Five Gray Whale Per Year for Cultural and Subsistence Use 1 (Oct. 17, 1997) [hereinafter Dep't of Commerce EA] (stating that the Makah have been whaling over 1500 years).

41. *Indians of Cape Flattery*, *supra* note 10, at 19 (stating that "[t]he California gray is the kind usually taken by the Indians," and that the Makah had names for all the whale stocks, but their generic name for whale is also their word for gray whales); HEWES, *supra* note 10, at 133 ("The whales taken off Cape Flattery by the Makah were chiefly the California gray whale"); O'Leary, *supra* note 13, at 82, 93, 95 (stating that humpback and gray whale bones were found in the archaeological dig at the Makah village of Ozette in about equal numbers); Riley, *supra* note 9, at 71 (stating that the Makah took lots of different whales but the California gray was the main one taken).

42. O'Leary, *supra* note 13, at 97 (stating that the Makah mostly hunted gray whales in the spring during the northward migration when the seas were calmer); DOIG, *supra* note 27, at 120 (stating that the first whale of the season was taken April 4, 1866).

43. Videotape: A Gift From the Past (Video Media Resource Associates, Inc. 1994); DOIG, *supra* note 27, at 32, 130-31 (stating that the Makah used cedar canoes with eight-man crews and harpoons eighteen feet long made of yew wood and buoy-like floats of seal skin, and bought their cedar canoes from tribes on Vancouver Island because few were made by the Makah due to the scarcity of cedar); T.T. WATERMAN, THE WHALING EQUIPMENT OF THE MAKAH INDIANS (1955 reprint, 1920); SCAMMON, *supra* note 43, at 29-30 (stating that Makah whaling canoes were thirty-five feet in length, and carried a crew of eight men).

44. *Indians of Cape Flattery*, *supra* note 10, at 36; DOIG, *supra* note 27, at 130-31 (citing Swan diaries, which stated that the Makah bought their cedar canoes from the "Clyoquot and Nittinat Tribes, on Vancouver Island" because few were made by the Makah, due to "the scarcity of cedar in their vicinity").

45. *Indians of Cape Flattery*, *supra* note 10, at 38.

46. *Id.* at 39-42.

47. *Indians of Cape Flattery*, *supra* note 10, at 21; SWAN, ALMOST OUT OF THE WORLD, *supra* note 10, at 76 (stating that Makah whale crews consisted of eight men — one harpooner, one steerer, and six paddlers); Videotape: A Gift From the Past, *supra* note 43; *United States v. Washington*, 730 F.2d 1314, 1317 (9th Cir. 1984) (interpreting the treaty language of the Makah's "usual and accustomed" whaling range as being up to forty miles out to sea).

Makah used fourteen to eighteen-foot wooden harpoons with razor sharp mussel shell tips barbed with elk antler and attached to the harpoon with whale sinew.⁴⁸ The harpoons were ingeniously designed to facilitate delivering the harpoon tip securely into the whale.⁴⁹ The Makah used floats, made of seal skins turned inside out and inflated. They were attached to the harpoons so as to follow the whale, impeding and tiring it, and to float the whale so that the killing stroke could be administered.⁵⁰ The killing blow was sometimes delivered by a man standing on the whale's back.⁵¹ One crewman then had the task of diving into the sea and sewing the whale's mouth closed so that the whale would not fill with water and sink.⁵² The crew was then faced with a long tow back to shore which could last for days.⁵³ Makah whalers prepared for whaling by practicing the physical skills needed including staying awake for days at a time and fasting to learn to do without food for days as they might be forced to do if a whale pulled them far out to sea.⁵⁴ It is obvious that the Makah developed their whaling into a high art while working with primitive tools.⁵⁵

The Makah often hunted cooperatively and several canoes would strike and help capture a whale.⁵⁶ The whale would be beached on the nearest shore

48. *Indians of Cape Flattery*, *supra* note 10, at 19-20 (stating that, by 1860, Makahs were using harpoon heads of copper or iron but that the heads were still barbed with elk horn and that eighteen-foot two-piece yew wood harpoon lances, thirty-foot lanyards made of whale sinew, and seal skin buoys were still used); O'Leary, *supra* note 13, at 89 (noting mussel shell harpoon tips found in five humpback whale scapulae at Makah Ozette village); SCAMMON, *supra* note 43, at 29-30 (stating that Makah harpoon tips were made from musselshell or abalone and the rope attached to the lances was made from cedar).

49. WATERMAN, *supra* note 43, at 27-30, 32-34 (stating that the harpoons were cleverly manufactured from different materials and had barb of elk antler, musselshell or bone (citing 11 EDWARD S. CURTIS, *THE NORTH AMERICAN INDIAN* (1916), and FRANZ BOAS, *THE KWAKWITL OF VANCOUVER ISLAND* (1909)).

50. DENSMORE, *supra* note 10, at 49-50 (stating that used seal skins were turned inside out as floats, blown up, and tied off); KIRK & DAUGHERTY, *supra* note 38, at 44-47 (stating that sealskin floats were used to tire and float whale).

51. DENSMORE, *supra* note 10, at 52 (stating that some whalers left the canoe and climbed onto the back of the whale to kill it, and that one Makah family name means "stepping on a whale").

52. O'Leary, *supra* note 13, at 89; KIRK & DAUGHERTY, *supra* note 38, at 47.

53. DENSMORE, *supra* note 10, at 52 (stating that a whale might tow a canoe for three to four days; crew would sing whaling songs while towing); O'Leary, *supra* note 13, at 90 (stating that the canoe was out to sea up to four days); KIRK & DAUGHERTY, *supra* note 38, at 44-47 (stating that, after harpooning a whale, the crew prayed and sang special towing songs to the whale to swim towards shore because the people would sing and dance to welcome it and decorate it with feathers; and that the crew carried food and water in case the whale towed them out to sea).

54. DENSMORE, *supra* note 10, at 48 (stating that whalers practiced fasting and learning and stay awake).

55. Taylor, *supra* note 9, at 68 (citing 11 CURTIS, *supra* note 49, at 145) (stating that the Makah were whalers par excellence and carried the art of whaling to the highest pinnacle of refinement).

56. *Indians of Cape Flattery*, *supra* note 10, at 20-21 (stating that the first canoe to strike

and the entire village would participate in butchering it. Then the meat and blubber would be distributed by traditional rules.⁵⁷ The first to strike a whale had the primary meat distribution rights under the traditional rules.⁵⁸ The Makah used almost the entire whale, even using the sinew to make harpoon ropes, the bones for tools and weapons, and the intestines and stomach to hold oil.⁵⁹ It is estimated that they landed four or five whales a year and that they used any other whales that washed ashore.⁶⁰

The Makah were well known traders in the Pacific Northwest. In fact, Swan described them as "emphatically a trading, as well as a producing people."⁶¹ The primary items they traded were whale oil, marine mammals, fish, and shellfish.⁶² Whale oil was a prized trade commodity. The Makah traded it extensively from California to Alaska and inland to Washington, Idaho, and Colorado, and it "may have functioned as a type of currency on the Northwest coast."⁶³ The Makah traded enormous quantities of whale oil,

would signal other canoes, who would also strike, and up to 30 or 40 buoys might be attached to a whale); MCCURDY, *supra* note 11, at 104-06 (offering a non-Indian report of a late 1870s Makah whale hunt).

57. *Indians of Cape Flattery*, *supra* note 10, at 21 (stating that portions were distributed by rules); O'Leary, *supra* note 13, at 94.

58. *Indians of Cape Flattery*, *supra* note 10, at 21-22 (stating that the whale was towed to nearest shore and butchered; first striker got best piece of blubber; it would be aged five days and then a feast would be held); O'Leary, *supra* note 13, at 94 (stating that the butchering was done by tradition and accompanied with dance and song; first to strike got the saddle, whale piece near the fin, it was "ritually decorated and sung over."); DOIG, *supra* note 27, at 33 (stating that the whole village would butcher a whale).

59. *Indians of Cape Flattery*, *supra* note 10, at 22 (stating that the Tribe used the whole whale except offal and vertebrae, and that the stomach and intestines were used to hold oil); Videotape: *A Gift From the Past*, *supra* note 43; (stating that the Makah used all the whale, oil, meat, and sinews, and that even the ribs were used, for weapons); O'Leary, *supra* note 13, at 94-96 (stating that whale bones were used at Ozette Village to retain mud banks and to control rain runoff; O'Leary argues, however, that the Makah could not have possibly used all the whale meat because of rapid spoilage; the blubber and skin was quickly eaten and rendered into oil); WATERMAN, *supra* note 43, at 45 (stating that the Makah did not generally utilize the meat because it decays more rapidly than blubber).

60. SWAN, *ALMOST OUT OF THE WORLD*, *supra* note 10, at 77 (stating that he thought he had been reliably informed that the Tribe had used thirteen whales in 1859, the year before he arrived at Neah Bay; they had killed seven, and six had washed up dead); DENSMORE, *supra* note 10, at 63 (estimating the average take as one or two or up to four or five whales a year).

61. *Indians of Cape Flattery*, *supra* note 10, at 30.

62. MCCURDY, *supra* note 11, at 108 (stating that in the 1870s, Makah traded whale oil to other northwest tribes); DENSMORE, *supra* note 10, at 10 (stating that the Makah engaged in a great amount of trade with the Chinooks at the Columbia River and into Canada, and that they traded dentalium shells, whale blubber and oil, halibut, and slaves).

63. O'Leary, *supra* note 13, at 95 ("Whale oil was the most prized commodity among these Northwest groups."); Videotape: *A Gift From the Past*, *supra* note 43 (stating that the Makah traded whale from southern California to Alaska and as far as Idaho and Colorado); LEWIS & DRYDEN, *supra* note 15, at 5, 6, 55 (stating that lucrative trading with Makahs led New Yorkers in 1787 to send ships to trade for whale oil with the Makah); Riley, *supra* note 9, at 59, 61, 63

up to 30,000 gallons a year, to other tribes and to European and American ships that called at Neah Bay, the main village on Makah land.⁶⁴ As early as 1852, American traders moved to Neah Bay in Makah country to engage in full-time trade for whale oil with the Tribe.⁶⁵ The Tribe made a comfortable living and became prosperous by trading whale oil.⁶⁶

The incursion of European and American whalers into the Pacific Northwest and into Makah waters from the 1840s forward soon had an adverse impact on the Makah.⁶⁷ These "foreign" whalers discovered the calving grounds of the gray whale in the late 1840s and very soon decimated the gray whale stock the Makah relied on.⁶⁸ The near destruction of the stock

(stating that numerous Spanish, English, French, Russian and American ships traded with the Makah from the 1770s forward); Paul Shukovsky, *Makah Whale Hunt Plan Alarms Animal Activists*, SEATTLE POST-INTELLIGENCER, June 6, 1995, at B1 (stating that the Makah traded along the Pacific Coast from Alaska to the Columbia River in Oregon).

64. O'Leary, *supra* note 13, at 93 (citing 31 H.H. BANCROFT, HISTORY OF WASHINGTON, IDAHO AND MONTANA, 1845-1889 (1890)) (stating that the Makah were reported to have sold \$8000 worth of whale oil in 1856); Taylor, *supra* note 9, at 67-68 (stating that the Makah were major traders with tribes and Europeans, and that "by 1789 Neah Bay had begun to be a principal stopping point for European vessels engaged in the sea-otter trade"; Makah did a thriving trade with the Hudson's Bay Company at Victoria, Canada, and by 1850 was trading 30,000 gallons of whale oil annually, mostly to European ships); Gibbs, *Tribes of . . .*, *supra* note 11, at 25, 175 (stating that the Makah traded oil and whale meat inland and southwards, totalling 30,000 gallons of oil in a single season).

65. LUCILE McDONALD, SWAN AMONG THE INDIANS: LIFE OF JAMES G. SWAN, 1818-1900, at 42, 136 (1972) (stating that in 1852 and 1856 white traders opened posts at Neah Bay to trade whale oil).

66. Videotape: A Gift From the Past, *supra* note 43; United States v. Washington, 384 F. Supp. 312, 364 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (stating that "the Makah enjoyed a high standard of living as a result of their marine resources and extensive marine trade," that they sustained a Northwest Coast culture and were wealthy and powerful, and that "[t]hey maintained from time immemorial a thriving economy based on commerce").

67. The number of whales available were apparently down even as early as the 1860s. DOIG, *supra* note 27, at 32 (stating that Swan thought the numbers of whales were reduced even as early as the 1860s); *see also* DENSMORE, *supra* note 10, at 63 (stating that in the 1920s "[i]t was said there are now no whales in the vicinity of Cape Flattery . . . Modern methods . . . will reduce the number more rapidly than the methods used by the Indians and lead to the extermination of this interesting animal."); William A. Wilcox, Comm'n of Fish and Fisheries, *The Fisheries of the Pacific Coast*, in REPORT OF THE COMMISSIONER FOR THE YEAR ENDING JUNE 30, 1893, pt. 19, at 256, 289 (1895) (stating that the Makah hunt was greatly reduced by 1892, and that the Makah took only three whales all year).

68. HEWES, *supra* note 10, at 133 (stating that the activities of New England whalers in the nineteenth century "soon so reduced the number of whales in the North Pacific that the Makah were forced to rely more and more upon seal hunting"); SCAMMON, *supra* note 43, at xviii-xix, xxxiii-xxxiv, 33 (stating that by 1938 gray whales had become economically extinct and were protected by International agreements; Captain Scammon discovered the major breeding lagoons of the gray whale in Baja Mexico which led to a major slaughter of grays; whale baleen was used for umbrella and corset stays and canes; non-Indian whalers did not eat meat or blubber but hunted only for baleen and oil which was used for lamps and industrial lubrication; new uses for

by the commercial European and American whalers rendered whaling impossible for the Makah people and the Tribe had to rely on other marine resources. The last Makah whale hunt is reported to have occurred in 1928 or perhaps later.⁶⁹ The Tribe's reliance on whales and ability to use available resources is demonstrated by the fact that as recently as July 1995 the Tribe fully utilized a whale which was accidentally captured and landed, and in June 2001 when Makahs butchered a gray whale found on the beach in the Olympic National Park.⁷⁰

2. Whaling Culture and Way of Life

Whaling forms the core of the Tribe's culture and is "an integral part of the world view, heritage, and identity of the Makah."⁷¹ In their culture, whalers were the most honored and respected tribal members.⁷² In fact, whaling was primarily a chiefly prerogative and prestige was gained by distributing great

oil during World War I for nitroglycerine and margarine led to Norwegian and Russian factory ship whaling methods and a new decimation of the gray whale); JOAN GODDARD, *A WINDOW ON WHALING IN BRITISH COLUMBIA* 29-30, 74-76, 83-84 (1997) (stating that grays were hunted for oil for lighting and machine lubricants; baleen was used for brushes, skirts, corsets, hoop stays and umbrellas; and that grays were decimated after breeding grounds were discovered in 1846); Rob Taylor, *Gray Whales Taken Off Endangered List*, *SEATTLE POST-INTELLIGENCER*, Jan. 1, 1993, at D2 (reporting that early in the twentieth century, non-Indian commercial whaling threatened gray whales with extinction).

69. BUSCH, *supra* note 7, at 75 (stating that the last Makah ocean whale hunt was in 1928); Timothy Egan, *Makah Tribe Seeks Return to Tradition of Whaling*, *SEATTLE TIMES*, June 4, 1995, at A1 (stating that the Makah took a gray whale as late as 1926); ROBERT LLOYD WEBB, *ON THE NORTHWEST: COMMERCIAL WHALING IN THE PACIFIC NORTHWEST 1790-1967*, at 287 (1988) (stating that the Makah continued whaling until at least 1928; perhaps took a few whales before World War II "during a revival of Makah culture"); WATERMAN, *supra* note 43, at 48 (stating the Makah were still whaling in 1920, largely with traditional gear).

70. Dept of Commerce EA, *supra* note 40, at 24-24 (stating that a whale accidentally captured was butchered in five hours by over 150 people with elders leading the butchering; experienced cooks made sure all meat and blubber was distributed and stoves all over the reservation were used to render whale; old recipes were broken out; babies were teething on whale meat again); Paul Shukovsky & Mike Barber, *'Resident' Gray Whales Now Fair Game for Makah*, *SEATTLE TIMES*, July 14, 2001, at A1.

71. Watters & Dugger, *supra* note 4, at 325; *see also* COLSON, *supra* note 10, at 5 (stating that whaling, "for which they had elaborate techniques and ritual[,] played a central role in their culture").

72. Whales were extremely important economically and culturally, and whalers had the greatest reputation and dignity in the community. Billy Ray Roulette, Jr., *Harpooners: A Comparison of Whalers in Two Whale Fisheries*, in *WESTERN WASHINGTON INDIAN SOCIO-ECONOMICS*, *supra* note 36, at 144, 146-47 (stating that whaling may have been an avenue of upward mobility within the Makah; comparing Northwest Coast and New England whaling and concluding that significant similarities existed in regard to the status of the whale hunters within their societies); DENSMORE, *supra* note 10, at 63 ("A successful whaler held a high position in the tribe, not only because of the difficulty of this task but because of the wealth he acquired from the exchange of whale products in his own and other tribes."); O'Leary, *supra* note 13, at 91 (stating that whalers were the elite group with an elevated economic status).

quantities of whale meat and oil.⁷³ In addition, the importance of whales and the marine environment to the Tribe is demonstrated by the Makah naming the constellations after whales, fish, and sharks.⁷⁴ The Makah also named many of the months and the moons after whale events, including the arrival of the gray whale in their waters.⁷⁵ The Tribe also celebrated a first whale of the season ceremony, which is similar to how numerous fishing tribes celebrate the first salmon.⁷⁶

Whale oil, blubber and meat was the primary food of the Makah and constituted up to 80% of their diet.⁷⁷ The Makah used whale oil like butter or gravy and poured copious amounts of it on all their food.⁷⁸ The most prized pieces of whale meat were saved to be served at feasts and ceremonies.⁷⁹ The Makah also demonstrated their high esteem of whale meat and oil because they gave it as gifts at holidays and celebrations.⁸⁰

The rituals and ceremonialism of whaling played a large role in everyday Makah life and had a deep spiritual meaning.⁸¹ The Makah longhouses were

73. MCMILLAN, *supra* note 14, at 139 (stating that a successful whaler demonstrated personal, political, and ritual power).

74. *Indians of Cape Flattery*, *supra* note 10, at 90.

75. *Id.* at 91 (stating that December was named the moon in which the gray whale appeared, January the moon in which the whale has its young, March the moon the finback whale arrived).

76. The first whale "was treated with appropriate ceremonies." SWAN, ALMOST OUT OF THE WORLD, *supra* note 10, at 120. This celebration is similar to how salmon fishing tribes treat the first salmon of the season. *United States v. Washington*, 384 F. Supp. 312, 382 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (describing the Yakama Tribe's salmon religious ceremonies).

77. The Makah relied on whales for their subsistence. 7 SMITHSONIAN INSTITUTION HANDBOOK OF NORTH AMERICAN INDIANS, NORTHWEST COAST 391-97 (Wayne Suttles ed., 1990); *Indians of Cape Flattery*, *supra* note 10, at 19, 22 (stating that the principal food of the Makahs was whale and halibut); Taylor, *supra* note 9, at 53, 74 (stating that the Makah main food in "prehistoric times" was shellfish "and sea mammal, particularly whale"); HEWES, *supra* note 10, at 132 ("Whale and halibut formed the chief subsistence of the Makah."); Egan, *supra* note 69 (quoting Hubert Markishtum, tribal chairman, as stating that whale products were 80% of the Makah diet); *Makah Indian Tribe v. United States*, 23 Ind. Cl. Comm. 171, 174 (Docket No. 60-A, 1970), *aff'd*, 195 Ct. Cl. 539 (1971) (stating that 75-90% of the Tribe's subsistence in 1855 came from the sea, including whales); David R. Huelsbeck, *The Utilization of Whales at Ozette*, in 2 OZETTE ARCHAEOLOGICAL PROJECT RESEARCH REPORTS 267 (Stephan R. Samuels ed. 1994) (stating that whale bones found in Ozette Village could have accounted for 70-85% of all meat and oil consumed by inhabitants).

78. SWAN, ALMOST OUT OF THE WORLD, *supra* note 10, at 72, 76, 78 (stating that whale oil was used like butter); O'Leary, *supra* note 13, at 95 (stating that whale oil was used as a preservative and "as a gravy on foods and considered necessary to the diet").

79. Goodman, *supra* note 30, at 230, 252 (stating that a prized portion saddle of blubber from between head and dorsal fin was the property of the first to harpoon a whale; would hang in house for five days with the oil draining off into a bowl, then when the meat was ready the hunter would hold a big feast).

80. See DOIG, *supra* note 27, at 27 (stating that some Makah gave Swan whale meat in 1861 for Christmas); McDONALD, *supra* note 65, at 118 (stating that Makah gave Swan whale meat in December 1864).

81. "A rich ceremonialism was attached to their sea mammal hunting, particularly to the

filled with whaling equipment and with art which depicted whales and marine mammals and which used whale bones and body parts as part of the art.⁸² Most of the tribal art had ceremonial uses for cultural, religious or hunting ceremonies.⁸³ Whaling families also passed down the hunting skills and traditions to their children. Makah children loved to play at whaling and would practice sailing skills in small canoes in the ocean surf and the boys developed their whaling skills by throwing harpoons at kelp.⁸⁴ The children were actually learning and practicing whaling, which in turn demonstrates the central role of whaling in Makah life. The Tribe also used whale parts in a game like hockey that was played on the beach.⁸⁵ Whaling songs played a large role in the tribal festivals, celebrations and feasts.⁸⁶ The Tribe also has numerous legends regarding whaling and how it began.⁸⁷

hunting of whales . . . [and] a rich and elaborate artistic tradition." DAUGHERTY, *supra* note 19, at 5 (stating that whale bones were carved into ceremonial clubs); Taylor & Bosch, *supra* note 36, at 133 (discussing ceremonial and supernatural aspects of Makah whaling); *Makah Want to Kill 5 Whales a Year for Food and Ceremony*, SEATTLE POST-INTELLIGENCER, May 23, 1995, at B3 (stating that rigorous training and preparation required for a hunt involved the entire community); Roberta Ulrich, *Seeing a Future in the Past*, OREGONIAN (Portland), Mar. 15, 1995, at C11 ("Everyone in Makah villages was involved with the whale, from the crew that killed it to the women who smoked the meat.").

82. SWAN, *ALMOST OUT OF THE WORLD*, *supra* note 10, at 72, 76, 78 (stating that Makah houses were full of whaling implements and art depicting whales); Taylor, *supra* note 9, at 49-50 (stating that blubber oil in seal skins and whaling and fishing equipment hung from the ceiling of Makah houses); DAUGHERTY, *supra* note 19, at 3 (describing an effigy of a whale dorsal fin carved in cedar and inlaid with over 700 sea otter teeth used for whale hunting ceremonies); accord KIRK & DAUGHERTY, *supra* note 38, at 101-02.

83. DAUGHERTY, *supra* note 19, at 3; KIRK & DAUGHERTY, *supra* note 38, at 28, 43-44, 76, 110, 119, 143, 155 (stating that whale petroglyphs were etched into rocks by ancient Makahs near Ozette; whale figures were carved into wood panels found in the houses; an enormous number of whale bones were unearthed, some of which had been made into clubs); ALLAN MAY, *THE SEA PEOPLE OF OZETTE* 58, 92, 97, 99 (1975) (stating that bones from different whales were reassembled into complete skeletons next to Ozette houses; wooden carvings of seals, whale fins embedded with animal teeth and fish engraved on rock); MCMILLAN, *supra* note 14, at 164-66 (stating that rock art of etched petroglyphs and painted pictographs of whaling are found in Makah territory).

84. *Indians of Cape Flattery*, *supra* note 10, at 14 (stating that Makah children played in small canoes in the surf and the boys played at imitating whale hunting).

85. 11 CURTIS, *supra* note 49, at 50 (stating that the Makah played shinny with whale cartilage); DENSMORE, *supra* note 10, at 62-63 (stating that the Makah played a game like shinny or hockey with whale gristle).

86. *Id.* at 54, 56, 59-60, 65-66, 68, 70-71, 95, 246 (stating that 1920s research revealed the Makah had whaling songs regarding whales not to be eaten; songs regarding eatable whales; a "song to make a wounded whale swim toward shore"; allegorical and ceremonial songs about whales and whale oil potlatches; and a wedding song); Goodman, *supra* note 30, at 223, 224 & n.3, 229-30 (quoting 11 CURTIS, *supra* note 49, at 32) (stating that whaling songs were used while fasting, bathing, and praying before the hunt, for towing and beaching a whale, and to make the dead whales' spirit proud and willing to be towed lightly behind the canoe).

87. *Indians of Cape Flattery*, *supra* note 10, at 7-8 (stating that the Makah believed the

The enormity of the task of taking whales and the religious or spiritual feelings about the hunt also manifested themselves in celebrating the successful taking of whales. The whole village would come out to sing and dance to welcome a whale and to treat it like an honored guest who favored the Tribe by coming ashore so the Makahs could sustain themselves.⁸⁸ Feasts were always given by the successful hunter after landing a whale. The most desirable morsel of whale was saved for the special feast which was held five days after landing a whale.⁸⁹ There were special songs and rattles used by the whalers at these whale feasts and the celebration songs were sung to express their joy and wonder at landing a whale.⁹⁰

Whales also figured prominently in the Makah cultural celebration of the potlatch. As mentioned above, the potlatch is the most important ceremonial event in northwest coast native cultures.⁹¹ In the Makah Tribe, wealthy persons would hold potlatches to give away much of their material goods to gain the dignity of a chief.⁹² Among the Makah, it was mostly the whaling families who were wealthy enough to hold elaborate potlatches.⁹³

Thunderbird hunted and ate whales); MCCURDY, *supra* note 11, at 110-11 (relating an 1877 story of the Thunderbird and the whale god, and how the Makah chose the whale god); DENSMORE, *supra* note 10, at 53-61 (stating that the Makah have many whale legends, and believe that the Thunderbird, a great bird that lived in the mountains, would sweep down to take whales and would drop them to wash up on the shore for the Makah).

88. KIRK & DAUGHERTY, *supra* note 38, at 44 (stating that the Makah would sing and dance to welcome a landed whale and decorate it with feathers); BUSCH, *supra* note 7, at 74 (stating that the Makah sang to the beached whale and honored it as a guest so it would return); WEBB, *supra* note 69, at 24 (stating that rituals would be conducted on the beach and for days afterward); MCMILLAN, *supra* note 14, at 161 (stating that the Makah observed rituals after landing a whale).

89. DENSMORE, *supra* note 10, at 62, 64 (stating that the upright whale fin was saved and aged, and five days after landing a whale a special feast would be held with its own special songs).

90. KIRK & DAUGHERTY, *supra* note 38, at 48-49; DENSMORE, *supra* note 10, at 28.

91. MCCURDY, *supra* note 11, at 74 n.5 (stating that, in the greatest Makah ceremony, wealthy chiefs and families gave away a lifetime's accumulation of goods to demonstrate their success and to increase their status and respect in the Tribe); DOIG, *supra* note 27, at 31 (stating that potlatches were the giving away of one's possessions to increase standing); DENSMORE, *supra* note 10, at 70-86 (stating that the Makah had numerous potlatch songs and traditions); Gibbs, *Tribes of . . .*, *supra* note 11, at 205 (stating that the greatest feast of the northwestern Washington tribes was the potlatch, which a chief or man of wealth gave to "secur[e] or extend[] his influence").

92. *Indians of Cape Flattery*, *supra* note 10, at 13; Gibbs, *Tribes of . . .*, *supra* note 11, at 185 ("Wealth gives a certain power among them and influence is purchased by its lavish distribution.").

93. Goodman, *supra* note 30, at 223, 224, 230 (stating that the chiefs owned the family's wealth, songs, dances, masks, shellfish, salmon, halibut and berry grounds, and that the whale oil potlatch was most important potlatch where chiefs demonstrated wealth by pouring whale oil on guests and fire); O'Leary, *supra* note 13, at 95 (stating that the amount of oil you had indicated wealth, and that people would throw oil into the fire to impress others with their wealth).

Significantly, whaling also played a role in marriage in the Makah Tribe. Wedding proposals were often given using a pantomime of whaling by the prospective bridegroom.⁹⁴ There may even have been required feats of strength related to harpooning and whaling which were demonstrated during a marriage proposal.⁹⁵ Whaling customs also played a part in childbirth as new born infants were welcomed into the world by placing a sliver of whale blubber in their mouths.⁹⁶ Clearly, these varied and rich aspects of Makah tradition and culture demonstrate the central and important role whales played in their society.

3. Whaling Spirituality

Makah whaling is also steeped in spiritual, religious and ritualistic beliefs.⁹⁷ The ritual or spiritual nature of whaling is based on the idea that humans are too insignificant to capture such enormous and powerful creatures if the whale does not want to be taken or does not cooperate in its capture.⁹⁸

94. *Indians of Cape Flattery*, *supra* note 10, at 11-12 (stating that an eight-man crew carried a canoe with three men in it mimicking whale hunting while the groom went to the woman's house to give his proposal, and split the bride's door with the harpoon); DOIG, *supra* note 27, at 153 (stating that Makah marriage proposals were performed by a whaling pantomime complete with harpoons and a canoe); DENSMORE, *supra* note 10, at 247-48 (stating that the Makah bride was carried to her husband's house in a canoe, preceded by a male dancer imitating a whale); GIBBS, *INDIAN TRIBES*, *supra* note 10, at 35 ("Their marriages are said to have some peculiar ceremonies, such as going through the performance of taking the whale, manning a canoe, and throwing the harpoon into the bride's house.").

95. DENSMORE, *supra* note 10, at 247-48 (stating that sometimes a "whaling test" qualified a potential husband because the man had to be able to throw a harpoon through a board the woman's family would set up); *see also* 11 CURTIS, *supra* note 49, at 64 (describing the Makah relatives, the Clayoquots of Vancouver Island, using whaling in wedding ceremonies and using a harpoon to strike a prospective bride's house; if the harpoon did not stick in the wood, the proposal would not be accepted).

96. Beatrice D. Miller, *Neah Bay: The Makah in Transition*, 43 PAC. NW. Q. 262, 266 (1952) [hereinafter Miller, *Neah Bay*].

97. The Makah thought "the really important matter is the proper observance before and during the hunt of various ceremonial [sic] performances for procuring help from the spirits." WATERMAN, *supra* note 43, at 38-40, 46-47 (citing 11 CURTIS, *supra* note 49, at 18 (regarding whaling, ceremonialism, butchering and whalers bathing in ponds and scourging with thorned hemlock, imitating a whale by swimming in a pond or surf; praying about whaling and observed phases of the moon for ceremonies and for starting the hunt; participating in ceremonies before butchering, special prayers and feasts); Taylor & Bosch, *supra* note 36, at 133 (describing the ceremonial and supernatural aspects of Makah whaling); McDONALD, *supra* note 65, at 48, 136 (stating that the Makah believed in tamanos as a guardian spirit power and kept talismans or shamanistic articles of "whaling medicine"); WEBB, *supra* note 69, at 19 (describing severe and stringent ritual preparation, including bathing, fasting, sleep denial, swimming in the ocean mimicking whales, and ceremonial dances); MCMILLAN, *supra* note 14, at 160 ("Whaling was one of the most supernaturally charged activities and required the most elaborate ritual preparation.").

98. DENSMORE, *supra* note 10, at 48 (stating that whaling was beyond human powers and thus needed superhuman or spirit strength); George Bowechop, Makah Tribal Elder, Address at

Ritual preparation for months before whaling ensures that the Makah whaler is pure in heart and deserves to take a whale.⁹⁹ In fact, the Makah and other native whalers believed that the spiritual preparation was as important as the whaling equipment and methods they used.¹⁰⁰

The Makah practice religious rituals in the woods in private with the goal of finding and securing the aid of intermediary spirits or *tamanos*, which guarded the destinies of individuals.¹⁰¹ They would bathe ritually in lakes and in the ocean and would swim imitating a whale by spouting water from their mouths.¹⁰² They would also purify themselves by self-flagellation with nettles or hemlock branches.¹⁰³ Moreover, the Makah believed in human to

Portland State University (Mar. 9, 2000) (notes on file with author) ("[W]ithout the spiritual side the whale hunt means nothing."); ROBERT SULLIVAN, *A WHALE HUNT* 40 (2000) (quoting an old Makah saying that says "the whale chooses the whaler").

99. Makah whalers undertake months of ritual and physical preparation before whaling. Videotape: *A Gift From the Past*, *supra* note 43; *Bowechop*, *supra* note 98 (stating that for the 1999 hunt, Makah whalers trained thousands of hours to learn the weather, tides, and ocean conditions, and to prepare physically); KIRK, *supra* note 15, at 38, 86-87, 133, 137 (describing "[p]owerful ritual, painstaking preparation, courage, patience, skill — plus an ability to design, make and use excellent equipment," and serious intense ritual preparations and fasting over a period of years before whaling); MCMILLAN, *supra* note 14, at 139 (stating that the Makah followed highly ritualistic whaling practices, including bathing and ceremonies).

100. Common to all native whaling groups is the ritual preparation. "The material, customs, and supernatural interaction were as important to the aboriginal mind as the actual whaling equipment." O'Leary, *supra* note 13, at 91; *Bowechop*, *supra* note 98 ("[W]ithout the spiritual element they could die.").

101. *Indians of Cape Flattery*, *supra* note 10, at 61-66 (stating that many Makahs engaged in wintertime ceremonies to find their *tamano*, or animal spirit, or protector); DENSMORE, *supra* note 10, at 31, 47, 165 (stating that whalers had special seasons and prayers to secure a *tamano* or spirit helper, and that whalers especially needed a strong *tamanos*, due to the great difficulties and dangers of whaling).

102. KIRK & DAUGHERTY, *supra* note 38, at 44 (stating that special songs, magic amulets, charms, and prayers were used to bring power in the months of ritual preparation before whaling); DENSMORE, *supra* note 10, at 31, 47 (stating that, to obtain a *tamano*, Makah whalers would bathe in a special manner, and pray and practice severe discipline and endure hardships, including ocean bathing at time of new moons, prayers for success, rubbing body with herbs or hemlock branches and nettles or wild roses); Goodman, *supra* note 30, at 229-30 & n.3 (stating that whalers had personal secret rituals received on a spirit quest from their guardian spirit or *tamano* who taught them proper prayers, songs, ritual bathing techniques, and how to hunt, harpoon and land whale; and that the whalers sang certain songs while fasting, bathing and praying before the hunt; songs for after landing whale); Taylor, *supra* note 9, at 51 (noting there were long and arduous rituals to become a whaler, and only top class of young men become such); BUSCH, *supra* note 7, at 69-70, 72 (stating that the Makah prayed to whales and used rituals, fasting, and abstinence to prepare).

103. O'Leary, *supra* note 13, at 91 (describing ritual nightly bathing for many moons in rivers and ocean and rub body with nettles); DENSMORE, *supra* note 10, at 31, 47; WATERMAN, *supra* note 43, at 38-40, 46-47 (citing Edward Curtis' account of Makah scourging themselves with thorned hemlocks branches); McDONALD, *supra* note 65, at 97 (stating that, in a Makah *tamano* ceremony, participants would cut arms and legs to let blood flow); WEBB, *supra* note 69, at 19 (stating that herbs were rubbed on and thorny hemlock applied until bleeding).

whale transformations.¹⁰⁴ The Makah often began seeking their guardian animal spirit or tamano by fasting and praying as young boys.¹⁰⁵ They sought these guardians to give them power for whaling.¹⁰⁶

There were even taboos or traditions that the shore based Makahs had to follow while whalers were at sea. Everyone would try to keep quiet and move gently, and the whalers' wives would stay at home and lay down in the dark to show respect for the whale and to assist the hunt.¹⁰⁷ Whalers even abstained from family contact and practiced sexual abstinence when preparing for whaling.¹⁰⁸

Once a whale was struck, the Makah used spiritually powerful family songs to turn a harpooned whale towards shore.¹⁰⁹ 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.¹¹⁰ It took the whalers' tamanos' power to overcome the whale's strength and to flatter and cajole the whale to the beach.¹¹¹

104. DENSMORE, *supra* note 10, at 64.

105. See Gibbs, *Tribes of . . .*, *supra* note 11, at 175 ("Previous to becoming whalers, the young men go through a species of probation . . .").

106. COLSON, *supra* note 10, at 4.

107. BUSCH, *supra* note 7, at 72 (stating that, when a whaler was hunting, his wives laid quietly in the house in the dark); KIRK & DAUGHERTY, *supra* note 38, at 44-46 (stating that people ashore kept quiet, or talked and moved gently, because whales liked to come to a quiet, orderly village, and that if a hunt was unsuccessful it meant someone in the crew had not prepared properly or someone ashore acted improperly during the hunt); KIRK, *supra* note 15, at 138 (stating that a Makah wife in 1898 told of the taboos; she did not comb her hair during whaling season because breaking a hair might cause a harpoon line to break; whaler did not sleep with wife; she would stay motionless in house while husband gone whaling to keep whale from acting unruly); WATERMAN, *supra* note 43, at 38-40, 46-47 (stating that menstruating women stayed indoors).

108. WATERMAN, *supra* note 43, at 46 (stating that whalers would not have sex with wives during whaling preparations; wives would sleep under new mats and try not to move while husband was whaling (citing 11 CURTIS, *supra* note 49); DENSMORE, *supra* note 10, at 48 (stating that whalers abstained from family contact and from marital relations before whaling); WEBB, *supra* note 69, at 19-20 (stating that whalers practiced sexual abstinence and wives had a role in preparation for whaling); BUSCH, *supra* note 7, at 74.

109. DENSMORE, *supra* note 10, at 48; KIRK, *supra* note 15, at 138 (stating that songs were sung to a harpooned whale to get it to swim to shore, where the whale would be honored); WEBB, *supra* note 69, at 23 (stating that the Makah would pray and sing to the whale, begging its spirit to turn toward shore where the people "stood ready to give it praise"); WATERMAN, *supra* note 43, at 46-47 (stating that the Makah followed ceremonies and special prayers before butchering, and observed special feasts, performances, and ceremonies after butchering) ("The whale, nevertheless, was supposed theoretically to be a guest of the village, and to have appeared upon the scene of his own volition.").

110. KIRK & DAUGHERTY, *supra* note 38, at 44 (stating that the Makah would sing to and dance to welcome a landed whale and decorate it with feathers); MCMILLAN, *supra* note 14, at 161 (stating the Tribe observed rituals after landing a whale).

111. DENSMORE, *supra* note 10, at 48, 53-61; Gibbs, *Tribes of . . .*, *supra* note 11, at 23-24.

4. Ozette Village

Ozette was one of the five main villages of the Makah and was continuously occupied for at least two thousand years.¹¹² Extraordinarily valuable archeological excavations were conducted there in the 1960s and 1970s which provided a wealth of evidence about the traditional, cultural, and religious aspects of whaling by the Makah people for over fifteen hundred years.¹¹³ The excavations at Ozette also greatly assisted the Makah Tribe by helping to keep alive within the Tribe its whaling culture and to renew the Tribe's "interest in its cultural heritage."¹¹⁴

The village was preserved by being covered by mud flows over five hundred years ago.¹¹⁵ The mud left wooden houses and all sorts of wooden and bone artifacts in remarkably preserved condition.¹¹⁶ The excavations

The Makah believed in the Thunderbird, a great bird that lived in the mountains that would sweep down to take whales; in fact, thunder was caused by the flap of its wings. *Indians of Cape Flattery*, *supra* note 10, at 7-8; McCURDY, *supra* note 11, at 110-11 (stating that, in 1877, an old Makah told the story of the Thunderbird and the whale god whose flapping wings made thunder and blazing eyes made lightning); KIRK, *supra* note 15, at 78-79, 86-87 (stating that Makah ceremonies use masks and dances showing Thunderbird catching whales). The Makah also believed that washed up whales were dropped by the Thunderbird for the Makah. BUSCH, *supra* note 7, at 74-75. In fact, the Makah still tell stories today that in the past, during a great famine, the Thunderbird first brought them their whale. SULLIVAN, *supra* note 98, at 32.

112. DAUGHERTY, *supra* note 19, at 1 (stating that each spring Ozette's population would increase greatly as the Makah gathered for whaling); KIRK & DAUGHERTY, *supra* note 38, at 58-59 (stating that radio-carbon dating showed 2000 years of human occupation at Ozette with very little change in hunting and fishing activities); MCMILLAN, *supra* note 14, at 86 (stating that Ozette was inhabited at least 2000 years).

113. MCMILLAN, *supra* note 14, at 89-93, 131-32 (stating that over a million identified faunal elements, 50,000 artifacts, and 20,000-40,000 preserved wooden structural elements were found at Ozette); DAUGHERTY, *supra* note 19, at 1 (stating that Ozette is one of most significant sites ever discovered in the western hemisphere, due to the completeness of the cultural record and the discovery of normally perishable items).

114. Dept of Commerce EA, *supra* note 40, app. 8.2, at ii, 27 (stating that Ozette artifacts "testify to the central role of whaling in the Tribe").

115. DAUGHERTY, *supra* note 19, at 3, 7 (explaining that village houses and artifacts were preserved by being covered by mudslide hundreds of years ago, and that the village was since uncovered by ocean action in 1970); *see also* Gerald H. Grosso, Trade Beads From Ozette Village Site 36 (Apr. 1977) (stating that Ozette was covered by mud flows about 500 years ago); MAY, *supra* note 83.

116. *See* Gerald H. Grosso, *Volume Processing of Waterlogged Wood at a Remote Archaeological Site: Modification of Old Techniques, Identification of Special Problems and Hopes for Their Solution*, in 1 PACIFIC NORTHWEST WET SITE WOOD CONSERVATION CONFERENCE PROCEEDINGS 35 (Papers on the Ozette Archaeological Project, 1976) (stating that directions given by Makah oral knowledge about Ozette Village were used in the excavating and exploration); Gerald H. Grosso, Field Conservation of a Variety of Waterlogged Artifacts From a Remote Archaeological Site 1-2, 38 (June 5, 1975) (stating that numerous mussel shells harpoon blades were found, and that whales, seals, sea lions and sea otters were hunted regularly and formed an important part of the villager's economy); Gerald H. Grosso, European Goods on the Northwest Coast c. A.D.900: Why Not? 1 (Apr. 1978) (stating that 500-year-old European beads

demonstrated that marine products created the wealth of the Makah economy, their elaborate culture and complex social and ceremonial life, and made them a leading group along the Pacific Northwest coast.¹¹⁷ Whale and seal hunting was one of the most important activities of Ozette life. The Pacific Ocean environment was bountiful and provided the Makah with a dependable food supply and a wealth of raw materials to manufacture houses and possessions.¹¹⁸ As would be expected, the excavations discovered an extraordinary amount of evidence of whaling and the use of whale bones for everyday tools and for cultural and religious purposes.¹¹⁹ Whales and marine mammals were also depicted in the tribal art and their bones and body parts were also used in that art.¹²⁰ Moreover, many of these pieces of art had ceremonial uses for religious or hunting ceremonies.¹²¹ After this brief overview of the Makah whaling culture, traditions, and religion, it seems clear that whales and whaling were, and still are, of absolute importance to the Tribe's life.

were found, and might have arrived as part of a long-standing transpacific trade).

117. DAUGHERTY, *supra* note 19, at 3; EDWARD FRIEDMAN, AN ARCHAEOLOGICAL SURVEY OF MAKAH TERRITORY: A STUDY IN RESOURCE UTILIZATION 101-02, 121, 172, 208 (1976) (stating that the Makah were ocean-oriented and had "a heavy reliance on sea mammals"; listing copious historical written references to Makah taking whales and specifically mentioning grays and many other stocks and other marine mammals such as seals, sea otters, and sea lions, and also stating that whale bones occurred in all the Makah sites, twenty harpoons were found at Ozette, and describing "an economic dependence on the sea, with a full-blown maritime economy").

118. DAUGHERTY, *supra* note 19, at 5.

119. Whale bones were used at Ozette to retain mud banks and to channel high rain runoff. O'Leary, *supra* note 13, at 96; KIRK & DAUGHERTY, *supra* note 38, at 28, 43-44, 76, 110, 119, 143, 155 (stating that whale petroglyphs were etched into rocks by ancient Makahs near Ozette, whale figures were carved into wood panels found in the houses, and that an enormous number of whale bones were unearthed, some of which had been made into clubs); MAY, *supra* note 83, at 58, 92, 97, 99 (1975) (stating that bones from several different whales were reassembled into complete whale skeletons and that wooden carvings of whale fins were embedded with animal teeth); KIRK, *supra* note 15, at 113 (stating that over 2000 tools were found at Ozette, along with a few large and broad iron blades for flensing whale blubber and over seventy-five whalebone wedges); MCMILLAN, *supra* note 14, at 131-32, 134 (stating that whale bones were used as retaining walls and with wooden planks to line trenches for diverting water). A large number of whaling harpoon heads with mussel shell blades and elk bone barbs were found. DAUGHERTY, *supra* note 19, at 6; MAY, *supra* note 83, at 70 (stating that fourteen-foot-long wooden harpoons were found at Ozette, with razor sharp and barbed shell points); WEBB, *supra* note 69, at 25-26 (stating that mussel shell harpoon points, up to twelve inches long, penetrated to and embedded into whale scapula bones, were found at Ozette).

120. DAUGHERTY, *supra* note 19, at 3 (stating that an effigy of a whale dorsal fin carved in cedar and inlaid with over 700 sea otter teeth was used for whale hunting ceremonies); accord KIRK & DAUGHERTY, *supra* note 38, at 101-02.

121. DAUGHERTY, *supra* note 19, at 3.

C. The Makah Treaty

The purpose of the United States in negotiating treaties with American Indian tribes was to gain land cessions and guarantees of peace so that American "manifest destiny" and settlement of the American continent could proceed as peaceably as possible.¹²² Indian tribes were mostly aware of what business was being conducted in treaty negotiations and generally they insisted on retaining in the treaties various rights that were crucial to their cultures and religions. Indian treaties are compared to contracts between the United States and the signatory tribe because they were agreements to exchange rights.¹²³ The treaties were not gifts to the tribes but were a negotiated trade of rights between sovereigns; they were "not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted."¹²⁴

The right to whale, which the Makah Tribe reserved in its 1855 treaty with the United States, is one of the primary reasons the federal government supported the Makah application to resume hunting gray whales in the 1990s.¹²⁵ The Makah Tribe was well aware of the treaty negotiations that had gone on in the Washington Territory in 1854 with other tribes and they knew roughly what the United States wanted when its representative came to Neah Bay in January 1855. The Tribe was also well aware what it wanted to reserve in any treaty it might sign with the American government.

122. See DOIG, *supra* note 27, at 22-23 (stating that Swan had a dim view of the prospects for tribes to get fair treatment in treaties with the U.S.: "These worked out as was usual in our continental history: The Indians got a chance for soulful rhetoric, and the whites got the land.").

In exercising "manifest destiny" to take control of the American landmass, the United States justified its dealings with tribes under the doctrine of "discovery." *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). That doctrine recognized the ownership by tribal governments of their territory but granted the sole right to acquire land from a tribe to the European nation which first discovered the specific land in the New World. *Id.*; FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS 1-3* (1983). Tribes continued to have a use and occupancy right but their sovereignty was restricted in that they could only alienate their lands to the discovering European nation. *Johnson*, 21 U.S. at 573-74.

123. *Washington v. Wash. State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.").

124. *United States v. Winans*, 198 U.S. 371, 381 (1905).

125. Nat'l Marine Fisheries Serv., Northwest Region, *Makah Whaling*, at <http://www.nwr.noaa.gov/1seals/marmam1.htm> (last visited Feb. 12, 2000) ("The U.S. government requested the quota from the IWC on behalf of the Tribe in acknowledgment of the Makah Tribe's explicit treaty right to whaling."); Richard Kirk Eichstadt, "Save the Whales" v. "Save the Makah": *The Makah and the Struggle for Native Whaling*, 4 ANIMAL L. 145, 155 (1998) ("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.").

Consequently, the Tribe bargained for and retained its cultural, economic and religious rights and interests in the ocean around its lands. Indeed, the Makah Tribe's treaty of January 31, 1855 is the only Indian treaty with the United States that reserves to a tribe the right to whale.¹²⁶ Thus, an understanding of the treaty is very significant to any discussion of Makah whaling rights.

1. Introduction to American Indian Treaties

The importance of treaty making to the relationship of Indian tribes and the United States cannot be overstated. The fact that Indian tribes are deemed to have a political, government-to-government relationship with the United States today is largely based on the history and precedent of treaty making. The modern day status of Indian tribes as sovereign governments is also largely based on the historical practice of the United States and the European nations dealing with tribes through treaty making.¹²⁷ In addition, many specific rights which certain tribes and individual Indians own are based on the particular treaty signed by the tribe. For example, fishing rights in particular rivers or lakes or for a particular species, or the right to gather berries and wild rice in certain defined areas, are rights owned by a tribe and its members as defined by the specific treaty signed by the tribe; these treaty rights do not belong to all Indians in general just because they are Indian.¹²⁸

a) Treaty Negotiations

There are many troubling aspects to the over 370 treaties the United States enacted with tribes. Federal courts have recognized these issues and, consequently, have interpreted Indian treaties in a manner favorable to tribes. For example, the United States sought out tribes to negotiate treaties for land cessions; rarely if ever did a tribe ask the U.S. to negotiate a treaty.¹²⁹ The

126. "The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States . . ." Treaty with the Makah, Jan. 31, 1855, art. 4, 12 Stat. 939, *reprinted in* 2 KAPPLER, *supra* note 26, at 682.

127. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (stating that tribes were "uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States . . . [and the] acts of our government plainly recognize the Cherokee nation as a state").

128. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (holding that by treaty, tribe and members retain rights to hunt, fish, and gather wild rice on ceded lands); *United States v. Winans*, 198 U.S. 371, 381 (1905) (holding that tribal members whose tribes signed treaty possessed easement rights to reach fishing spots over private property). *See generally* 2 KAPPLER, *supra* note 26 (containing all U.S. tribal treaties); FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES* (1994) [hereinafter PRUCHA, TREATIES].

129. It was a common practice for United States treaty negotiators to select "chiefs" and to appoint Indians to negotiate a treaty for a tribe. PRUCHA, TREATIES, *supra* note 128, at 210-13 (stating that sometimes whole tribes, sometimes small groups, and sometimes individual chiefs would gather to conduct negotiations, and that when individuals could not be identified to

treaties were always negotiated in English, with oral translations of the negotiations of the American agents made into the tribal language or even worse made from English into a trade language, like "Chinook Jargon,"¹³⁰ and then translated into the specific language of the tribe at issue. These three fold translations could not have helped convey the necessary meanings. Furthermore, the treaties were always written in English which led to drafting and interpretational problems.¹³¹ The United States always had legal representation at the treaty sessions and of course the tribes had no such assistance.¹³² To make matters worse, the U.S. Senate often did not ratify, and thus make binding, treaties which tribes had agreed to and complied with years before the Senate decided not to ratify them.¹³³

Most people are unaware that the vast majority of Indian treaties were not negotiated after the United States had defeated a tribe in a war.¹³⁴ Thus, the treaties were negotiated between equal sovereign governments. However, it was still common for the federal government to use sharp tactics, threats, fraudulent practices, and gifts and alcohol as coercion in the negotiations.¹³⁵

negotiate with, they were appointed by the U.S. treaty commissioners). The Supreme Court has referred to this practice of aggregating loose bands into designated tribes and even appointing many of the chiefs almost with approval. *Washington v. Wash. State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 n.5 (1979).

130. McCURDY, *supra* note 11, at 47 n.1 (stating that the Chinook Jargon was a mixture of English, French and Indian words spoken in the Northwest); *United States v. Washington*, 384 F. Supp. 312, 330-31 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) ("The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.").

131. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 CALIF. L. REV. 601, 610 (1975) [hereinafter Wilkinson & Volkman, *Indian Treaty Abrogation*].

132. See FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 402, 403-04, 406-07 (1995 ed.) [hereinafter PRUCHA, *GREAT FATHER*] (stating that Stevens conducted staff strategy sessions on how to get tribes to agree to treaties, and that George Gibbs, a talented Harvard lawyer, worked with Stevens and prepared draft treaties); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970) ("The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent.").

133. BECKHAM, *supra* note 36, at 145-46, 152 (stating that up to twenty treaties with Oregon tribes, which the tribes complied with, were never ratified or honored by the U.S., and that the first mention of a right to whales in American Indian treaties was in an unratified 1851 treaty with the Clatsop Tribe in Oregon, in which the tribe was reserved the right "to pick up whales that may be cast upon the beach"); 3 CLINTON A. SNOWDEN, *HISTORY OF WASHINGTON; THE RISE AND PROGRESS OF AN AMERICAN STATE* 265 (1909) (stating that Washington tribes knew some treaties with Oregon tribes had never been honored by the U.S. Senate).

134. *United States v. Washington*, 384 F. Supp. at 330-31 ("Congress chose treaties rather than conquest as the means to acquire vast Indian lands.").

135. Wilkinson & Volkman, *Indian Treaty Abrogation*, *supra* note 131, at 610; Robert J.

Furthermore, some tribes did not understand what they were agreeing to, and some tribes did not take the treaty sessions seriously because the federal representatives could not make decisions in the field but had to refer everything back to Washington D.C., which could take years. The tribes were also aware that some signed treaties had been rejected by the Senate.¹³⁵

b) Treaty Interpretation

The manner of interpreting the meaning of treaties written and negotiated in English by United States lawyers and army officers with uneducated Indian people is an interesting byproduct of American history. The rights preserved by these documents and the meaning given the treaties by the courts have resulted in the preservation of concrete rights that treaty tribes and their members hold today. Federal courts have often interpreted the meaning of many Indian treaties.¹³⁷ The courts have developed well established judicial "canons of construction" for interpreting the treaties. The canons are favorable to tribes and, in reality, are a recognition of the historical coercive conduct and unfair treaty making by the United States.

The canons include: a "treaty is not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted."¹³⁸ Thus, treaties were bargaining sessions in which tribes traded away their aboriginal ownership of areas of land in exchange for federally recognized title to specific reservation lands, and to retain other rights they already possessed such as hunting, fishing, and gathering, and for promises of federal assistance for education, housing, medical care, farming implements, and food. Second, an Indian treaty should be construed as the tribe itself would have understood it.¹³⁹ This canon lessens the unfair advantage the United States had by

Miller & Maril Hazlett, *The "Drunken Indian" — Myth Distilled Into Reality Through Federal Indian Alcohol Policy*, 28 ARIZ. ST. L.J. 223, 232, 249 (1996) (stating that alcohol was used by the U.S. in treaty negotiations); Miller, *Speaking with Forked Tongues*, *supra* note 2, at 552-55 (stating that the U.S. employed coercion and bribery, and selected chiefs to sign treaties); BECKHAM, *supra* note 36, at 18 (quoting Joel Palmer, Oregon Territory Indian Superintendent, who wrote of his theory of Indian treaty negotiations: "When Indians were hungry, they were more amenable to government offers of beef," and further stated that the season of the year was important, and when Indians wants were numerous they would sell their land).

136. SWAN, *ALMOST OUT OF THE WORLD*, *supra* note 10, at 348-49 (some tribes did not take treaty making serious because Stevens could not make decisions, but had to refer back to D.C. and years passed before answers were received; tribes were aware of earlier treaties negotiated at Columbia River which D.C. overruled years later; tribes thought the process was a sham and did not credit what Stevens was doing).

137. *See, e.g.*, *United States v. Dion*, 476 U.S. 734 (1986) (treaty hunting rights for bald eagles); *United States v. Winans*, 198 U.S. 371, 381 (1905) (treaty easement fishing rights over private property owners).

138. *Winans*, 198 U.S. at 381.

139. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970); *Tulee v. Washington*, 312 U.S. 681, 684-85 (1942); *see also United States v. Washington*, 384 F. Supp. at 330 (stating that the court interpreted treaty language, written in English and negotiated in Chinook Jargon, as it

conducting treaty negotiations in English with its own interpreters and lawyers while the tribes had no such assistance. Third, any ambiguities in treaty language or the historical situation surrounding a treaty negotiation must be resolved in favor of the tribe.¹⁴⁰ Finally, treaties in general are to be liberally construed in favor of tribes to accomplish their protective purpose because the treaties were allegedly for the benefit of the tribes.¹⁴¹

2. Governor Stevens

Isaac I. Stevens, the Washington Territory Governor and Superintendent of Indian Affairs, was the United States' representative at the Makah treaty negotiations in 1855 and he signed the treaty for the government.¹⁴² Stevens was an army officer and had been appointed the Governor of the Territory in 1853.¹⁴³ He was assigned the job of settling tribal land claims in the Washington Territory and also to survey a railroad route to the Pacific Ocean.¹⁴⁴ Stevens negotiated more than a dozen treaties with Indian tribes during his tenure in office.¹⁴⁵ The treaties negotiated by Governor Stevens with various Washington, Oregon, Idaho and Montana tribes are illustrative of the treaty making process between the United States and Indian tribes.

English was the official language of the Stevens treaties even though very few Washington Territory Indians could speak or read it.¹⁴⁶ The Stevens

would have been understood by Indians in 1855 and used dictionaries from that era to fully understand the meaning of the English words used).

140. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n.17 (1978); *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832) ("The language used in treaties with the Indians should never be construed to their prejudice.").

141. *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) (stating that Indian treaties should be interpreted to accomplish their protective purpose); see also PRUCHA, GREAT FATHER, *supra* note 132, at 404 (stating that Governor Stevens told Washington tribes at the treaty negotiation at Medicine Creek that the treaty was for the tribes' benefit).

142. 1 HAZARD STEVENS, THE LIFE OF ISAAC INGALLS STEVENS 474 (1901) [hereinafter HAZARD STEVENS, LIFE OF ISAAC STEVENS]; PRUCHA, GREAT FATHER, *supra* note 132, at 402.

143. PRUCHA, GREAT FATHER, *supra* note 132, at 402.

144. The Commissioner of Indian Affairs directed Stevens to learn all he could about Washington tribes and to conclude treaties with them; he was given instructions on treaty making and copies of treaties negotiated with other tribes. 3 SNOWDEN, *supra* note 133, at 259-63; see also PRUCHA, GREAT FATHER, *supra* note 132, at 402, 403-04, 406-07 (stating that Stevens conducted strategy sessions with his staff on how to get tribes to agree to treaties, and reviewed recent treaties; that George Gibbs, a Harvard lawyer, prepared draft treaties; that Stevens promoted the treaties and the alleged peace gained with the tribes as reasons for a northern cross country railroad route; and that he had been appointed by the War Department to survey a northern route for a Pacific railway); GIBBS, INDIAN TRIBES, *supra* note 10, at 8 (noting that Stevens was the governor of the Washington Territory and in charge of Northern Pacific Railroad Survey).

145. SWAN, ALMOST OUT OF THE WORLD, *supra* note 10, at 348-49.

146. AMERICAN FRIENDS SERVICES COMM., UNCOMMON CONTROVERSY: FISHING RIGHTS OF THE MUCKLESHOOT, PUYALLUP, AND NISQUALLY INDIANS 21-24 (1970) [hereinafter UNCOMMON CONTROVERSY].

treaties were explained and translated to the tribes by interpreters provided by the United States through the Chinook Jargon, a mixed "language" of French, English and Indian words which did not have more than a 300-word vocabulary.¹⁴⁷ The very limited vocabulary of the "Jargon" would have rendered it incapable of conveying the technical meaning of the property and rights exchanges that were being enacted.¹⁴⁸ Understandably, Northwest tribes have claimed that they did not comprehend what was being discussed and negotiated and that true interpretations of the treaties were not provided.¹⁴⁹ In addition, Stevens was known for "creating a tribe" to negotiate with and for selecting the "chief" of a tribe whom he would negotiate with and get to sign a treaty.¹⁵⁰ Stevens also gave "gifts" or bribes

147. Miller, *Speaking with Forked Tongues*, *supra* note 2, at 543, 552-56. Stevens had people on his staff who could speak the Indians' native tongues but he instead chose to use Chinook Jargon. *Dumawish v. United States*, 79 Ct. Cl. 530, 536-37 (1934).

148. See *United States v. Washington*, 384 F. Supp. 312, 330, 355-56, 381 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) (stating that the Chinook Jargon dictionary prepared by George Gibbs, Stevens' staff attorney, shows the total absence of adequate words to convey the meaning of the treaties); FAY COHEN, *TREATIES ON TRIAL* 37 (1986) (same); EZRA MEEKER, *PIONEER REMINISCENCES OF PUGET SOUND* 208 (1905) ("Of course, it was utterly impossible to explain the treaties to them in Chinook.") (quoting Owen Bush); *UNCOMMON CONTROVERSY*, *supra* note 146, at 21-23; SWAN, *ALMOST OUT OF THE WORLD*, *supra* note 10, at 307, 309, 316, 345 (stating that Chinook Jargon consists of Indian, French and English words; Swan was at the treaty negotiation with five Washington tribes on the Chehalis river in spring 1854, U.S. interpreter Col. Shaw spoke Chinook Jargon fluently, but while two tribes could understand him, the other three had great difficulty; Jargon was so limited that "the same word represents a great many different things"; different tribal languages and Jargon to English made it "difficult to have the subject properly understood by all"); see also *United States v. Lower Elwha Tribe*, 642 F.2d 1141 (9th Cir. 1981) (stating that the Makah continue to contest that their Treaty does not correctly designate the agreed-upon territory).

149. *Dumawish v. United States*, 79 Ct. Cl. 530, 578-79 (1934).

150. *United States v. Washington*, 384 F. Supp. at 355 (stating that Stevens "deliberately created political entities for purposes of delegating responsibilities and negotiating treaties, in creating these entities Governor Stevens named many chiefs and sub-chiefs."); *PRESIDENTIAL REPORT TO THE HOUSE COMM. ON INDIAN AFFAIRS*, EXEC. DOC. No. 112, 35th Cong. 3 (May 6, 1858) (quoting General Clarke letter to President Buchanan) ("The great objection entertained to the treaties made with Governor Stevens [is] the want of authority in the Indians who spoke for the tribes, and the conditions themselves."); see also KENT D. RICHARDS, *ISAAC I. STEVENS: YOUNG MAN IN A HURRY* 209 (1979) (stating that Stevens was well known for "[n]aming chiefs to represent people over whom they could claim no authority [and] grouping incompatible tribes on one reservation"); Edward J. Kowrach, *Foreword* to JAMES DOTY, *JOURNAL OF OPERATIONS OF GOVERNOR ISAAC INGALLS STEVENS OF WASHINGTON TERRITORY IN 1855*, at 8 (Edward J. Kowrach ed., 1978) (stating that "historians are critical of [Steven's] giving the title of "chief" to some of the Indians whom they felt were either pliable or favorable to the Whites," and quoting the *Puget Sound Courier*, Aug. 24, 1855, as stating that "Stevens arbitrarily raised some of the lowest order of tribesmen to chiefs without the consent of the tribes"). "A specific example of this is the giving of the title of 'Chief' to Spokane Gary by Stevens. The Spokane Indians to this date claim that he was never chosen to this position by the Spokanes themselves." DOTY, *supra*, at 6, 8 (stating that Stevens selected a "chief" for the Flathead Indians; that a Pend Oreille Chief said Stevens was a man of two mouths; that Indians said Stevens was not completely candid; and

to the tribes and chiefs that signed treaties and refused to give gifts to those who did not sign.¹⁵¹ Stevens was also accused by his own officers of badgering and coercing tribes to sign treaties.¹⁵² The Stevens treaties present a good example of how the United States pursued its own goals in treaty making with tribes.¹⁵³

3. *The Makah Treaty Negotiation*

The United States initiated treaty negotiations with the Makah Tribe in Neah Bay in January 1855.¹⁵⁴ Governor Stevens traveled to Neah Bay in a steam schooner and arrived on the evening of January 28, 1855.¹⁵⁵ On January 29, he and his assistant George Gibbs toured the Makah lands selecting a reservation for them.¹⁵⁶ On January 30, the Makah met with Stevens on his ship and he told them about the Great White Father and that the United States wanted to buy some of their land for a fair price.¹⁵⁷ Stevens asked them to pick a head chief but they declined because they considered all their chiefs to be of equal rank.¹⁵⁸ As was his practice, Stevens then selected who would be the Makah chief.¹⁵⁹ The negotiations

that at the June 1855 Treaty at Walla Walla, Wash., Stevens is characterized as saying "here is a treaty-sign it or else").

151. ALVIN JOSEPHY, JR., *THE NEZ PERCE INDIANS AND THE OPENING OF THE NORTHWEST* 327 (1965). One of the recorders of the treaty sessions wrote that Stevens gave treaty presents to the chiefs who signed the treaties but not to chiefs who did not sign or left before the signing occurred. DOTY, *supra* note 150, at 36 (stating that Stevens gave gifts to the Palouse chief to sign the June 1855 treaty).

152. JOSEPHY, *supra* note 151, at 310-11; BECKHAM, *supra* note 36, at 36 (stating that Captain Thomas Cram attended the Walla Walla treaty council conducted by Stevens and said Stevens operated in "hot haste and grasping disposition" with "threatening argument" and that "treaties were negotiated [under] tension, misunderstanding, pressure and latent hostility"); *see also* SWAN, *ALMOST OUT OF THE WORLD*, *supra* note 10, at 347-48, 363 (stating that, when one chief said he did not believe the U.S. promises and refused to sign the Chehalis treaty, Stevens took from him the "official" paper Stevens had given him to show he was recognized as a chief and tore it to pieces and thus took "away his recognition as chief").

153. RICHARDS, *supra* note 150, at 198, 206 (stating that federal treaty representatives had many goals: concentrate tribes on small reservations; encourage farming and civilized habits; pay for land with annuities of goods and not cash; furnish teachers, doctors, farmers and blacksmiths; prohibit war between tribes; end slavery; halt liquor traffic; allow Indians to hunt, fish, and gather; and institute gradual assimilation, and that Stevens paid no heed to Indian complaints that the treaties violated traditional customs, habits, superstitions, or religions).

154. Stevens and his entourage went to Neah Bay to select a suitable reservation for the Makah. 1 HAZARD STEVENS, *LIFE OF ISAAC STEVENS*, *supra* note 142, at 474.

155. *Id.*

156. *Id.*

157. RICHARDS, *supra* note 150, at 207; *see also* 1 HAZARD STEVENS, *LIFE OF ISAAC STEVENS*, *supra* note 142, at 474-75 (stating that Isaac Stevens explained what he had done with other tribes regarding their land, making friends with them and giving them schools, farms and doctors, and that Isaac Stevens told them about the Great White Father).

158. 1 HAZARD STEVENS, *LIFE OF ISAAC STEVENS*, *supra* note 142, at 475.

159. *Id.*; *see also* RICHARDS, *supra* note 150, at 207 (stating that Stevens insisted one chief

were conducted in English and the resulting treaty was, of course, written in English. No Makah could read, write or speak English.¹⁶⁰ A three way translation into Makah was provided by a United States officer who first translated Stevens' English into Chinook Jargon, and then a Clallam Indian who could supposedly speak Makah, translated the Chinook words into Makah.¹⁶¹ It is uncertain how much the tribal representatives understood of the language used in the negotiations and the treaty.

The Makah made it clear to Stevens that their land was not fit for cultivation because it had a rocky soil and received up to 122 inches of rain a year.¹⁶² The amount of land Stevens proposed for a Makah reservation appeared adequate to the chiefs because they looked to the ocean and the "whale and halibut" for their livelihood.¹⁶³ In fact, as Stevens expressly stated, the Makah had prospered by catching vast quantities of fish, furs, and whale oil for market, such that few white communities had as much wealth per capita and as evenly distributed as did the Makah.¹⁶⁴

The Tribe's representatives expressed to Stevens the most important negotiating point for the treaty of land cession and peace that the United States desired. "The Indians expressed concern that they would be forced to abandon their fishing grounds and become farmers. Stevens assured them that he would provide fishing equipment and asked only that they share the whale fishery with whites."¹⁶⁵ The Makahs 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.¹⁶⁶ One Makah chief said: "He thought

be the leader and reluctantly the Tribe let Stevens name an official head chief); Gibbs, *Tribes of . . .*, *supra* note 11, at 177 (stating that Stevens "named two sub-chiefs from each village, from whom he selected an Oset . . . as head chief").

160. *United States v. Washington*, 384 F. Supp. 312, 364 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

161. *United States v. Washington*, 384 F. Supp. at 364. See generally GEORGE GIBBS, *DICTIONARY OF THE CHINOOK JARGON, OR, TRADE LANGUAGE OF OREGON* (1863) [hereinafter GIBBS, *DICTIONARY*].

162. 1 HAZARD STEVENS, *LIFE OF ISAAC STEVENS*, *supra* note 142, at 477.

163. *Id.* at 474, 478 (stating that the Makah were "bold and skillful fishermen and sailors, accustomed to venture thirty to fifty miles out to sea in their large canoes, and take the whale and halibut").

164. *Id.*

165. RICHARDS, *supra* note 150, at 207.

166. *United States v. Washington*, 384 F. Supp. at 363 ("Governor Stevens found the Makah not much concerned about their land, apart from village sites, burial sites, and certain other locations, but greatly concerned about their marine hunting and fishing rights. . . . Stevens found it necessary to reassure the Makah that the government did not intend to stop them from marine hunting and fishing but in fact would help them to develop these pursuits."); 3 SNOWDEN, *supra* note 133, at 278 ("Indians were chiefly concerned about their rights to take halibut and whales, as they had always been accustomed to do As there was no reason to interfere with these privileges, but rather every reason to encourage the exercise of the rights, the negotiations were easily concluded."). In this regard, the Makah were similar to the Puget Sound and Columbia

he ought to have the right to fish, and take whales, and get food where he liked."¹⁶⁷ Two other chiefs expressed agreement with that statement and both also added that they "did not want to leave the salt water."¹⁶⁸ 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."¹⁶⁹ The tribe wanted to retain all their rights to the sea and to whaling because that "was [their] country."¹⁷⁰

The official treaty notes from this negotiation and the biography of Stevens by his son are very helpful in understanding the Makah treaty because often what was actually said and promised at Indian treaty negotiations is not certain. In the Makah treaty notes, however, the unmistakable message from the Makah comes through crystal clear that they demanded to retain their ocean going life style and culture, and their rights to whales, fish and marine products before they would cede any land or surrender any rights.¹⁷¹ The Makah culture was so extremely ocean oriented and they so relied on the sea

River tribes who would not agree to give up their semi-nomadic lifestyles and over sixty-four million acres of land without first preserving their salmon fishing rights in their treaties. *Sohappy v. Smith*, 302 F.Supp. 899, 906 (D. Or. 1969); UNCOMMON CONTROVERSY, *supra* note 146, at 21; *see also Winans*, 198 U.S. at 381 (stating that the "right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians . . . which were not much less necessary to the existence of the Indians than the atmosphere they breathed").

167. 1 HAZARD STEVENS, LIFE OF ISAAC STEVENS, *supra* note 142, at 474 (quoting Kalchote); George C. Gibbs, Ratified Treaty No. 286: Documents Relating to the Negotiation of the Treaty of January 31, 1855, with the Makah Indians 2 (n.d.) (on file with author) [hereinafter Ratified Treaty No. 286].

168. 1 HAZARD STEVENS, LIFE OF ISAAC STEVENS, *supra* note 142, at 474, 475; *see also* EDWARD SWINDELL, JR., REPORT ON SOURCE, NATURE, AND EXTENT OF THE FISHING, HUNTING, MISCELLANEOUS RIGHTS OF CERTAIN INDIAN TRIBES IN WASHINGTON AND OREGON 17, 122 (BIA Office of Forestry & Grazing 1942) (quoting It-an-daha of Wa-atch village as telling Stevens that "my wish is like the rest, I do not wish to leave the salt water. We want to fish in common with the whites."). A fourth chief and a fifth also demanded the retention of their rights and reemphasized the importance to the Makah of ensuring that they reserved to themselves the right to continue whaling, sealing, and fishing, and living off the ocean as they had always done. He added that they were "willing to sell land. All [they] wanted was the right of fishing." 1 HAZARD STEVENS, LIFE OF ISAAC STEVENS, *supra* note 142, at 475; Ratified Treaty No. 286, *supra* note 168, at 2-3.

169. 1 HAZARD STEVENS, LIFE OF ISAAC STEVENS, *supra* note 142, at 475.

170. *Id.* (describing one chief as stating that "[i]f whales were killed and floated ashore, he wanted, for his people the exclusive right of taking them," and describing another chief as stating, "He wanted the sea. That was his country."); *accord* Riley, *supra* note 9, at 71 (stating that Chief Tse-kan-woot told Stevens, "He wanted the sea. That was his country."); Ratified Treaty No. 286, *supra* note 168, at 2 (stating that the Tribe wanted whales that floated ashore).

171. *United States v. Washington*, 384 F. Supp. at 353, 363-65 ("Much of the official record of the treaty negotiations deal with the [Makah's marine hunting and fishing rights.]").

for their needs that "once assured that they could continue hunting whales, [the Makah] were happy to dispose of interior lands"172

Stevens clearly heard the concerns of the Makah about keeping their whaling and fishing rights. Stevens promised that the Makah could keep their whaling and marine culture and 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.¹⁷³ Governor Stevens explained that instead of wanting "to stop their fisheries, [the President] wished to send them oil-kettles and fishing apparatus."¹⁷⁴ Stevens added that "[the Great Father] knows what whalers you are, how far you go 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."¹⁷⁵

After hearing these promises and being "assured that they could continue hunting whales," the Makah agreed to sell their interior lands and forty-one tribal members and chiefs signed the treaty on behalf of their Tribe and Governor Stevens signed on behalf of the United States.¹⁷⁶ In contrast to the language and interpretation problems encountered in other Indian treaties, it is clear that the Makah and the United States representatives understood

172. RICHARDS, *supra* note 150, at 209.

173. *Id.* at 195 & 201; Treaty with the Makah, Jan. 31, 1855, art. 4, 12 Stat. 939, *reprinted in* 2 KAPPLER, *supra* note 26, at 682; *United States v. Washington*, 384 F. Supp. at 363-64 (stating that "treaty commissioners were aware of the commercial nature and value of the Makah maritime economy and promised the Makah that the government would assist them in developing their maritime industry"; and that Stevens' promises of kettles and fishing apparatus "clearly indicated that the treaty commissioners had no intention to restrict the Indians to aboriginal equipment or techniques. The Government's intent to aid the Makah in their whaling, sealing and other fisheries continued after the treaty."); BECKHAM, *supra* note 36, at 32, 60-61, 91-92 (stating that Stevens and Gibbs were well aware of the potential value of commercial whaling and marine fishing and reserved the tribal rights). Compare with RICHARDS, *supra* note 150, at 195, 201 (stating that Stevens thought their usufructuary rights would allow them to remain self-supporting and "would not create any problem for the settlers").

174. Ratified Treaty No. 286, *supra* note 168, at 2; 1 HAZARD STEVENS, LIFE OF ISAAC STEVENS, *supra* note 142, at 474; *see also id.* at 475 ("Whoever killed the whales was to have them if they came ashore.").

175. Ratified Treaty No. 286, *supra* note 168, at 4; 1 HAZARD STEVENS, LIFE OF ISAAC STEVENS, *supra* note 142, at 476 (stating that the United States had an interest, of course, in ensuring that the Makah were self-supporting). The Makah later sued the United States for underpayment for their ceded lands due to the failure of the U.S. to provide the modern whaling equipment Stevens promised. *Makah Indian Tribe v. United States*, 7 Ind. Cl. Comm. 477, 478-79, 482-83 (Docket No. 60, 1959), *aff'd*, 151 Ct. Cl. 701 (1960), *cert. denied*, 365 U.S. 879 (1961) (stating that the Tribe sought compensation for an oral promise at the treaty negotiations wherein Stevens said U.S. would guarantee and support their rights to a fishery and whaling by providing them with modern fishing and whaling apparatus, barrels for whale oil and kettles to boil it out).

176. RICHARDS, *supra* note 150, at 209; 1 HAZARD STEVENS, LIFE OF ISAAC STEVENS, *supra* note 142, at 476 (stating that chiefs and members from Neah, Waatch, Tsoo-yess, and Oseth villages signed treaty); Ratified Treaty No. 286, *supra* note 168, at 5.

exactly what the United States was recognizing and promising to preserve regarding Makah whaling in this treaty.¹⁷⁷ The parties understood that the Makah were preserving their right to whale and seal in the Pacific Ocean and to maintain their ocean culture. Governor Stevens understood the intent of the treaties that he negotiated with Washington State tribes regarding fishing rights and wrote that "[i]t never could have been the intention of Congress that the Indians could be excluded from their ancient fisheries."¹⁷⁸ Regrettably, the United States did not live up to its promised payments for the Makah lands because the new whaling equipment was never delivered to the Tribe.¹⁷⁹ In addition, 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.¹⁸⁰

D. Federal Cultural Oppression and Assimilation

The Anglo/American view of property, culture and religion differs radically from Native American viewpoints. Not surprisingly, the culture of the United States clashed with the Makah culture.¹⁸¹ In fact, the Makah suffered through overt cultural oppression under the guise of the various federal Indian policies adopted by the United States and through other policies which were specifically aimed at the Makah.

In the first instance, the extent of the Makah territory and sovereign rights were limited under its treaty with the United States.¹⁸² Second, under the

177. Even though the treaty negotiation was conducted in the limited vocabulary of Chinook Jargon, there were three separate words for whales and two for seals. GIBBS, *DICTIONARY*, *supra* note 161, at xi, xiv, 3, 40, 42 (noting that Gibbs was Stevens' secretary and attorney, and was at the Makah treaty and at other negotiations across the Pacific Northwest).

178. Riley, *supra* note 9, at 27 (quoting Stevens' 1854 Report to the Commissioner of Indian Affairs).

179. *Makah Indian Tribe v. United States*, 7 Ind. Cl. Comm. 477, 478-79, 482-83 (Docket No. 60, 1959), *aff'd*, 151 Ct. Cl. 701 (1960), *cert. denied*, 365 U.S. 879 (1961) (stating that Tribe sought compensation for treaty promise of U.S. to provide new whaling equipment, barrels for whale oil, and kettles to boil it).

180. MCDONALD, *supra* note 65, at 91, 98-99, 136 (stating that nothing was done for Tribe after signing the treaty; annuity goods were stored in Olympia, Wash., and no payment for tribal land was ever made and no health care provided; goods that finally were delivered were not useable by the Makah, were shopworn, and the value was greatly inflated; and that one American "[r]egarded the shipment as a travesty on the treaty agreements and suspected it represented plain dishonesty on the part of speculators").

181. FIXICO, *supra* note 1, at xv-xix (contrasting values, differences and violent struggles between American culture and values of capitalism and the cultural values of Indians).

182. The Tribe claims that the treaty language incorrectly described the reservation boundaries and the Tribe lost land not intended to be ceded to the United States. MCMILLAN, *supra* note 14, at 217 (stating that the Ozette village was left out of the original 1855 reservation); DENSMORE, *supra* note 10, at 8 (discussing what lands the treaty reserved, and noting that by Executive Order in 1872, the U.S. added more land to the Reservation). Ozette village was added later to the Tribe's reservation. Ann M. Renker & Erna Gunther, *Makah, in*

federal policy of assimilation, the Makah suffered an active and direct campaign to destroy their culture, religion, families, and government because those were the goals of the United States in the allotment and assimilation era.¹⁸³ Finally, the Makah suffered specific actions by the federal Indian agents located at the Neah Bay Agency on the Makah Reservation to destroy the Makah language, families, culture and traditions.¹⁸⁴ These types of federal actions were a serious and common problem throughout Indian country because only in the 1930s and even up to the 1950s did the federal government and the federal Bureau of Indian Affairs (BIA) rescind regulations prohibiting reservation Indians, who supposedly were living on their own lands, from wearing long hair, performing their religious ceremonies, and

7 HANDBOOK OF NORTH AMERICAN INDIANS 429 (William C. Sturtevant ed., 1990). Furthermore, the Makah's trade with Canadians and its practice of owning slaves was ended by the treaty. Treaty with the Makah, Jan. 31, 1855, arts. 12, 13, 12 Stat. 939, 940, *reprinted in* 2 KAPPLER, *supra* note 26, at 682; GIBBS, INDIAN TRIBES, *supra* note 10, at 37 (stating his concern about the Makah trade with Canadians and recommending that "as a revenue measure[,] [i]n any treaties made with them, it should enter as a stipulation that they should confine their trade to the American side.").

183. *See infra* Part III.B.2.a; *Montana v. United States*, 450 U.S. 544, 560 n.9 (1981) ("[T]he avowed purpose of [Congress'] allotment policy was the ultimate destruction of tribal government."); DELOS OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 32 (1973); JOE STARITA, THE DULL KNIVES OF PINE RIDGE 177 (1995) (stating that the federal government felt that Indians "must be imbued with the exalting egotism of American Civilization," and quoting Commissioner of Indian Affairs Report); COLSON, *supra* note 10, at 1, 11-12 (stating that the policy of the United States "was expected to lead to the extinction of American Indians as a people and to their absorption into the general society"); KIRK, *supra* note 15, at 226, 228-33; 245-46 (stating that the Makah life style and land ownership system changed under U.S. and missionary systems, with the goal of making Indians comply with American social principles and leave their own values). Part of "manifest destiny" was the destruction of Indian tribes and cultures. "As a rule Americans hated red Indians, wished to see them exterminated, and for the most part treated them accordingly." CATHERINE D. BOWEN, MIRACLE AT PHILADELPHIA 143-44 (1966); *accord* NATHAN SCHACHNER, THE FOUNDING FATHERS 64-65 (1954). The goal of frontiersmen was to destroy Indians and take their land. ROBERT E. SHALHOPE, THE ROOTS OF DEMOCRACY: AMERICAN THOUGHT AND CULTURE, 1760-1800, at 128-31 (1990) (stating that philanthropists had the same goals but used different methods).

184. COLSON, *supra* note 10, at 1, 9, 11, 18, 30 (stating that the U.S. later tried to turn the Makah to farming even though that was impossible and the Makah excelled at whaling and fishing); Riley, *supra* note 9, at 65 & n.5 (noting "[d]rastic changes" at Makah in second half of the 1800s as the U.S. attacked "the religious and social parts of the culture" and tried to discourage ceremonies such as the potlatch because it was "regarded by some of the agents as sinfully improvident"); Miller, *Neah Bay*, *supra* note 96, at 262, 268, 271 (describing "harsh governmental attempts to suppress" Makah customs and culture); Dep't of Commerce EA, *supra* note 40, app. 8.2, at ii, 18-21 (stating that the U.S. tried to undermine Makah traditions and assimilate them into American values and culture); Robert L. Whitner, Culture Conflict in the Agency School: An Introduction to a Case Study, the Neah Bay Reservation, 1861-1896 28 (1977) (unpublished manuscript, on file with Makah Cultural and Research Center, Neah Bay, Wash.) (quoting Indian agent: "If the purpose be to civilize these children of darkness, to take them from a barbarous life and put them into a civilized life, the more divorced from the house of their childhood the better.").

living their own lives.¹⁸⁵ And it was well into the 1950s before the government stopped trying to eradicate Indian languages.¹⁸⁶ In essence, the federal government did not act like Indian tribes were living on their own lands and according to their own cultures and religions. Instead, the United States acted more as if Indians were in prisons where the government could control every aspect of their lives.¹⁸⁷

1. Cultural and Religious Oppression

For over one hundred years, the federal government purposely tried to alter every aspect of Makah culture. The ultimate goal of the United States "was the complete assimilation of the . . . Makahs into American society in as short a time as possible."¹⁸⁸ The government wanted to transform the Makah culture and substitute its way of life with the American culture. The reports of the Commissioners of Indian Affairs demonstrated that the "official policy . . . [of] ruthless benevolence" was designed to extinguish the "Indianness" of all Indians and teach them "civilized" ways.¹⁸⁹ As an example, notwithstanding Governor Stevens' promise to assist the Makah in

185. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 175 n.347 (Univ. of N.M. photo. reprint 1971) (1942) (quoting Office of Indian Affairs, Circular No. 1665, April 26, 1921) ("The sun-dance and all other similar dances and so-called religious ceremonies are considered 'Indian Offenses' under existing regulations, and corrective penalties are provided."); *id.* at 176 n.347 (quoting AMERICAN INDIAN DEFENSE ASSOCIATION, INC., THE NEW DAY FOR THE INDIANS 12 (1938) [hereinafter NEW DAY FOR THE INDIANS]) ("[C]hildren enrolled in Government schools were forced to join a Christian sect, to receive instruction in that sect, and to attend its church. On many reservations native ceremonies were flatly forbidden, regardless of their harmless nature. In some cases force was used to make the Indians of a reservation cut their hair short."); STARITA, *supra* note 183, at 269 (stating that in the 1950s the BIA still enforced restrictions on religious ceremonies and beliefs, such as the Sun Dance, flesh offerings, and piercings).

186. Mark Shaffer, *Indians' Languages Near Extinction*, ARIZ. REPUBLIC, July 16, 2000 ("[M]alaise in Native American languages is the result of long-standing federal policy to eliminate them."). BIA schools, even up to the 1950s, prevented Indian children from speaking their native languages. STARITA, *supra* note 183, at 155 (noting that speaking Lakota at school was expressly forbidden into the 1950s).

187. Roberta Haines, *Singers, Dancers, Dreamers, Travelers*, in SPIRIT OF THE FIRST PEOPLE: NATIVE AMERICAN MUSIC TRADITIONS OF WASHINGTON STATE 7 (Willie Smyth & Esme Ryan eds., 1999) (stating that the government treated "many reservation people like prisoners of war"); McDONALD, *supra* note 65, at 154 (stating that, in 1869, the Army took over the Makah Reservation for two years).

188. COLSON, *supra* note 10, at 2 nn.1, 11 (defining assimilation as the amalgamation of people derived from different groups into one social body); FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920, at 58-61 (1984).

189. COLSON, *supra* note 10, at 12 ("The policy was one of wholesale transformation, or the substitution of one entire way of life for an alien one."); *id.* (quoting REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 357 (1940)) ("[O]fficial policy [enacted] through all the devices within the control of a government whose power over Indians was absolute."); Videotape: A Gift From the Past, *supra* note 43.

their whaling and fishing economy, federal pressure was placed on the Makah to become farmers.¹⁹⁰

The federal government tried to "civilize" the Makah Tribe by taking its culture, its religion, and its traditions.¹⁹¹ In a concerted and calculated strategy the federal agents stationed at the Neah Bay Indian Agency tried to wipe out the Makah language, and tried to withdraw the children from their culture and families and raise them as "white" children.¹⁹² The federal agents worked to completely change even the most basic parts of Makah life. The agents discouraged the longhouse style of communal living and helped Makahs build single family homes and tear down the remaining longhouses.¹⁹³ Agents would visit Makahs in their homes to observe and to correct perceived deficiencies, such as encouraging the Makah to dress like white citizens.¹⁹⁴ The federal agents tried to control every single aspect of Makah life, outlawing tribal games and dances and setting standards for Makah sexual life, and punishing any violators.¹⁹⁵ Furthermore, the American legal system, with courts, judges and police, was imposed on the Tribe.¹⁹⁶ The federal agents even interfered with the Tribe's internal class

190. The government tried to turn the Makah to farming, even though everyone recognized that was impossible with the soil and the rain (110 inches annually) and that the Makah excelled at whaling and fishing. COLSON, *supra* note 10, at 18, 30; Alix Jane Gillis, *History of the Neah Bay Agency, in COAST SALISH AND WESTERN WASHINGTON INDIANS III*, *supra* note 9, at 103 (stating that Neah Bay Indian agents in 1876 gave up trying to make farmers out of the Makah and thought "it was better to let them resort to their fishing and sealing").

191. COLSON, *supra* note 10, at 11 (stating the belief that the first step to civilizing Indians was to teach the children in English and end the "folly of continuing in their barbarous practices"); *id.* (quoting ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS xxiii (1887) [hereinafter 1887 COMMISSIONER'S REPORT]) ("If we expect to infuse into the rising generation the leaven of American citizenship, we must remove the stumbling-blocks of hereditary customs and manners, and of these language is one of the most important elements."); Goodman, *supra* note 30, at 223, 233 n.1 (quoting ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 224 (1890) [hereinafter 1890 COMMISSIONER'S REPORT]) (stating that Makah religious and cultural ceremonies were banned).

192. COLSON, *supra* note 10, at 13, 19 (stating that Neah Bay agents "concentrated their efforts on isolating the children from contact with tribal life and on indoctrinating them with American culture," and that "[t]he Indian tongue must be put to silence and nothing but English allowed in all social intercourse"); SWAN, *ALMOST OUT OF THE WORLD*, *supra* note 10, at 193 (stating the belief that the Indians could be changed and Christianized "by either taking the child from its parents and bringing it up under Christian instruction, and away from tribal influences and prejudices or to gradually civilize a tribe, and let the rising generation make the change").

193. COLSON, *supra* note 10, at 14.

194. *Id.* at 14, 15 (quoting Neah Bay Agent in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 162 (1891)).

195. KIRK, *supra* note 15, at 236 (stating that the Makah had to hide their dances and bone games and were arrested if caught); COLSON, *supra* note 10, at 15 (quoting Neah Bay Agent in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 146 (1879) regarding Makah sexual life).

196. COLSON, *supra* note 10, at 15; Gillis, *supra* note 190, at 104-05 (stating that federal

and governmental system by selecting the men who would serve as chiefs.¹⁹⁷ The agents also tried to alter Makah ownership rights regarding coastal and ocean fishing sites.¹⁹⁸ Even the Makah traditional healing methods were banned by the agents and Makah doctors were threatened with imprisonment.¹⁹⁹

The government suppressed other cultural activities, such as the traditional Cloqually dances, because the agents considered them "heathenish and barbarous."²⁰⁰ The government even tried to end the tribal tradition of potlatching. The Indian agents tried to stop this activity because they thought it was not a good tradition.²⁰¹ "Activities of a ceremonial or ritual nature were discouraged or prohibited. . . . Potlatches, gambling games, the performance of Indian dances were usually forbidden. The ceremonies of the secret religious and curing societies were . . . banned altogether."²⁰²

In Washington State in the 1880s, the United States made a special attempt to civilize Indians by "banning traditional native practices" and public gatherings, including dancing, gambling, and spiritual activities, and by requiring reservation Indians to carry identification cards.²⁰³ The Makah resisted the denial of their political, religious, and First Amendment rights by going underground with some potlatch and cultural and spiritual traditions or by reorganizing their traditional ceremonies around American holidays like Christmas, birthday parties, and Independence Day or by incorporating them into Christian practices.²⁰⁴ The Makah also resisted this oppression by

agents established a police force in 1881 and established a court, but Indians were not considered suitable so the Agent acted as judge).

197. COLSON, *supra* note 10, at 15.

198. *Id.* at 16.

199. *Id.* at 14.

200. *Id.* at 17; Goodman, *supra* note 30, at 223, 233 n.1 (stating that religious and cultural ceremonies were banned); *id.* (quoting 1890 COMMISSIONER'S REPORT, *supra* note 191, at 224) ("All heathenish and barbarous practices I have endeavored to stop and where possible prohibit altogether, such as the 'Cloqually [Makah Klookwalli wolf ceremony] Dance' . . . Potlatching of all kinds . . . has been carried on here without stay or hindrance, and I have had a great deal of trouble in carrying out the instructions of the Indian Department in this matter.").

201. COLSON, *supra* note 10, at 16 (stating that the potlatch discouraged and forbidden because it "mobilized the economic resources of the Makah in a manner alien to the comprehension of the agents"); MCCURDY, *supra* note 11, at 74 n.5 (stating that the agents thought potlatches wasteful and destructive, and that an agent stated in 1906 that it was "at the bottom of all evils besetting the Indians").

202. COLSON, *supra* note 10, at 14.

203. Haines, *supra* note 187, at 7, 12.

204. *Id.* at 12; KIRK, *supra* note 15, at 236, 245 (stating that the Makah hid their dances and bone games, and that they were "taught to forget everything and now we're trying to get it back"); COLSON, *supra* note 10, at 17-18 (stating that the Makah resisted by holding potlatches at birthday or christmas or just off the reservation); Goodman, *supra* note 30, at 223, 233 n.4 (stating that the Makah started holding "parties" instead of potlatches, and quoting letter from federal agent for Neah Bay Indian Agency 1931: "There is no doubt as to the harm of these

traveling to Tatoosh Island, just off the tip of Cape Flattery, to hold ceremonies notwithstanding the threats of imprisonment.²⁰⁵

2. Attacks on Makah Families

The United States agents at the Makah Reservation "concentrated their efforts on isolating the children from contact with tribal life and on indoctrinating them with American culture."²⁰⁶ The government literally tried to destroy Makah family life as part of its attempt to alter Makah culture and assimilate them into white society.²⁰⁷ The federal agents at Neah Bay wanted to segregate tribal members over fifty-five from the rest of the families because the agents thought that younger Indians would never learn civilized ways if they were being influenced and taught by their elders.²⁰⁸ At school, children were punished for speaking the Makah language and were taught to ridicule and to be ashamed of their own families, culture, and language.²⁰⁹

Boarding schools were used at Makah from roughly 1870-1940 the same as in the rest of Indian country to teach Indian children civilized ways and to eradicate Indian culture.²¹⁰ Makah families were forced to send their children

Indian parties where they give away money, clothes, etc. . . . The potlatch, which is masked as a birthday party, christening party or wedding party is going to be very difficult to stop at once. . . . The Indian Police [BIA] were instructed to arrest anyone giving away money at a party or playing the bone game for money . . . to stop these harmful practices."); MCCURDY, *supra* note 11, at 73 n.4 (stating that in the late 1870s the U.S. published an order forbidding dances, but that the Makah refused to obey and continued to hold their ceremonies and dances in secret).

205. Goodman, *supra* note 30, at 223, 233 n.1 (quoting 1890 COMMISSIONER'S REPORT, *supra* note 191, at 224).

206. COLSON, *supra* note 10, at 13; see SWAN, ALMOST OUT OF THE WORLD, *supra* note 10, at 193.

207. Robert L. Whitner, Culture Conflict in the Agency School: An Introduction to a Case Study, the Neah Bay Reservation, 1861-1896, at 28 (1977) (unpublished manuscript, on file with Makah Cultural and Research Center, Neah Bay, Wash.) (quoting Indian agent: "If the purpose be to civilize these children of darkness, to take them from a barbarous life and put them into a civilized life, the more divorced from the house of their childhood the better.").

208. Gillis, *supra* note 190, at 100-01, 105-06 (quoting a federal agent's 1871 observation that "the parents, with few exception, do not want their children to attend school, or to be like the white people," and an agent's 1887 recommendation of "the separation of the children from the people over 55 years old."); COLSON, *supra* note 10, at 17 (quoting Neah Bay Agent in 1887 COMMISSIONER'S REPORT, *supra* note 191, at 211 (stating that tribal members would revert to the Indian way when ridiculed).

209. COLSON, *supra* note 10, at 20, 127-29 (stating that children were weaned from "any lingering belief in the customs of their ancestors by a policy of ridicule. They were taught to regard their own elders as ignorant and superstitious barbarians whose advice should be ignored."). The schools taught English so that "[t]he Indian tongue must be put to silence and nothing but English allowed in all social intercourse." *Id.* at 19. "Where possible, [children] were prevented from acquiring the culture of their elders." *Id.* at 21.

210. Schools tried "to inculcate Indian children with the values of Western civilization and to eliminate any traces of the children's native heritage." John E. Silverman, *The Miner's Canary: Tribal Control of American Indian Education and the First Amendment*, 19 FORDHAM URB. L.J.

to the boarding school at Neah Bay or the parents would be arrested.²¹¹ The mandatory schooling at Neah Bay is the main reason why some of the other Makah villages came to be abandoned because families wanted to be near their children at school.²¹² In addition, in 1874, the Makah boarding school was purposely moved and located further away from the nearest village to stop any home influence of Makah culture on the children and to take the children "entirely out of barbarous surroundings and put them in the midst of a civilized Christian home."²¹³ Makah children were then forced to attend school from seven to fourteen years of age, and the schools were usually conducted year round with only a few hours a week at home.²¹⁴ "Where possible, [children] were prevented from acquiring the culture of their elders."²¹⁵ The children were dressed in American clothing, taught the English language and American games, and forced to accept the Christian religion.²¹⁶ This deliberate attack on Makah family life succeeded in weakening Makah culture because it alienated these generations of Makah children to some extent from their culture and families.²¹⁷

1019, 1022 (1992).

211. COLSON, *supra* note 10, at 10, 20 (stating that boarding schools were preferred to normal day schools because the children could be cut off from Indian family life and culture).

212. Miller, *Neah Bay*, *supra* note 96, at 262 (stating that families moved to Neah Bay from other villages to be near their children at the boarding school); WEBB, *supra* note 69, at 287 (stating that compulsory schooling of Makah children at Neah Bay led to the abandonment of Ozette Village).

213. COLSON, *supra* note 10, at 19 (quoting Neah Bay Agent in ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 333 (1874)); *see also* Gillis, *supra* note 190, at 103, 106 (stating that, in 1877, the federal plan was to separate the younger Makah children from their parents for training, and that a new federal agent in 1889 advocated the school be moved farther away from the childrens' homes to separate them from their parents and culture); Miller, *Neah Bay*, *supra* note 96, at 262 (quoting 1889 Neah Bay agent: "Far superior results [with Makah children] would be accomplished were the schools at a long distance from the tribes.").

214. COLSON, *supra* note 10, at 20-21 (stating that the school was held ten months a year).

215. *Id.* at 21.

216. *Id.* at 20; Gillis, *supra* note 190, at 101 (stating that by 1870 the school was advancing because nineteen boys were attending "uniformly clothed . . . a step in the direction of civilization."); *see also* NEW DAY FOR THE INDIANS, *supra* note 185 (Indian "children enrolled in Government schools were forced to join a Christian sect, to receive instruction in that sect, and to attend its church."); PRUCHA, GREAT FATHER, *supra* note 132, at 145 ("The churches engaged in a long and inconclusive debate over the precedence to be given to civilizing and to Christianizing. . . . It was largely a theoretical squabble, for the two processes, civilizing and Christianizing, were inextricably mixed. When missionaries went among the Indians, they went to educate and convert, and it would be difficult to tell where one activity ended and the other began.").

217. COLSON, *supra* note 10, at 127-29 (stating that in 1942 some Makah admitted that as children they spoke against their parents and elders talking about their culture, and others recognized that they had been assimilated); *accord* Miller, *Neah Bay*, *supra* note 96, at 262, 267-68; *see also* JACQUELINE PETERSON, SACRED ENCOUNTERS: FATHER DE SMET AND THE INDIANS OF THE ROCKY MOUNTAIN WEST 143 (1993) (stating that, after leaving boarding school, many Salish boys had forgotten their languages and could not speak to their parents).

3. *Oppression of Makah Government*

The Makah developed an organized political system based on their cultural and religious beliefs which differed from the United States system of government.²¹⁸ As demonstrated by the chiefs who represented each village at the 1855 treaty negotiation, the Tribe had its own political organization and structure which represented its people. Starting with Governor Stevens "selection" of a head chief for the Makah, the federal government controlled and directed the Makah government for over a century.²¹⁹ The Indian agents at Neah Bay treated the Makah like children.²²⁰ The federal Indian Agency at Neah Bay operated as the de facto Makah tribal government from 1863-1930, when the tribe adopted a new form of federally encouraged tribal government and ostensibly started governing itself.²²¹ As of 1942, however, it was one observer's opinion that the Tribe was still not in control of its own affairs, even though the federal agents at Neah Bay were gone and the Tribe had an elected tribal council, because it was still completely controlled by BIA agents.²²² Notwithstanding this history, the Makah have taken advantage of the modern era of federal Indian policy and the latitude the federal government has granted to tribal governments to really begin governing their territory and citizens. Today, the Makah operate a fully functioning government with control over their reservation.

III. *Cultural Determination*

This Article defines "cultural self-determination" as the right of a distinct and identifiable group of people or a separate political state to set the standards and mores of what constitutes its traditional culture and how it will honor and practice that culture. The conflicts that arise when a state or people determine its own culture occur when the practice of that culture or traditions affects the interests of other distinct groups or states. Of course, defining a "distinct group of people" or a "separate political state" which should hold such rights could also cause problems.

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. As might be expected with

218. Taylor, *supra* note 9, at 47; COLSON, *supra* note 10, at 280 (stating that, because of the principles controlling Makah behavior and religion, they have a political structure not shared by whites).

219. COLSON, *supra* note 10, at 15 (stating that federal agents ignored the tribe's class system in appointing men as chiefs).

220. *Id.* at 10.

221. *Id.* at 9.

222. *Id.* at 22, 23 (claiming the Tribe had no control over its own trust funds and that the BIA officials sent documents for the tribal council to sign).

a whaling culture, the Tribe's cultural practices conflicted with other interests, such as the United States' international leadership role in controlling whaling, the anti-whaling nations, and some animal rights groups who work to stop whaling. With this definition of cultural self-determination and the inherent risk of conflicts with other "cultures" and nations in mind, we will briefly examine why the United States came to support Makah whaling and whether the Makah have the right to decide what its culture is and how to practice that culture.

A. *What Is Culture?*

A dictionary defines culture as the "pattern of human knowledge, belief, and behavior that depends upon man's capacity for learning and transmitting knowledge to succeeding generations[,] the customary beliefs, social forms, and material traits of a racial, religious or social group."²²³ This definition appears to fit the Makah situation perfectly because the Tribe, as a racial, social, religious, and political group does want to preserve and pass on a pattern of knowledge, beliefs, and behaviors about whales and whaling to future Makah generations.

Culture is not easy to define. There are about as many variations on the definition as there are sociologists and anthropologists. The influential Dutch sociologist Geert Hofstede defined culture as "'the collective programming of the mind which distinguishes one human group from another.' . . . Culture is to a human collectivity what personality is to an individual."²²⁴ This definition is also apropos to the Makah. 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."²²⁵ The Makah have shown that they will fight to keep their

223. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 314 (1985) [hereinafter WEBSTER'S NINTH DICTIONARY]; see also THE AMERICAN HERITAGE DICTIONARY 348 (2d ed. 1985) (defining culture as "[t]he totality of socially transmitted behavior patterns, arts, beliefs, institutions, and all other products of human work and thought characteristic of a community or population"); DAVID W. MCCURDY & JAMES P. SPRADLEY, ISSUES IN CULTURAL ANTHROPOLOGY 13 (1979) ("Culture labels the total way of life for each group. It is what made one society different from another. . . . 'Culture . . . is that complex whole which includes knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by man as a member of society.'). Cultural anthropology "deals with human culture esp. with respect to social structure, language, law, politics, religion, magic, art, and technology." WEBSTER'S NINTH DICTIONARY, *supra*, at 314.

224. GEERT HOFSTED, CULTURE'S CONSEQUENCES 25 (1980); accord Alfred M. Jaeger, *Organization Development and National Culture: Where's the Fit*, 11 ACAD. OF MGMT. REV. 178, 179 (1986); DAN VOICH, JR. & LEE P. STEPINA, CROSS-CULTURAL ANALYSIS OF VALUES AND POLITICAL ECONOMY ISSUES 29 (1994) ("[Hofstede] made a convincing case for the consideration of prevailing social values as quintessential variables in understanding motivation and organizational behavior cross culturally").

225. COLSON, *supra* note 10, at 11.

own "personality" as a nation, race, and people and will teach this culture to their children.²²⁶

National cultural differences continue to exist even in today's "modern" world and in this era of globalization.²²⁷ These differences are even demonstrated in governmental organizations and other types of organizations, as well as in the organization and rules of national court systems.²²⁸ This is because cultural values influence the very forms of organizations, legal infrastructure, and procedures a society develops.²²⁹ In fact, even something as seemingly straightforward as what is offensive "is a subjective, cultural determination defined differently in each country."²³⁰

It is a testament to the importance of American Indian cultures and the extent they have fought to keep their cultures and religions that they still survive today as separate groups. The experience of most of history has been the opposite; the conquering, dominant society's language and culture takes over while the indigenous cultures and languages die out.²³¹ Native

226. Culture must be taught to future generations because it is not inherently passed on. MCCURDY & SPRADLEY, *supra* note 223, at 13, 29 ("An important attribute of culture . . . is learning. Culture . . . is learned, not inherited biologically. In short, learning is key to human adaptation and culture labels what is learned."); V. Robin Fox, *The Cultural Animal*, in ISSUES IN CULTURAL ANTHROPOLOGY 17 (David W. McCurdy & James P. Spradley, eds., 1979) ("Culture, in anthropological parlance, refers to traditional modes of behaving and thinking that are passed from one generation to another by social learning of one kind or another."); L.L. LANGNESS, OTHER FIELDS, OTHER GRASSHOPPERS 6 (1977) ("Culture consists essentially of a set of controls for organizing and directing human behavior. [and] are transmitted to us extra-genetically from previous generations and peers.").

227. Voich and Stepina state:

Hofstede is also credited with being the first to empirically demonstrate the counterintuitive notion that, despite ever-increasing global communications, along with the globalization and increased interdependence of world markets, there continue to be distinctive cultural differences between nations and regions. In fact, several researchers have provided evidence that such cultural differences are increasing rather than decreasing.

VOICH & STEPINA, *supra* note 224, at 29. Indian tribes are not the only groups interested in preserving their cultures. See, e.g., A. Dan Tarlock, *Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants*, 31 ARIZ. ST. L.J. 539 (1999); Ted Anthony, *World Tries to Resist American Invasion of Culture, Language*, OREGONIAN (Portland), Apr. 17, 2000, at A6 (reporting that English seems to be taking over the world along with American commercial icons, and that "[a]s English becomes a global tongue, it becomes clear that language and culture cannot be separated").

228. Oscar G. Chase, *Some Observations on the Cultural Dimension in Civil Procedure Reform*, 45 AM. J. COMP. L. 861, 864 (1997) (noting the relationship between national cultures and the functioning of their organizations because "[o]rganizations are culture-bound").

229. Oscar G. Chase, *Legal Processes and National Culture*, 5 CARDOZO J. INT'L & COMP. L. 1, 13-17 (1997).

230. John H. Taylor, III, Comment, *The Internet in China: Embarking on the "Information Superhighway" With One Hand on the Wheel and the Other Hand on the Plug*, 15 DICK. J. INT'L L. 621, 625 (1997).

231. See, e.g., JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN

Americans, however, have fought for over three hundred years to keep their cultures, languages, and religions alive and separate from the European/American society. Amazingly, they have kept many of these important cultural aspects viable even today.²²²

Equally surprising is the strength of the Makah whaling culture and their exercise of an internal will to keep alive the desire to practice whaling, after a seventy-year hiatus. The Tribe has the will and strength to fight the external battle to restore this cultural aspect. The Makah effort demonstrates to other nations, cultures, and peoples that if they want to maintain their distinct cultures that they must fight for the culture, practice their cultures, keep them alive within their own group, and pass them on to succeeding generations. If this effort and success is not maintained, the Makah and other distinct peoples will not remain peoples and societies separate and unique from the dominant society.

B. Federal Indian Policies and Self-Determination

The United States has dealt with American Indian tribes through a conflicting array of official policies during its two hundred plus years of existence. These policies affected the day to day operation of the federal government in tribal affairs and affected the existence and activities of tribes. Many of these policies were purposely designed to destroy Indian cultures and tribal governments. To better understand the cultural existence of the Makah Tribe today and the United States decision to support the Tribe's right to whale hunting, we must briefly review the relevant federal policies towards Indian tribes and especially the importance of the official policy of self-determination towards tribes that the United States is currently following.

An additional significant aspect of the United States relations with Indian tribes and Indian people is that the relationship is based on a political, government-to-government basis and is not racially based.²³³ Thus, federal actions, policies and legislation which benefit or negatively impact tribes and Indians to some extent do not implicate the Equal Protection clause of the United States Constitution since tribes are treated differently based on their political status.²³⁴ At first glance this might appear to be counterintuitive; however, all legislation that benefits tribes addresses them as governments and

SOCIETIES 328-29, 332, 343-45, 367-68, 375 (1997) (discussing spread of oral and written languages over conquered peoples).

232. KLAUS FRANTZ, *INDIAN RESERVATIONS IN THE UNITED STATES: TERRITORY, SOVEREIGNTY, AND SOCIOECONOMIC CHANGE* 161 (1999) (stating that tribes are "distinctive cultural enclaves within the dominant Anglo-American society").

233. *United States v. Antelope*, 430 U.S. 641, 645-46 (1977); *Morton v. Mancari*, 417 U.S. 535, 551-54 & n.24 (1974) (stating that the federal/tribal relationship "is political rather than racial in nature").

234. *Morton v. Mancari*, 417 U.S. 535, 551-54 (1974); *accord Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 304 n.42 (1978); *Fisher v. District Court*, 424 U.S. 382, 390 (1976).

political entities, and almost all legislation which benefits individual Indian people relies upon the individual being an enrolled member of a federally recognized Indian tribe and, thus, a member of a separate political entity.²³⁵ Thus, such legislation is based on the different governmental/political status of Indian tribes and their members and not on their racial status.

1. Early Federal Indian Policies Affecting the Makah

From its beginnings, the United States continued the English and colonial strategy of officially dealing with tribes as governments or "states" on a government-to-government basis by negotiating with tribes as sovereigns and entering treaties with tribes.²³⁶ From 1778 though 1871, the Continental Congress, the Congress of the Articles of Confederation, and the United States Congress entered almost 370 treaties with tribes.²³⁷ Even though by entering these treaties tribes were considered to have placed themselves under the protection of the United States, the federal government still recognized tribes as "distinct, independent, political communities" which still possessed the rights of self-government and an existence as political states.²³⁸ In other words, tribes "were perceived as a separate state and government from the United States and under the protection of the federal government."²³⁹

235. Treaty rights, whether exercised by Indian tribes, Indian individuals, or foreign citizens inside the United States, are political rights based on a person's citizenship in a foreign state and are not special rights or civil rights enjoyed by all American citizens. *See, e.g.*, 8 U.S.C. § 1101(a)(15)(E) (2000) (Immigration Act category admitting visitors if their country has a specific treaty with the United States); *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991) (holding that discrimination by Japanese corporation's American subsidiary based on Japanese citizenship was authorized by U.S.-Japan treaty and did not violate Title VII).

236. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (noting that the United States "history of treaties and the assumption of a 'guardian-ward' status" with tribes is the basis for the "unique legal status of Indian tribes under federal law"); PRUCHA, GREAT FATHER, *supra* note 132, at 31; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) (noting that tribes were "treated as a state from the settlement of our country. The numerous treaties made with them by the United States . . . [and the] acts of our government plainly recognize the Cherokee nation as a state").

237. PRUCHA, TREATIES, *supra* note 128, at 1; 2 KAPPLER, *supra* note 26 (compiling all U.S.-Indian treaties).

238. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559-61 (1832); *see also* Joseph Story, *Commentaries on the Constitution of the United States*, reprinted in 2 PHILLIP B. KURLAND & RALPH LERNER, *THE FOUNDER'S CONSTITUTION* 550 (1987). Justice Story agreed that "Indians . . . were always treated, as distinct, though in some sort, as dependent nations. Their territorial rights and sovereignty were respected. . . . But their right of self-government was admitted; and they were allowed a national existence . . ." *Id.* It is a settled doctrine of international law that a weaker power does not surrender its independence — its right to self-government — by associating with a stronger nation for protection. "A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government and ceasing to be a state." *Worcester v. Georgia*, 6 U.S. (Pet.) 515, 517 (1832).

239. Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 AM. INDIAN L. REV. 133, 140 (1993).

Tribes are also recognized as separate states or political entities in the United States Constitution. In the Interstate Commerce Clause of the Constitution, Congress is granted the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"²⁴⁰ This provision seems to define tribes as some form of political entity similar, but not identical, to "the several States" and the "foreign Nations."

By the 1850s, official federal Indian policy had coalesced into an attempt to separate Indians from white settlers by placing tribes onto small and remote reservations to confine and civilize Indian people.²⁴¹ Reservations were designed to create a "measured separatism" to keep Indian people and their cultures separate from the dominant American society.²⁴² Hopefully, conflict on both sides could be reduced by separating these cultures. Reservations were also designed by Congress to convert nomadic tribesmen into settled farmers.²⁴³

The reservation system led to many abuses, however. Even though Indians were living on their own land, federal agencies outlawed their religions and cultures.²⁴⁴ Indians also suffered at the hands of corrupt federal agents who were more interested in making money off their positions than in helping the reservation inhabitants.²⁴⁵ In 1869, in an attempt to replace corrupt reservation officials and improve services to Indians, President Grant handed management of reservations to the military.²⁴⁶ Congress objected to this action and President Grant passed control over the reservations to various religious denominations.²⁴⁷

240. U.S. CONST. art. I, § 8, cl. 3.

241. PRUCHA, GREAT FATHER, *supra* note 132, at 317; S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 71-88 (1973).

242. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 14-19, 100-01 (1987). Nearly 300 reservations were ultimately established by the United States. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 8 (4th ed. 1998).

243. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 380 n.11 (1980); Robert Hagan, *The Reservation Policy: Too Little and Too Late*, in INDIAN-WHITE RELATIONS: A PERSISTENT PARADOX 157-69 (Joseph Smith & Robert Kvasnicka eds., 1976).

244. Robert J. Miller, *Correcting Supreme Court Errors: American Indian Response to Lyng v. Northwest Indian Cemetery Protective Ass'n*, 20 ENVTL. L. 1037, 1039 (1990) [hereinafter Miller, *Correcting Supreme Court Errors*].

245. PRUCHA, GREAT FATHER, *supra* note 132, at 525 (discussing the "spoils system" of appointing friends to agency positions).

246. TERENCE O'DONNELL, AN ARROW IN THE EARTH 291 (1991).

247. *Id.* Christian religions created their own particular brand of havoc on the reservations and on Indian life. FRANK POMMERSHEIM, BRAID OF FEATHERS 21-22 (1995); VINE DELORIA JR., GOD IS RED 238-41 (2d ed. 1994).

2. Modern Federal Indian Policies Affecting the Makah

a) Allotment and Assimilation Policy

The allotment and assimilation era in official federal Indian policy ran approximately from 1871 to the early 1930s. During that time, the common understanding for most American politicians and citizens was that tribes were no longer a military threat to the United States and would soon disappear as separate peoples and cultures. This expectation led to a new policy toward Indian tribes which was designed to bring Indians into the American mainstream society by assimilating them.²⁴⁸ The federal policy also had the goals of breaking up tribal ownership of land, opening the reservations for settlement, and destroying tribal existence.²⁴⁹

The major tool of this era was the General Allotment Act.²⁵⁰ This Act provided for the division or allotment of reservation lands to Indian family heads and adults for ultimate ownership in fee simple.²⁵¹ Indians were expected to learn farming skills and the value of private property ownership.²⁵² A significant amount of the land allotted to tribal members during this time was ultimately lost from Indian ownership by voluntary sales and tax foreclosures.²⁵³

The government also tried to forcibly assimilate reservation Indians into American life. Various Christian and liberal groups, the so-called "Friends of the Indian," were also in favor of this attempt to civilize and Christianize Indians, turn them into farmers, and "do away with Indianness and tribal

248. Delos Sackett Otis, *History of the Allotment Policy, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., pt. 9, at 434 (1934); *Winters v. United States*, 207 U.S. 564 (1908); HENRY E. FRITZ, *THE MOVEMENT FOR INDIAN ASSIMILATION* 19 (1963).

249. *Montana v. United States*, 450 U.S. 544, 560 n.9 (1981) (stating that "the avowed purpose of [Congress'] allotment policy was the ultimate destruction of tribal government"); OTIS, *supra* note 183, at 32; GETCHES ET AL., *supra* note 242, at 141, 166.

250. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381).

251. OTIS, *supra* note 183, at 428-85.

252. *Winters v. United States*, 207 U.S. 564 (1908).

253. WILKINSON, *supra* note 242, at 20; PRUCHA, GREAT FATHER, *supra* note 132, at 896; John Collier, Memorandum, *In the Purposes and Operation of the Wheeler-Howard Indian Rights Bill, Hearings on H.R. 7902 Before the Senate and House Committees on Indian Affairs*, 73d Cong. 15, 15-18 (1934) [hereinafter *Collier Memorandum*]. Also, reservation land not allotted to tribal members was considered "surplus" and was sold for non-Indian settlement. The transfer from Indian ownership of many Indian allotments and the sale of "surplus" lands resulted in a major loss of tribal lands and created a "checkerboard" effect of non-Indian land ownership on many reservations today. See *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989). The Allotment Era ultimately resulted in a loss of about two-thirds of all tribally held lands. Tribal land holdings dropped from 138 million acres in 1871 to about 48 million acres by 1934. FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 130-38 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN 1982 ED.]; *Collier Memorandum*, *supra*, at 15. Nearly 20 million acres of the remaining Indian lands were desert or semi-desert. *Id.*

relations.¹²⁵⁴ The BIA was used during this time to attempt to take absolute control of Indian life and to squeeze out Indian government, religion, and culture.²⁵⁵ The federal government also used a network of off and on-reservation boarding schools where it placed Indian children in an attempt "to inculcate Indian children with the values of Western civilization and to eliminate any traces of the children's native heritage."²⁵⁶ The federal policy was to civilize "savage" nomadic Indians.²⁵⁷

b) Termination Policy

From about 1945 to the early 1960s, the United States again sought to destroy the federal/tribal relationship as part of its official policy. Congressional policy was now designed to end the authority and legal existence of tribal governments.²⁵⁸ Once again, assimilation was emphasized as federal policy because Congress sought to "protect" Indians by integrating them into the general population and exposing them to state laws for the first time.²⁵⁹ Congress also took other steps to limit its involvement in Indian

254. PRUCHA, GREAT FATHER, *supra* note 132, at 609-30, 643-52; *see also* 25 U.S.C. § 348 (2000); *Winters v. United States*, 207 U.S. 564, 576-77 (1908); FRITZ, *supra* note 248, at 56-57, 102-03 (stating that the government contracted with religious missionary societies to operate Indian schools to teach agricultural and mechanical arts and to "prepar[e] Indians to adopt Anglo-American culture"); PETERSON, *supra* note 217, at 140 (stating that the missionaries tried to stamp out Salish traditional practices and beliefs).

255. Miller, *Correcting Supreme Court Errors*, *supra* note 244, at 1039; GETCHES ET AL., *supra* note 242, at 184-85; FRANTZ, *supra* note 232, at 157-58 (quoting 1923 Commissioner of Indian Affairs imploring Indians to give up feasts, celebrations, giveaways, ceremonies, and dancing); PETERSON, *supra* note 217, at 142 (stating that agencies assimilated Indians by modeling Euroamerican morals and values and pressuring Indians).

256. Silverman, *supra* note 210, at 1022; *see also* Raymond Cross, *American Indian Education: The Terror of History and the Nations' Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 948, 951 (1999) (stating that Indian educational policy was designed to assist "the disappearance of the Indian way of life" and "was an agent for Christianizing and civilizing"); DONALD L. PARMAN, *THE NAVAJOS AND THE NEW DEAL* 193, 292, 295-96 (1976) (stating that boarding schools did not prepare Indians for life "in white society nor with their own people"; government schools forced "involuntary religious instruction" on Indian children); FRITZ, *supra* note 248, at 56-57, 102-03 (stating that missionary societies operated Indian schools to "prepar[e] Indians to adopt Anglo-American culture"); PETERSON, *supra* note 217, at 143 (stating that a Jesuit school for Salish boys "separated the students 'from the blighting influence of their savage environment' and trained them 'in the habits of civilized life.'").

257. PRUCHA, GREAT FATHER, *supra* note 132, at 609-757 (describing civilizing attempts of religious reformers on reservations, and educational reform); *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

258. During Termination, some 109 tribes and bands were terminated from existence as federally recognized tribes and lost all federal benefits. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of Termination Policy*, 5 AM. IND. L. REV. 139, 146, 151-54 (1977) (noting that 1.3 million acres of tribal lands were lost during the Termination era); GETCHES ET AL., *supra* note 242, at 204.

259. Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (applying some provisions of the federal Bill of Rights in Indian country for the first time); 18 U.S.C. § 1162; 28 U.S.C. § 1360

affairs and to increase state powers over reservations. As part of this policy, in the 1950s Congress transferred many of its educational responsibilities for tribes to the states and transferred Indian health duties from the Indian-oriented BIA to the Department of Health, Education and Welfare.²⁶⁰ The BIA also actively relocated individual Indians from the reservations to big cities so that federal responsibilities towards Indians could be lessened.²⁶¹

c) Self-Determination Policy

The self-determination policy began in the 1960s and is still the official federal Indian policy today.²⁶² The policy has been instrumental in assisting tribes to resume many of the sovereign powers they are exercising today. Self-determination had its beginnings when the Kennedy administration deemphasized the further termination of tribes.²⁶³ This action was followed by federal poverty programs in the 1960s under President Johnson which invested millions of dollars into tribal programs and infrastructure.²⁶⁴ In 1970, President Nixon issued a landmark statement which named the new federal Indian policy as "Self-Determination" and stated that the United States would allow Indian tribes to determine for themselves what direction their lives, laws, economies, educations, etc. would take in the future.²⁶⁵

(exposing reservation Indians to some state criminal and civil jurisdiction).

In the Indian Reorganization Act policy era that ran from the early 1930s to the early 1940s, preceding the Termination policy, assimilation was still to some extent the goal of federal policy. In that era tribes were encouraged to adopt constitutions and form governments patterned after the United States. Some charge that this imposed Anglo-American governmental and judicial systems on tribes and inhibited traditional tribal governments. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICANS JUSTICE* 14-15 (1983); EDWARD H. SPICER, *CYCLES OF CONQUEST* 351-52 (1962).

260. Miller & Hazlett, *supra* note 135, at 262, 264-66; Gerald L. Brown, *An Historical Overview of Indian Education and Four Generations of Desegregation*, 2 *J. GENDER RACE & JUST.* 407 (1999); GETCHES ET AL., *supra* note 242, at 208; PRUCHA, *GREAT FATHER*, *supra* note 132, at 1023-24, 1060-84.

261. PRUCHA, *GREAT FATHER*, *supra* note 132, at 1079-84; DONALD L. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960*, at 203 (1986).

262. Joyotpaul Chaudhuri, *American Indian Policy: An Overview*, in *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* 28 (Vine Deloria, Jr. ed., 1985); GETCHES ET AL., *supra* note 242, at 224.

263. Wilkinson & Biggs, *supra* note 258, at 163; Michael C. Walch, *Terminating the Indian Termination Policy*, 35 *STAN. L. REV.* 1181, 1191 (1983) (stating that the Kennedy administration "de-emphasized termination").

264. TYLER, *supra* note 241, at 200-14; Vine Deloria, Jr., *The Evolution of Federal Indian Policy Making*, in *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY*, *supra* note 262, at 250-51; GETCHES ET AL., *supra* note 242, at 226.

265. JACK D. FORBES, *NATIVE AMERICANS AND NIXON* 121 (1981) (stating that Nixon set forth the goal of Indian and tribal self-determination); Walch, *supra* note 263, at 1191 ("Nixon called for an Indian policy of 'self-determination without termination.'"); *see also* Richard M. Nixon, *Special Introduction*, 48 *N.D. L. REV.* 529, 529-30 (1972) (stating that he intended "to develop a new policy for the Federal Government in its special relation to" Indians to "encourage

The principal legislative initiative of this era is the Indian Self-Determination and Education Assistance Act of 1975.²⁶⁶ This Act instituted a fundamental, philosophical change in the administration of Indian affairs. The Act allows tribes to contract with the federal government to administer the social, health and economic programs enacted for the benefit of Indians. While these programs continue to be federally funded, the programs can be planned and operated by the tribes themselves. Federal "domination" of Indian affairs is supposed to end.²⁶⁷

The most recent expansion of tribal self-determination is the Tribal Self-Governance Act of 1994.²⁶⁸ This Act allows qualifying tribes to consolidate and manage all programs administered by the BIA, as well as the programs of other Department of the Interior agencies which have some "special geographical, historical or cultural significance" to the tribe.²⁶⁹

The self-determination policy is important to the Makah whaling issue because this federal Indian policy truly affects how the United States deals with and supports tribal sovereignty and tribal cultures. The United States Congress, Executive Branch and court system have attempted to follow the principles of self-determination and have allowed tribes to a large extent to fashion the debate over tribal and individual Indian rights in several different areas.²⁷⁰ The policy of self-determination is also very important in the debate

Indian self-determination so that more of the solutions to local Indian problems could be worked out by Indians themselves. . . . This new policy involves Indian tribes taking over services which in the past have been performed only by the Federal Government. . . . Indians must be given more of an opportunity to control their own lives and their destiny as a people. There still exists a need for Federal assistance, both financial and advisory, but there also exists a need for greater control of Indian affairs by Indians."). Self-determination is defined as the "free choice of one's own acts or states without external compulsion [and] determination by the people of a territorial unit of their own future political status." WEBSTER'S NINTH DICTIONARY, *supra* note 223, at 1066. The federal government and the courts have seriously applied this policy to tribes. *See, e.g., Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination."); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 (1978) (using the policy of self-determination to decide congressional intent regarding Indian Civil Rights Act); *Fisher v. District Court*, 424 U.S. 382, 391 (1976) (justifying tribal court jurisdiction because it would "further[] the congressional policy of Indian self-government").

266. 25 U.S.C. §§ 450-450n (2000).

267. *Id.* § 450(a).

268. 25 U.S.C. §§ 458aa-458-hh.

269. *Id.* § 458cc.

270. *See, e.g., Native American Housing Assistance and Self-Determination Act of 1996*, 25 U.S.C. § 4101(1)-(7) ("[T]here exists a unique relationship between the Government of the United States and the governments of Indian tribes and a unique Federal responsibility to Indian people. . . . Federal assistance to meet these responsibilities should be provided in a manner that recognizes the right of Indian self-determination and tribal self-governance."); *Native American Languages Act*, 25 U.S.C. § 2901(8) (stating that suppression and extermination against Native American languages and cultures conflicts with the United States "policy of self-determination for Native Americans"); *Indian Sacred Sites*, Executive Order No. 13007, 61 Fed. Reg. 26,771

of how far the United States will go in supporting tribes as they determine and exercise their cultural rights.

C. *The Federal Trust Responsibility*

A basic examination of the federal trust responsibility owed to Indian tribes is important to understanding the United States' support for Makah whaling. In stark contrast to much of the history of United States interaction with tribal governments and cultures, the federal government owes a fiduciary/trust responsibility to American Indian and Alaska Native tribes and individual tribal citizens. The United States voluntarily took on this duty by negotiating treaties with tribes and, in exchange for vast areas of tribal lands, promised to protect the welfare, the remaining homelands, and the existence of tribes and promised educational, medical and financial support for tribal members.²⁷¹ The Supreme Court has stated that this relationship became like that "of a ward to his guardian."²⁷² Consequently, a fiduciary relationship and trust responsibility arose due to the United States promises of protection and care made to tribes and their citizens.²⁷³

A trust responsibility also arose from the plenary power Congress was granted in Indian affairs in the U.S. Constitution.²⁷⁴ The power which the

(1996), available at 1996 WL 285380 (mandating that federal agencies shall accommodate Indian religious use of sacred sites on federal lands); *National Farmer's Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) ("Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination.").

271. "[T]he duty of protection" arises from "the treaties in which it has been promised." *United States v. Kagama*, 118 U.S. 375, 384-85 (1886). Congress recognizes the trust responsibility it owes tribes and their citizens. See, e.g., *Native American Housing Assistance and Self-Determination Act of 1996*, 25 U.S.C. § 4101(1)-(7) ("[T]here exists . . . a unique Federal responsibility to Indian people . . . a unique trust responsibility to protect and support Indian tribes and Indian people"); RICHARDS, *supra* note 150, at 198 (stating that, in treaties entered with Washington tribes, the federal representative promised to furnish tribes with teachers, doctors, farmers and blacksmiths, and allow Indians to hunt, fish, and gather).

272. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (finding that tribes are considered to be "domestic dependent nations" and their relation to the United States resembles that of a ward to his guardian).

273. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) ("Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (holding that United States' conduct towards tribes and Indians is "judged by the most exacting fiduciary standards" and the "Government's fiduciary obligation"); *United States v. Mitchell*, 463 U.S. 206, 224-26 (1983) (discussing the fiduciary relationship between the U.S. and Indians).

274. Congress was granted the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." U.S. CONST. art. I, § 8, cl. 3. This provision can be traced back to Article IX of the Articles of Confederation, which gave that Congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians." ARTICLES OF CONFEDERATION art. IX (U.S. 1777); see also Cotton

federal government assumed over Indians and tribes in conjunction with the guardianship duties the U.S. assumed on behalf of Indians through treaties and by the authority vested in it from the Constitution led to the development of the trust doctrine.²⁷⁵ The Supreme Court 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.²⁷⁶

The impact of the trust doctrine and the fiduciary guardian relationship that the United States has with Indian tribes is extremely important to understanding the United States interactions with tribes. "These Indian tribes are the wards of the nation. They are communities dependent on the United States."²⁷⁷ In fact, in Indian affairs, the United States has "charged itself with moral obligations of the highest responsibility and trust" and the conduct of the United States towards tribes is "judged by the most exacting fiduciary standards."²⁷⁸ This trust responsibility requires the United States to manage and handle tribal lands and assets as a guardian.²⁷⁹ 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.²⁸⁰ The federal government, through recognition

Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (stating that Congress has plenary power in Indian affairs); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 551-52, 565 (1903) (same). Congress' plenary power has generally been interpreted to mean an "untrammelled" and "absolute or total" power over Indians. WILKINSON, *supra* note 242, at 78-79. This power allows Congress to pass laws which are detrimental to Indian tribes or to enact programs that promote tribal sovereignty. *Id.* at 79. Indians are mentioned once more in the Constitution where they were expressly not to be counted towards the population of a state for computing congressional representation unless they paid taxes. U.S. CONST. art. I, § 2, cl. 3. After the Civil War when citizenship rights were extended through the Fourteenth Amendment to "[a]ll persons born or naturalized in the United States," that amendment still excluded Indians from citizenship unless they paid taxes. U.S. CONST. amend. XIV, § 2. Thus, Congress still considered Indians to be citizens of other sovereign governments in 1868. This view was correct because Congress did not make all Indians United States citizens until 1924. Act of June 2, 1924, ch. 233, 43 Stat. 253 (current version at 8 U.S.C. § 1401(a)(2)).

275. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) at 17; COHEN 1982 ED., *supra* note 253, at 207-57; *see also United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("[A] fiduciary relationship necessarily arises when the Government assumes such elaborate control All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds).").

276. *United States v. Mitchell*, 463 U.S. 206, 224-26 (1983); *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

277. *United States v. Kagama*, 118 U.S. 375, 381, 383 (1886).

278. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

279. *See, e.g., Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) (stating that the Interior Secretary is not allowed to dispose of Indian lands the same as could dispose of public lands because that "would not be an exercise of guardianship, but an act of confiscation"); *United States v. Mitchell*, 463 U.S. 206, 224-26 (1983) (stating that the U.S. could be held liable for money damages to individual Indians for mismanagement of their timber).

280. *See, e.g., 25 U.S.C. § 406* (duty to manage reservation timber by sustained yield

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."²⁸¹ In conjunction with the federal policy of self-determination for tribes, the United States trust responsibility towards tribes plays a major role in the latitude the federal government gives tribes to operate and the support the U.S. gives to tribal initiatives. 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.²⁸²

D. Modern Day federal Support for Native American Cultures

To better understand the United States support for the Makah whaling, it is instructive to briefly review the depth of support the United States has given to tribal cultural and religious issues in the self-determination policy era and in light of the trust responsibility the U.S. owes tribes. Even in earlier less "enlightened" times, the federal government undertook steps to protect and support tribal cultures and governments.²⁸³ The reservation system itself

principles); National Indian Forest Resources Management Act, 25 U.S.C. § 3101; Indian Energy Resources Act, 25 U.S.C. § 3501; American Indian Agricultural Resource Management Act, 25 U.S.C. § 3701. By federal statute, certain Indian land and resources transactions must be approved by the Secretary, including leasing Indian lands and the sale of timber. 25 U.S.C. §§ 407, 415; 25 C.F.R. pts. 162, 163. 25 U.S.C. § 81 broadly requires secretarial approval of contracts with Indian tribes relative to their lands.

281. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5 (1982). Part of Congress' trust responsibility is to promote the "policy of furthering Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). As an example of the federal role as a trustee or fiduciary, the United States directly oversees and approves many aspects of economic dealings with Indian tribes. *See, e.g.*, 25 U.S.C. §§ 81, 84, 464 (2000). Contracts with tribes generally must be approved by the Secretary of the Interior. Without such approval a contract is void and any moneys received under the contract may have to be repaid. 25 U.S.C. § 81; *Barona Group of Capitan Grande Band of Mission Indians v. American Mgmt. & Amusement*, 840 F.2d 1394 (9th Cir. 1987), *cert. dismissed*, 487 U.S. 1247 (1988). For example, Congress has delegated federal responsibility to tribes in such areas as alcohol regulation and environmental control in Indian country. *See, e.g.*, 18 U.S.C. § 1161 (granting tribes the right to allow or prohibit the introduction of liquor into Indian country); *Miller & Hazlett, supra* note 135, at 233-35, 262-63 (stating that, starting in 1953, tribes were delegated authority to decide whether to allow alcohol into Indian country); 33 U.S.C. § 1377 (authorizing tribes to assume responsibility for various water quality programs).

282. *Dep't of Commerce EA, supra* note 40, at 14-15.

283. *See, e.g.*, *Miller & Hazlett, supra* note 135, at 240-45 (stating that, at tribes' request, as early as 1802 federal statutes controlled alcohol in Indian country). Compare with 18 U.S.C. §§ 1154, 1156, 1161, 3055, 3113, 3488, 3618, 3619 (2000). In various treaties the U.S. agreed to keep alcohol out of Indian country. *See, e.g.*, Treaty with the Makah, Jan. 31, 1855, art. 4, 12 Stat. 939, *reprinted in* 2 KAPPLER, *supra* note 26, at 682 ("[W]hich said tract shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe and of the superintendent or agent."); Treaty with the Choctaw, Oct. 18, 1820, art. 12, 7 Stat. 210, *reprinted in* 2 KAPPLER, *supra* note 26, at 191, 682; *Fisher v. District Court*, 424 U.S. 382, 387 (1976)

was partially designed as a protective step to separate Indian people and their cultures from American settlers whose divergent interests caused conflict with tribes.²⁸⁴ In recent years, however, the United States has taken several dramatic steps to support tribal cultures, religions and governments.²⁸⁵

1. Tribal Cultural Practices

a) Indian Child Welfare Act

The most important aspect of maintaining a separate culture must be the preservation of the very population of that culture. Congress recognized this point in enacting the Indian Child Welfare Act of 1978 (ICWA).²⁸⁶ The ICWA is arguably the most significant, and perhaps surprising, federal action of any taken to protect tribal cultures and to protect tribes as governments. ICWA is a federal attempt to protect Indian children from the wholesale adoptions and foster care placements outside their culture that Indian children had been suffering from for many years at the hands of state agencies.²⁸⁷ The Act was also a significant attempt by Congress to protect tribes from losing the crucial membership and citizens they need to survive.²⁸⁸ This federal entry into family law was also most unusual because family law is traditionally an exclusive state law arena.²⁸⁹

(stating that federal policy in the 1930s was "specifically intended to encourage Indian tribes to revitalize their self-government").

284. Reservations were designed to create a "measured separatism" to keep Indian peoples and cultures separate from the dominant American society. WILKINSON, *supra* note 242, at 14-19, 100-01; *see, e.g.*, Fort Laramie Treaty of Apr. 29, 1868, 15 Stat. 635, art. II, *reprinted in* 2 KAPPLER, *supra* note 26, at 998 (pledging that the Sioux Nation reservation was "set apart for the absolute and undisturbed use and occupation of the Indians"); *see also* Menominee Tribe v. United States, 391 U.S. 404, 406 (1968) (stating that the tribe's treaty helped "maintain . . . their way of life which included hunting and fishing").

285. *See, e.g.*, 25 U.S.C. § 1901(2), (3), (5) (entering the field of family law, almost exclusively a state law arena, to legislate to protect Indian children, their cultures and the tribal governmental interest in Indian children); Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721 (leading to the widespread growth in Indian gaming); Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1453, 1461-1469, 1481-1498, 1511-1512, 1521-1524, 1541-1543.

286. 25 U.S.C. §§ 1901-1963 (2000).

287. Manuel P. Guerrero, *Indian Child Welfare Act of 1978*, 7 AM. INDIAN L. REV. 51, 57 & n.8 (1979) (stating that state studies demonstrated extraordinary percentages of Indian children removed from their homes and cultures, far in excess of non-Indian children, and placed by non-Indian social workers and court systems in non-Indian homes; between 1969 and 1974, approximately 23%-35% of all Indian children had been separated from their families by foster care placements).

288. Congress recognized and created an unprecedented tribal governmental interest in Indian children: "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(3). Congress also stated "that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards . . . [to] reflect the unique values of Indian culture . . ." 25 U.S.C. § 1902.

289. B.J. JONES, THE INDIAN CHILD WELFARE ACT HANDBOOK 6 (1995).

Congress recognized the danger to Indian children of being taken from their cultures and the danger to tribal governments.²⁹⁰ ICWA protects tribal social and cultural issues by mandating that foster care and parental rights decisions be considered in light of the "social and cultural standards of the Indian community."²⁹¹ ICWA mandates that placement decisions made in state courts under state law must comply with ICWA's preference for placements of Indian children into Indian cultures.²⁹² Tribes can also establish their own preferences favoring tribal foster care facilities or Indian homes for placing Indian children which can be different from those set out in ICWA.²⁹³ In essence, ICWA is a strong statement by Congress that it will fulfill its trust responsibility to tribes and Indians to protect their families and cultures.

b) Native American Languages Act

Probably the second most important issue of maintaining a separate culture is the preservation of the language of the culture.²⁹⁴ Preserving minority languages, however, can be a source of problems for a nation as is demonstrated by the issue of English as the official language of the United States and in other situations.²⁹⁵ Notwithstanding such concerns, Congress

290. "Removal of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children." AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT 52 (1977), *quoted in* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 50 (1989); *see also* 25 U.S.C. § 1901(3), (4), (5).

291. 25 U.S.C. § 1915(d) (2000).

292. *Id.* § 1915(a) (setting forth standards to be applied in making adoption or foster care placement decisions in state or tribal courts).

293. The standard for placements "shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." *Id.* § 1915(d). Section 1915(c) allows a tribe to set its own placement preferences different from the federal ones set out in ICWA.

294. *Id.* § 2901(3) ("[T]he traditional languages of Native Americans are an integral part of their cultures and identities and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values."); *id.* § 2901(9) ("[L]anguages . . . are critical to the survival of cultural and political integrity of any people."); Courtenay Thompson, *Passing on Tribal Languages*, SUNDAY OREGONIAN (Portland), June 28, 1998, at A1 (stating that Israel realized the "power of language to define a people and a way of understanding the world" when adopting Hebrew as the national language).

295. *See, e.g.*, Alakayak v. Alaska, Nos. 3DI99-00012CI, 3AN99-4488CI (Alaska Superior Ct. 1999) (pending motions July 23, 2001) (Alaskan Natives sued to stop the implementation of the English Only ballot measure that passed in Alaska); Julie Cart, *Tribal Languages Unintended Target in English-Only Drive*, L.A. TIMES, Nov. 4, 2000, at A4; Madeline Baro Diaz, *Texas Town Decides It's Best to Hold Meetings in Spanish*, OREGONIAN (Portland), Aug. 20, 1999, at A3; Roger Hernandez, *Border Town Should Drop Spanish Law*, OREGONIAN (Portland), Aug. 20, 1999, at C9; Roderick A. McDonald, *Legal Bilingualism*, 42 MCGILL. L.J. 119 (1997) (exploring the difficulties in a legal system operated in two different languages); Jeremy Webber, *The*

has issued a strong statement in support of tribal cultures in the Native American Languages Act.²⁹⁶

Congress acknowledged its "responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages" and to recognize the special status of tribes in the United States and their "distinct cultural and political rights, including the right to continue separate identities."²⁹⁷ This legislation emphasizes several times the importance of tribal languages to their cultures and to the very survival of Native American cultures.²⁹⁸

The Executive Branch has also supported tribal languages and cultures. In 1996, President Clinton issued an Executive Order concerning tribal colleges in which he reaffirmed the federal responsibility to "promote the preservation and the revitalization of American Indian and Alaska Native languages and cultural traditions"²⁹⁹ Again in 1998, President Clinton addressed the unique "educational and culturally related academic needs of American Indian and Alaska Native students" when he created a task force to "evaluate the role of native language and culture in the development of educational strategies . . . [and to] assist tribal governments in meeting . . . the need to preserve, revitalize, and use native languages and cultural traditions."³⁰⁰

Tribes are extremely concerned with preserving their languages as a crucial aspect of retaining their separate and distinct cultures. Presently, a large number of tribes are conducting various programs to preserve and revive their languages and are investing scarce time, attention, and resources into this endeavor.³⁰¹

Legality of a Unilateral Declaration of Independence Under Canadian Law, 42 MCGILL. L.J. 281 (1997) (arguing that Quebec would probably be allowed to secede if there was a clear mandate); *Canada: Challenge to Quebecers*, N.Y. TIMES, Nov. 2, 2000, at A6 (noting that Quebec has twice held referendums to secede from Canada).

296. 25 U.S.C. §§ 2901-2906 (2000).

297. *Id.* § 2901(1), (2); see also DIAMOND, *supra* note 231, at 375 (stating that, of hundreds of Native languages originally spoken in North America, only 187 are still spoken at all and 149 are moribund, in that they will soon die out); Thompson, *supra* note 294 (stating that, of the estimated 300 native languages that were spoken in today's United States in 1492, only 175 are still spoken today and most of them are just a generation away from extinction).

298. 25 U.S.C. § 2901(3), (9).

299. Tribal Colleges and Universities, Exec. Order No. 13,021, 61 Fed. Reg. 54,329 (1996).

300. American Indian and Alaska Native Education, Exec. Order No. 13,096, 63 Fed. Reg. 4268 (1998).

301. See, e.g., Thompson, *supra* note 294 (stating that the Klamath Tribe of Oregon is using a federal grant to match Klamath elders to speak their language with young apprentices; other Oregon tribes tape native speakers and teach language classes; Maori natives of New Zealand and Hawaiian natives have started language immersion schools); Shelley Swift, *Reviving the Mother Tongue*, AM. IND. REPORT, Dec. 1999, at 26 (stating that in 1995 the Mille Lacs Band of Ojibwe Indian began a mandatory program in the tribal K-12 school system to preserve their language because it is "an important part of their heritage"); Cathy Cashio-Kauchick, *Navajo Camp Reverses Language Loss*, INDIAN COUNTRY TODAY, Aug. 9, 1999, at C2.

c) *Other Culturally Relevant Federal Actions*

The federal government has undertaken numerous other actions to preserve and strengthen Native American cultures. In 1989 and 1990, Congress enacted laws to address the possession and ownership of Native American human remains, and funerary, cultural and sacred objects held by the Smithsonian Museum and by any other federally supported museum or institution.³⁰² These Acts were unpopular with museums as the result on museum collections and future collecting was unknown.³⁰³ The Acts have led to changes in museum displays and have required museums to spend time and money inventorying their collections and returning some human remains and cultural and religious items to tribes.³⁰⁴

In the Native Arts & Crafts Act,³⁰⁵ Congress made illegal the counterfeiting of government trademarks for authentic Indian made handicrafts, or the misrepresentation of crafts or goods to be Indian made products. Congress also authorized the building of the National Museum of the American Indian on the last site on the Mall in Washington D.C.³⁰⁶ The Museum will highlight the history and cultures of America's Indians.³⁰⁷

302. Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013 (2000); National Museum of the American Indian Act, 20 U.S.C. §§ 80q-9(a)-(f) (1989).

303. 135 CONG. REC. S5500-02, S5517 (1990); Michael Wilcox, *Dialogue or Diatribe? Indians and Archaeologists in the Post-NAGPRA Era*, in RONALD NIEZEN, *SPIRIT WARS: NATIVE NORTH AMERICAN RELIGIONS IN THE AGE OF NATION BUILDING* 190 (2000); Daniel J. Hurtado, *Native American Graves Protection and Repatriation Act: Does it Subject Museums to an Unconstitutional "Taking"?*, 6 HOF. PROP. L.J. 1 (1993); Stephen Kinzer, *Museums and Tribes: A Tricky Truce*, SUNDAY N.Y. TIMES, Dec. 24, 2000, § 2, at 1; Bowen Blair, *Indian Rights: Native American Versus American Museums — A Battle for Artifacts*, 7 AM. INDIAN L. REV. 125, 126-28 (1979).

304. 25 U.S.C. §§ 3003-3005 (requiring museums to repatriate items to tribes); 20 U.S.C. §§ 80q-9(a)-(f) (2000) (requiring the Smithsonian to inventory and determine origin, geographic and cultural affiliation, in consultation with Indian religious leaders and officials, the Indian human remains and Indian funerary objects and notify any affected tribe and return the items); see, e.g., Courtenay Thompson, *The Return of the Chief*, SUNDAY OREGONIAN (Portland), May 2, 1999, at A1 (reporting return of remains by Smithsonian to tribe); Department of the Interior, National Parks Service, 65 Fed. Reg. 6622-01 (Feb. 10, 2000) (Notice of Inventory Completion for Native American Human Remains); Department of the Interior, National Parks Service 64 Fed. Reg. 13034-01 (Mar. 16, 1999) (Notice of Inventory Completion for Native American Human Remains and Funerary Objects from the Little Bighorn Battlefield National Monument). The Field Museum in Chicago has taken objects off public display and posted placards in their place explaining NAGPRA and displaying a letter from an Alaska tribe requesting certain sacred objects not be on public display. Notes on File with Author (Mar. 1999).

305. 18 U.S.C. §§ 1158, 1159 (2000). Congress has been accused, however, of not really enforcing the Act. Matt Kelley, *American Indian Art Under Siege from Forgers*, SEATTLE POST-INTELLIGENCER, May 24, 2000, at A1 (describing testimony heard by the Senate that the government is not enforcing the Act and the agency charged with enforcement states Congress has not appropriated enough money to investigate and bring prosecutions).

306. 20 U.S.C. § 80q-1 (2000).

307. Smithsonian Institution, *Museum on the Mall in Washington D.C.*, at <http://www.si.edu/>

In addition, the United States has given serious attention to tribal concerns regarding historical issues which might affect tribal cultural and religious traditions.³⁰⁸ Under the National Historical Preservation Act (NHPA), tribes can assume the federal position of the historic preservation officer for their reservations, be actively involved at the state and federal levels in preserving their historic properties, and can list their traditional religious and culturally important places on the National Register of historic sites.³⁰⁹

Furthermore, in the majority of federal environmental laws, Congress has authorized tribes to be treated as states and thus has delegated to tribes the federal authority to set the environmental standards to be applied on reservations.³¹⁰ This allows tribes to enforce their cultural and even religious concerns as regards the level of environmental protection that will be enforced on reservations and in the air and water on reservations.³¹¹

Congress has also provided Alaska Natives with several avenues to support and protect their cultural/subsistence way of life. In the Endangered Species Act (ESA), the Marine Mammal Protection Act, and in other acts, Congress

[nmai/abmus/index.htm](#) (last visited Aug. 15, 2000) (stating that the National Museum of the American Indian will open in Washington, D.C., in 2002, and will be a center for ceremonies, performances, and educational activities and exhibition space for Indian arts and material culture).

308. The National Historic Preservation Act, 16 U.S.C. § 470a(d) (2000); *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995) (stating that the U.S. had to meaningfully consult with tribe regarding tribal historic aspects of national forest under the NHPA before allowing construction activity in the forest).

309. 16 U.S.C. § 470a(d) (2000) (allowing tribes preserve their historic properties and communicate and cooperate with the Secretary of the Interior and State Historic Preservation Officers in administering the national historic preservation program to ensure that tribal values are taken into account; Secretary shall consult with Indian tribes; tribes may assume all or part of the functions of a State Historic Officer with respect to tribal lands; tribes or Native Hawaiian organizations may list their traditional religious and culturally important properties on the National Register). A southern California tribe succeeded in having its sacred mountain, Mt. Kuchamaa, placed on the national registry of historic places so that it receives some extra protection. *See* 59 Fed. Reg. 49708 (1994); 58 Fed. Reg. 12249 (1993).

310. 33 U.S.C. § 1377 (1994) (authorizing EPA to treat tribes as states under the Clean Water Act; 40 C.F.R. § 131.4 (c); 42 U.S.C. § 7601(d) (2000) (authorizing EPA to treat tribes as states under the Clean Air Act); *Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1997) (upholding authority of EPA to delegate to tribes authority to set water standards on reservation even when controls non-Indian activities on their fee owned land), *cert. denied*, 119 S. Ct. 275 (1998); *Washington Dep't of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985) (upholding EPA policy of allowing tribe to set environmental standards for whole reservation); *see also* Treatment of Indian Tribes as States for Purposes of Sections 308, 309, 401, 402, and 405 of the Clean Water Act, 58 Fed. Reg. 67966 (1993); EPA, Policy for the Administration of Environmental Programs on Indian Reservations (Nov. 11, 1984).

311. 42 Fed. Reg. 40,695 (1977) (granting Northern Cheyenne Tribe's reservation Class I "pristine" Clean Air Act standards); *Northern Plains Resource Council v. EPA*, 645 F.2d 1349, 1351-52 (9th Cir. 1981) (same); *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996) (stating that Albuquerque had to improve water treatment system to meet Pueblo of Isleta down stream standards, which included clean water for tribal religious ceremonies), *cert. denied*, 118 S. Ct. 410 (1997).

provided exemptions from hunting restrictions on protected species for Alaska Natives in recognition of their cultural and subsistence needs.³¹² These exemptions for Alaska Natives are significant in the federal Indian law arena and to any analysis of the protection the United States owes under its trust duty to Indian tribes on cultural issues. This is because Alaskan tribes never signed treaties with the United States and, hence, do not have treaty rights such as the Makah whaling rights and the numerous treaty rights of other American Indian tribes. Thus, the exemptions which allow Alaska Native hunting of otherwise protected species is based solely on a congressional decision under its trust responsibility and the self-determination policy to protect the cultural rights of Alaska Natives and is not based on treaty rights. Consequently, when the trust responsibility and self-determination policy is added to treaty rights Congress owes a tribe, such as the Makah, the incentive to support those cultural rights is even stronger than in the Alaska Native situation.

Moreover, the treaties the United States entered with tribes demonstrated a contractual intent to preserve to the greatest extent possible the tribal ways of life.³¹³ The treaties provided permanent home lands for the tribes and their citizens where they were supposed to be able to live as they wished and continue to observe their cultures and traditions.³¹⁴ In these treaties, many

312. Endangered Species Act, 16 U.S.C. § 1539(e)(1) (2000) (stating that the act "shall not apply with respect to the taking of any endangered species or threatened species . . . by — (A) any Indian, Aleut, or Eskimo who is an Alaskan Native . . . if such taking is primarily for subsistence purposes"); Marine Mammal Protection Act, 16 U.S.C. § 1371(a) ("Exemptions for Alaskan natives . . . this chapter shall not apply with respect to the taking of any marine mammal by any Indian, Aleut, or Eskimo . . . if such taking — (1) is for subsistence purposes; or (2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing: . . . any edible portion of marine mammals may be sold in native villages and towns in Alaska or for native consumption."); Migratory Bird Treaty Act, 16 U.S.C. § 704, 712 (same); Fur Seal Act of 1966, 16 U.S.C. § 1153(a) (same). The federal government has worked with other tribes to limit the ESA effect on Indian cultural and religious needs. U.S. Dep't of the Interior, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997) (secretarial order signed by Sec. Babbitt & Sec. Daley); *see also* Charles F. Wilkinson, *The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Order*, 72 WASH. L. REV. 1063 (1997).

313. *See, e.g.*, *Menominee Tribe v. United States*, 391 U.S. 404, 406 (1968) (holding that the tribe's treaty "authorized [it] to maintain . . . their way of life which included hunting and fishing").

314. *See, e.g.*, Navajo Treaty, June 1, 1868, 15 Stat. 667 ("set apart" lands for "permanent home"), *reprinted in* 2 KAPPLER, *supra* note 26, at 1015; Nez Perce Treaty, June 11, 1855 (lands "shall be set apart . . . for the exclusive use and benefit of said tribe as an Indian reservation"); Treaty with the Makah, January 31, 1855, 12 Stat. 939 (lands "shall be set apart . . . for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe"), *reprinted in* 2 KAPPLER, *supra* note 26, at 682; Treaty with the Yankton Sioux, Apr. 19, 1858, art 4, 8, 10, 11 Stat. 743 ("To protect the said Yanktons in the quiet and peaceable possession of the said tract . . . so reserved for their future home . . . The said Yankton Indians shall be secured in the free and unrestricted use of the red pipe-stone quarry [in Minnesota], or

cultural, traditional and subsistence rights were preserved and many continued in effect even on the very lands the tribes had ceded to the U.S.³¹⁵ For example, tribes were extremely concerned with preserving their traditional and cultural means of subsistence and, as the Makah did with whaling, they refused to sign treaties until these rights were guaranteed.³¹⁶ Various treaties preserved the specific cultural and traditional practices of the tribe at issue and in recent times the United States has often supported the exercise of these rights. In addition, the United States has mostly stayed out of the internal, social and cultural affairs of tribes because tribes are a "separate people, with the power of regulating their internal and social relations."³¹⁷ Tribes have exercised their authority in this area and make their own substantive laws regarding internal and cultural matters such as tribal membership, inheritance, and domestic relations.³¹⁸

d) Alaska Native Whaling

The dramatic effect of the United States trust responsibility and the self-determination era in Indian affairs is well demonstrated by Alaska Native bowhead whaling. The conduct of the United States in this situation is very relevant to why it also supported the Makah whaling rights. Bowhead whaling by subsistence hunters presents a more "difficult case" than Makah whaling and tests the limits of a majority culture/society tolerating and allowing the practice of minority cultural traditions. A brief examination of Alaska Native bowhead whaling is illustrative of many issues present in the case of Makah whaling.

so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes"), *reprinted in 2 KAPPLER, supra note 26, at 776.*

315. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (holding that treaty tribal members retain rights to wild rice and hunting and fishing on lands ceded to U.S.); *see Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) (holding that treaty tribes had right to take 50% of the salmon harvest); *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (holding that treaty tribe retained right to hunt and fish on old reservation even though treaty was silent); *United States v. Winans*, 198 U.S. 371 (1905) (holding that treaty reserved right for Indians to continue to fish at and occupy their usual and accustomed spots despite new property rights in the lands); *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998) (holding that treaties reserved for the tribes and their members the right to harvest up to 50% of the shellfish in Puget Sound even on private property), *cert. denied*, 119 S. Ct. 1376 (1999).

316. *United States v. Washington*, 384 F. Supp. 312, 363 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); RICHARDS, *supra* note 150, at 207; 1 HAZARD STEVENS, *LIFE OF ISAAC STEVENS, supra* note 142, at 475.

317. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

318. Tribes have the sole authority, not reviewable by federal or state courts or governments, to define their tribal membership, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Roff v. Burney*, 168 U.S. 218 (1897), determine their own inheritance laws, *Jones v. Meehan*, 175 U.S. 1, 29 (1899), and set their own domestic relations law, *United States v. Quiver*, 241 U.S. 602 (1916).

Alaska Natives have been taking bowhead whales for thousands of years. They developed a highly complex society and culture based on bowheads, called the Thule Culture, and it spread throughout the Inuit/Eskimo world to Siberia, northern and eastern Canada, and Greenland.³¹⁹ Even in modern times, many Alaska Natives have relied on the bowhead whale for a major portion of their subsistence lifestyle and culture.³²⁰

Bowhead whale stocks in the Bering Sea were decimated by European and American whalers and their numbers became dangerously low. In fact, from the beginning of the International Whaling Commission (IWC) in 1946 the bowheads have been protected from all but subsistence native hunting.³²¹ Despite the desperate plight of the bowheads, the United States was instrumental in preserving for Alaska Natives the right to hunt bowheads and the U.S. secured an IWC bowhead quota for Alaska Natives.³²²

In 1972, however, the IWC wanted to review the bowhead situation and asked the United States for more information on the hunt.³²³ In 1977, after reviewing the evidence, the IWC called for a moratorium on all hunting of bowheads.³²⁴ The Alaska Native community was alarmed at this situation

319. John R. Bockstoe & John J. Burns, *Commercial Whaling in the North Pacific Sector*, in *THE BOWHEAD WHALE* 577 (John J. Burns et al. eds., 1993) (estimating that Alaskan Eskimos hunted whales for at least 2000 years); MILTON M.R. FREEMAN ET. AL., *INUIT, WHALING, AND SUSTAINABILITY* 59 (1998) (estimating that ancestors of Alaska's Inuit people began whale hunting as much as 5500 years ago). The Thule culture based on the bowhead whale left Alaska and swept across Canada to Greenland between 1000-3000 A.D. GEORGE WENZEL, *ANIMAL RIGHTS, HUMAN RIGHTS: ECOLOGY, ECONOMY AND IDEOLOGY IN THE CANADIAN ARCTIC* 26 (1991).

320. Sam W. Stoker & Igor I. Krupnik, *Subsistence Whaling*, in *THE BOWHEAD WHALE*, *supra* note 319, at 579, 603-04, 607, 616 [hereinafter *Subsistence Whaling*] (stating that today bowheads are harvested mostly by nine native villages in northwest Alaska, and that Inuits heavily rely on the bowhead, since it provided an average of 12% of the primary subsistence resources for eight Alaskan villages in 1962-82; "bowhead whaling continued to the present as a viable, cultural enterprise.").

321. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72, 76 sched., paras. 1, 6(c), 7 (allowing the harvest of bowheads (right whale) by aborigines); WILLMAN M. MARQUETTE, *THE 1976 CATCH OF BOWHEAD WHALES (BALAENA MYSTICETUS) BY ALASKAN ESKIMOS, WITH A REVIEW OF THE FISHERY, 1973-1976, AND A BIOLOGICAL SUMMARY OF THE SPECIES* 2, 27 (1977) (bowheads became so endangered they were protected from commercial whaling by International Conventions for the Regulation of Whaling in 1931, 1937 and then in 1946; the 1946 Convention paragraphs 1, 6(c), 7 allowed the harvest of bowheads (right whale) by aborigines).

322. ICRW, Schedule, para. 2, 62 Stat. at 1723; Watters & Dugger, *supra* note 4, at 335-36 & n.110.

323. *Subsistence Whaling*, *supra* note 320, at 579, 617 (stating that in 1972 IWC requested that U.S. obtain data on subsistence whaling and bowhead populations); ALASKA CONSULTANTS, INC. & STEPHEN BRAUND & ASSOCS., *SUBSISTENCE STUDY OF ALASKA ESKIMO WHALING VILLAGES* 11 (1984) [hereinafter BRAUND] (Department of the Interior study) (showing Eskimo/Inuit need for whale meat and marine mammal products).

324. *Subsistence Whaling*, *supra* note 320, at 617 (stating that the IWC called for a ban in 1977); BRAUND, *supra* note 323, at 11 (same); FREEMAN, *supra* note 319, at 118 (stating that the

and in August 1977 it organized the Alaska Eskimo Whaling Commission (AEWC) to contest the IWC decision.³²⁵ The AEWC asked the United States to exercise a loophole in the ICRW treaty to avoid the IWC ban but the U.S. refused to do so.³²⁶ In October 1977, the AEWC sued the United States Secretary of State to force him to object formally to the IWC's action but the Secretary prevailed because the court held this decision to be an executive branch foreign affairs decision and the plaintiffs did not make the extraordinarily strong showing that was necessary to interfere.³²⁷ The AEWC also contested the IWC bowhead population estimates because, based on the AEWC's intimate knowledge of the bowhead, there was a much higher bowhead population than the IWC estimated.³²⁸ Notwithstanding winning the October 1977 lawsuit, the United States continued to support the Alaska Native request for a quota of bowheads. In December 1977, the United States and the AEWC presented IWC with a request to modify the ban on bowhead whaling and to give the United States a bowhead quota; this request was granted for 1978.³²⁹ The AEWC ultimately entered a cooperative agreement with the United States in which the AEWC monitors and controls the bowhead hunt that continues to this day.³³⁰

IWC's Scientific Committee thought only 2000 bowhead existed in the mid-1970s and called for a ban on Alaska Native whaling); BILL HESS, *GIFT OF THE WHALE: THE INUIPAT BOWHEAD HUNT, A SACRED TRADITION* 2 (1999) (stating that the U.S. declared bowheads endangered in 1970, that a U.S. 1977 report estimated between 600-1800 bowheads left, and that the IWC decreed no take in 1978).

325. *Subsistence Whaling*, *supra* note 320, at 617 (stating that the goals of AEWC are to insure viability of bowheads, gather data on population, migration and habitats, monitor the subsistence hunt, reduce the number of whales struck and lost, and represent Alaska whalers interests); BRAUND, *supra* note 323, at 27.

326. The ICRW allows any signatory country to avoid obeying newly adopted provisions if they formally object within ninety days of the adoption of the new provision. ICRW art. V(3), 62 Stat. at 1719.

327. *Adams v. Vance*, 570 F.2d 950, 951 (D.C.C. 1978) (refusing, after Eskimos sued to compel the Secretary of State to file an objection, to intrude into the core concerns of the executive branch such as foreign affairs without an extraordinary showing by plaintiffs).

328. *Subsistence Whaling*, *supra* note 320, at 617 (stating that the AEWC disputed the small estimate of the bowhead population, and that their hunt hurting the bowhead).

329. *Id.* at 617 (stating that, at the December 1977 IWC meeting, the U.S. and the AEWC requested a modification to the ban and IWC gave a quota for 1978 of twelve whales landed or eighteen struck); *Introduction in, THE BOWHEAD WHALE*, *supra* note 319, at 5 (stating that the U.S. committed to research program so a small quota was granted by IWC); BRAUND, *supra* note 323, at 13 (stating that at a special meeting IWC modified ban in recognition of Eskimos nutritional and cultural needs).

330. *Review of the 32d IWC Meeting*, *supra* note 6, at 61-65; BRAUND, *supra* note 323, at 28-30 (stating that the AEWC developed regulations in 1977, and monitors and controls the harvest to the IWC quotas and gathers data for the U.S. and the IWC); FREEMAN, *supra* note 319, at 18, 120 (stating that the U.S. delegates authority to the AEWC to manage the hunt without the presence of federal agents, and that the U.S. entered cooperation agreements with the AEWC in 1977 and 1981).

The United States and the AEWC have continued to gather information and report to the IWC to prove the subsistence need of Alaska Natives to continue bowhead hunting.³³¹ The evidence gathered by the AEWC and the U.S. also demonstrates that the bowhead stock is recovering nicely as of 1999.³³² The IWC has continued to grant a bowhead quota to the U.S. and the AEWC in ever increasing numbers.³³³

Alaska Native cultures have benefitted from the continuation of bowhead whaling and the number of bowheads is also increasing. It would have been a disaster if the Alaska Natives had lost their cultural subsistence whaling rights due to the decimation of whale stocks by non-native people.³³⁴ Their situation closely parallels the Makah situation.

It is very significant to tribal cultural situations such as the Makah that the United States led the fight in the international arena for Alaska Natives to be allowed to continue their 3000- to 4000-year-old cultural, traditional and subsistence bowhead hunts. The United States undertook this battle notwithstanding the protection of bowheads by the IWC, the listing of bowheads on the United States endangered species list, and the damage to the U.S. international leadership role as an opponent to whaling.³³⁵ This is truly

331. *Subsistence Whaling*, *supra* note 320, at 618, 622 (stating that the IWC was given reports on the traditional and cultural importance of the bowhead to the northern Eskimo community and higher estimates of bowhead population from improved methods; AEWC, federal and state research quantified the size of the Bering Sea stock and subsistence needs of natives; estimate of bowheads have risen steadily and levels of subsistence needs of natives have been established). The federal government is committed to creating co-management whaling structures with Alaska Natives. FREEMAN, *supra* note 319, at 115 (stating that the U.S. wants whalers' knowledge and concerns as part of decision making process).

332. FREEMAN, *supra* note 319, at 117 (stating that the IWC's Scientific Committee now thinks the bowhead stock numbers 8000 and is rising by 3% a year); HESS, *supra* note 324, at 8, 12 (noting the AEWC agreement with NOAA to perform whale observations and enforce IWC quota, that the AEWC now estimates there are 8000 bowheads and IWC accepts, and that the quota is now 255 landed in a five-year period); Judith E. Zeh et al., *Current Population Size and Dynamics*, in *THE BOWHEAD WHALE*, *supra* note 319, at 409, 479 (stating that the current estimate of stock in 1993 Bearing Sea, not including Okhotsk Sea, was 7500, that the IWC in 1992 estimated 6400-9200, and that the stock was increasing at a very healthy rate of 3% a year).

333. *Subsistence Whaling*, *supra* note 320, at 618 (stating that the IWC gives a higher bowhead quota every year based on new data); BRAUND, *supra* note 323, at 13.

334. Commercial whaling for the bowhead started in the North Pacific in 1843 and essentially ended in 1914 with the collapse of the price of baleen and the depletion of the bowheads. These actions of American and European whalers had a profound effect on the aboriginal whalers by decimating bowhead stocks and causing great losses and dislocation among the Eskimo people. *Introduction*, in *THE BOWHEAD WHALE*, *supra* note 319, at xxxiii, 4.

335. 50 C.F.R. § 17.11 (1999); *see, e.g.*, LYNTON KEITH CALDWELL, *INTERNATIONAL ENVIRONMENTAL POLICY* 229 (Paul Stanley Weiland ed., 3rd ed. 1996) ("[T]he United States appeared to depart from its hitherto consistent protectionist position to reject the unanimous recommendation of the IWC Scientific Committee that the bowhead whale be totally protected."); *U.S. Whaling Policies/ International Whaling Comm'n, Hearings Before the Senate Comm. on Commerce, Science, And Transportation*, 97th Cong. 2, 12, 17-21, 44-48 (1981) (statement of

an example of the United States taking seriously its trust responsibility towards American Indians and Alaska Natives to fight to preserve the culture of these peoples. The justification for the United States' actions in regards bowheads and Alaska Natives is to support the hunting and subsistence lifestyle and the cultural and religious traditions of these indigenous people.³³⁶ The U.S. expressly recognized the cultural need and clearly stated that it was working to protect the "cultural integrity" and "cultural needs" of Alaska Natives to engage in whaling activities even if they did not land whales.³³⁷ Thus, the nutritional needs of these people were not the main or most important issue in the view of the federal government. The IWC also recognized that the cultural aspects of the whale hunt was crucial to these indigenous whaling people.³³⁸

These facts are especially relevant to the Makah situation. The United States' support for the Alaska Native bowhead hunting was based only on its

Sen. Stevens) (stating that seeking Eskimo bowhead quota contradicts the U.S. argument for a commercial moratorium on whaling and appears "ludicrous"); *Review of the 32d IWC Meeting*, *supra* note 6, at 7-8, 21-24, 63 (statement of Humane Society) (calling the Eskimo and bowhead quota a contradiction in United States' stance, stating that it changed U.S. leadership role in the IWC to end whaling to a confused need to obtain a quota on the most endangered whale stock, and accusing U.S. of ignoring unanimous IWC Scientific Committee vote for a moratorium on hunting bowheads and repoliticizing the IWC by seeking a quota and changing the IWC from a scientifically controlled body to a "no-holds-barred political forum it is today").

336. U.S. DEPT OF COMMERCE, A SPECIAL REPORT TO THE INTERNATIONAL WHALING COMMISSION: BOWHEAD WHALES 58 (1978) [hereinafter SPECIAL REPORT] (stating that restrictions on Alaska Native whaling "have the potential of disrupting community and cultural integrity," that hunts even without success are "necessary to maintain the positive role of sharing and cooperation" and serve "social and cultural need[s] [] apart from nutritional requirements," and that "Bowhead whaling serves as the central force of the community binding it together and reaffirming the culture") (citing Robert F. Spencer, *The North Alaskan Eskimo, A Study in Ecology and Society*, Smithsonian Institute, 171 BUREAU AM. ETHNOLOGY, 332-52 (1959)); HESS, *supra* note 324, at 10 (noting Interior study showed 97% of Alaska Natives in whaling communities shared bowhead meat, 98% preferred whale to store bought meat, and over 82% ate subsistence meats at least five days a week).

337. SPECIAL REPORT, *supra* note 336, at 58 (stating that the government stressed "cultural integrity" and "social and cultural need"); Ray Gambell, *International Management of Whales and Whaling: An Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling*, 48 ARCTIC 97, 103 (1992) [hereinafter Gambell, *International Management*] (stating that the U.S. argued that it was important for Alaska Natives to exercise their culture and have the opportunity to hunt whales and to participate in whaling activities and not just to serve a nutritional need).

338. INTERNATIONAL WHALING COMM'N, ABORIGINAL/SUBSISTENCE WHALING (WITH SPECIAL REFERENCE TO THE ALASKA AND GREENLAND FISHERIES) 1-2, 40 (1982) [hereinafter ABORIGINAL/SUBSISTENCE WHALING] (stating that Alaskan whaling "is part of their culture as well as necessary for subsistence" and "is fundamental to the entire social and cultural fabric of the communities," that "Whaling has become a matrix for cultural survival [and] is a focal point of Eskimo culture in which values are expressed and actualized, individual achievement is fulfilled, and social integration is manifested," and that "Whales are much more than food for the north Alaskan Eskimos").

trust responsibility to the Natives as American Indians, and its self-determination policy, and was primarily designed to protect cultural and subsistence rights. Alaska Natives do not have treaty rights.³³⁹ By comparison, the U.S. owes a trust duty to the Makahs, is bound by its self-determination policy, and also has a binding and valid treaty with the Makahs which reserved to them the right to whale. An additional relevant fact connecting the Alaska Native bowhead whaling situation and the Makah situation is that the Alaska Natives were in the midst of a cultural revival in the 1960s and 1970s and many were just beginning or were increasing their whaling activities.³⁴⁰ Hence, the fact that the Makah were reviving their whaling does not distinguish the Makah situation from the Alaska Natives. The bowhead situation, then, is precedent for the United States supporting American Indians in protecting cultural rights and in reviving cultural traditions even when they include the controversial issue of whaling an endangered species.

2. Tribal Religious Practices

Under its trust responsibility and the modern day self-determination policy, the United States has also strongly supported American Indian religious issues. This is significant to the Makah situation because Indian cultural issues are intimately connected to and actually synonymous with tribal religious issues.³⁴¹ In fact, tribal governments are not prevented from

339. PRUCHA, GREAT FATHER, *supra* note 132, at 1128.

340. *Subsistence Whaling*, *supra* note 320, at 579, 603-04, 607, 616 (stating that the 1970s resurgence of whaling in Alaska was caused by increased cultural awareness, and that oil created jobs and money and "encouraged a resurgence of traditional cultural values"); ABORIGINAL/SUBSISTENCE WHALING, *supra* note 338, at 37, 40 (stating that shifts in assimilation and acculturative trends caused interest in native traditions to grow dramatically); *Introduction*, in THE BOWHEAD WHALE, *supra* note 319, at 5, 276 (stating that Alaska Eskimos took an average of eight to ten bowheads a year in 1915-1969, thirty per year in 1970-1977, and an average of fifteen a year in 1978-1989); Gambell, *International Management*, *supra* note 337, at 102 (stating that Alaska Natives significantly increased bowhead whaling in the 1970s over that in 1910-69); see also Dep't of Commerce EA, *supra* note 40, at 20 (stating that since 1991, the Siberian natives, the Chutkoas, started relearning whaling and doing the hunting themselves).

341. "Religion is the foundation of Indian life. It is the glue that holds tribes together, and if you strip away legal protections, you are threatening the very survival of tribes in the United States." Kevin McCullen & Scripps Howard, *Preserving Indian Culture: Bill Would Shield Ceremonial Peyote Use, Sacred Sites*, ARIZONA REPUBLIC (Phoenix), Jan. 18, 1993, at B3 (quoting Walter EchoHawk, Native American Rights Fund); see also *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 459 (1988) (Brennan, J., dissenting) ("[F]or Native Americans religion is not a discrete sphere of activity separate from all others, and any attempt to isolate the religious aspects of Indian life 'is in reality an exercise which forces Indian concepts into non-Indian categories.'" (citation omitted)). A federal judge also said that no "legitimate distinction can be drawn . . . between the 'religious' and 'cultural' practices of those American Indians who consider Devils Tower a sacred site." *Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp.2d 1448, 1450 n.2 (D. Wyo. 1998). Congress expressly agrees with this: "The religious

establishing and supporting a tribal religion the way the federal and state governments are restricted in this arena.³⁴² Hence, United States actions regarding Indian religions impact the level of support it should have provided to the Makah and should provide to other tribes and Indians attempting to practice cultural/religious traditions.

In recent years, Congress and the Executive Branch have taken several steps to benefit tribal and individual Indians' religious practices. The National Park Service, for example, has struggled with ways to impose a ban on rock climbing at a traditional Indian religious site in Wyoming when religious ceremonies are being conducted.³⁴³ The Park Service is currently being sued for also trying to restrict tourist access to the Rainbow Bridge in New Mexico, a site that is sacred to certain Indian tribes.³⁴⁴ In a rather stunning display of accommodation for tribal religions, especially in light of the "war on drugs," federal agencies and Congress have extended federal protection to the possession and use of peyote, a level one controlled substance, for American Indian religious purposes.³⁴⁵ Congress has also recognized the tribal religious use of bald and golden eagle feathers and parts.³⁴⁶ Congress honored this use and provided a permit system for Indians to take, possess and transport eagles and eagle parts "for the religious purposes of Indian tribes."³⁴⁷

practices of the American Indian . . . are an integral part of their culture, tradition and heritage, such practices forming the basis of Indian identity and value systems." American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2000).

342. Tribal governments can establish official tribal religions because tribes predate the U.S. Constitution and the Bill of Rights and are not controlled by those documents. *Talton v. Mayes*, 163 U.S. 376 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). The parts of the Bill of Rights which Congress did apply to tribes in 1968 do not include a provision preventing tribes from establishing religions. Compare 25 U.S.C. § 1302(1) (2000) with U.S. CONST. amend 1.

343. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814 (10th Cir. 1999) (rejecting establishment of religion challenge against Park Service instituting a voluntary ban on rock climbing on Devils Tower every June when Indians practice sacred ceremonies at the site).

344. *Saving the Sacred Lands and Monuments*, INDIAN COUNTRY TODAY, July 26, 2000, at C7.

345. The federal government has allowed Native American religious practitioners to use peyote, as a religious sacrament since 1965 by federal regulation, 21 C.F.R. § 1307.31 (1990), and by federal statute since 1994. 42 U.S.C. § 1996a (2000). About twenty-two other states also allow this practice by statute, *see, e.g.*, ARIZ. REV. STAT. ANN. § 13-3402(B) (1989); MINN. STAT. ANN. § 152.02 subd. 2(4) (West Supp. 1988); WISC. STA. ANN. § 161.115 (West 1989), and several states allow it by court decision, *see, e.g.*, *People v. Woody*, 394 P.2d 813 (Cal. 1964).

346. Bald Eagle Protection Act, 16 U.S.C. §§ 668-668d (2000).

347. *Id.* § 668a; *see also* Anthony Ramirez, *Indian Rights vs. a National Sanctuary*, N.Y. TIMES, Nov. 19, 2000, § 4, at 16 (describing Hopis hunting and killing baby eagles in religious ceremony). Individual Indians have been criminally prosecuted for hunting eagles without a permit even when using the parts for religious and funeral ceremonies. *United States v. Dion*, 476 U.S. 734 (1986) (holding that a tribal member lost a treaty hunting right for eagles because Congress abrogated that right in enacting the BEPA).

Moreover, Indian religious practices are often site-specific; that is, the ceremony or practice must be conducted at a specific sacred site.³⁴⁸ The natural environment actually becomes a fundamental ingredient of these religious rituals, such as an altar or church, because certain powers can only be acquired by worship and ceremonies conducted at certain sites.³⁴⁹ Indian peoples have had great problems, however, in accessing and protecting these sites when they are on state, private or federal lands.³⁵⁰ In 1996, President Clinton issued an Executive Order "in furtherance of Federal treaties, and in order to protect and preserve Indian religious practices."³⁵¹ The Order required federal Executive Branch agencies to manage federal lands to accommodate access to, ceremonial use of, and the preservation of Indian sacred sites.³⁵²

In 1978, Congress also addressed Indian religious practices and access to sacred sites by enacting the American Indian Religious Freedom Act.³⁵³ While the Act contained lofty language about protecting and preserving religious rights, practices, and access to sacred sites for Native Americans, it has been interpreted by the courts to be only a policy statement and does not grant any substantive religious rights to Indians.³⁵⁴

The significance of the support discussed above which the federal government has given tribal governments and Indian people in culture, religion and governance points to the major role the United States plays in Indian affairs. To some extent the United States has protected tribal cultures

348. Miller, *Correcting Supreme Court Errors*, *supra* note 244, at 1039.

349. *Id.*

350. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (holding that the U.S. did not burden Indians tribes' religious beliefs by decision to build logging road near sacred site, even though decision would destroy ability to practice the religion); *Mount Graham Coalition v. Thomas*, 89 F.3d 554 (9th Cir. 1996) (holding that Indians, on religious and sacred site principles, could not prevent university from building telescope on federal land); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980) (holding that individual Navajos' and Navajo Nation religious beliefs cannot prevent building of dam and flooding of Glen Canyon, which would cover religious sites, or alter Forest Service management of tourists near sacred site of Rainbow Bridge National Monument), *cert. denied*, 452 U.S. 954 (1981).

351. Indian Sacred Sites, Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (1996).

352. *Id.*

353. 42 U.S.C. § 1996 (2000). The act stated:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

Id.

354. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 455 (1988); *Crow v. Gullet*, 541 F.Supp. 785, 793 (D.S.D. 1982) (holding that AIRFA "does not create a cause of action in federal courts").

and has tried to live up to its trust and fiduciary responsibilities to support tribal cultures in recent years. It is not a great surprise, then, that the United States supported the Makah Tribe in seeking to restore its whaling culture.

E. Cultural Self-Determination

The dominant American society reflects its religious and cultural values.³⁵⁵ American citizens are so accustomed to these activities that few people question the right of the dominant society to honor and observe its cultural and religious values. It is another issue, however, when a minority religion or culture wants to follow its traditional precepts but they conflict with majority interests. In fact, minority groups' religious and cultural activities and beliefs have often been limited or prevented because they conflicted with the dominant society's interests.³⁵⁶ But it is exactly at this juncture where cultural self-determination must apply; that is, minority groups and cultures must be allowed the same rights and privileges to preserve and practice their cultures and values as is granted to the dominant American society and even if the minority practices impact dominant societal interests to some extent.

Minority groups and tribes should have the same basic human right to live according to their cultural and religious beliefs as does the American dominant society. In most questions about civil and human rights, however, the issue comes down to who has the authority to mandate how another group of people will live. In American society it is allegedly the majority that sets the laws and rules of society. Thus, the issue of majority control over minority cultures arises. In the Makah situation it is enlightening to discuss briefly the importance of whaling to whale hunting cultures and the question of whether the Makah and other distinct cultural groups have the right to make decisions about what cultural aspects they can practice.

1. Whaling Cultures

Generally, the native cultures of North America existed by hunter/gatherer and cultivation activities.³⁵⁷ To the Makah and other whaling peoples,

355. See, e.g., 5 U.S.C. § 6103 (2000) (stating that U.S. public holidays include George Washington's Birthday, Memorial Day, Independence Day, Columbus Day, Veterans Day, Thanksgiving, Christmas, Flag Day); *Murray v. Buchanan*, 720 F.2d 689 (D.C. Cir. 1983) (upholding legality of congressional chaplains).

356. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503 (1986) (preventing an Army officer from wearing a yarmulke under his Army cap while on duty); *United States v. Lee*, 455 U.S. 252 (1982) (requiring Amish employers to pay Social Security taxes even though their religious beliefs prevented it); *Reynolds v. United States*, 98 U.S. 145 (1878) (affirming criminal conviction of Mormon for polygamy because practice violated society's compelling interest in protecting children and families); Deirdre Evans-Pritchard and Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California*, 4 S. CAL. INTERDISCIPLINARY L. J. 1 (1995).

357. See, e.g., Dean R. Snow, *The First Americans and the Differentiation of Hunter-*

whaling is central or crucial to their existence as native peoples and cultures. The cultural, religious, and traditional significance and importance of whaling to the Eskimo/Inuit/Inupiat peoples of Alaska, Canada, Greenland and Russia is instructive to how important and crucial whaling is to the Makah culture.

The Thule Eskimo culture of Alaska, based on whaling, spread to Siberia, northern Canada and Greenland from 900-1000 A.D. onward.³⁵⁸ The relationship of these people with marine mammals and their reliance for everyday clothing, food and shelter on these mammals cannot be overstated. The Alaska Native people developed a very close relationship with these creatures and are excellent analogies for understanding the importance of whaling to the Makah.

a) Community and Culture

Whaling is a major aspect of cultures such as the Inuits, Inupiat and Makahs and helps these cultures to survive as distinct peoples and close knit communities. The shared survival needs of such communities helps to bond the communities due to the sharing of work and of food which is an extremely important part of the cultures.³⁵⁹ Whales and whaling play a major role in the lives and culture of the Inuit and Inupiat and are common themes in their songs, legends, art, dance, geographic names and thoughts.³⁶⁰ The

Gatherer Cultures, in 1 THE CAMBRIDGE HISTORY OF THE NATIVE AMERICAN PEOPLES OF NORTH AMERICA 125 (1996) (stating that Indian societies were hunter/gatherers); Dep't of Commerce EA, *supra* note 40, app. 8.2, at 30 (stating that Native Americans engaged in hunting/gatherer and crop cultivation); RICHARD K. NELSON, HUNTERS OF THE NORTHERN FOREST 311 (1973) ("To be an Eskimo is to hunt."); RICHARD A. CAULFIELD, GREENLANDERS, WHALES AND WHALING: SUSTAINABILITY AND SELF-DETERMINATION IN THE ARCTIC 108 (1997) (stating that whaling is part of Greenlandic identity and provides continuity).

358. *Subsistence Whaling*, *supra* note 320, at 581; J. Jerome Montague, *Introduction*, in THE BOWHEAD WHALE, *supra* note 319, at 2 (Greenland, Canada, American Inuits and Russian natives began bowhead hunting about 3,800 years ago); FREEMAN, *supra* note 319, at 59, 71, 74, 80 (stating that Alaska natives whaled for belugas up to 5500 years ago, and that Alaska, Russian, and Canadian whaling started about 2000 years ago); MARC G. STEVENSON, INUIT, WHALERS AND CULTURAL PERSISTENCE 111, 309 (1997) (stating that Thule Inuit whale and marine mammal culture spread from Alaska around 900-1000 A.D., and is the direct ancestor of the current Inuit culture of Alaska, Canada and Greenland); CAULFIELD, *supra* note 357, at 6, 26-28 (stating that whaling in Greenland has taken place for 4000 years).

359. CAULFIELD, *supra* note 357, at 8, 66-67 & n.24, 71 (stating that co-management of the whaling regime incorporates indigenous knowledge and practices, that the primary goal of Inuit kinship societies is to include people in mutual security based upon collective responsibility in production activities and sharing of subsistence products, and that hunters' sharing of food remains an important part of Greenland life today); *see also* Robert Petersen, *Cultural Needs: Communal Aspects of Preparation for Whaling, of the Hunt Itself and of the Ensuing Products*, Report to the 39th Annual Meeting IWC, Bournemouth, U.K., June 22, 1987, TC/39/AS.4.

360. FREEMAN, *supra* note 319, at 22-24, 38-40 (stating that whaling is physiologically important for aesthetic, emotional, and symbiotic needs, that Inuit cultures are based on marine mammal hunting and utilization which contributes to "community social solidarity" and "security" due to the cooperation required to hunt, process, and distribute whales, and that "leadership

importance of whaling is self-evident when one considers the great risks and enormous effort needed to take whales.³⁶¹ It is a very dangerous job to hunt in the open sea and land whales, and the whole community has to be involved.³⁶² Whale blubber and meat is worth the effort to these cultures because it is highly esteemed by native hunters both as their most important and desired food and for its cultural significance.³⁶³ Sharing food is an extremely important part of building a sense of community and preserving cultural ties, and it is a basic ethic of Inuit and Inupiat society.³⁶⁴

Like the Makah, Inuit whalers observe many rituals and customs in regards whaling and these comprise "the essential elements of a distinctive and respected culture."³⁶⁵ These people observe property rights in whales and equipment that is "rooted in customary law and practice."³⁶⁶ Whaling also

required in such activities also serves to validate the status and continuing importance to society of older, more experienced, hunters"); HESS, *supra* note 324, at 2 (stating that bowhead are "the central element in the diet, culture, and spiritual well-being of the arctic coast Inupiat").

361. FREEMAN, *supra* note 319, at 24-25 (stating that whale is a highly desirable food which takes on a social importance because hunters will make the effort and take the risks to catch).

362. *Id.* at 35 (stating that Makah women have whaling ceremonies and take part in butchering, that Inuit women were designated as whaling captains but do not appear to take part in the actual sea hunting, and that the whale was perceived as "com[ing] to the whaling captain's wife" (italics omitted)). See generally Boris Bodenhorn, *I'm Not the Great Hunter, My Wife Is*, 14 *ETUDES/INUIT/STUDIES* 55-74 (1990).

363. FREEMAN, *supra* note 319, at 25, 29, 35, 38 (stating that whaling ensures historic and cultural connections are maintained and passed on, that whaling links Inuits to their cultural heritage, that many people feel ill on imported food; and that studies in Greenland and the Yukon Territory of Canada demonstrate the prevalence and overwhelming choice of whale by Inuit adult and children); *Subsistence Whaling*, *supra* note 320, at 606, 608 (stating that whaling is still of economic importance to some Eskimo communities and "is of much greater and more general cultural importance to all whaling villages and to the Eskimo community as a whole. . . . [W]haling remains a significant element of both economic importance and socio/cultural focus. Many festivals indigenous to the culture, some of which are still celebrated, derive from whaling," and that bowhead is the "most desirable resource in terms of food preference at most northwestern Alaskan villages").

364. FREEMAN, *supra* note 319, at 29, 32 (stating that sharing whale has special significance and "creates and sustains the bonds that remain the basis of social and economic relationships"); *accord Subsistence Whaling*, *supra* note 320, at 614-16, 622 (stating that entire villages help haul in and butcher whales, that meat is distributed by traditional rules, that whaling captain opens home and feeds all who come, that captains have authority and respect in the community, and that bowhead is a substantial portion of the subsistence resource base and provides an important element of social structure, cultural identity, and ethnic continuity); HESS, *supra* note 324, at 7, 10, 211 (stating that Inupiat communities, families, ceremonies, spirituality, culture, and nutrition need whales).

365. FREEMAN, *supra* note 319, at 41; see also *Subsistence Whaling*, *supra* note 320, at 610, 615 (stating that Inuits have many traditions about whaling camps and numerous taboos regarding tents, fires, dogs, noise, human waste, non-native foods, menstruating women and more, that many hunters carry amulets of animals for good luck, and that landed bowhead is given a "ceremonial 'drink' of fresh water to placate its spirit.").

366. CAULFIELD, *supra* note 357, at 83.

brings prestige to hunters, and helps the community develop and maintain its customs and traditions.³⁶⁷ Communal whaling is performed by small crews or family groups and thus serves complex cultural functions by preserving extended family and kinship groups, reinforcing language, and preserving historical connections.³⁶⁸ The required cooperative and shared work also helps keep families and communities together.³⁶⁹ Moreover, whaling requires sharing specific knowledge, values, and beliefs, and this leads to the development of respect for elders because the young learn to rely on the knowledge and experience of their elders.³⁷⁰ Thus, the culture's social order is expressed and reenforced by the oldest and most experienced hunters assuming whaling captain roles as leaders and decision makers.³⁷¹

The traditions and rules of whaling are developed at the community level by unwritten social norms and oral traditions.³⁷² The Inuit and Inupiat communities of Alaska and other Inuit peoples around the world have developed cultures which value hunting and fishing and which prefer locally harvested meats, although it is clear that bowhead hunting is far more important than the food itself because whaling reinforces the culture and provides continuity to native people.³⁷³ It is easy to see why hunting cultures

367. *Id.* at 6-7, 109; *Subsistence Whaling*, *supra* note 320, at 579, 606 (stating that whaling is still a "prerequisite to social and political status"); BRAUND, *supra* note 323, at 13 (noting that studies from 1892-1980 show the importance of whaling to Eskimos for status and prestige, and creating bonds and kinship).

368. CAULFIELD, *supra* note 357, at 108-09 (citing authorities); BRAUND, *supra* note 323, at 8 (stating that whaling crews are based on kinship and build and maintain close family ties and integrate the society); FREEMAN, *supra* note 319, at 31 (stating that working with family on a whaling crew reinforces kin relations and communities).

369. CAULFIELD, *supra* note 357, at 3, 98, 108-09 (explaining that boats are family-owned, that crews are centered around a nuclear or extended family, that activities provide a sense of continuity and affirmation, and that communal whaling serves complex cultural functions by preserving the extended family, reinforcing language and preserving historical connections); *Subsistence Whaling*, *supra* note 320, at 606 (stating that whaling reinforces extended family structures and helps maintain interfamily and community cultural bonds through exchange and sharing).

370. CAULFIELD, *supra* note 357, at 109; FREEMAN, *supra* note 319, at 31 (stating that, in addition, sharing whale meat and extra portions with elders reaffirms their traditional role in Inuit society).

371. FREEMAN, *supra* note 319, at 31 (stating that shared knowledge, values and beliefs creates respect for elders due to their knowledge and experience); CAULFIELD, *supra* note 357, at 109; BRAUND, *supra* note 323, at 91, 94 (noting that Interior study showed Eskimo/Inuit need for whale meat and marine mammal products, that Alaskan whaling creates respect for elders and their whaling experience, and that the average age on becoming a captain was thirty-five plus).

372. CAULFIELD, *supra* note 357, at 9 (citing authorities).

373. FREEMAN, *supra* note 319, at 7-8, 202-08, 213; *see also id.* at 5-7 (stating that bowhead is a preferred food of Alaskan natives and people prefer culturally correct hunting, and that 92.9% of the people participate in bowhead hunts directly or in butchering, preparing, or cooking); BRAUND, *supra* note 323, at 10 ("In most villages, hunting the bowhead whale is the first and most important activity of the subsistence cycle.").

fight to preserve their cultures and practices. Such peoples are not just interested in preserving the artifacts of how they used to live; they are concerned about preserving their current and actual way of life and they demand to be allowed to live as they always have and as they want to live in the future.³⁷⁴

b) Spirituality

As with the Makah, whaling in Greenland and Alaska "takes on religious significance."³⁷⁵ Native hunting peoples developed many spiritual beliefs and practices which governed the hunters' relationships with the animals and with their community.³⁷⁶ 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 even when killing and consuming them.³⁷⁷

Inuit peoples had an extensive array of beliefs in the supernatural world including spirits of the bowhead whale and a variety of taboos, customs and rituals were used to appease whales.³⁷⁸ They believed that following these spiritually based principles and rituals would convince whales to give themselves to the hunter.³⁷⁹ In fact, Makah, Inuit and Inupiat whalers believe that whales actually give themselves to the hunter because the animals have

374. GAIL OSHERENKO & ORAN R. YOUNG, *THE AGE OF THE ARCTIC: HOT CONFLICTS AND COLD REALITIES* 73, 91, 96 (1989) (stating that Inuits and Inupiat have established powerful and effective organizations to pursue their aims of cultural survival, protection, and retention of their land, and self-government, that "cultural survival is paramount," that "[c]ultural survival does not mean preservation of cultural artifacts nor does it mean static resistance to change," it means preserving language and cultural development, and that subsistence hunting perpetuates northern Native cultures, and their community life revolves around it).

375. Moses Olsen, *Aboriginal Subsistence Whaling*, in *THE ANTHROPOLOGY OF COMMUNITY-BASED WHALING IN GREENLAND* 19 (Marc G. Stevenson et al. eds., 1997); FREEMAN, *supra* note 319, at 55 ("The whale is more than food to us. It is the center of our life and culture. . . . The taking and sharing of the whale is our Eucharist and Passover. The whaling festival is our Easter and Christmas."). See generally TOM LOWENSTEIN, *ANCIENT LAND: SACRED WHALE: THE INUIT HUNT AND ITS RITUALS* (1994).

376. CAULFIELD, *supra* note 357, at 6-7.

377. Edward M. Hutchinson, *Order and Chaos in the Cosmology of the Baffinland Eskimo*, 120 *ANTHROPOLOGY* 1, 60-61 (1977) (stating that Inuits believe animals share with humans a common state of being, kinship and family relations, sentience, and intelligence); WENZEL, *supra* note 319, at 140-41 (stating that hunting "unifies the land, the animals and the community," and that "a reciprocity exists between hunter and animal . . . and between the human community and the natural environment"); CAULFIELD, *supra* note 357, at 82-83 (stating that whales were gifts from "the 'woman-of-the sea,' who made them available to humans as long as proper taboos and rituals were observed"); FREEMAN, *supra* note 319, at 40.

378. FREEMAN, *supra* note 319, at 194, 228.

379. *Id.* at 60.

to come so close to shore to be caught by the primitive equipment these hunting cultures possessed.³⁸⁰ Catching whales under seemingly impossible situations led the whalers to believe in and rely on rituals and religious ceremonies to show respect for the animal and gratitude that it had given itself to sustain the people.³⁸¹ The Inuit view nature and animals and whales as being in a special or spiritual relationship with humans.³⁸² Sharing an animal with others as food is one way of respecting it.³⁸³

Today, native whalers still practice many whale ceremonies, rituals and feasts which highlight whales and which are very important to their cultures.³⁸⁴ These feasts and ceremonies cannot be held if there is not enough whale meat available; hence, today bowhead meat is saved and used for festivals year around.³⁸⁵ The bowhead is still essential to the Alaskan Native culture and subsistence and numerous studies have demonstrated the importance of bowhead whaling to these people as a central element of their ceremonial and religious beliefs.³⁸⁶

c) Economic Importance

American Indian reservations and native whaling villages around the world generally suffer from very high unemployment, seasonal employment opportunities and the absence of cash economies.³⁸⁷ Hunting and whaling has always been a major part of the economy, resources, and trading practices of Alaska Natives, Inuits around the world and other Indian people.³⁸⁸

380. See *supra* notes 98-111 (Makah whaling spirituality); FREEMAN, *supra* note 319, at 25 (Inuits); HESS, *supra* note 324, at 15, 203 (stating that Inupiat believe whales give themselves to a crew that deserves it, and that whales are so smart and powerful even the best crew could never kill one unless it gives itself).

381. FREEMAN, *supra* note 319, at 25-26; see also WATERMAN, *supra* note 43, at 47 (stating that the Makah thought the whale was "a guest of the village, and [] appeared upon the scene of his own volition").

382. FREEMAN, *supra* note 319, at 53. See generally KNUD RASMUSSEN, *INTELLECTUAL LIFE OF THE IGLULIK ESKIMOS* (1929) (report of the fifth Thule expedition 1921-24).

383. FREEMAN, *supra* note 319, at 54 (stating that sharing food signifies generosity and is an appropriate use of the gift).

384. *Id.* at 8 ("The bowhead whale played a central role in the traditional Eskimo culture. Ceremonies, feasts, sharing patterns, social organization, religious beliefs, power and prestige were integrated in some way with bowhead whaling."); see also *id.* at 187-89, 194, 219.

385. *Id.* at 73, 198, 222 (stating that whale is served at feasts and rituals, including Thanksgiving and Christmas).

386. BRAUND, *supra* note 323, at 10, 13 (citing studies from 1892-1980).

387. See, e.g., Michael Rollins, *Pride Swells in Youngsters of Makah Tribe*, OREGONIAN (Portland), May 19, 1999, at A1 [hereinafter Rollins, *Pride Swells*] (stating that a 1995 survey at Makah Reservation showed 55% unemployment, per capita income of \$5200 a year, and that 50% of the Tribe was under the federal poverty limits); Shukovsky, *supra* note 63 (stating that seasonal work results in an unemployment rate at Makah from 50-70%, and an average household income of \$7000 a year).

388. FREEMAN, *supra* note 319, at 60; BRAUND, *supra* note 323, at 13. Inuits have six

Bartering and exchanging of animal meat and products are also economic transactions which possess social meaning in small communities because it allows the maintenance of relations and production processes that are deeply rooted in tradition and culture.³⁸⁹

In Greenland today, whale meat is still sold from low income hunter groups to higher income Greenlanders.³⁹⁰ One commentator considers this not to be commercialization of the whale hunt but to be a traditional distribution channel that benefits all parties because it allows the hunting to continue and allows nonhunters to get a share of the whale meat.³⁹¹ Greenland Inuits are similar to the Makah and other whaling communities because they no longer have a purely subsistence economy. Greenlanders possess a mixed subsistence-cash economy with small scale production of simple commodities, some wage employment, and transfer payments which complement their production of wild foods.³⁹²

Whales and other animals have always been part of native economies because hunters have always sold parts of the seals or whales they catch.³⁹³ Alaska Natives and other Inuits have usually sold parts of any whale landed and the income helps them survive in the market economy they are now a part of and helps them buy needed supplies for living and new equipment for whaling.³⁹⁴ These people live in "mixed economies" where only a few people have steady cash paying jobs and thus most hunters need to trade or sell whale products because it helps them to participate in their economy and get needed goods.³⁹⁵

Similarly, the Makah had originally planned on resuming their traditional economic use of whales and whale products by utilizing any captured gray whales commercially but the United States required that they use the whale only for subsistence food.³⁹⁶ The Makah are allowed, however, to sell

characteristics of a mixed subsistence-cash economy: community-wide seasonal production activities; high household production of wild resources; kinship based social organizations, extensive noncommercial distribution and barter; traditional systems of land use and occupancy; and cash used to support hunting and fishing. ROBERT WOLFE & LINDA ELLANNA, ALASKA DEPT FISH & GAME, RESOURCE USE AND SOCIOECONOMIC SYSTEMS: CASE STUDIES OF FISHING AND HUNTING IN ALASKAN COMMUNITIES (1983); Oran R. Young, *The Mixed Economies of Village Alaska*, in ARCTIC POLITICS: CONFLICT AND COOPERATION IN THE CIRCUMPOLAR NORTH (1992).

389. FREEMAN, *supra* note 319, at 49.

390. Robert Petersen, *Communal Aspects of Preparing for Whaling, the Hunt Itself, and the Ensuing Products*, in THE ANTHROPOLOGY OF COMMUNITY-BASED WHALING IN GREENLAND 96 (Marc G. Stevenson et al. eds., 1997); CAULFIELD, *supra* note 357, at 103 (stating that whale meat is eaten, widely distributed, and some is sold for cash).

391. FREEMAN, *supra* note 319, at 97.

392. CAULFIELD, *supra* note 357, at 49.

393. WENZEL, *supra* note 319, at 89.

394. FREEMAN, *supra* note 319, at 24.

395. *Id.*

396. Dep't of Commerce EA, *supra* note 40, at 7; Sea Shepherd Conservation Soc'y, *Stop*

artifacts made out of the non-edible parts of the whales they land.³⁹⁷ In contrast to how the Makah were treated in regards selling whale products, internationally it is recognized that native cultures should be allowed to determine for themselves what their "degree of participation in the cash economy" will be: "Only through recognition of this right can economic self-sufficiency and cultural autonomy be safeguarded."³⁹⁸

d) Nutrition and Health

Marine mammals are an excellent food source. Whale blubber and meat are very nutritious and are needed by whalers for food.³⁹⁹ Research shows that marine mammal fats are much healthier than other foods in terms of minerals, energy value and the quality of the fat and it is significant in preventing cardiovascular and atherosclerotic diseases.⁴⁰⁰ Studies based on the low incidence of heart disease among Greenland Inuits, even though they eat a high whale fat diet, resulted in the discovery of the beneficial effects of omega-3 fatty acids which protect from cardiovascular disease.⁴⁰¹ In fact, substituting a Euro-American diet for the traditional Inuit diet causes "a risk of introduction of diet-related civilization diseases."⁴⁰² In addition, store

the Makah Whale Hunt!, at <http://www.seashepherd.org/issues/whales/makahhunt20701.html> (last visited Aug. 7, 2001) [hereinafter *Stop the Makah Whale Hunt!*] (on file with author) (quoting Apr. 27, 1995 Letter from Robert L. Brownell of NMFS Region 4 to Michael Tillman Deputy Commissioner at NMFS' SW Fisheries Science Center, describing the intentions of the Makah to operate a processing plant to sell to "markets outside the U.S.").

397. The Makah can sell handicrafts made from nonedible whale parts. 61 Fed. Reg. 29628 (1997). The Tribe agreed to this stipulation even though it is an infringement on its sovereignty and treaty right to use the whales in its traditional economic manner as trade and commercial products. See, e.g., McMILLAN, *supra* note 14, at 18-19 (stating that whaling played a major role in the Makah economy).

398. FREEMAN, *supra* note 319, at 24 (quoting a 1997 World Conservation Union report).

399. Whaling is an important part of the nutrition and diet in modern day Greenland. Robert Petersen et al., *Subsistence Whaling in Greenland*, in *THE ANTHROPOLOGY OF COMMUNITY-BASED WHALING IN GREENLAND* 36 (Marc G. Stevenson et al. eds., 1997); see also BRAUND, *supra* note 323, at 5-10 (noting an Interior Study showed Eskimo/Inuit need for whale meat and marine mammal products).

400. Peder Helms, M.D., *Nutritional Needs Relating to Aboriginal Subsistence Whaling Among the Inuit in Greenland*, in *THE ANTHROPOLOGY OF COMMUNITY-BASED WHALING IN GREENLAND* 49-53 (Marc G. Stevenson ed., 1997); MILTON M.R. FREEMAN ET AL., *RECOVERING RIGHTS: BOWHEAD WHALES AND INUVIALUIT SUBSISTENCE IN THE WESTERN CANADIAN ARCTIC* 104-06 (1992) [hereinafter *RECOVERING RIGHTS: BOWHEAD WHALES*] (stating that whale and other native meats are much healthier than beef and chicken); FREEMAN, *supra* note 319, at 25, 45-47 (stating that marine mammal fat is a rich source of antioxidants and selenium, which promote health and protect from heavy metals, and that the Department of Agriculture agrees about vastly superior qualities of whale meat over beef in protein, vitamins and minerals, and lack of fat).

401. FREEMAN, *supra* note 319, at 47. See generally Jonathan C. Hansen et al., *Fatty Acids and Antioxidants in the Inuit Diet*, 53 *ARCTIC MEDICAL RESEARCH* 4-17 (1994).

402. FREEMAN, *supra* note 319, at 48 (quoting 1984 IWC report).

bought meats are not preferred by Alaska Natives and the absence of marine mammal and whale products lead to the breakdown of Native traditions.⁴⁰³ Numerous studies have showed the importance of whaling to Alaska Natives and Inuits around the world as a major food source.⁴⁰⁴

Similarly, the Makah have a nutritional need for whales and can benefit greatly from increasing this food source in their diet.⁴⁰⁵ As with many Native Americans, the Makah suffer from various nutritional problems and systemic illnesses that experts attribute to the introduction of western foods.⁴⁰⁶ Furthermore, the Makah and other American Indians are suffering with an epidemic of diabetes that is also partly attributable to western foods replacing traditional diets.⁴⁰⁷ Perhaps a return to their historical diet would help improve the health of the Makah Tribe.⁴⁰⁸

A perverse variation on the nutrition issue was actually used as an argument against the Makah resuming whaling. Since the Tribe had not whaled in over seventy years, commentators stated that the Makah had no nutritional reason to resume whaling because obviously they had been eating other foods for the past seventy years.⁴⁰⁹ This argument is disingenuous and also ignores the potential health benefits from the Makah returning to a more traditional diet. Furthermore, the reason the Makah have not been eating whale for the past seventy years is because American and European commercial whalers devastated their traditional food source. To prevent the Makah from resuming their cultural traditions and benefitting from whales as a valuable and nutritious health source due to the profligate actions of other

403. BRAUND, *supra* note 323, at 10.

404. *Id.* at 13 (citing studies 1892-1980).

405. Dep't of Commerce EA, *supra* note 40, app. 8.2, at 28-33.

406. *Id.* at 30-32 (citing numerous authorities).

407. *Id.*; NAT'L INST. OF HEALTH, THE PIMA INDIANS: PATHFINDERS FOR HEALTH 26 (1996) ("Indians have the highest rates of diabetes in the world."); INDIAN HEALTH SERV., REGIONAL DIFFERENCES IN INDIAN HEALTH 5 (1995) (stating that infant mortality and life expectancy on reservations are the worst for all Americans, and that diabetes is 234% more prevalent among Indians than in other U.S. citizens); INDIAN HEALTH SERV., DEP'T OF HEALTH & HUMAN SERVS., IHS NATIONAL DIABETES PROGRAM, SPECIAL DIABETES PROGRAM FOR INDIANS: INTERIM REPORT TO CONGRESS 12 (2000) [hereinafter SPECIAL DIABETES PROGRAM] (stating that major factors contributing to diabetes in American Indians are obesity and genetics, and that contributing to obesity is a "westernized" high-fat diet and lack of physical activity and less reliance on hunting and farming).

408. Dep't of Commerce EA, *supra* note 40, app. 8.2, at 32-33.

409. Leesteffy Jenkins & Cara Romanzo, *Makah Whaling: Aboriginal Subsistence or a Stepping Stone to Undermining the Commercial Whaling Moratorium?*, 9 COLO. J. INT'L ENVTL. LAW & POL. 71, 86-87 (1998); Sarah Suhre, Comment, *Misguided Morality: The Repercussions of the International Whaling Commission's Shift from a Policy of Regulation to One of Preservation*, 12 GEO. INT'L ENVTL. L. REV. 305, 332 (1999) (stating that Makah seventy-year absence of whaling is hard to reconcile with any claim of nutritional need and with the traditional definition of aboriginal subsistence whaling, which includes the requirement that a group has "consistently relied upon whales").

societies would be cultural genocide of the worst form.⁴¹⁰ The cultural and nutritional dietetic needs of the Makah and other whaling natives should not be determined or judged by a modern diet that has been forced on these cultures by the dominant American/European cultures.⁴¹¹

2. *Hunting Cultures or Animal Preservation Groups — Who Gets to Decide?*

The Makah, Alaska Natives and Inuit peoples around the world are hunting cultures. These cultures appear to directly conflict with most of the tenets of what is called the "animal rights movement."⁴¹² One cannot generalize, however, about either group because a few Makahs were against the Tribe resuming whaling and many members of the animal rights movement have a wide array of thoughts on the appropriateness of killing and using whales.⁴¹³

410. The IWC recognizes the unfairness of punishing natives due to the whaling activities of non-natives. ABORIGINAL/SUBSISTENCE WHALING, *supra* note 338, at 1, 4, app. at 33, 37 (stating that the IWC argued against using nutritional need as part of the test for aboriginal subsistence whaling because that allows non-natives to destroy whale stocks for economic reasons yet native cultures suffer the effect).

411. STOETT, *supra* note 6, at 69 (stating that aboriginal coastal whaling died out in many places because of European over-exploitation). Compare with SPECIAL DIABETES PROGRAM, *supra* note 407, at 12 (stating that the major factors contributing to diabetes in American Indians are obesity, genetics, and high levels of insulin, that contributing to obesity is adoption of a "westernized" high-fat diet, and that the level of physical activity also has declined, with less reliance on hunting and farming as occupations).

412. FREEMAN, *supra* note 319, at 9 (stating that the fight over whaling is a cultural conflict). For contrasting views on the right of whales to life or humans to hunt them, compare Finn Lynge, *Arctic Wars, in WHALES AND ETHICS* (Olaf Jonsson ed., 1992); Anthony D'Amato & Sudhir Chopra, *Whales: Their Emerging Right to Life*, 85 AMERICAN J. INT'L L. 21 (1991); WENZEL, *supra* note 319; Robbins Barstow, *Beyond Whale Species Survival: Peaceful Coexistence and Mutual Enrichment as a Basis for Human/Cetacean Relations*, SONAR, Autumn 1989, at 2; A QUESTION OF RIGHTS: NORTHERN WILDLIFE MANAGEMENT AND THE ANTI-HARVEST MOVEMENT (Robert Keith & Andrew Saunders eds., 1989).

413. See *supra* note 5 (stating that some Makah opposed the Tribal whale hunt). See CAULFIELD, *supra* note 357, at 8, 151 (stating that some anti-whaling groups contest natives' rights to take any whales, that they think whales have special characteristics, and that a spokesperson for the Whale and Dolphin Society said whaling is not an environmental issue but a moral and ethical one); DAVID BOERI, PEOPLE OF THE ICE WHALE: ESKIMOS, WHITE MEN, AND THE WHALE 278 (1983) (stating that some environmentalists compared Eskimo whaling to headhunting and cannibalism); FREEMAN, *supra* note 319, at 27 ("Animal protection organizations [] assert that the human use of animals is perverse and unnecessary."); STOETT, *supra* note 6, at 120 (admitting that with abundant gray whales it is difficult to argue biological reasons to stop the Makah hunt); D'Amato & Chopra, *supra* note 412, at 57-59 (claiming that whales are "entitled" to life, that while commercial whaling practices were primarily responsible for endangering the bowhead, Inuits have no right to kill bowheads because only "their traditional life style" is endangered and not their lives, and arguing an obligation has arisen to feed Inuits by nations who benefitted from commercial whaling if the Inuits choose to remain where they are instead of migrating to where other food is available); O'Callahan, *supra* note 1; FINN LYNGE, ARCTIC WARS, ANIMAL RIGHTS, ENDANGERED PEOPLES 111 n.14 (Marianne Stenbaek trans.

It seems obvious though to state that the positions of these groups are diametrically opposed because "whale preservationists" believe that not one single whale should be killed for any reason.⁴¹⁴ This raises an important question regarding indigenous whaling cultures — who gets to decide whether cultural and traditional whaling is a valid practice that should continue?

As discussed above, whaling and hunting cultures respect the animals upon which their society relies for subsistence and these animals figure significantly in the mythology, religion and culture of hunting societies. Hunting people are proud of their cultures and they desire to pass them on to their descendants the same as any other people desire to perpetuate their culture.⁴¹⁵ As would be expected, these hunting cultures have different values, philosophies and ways of understanding nature and its creatures than do other cultures and the animal rights movement.⁴¹⁶

The animal rights movement, on the other hand, generally places animal rights at the same level as human rights and believes that humans do not have the right to eat, wear, kill or use animals.⁴¹⁷ Such groups and some mainstream environmental groups have pushed animal rights even when it adversely impacted indigenous hunting cultures.⁴¹⁸ Many of these groups pursue animal rights campaigns even when the animal in issue is not endangered or threatened as a species by hunting or use.⁴¹⁹ Many of the groups state that their preservationist stance to protect each and every animal,

1992) (quoting animal rights activist Peter Singer) ("If the native people are killing animals as part of a traditional way of life, I think we really can't rightfully interfere.").

414. D'Amato & Chopra, *supra* note 412, at 59 (stating that whales have a right to life and cultural rights to subsistence food cannot trump that right).

415. FREEMAN, *supra* note 319, at 84.

416. *Id.*

417. GARY L. FRANCIONE, RAIN WITHOUT THUNDER 2 (1996); TOM REGAN, IN DEFENSE OF ANIMALS 13 (Peter Singer ed., 1985); FREEMAN, *supra* note 319, at 27, 148, 156 ("new ideology . . . that animals have rights at least equal to those of humans"); WENZEL, *supra* note 319, at 37 (stating that opponents of sealing believe that animals are sentient beings and should live free from human exploitation); *see generally* PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS (1975).

418. The baby harp seal controversy from 1970 to the 1980s seriously injured Canadian and Greenlandic Inuit cultures. WENZEL, *supra* note 319, at 1, 3-4, 145 (stating that seal hunt protestors claimed that Inuits were not their goal, but Inuit communities were severely injured when commercial sealing stopped); FREEMAN, *supra* note 319, at 157 (stating that the collapse of sealing led to high rates of suicide, escalating social assistance payments, and loss of self-respect, which caused alarm in Arctic Canada and Greenland, and was catastrophic to Inuit families); LYNGE, *supra* note 413, at 2, 35 & n.12 (stating the collapse of sealing "shook the very foundations of the Arctic cultures," and that Greenpeace officially apologized for the unintentional harm its anti-sealing campaign caused Inuits).

419. A seal biologist discussing the effort to end clubbing and harvesting harp seal pups stated that the seal war "revolves not around scientific data, but on politically translatable moral and ethical differences." WENZEL, *supra* note 319, at 171 (quoting David Levigne).

as opposed to a conservationist approach which looks to protect a species from extinction, is based on moral issues and not on wildlife management.⁴²⁰

A few of the most extreme animal rights groups have even placed animal lives over human lives. There have been arson incidents and violent attacks on humans around the world to advance animal rights.⁴²¹ One of the primary protestors against the Makah whaling, the Sea Shepherd Conservation Society, has been involved in worldwide violent attacks against whalers.⁴²² The Society also threatened to attack Makah whaling boats.⁴²³ The most disturbing aspect of the protest against the Makah whaling was the placing of animal lives and interests above that of humans. The slogan "Save a Whale, Harpoon a Makah" was used by protestors in demonstrations in Seattle, Washington and near the Makah reservation.⁴²⁴ It seems incongruous that people protesting to save whales would advocate killing humans.

Consequently, we are left with the question: who has the right to choose how to use the animals and whales that native peoples want to utilize? For tribes, hunting and using certain animals is a cultural, traditional and even a religious issue, and often they are trying to preserve centuries old customs, traditions, ways of life and subsistence lifestyles.⁴²⁵

420. WENZEL, *supra* note 319, at 156, 158 (giving protestors' reason for opposing Inuit sealing as "a question of morality" and not wildlife management, economics, politics or science, and stating that animal rights groups said it was not their job to assess the impact of their efforts on cultures, but rather "to protect animals").

421. LYNCE, *supra* note 413, at 66-69, 67 n.1, 68 n.2 (stating that the Animal Liberation Front's London headquarters claimed credit for bombings of fur stores, sending bombs to publishers of fur ads, and poisoning candy bars, and quoting an anonymous spokesperson as saying in a London newspaper, "We do not care whether or not people die. Animals come first."); HAROLD D. GUITHER, *ANIMAL RIGHTS: HISTORY AND SCOPE OF A RADICAL SOCIAL MOVEMENT* 152 (1998) (citing direct acts of violence by animal rights extremist, and stating that the federal government has documented 313 individual actions). *See generally* U.S. DEPT OF JUSTICE & U.S. DEPT OF AGRICULTURE, *REPORT TO CONGRESS ON THE EXTENT AND EFFECT OF DOMESTIC AND INTERNATIONAL TERRORISM ON ANIMAL ENTERPRISES* (1993).

422. STOETT, *supra* note 6, at 95 & n.85 (stating that a Society ship rammed a pirate whaling ship, attacked and destroyed Icelandic whaling property, and caused bombings in Portugal and Spain in 1986); OSHERENKO & YOUNG, *supra* note 374, at 17-44 (stating that the Sea Shepherd Conservation Society sank two of Iceland's four whaling ships and sabotaged the country's only whale oil processing plant).

423. Shukovsky, *supra* note 63 (quoting Paul Watson of the Sea Shepherd Conservation Society) ("We will directly intervene to protect the whales. [Makah whaling boats] will be sunk."); Neal Hall, *Indian Whaling Ships Will Be Sunk*, VANCOUVER SUN, May 24, 1995, at A2 (reporting threat of Sea Shepherd Conservation Society against Makah); STOETT, *supra* note 6, at 95 n.85 (stating the Society vowed to stop the Makah whaling).

424. *See supra* note 1.

425. WENZEL, *supra* note 319, at 55, 152 (stating that preservationists are "unwilling and unable to recognize that Inuit subsistence was a matter of cultural right, as well as need," and that protestors define subsistence as conforming to the "southern perception of what is traditional and necessary to Inuits").

In situations like the Makah whaling, however, some animal rights groups have tried to tell indigenous peoples what their culture should be and how to practice their traditions.⁴²⁶ These protestors are trying 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 and other animals. 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. Some groups have gone even farther and have denigrated the cultural beliefs of native peoples. Unintentionally perhaps, some groups have resorted to tactics which could be defined as racism.⁴²⁷ Some commentators have called the conduct of these groups "Cultural Imperialism" and have chastised them for attacking native subsistence users and not working on the real problems facing marine mammals from modern day commercial activities and pollution.⁴²⁸

426. *Id.* at 37, 41, 59, 158 (stating that the seal-hunting debate was not only an animal rights issue, it was also "a debate over the rightness or wrongness of Inuit hunting and especially the right of southerners, of any philosophical stripe, to dictate the nature of Inuit culture," that animal groups view "Inuit livelihood and lifestyle . . . through its own ethnocentrically derived universalist perceptions," that protestors wanted Inuit to only seal with methods defined by animal rights groups, and that the animal rights stance questions the viability of subsistence in the modern Arctic and whether harvesting can continue as a way of life).

427. Alert Memmi, *Attempt at a Definition*, in *DOMINATED MAN: NOTES TOWARD A PORTRAIT* 185-95 (1968) (stating that a "racist attitude" has these elements: (1) stressing real or imaginary differences between the racist and the victim, (2) assigning values to the differences, overvaluing the racist's values, (3) making absolutes by generalizing about the values, and (4) justifying any aggression or privilege). Compare with WENZEL, *supra* note 319, at 37 (stating that opponents of Inuit sealing "appear disposed to attack Inuit hunting in light of their own values . . . The animal rights perspective . . . takes a position on the issue of Inuit consumptive use of wildlife based on its own ideological evaluation of Western philosophy and ethics.").

428. FREEMAN, *supra* note 319, at 149, 154, 163 (defining cultural imperialism as the ethnocentric disregard or disdain for other cultures and lifestyles, and that it is cultural imperialism for animal rights groups to attack indigenous whaling); see also OSHERENKO & YOUNG, *supra* note 374, at 123-25, 128 (stating that pollution from industrialized world building up in the Arctic, and that oil spills will cause widespread damage to marine habitat); BUSCH, *supra* note 7, at 123-27 (stating that whales are dying in fish nets, that oil, pollution, DDT, and other pesticides are found in them, that nuclear waste is dumped in the ocean off California coast on gray whale migration route, that Vancouver, B.C., dumps 200 million gallons of treated sewage into the ocean every day, that boats cause propeller damage to whales, and that a whale watcher boat cut off one gray's tail); Charles Johnson, *The Role of Indigenous Peoples in Forming Environment Policies*, in *CONTESTED ARCTIC: INDIGENOUS PEOPLES, INDUSTRIAL STATES, AND THE CIRCUMPOLAR ENVIRONMENT* 4-5 (Eric Alden Smith & Joan McCarter eds., 1997) (stating that pollutants and heavy metals are appearing in animals used for subsistence in the Arctic); *Noise and Behavioral Responses*, in *THE BOWHEAD WHALE*, *supra* note 319, at 631-92 (stating that manmade noise, ships, planes, and seismic exploration cause short-term change in whale activity, breathing rate, direction, and speed of travel and group composition); Gerald R. Bratton et al., *Presence and Potential Effects of Contaminants*, in *THE BOWHEAD WHALE*, *supra* note 319, at 701-35 (stating that heavy metals, pesticides, hydrocarbons, and chlorinated residues and atmospheric atomic testing are appearing in bowheads); STOETT, *supra* note 6, at 5, 125-27, 130,

Especially in regards the Makah, when the gray whale is at its highest population in history, the question of who decides whether the Makah can go whaling is appropriate. Why should the "ethics and morals" of a few protestor groups be more important than the ethics, morals and cultural beliefs of the Makah? Should the Makah and like groups be allowed to make the decision to continue their subsistence life styles and to revive and preserve their cultures? Do members of the animal rights movement have the right or moral superiority to make a decision forbidding the Makah to live? Simply asking such questions appears to provide the answers because it seems clear that whale preservationists have no superior moral or ethical right to say what the Makah culture should be, nor to prevent the Makah from practicing their culture and exercising cultural self-determination. Consequently, the Makah should have the right to choose to observe their customs and traditions and to exercise rights of cultural self-determination.

Determining who gets to decide whether the Makah can continue their separate cultural lives is the difficult part of defining and allowing cultural self-determination and the right of a distinct culture or people to practice their culture and religion. 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.⁴²⁹

132, 146 (comments of an animal rights activist, admitting that small-scale whaling will probably not hurt whales, that the greatest threat is industrial, agricultural and marine activities hurting the health of the oceans, that whale food is being overfished by humans; rising ocean temperature, ship traffic; that it is hard ethically, legally and politically to deny all humans the right to eat whales; and that habitat is the critical survival issue).

429. The U.S. Constitution does not expressly mention culture. However, a possible avenue for finding culture to be a constitutional right might be the right to freedom of association. The Supreme Court has several times expressly referenced culture when discussing the right of association. The Court has approved of exercising the right to association by engaging in group efforts which serve "shared goals . . . in preserving political and *cultural diversity* . . ." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added) (citing numerous authorities). In equally intriguing language, seemingly including culture in the right of association and other rights, the Court has stated:

It is beyond debate that *freedom to engage in association for the advancement of beliefs and ideas* is an inseparable aspect of the 'liberty' assured by the *Due Process Clause* of the Fourteenth Amendment, which embraces *freedom of speech*. Of course, it is *immaterial whether the beliefs sought to be advanced by association* pertain to political, economic, religious or *cultural matters*, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

NAACP v. Alabama ex rel. Patterson, 357 U.S. at 460-61 (emphasis added) (internal citations omitted); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (stating that the Court has "protected forms of 'association' that are not political in the customary sense but pertain to the

IV. The Makah Reassert Their Whaling Culture

Throughout the century of federal oppression of their culture and Tribe, the Makahs kept alive their separate culture and the desire to honor, preserve, and practice their ancient traditions. The Tribe "place[d] a premium on the continuance of the Makah as a distinctive group."⁴³⁰ Preserving their culture after a century of active oppression is a tribute to the Makah.⁴³¹

According to various researchers, the Makah were able to accomplish this amazing feat by utilizing a specific aspect of their culture to keep their whaling traditions alive during a long dormant period. The Makah culture developed a longstanding procedure of "storing away" aspects of its culture by preserving traditions or holding onto rights, privileges and practices even over long periods of nonuse of the practice or tradition.⁴³² Moreover, some Makah cultural rights and privileges are intangible properties, that are in essence permanently stored away, because they cannot be publicly used or displayed even though they are still discussed and known in the Tribe and are taught as part of the culture.⁴³³ The rights are retained, and remain viable

social . . . benefits of the members") (emphasis added).

The Court has used other language which could include culture as a constitutional right: "We have long understood as implicit in the right to engage in *activities protected by the First Amendment* a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and *cultural ends*." *Roberts*, 468 U.S. at 622 (emphasis added). The *Roberts* Court also stated that "*certain kinds of personal bonds* have played a critical role in the *culture and traditions of the Nation* by cultivating and transmitting shared ideals and beliefs" and that these bonds "foster diversity" and help create "close ties with others . . . [which promote the] ability independently to *define one's identity* that is central to any concept of *liberty*." *Id.* at 618-19 (emphasis added) (citations omitted). Was the Court extolling the values of personal bonds and distinct identities or cultures and that "liberty" interests protect culture? See also LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1011, 1400-01, 1419-20 (2d ed. 1988) (implying that infringements on practicing culture would implicate the right of association, stating that "virtually every invasion of personhood is also an interference with association . . . The vital role that such freedom of intimate association plays in our cultural and social history must receive protection *by* as well as *from* the state," and stating further that believers in the diversity of society may find comfort in the freedom of association right).

430. COLSON, *supra* note 10, at 294-95; see also *id.* at 242, 280, 291 (stating that "the Makah remain a distinct group" and see themselves as a distinct people who have not merged into the American culture; that Makah do not identify themselves with white society and their traditional culture still persisted in 1942; and that Makah always had and, as of 1942, continued to some extent to have a belief in the supernatural and a widespread concept of supernatural powers which can enter human beings).

431. *Id.* at 294 ("Eighty years, during which it has been obvious to the Makah that there was no possibility of escape from this domination, have still left them with a residue of behaviour and belief which distinguishes them from white groups in the United States. This has happened though there has been no agency for the perpetuation of their own traditions save in the very people.").

432. Dep't of Commerce EA, *supra* note 40, app. 8.2, at 1, 24-25.

433. *Id.* at 24 (citing Christopher B. Wooley, A Reassessment of Westcoast (Nootka)

and ready for when they may appropriately be used again.⁴³⁴ The Tribe followed this practice of storing away parts of its culture with the whaling traditions. The Makah never stopped preparing for the resumption of whaling and never stopped honoring this part of their culture and teaching their children about their traditions.⁴³⁵ By storing up their whaling culture and preserving it as part of their living culture, whaling has remained a major part of reservation life, the reservation school curriculum, and is emphasized in conjunction with the tribal museum and the language program since 1960.⁴³⁶ The Makah museum, built to house the Ozette artifacts has become a major force in preserving and reviving the Tribe's culture and language.⁴³⁷ These facts demonstrate that the Tribe has a history of revitalizing dormant cultural traditions.⁴³⁸

The success of the Tribe's storing away its cultural knowledge to preserve dormant traditions is demonstrated by a recent incident in which a gray whale was accidentally captured by the Tribe. In July 1995, within five hours of landing a whale, over 150 Makahs participated in butchering it under the direction of tribal elders.⁴³⁹ All of the meat and blubber was distributed to tribal families, and stoves all over the reservation were kept busy cooking whale and using old recipes.⁴⁴⁰ Makah babies were once again allowed to teethe on whale blubber.⁴⁴¹

Not surprisingly, then, the ability to store up cultural aspects has ensured that whaling remained a crucial and important part of the Tribe's culture even into the 1990s and even though the Makah had not gone whaling for almost seventy years.⁴⁴² This ability, or what another sociologist labels a "latent

Whaling (1984) (master's thesis, Department of Anthropology, Washington State University)).

434. Dep't of Commerce EA, *supra* note 40, app. 8.2, at 24.

435. *Id.*

436. *Id.*

437. *Id.*; Renker & Gunther, *supra* note 182, at 429 (stating that the Makah have "administered one of the most active and successful language preservation programs in the United States").

438. Dep't of Commerce EA, *supra* note 40, app. 8.2, at 25-26 (stating that the Tribe has a history of reviving dormant traditions; that in the 1970s and 1980s the Tribe reinstated numerous songs, dances, and artistic traditions and operated a program to restore its language; and that in 1995 community members began discussing the positive effects resuming whaling could have on the Tribe and the young).

439. *Id.* (stating that the efficient butchering showed that traditional knowledge was still retained in the Tribe).

440. *Id.*

441. *Id.*

442. *Id.* at 24 (stating that a whaling "tradition remains the focal point of the Makah culture and social structure"); Peggy Andersen, Associated Press, *One Tribal Whale Hunt, Two Opposing Views of Its Success*, OREGONIAN (Portland), May 24, 1999, at B1 [hereinafter Andersen, *Two Opposing Views*] ("The whale is at the heart of the Makah culture, and its image decorates buildings, boats, costumes and drums."); Rollins, *Kill Revives Tradition*, *supra* note 7 ("Whaling still looms large in Makah culture, with images of the animal emblazoned on the high school and

culture," has allowed the Makah to preserve a love and respect for their ancient but dormant whaling culture.⁴⁴³ The Makah did this by teaching their children and grandchildren about their whaling traditions and by honoring what made them separate and distinct from other peoples.⁴⁴⁴ For seventy years, when the possibility of ever again hunting whales must have seemed impossible, the Tribe continued to honor its past and keep the love of this distinct and unique culture alive within the Tribe. Based on the fact that cultural traditions which go dormant usually disappear forever, it is little short of miraculous that the Makah kept alive the desire to practice whaling within their own people.⁴⁴⁵ In fact, this may be the most basic and most significant lesson from the Makah cultural self-determination story. Other American Indian tribes and distinct cultural groups should note this point and recognize that keeping a culture and distinct traditions alive starts with keeping the practices and the desire to honor the traditions and culture alive within the very group itself. Only if the culture and traditions are maintained within the group or tribe will it ever become an issue with outside interests of whether the group can continue or revive certain cultural practices.

As the gray whale stock recovered, the Makah began to think that whaling would actually be possible again. In spite of the obstacles they would face in reviving whaling within their Tribe, dealing with the United States and the

the backdrop used for traditional dances."); Rollins, *Pride Swells*, *supra* note 387 (noting that a copy of the 1855 treaty preserving the Makah whaling rights is displayed on the Tribe's high school wall).

443. COLSON, *supra* note 10, at 172-74, 190, 201 (stating that the Makah in 1942 had traditions and culture in the "latent" sense, traditional knowledge that they expressed and learned about and still formed part of their culture but no longer practiced; that they still talked about, thought about and thought themselves capable of doing them; that their culture was passed on verbally by teaching children about the old ways; and that Makah traditions still affect the interactions of Makahs and gives them standards to follow and how to deal with unseen powers).

444. *Id.* at 47, 173-78, 181, 184, 188, 218 (stating that whaling stories were "still described in detail" in 1942; that whaling continued to be a part of everyday life; that, in 1942, several old whalers and whalers' wives had ancient whaling equipment and told of the ritual preparation, search for power, the prayers, songs and techniques, and the rituals and taboos; that the Makah kept their culture alive up to 1942 because the young learned the importance of whales for food, of seeking guardian spirits, reading the seas and weather, the subsistence knowledge, songs and ceremonies; that the elders talk to the young and present whaling as the culture of their forebears and reinforce the sense of belonging to a specific group of people and to a tradition other than American; and that it is still important for the Makah to see themselves "as a people with a common background distinct from all other groups"); *Racism Enters Whale Dispute*, SPOKANE TIMES, May 22, 1999, at B2 (stating that whales are the heart of Makah culture and whale images decorate the school, tribal headquarters, costumes, and drums); Dep't of Commerce EA, *supra* note 40, app. 8.2, at 24, 26-27 (stating that the Makah teach their children about whaling).

445. MCMILLAN, *supra* note 14, at 45 (stating that Indian cultures change over time); COLSON, *supra* note 10, at 173-74, 294 (stating that stories and traditions assure the Makah that another way exists; and that alternative modes of behavior, beliefs, customs and traditional knowledge, even if they no longer practice them, still form their culture as they talk about them, think about them and think themselves capable of performing them).

international whaling interests, and despite the very real dangers and arduous efforts of whaling, the Makah began working inside and outside their Tribe to restore their whale hunt. At this juncture, the Makah decided to assert their cultural and treaty rights by resuming whaling. The struggles they went through keeping the cultural tradition alive within the Tribe, gaining the support of the United States, securing a quota of gray whales from the IWC, and actually preparing for and resuming whaling are instructive events for other groups or tribes trying to practice cultural self-determination.

A. *The ICRW and the IWC*

The Makah ceased whaling in the 1920s because of the lack of whales in their waters. The California gray whales, which the Makah primarily harvested, had become seriously endangered due to the non-Indian commercial whaling industry. In the 1930s, the international community became worried about declining whale stocks and commercial overharvesting and took some steps to protect whales.⁴⁴⁶ In fact, the threatened condition of whale stocks around the world led fifteen nations to meet in Washington D.C. in 1946 to sign the International Convention for the Regulation of Whaling (ICRW).⁴⁴⁷

The ICRW was not enacted to prevent whaling but instead to conserve whale stocks to allow harvesting of whales to continue.⁴⁴⁸ The gray whale, however, was almost completely protected by the ICRW from its inception due to the grays' precarious situation.⁴⁴⁹ Only indigenous native gray and

446. Gambell, *International Management*, *supra* note 337, at 98 (stating that steps were taken internationally to protect whales in 1931, 1937, and 1938); Randall R. Reeves, *Modern Commercial Pelagic Whaling for Gray Whales*, in *THE GRAY WHALE*, *supra* note 13, at 188-89 (stating that the International Agreement for the Regulation of Whaling was signed by nine countries in 1937); John J. Burns, *Epilogue*, in *THE BOWHEAD WHALE*, *supra* note 319, at 752 (stating that in 1931 bowheads were protected by the League of Nations, and in 1935 by U.S. law).

447. International Convention for the Regulation of Whaling with Schedule of Whaling Regulations, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 361; *see* PACIFIC CTR. FOR INT'L STUDIES, *THE INTERNATIONAL WHALING COMMISSION AND THE REGULATION OF SMALL CETACEANS I* (1994) [hereinafter *SMALL CETACEANS*] (stating that, amid evidence of devastating reductions of great whales, fifteen nations gathered in Washington D.C. in 1946 for the International Whaling Conference).

448. The purpose of the ICRW is "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry . . ." 62 Stat. at 1717. The rules developed under the ICRW are to "take into consideration the interests of the consumers of whale products and the whaling industry." *Id.* art. V(2)(d), 62 Stat. at 1719; 1 PATRICIA BIRNIE, *INTERNATIONAL REGULATION OF WHALING 167* (1984) (stating that the ICRW was to establish sustainable harvesting quotas to ensure the long-term viability of whales); FREEMAN, *supra* note 319, at 101 (stating that the purpose of the ICRW is "to conserve whales in order to allow the orderly development of the whaling industry" and the "optimum utilization of whale resources").

449. The ICRW Schedule of regulations states it is "forbidden to take or kill gray whales or right whales, except when the meat and products of such whales are to be used exclusively for

bowhead whaling was specifically allowed to continue.⁴⁵⁰ However, Russia, the United States and Canada used an ICRW loophole and continued to take gray whales for "scientific" reasons even after 1946 and the ICRW attempt to protect them.⁴⁵¹ The United States finally stopped hunting grays when it protected grays in 1970 by listing them as endangered under the Endangered Species Conservation Act.⁴⁵²

The International Whaling Commission (IWC) is the administrative arm of international whaling and was created by the ICRW.⁴⁵³ The IWC is comprised of a representative from every country that is a party to the ICRW.⁴⁵⁴ The IWC meets once every year to consider reports from its standing committees and scientific advisors and to consider amendments to the ICRW Schedule of whaling regulations and to set quotas for whale harvesting.⁴⁵⁵ Since 1946, the IWC has slowly moved from being dominated by whaling nations interested in conserving whales to ensure future commercial whaling into an organization controlled by nonwhaling nations with a preservationist stance to save whales.⁴⁵⁶ In fact, the IWC passed a moratorium on worldwide commercial whaling in 1982 which became effective in the 1985-86 season.⁴⁵⁷

local consumption by the aborigines." 62 Stat. at 1723; Reeves, *supra* note 446, at 187-89 (stating that the ICRW protected grays in 1946; that the United States, Japan, Norway, and the Soviet Union engaged in commercial whaling for grays in 1910-46 on both the west coast of North America and in the Korean gray whale stock; and that these countries took 933 California grays and 1474 Korean stock grays in that time). Compare with BUSCH, *supra* note 7, at 97 (stating that in 1911-13 non-natives took over 4000 gray whales off the coast of British Columbia). The concern was well-placed. At one time there was a stock of Atlantic gray whales but they were hunted to extinction by the mid 1700s. JAN MELL, *THE ATLANTIC GRAY WHALE* 8 (1989).

450. 62 Stat. at 1723.

451. BUSCH, *supra* note 7, at 99-100, 188-89 (stating that ICRW art. VIII, 62 Stat. at 1719, allows governments to grant scientific research permits to take whales, and that the U.S. took 316 grays for "scientific purposes" in 1959-70).

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

453. ICRW arts. III, V, 62 Stat. at 1717-19.

454. *Id.*

455. *Id.*

456. FREEMAN, *supra* note 319, at 100 (stating that fifteen nations started the IWC; that by 1980 there were forty; that thirty were non-whaling countries; and that the majority strongly opposed killing whales); STOETT, *supra* note 6, at 63-64 (stating that many countries joined the IWC to stop whaling although the ICRW was designed to conserve whales for "the orderly development of the whaling industry"); INST. OF CETACEAN RESEARCH, *WHO'S AFRAID OF COMPROMISE?* 9-11 (Simon Ward ed., 1990) (stating that the ICRW's intent was to "safeguard[] for future generations the great natural resources represented by the whale stocks"; that attitudes have changed dramatically; and that whales have become the symbol of the environmental community).

457. SIDNEY HOLT & NINA M. YOUNG, *GUIDE TO REVIEW OF THE MANAGEMENT OF WHALING* 2-13, 37 (1991) (stating that the IWC voted a moratorium on commercial whaling in 1982); SMALL CETACEANS, *supra* note 447, at 5 (1994) (stating that the increase in IWC

The IWC has not been successful in stopping worldwide whaling notwithstanding the commercial whaling moratorium. Critics charge that the IWC lacks an effective oversight mechanism, has no observers on whaling ships, lacks enforcement powers, and ignores its own scientists.⁴⁵⁸ In addition, the ICRW contains two big loopholes which Japan and Norway, for example, have used to continue what looks like commercial whaling.⁴⁵⁹ Furthermore, some whaling countries do not belong to the IWC; Iceland withdrew in 1993 from the ICRW and the IWC because of the commercial whaling moratorium and continues to whale today, and Canada withdrew in 1982 and has allowed some Canadian natives to take whales.⁴⁶⁰ The IWC itself grants quotas to Alaskan, Siberian, Greenlandic and Caribbean natives to take hundreds of whales each year to meet their cultural and subsistence needs.⁴⁶¹

membership of many non-whaling nations led to the moratorium on commercial whaling in 1982, which became effective in 1986).

458. WILLIAM C. BURNS, *THE INTERNATIONAL WHALING COMMISSION IN THE 1990S: PROBLEMS AND PROSPECTS* 28-32 (1995); accord HOLT & YOUNG, *supra* note 457, at 2-13, 37 (alleging poor IWC management and presence of ICRW loopholes, and stating that no observers are employed to check reliability of catch data, and that some reports were falsified); STOETT, *supra* note 6, at 4-5, 10-11, 69, 117, 121 (noting that IWC has problems with control, leadership, and compliance due to lack of money, power, and observers).

459. ICRW arts. V, VIII, 62 Stat. at 1719-20 (stating that states can avoid IWC decision if they object within ninety days, and allowing countries to continue whaling for scientific research). Norway still whales and takes about 300 whales a year under the ICRW protest loophole. STOETT, *supra* note 6, at 4-5, 10-11, 69, 117, 121 (stating that Norway conducts a legal hunt of 300 minke whales a year, that Japan conducts controversial "scientific whaling," that the Portuguese whale in the Azores, and that native groups whale in Alaska, Russia, Greenland, and St. Vincent and the Grenadines); Jeffrey D. Lindemann, Comment, *The Dilemma of the International Whaling Commission: The Loophole Provisions of the Commission vs. the World Conscience*, 7 J. INT'L L. & PRAC. 491, 492-93 (1998) (stating that Japan takes hundreds of whales under the IWC scientific research exception, yet almost all of the meat is sold commercially); Calvin Sims, *Japan Defiantly Hunts Whales, Calls It Science*, SUNDAY OREGONIAN (Portland), Aug. 13, 2000, at A19 (reporting that, starting in 2000, Japan will take sperm and Bryde's whales which are on the U.S. endangered species list, and that Japan took 400 minke whales in 1999 for "scientific purposes").

460. Iceland withdrew from the IWC in 1992; although Norway stayed in, it resumed commercial whaling in 1993 under an ICRW loophole. SMALL CETACEANS, *supra* note 447, at 6 (citing authorities); David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of coercion in Consensual Structures*, 89 AM. J. INT'L L. 154, 160 (1995). Canada allowed a native bowhead whale hunt in 1991. RECOVERING RIGHTS: BOWHEAD WHALES, *supra* note 400, at ix, 4-5 (stating that Canadian Inuvialuits were allowed a bowhead hunt by Canada to reinstate important cultural and subsistence activity; and that return of their drum dance and cultural identity strengthened their language and tribal management responsibility); *Subsistence Whaling*, *supra* note 320, at 621 (stating that Canada allowed whaling).

461. Rollins, *Kill Revives Tradition*, *supra* note 7 (stating that Alaskan Eskimo, Greenland, Russian natives and others have IWC quotas and take hundreds of whales each year); BUSCH, *supra* note 7, at 118 (stating that the IWC allows hunting of bowhead whales by Alaska Natives,

B. Gray Whales

The gray whale or *eschrichtius robustus* is a marine mammal. They are an interesting and delightful creature. The Eastern Pacific stock of California gray whales are probably the best known whales to humans because of their incredible annual migration of nearly 13,000 miles along the west coast of North America and their habit of swimming close to shore.⁴⁶² Grays stay in relatively shallow water because they are bottom feeders and they mostly eat amphipods living in the top two centimeters of the ocean floor.⁴⁶³

The gray whale numbered between 15,000-24,000 when its winter calving grounds in Baja California were discovered around 1848 by American whalers; thereafter intensive hunting decimated the stock to number about 4000 by 1875.⁴⁶⁴ Active commercial hunting then ceased because the stock

minke and fin whales by Greenland Inuits, California grays by Russian natives, and humpbacks in the Caribbean).

462. Their annual migration is the best known of any whale species. Bruce R. Mate & James T. Harvey, *Ocean Movements of Radio-Tagged Gray Whales*, in THE GRAY WHALE, *supra* note 13, at 588 (stating that the average speed from radio-tagged grays was eighty-five km/day and gets faster the farther north they go, to 127 km/day in the last twenty-nine days of migration to Bering Sea). Grays migrate each spring from their calving grounds in lagoons in Baja California, Mexico along the west coast of North America to their feeding grounds in the Bering and Chukchi Seas. James D. Darling, *Gray Whales of Vancouver Island, British Columbia*, in THE GRAY WHALE, *supra* note 13, at 267, 268-69, 281 (stating that some grays do not migrate that far but remain all summer at Cape Flattery and Vancouver Island); STOETT, *supra* note 6, at 103-04 & n.2 (stating that the grays' increase is as certain as any population estimate can be, due to their migration so close to shore; and that on the 13,000 mile migration from Baja to Chukchi and Bering Seas, they average 115 miles a day); GODDARD, *supra* note 68, at 29-30, 74-76, 83-84 (stating that the annual migration of over 12,000 miles is the longest known of any mammal); DALE W. RICE & ALLEN A. WOLMAN, *THE LIFE HISTORY AND ECOLOGY OF THE GRAY WHALE (ESCHRICHTIUS ROBUSTUS) I* (1971) (stating that hundreds of grays have been autopsied and studied).

463. Grays mostly feed in the sediment at the bottom of the ocean. Mary Nerini, *A Review of Gray Whale Feeding Ecology*, in THE GRAY WHALE, *supra* note 13, at 423-30, 435-36, 445-46, 452, 460-61 (stating that apparently grays suck up bottom sediments to reach their food; that grays roll to their side to take in food and some sediment and leave "mud plumes" by expelling muddy water when surfacing; feed in shallow ocean waters; that environmental degradation or the presence of too many whales diminishes the food source, and grays will starve; and that grays put on most weight feeding five summer months in the Bering and Chukchi Seas); accord BUSCH, *supra* note 7, at 41 (stating that grays feed by turning to their right side and sucking up ocean bottom silt to feed on amphipods, and sometimes feed by straining ocean water).

464. Sam W. Stoker, *Subsistence Harvest Estimates and Faunal Resource Potential at Whaling Villages in Northwestern Alaska*, in BRAUND, *supra* note 323, at A-60; see also *Introduction*, in THE GRAY WHALE, *supra* note 13, at xxi ("Most whaling historians and biologists believe the pre-exploitation stock size was between 15,000 and 24,000 animals."); David A. Henderson, *Nineteenth Century Gray Whaling: Grounds, Catches and Kills, Practices and Depletion of the Whale Population*, in THE GRAY WHALE, *supra* note 13, at 163, 165, 166-67, 173-76, 181 (stating that non-native whaling of grays began in the winter of 1845, but that the worst damage was done when calving and mating grounds found; estimating pre-exploitation population as 15,000 and no more than 20,000; and stating that only 4000-5000 were left when

was so drastically diminished that it was uneconomical to continue whaling.⁴⁶⁵ The cessation of widespread commercial hunting and the protection provided by the ICRW in 1946 and under United States law in 1970 greatly aided a gray whale comeback. The grays made a good recovery to number about 15,000 to 20,000 by 1980.⁴⁶⁶ The Eastern Pacific stock of gray whale has continued its recovery, was removed from the United States endangered species list in 1994 and today is thought to have reached its highest population numbers in history of over 26,000 whales.⁴⁶⁷ Currently, however, gray whales are dying of natural causes in record numbers; scientists hypothesize that the grays have exceeded the carrying capacity of their food supply.⁴⁶⁸

intensive hunting stopped in the mid-1870s).

465. Henderson, *supra* note 464, in *THE GRAY WHALE*, *supra* note 13, at 163, 165, 166-67, 173-76, 181 (stating that, in eleven years, whalers decimated the stock and caused the near abandonment of gray whaling in the mid-1870s).

466. S.B. REILLY ET AL., *PRELIMINARY POPULATION ESTIMATE FOR THE CALIFORNIA GRAY WHALE BASED UPON MONTEREY SHORE CENSUSES, 1967/68 TO 1978/79*, at A-60-61 (1980) (stating that, in 1979, the IWC thought grays sufficiently healthy to reclassify as a sustained management stock with an aboriginal native catch quota of 178 a year; and that, in 1957-80, Russia was taking 163 grays a year for Siberian natives); Stephen B. Reilly, *Assessing Gray Whale Abundance: A Review*, in *THE GRAY WHALE*, *supra* note 13, at 204 (stating that estimates of the gray whale population ranged between 15,000 to 20,000 in 1978-80). The IWC moved grays from protected status to a sustained-management status in 1978. *Introduction*, in *THE GRAY WHALE*, *supra* note 13, at xxi (stating that, as of 1984, a few grays were taken each year by Alaskan Eskimos from St. Lawrence Island, and that Soviet government catcher boats took about 140-200 a year for Russian aborigines); Alfred Antonovich Berzin, *Soviet Studies on the Distribution and Numbers of the Gray Whale in the Bering and Chukchi Seas from 1968 to 1982*, in *THE GRAY WHALE*, *supra* note 13, at 419 (citing Russian estimates of 14,000 to 15,000 gray whales in 1984).

467. The gray whale was delisted in 1994 and confirmed in 1999 at the end of the mandatory five-year post-delisting monitoring period. Final Rule to Remove the Eastern North Pacific Population of the Gray Whale from the List of Endangered Wildlife, 59 Fed. Reg. 31094 (1994); Gray Whale Research and Monitoring, 64 Fed. Reg. 54275 (1999). While the estimates of the gray whale population differ, they all agree that grays are now at a very high number. Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16701, 16704 (1998) (stating that federal studies estimated the grays' population at 22,000 to 23,000, increasing at 2.5% a year, and "approaching its carrying capacity"); Brian T. Meehan, *Whale Beachings Linked to Sea Changes*, *OREGONIAN* (Portland), June 14, 1999, at A1 (stating that grays now number 26,600, their highest known population); BUSCH, *supra* note 7, at 102 (stating that in 1997, grays are said to number between 20,000 and 25,000).

468. Sam Howe Verhovek, *Makah Tribal Members Get Taste of Ancestral Rites, Others' Anger*, *OREGONIAN* (Portland), May 19, 1999, at A12 (statements of Dr. Bruce Mate of the Oregon State University Hatfield Marine Science Center and John Calambokidis, Research Biologist at the Cascadia Research Collective); Meehan, *supra* note 467 (stating that gray whales are dying in record numbers; that over 125 died and washed ashore from Mexico to Washington state on their northward spring 1999 migration; that the animals appear malnourished; and that the grays may have reached carrying capacity for their food source); *Whale Deaths*, *OREGONIAN* (Portland), May 19, 1999, at A12 (stating that the record die-off of grays may be due to insufficient food supply, and that they might have reached carrying capacity of the species).

C. United States/Makah Application for a Gray Whale Quota

The Makahs never forgot their whaling culture throughout this chain of events, even after a seventy-year hiatus in tribal whaling. The Tribe watched the gray whale recovery with great interest and when the whale was taken off the U.S. endangered species list the Makah Tribe immediately turned its attention to resuming its ancient tradition.⁴⁶⁹ The Tribe approached the U.S. to represent it in securing a quota of gray whales from the IWC, and in 1995 the United States tentatively agreed to help the Tribe.⁴⁷⁰ While there was not enough time to prepare a formal application for a Makah quota for the May 1995 annual IWC meeting, the United States informed the IWC at the 1995 meeting that it would present a formal proposal requesting a gray whale quota for the Makah in the future.⁴⁷¹

In early 1996, the federal agencies involved decided to support the Makah application for a gray whale quota and the National Oceanic and Atmospheric Administration (NOAA) entered an agreement with the Tribe to prepare a statement of need for the hunt and for the United States IWC Commissioner to propose a quota for the Tribe.⁴⁷² This agreement also required the Tribe to adopt a management plan and regulations to govern the hunt and that NOAA would revise its regulations to allow the hunt and to monitor the hunt.⁴⁷³ In June 1996, the U.S. presented the Makah quota proposal at the IWC annual meeting. The proposal was withdrawn after it turned controversial and when the United States thought it did not have the required three-fourths majority vote of IWC Commissioners to approve the quota as an amendment to the ICRW Schedule of regulations.⁴⁷⁴

The United States then considered a different approach.⁴⁷⁵ Before the

469. *Indian Band Applies for Gray Whale Hunt*, VANCOUVER SUN, May 23, 1995, at A1.

470. Dep't of Commerce EA, *supra* note 40, at 6-7; *Metcalf v. Daley*, 214 F.3d 1135, 1138 (9th Cir. 2000). Even though the United States delisted the gray whale, federal law required securing the permission of the IWC before the Makah could go whaling because in 1949, Congress adopted the ICRW into American law. Whaling Convention Act, 16 U.S.C. §§ 916-916f. This Act prohibits whaling in violation of the ICRW and its Schedule of regulations. *Id.* § 916c.

471. *Metcalf*, 214 F.3d at 1138; INT'L WHALING COMM'N, FORTY-SIXTH REPORT OF THE INTERNATIONAL WHALING COMMISSION 22 (G.P. Donovan ed., 1996) [hereinafter FORTY-SIXTH REPORT] (stating that, at the 1995 IWC annual meeting, "[t]he USA said that following the recovery of the Eastern Pacific stock of gray whales the Makah Indian Tribe had expressed an interest in taking five gray whales for ceremonial and subsistence purposes. The USA might therefore wish to submit a formal proposal for this at a future date.").

472. Dep't of Commerce EA, *supra* note 40, at 6-7.

473. *Id.*; *Metcalf*, 214 F.3d at 1139.

474. FORTY-SIXTH REPORT, *supra* note 471, at 2-23, 28-30; Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701, 16,703 (1998) ("The U.S. proposal had considerable support at the 1996 annual meeting, it did not appear to have the necessary three-quarters majority vote for a Schedule amendment and was withdrawn before a vote was taken."); *Metcalf*, 214 F.3d at 1139.

475. Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701,

October 1997 annual IWC meeting, the United States entered negotiations with the Alaska Eskimo Whaling Commission (AEWC) and the Russian Federation to trade a share of the gray whale IWC quota, which the Siberian Natives hunted, for part of the bowhead whale IWC quota, which the Alaska Natives hunted.⁴⁷⁶ The U.S. was criticized for this tactic.⁴⁷⁷ However, the Secretary of the IWC states that it is proper for countries to share a quota.⁴⁷⁸ In fact, the IWC does not assign quotas to specific countries or specific native groups but it just sets a total annual number which can be taken from a specific whale stock and it is then up to the interested IWC countries to divide the quota.⁴⁷⁹ Countries have often shared IWC commercial whaling quotas and native subsistence whaling quotas in the past.⁴⁸⁰ The identity, however,

16,703 (1998) ("In preparation for the IWC's Annual Meeting in October 1997, the U.S. delegation began considering suggestions from other Commissioners that the United States should find a way to share the gray whale quota with the Russians, preferably a quota lower than the combined requests of 145 per year.").

476. Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. at 16,703 ("After extensive discussions with the AEWC about bowhead whales and the Makah Tribe about gray whales . . . the U.S. delegation consulted with the Russian delegation on the appropriate formulation of the schedule language, given the Convention's prohibition against allocating quotas to individual countries and the desire expressed by some delegations for a shared quota."); FREEMAN, *supra* note 319, at 82 (stating that in 1998 Siberian and Alaska Native whalers signed an agreement to share the bowhead quota); Lindemann, *supra* note 460, at 495 (stating that the U.S. and AEWC traded five bowheads whales to Russia and the Siberians for five grays for the Makah). Compare with Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. at 16,702-03 (1998) (stating that the IWC set quotas for bowheads and gray whales "based on a joint request by the United States and the Russian Federation, accompanied by documentation concerning the needs of the two Native groups, Alaska Eskimos and Chukotka Natives The gray whale quota was also based on the needs of two Native groups, the Chukotka Natives and the Makah Indian Tribe in Washington State.").

477. Alexander Gillespie, *Aboriginal Subsistence Whaling: A Critique of the Inter-Relationship between International Law and the IWC*, 12 COLO. J. INT'L ENV'L L. & POL'Y 77, 87-89 (2001) (criticizing U.S.-Russian trade of whales); Jenkins & Romanzo, *supra* note 409, at 113-14 (same); Lindemann, *supra* note 459, at 495 (stating that the U.S. "decided to circumvent the IWC"). The AEWC shared part of its IWC bowhead quota with Canadian native groups in 1990. RECOVERING RIGHTS: BOWHEAD WHALES, *supra* note 400, at ix, 4-5.

478. E-mail from Dr. Ray Gambell, IWC Secretary (Mar. 24, 2000) [hereinafter Gambell E-mail of Mar. 24] (on file with author) ("The allocation of any catch from a whale stock is outside the direct jurisdiction of the IWC, this has to be negotiated between the governments who may wish to recognise such aboriginal subsistence needs by their native peoples."). It appears that the United States and Russia have shared the gray whale quota in the past. *Introduction, in THE GRAY WHALE, supra* note 13, at xxi (stating that, as of 1984, a few gray whales were being taken each year by Alaska Natives from St. Lawrence Island out of the IWC quota for Siberian natives).

479. Gambell E-mail of Mar. 24, *supra* note 478; *see also* FREEMAN, *supra* note 319, at 109 (quoting the IWC Infractions Committee as stating that "the IWC does not award quotas to individual countries"); Whaling Provisions: Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701, 16,702 (1998) ("Although the IWC sets quotas for the aboriginal subsistence harvest of these stocks at the request of a Contracting Government, the quotas are not assigned to a particular group of aborigines or to a particular country.").

480. FREEMAN, *supra* note 319, at 109 (stating that the IWC overlooked a 1996 U.S. self-

of the aboriginal or native group that will hunt the whales under a quota are always known to the IWC commissioners when approving the quota as an ICRW Schedule amendment.

The United States arranged with the Russian Federation to make a joint proposal for a gray whale quota which would be understood by the IWC to include Siberian Natives, the Chukotkas, who were renewing a gray whale quota, and the Makahs. Interestingly, the Chukotkas had only revived their culture's whale hunting traditions in 1994; prior to that time the Soviet Union operated a government whaling boat that hunted grays for the Chukotaks under the IWC quota.⁴⁸¹ Alaska Natives had also engaged in a revival of whaling in the 1970s regarding the endangered bowhead.⁴⁸² Thus, reviving dormant whaling traditions should not have presented a problem for the U.S. and the Makah in gaining an IWC quota.

The previous gray whale quota, which had been understood to be for the Chukotkas, was for 140 gray whales a year.⁴⁸³ The joint 1997 U.S./Russia quota proposed to the IWC for the gray whale stock for the five-year period

reported violation when Alaska Natives took two grays by accident; and that the IWC did not consider it a violation because "the IWC does not award quotas to individual countries" and thus the U.S. take fell within the IWC quota for grays); Whaling Provisions: Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701, 16,702-03 (1998) ("Up to 10 animals of the gray whale quota based on the Soviet Union's request were understood by the IWC to be available for take by Alaska Eskimos, through an informal arrangement between the Soviet Union and the United States. This arrangement was modeled on the bilateral or multilateral arrangements of Contracting Parties to allocate commercial quotas set by the IWC Catches of gray whales for aboriginal subsistence use by Alaska Eskimos, when they occurred, were reported by the United States each year and were published in the Annual Reports of the IWC. No IWC member objected to these catches."); RECOVERING RIGHTS: BOWHEAD WHALES, *supra* note 400, at 4-5, 38 (stating that, in 1990, Canada obtained AEWC permission for Canadian Eskimos to hunt within the AEWC bowhead quota); *Introduction*, in THE GRAY WHALE, *supra* note 13, at xxi (stating that, as of 1984, the U.S. and the Soviet Union shared the gray quota).

481. An official Soviet Union boat did the whaling for the Siberian Natives in 1969-91. INT'L WHALING COMM'N, FORTY-EIGHTH REPORT OF THE INTERNATIONAL WHALING COMMISSION 93-94 (G.P. Donovan ed., 1998) [hereinafter FORTY-EIGHTH REPORT]. Siberian Natives are now doing their own whaling and are learning from and borrowing boats and equipment from Alaska Natives. Igor I. Krupnick, *Gray Whales and the Aborigines of the Pacific Northwest: the History of Aboriginal Whaling*, in THE GRAY WHALE, *supra* note 13, at 112-13; accord FREEMAN, *supra* note 319, at 85-86 (stating that a whale hunt by Siberian natives resumed on the Chukchi Peninsula in 1994; that 51 grays were landed using spears, harpoons, and rifles; and that "spontaneous and rapid revival of gray-whale hunting by village crews had immediate effects. . . . [P]eople started recalling what they seemed to have long forgotten: traditional methods of hunting, local ecological knowledge, whaling rituals, and rules of hunter behaviour, including the importance of mutual assistance and sharing between villages"). See generally Igor I. Krupnik, *Bowhead v. Gray Whale in Chukotka Aboriginal Whaling*, 40(1) ARCTIC 16-31 (1987).

482. See *supra* note 341.

483. Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701, 16,703 (1998) (stating that the gray whale quota for 1995-97 was 140 per year); FREEMAN, *supra* note 319, at 85-86, 88 (stating that seven Siberian villages landed fifty-one gray whales in 1994 out of the gray whale quota of 140 a year).

1998-2002 was for 124 gray whales to be taken a year. The quota proposal was understood to include twenty gray whales which could be taken by the Makah in the five-year period.⁴⁸⁴ The new quota, even including the Makah take, is thus smaller than the prior quota for the Chukotkas alone.

D. Gray Whale Quota Approved

As expected, the IWC engaged in a vigorous debate of the issue of a new native group taking part of the quota for the Eastern Pacific stock of gray whales.⁴⁸⁵ After days of on-and-off deliberations during the annual meeting, and on-and-off the record discussions, the IWC approved the new gray whale quota for 1998-2002 put forward by the United States and the Russian Federation by a voice consensus; no official recorded vote was taken.⁴⁸⁶

Some critics allege that the approval of the new gray whale quota "does not specifically authorize Makah whaling" "per se" but that it was only intended to be a quota for the Russian Siberian natives.⁴⁸⁷ This argument is based on the fact that the IWC did not vote to recognize the Makah as qualifying for "aboriginal subsistence whaling." The argument is correct as far as it goes. The IWC did not approve the Makah for "aboriginal subsistence whaling" status. However, an examination of the proceedings and the language of the Schedule of regulations amendment adopting the gray whale quota makes it clear that the IWC approved the 1998-2002 quota knowing full well that the Makah would share in the quota with the Siberian Natives.

The joint quota proposal to amend the Schedule regulation allowing gray whale hunting originally advanced by the U.S. and Russia did not contain any new qualifying language about "aboriginal subsistence whaling" or need.⁴⁸⁸

484. *Metcalf*, 214 F.3d at 1140; Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16701, 16703 (Apr. 6, 1998). The total number of grays authorized to be taken thus declined from 140 a year when the quota was understood to be for the Chukotkas alone to 124 whales a year under the joint quota for the Makah and the Chukotkas. Danny Westneat, *Save-the-Whales Movement Failed to Rally Opposition to Makah Hunt*, SEATTLE TIMES, Oct. 24, 1997, at A1.

485. Int'l Whaling Comm'n, 49th Annual Meeting, Extracts From the Verbatim Record 1-16 (Oct. 20-24, 1997, Monaco) (on file with author) [hereinafter Verbatim Record]; FORTY-EIGHTH REPORT, *supra* note 481, at 22-23, 28-30.

486. Verbatim Record, *supra* note 485, at 16; FORTY-EIGHTH REPORT, *supra* note 481, at 30, 51; Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16701, 16703 (1998); Gambell E-mail of Mar. 24, *supra* note 478; E-mail from Dr. Ray Gambell, IWC Secretary (Mar. 7, 2000) (copy on file with author).

487. Jenkins & Romanzo, *supra* note 409, at 113-14. The Sea Shepherd Conservation Society put its own "spin" on the IWC action and claims the Makah whale hunt was illegal because, it says, the IWC never gave the tribe authorization to whale. Sea Shepherd Conservation Soc'y, *What You Need to Know About the Makah Hunt*, at <http://www.seashepherd.org/issues/whales/makahhunt1200.html> (last visited Aug. 7, 2001) (on file with author); *Stop the Makah Whale Hunt!*, *supra* note 396.

488. Jenkins & Romanzo, *supra* note 409, at 114 n.2.

The proposal just asked the IWC to approve a new quota of the number of gray whales which could be taken in 1998-2002 and left the rest of the language of the Schedule unchanged. During discussions of the quota proposal on October 22, 1997, at a plenary session of the IWC, Austria asked that language be included in the Schedule amendment defining groups who could take gray whales under the quota as those "whose subsistence nutritional and cultural needs have been accepted by IWC."⁴⁸⁹ Australia recommended that the proposed language read that groups who could take gray whales under the quota would be those "whose traditional subsistence and cultural needs have been recognized by the International Whaling Commission."⁴⁹⁰ After some informal discussions on this language off-the-record, the plenary session was adjourned.

The next day, the plenary session was delayed by an off-the-record Commissioners-only meeting to discuss the language proposed to be added to the new gray whale quota.⁴⁹¹ When the plenary session was commenced after the informal discussion, the U.S./Russia proposed gray whale quota amendment to the Schedule of regulations was adopted by "broad consensus" without a recorded vote.⁴⁹² The Chairman then read for the record the new language that was added to the Schedule quota amendment in addition to adopting the recommended number of gray whales to be taken in 1998-2002; gray whales could be taken under the quota by aborigines "whose traditional aboriginal subsistence and cultural needs have been recognized."⁴⁹³

It appears impossible to determine exactly why the language — recognized "by the International Whaling Commission" was dropped from the Austrian and Australian suggestions because of the off-the-record discussions. In all probability, the suggested language was not acceptable to the United States because it did not think it could gain IWC approval of the Makah hunt as an aboriginal, subsistence and/or nutritional whale hunt or it did not want to take the time to negotiate for and secure that approval.⁴⁹⁴ The United States claims that it objected to that language "because the IWC had no established mechanism for recognizing such needs, other than adoption of a quota."⁴⁹⁵

489. Verbatim Record, *supra* note 485, at 4.

490. *Id.* at 15; Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701, 16,703 (1998).

491. Verbatim Record, *supra* note 485, at 16; Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701, 16,703 (1998).

492. Verbatim Record, *supra* note 485, at 16.

493. *Id.*

494. *See id.* at 4-14 (from the comments of several nations on the Makah sharing in the quota, it appears that the Makah might not have received IWC approval for aboriginal subsistence whaling if the vote needed a three-fourths majority); Jenkins & Romanzo, *supra* note 409, at 114 (counting twelve nations out of forty IWC members as being against recognizing the Mahak's aboriginal subsistence whaling needs).

495. Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701, 16,703 (1998); Metcalf v. Daley, 214 F.3d 1135, 1140 (9th Cir. 2000).

Thus, it might have been impossible or taken years to gain this type of IWC approval since the United States alleged that the IWC does not have a particular procedure or mechanism to make a decision about aboriginal subsistence and cultural needs.⁴⁹⁶ Consequently, the IWC never voted on approving the Makah for "aboriginal subsistence and cultural needs" nor does it appear that it could have voted on this question if the United States is correct that there is no IWC established procedure for this type of decision.

The glaring omission, of course, or the expert draftsmanship from the U.S. and Makah view is that the new IWC Schedule language does not say by whom an aboriginal group's needs have to be recognized. Thus, the Makah's right to take part of the approved gray whale quota for 1998-2002 could be argued to have been recognized by the IWC when it adopted the new gray whale quota knowing full well that the Makah were going to take grays, or by the United States recognizing that the Makah have a "traditional aboriginal subsistence and cultural need" to take gray whales.⁴⁹⁷ If one reads the

496. E-mail from Dr. Ray Gambell, IWC Secretary (Aug. 23, 2000) (copy on file with author) (stating that "there is no formal [IWC] definition of need," but that there is a report from an "ad hoc" 1981 Working Group on subsistence catches with a definition which some people cite but it was never "formally adopted by the IWC"); Whaling Provisions; Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701, 16,702-03 (1998) (claiming that in two decades the IWC has never established a mechanism for recognizing subsistence needs of aboriginal groups, but just sets quotas based on documentation of those needs by a contracting government) ("The IWC has never established a mechanism for recognizing the subsistence needs of an aboriginal group."). *But see* Jenkins & Romanzo, *supra* note 409, at 75, 78-79 (speaking about "the narrowly prescribed IWC requirements for obtaining an aboriginal whaling quota," "the stringent cultural need component of the IWC test for an ASW [aboriginal subsistence whaling] quota," IWC "management principles and guidelines for aboriginal subsistence catches that continue to define qualifications today," and "stringent two-pronged test to obtain an ASW quota"); Gillespie, *supra* note 477, at 87-88 & n.59 (stating that there is an IWC mechanism for determining ASW).

The United States and the IWC Secretary have come close to agreeing that there are IWC procedures for determining ASW. Dept of Commerce EA, *supra* note 40, at 3, 10 (stating that the IWC has never formally adopted a "strict definition of what constitutes aboriginal subsistence whaling . . . but it does have guidelines based on the recommendations of a Working Group that met in 1981"); Gambell, *International Management*, *supra* note 337, at 106 (stating that there is a definition of ASW under the IWC 1981 working group) ("The procedure presently followed in practice places the primary determination of catch levels on the perceived subsistence need of the local human populations.").

497. This is exactly how NOAA interprets the IWC action. 63 Fed. Reg. 16,701, 16,704 (1998). NOAA first concludes that the IWC's approval of the joint quota means that the IWC recognized the Makah Tribe's subsistence and cultural need to hunt gray whales. However, NOAA also states that the "Tribe's subsistence and cultural needs have been recognized . . . by the United States in the NOAA-Council agreement and other documents." *Id.*; *see also id.* at 16,702 (stating that the IWC "set quotas for aboriginal subsistence use of bowhead whales . . . and gray whales . . . The gray whale quota was also based on the needs of two Native groups, the Chukotka Natives and the Makah Indian Tribe in Washington State. . . . *These actions by the IWC thus authorized aboriginal subsistence whaling by the AEWC for bowhead whales, and by the [Makah] Tribe for gray whales . . .*") (emphasis added).

Schedule amendment language, as some critics have done, to mean that the IWC has to separately recognize the Makah as qualifying for aboriginal subsistence whaling, then it appears clear that the Makah were not so recognized by a separate vote or action of the IWC because the IWC never held such a separate vote.⁴⁹⁸

Notwithstanding the nonsensical language of the Schedule amendment, which does not state who must recognize the Makah's needs, and the attempt by some commentators to parse the language into a meaning that the Makah have no right to take grays, the action of the IWC seems clear.⁴⁹⁹ By unanimous consensus, the IWC commissioners amended the ICRW Schedule of regulations and adopted a new gray whale quota for 1998-2002 with the full recognition that the Makah would take part of the quota and that they are a group recognized by the United States as qualifying for traditional, cultural aboriginal subsistence whaling.⁵⁰⁰ The IWC unanimously approved the Russia-United States gray whale quota proposal.⁵⁰¹

E. Makah Gray Whale Hunts

The Makah immediately began their ritual and cultural preparations for the gray whale hunt after the IWC approval of the new quota in October 1997. The Tribe used the eighteen months between the IWC approval and its first hunt in spring 1999 to train a crew and to prepare physically and spiritually.⁵⁰²

498. Jenkins & Romanzo, *supra* note 409, at 114; *see also* Gambell E-mail of Mar. 24, *supra* note 478 ("You will not find anywhere a formal statement from the IWC that the Makah whale hunt is legal, since it has not made such a determination.").

499. The IWC Secretary states that the IWC commissioners purposely put "the onus" on the United States to be the one to recognize the Makah's needs: "It was precisely for that reason that the recognition of the aboriginal subsistence character of the hunt was left deliberately vague." Gambell E-mail of Mar. 24, *supra* note 478.

500. Verbatim Record, *supra* note 485, at 1-16; FORTY-EIGHTH REPORT, *supra* note 481, at 22-23, 28-30, 51; *see also* Whaling Provisions: Aboriginal Subsistence Whaling Quotas, 64 Fed. Reg. 28,413 (1999) (stating that the U.S. and Russia concluded an arrangement to ensure that the block quota and annual cap for gray whales are not exceeded; and that the bilateral arrangement between NOAA and the Makah Tribal Council specifies that the Makah will take no more than five gray whales in any one year and that the Council will manage the harvest).

501. Metcalf v. Daley, 214 F.3d 1135, 1140 (9th Cir. 2000); Gambell E-mail of Mar. 24, *supra* note 478 ("The IWC set an overall catch limit for the gray whale stock, recognising that the Makah Indian Tribe would want to utilise part of this quota, since it [IWC] received the needs statement and supporting arguments from the government of the USA on its behalf. . . . [T]he IWC last year received a report on the 1999 kill, and took no action to vary the catch limits for the stock of eastern North Pacific gray whales. There is thus a de facto acceptance of this hunt as falling within the IWC's requirements for aboriginal subsistence whaling . . .").

502. Bowechop, *supra* note 98 (stating that, for the 1999 hunt, Makah whalers trained thousands of hours to learn the weather, tides and ocean conditions, and to prepare physically).

1. 1999 Hunt

For its first hunt in seventy years, the Tribe prepared a crew comprised of several different Makah whaling families. The eight-man crew used a traditional cedar canoe, and traditional harpoons and paddles because they wanted to perform the hunt as traditionally as possible.⁵⁰³ On their fourth day of whale hunting, May 17, 1999, they harpooned, killed and landed a thirty-foot, three-year-old female gray whale.⁵⁰⁴ The celebration that followed was joyous on the side of the Tribe and its supporters,⁵⁰⁵ and angry and ugly on the opponents' side.⁵⁰⁶ Racist acts and death threats against Makah tribal members and their children and even against Indian school children of another tribe occurred before, during, and after the hunt.⁵⁰⁷ The media and worldwide attention surprised many people.⁵⁰⁸

The Makah rejoiced in the revival and celebration of their culture. The Tribe held the traditional post-hunt feast and it was attended by almost 3000 Makahs, tribal people and other supporters from across the nation.⁵⁰⁹ All of the whale meat was distributed and used.⁵¹⁰ In fact, even the skeleton was

503. FORTY-EIGHTH REPORT, *supra* note 481, at 22 (statement of USA at IWC annual meeting).

504. U.S. Dep't of Commerce, Preliminary Report on Makah Tribe Gray Whale Hunt, 1-2 (May 25, 1999) (on file with author) [hereinafter Dep't of Commerce Report]; Rollins, *Kill Revives Tradition*, *supra* note 7 (reporting that a whale was towed ashore by five Makah boats and that spiritual ceremonies were performed); SULLIVAN, *supra* note 98, at 252-65.

505. *See, e.g.*, Nat'l Congress of American Indians, Legislative Update (May 20, 1999) (expressing support for and congratulating the Makah on taking a gray whale) (on file with author).

506. Verhovek, *supra* note 468.

507. *Racism Enters Whale Dispute*, *supra* note 444 (reporting that "Save a Whale, Harpoon a Makah" was worn by protesters and carried on signs at a Progressive Animal Welfare Society demonstration in Seattle, and that a bomb threat closed the Puyallup Tribe's grade school); Andersen, *Two Opposing Views*, *supra* note 442 (stating that protestors of the tribal feast celebrating the hunt carried signs reading "Save a whale, harpoon a Makah"); O'Callahan, *supra* note 1 (reporting that racist signs and death threats poured into Makah reservation, and that a bomb threat closed the Puyallup Tribe grade school); Cate Montana, *Under Scrutiny: Makah Whale Revived Ancient Tradition*, INDIAN COUNTRY TODAY, Jan. 12, 2000, at B3 (stating that the Makah whaling captain received over 100 death threats a day and that the lives of Makah children were threatened).

508. *See, e.g.*, Robert J. Miller, *In Defense of Whaling by the Makah Tribe*, SUNDAY OREGONIAN (Portland), May 23, 1999, at G5; *Stop the Whale Hunt*, OREGONIAN (Portland), May 18, 1999, at B10 (editorial); *After 70-plus Years, A Successful Whale Hunt*, N.Y. TIMES, May 18, 1999, at A1; Patrick McMahon, *Tribal Hunters Harpoon Whale, Protestors Decry Revival of Tradition*, USA TODAY, May 18, 1999, at 3A; Dennis Johnson, *Activists Protest Indian Tribe's Whale Hunt*, AGENCE FRANCE PRESSE, May 15, 1999; *Opposition to Indian Whale Hunting Builds on Internet*, DEUTSCHE PRESSE-AGENTUR, May 22, 1999.

509. Andersen, *Two Opposing Views*, *supra* note 442; *Racism Enters Whale Dispute*, *supra* note 444 (stating that thousands of Natives from Canada to New Mexico attended); SULLIVAN, *supra* note 98, at 13, 267-68.

510. *Makah Students Preserve Legacy of Whales*, INDIAN COUNTRY TODAY, May 31, 2000,

saved and it is being put to use to educate future generations of Makahs as Makah high school students are reassembling it for display in the tribal museum.⁵¹¹ The Makah were content with landing one whale in 1999 and engaged in no more whaling that year.

2. 2000 Hunt

As was their tradition, the Makah waited until the next spring to hunt again. In the spring of 2000, the Makah returned to their ancient tradition of separate families training and preparing for whaling, and launching their own hunting canoes.⁵¹² The Makah did not kill or land a whale in their spring 2000 hunts.

3. Modern Equipment

In 1999, the Makah used both a .50 caliber rifle to quickly kill the whale after harpooning it and a motorized tow boat to bring in the whale. The Makah did not want to use a rifle or an explosive grenade/harpoon but the United States required it to ensure the most efficient and rapid death possible and to use a motorized tow boat so as not to lose the whale while towing it.⁵¹³ The rifle accomplished its purpose because the whale died within eight minutes of being harpooned and after being shot twice.⁵¹⁴

Many observers and commentators were confused by this use of modern equipment. The protestors of the hunt tried to turn this into an argument against the hunt. However, the argument is a red herring and looks like "spin" designed to disparage the Makah. In fact, native hunters throughout history have always taken advantage of modern advancements as everyone does to make life easier. It is usually people who do not understand subsistence

at C10.

511. Peggy Andersen, Associated Press, *A Year After Hunt, Students Work on Whale's Legacy*, NEWS FROM INDIAN COUNTRY, mid-Aug. 2000, at 4A [hereinafter Andersen, *A Year After Hunt*] (stating that the Makah high school class is preparing the whale skeleton for display); *Makah Students Preserve Legacy of Whales*, *supra* note 510 (stating that students were learning and were very appreciative and excited to be working with the whale skeleton).

512. *Makah Family Fails to Kill Gray Whale on First Hunt of Spring*, OREGONIAN (Portland), Apr. 18, 2000, at B14 (reporting that the 1999 hunt was conducted by a tribal crew with representatives from several whaling families, but for 2000 the hunts were conducted by individual Makah families as tradition dictates); Craig Welch & Keiko Morris, *Protesters Are Back as Whale Hunt Nears*, SEATTLE TIMES, Apr. 12, 2000, at A1 (stating that five Makah families in various stages of preparing for whaling (citing Keith Johnson, President Makah Whaling Commission). "Each whaling family has their own way to prepare spiritually." Bowchop, *supra* note 98).

513. Dep't of Commerce Report, *supra* note 504, at 2 ("Use of a large caliber gun and a motorized chaser boat were not a part of traditional Makah whaling, but they were used because the Tribe was required by NOAA to ensure that whales are taken in a humane and efficient manner through appropriate modification of traditional hunting methods").

514. *Id.*

hunting cultures who demand that native hunters stay unchanged so as to be a living museum for the pleasure of nonhunters,⁵¹⁵ or in this case to use the modern equipment as a reason to criticize the Makah. The criticism of the Makah for using this equipment flies in the face of reason because the IWC and animal rights groups encourage the use of the most modern and efficient whaling methods to ensure quick and humane deaths.⁵¹⁶ Just imagine, for example, the uproar that would have resulted if the Makah had not used a rifle to quickly kill the harpooned whale and a motorized boat to tow it and the whale had only been wounded and escaped to die a long and lingering death or been lost on the tow to shore. The opponents of the hunt would certainly have put even more "spin" on that scenario.

The IWC itself has long studied this issue, has a standing committee which studies modern equipment and faster killing techniques, and requires that whaling be performed with the most efficient equipment to ensure that struck whales are landed and to ensure the quickest death and the least suffering for whales.⁵¹⁷ In 1991, for example, the IWC required that all whaling under its auspices be performed with a new explosive grenade or high powered rifles to quickly and humanely kill whales.⁵¹⁸

While the Makah wanted to conduct the hunt as traditionally as possible, there is no legal or moral requirement that they hunt only as they did in the distant past. In fact, the exact opposite is true. The United States offered in 1855 to provide the Makah with modern and improved equipment for whaling so that the Tribe could support itself more efficiently and not be a burden on

515. SULLIVAN, *supra* note 98, at 23 (quoting a Makah elder as stating that others just "want us in the museum . . . [and] to have a dead culture"); CAULFIELD, *supra* note 357, at 18-19 (stating that many like to see natives as noble savages, living unchanged in the modern world so they can see what the rest of us once were like (citing authorities)) ("When [Greenlanders] use a high-powered rifle or an exploding harpoon to catch a whale, we wonder why they can't be doing it the more 'traditional' way."); Susie Shook, *Adaptation Is 'Traditional'; Get Used to It*, ANCHORAGE DAILY NEWS, Oct. 17, 2000, at B1 (stating that Alaska Native hunters have gladly accepted and adapted to every modern convenience that helps them hunt and feed their families).

516. *Review of the 32d IWC Meeting*, *supra* note 6, at 7-8, 76-77 (stating that animal advocates favor "efficient" whaling so that struck whales are killed and captured to reduce waste, and have wanted explosive harpoons and more efficient ways to kill and land struck whales be used; and that the IWC and NMFS held meetings with Eskimo whalers on how to improve killing); BUSCH, *supra* note 7, at 41, 126 (stating that concerns about humane killing led the IWC to ban the use of non-explosive harpoons in 1982); SPECIAL REPORT, *supra* note 336, at 51-53, C-4 (stating that the U.S. improved whale hunting weaponry); *U.S. Whaling Policies/International Whaling Comm'n, Hearings Before the Senate Comm. on Commerce, Science, And Transportation*, 97th Cong. 24-25 (1981) (stating that, according to the U.S. IWC representative and the Society for Animal Protective Legislation, animal advocates long favored more "efficient" whaling so that struck whales are killed and captured to reduce waste and suffering, and have advocated used of explosive harpoons).

517. BUSCH, *supra* note 7, at 41, 126; FORTY-EIGHTH REPORT, *supra* note 481, at 20 (report to the IWC of the Working Group on Humane Killing).

518. CAULFIELD, *supra* note 357, at 97-98, 132.

the U.S.⁵¹⁹ Furthermore, the critics of the hunt who allege the Makah should only hunt with traditional equipment are placing their own, newly acquired, cultural moral requirements on the Makah.⁵²⁰ The Makah themselves, as well as all subsistence hunters, have never had any qualms or concerns about using the most efficient means of catching the animals they need to live and for their cultural needs. The Makah have always used the most modern equipment they could when whaling. Their own artisans and craftsmen developed the mussel shell harpoon tips and wooden harpoons, sealskin floats and the whale sinew and cedar ropes they used in whaling before contact with the white man. After trading began with Europeans and Americans, the Makah utilized iron tips for their harpoons from the mid-1800s forward and they used steam powered tow boats when they were available to bring in whales instead of needlessly rowing for days to land a whale.⁵²¹ Other native whalers around the world have also utilized modern equipment in these modern times.⁵²²

4. Protests

Protestors began organizing to stop the Makah whale hunts as early as 1995.⁵²³ Interestingly, none of the major worldwide environmental groups like Greenpeace, for example, opposed the Makah whaling.⁵²⁴ Apparently,

519. Ratified Treaty No. 286, *supra* note 168, at 4; 1 HAZARD STEVENS, LIFE OF ISAAC STEVENS, *supra* note 142, at 484, 486; United States v. Washington, 384 F. Supp. 312, 363-64 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

520. CAULFIELD, *supra* note 357, at 18-19 (stating that many people like to see natives living unchanged in the modern world, and take an attitude of "why they can't be doing it the more 'traditional' way"); *cf.* LYNGE, *supra* note 413, at xi (stating that, by undervaluing indigenous cultures and depriving them of the right to use and manage the natural resources upon which they depend, dominant societies unwittingly disrupt the lives of indigenous peoples).

521. Gibbs, *Tribes of . . .*, *supra* note 11, at 1, 175 (stating that whales dragged Makah boats to sea often for many days; and that one canoe was gone five days before the whale died and it had to be abandoned because the crew ran out of water and food and had to row quickly home). In the 1920s and earlier the Makah used steam-powered boats to tow whales. DENSMORE, *supra* note 10, at 52 (Makah used tug boats in the 1920s to tow whales); WEBB, *supra* note 69, at 134 (stating that in 1905 the Makah used iron harpoon tips and occasionally tow boats to tow whales (citing authorities including a photo of a Makah whale canoe being towed by a steam ship)); Dep't of Commerce EA, *supra* note 40, app. 8.2, at 11 (stating that the Makah used innovations to improve their whaling and accepted tows to and from the whaling grounds from steam ships).

522. *See, e.g.*, CAULFIELD, *supra* note 357, at 98 (stating that Greenland natives tow whales by boat); FREEMAN, *supra* note 319, at 61, 64-66, 69, 70, 77, 79, 85-86, 94 (stating that Canadian Natives hunt beluga whales with guns and motorboats, that Siberian Natives hunt gray and beluga whales using rifles and motorboats, that Greenland Inuits take beluga and Narwal whales with rifles, and that the Canadian Inuits use rifles, and motor boats for whaling).

523. Shukovsky, *supra* note 63 (quoting Paul Watson of the Sea Shepherd Conservation Society) ("We will directly intervene to protect the whales. [Makah whaling boats] will be sunk."); Hall, *supra* note 423 (quoting Watson).

524. SULLIVAN, *supra* note 98, at 59 (stating that Greenpeace and the Sierra Club, for

the major environmental groups thought Makah whaling was not an environmental or conservation issue, as the gray whales are at a record high population. The protestors at the 1999 and 2000 Makah hunts represented only a tiny minority of even the animal rights groups.

The protestors filed a federal law suit contending that the United States government erred in supporting the Makah quota and in conducting the required environmental reviews. The federal courts denied the request to temporarily stop the hunt and also upheld the Coast Guard implementing an interim rule to provide a 500 yard moving exclusionary zone around the Makah whaling canoes where the protestors could not trespass.⁵²⁵ The federal district court also denied the protestors' other claims.⁵²⁶

The protestors also undertook more active forms of opposition. On November 1, 1998, four protestors landed at Neah Bay and were arrested in a physical confrontation which resulted from the trespass on tribal land.⁵²⁷ The protestors monitored Makah training cruises and the hunts. They blasted Makah whaling canoes, persons on shore and then the crowd celebrating the landing of the 1999 whale with airhorns, loudspeaker messages, fire extinguisher fumes, smoke bombs and rifle shots.⁵²⁸ Ironically, in 1999, protestor boats hit two gray whales and possibly injured them.⁵²⁹ Protestors were arrested by the Coast Guard and County Sheriff for alleged illegal activities and for assaults on the Makah whaling crew.⁵³⁰ Slogans were

example, did not oppose the hunt); *see also* D'Amato & Chopra, *supra* note 412, at 58 (stating that leading environmental organizations such as "the Sierra Club and Friends of the Earth" have been criticized for not even protesting the Alaska Native hunt of "the bowhead whale — a truly endangered species").

525. *Progressive Animal Welfare Society v. Slater*, No. 98-36053, 1999 U.S. App. LEXIS 3525 (Mar. 4, 1999) (affirming federal district court rulings) (listed in Table of Decisions Without Reported Opinions at 172 F.2d 876).

526. Peggy Andersen, *Makah Whaling Plan Receives Go-Ahead from Federal Judge*, SEATTLE TIMES, Sept. 22, 1998. The federal appellate court partially reversed this decision later. *See infra* Part IV.F.

527. Peggy Andersen, Associated Press, *Melee During Anti-Whaling Demonstration Shakes Both Sides*, COLUMBIAN, Nov. 2, 1998; SULLIVAN, *supra* note 98, at 139-42.

528. Rollins, *Kill Revives Tradition*, *supra* note 7 (stating that protestor boats blasted an air horn for over an hour trying to disrupt the Makah whale ceremony on the beach); Montana, *supra* note 507 (stating that protestors blasted air horns, screamed insults, and fired rifle shots); SULLIVAN, *supra* note 98, at 238, 241, 244, 248 (stating that protestors shot fire extinguishers at the whaling canoe, and that protestors in zodiacs tried to cut between the whaling canoe and whales and fired off flare guns).

529. On May 15, 1999, two protest boats hit and perhaps injured two whales; one was stunned for a while. Dep't of Commerce Report, *supra* note 504, at 1-2.

530. *Two Anti-whaling Activists Plead Not Guilty to Charges*, OREGONIAN (Portland), May 22, 1999, at D6. The Coast Guard cited and seized protestor boats and the County Sheriff arrested several protestors during the hunts for negligent operation of boats and possible assaults on the whaling crew. Dep't of Commerce Report, *supra* note 504, at 1-2; Montana, *supra* note 507 (reporting that protestors blasted air horns and screamed insults at the whaling crew on practice sessions and hunts, hosed the crew with fire extinguishers, and blinded them with smoke

displayed and worn during protest rallies in Seattle and near the Makah Reservation that said "Save a Whale, Harpoon a Makah."⁵³¹ Hundreds of death threats were delivered to the Makah whaling captain, the village of Neah Bay was besieged for months, and the lives of Makah school children were threatened.⁵³² Some of the protesting took on an ugly racist aspect.⁵³³

In spring 2000, the number of protestors opposing the hunt dwindled to a couple dozen.⁵³⁴ One protestor was seriously injured when she drove her jet-ski between a Makah canoe and a whale and a Coast Guard boat bumped her out of the way.⁵³⁵ The protestors also continued to pursue judicial remedies to stop further whaling.⁵³⁶

F. Ninth Circuit June 2000 Decision

On June 9, 2000, a federal appellate court decision raised some question about the future of Makah whaling.⁵³⁷ A divided panel of the United States Court of Appeals for the Ninth Circuit invalidated the Environmental Assessment (EA) of the whale hunt performed by the National Marine Fisheries Service (NMFS). The Ninth Circuit was persuaded that the United States had already agreed and contractually bound itself to support the Makah's proposal to whale before it performed the required environmental review.⁵³⁸ There is no doubt that the U.S. tentatively agreed to support the Makah gray whale quota request in 1995 and that it informed the IWC in May

bombs).

531. O'Callahan, *supra* note 1.

532. Montana, *supra* note 507.

533. Tizon, *supra* note 1 (reporting that Makah members and their reservation were inundated with death threats and bomb threats; that airwaves and editorial pages across western Washington carried anti-Indian vitriol; that Makahs were called savages, drunkards, and laggards; and that calls for a return to killing Indians appeared in Internet chat rooms and in newsletters); Lynda V. Mapes, *Standoff at Makah Border Gets Ugly*, SEATTLE TIMES, Nov. 1, 1998, at B3.

534. Welch & Morris, *supra* note 512 (reporting that a few dozen protestors showed up to protest the 2000 Makah hunt).

535. The protestor was trying to cut between a Makah canoe and a whale and was struck and injured by a Coast Guard boat. *Protester Hurt During Makah Whale Hunt*, OREGONIAN (Portland), Apr. 21, 2000, at C6; John Hopkins, *Injured Protester Is Ordered to Stay Away from Makah*, SEATTLE POST-INTELLIGENCER, Apr. 25, 2000, at B3 (stating that she will be prosecuted and faces up to six years in prison and fines).

536. *Sea Shepherd Sues State over Whale Policy*, SEATTLE POST-INTELLIGENCER, Dec. 15, 2000, at D1 (reporting that the Conservation Society sued the state of Washington in state court to force it to protect gray whales).

537. *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000). The court was divided 2-1; Judge Kleinfeld filed a dissent because he thought the EA was adequate. *Id.* at 1146-47. Ironically, a gray whale died in 2000 and washed ashore onto property owned by the lead plaintiff, Rep. Jack Metcalf. *Dead Whale Parked in Front of Congressman's B&B*, INDIAN COUNTRY TODAY, Apr. 26, 2000, at A6 (stating that the congressman, of course, thought the whale was looking for a friendly place to die).

538. *Metcalf*, 214 F.3d at 1144-45.

1995 that it would be making a quota request for the Makah in the future.⁵³⁹ The appropriate federal agencies then entered agreements with the Makah to put forward and support the quota and took other actions relevant to that decision.⁵⁴⁰

An EA was not conducted before the federal agencies began cooperating with the Makah to gain an IWC quota and even before the United States made its first proposal to the IWC for a Makah quota in 1996. It almost appears as if the federal agencies forgot to conduct an EA because NOAA only agreed to draft one after the protestors' attorney wrote NOAA and NMFS in June 1997 alleging that they had violated federal environmental laws by neglecting to draft an EA regarding Makah whaling.⁵⁴¹ The final EA was not issued until October 17, 1997, after NOAA and the Makah had signed yet another agreement to control the whaling and only one day before the start of the annual IWC meeting where the U.S. presented and gained approval of the Makah quota request.⁵⁴² In light of these facts and Ninth Circuit precedent, the court held the EA was untimely, not objective and violated the National Environmental Policy Act requirements.⁵⁴³ The court ordered the federal government to perform another EA.⁵⁴⁴

The appellate court decision may turn out to be nothing but a procedural bump in the road for the Tribe, however. First, the decision did not become valid until after the spring 2000 whale hunting season had ended and thus it did not interfere with the 2000 hunt. Second, the United States put out for comment on January 12, 2001 a new draft EA which sets out four alternatives regarding the gray whale hunt which will apparently allow the Makah hunt to proceed.⁵⁴⁵ The EA will be finalized by March 2001 and if the final decision is to allow the hunt, it appears that the EA's procedural defect will be corrected before the Makah spring 2001 hunting season is affected.⁵⁴⁶ It is

539. *Id.* at 1138, 1143.

540. *Id.* at 1139, 1143-45.

541. *Id.*

542. *Id.* at 1139-40; *see also* 62 Fed. Reg. 5393 (Oct. 17, 1997).

543. *Metcalf*, 214 F.3d at 1143-45.

544. *Id.* at 1145-46.

545. Peggy Andersen, Associated Press, *Gray Whales Doing Well, Study Finds*, SUNDAY OREGONIAN (Portland), Jan. 14, 2001, at A26 [hereinafter Andersen, *Whales Doing Well*]. The new EA estimates the gray whale population at 26,600, which is "more than likely larger than before commercial exploitation in the 1840s, and may be at the carrying capacity of the ecosystem." *Id.* (quoting NMFS' spokesman). The final EA should be finalized by March 2001. *Id.* A public hearing on the draft EA was held February 1, 2001 in Seattle even though it was not required by law. *Id.*; *see also* Peggy Andersen, *U.S. Drafts New Evaluation of Makah Whaling*, SEATTLE POST-INTELLIGENCER, Jan. 13, 2001, at B1. The public hearing in Seattle led to familiar confrontations and verbal skirmishes between whale hunt protestors and tribal representatives. Craig Welch, *Bitter Words Ring out at Whaling Hearing*, SEATTLE TIMES, Feb. 2, 2001, at A1; *Public Hearing on Makah Whale Hunt Brings out Opposition*, SEATTLE POST-INTELLIGENCER, Feb. 2, 2001, at A1.

546. The final EA should be finalized by March 2001. Andersen, *Whales Doing Well*, *supra*

difficult to predict what the Makah will do if the new EA does not approve the Tribe's hunt in time for the spring 2001 whale migration.⁵⁴⁷ The protestors will no doubt continue to try to stop the hunt and will challenge the new environmental review.⁵⁴⁸

V. Conclusion

It appears that the Makah have won a great victory. They have been successful in keeping their ancient whaling culture alive within their own Tribe, in securing the United States cooperation and support to revive whaling, and in gaining a gray whale quota on the international stage.⁵⁴⁹ Probably the most difficult and amazing part of the Tribe's accomplishment was keeping alive and vibrant within the Tribe itself the desire to whale notwithstanding a seventy-year hiatus in whaling and the undeniable physical hardships and deadly risks of reviving the practice. The fact that people would willingly undertake the rigorous training and risks of whaling for cultural and religious reasons in this modern, comfortable world is a testament to the strong desire in the Makah to preserve and practice their culture. In fact, the Makah demonstrate for other distinct cultures that the key point and the first duty to preserve culture is not the struggle against the outside world but it is in fighting the battle that goes on inside the culture itself on how to preserve and perpetuate it.⁵⁵⁰ The practitioners of all distinct cultures must answer for themselves if they will succumb to the slow death of their culture, language and religion to what might be called the western/American society or the modern "pop, media or television culture." Will unique cultures manage to change with the times and absorb the inevitable changes all cultures undergo while keeping the basic cultural aspects that made them distinct? The Makah have shown that distinct cultures must preserve

note 545.

547. Makah tribal officials have stated in the past that they will whale regardless of IWC approval. Ben Johnson, *Makah Whaling: Tribe Has Inalienable Right to Harvest Gray Whales*, SEATTLE TIMES, Jan. 1, 1997, at B7.

548. Bernton & Mapes, *supra* note 4; Cate Montana, *Court of Appeals Suspends Makah Whaling*, INDIAN COUNTRY TODAY, June 21, 2000, at A6.

549. COLSON, *supra* note 10, at 280 (stating that "the Makah remain a distinct group" and see themselves as a distinct people who have not merged into a common culture with white society); Rollins, *Kill Revives Tradition*, *supra* note 7; see also Alma Soongi Beck, Comment, *The Makah's Decision to Reinstate Whaling: When Conservationists Clash with Native Americans Over an Ancient Hunting Tradition*, 11 J. ENVTL. L. & LITIG. 359, 376 (1996) (stating that the trust responsibility affected the U.S. decision to support the Makah; that the hunt was a testament to NMFS willingness to work cooperatively with the Makah, to the general public's heightened awareness on matters concerning Indian rights, and to the Makah's own political savvy gleaned from decades of experience with legal and political struggles through courts and directly with NMFS officials on issues involving fishing rights).

550. The Makah Tribal Council and Whaling Commission encountered opposition from inside the Tribe to their plans to resume whaling. See *supra* note 5.

themselves from the inside first and must keep alive a desire to preserve and practice the culture in their own people. American Indian tribes should learn this lesson from the Makah and take the necessary steps within their own cultures now to preserve their cultures, religions, and languages before it is too late.⁵⁵¹

The Makah Tribe has also shown that the struggle to preserve a separate and distinct culture, government, religion, and way of life is a long term issue. It is a testament to the Makah as a people that they kept their whaling traditions alive even when they could not go whaling and that they had the will to restore this tradition within the Tribe and then had the strength to make it happen in the outside world. As such, the Tribe is an excellent example for other Indian tribes and separate and unique peoples in how to exercise cultural self-determination and how to preserve and practice a culture according to their cultural ways and not someone else's mandates.

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.⁵⁵² In fact, their dormant whaling traditions played a key role in keeping their culture distinct, separate and alive. Whales and whaling 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.

The nearly five-year campaign to restore whaling and the 1999 and 2000 whale hunts will also continue to play a very large role in helping the Makah to preserve their existence, their culture and their traditions as a separate people.⁵⁵³ Bringing their cultural traditions out of "storage" and exercising them will energize new generations of Makahs to preserve and practice these traditions. This anticipated effect is demonstrated by the beneficial cultural response that was caused by the explorations of the Tribe's whaling history at Ozette Village, the building of the tribal museum at Neah Bay to hold the

551. Videotape: *A Gift From the Past*, *supra* note 43 ("Not learning your language is a Native experience. . . . Once we lose language and culture, we become like the rest of the world.") (quoting Greg Colfax, Makah artisan).

552. COLSON, *supra* note 10, at 291-94.

553. The effort to resume whaling galvanized the Makah community. Shukovsky & Barber, *supra* note 70 (reporting that the May 1999 whale hunt was a life change for the reservation and sparked cultural interest in the tribe, and that attendance of young people in Makah language classes has increased, as well as requests for new classes on tribal traditions through the tribal museum); Rollins, *Kill Revives Tradition*, *supra* note 7 (quoting Thomas Parker, Makah member); Egan, *supra* note 69 (quoting Herbert Markishtum, ex-tribal chairman) ("Re-establishing a ceremonial and subsistence whale hunt would be a catalyst which would allow us to instill in our young people the traditional values which have held our people together over the centuries.") ("A return to whaling is simply a way to bring back a sense of cultural cohesion for the young."); Ulrich, *supra* note 81 ("The Makahs want to reclaim their treaty right to hunt whales as a way to recapture the core of their society and forge a sense of identity in their youth.").

Ozette discoveries and, for example, by the use of the skeletons of the whales landed in 1995 and 1999.⁵⁵⁴

As with other native whaling peoples, the Makah's community wide whaling activities will strengthen the bonds of the community and of their families because of shared survival needs, cooperative labor, sharing food and the risks of whaling which will keep these activities an important part of the Makah culture.⁵⁵⁵ Respect for elders in the community is also engendered because the young learn to rely on the knowledge and experience of their parents and elders. The hunt also demonstrated that distributing and sharing whale meat is a cultural tradition that is far more important than the sustenance of the food because it reinforces the culture, provides continuity and community to the people, and sharing food with tribal elders reaffirms their traditional role in native societies.⁵⁵⁶ The importance of whaling itself is self-evident when one considers the great risks and enormous effort needed to take whales.⁵⁵⁷ Such an effort takes a whole community, and that also demonstrates the importance of whaling to assist the Makah in staying a cohesive, separate society and to preserve their culture.⁵⁵⁸

A whaling culture is indeed something special and distinct in today's world. The Makah whaling rituals and customs are the essential elements of a distinctive and respected culture. The Tribe's rationale for renewing whaling was that "the whale hunt will not only bring the community together, but it

554. The skeleton of the 1995 gray whale was used by Makah artisans, and the 1999 whale skeleton is being assembled and hung in the tribal museum by reservation school students so that Makah children can learn about and take pride in their culture. Andersen, *A Year After Hunt*, *supra* note 511; *Makah Students Preserve Legacy of Whales*, *supra* note 510 (stating that students are learning and are excited to be working with the skeleton); Rollins, *Pride Swells*, *supra* note 387; Rob McDonald, *Teenagers Spellbound by Whaling Tale: Makah Hunter Shares Story at Youth Camp*, SPOKANE.NET, Apr. 29, 2000, available at <http://www.spokane.net:80/news-story-body.asp> (stating that Makah children are learning about their culture because the hunt restored interest and provided information) (quoting Keith Johnson, vice-chair of the Makah Tribal Council) ("Our young people know we are from a whaling tribe. We are not museum whalers. It's a living culture."); Videotape: *A Gift From the Past*, *supra* note 43 (stating that the Makah museum and Ozette village have assisted with a cultural revival, and that the Tribe is recording its oral traditions and teaching the children language and arts).

555. The hunt brought the Makah people and the community. Bowechop, *supra* note 98 ("The great reward was seeing people come together and tribes coming together supporting the Makah.").

556. Montana, *supra* note 507 (stating that the hunt changed the Makah whaling captain's life, and that he "enjoyed the feeling of feeding my people"); accord FREEMAN, *supra* note 319, at 7-8, 31-32, 202-08.

557. FREEMAN, *supra* note 319, at 24-25 (stating that whaling satisfies emotional and important nutritional needs, and that whale food takes on a social importance because hunters will make the effort and the risks to catch whales).

558. *Id.* at 25, 35; *Subsistence Whaling*, *supra* note 320, at 606, 608 (stating that whaling is of "cultural importance to all whaling villages . . . [it] remains a significant element of both economic importance and socio/cultural focus," and that many festivals indigenous to the culture derive from whaling).

enriches our culture."⁵⁵⁹ The federal government itself recognizes that the Makah's "subsistence hunting includes far more than physical survival. It is a way of life that includes historical practices and is the cultural 'glue' that holds the Tribe together."⁵⁶⁰ Thus, American Indian tribes and other distinct cultures should have the right of cultural self-determination to keep their unique cultures, "ways of life" and traditional practices viable and active unless they cause unreasonable harm to majority societal interests. In addition, in the case of American Indian tribes and Indian people it is the duty of the United States under its official policy of self-determination and its trust responsibility to support tribal cultural practices.

The positive and beneficial results for their culture, families and Tribe, discussed above, demonstrate that the Makah were wise to store up and preserve their whaling traditions, and to revive this cultural tradition by resuming whaling. Their right to hunt whales is evident from their treaty and from the legal rights they possessed since time immemorial. The United States supported the revival of Makah whaling exactly because of the Tribe's treaty right and the U.S. trust responsibility to support tribes and Indian cultures.⁵⁶¹ Not surprisingly, there were some dissenting voices within the Tribe about resuming whaling and there were many dissenting voices in the international community. However, the resumption of Makah whaling is not an issue of conservation because it is not about hunting a threatened or endangered species. The gray whale is currently at the highest population level it has ever been and in fact they are dying of natural causes in record numbers perhaps because they have exceeded the carrying capacity of their food supply. Thus, instead of gray whales being endangered, it is the Makah culture that is endangered and the Tribe has the moral right to choose to preserve, revive and practice that culture.

The Makah, then, are solidly based on legal and moral rights; rights they have always held and which they carefully and wisely preserved in their 1855 treaty. The Makah have also wisely kept alive the love of their traditions and whaling culture within their society and they have stored up and passed on that culture and the desire to preserve and revive their culture to their children and grandchildren. The Tribe has carefully maneuvered itself and used the cooperation and support of the United States to gain recognition on the international stage that it deserves and needs to exercise its treaty and cultural

559. Richard Blow, *The Great American Whale Hunt*, MOTHER JONES, Sept. 1, 1998, available in 1998 WL 10365177 (statement of tribal chairman Ben Johnson).

560. *Id.* (statement of the National Oceanic and Atmospheric Administration).

561. Will Martin, leader of the U.S. delegation to the IWC 1997 meeting and Deputy Assistant Secretary for International Affairs at NOAA, said the U.S. supported the Makah (1) because of their 1855 treaty rights, (2) in recognition of the cultural significance of whaling to the Makah, and (3) because the science showed that the gray whale stock would not be significantly affected. Courtenay Thompson, *Washington Tribe Wants Approval to Start Whaling*, OREGONIAN (Portland), Oct. 16, 1997, at F1.

right to hunt whales. The Tribe has handled itself well in the storm of international press coverage and provocation by protestors. In essence, the Tribe has done what was necessary to keep its culture alive and to restore it. The Tribe has exercised cultural self-determination and taken on all comers and overcome all obstacles to do so. The Makah, then, are an excellent example of how other American Indian tribes, native peoples, and distinct cultures can work to preserve and restore their traditional practices and engage in them by their own methods. The Makah have demonstrated how to practice cultural self-determination.

Postscript

On July 13, 2001, the National Marine Fisheries Service and the National Oceanic and Atmospheric Administration approved a final Environmental Assessment which allows the Makah gray whale hunt to continue.⁵⁶² In fact, this new EA allows for an expanded gray whale hunt by the tribe because it removes some of the time and place restrictions that the first EA had imposed on the tribe.⁵⁶³ The Makahs plan on continuing to exercise their cultural and legal right to hunt for gray whales.

562. Nat'l Marine Fisheries Serv., Nat'l Oceanic & Atmospheric Admin., U.S. Dept of Commerce, Environmental Assessment on Allocating Gray Whales to the Makah Tribe for the Years 2001 and 2002, 66 Fed. Reg. 37,641 (July 19, 2001).

563. Shukovsky & Barber, *supra* note 70 (reporting that the Makah hunt can resume whaling with fewer restrictions on time, place, and protection for resident whales); Ross Anderson, *Makah Hunt for Whales May Enter New Waters*, SEATTLE TIMES, July 14, 2001, at A1 (same).

