

# Dangerous Crossings

*Race, Species, and Nature in a  
Multicultural Age*

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## Makah Whaling and the (Non) Ecological Indian

Whales should not be slaughtered anytime or anywhere by any people.

– Sea Shepherd Conservation Society

Them [protesters] being here is like bringing a blanket of smallpox.

– Wayne Johnson, Makah Whaling Captain

Early in the morning of May 17, 1999, in the Pacific waters off of the northwest tip of Washington State, a three-year-old female gray whale swam up alongside a canoe of Makah hunters, expressing the curiosity that many gray whales show toward humans. Theron Parker, the harpooner, stood up, and launched the first of three harpoons into her back. The hunt was being filmed, and television viewers across the globe watched “as the wounded whale struggled, twisting and zig-zagging, pulling the Makah hunters a short distance, three harpoons lodged in her 30-foot body.” As “bloodied waters swelled outward from the dying whale in crimson waves,”<sup>1</sup> the Makah hunters then shot her three times with a powerful rifle. The last bullet penetrated the gray whale’s brain and killed her. The broadcasting of the hunt prompted both exultation on the part of many Makah and intense expressions of sorrow and outrage on the part of other Makah and non-Makah.<sup>2</sup> Alberta Thompson, a Makah elder who opposed the hunt, named the whale who had been killed “Yabis,” which means “beloved” in the Makah language.<sup>3</sup>

It was the first time that the Makah had successfully hunted a whale in more than seventy years. Once legendary whale hunters of the Pacific Northwest Coast, the Makah ceased whaling in the 1920s, in part because of the depletion of whale populations brought about by European and American commercial whaling. Since that time, international and domestic practice and opinion had largely turned against whaling, so the tribe’s announcement in the mid-1990s

<sup>1</sup> Peterson and Hogan (2002), 148.

<sup>2</sup> The hunt can be viewed at <http://www.youtube.com/watch?v=cGmcr-fbs5U>.

<sup>3</sup> Peterson and Hogan (2002), 152.

that it wished to resume whaling set off a global firestorm that raged from the Makah reservation in Neah Bay to the National Marine Fisheries Service in Washington, DC to International Whaling Commission meetings in Europe over what constitutes a subsistence hunting tradition, who owns the seas and living marine resources, the biological and moral status of the gray whale, the cultural rights of indigenous peoples, and the imperatives of environmental protection. The Makah whale hunt has been the site of intense political, legal, moral, spiritual, and physical struggle from the moment it was proposed in the mid-1990s until today, when, deterred from whaling by legal and bureaucratic obstacles, the Makah wait to hunt again.

In this conflict, as in the others examined in this book, race, species, nature, and culture are passionately contested in a discursive-political space defined in part by multiculturalist norms and the values and practices of neoliberal capitalism. Indianness continues to be constituted here in relation to species and nature; claims of tribal identity and culture are both accorded presumptive weight and seen as special pleading against the universalist claims of environmental and animal protection; environmental and animal protection claims, in turn, are cast as racist and imperialist; and the neoliberal instrumentalization of nature as a "resource" proceeds in the face of unspoken collective anxiety about the rightness of this course. But the Makah whaling story also contains many distinctive elements, from the imagining of the "ecological Indian" in U.S. culture; to the special status of the whale as an intelligent mammal and environmental icon; to the vexing tangle of treaty rights, federal law, and international conservation law that contours this dispute; to the highly charged global politics of whaling; to the utterly unique political and legal status of indigenous peoples as nations rather than minorities within the United States.

As in the Chinatown case, a racial trope of considerable vintage took center stage in the discourse about the conflict. As discussed in Chapter 2, as far back as the 1600s, whites imagined the North American Indian as a constituent part of nature and apart from civilization – and this idea proved remarkably tenacious over the centuries. In the 1970s, in the context of the modern environmental movement, the idea reemerged in the trope of the "ecological Indian," the Indian who is a natural conservationist, lives simply and virtuously, maintains a spiritual balance with nature, and thus serves as the perfect foil for the Western capitalist, whose greed and rapaciousness leave him severely out of joint with (not to mention a serious threat to) the natural world.<sup>4</sup> In this trope, the culture/nature divide is maintained and the Indian is still identified with nature, but now it is nature not culture that is valorized. The 1971 anti-pollution television commercial featuring Iron Eyes Cody as an Indian weeping over whites' despoliation of nature exemplified this trope. In the whaling conflict, this trope was evoked by members of the public (and occasionally by environmental and animal protectionists) to castigate the Makah for acting

<sup>4</sup> See Krech (1999) and Nadasdy (2007).

non-ecologically, or betraying their Indianness. That is, the "ecological Indian" trope functioned as a disciplinary tool, essentializing Native Americans (in the guise of lauding them) and erecting a behavioral ideal that was both restrictive and unattainable.

In many ways, the debate over the relationship between Indians and nature was at the heart of the Makah whaling conflict. Native American leaders and scholars regularly assert that "indigenous standpoints" (Tallbear 2011) have something distinctive and important to say about human relations with non-human animals and nature, and they argue that Native peoples were practicing "sustainability" long before this ethos surfaced as an eleventh-hour response to the excesses of neoliberal capitalism (Coté 2010). But they did not therefore embrace the "ecological Indian" trope, the dualistic premises of which are alien to Native American ontologies, which rest on different foundational understandings about humans, animals, and nature than do Western ones (Deloria 2001; Tallbear 2011).

A few environmental and animal protectionists deployed the "ecological Indian" trope against the Makah, but most argued instead for moving beyond the dualisms of culture/nature and human/animal and rejecting the positioning of animals and nature as objects beneath us. For them, recognizing the whale's subjectivity, understanding human-whale continuities, and respecting the whale *logically entailed a prohibition on* hunting the whale. But Native American ontologies, which have always viewed humans, animals, and other beings in nature as all animate and all related (non-dualistically), *simultaneously* recognize the animal's kinship with the human and the rightness of killing animals for food (Nadasdy 2007). For Native Americans like the Makah, recognizing the whale's subjectivity, understanding human-whale continuities, and respecting the whale *logically allowed for* hunting the whale.<sup>5</sup>

Chinatown leaders enthusiastically espoused the instrumentalization and commodification of "food" animals, out-whiting whites in their dualistic perceptions of humans and animals. (Recall Rose Pak's acerbic observation that animal advocates would be worried about vegetables next.) Animal advocates responded by arguing the moral considerability of the animals sold by the markets. The debate in the Chinatown conflict, therefore, was between seeing these animals as morally considerable or not. But Makah leaders presented an *alternative* ontology that sees animals as respect-worthy and important but still edible. Environmental and animal protectionists did not acknowledge or grapple with this different moral and spiritual understanding of human-whale relations, but simply dismissed it. This attempt to erect a Western framework of understanding upon the elision of a Native one elicited the charge of colonial domination from the Makah.

<sup>5</sup> My thanks to Kim Tallbear for insight on these points. See Plumwood (2000) for a Western ecofeminist defense of the Native understanding of hunting and Eaton (2002) for a commentary on Plumwood's argument.

I begin with a historical account of the Makah tribe, gray whales, and the International Whaling Commission and then tell the story of what happened when the Makah sought to resume whaling in the mid-1990s. Next, I examine the optics of ecological and ethical harm articulated by environmental and animal protectionists, as well as the optic of ecocolonialism articulated by the Makah in response. I then show how animal and environmental activists and Makah activists disavowed each other's claims and perspectives in the course of political struggle. Here I pause to reflect first, on the historical relationship of Makah whaling to slavery and sex inequalities within the tribe, and second, on what it means to consider that gray whales might have their own perspective on the whaling issue. I conclude with a brief discussion of what an ethics of mutual avowal might entail in this case.

#### HISTORIES: THE MAKAH, GRAY WHALES, THE INTERNATIONAL WHALING COMMISSION

The Makah are a Native people who have lived on the tip of the Olympic Peninsula for thousands of years (see Figure 7.1). Based on the neighboring Clallam tribe's description, whites gave them the name "Makah," meaning "generous with food." Their name for themselves is *kwih-dich-chuh-abtX*, meaning "people who live on the cape near the rocks and seagulls."<sup>6</sup> The Makah are culturally and linguistically related to the Nuu-Chah-Nulth tribes on western Vancouver Island (just across the Strait of Juan de Fuca), who are First Nations in Canada. As a coastal people whose lands are largely inhospitable to agriculture, the Makah have traditionally lived off of the sea, developing deep local knowledge of the ocean's shelves and currents and skills in fishing and sea mammal hunting.<sup>7</sup>

Archaeological research at the Ozette site, discovered in the 1970s, indicates that for more than 1,500 years, whaling was an integral aspect of Makah life. Whales occupy a central status in Makah religious and spiritual practices, cultural ceremonies, and artwork. The practice of whaling reflected and in turn reinforced social organization and stratification within the tribe. Whaling was the preserve of chiefs or titleholders who owned not only the whaling equipment (canoes, buoys, harpoons) but also the songs and ceremonial rituals that accompanied the hunt. The practice enabled chiefs to amass the resources (including whale meat and whale oil) to hold potlatches – lavish ceremonial feasts where chiefs encouraged the consumption of goods and distributed goods in order to demonstrate and thereby shore up their power and authority. The Makah put almost every part of the whale's body to use in some way, and evidence from the Ozette site suggests that whale products made up more than 80 percent of the tribe's diet at one point.<sup>8</sup>

<sup>6</sup> Coté (2010), 18.

<sup>7</sup> Coté (2010).

<sup>8</sup> Coté (2010), 12.

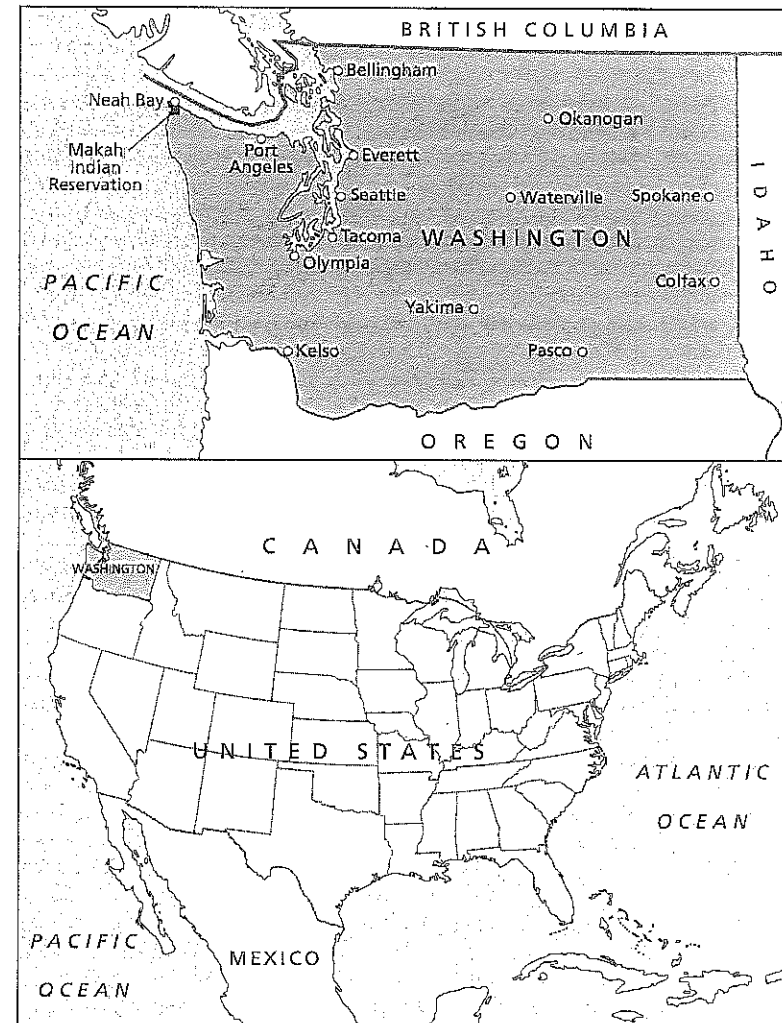


FIGURE 7.1. Makah Reservation, Neah Bay, Washington.

Whaling was also the key to the Makah's commercial success during the mid-1800s. Although the first contact with Europeans occurred in the late 1700s, it was not until the 1840s that American and European whalers became a significant presence in the waters of the Pacific Northwest. The Makah, who had already established a thriving commerce in whale oil and dogfish oil with

neighboring tribes, commenced trading with the Hudson Bay Company as well, trading up to 30,000 gallons of whale oil a year and becoming one of the wealthiest tribes in the region.<sup>9</sup>

The arrival of whites brought short-term enrichment but long-term immiseration. By the mid-1800s, the colonization process that had begun centuries earlier on the Eastern Seaboard of the United States had reached the Pacific. The Indian Removal Act of 1830 had forced Native American tribes from the southeastern United States to move west of the Mississippi River, and the U.S. government was setting up a system of reservations upon which to relocate them. In this context, Governor Isaac Stevens of the Washington Territory sat down with Makah elders to negotiate the Treaty of Neah Bay in 1855. In this treaty, the Makah ceded most of their lands, accepted the establishment of a reservation at Neah Bay of approximately 27,000 acres, received sums of money, and agreed to various regulations banning slavery, the sale of alcohol, and other practices on the reservation.<sup>10</sup> Historical accounts make it clear that the Makah were intent on preserving their fishing, whaling, and sealing rights and that they received assurances from Governor Stevens's aides that the United States would support these.<sup>11</sup> Makah Chief Stecowilth stated memorably, "I want the sea. That is my country."<sup>12</sup> Article IV of the Treaty of Neah Bay states: "*The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States.*" The Treaty of Neah Bay is the only Native American treaty with the U.S. government that explicitly secures the right to whale.

Despite its assurances, the U.S. government set out to radically restructure Makah society. The story is tragically reiterative of the histories of other Native American tribes. The plan was to forcibly assimilate the Makah into American society, which first required the strategic eradication of all markers of difference – that is, of Makah language, religion, and culture. Colson writes: "The policy was one of wholesale transformation, or the substitution of one entire way of life for an alien one."<sup>13</sup> To this end, U.S. government representatives set up a boarding school for Makah children in 1874. Attendance was compulsory, and parents were jailed if they resisted sending their children. At the school, children were forbidden to wear traditional dress or speak the Makah language. For ten months of the year, they were relentlessly indoctrinated into believing that all things Makah were backward and pagan, and that Christianity and English were the keys to salvation.<sup>14</sup>

<sup>9</sup> Miller (2005), 127. Also see Renker (2012).

<sup>10</sup> [http://www.fws.gov/pacific/ea/tribal/treaties/MAKAH\\_1855.pdf](http://www.fws.gov/pacific/ea/tribal/treaties/MAKAH_1855.pdf).

<sup>11</sup> Coté (2010).

<sup>12</sup> Peterson and Hogan (2002), 121.

<sup>13</sup> Colson (1953), 12.

<sup>14</sup> Coté (2010).

U.S. government agents took other steps to dismantle Makah society and rebuild it in their own image. They instituted a system of elected tribal government. They encouraged the destruction of the wooden longhouses where Makah kin groups lived and the construction of single-family homes in their place. They tried to stamp out potlatches, which they viewed as heathen rituals hampering assimilation. Instead of providing fishing and hunting equipment as promised, they distributed agricultural equipment. Hunters and fishermen had to be turned into farmers because agriculture was the foundation of civilization (even if the topography of the area did not support agriculture). The barbaric savage would be made Christian and civilized whether he wished this or not.<sup>15</sup> By and large, he did not wish this. The Makah continued to speak to their children in the Makah language and to teach them about their history and culture. They engaged in potlatches under the creative cover of Christian rituals like Christmas or in physical sites (e.g., Tatoosh Island) free of government supervision.<sup>16</sup> They accepted the agricultural equipment and transformed it into whaling equipment.<sup>17</sup>

Despite these forms of resistance, Makah society experienced significant political, social, and cultural disruption. The imposition of elected government and policies of cultural suppression (including the suppression of the potlatch) weakened the authority of titleholders: "[T]he Indian agents' attempts to displace the authority, and consequently diminish the acquisition of wealth that accompanied chiefly positions, including that of the titled men who once carried out the whale hunt, took its toll on the community's recognition of traditional leadership."<sup>18</sup> Diseases introduced by whites – including smallpox, influenza, and tuberculosis – devastated the Makah population during the mid- to late 1800s, accelerating social change and disrupting the passing on of cultural knowledge and "proprietary rights regarding ownership of dances, songs, and other ceremonial and economic privileges."<sup>19</sup> By 1890, such diseases had reduced the Makah population by 75 percent.<sup>20</sup>

With lines of traditional authority and cultural transmission interrupted, whaling became more difficult, and many Makah turned to sealing. The rise of commercial pelagic sealing in the 1860s enabled many Makah to thrive selling furs, working as laborers on sealing vessels, and occasionally purchasing and operating such vessels themselves. By 1875, sealing was the tribe's principal source of income.<sup>21</sup> In sealing, commoners could make a living on their

<sup>15</sup> Miller (2005).

<sup>16</sup> Coté (2010). Colson (1953) mentions that the Makah reproduced the potlatch in the guise of Christmas.

<sup>17</sup> Coté (2010); Renker (2012).

<sup>18</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Northwest Region, *Draft Environmental Impact Statement for Proposed Authorization of the Makah Whale Hunt* (May 2008) (hereafter DEIS), 3–236.

<sup>19</sup> Renker (2012), 41.

<sup>20</sup> *Ibid.*, 40.

<sup>21</sup> DEIS, 3–235.

own, no longer dependent on a chief who controlled access to resources.<sup>22</sup> The changing Makah social structure, that is, made whaling more difficult and sealing more plausible. In the 1890s, the combination of faltering seal populations and new government regulations on sealing prompted the Makah to return to whaling and other forms of fishing, but the alteration in the social structure that whaling had depended on and reinforced, as well as the steady depletion of whale populations due to European and American commercial hunting, led the Makah to gradually cease whaling by the 1920s.

In 2010, the population of the Neah Bay reservation was 1,414, 75 percent of whom were Makah tribal members. Another 1,512 Makah tribal members lived off of the reservation.<sup>23</sup> The Makah Tribal Council is the governing body and consists of five members who are elected for staggered three-year terms.<sup>24</sup> Commercial fishing and timber are current mainstays of the tribe's economy, as well as tourism and sport fishing.<sup>25</sup> As a result of extensive litigation in the 1970s, the tribe co-manages various fisheries with the state and other entities and gets a direct allocation of various kinds of fish (including halibut and black cod/sablefish) every year.<sup>26</sup> The decline of the Pacific Northwest timber industry and salmon fisheries in the past few decades has impacted the tribe's economic welfare, however, and poverty, unemployment, drug abuse, and alcoholism are all notable problems on the reservation. Per capita income on the reservation in 2007 was \$11,030, as compared with \$21,587 for all Americans, and the unemployment rate was 51 percent (this figure climbs even higher in the winter season). Almost 40 percent of reservation households are below the federal poverty line.<sup>27</sup> Makah Tribal Council members say they are a people in crisis and claim that whaling will restore tribal unity and pride, promote social cohesion, and reinvigorate their culture.

Gray whales pass through the Makah usual and accustomed hunting grounds twice a year on their famed migrations along the Pacific coast between their birthing lagoons in Baja Mexico and their summer feeding grounds in the Bering and Chukchi Seas off of Alaska (see Figure 7.2). They are uniquely vulnerable to human activity because they inhabit and migrate through shallow coastal waters. Human-related threats to their survival include ship strikes, fishing nets, pollution, global warming and its impact on their prey, oil and gas exploration, military activities, and hunting. One-third of calves do not survive their first year and the momentous migration northward.<sup>28</sup> Our ability to narrate the history of gray whales – and “scientifically manage” their

<sup>22</sup> Coté (2010).

<sup>23</sup> Renker (2012).

<sup>24</sup> According to the constitution and bylaws adopted by the Makah tribe in 1936 following the passage of the Indian Reorganization Act.

<sup>25</sup> DEIS, 3–184.

<sup>26</sup> DEIS, 3–193.

<sup>27</sup> Renker (2012), 62, 64.

<sup>28</sup> Peterson and Hogan (2002), 27.

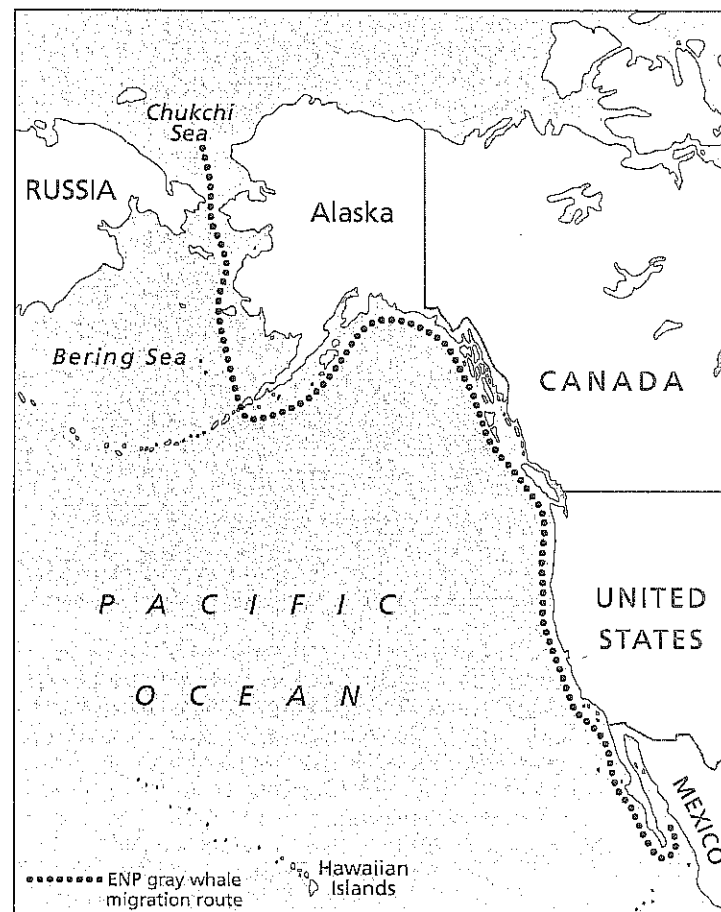


FIGURE 7.2. Gray Whale Migration Route, Mexico to Alaska.

populations – is compromised by the fact that scientific knowledge about them is provisional, incomplete, and vigorously contested.

*Eschrichtius robustus* is a species of baleen whale whose members grow to between thirty-six and fifty feet long, weigh between sixteen and forty-five tons, and may live as long as eighty years.<sup>29</sup> They feed in shallow coastal waters by scraping the mud bottom and using their baleen to filter out their prey, which

<sup>29</sup> <http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/graywhale.htm>.

consists of benthic and epibenthic invertebrates such as amphipods, decapods, mollusks, sponges, and shrimp. They also consume pelagic prey such as crab larvae and herring eggs and larvae.<sup>30</sup> Like other whales, grays evolved from land mammals who returned to the sea about 50 million years ago.<sup>31</sup>

Recent studies of closely related species, as well as behavioral studies of grays themselves, suggest that gray whales are intelligent mammals with cognitive abilities, emotional lives, and social relations. A 2006 study of other baleen whales (the humpback and finback) and toothed whales, conducted at the Mount Sinai School of Medicine, reported that these whales had, on a parallel track, evolved brain structures similar to our own, with specialized neurons called spindle cells that are linked to self-awareness, linguistic expression, compassion, and other traits. The study argued that these whales “exhibited complex social patterns that include intricate communication skills, coalition formation, cooperation, cultural transmission and tool usage.”<sup>32</sup> Many scientists argue that cetaceans’ large brains indeed “evolved to support complex cognitive abilities.”<sup>33</sup> Odontocetes (toothed whales), in particular, have large brains relative to body size because they hunt for food in groups, which requires highly developed social and communication skills. Although the evidence of cognitive abilities and social relations is stronger for odontocetes (toothed whales) than for mysticetes (baleen whales), Simmonds notes that the latter are understudied and that recent studies on minke whales suggest that “the behavior of baleen whales may be more complex than previously thought.”<sup>34</sup> Swartz points out that gray whales give care to unrelated calves and help injured companions, behaviors that suggest significant cognitive, emotional, and social abilities: “[O]n the Arctic feeding grounds, it was common for a second whale to remain with a harpooned one. In one instance, a harpooned pregnant female was supported at the surface by a second pregnant female that put her head and tail under the animal.”<sup>35</sup>

Gray whales used to live in the Atlantic Ocean as well as the Pacific, but they were hunted to extinction in the Atlantic by the end of the 1600s.<sup>36</sup> They were very nearly driven to worldwide extinction by commercial whalers in the 1800s. Captain Charles Scammon’s discovery in 1858 that gray whales return every year to birthing lagoons in Mexico led to the intensive slaughtering of whales there and sent the population numbers of gray whales plummeting. Scammon went after calves, knowing that gray whale mothers would come in close to try to protect their young. By the late 1930s, gray whale numbers were estimated at 1,500 worldwide, down from tens of thousands prior

<sup>30</sup> DEIS, 3–62.

<sup>31</sup> Peterson and Hogan (2002), 15.

<sup>32</sup> Siebert (2009), 35 citing a study published in *Anatomical Record* in November 2006.

<sup>33</sup> Marino et al. (2007).

<sup>34</sup> Simmonds (2006), 103.

<sup>35</sup> Swartz (1986), 222.

<sup>36</sup> DEIS, 3–58.

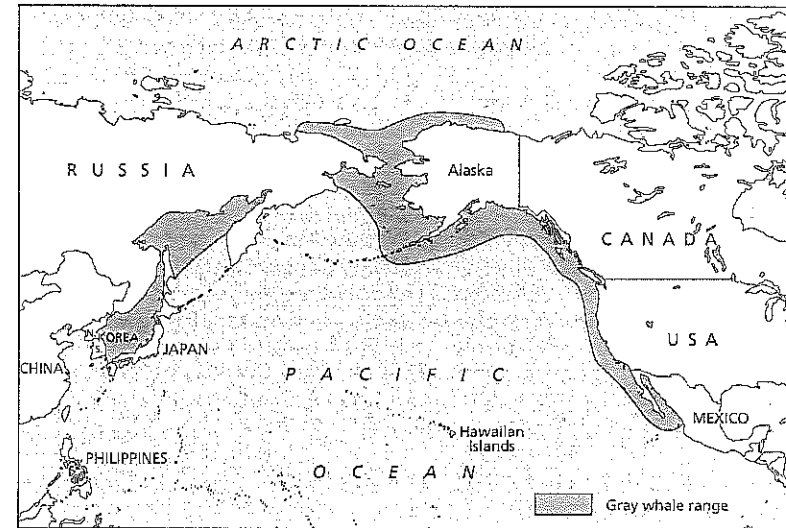


FIGURE 7.3. Ranges for Western North Pacific and Eastern North Pacific Gray Whales.

to the advent of commercial whaling.<sup>37</sup> In 1937, in recognition of the gray whale’s dire situation, an international agreement on the regulation of whaling banned the commercial hunting of gray (and right) whales, with an exception for aboriginal hunting. Both the ban and the aboriginal exception were continued under the 1946 International Convention on the Regulation of Whaling (ICRW), the agreement that established the International Whaling Commission (IWC). In the 1970s, the United States extended the species additional protections by passing the Marine Mammal Protection Act of 1972, which prohibits the “taking” of marine mammals (with various exceptions), and listing the gray whale as an endangered species under the Endangered Species Act of 1973. Enacted in 1986, the IWC’s moratorium on commercial whaling, again with an aboriginal exception, also protects gray whales.

Today, there are two surviving populations of gray whales: the Western North Pacific gray whale and the Eastern North Pacific gray whale (ENP). The Western gray lives along the coasts of Russia, Japan, Korea, and China, whereas the Eastern gray lives along the coasts of Mexico, the United States, and Canada (see Figure 7.3). The official stance of the U.S. National Marine Fisheries Service (NMFS) is that these are two genetically distinct populations with separate migratory routes and feeding and breeding grounds. When the NMFS advised the U.S. Fish and Wildlife Service to delist the gray whale

<sup>37</sup> DEIS, 3–71.

in 1994 – the governmental move that opened the door to the resumption of Makah whaling – it stated that the Eastern North Pacific gray whale had rebounded to a healthy population size of 20,000+, whereas the Western gray whale remained critically endangered at a population size of 100–200, and recommended delisting only the former. However, scientists have recently discovered that “at least some individuals from summer feeding grounds utilized by the endangered western stock migrate across the Pacific and into areas used by ENP gray whales,” suggesting that the two populations may not be as distinct as previously thought.<sup>38</sup> The possible implications of these studies for the scientific management of gray whales are significant enough that the NMFS cited them in May 2012 as one reason it had decided to discard the 2008 Draft Environmental Impact Statement (DEIS) on the proposed Makah whale hunt and start the environmental impact assessment process over again. (It is ongoing at the time of this writing.)

Another reason given by the NMFS for discarding the DEIS also had to do with emergent data and scientific uncertainty. ENP gray whales engage in the longest biannual migration of any mammal, traveling up to 12,000 miles round-trip from Baja Mexico to the Bering and Chukchi Seas in the spring, and back again in the fall. Each year, a small group of gray whales (approximately 200 individuals) does not travel all the way north to Alaska in the spring but instead chooses to spend the summer feeding in waters from Northern California to Northern British Columbia (an area that includes the Makah usual and accustomed fishing and hunting grounds). Scientists cannot explain why this subgroup of whales makes this decision, whether and to what extent these whales are distinguishable genetically or otherwise from whales who migrate all the way north to Alaska, or why the composition of this group varies to some degree but not wholly from year to year. What is certain is that the project of characterizing and understanding these whales has high political stakes. NMFS scientists call these whales the Pacific Coast Feeding Aggregation or Group (PCFA or PCFG) and emphasize that their composition varies somewhat annually, while whale advocates call them “resident” whales, speak of their “site fidelity,” note that some have returned every year for twenty-five years, and emphasize their individual identities (to the extent these are known through photo identification and other techniques). Continuing uncertainty about these whales is cited by the NMFS as another reason why it began the environmental impact review process anew in 2012: “In 2010 and 2011, researchers studying the genetics of ENP and PCFG whales found evidence of population substructure indicating that PCFG whales may warrant consideration as a separate management unit.”<sup>39</sup>

<sup>38</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration, “Notice of Intent to Terminate the Existing Draft Environmental Impact Statement and Prepare a New Environmental Impact Statement,” 29968.

<sup>39</sup> U.S. Department of Commerce, “Notice of Intent to Terminate the Existing Draft Environmental Impact Statement and Prepare a New Environmental Impact Statement,” 29968.

Like the California Fish and Game Commission, the NMFS claims to base all of its decisions in gray whale management on the “best available” science, a phrase that hints at the provisional nature of this science even as it sanctifies it. In fact, the incompleteness and contingency of gray whale science is a pivotal part of the Makah whaling story. Scientists have been unable to explain, for instance, either the precipitous increase in gray whale deaths in 1999–2000, when strandings on the West Coast increased sevenfold, or the significant drop in calf production from 1999–2001.<sup>40</sup> The NMFS formed a special working group on the strandings, which it termed an “unusual mortality event,” but the group could not provide a definitive explanation for the phenomenon, instead citing a number of possible factors such as starvation due to unavailability of prey brought about by global warming.<sup>41</sup> Although strandings have diminished and calf production has rebounded, opponents of Makah whaling have pointed to these issues as evidence of the fragility of the gray whale population and the insufficiency of the “best available” science on this species.

The NMFS held fast to its overall population estimates for the gray whale through the delisting process and the environmental assessment of the Makah hunt, claiming that gray whales’ “historical abundance” or population before commercial hunting was between 15,000 and 24,000, and that its current population estimate of 20,000 plus indicates their full recovery, thereby justifying their delisting.<sup>42</sup> In 1991, the NMFS proposed delisting the ENP gray whale (but not the Western gray) “based on evidence that this [ENP] stock has recovered to near its estimated original population size and is neither in danger of extinction throughout all or a significant portion of its range, nor likely to again become endangered within the foreseeable future throughout all or a significant portion of its range.”<sup>43</sup> The Fish and Wildlife Service approved delisting on June 16, 1994, accepting the NMFS’s claims that the current population of ENP whales is close to historic abundance and that the ENP and Western grays are wholly separate stocks. Both of these claims are, in fact, based on uncertain and contested science. Recent research by Alter and colleagues (2007), based on genetic analysis of whale meat sold in Japanese markets, suggests that the historical abundance of gray whales may have been as high as 100,000, which casts the current population estimate of 20,000 plus and the delisting decision in an entirely new (and less favorable) light.<sup>44</sup> In their DEIS on the Makah hunt, the NMFS mentions the work of Alter and colleagues (2007) but

<sup>40</sup> Peterson and Hogan (2002), xvi.

<sup>41</sup> DEIS, 3-103, 3-107.

<sup>42</sup> DEIS, 3-70, 3-71, 3-108.

<sup>43</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, “Endangered Fish and Wildlife; Gray Whale,” 58869.

<sup>44</sup> Alter et al. (2007). The impressive genetic diversity discovered suggests that the historic population of gray whales in the Pacific could have been up to three to five times higher than previously believed. See Alter et al. (August 2007).



dismisses it and stands by its original calculations of historical abundance.<sup>45</sup> Nevertheless, estimates of the historic population of gray whales remain highly contested among scientists.<sup>46</sup>

Biologists are not the only scientists perplexed by gray whales. For decades, this species has presented ethologists with a fascinating behavioral puzzle. In the birthing lagoons of Baja Mexico, locals have named gray whales "*Las Ballenas Amistosas*," or "friendly whales." Friendlies, mothers who bring their calves right up to small whale-watching boats to be petted and adored by humans, often bear harpoon scars that indicate that they have encountered human hunters (probably Inupiat Eskimos). Why do whales who have had such experiences choose to approach humans and even encourage contact between their calves and humans? On a whale-watching excursion in Western Baja's Laguna San Ignacio, author Charles Siebert asked HSUS marine mammal biologist Toni Frohoff if the whales were possibly expressing forgiveness. Frohoff responds:

Those are the kinds of things that for the longest time a scientist wouldn't dare consider. But thank goodness we've gone through a kind of cognitive revolution when it comes to studying the intelligence and emotion of other species. In fact, I'd say now that it's my obligation as a scientist not to discount that possibility. We do have compelling evidence of the experience of grief in cetaceans; and of joy, anger, frustration and distress and self-awareness and tooluse; and of protecting not just their young but also their companions from humans and other predators. So these are reasons why something like forgiveness is a possibility. And even if it's not that exactly, I believe it's something ... I'd put my career on the line and challenge anybody to say that these whales are not actively soliciting and engaging in a form of communication with humans, both through eye contact and tactile interaction and perhaps acoustically in ways that we have not yet determined.<sup>47</sup>

The whale watchers in San Ignacio experience not only the whale's subjectivity – the sense, in ethologist Barbara Smuts's words, of looking in an animal's eyes and realizing there is "someone home" – but a moment of interspecies intersubjectivity. A moment of mutual beholding, when whale and human regard one another and say something to one another. Many remark upon the singular experience of being beheld as the whale turns on her side beside the boat and opens her eye to observe them.

The gray whale was pulled back from the brink of extinction in the mid-twentieth century by international conservation law. As mentioned earlier in this chapter, the International Convention for the Regulation of Whaling (1946) continued an earlier international agreement to protect grays from commercial

<sup>45</sup> DEIS, 3–71. Here the NMFS mentions Alter et al. (2007) and suggests that because the study's calculations of historic abundance included both western and eastern stocks and because carrying capacity may have declined over time, the study does not alter the NMFS's position on historic abundance and the advisability of delisting of the ENP.

<sup>46</sup> Pyenson and Lindberg (2011).

<sup>47</sup> Siebert (2009), 35.

hunting, with an aboriginal exception. The ICRW created the International Whaling Commission (IWC), whose original mission was not to protect whales per se but rather "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."<sup>48</sup> The IWC wanted to conserve whales, in other words, so that there would be enough of them to hunt. There is little doubt that signatory nations viewed whales instrumentally, as means to human ends: until 1972, national whaling quotas were allocated in BWUs (blue whale units), with one BWU equaling two fin whales, two and a half humpback whales, or six sei whales. The whale was not an individual animal but a number of units of whale – a measurable commodity with a set exchange value. From the 1940s through the 1960s, the IWC set whaling quotas higher than its own Scientific Committee recommended, ignoring the latter's warnings that several whale species were headed toward extinction.<sup>49</sup>

Beginning in the 1970s, however, the body slowly but perceptibly adopted a more protectionist tone toward whales. To begin with, the United States turned decisively toward protectionism. Responding to domestic pressure from environmental and animal protection groups, the U.S. government placed several whale species on the newly created endangered species list and passed the Marine Mammal Protection Act (1972) prohibiting the "taking" of marine mammals domestically. Congress passed the Pelly (1971) and Packwood-Magnuson (1979) amendments to create more leverage for the United States to persuade noncompliant nations to abide by international conservation programs and ICRW regulations.<sup>50</sup> At the annual IWC meetings, the United States unsuccessfully proposed a global moratorium on commercial whaling in 1972, 1973, 1974, 1979, 1980, and 1981. Finally, in the early 1980s, a number of non-whaling nations joined the IWC, creating the three-fourths supermajority needed to approve the moratorium in 1982.<sup>51</sup> The international body that had been created to protect whales *for* the whaling industry was now protecting whales *from* the whaling industry.

<sup>48</sup> International Convention for the Regulation of Whaling, December 2, 1946, 161 United Nations Treaty Series 72. Today, the IWC maintains the Schedule, a program that regulates whaling through the maintenance of the commercial moratorium and the issuing of quotas for aboriginal subsistence whaling. The IWC also coordinates and funds conservation work and research. As of October 2012, it had eighty-nine member nations. See <http://iwcoffice.org/history-and-purpose>.

<sup>49</sup> Burns (1997).

<sup>50</sup> The Pelly Amendment (1971) gives the president authority to ban the importation of fish products from a nation contravening international fishery conservation programs. The Packwood-Magnuson Amendment (1979), passed because the Pelly sanctions process proved unwieldy, reduces a nation's fishing quota within U.S. waters by at least 50 percent if it is acting to diminish the effectiveness of the International Convention for the Regulation of Whaling. See Beck (1996) on why these amendments have been relatively ineffective.

<sup>51</sup> Beck (1996). The moratorium went into effect in 1986, with exceptions for scientific research and aboriginal subsistence whaling (ASW).

The implementation of the moratorium on commercial whaling in 1986 did not end the battle between pro- and anti-whaling nations in the IWC; it merely shifted the terrain. Several nations including Norway, Iceland, and Japan lodged objections to the moratorium, although Japan later withdrew its objection because of pressure from the U.S. government. Under IWC regulations, a member nation that lodges an objection to the body's decision can flout that decision with impunity, and Norway and Iceland have since resumed commercial whaling.<sup>52</sup> Pro-whaling nations have also sought to exploit the moratorium's two exceptions – for aboriginal subsistence whaling (ASW) and for “scientific research” – all the while shrugging off condemnation from the IWC and environmental and animal protection organizations worldwide. Japan has continued commercial whaling under the “scientific research” exception, claiming that it needs to kill whales to advance scientific knowledge. It has also argued continuously since the moratorium was enacted that what it calls STCW (small type coastal whaling), traditional hunting conducted with hand implements by coastal villagers, should be considered aboriginal subsistence whaling and thus permitted. Indeed, Japan has accused the United States and other anti-whaling nations of having a discriminatory “double standard” when it comes to the ASW exception.<sup>53</sup> In addition, pro-whaling nations have fought assiduously to overturn the moratorium within the IWC. The IWC has become a case study of an international organization struggling without enforcement powers to maintain compliance among member states to a global conservation regime. The moratorium is helping whale populations to recover, but it is a fragile and ongoing accomplishment, vulnerable to being overturned or rendered irrelevant by noncompliance. When the Makah signaled their eagerness to resume whaling in the mid-1990s, their story intersected explosively with this global political battle over whaling.

#### THE MAKAH WHALE AGAIN: SCIENTIFIC AND LEGAL UNCERTAINTIES

Interest in Makah culture and history was reinvigorated in the 1970s by the discovery of the Ozette site – a Makah village located thirty miles from Neah Bay that had been buried by a mudslide hundreds of years ago. The artifacts at Ozette, which turned out to be one of the most important archaeological finds in Pacific Northwest history, confirmed the historical centrality of whaling to Makah life and generated excitement within the tribe about this practice. The larger political environment in the region and the nation was also conducive to tribal revival. During the 1950s and 1960s, the Makah and other Northwest Coast tribes had been involved in extensive litigation to defend their treaty fishing rights, culminating in the favorable *Boldt* decision of 1974, which imposed a conservation necessity test on state regulation of tribal fishing

<sup>52</sup> *Ibid.*

<sup>53</sup> DEIS, 3-331.

and guaranteed tribes 50 percent of the harvestable fish in their usual and accustomed fishing grounds.<sup>54</sup> As part of this struggle, the Makah and other tribes had organized “fish-ins,” modeled on the sit-ins of the then-emergent civil rights movement. By the 1970s, movements were flowering within Black, Chicano, Puerto Rican, Asian American, and Native American communities across the nation. Liberation, self-determination, and sovereignty were the principles of the era. In this context, insistence on their right to whale came to be read by many Makah as an assertion of sovereignty and a rebuke to the failed designs of white colonialism.

Discussions about whaling percolated within the Makah tribe and in the 1980s, the Makah, along with other Northwest Coast tribes and fisheries, approached the NMFS about delisting the gray whale. Beck (1996), based on an interview with Makah Fisheries Director Dan Greene, writes that “from 1987 to 1993, [the Makah] were closely involved with NMFS’s eventual 1993 recommendation to the U.S. Fish and Wildlife Service (FWS) for delisting the gray whale from the Endangered Species list, approved by FWS in 1994.”<sup>55</sup> This was the first step on a long journey through the intricacies of U.S. and international regulations relating to whaling, and the Makah brought to this process “political savvy gleaned from decades of experience with legal and political struggles through courts and directly with NMFS officials on issues involving fishing rights.”<sup>56</sup>

This early Makah involvement in delisting the gray whale was behind the scenes and largely off the record, it seems; neither the Makah tribe nor the NMFS acknowledge it in the official documents they have produced concerning the delisting process and the subsequent tribal proposal to resume whaling. The official record of the NMFS indicates only that the agency received a 1991 petition for delisting from the Northwest Indian Fisheries (of which the Makah are a part) and that the NMFS disregarded the petition because the delisting process was already well under way.<sup>57</sup> The Makah tribe, for its part, implies

<sup>54</sup> *U.S. v. Washington*, 384 F. Supp. 312, 1974, U.S. Dist. Court. See also Coté (2010).

<sup>55</sup> Beck (1996), 377.

<sup>56</sup> *Ibid.*, 376.

<sup>57</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Association, National Marine Fisheries Service, “Endangered Fish and Wildlife; Petition and Finding to Remove the Eastern Pacific Gray Whale Stock From the List of Endangered and Threatened Wildlife,” 64499. A few years later, the NMFS indicated that the Makah seeking to resume whaling was “unlikely,” a strange claim if Dan Greene was accurate in saying that the Makah had been involved in the delisting process for years: “The question has arisen whether non-Alaskan natives would, in the near future, pursue traditional whaling and sealing activities. To date, only the Makah Tribe has expressed such an interest, but it is unclear at this time whether they would be interested in pursuing open-boat whaling or could satisfy subsistence and/or cultural needs by other means. For any Native American group to begin harvesting large whales, they would need to demonstrate a subsistence need and request (through the Bureau of Indian Affairs) the U.S. Commissioner to the IWC to petition that body for a portion of the subsistence quota for gray whales. Such a scenario is considered unlikely at this time.” U.S. Department of Commerce, National Oceanic and Atmospheric Association, National Marine Fisheries Service, “Endangered Fish and Wildlife; Gray Whale,” 3132.

that it was not involved in lobbying the NMFS for delisting and that it waited patiently until the NMFS acted of its own accord: "Once NOAA determined that the protections of the Endangered Species Act were no longer necessary, the Tribe notified NOAA that it wished to reinstate a ceremonial and subsistence gray whale hunt."<sup>58</sup> Just as the NMFS wants to present its decision making as neutral and insulated from political pressure – based on the "best available science" – so, too, does the Makah tribe want to present its actions as environmentally sensitive. It would not enhance the tribe's image to be seen as pushing the NMFS to delist the gray whale for the sake of resuming the hunt.

Once the ENP grays were delisted, the Makah pressed the NMFS for permission to whale, and the U.S. government agreed to request a quota for the Makah under the ASW exception at the 1996 IWC meeting.<sup>59</sup> Although they came under immediate fire from whaling opponents at home and abroad, U.S. officials interpreted the government's historic trust responsibility toward the Makah as mandating this action. This trust responsibility toward Native American tribes was first articulated in *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832), wherein Chief Justice John Marshall held that tribes were "domestic dependent nations," that their relationship to the state was that of ward to guardian, and that all three branches of the U.S. government had a fiduciary obligation to protect and support them.<sup>60</sup> In the modern era, the trust responsibility has been seen as an "explicit duty binding the U.S. to uphold Indian treaty obligations and act as trustee in promoting the economic and political development of the Indian tribes."<sup>61</sup> The Indian Tribal Justice Support Act (1993), the Department of Commerce's American Indian and Alaska Native Policy (March 30, 1995), and Executive Order 13175 (2000) all affirm the government's unique obligation to Native American tribes.<sup>62</sup>

Opposition to the Makah request emerged before the 1996 IWC meeting convened. More than 300 organizations worldwide signed an "Open Letter to the Makah Nation" asking them to reconsider their plan:

The undersigned groups respectfully appeal to the Makah Nation to refrain from the resumption of whaling. People from many cultures worldwide hold whales to be sacred and consider each species a sovereign nation unto itself, worthy of respect and protection. Gray whales migrate vast distances each year and bring joy to many thousands of whale watchers. They only briefly pass through Makah waters. The resumption of the slaughter of these benign and trusting beings would bring to your nation swift and ongoing world-

<sup>58</sup> Makah Tribal Council, "Application for a Waiver," 10.

<sup>59</sup> Many Makah whaling advocates believe that their treaty right to whale is absolute and overrides both domestic law (the MMPA) and international law (the ICRW), but they have submitted to these legal-bureaucratic processes in order to demonstrate good faith and enhance the perceived legitimacy of the hunt. Some whaling opponents argue that the Treaty of Neah Bay was abrogated by the ICRW, the Whaling Convention Act of 1949 (which gives the U.S. Secretary of Commerce powers to enforce the ICRW domestically), and the MMPA.

<sup>60</sup> Coté (2010).

<sup>61</sup> Bradford (2000-1), 190. See also Miller (2005).

<sup>62</sup> DEIS, 1-12.

wide condemnation. We submit that important spiritual traditions must be observed in the context of a planet whose wildlife are being destroyed by habitat reduction, human overpopulation and exploitation, competition for food, and the proliferation of toxic chemicals. As global neighbors also committed to healing our spiritual connection to the natural world, we appeal to you to work with us to pursue creative alternatives to your planned whaling, avoiding a conflict that will have no winners.<sup>63</sup>

Predicting the intense conflict that would envelop the Makah whaling proposal, the letter highlights two counterweights to the Makah argument about cultural tradition: the fact that many other cultures believe that the whale deserves "respect and protection" and the idea that traditions should be flexible enough to take changing (ecological) circumstances into account.

During the 1996 IWC meeting, anti-whaling nations argued that the Makah request did not satisfy the terms of the ASW exception. A 1982 IWC report had clarified the following terms relating to the ASW exception:

*Aboriginal subsistence whaling* means whaling for 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 on the use of whales.

*Local aboriginal consumption* means the traditional uses of whale products by local aboriginal, indigenous, or native communities in meeting their nutritional, subsistence, and cultural requirements. The term includes trade in items which are by-products of subsistence catches.

*Subsistence catches* are catches of whales by aboriginal subsistence whaling operations.<sup>64</sup>

Critics argued that the Makah could demonstrate neither a "continuing traditional dependence" on whaling nor a subsistence requirement for whale meat, and that they were therefore not eligible for the ASW exception. In addition, Alberta Thompson and other dissenting Makah elders arrived at the meeting to speak against their tribe's request. As Thompson puts it, "[We] were grandmothers arriving at the IWC in wheelchairs."<sup>65</sup> The U.S. House of Representatives Committee on Resources seized the moment to unanimously pass a resolution expressing opposition to the Makah hunt.<sup>66</sup> U.S. officials decided to withdraw the request for a Makah quota.

At the next IWC meeting in 1997, the United States did an end run around the quota approval process by folding its gray whale quota request into that of the Chukotka (indigenous inhabitants of Russia) and trading part of the Alaskan Inupiat's bowhead whale quota in exchange for some of the Chukotka's gray whale quota. Member nations who opposed Makah whaling were left with little choice but to approve the Chukotka quota because this people clearly fit the

<sup>63</sup> <http://www.earthisland.org/ci/immmp/makah.htm>, cited in Watters and Dugger (1997).

<sup>64</sup> *Report of the Aboriginal Subsistence Whaling Working Group*, 5.28.12, iw64/ASW5 Rev1, agenda item 5.1.

<sup>65</sup> Peterson and Hogan (2002), 125.

<sup>66</sup> Watters and Dugger (1997), 334.

ASW exception and received quotas every year from the IWC. They registered their protest by issuing a statement that the ASW exception applies only to those "whose traditional subsistence and cultural needs have been recognized by the IWC," but the United States succeeded in removing "by the IWC" from the statement, thus leaving the recognizing agent unspecified and the statement virtually meaningless.<sup>67</sup> Coming out of the 1997 IWC meeting, the NMFS and Makah claimed that the IWC had allocated the latter a gray whale quota, and whaling opponents (including anti-whaling nations such as Australia and New Zealand) claimed that the IWC never explicitly recognized the Makah under the ASW exception and that the Makah therefore had no legal right to whale.<sup>68</sup>

In April 1998, the NMFS announced that Makah subsistence and cultural needs had been recognized by both the United States and the IWC and issued the tribe a gray whale quota. The Makah hunted a gray whale in May 1999, as described at the opening of this chapter. Before the Makah could hunt again, a coalition of individuals and environmental and animal protection groups took the National Oceanic and Atmospheric Administration (NOAA) – of which the NMFS is a part – to court, arguing that it had shown bias (in favor of the hunt) and had rushed to judgment in its assessment of what kind of environmental impact Makah whaling was likely to have, thus violating the National Environmental Policy Act (NEPA) of 1970.<sup>69</sup> In *Metcalf v. Daley* (2000), the Ninth Circuit Court of Appeals ruled in favor of the plaintiffs, finding that the NOAA had indeed shown bias and violated NEPA by preparing an Environmental Assessment (EA) – which resulted in a FONSI or "finding of no significant impact" – of the proposed hunt after it had already committed itself in writing to supporting the Makah hunt.<sup>70</sup> The court wrote: "It is highly likely that because of the Federal Defendants' prior written commitment to the Makah and concrete efforts on their behalf, the EA was slanted in favor of finding that the Makah whaling proposal would not significantly affect the environment."<sup>71</sup> The court also affirmed that the U.S. Supreme Court "has clearly held that treaty rights such as those at stake in this case 'may be regulated ... in the interest of conservation ... provided the regulation ... does not discriminate against the Indians.'"<sup>72</sup> The NOAA was ordered to set aside

<sup>67</sup> Hodges (2000).

<sup>68</sup> Peterson and Hogan (2002); Firestone and Lilley (2005).

<sup>69</sup> NEPA sets out procedures concerning proposed federal actions that might affect the environment, requiring an agency to collect information on the possible impact and disclose this information to the public.

<sup>70</sup> 214 F.3d 1135 (9th Cir., 2000). Plaintiffs-Appellants included Jack Metcalf, Australians for Animals, Beach Marine Protection, Alberta Thompson, the Fund for Animals, and others. Defendants-Appellees included William Daley, Secretary, U.S. Department of Commerce; James Baker, Administrator, NOAA; and Rolland Schmitten, Director, NMFS. Defendant-Intervener-Appellee was the Makah Indian Tribe.

<sup>71</sup> Section 35.

<sup>72</sup> Section 36.

the written agreement it had made with the Makah tribe, start the NEPA process again from scratch, and prepare a new EA.

After the NMFS issued a second EA in July 2001, again with a "finding of no significant impact" (FONSI), it found itself back in court. In *Anderson v. Evans* (2002), the Ninth Circuit Court of Appeals once again ruled in favor of the plaintiffs, finding that the NOAA had violated NEPA by preparing an EA rather than a more comprehensive Environmental Impact Statement (EIS).<sup>73</sup> The court argued that the impact of the Makah hunt on the small population of "local" or "resident" whales was "sufficiently uncertain and controversial to require the full EIS protocol."<sup>74</sup> The Court also remarked upon the IWC's ambiguous language about aboriginal and subsistence needs needing to be "recognized": "We cannot tell whether the IWC intended a quota specifically to benefit the Tribe. ... [T]he surrounding circumstances of the adoption of the Schedule cast doubt on the intent of the IWC to approve a quota for the Tribe. ... Whether recognition must formally come from the IWC or from the United States is not clear."<sup>75</sup> Noting the potential precedential impact of the scenario, the court remarks:

Prior to adoption of this language, the understanding among IWC members was that only the IWC could decide which groups met the subsistence exception. The 1997 IWC gray whale quota, as implemented domestically by the United States, 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.<sup>76</sup>

Environmental and animal protectionists expressed deep concern about the Makah hunt opening the door to the claims of other groups across the world. The Court's remarks recognized the legitimacy of those concerns.

The *Anderson* court also ruled that the Marine Mammal Protection Act (MMPA) of 1972 applies despite the Makah's treaty rights because the courts have recognized the government's right to regulate Native American fishing in the name of "conservation necessity."<sup>77</sup> The Makah were therefore required to

<sup>73</sup> 371 F.3d 475 (9th Cir., 2002). Plaintiffs-Appellants included Will Anderson, Fund for Animals, HSUS, Australians for Animals, Cetacean Society International, West Coast Anti-Whaling Society, and others. Defendants-Appellees were Donald Evans, Secretary, U.S. Department of Commerce; Conrad Lautenbacher, Administrator, NOAA; and William Hogarth, Assistant Administrator for Fisheries, NMFS. Defendant-Intervener-Appellee was the Makah Indian Tribe. Under NEPA, an Environmental Assessment (EA) either results in a FONSI (finding of no significant impact) or triggers the preparation of a full Environmental Impact Statement (EIS).

<sup>74</sup> Section 68.

<sup>75</sup> Section 95.

<sup>76</sup> Section 80-1.

<sup>77</sup> The MMPA prohibits (with exceptions) the "take" of marine mammals in U.S. waters, or by U.S. citizens on the high seas, as well as the importation of marine mammals and/or products into the United States. In 1994, the MMPA was amended to specify an exception for Alaskan Natives relying on marine mammals as a subsistence resource. <http://www.nmfs.noaa.gov/pr/laws/mmpa>. The court mentioned the three-part Fryberg test for conservation laws affecting Native treaty rights: The sovereign must have jurisdiction in the activity area; the statute must be nondiscriminatory; and the statute must be necessary to achieve the conservation purpose.

apply for a waiver from the MMPA in order to whale. Here the court argued that Article IV of the Treaty of Neah Bay, which grants the Makah fishing, whaling, and sealing rights "in common with all citizens of the United States," indicates a "cotenancy" relationship over these resources. According to the court, the "in common with" language

prevent[s] Indians from relying on treaty rights to deprive other citizens of a fair apportionment of that resource ... [which means] the Makah cannot, consistent with the plain terms of the treaty, hunt whales without regard to processes in place and designed to advance conservation values by preserving marine mammals or to engage in whalewatching, scientific study, and other non-consumptive uses. ... The MMPA will properly allow the taking of marine mammals only when it will not diminish the sustainability and optimum level of the resource for all citizens.<sup>78</sup>

In other words, gray whales are common property of U.S. citizens – *res communis* – or part of the global (in this case, national) commons.<sup>79</sup> Thus the Makah treaty right to whale, although valid, must be weighed against other U.S. citizens' right to have (non-consumptive) access to this resource as well. Unlike the environmental and animal protection groups who made various biocentric assertions in the "Open Letter to the Makah Nation," the court relied on exclusively anthropocentric claims to make its case. Although the intent is protectionist, the court's instrumentalizing language is eerily reminiscent of the IWC's old unit of measurement, Blue Whale Units. Which type of argument has more promise for protecting gray whales – a neoliberal one about resources and property rights or an alternative one about ecological health and animal well-being? Can they be deployed together or are they mutually exclusive?

In 2012, the NMFS abruptly announced that it was discarding the Draft Environmental Impact Statement (DEIS) it had been working on and starting the process from scratch, citing, as described earlier in this chapter, "several substantive scientific issues [that] arose that required an extended period of consideration."<sup>80</sup> With the NEPA process restarting, it will likely be several more years until a new DEIS is produced, subjected to public comment, and revised into a final EIS. Thus it will be several more years until the decision is made to grant or not grant the Makah a waiver to the MMPA. The contingency of gray whale science surfaces and shakes things up, highlighting the unstable foundation of scientific management efforts and the uncertain status of the species. The scientific management of the commons in the public interest turns out to be a fraught and deeply political project.

<sup>78</sup> Section 108.

<sup>79</sup> Burns (1997) asks if whales are *res nullius* resources (the property of no one, there for the taking) or *res communis* resources (common property of the world). He argues that international agreements have tended to lean toward the latter definition. Burns does not consider a third possibility: that whales are not resources or property at all.

<sup>80</sup> U.S. Department of Commerce, "Notice of Intent to Terminate the Existing Draft Environmental Impact Statement and Prepare a New Environmental Impact Statement," 29968.

#### THE OPTICS OF ECOLOGICAL AND ETHICAL HARM

Environmental and animal protectionist organizations made two principal types of arguments against the Makah hunt.<sup>81</sup> These are analytically distinct optics that were often combined in practice. The first was that Makah whaling caused real and potential ecological harm by killing members of a species whose status is precarious and opening the door legally and morally to whaling by others around the world. The second was that Makah whaling caused ethical harm by taking the lives of animals who deserve significant moral consideration and, in the eyes of some, a "right to life." Thus many whale advocates went beyond admonitions about cruelty and the infliction of unnecessary suffering (arguments used in the Chinatown market case) to suggesting that whales, because of their special characteristics, deserve to be protected from hunting altogether.

Staff scientists from the environmental and animal protections groups challenged the NMFS's "best available science" at every turn – questioning specific studies and claims, requesting up-to-date and impartial research on all aspects of gray whale behavior, biology, and ecology, and emphasizing the indeterminacy of gray whale science. Reporting on the response of these organizations to the 2008 DEIS, the NMFS scoping report drily noted:

Ocean Defense International commented that the EIS needs to examine the methodology of population estimates over the last ten years ... because the assessments cannot be made on questionable or out of date data. Cetacean Society International commented that data must be sought from all legitimate sources (not just NMFS-funded), and asked for the EIS to discuss NFMS' funding priorities, or lack of, for assessments. The comment claimed that because NFMS has not funded and accomplished recent studies, the EIS cannot assert with objectivity that climate, population and habitat trends are suitable to allow whaling in a given future period, much less that the population will remain stable.<sup>82</sup>

In an August 10, 2012 letter to the NMFS, HSUS marine mammal scientist Dr. Naomi Rose urged NMFS officials preparing their new EIS to pay heed to the Alter and colleagues (2007) study on historical ENP population estimates so that they might develop a "proper environmental baseline" from which to analyze the environmental impact of the Makah hunt.

Whale advocates also warned insistently about the precedential dangers posed by Makah whaling. Some expressed strong concern that the Makah

<sup>81</sup> The coalition of groups included local groups (e.g., Peninsula Citizens for the Protection of Whales) as well as other whale and cetacean protection organizations (e.g., Cetacean Society International) and national and international environmental and animal protection organizations (e.g., HSUS, Sea Shepherd Conservation Society, Ocean Defense International, Animal Welfare Institute, Progressive Animal Welfare Society).

<sup>82</sup> U.S. Department of Commerce, NOAA, NMFS, "Scoping Report: Makah Whale Hunt Environmental Impact Statement," 12. While preparing the DEIS, the NMFS held four public scoping meetings in October 2005 (three in Washington State and one in Maryland) and solicited more than 300 written comments in 2005–6, the vast majority of which were sent by individuals.

would move from “cultural and subsistence” hunting to resuming full-scale commercial hunting. The fact that IWC regulations allowed the sale of handicrafts made from nonedible whale products seemed to blur the line between aboriginal and commercial whaling. In an October 24, 2005 letter to the NMFS, Cathy Liss, president of the Animal Welfare Institute, wrote: “AWI is concerned that the granting of an additional waiver to the MMPA [to the Makah] for the sale of handicrafts made from whale products within the United States might lead to commercialization of the whale as a resource.”<sup>83</sup>

The Makah Tribal Council had assured the NMFS that they had no plans to resume commercial whaling, and the tribe’s “Application for a Waiver of the Marine Mammal Protection Act Take Moratorium” (2005) clearly stated that the tribe wished to hunt only for local consumption and ceremonial purposes. Yet the Makah had openly discussed the resumption of commercial whaling early on in the approval process. Obtained through an FOIA request, an April 27, 1995 memo from an NMFS staffer to Michael Tillman, the deputy U.S. commissioner to the IWC, mentioned that the Makah planned “to operate a processing plant so as to sell [whale meat] to markets outside the U.S. ... [and] have started discussions with Japan and Norway about selling their whale products to both countries.”<sup>84</sup> John McCarty, executive director of the Makah Whaling Commission, remarked: “[S]elling the whale was a thought. And I’ll be honest with you. Selling the whale could be very, very advantageous to the tribe.”<sup>85</sup> In addition, in a May 5, 1995 letter to Will Martin of NOAA and David Colson of the Department of State, Makah Tribal Council member Hubert Markishtum states for the record that the Makah have the treaty right to hunt whales commercially and that they are not waiving that right by applying for an ASW exception.<sup>86</sup>

The precedential danger was magnified, whale protectionists argued, because of the U.S. government’s demonstration of bias during the NEPA and IWC approval processes. The HSUS sent numerous scoping letters to the NMFS alleging the agency’s bias and warning that Makah whaling would open the door to other groups and nations keen on expanding the definition of ASW. In a February 16, 2001 letter to the NMFS, HSUS marine mammal scientist Dr. Naomi Rose wrote that the just-released Draft Environmental Assessment (DEA), with its finding of no significant impact (FONSI), was misguided because it relied on the U.S. delegation’s interpretation of what had occurred at the 1997 IWC meeting – an interpretation that was “entirely erroneous” and “self-serving”: “The HSUS firmly believes that in order to avoid a lawsuit by the Makah Tribe regarding treaty rights, the US has wilfully misinterpreted the unambiguous statements and intentions of other IWC delegations.” Rose points

<sup>83</sup> October 24, 2005 letter from Cathy Liss to Cassandra Brown of NMFS, Northwest Region.

<sup>84</sup> Russell (1999), 32. See also Schmidt (1998) and Firestone and Lilley (2005).

<sup>85</sup> Blow (1998).

<sup>86</sup> February 16, 2001 letter from Dr. Naomi Rose to Cathy Campbell of NOAA. See also “Native Americans and the Environment/The Makah Whaling Conflict: Arguments Against the Hunt.”

to the verbatim record of the 1997 IWC plenary session, which indicates that a majority of the nations who voted for the Chukotka gray whale quota “specified that their votes were not to be perceived as support for the U.S. request or the Makah Tribe’s ASW claims.” In an October 24, 2005 letter to NMFS, Rose then highlights the IWC definition of “local aboriginal consumption” as including “nutritional, subsistence, and cultural requirements” and argues that transcripts of the 1996 and 1997 IWC meetings indicate dissensus on whether Makah nutritional needs had been adequately established. Finally, in an August 20, 2012 letter to the NMFS, Rose concludes that the Makah hunt does not “conform to international standards of subsistence whaling ... and threaten[s] to create (and has indeed *de facto* created) a new category of whaling – cultural whaling – that does not reflect a true subsistence need.” The NMFS is responsible for this outcome as its actions “have consistently resulted in legal short cuts and questionable policy positions that have weakened domestic and international whale protection.”

The ecological Indian trope was deployed as a disciplinary tool by some whaling opponents (both members of the public and a few advocates).<sup>87</sup> The suggestion here was that the Makah were betraying their Makahness by pursuing an activity that threatened environmental balance. In seeking to whale, they were being non-ecological or bad Indians. Consider this e-mail sent to the NMFS during the scoping period for the 2008 DEIS:

Whales are one of the wonders and treasures of the world, and their sacred being is for all mankind. It is very disheartening to see that the quest for their destruction for profit is still going on. I honor and respect our native peoples and have a reverence for their culture. Here in the San Francisco Bay Area, the history of the Ohlone tribe has shown that they were one of the most peaceful, spiritual peoples that ever walked planet earth. ... I believe that any Makah who are willing to destroy one of the most magnificent creatures that the earth has provided are not true to their spirit. Surely, sharing and providing educational opportunities to view and be with these creatures would be a better income producing avenue for the Makah.<sup>88</sup>

A whale advocate made a similar point: “The Makahs are the cowboys here ... and we’re the Indians. We’re protecting nature with very few resources; the Makah are hunting with high-caliber weapons, and with the Coast Guard and the U.S. government behind them.”<sup>89</sup> The force of this statement, of course, lies in its pointed reversal of the ecological Indian trope. It is the Makah who are the rapacious, powerful despoilers of nature, while their opponents struggle to

<sup>87</sup> There were aspects of Makah culture and history that made this mantle an awkward fit to begin with. The Makah’s strong property orientation (they rendered property not just topographical features, marine resources, and physical material but also songs, dances, images, rites, and specific kinds of cultural knowledge), their history as commercial whalers and sealers, and their continued claim to the right to whale commercially – all of this disrupts the image of the Indian as an organic constituent element of nature.

<sup>88</sup> October 15, 2005 e-mail sent by a private individual to the NMFS during public comment on the DEIS.

<sup>89</sup> Martello (2004), 271, citing Schmidt (1999).

stymie their destructive advance. The Makah have become so non-ecological that they are like *cowboys*. Reprising a common theme among whaling opponents, one letter writer to the *Seattle Times* wrote:

Make your clothing on looms so you will look like your ancestors when you are hunting. Give up Gore-Tex and Thinsulate, wear moccasins instead of sneakers and hiking boots. Grow and hunt the rest of your food, stop going to grocery stores. Stop using electricity and all the appliances it supplies. ... If you really want to return to the "old days" of your culture, then turn around and go all the way back.<sup>90</sup>

The suggestion here was that the Makah tribe's embrace of things modern – including modern methods of hunting such as a high-powered rifle and a speedboat – meant that the hunt was not authentic and that they were not acting like authentic Indians.<sup>91</sup> The tone of the quote is sarcastic and disparaging, implying that the Makah are using culture as an excuse to kill whales and that they want to have it both ways by claiming traditionalism while availing themselves of modern conveniences.

The second optic used by whale advocates focused on the ethical harm done by the Makah hunt to unique creatures who deserve human protection. Many of the e-mails sent by concerned individuals to the NMFS during the public comment period on the DEIS opposed the hunt on the grounds that gray whales were singularly "majestic," "ancient," and "intelligent," with large, complex brains and strong family bonds. Victor Sheffer, former chair of the U.S. Marine Mammal Commission, spoke for many when he stated: "I believe we ought to stop killing them [whales] unless for human survival only. ... I see no need to extend this protective ethic to rabbits, or chickens, or fish. Whales are different."<sup>92</sup> The uniqueness argument was an effective strategy for mobilizing public opposition to the Makah hunt, particularly because whales have been emblems of environmental consciousness in the United States since the "Save the Whales" campaign of the 1970s. That it straightforwardly asserted a species hierarchy and thus rendered other kinds of animals (rabbits, chickens, fish, and others) more killable, concerned some, including Gillespie, who recommends linking the critique of whaling to a broader discussion about the "the moral considerability of [all] animals."<sup>93</sup> Interestingly, the ontology explicated by Makah leaders accepts most if not all of these posited whale attributes – and still views whales as edible. Again, this was a wrinkle that environmental and animal advocates did not explore.

Several scholars have directly challenged the IWC's and NMFS's scientific management model for its reduction of whales to resources, calling instead for a reimagining of whales as morally considerable beings. Hawkins writes: "The central issue ... [is] not a matter of whether or not 'science' tells us that certain

<sup>90</sup> 1999 letter to the *Seattle Times*, cited in Erikson (1999), 575.

<sup>91</sup> Van Ginkel (2004).

<sup>92</sup> Cited in Gillespie (1997), 369.

<sup>93</sup> *Ibid.*, 355.

whale populations can be 'harvested sustainably' given the industrial economic model; it is, rather, whether or not that model itself is an appropriate one for all, or any, of humanity to adopt and live by."<sup>94</sup> Addressing the question of Inuit whaling, D'Amato and Chopra challenge the anthropocentric view that the humans' (Inuits') are the only interests at stake: "[T]here is a second interest: that of the great whales in the survival of their species or – even short of claims of survival – in their right to live. The whales find their own sustenance in the oceans; by what right do the Inuit expropriate the bodies of the whales to serve as their food?"<sup>95</sup> The authors point to trends in international conservation law, evolving state practices, and a "broadening international cultural consciousness" as evidence that a "right to life" for whales is emerging as part of binding customary international law.<sup>96</sup> They argue that international institutions regulating whaling have gone through five incremental stages – free resource, regulation, conservation, protection, preservation – and are now entering the sixth stage of "entitlement."<sup>97</sup>

Of the broad coalition of groups opposing the Makah hunt, Sea Shepherd Conservation Society was the most visible. Unlike the local groups involved, SSCS operates globally and has an international reputation. Unlike broad-stroke groups like the HSUS, SSCS maintains a specific focus on protecting marine life, especially whales. With its outspoken leader, Captain Paul Watson, SSCS has garnered attention as a direct-action group that seeks out dramatic encounters with whaling vessels on the high seas. SSCS holds that whaling by Norway, Japan, and others is illegal because it is done in defiance of (or by exploiting loopholes in) IWC regulations and casts itself in an international law enforcement role, per the UN statement authorizing citizens to undertake such action. The SSCS Web site lists "12 Primary Reasons for Opposing the Plan to Slaughter Whales by the Makah." Copied and pasted into many of the citizen e-mails sent to the NMFS, the list expresses the range of complementary arguments (paraphrased below, except for items 11 and 12, which are directly quoted) made against the hunt:

1. The Makah do not qualify for the IWC's ASW exception because they do not have an unbroken tradition of whaling and they do not have a subsistence dependence on whale meat.
2. The United States abrogated the Treaty of Neah Bay when it signed the IWC in 1946; it does not therefore have the right to grant a whale quota to the Makah.
3. The Makah will ask for quotas on other whales next.
4. Makah whaling will motivate tribes on Vancouver Island to resume whaling.

(continued)

<sup>94</sup> Hawkins (2001), 305.

<sup>95</sup> D'Amato and Chopra (1991), 59.

<sup>96</sup> *Ibid.*, 49.

<sup>97</sup> *Ibid.*, 23.

5. Allowing the Makah to whale will strengthen the position of Japan, Norway, and Iceland as they seek to expand their illegal whaling operations.
6. The original Makah plan was to whale commercially and sell the meat to Japan.
7. The IWC never granted a gray whale quota to the Makah.
8. Makah whaling will threaten resident whales.
9. Makah whaling will stress whales in the area, posing a danger to whale watchers.
10. Many Makah oppose whaling, which has been pushed through without full democratic tribal participation.
11. "Tradition and culture must not be the basis for slaughter. The ancestors of the Makah killed whales because they had to do so for survival. There is no survival necessity today to justify such killing. The treaty that the Makah cite as evidence of their right to whale specifically states that they have the right to whale 'in common with the people of the United States.' When the treaty was signed, all Americans had the right to kill whales. When whaling was outlawed for all Americans it included the Makah as the rights are 'in common' and not separate. There cannot be unequal rights granted in a system that promotes equality under the law. This is tantamount to extra special rights for a group of people based on race and/or culture and is contrary to the guarantee of equality under the law as guaranteed by the U.S. Constitution."
12. "Whales should not be slaughtered anytime or anywhere by any people. These are socially complex, intelligent mammals whose numbers worldwide have been diminished severely. Sea Shepherd is dedicated to the objective of ending the killing of all whales in the world's oceans forever. In this effort, we speak for the whales as citizens of the Earth whose right to live and survive on this planet must be defended."<sup>98</sup>

The eleventh item reads the "in common with" language from the Treaty of Neah Bay not as indicating "cotenancy" in whales as resources, as the *Anderson* court asserted, but rather as indicating that the Makah right to whale was abrogated along with other Americans' right to whale by the ICRW/WCA and the MMPA. The suggestion that the Makah are asking for "special rights" (point 11) reverberates loudly with the claims of opponents of Native American rights and minority rights more generally.

#### THE OPTIC OF ECOCOLONIALISM

The Makah Tribal Council (MTC) attributed the furor over its attempted resumption of whaling to ecocolonialism or ecoracism – that is, to the continuation of

<sup>98</sup> <http://www.seashepherd.org/whales/makah-tribe.html>.

historical colonialism in contemporary ecological garb. Reading environmental and animal activists' efforts through the lens of anticolonialism, they rejected their ontological and moral claims outright. In their view, whaling had been central to Makah culture for millennia and it had been secured in perpetuity by their far-thinking ancestors in the Treaty of Neah Bay. To resume whaling meant honoring and connecting with those ancestors, recovering a suppressed tradition, restoring a severed bond between the Makah and the whale, making real a treaty right, and reinvigorating tribal culture and identity. As time went by, it also meant resisting colonial domination and asserting sovereignty, as the firestorm grew and public denunciations of the Makah intensified.

Responding to charges that their culture was reconstructed, adulterated, and inauthentic, Makah tribal leaders emphasized the continuity of their cultural traditions, characterizing the seventy-year hiatus from whaling as a brief interruption and pointing out the clear persistence of whaling songs, dances, stories, and images in contemporary Makah culture. Their culture was living and evolving, they argued, and technological change was a continuous part of this process. Just as shifting from using harpoons made of mussel shells to harpoons made of steel had not made the whale hunt less authentic, neither did using a rifle and speedboat, particularly because these latter adaptations were made to make the kill more humane and to enhance the hunters' safety.<sup>99</sup> A Makah with a rifle was still a Makah and still an Indian, not a cowboy. Makah leaders read criticisms of their practices as thinly veiled expressions of ethnocentrism and hostility – that is, as reiterations of the colonial impulse. In an "Open Letter to the Public from the President of the Makah Whaling Commission," (August 6, 1998), Keith Johnson wrote: "We don't take well to Sea Shepherd or PAWS telling us we should rise to a 'higher' level of culture by not whaling. To us the implication that our culture is inferior if we believe in whaling is demeaning and racist."<sup>100</sup> On the Makah tribe's Web site, [www.makah.com](http://www.makah.com), Makah leaders charge their opponents with manufacturing an uproar in an attempt to suppress Makah culture:

Much of this opposition has been whipped up deliberately by organized groups who have put out a blizzard of propaganda attacking us. ... The anti-whaling community is very well organized and very well financed and puts out a steady stream of propaganda designed to denigrate our culture and play on human sympathy for animals. Perhaps what is lost in all of their rhetoric is an appreciation of the value of preserving the culture of an American Indian Tribe – a culture which has always had to struggle against the assumption by some non-Indians that their values are superior to ours. ... We can only hope that those whose

<sup>99</sup> The NMFS required the Makah to use a rifle after harpooning the whale on the grounds that it was more humane than the traditional method, which involved harpoons and lances alone. The Makah tribe worked with a veterinarian to develop a rifle that would be powerful enough to penetrate a whale's skull and kill it instantly. Motorboats were used in addition to the whaling canoe in order to enhance the safety of the hunters.

<sup>100</sup> Johnson is responding in part to a PAWS (Progressive Animal Welfare Society) brochure that mentions the tribe's modern amenities (lighted tennis courts, Fed Ex deliveries, etc.) as a way of raising questions about the authenticity of the tribe's culture today.



opposition is most vicious will be able to recognize their ethnocentrism – subordinating our culture to theirs.<sup>101</sup>

Makah leaders directly linked the firestorm over whaling to practices of colonial domination manifested centuries earlier. Wayne Johnson, the captain of the Makah whaling crew in the 1999 hunt, said of protesters: “[T]hem being here is like bringing a blanket of smallpox,” referring to the notorious plans of British officers to use blankets to infect the Delawares with smallpox during the Siege of Fort Pitt in 1758 during the French and Indian War.<sup>102</sup> As one observer noted, “The more the [Makah] tribe discussed the topic of whaling in the media, the more the boundaries between past federal conflicts and modern environmental frictions blurred.”<sup>103</sup>

Some of the public criticism of the Makah lent credence to the notion that a colonialist mindset was at play. While environmental and animal protectionists mostly refrained from making comments on race or indigeneity and steered away from language that was obviously racially fraught, some members of the public did not hesitate to denigrate the Makah as savage, barbaric, and backward. In public scoping comments e-mailed to the NMFS about the DEIS, one person wrote: “It is difficult for civilized countries to imagine such barbarity towards endangered species of whales. ... These are primitive and savage acts that reflect badly on the Makah tribe and United States’ citizens” (May 18, 2008). Other e-mailed comments included “These tribes need to come to terms with evolving with the civilized world” (May 12, 2008) and “It is time for the Makah to come out of the Stone Age” (May 9, 2008).

Other public comments were aggressively threatening and contemptuous toward the Makah. Bumper stickers that read “Save a Whale, Harpoon a Makah” reversed the status of animal and Indian, suggesting that the former deserved moral consideration while the latter was merely animal. In his analysis of letters and calls to the *Seattle Times* right after the 1999 hunt, Tizon (1999) notes that public opinion ran 10 to 1 against the hunt and categorizes critics of the hunt into three groups: those who decried the killing, those who decried the methods used, and a third, smaller group that expressed racial hatred toward the Makah, including these statements:

- “Publish this article but don’t use our last names. We wouldn’t want to lose our scalps.”
- “These idiots need to use what little brains they have to do something productive besides getting drunk and spending federal funds to live on.”
- “I am anxious to know where I may apply for a license to kill Indians. My forefathers helped settle the west and it was their tradition to kill every

<sup>101</sup> Makah Tribal Council and Makah Whaling Commission, “The Makah Indian Tribe and Whaling: Questions and Answers.”

<sup>102</sup> Gorman (2000), 63. On Fort Pitt, see Ranlet (2000).

<sup>103</sup> Barton (2000), 187.

Redskin in the way. ‘The only good Indian is a dead Indian,’ they believed. I also want to keep faith with my ancestors.”

These constructions of Native Americans as irredeemably savage, like most racial fantasies, have proven remarkably enduring across spatial and temporal dimensions. The cunning, parasitical Asian, the violent Negro beast, and the savage Indian are stock characters in the American cultural imaginary. The savage Indian is but the flip side of the “ecological Indian,” of course: it is the Indian’s embeddedness in nature, his quasi-animality, that makes him both attuned to ecological considerations and prone to barbarity.

Makah leaders and supporters pointed to Representative Jack Metcalf (R-WA) and Senator Slade Gorton (R-WA), both of whom vigorously opposed Makah whaling, as quintessential ecocolonialists. Gorton had represented Washington State against the U.S. government and Native American tribes in the *Boldt* decision and was a longtime crusader against treaty fishing rights.<sup>104</sup> Metcalf was the founder of Steelhead and Salmon Protection Action in Washington State (later known as United Property Owners of Washington), a group that opposed tribal rights on behalf of white landowners.<sup>105</sup> According to the League of Conservation Voters, Metcalf had one of the worst environmental voting records in Congress.<sup>106</sup> Metcalf took a prominent role in the fight against Makah whaling, cosponsoring a unanimous resolution in 1996 by the U.S. House of Representatives Committee on Resources opposing the Makah hunt and joining other individuals and groups in bringing the *Metcalf v. Daley* lawsuit in 2000. Both Gorton and Metcalf were white Republicans who supported fishing and hunting, had deep connections to the fishing industry, and devoted a good portion of their public lives to fighting Native American treaty rights as “special rights.”<sup>107</sup> Given their histories, their interest in protecting the gray whales from the Makah struck many as going after Indians under the guise of environmental protection – the very definition of ecocolonialism. Sea Shepherd Conservation Society worked with Metcalf in a highly visible way on the Makah whaling issue, praising his leadership and appearing with him in public. Those familiar with Metcalf’s reputation as an Indian hater excoriated SSCS for this association and raised questions about the group’s motives for opposing the Makah hunt.<sup>108</sup>

The resumption of whaling promised to be, according to Makah leaders, a salve for the wounds inflicted by historical colonialism. What colonialism had rent asunder, they suggested, only whaling could put back together. In the tribe’s “Application for a Waiver of the Marine Mammal Protection Act Take Moratorium” (2005), numerous social problems (teenage pregnancy, elevated high school dropout rates, drug use, juvenile crime) and economic problems

<sup>104</sup> Coté (2010).

<sup>105</sup> “Metcalf’s Indian History.”

<sup>106</sup> Miller (1999).

<sup>107</sup> Westneat (1999).

<sup>108</sup> Coté (2010) and Miller (1999).

(unemployment, poverty, substandard housing) afflicting the Makah reservation are identified and attributed to the U.S. government's past assimilation policies. Whaling is then presented as the solution to these problems:

Whaling was the keystone of traditional Makah society. Makah society was mirrored in the structure of the whale hunt, including ceremonial preparation, the hunt itself, and the ultimate acts of butchering and distribution. ... Ceremonies to prepare whalers and their families for the hunt provided the Makah with a social framework that contributed to governmental, social, and spiritual stability. ... Given the centrality of whaling to the Tribe's culture, a revival of subsistence whaling is necessary for the Makah to complete this spiritual renaissance and repair the damage done to the Tribe's social structure during the years of forced assimilation.<sup>109</sup>

In "Whale Hunting and the Makah Tribe: A Needs Statement" (2012), prepared on behalf of the tribe and submitted by the United States to the IWC, Dr. Ann Renker writes: "Current data from Neah Bay High School verifies that, in the absence of active whale hunting and its related preparations, one in seven male high school students was using or experimenting with drugs and/or alcohol in 2010."<sup>110</sup> Renker's phrasing suggests that student drug and alcohol use is a *direct result of not whaling*. Renker then echoes the "Application for a Waiver" by arguing that the resumption of whaling is necessary for the spiritual, cultural, social, and nutritional health of a people still grappling with the effects of colonialism. Prohibiting it would mean "introduc[ing] a new shroud of oppression into the daily life of Makah people."<sup>111</sup>

Responding to the optics of ecological and ethical harm, Makah leaders emphasized that their whaling proposal reflected their continuing spiritual relationship with nature as Native people.<sup>112</sup> In his "Open Letter to the Public from the President of the Makah Whaling Commission" (August 6, 1998), Keith Johnson writes: "We have an understanding of the relationship between people and the mammals of the sea and land. We are a part of each other's life. We are all part of the natural world and predation is also part of life on this planet." Charlotte Coté (2010), writing sympathetically about the Makah as a member of a closely related Nuu-Chah-Nulth tribe, writes: "Our cultures thrived in a world of reciprocity between us and our environment. Our relationship with animals has always been one based on respect and gratitude and there is a sense of sacredness attached to the spirit of the animal for giving itself to us for sustenance."<sup>113</sup> Coté references the Makah understanding that the whale gives himself or herself to the hunters if they are worthy and have conducted proper spiritual preparations – an understanding that makes it consistent to revere the animal and also kill her.

<sup>109</sup> Makah Tribal Council, "Application for a Waiver," 6.

<sup>110</sup> Renker (2012), 56.

<sup>111</sup> *Ibid.*, 7.

<sup>112</sup> See Renker (2012) and the Makah tribe's Web site, <http://www.makah.com>.

<sup>113</sup> Coté (2010), 164–5.

From the viewpoint of Makah leaders, animal and environmental advocates are attempting to erase the Makah's historically and spatially embedded understanding of nature and impose their own ahistorical and abstract understandings of nature upon the tribe. If whites tend to define themselves as apart from nature and animals, which they alternately approach as exploiter or protector, Native peoples such as the Makah see themselves as intimately connected to other living beings in the web of life and death. Hunting, for them, is a form of reciprocal exchange between humans and animals (Nadasdy 2007). Moreover, they understand these relationships to be place-specific (Talbear 2011): the Makah know whales and other sea life – not in the abstract, as rights-bearing subjects or ecological bellwethers, but as particular kin with whom they have shared Neah Bay's swells, currents, and cliffs for millennia. The sea is their country. Did it make sense for whites, who had nearly driven the gray whale to extinction, to block the Makah's efforts to resume a tradition of whaling that had always been "sustainable" and respectful toward the animal?

The effort to resume whaling has become inextricably tied to the question of sovereignty. The question "Who decides what the Makah can and cannot do?" hangs over every aspect of the controversy. Resuming whaling has been a costly endeavor: the tribe spent well over a million dollars of its own funds between 2003 and 2012 alone, and at least \$335,000 of NMFS funds between 1995 and 1998.<sup>114</sup> For a brief moment, Makah leaders contemplated accepting financial incentives to desist, and some Makah favored developing a lucrative whale-watching industry instead of whaling, but in the end, the decision to pursue whaling was closely tied to a sense of collective self-determination and pride.<sup>115</sup> This is likely what the young Makah man felt as he held up a sign saying "Kill the Whales" in front of protesters.<sup>116</sup> And this is likely what Makah Tribal Council member Marcy Parker meant when she emerged out of a meeting where a financial offer to desist had been discussed and rejected and stated, "You can't buy our treaty right, and you can't buy our pride."<sup>117</sup> As opposition intensified, so did the resolve of many Makah to keep fighting. One scholar notes:

[I]t was almost a badge of honor to be disparaged by non-natives for continuing their cultural traditions. The whale hunters felt a connection to their ancestors who had been arrested for engaging in potlatches, beaten for speaking Indian languages in government boarding schools, or vilified by Christian missionaries as culturally inferior savages. With protests and other attempts to block the tribe's efforts seen as an extension of ongoing

<sup>114</sup> From 1995–8, the U.S. government spent \$335,000 helping the Makah in their pursuit of whaling (Blow 1998). From 2003–7, the tribe spent approx. \$675,000 of its own funds on the pursuit of whaling; from 2007–12, it spent \$404,000 (Renker 2012).

<sup>115</sup> An assistant of Seattle communications billionaire Craig McCaw, who spent \$12 million to return the orca Keiko of *Free Willy* fame to the wild, visited the Makah reservation to try to negotiate with Makah leaders, who had hinted that they might suspend the hunt if the financial incentive was significant enough. The negotiations came to naught (Tizon and Broom 1998).

<sup>116</sup> Van Ginkel (2004), 70.

<sup>117</sup> Russell (1999), 32.

processes of colonization, whaling and the activities surrounding it became a form of resistance to a larger history of cultural oppression.<sup>118</sup>

Interestingly, of the 93 percent of Makah who said in a survey that the tribe should continue to whale, more cited treaty rights as a reason (46 percent) than either cultural tradition (36 percent) or moral/spiritual benefits (20 percent).<sup>119</sup> It was the desire to preserve and exercise sovereign power that led many Makah to engage the whaling issue so passionately. If Chinese Americans in San Francisco wanted greater multiculturalist tolerance for and recognition of their foodways, the Makah, struggling with poverty and dispossession on the Neah Bay reservation, wanted to wrest back the power of self-determination that colonialism had stripped away.

The spirit of angry resistance sparked the so-called rogue hunt of 2007, when Makah hunters impatient with legal uncertainties decided to kill a whale without federal authorization. The Makah "Application for a Waiver" (2005) painstakingly explicates the tribe's commitment to humane killing, minimizing harm to whales (especially the PCFA or "resident" whales), protecting the environment, and abiding by federal and international laws. The "rogue hunt" ruptured, at least momentarily, the tribe's self-consciously projected image of unity, spirituality, ecosensitivity, and respect for the law. On September 8, 2007, five Makah men paddled out in the Strait of Juan de Fuca, where they harpooned a gray whale at least four times and shot him at least sixteen times. One reporter narrated: "The big gun misfired and fell overboard, and the only other means of quick dispatch at hand were a shotgun and a rifle. These lacked the strength to pierce the whale's thick skull, though, and anyway the men shot at the wrong spot. Then they ran out of bullets."<sup>120</sup> The whale, who bled for twelve hours before dying and sinking to the bottom of the ocean, turned out to be a whale whom scientists had labeled CRC-175, a "resident" gray whale who frequented the area summer after summer.<sup>121</sup> These whalers were not random hunters but central players in the ongoing drama over whaling rights: two of the men were Wayne Johnson and Theron Parker, members of the crew in the 1999 hunt; a third, Andy Noel, was a member of the Makah Whaling Commission. Because the tribe's application for a waiver from the Marine Mammal Protection Act of 1972 had not yet been granted, the hunt violated this federal statute.

The Makah Tribal Council held a news conference where it officially condemned the hunt and promised to prosecute and punish the five men to the fullest extent under tribal law.<sup>122</sup> The tribe also sent representatives to Washington, D.C. to reassure concerned government officials. In U.S. District Court, three of the men pled guilty to violating the MMPA and were placed on probation and

<sup>118</sup> Sepez (2002), 155.

<sup>119</sup> Renker (2012).

<sup>120</sup> Wagner (2009).

<sup>121</sup> Gottlieb (2009).

<sup>122</sup> Mapes (2008).

assigned community service. Wayne Johnson and Andy Noel were convicted in a bench trial and sentenced to five and three months jail time, respectively.<sup>123</sup> A defiant Johnson stated: "I'm proud of what we did. Some people are calling what I did an act of civil disobedience. I don't know much about that, but if civil is what the government is, then call my part savage disobedience."<sup>124</sup> Is Johnson an Indian hero, proudly carrying the banner of sovereignty into battle with the U.S. government? Or is he a troubled man struggling with what Cynthia Enloe calls "masculinized memory, masculinized humiliation and masculinized hope," indifferent to the impact of his acts on others?<sup>125</sup> Although many Makah expressed concern that the rogue hunt would damage the tribe's reputation and its chances for a legal waiver from the MMPA, there was sympathy for the hunters, too, and an unwillingness to punish them. In the end, the tribal court could not put an impartial jury of Makah together and tribal judge Stanley Myers dropped all charges against the whalers on the promise of a year's good behavior.<sup>126</sup>

Some Makah rejected the optic of ecocolonialism and openly dissented from the tribe's pursuit of whaling. During the 1996 IWC meeting, seven Makah elders, including descendants of whaling chiefs and signatories to the Treaty of Neah Bay, signed and circulated the following petition:

We are elders of the Makah Indian Nation (Ko-Ditch-ee-ot) which means People of the Cape.

We oppose this Whale hunt our tribe is going to do.

The opposition is directly against our leaders, the Makah Tribal Council, Tribal Staff, and the Bureau of Indian Affairs, which is an arm of the United States Government.

The Makah Indian Nation has been functioning without a quorum; two Councilmen are off on sick leave for very serious reasons, cancer.

How can any decision be legal when our by-laws state the Treasurer shall be present at every meeting. The Vice Chairman is the other man out.

The Whale hunt issue has never been brought to the people to inform them and there is no spiritual training going on. We believe they, the Council, will just shoot the Whale, and we think the word "subsistence" is the wrong thing to say when our people haven't used or had Whale meat/blubber since the early 1900's.

For these reasons we believe the hunt is only for the money. They can't say "Traditional, Spiritual and for Subsistence" in the same breath when no training is going on, just talk.

Whale watching is an alternative we support.

<sup>123</sup> "Makah Tribal Members Sentenced for Violating Marine Mammal Protection Act."

<sup>124</sup> Wagner (2009).

<sup>125</sup> Enloe (1989), 44, cited in Gaard (2001). See Sullivan (2000) for a revealing close-up portrait of Wayne Johnson.

<sup>126</sup> Mapes (2008).

The signatories were Isabell Ides (age 96), Harry Claplanhoo (age 78), Margaret Irvin (age 80), Ruth Claplanhoo (age 94), Viola Johnson (age 83), Lena McGee (age 92), and Alberta Thompson (age 72).<sup>127</sup> The petition suggests that Makah leaders are driven by greed and willing to violate tribal laws to achieve their aims. Dottie Chamblin, another Makah elder, stated: "They [the tribal leaders] say they're traditional but they are not listening to or protecting the elders. Shooting a whale with a machine gun is not a spiritual way ... no one in this village has a direct relationship with the whale any longer."<sup>128</sup>

Dissenters recounted the harassment and persecution they experienced within the tribe. Dottie Chamblin commented:

There's something very wrong here. We created a stir just by seeking the truth and asking them to tell it. Because of this treatment, no one else will speak up for the rest of the people, and that's a sad state of affairs. They've ostracized us. They've victimized us. It's difficult to get health care. They treat me badly. It's not the Makah way. There is a young, educated faction that is in breach of tradition.<sup>129</sup>

According to Chamblin, the tribal council's threat to banish dissenters from the reservation discouraged others from supporting or joining the dissenters.<sup>130</sup> The most outspoken dissenting elder was Alberta Thompson, a descendant of three signatories of the Treaty of Neah Bay, granddaughter of a whaler, and survivor of the government-run boarding school for Makah children. Once she publicly opposed whaling, Thompson was fired from her job as a coordinator at the Makah Tribal Senior Center on the grounds that she had spoken with Sea Shepherd Conservation Society representatives while at her job.<sup>131</sup> Her grandson was bullied at school and her dog was taken from her home, killed, and left on the side of the road a mile from her house. The acting chief of police informed Thompson that if she spoke about whaling or even "made a face" she would be arrested. Indeed, the Makah Tribal Council passed a resolution that only tribal council members and their hired public relations advisors could speak to the media. Thompson asked: "What has this old lady done to aggravate them? What am I onto that they would think I'm so dangerous?"<sup>132</sup> In 1997, oceanographer Jean-Michel Cousteau invited Thompson on a whale-watching expedition at San Ignacio. She recounted her experience, her eyes filling with tears:

In Baja, I met what I was fighting for, face to face. A mother whale rose up out of those warm waters right under my hand. She looked me straight in the eye, mother to mother. Then I saw a harpoon scar on her side, probably from up north in Siberia where the native people still hunt the whales for sustenance. The mother brought her baby over to

<sup>127</sup> Anderson et al. (2012).

<sup>128</sup> Hogan (1996).

<sup>129</sup> Ibid.

<sup>130</sup> Peterson (1996).

<sup>131</sup> Russell (1999), 32.

<sup>132</sup> Hogan (1996).

our little boat. I talked to them and I petted them. I felt their spirit of trust was somehow being conveyed to me. I laughed and I cried all the way back to shore, and all that night. I've never been the same since. When times get hard, I think of those great big wonderful beings.<sup>133</sup>

Thompson died in 2012. Her pastor "wept as he told the mourners at the packed church about her persecution."<sup>134</sup>

While surveys indicated overwhelming support for whaling within the tribe, a closer look at the numbers suggests a significant minority opposed the resumption of whaling for a variety of reasons, but that this opposition was *sub rosa*. One survey indicated that 95 percent of Makah respondents said they thought the tribe had the right to whale, but only 75 percent thought they should exercise this right.<sup>135</sup> Barton writes that most of those who opposed whaling in the survey were critical of the manner in which it was being conducted – that the hunters were not spiritually ready, that the federal government was dictating all of the terms – but that they were not necessarily outspoken about their views. She concludes: "[T]he vast majority of intra-tribal opposition was less visible than the media had portrayed."<sup>136</sup>

Many Native American organizations and tribes viewed the whaling issue as a matter of sovereignty and strongly supported the Makah. The Northwest Indian Fisheries Commission and Affiliated Tribes of Northwest Indians voiced their support.<sup>137</sup> Members of the Nuu-Cha-Nulth tribes of Vancouver Island attended the Makah celebration after the 1999 hunt. On June 23, 2004, the National Congress of American Indians, the oldest and largest national organization of Native American and Alaskan Native tribal governments, passed a resolution supporting the Makah tribe's right to whale.<sup>138</sup> Native scholars, too, celebrated the Makah's resumption of whaling. For example, Robert Miller, an eastern Shawnee, wrote: "The tribe has exercised its sovereignty and its right of cultural self-determination and has taken on all comers and overcome all obstacles to do so."<sup>139</sup> Other Native Americans disagreed, arguing that killing whales was not the right way to remedy past wrongs or assert sovereignty today. The First Nations Environmental Network issued an online statement that read: "Not all indigenous people support Makah whaling. ... While we respect Treaty Rights, this is political reason being used for killing and not a true meaning of need when it comes to the taking of another being's life."<sup>140</sup>

<sup>133</sup> Russell (1999), 31.

<sup>134</sup> Anderson et al. (2012).

<sup>135</sup> Barton (2000), 247–8.

<sup>136</sup> Ibid., 248.

<sup>137</sup> DEIS, 3–215.

<sup>138</sup> October 24, 2005 letter from Jacqueline Johnson, executive director of the National Congress of American Indians, to Kassandra Brown of NMFS, Northwest Region.

<sup>139</sup> Miller (2005), 145–6.

<sup>140</sup> Peterson and Hogan (2002), 215–16.

## MUTUAL DISAVOWAL IN THE MAKAH WHALING CONFLICT

In the heat of political struggle, the parties to the Makah whaling conflict disavowed the other sets of claims in play. There were partial exceptions to the rule, however. Cetacean Society International (CSI), for example, spoke out in favor of Makah sovereignty and treaty rights and tried to organize start-up funding for a Makah whale-watching business as an alternative to the whale hunt, and Earth Island Institute suggested that the U.S. government give the Makah "a much larger land base; economic development grants; better health care; overall greater funding"<sup>141</sup> instead of granting them the right to whale. Both organizations attempted to signal that they were both pro-whale and pro-Makah and sought a solution to the conflict that was not zero-sum.<sup>142</sup> But neither organization could escape the dilemma that in rejecting the Makah's proposed remedy for the damage inflicted by colonialism and proposing other remedies, they were seen as continuing the colonial practice of imposing an external (Western) set of understandings on the Makah. In the eyes of Makah leaders, friendly colonialism was still colonialism.

The most visible anti-whaling group, Sea Shepherd Conservation Society, did not recognize the Makah's rights or claims in any way and chose instead to adopt the defensive posture that its agenda and actions had "nothing to do with race." In its "Equality Statement," SSCS says that it "operates internationally without prejudice towards race, color, nationality, religious belief, or any other consideration except for an impartial adherence to upholding international conservation law to protect endangered marine species and ecosystems."<sup>143</sup> It then states: "Sea Shepherd operates outside the petty cultural chauvinism of the human species. Our clients are whales, dolphins, seals, turtles, sea-birds, and fish. We represent their interests. . . . We are not anti-any nationality or culture. We are pro-Ocean and we work in the interests of all life on Earth." SSCS leaders scoff at tribal, racial, and national concerns as narrow matters among humans, as "special interests," as a trivial distraction from the axis of power that really matters – that of human supremacy over animals. As in the Fish and Game Commission hearings in the Chinatown conflict, the universalistic language of equality, ecological health, and animal considerability is invoked to provide protection for nature and nonhuman animals – but at the expense of a racialized minority whose claims are derogated as particularistic and selfish.

It is not that SSCS is using eco-speak as a pretext for persecuting the Makah, then, but rather that it is advancing animal and ecological concerns in a way that manifestly trivializes concerns about tribal or racial justice. The history of colonialism and forced assimilation, of white encroachment upon Native fishing

<sup>141</sup> October 24, 2005 letter from Will Anderson, Earth Island Institute, International Marine Mammal Project, to Kassandra Brown of NMFS, Northwest Region.

<sup>142</sup> October 24, 2005 letter from William Rossiter, President of Cetacean Society International, to Kassandra Brown of NMFS, Northwest Region.

<sup>143</sup> <http://www.seashepherd.org/who-we-are/equality-statement.html>.

and hunting rights, of persistent anti-Indian racism and Makah marginalization – all of this is denied or elided. Moreover, SSCS declines to acknowledge that its own actions might aggravate racial problems by bringing anti-Indian public sentiment to the surface or giving succor to politicians like Jack Metcalf. Instead it insists that its practices are colorblind and its hands are clean.

Both animal protectionists and the Makah claim to revere and love the whale. At issue between them is whether reverence and love are consistent with killing the whale for food. At issue is the meaning of the killing – is it an exercise of unjust and unnecessary violence against another sentient being or is it the grateful acceptance of a gift from a kindred being in the context of the cycle of life and death? In trying to prohibit the hunt, animal and environmental protectionists disavowed (to varying degrees) Makah claims about racism and colonialism *as well as* Makah leaders' ontological claims about humans, whales, and nature.

Makah leaders and supporters, for their part, delegitimated the anti-whaling position and reduced it to a hatred of Indians or a desire to control them. They, too, chose not to approach the conflict as a confrontation of two reasonable but incommensurate views of whaling, but instead essentialized whaling opposition as racist and imperialist – *as not really being about whales at all*. In his "Open Letter to the Public from the President of the Makah Whaling Commission" (August 6, 1998), Keith Johnson writes: "We feel that the whaling issue has been exploited by extremists who have taken liberties with the facts in order to advance their agenda." And Native scholar Charlotte Coté writes:

The vegan lifestyle is one that some people throughout the world have chosen to embrace, but it is ultimately a personal choice. We Native people do not want people who choose to live that way imposing their dietary rules on us, as this is just another form of cultural imperialism and food hegemony.<sup>144</sup>

Most whaling opponents said nothing about veganism so it may be that Coté raises the issue both because it powerfully evokes an image of Western privilege and because it allows her to depoliticize opposition to whaling as a "lifestyle" choice. Neither Johnson nor Coté acknowledges or attempts to reckon with an alternative ontology whereby respect entails protection and whereby the slaughtering of whales, who are seen as sentient beings and/or rights-bearing subjects, is an unjustifiable exercise of domination. This ontology, by virtue of being of Western origins, is dismissed as a product of and vehicle for colonialism.

The American public has in fact expressed growing concern about whales over the past several decades. In 1979, the U.S. Congress declared that "whales are a unique marine resource of great aesthetic and scientific interest to mankind" and that "the protection and conservation of whales are of particular

<sup>144</sup> Coté (2010), 163.

interest to citizens of the United States."<sup>145</sup> In 1993, Representative Gerry Studds introduced a House resolution (which passed unanimously) opposing the resumption of commercial whaling, stating: "[N]o other group of animals has so captured the imagination of the American people."<sup>146</sup> A poll conducted by International Fund for Animal Welfare in 1997 showed that 80 percent of Americans oppose whale hunting.<sup>147</sup> The increasing popularity of whale watching, the success of the *Free Willy* movie franchise, television programs like *Whale Wars*, and public interest in real life rescue stories involving gray whales all confirm that Americans believe that whales are due some significant measure of moral consideration and protection.<sup>148</sup> There has been, therefore, a notable cultural shift in American attitudes toward whales in recent decades.

In Coté's (2010) discussion of a "conservation burden," she asks: "Why should our culture and traditions be sacrificed upon the altar of the non-Indian conscience to pay for the environmental sins of the dominant culture?"<sup>149</sup> Because it was not the Makah who brought various whale species to the point of extinction, why should they be asked to bear the conservation burden of not whaling now?<sup>150</sup> Viewed anthropocentrically, this question makes a good deal of sense – it goes straight to the question of justice among human communities. But viewed ecocentrically or biocentrically, this question make less sense – if killing whales is a bad idea, for ecological or ethical reasons, it is no less a bad idea when the Makah do it. Gillespie writes: "[T]he fact that earlier colonial cultures ruthlessly exploited Nature does not give cultures with a traditional interest in the exploitation of Nature the right to finish off the job."<sup>151</sup> Indeed, one could equally ask "Why should whales be sacrificed on the altar of Makah sovereignty and anticolonialism?" Coté writes: "The anti-whaling groups saw the death of the whale through a Western cultural lens and thus ignored the spiritual and sacred elements attached to the Makah and Nuu-chah-nulth whaling tradition."<sup>152</sup> One could also say the Makah whalers (and Coté) saw the death of the whale through a Makah cultural lens and thus ignored the perspective(s) of environmentalists, animal protectionists, and the broader public.

What about the perspective(s) of the grays themselves? The question of what gray whales themselves want is a vexed one, of course, because all human interpretations of whale interests and desires are culturally mediated and

<sup>145</sup> 16 USC 916 note, Public Law 96-60, August 15, 1979, cited in DEIS, 3-198.

<sup>146</sup> H.R. Con.Res. 34, 103d Cong. (1993). See Gillespie (1997).

<sup>147</sup> Jenkins and Romanzo (1998), 111.

<sup>148</sup> See Wagner (2004-5). For stories of the rescue of J. J. in California and the grays of Point Barrows, Alaska, see Peterson and Hogan (2002).

<sup>149</sup> Coté (2010), 192.

<sup>150</sup> The same type of question comes up in international discussions about the environment, with China and India asking why they should bear the conservation burden now when U.S. industrial development has long had a disproportionately adverse effect on the environment.

<sup>151</sup> Gillespie (1997), 375.

<sup>152</sup> Coté (2010), 164-5.

inescapably so. We do not know what it is like to be a gray whale, as Thomas Nagel would remind us. In the Chinatown case, Chinese American advocates did not argue that market animals exercised volitional self-sacrifice; the only issue was whether or not the animals' suffering mattered morally speaking. But in the Makah whaling case, contradictory ontological claims about gray whales emerged, raising the question of whale phenomenology. Do whales, as sentient and intelligent creatures with life stories and familial and social worlds of their own, prefer being alive to being chased, harpooned, shot, and killed? In part, this is a matter of observing their behavior. Gray whales either try to flee when they are first harpooned – buoys are attached to the harpoons to keep the whales from diving and escaping – or in some cases fight back by thrashing and overturning the canoe. In the days before motorboats and guns, gray whales would sometimes flee for days, harpoons and buoys attached, lanced and bleeding from various parts of their bodies, before collapsing from exhaustion. Grays in particular used to be known as "devilfish" among hunters because they resisted slaughter.

Paul Nadasdy (2007) rightly cautions against the Western habit of dismissing Native understandings as "beliefs" (that is, superstitions) constructed to rationalize the violence of hunting and urges us to take seriously the possibility that Native understandings might be right. But fully assessing (as opposed to simply endorsing) Makah understandings requires us to consider that they function to cleanse the taint of domination from the act of killing. They function to reconcile reverence for the animal with killing him/her. The whale is not chased down and violently slaughtered; the hunters entreat and perhaps cajole her into giving herself in a spiritual and reciprocal exchange between human and animal. Environmental and animal protectionists doubtless have a stake in their own ontology as well, but there is no compelling reason to declare that the Makah are exempt from the human proclivity for self-rationalization. Westerners should be open to the possibility that the Makah are right. Should the Makah be open to the possibility that they are wrong?

Both Western and Makah ontologies are all too human. Makah ontological understandings about humans, whales, and nature are no more "constructed" or provisional than Western ones, but no less so either. They, too, are products of the human power to describe and attribute meaning to phenomena within the theater of power. We are back to Renteln's chicken once again, or the irreducibility of the animals' own phenomenal world(s). Does it matter to the chicken if she is killed in a Santería ritual or by the slaughterhouse worker? Does it matter to the gray whale if she is killed by a Norwegian commercial whaling boat or a canoe of ritual-observant Makah hunters uttering prayers? It may be that a fully developed "ecology of selves," in Eduardo Kohn's (2007) words, will reveal the phenomenal world(s) of the gray whales to us. Until then, it may be prudent to err on the side of caution and act as though gray whales wish to live. Otherwise, we humans, Native and non-Native, run the risk of imposing our own systems of meaning on those who lack the power to contradict us.

## WHALING AND SOCIAL DOMINATION

Renker (2012) and others speaking for the Makah argue that the resumption of whaling is the essential antidote to colonial domination. What whaling proponents are conspicuously silent about is that Makah whaling historically depended on various patterns of *internal* domination relating to class/status and sex as well as species. Historically, Makah society was organized by descent group and ranked strata. Kin groups lived together in longhouses and were divided into chiefs or titleholders and commoners. Slaves acquired through trade, warfare, or purchase from neighboring tribes comprised the third, lowest stratum.<sup>153</sup> Whaling was the exclusive practice of chiefs, who inherited and owned both the physical equipment and ceremonial rituals and songs associated with the practice, and it was a crucial mechanism for shoring up their power and authority. Swan writes: “[I]t was considered degrading for a chief, or the owner of slaves to perform any labor except hunting, fishing, or killing whales.”<sup>154</sup> By killing whales, chiefs demonstrated that they were gifted and worthy of the favor of the spirits. “Killing a whale,” Coté writes, “was considered the highest glory: the more whales a chief caught, the more prestige, respect, and physical wealth he received, thus serving to elevate his status and position inside and outside his village or social group.”<sup>155</sup> The butchering of the whale and distribution of meat followed strict guidelines that reflected the social hierarchy within the tribe. Whale meat and whale oil were also used for consumption and distribution at potlatches, ceremonies that expressed and enhanced a chief’s power over rivals, commoners, and slaves.

According to Donald (1997), slavery played a vital role in Northwest Coast tribal cultures and economies, including the Makah’s:

Titleholders were able to undertake prestige-producing activities because they could control and manage resources and labor to produce the food and other goods and free the time needed for such activities. ... [S]lavery was essential ... because only slaves made it possible for titleholders – the exemplars of Northwest Coast culture – to live and act as titleholders.<sup>156</sup>

The labor of slaves, in other words, helped to underwrite the whaling exploits of chiefs. Slave status in Makah society was hereditary and slaves had no rights or privileges because they did not have membership in any kin groups. They were the property of their owners – exploited for their labor, traded for other goods, given as gifts, destroyed to demonstrate wealth and power. Slaves were sometimes killed during the funerals of Makah chiefs “both to accompany the deceased as servants in the next world and to show the power of the heir.”<sup>157</sup> Among the many rituals whalers practiced, one involved draping a corpse

<sup>153</sup> Swan (1869).

<sup>154</sup> *Ibid.*, 10–11.

<sup>155</sup> Coté (2010), 23.

<sup>156</sup> Donald (1997), 311.

<sup>157</sup> *Ibid.*, 34. See also Swan (1869), 10.

across one’s body as a charm to gain spirit power.<sup>158</sup> Parts of a deceased whaler’s body were especially favored, but sometimes, according to Curtis, a small child was killed for this purpose, presumably a slave.<sup>159</sup>

The link between social hierarchy and whaling was sufficiently strong that when assimilation policies, disease, and other factors disrupted social structure, whaling became increasingly infeasible. The (selectively) egalitarian ideology of U.S. government agents also played a role: “For example, the American philosophy of social equality made it difficult for Makahs to select crew members and organize whaling canoes, and therefore households, according to the ancestral patterns.”<sup>160</sup> In 1855, the U.S. government inserted into the Treaty of Neah Bay an article prohibiting slavery on the Makah reservation. Article XII states: “The said tribe agrees to free all slaves now held by its people, and not to purchase or acquire others hereafter.” Subsequently, as Colson relates, “[T]he social status of the former slaves was ignored by [U.S. government] agents who attempted to treat all Makah as though they were on the same social level” and forbade “discrimination along the lines of status institutionalized in Makah society.”<sup>161</sup> Although slavery did not end completely for several decades, these actions initiated its decline. “The presence of white men has exerted a salutary influence in this respect,” Swan writes, “and the fear of being held responsible renders [the Makah] more gentle in their deportment to their slaves.”<sup>162</sup> Ironically, then, slavery and social inequality were mitigated within Makah society through the imposition of colonial power on the part of a federal government that was itself a slave state (until the mid-1860s). While the requisite social structure for whaling was being dismantled, the “more egalitarian pursuit of sealing”<sup>163</sup> was open to all regardless of family or inherited privileges and displaced whaling among the Makah by the late 1800s.

As Gaard (2001) indicates, Makah whaling also reinforced traditional sex relations within the tribe. Women could not be chiefs and therefore could not whale. If a whaler’s wife was menstruating at the time of the hunt, she was not allowed to touch the gear or come near him.<sup>164</sup> During the hunt, she was required to lie silent and motionless and to go without food or water so that the whale would stay calm and not swim out to sea:

[D]uring the hunt, the whaler’s wife would act as if she had become the whale. Her movements would determine the behavior of the whale – if she moved about too much, the whale her husband was hunting would be equally active and difficult to spear; if she lay quietly, the whale would give itself to her husband. Towing chants often reflected this

<sup>158</sup> Gunther (1942).

<sup>159</sup> Curtis (1916), 39.

<sup>160</sup> Renker (2012), 40.

<sup>161</sup> Colson (1953), 15.

<sup>162</sup> Swan (1869), 54.

<sup>163</sup> Renker (2012), 39.

<sup>164</sup> Gunther (1942).

association, and the whalers addressed the dead carcass using a term that refers to a chief's wife.<sup>165</sup>

The woman was animalized, the animal feminized. The chief demonstrated his greatness by exercising mastery over whale, woman, and nature. In this scenario, women sometimes bore the blame for the failure of the hunt. One whaler's wife recalled what happened after she ate and drank a bit during a hunt: "When my husband came back he walked up to me and said, 'You drank something when you got up; we got a whale but he is not fat.' This frightened me very much and after that I never drank anything again."<sup>166</sup>

Makah tribal leaders argue that whaling will restore social order and unity. Do they mean to suggest that it will reinvigorate the stabilizing social hierarchies of the past? Might the resumption of whaling reinforce old status distinctions among Makah families and sharpen inequalities between men and women in the tribe? In a gesture of democratic intent, the tribe invited all Makah families to participate in the Makah Whaling Commission in the 1990s, but this did not prevent concerns about family prerogatives and status from emerging in force. Dougherty (2001) reports that power struggles emerged over the composition of the 1999 whaling crew and that some members of the chosen crew "despised each other." Van Ginkel adds: "There was even greater animosity as to who was to be the captain of the whaling team. . . . [Harpooner Theron Parker] and [Wayne] Johnson could not get along with each other, to put it mildly, but they finally worked out some kind of modus vivendi although the crew remained 'bitterly divided.'"<sup>167</sup> Parker and Johnson argued over whose family sacred whaling song would be sung when the whale was beached. Johnson recalled: "I told Theron there was going to be no family songs and dances. . . . I didn't want just one family to take the glory. So when we got on the beach, he down-feathered it, claimed it with eagle feathers, sang his songs. . . . I didn't want that to happen."<sup>168</sup> When Parker then took the first cut of whale meat, Johnson bristled again: "That was my job to do that. Not his job. It's not his whale. It's my whale."<sup>169</sup>

There are also signs that the gendered aspects of whaling would persist. Makah women were excluded from the whaling crew in the 1999 hunt. Denise Dailey, a Makah Fisheries biologist, was appointed to be executive director for the hunt, but "[b]ecause she was a woman, the [Makah whaling] commission insisted that she not speak for the crew, so Keith Johnson, the president of the whaling commission, was dubbed the spokesman for the hunt." Dailey remarked: "I'll never hunt a whale because I'm a woman and I'm okay with that."<sup>170</sup> Prior to the hunt, women were instructed about the historic rituals of

<sup>165</sup> DEIS, 3-228.

<sup>166</sup> Gunther (1942), 68.

<sup>167</sup> Van Ginkel (2004), 66.

<sup>168</sup> Dougherty (2001).

<sup>169</sup> *Ibid.*

<sup>170</sup> Sullivan (2000), 89.

lying silent and motionless and the "wives, partners, and mothers of the crew" chose to do this.<sup>171</sup> Also, "a group of young girls from the Neah Bay school went to their teacher and asked if they could take ten minutes to lie still and be quiet and pray while the hunt was taking place, because they had been told that that was historically what young women in the community did."<sup>172</sup> In one of Renker's surveys, of the few who opposed the hunt, some cited "the inequality of women's involvement in the hunt" as a reason.<sup>173</sup> Gaard (2001) suggests a connection between the masculinist, elitist aspects of whaling and "the tribe's current practices of silencing the dissenting voices of women elders who oppose the renewed hunt."<sup>174</sup> As Dottie Chamblin said, "It's grandmothers fighting this fight against them."<sup>175</sup> The argument over Makah whaling has been structured publicly as an argument between those concerned about colonial domination over the Makah and those concerned about human domination over animals. Perhaps the intimate connection of Makah whaling to other forms of social domination and inequality should figure in this debate as well.

#### CRITIQUE AND AVOWAL

The dilemma facing Cetacean Society International and Earth Island Institute, I mentioned earlier, was that their opposition to Makah whaling was taken as *de facto* evidence of colonial intent, regardless of their public stance calling for the federal government to redress the injuries inflicted on the tribe by colonialism. The member of the public who sent this e-mail to the NMFS during the October 2005 scoping period was also trying to be both pro-whale and pro-Makah:

I strongly believe that the United States Government has broken most of the treaties it has negotiated with Native Americans and many administrations in the 1800s were guilty of ethnic cleansing and genocide. I am generally in favor of giving Native American tribes the benefit of the doubt in most of their claims against state and federal governments. However, when it comes to whale hunting I believe that their traditions and treaties cannot take precedence over the lives of intelligent, self-aware animals such as whales.<sup>176</sup>

Is it possible to critique a specific Makah practice (and the understandings associated with it) in the name of anti-subordination and still meaningfully support Makah claims to sovereignty and redress? Can one argue against whaling and still be anticolonialist? One might respond that the Makah's ontology is central to their way of life so that a rejection of its implications for whaling is, in effect, a rejection of the entire Makah way of being. But, as discussed later in

<sup>171</sup> Renker (2012), 33. See also Bovechop (2004).

<sup>172</sup> Coté (2010), 141.

<sup>173</sup> DEIS, 3-242 citing Renker (2012).

<sup>174</sup> Gaard (2001), 16.

<sup>175</sup> Peterson (1996).

<sup>176</sup> August 27, 2005 e-mail from a private individual to the NOAA during the period of public scoping for the DEIS.



this chapter, other Pacific Northwest tribes with similar ontologies have elected to observe a continued moratorium on whaling and have not found their ways of life significantly compromised. For if Native American/Canadian ontologies hold whaling to be morally and spiritually permissible, they do not deem it morally or spiritually *compulsory*.

In the Makah whaling conflict, multi-optic analysis helps us to perceive clearly the varied perspectives, claims, and stakes involved. Once again, this does not have to lead to political or moral paralysis, but it should contour political action in particular ways. Thus seeing multi-optically would not necessarily stop someone from opposing Makah whaling (on anti-subordination grounds), but it would influence them to do so in a way that respected rather than denied the colonial context. Thoughtful critique of a racially marginalized group can be joined, then, to a posture of avowal toward that group's moral and political claims toward the larger society.

In this scenario, animal and environmental activists who chose to fight the resumption of Makah whaling would begin by recognizing their own racial situatedness and its implications for this story. They would learn about and respectfully engage Makah ontological claims about humans and whales, even if they ultimately disagreed with these claims and their implications. They would educate themselves deeply on the history of U.S. colonialism toward the Makah; think through the ongoing economic, social, and psychological effects of past and present governmental policies on the tribe; repudiate (rather than allying themselves with) the organized white political and economic interests who continuously seek to encroach on tribal fishing and hunting rights; actively condemn anti-Indian sentiments expressed by the public; and promote the Makah struggle for sovereignty and redress. They would *connect* the historical practices of colonialism with the violence against whales they are trying to curtail, while thinking through the impact of their activism on *both*. Rather than treating the question of whaling as an isolated issue that can be detached from the context of U.S.-Makah relations, they would situate the critique of whaling within a larger framework of justice that challenges multiple, interconnected forms of domination (including colonial domination) at once.

In this scenario, Makah leaders would not presumptively reduce all alternative perspectives to colonialism. They would take seriously and engage environmental and animal advocates' understandings and claims about both the ecological status of whales and what whales deserve and want, as well as learning about the long history of global activism to protect whales and the American public's growing concern about their protection. They would reflect upon the connections between colonialism and the mastery of nature and animals and question whether their own cultural understandings, too, might bear traces of domination (and self-rationalization). Rather than focusing exclusively on Coté's argument about the unfair "conservation burden" placed on the Makah, they would be open to assessing the possibly destructive implications of whaling, in particular the precedential dangers of stretching the ASW exemption in

international conservation law.<sup>177</sup> Precisely because their culture is dynamic and living and evolving, they would consider and debate whether the fight for Makah sovereignty might be productively uncoupled from the issue of whaling, as Alberta Thompson and the other dissenting elders suggested. They would not need to repudiate their ontology or cultural understandings or tribal sovereignty to consider whether whaling is, all told, a practice worth resuming.

There are precedents for deciding that it is not. Down the coast of Washington from Neah Bay, the Quileute Tribal Council in La Push passed a resolution to not whale in 1988. Fred Woodruff, a member of the Quileute, hopes to build a whale-watching business using traditional whaling canoes. He comments:

Our tribe fully supports our Makah neighbors in their treaty rights. But our Quileute elders have made a different decision. Even though we and other tribes along the coast have the same treaty rights to hunt, our elders have chosen to support the gray whale. For thousands of years, this whale has been valuable under subsistence, but now the value is in its life. The gray whale is more valuable to the Quileutes living than hunted. We must begin the healing here in our village and hope it can help others, as well. We Quileutes would like to offer a new vision and a different model for other tribes, as well as peoples.<sup>178</sup>

Fred's brother, tribal chairman Russell Woodruff, adds: "We see the damage of what's taking place in Makah. Our neighbors do not own the story of the gray whales. ... The Quileute tribe would like to declare a Welcoming the Whale spring ceremony and invite all peoples to come celebrate the gray whales."<sup>179</sup>

In 2006, five groups of Nuu-Chah-Nulth on Vancouver Island (peoples who are closely related culturally and linguistically to the Makah) came together under the name Maa-Nulth and signed a historic treaty with the Canadian and British Columbia governments. The Maa-Nulth receive more than 24,000 hectares of land, \$90 million in cash, up to \$45 million for potential revenue-sharing projects, and \$150 million for program financing.<sup>180</sup> In a side agreement, they promise not to hunt gray or sei whales for twenty-five years. The Maa-Nulth thus pursued reparations and redress while also protecting their right to whale – and they have chosen not to exercise this right, at least for the time being.

In this chapter, I analyze the Makah whaling controversy, tracing the history of the dispute and explicating the optics of ethical harm, ecological harm, and eco-colonialism. I discuss how the parties to the conflict advanced incommensurate ontologies about humans, whales, and nature, and how they disavowed one another's claims in the course of political struggle. I then suggest that

<sup>177</sup> In response to the Makah's attempt to resume whaling, the Nuu-chah-nulth tribe created the World Council of Whalers, an aboriginal lobbying group that receives funding from whaling nations like Japan and Norway and seeks to loosen IWC restrictions. Jenkins and Romanzo (1998), 76, n. 11.

<sup>178</sup> Peterson and Hogan (2002), 190-1.

<sup>179</sup> *Ibid.*, 199.

<sup>180</sup> "Maa-nulth First Nations Sign Historic B.C. Treaty."

animal and environmental activists can critique Makah whaling mindfully, that is, in a way that engages and takes seriously the Makah's ontology and tribal justice claims. I also argue that the Makah, for their part, can move toward opening themselves to animal and environmental protectionist claims, building upon the example of some other Native American tribes and Canadian First Nations. The next chapter explores a second comparative case, the Michael Vick dogfighting scandal.

## 8

### Michael Vick, Dogfighting, and the Parable of Black Recalcitrance

Vick beat dogs to death. He watched dogs drown in his swimming pool, he shot them, he electrocuted them, he buried them alive, he savagely abused them, he took great enjoyment in it, and he found it funny to watch family pets being torn apart.

– Nathan Winograd

[What happened to Vick was] an electronic lynching.

– Kwame Abernathy

On April 25, 2007, the Sheriff's Department in Surry County, Virginia executed a search warrant at 1915 Moonlight Road, a fifteen-acre property owned by NFL superstar and Atlanta Falcons quarterback Michael Vick. The search warrant was triggered by the arrest of Vick's cousin on marijuana possession charges, but investigators had heard rumors of Vick's involvement in dogfighting for years, so they asked Animal Control Officer Kathy Strouse to accompany them. At Vick's property, they found more than fifty dogs (many of them scarred or wounded), kennels, a fighting pit, and the standard paraphernalia of dogfighting, including breeding stand, treadmill, breakstick, and injectable steroids. Over the following months, investigators ascertained that Vick, who lived in Atlanta, had selected, purchased, built, and maintained the entire property for six years for the express purpose of housing his dogfighting operation, known as Bad Newz Kennels. Vick financed the operation, maintained several of his friends on the property to manage the breeding, training, and fighting of dogs, and visited every Tuesday (his day off from the Falcons) to supervise. Vick hosted fights involving dogs from many other states and took his dogs to fights in other states as well.

Thus began Michael Vick's precipitous fall from grace. Years earlier, Vick had vaulted from humble beginnings in a Virginia public housing project to NFL superstardom. Recognized as a prodigious talent, he was the first African American to be selected first in the NFL draft (in 2001 by the Atlanta Falcons) and became the highest paid player in NFL history. In 2004, he signed a

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