

Whaling in Circles: The Makahs, the International Whaling Commission, and Aboriginal Subsistence Whaling

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In Anderson v. Evans, the Ninth Circuit held that the International Whaling Commission (“IWC”) Schedule’s approval of a quota to hunt whales for the Native American Makah Tribe (“Makahs”) violated the Marine Mammal Protection Act. The implications of this holding were troubling: despite the U.S. government and the IWC approving, on domestic and international levels, the Makahs’ whaling proposal in the 1990s, the Makahs were still unable to hunt whales legally. The Makahs’ right to whale stemmed from the 1855 Neah Bay Treaty, an agreement between the Makahs and the U.S. government in which the government promised the Makahs the right to whale. However, the enactment of a domestic law called the Whaling Convention Act in 1949 superseded the treaty, rendering it void.

Yet, enforcement of these domestic and international approvals presents problems. First, allowing the Makahs to resume whaling risks setting a dangerous precedent that will trigger a “domino effect,” causing other countries to resume whaling as well. Further, the international community might perceive the IWC’s approval of the Makahs’ whaling as favoritism to the United States. Such a perception might lead to further fragmentation of the global community regarding whaling. Accordingly, this Note suggests that the moratorium on whaling be lifted for specific whale stocks because oftentimes, a complete ban results in unnecessary and avoidable violations of the law. Further, this Note suggests that other countries be allowed to whale under science-based IWC regulations to achieve international consensus and yield better compliance.

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TABLE OF CONTENTS

INTRODUCTION.....	294
I. HISTORY OF WHALING.....	296
II. THE MAKAHS AND WHALING.....	297
III. THE INTERNATIONAL CONVENTION FOR THE REGULATIONS OF WHALING	299
A. THE IWC AND ITS RIVAL	299
B. THE ROLE AND INFLUENCE OF THE UNITED STATES AND NONGOVERNMENTAL ORGANIZATIONS	302
IV. U.S. LAWS AND COURT DECISIONS AFFECTING THE MAKAHS' RIGHT TO WHALE	304
A. NEAH BAY TREATY.....	304
B. THE WHALING CONVENTION ACT'S EFFECT ON THE NEAH BAY TREATY	305
C. NATIONAL ENVIRONMENTAL POLICY ACT.....	307
D. MARINE MAMMAL PROTECTION ACT.....	307
E. NINTH CIRCUIT DECISIONS	308
V. THE MAKAHS' PROPOSAL: INTERNATIONAL PROBLEMS, PRECEDENT, AND PERCEPTION	311
VI. THE CURRENT STATE OF AND ISSUES FACED BY WHALING	312
VII. SOLUTION: HUNTING FOR A MIDDLE GROUND	315
A. LIFT THE MORATORIUM FOR CERTAIN WHALE STOCKS	316
B. STRONGER IWC ENFORCEMENT AUTHORITY.....	317
C. CLARIFY THE ABORIGINAL SUBSISTENCE EXCEPTION INTERNATIONALLY AND DOMESTICALLY.....	318
CONCLUSION	320
APPENDIX: LIST OF ABBREVIATIONS.....	321

INTRODUCTION

Whales are beautiful, majestic, and intelligent animals capable of feeling pain, yet are playful and humorous.¹ Whales have roamed Earth's seas for more than ten million years,² and humans have been hunting whales for only a few thousand of those years.³ The Native American Makah Tribe (the "Makahs"), located in northwestern Washington,⁴ had

1. Rupa Gupta, *Indigenous Peoples and the International Environmental Community: Accommodating Claims Through a Cooperative Legal Process*, 74 N.Y.U. L. REV. 1741, 1759 (1999).

2. Cliff M. Stein, *Whales Swim for Their Lives as Captain Ahab Returns in a Norwegian Uniform: An Analysis of Norway's Decision to Resume Commercial Whaling*, 8 TEMP. INT'L & COMP. L.J. 155, 157 (1994).

3. Peter J. Stoett, *THE INTERNATIONAL POLITICS OF WHALING* 152 (1997).

4. *Metcalf v. Daley*, 214 F.3d 1135, 1137 (9th Cir. 2000).

hunted whales for thousands of years⁵ when they signed the Neah Bay Treaty (“Treaty”) with the U.S. government in 1855 for the right to continue whaling.⁶ However, in the 1920s, the Makahs voluntarily ceased whaling due to concerns with whale extinction as a result of commercial whaling.⁷ In 1946, the international whaling community established the International Convention for the Regulation of Whaling (“ICRW”) in an attempt to regulate whaling globally.⁸ In the 1960s and 70s, the United States enacted the Whaling Convention Act (“WCA”) and the Marine Mammal Protection Act (“MMPA”), which prohibited whaling domestically.⁹ The IWC, an organ of the ICRW, implemented a complete ban on commercial whaling in 1986, but made an exception for aboriginal subsistence whaling.¹⁰ As a result, whaling became prohibited under both U.S. and international law.

In the 1990s, the Makahs asked the U.S. government to allow them to resume subsistence whaling.¹¹ However, under international and U.S. law, it remains unclear whether the U.S. government may allow its Native American tribes to hunt whales. That is, allowing the U.S. government to approve subsistence whaling opens the questions of who determines whether a tribe qualifies for an aboriginal subsistence exception under the IWC and who determines the makeup of the quota.

When the Makahs wanted to resume whaling, the WCA had already superseded the Neah Bay Treaty, thus rendering the Makahs’ Treaty right to hunt whales void.¹² Nonetheless, the U.S. government presented the Makahs’ proposal to the IWC and successfully obtained a quota on their behalf.¹³ However, the Ninth Circuit subsequently determined that the U.S. government’s representation of the Makahs violated domestic laws.¹⁴ Therefore, although the U.S. government and the IWC permitted the Makahs to hunt whales, they were still unable to do so legally.¹⁵

5. *Id.*

6. Treaty of Neah Bay, U.S.-Makah, Jan. 31, 1855, 102 Stat. 939.

7. *Metcalf*, 214 F.3d at 1137.

8. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1050 (4th ed. 2011). By 1946, the Makahs had voluntarily ceased whaling due to concerns with rapidly decreasing whale stocks. *Metcalf*, 214 F.3d at 1137.

9. 16 U.S.C. § 1361 (2013).

10. See *Anderson v. Evans*, 314 F.3d 1006, 1012 n.7 (2002) (prohibiting the taking or killing of gray whales except where whale meat and products will be used by aborigine subsistence); Brian T. Hodges, *The Cracking Facade of the International Whaling Commission as an Institution of International Law: Norwegian Small-Type Whaling and the Aboriginal Subsistence Exemption*, 15 J. ENVTL. L. & LITIG. 295, 303–04 (2000).

11. *Metcalf*, 214 F.3d at 1138.

12. See *infra* Part IV.B.

13. *Metcalf*, 214 F.3d at 1140; see also *Anderson*, 314 F.3d at 1013.

14. See *Metcalf*, 214 F.3d at 1135; *Anderson*, 314 F.3d at 1006.

15. See *Metcalf*, 214 F.3d at 1135; *Anderson*, 314 F.3d at 1006.

Parts I and II of this Note provide a brief history of whaling and the Makahs, followed by international and U.S. laws regarding whaling in Parts III and IV. Part IV also discusses the reasons the Ninth Circuit ruled against the Makahs' whaling plans in two cases. Part V focuses on the current fragmentation within the international community and the risks of allowing the Makahs to hunt whales. Part VI explains the current state of whaling and the revival of certain whale stocks. Finally, Part VII of this Note presents a viable solution: lifting the moratorium and allowing whaling to resume for specific whale stocks under science-based IWC regulations. This will also clarify whether the U.S. government may allow certain Native American tribes to hunt whales and how the quota is to be determined.

I. HISTORY OF WHALING

Humans have been whaling for thousands of years,¹⁶ using nearly every part of the animal.¹⁷ Traditionally, humans ate the whales' meat, organs, and blubber, and used baleen, oil, and bones for various purposes.¹⁸ Whales were considered "a free resource, a gift from nature available to anyone who would hunt and kill them."¹⁹ Before the Basques of Biscay, modern-day Spain, initiated industrialized and organized whaling in the eleventh century,²⁰ humans lacked the necessary technology to catch whales in large numbers, and overexploitation was not an issue.²¹ Whaling gradually increased, and by the fifteenth and sixteenth centuries, whaling spread to the North Atlantic where the Dutch and the British had begun whaling.²² Less than a century later, several whale species were on the verge of extinction.²³ Throughout the sixteenth and seventeenth centuries, whaling brought "untold wealth" to nations and "their national treasuries."²⁴ And in the nineteenth century, whale carcasses were worth over \$2000, making whaling a highly

16. See Stoett, *supra* note 3.

17. Sarah Suhre, *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, 307 (1999); Meghan E. Marrero & Stuart Thornton, *Big Fish: A Brief History of Whaling*, NAT'L GEOGRAPHIC (Nov. 1, 2011), <http://education.nationalgeographic.com/education/news/big-fish-history-whaling/>.

18. See Suhre, *supra* note 17; see Marrero & Thornton, *supra* note 17.

19. Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 28 (1991).

20. Gerry J. Nagtzaam, *The International Whaling Commission and the Elusive Great White Whale of Preservationism*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 375, 389 (2009); see also Suhre, *supra* note 17.

21. See Nagtzaam, *supra* note 20.

22. *Id.*; see also Suhre, *supra* note 17.

23. See Suhre, *supra* note 17.

24. See Nagtzaam, *supra* note 20.

profitable industry.²⁵ Although whaling began having a noticeable negative impact on whale stocks, the short-term economic incentive deterred nations from ceasing whaling, “leading to what we would now consider to be a classic instance of the ‘tragedy of the commons.’”²⁶

Americans began whaling in the eighteenth century, and by the nineteenth century, they had developed “one of the world’s leading whaling fleets,” which depleted whale stocks on America’s coasts.²⁷ In the late nineteenth and early twentieth centuries, technological developments made whaling easier and more efficient than ever.²⁸ Whaling technology at that stage included harpoon guns and floating factory ships powered by steam engines, which enabled whalers to catch faster moving and larger whales, and to load them onto the floating factory ships.²⁹ As a result, “more whales were killed in the first forty years of the twentieth century than in the previous four hundred years.”³⁰ During that time, countries became concerned with the depleting whale stocks worldwide and began regulating commercial whaling activities in order to prevent whales from going extinct.³¹

II. THE MAKAHS AND WHALING

The Makah Tribe is a Native American tribe that still resides on Washington’s Olympic Peninsula.³² The Makahs have a 1500-year tradition of whale hunting,³³ but old deposits found on Makah territory, including barbs from harpoons and gray whale bones, date back 2000 years.³⁴ Unlike the global trend, however, the Makahs did not engage in commercial whaling. Rather, they hunted for subsistence and cultural purposes.³⁵ Whales once accounted for up to eighty percent of the Makahs subsistence, “and the rigorous training and preparation required

25. *Id.* at 390. In 1875, \$2000 was equivalent to over \$40,000 in 2014. See *Relative Values – US \$*, MEASURINGWORTH.COM (last visited Dec. 18, 2015) (using Initial Year of 1875, Initial Amount \$2000, and Desired Year 2014).

26. Nagtzaam, *supra* note 20, at 390–91. “Tragedy of the commons” occurs when independent actors progressively exploit and ultimately destroy a common resource. See THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 557 (Daniel Bodansky et al. eds., 2007).

27. See Stein, *supra* note 2, at 159.

28. *Id.* at 159–61.

29. *Id.*; see also Nagtzaam, *supra* note 20, at 391.

30. David S. Lessoff, *Jonah Swallows the Whale: An Examination of American and International Failures to Adequately Protect Whales from Impending Extinction*, 11 J. ENVTL. L. & LITIG. 413, 417 (1996).

31. See Nagtzaam, *supra* note 20, at 391–92.

32. *Metcalf v. Daley*, 214 F.3d 1135, 1137 (9th Cir. 2000).

33. *Id.*

34. 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, 323 (1997).

35. *Id.*

for a hunt involved the entire community.”³⁶ For the Makahs, “[w]haling provided not merely food, clothing and shelter—it formed an integral part of the world view, heritage, and identity.”³⁷

The Makahs are known to target the Eastern North Pacific gray whale, whose annual migration passes near the Olympic Peninsula.³⁸ In 1855, the Makahs signed the Neah Bay Treaty with the U.S. government, relinquishing most of their land in exchange for the continued right to whale.³⁹ In the 1920s, the Makahs voluntarily ceased whaling because “the widespread commercial whaling had devastated the population of gray whales almost to extinction.”⁴⁰ At that time, estimates of the gray whale population were less than 5000.⁴¹ Thus, “notwithstanding the important cultural role this practice played in their community,” the Makahs did not hunt whales for the next seventy years.⁴² The Makahs thought of this as a temporary solution and always planned to resume whaling once the whale stocks had recovered.⁴³

In 1970, nearly fifty years after the Makahs ceased whaling, the gray whale was on the endangered species list created by the domestic Endangered Species Act.⁴⁴ By 1993, the Eastern North Pacific stock of gray whales recovered and was no longer in danger of extinction.⁴⁵ The following year, the gray whale was no longer on the endangered species list.⁴⁶ Subsequently, the Makahs decided to revive their important cultural practice of whaling.⁴⁷ The Makah leaders claimed that resuming whaling would “not only contribute to the [Makahs’] subsistence and economic needs, but it [would] also help to revive a sense of community, self-worth and spirituality.”⁴⁸ However, by the 1990s, the ICRW, and its domestic counterpart, the WCA, prohibited whaling all together. As a result, the Makahs had to go through domestic and international hurdles to resume whaling.

36. *Id.* at 323–25.

37. *Id.* at 325.

38. *Metcalf*, 214 F.3d at 1137.

39. *Id.*

40. *Id.*

41. See Watters & Dugger, *supra* note 34. In 2007, estimates of the same stock were between 17,000 and 22,000. *Whale Population Estimates*, INT’L WHALING COMMISSION, <http://iwc.int/estimate#table> (last visited Dec. 18, 2015).

42. *Metcalf*, 214 F.3d at 1137.

43. See Watters & Dugger, *supra* note 34.

44. *Metcalf*, 214 F.3d at 1138. This Act was previously known as the Endangered Species Conservation Act of 1969. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Watters & Dugger, *supra* note 34, at 324.

III. THE INTERNATIONAL CONVENTION FOR THE REGULATIONS OF WHALING

One of the major international hurdles that the Makahs faced was the ICRW, which ultimately led to the implementation of the moratorium. The international community established the ICRW in 1946 due to concerns with over-hunting whales⁴⁹ and pressure from the United States and nongovernmental organizations (“NGOs”).⁵⁰ Since its establishment, the ICRW has become the dominant international agreement regulating whaling.⁵¹ Because the ICRW’s regulations extend to all waters in which whaling occurs, it protects whales throughout their migration.⁵² The ICRW’s original goal was to provide a system for managing whale fishery stocks at a sustainable level.⁵³ However, the preamble’s contradictory goals of biodiversity conservation and fishery management have sparked a debate over the ICRW’s true purpose.⁵⁴ Nonetheless, since its creation, the ICRW’s mandate has undoubtedly shifted from regulations of whaling fishery to a moratorium, or a complete ban, on commercial whaling.⁵⁵ The ICRW implemented the moratorium through the IWC.

A. THE IWC AND ITS RIVAL

Article III of the ICRW created the IWC, which ultimately implemented the moratorium on commercial whaling.⁵⁶ The IWC is considered the “ICRW’s most important innovation,”⁵⁷ and is composed of one member from each “Contracting Government.”⁵⁸ Although the IWC has no enforcement authority, Contracting Governments are required to report the number of all hunted whales to the IWC.⁵⁹ The IWC uses the data from these reports, studies, and investigations to determine the level of protection necessary for certain whale stocks.⁶⁰ Such protections become part of the ICRW Schedule⁶¹ through

49. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849.

50. See Watters & Dugger, *supra* note 34, at 321–32.

51. See HUNTER ET AL., *supra* note 8, at 1049.

52. *Id.* at 1050.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1050–54.

57. *Id.* at 1050.

58. International Convention for the Regulation of Whaling, *supra* note 49, at art. III. Contracting Government is “any Government which has deposited an instrument of ratification or has given notice of adherence to this Convention.” *Id.* at art. II.

59. See HUNTER ET AL., *supra* note 8, at 1051.

60. *Id.* at 1050–51.

61. The ICRW Schedule is “[a]n integral part of the Convention” and is legally binding on a Contracting Government. *History and Purpose*, INT’L WHALING COMMISSION, <https://iwc.int/history->

amendments, which require a three-fourths majority vote of the Contracting Governments in order to pass.⁶²

The moratorium includes two exceptions. The first is an exception for scientific research specifically outlined in Article VIII of the ICRW.⁶³ This exception will only be briefly discussed below in Part III.B, as it is outside the scope of this Note. The second exception, which is the focus of this Note, is the aboriginal subsistence exception.⁶⁴ This exception originally⁶⁵ allowed for the taking or killing of whales “when the meat and products of such whales are to be used exclusively for local consumption by the aborigines.”⁶⁶ The IWC has recognized the difference between aboriginal subsistence whaling and commercial whaling since the IWC’s establishment.⁶⁷ While commercial whaling seeks to maximize catches and profit, aboriginal whaling is practiced for cultural and survival purposes.⁶⁸

Despite the inclusion of two exceptions, the moratorium did not appease everyone, and since its implementation, the global community has been fragmented regarding whaling.⁶⁹ In 2000, the IWC’s secretary of twenty-four years retired and issued a stark warning:

Whaling is going on at a commercial level. It’s outside IWC control. I would think it much better that it was brought within international regulations and oversight. I think the [IWC] will need to move forward in measures which would allow controlled whaling, otherwise it will lose credibility. If the [IWC] cannot set its house in order, people will start to ask: “Why do we need it at all?”⁷⁰

While some countries, including the United States, support the moratorium, others have lodged objections to it and therefore are not bound by it.⁷¹ The moratorium went into effect in 1986 and was supposed

and-purpose (last visited Dec. 18, 2015). It “sets out specific measures that the IWC has collectively decided are necessary in order to regulate whaling and conserve whale stocks.” *Id.*

62. See HUNTER ET AL., *supra* note 8, at 1051.

63. International Convention for the Regulation of Whaling, *supra* note 49, at art. VIII.

64. See *Anderson v. Evans*, 314 F.3d 1006, 1012 n.7 (2002) (prohibiting the taking or killing of gray whales except where whale meat and products will be used by aborigine subsistence).

65. The IWC has amended the original language of the exception. *Metcalf v. Daley*, 214 F.3d 1135, 1140 (9th Cir. 2000).

66. See *Anderson*, 314 F.3d at 1012 n.7; see also International Convention for the Regulation of Whaling, *supra* note 49, at art. V; Hodges, *supra* note 10, at 301.

67. *Aboriginal Subsistence Whaling*, INT’L WHALING COMMISSION, <http://iwc.int/aboriginal> (last visited Dec. 18, 2015).

68. *Id.*; see also Hodges, *supra* note 10, at 303.

69. See Hodges, *supra* note 10, at 324.

70. See HUNTER ET AL., *supra* note 8, at 1059.

71. See Hodges, *supra* note 10, at 303; see also HUNTER ET AL., *supra* note 8, at 1054. Pursuant to ICRW Article V, section 3, an amendment “shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn.” International Convention for the Regulation of Whaling, *supra* note 49, at art. V, § 3 (emphasis added).

to provide for a cessation of all commercial whaling—rather than an outright ban of all whaling—until a comprehensive review was completed.⁷² However, in 1990, upon completion of the review, the IWC decided to extend the moratorium.⁷³ The controversial decision led to the resignation of the head of the IWC Scientific Committee, who accused “the IWC of treating the committee’s unanimous recommendations with contempt.”⁷⁴

Frustrated with the continuing moratorium, Iceland, Norway, Greenland, and the Faeroe Islands created the North Atlantic Marine Mammal Commission (“NAMMCO”), a new “rival”⁷⁵ international whaling institution in 1992.⁷⁶ The creation of NAMMCO, in and of itself, challenged the legitimacy of the IWC.⁷⁷ NAMMCO is similar to the IWC in several respects. NAMMCO “focuses on modern approaches to the study of the marine ecosystem as a whole, and to understanding better the role of marine mammals in this system.”⁷⁸ NAMMCO also calls for cooperation in the conservation and management of whales and other marine mammals.⁷⁹ The most important difference between NAMMCO and the IWC, however, is that NAMMCO does not prohibit all commercial whaling. Instead, NAMMCO allocates whaling quotas based on scientific data and sustainable management efforts.⁸⁰ NAMMCO provides an alternative for countries that decide to withdraw from the IWC⁸¹ or opt out of specific IWC obligations, for instance, complying with the moratorium.⁸²

The IWC was intended to provide a framework for international whaling regulation. However, the IWC’s moratorium, even with its two exceptions, proved too strict for some countries. As a result, pro-whaling countries were forced to create their own regional regulatory body in order to continue whaling legally, which in turn challenged the legitimacy of the IWC. Consequently, the IWC’s moratorium further fragmented the international community regarding whaling.

72. See HUNTER ET AL., *supra* note 8, at 1054.

73. *Id.*

74. *Id.*

75. See Suhre, *supra* note 17, at 314.

76. See HUNTER ET AL., *supra* note 8, at 1054.

77. *Id.*

78. *Agreement*, N. ATLANTIC MARINE MAMMAL COMM’N, <http://www.nammco.no/about-nammco/nammco-agreement/> (last visited Dec. 18, 2015).

79. *About NAMMCO*, NORTH ATLANTIC MARINE MAMMAL COMMISSION, <http://www.nammco.no/about-nammco> (last visited Dec. 18, 2015).

80. See Suhre, *supra* note 17, at 315.

81. See *Japan Threatens to Set Up, or Join, Rival to IWC*, WHALE & DOLPHIN CONSERVATION (Sept. 1, 2003, 4:30 PM) <http://us.whales.org/news/2003/09/japan-threatens-to-set-up-or-join-rival-to-iwc> (discussing Japan’s consideration of joining NAMMCO).

82. See HUNTER ET AL., *supra* note 8, at 1057.

B. THE ROLE AND INFLUENCE OF THE UNITED STATES AND
NONGOVERNMENTAL ORGANIZATIONS

The U.S. government is at the heart of IWC's moratorium because it has taken a lead role in protecting whales.⁸³ Because the IWC has no enforcement mechanism, conservation groups lobbied Congress to pass legislation that would give teeth to IWC regulations.⁸⁴ Today, the main legal provision for enforcing international whaling regulations is contained in two pieces of U.S. law.⁸⁵ The first is the Pelly Amendment to the Fishermen's Protective Act.⁸⁶ The Pelly Amendment authorizes the President to embargo wildlife products of foreign countries when those countries' nationals engage "in trade or taking that diminishes the effectiveness of an international program in force with respect to the United States for the conservation of endangered or threatened species."⁸⁷ The second enforcement mechanism is the Packwood-Magnuson Amendment to the Fishery Conservation and Management Act.⁸⁸ Congress enacted the Packwood-Magnuson Amendment to restrict the discretion in the Pelly Amendment through mandatory sanctions on violators.⁸⁹ As a result, "the effectiveness of the IWC can be directly linked, in large part, to the United States' willingness to support the IWC unilaterally[.]"⁹⁰

Although the United States gave the IWC moratorium teeth through the use of trade sanctions, the U.S. government has not had much success imposing sanctions on violators for two reasons.⁹¹ First, instead of imposing sanctions on violators, the United States has tried to use the threat of sanctions as a bargaining chip to obtain favorable future behavior.⁹² Second, the U.S. Supreme Court interpreted one of the laws "in a manner which has done little to strengthen the United States' and IWC's goal of preserving and protecting [whales.]"⁹³

83. See Lessof, *supra* note 30, at 424.

84. *Id.* at 418.

85. *Id.* at 424.

86. *Id.* at 424-27.

87. *Pelly Amendment*, U.S. FISH & WILDLIFE SERVS. INT'L AFFAIRS, <http://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/pelly-amendment.html> (last visited Dec. 18, 2015).

88. See Lessof, *supra* note 30, at 428-29.

89. *Id.*

90. *Id.* at 424.

91. *Id.* at 424-25; see also Suhre, *supra* note 17, at 318-20.

92. See Lessof, *supra* note 30, at 418.

93. *Id.* at 424-25; see also Suhre, *supra* note 17, at 318-20. On the international level, the effectiveness of the IWC can be realized through other means. For example, IWC member states may bring claims against other member states in the International Court of Justice ("ICJ"). See Hodges, *supra* note 10, at 325. The ICJ recently ruled on a claim brought by anti-whaling states against Japan, which prompted Japan to change its whaling practices to comply with international law obligations. See Cymie R. Payne, *Australia v. Japan: ICJ Halts Antarctic Whaling*, AM. SOC'Y OF INT'L L. (Apr. 8, 2014), <http://www.asil.org/insights/volume/18/issue/9/australia-v-japan-icj-halts-antarctic-whaling>; see

The United States' support of the IWC goes beyond enacting domestic laws. Many scholars credit the United States for strengthening conservation policies at the IWC.⁹⁴ In fact, some people claim that the IWC only adopted the whaling moratorium due to pressure from the United States and other anti-whaling nations.⁹⁵ Others, in comparison, emphasize the role that NGOs, particularly Greenpeace and EarthTrust, played in shifting the debate from sustainable use to conservation.⁹⁶ This shift in the debate, for example, ultimately led to the extension of the moratorium in 1990.⁹⁷ These NGOs' efforts are well documented⁹⁸ and should not be underestimated.

Individuals have also taken steps to stop whaling. In one anti-whaling demonstration, hundreds of people formed a shape of a giant humpback on a Sydney beach.⁹⁹ People have also peacefully demonstrated in the United Kingdom against the killing of whales.¹⁰⁰ However, not all demonstrations and protests are peaceful. The Sea Shepherd Conservation Society ("Sea Shepherds") is an American non-profit organization established in 1977 for the purpose of "shutting down illegal whaling."¹⁰¹ The Sea Shepherds, known for their more militant tactics,¹⁰² have gained publicity in the past few years, due in part to an Animal Planet show entitled *Whale Wars*, which follows the Sea Shepherds as they attempt to stop Japanese whaling crews from hunting whales.¹⁰³ The Sea Shepherds' "primary tactics consist of ramming, sabotaging, and sinking whale vessels."¹⁰⁴ They use ships that are

also Martin Fackler, *Japan Plans to Resume Whaling Program, with Changes to Address Court Concerns*, N.Y. TIMES (Apr. 18, 2014), <http://www.nytimes.com/2014/04/19/world/asia/japan-says-it-will-resume-whaling-off-antarctica.html>. That being said, some argue that "[t]he essential binding force can be found in ecopolitics, or normative environmental politics" and that the IWC should be seen as a normative institution rather than one of legal enforcement. Hodges, *supra* note 10, at 323. Under this theory, the anti-whaling coalition, led by the United States, would apply pressure on non-adhering states in hopes of changing practices based upon a belief of right and wrong behavior. *Id.* at 323-24.

94. See Lessof, *supra* note 30, at 424-25; Suhre, *supra* note 17, at 318-20; Watters & Dugger, *supra* note 34, at 331.

95. See Watters & Dugger, *supra* note 34, at 331.

96. See HUNTER ET AL., *supra* note 8, at 1054.

97. *Id.*

98. *Id.*; see also Watters & Dugger, *supra* note 34, at 332; Stein, *supra* note 2, at 180-82.

99. Stavros Teaching, *Anti-Whaling Demonstration on Bondi Beach, Sydney*, YOUTUBE (Nov. 20, 2007), https://www.youtube.com/watch?v=SfPyo_wbGRM.

100. Latin America News, *Anti-whaling Demonstrations in UK 07-11-11*, YOUTUBE (July 11, 2011), <https://www.youtube.com/watch?v=eBAwN350xvo>.

101. *The History of Sea Shepherd*, SEA SHEPHERD CONSERVATION Soc'Y, <http://www.seashepherd.org/who-we-are/our-history.html> (last visited Dec. 18, 2015).

102. See Stein, *supra* note 2, at 181.

103. See *Whale Wars*, ANIMAL PLANET, <http://www.animalplanet.com/tv-shows/whale-wars/> (last visited Dec. 18, 2015).

104. See Stein, *supra* note 2, at 182.

specifically designed and reinforced to “battle the whaling industry.”¹⁰⁵ During one of the Whale Wars episodes, Sea Shepherd and Japanese whaling ships collided on the high seas.¹⁰⁶ Occasionally, Sea Shepherd crew members are arrested.¹⁰⁷ Similar instances of protestors attacking and sinking whaling boats around the world have also been documented.¹⁰⁸

It is evident that the United States and NGOs have played an important role in supporting and strengthening conservation efforts at the international level. However, the U.S. government extended its conservation efforts to the domestic level by enacting several anti-whaling legislative acts, which directly affect the Makahs’ plans to resume whaling.

IV. U.S. LAWS AND COURT DECISIONS AFFECTING THE MAKAHS’ RIGHT TO WHALE

Although the U.S. government approved the Makahs’ plans to resume whaling,¹⁰⁹ several domestic U.S. laws have presented a challenge to the Makahs’ plans. Furthermore, as illustrated below, the Ninth Circuit has interpreted those domestic laws in favor of whale conservation and against the Makahs’ requests to resume whaling.

A. NEAH BAY TREATY

The first legal instrument directly related to the Makahs’ whaling rights is the 1855 Neah Bay Treaty, which is an agreement between the U.S. government and the Makahs.¹¹⁰ In this Treaty, the Makahs agreed to “cede[], relinquish[], and convey[] to the United States all their right, title, and interest in and to the lands and country occupied by” the tribe.¹¹¹ In exchange, the Makahs received “[t]he right of taking fish and of *whaling* or sealing.”¹¹² The Neah Bay Treaty went into effect following its ratification on March 8, 1859.¹¹³ Significantly, the Treaty contained no expiration date or other provision suggesting when it would no longer be binding on the contracting parties.¹¹⁴ Although the Treaty provided the Makahs with the right to whale, the superceding enactment of a domestic

105. *Id.* at 182 n.280.

106. *Whale Wars: Ships Collide in Final Confrontation*, ANIMAL PLANET, <http://www.animalplanet.com/tv-shows/whale-wars/videos/ships-collide-in-final-confrontation/> (last visited Dec. 18, 2015).

107. See Stein, *supra* note 2, at 182; see also Agence France Presse, *Paul Watson, Sea Shepherd Founder, Disembarks in U.S. for First Time in Months*, HUFFINGTON POST (Dec. 31, 2013, 5:12 AM), http://www.huffingtonpost.com/2013/10/31/paul-watson-sea-shepherd-us_n_4183030.html.

108. See Hodges, *supra* note 10, at 312.

109. *Metcalf v. Daley*, 214 F.3d 1135, 1138–42 (9th Cir. 2000).

110. Treaty of Neah Bay, *supra* note 6.

111. *Id.* at art. 1.

112. *Id.* at art. IV (emphasis added).

113. Treaty of Neah Bay, *supra* note 6.

114. *Id.*

law rendered the Makahs' Treaty rights void, including the right to hunt whales. Over a century passed before the Makahs realized how difficult it would be to reap their end of the bargain.

B. THE WHALING CONVENTION ACT'S EFFECT ON THE NEAH BAY TREATY

In 1946, nearly a century after the U.S. government entered into the Neah Bay Treaty, the United States signed the ICRW.¹¹⁵ Three years later, Congress passed the Whaling Convention Act ("WCA") to implement the ICRW domestically.¹¹⁶ Still in effect today, the WCA prohibits whaling in violation of the ICRW, any IWC regulations, and any regulations adopted by the Secretary of Commerce.¹¹⁷

Although the WCA is silent as to the Neah Bay Treaty, the enactment of the WCA rendered the Treaty void because Congress retains the power to unilaterally modify or abrogate a treaty by later acts.¹¹⁸ This has become known as the "last in time" principle, which suggests that when two statutes—or as in this case, a treaty and a statute—conflict, the one enacted later in time prevails.¹¹⁹ In *United States v. Dion*,¹²⁰ the U.S. Supreme Court established a test to determine which statute prevails if the later statute, as here, is silent regarding the first statute. The Court stated: "What is essential is clear evidence (1) that Congress actually considered the conflict between the intended action on the one hand and Indian treaty rights on the other, and (2) chose to resolve that conflict (3) by abrogating the treaty."¹²¹

In the case of the Neah Bay Treaty and the WCA, the first prong of the test is met because Congress considered a potential conflict between the WCA and Indian treaty rights generally. In *Dion*, the Court did not find dispositive the fact that Congress was not aware of the specific treaty at issue.¹²² Rather, Congress' general awareness of a potential conflict between Indian treaty rights and the new statute was sufficient to satisfy

115. See Hodges, *supra* note 10, at 300.

116. *Id.* at 301.

117. 16 U.S.C. § 916(c) (2013).

118. *Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903).

119. Leesteffy 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, 104 (1998).

120. 476 U.S. 734 (1986). In *Dion*, a Native American defendant from the Yankton Sioux Tribe was convicted of shooting four bald eagles in violation of the Endangered Species Act, which prohibited the hunting of bald eagles in the United States absent a Secretary of the Interior permit. *Id.* at 735–36. The Eighth Circuit vacated the conviction, relying on the defendant's treaty right to hunt bald eagles. *Id.* at 736. Under the treaty, the Yanktons ceded their land to the U.S. government in exchange for, *inter alia*, the right to hunt and fish on their land. *Id.* at 737. Subsequently, the Supreme Court reversed, holding that the enactment of certain laws abrogated the Yanktons' treaty right. *Id.* at 745.

121. *Dion*, 476 U.S. at 739–40.

122. See Jenkins & Romanzo, *supra* note 119, at 108.

the first prong of the test.¹²³ Therefore, here, it is irrelevant whether Congress knew of the Neah Bay Treaty at the time it enacted the WCA, so long as it knew about Indian treaty rights regarding whaling generally. It further appears that Congress was aware of a potential conflict with the Neah Bay Treaty because Congress specifically incorporated into the WCA the aboriginal subsistence exception of the IWC.¹²⁴ This further shows that Congress considered that the WCA might affect some Indian treaty rights. Therefore, the first prong is met.

As for the second and third prongs,¹²⁵ “[t]he WCA specifically and unequivocally incorporate[d] the ICRW and the IWC amended Schedule.”¹²⁶ Similar to the statute at issue in *Dion*, the WCA prohibition is “sweepingly framed . . . [and] ‘exhaustive and careful.’”¹²⁷ The WCA specifically mentions what activities are unlawful,¹²⁸ has an enforcement mechanism,¹²⁹ and lists penalties and fines.¹³⁰ Moreover, the incorporation of the aboriginal subsistence exception into the WCA “reveals a congressional intent to resolve this tension in favor of creating a specific exemption and quota to supersede any previous treaty rights to whale.”¹³¹ The incorporation of the aboriginal subsistence exception into the WCA is difficult to explain “except as a reflection of an understating that the statute otherwise bans the taking of [whales] by Indians, a recognition that such a prohibition would cause hardship for the Indians, and a decision that that problem should be solved not by exempting Indians from the coverage of the statute,” but by providing an exception in narrow circumstances.¹³² Therefore, the second and third prongs are also met to conclude that the WCA supersedes the Neah Bay Treaty.¹³³ As a result, the Treaty is void and the Makahs can no longer claim to have a right to hunt whales under the Treaty. Unfortunately for the Makahs, other domestic laws and court decisions prohibiting whaling pose additional legal hurdles.

123. *Id.*

124. *Id.* at 107.

125. The second and third prongs state that Congress chose to resolve the conflict between the intended action and the treaty right (second prong), by abrogating the treaty (third prong). *Dion*, 476 U.S. at 739–40.

126. Jenkins & Romanzo, *supra* note 119, at 106.

127. *Dion*, 476 U.S. at 740.

128. 16 U.S.C. § 916 (c) (2013).

129. *Id.* § 916 (g).

130. *Id.* § 916 (f).

131. Jenkins & Romanzo, *supra* note 119, at 107.

132. *Dion*, 476 U.S. at 740.

133. This explains why neither the Makahs nor the U.S. government argued that the Neah Bay Treaty acts as an exception to the Marine Mammal Protection Act, discussed *infra* Part IV.D. The lack of such an argument suggests that the U.S. government, during its representation of the Makahs, was aware of the fact that the WCA superseded the Neah Bay Treaty.

C. NATIONAL ENVIRONMENTAL POLICY ACT

In 1970, Congress enacted the National Environmental Policy Act (“NEPA”) to “encourage productive and enjoyable harmony between man and his environment” and “to promote efforts which will prevent or eliminate damage to the environment.”¹³⁴ The NEPA requires federal agencies to take a “hard look” at and consider the environmental impact of their actions.¹³⁵ Under § 4332 of the NEPA, an Environmental Impact Statement (“EIS”) must be prepared any time the “actions [of Federal agencies] significantly [affect] the quality of the human environment.”¹³⁶ However, in deciding whether to prepare an EIS, government agencies may rely on a less formal process known as an Environmental Assessment (“EA”).¹³⁷ Depending on the EA’s finding, the agency will then complete an EIS or submit a Finding of No Significant Impact (“FONSI”).¹³⁸ Today, the NEPA is viewed as a statute that sets out “action-forcing” procedural requirements and attempts to “promote environmentally sensitive governmental decisionmaking, without prescribing any substantive standards.”¹³⁹ Therefore, in order for a government agency to assist the Makahs in obtaining a whaling quota, that agency must comply with NEPA requirements by taking a hard look at the environmental impact of such a quota.

D. MARINE MAMMAL PROTECTION ACT

In 1972, Congress enacted the Marine Mammal Protection Act (“MMPA”).¹⁴⁰ The MMPA implemented a moratorium—a complete cessation of the taking of marine mammals, including whales, absent a permit or waiver.¹⁴¹ The only *explicit* exemption from the MMPA’s prohibition on the taking of marine mammals is provided in § 1371(b) and applies to Alaskan natives only.¹⁴² Section 1372(a)(2) provides an exception for the MMPA’s prohibition when the takings are “expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into *before* [1972] or by any statute implementing any such treaty, convention, or agreement.”¹⁴³ The MMPA’s prohibition, still in effect, presents a challenge to the Makahs’ plans to resume whaling.

134. 42 U.S.C. § 4321 (2013).

135. *Anderson v. Evans*, 314 F.3d 1006, 1015–16 (9th Cir. 2002).

136. *See* 42 U.S.C. § 4332(C) (2013).

137. *Anderson*, 314 F.3d at 1017.

138. *Id.*

139. *Id.* at 1016; *see also* *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000).

140. 16 U.S.C. § 1361 (2013).

141. *Id.* §§ 1371–1372; *see also* *Anderson*, 314 F.3d at 1023 (Gould, J., concurring).

142. 16 U.S.C. § 1371(b) (2013).

143. *Id.* § 1372 (a)(2) (emphasis added).

E. NINTH CIRCUIT DECISIONS

In the following two cases, the Ninth Circuit considered the Makahs' plans and requests to resume whaling in the contexts of the WCA, NEPA, and MMPA. In the first case, *Metcalf v. Daley*,¹⁴⁴ the Ninth Circuit examined the Makahs' plan to revive its culture and resume whaling after the gray whale was removed from the endangered species list in 1994.¹⁴⁵ In this case, the Makahs had asked the U.S. Department of Commerce for help with developing and presenting their plan to the IWC.¹⁴⁶ Following an evaluation of the Makahs' request, the National Oceanic and Atmospheric Administration ("NOAA"), a division of the U.S. Department of Commerce, decided to support the Makahs' plan.¹⁴⁷ However, in the process of their support, the NOAA failed to comply with the NEPA requirements by not publishing an EA or EIS for public review.¹⁴⁸

In 1996, NOAA and the Makahs entered into a formal, written agreement, whereby NOAA committed to present the Makahs' proposal to the IWC after the Makahs prepared an adequate statement of need.¹⁴⁹ Later that year, the U.S. government presented a formal proposal to the IWC on behalf of the Makahs.¹⁵⁰ However, several IWC member nations "expressed concerns and indicated that they would vote against" the proposal.¹⁵¹ Such concern and opposition derived partially from within the Makahs themselves because the Makah Tribal Council's process of obtaining a quota did not include a referendum on the issue.¹⁵² The proposal also faced opposition from U.S. politicians and NGOs.¹⁵³ The United States subsequently withdrew the IWC proposal when it realized that the proposal lacked the support it needed to pass.¹⁵⁴

In 1997, NOAA became aware of the possibility that it violated NEPA, and in order to comply, prepared an EA followed by a FONSI.¹⁵⁵ Prior to the 1997 IWC meeting, the U.S. and Russian governments considered submitting a joint proposal requesting a gray whale quota for the Makahs of the United States and for the Chukotka, a Siberian aboriginal tribe located in Russia.¹⁵⁶ This was a strategic alliance by the

144. 214 F.3d 1135 (9th Cir. 2000).

145. *Id.* at 1138.

146. *Id.*

147. *Id.*

148. *Id.* at 1139.

149. *Id.*

150. *Id.*

151. *Id.*

152. See Watters & Dugger, *supra* note 34, at 332-34.

153. *Id.*

154. *Metcalf*, 214 F.3d at 1140.

155. *Id.* at 1139-40.

156. *Id.* at 1140.

United States because the IWC had previously granted a gray whale quota for the Siberian Chukotka.¹⁵⁷ Subsequently, the U.S. government submitted a joint proposal with Russia, asking for a quota of 620 whales over a five-year period.¹⁵⁸ During the IWC meeting, however, it became clear that some of the delegates thought that the Makahs did not qualify for the aboriginal subsistence exception.¹⁵⁹ At that time, the IWC defined aboriginal subsistence whaling as “whaling for the purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties related to a *continuing traditional dependence* on whaling and the use of whales.”¹⁶⁰ This posed a problem for the Makahs because they had lived without whales for seventy years and therefore did not meet the “continuing traditional dependence” aspect of the definition.¹⁶¹ Nonetheless, after negotiations, the IWC approved the quota and “the delegates agreed to amend the proposal to allow the quota to be used only by aboriginal groups ‘whose traditional subsistence and cultural needs have been recognized.’”¹⁶² However, to date, it remains unclear who is responsible for recognizing such subsistence and cultural needs.

In 1997, on the same day NOAA released the FONSI, Congressman Jack Metcalf of Washington, along with various organizations concerned about whaling (herein “appellants”), filed a complaint against the U.S. government and the Makahs (herein “federal defendants”) for violating NEPA.¹⁶³ The appellants appealed the district court’s decision granting the federal defendants’ motion for summary judgment.¹⁶⁴ In determining whether the federal defendants violated NEPA, the Ninth Circuit relied on a Supreme Court decision¹⁶⁵ in which the Court held that an EIS “shall be prepared at the feasibility analysis [go/no-go] stage.”¹⁶⁶ In other words, the federal defendants should have prepared the EA, and subsequently EIS or FONSI, *before* they signed a formal, written agreement with the Makahs.¹⁶⁷ The Ninth Circuit held that the federal defendants’ commitment to helping the Makahs before preparing an EA “probably influenced their evaluation of the environmental impact of the

157. *Id.*

158. *Id.* The Makahs would have been entitled to only a fraction of the 620 whales. *Id.*

159. *Id.*

160. See Hodges, *supra* note 10, at 304 (emphasis added).

161. *Id.*

162. *Metcalf*, 214 F.3d at 1140.

163. *Id.*

164. *Id.* at 1141.

165. *Andrus v. Sierra Club*, 442 U.S. 347 (1979).

166. *Metcalf*, 214 F.3d at 1142 (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 351 n.3 (1979)).

167. *Id.* at 1143, 1145.

proposal.”¹⁶⁸ Therefore, the Ninth Circuit held that the federal defendants violated NEPA by preparing an untimely EA and failing to prepare an EIS.¹⁶⁹

Merely two years after *Metcalf*, the government’s approval of the Makahs’ whaling plans faced yet another legal challenge.¹⁷⁰ In *Anderson v. Evans*, the Ninth Circuit once again found the federal government in violation of NEPA.¹⁷¹ Here, however, the court concluded that even though the government prepared a timely EA, it violated NEPA by preparing a FONSI instead of an EIS.¹⁷² The court reasoned that “there [were] substantial questions remaining as to whether the [Makahs’] whaling plans [would] have a significant effect on the environment,” and therefore, the government should have prepared an EIS.¹⁷³

In the same case, the Ninth Circuit also found the government in violation of the MMPA for improperly approving the Makahs’ whaling plan in 1997.¹⁷⁴ Section 1372 of the MMPA provides for an exception to the blanket moratorium on whaling.¹⁷⁵ This exception applies when whaling has been “expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into *before* [1972] or by any statute implementing any such treaty, convention, or agreement.”¹⁷⁶ The court held that the exception did not apply here for four reasons.¹⁷⁷ First, the IWC Schedule that approved the Makahs’ quota passed in 1997, well after the 1972 cutoff date allowed by the exception.¹⁷⁸ Second, even if the 1997 IWC Schedule related back to the 1946 Convention and predated the MMPA, the IWC Schedule expressly failed “to provide any whaling quota for the [Makahs]” as required by the MMPA’s exception.¹⁷⁹ Third, the express requirement of § 1372(a)(2) was not satisfied due to the vague definition of the IWC’s aboriginal subsistence exception and the uncertainty as to who conducts the recognition.¹⁸⁰ Fourth, “there [was] no domestic statute implementing the ICRW that expressly permit[ed] the [Makahs’]

168. *Id.* at 1145.

169. *Id.*

170. *See Anderson v. Evans*, 314 F.3d 1006, 1006 (9th Cir. 2002).

171. *Id.* at 1009.

172. *Id.*

173. *Id.*

174. *Id.* at 1030.

175. *Anderson*, 314 F.3d at 1023; *see also* 16 U.S.C. § 1372 (a)(2) (2013).

176. 16 U.S.C. § 1372 (a)(2) (2013) (emphasis added).

177. *Anderson*, 314 F.3d at 1023–25.

178. *Id.* at 1023–24.

179. *Id.* at 1024–25.

180. *Id.* at 1025.

whaling.”¹⁸¹ Therefore, the Ninth Circuit held that the government violated the MMPA by approving the Makahs’ whaling plan.¹⁸²

As a result of these two cases, the Makahs could not legally hunt whales under domestic law. The cases illustrate the challenges and complications of approving the Makahs’ proposals under domestic laws. However, beyond violating domestic laws, the Makahs’ proposals present significant issues on an international level.

V. THE MAKAHS’ PROPOSAL: INTERNATIONAL PROBLEMS, PRECEDENT, AND PERCEPTION

There is no doubt that the Makahs had a long and demonstrable tradition of whaling for both nutritional and cultural purposes.¹⁸³ However, the Makahs voluntarily ceased hunting whales in the 1920s—nearly half a century before the moratorium went into effect—and continued to survive without whale meat as a source of subsistence.¹⁸⁴ For that reason, the Makahs’ petition to the IWC focused on the importance of whaling to the Makahs’ culture, rather than on their nutritional dependency on whale meat.¹⁸⁵ The Makahs’ culture-based proposal was problematic because until the IWC’s approval of the Makahs’ quota, the IWC had only granted the exception to groups that had consistently relied upon whale meat for nutritional *and* cultural needs.¹⁸⁶ To solve the problem, the United States amended its domestic subsistence regulations to allow for whaling based on “cultural and/or subsistence” need.¹⁸⁷ The United States also lobbied the delegates at the IWC and amended the aboriginal subsistence exception to groups “whose traditional subsistence and cultural needs have been recognized.”¹⁸⁸ By doing so, the U.S. government fit the Makahs within a domestic exception because of the “and/or” language, and was able to formally recognize the Makahs’ “traditional subsistence and cultural needs” as required by the amended IWC definition. However, “[c]onspicuously absent from [the IWC definition] is any delineation of who must [conduct this] recognition and how.”¹⁸⁹ Because it remains unclear who has the authority to “recognize” these needs, any country can claim such recognition on behalf of its aboriginal communities.¹⁹⁰ The Ninth Circuit recognized the danger of

181. *Id.*

182. *Id.* at 1030.

183. See Hodges, *supra* note 10, at 320.

184. *Id.*; see also *Metcalf v. Daley*, 214 F.3d 1135, 1137 (9th Cir. 2000).

185. See Hodges, *supra* note 10, at 320.

186. See Hodges, *supra* note 10, at 320; see also *Watters & Dugger*, *supra* note 34, at 341.

187. 50 C.F.R. § 230.2 (1996); see also Hodges, *supra* note 10, at 320.

188. *Metcalf*, 214 F.3d at 1140.

189. *Anderson v. Evans*, 314 F.3d 1006, 1022 (9th Cir. 2002).

190. *Id.*

the tactics used by the United States¹⁹¹ and warned: “[These tactics] could be used as a *precedent* for other countries to declare the subsistence need of their own aboriginal groups, thereby making it easier for such groups to gain approval for whaling.”¹⁹²

The real concern here is that other countries, such as Japan and Norway, have aboriginal communities that technically meet the new IWC definition,¹⁹³ yet have been consistently denied applications for aboriginal whaling.¹⁹⁴ Thus, in allowing the Makahs to hunt under the aboriginal subsistence exception based on a purely cultural needs, the IWC set a precedent that would open the door for other communities to put forth and rely on similar cultural-needs claims.¹⁹⁵ In fact, some argue that other communities will likely have even stronger cultural claims than that shown by the Makahs.¹⁹⁶ Broadening the aboriginal subsistence exception would have a “domino effect”¹⁹⁷ that will create the “danger of rendering the commercial whaling moratorium essentially meaningless.”¹⁹⁸ Therefore, the Makahs’ proposals present significant issues on the international level, which require careful attention and consideration.

VI. THE CURRENT STATE OF AND ISSUES FACED BY WHALING

Although the Ninth Circuit held against the Makahs’ plan, the IWC’s approval of the quota is still technically valid for IWC aboriginal subsistence exception purposes.¹⁹⁹ The IWC currently lists five indigenous people with approved quotas to hunt whales under the aboriginal subsistence exception, including native Alaskans (“Inuits”),

191. This entails, in essence, the changing and tailoring of domestic law to fit aboriginals within an exception or setting aboriginals outside the reach of anti-whaling laws.

192. *Anderson*, 314 F.3d at 1022.

193. See Hodges, *supra* note 10, at 320 n.155; see also Jenkins & Romanzo, *supra* note 119, at 88–92.

194. See Watters & Dugger, *supra* note 34, at 337; see also Suhre, *supra* note 17, at 325, 327–28; see, e.g., *IWC Resolution 1996-1*, INT’L WHALING COMMISSION, https://archive.iwc.int/pages/view.php?ref=2072&search=%21collection72&offset=0&order_by=relevance&sort=DESC&archive=0&k=&go=next&curpos=14 (last visited Dec. 18, 2015) (presenting resolution for distressed coastal Japanese communities dependant on whaling for cultural, social, dietary, and economic needs); *IWC Resolution 1990-1*, INT’L WHALING COMMISSION, https://archive.iwc.int/pages/view.php?ref=2066&search=%21collection72&offset=0&order_by=relevance&sort=DESC&archive=0&k=&go=next&curpos=14 (last visited Dec. 18, 2015).

195. See Jenkins & Romanzo, *supra* note, 119, at 93–95; see also Watters & Dugger, *supra* note 34, at 337.

196. See Jenkins & Romanzo, *supra* note, 119, at 95–96; see also Suhre, *supra* note 17, at 322–28.

197. See Watters & Dugger, *supra* note 34, at 320; see also Brenda Peterson, *Who Will Speak for the Whales? — Elders Call for a Spiritual Dialogue on Makah Tribe’s Whaling Proposal*, SEATTLE TIMES (Dec. 22, 1996, 12:00 AM), <http://community.seattletimes.nwsourc.com/archive/?date=19961222&slug=2366339>.

198. See Jenkins & Romanzo, *supra* note 119, at 94.

199. Ninth Circuit decisions are only binding domestically and do not affect the IWC.

Chukotkas, and Makahs.²⁰⁰ The Chukotka and Makahs had a combined approved quota of 620 Eastern North Pacific gray whales from 2008 to 2012.²⁰¹ According to the IWC, the Makahs have caught two gray whales under the aboriginal subsistence exception: the first in 1999 and the second in 2007.²⁰² As of 2007, the Eastern North Pacific gray whale stock was estimated between 17,000 and 22,000.²⁰³ According to the International Union for the Conservation of Nature (“IUCN”) Red List²⁰⁴ and the National Marine Fisheries Service (“NMFS”), two sources the IWC relies on for scientific reports,²⁰⁵ the gray whale is no longer in danger of extinction.²⁰⁶ The IUCN Red List has nine categories, ranking from “Not Evaluated” species to “Extinct” species.²⁰⁷ The IUCN Red List has the gray whale under its “Least Concern” category, three full categories away from the “Endangered” list.²⁰⁸ The mere fact that the quota was approved under the IWC’s strict standards shows that the Makahs’ proposed quota would not have had a significant negative impact on the whale stock. A spokesperson for the NMFS, an organ of NOAA, stated, “There isn’t any question about the biological impact of [the Makahs] taking 20 whales over the course of five years out of a population of 20,000 gray whales . . . Its impact would be . . . insignificant.”²⁰⁹

The combined approved quota under the aboriginal subsistence exception is about a third of the number of whales hunted every year for

200. *Catch Limits & Catches Taken*, INT’L WHALING COMMISSION, http://iwc.int/index.php?cID=html_76#aborig (last visited Dec. 18, 2015).

201. *Id.*

202. *Catches Taken: ASW*, INT’L WHALING COMMISSION, http://iwc.int/table_aboriginal (last visited Dec. 18, 2015).

203. *Whale Population Estimates*, INT’L WHALING COMMISSION, <http://iwc.int/estimate#table> (last visited Dec. 18, 2015).

204. The IUCN is a leading authority on the conservation status of species. The IUCN Red List’s goal is “[t]o provide information and analyses on the status, trends and threats to species in order to inform and catalyse action for biodiversity conservation.” *Overview of the IUCN Red List, Introduction*, IUCN RED LIST OF THREATENED SPECIES, <http://www.iucnredlist.org/about/overview#introduction> (last visited Dec. 18, 2015).

205. *Status of Whales*, INT’L WHALING COMMISSION, <http://iwc.int/status> (last visited Dec. 18, 2015).

206. *Eschrichtius Robustus*, IUCN RED LIST OF THREATENED SPECIES, <http://www.iucnredlist.org/details/summary/8097/0> (last visited Dec. 18, 2015); see also *Endangered and Threatened Marine Species Under NMFS’ Jurisdiction*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://www.nmfs.noaa.gov/pr/species/esa/listed.htm#mammals> (last visited Dec. 18, 2015).

207. INT’L UNION FOR CONSERVATION OF NATURE, IUCN RED LIST OF THREATENED SPECIES 14–15 (2d ed. 2012).

208. *Eschrichtius Robustus*, *supra* note 206.

209. Eric Rosenberg, *Makah Hopeful About Whaling Again by 2010*, SEATTLE POST-INTELLIGENCER (Jan. 13, 2008, 10:00 PM), <http://www.seattlepi.com/local/article/Makah-hopeful-about-whaling-again-by-2010-1261497.php>. Only a small fraction of the 620 quota mentioned above was dedicated to the Makahs. *Metcalf v. Daley*, 214 F.3d 1135, 1140 (9th Cir. 2000).

commercial purposes.²¹⁰ Countries that submitted official and timely objections to the IWC's moratorium are not bound by it and can therefore legally engage in commercial whaling.²¹¹ Between 1985 and 2013, Norway, Japan, the U.S.S.R., and Iceland commercially hunted over 23,000 whales.²¹² Additionally, Norway increased its commercial quota for minke whales from 226 in 1993 to 885 in 2009,²¹³ showing no intention of slowing down or ceasing whaling.

Japan, on the other hand, has taken a completely different route to continue whaling, relying on the IWC's scientific permit exception.²¹⁴ Japan's whaling practices have been controversial,²¹⁵ and have been condemned in many IWC meetings.²¹⁶ In March 2014, the ICJ found Japan in violation of its international law obligations under the ICRW.²¹⁷ In its ruling, the ICJ "questioned whether [Japan's whaling] program was really for research, pointing out that it had yielded few scientific results."²¹⁸ Therefore, the ICJ ordered Japan to suspend all permits and halt all whaling in the Southern Ocean.²¹⁹ In April 2014, Japan announced its plan to redesign the research program to address the ICJ's concerns, which would allow Japan to resume whaling.²²⁰

Another IWC member state, which nonetheless continues to whale, is Iceland.²²¹ Iceland has always opposed the IWC moratorium, but was still bound by it because, unlike Norway, it did not file an official objection when the moratorium went into effect in 1986.²²² However, in 1992, Iceland withdrew from the IWC in protest over the decision to extend the moratorium and subsequently joined NAMMCO.²²³ In 2002, Iceland was readmitted into the IWC and was allowed to file a

210. The IWC approved a total quota of 1137 whales for aboriginal subsistence between 2008 and 2012, compared to 3247 of whales hunted for commercial purposes between 2008 and 2012. *Compare Catch Limits & Catches Taken*, *supra* note 200, with *Catches Taken: Under Objection or Under Reservation*, INT'L WHALING COMMISSION, http://iwc.int/table_objection (last visited Dec. 18, 2015).

211. See Lessof, *supra* note 30, at 421.

212. *Catches Taken: Under Objection or Under Reservation*, *supra* note 210.

213. See HUNTER ET AL., *supra* note 8, at 1058.

214. *Id.*

215. Peter W. Kirby, *The Big Lie Behind Japanese Whaling*, N.Y. TIMES (Oct. 13, 2014), <http://www.nytimes.com/2014/10/14/opinion/the-big-lie-behind-japanese-whaling.html?smprod=nytcore-iphone&smid=nytcore-iphone-share>; see also Hodges, *supra* note 10, at 310-11; Jenkins & Romanzo, *supra* note 119, at 89-90.

216. See HUNTER ET AL., *supra* note 8, at 1059.

217. Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. 148, ¶ 233 (Mar. 31); see Payne, *supra* note 93.

218. See Fackler, *supra* note 93.

219. See Payne, *supra* note 93.

220. See Fackler, *supra* note 93.

221. See Hodges, *supra* note 10, at 312.

222. *Id.* at 312-14.

223. *Id.* at 312; see HUNTER ET AL., *supra* note 8, at 1062.

reservation to the IWC's moratorium.²²⁴ As a result, Iceland is currently not bound by the moratorium and continues to whale.²²⁵

Iceland's withdrawal and readmission with a reservation, Norway's persistent objections, Japan's misuse of the scientific permit exception, and the creation of NAMMCO "call into question the effectiveness, [and] indeed the relevance, of the IWC."²²⁶ The IWC has been successful in reviving some whale stocks, but many, including former IWC officials and ocean policy scholars, have criticized the IWC and its decisions.²²⁷ The international community's disapproval and dissatisfaction with the IWC and its regulations are evident in the continued discussions regarding the establishment of regional whaling organizations.²²⁸ These calls for regional regulatory bodies continue to challenge the legitimacy of the IWC.²²⁹

VII. SOLUTION: HUNTING FOR A MIDDLE GROUND

It appears from the criticism, objections, and fragmentation of the international community regarding whaling that the current moratorium approach is not effective in accomplishing the entirety of the IWC's vision for the future of whaling. The moratorium has only been successful at reviving and conserving certain whale stocks, which is only part of what the IWC seeks to achieve. The other part, which the IWC has failed to achieve by diverting its attention to a complete moratorium, is the control of international whaling through regulations, which requires compliance and some level of consensus. Because pro-whaling nations have shown an increased frustration with the moratorium, "[t]he failure to resolve the current deadlock within the IWC could lead to a breakup or even a complete dissolution of the IWC."²³⁰ The continued ambiguity regarding the aboriginal subsistence exception further exacerbates the situation. To fix the issue, the following steps should be taken: (1) the moratorium should be lifted for certain whale stocks; (2) the IWC should strengthen its enforcement authority; and (3) the aboriginal subsistence exception should be clarified, both domestically and internationally.

224. See HUNTER ET AL., *supra* note 8, at 1062.

225. *Id.*

226. *Id.* at 1059.

227. *Id.* at 1058–59; see also Hodges, *supra* note 10, at 322.

228. See Hodges, *supra* note 10, at 311.

229. See HUNTER ET AL., *supra* note 8, at 1057.

230. See Lisa Kobayashi, *Lifting the International Whaling Commission's Moratorium on Commercial Whaling as the Most Effective Global Regulation of Whaling*, 29 ENVIRONS ENVTL. L. & POL'Y J. 177, 205 (2006).

A. LIFT THE MORATORIUM FOR CERTAIN WHALE STOCKS

The moratorium on whaling was implemented due to concerns with diminishing whale stocks.²³¹ In order to determine whether such a justification for the moratorium still exists, it is necessary to examine scientific data on whale stocks. Recent scientific evidence shows that certain whale stocks are healthy enough to resume controlled and sustainable whaling.²³² Data from the IWC shows that many whale stocks, including species that were once “heavily exploited,” have recovered or are recovering at an increased annual rate.²³³ For example, in the North Atlantic, humpbacks have recovered to pre-exploitation levels,²³⁴ and in other parts of the world, humpbacks are recovering at a ten percent annual increase rate.²³⁵ Other whales, including gray whales in the Eastern North Pacific, which the Makahs had hunted, and bowhead whales, are also either fully recovered or are in a “healthy state.”²³⁶

Because there is scientific evidence that whale stocks have recovered and some are even thought to be healthier than their pre-exploitation numbers,²³⁷ there is no longer a scientific justification for a global moratorium. While there may be a justification based on moral or ethical grounds, such an argument is unlikely to gain traction because pro-whaling countries have shown signs of increased whaling and frustration with the current system. Furthermore, some argue that pro-whaling nations have recently gained support.²³⁸ In fact, during the IWC’s 2005 meeting, twenty-three member states voted in favor of lifting the moratorium, twenty-nine voted against it, and five abstained.²³⁹ This shows that, at least in 2005, nearly half of the member states were either in support of or did not oppose lifting the moratorium.²⁴⁰

Nevertheless, a precautionary approach should be taken with certain whale stocks because such an approach “addresses how environmental decisions are made in the face of scientific uncertainty.”²⁴¹ This precautionary approach, which is gaining traction as a principle of international environmental law, is best explained as follows: “Where

231. International Convention for the Regulation of Whaling, *supra* note 49.

232. *Status of Whales*, *supra* note 205; *see also* Kobayashi, *supra* note 230, at 201.

233. *Status of Whales*, *supra* note 205.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *See* Kobayashi, *supra* note 230, at 208; Tom Clifford, *Slaughter Ahead as Whaling Ban May End*, GULF NEWS (Mar. 16, 2005), <http://gulfnews.com/news/world/other-world/slaughter-ahead-as-whaling-ban-may-end-1.280924>.

239. *See* Kobayashi, *supra* note 230, at 208 n.244.

240. *See* Clifford, *supra* note 238 (citing fifteen member states in 2002 and twenty-one in 2003 supported lifting moratorium in previous years).

241. *See* HUNTER ET AL., *supra* note 8, at 478.

there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”²⁴² Thus, where there is a lack of scientific evidence that a specific whale stock is not yet healthy enough for sustainable whaling, and hunting that specific stock might lead to serious or irreversible damage, protective measures should be applied until scientific evidence proves otherwise.

To properly apply the precautionary approach and to avoid over-exploiting whale stocks, an IWC scientific committee should review requests for whaling quotas and determine the appropriate outcome. Such committee should take a scientific approach when determining a quota and rely on studies and data from unbiased and reliable sources. The committee should review each request objectively, from a fair and impartial position. For example, in the Makahs’ case, the scientific committee would base its decision on the status of the Eastern North Pacific gray whale stock, the quota requested, and the Makahs’ legitimate needs, but not the fact that it is an American request.

B. STRONGER IWC ENFORCEMENT AUTHORITY

In order to ensure compliance with IWC regulations, the IWC must have enforcement authority because unenforced regulations lead to a lack of deterrence which invites a lack of compliance. By lifting the moratorium and allowing whaling to resume, the IWC can continue to regulate the whaling activity of its member states. The IWC, in and of itself, has the potential to effectively control whaling by its member states. However, throughout its history, the IWC has consistently been criticized for its inability to enforce its own regulations²⁴³ “like a sheriff without a gun.”²⁴⁴ Currently, the ICRW leaves enforcement entirely up to member states, merely providing, “Each Contracting Government shall take appropriate measures to ensure the application of the provisions of this Convention and the punishment of infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction.”²⁴⁵ Additionally, as mentioned earlier in Part III, the United States’ enforcement mechanism has not had much success.²⁴⁶ The lack of international supervision and the possibility that some member states do not domestically enforce the ICRW contribute to the lack of political will to cooperate.²⁴⁷

242. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol. 1), annex I, principle 15 (Aug. 12, 1992).

243. See Lessof, *supra* note 30, at 421.

244. *Id.* at 424.

245. International Convention for the Regulation of Whaling, *supra* note 49, at art. IX.

246. See Lessof, *supra* note 30, at 424–25; see also Suhre, *supra* note 17, at 318–20.

247. See Kobayashi, *supra* note 230, at 217.

This problem has two possible solutions. First, the ICRW could be amended to include mandatory enforcement and reporting by member states. However, such regulations will likely face criticism for being too restrictive.²⁴⁸ Moreover, because consent of any affected party is required in order to amend the ICRW,²⁴⁹ it is unlikely to be amended in such a way. The second and preferred solution is for the IWC to become a United Nations body.²⁵⁰ This approach has potential because the United Nations Charter (“Charter”) and the General Assembly both have broad aims that cover the IWC’s goals. The Charter aims to “establish conditions under which justice and respect for the obligations arising from *treaties* and other sources of international law can be maintained.”²⁵¹ Because the IWC imposes obligations on member states as part of a treaty, it is covered by the Charter’s aim. Furthermore, the General Assembly aims to “promot[e] international co-operation in the *economic, social, [and] cultural . . . fields.*”²⁵² This aim covers the IWC because whaling concerns economic, social, and cultural fields. Thus, both aims are broad enough to cover the IWC’s efforts of whale conservation and regulation.

With more resources, more influence, and more power, the United Nations would be better equipped than the IWC in its present form to enforce whaling laws on an international level. That would be especially true if the General Assembly were to approve specialized agencies focused on whaling because it becomes the General Assembly’s responsibility to ensure that such agencies fulfill their functions and obligations.²⁵³ Therefore, by making the IWC a body of the United Nations, the IWC will have more enforcement power and authority to implement its post-moratorium regulations.

C. CLARIFY THE ABORIGINAL SUBSISTENCE EXCEPTION INTERNATIONALLY AND DOMESTICALLY

Ambiguous and unclear laws lead to conflicts and inconsistencies. The exact definition and scope of the aboriginal subsistence exception on the international level remain unclear, leaving the door open for inconsistent interpretations.²⁵⁴ As a result of the inconsistent interpretations, countries like Japan and Norway contend that the United States receives special treatment from the IWC for its aborigines

248. See Lessof, *supra* note 30, at 440 (stating that measures that are too restrictive are likely to threaten the ICRW).

249. Vienna Convention on the Law of Treaties, art. XXXIX–XLI, May 23, 1969, 1155 U.N.T.S. 331.

250. See Kobayashi, *supra* note 230, at 217.

251. U.N. Charter, pmb. (emphasis added).

252. U.N. Charter, art. 13, ¶ 1(b) (emphasis added).

253. U.N. Charter, art. 57–63.

254. See *infra* Part V.

that natives from their countries are denied.²⁵⁵ Moreover, the Norwegians, in particular “believe that the IWC has been taken over by non-compromising political bodies, particularly under pressure by the United States.”²⁵⁶ Evidence shows that certain Japanese and Norwegian communities have had a long tradition of whaling, some even longer than the Alaskan Inuits and the Makahs.²⁵⁷ Furthermore, even though the IWC has recognized the “extreme distress” in which some of those Japanese and Norwegian communities live in as a result of the moratorium, the IWC has yet to grant those communities an aboriginal subsistence quota.²⁵⁸

In order to make the process of obtaining aboriginal subsistence quota more fair, the IWC should implement two changes. First, the IWC should amend its definition of the aboriginal subsistence exception to grant quotas to aboriginal groups whose traditional subsistence and cultural needs have been recognized *by the IWC*. This definition addresses the current ambiguity and clarifies that the IWC is the party responsible for the recognition. Second, the IWC should implement an unbiased, scientific approach to determine aboriginal subsistence needs. The IWC should view communities objectively, and determine their statuses under the exception based solely on scientific findings rather than on political views. The committee should take into account scientific data about quotas requested and the respective whale stocks, whaling traditions and cultures, and subsistence needs. This process would provide countries with assurance that their communities’ requests for quotas receive fair and impartial reviews without undue influence from anti-whaling countries like the United States.

As for a domestic solution to the aboriginal subsistence exception, if the United States intends for the Makahs to be able to legally whale, it must amend its domestic laws. The United States may do so by providing the Makahs with an explicit exception in the MMPA and ensuring that future proposals comply with other domestic laws, including NEPA and the WCA. Additionally, in order to comply with the Ninth Circuit decisions, the U.S. government must objectively evaluate the Makahs’ plan and prepare either an EIS or a FONSI in compliance with NEPA before representing them at the international level. Further, clarification of the aboriginal subsistence exception will leave less room for inconsistent interpretations, which will placate international concerns about the current system and about the IWC’s perceived preferential

255. See *Anderson v. Evans*, 314 F.3d 1006, 1022 n.17 (9th Cir. 2002) (stating that Japan has attempted to block whaling quotas for other nations until quota for Japanese communities was approved); see also *Hodges*, *supra* note 10, at 316; *Suhre*, *supra* note 17, at 322–28.

256. See *Hodges*, *supra* note 10, at 316.

257. See *Suhre*, *supra* note 17, at 322–28.

258. *Id.* at 325.

treatment of the United States. If the U.S. government wants to be perceived as an equal member of the IWC, it must amend its domestic laws to fit the Makahs within an exception, present a new proposal to the IWC on behalf of the Makahs, and go through the same impartial and scientific review process imposed on other countries to obtain a quota.

CONCLUSION

The international community is currently fragmented and divided regarding whaling. In order for the U.S. government to allow the Makahs to legally resume subsistence whaling, the government must amend its domestic laws to include an explicit exception for the Makahs and present the IWC with a new proposal. However, allowing the Makahs to resume subsistence whaling might set a dangerous precedent that will lead to the further disruption of international consensus regarding whaling. To solve this problem, the IWC must lift its moratorium and allow for specific whale stocks to be hunted under science-based IWC regulations. Doing so will enable the IWC to balance monitoring and controlling whaling while allowing countries to meet the cultural and economic needs of their people.

APPENDIX: LIST OF ABBREVIATIONS

EA	Environmental Assessment
EIS	Environmental Impact Statement
FONSI	Finding of No Significant Impact
ICJ	International Court of Justice
ICRW	International Convention for the Regulation of Whaling
IWC	International Whaling Commission
MMPA	Marine Mammal Protection Act
NEPA	National Environmental Policy Act
NGO	Nongovernmental Organization
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
WCA	Whaling Convention Act
