

May 2017

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### Recommended Citation

Stevens, Jeremy (2017) "Of Whaling, Judicial Fiats, Treaties and Indians: The Makah Saga Continues," *American Indian Law Journal*: Vol. 1: Iss. 1, Article 4.

Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol1/iss1/4>

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## OF WHALING, JUDICIAL FIATS, TREATIES AND INDIANS: THE MAKAH SAGA CONTINUES

Jeremy Stevens\*

*"Fiat lux et facta est lux."*<sup>1</sup>

*"So is this great and wide sea,  
wherein are things creeping innumerable,  
both small and great beasts.  
There go the ships:  
there is that Leviathan  
whom thou hast made to play therein."*<sup>2</sup>

*"[O]ur treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith. Here, as in other parts of the world, the undermining of that faith begins with the glorification of 'expert administrators' whose power-drives are always accompanied by soft music about 'the withering away of the state' or the ultimate 'liquidation' of this or that bureau."*<sup>3</sup>

At the northwestern-most corner of the continental United States, on a 27,000 square acre reservation, reside the Makah.<sup>4</sup> Currently the only group of the Nuuchah-nulth people within the realm of the United States of America,<sup>5</sup> the Makah once exerted dominion over a territory that consisted of all "that portion of the extreme northwest part of Washington Territory . . . between Flattery Rocks on the Pacific coast, fifteen miles south from Cape Flattery, and the Hoko [R]iver . . . eastward from the cape on the Strait of [Juan de] Fuca."<sup>6</sup> The Makah also claimed Tatoosh Island, and indeed still today retain Tatoosh Island and the cluster of land masses which the appellation has come to

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\* J.D. Seattle University School of Law; B.S. Northwestern University. Special thanks to Bree Blackhorse and Shay Story for the good – and hard – work they do; to Hank McGee for the broadness of his mind and the bigness of his heart; and to Eric Eberhard for reminding us why we do the work we do and for educating us all.

<sup>1</sup> Genesis 1:3, Latin Vulgate (translated into common parlance: "'Let there be light.' And there was light.").

<sup>2</sup> Psalm 104: 25-6 (King James).

<sup>3</sup> Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

<sup>4</sup> William Bradford, *Save the Whales" v. Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes in the New International Economic Order*, 13 ST. THOMAS L. REV. 155, 172 (Fall 2000).

<sup>5</sup> Other Nuuchah-nulth tribal people live on Vancouver Island and along the central and Columbia coast. See Ruth Kirk, *TRADITION AND CHANGE ON THE NORTHWEST COAST: THE MAKAH, NUUCHAH-NULTH, SOUTHERN KWAKWATL, AND NUXALK* 8-9, University of Washington Press (1986).

<sup>6</sup> JAMES G. SWAN, *THE INDIANS OF CAPE FLATTERY, AT THE ENTRANCE TO THE STRAIT OF FUCA, WASHINGTON TERRITORY*, in 220 *The Smithsonian Contributions to Knowledge* 1, 4 (1868) available at [http://www.sos.wa.gov/history/publications\\_detail.aspx?p=74](http://www.sos.wa.gov/history/publications_detail.aspx?p=74) (last visited Oct. 31, 2012).

represent.<sup>7</sup> But the whole of the Makah ancestral lands “is of a mountainous character, and is the termination of the Olympic range, [covered with] an almost impenetrable forest.”<sup>8</sup> The inhospitable climate—the winds, the rains, the rocky crags, the clay dirt and sandstone, and the occasional boulder of granite—is not suitable for cultivation. Owing to the terrain and the climate, the Makah engaged in very limited amounts of agriculture, cultivating potatoes “at a hill on Flattery rocks”<sup>9</sup> and picking berries, naturally resident to the terrain. It is thus not difficult to understand that the Makah were primarily “a seafaring people who spent their lives either on the water or close to the shore,”<sup>10</sup> sprinkled with the occasional tuber, nut, berry or sea fowl, most of the Makah “subsistence came from the sea where they fished for salmon, halibut and other fish, and hunted for whale and seal.”<sup>11</sup> But paramount to the Makah of all the fecund ocean’s largesse was the California Gray Whale.<sup>12</sup> As the Makah themselves assert, whale hunting is the “symbolic heart” of their culture.<sup>13</sup>

And the Makah have been hunting whales for 1,500 years.<sup>14</sup> Makah religion in fact instructs that Thunderbird, a “flying wolflike god, delivered a whale to their shores to save them from starvation.”<sup>15</sup> For at least 3,000 years since, the “gray whales have been sacred icons in the petroglyphs, jewelry, art, carvings, songs, and dances”<sup>16</sup> of the Makah. Whaling has not only been a source of subsistence to the Makah as they have learned to survive—thrive, even, before westward expansion squeezed them onto their current reservation—atop their clump of clay, rock, and dirt—whaling has been “an expression of religious faith and community cohesion.”<sup>17</sup> Nowhere else is this

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *United States v. State of Wash.*, 384 F. Supp. 312 (W.D. Wash. 1974).

<sup>11</sup> *Id.*

<sup>12</sup> “The California gray is the kind usually taken by the Indians, the others being but rarely attacked.” SWAN, *supra* note 6, at 19.

<sup>13</sup> Makah Tribal Council, Application for a Waiver of the MMPA Take Moratorium to Exercise Gray Whale Hunting Rights Secured in the Treaty of Neah Bay, submitted to NOAA (Feb. 11, 2005) at 8.

<sup>14</sup> See generally, SWAN, *supra* note 6, at 4.

<sup>15</sup> Bradford, *supra* note 4, at 171.

<sup>16</sup> *Id.* at 172.

<sup>17</sup> *Id.* “The practice of the whalers is particularly revealing of the religious essence of Makah whaling: in order to become spiritually pure enough to enter the spirit world where they could become ‘at one with the whale’ and deserving of the whale’s gift of itself to them, Makah whalers were required to undergo grueling physical training which included abstention from sex, self-infliction of floggings with stinging nettles, bathing in frigid ponds, lying naked on the beach covered in sand fleas, and swimming large rocks from one river bank to another.” Footnote 52. But the Makah were also ‘emphatic’ traders of whale blubber and oil to white traders, lumber mills and other tribes along the coast of the Pacific Northwest. Indeed, the trading of whale oil brought a notable degree of prosperity to the tribe. See SWAN, *supra* note 6, at 31-2. And modern scholars posit that as much as 84.6 % of the Makah pre-contact diet could have been composed of whale meat and other whale derivatives. See Ann M. Renker, Ph.D., *Whale Hunting and the Makah Tribe: A Needs Statement*, April 2007, <http://iwcoffice.org/cache/downloads/ds5fzaq2p14w88ocko00o4gcw/64-ASW%204.pdf> (last visited Oct. 31, 2012).

reverence, this sense of cultural inter-dependence, more illustrated than in the Treaty of Neah Bay.<sup>18</sup>

The Treaty of Neah Bay is the constitutionally binding source of federal plenary authority and dominion over the Makah Indians—the exercise of the Indian Commerce clause which grants the congressional right to dictate by legislative fiat the totality of Makah affairs. Effectuated in 1855, it is but one of the “eleven different treaties, each with several different tribes”<sup>19</sup> produced by Governor Isaac Stevens.<sup>20</sup>

Congress’ chosen method of opening up vast swaths of Pacific Northwest land for white westward expansion was through the negotiation of treaties, as an instrument of conquest.<sup>21</sup> And to clear the way for white settlement onto Indian lands, to accommodate the increasing flow of American settlers pouring into the lowlands of Puget Sound and the river valleys north of the Columbia River, Governor Isaac Stevens was tasked with inducing the Indians of the area to move “voluntarily”<sup>22</sup> onto reservations. Indeed, Governor Stevens was well-suited for the undertaking. He recognized in the Makah not much concern for their land (save for their village, burial sites, and other sundry locations), but recognized great concern for “their marine hunting and fishing rights.”<sup>23</sup> The Governor therefore reassured the Makah that the United States government did not “intend to stop them from marine hunting and fishing but in fact would help them to develop these pursuits.”<sup>24</sup> But Governor Stevens did not speak the Makah’s language, nor did the Makah representatives speak English. Instead, the Treaty of Neah Bay was negotiated in English and an interpreter translated English into “Chinook Jargon” which then a member of the Clallum Tribe translated into Makah: English into Chinook into Makah, and back.<sup>25</sup> Nevertheless, Governor Stevens was sufficiently intuitive and well enough informed to recognize the primacy of the whale

<sup>18</sup> Treaty of Neah Bay, Jan. 31, 1855, U.S.-Makah Tribe, 12 Stat. 939. Neah Bay is situated on the Northwestern corner of the Olympic Peninsula in Clallam County, Washington.

<sup>19</sup> *United States v. State of Wash.*, 384 F. Supp. At 330. .

<sup>20</sup> Governor (US Army Colonel) Isaac Stevens was neither a benevolent nor a pusillanimous man. Born in Massachusetts in 1818 and a top of his class West Point graduate, having been a strong supporter of Franklin Pierce’s presidential candidacy, he was rewarded for his dedication with the position of Governor/Superintendent of Indian Affairs for the newly created Washington Territory. In this capacity and with the occasional use of intimidation and force, Governor Stevens orchestrated virtually all of the of the US-Indian treaties – Treaty of Medicine Creek, Treaty of Hellgate, Treaty of Neah Bay, Treaty of Point Elliott, Point No Point Treaty, Quinault Treaty – which laid the foundation of Indian displacement, loss of cultural identity, and Indian Tribal rights and reservation boundaries in the Pacific Northwest. Despite his hostility toward Natives (or perhaps as a consequence of it), Governor Stevens was popular enough to be elected delegate to the United States Congress in 1857 and 1858. But he resumed service in the United States Army when the civil war began in 1861, became a brigadier general on September 28, 1861, and was shot in the head while leading an infantry charge at the Battle of Chantilly, going on to meet his maker instantly on September 1, 1882.

<sup>21</sup> *United States v. State of Wash.*, 384 F. Supp. at 330. .

<sup>22</sup> See *United States v. Washington*, 520 F.2d at 682-83 (9th Cir. Wash. 1975) (aff’g *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974)).

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

<sup>24</sup> *United States v. State of Wash.*, 384 F. Supp. at 330.

<sup>25</sup> Robert J. Miller, *Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 OR. L. REV. 543, 553 (1991).

in Makah culture; indeed, the man “promised United States assistance in securing a treaty-based right for the Makah to whale and promot[e] Makah whaling”<sup>26</sup> because, in his own words, “[t]he Great Father knows what whalers you are.”<sup>27</sup> Much of the official record of the treaty negotiations thus deals with securing the right to whale; and as consideration for that treaty-reserved right, the Makah ceded 91% of their land—a full 300,000 square acres—and retained only a 27,000 square acre wind-swept, crag-ridden, “mountainous, forest-covered region, with no arable land except the low swamp and marsh.”<sup>28</sup> The Makah were not interested in becoming tillers of soil or hunters of the elk, deer and bear which dwelt among them. Yes, the Makah grew their potatoes and gathered berries when the season was proper, but no culture can survive on tubers and berries alone; a people requires “animal food, and [the Makah] prefer[red] the products of the ocean to the farina of the land.”<sup>29</sup> As a testament to the importance of the whale to every aspect of Makah culture and as an illustration of the extent to which the act of whaling was more important to the Makah than it was to any other tribe with which the Government negotiated a treaty, the Treaty of Neah Bay is the *only* United States-Indian treaty which secures for the Indians the express right to whale: 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”<sup>30</sup> with all citizens of the United States.”<sup>31</sup>

But in *Anderson v. Evans*,<sup>32</sup> the Ninth Circuit abrogated that right, and did so through applying an eminently improper analytical framework of its own making.<sup>33</sup> Part I of this article will chart the unhappy sequence of events leading up to the *Anderson* decision as the Makah sought—and continue to seek today—to re-establish their long-customary and treaty-reserved practice of whaling. Next, this article will consider the canons of United States-Indian treaty interpretation relevant to the *Anderson* court’s failings. Included in this proposition is identifying the source of federal power over Indians, identifying the source of state power over Indians, and identifying what are referred to as the state conservation necessity test and the federal weight and consideration test. As each appellation suggests, the former is used to assess the effects a *state*’s regulation imposes upon an Indian treaty-reserved right while the latter

<sup>26</sup> Bradford, *supra* note 4, at 172 (citing Keith Johnson, The Makah Manifesto, SEATTLE TIMES, August 23, 1998, at B9, <http://community.seattletimes.nwsources.com/archive/?date=19980823&slug=2768010> (last visited Oct. 31, 2012)).

<sup>27</sup> *Id.*

<sup>28</sup> SWAN, *supra* note 6, at 2.

<sup>29</sup> *Id.*

<sup>30</sup> But “[t]here is no indication that the Indians intended or understood the language ‘in common with all citizens of the Territory’ to limit their right to fish in any way. For many years following the treaties the Indians continued to fish in their customary manner and places . . .” *United States v. State of Wash.*, 384 F. Supp. at 333.

<sup>31</sup> Treaty of Neah Bay, ART. 4, Jan. 31, 1855, U.S.-Makah Tribe, 12 Stat. 939.

<sup>32</sup> 371 F.3d 475, 501 (9th Cir. 2004) (amending 314 F.3d 1135 (9th Cir. 2002)).

<sup>33</sup> A string of articles addresses the Ninth Circuit’s analytical errors, see Zachary Tomlinson, *Abrogation or Regulation? How Anderson v. Evans Discards the Makah’s Treaty Whaling Right in the Name of Conservation Necessity*, 78 WASH. L. REV. 1101 (2003); Emily Brand, *The Struggle to Exercise a Treaty Right: An Analysis of the Makah Tribe’s Path to Whale*, 32 ENVIRONS ENVTL. L. & POL’Y J. 287, 305 (2009); Bradford, *supra* note 4, at 172, and one outlier among them even defends the Ninth Circuit’s analytical errors. See Karol Koppelman, *Anderson v. Evans: the Ninth Circuit Harmonizes Treaty Rights and the Marine Mammal Protection Act*, 16 HASTINGS W.-N.W. J. ENV. L. & POL’Y 287, 353 (2010).



is used to assess the effects a *federal* regulation imposes upon an Indian treaty-reserved right. This article will then address in Part III why the *Anderson* decision was incorrectly decided and in conclusion, this article will present the current state of the Makah's efforts to resume their treaty-reserved right of "whaling or sealing at usual and accustomed grounds and stations"<sup>34</sup> in exercise of their treaty right to do so.

### I. THE MAKAH'S QUEST TO RE-ESTABLISH WHALING

Having been whalers for over 1,500 years,<sup>35</sup> in the 1920s, as greatly "improved equipment increased the slaughter of [whales] to such a degree that world-wide attention began to focus on the possibility of hunting several species of whales to extinction," the Makah voluntarily ceased their whaling activities.<sup>36</sup> Recognizing the pressing need to roll back the near extirpation of several whale species, in 1937 several nations—among them the United States of America—signed the first International Whaling Agreement.<sup>37</sup> Faced with the virtual extinction of the California Gray Whale nine years later in 1946, the United States signed the International Convention for the Regulation of Whaling (ICRW), established in order "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."<sup>38</sup> The ICRW then enacted a "schedule of whaling regulations"<sup>39</sup> and created the International Whaling Commission (IWC) as its rule-making/enforcement arm. The IWC was to be "composed of one member from each signatory nation," and the ICRW granted the IWC the power to amend the "schedule of whaling regulations" by "adopting regulations with respect to the conservation and utilization of whale resources;"<sup>40</sup> this included—and remains to this day—setting quotas for the maximum number of whales that can lawfully be taken in any one whaling season. IWC then placed an outright ban on taking or killing gray whales,<sup>41</sup> but allowed an aboriginal subsistence exception "when the meat and products of such are to be used exclusively for local consumption by the aborigines."<sup>42</sup> Congress for its part passed the Whaling Convention Act in 1949 "to implement domestically the International Convention for the

<sup>34</sup> Treaty of Neah Bay, ART. 4, Jan. 31, 1855, U.S.-Makah Tribe, 12 Stat. 939.

<sup>35</sup> When Attila the Hun was ravaging the eastern boundaries of the Roman Empire, the Makah where whaling. Prior to contact with non-Indians in fact, the Makahs had been hunting "whale successfully for at least 1200 years without destroying the resources. Ceremonial, social and cultural proscriptions established a functional balance between the Makahs and the whale populations which swam in or through Makah waters." Renker, *supra* note 17, at 12. See also SWAN, *supra* note 6.

<sup>36</sup> Murray Lundberg, *Thar She Blows! Whaling in Alaska and the Yukon*, Explore North, available at <http://explore north.com/library/yafeatures/bl-whaling.htm> (last visited Oct. 31, 2012). See also *Anderson v. Evans*, 371 F.3d 475, 480 (9th Cir. 2004).

<sup>37</sup> For an accessible and readable snapshot overview of the Makah's discouraging quest up to 2008, see NOAA, Chronology of Major Events Related to Makah Tribal Whale Hunt, 2008, available at <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/Makah-chron.cfm> (last visited Oct. 31, 2012).

<sup>38</sup> International Convention for the Regulation of Whaling, 62 Stat. 1716, 1717 (1946).

<sup>39</sup> *Metcalf v. Daley*, 214 F.3d 1135, 1138 (9th Cir. 2000).

<sup>40</sup> International Convention for the Regulation of Whaling, 62 Stat. 1716, 1718-19 (1946).

<sup>41</sup> See 62 Stat. 1716, 1723, 161 U.N.T.S. 72 (Dec. 2, 1946).

<sup>42</sup> 62 Stat. at 1723. Note that this qualification the *Metcalf* court and others refer to as the "aboriginal subsistence exception." See *Metcalf v. Daley*, 241 F.3d at 1138.

Regulation of Whaling.”<sup>43</sup> The Whaling Convention Act prohibits whaling in violation of ICRW, the IWC schedule of whaling regulations, or any whaling regulation adopted by the United States Secretary of Commerce.<sup>44</sup> Furthermore, and most relevant for the purpose of this article, Congress has tasked the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS) with the promulgation of regulations to implement the Whaling Convention Act.<sup>45</sup>

Notwithstanding IWC, NOAA and NMFS efforts, unhappily, by 1970 the global gray whale population—that awesome but “gentle giant of the sea”<sup>46</sup>—had decreased to less than a meager 2,000 individual leviathans. The next significant development vis-à-vis the Makah, then, came that very year when Congress designated the California Gray Whale as an endangered species in compliance with the United States Endangered Species Conservation Act (ESA);<sup>47</sup> two years later, in 1972, Congress enacted the Marine Mammal Protection Act (MMPA). Under the MMPA, the NOAA is responsible for the conservation of, among others, the California Gray Whale, that behemoth long instrumental to Makah cultural identity and preservation.

Happily, by June of 1994, the Eastern North Pacific (ENP) population of the California Gray Whale had “recovered to near its estimated original population size and [was] 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>48</sup> This steady, stable population of approximately 20,000 California Gray Whales<sup>49</sup> leisurely roaming the seas was delisted under the ESA that same year, and the Makah decided to resume its hunting of those “who migrated through the Sanctuary.”<sup>50</sup> To accomplish this end, the Makah sought the assistance of the Federal government’s Department of Commerce: specifically, the NOAA which Congress had tasked with the promulgation of regulations to implement the Whaling Convention Act. Indeed, on March 22, 1996, the Makah and the NOAA entered into a

<sup>43</sup> *Id.* See also 16 U.S.C.A. § 916 *et seq.* (1985).

<sup>44</sup> See *Metcalf v. Daley*, 241 F.3d at 1138. See also 16 U.S.C.A. § 916c (1985).

<sup>45</sup> See 16 U.S.C. § 916 *et seq.*; 50 C.F.R. § 230.1 (1998).

<sup>46</sup> Mary Jordan, *Gentle Giants of the Sea Return to Mexico Lagoon*, THE WASHINGTON POST, Feb. 20, 2005, at A01, <http://www.washingtonpost.com/ac2/wp-dyn/A38433-2005Feb19?language=printer> (last visited Oct. 31, 2012).

<sup>47</sup> The Endangered Species Conservation Act was the precursor to the 1973 Endangered Species Act

<sup>48</sup> Endangered and Threatened Wildlife and Plants; Final Rule to Remove the Eastern North Pacific Population of the Gray Whale From the List of Endangered Wildlife, 59 Fed. Reg. 31,094 (June 16, 1994) (codified at 50 C.F.R. pt. 17).

<sup>49</sup> See Jordan, *Supra* at A01.

<sup>50</sup> *Metcalf v. Daley*, 241 F. 3d at 1138. Makah whaling has long targeted the California gray whale, which migrates between the North Pacific and the coast of Mexico. “During their yearly journey, the migratory whale population travels through the Olympic Coast National Marine Sanctuary (“Sanctuary”), which Congress established in 1993 in order to protect the marine environment in a pristine ocean and coastal area. A small sub-population of gray whales, commonly referred to as ‘summer residents,’ live in the Sanctuary throughout the entire year.” *Id.* For further profitable information about the California gray whale and its usefulness to the Makah, See Ann M. Render, Ph.D., *Whale Hunting and the Makah Tribe: A Needs Statement*, 5- 23 (April 2007),

<http://iwcoffice.org/cache/downloads/ds5fzaq2p14w88ocko00o4gcw/64-ASW%204.pdf> (last visited Oct. 31, 2012).

formal written agreement by which the “NOAA, through the United States Commissioner to the IWC, will make a formal proposal to the IWC for a quota of gray whales for subsistence and ceremonial use by the Makah Tribe.”<sup>51</sup> But in response to this agreement, in June of 1997, two organizations—Australians for Animals and the BEACH Marine Protection—submitted a letter to NOAA “alleging that the United States Government had violated National Environmental Policy Act (NEPA) by authorizing and promoting the Makah whaling proposal without preparing an”<sup>52</sup> Environmental Assessment (EA) or an Environmental Impact Statement (EIS). The NOAA responded by distributing an EA for public comment, in compliance with the National Environmental Policy Act, on August 22, 1997.<sup>53</sup> A short time later, on October 13, 1997, NOAA and the Makah entered into a new written agreement which “required the Makah to confine hunting activities to the open waters of the Pacific Ocean.”<sup>54</sup> After the signing of this new agreement, the NOAA issued a Finding of No Significant Impact (FONSI) four days later, on October 17, 1997.<sup>55</sup>

One day later at the IWC’s annual meeting the United States on behalf of the Makah, and the Russian Confederation on behalf of a Siberian aboriginal group called the Chukotka, submitted a “joint proposal for a five-year block quota of 620 whales. The total quota of 620 assumed an average annual harvest of 120 whales by the Chukotka and an average annual harvest of *four* whales by the Makah.”<sup>56</sup> Yet some delegates “expressed doubts about whether the Makah qualified for the quota under the ‘aboriginal subsistence’ exception,”<sup>57</sup> and therefore suggested “amending the joint proposal to allow the quota to be used only by aboriginal groups whose traditional subsistence and cultural needs have been recognized by the International Whaling Commission.”<sup>58</sup> The United States rejected this amendment, arguing that the IWC had no “established mechanism for recognizing such needs.”<sup>59</sup> The proposal submitted by the United States and the Russian Federation was thus amended to allow the block quota of 620 whales to be used only by aboriginal groups “whose traditional subsistence and cultural needs have been recognized.”<sup>60</sup> This quota shortly thereafter was approved, and on April 6, 1998, NOAA issued a Federal Register Notice allocating a

<sup>51</sup> *Metcalf v. Daley* 214 F. 3d at 1139.

<sup>52</sup> *Id.* Under the National Environmental Policy Act, when a Federal agency develops a proposal to take an action, there are three levels of analysis that a federal agency must undertake to comply with the law. These three levels include: preparation of a Categorical Exclusion (CE); and if no CE applies, the preparation of an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI); or when there has been no FONSI, the preparation and drafting of an Environmental Impact Statement (EIS).

<sup>53</sup> *Metcalf v. Daley*, 214 F. 3d at 1139.

<sup>54</sup> *Id.* (interior quotations omitted). The *Metcalf* court further provided, “Apparently, this provision was added to the Agreement in order to increase the probability that, although the whaling would occur in the Sanctuary, the Makah would hunt only migratory whales, rather than the Sanctuary’s ‘summer residents.’”

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

<sup>56</sup> *Metcalf v. Daley*, 214 F. 3d at 1140 (emphasis added).

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

<sup>58</sup> *Id.* (interior quotations omitted.) The *Metcalf* court presumes that these delegates, for their own reasons, “were attempting to amend the proposal in a manner that would allow the Chukotka to harvest gray whales, but would prohibit the Makah from doing so.” *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*



quota to the Makah for limited hunts in 1999. This allowed the Makah, in lawful exercise of its re-established expressly-reserved treaty right, to engage in whaling “pursuant to the IWC-approved quota and Whaling Convention Act regulations.”<sup>61</sup>

Meanwhile, on the very day the 1997 Finding of No Significant Impact was released by the NOAA—October 17, 1997—Congressman Jack Metcalf,<sup>62</sup> joined by Australians for Animals, BEACH Marine Protection and others, filed a complaint in the United States District Court for the District of Columbia alleging that the federal defendants—NOAA and NMFS—violated the National Environmental Policy Act, the Whaling Convention Act and the Administrative Procedures Act.<sup>63</sup> Metcalf et al. chiefly contended that NOAA’s Environmental Assessment was a “deficient effort”<sup>64</sup> organized simply to “justify the prior agreement allowing the Tribe to hunt whales.”<sup>65</sup> After granting the Makah’s motion to intervene, the District Court transferred the case to the Western District of Washington.<sup>66</sup> The district court for the Western District of Washington granted summary judgment for the Makah and their Federal allies.<sup>67</sup> Thereafter, the Makah, having voluntarily suspended whaling operations in the 1920s, resumed whaling under full federal supervision in 1999. On May 17, 1999, the Makah

celebrated a pivotal moment in [their] long history. At 6:54 a.m., the Creator allowed a Makah crew to realize a collective dream that the Makah Nation had stored in its minds and hearts for seventy long years: they brought a whale home to the Tribe. This pivotal cultural event riveted the attention of the Makah community, and energized Makah Tribal members who believed in, and worked toward, the restoration of this significant cultural and subsistence practice.<sup>68</sup>

1,200 Makah watched the hunt’s successful completion on live television; hundreds of off-reservation Makah traveled home to the land of their fathers, seeking only to be a part of this event; 1,400 Makahs gathered at Front Beach in Neah Bay to welcome the whale and the successful whalers; and as they undertook the process of preparing the food and resources for consumption and sharing at a later date, many “ate raw blubber right on the spot.”<sup>69</sup>

<sup>61</sup> *Id.* See also Notice of Aboriginal Subsistence Whaling Quotas, 63 Fed. Reg. 16,701 (April 6, 1998) (codified at 50 C.F.R. pt. 230).

<sup>62</sup> Congressman Jack Metcalf, 1997 – 2007, was elected as a Republican to the One Hundred Fourth, Fifth and Sixth Congresses (January 3, 1995-January 3, 2001) but was not a candidate for reelection to the One Hundred Seventh Congress. See Biographical Directory of the United States Congress *available at* <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000669> (last visited Oct. 31, 2012) Congressman Metcalf died of Alzheimer’s at an Alzheimer’s care facility in Oak Harbor, WA, on March 15<sup>th</sup>, 2007.

<sup>63</sup> See Metcalf v. Daley, 214 F.3d at 1140. See also Anderson v. Evans, 371 F.3d at 485.

<sup>64</sup> Anderson v. Evans, 371 F.3d at 485.

<sup>65</sup> *Id.*

<sup>66</sup> See Metcalf v. Daley, 214 F.3d at 1140. See also Anderson v. Evans, 371 F.3d at 485.

<sup>67</sup> *Id.*

<sup>68</sup> Renker, *supra* note 17, at 15.

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

But neither the whale's demise nor the Tribe's jubilation brought "this prolonged dispute to an end,"<sup>70</sup> for the United States Court of Appeals for the Ninth Circuit reversed the district court in *Metcalf v. Daley*<sup>71</sup>, concluding that

NOAA violated NEPA because agencies must engage the NEPA process before any irreversible and irretrievable commitment of resources. Therefore, before NOAA can issue the Tribe a permit or waiver under the MMPA, which would be an irretrievable commitment of resources, NOAA must complete the NEPA process. Otherwise, NOAA may have granted permits for takings of marine mammals without first fully considering the effects of that federal action through NEPA.<sup>72</sup>

The *Metcalf* court accordingly ordered that a new EA must be drafted "under circumstances that ensure an objective evaluation free of the previous taint."<sup>73</sup> In compliance with the court's directive, NOAA then rescinded its agreement with the Makah and began the EA process anew.<sup>74</sup> Unfortunately their next effort would prove no more successful, but would be far more discouraging than its predecessor had.

## II. CANNONS OF UNITED STATES INDIAN TREATY INTERPRETATION UNITED STATES

The Federal government was granted its power to govern when by act of ratification in 1790 the Constitution was finally approved by each of the original thirteen colonies.<sup>75</sup> Because each of the thirteen colonies granted the Federal government only those powers explicitly stated in the Constitution and reserved unto themselves a great multitude of powers, the states derive their authority over Indian affairs from a different paradigm than whence originate the Federal government's powers over Indian tribes.

### A. Source of Federal Power Over Indian Tribes

The source of federal authority over Indian tribes derives from the United States Constitution, through the Treaty Clause and the Indian Commerce Clause.<sup>76</sup> Nearly two hundred years ago, in fact, the Supreme Court stated that the "Constitution . . . confers on congress the powers of war and peace; of making treaties, and of regulating commerce with *foreign nations*, and among the several states, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our

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<sup>70</sup> *Id.*

<sup>71</sup> *Metcalf v. Daley*, 214 F.3d at 43.

<sup>72</sup> *Anderson v. Evans*, 371 F.3d at 501 (citing *Metcalf*, 214 F.3d at 1143) (interior quotations omitted).

<sup>73</sup> *Metcalf v. Daley*, 214 F.3d at 1146.

<sup>74</sup> *Id.*

<sup>75</sup> The historian will of course recognize that the Constitutional Convention in Philadelphia, Pennsylvania decided that only nine states would be required to ratify the Constitution; yet in 1790, on May 29, Rhode Island, the last of the thirteen original colonies to do so, ratified for its part the United States Constitution, thus categorically imbuing that document by unanimous act of "The People" with what force it possesses and the Federal Government with the powers its founding document enumerates.

<sup>76</sup> U.S. Const. art. I, § 8, cl 3.

intercourse with Indians.”<sup>77</sup> Supreme Court decisions involving Indian affairs have therefore referenced *jus gentium*—the law of nations—to explain and justify the relationship between the Federal government and Indian tribes.<sup>78</sup> Consequently, the field of Indian law has its roots in international law.<sup>79</sup> And just as the Treaty Clause grants the President power to enter into binding agreements with extra-territorial nations subject to ratification by the Senate, the Treaty clause also grants the President power to enter into binding agreements with Indian tribes subject to Senate approval, and “has been a principal foundation for federal power over Indian affairs.”<sup>80</sup>

Consider then that Indian tribes once were vast, indomitable governmental forces exerting their dominion over miles and miles of inhospitable and rugged terrain even as throngs of young Americans and recent immigrants rushed westward to hack a life out of the wilderness the Indians regarded as their own. Consider this and it is easy to ascertain just how the Supreme Court could state that treaties with these Indian tribes were not grants of property or sovereignty *from* the United States to Indian tribes, but conversely, treaties with these Indian tribes were acts of cession, acts of *surrendering* those long-held property rights—the dominion and governance over millions of acres of tribal hunting, grazing and wintering grounds—*by* the Indians *to* the United States, subject to a reservation of rights not explicitly relinquished.<sup>81</sup>

The United States Supreme Court first attempted to formulate its views of Indian tribes and their legal and historical relation to the land in *Johnson v. McIntosh*.<sup>82</sup> In *Johnson* the Court held that the discovery of lands in the new world gave the discovering Europeans a sovereign title, good against all other Europeans and the “sole right of acquiring the soil from the natives.”<sup>83</sup> Thus, Indians only retained the right of occupancy which only the sovereign could extinguish, either by “purchase or by

<sup>77</sup> *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (first emphasis added, second emphasis in original).

<sup>78</sup> See *Cherokee Nation v. Georgia*, 30 U.S. 1, 53 (1831); *Johnson v. McIntosh*, 21 U.S. 543, 71-84 (1823) (regarding rights of ‘discovering nations’).

<sup>79</sup> See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 5.01 (2005 ed.).

<sup>80</sup> *Id.*

<sup>81</sup> See *United States v. Winans*, 198 U.S. 371, 381 (1905). See also FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 2.02 (2005 ed.).

<sup>82</sup> *Johnson v. McIntosh*, 21 U.S. at 543. But 13 years earlier in 1810 the Court hinted that Indians did not hold title to their lands sufficient to validate a transfer for those lands to non-natives in *Fletcher v. Peck*, 10 U.S. 87 (1810) (stating that the “reservation for the use of the Indians appears to be a temporary arrangement suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony.” *Id.* at 142). In 1795, members of the Georgia legislature had been bribed to convey 35 million acres of land to private companies at a price of 1.5 cents an acre. In 1796, the Georgia legislature rescinded the grant of land, but by then much of the property already had been conveyed to unsuspecting investors. In an opinion authored by Chief Justice Marshall the Court held that it was unconstitutional for Georgia to rescind its grant of land. The Court indicated that the legislative power is limited by both “the general principles of our political institutions,” 10 U.S. at 139, and “the words of the Constitution.” *Id.* Because title had been conveyed to innocent owners, the law rescinding the grant was deemed to unconstitutionally interfere with vested rights. Because the Indians lacked any proper claim to the land, their conveyance of the land was invalid.

<sup>83</sup> *Johnson v. McIntosh*, 21 U.S. at 573.

conquest.”<sup>84</sup> The “sovereign” in this case was not a king but the United States government. The result of *Johnson v. McIntosh*, then, was that the Federal government was to recognize a legal right of Indians in their lands, good against all third parties but existing at the mere sufferance of the federal government: this *right to occupancy* is referred to as “aboriginal title” or simply “Indian title.” Additionally, the proposition that the Federal government possesses plenary authority over Indian tribes by virtue of having discovered them is referred to as the Doctrine of Discovery.

Eight years later, the Supreme Court further defined the Federal relationship to Indian tribes in *Cherokee Nation v. Georgia*<sup>85</sup> when it held that Indian tribes are *domestic dependent nations*: Indians were acknowledged to possess an unquestionable right to the lands they occupy, “yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly . . . be denominated domestic dependent nations.”<sup>86</sup> Therefore, Indian tribes are not foreign states or states within the meaning of Article III of the Constitution. Instead, an Indian tribe is to be regarded as a dependent nation, with “a distinct political society separated from others, capable of managing its own affairs and governing itself.”<sup>87</sup> Indeed, Chief Justice Marshall’s characterization of Indian tribes as “domestic dependent nations” laid the groundwork for future protection of tribal sovereignty by Marshall and his immediate successors. But the characterization also created an opportunity for much later Courts to discover limits to tribal sovereignty inherent in the domestic dependent status of tribes.

Yet before later Courts would discover limits to Indian tribal sovereignty, the *Marshall* Court further circumscribed the nature of Indian tribal sovereignty: State governments could be excluded from exerting dominion over Indian affairs due to the actual words of the United States Constitution,<sup>88</sup> the Articles of Confederation, and in *Worcester v. Georgia*.<sup>89</sup> In *Worcester*, Chief Justice Marshall developed the idea that Indian tribes are nations whose independence had been limited in only two essentials—their right to convey land and their ability to deal with foreign powers. Reinforcing the tribal right of self-government and the exclusive federal right to govern relations between the tribe and outsiders, the Supreme Court ruled that Georgia laws which sought to influence on-reservation behavior were nullities because they conflicted with federal dominion over Indian affairs. Indeed, state laws seeking to influence on-reservation behavior are “repugnant”<sup>90</sup> to the Constitution—and this not due to the essential character or nature of Indian tribes, but due to the primacy and plenary authority of Congress to dictate by legislative fiat the sum of tribal affairs. The trilogy of Justice Marshall’s opinions thus stands for the propositions relevant to this article that (1) state law by virtue of its essential character does not apply within treaty-reserved

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<sup>84</sup> *Id.* at 587.

<sup>85</sup> *Cherokee Nation v. Georgia*, 30 U.S. at 1.

<sup>86</sup> *Id.* at 17.

<sup>87</sup> *Id.* at 30.

<sup>88</sup> U.S. Const. art. I, § 8, CL. 3.

<sup>89</sup> *Worcester v. State of Georgia*, 31 U.S. at 515.

<sup>90</sup> *Id.* at 540.

Indian land; (2) tribes are distinct political entities; (3) a trust doctrine exists whereby the Federal government is charged with protecting tribal sovereignty from state incursion; and (4) it is the Federal government's power, by virtue of Congress, that serves to block the application of state laws, not the tribe's status as a distinct political subdivision.

Yet attendant to the power to enter into a treaty is the power to abrogate that selfsame treaty, and the Supreme Court has applied this axiom to treaties with Indian tribes.<sup>91</sup> Indeed, because Indian tribes are "domestic dependent nations,"<sup>92</sup> their "incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised."<sup>93</sup> Because the tribes have surrendered rights to the Federal government, Congress' constitutionally-granted power over Indian affairs is "plenary and exclusive."<sup>94</sup>

By virtue of categorical ratification, then, "the People" have imbued the Constitution with legal effect, thus granting the Federal government authority to enter into binding treaties with foreign nations. Expressly, the Constitution elevates those treaties to the perch of the "supreme Law of the land." And by virtue of the Marshall Court's decisions declaring them so, and due to their inability to mount any realistic sense of militaristic resistance, Indian tribes in effect are "domestic dependent nations," owing their existence to and depending upon the largesse and protection of the Federal government. Consequently, the Federal government has the power to expand or contract or abrogate any treaty stipulation Congress so desires. This is so because the Constitution and Supreme Court precedents say it is so, and because Indian tribes have no armies.

### ***B. Source of State Power Over Indian Tribes***

Whereas the Federal government's power to regulate Indian tribes and their treaty rights extends from the Federal government's constitutionally-enumerated authority to regulate "Commerce with . . . the Indian tribes"<sup>95</sup> and from Congress' plenary power over treaties,<sup>96</sup> a state by "virtue of its *police power* has the initial authority to regulate the taking of fish and game."<sup>97</sup> Indeed, the Supreme Court has stated that it "see[s] no reason why the rights of the Indians may not also be regulated *by an appropriate exercise of the police power of the State.*"<sup>98</sup> As a direct product of a

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<sup>91</sup> See *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); see also *United States v. Dion*, 476 U.S. 734 (1986).

<sup>92</sup> *Cherokee Nation v. Georgia*, 30 U.S. at 1.

<sup>93</sup> *U.S. v. Wheeler*, 435 U.S. 313, 328 (1978).

<sup>94</sup> *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470-71 (1979).

<sup>95</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>96</sup> See *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 172 n.7 (1973) (stating "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulation commerce with Indian tribes and for treaty making." (citing U.S. Const. art I, § 8, cl. 3; *id.* art. II, § 2, cl. 2 (additional citations omitted.))

<sup>97</sup> *United States v. State of Wash.*, 520 F.2d at 684. See also *Geer v. Connecticut*, 161 U.S. 519, 540 (1896), "By virtue of its police power, the state has authority to regulate the taking of fish and game."

<sup>98</sup> *Puyallup Tribe v. Dep't of Game*, 391 U.S. 392, 398 (1968).



state's police power, a state's regulatory authority thus does not extend—unless congressionally-mandated—to federal lands, such as to federal lands held *in trust* for Indian tribes,<sup>99</sup> or to United States waters. Since the Federal government possesses plenary power to enter into Indian treaties and to abrogate rights expressly retained by treaties, and since the state derives its powers over Indian tribes either through non-constitutionally enumerated power to police or through an explicit act of Congress,<sup>100</sup> it is easy to understand the appropriateness of two different analytical frameworks through which to assess a regulation's effect on rights explicitly protected by United States-Indian treaties. These two frameworks are referred to as the State conservation necessity test, and the federal weight and consideration test.

### ***C. Canons of Treaty Interpretation***

Interpretation of United States-Indian treaties begins and ends with the Supreme Court's maxim: "the intention to abrogate or modify a treaty is not to be lightly imputed to Congress."<sup>101</sup> In consideration of the cultural differences between Indian tribes, the United States government and its representatives, then, and out of deference to the federal role as trustee of lands and resources for Indian tribes, the Supreme Court has fashioned rules of treaty construction sympathetic to Indians.<sup>102</sup> First, United States-Indian treaty provisions are to be liberally construed in favor of the Indians in order to accomplish the protective purpose under which the Federal government entered into the treaties with the Indian tribes.<sup>103</sup> And although United States-Indian treaty negotiations were between the Federal government and the Indian tribe, the treaties nonetheless "reserved rights . . . to every individual Indian, as though named therein . . . and the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees."<sup>104</sup> Finally, treaties were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."<sup>105</sup> The extent of that grant will be construed as understood by the Indians at that time, taking

<sup>99</sup> See *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976) (holding that a state does not have regulatory authority over Indian activity on tribal land absent specific Congressional authority).

<sup>100</sup> An example of an explicit act of Congress granting states power over Indians within Indian country is Public Law 83-280, codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-1326, which granted five states jurisdiction over criminal violations on tribal land.

<sup>101</sup> *Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138 (1934). See also *Squire v. Capoeman*, 351 U.S. 1 (1956).

<sup>102</sup> In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899) (citing *Worcester v. State of Georgia*, 31 U.S. at 515).

<sup>103</sup> See *Carpenter v. Shaw*, 280 U.S. 363 (1930).

<sup>104</sup> *United States v. Winans*, 198 U.S. 371, 381 (1905).

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

into consideration the Indians' lack of literacy and lack of familiarity with the United States legal system, and the limited understanding of the jargon in which negotiations were conducted.<sup>106</sup> Ambiguities extant in United States-Indian treaties, then, are to be construed liberally in favor of the Indian tribes and in all cases, "the intention to abrogate or modify a treaty is not to be lightly imputed to Congress."<sup>107</sup> But what exactly does this mean—when, if at all, can a state or the Federal government entirely abrogate a United States-Indian treaty, or merely enact a statute that infringes upon a treaty-reserved right such as the right to hunt and fish, or the right to *whale*?

#### ***D. The State Conservation Necessity Test***

The Supremacy Clause of the United States Constitution "ensures that [Federal] laws regulating Indian affairs and treaties with tribes supersede conflicting state laws or state constitutional provisions."<sup>108</sup> Yet the Supreme Court has also held that by virtue of its police power, the state and its political subdivisions can regulate the off-reservation exercise of treaty-reserved hunting and fishing rights; but a state can only do so if it first demonstrates that the "specific regulation is reasonable and necessary for conservation."<sup>109</sup> Additionally, the regulating state must also show that the conservation objective cannot be attained by restricting only citizens other than treaty Indians and the regulation must not discriminate against treaty Indians and must meet appropriate due process standards.<sup>110</sup> This is the state conservation necessity test: states do have the authority to qualify treaty-guaranteed rights, provided first that the regulation is "necessary" for the "conservation" of the affected species and only if the goals of the regulation cannot be attained by restricting only citizens other than treaty Indians, and in no way may the regulation discriminate against treaty Indians.<sup>111</sup>

As early as 1942, the Supreme Court suggested the possibility of a state regulating off-reservation Indian fishing and hunting activity, despite United States-Indian treaties explicitly preserving these same rights. In *Tulee v. Washington*,<sup>112</sup> a Yakima Indian was arrested for catching salmon off reservation without a license, in violation of Washington State law.<sup>113</sup> The fishing right the Yakima had been exercising was explicitly reserved in the 1854 Treaty of Medicine Creek:<sup>114</sup> the "right of taking fish,

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<sup>106</sup> *Id.* at 380.

<sup>107</sup> *Pigeon River Imp., Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. at 138; see also *Squire v. Capoeman*, 351 U.S. at 1).

<sup>108</sup> See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 5.01 (2005 ed.).

<sup>109</sup> *United States v. State of Wash.* 384 F. Supp. at 410.

<sup>110</sup> See *Id.* at 33 *et seq.*

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

<sup>112</sup> *Tulee v. State of Wash.*, 315 U.S. 681 (1942).

<sup>113</sup> Wash. Admin. Code 220-32-055.

<sup>114</sup> Treaty with the Nisqualli, Puyallap, Etc. 185410 Stat. 1132. The Treaty of Medicine Creek, was ratified March 3<sup>rd</sup>, 1855, was signed by the Nisqually, the Puyallup, the Squaxin Island tribes and six other regional Indian tribes, and Governor Isaac Stevens on December 26<sup>th</sup>, 1864. Through the Treaty of Medicine Creek, the tribes "cede[d] most of their lands in exchange for \$32,500, designated reservations, and the permanent right of access to traditional hunting and fishing grounds." See Walt Crowley, *Native American Tribal Leaders and Territorial Gov. Stevens Sign Treaty at Medicine Creek*, The Free On-line Encyclopedia of Washington History *available at*

at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory.”<sup>115</sup> The Supreme Court held that the Treaty of Medicine Creek did not permit the state from charging the Yakima a license “fee of the kind in question here.”<sup>116</sup> The Court found that the state’s

regulatory purpose could be accomplished otherwise, [and] that the imposition of license fees is not indispensable to the effectiveness of a state conservation program. Even though this method may be both convenient and . . . fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the “usual and accustomed places” cannot be reconciled with a fair construction of the treaty. We therefore hold the state statute invalid as applied in this case.<sup>117</sup>

The Court’s choice of language, “[t]he license fees prescribed are regulatory as well as revenue producing . . . [b]ut it is clear that their regulatory purpose could be accomplished otherwise,” suggests two things: (1) it may be possible for a state to regulate Indian treaty-reserved fishing rights, but (2) only if no other regulatory measure (e.g. one that does not infringe upon a treaty-reserved right) can accomplish the “regulatory purpose” at issue. In response to this ruling, the State of Washington ceased charging the Yakima Indians a license fee. But on grounds that regulating off-reservation exercise of treaty-reserved fishing rights was “indispensable”<sup>118</sup> to the state’s “regulatory purpose,”<sup>119</sup> the State of Washington continued to regulate the act.<sup>120</sup> Indian resistance to the regulations increased until the State of Washington sued the Puyallup and Nisqually Tribes and several of the Tribes’ members to enjoin further fishing inconsistent with state law, even when the fishing was ostensibly reserved by Treaty.<sup>121</sup>

The resulting lawsuit, *Puyallup Tribe v. Department of Game* (“Puyallup I”),<sup>122</sup> concerned a Washington State regulation effectively banning off-reservation net fishing of steelhead trout and salmon by everyone, Indian and non-Indian alike. As stated, the United States-Puyallup Treaty guaranteed the Puyallup the right to fish at their “usual and accustomed grounds and stations . . . in common with all citizens of the Territory.” The Supreme Court went on to hold for the first time in explicit terms that a state can lawfully regulate treaty rights of Indian tribes, finding that the tribes’ use of the nets at issue to capture salmon and steelhead trout was illegal under the Washington law.

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[http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file\\_id=5254](http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=5254) (last visited Oct. 31, 2012).

<sup>115</sup> Treaty with the Nisqualli, Puyallup, etc., 184., 10 Stat. 1132, art. 3.

<sup>116</sup> *Tulee v. State of Wash.*, 315 U.S. at 684.

<sup>117</sup> *Id.* at 685.

<sup>118</sup> *Puyallup Tribe v. Dep’t of Game of Wash.*, 391 U.S. at 392.

<sup>119</sup> *Tulee v. State of Wash.*, 315 U.S. at 684.

<sup>120</sup> See *Puyallup Tribe v. Dep’t of Game*, 391 U.S. at 395.

<sup>121</sup> The Puyallup and Nisqually tribes are both signatories to the Treaty of Medicine Creek. The Treaty of Medicine Creek, like the Treaty of Neah Bay, was negotiated by Governor Isaac Stevens.

<sup>122</sup> *Puyallup Tribe v. Dep’t of Game*, 391 U.S. at 392.

The treaty right is in terms of the right to fish “at all usual and accustomed places.” We assume that fishing by nets was customary at the time of the Treaty . . . [b]ut the *manner* in which the fishing may be done and its purpose . . . are not mentioned in the Treaty. We would have quite a different case if the Treaty had reserved the right to fish at the “usual and accustomed places” in the “*usual and accustomed*” manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather it is one “in common with all citizens of the Territory.” Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State . . . [T]he manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.<sup>123</sup>

In 1972, Federal Indian Law scholar Professor Ralph W. Johnson<sup>124</sup> accordingly predicted a “continuing series of clashes between the Indians and the state, each seeking to carve out the broadest possible claim in this legal thicket”<sup>125</sup> on grounds that the newly-coined conservation necessity test was “notoriously vague.”<sup>126</sup> As it turns out, his prediction was not entirely inaccurate.

On remand from the United States Supreme Court, the Washington Supreme Court found that *Puyallup I*’s ban against net fishing was necessary for species conservation and thus held lawful the State’s ban on *all* Indian net fishing.<sup>127</sup> After hook-and-line sport fishing, there were only sufficient numbers of steelhead left to propagate the species. The tribe disputed this assertion and their claim became *Puyallup II*.<sup>128</sup> The United States Supreme Court then went on with relative ease to conclude that the ostensible state-granted priority for hook-and-line sport fishing, though facially neutral, discriminated against the Indians because nearly all Indian fishing was carried out by net, in the now prohibited fashion. “There is discrimination here because all Indian net fishing is barred and only hook-and-line fishing, entirely preempted by non-Indians, is

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<sup>123</sup> *Id.* at 398 (quoting Treaty of Medicine Creek, art. 3, 10 Stat. at 1133). Yet because the question of the whether the prohibition on the use of the nets at issue were a “reasonable and necessary” conservation measure had not been addressed by the Washington State courts, the case was remanded and the lower State courts were told that “any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase ‘in common with.’” *Id.* at 403.

<sup>124</sup> Professor Johnson was also the founder of the Native American Law Center at the University of Washington Law School. See [http://www.celp.org/water/celpjohnson/Rachael\\_Paschal\\_Osborn.html](http://www.celp.org/water/celpjohnson/Rachael_Paschal_Osborn.html) for a brief biography of the good Professor Johnson. (last visited Oct. 31, 2012).

<sup>125</sup> Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 207-08 (1972).

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

<sup>127</sup> See *Dep’t of Game of State of Wash. v. Puyallup Tribe, Inc.*, 80 Wn.2d 561, 497 P.2d 171 (1972).

<sup>128</sup> *Dep’t of Game of State of Wash. v. Puyallup Tribe*, 414 U.S. 44 (1973).

allowed.”<sup>129</sup> Nevertheless, the Court reasoned, “the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.”<sup>130</sup> The Court thus propagated the principle that the non-discrimination aspect of the state conservation necessity test guarantees treaty fishermen not just the opportunity to fish on the same terms as other citizens, but a share of the harvestable fish.

Whereas *Puyallup I* and *II* dealt with Indians’ rights to treaty-reserved fishing off-reservation, in 1977 the United States Supreme Court<sup>131</sup> confronted the issue of a state’s ability to lawfully regulate Indians’ on-reservation exercise of their treaty-reserved fishing rights. The United States Supreme Court held that indeed a state, subject to the state conservation necessity test, could also regulate on-reservation exercise, by Indians, of treaty-protected fishing rights.

Though it would be decidedly unwise, if *Puyallup* treaty fishermen were allowed untrammelled on-reservation fishing rights, they could interdict completely the migrating fish run and “pursue the last living steelhead until it enters their nets.” In this manner the treaty fishermen could totally frustrate both the jurisdiction of the Washington courts and the rights of non-Indian citizens of Washington recognized in the Treaty of Medicine Creek. In practical effect, therefore, the petitioner is reasserting the right to exclusive control of the steelhead run that was unequivocally rejected in both *Puyallup I* and *Puyallup II*. At this state of this protracted litigation, we are unwilling to re-examine those unanimous decisions or to render their holdings virtually meaningless.<sup>132</sup>

In theory, then, a state is able to lawfully regulate the exercise—on and off reservation—of Indian treaty rights. Yet in practice, the United States Supreme Court requires an exacting standard. In order to lawfully regulate the exercise of Indian treaty rights, in each instance the state must demonstrate that (1) the regulation is necessary for the conservation of the concerned species; (2) no other regulation is sufficient to effect the intended species conservation than the regulation at issue; and (3) any regulation meeting this necessity test must not have the practical effect, even though the regulation may be facially neutral, of denying Indian fishermen the ability to fish. Indeed, applying the canons of treaty interpretation to the in-common-with language of United States-Indian treaties demands that the Indians possess a right to the *harvest* of no less than one half of the harvestable total take of the species at issue. But what about federal regulation of Indian treaty rights? Are the standards as exacting? In light of Congress’ plenary power over Indian tribes, is the same conservation necessity test appropriate?

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<sup>129</sup> *Id.* at 49.

<sup>130</sup> *Id.*

<sup>131</sup> *Puyallup Tribe, Inc., v. Dep’t of Game of State of Wash.*, 433 U.S. 165 (1977).

<sup>132</sup> *Dep’t of Game v. Puyallup Tribe*, 414 U.S. 44.



### ***E. The Federal Weight and Consideration Test***

The United States Supreme Court stated in 1903 that “Congress may abrogate treaties and tribal sovereignty when circumstances arise which . . . not only justify the government in disregarding the stipulations of [a] treaty, but may demand, in the interests of the country and of the Indians themselves, that it should do so.”<sup>133</sup> In considering the effect of congressional regulation on an Indian treaty right, the general presumption militates against treaty abrogation. The United States Supreme Court offered guidance for this general proposition in *Menominee Tribe of Indians v. United States*.<sup>134</sup> An 1854 treaty set aside territory for the Menominee and reserved hunting and fishing rights on the reservation lands.<sup>135</sup> One hundred years later, Congress passed the Menominee Termination Act<sup>136</sup> to take effect in 1964 whereby

all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction.<sup>137</sup>

This effectively removed the United States-Menominee trust relationship and ceased to recognize, at least legally, the Menominee as a bona fide Indian tribe. Yet the Termination Act did not mention the Menominee's treaty-reserved right of hunting and fishing. The State of Wisconsin, seeking to charge the Menominee state hunting and fishing license fees, argued that the Termination Act was a per se extinguishment of their fishing and hunting rights. A majority of the Warren Court<sup>138</sup> disagreed and “decline[d] to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians, [finding] it difficult to believe that Congress without *explicit statement* would subject the United States to a claim of compensation by destroying property rights conferred by treaty.”<sup>139</sup> Thus, treaty-reserved hunting and fishing rights are not extinguished absent congressional intent to do so. But despite *Menominee's* requirement of clear intent to abrogate a treaty-reserved right, in *United*

<sup>133</sup> Lone Wolf v. Hitchcock, 187 U.S. at 566.

<sup>134</sup> Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

<sup>135</sup> Treaty of Wolf River, May 12, 1854, U.S.-Menominee, 10 Stats. p. 1064, ART. 2. (Stating lands “to be held as Indian lands are held.”)

<sup>136</sup> Termination of Indian tribes was the general policy of the United States from the mid-1940s to the mid-1960s. The idea was that Indians would be better served if they assimilated into mainstream American society. Intending to grant Indians all the rights and privileges of proper American citizenship and thus removing all the rights and privileges granted to Indians, Congress purposed to terminate the special trustee relationship between Indian tribes and the Federal Government. As a result of this termination, the Menominee were to become subject to the state and federal taxes and laws from which their special trust relationship had theretofore exempted them. See U.S. House of Representatives Resolution 108, 83rd Congress, 1953.

<sup>137</sup> Menominee Termination Act of 1954, ch. 303, 68 Stat. 250 (repealed 1973) (formerly codified at 25 U.S.C. § 899 (1970)).

<sup>138</sup> Justices Black and Stewart dissenting (Justice Marshall not involved).

<sup>139</sup> Menominee, 391 U.S. at 412-13 (emphasis added).

*States v. Dion*<sup>140</sup> the United States Supreme Court rejected a per se rule requiring explicit congressional language to do so, in favor of a federal weight and consideration test.

Generally, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress.<sup>141</sup> Determining just when these treaty rights become clearly relinquished was the Court's task in *Dion*. When the state of South Dakota convicted Mr. Dion, a Yankton Sioux, for killing four bald eagles on reservation land in violation of the Eagle Protection Act<sup>142</sup> (EPA) and the ESA, Mr. Dion asserted as his defense his treaty-reserved right of taking eagles for non-commercial purposes. The court found this argument of little avail and held that the EPA and the ESA reflected an unmistakable and explicit legislative policy choice that Indian hunting of the bald or golden eagle, except pursuant to a permit, was inconsistent with the need to preserve those species and that both laws abrogated the treaty right to unrestricted hunting.

[W]here the evidence of congressional intent to abrogate is sufficiently compelling, the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute. What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.<sup>143</sup>

In establishing the federal weight and consideration test, the Court noted that in implementing the EPA,

Congress expressly chose to set in place a regime in which the Secretary of the Interior had control over Indian hunting, rather than one in which Indian on-reservation hunting was unrestricted. Congress thus considered the special cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statute, and provided a

<sup>140</sup> *United States v. Dion*, 476 U.S. 734 (1986).

<sup>141</sup> FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 18 (2005 ed.). See generally *Menominee Tribe v. United States*, 391 U.S. 404. But this is not to say that Indian tribes may not license non-Indians to hunt on their tribal lands.

<sup>142</sup> The Eagle Protection Act expressly made it a federal offense to hunt bald or golden eagles anywhere within the United States unless provided a permit by the Secretary of the Interior. 16 U.S.C. § 668.

<sup>143</sup> *United States v. Dion*, 476 U.S. at 739-40 (1986) (interior quotations omitted). It is interesting to note that such a simple set of facts with such a simple, forthright holding from the Court has codified entirely that realm of Federal Indian Law which deals with the abrogation of Indian treaty rights by Federal statute. Indeed, given the simplicity of the High Court's directive, it is difficult to ascertain just how the United States Court of Appeals for the Ninth Circuit could have failed to see the correctness of applying the Federal weight and consideration test vis-à-vis the Makah's treaty-reserved whaling right, but instead applied the State Conservation and Necessity Test. One can very easily conclude that the Ninth Circuit's conflation of the two tests was not an accidental error but a willful and deliberate act of disregarding Supreme Court precedent in favor of its own line of reasoning. Why the court would do such a thing is of course open to speculation; but such speculation is beyond the scope of this article.

specific, narrow exception that delineated the extent to which Indians would be permitted to hunt the bald and golden eagle.<sup>144</sup>

After *Dion*, in order for a congressional statute to abrogate a treaty-reserved right, Congress must only consider the regulated action weighed against the action reserved in the treaty, and then choose to infringe upon the treaty-reserved right.

Further cementing the correctness of the federal weight and consideration test, the United States Supreme Court has applied the *Dion* analysis to two subsequent cases, *South Dakota v. Bourland*,<sup>145</sup> and *Minnesota v. Mille Lacs Band of Chippewa Indians*.<sup>146</sup> *Bourland* held that Congress abrogated the Cheyenne River Sioux Tribe's treaty-reserved right to "absolute and undisturbed use and occupation"<sup>147</sup> of former tribal trust lands when Congress acquired the trust lands for a dam and flood control project. Congress explicitly reserved tribal rights to hunt and fish *around* the reservoir "subject to the regulations governing the corresponding use by other citizens of the US"<sup>148</sup> and this limited reservation of rights could not be supported, except by presuming an intent to abrogate the Tribe's treaty-reserved right of hunting and fishing on and off reservation lands. Holding conversely that treaty-reserved<sup>149</sup> rights to hunt and fish were not abrogated by a subsequent act,<sup>150</sup> the Court in *Mille Lacs* explicitly held there was no "clear evidence"<sup>151</sup> that Congress intended to abrogate the treaty-reserved "privilege of hunting, fishing and gathering."<sup>152</sup> In both cases, the federal weight and consideration test, promulgated in *Dion*, was upheld and used to determine each case's outcome.

*Bourland* and *Mille Lacs* were each decided after *Puyallup I* and *II* yet neither *Bourland* nor *Mille Lacs* follows—or even mentions—the state conservation necessity test. In neither *Dion*, *Bourland*, nor *Mille Lacs* did the Court say it was overruling any decision which developed or supported the state conservation necessity test. Nor does *Dion* cite any Supreme Court decision—nor any Ninth Circuit decision, in any relevantly meaningful capacity<sup>153</sup>—that either supports or develops the state conservation necessity test. This illustrates further the Court's clear intention to promulgate two distinct tests to determine the constitutionality of federal regulations which interfere with

<sup>144</sup> United States v. *Dion*, 476 U.S. at 43-44.

<sup>145</sup> *S. Dakota v. Bourland*, 508 U.S. 679, 693-99 (1993).

<sup>146</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

<sup>147</sup> *S. Dakota v. Bourland*, 508 U.S. at 683.

<sup>148</sup> *Id.* at 690 (citing Cheyenne River Act of Sep. 3, 1954, 68 Stat. 1191, 1193 (1954)).

<sup>149</sup> Under the Treaty of St. Peters of 1837, 7 Stat. 536, the Ojibwa (Chippewa) Nations ceded a vast tract of lands stretching from what now is north-central Wisconsin to east-central Minnesota. Article 5 of the treaty states, in relevant portion, "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed [sic] to the Indians, during the pleasure of the President of the United States."

<sup>150</sup> The Enabling Act, whereby Minnesota was admitted to the Union.

<sup>151</sup> *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. at 203.

<sup>152</sup> Treaty of St. Peters, U.S.-Chippewa, art. 5., July 29, 1837

<sup>153</sup> *United States v. Dion*, 476 U.S. at 739, does cite *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (U.S. 1979), only to provide the following: "Absent explicitly statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights . . . ."

treaty-reserved rights on the one hand, and state regulations which interfere with treaty-reserved rights on the other: the weight and consideration test applicable to the former, the conservation necessity test applicable to the latter.<sup>154</sup>

### III. ANDERSON V. EVANS AND WHY IT VIOLATES FEDERAL INDIAN LAW

*Anderson* arose in the wake of the NMFS and the NOAA response to *Metcalf*. Complying with that court's directive, in January of 2001 NMFS and NOAA published another Draft Environmental Assessment. The whale quota in this Draft, and in the Makah Management Plan which accompanied it, targeted migrating whales. This meant that whaling would be allowed only in the "open waters of the Pacific Ocean which are outside the Tatoosh-Bonilla Line,"<sup>155</sup> thus targeting migratory whales. But the Makah revised their management plan; the amended plan, in contrast to the Tribe's earlier management plan, did "not contain any general geographic limitations on the whale hunt."<sup>156</sup> This amendment was not incorporated into the Draft Environmental Assessment and there had thus "been no opportunity for public comment on the important"<sup>157</sup> change. Additionally, none of the scientific studies relied upon in the Draft EA evaluated the impact of the revised management plan.<sup>158</sup> Nevertheless, the NOAA and the NMFS issued a FONSI, thereby obviating the need to proceed, under NEPA, with an EIS.<sup>159</sup> The next "step in the administrative saga took place when NOAA and the NMFS issued a Federal Register notice on December 13, 2001 announcing a quota"<sup>160</sup> of five gray whales in 2001 and 2002, and in approval of the Makah management plan.<sup>161</sup>

It should come as no surprise, then, that citizens and animal welfare groups filed another complaint in January 2002, alleging violations of both the National Environmental Policy Act and the Marine Mammal Protection Act. Once again, the Makah Tribe intervened as a defendant, and once again, on the district court level, summary judgment was granted to the defendants, whereupon the plaintiffs, once again, appealed.<sup>162</sup> The saga took its most relevant and unhappy turn when the Ninth Circuit considered the plaintiffs' appeal from the district court's summary judgment, and reversed the lower court. The court held in *Anderson v. Evans* that the government's failure to prepare an EIS violated NEPA and the MMPA's take moratorium and permitting process was binding upon the Tribe's exercise of its treaty-reserved right to hunt whales. On November 26, 2003<sup>163</sup> and June 7, 2004,<sup>164</sup> the Ninth Circuit Court of

<sup>154</sup> See Zachary Tomlinson, *Abrogation or Regulation? How Anderson v. Evans Discards the Makah's Treaty Whaling Right in the Name of Conservation Necessity*, 78 WASH. L. REV. 1101 (2003).

<sup>155</sup> *Anderson v. Evans*, 371 F.3d at 485.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 486.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 485-86.

<sup>160</sup> *Id.* at 486.

<sup>161</sup> See 66 Federal. Reg. 64, 378 (Dec. 13, 2001).

<sup>162</sup> *Anderson v. Evans*, 371 F.3d at 486.

<sup>163</sup> *Anderson v. Evans*, 350 F. 3d 815 (9th Cir. 2003).

<sup>164</sup> *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004).

Appeals denied *en banc* rehearings and issued amended opinions which clarified the (faulty) legal reasoning of its decision, but did not alter the conclusion.

Having held that the Marine Mammal Protection Act proscribes the Makah Tribe's treaty-reserved whaling rights, the *Anderson* Court stated that they were not overruling the Treaty of Neah Bay's explicitly-reserved right to whale; this however is in essence the practical impact of the decision. In reaching its conclusion, the Court used the state conservation necessity test which the United States Supreme Court in *Puyallup I, II* and *US v. Washington* used to assess the constitutionality of state laws which infringe upon Indian treaty rights, while the MMPA is a federal law. Regardless of the United States Supreme Court's clear intention to promulgate two distinct tests to assess a federal or a state statute's constitutionality when the statute infringes upon a treaty-reserved right, it is this latter test, this state conservation necessity test, which the Ninth Circuit followed in applying the MMPA in *Anderson v. Evans*.

The satisfaction of the state conservation necessity test was instrumental in the Ninth Circuit's ruling against a Tulalip Indian who shot and killed a bald eagle on the Tulalip reservation in *United States v. Fryberg*.<sup>165</sup> In *Fryberg*, the Ninth Circuit faced in 1980 the same issue the Supreme Court would address in 1986 in *Dion*: whether the Eagle Protection Act modified or abrogated Indian treaty-reserved rights. In deciding the matter, the Ninth Circuit took its cue from the *Puyallup* cases, applying the state conservation necessity test, this time to a *federal statute*, which the United States Supreme Court in *Puyallup I* and *Puyallup II* etched into judicial granite. Yet each *Puyallup* case involved state conservation laws, not federal statutes. Further illustrative of the fact that the United States Supreme Court in *Dion* was developing a distinct test to be used for determining the relevance of federal statutes to treaty-reserved rights, is the incontrovertible fact that not once—not in the text, not in a footnote—in its *Dion* opinion did the United States Supreme Court six years later mention either *Fryberg* or any of the *Puyallup* cases. Indeed, there was no need to mention either because neither was relevant. Instead, there was to be a distinction between manner of determining the relevance of a state's conservation statute to treaty-reserved tribal rights and determining the relevance of a federal statute to treaty-reserved tribal rights because the provenance of state authority over Indian tribes differs from the provenance of federal authority over Indian tribes.

The Ninth Circuit was careful to note in *Anderson*, however, that they were not deciding whether or not the MMPA actually abrogated the Makah treaty-reserved right to whale, holding only that satisfaction of the state conservation necessity test bound the Makah to MMPA regulations.<sup>166</sup> But hearkening to the distinction between regulation and abrogation as a way to avoid the larger abrogation analysis is intellectual sophistry which skirts the issue of whether Congress *intended* a federal statute to even apply to—and in this way to limit—an Indian treaty-reserved right. Applying the state conservation necessity test to determine the effects of a state statute violates a sacrosanct tenant in

<sup>165</sup> *United States v. Horwitz*, 622 F.2d 1010 (9th Cir. 1980).

<sup>166</sup> See *Anderson v. Evans*, 371 F.3d at 480 (concluding "that the MMPA applies to the Tribe's proposed whale hunt.").



the field of Federal Indian Law and a Supreme Court admonition: congressional intent to modify or abrogate Indian treaty-rights “is not to be lightly imputed.”<sup>167</sup> Having used the state conservation and necessity test to bind the Makah to the MMPA, the Ninth Circuit has subjected the Makah’s treaty-reserved right to whale to the academics and the “expert administrators’ whose power-drives” may very well “reflect the rise and fall in our democratic faith.”<sup>168</sup>

#### IV. THE CURRENT STATE OF THE MAKAH’S EFFORTS

How, then, have the Makah responded? In Ms. Emily Brand’s words:

After two rejected *en banc* rehearing requests, the Tribe had to decide whether to appeal *Anderson* to the United States Supreme Court or follow the Ninth Circuit’s direction. The Makah chose to forgo appeal and follow *Anderson*. The possibility of the Supreme Court affirming the decision and creating groundbreaking precedent against treaty rights for all tribes was too big of a risk.<sup>169</sup>

And so in September of 2003, having worked closely with federal agencies “on marine mammal issues for over fifteen years, the Makah Tribe formally instituted a Marine Mammal Management Program” of its own.<sup>170</sup> The Tribe intended to monitor marine mammal populations, particularly the Eastern North Pacific stock of gray whales, within its usual and accustomed whaling areas<sup>171</sup> and to develop regulations “regarding marine mammals that might be stranded in Makah territory or be caught as incidental bycatch in the Tribe’s fisheries.”<sup>172</sup> Paramount among the program’s motives was to “reduce incidental mortality of marine mammals . . . and look at ways to reduce harm to gear.”<sup>173</sup> The program scheduled and oversaw “marksmanship training”<sup>174</sup> for hopeful whaling crews and for the next three years would participate in survey operations, charged with identifying gray whales by visual observations and aerial photographs.<sup>175</sup> In 2004, the Makah Program began to participate in the IWC Scientific Committee meetings—sending its marine biologist to participate in the meetings as a United States delegate—and this collaboration “continued in 2005 and 2006.”<sup>176</sup> In 2004, the Makah marine biologist was invited to join a “research project that documented and monitored contaminants in marine mammals collected” in the Makah’s usual and accustomed whaling grounds.<sup>177</sup> Having become of its own accord entirely satisfied that resuming its

<sup>167</sup> See *Menominee Tribe of Indians v. United States*, 391 U.S. at 412.

<sup>168</sup> Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

<sup>169</sup> Emily Brand, *The Struggle to Exercise a Treaty Right: An Analysis of the Makah Tribe’s Path to Whale*, 32 ENVIRONS ENVTL. L. & POL’Y J. 287 (2009).

<sup>170</sup> Renker, *supra* note 17, at 17.

<sup>171</sup> *Id.*

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

<sup>173</sup> *Id.* (interior citations omitted).

<sup>174</sup> *Id.* at 18.

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

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

<sup>177</sup> *Id.*

treaty-reserved whaling practice yet again would pose absolutely no deleterious effects on the global California Gray Whale population, on February 14, 2005, the Makah sent NOAA Fisheries a request for a limited waiver of the MMPA take moratorium, including the issuance of regulations and any necessary permits. The application submitted explicitly explained the Makah's request, the applicable law, the international California Gray Whale populations, and the impact Makah whaling may have on the California Gray Whale population.<sup>178</sup> In response, NOAA published a notice of availability of the waiver request on March 3, 2005<sup>179</sup> and the process began anew for the third time. On August 25, 2005, NOAA Fisheries published a Notice of Intent to conduct public scoping meetings and to prepare the EIS required under NEPA, the MMPA and *Anderson*, related to the Makah Tribe's request to resume its treaty-reserved practice of whaling.<sup>180</sup> Initially, NOAA proposed that its updated draft EIS would be ready for public comment in December of 2006 and that the final draft EIS would be complete "in August or September"<sup>181</sup> of 2007; the comment period would then begin and a final document, *and a final decision*, would "follow eight to ten months later, in the summer of 2008."<sup>182</sup> But not until nearly three years later, on May 9, 2008, did NOAA Fisheries announce the release of a draft EIS, and the comment period began.<sup>183</sup> And even now, more than four years after the comment period began, NOAA has still failed to make a final determination.

Of particular importance to NOAA's consideration of the Tribe's request is information on the genetic structure of the Eastern Northern Pacific Stock of Gray Whales. Three "Technical Memorandums"<sup>184</sup> currently under consideration implicitly argue that the 2008 Draft EIS is insufficient for failing to address the *possibility* that the

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<sup>178</sup> Makah Tribal Council, Application for a Waiver of the MMPA Take Moratorium to Exercise Gray Whale Hunting rights Secured in the Treaty of Neah Bay, submitted to NOAA (Feb. 11, 2005) *available at* <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/upload/application.pdf> (last visited Oct. 31, 2012).

<sup>179</sup> NOAA Marine Fisheries Service, Makah Request for MMPA Waiver, <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/Makah-Hunt.cfm> (last visited Oct. 31, 2012).

<sup>180</sup> Request Notice of Intent to Conduct Public Scoping Meetings and to Prepare an Environmental Impact Statement Related to the Makah Tribe's Continuation of Treaty Right Hunting of Gray Whales, 70 Fed. Reg. 49911 (Aug. 25, 2005).

<sup>181</sup> Renker, *supra* note 17, at 20.

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

<sup>183</sup> The 909 page document is available at <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/upload/Makah-DEIS-All.pdf> (last visited Oct. 31, 2012). For further reading see NOAA National Marine Fisheries Service, Northwest Regional Office, website detailing the Makah quest and many relevant filings at <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Gray-Whales/Makah-Whale-Hunt.cfm> (last visited Oct. 31, 2012).

<sup>184</sup> ANDRE E. PUNT ET AL, POPULATION STATUS OF THE EASTERN NORTH PACIFIC STOCK OF GRAY WHALES IN 2009 (2010), available at [http://archive.iwcoffice.org/\\_documents/sci\\_com/SC62docs/SC-62-AWMP2.pdf](http://archive.iwcoffice.org/_documents/sci_com/SC62docs/SC-62-AWMP2.pdf); JOHN CALAMBOKIDIS ET AL, ABUNDANCE AND POPULATION STRUCTURE OF GRAY WHALES IN THE PACIFIC NORTHWEST FROM 1998-2008 (2010) [hereinafter CALAMBOKIDIS], available at [http://archive.iwcoffice.org/\\_documents/sci\\_com/SC62docs/SC-62-BRG32.pdf](http://archive.iwcoffice.org/_documents/sci_com/SC62docs/SC-62-BRG32.pdf); A. R. LANG ET AL, GENETIC ANALYSES OF GRAY WHALES UTILIZING FEEDING GROUNDS IN THE EASTERN NORTH PACIFIC (2011), available at [http://archive.iwcoffice.org/\\_documents/sci\\_com/workshops/AWMP2/SC\\_M11\\_AWMP4.pdf](http://archive.iwcoffice.org/_documents/sci_com/workshops/AWMP2/SC_M11_AWMP4.pdf); and TIMOTHY R. FRASIER ET AL., ASSESSMENT OF POPULATION SUBSTRUCTURE IN RELATION TO SUMMER FEEDING GROUND USE IN THE EASTERN NORTH PACIFIC GRAY WHALE, [hereinafter FRASIER], *available at* <http://www.pwlf.org/GrayWhaleManuscript.pdf> (all last visited Oct. 31, 2012).

Eastern North Pacific stock<sup>185</sup> of the California Gray Whale is sufficiently isolated from the rest of the global population to merit a new Draft EIS. The majority of California Gray whales migrate north to “summer feeding grounds in the Bering, Chukchi, and Beaufort Seas [while] a small number of individuals [of about 200] spend the summer feeding in the waters ranging from northern California to southeast Alaska.”<sup>186</sup> The scientific/academic community commonly regards the former constituency as the northern feeding group and the latter as the southern feeding group. A California Gray whale learns from its mother “site fidelity to different feeding grounds.”<sup>187</sup> Because California Gray whale calves have through the ages learned from their mothers what and where a feeding ground is, one memorandum contends that “knowledge of specific feeding areas is only present within certain matriline. Therefore, if whales are extirpated from a specific feeding ground, they will not be ‘replaced’ (or the area will not be repopulated) by others.”<sup>188</sup> The memorandum also demonstrates that there are very slight mitochondrial differences extant between the northern and southern feeding groups and argues that these differences predate whaling.<sup>189</sup> Accordingly, because with the extirpation of the 200 whales which the authors presume comprise the southern feeding group, the strain of whales possessing that slight mitochondrial distinction will not re-populate. The authors themselves concede that there is some degree of migration between the northern and southern feeding groups, but assert that “although reliable estimates of migration rates could not be obtained here, the data clearly show that rate of migration is low enough for the two groups to represent independent demographic entities.”<sup>190</sup> The authors then conclude that the southern feeding group consequently “qualifies as a separate management unit, and requires separate management considerations.”<sup>191</sup> While the Memorandum does not state exactly what these considerations should compel, all they can compel is another EIS.

Taking the authors’ contentions to be true, the authors still fail to address the near extirpation of the species and the geographic size of the southern feeding group’s southern feeding grounds. Consider the following: if the southern feeding group is a distinct “management unit,” as the authors contend, and if once extirpated cannot repopulate, then the near extinction of the entire global population of California Gray Whales failed to eliminate that small southern feeding group. But somehow the Makah’s hunting of four whales per year—not necessarily killing four whales per year—when the northern feeding group is also passing through the Makah’s usual and accustomed whaling areas bound for their winter feeding grounds is a sufficiently grave threat to the population of a presumed amount of 200 whales, is enough to merit an entirely new Draft EIS. Further, by the author’s own admission, the southern feeding grounds of the

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<sup>185</sup> “There is widespread agreement that at least two populations of gray whales in the North Pacific exist, a western North Pacific population (also called the Korean population) and an eastern North Pacific (ENP) population (sometimes called the California population).” CALAMBOKIDIS, *supra* note 184, at 13.

<sup>186</sup> FRASIER, *supra* note 184, at 2.

<sup>187</sup> *Id.* at 15.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 15-16.

<sup>191</sup> *Id.* at 16.

southern feeding group extends from “northern California to southeast Alaska.”<sup>192</sup> But the Makah’s usual and accustomed whaling areas is an area that does not extend south of the Olympic Peninsula.<sup>193</sup>

Still more maddening is that to combat this kind of scientific speculation and murkiness, courts past have fashioned the Canons of Treaty Construction and developed from them the federal weight and consideration test. The recent “Technical Memorandums,” are stultifying the current NOAA process. The potential result of yet another Draft EIS demonstrates just a handful of consequences attending three judges’ decision to bind the Makah’s treaty-reserved right to whale to the rubric of the conservation necessity test, in defiance of Supreme Court precedent.

But the Ninth Circuit for its part seems to have corrected itself and embarked upon a path destined to either proscribe the applicability of *Anderson*’s use of the conservation necessity test *only* to assessing the relationship between “state regulations and treaties with ‘in common’ rights,”<sup>194</sup> or ridding itself altogether of the Makah’s tragic, crushing millstone. Addressing a pre-trial motion<sup>195</sup> in a case involving whether or not the Migratory Bird Treaty Act abrogated hunting rights reserved by the Yakama Treaty, on August 13, 2009, federal judge Edward F. Shea of the Eastern District of Washington addressed squarely the *Anderson* court’s errors. “[A] court analyzing the impact of federal legislation on treaty rights must determine whether Congress clearly and plainly intended to modify or abrogate an Indian treaty right.”<sup>196</sup> Judge Shea then addressed the series of cases – *Puyallup I* and *II* and *Fryberg* – which develop and chart the application of the conservation necessity test to state statutes that would infringe upon Indian treaty-reserved rights. Judge Shea then described the weight and consideration test implemented by *Dion*, noting that “while Congress has the authority to abrogate an Indian treaty right, a state does not.”<sup>197</sup> Although “the Ninth Circuit [in *Anderson*] was analyzing a *federal* [statute], not a *state* statute or regulation, the Ninth Circuit failed to use congressional treaty abrogation analysis. This failure conflicts with . . . basic principles of Indian treaty analysis.”<sup>198</sup> Judge Shea noted that the *Anderson* court, despite its intellectual prestidigitations, did recognize that *Dion* did not discuss the conservation necessity test but the *Anderson* court erroneously concluded “that the conservation necessity test . . . has not been undermined by later cases and is supported by the Supreme Court authorities.”<sup>199</sup> This “conclusion,” Judge Shea asserted, “was reached without analysis and is wrong. The Supreme Court cases alluded to [in *Anderson*] involved state regulations and treaties with ‘in common’ rights. When the Supreme Court has explicitly used congressional treaty abrogation analysis to

<sup>192</sup> FRASIER, *supra* note 184, at 2.

<sup>193</sup> See generally, SWAN, *supra* note 6.

<sup>194</sup> United States v. Fiddler, 2:10-CR-00052-RLH, 2011 WL 2148853 (D. Nev. June 1, 2011) (quotations in original).

<sup>195</sup> Amended Order Ruling On Pretrial Motions, U.S. v. Hawk, 2009-CR-2034 (E.D. Wa. Aug. 13, 2009), ECF No. 107 [hereinafter Order].

<sup>196</sup> *Id.* at 3.

<sup>197</sup> *Id.* at 8.

<sup>198</sup> *Id.* at 9 (emphasis in original).

<sup>199</sup> *Anderson*, 371 F. 3d at 498, n. 22.

interpret federal statutes, the same analysis should be used when interpreting the same federal statutes and treaty rights.”<sup>200</sup>

Judge Shea is not alone in this belief. Writing for the District Court from the District of Nevada and similarly called upon to address the extent to which the Migratory Bird Treaty Act may have abrogated Indian treaty-reserved rights, Magistrate Judge Lawrence R. Leavitt similarly criticized the *Anderson* fiat.<sup>201</sup> “In assessing whether Congress implicitly abrogated a treaty right, what is essential, is clear and convincing evidence that Congress considered the conflict between its intended action on the one hand and Indian treaty rights on the other. [After undergoing this analysis, if Congress subsequently] chose to resolve the conflict by abrogating the treaty . . . the proper approach,” continued Magistrate Leavitt, “would be clear but for the Ninth Circuit’s 1980 decision in *United States v. Fryberg* and the application of *Fryberg*’s analysis [– the conservation necessity test –] in *Anderson v. Evans*.”<sup>202</sup> Magistrate Leavitt then went on to repeat that in developing its conservation necessity test, the Ninth Circuit based its “doctrine on various Supreme Court cases, all of which involve *state* conservation statutes or regulations, and not congressional treaty abrogation power.”<sup>203</sup> In recognizing that the *Dion* Court used the weight and consideration test to determine the applicability of a congressional enactment to a treaty-reserved right, Magistrate Leavitt was similarly careful to note that in *Dion* the Supreme Court “employed an abrogation analysis in reaching its holding, without once referring to *Fryberg* or the state-based conservation necessity analysis [from the Ninth Circuit]. Nevertheless, eight years after *Dion*, the Ninth Circuit in *Anderson v. Evans* applied the conservation necessity doctrine to a federal statute without recognizing or engaging in an abrogation analysis.”<sup>204</sup> As categorically as Judge Shea had, Magistrate Leavitt then concluded that the “Ninth Circuit’s decision in *Anderson* cannot be reconciled with the Supreme Court’s decision in *Dion*.”<sup>205</sup> The *Anderson* Court’s conclusion that its own conservation necessity test ought to be applied in determining the applicability of congressional enactments to Indian treaty-reserved rights “was reached without analysis.”<sup>206</sup>

The *Anderson* court clearly conflated the state conservation necessity test with the federal weight and consideration test in holding the Makah’s exercise of their treaty-reserved right to whale bound by the MMPA. But the great tragic irony of the matter is that in defense of four whales per year of the estimated 20,000 global beasts, three circuit judges have embarked upon a course which further erodes tribal sovereignty and cultural identity when the absence of whaling presents devastating consequences on Makah health and their collective psyche.<sup>207</sup> Particularly illustrative of the ridiculousness

<sup>200</sup> *Order*, *supra* note 195 at 11.

<sup>201</sup> *United States v. Fiddler*, 2:10-CR-00052-RLH, 2011 WL 2148853 (D. Nev. June 1, 2011).

<sup>202</sup> *Id.* at 5-6 (emphasis in original).

<sup>203</sup> *Id.* at 6 (emphasis in original).

<sup>204</sup> *Id.* at 7.

<sup>205</sup> *Id.* at 8.

<sup>206</sup> *Id.*

<sup>207</sup> See Renker, *supra* note 17, at 19 (“[W]hen the Tribe was whaling, young people were involved with ceremonies and remained clean and sober instead of turning to drugs and alcohol. Current data from Neah Bay High School verifies that, in the absence of active whale hunting and its related preparations,



of this fact and the decided, intuitive injustice of it all is the quota of 120 whales per year granted by the IWC—the recognized global expert administrative body on the California Gray Whale—to the Russian Confederation on behalf of the Chukotka while three circuit judges sitting on a domestic American court have prohibited the Makah from hunting four whales per year in exercise of its treaty-reserved right to do so. Compounding the maddening injustice is that in doing this, these circuit judges have chosen to ignore United States Supreme Court precedent in favor of applying the test the Ninth Circuit itself developed, even when the United States Supreme Court has held that the Ninth Circuit's test is to be applied in determining the effect state statutes—not federal statutes—have on Indian treaty-reserved rights. As Indian Law scholar Felix S. Cohen presciently penned 60 years ago, stifling the exercise of much of what it means to be Makah “reflects the rise and fall in our democratic faith”<sup>208</sup> as the Ninth Circuit brings the Makah under the heel of “expert administrators whose power-drives are always accompanied by soft music about the withering away of the state or the ultimate liquidation of this or that bureau.”<sup>209</sup>

Whereas once the Makah were warriors, mastering the storms and calms and collecting for their kin the giants of the deep, now the Makah have only their bit of earth, the rain, and a whisper, a hope and a dream of re-establishing that practice once abandoned out of respect for the leviathan itself—this as the Ninth Circuit chooses to apply the wrong rubric in order to protect 20 California Gray whales over the course of five years, even as the Makah's northern neighbors are free to take 120 California Gray Whales in a single 365-day period. The decided, pernicious danger of the Ninth Circuit's application of its conjured legal precedent in order to subject the Makah to the *administrative* leviathan is that in choosing to protect four living leviathans per year, even more of what yet remains of tribal sovereignty and cultural distinction is taken from the Makah. While the effects of this loss of cultural identity continue in earnest to affect the Makah, the reason for its taking is entirely illusory.

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one in five male high school students is currently using drugs and or alcohol. . . . 71.0 % of the [recent survey's] respondents view the whale hunt as a means to maintain a healthy lifestyle for youth, as well as increase pride in being a Makah. In addition, [Makah Whaling Commission] members share the opinion that the ceremonies which must occur before a hunt, and the clean/sober lifestyle that hunters and their families must have, are a critical part of the Makah Tribe's spiritual profile. The moratorium on active hunting places Makah families at risk because important ceremonial practices cannot take place. These ceremonies have evolved over millennia, and shall not take place unless hunters are preparing for an actual hunt. Without an active hunt, [Makah Whaling Commission] members fear that an important part of the ceremonial life that was restored during the active hunting period in the late 1990s will remain in jeopardy . . . it is hard for Makah people to live under the stress of a concerted effort to derail a religious activity and an important aspect of tribal identity whose end product also provides a subsistence benefit.”).

<sup>208</sup> Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

<sup>209</sup> *Id.* (internal quotations omitted).