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Pursuing the Exemption: The Makah's White Whale

Cover Page Footnote

14 WASH. J. SOC. & ENV'T. JUSTICE 1 (2024)

PURSUING THE EXEMPTION: THE MAKAH'S WHITE WHALE

SARAH VAN VOORHIS

I. INTRODUCTION

Whales hold a special place in our hearts. They evoke a sense of awe and majesty in their size and grace.¹ Media commonly features whales as a tool to help audiences connect with a story or character that might otherwise be unrelatable, whether it asks viewers to care about the environment of the far-off planet of Pandora in James Cameron's latest blockbuster² or asks audiences to understand the inner workings of an autistic lawyer in Korea as she begins her career.³ Something about whales captures people's hearts and minds and evoke deep sympathy and passion. This evocation of feelings is especially true for the Makah Tribe of the Pacific Northwest. Whales are central to the tribe's religion and culture, which is why, for the past twenty years, the Makah have been on a quest to kill them.⁴

The Makah Tribe believes that the resumption of the traditional whale hunt is necessary to rejuvenate its culture⁵ after over a century of forced "cultural and religious assimilation and oppression."⁶ The Tribe also believes that a return to its traditional diet will help improve the

¹ Joel Reynolds, *Save the Whales, Save Ourselves: Why Whales Matter*, NDRC (Oct. 15, 2013), <https://www.nrdc.org/experts/joel-reynolds/save-whales-save-ourselves-why-whales-matter#:~:text=They've>.

² Andrew J. Salazar, *The Most Important Scene in 'Avatar: The Way of Water' is All About the Tulkun*, DISCUSSINGFILM (Jan. 6, 2023), <https://discussingfilm.net/2023/01/06/the-most-important-scene-in-avatar-the-way-of-water-is-all-about-the-tulkun/> (Discussing the use of the whale-like creatures in *Avatar: Way of Water*).

³ See Tuba Waqar, *Viewers debate the recurring whale symbolism in Extraordinary Attorney Woo*, SK POP (Jul. 16, 2022), <https://www.sportskeeda.com/pop-culture/viewers-debate-recurring-whale-symbolism-extraordinary-attorney-woo> (Discussing the symbolism of the recurring whale imagery in Korean drama "Extraordinary Attorney Woo").

⁴ John Eligon, *A Native Tribe Wants to Resume Whaling. Whale Defenders Are Divided*, NEW YORK TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/14/us/whale-hunting-native-americans.html>.

⁵ See Eligon, *supra* note 4 ("It brings to life a better part of our culture.") (quoting Spencer McCarty, a Makah whaler).

⁶ Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 202-203 (2000) (Discussing how the federal government purposely sought to alter every aspect of the Makah culture, from its language, religious practices, communal living practices and tribal government); See Adam Wesolowski, *Taking it off the Table: A Critical View of Culture in the Whaling Debate*, 26 GEO. INT'L ENV'T. L. REV. 99, 116 (2013); See also BRYAN NEWLAND, U.S. DEPT. OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 3 (2022) ("the United States directly targeted American Indian, Alaska Native, and Native Hawaiian children in the pursuit of a policy of cultural assimilation that coincided with Indian territorial dispossession.").

health of its tribe-members, who currently experience higher rates of diabetes and cardiovascular disease than the general U.S. population.⁷ With a treaty that explicitly grants the Tribe the right to hunt whales and approval from the International Whaling Commission (IWC), the Makah's quest to resume whaling should have been relatively simple;⁸ however, the Tribe has faced fierce opposition from conservationists and animal rights activists every step of the way.⁹ These groups, led by the Sea Shepherd Conservation Society, have waged a "protracted administrative and legal battle" against the Makah Tribe for the past two decades.¹⁰ These attacks, borne out of the deep love humanity has for cetaceans, have led to additional administrative hurdles for the Tribe and questionable legal decisions that run counter to judicial precedent when analyzing tribal treaty rights.¹¹ Rather than allow the Makah people to whale under the authority of their treaty and the IWC quota, the U.S. Court of Appeals for the Ninth Circuit determined that the Makah must apply for an exemption under the Marine Mammal Protection Act (MMPA) which the National Oceanic and Atmospheric Administration (NOAA) may only approve after considering an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA).¹² Since 2002, activist groups have challenged the methodology, findings and validity of each Makah whaling EIS NOAA has published.¹³

On September 23, 2021, after a lengthy hearing and an in-depth analysis of the 2015 Draft EIS (DEIS), an administrative judge issued a recommendation that NOAA approve the

⁷ CHARLOTTE COTÉ, SPIRITS OF OUR WHALING ANCESTORS: REVITALIZING MAKAH AND NUU-CHAH-NULTH TRADITIONS 195 (Univ. Wash, Press 2010).

⁸ Emily Brand, *The Struggle to Exercise a Treaty Right: An Analysis of the Makah Tribe's Path to Whale*, 32 ENVIRONS ENV'T. L. & POL'Y J. 287, 289-90 (2009).

⁹ Eligon, *supra* note 4.

¹⁰ *Id.*

¹¹ Brand, *supra* note 8, at 289-90.

¹² *Id.* at 299-301; National Environmental Policy Act, 42 U.S.C. §§ 4331-4332.

¹³ *Aboriginal Subsistence Whaling*, ANIMAL WELFARE INST., <https://awionline.org/content/subsistence-whaling> (last visited Mar. 14, 2023).

Makah's waiver under the MMPA.¹⁴ NOAA could not make a final decision, however, until it had published the supplemental environmental impact statement, which was in progress at the time of the hearings.¹⁵ On November 3, 2022, the comment period for the most recent supplement to the 2015 DEIS ended.¹⁶ Because the supplement was consistent with the 2015 DEIS and did not identify any new dangers to the gray whale population, NOAA is likely to approve the waiver for the MMPA's take moratorium, putting the Tribe one step closer to resuming its traditional whale hunts.¹⁷

This Note begins with an explanation of the different whale stock populations present in the Makah Tribe's proposed hunting grounds before continuing in Part III into an examination of the history of the Makah Tribe's whaling traditions, beginning with the Makah and Nuu-chah-nulth's ancient practices.¹⁸ This section will also examine the Makah Tribe's efforts to protect its ability to whale in the future both by enshrining its whaling right in the Treaty of Neah Bay and also by voluntarily giving up whaling when the gray whale population was in peril.¹⁹ Next, Part III.C of the Note will discuss the tribe's attempts to resume whaling after NOAA removed the gray whale from the endangered species list, before continuing into an analysis of the Ninth Circuit decisions that determined that the rights identified in the Treaty of Neah Bay were subject to the restrictions of the MMPA in Part IV.²⁰ Part V takes a close look at the challenges and setbacks to the DEIS process, and a discussion of the administrative hearing and comments

¹⁴ *Makah Tribal Whale Hunt Chronology*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/west-coast/marine-mammal-protection/makah-tribal-whale-hunt-chronology> (Oct. 24, 2022).

¹⁵ *See Id.*

¹⁶ *Id.*

¹⁷ *Makah Tribal Whale Hunt Frequently Asked Questions*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/west-coast/makah-tribal-whale-hunt-frequently-asked-questions> (Aug. 16, 2022).

¹⁸ *See discussion infra* Part III.A.

¹⁹ *See discussion infra* Part III.B.

²⁰ *See infra* Part III; *See infra* Part IV.

made in support of and opposition to the waiver upon the publication of the 2022 Supplemental DEIS.²¹ In Part VI, this Note argues that NOAA is likely to approve the Makah waiver and will predict and address the challenges that conservationist groups are likely to raise in opposition to the waiver.²² By analogizing the Makah's whaling rights to the fishing rights of the Native American Tribes in the Washington Culvert cases, this Note explains why any issued waiver should be upheld.²³ The Note will conclude with a prediction that although public sentiment surrounding the nature of whales has caused Courts to mishandle the Makah's treaty rights, the Tribe's perseverance will eventually overcome the opposition as they run out of procedural challenges that they can raise.²⁴

II. THE WHALE POPULATIONS

Gray whales are mid-sized baleen whales that undertake the longest migration of any mammal.²⁵ The gray whale historically occurred in both the North Atlantic and North Pacific Oceans; however, commercial whaling decimated the North Pacific whales and destroyed the North Atlantic populations.²⁶ There are two genetically distinct gray whale populations that migrate through the North Pacific: The Eastern North Pacific (ENP) stock which migrates

²¹ See *infra* Part V.

²² See *infra* Part VI.

²³ See *infra* Part VI.

²⁴ See *infra* Part VII.

²⁵ *Gray whale (Eschrichtius robustus)*, WASH. DEPT. FISH & WILDLIFE, <https://wdfw.wa.gov/species-habitats/species/eschrichtius-robustus#:~:text=Gray%20whales%20are%20medium%2D%20sized,knuckles%E2%80%9D%20between%20hump%20and%20tail> (last visited Mar. 23, 2023).

²⁶ *Gray Whale (Northeast Pacific DPS)*, CTR. FOR BIOLOGICAL DIVERSITY https://www.biologicaldiversity.org/campaigns/esa_works/profile_pages/PacificGrayWhale.html (last visited Mar. 20, 2023).

through U.S. waters, and Western North Pacific (WNP) stock which migrates through Russian waters.²⁷

Through dedicated conservation measures, both domestic and international, the Eastern North Pacific stock of gray whale, the stock that travels along the west coast of the United States, has recovered from near extinction.²⁸ The Western North Pacific (“WNP”) stock, which feeds in the Sea of Okhotsk and off the coast of the Kamchatka Peninsula in the Bering Sea, remains endangered.²⁹ Scientists studying the whale populations have detected a small number of WNP whales “migrating to the Pacific Coast of North America to feeding and wintering grounds traditionally used by the Eastern North Pacific population.”³⁰ The ENP stock migrates 11,200 miles roundtrip, travelling from Alaska and Siberia in the summer to Mexico in the winter.³¹ A small subset of the ENP stock, referred to as the Pacific Coast Feeding Group (“PCFG”), do not migrate to the Arctic in the summer and instead feed along the Pacific coast between northern California and southeast Alaska.³² Most of the migrating ENP whales pass through the Olympic Coast National Marine Sanctuary, which is near the Makah Tribe’s traditional territory in Washington State, on their journey between their summer and winter waters.³³ Despite high levels of gray whale mortality in 1999 and 2000 caused by an unusual

²⁷ *Gray whale (Eschrichtius robustus)*, *supra* note 25.

²⁸ *Gray Whales in the Eastern North Pacific*, NOAA FISHERIES <https://www.fisheries.noaa.gov/west-coast/science-data/gray-whales-eastern-north-pacific> (last visited Mar. 23, 2023).

²⁹ *Gray whale (Eschrichtius robustus)*, *supra* note 25. See also COOKE, J.G., TAYLOR, B.L., REEVES, R. & BROWNELL JR., *ESCHRICHTIUS ROBUSTUS (WESTERN SUBPOPULATION)*, WESTERN GRAY WHALE, IUCN RED LIST OF THREATENED SPECIES 1 (2018) <https://dx.doi.org/10.2305/IUCN.UK.2018-2.RLTS.T8099A50345475.en>.

³⁰ *Gray whale (Eschrichtius robustus)*, *supra* note 25.

³¹ *Id.*

³² *Gray Whales in the Eastern North Pacific*, *supra* note 28.

³³ *Anderson v. Evans*, 371 F.3d 475, 481 (9th Cir. 2002).

mortality event, the ENP stock has maintained a population close to its carrying capacity since its delisting from the Endangered Species List in 1994.³⁴

III. THE MAKAH'S WHALING HISTORY

A. THE CULTURAL TRADITION

In the tradition of the Nuu-chah-nulth people, the first whale hunter was the Thunderbird, T'iick'in.³⁵ T'iick'in hunted whales using the Lightning Sea Serpent as a harpoon to stun the whale before swooping down to catch the whale in his mighty claws.³⁶ The legends say that, in a time of great famine for the Nuu-chah-nulth, T'iick'in brought the Tribe a whale to eat so they could survive.³⁷ Ever since, the whale has been central and sacred to the Tribe, with stories of the whale and T'iick'in passed down through the generations.³⁸ Archaeological excavations of Nuu-chah-nulth sites have found whalebones, showing that “whales were significant to Native cultures as far back as 4,000 years.”³⁹

The Makah Tribe is the only group of Nuu-chah-nulth people within the United States of America, residing on a 27,000-square-acre reservation at the northwestern point of the Olympic Peninsula in Washington State.⁴⁰ Even after splitting from the Nuu-chah-nulth, whaling remained an “essential part of Makah social identity.”⁴¹ Archeological excavations of the Makah village of

³⁴ *Gray whale (Eschrichtius robustus)*, *supra* note 25.

³⁵ COTÉ, *supra* note 7 at 15.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 16.

³⁹ *Id.* at 20.

⁴⁰ Ann M. Renker, *The Makah Tribe: People of the Sea and the Forest*, UNIV. WASH. LIBRARIES, <https://content.lib.washington.edu/aipnw/renker.html#:~:text=The%20current%20reservation%20is%20approximately,See%20also%3A%20Makah%20Treaty> (last visited Jan. 3, 2023); Jeremy Stevens, *Of Whaling, Judicial Fiats, Treaties and Indians: The Makah Saga Continues*, 1 AM. INDIAN L.J. 99, 99 (2017).

⁴¹ Madonna L. Moss, *Makah Whaling Misunderstood*, UNIV. OR. (May 28, 1999), <https://pages.uoregon.edu/mmoss/makah.htm>.

Ozette, which the Makah have occupied for at least 1,500 years, uncovered evidence that whales were a prime resource for the tribe.⁴² Whale meat accounted for 75 percent of the Makah diet.⁴³ The Tribe used whale oil as a condiment, used whale sinew to make rope, crafted whale bones into everything from clubs to furniture, and even incorporated the bones into an extensive drainage system.⁴⁴

Whaling was more than just a means of gathering these resources, however, “whaling was entwined in a complex web of social interactions and served important social, subsistence, and ritual functions.”⁴⁵ Whalers would engage in spiritual ceremonies and cleansing rituals for months to prepare themselves for the hunt.⁴⁶ Whalers conducted the hunt in eight person canoes using a harpoon to strike at the surfacing whale, with the final blow delivered by lance, reminiscent of T’iick’in’s hunt using harpoon and claws.⁴⁷ The whalers would then tow the body back to shore, singing their ancient songs while they paddled.⁴⁸

B. ENSURING THE FUTURE OF WHALING

The Treaty of Neah Bay demonstrates whaling’s importance to the Makah, being the only treaty between Native Americans and the United States to explicitly grant a Tribe the right to hunt whales in particular, rather than a more general allowance regarding the “right of taking fish.”⁴⁹

⁴² *Id.*

⁴³ COTÉ, *supra* note 7 at 20.

⁴⁴ *Id.* at 20-22; Moss, *supra* note 41.

⁴⁵ COTÉ, *supra* note 7 at 22.

⁴⁶ *Id.* at 25; *The Makah Whaling Tradition*, MAKAH TRIBAL COUNCIL, <https://makah.com/makah-tribal-info/whaling/> (last visited Jan. 2, 2023); *See also* Emily Sun, *The Makah and Nuu-chah-nulth Go Whaling*, MIDDLEBURY COLL., <https://sites.middlebury.edu/borderrites/files/2018/07/Makah-and-Nuu-chah-nulth-and-Whaling.pdf> (last visited Jan. 3, 2023).

⁴⁷ *Id.*; *See also* COTÉ, *supra* note 7 at 15.

⁴⁸ *The Makah Whaling Tradition*, *supra* note 46; *See also* COTÉ, *supra* note 7 at 32-40.

⁴⁹ Eligon, *supra* note 4; *See also* Makah Indian Tribe v. Quileute Indian Tribe, 873 F.3d 1157, 1159 (9th Cir. 2017) (determining that the Treaty of Olympia’s language regarding the “right of taking fish” should be read to include the right to hunt whales and seals in light of historical and linguistic evidence of intent).

During negotiations, Governor Isaac Stevens assured the Tribe that the United States Government would not prevent them from engaging in its traditional marine hunt, promising them “United States’s assistance in securing a treaty-based right for the Makah to whale and promote Makah whaling.”⁵⁰ As consideration for that right, the Makah Tribe ceded ninety-one percent of its land to the United States, keeping only the Neah Bay territory—“a wind-swept, crag-ridden, mountainous, forest-covered region, with no arable land except the low swamp and marsh.”⁵¹ The right to hunt whales was far more important to the Makah than the land on which they lived.⁵² However, in the 1920s, recognizing that rampant commercial whaling activities posed a danger to the gray whale population,⁵³ the Makah people voluntarily chose to cease their own traditional whale hunts.⁵⁴ Although the Tribe faced a cultural attack by laws the U.S. Government instituted to prohibit potlatches, ceremonies, and the Makah language to attempt to force the assimilation of its people, the Tribe chose to step away from this central aspect of its heritage in the hope that by doing so, future generations of Makah could experience whales and the whale hunt.⁵⁵ Since that time, regulations on whaling have changed dramatically with the creation of the International Whaling Commission (IWC)⁵⁶ to regulate whaling in the international community in addition to the passage of the Whaling Convention Act (WCA),⁵⁷ the Marine Mammal Protection Act

⁵⁰ Stevens, *supra* note 40 at 101–02.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Although commercial whaling occurred in the traditional whaling waters of the Makah, no Nuu-chah-nulth or Makah people worked on commercial whaling ships. COTÉ, *supra* note 7 at 63–64.

⁵⁴ Brand, *supra* note 8 at 289; Monder Khoury, *Whaling in Circles: The Makahs, the International Whaling Commission, and Aboriginal Subsistence Whaling*, 67 *Hastings L.J.* 293, 295 (2015).

⁵⁵ See Brand, *supra* note 8 at 289; See also COTÉ, *supra* note 7 at 50–59 (describing various methods used by the United States and Canadian government to eradicate the native ways of life through the use of boarding schools, bans on potlatches, and the replacement of traditional tribal political structures.); See also Renker, *supra* note 40.

⁵⁶ INTERNATIONAL WHALING COMMISSION, <https://iwc.int/en/> (last visited Mar. 15, 2023).

⁵⁷ Whaling Convention Act of 1949, 16 U.S.C.A. § 916 (West).

(MMPA),⁵⁸ the Endangered Species Act (ESA),⁵⁹ and NEPA,⁶⁰ which in effect prohibit the practice of whaling within the United States.⁶¹

C. SEEKING TO WHALE ONCE MORE

In 1994, NOAA removed the gray whale from the Endangered Species List after regaining a “steady, stable population of approximately 20,000 California Gray Whales.”⁶² In light of this development, the Makah chose to seek legal permission from the ICW to finally resume its traditional whale hunt.⁶³ Elders believed that the resumption of the hunt would “help to revive a sense of community, self-worth and spirituality” within the tribe.⁶⁴ In the spring of 1995, Makah tribal Chairman Hubert Markishtum petitioned the United States Department of State and NOAA for the right to resume whaling, claiming that the Makah had a cultural need to whale and referencing the 1855 Treaty of Neah Bay’s express whaling provisions.⁶⁵ On March 22, 1996, the Makah Tribe entered into a formal written agreement with NOAA promising that “NOAA, through the United States Commissioner to the IWC, will make a formal proposal to the IWC for a quota of gray whales for subsistence and ceremonial use by the Makah Tribe.”⁶⁶

This agreement drew the ire of two groups, Australians for Animals and the BEACH Marine Protection, who submitted a letter to NOAA first raising the allegation that would plague

⁵⁸ Marine Mammal Protection Act, 16 U.S.C. § 1372.

⁵⁹ Endangered Species Act of 1973, 16 U.S.C.A. §§ 1531–40.

⁶⁰ National Environmental Policy Act, 42 U.S.C. §§ 4331–4332.

⁶¹ Brand, *supra* note 8 at 289. *But see* Miller, *supra* note 6 at 228-229 (explaining that despite bowhead whales being on the endangered species list and efforts by the IWC to cease bowhead hunting, the United States made great efforts to preserve the right for Alaskan Natives to continue their traditional whaling activities.).

⁶² Stevens, *supra* note 40 at 104.

⁶³ MICHAEL D. MCNALLY, DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT 225 (Princeton Univ. Press, 2020).

⁶⁴ Khoury, *supra* note 54 at 298.

⁶⁵ *Aboriginal Subsistence Whaling*, *supra* note 13.

⁶⁶ Stevens, *supra* note 40, at 105.

the Makah's quest for the next three decades: by authorizing the hunt without first preparing an Environmental Assessment (EA) or EIS, the United States Government had violated the National Environmental Policy Act.⁶⁷ Under NEPA, whenever an agency proposes an action that may significantly affect the environment, it must prepare an EA with a Finding of No Significant Impact (FONSI) or, if there is a significant impact, the agency must prepare an EIS.⁶⁸

Within months of receiving this letter of complaint, NOAA distributed an EA for public comment, entered into a new agreement with the Makah requiring the tribe to hunt only in the open ocean, issued a FONSI, and submitted a proposal to the IWC to allow the Makah to harvest a limited number of whales.⁶⁹ Congressman Jack Metcalf, along with Australians for Animals and BEACH Marine Protection,⁷⁰ immediately filed suit against NOAA and NMFS alleging that the FONSI had violated NEPA, the WCA, and the Administrative Procedure Act. Metcalf asserted that the FONSI improperly relied on the EA because it was “was a ‘deficient effort’ organized simply to ‘justify the prior agreement allowing the Tribe to hunt whales.’”⁷¹

While the Makah and conservationist groups fought over the validity of the EA in federal court, the International Whaling Commission reviewed the proposal for the gray whale take quota.⁷² In April 1998, despite internal debate over whether the IWC could categorize the Makah whale hunt as meeting a “subsistence and cultural need” after such a long hiatus, the IWC

⁶⁷ *Id* at 105.

⁶⁸ *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

⁶⁹ Stevens, *supra* note 40 at 105; The proposal was submitted as part of a joint proposal with the Russian Federation on behalf of the Chukotkas who were in the process of renewing their own gray whale hunting quota. Miller, *supra* note 6 at 257.

⁷⁰ Major environmentalist groups such as Greenpeace, however, did not oppose the whale hunt. Miller, *supra* note 6 at 265.

⁷¹ Stevens, *supra* note 40 at 105.

⁷² See *Metcalf v. Daley*, 214 F.3d 1135, 1140-1141.

unanimously approved the proposal.⁷³ In the U.S., the United States District Court for the District of Columbia transferred the *Metcalf* case to the Western District of Washington, where the district court granted summary judgement for the Makah on September 21, 1998.⁷⁴ Having won the battle in the district court, the Makah prepared to resume their cultural whaling practice—subject to federal supervision.⁷⁵

D. THE 1999 WHALE HUNT

In 1999, Makah hunters landed their first whale since voluntarily ceasing whaling activities in the 1920s.⁷⁶ On May 17, after completing their traditional spiritual practices which included “months of praying, fasting, cleansing, and physical preparation,” a small band of tribesmen in the *Hummingbird*, a traditional Makah canoe, ventured into the “cold, choppy” waters surrounding the Makah reservation in search of a whale.⁷⁷ The hunt was not quiet; they set forth “amid amidst a noisy flotsam and jetsam of protest boats with loudspeakers, media helicopters, onlookers, and a German film crew.”⁷⁸ Animal rights activists, deeply opposed to the hunt, did what they could to prevent its success: throwing smoke bombs at the hunters, spraying fire extinguishers into the whalers’ faces, and even weaving speedboats between the Tribe’s canoes.⁷⁹ Despite these distractions, when a gray whale crossed their path, the whalers were ready. Using a

⁷³ Miller, *supra* note 6 at 257-61; Stevens, *supra* note 40 at 106; *see also* Claire Jean Kim, *Makah whaling and the (non) ecological Indian* (2015), *referenced in* COLONIALISM AND ANIMALITY: ANTI-COLONIAL PERSPECTIVES IN CRITICAL ANIMAL STUDIES 50, 65-66 (Kelly Struthers Montford & Chloë Taylor eds., 2020); *see generally* Leestefly Jenkins & Cara Romanzo, *Makah Whaling: Aboriginal Subsistence or a Stepping Stone to Undermining the Commercial Whaling Moratorium?*, 9 COLO. J. INT’L ENVTL. L. & POL’Y 71 (1998).

⁷⁴ *Metcalf v. Daley*, 214 F.3d 1135, 1141.

⁷⁵ Stevens, *supra* note 40 at 106.

⁷⁶ Brand, *supra* note 8 at 292, 297; Stevens, *supra* note 40 at 106.

⁷⁷ COTÉ, *supra* note 7 at 138.

⁷⁸ McNally, *supra* note 63 at 224.

⁷⁹ Manase Salema, *Whether the Federal Government should Allow Makah Tribe to Resume Hunting Whales*, LEWIS & CLARK L. SCH.: EVN’T, NAT. & ENERGY L. BLOG (Aug. 19, 2020).

method “established by the Tribe and NOAA to ensure the most humane and traditional hunt possible”⁸⁰ combining the use of harpoons and rifles,⁸¹ the whalers killed and landed a thirty-foot, three-year-old female gray whale.⁸²

The broadcast of the death met a mixed reception of “exultation” and “intense expressions of sorrow” from the Makah.⁸³ Even the whaler who⁸⁴ To honor the whale’s sacrifice, the “Makah people carried drums and sang songs in honor of the whale and to show it respect” as they towed the whale to shore.⁸⁵ Once landed on shore, the Makah sprinkled the whale with eagle feathers before distributing blubber and meat to all the Tribe members.⁸⁶ Unlike the actual hunt, news agencies did not televise the religious ceremonies and prayers to honor the whale at the tribe’s request.⁸⁷ This decision may have harmed public perception of the hunt.⁸⁸ Absent footage showing the religious practices surrounding the hunt, the brutality of the killing took center stage, standing in stark contrast to the general public’s romanticized ideas of native tribes being protectors of the environment.⁸⁹ Some non-native people, inflamed by the graphic footage of the kill, dismissed the spiritual practice at the heart of the hunt and decried the Makah practice⁹⁰

⁸⁰ Brand, *supra* note 8 at 296.

⁸¹ *Description of the USA Aboriginal Subsistence Hunt: The Makah Tribe*, INT’L WHALING COMM’N, <https://iwc.int/management-and-conservation/whaling/aboriginal/usa/makah-tribe> (last visited Jan. 5, 2023); Miller *supra* note 6 at 263.

⁸² Miller, *supra* note 6, at 262.

⁸³ Kim, *supra* note 73 at 50.

⁸⁴ COTÉ, *supra* note 7 at 138-39.

⁸⁵ *Id.* at 140.

⁸⁶ McNally, *supra* note 63, at 225; COTÉ, *supra* note 7 at 140.

⁸⁷ Peggy Anderson, *Makah Whale Hunt Sparks Death Threats, Obscenities, Prompts Call for Tolerance*, LOS ANGELES TIMES (May 23, 1999) <https://www.latimes.com/archives/la-xpm-1999-may-23-me-40138-story.html>.

⁸⁸ See *Id.*

⁸⁹ See *Id.* (“We get it all the time—I thought you people respected the earth and its inhabitants.’ I don’t know of any Native Americans that have been vegetarians,”) (quoting Janine Bowechop); See generally Kim, *supra* note 73.

⁹⁰ *Id.*

While the hunt sparked outcry and death threats,⁹¹ it also brought a resurgence of tribal unity and cultural pride.⁹² The Tribe served whale meat and blubber at a potlatch that “attracted more than 3,000 people to Neah Bay to join the Makah people in celebrating their successful hunt.”⁹³ The beneficial effects of the hunt were noticeable long after the celebration ended.⁹⁴ School children began putting on cultural performances, elders remembered and shared old songs and stories, and high school students worked to reassemble the whale bones into a structure that the Tribal Council would eventually hang in the Makah Cultural and Research Center.⁹⁵

III. LEGAL CHALLENGES

A. NINTH CIRCUIT

Sadly, the tribe’s return to tradition did not last long—the Makah have not conducted another legal whale hunt since 1999.⁹⁶ Metcalf and the other plaintiffs filed an appeal and the U.S. Court of Appeals for the Ninth Circuit reversed the earlier decision,⁹⁷ determining that NOAA had produced a “demonstrably suspect” EA prepared under a “fatally defective” process.⁹⁸ The court asserted that “the Federal Defendants were predisposed to finding that the Makah whaling proposal would not significantly affect the environment.”⁹⁹ The court further reasoned that, time was “not

⁹¹ Anderson, *supra* note 87 (describing obscene telephone calls, and protest signs reading “Save the Whales, kill a Makah.”).

⁹² COTÉ, *supra* note 7 at 141-42.

⁹³ *Id.* at 140.

⁹⁴ *Id.* at 140-49.

⁹⁵ *Id.*

⁹⁶ *Makah Tribal Whale Hunt Chronology*, *supra* note 14; Carol B. Koppelman, *Anderson v. Evans: The Ninth Circuit Harmonizes Treaty Rights and the Marine Mammal Protection Act*, 16 HASTINGS ENV’T L. J. 353, 373 (2010). A group of five Makah tribesmen illegally hunted and killed a whale in 2007. They were apprehended by the Coast guard and convicted for their violations of the MMPA and WCA. *Id.* at 383.

⁹⁷ The earlier decision of the trial court had granted the Makah Tribe’s motion for summary judgement. *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000).

⁹⁸ *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000).

⁹⁹ *Id.*

of the essence” and, “although the doctrine of laches cannot defeat Indian rights recognized in a treaty, the Makah's seventy-year hiatus in connection with whale hunting suggests that a modest delay occasioned by the need to respect NEPA's commands will cause no harm.”¹⁰⁰ After this decision, NOAA canceled the earlier agreement with the Makah Tribe and performed another EA to assess whether another Makah hunt would have a negative impact on the population of gray whales.¹⁰¹ The Makah did not appeal the decision, opting instead to wait for the new environmental review.¹⁰² NOAA released the new EA the following year, finding again that the proposed quota would have “no significant impact on the eastern North Pacific gray whale population.”¹⁰³

Unfortunately, despite the new EA and a renewed whale catch limit approved by the ICW for the 2003–2007 period, the Makah would not legally whale during this time.¹⁰⁴ When NOAA approved the FONSI, eliminating the need to conduct an EIS under NEPA, NOAA failed to fully follow all required procedural steps, leaving room for conservationist groups to challenge the decision.¹⁰⁵ After the public comment period on the EA ended, NOAA created a revised management plan which removed the geographic limitation, present in the EA, that ensured that the Makah would only target migratory whales.¹⁰⁶ NOAA approved this revised plan without it for public comment.¹⁰⁷ Humane Society of the United States and the Fund for Animals challenged the legality of the decision to permit the Makah to whale .¹⁰⁸ Despite NOAA's initial victory in

¹⁰⁰ *Id.* (internal citations omitted).

¹⁰¹ Brand, *supra* note 8 at 299.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Stevens, *supra* note 40 at 119.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Anderson v. Evans, 371 F.3d 475, 480 (9th Cir. 2004) (reprinted from 314 F.3d 1006 (9th Cir. 2002)); *see also* Koppelman, *supra* note 96 at 375.

2002¹⁰⁹, the U.S. Court of Appeals held that 1) the federal government needed to conduct an EIS rather than an EA to satisfy NEPA and 2) the Tribe must “satisfy the permit or waiver requirements of the MMPA . . . before any taking of a marine mammal”¹¹⁰

Much of the debate in *Anderson v. Evans* hinged on uncertainty surrounding the precise migration patterns of the California North Pacific Gray Whales.¹¹¹ The court determined that NOAA should conduct an EIS in order to examine to the local population of possibly nonmigratory whales in the event that the Makah continued whaling.¹¹² Further, the court was concerned that approving the Makah’s tribal hunt would encourage native populations in other countries to pursue their own whaling exemptions, and the EA did not sufficiently examine that particular risk.¹¹³ Additionally, the Ninth Circuit rejected two arguments the defendants had made alleging that the MMPA would not apply to the Tribe’s treaty right and ordered that the Makah must obtain a permit. First, while Section 1372(a)(2) of the MMPA provides an exemption to the act’s blanket moratorium on whaling when such hunting is “expressly provided for by an international treaty, convention, or agreement to which the U.S. is a party,”¹¹⁴ the court determined that the approval of the IWC quota did not fit into this exemption.¹¹⁵ The court reasoned that; the exemption would apply only to treaties and agreements signed before Congress enacted the MMPA and would not apply to amendments such as the 1997 whaling approval; even should the 1997 amendment apply,

¹⁰⁹ In the district court, Judge Franklin Burgess deferred to NOAA’s decision regarding the EA and stated that the Treaty of Neah Bay took precedence over MMPA requirements. *Anderson*, 371 F.3d at 486.

¹¹⁰ *Anderson*, 371 F.3d at 501-502.

¹¹¹ *Id.* at 480-482.

¹¹² *Id.* at 501.

¹¹³ *Id.* at 493.

¹¹⁴ 16 U.S.C. § 1372(a)(2) (1994). The MMPA was initially written in 1972 with the last significant amendment occurring in 1994. ANTHONY R. MARSHAK, CONG. RSCH. SERV., PL92522, THE MARINE MAMMAL PROTECTION ACT: PRIMER AND ISSUES FOR CONGRESS 25 (2024).

¹¹⁵ *Anderson*, 371 F.3d at 496-97; Brand, *supra* note 8 at 300.

it did not expressly assign a quota to the Makah Tribe, but rather to “aborigines whose traditional aboriginal subsistence and cultural needs have been recognized;”¹¹⁶ the language of the IWC’s quota was unclear with regards to how a Tribe may be “recognized” as one with “traditional aboriginal subsistence and cultural needs” and whether the Makah Tribe fall into that category considering its seventy-year whaling hiatus; and while the MMPA allows exemptions from the take moratorium if a statute implementing such a treaty expressly provides for such takes, the Whaling Convention Act, the only law implementing the ICRW domestically, makes no mention of aboriginal whaling.¹¹⁷

The *Anderson* Court then turned to the question of whether the 1855 Treaty of Neah Bay would provide a right to whaling that the MMPA could not affect.¹¹⁸ Reversing the lower court, the Ninth Circuit applied the test established in *United States v. Fryberg*¹¹⁹ to determine that the MMPA qualified as a conservation statute that could affect Indian Treaties.¹²⁰ *Fryberg* indicates that:

Reasonable conservation statutes affect Indian treaty rights when (1) the sovereign exercising its police power to conserve a resource has jurisdiction in the area where the activity occurs; (2) the statute applies in a non-discriminatory manner to both treaty and non-treaty persons; and (3) the application of the statute to treaty rights is necessary to achieve its conservation purpose.¹²¹

¹¹⁶ *Anderson*, 371 F.3d at 495, n.18; Koppelman, *supra* note 96 at 378.

¹¹⁷ *Anderson*, 371 F.3d at 496-97.

¹¹⁸ *Id.* at 497-98.

¹¹⁹ *United States v. Fryberg*, 622 F.2d 1010 (9th Cir. 1980).

¹²⁰ *Anderson*, 371 F.3d at 499-500.

¹²¹ *Fryberg*, 622 F.2d at 1015.

The court determined that the MMPA met each prong.¹²² The MMPA applied to activities of “any person subject to the jurisdiction of the United States . . . and reaches 200 nautical miles outward from the seaward boundary of each coastal state” and places a general moratorium on all whaling except specifically exempted Alaskan Natives with subsistence needs, thereby fulfilling the first and second prongs.¹²³ The court determined that the MMPA satisfied the third prong of the test because Congress had specifically designed the gray whale take restrictions to promote the major objectives of the MMPA.¹²⁴ Because of this decision, NOAA must produce a more involved EIS before the Makah have hope of exercising their treaty-protected whaling tradition.¹²⁵

B. LEGAL REPERCUSSIONS OF ANDERSON

According to scholars, the Ninth Circuit’s application of the *Fryberg* test to its analysis of the MMPA represented a serious legal misstep.¹²⁶ In *Fryberg*, the Ninth Circuit relied on a series of Supreme Court decisions regarding the abrogation of treaty rights by state conservation laws, deciding that a federal statute abrogated a tribe’s treaty right to hunt bald eagles.¹²⁷ In doing so, the court enforced a conservation necessity test—instead of the requisite clear legislative intent—when determining if a statute abrogates a treaty right.¹²⁸ This conservation necessity test was notably absent from the Supreme Court’s analysis in *United States v. Dion*,¹²⁹ a case heard six years after the *Fryberg* decision, which similarly examined whether federal statutes abrogated

¹²² *Anderson*, 371 F.3d at 498-99.

¹²³ *Id.* at 498.

¹²⁴ *Id.* at 498-99. The court determined that the major objectives were “not merely . . . survival of marine mammals, though that is of inestimable importance, but more broadly with ensuring that these mammals maintain an ‘optimum sustainable population’ and remain ‘significant functioning elements in the ecosystem.’” *Id.* at 498 (citing 16 U.S.C. § 1361).

¹²⁵ *Id.* at 501.

¹²⁶ See Stevens, *supra* note 40, at 120-21.

¹²⁷ *Fryberg*, 622 F.2d at 1014-15; see also Stevens, *supra* note 40, at 120-21.

¹²⁸ Stevens, *supra* note 40, at 120-21.

¹²⁹ *United States v. Dion*, 476 U.S. 734 (1986).

Native American tribal treaty rights to hunt eagles.¹³⁰ Rather than examine whether conservation purposes required the statute to abridge treaty rights, the *Dion* Court required a finding that Congress had a “clear and plain” intention of abrogating treaty rights, and, in the “absence of explicit statement, the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.”¹³¹ The Supreme Court used the same plain-statement of intent abrogation test used in two subsequent cases, *South Dakota v. Bourland*¹³² and *Minnesota v. Mille Lacs Band of Chippewa Indians*,¹³³ both decided before *Anderson v. Evans*.

Thus, when the Ninth Circuit decided *Anderson v. Evans* in 2004, there already existed a well-established test regarding whether federal statutes abrogated native treaty rights—a clear and plain intent by Congress was necessary to abrogate a treaty right. In *Anderson*, however, the Ninth Circuit claimed that “it must be assumed that Congress intended to effectuate policies for the United States and its residents, including the Makah Tribe. . . .”¹³⁴ This decision to impute intention based on conservation necessity represented a sharp divergence from established legal practices.

Further, the *Anderson* Court ignored another key doctrine when assessing tribal treaty rights. Supreme Court cases going back to 1905 emphasize that, when examining a treaty with native tribes, the court must interpret treaties according to how the native tribes would have

¹³⁰ *See id.* at 735, 738-39.

¹³¹ *Id.* at 738-39 (internal quotations omitted).

¹³² *South Dakota v. Bourland*, 508 U.S. 679, 697 (1993) (holding that Congress had clearly intended to abrogate the Tribe's pre-existing regulatory control over non-Indian hunting and fishing when the statute contained explicit reservations of other rights to the Tribe and its members).

¹³³ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 207-08 (1999) (finding that the Chippewa's treaty rights were not abrogated merely due to Minnesota's rise to statehood because there was no evidence of congressional intent in enacting the Minnesota statehood Act to abrogate Chippewa usufructuary rights).

¹³⁴ *Anderson v. Evans*, 371 F.3d 475, 499 (9th Cir. 2004).

understood them, examining the “substance of the right without regard to technical rules.”¹³⁵ The Supreme Court echoed this principle in its analysis in *Minnesota v. Mille Lacs Band of Chippewa Indians*,¹³⁶ and the U.S. Court of Appeals for the Ninth Circuit itself relied on this concept in the 1975 iteration of *United States v. Washington*,¹³⁷ a long-running case involving tribal fishing rights in the state of Washington. In *Washington*, the Ninth Circuit explained that although the treaties in question guaranteed the “right of taking fish . . . in common with all citizens;”¹³⁸ the tribes would not have understood “that in permitting other citizens access to their traditional fishing areas they were submitting to future regulations calculated to benefit those other citizens” thus, subjecting Native American fishermen to the same regulations as other citizens of the state was improper.¹³⁹ However, in *Anderson* the Court examined the text of the treaty “on its face” when determining the meaning of the Treaty of Neah Bay.¹⁴⁰ The Ninth Circuit, citing *United States v. Washington*, determines that the same language discussed in *Washington*, the right of taking fish and whales “in common with all citizens,” required that the Makah Tribe “cannot, consistent with the plain terms of the treaty, hunt whales without regard to processes in place” as defined in the MMPA.¹⁴¹ As such, in *Anderson v. Evans*, the Ninth Circuit ignored well established legal practices in order to reach the conclusion that the MMPA imposes restrictions on the Makah Tribe’s treaty rights, an action that would have disastrous consequences for the Makah’s attempt to carry out its traditional hunt.

¹³⁵ *United States v. Winans*, 198 U.S. 371, 381 (1905).

¹³⁶ *Minn. v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196.

¹³⁷ *United States v. Wash.*, 520 F.2d 676, 684 (9th Cir. 1975).

¹³⁸ *Id.*, at 683.

¹³⁹ *Id.*, at 685.

¹⁴⁰ *Anderson v. Evans*, 371 F.3d 475, 500 (9th Cir. 2002).

¹⁴¹ *Id.*

IV. AFTER *ANDERSON*

After the *Anderson* decision, the Makah Tribe determined that they would forgo an appeal and instead devote the time and resources needed to gain an MMPA exemption.¹⁴² The Tribe formed its own Marine Mammal Protection Program, participated in IWC Scientific Committee meetings, and conducted research in the Makah's "usual and accustomed whaling grounds."¹⁴³ On February 14, 2005, satisfied that resuming the traditional whale hunt would not pose "deleterious effects on the California Gray Whale population," the Tribe requested a limited waiver of the MMPA take moratorium from NOAA.¹⁴⁴

Since then, despite multiple DEIS publications, the Makah are still waiting for a final decision on the waiver.¹⁴⁵ In 2006, NOAA expanded the scope of the DEIS to include analysis of the WCA quota issuance.¹⁴⁶ In 2008, NOAA released a DEIS that was open to comments.¹⁴⁷ In 2012, however, NOAA terminated the 2008 DEIS, citing "several substantive scientific issues" regarding "potential hunting impacts on PCFG whales," a concern conservationist groups raised in the public comments.¹⁴⁸ NOAA released a new DEIS in 2015, considering a "new set of alternatives from

¹⁴² Stevens, *supra* note 40 at 121.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *Makah Tribal Whale Hunt Chronology*, *supra* note 14.

¹⁴⁶ After receiving public comments from conservationist groups, NOAA decided to expand the scope of the DEIS, indicating that "The MMPA waiver determination and the WCA quota issuance are best treated as connected actions for NEPA review because the Makah's proposed action of hunting whales cannot occur without NMFS' approvals under both statutory regimes." Notice of Decision to Expand Scope of the Environmental Impact Statement Analyzing the Makah Tribe's Proposed Gray Whale Hunting and Reopening of Comment Period, 71 Fed. Reg. 38 (Feb. 27, 2006).

¹⁴⁷ Public Meetings on the Makah Tribe's Request to Hunt Eastern North Pacific Gray Whales, 73 Fed. Reg. 73 (May 9, 2008).

¹⁴⁸ Notice of Intent to Terminate the Existing Draft Environmental Impact Statement and Prepare a New Environmental Impact Statement 77 Fed. Reg. 98 (May 21, 2012).

those assessed in the 2008 DEIS.”¹⁴⁹ The new DEIS was open to comments from March through July 2015.¹⁵⁰

A. PROPOSED WAIVER TO THE MMPA TAKE MORATORIUM

No further movement on the issue occurred until April 5, 2019, when NOAA introduced a proposed waiver under the MMPA.¹⁵¹ If NOAA grants the waiver, the Makah Tribe would still need to obtain a permit from the National Marine Fisheries Service (“NMFS”), an office within NOAA, prior to the actual hunting of any whales, which would be open to public comment.¹⁵² The waiver included proposed regulations for the tribal hunt and measures that would limit the likelihood that tribal hunters would strike a whale from stocks other than the ENP stock.¹⁵³ It required the Tribe take action to conduct the killings humanely and included regulations regarding approaches, unsuccessful strikes and training.¹⁵⁴ The proposal came after careful consideration on the likely effects of the hunt on the whale population.¹⁵⁵ For the waiver to proceed, a public process and formal rulemaking session on the proposal needed to occur before an administrative judge.¹⁵⁶

¹⁴⁹ See *Makah Tribal Whale Hunt Chronology*, *supra* note 14.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Regulations Governing the Taking of Marine Mammals, 84 Fed. Reg. 66 (proposed Apr. 5, 2019).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See *Id.*; *ee* NAT’L. OCEANIC AND ATMOSPHERIC ADMIN., NOAA-NMFS-2012-0104, DRAFT ENVIRONMENTAL IMPACT STATEMENT RELATED TO THE MAKAH TRIBE’S REQUEST TO CONTINUE TO EXERCISE ITS TREATY RIGHT TO HUNT GRAY WHALES (2015).

¹⁵⁶ *Makah Tribal Whale Hunt Chronology*, *supra* note 14.

1. The Unusual Mortality Event

The administrative law judge initially scheduled the hearing for August 12, 2019.¹⁵⁷ The parties planned to add a new issue of fact, one outside the scope of the 2015 DEIS to the agenda—the examination of a potential Unusual Mortality Event (“UME”) on the ENP stock.¹⁵⁸ Since January 1, 2019, NOAA noticed an unusually high number of gray whale strandings along the North American Coast.¹⁵⁹ NOAA declared an Unusual Mortality Event connected to the decline in whale populations that corresponded with these strandings.¹⁶⁰ NOAA assembled an independent team of scientists to investigate the cause of these strandings and determine whether “recent ocean and ecosystem perturbations” potentially caused the event.¹⁶¹ Scientists conducted necropsy examinations on some stranded whales and found that several whales showed signs of emaciation, although these findings were not consistent across all of the examined whales.¹⁶² There was a similar UME from 1999–2000, during which researchers were similarly unable to identify a specific cause, but many stranded whales also showed signs of malnourishment.¹⁶³ After the 2000 UME, the gray whale population rebounded to “greater numbers than before.”¹⁶⁴ Scientists studying both events note that large-scale population fluctuations are “not rare” and that such short-

¹⁵⁷ Announcement of Hearing and Final Agenda Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals, 84 Fed. Reg. 123 (Jun. 26, 2019).

¹⁵⁸ *Id.*

¹⁵⁹ *2019-2023 Gray Whale Unusual Mortality Event along the West Coast and Alaska*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/marine-life-distress/2019-2023-gray-whale-unusual-mortality-event-along-west-coast-and> (last visited Mar. 19, 2023).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *West Coast Gray Whales Declined During Unusual Mortality Event, Similar to Past Fluctuations in Numbers*, NOAA FISHERIES (Jan. 19, 2021) <https://www.fisheries.noaa.gov/feature-story/west-coast-gray-whales-declined-during-unusual-mortality-event-similar-past>.

¹⁶⁴ *Id.*

term declines have not historically “resulted in any detectable longer-term impacts on the population.”¹⁶⁵

2. The Administrative Law Hearing

The administrative law judge agreed to move the hearing to November 2019 after the American Whaling Institute’s three lawyers all claimed to have scheduling conflicts throughout the entire month of October.¹⁶⁶ During the hearing, the Makah Tribe faced opposition from various organizations, such as the Peninsula Citizens for the Protection of Whales (“PCPW”), Animal Welfare Institute, and the Sea Shepherd Conservation Society (“SSCS”), dedicated to the mission of “saving the whales.”¹⁶⁷ After NOAA announced that it intended to prepare a Draft Supplemental Environmental Impact Statement (“DSEIS”), these groups, collectively termed “the Conservation Parties’ filed a joint motion asking . . . to stay the proceeding and postpone issuance of a Recommended Decision” until NOAA published DSEIS accounting for the 2019 Unusual Mortality Event.¹⁶⁸ The judge denied this motion after finding that: 1) the mandates of the MMPA and APA do not require a completed DSEIS; and 2) “an indefinite stay would cause prejudice to the Tribe and would be inconsistent with agency regulations governing the waiver and regulations

¹⁶⁵ *Id.*

¹⁶⁶ Announcement of Change in Hearing Date Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals 84 Fed. Reg. 149 (Aug. 2, 2019); Transcript of Prehearing Conference at 5, In Re Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Grey Whales by the Makah Tribe, No. 19-NMFS-0001 (NOAA Admin. Ct. July 29, 2019).

¹⁶⁷ Chuck Tanner, *Makah Whaling and the Anti-Treaty Mobilization*, INSTITUTE FOR RESEARCH AND EDUCATION ON HUMAN RIGHTS (Feb. 18, 2020) https://www.irehr.org/2020/02/18/makah-whaling-and-the-anti-treaty-mobilization/#_edn10; See also ANIMAL WELFARE INSTITUTE, <https://awionline.org/> (last visited February 16, 2023) (stating that “since 1951, the Animal Welfare Institute has been dedicated to reducing animal suffering caused by people.”); See also *Our Mission*, SEA SHEPHERD, <https://seashepherd.org/who-we-are/our-mission/> (last visited February 16, 2023) (stating that Sea Shepherd’s “sole purpose is to protect all marine wildlife.”).

¹⁶⁸ Order Denying Request for Stay Waiver Proceedings at 1, In Re Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Grey Whales by the Makah Tribe, No. 19-NMFS-0001 (NOAA Admin. Ct. May 4, 2020).

process.”¹⁶⁹ On September 23, 2021, Administrative Judge George J. Jordan transmitted his recommended decision to NOAA Fisheries to inform NOAA’s final decision on the Makah’s request.¹⁷⁰ The judge found that “the best scientific evidence available supports a waiver of the MMPA’s moratorium of the take of marine mammals to allow the Makah Tribe to engage in a limited hunt for ENP gray whales.”¹⁷¹ NOAA accepted comments on the recommendation through November 13, 2021, after a 25-day extension to the original 20-day comment period.¹⁷²

3. Comments and Reactions

Despite already receiving an extension, AWI argued in favor of extending the comment period for another 45 days.¹⁷³ Other public comments expressed anger at the mere prospect of killing whales.¹⁷⁴ Most comments against the granting of a waiver did not cite procedural concerns or new scientific evidence or legal assessments of treaty rights, but rather expressed rage at the

¹⁶⁹ *Id.*

¹⁷⁰ *Makah Tribal Whale Hunt Chronology*, *supra* note 14.

¹⁷¹ Recommended Decision at 155, In Re Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Grey Whales by the Makah Tribe, No. 19-NMFS-0001 (NOAA Admin. Ct. Sept. 23 2021).

¹⁷² *Makah Tribal Whale Hunt Chronology*, *supra* note 14.

¹⁷³ Animal Welfare Inst., Comment on Request for Public Comment Regarding an Administrative Law Judge's Recommended Decision on a Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Oct. 5, 2021), <https://www.regulations.gov/comment/NOAA-NMFS-2019-0037-0302>.

¹⁷⁴ See Lida Morgenroth, Comment on Request for Public Comment Regarding an Administrative Law Judge's Recommended Decision on a Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Sept. 29, 2021), <https://www.regulations.gov/comment/NOAA-NMFS-2019-0037-0217>; See also Peggy Graham, Comment on Request for Public Comment Regarding an Administrative Law Judge's Recommended Decision on a Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Sept. 29, 2021), <https://www.regulations.gov/comment/NOAA-NMFS-2019-0037-0216>; Linda Bosshart, Comment on Request for Public Comment Regarding an Administrative Law Judge's Recommended Decision on a Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Sept. 29, 2021), <https://www.regulations.gov/comment/NOAA-NMFS-2019-0037-0203>; Jean Poublicee, Comment on Request for Public Comment Regarding an Administrative Law Judge's Recommended Decision on a Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Oct 3, 2021), <https://www.regulations.gov/comment/NOAA-NMFS-2019-0037-0300>.

possible “unjust slaughter” of “magnificent creatures.”¹⁷⁵ Comments posted in support of the waiver generally cited the tribe’s treaty rights and the stable whale population found in the DEIS.¹⁷⁶

4. Release of the Draft Supplemental Environmental Impact Statement

On July 1, 2022, the EPA made the Supplemental DEIS that examined the 2019 UME available to the public.¹⁷⁷ This Supplemental DEIS considered seven alternative hunt proposals and their likely long-term effect on the whales.¹⁷⁸ Alternative seven included “mitigating measures specifically designed to safeguard” the whale populations possibly facing an UME, setting whale stock thresholds that would cause all hunting to cease should the population decline.¹⁷⁹ The Supplemental DEIS also stated that in the years in which the courts have prevented the Makah from hunting Gray whales, the Russian Chukotkan tribes have hunted the Makah’s share of the approved ICW Aboriginal catch limit; thus, “gray whales will continue to be harvested . . . at current or very similar levels by the ICW, regardless of whether a Makah hunt is authorized.”¹⁸⁰

¹⁷⁵ Ron Gregory, Comment on Request for Public Comment Regarding an Administrative Law Judge's Recommended Decision on a Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Sept. 29, 2021), <https://www.regulations.gov/comment/NOAA-NMFS-2019-0037-0213>.

¹⁷⁶ Lower Elwha Klallam Tribe, Comment on Request for Public Comment Regarding an Administrative Law Judge's Recommended Decision on a Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Nov. 9, 2021), <https://www.regulations.gov/comment/NOAA-NMFS-2019-0037-0400>; *See also* Chigozie Egbochue, Comment on Request for Public Comment Regarding an Administrative Law Judge's Recommended Decision on a Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Nov 14, 2021), <https://www.regulations.gov/comment/NOAA-NMFS-2019-0037-0424>; Celia Waddell, Comment on Request for Public Comment Regarding an Administrative Law Judge's Recommended Decision on a Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Nov. 14, 2021), <https://www.regulations.gov/comment/NOAA-NMFS-2019-0037-0432>.

¹⁷⁷ *Makah Tribal Whale Hunt Chronology*, *supra* note 14.

¹⁷⁸ NAT'L. OCEANIC AND ATMOSPHERIC ADMIN., EIS NO. 20220086, SUPPLEMENTAL DRAFT ENVIRONMENTAL IMPACT STATEMENT RELATED TO THE MAKAH TRIBE'S REQUEST TO CONTINUE TO EXERCISE ITS TREATY RIGHT TO HUNT GRAY WHALES, 43-46 (2022) (hereinafter SUPPLEMENTAL DEIS).

¹⁷⁹ *Id.* at 97.

¹⁸⁰ *Id.* at 96.

The comment period for this Supplemental Draft Environmental Impact Statement, after two extensions, ended on November 3, 2022.¹⁸¹ As before, the comments were deeply divided, with some commenters supporting the waiver¹⁸² and others deeply opposed to a whale hunt.¹⁸³ Conservation groups and individuals have launched a thorough campaign in the comments, attacking the Supplemental DEIS on procedural and substantive grounds, claiming NOAA had prepared the DEIS based on outdated data, ignored the UME and failed to consider all possible alternatives.¹⁸⁴ Groups particularly objected to the perceived “haste” of the Supplemental DEIS, decrying the use of a scientific paper that had been “in prep” at the time NOAA published the DSEIS and expressing incredulity that the DSEIS did not make use of new ENP population estimates that had been pending at the time of the DSEIS’s publication.¹⁸⁵

¹⁸¹ *Makah Tribal Whale Hunt Chronology*, *supra* note 14.

¹⁸² See Michael Mayer, Comment on Reopening of Comment Period on a Supplemental Draft Environmental Impact Statement Regarding the Makah Tribe’s Request To Hunt Eastern North Pacific Gray Whales (Oct. 30, 2022), <https://www.regulations.gov/comment/NOAA-NMFS-2012-0104-0490>.

¹⁸³ See B Ker, Comment on Reopening of Comment Period on a Supplemental Draft Environmental Impact Statement Regarding the Makah Tribe’s Request To Hunt Eastern North Pacific Gray Whales (Oct. 30, 2022), <https://www.regulations.gov/comment/NOAA-NMFS-2012-0104-0493> (“Nobody should be getting any authorization to kill whales”); See Mary Branch, Comment on Reopening of Comment Period on a Supplemental Draft Environmental Impact Statement Regarding the Makah Tribe’s Request To Hunt Eastern North Pacific Gray Whales (Nov. 3, 2022), <https://www.regulations.gov/comment/NOAA-NMFS-2012-0104-0500> (describing whale hunts as a “barbaric and inhumane practice.”).

¹⁸⁴ Animal Welfare Inst., Letter Comment on Reopening of Comment Period on a Supplemental Draft Environmental Impact Statement Regarding the Makah Tribe’s Request to Hunt Eastern North Pacific Gray Whales (November 3, 2022), <https://www.regulations.gov/comment/NOAA-NMFS-2012-0104-0501>; See also Janet Romano Letter Comment on Reopening of Comment Period on a Supplemental Draft Environmental Impact Statement Regarding the Makah Tribe’s Request to Hunt Eastern North Pacific Gray Whales (November 3, 2022), <https://www.regulations.gov/comment/NOAA-NMFS-2012-0104-0502>; Toni Frohoff, Emailed Comment on Reopening of Comment Period on a Supplemental Draft Environmental Impact Statement Regarding the Makah Tribe’s Request to Hunt Eastern North Pacific Gray Whales (Oct. 30, 2022), <https://www.regulations.gov/comment/NOAA-NMFS-2012-0104-0491>.

¹⁸⁵ Peninsula Citizens for the Protection of Whales, Emailed Comment on Reopening of Comment Period on a Supplemental Draft Environmental Impact Statement Regarding the Makah Tribe’s Request to Hunt Eastern North Pacific Gray Whales (Nov. 6, 2022), <https://www.regulations.gov/comment/NOAA-NMFS-2012-0104-0504> (hereinafter PCPW Comment); See also Will Anderson, Emailed Comment on Reopening of Comment Period on a Supplemental Draft Environmental Impact Statement Regarding the Makah Tribe’s Request to Hunt Eastern North Pacific Gray Whales (Oct. 14, 2022), <https://www.regulations.gov/comment/NOAA-NMFS-2012-0104-0495>.

The comments are currently under review by NOAA, a process expected to take several months.¹⁸⁶ NOAA anticipates publishing a final Environmental Impact Statement in early 2023, although in light of the scientific and procedural concerns raised by conservation groups, it is possible that NOAA will conduct a new DSEIS or DEIS. Should NOAA release a final Environmental Impact Statement, NOAA would only release a final decision following a mandatory waiting period.¹⁸⁷

Even should NMFS choose to grant the MMPA waiver, however, this would not be the end of the battle for the Makah Tribe: AWI has already announced its plan to challenge any government decision that would authorize the Makah to resume whaling.¹⁸⁸ Even if courts uphold the waiver, the Tribe would then need to request a permit, which would need to undergo examination and be subject to public comment.¹⁸⁹ NMFS would grant the Tribe authorization to hunt whales under the Whaling Convention Act only after a permit is issued, and the Tribe would need to abide by an annually allocated NMFS whale quota.¹⁹⁰

V. WHAT HAPPENS NEXT

A. THE PUBLICATION OF A FINAL EIS

In September 2022, after publishing the DSEIS, NOAA released a series of assessments showing a thirty-eight gray whales and the birth of the fewest number of calves since 1994.¹⁹¹ In

¹⁸⁶ Letter from Kimberly Damon-Randall, Dir. Off. Of Protected Resources, NOAA, to Makah Indian Tribe (Dec.10, 2021) (on file with NOAA Fisheries) <https://media.fisheries.noaa.gov/2022-01/letters-next-steps-dec-2021.pdf>

¹⁸⁷ *Id.*

¹⁸⁸ *Aboriginal Subsistence Whaling*, *supra* note 13.

¹⁸⁹ *Makah Tribal Whale Hunt Frequently Asked Questions*, *supra* note 17.

¹⁹⁰ *Id.*

¹⁹¹ NOAA first started tracking gray whale calf numbers in 1994. *Gray Whale Numbers Continue Decline; NOAA Fisheries Will Continue Monitoring*, NOAA FISHERIES, https://www.fisheries.noaa.gov/feature-story/gray-whale-numbers-continue-decline-noaa-fisheries-will-continue-monitoring?utm_medium=email&utm_source=govdelivery (Last updated Dec. 29, 2022). *See also* Tomoharu Eguchi, Aimée R. Lang, & David W. Weller, *NOAA Technical*

light of these new scientific findings, and with numerous anti-waiver commenters citing these reports when criticizing the DSEIS,¹⁹² it is unlikely that NOAA will finalize the EIS in its current form. When new scientific evidence has been available that could potentially lead to a change in the assessment, NOAA has traditionally endeavored to conduct new impact analyses rather than proceed.¹⁹³

However, it is possible that, after so many years of studies, none of which determined that the tribal whale hunt would pose a meaningful negative impact on the ENP stock, and with the mitigating measures established in alternative seven of the DSEIS,¹⁹⁴ NOAA will decide to finalize the EIS. Should NOAA finalize the EIS, NOAA will likely decide to follow the administrative judge's recommendation and grant the waiver.¹⁹⁵ When that day comes, the Makah Tribe will likely face another coalition of conservation groups in court,¹⁹⁶ where they will hopefully achieve a vastly different outcome than they did in 2002.

B. IF CHALLENGED, THE WAIVER SHOULD BE UPHeld UNDER NEAH BAY TREATY

Recent Ninth Circuit cases have shown a return to the more traditional deferential treatment of Tribal treaty rights.¹⁹⁷ The court has placed great emphasis on upholding the intent of the native tribes, even when the wording of a treaty could be ambiguous or when so doing

Memorandum NMFS Eastern North Pacific Gray Whale Calf Production 1994-2022 (Sept. 2022) <https://repository.library.noaa.gov/view/noaa/46436>; Tomoharu Eguchi, Aimée R. Lang, & David W. Weller, NOAA Technical Memorandum NMFS Abundance And Migratory Phenology Of Eastern North Pacific Gray Whales 2021/2022 (Sept. 2022) <https://repository.library.noaa.gov/view/noaa/46437>.

¹⁹² See PCPW Comment, *supra* note 185.

¹⁹³ See *Makah Tribal Whale Hunt*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/west-coast/marine-mammal-protection/makah-tribal-whale-hunt> (last updated Oct. 24, 2022) (indicating that the 2012 DEIS was terminated and a new DEIS developed in light of new scientific information, then a supplement was prepared after the 2015 DEIS).

¹⁹⁴ See generally SUPPLEMENTAL DEIS, *supra* note 178.

¹⁹⁵ See Recommended Decision, *supra* note 171 at 155.

¹⁹⁶ *Aboriginal Subsistence Whaling*, *supra* note 13.

¹⁹⁷ See *United States v. Washington*, 853 F.3d 946, 963 (9th Cir. 2017).

would place additional burdens on a state.¹⁹⁸ For example, in *Washington v. United States*, commonly referred to as the “Culvert Case,”¹⁹⁹ and the most recent in a long line of decisions in an ongoing case between the state of Washington and Native tribes concerning tribal fishing rights, the Ninth Circuit determined that the Tribes’ treaty right to take fish required the state to maintain the population of salmon “sufficient to provide a ‘moderate living’ to the Tribes.”²⁰⁰ The twenty-one tribes involved in the litigation had treaties with the United States guaranteeing them “the right of taking fish, at all usual and accustomed grounds and stations;”²⁰¹ however, the state of Washington had erected highway culverts that obstructed the passage of salmon through the rivers and streams to their spawning grounds, contributing to a significant decline in stock populations.²⁰² In an examination of the treaty negotiations, the court determined that the principal purpose of the tribes “was to secure a means of supporting themselves once the Treaties took effect.”²⁰³ Governor Stevens, in his negotiations, “explicitly promised that ‘this paper secures your fish,’ and that there would be food ‘forever.’”²⁰⁴ Because salmon were so important to the tribes, the treaty not only imposed a duty to allow the tribes access to “their usual and accustomed fishing places” but also a duty to ensure “there would be sufficient fish to sustain

¹⁹⁸ See *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1165 (9th Cir. 2017) (discussion of whether the tribes understood whales to be within the scope of “fish.”).

¹⁹⁹ Bart J. Freedman, Benjamin A. Mayer, Endre M. Szalay, Thomas Scott Miller & Francesca M. Eick, “*Culvert Case*” *Affirmed*, K&L GATES HUB (June 15, 2018) <https://www.klgates.com/SCOTUS-Affirms-Ninth-Circuit-Culvert-Case-06-15-2018>.

²⁰⁰ *United States v. Washington*, 853 F.3d at 966.

²⁰¹ *Id.* at 962.

²⁰² Maureen Murphy, *UPDATE: Extent of Habitat Protection Required for Indian Treaty Fishing Sites: Washington v. United States*, CONGRESSIONAL RESEARCH SERVICE, <https://crsreports.congress.gov/product/pdf/LSB/LSB10138> (last updated June 12, 2018).

²⁰³ *United States v. Washington*, 853 F.3d at 964.

²⁰⁴ *Id.* at 964-65.

them.”²⁰⁵ Thus, the United States must uphold not merely the text, but the overall purpose of treaties with Native American tribes.²⁰⁶

Similarly, the Treaty of Neah Bay²⁰⁷ secures the Makah the “right of taking fish and of whaling . . . at usual and accustomed grounds and stations.”²⁰⁸ As demonstrated by the negotiation history, ensuring their right to whale was the Makah’s paramount concern, similar to the Culvert Case Tribes’ desire to preserve their right to take salmon.²⁰⁹ Like he did with the other treaties relied upon in the Culvert Case, Governor Stevens made explicit promises to the Tribe during treaty negotiations.²¹⁰ He promised the assistance of the United States in “securing a treaty-based right for the Makah to whale and promote Makah whaling.”²¹¹ From the perspective of the Tribe, the purpose of the treaty was to secure this right.²¹² Thus, the United States has a duty to support this purpose.²¹³ To overturn a lawfully issued waiver to the moratorium on taking whales would run directly counter to the purpose of the Treaty of Neah Bay.

²⁰⁵ *Id.* at 964.

²⁰⁶ *Id.* at 965-66.

²⁰⁷ Isaac Stevens, the first governor of the Washington territory, negotiated eight treaties with twenty-four tribes, including the treaties involved in the Washington Culverts case as well as the Makah’s Treaty of Neah Bay. *Treaty History with the Northwest Tribes*, WASHINGTON DEPARTMENT OF FISH AND WILDLIFE, <https://wdfw.wa.gov/hunting/management/tribal/history#:~:text=Stevens%20ultimately%20negotiated%20eight%20treaties,lands%20beyond%20these%20reserved%20areas> (last visited Mar. 17, 2023).

²⁰⁸ Treaty of Neah Bay, Makah-U.S., art. 4, Mar. 8, 1859, 12 Stat. 939.

²⁰⁹ Stevens, *supra* note 40 at 102 (indicating that the Makah Tribe gave up 91% of its land territory in consideration for the whaling provision.).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *See id.*

²¹³ *See* United States v. Washington, 853 F.3d at 965. [REDACTED]

In the Culvert Case, the State of Washington claimed that the “long delay in raising the culvert issue should defeat the tribes’ claims.”²¹⁴ The Ninth Circuit rejected this argument, stating that:

The United States may abrogate treaties with Indian tribes, just as it may abrogate treaties with fully sovereign nations. However, it may abrogate a treaty with an Indian tribe only by an Act of Congress that clearly expresses an intent to do so. Congress has not abrogated the Stevens Treaties. So long as this is so, the Tribes' rights under the fishing clause remain valid and enforceable. The United States, as trustee for the Tribes, may bring suit on their behalf to enforce the Tribes' rights, but the rights belong to the Tribes. The United States cannot, based on laches or estoppel, diminish or render unenforceable otherwise valid Indian treaty rights.²¹⁵

The Ninth Circuit decision, affirmed by an equally divided Supreme Court in 2018,²¹⁶ shows that the mere passage of time is not sufficient to waive explicit treaty rights.²¹⁷

Opponents to the Makah’s waiver have often cited the Makah’s decision to cease whaling activity in the 1920s as a reason that the federal government should not permit the Tribe to renew its traditional whale hunts.²¹⁸ However, as discussed in the Culvert Case, a delay in exercising native treaty rights cannot diminish or waive these rights, so long as the rights remain valid.²¹⁹

While the *Anderson* Court determined that the MMPA applied despite the tribe’s treaty right, the court did not explicitly consider whether the MMPA abrogated this right.²²⁰ Further, as discussed

²¹⁴ Murphy, *supra* note 202.

²¹⁵ United States v. Washington, 853 F.3d 946, 967 (9th Cir. 2017).

²¹⁶ Washington v. United States, 138 S. Ct. 1832 (2018).

²¹⁷ See Murphy, *supra* note 202.

²¹⁸ See Frohoff, *supra* note 184; See also Recommended Decision, *supra* note 171 at 25.

²¹⁹ United States v. Washington, 853 F.3d 946, 967 (9th Cir. 2017).

²²⁰ Anderson v. Evans, 371 F.3d 475, 501 (9th Cir. 2002).

earlier in this Note,²²¹ the *Anderson* Court incorrectly applied the law by imputing congressional intention based on conservation necessity rather than requiring a “clear and plain” intention of abrogating treaty rights.²²² Because there has been no showing of congressional intent to abrogate the Treaty of Neah Bay, the Makah’s right to whale is still a valid right. The right was not waived or lost during the long hiatus in the Tribe’s whaling practices. As such, the United States, and the courts, must honor the purpose of the Neah Bay Treaty and uphold a lawfully awarded waiver of the MMPA whaling moratorium.

EVEN IF THE MMPA ABROGATED THE NEAH BAY TREATY, THE WAIVER SHOULD BE UPHELD

Even if a court presiding over a future challenge to the waiver does not respect the Treaty of Neah Bay, it should still uphold NOAA’s formally issued waiver as a valid exercise of power expressly granted to an administrative agency. While the MMPA imposes a general moratorium on whaling, it also authorizes the Secretary of Commerce to grant waivers of this restriction.²²³ Well established caselaw indicates that agency decisions made “pursuant to statutory authority . . . have the force and effect of law” provided they conform with “procedural requirements imposed by Congress.”²²⁴ A reviewing court may not set aside such agency determinations so long as they are “rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute.”²²⁵

Should the NMFS grant the Makah’s waiver, the decision would clearly fall under this category. The MMPA expressly delegates the authority to make waiver decisions to the

²²¹ See discussion *infra* Part III.B.

²²² See *supra* part F; *United States v. Dion*, 476 U.S. 734, 738-739 (1986).

²²³ *Makah Tribal Whale Hunt Frequently Asked Questions*, *supra* note 17.

²²⁴ *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-303 (1979).

²²⁵ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

Secretary of Commerce.²²⁶ Further, the NMFS would make the decision after carefully reviewing the findings of the EIS. NOAA conducted numerous scientific studies examining the impact of the tribal hunt on the ENP whale population over the course of years to arrive at the EIS's conclusions.²²⁷ The MMPA requires the agency to consider the "best scientific evidence available"²²⁸ when making a decision to grant a waiver; however, the act does not require agencies to use the best scientific data "possible."^{229, 230} Agencies are not required to constantly develop and examine "new data to supplement the information presented" because then "there would be no end to the decision-making process."²³¹ Further, the administrative law judge followed the required MMPA process by thoroughly examining the scientific evidence available and hearing considerable expert testimony from both sides of the debate before submitting his recommendation.²³² If the NMFS grants the waiver, the court should uphold it because such a decision would be the rational determination of an agency, acting within its defined scope of authority, having followed the required procedures.

If the opposition raises the argument, as they did in *Anderson*, and in the administrative hearing,²³³ that granting a waiver to the Makah Tribe will result in a slippery slope in which the NMFS must grant countless other tribes permission to whale, the court should dismiss this concern. The Makah are the only Native American Tribe in the United States with a treaty that expressly provides for a right to hunt whales.²³⁴ Further, in the administrative hearing, no party

²²⁶ 16 U.S.C.A. § 1371 (a)(3)(A).

²²⁷ See *Makah Tribal Whale Hunt Chronology*, *supra* note 14.

²²⁸ 16 U.S.C.A. § 1371 (a)(3)(A).

²²⁹ Recommended Decision, *supra* note 171, at 31.

²³⁰ *Id.*

²³¹ *Id.*

²³² See *id.* at 32-69 (first explaining how the judge planned to assess the scientific data to determine if the MMPA requirements were met, then summarizing the expert testimony and scientific evidence presented).

²³³ *Id.* at 125; *Anderson*, 371 F.3d at 493.

²³⁴ *Eligon*, *supra* note 4.

was able to identify any other “...individuals, tribes, or other groups or organizations who have expressed...” an interest in resuming whaling practices.²³⁵ Additionally, the United States does not have the power alone to authorize the right to take whales—the ICW must first grant a group a quota before NMFS could authorize a take.²³⁶ The ICW first approved a take quota for aboriginal hunts of gray whales in the United States and Russia in 1998,²³⁷ yet no other tribes have received similar quotas since then.²³⁸ If the ICW authorize other take quotas, the Tribe would still need to request an exemption from the MMPA.²³⁹ This exemption “. . . would have to be evaluated on its particular facts and circumstances, and the public would have the opportunity to participate in the process . . .” in the same manner as the current Makah waiver request.²⁴⁰ The fear of a slippery slope to worldwide tribal whale slaughter is simply unfounded and is not a reason to justify overruling a lawfully granted waiver.

Furthermore, the court should not consider any concerns regarding whether the Makah’s hunt qualifies as an “aboriginal subsistence hunt” when deciding whether to uphold a waiver. Although the Ninth Circuit discussed the issue in *Anderson*,²⁴¹ conservation groups attempted to raise the issue during the administrative hearing,²⁴² and the Animal Welfare Institute cites the Tribe’s lack of a “continuing nutritional or subsistence need” for the hunts as reason for their

²³⁵ Recommended Decision, *supra* note 171, at 125.

²³⁶ *Id.*

²³⁷ Miller, *supra* note 6, at 258.

1. ²³⁸ See *Descriptions of the USA Aboriginal Subsistence Hunts*, INTERNATIONAL WHALING COMMISSION, <https://iwc.int/management-and-conservation/whaling/aboriginal/usa> (last visited Feb. 26, 2024) (listing the aboriginal subsistence hunts in the United States which include only Alaskan natives and the Makah Tribe of Washington State).

²³⁹ Recommended Decision, *supra* note 171, at 126.

²⁴⁰ *Id.*

²⁴¹ *Anderson v. Evans*, 371 F.3d 475, 484 (9th Cir. 2002).

²⁴² See Recommended Decision, *supra* note 171, at 25.

opposition to the waiver,²⁴³ this issue is not relevant to the decision to uphold or deny a waiver to the whale take moratorium under the MMPA and is outside of the court's jurisdiction. Waivers under the MMPA are not restricted to "aboriginal subsistence hunts."²⁴⁴ The ICW, not any U.S. agency, considers this factor as part of its take quota analysis,²⁴⁵ and the ICW has determined that the Makah hunt qualifies as such a hunt.²⁴⁶ A court should not consider the issue when determining whether to overrule a lawfully granted waiver to the whaling moratorium under the MMPA, because the issue of whether the Makah hunt is a "subsistence hunt" does not relate to the requirements for a waiver under the MMPA.

VI. CONCLUSION

The Makah Tribe's quest to regain their culture and traditional whaling practice may finally be nearing its end. At each step of the journey, the Tribe attempted to do the right thing; however, each time, conservation groups used the Tribe's actions against them in both the courts of law and public opinion. The Tribe ceded 91% of its lands in return for a treaty right to take fish and whales and a promise that the United States would protect the Tribe's right to hunt whales,²⁴⁷ yet today the United States both controls the lands once owned by the Makah Tribe and prohibits the Tribe from whaling.²⁴⁸ When the Tribe chose to voluntarily cease its traditional whale hunts in the 1920s, it believed that doing so would help preserve the whale populations, allowing the Tribe to one day hunt again.²⁴⁹ The Makah people could not have

²⁴³ *Aboriginal Subsistence Whaling*, *supra* note 13.

²⁴⁴ See 16 U.S.C. § 1371 (a)(3)(A).

²⁴⁵ *Aboriginal Subsistence Whaling*, *supra* note 13.

²⁴⁶ Recommended Decision, *supra* note 171, at 20.

²⁴⁷ Stevens, *supra* note 40, at 102.

²⁴⁸ See *Makah Tribal Whale Hunt Chronology*, *supra* note 14 (the tribe cannot whale without a waiver to the MMPA, which has yet to be granted).

²⁴⁹ Brand, *supra* note 8, at 289.

known that groups would one day use this action as evidence that the Tribe's hunt is not a subsistence hunt and thus should remain prohibited.²⁵⁰ The Makah worked with the appropriate government agencies to request and receive a whale take quota from the IWC before preparing to resume the traditional hunt, in accordance with the Treaty of Neah Bay;²⁵¹ yet opponents objected, claiming that the agency should have conducted an Environmental Assessment prior to authorizing the hunt.²⁵² When NOAA promptly responded to those complaints and immediately conducted an EA, opponents rejected the EA, claiming it was clearly made only to support the pre-existing NOAA approval.²⁵³ During the 1999 whale hunt, the Tribe followed veterinary advice and used modern equipment to ensure the whale would not suffer unnecessarily; however, images of Tribe members hunting whales with machine guns invoked public outcry and caused the public to doubt that there was anything "traditional" about the hunt.²⁵⁵ The Tribe asked news agencies to respect its sacred traditions and not broadcast its rituals for public viewing,²⁵⁶ and now, likely because they never witnessed the sacred rituals, opponents of the waiver claim there "is nothing 'sacred' about the proposed slaughter."²⁵⁷ While the Tribe promptly followed every procedural step requested of it by the courts, the Ninth Circuit Court of Appeals still decided that those steps were insufficient, demanding NOAA conduct an EIS and formally authorize a waiver to the whale take moratorium under the MMPA before the Tribe could exercise this treaty right.²⁵⁸ Even then, the Tribe determined not to appeal

²⁵⁰ *Aboriginal Subsistence Whaling*, *supra* note 13.

²⁵¹ Stevens, *supra* note 40, 104-05.

²⁵² *Id.*

²⁵³ Stevens, *supra* note 40, at 106.

²⁵⁵ Anderson, *supra* note 87.

²⁵⁶ *Id.*

²⁵⁷ Tom Thiersch, Emailed Comment to Public Meetings and Request for Comments on a Draft Environmental Impact Statement Regarding the Makah Tribe's Request To Hunt Eastern North Pacific Gray Whales (Apr. 28, 2015), <https://www.regulations.gov/comment/NOAA-NMFS-2012-0104-0172>.

²⁵⁸ *Anderson v. Evans*, 371 F.3d 475, 501-502 (9th Cir 2002).

the decision and agreed to pursue an MMPA exemption as requested.²⁵⁹ NOAA conducted multiple EIS studies, yet conservationist groups challenged each one.²⁶⁰ Groups would often ask for extensions while claiming that an extension would not harm any of the parties, then once those extensions were granted, they changed positions, claiming that the data used to support the study is now out-of-date.²⁶¹ Despite conservationist groups targeting procedural issues in their challenges to the Makah's pursuit of the exemption, conservationist groups consistently indicate that their goal is not to ensure that NOAA grants the exemption based on the best scientific evidence and after following all procedural steps, but rather to "permanently relegate the tribe's whaling to the history books."²⁶²

Although NOAA agreed to support the Tribe in its quest to resume whaling in 1996 and has consistently appeared on the side of the Makah Tribe in litigation, the Federal Government refuses to take a hard stance in support of the Tribe's right.²⁶³ It has continued to grant extensions and agreed to conduct additional studies in response to the complaints of conservation groups.²⁶⁴

The time has come for the Federal Government to live up to the promises it made to the Makah Tribe in 1855 and 1996 and support the Tribe's treaty-preserved right. As discussed in

²⁵⁹ Stevens, *supra* note 40 at 121.

²⁶⁰ See *infra* Part V.

²⁶¹ Compare Animal Welfare Inst., Letter Comment on Request for Public Comment on a Supplemental Draft Environmental Impact Statement Regarding the Makah Tribe's Request To Hunt Eastern North Pacific Gray Whales (Jul. 31, 2022), <https://www.regulations.gov/comment/NOAA-NMFS-2012-0104-0464> with Animal Welfare Inst., Letter Comment on Reopening of Comment Period on a Supplemental Draft Environmental Impact Statement Regarding the Makah Tribe's Request to Hunt Eastern North Pacific Gray Whales (November 3, 2022), <https://www.regulations.gov/comment/NOAA-NMFS-2012-0104-0501>.

²⁶² *US Tribe's Quest to Kill Whales Moves Closer to Reality*, AWI QUARTERLY, Spring 2015, at 13, 13 https://awionline.org/sites/default/files/awi_quarterly_issue/digital_magazine/15SpringQ-FinalWeb_0.pdf

²⁶³ See *Metcalf v. Daley*, 214 F.3d 1135, 1137 (James Baker, Administrator of National Oceanic and Atmospheric Administration appearing as a Defendant alongside the Makah Tribe); *Anderson v. Evans*, 371 F.3d 475, 480 (9th Cir. 2002) (Conrad Lautenbacher, Administrator, National Oceanic and Atmospheric Administration appearing alongside the Makah Tribe as Appellee-Defendants).

²⁶⁴ See *infra* Part V.

Washington v. United States, the federal government not only has a duty to uphold the written language of the treaties made with Native American Tribes, but also the duty to uphold the purpose of such treaties.²⁶⁵ In the case of the Makah Tribe's Treaty of Neah Bay, both the text and the purpose are clear: the United States must protect the Tribe's "right of taking fish and of whaling . . . at usual and accustomed grounds and stations."²⁶⁶ Even if the MMPA limits this right, as determined under the questionable legal analysis of the *Anderson* Court,²⁶⁷ the Tribe has followed all required procedures under the MMPA to attain a waiver of the whale take moratorium. Because none of the EISs published to date have determined that authorizing the hunt would pose a meaningful negative impact on the ENP stock,²⁶⁸ NMFS should decide to grant the waiver. Should conservationist groups challenge the Makah in court once more, the court should uphold the waiver as the rational determination of an administrative agency, acting within its defined scope of authority, having followed the required procedures.²⁶⁹ The Makah Tribe should be able to whale once more.

²⁶⁵ *United States v. Washington*, 853 F.3d 946, 964.

²⁶⁶ Treaty of Neah Bay, Makah-U.S., art. 4, Mar. 8, 1859, 12 Stat. 939.

²⁶⁷ See *infra* Part IV.B.

²⁶⁸ See *generally* SUPPLEMENTAL DEIS, *supra* note 178.

²⁶⁹ See *infra* Part VI.C.