

## **A Whale of Trouble: An Institutional Analysis of the Whaling Practices of the Makah Indians of Washington State**

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### **Background**

The Makah Indian Tribe (Makah or Tribe) of Northwestern Washington State has traditionally hunted California grey whales (*Eschrichtius robustus*) from their ancestral land located on Cape Flattery (Makah Cultural and Research Center; Riley, 1968). Prior to the signing of the treaty between the United States and the Makah Indian Tribe in 1855 (Treaty of Neah Bay or Treaty), the Makahs claimed all lands from Flattery Rocks south fifteen miles to the Hohok River and fifteen miles east and Tatooch (Coast Salish, 1974; Colson, 1953; Swan, 1870). Along the land, the Makah claimed the waters surrounding their territory, from the Quileute Indian Tribe's Territory north to Victoria Island, Canada, eastward from the Pacific through the Strait of Juan de Fuca to the Clallam Indian Tribe's territory (Barker, 2005; Gibbs, 1967). The Makah used their territorial lands limitedly (i.e., collect salmon berries (*Rubus spectabilis*); Swan, 1870: 25), therefore, they placed much more importance on the waters surrounding their lands (Coast Salish, 1974; Riley, 1968). This importance stems from their ancestral reliance on the bounty of the ocean, therefore, activities such as whale hunting were a central part of the Makah culture. Thus, they ceded much of their land territory to the United States, through the Treaty of Neah Bay, in exchange for the continued right to hunt whales (Makah Cultural and Research Center). As a result, their territory was reduced to approximately six square miles on the land (Swan, 1870).

Even though they secured the right to hunt whales from the United States government, by the 1920s, they were forced to stop hunting the gray whale due to overexploitation by non-Makah whalers (Makah Cultural and Research Center; Barker, 2005). By the late 1940s, the gray whale was almost completely protected by the International Convention for the Regulation of Whaling (ICRW), which led to its complete protection under the Endangered Species Act in 1970. In 1994, the Makah began the steps to pursue a whale hunt due to the delisting of the gray whale from the Endangered Species Act list. During the time that the Tribe did not whale, the International Whaling Commission (IWC) had replaced the ICRW as the governing body, which oversaw whaling operations. Therefore, in order for the Makah to begin whaling again they had to gain approval from the IWC. With the help of the United States government, the Makah submitted their request for a quota of allowable hunting kills starting in 1995. Their request was not accepted until 1997, at which point they had agreed to submit a combined request with a Russian aboriginal group, the Chukotkas (Barker, 2005). Since this request was accepted, the Makah set forth to follow the Marine Mammal Protection Act (MMPA) by complying with such regulations as the submission of an Environmental Assessment (Makah Cultural and Research Center).

After the successful capture of a female gray whale in 1999, the United States Court of Appeals, Ninth Circuit (9<sup>th</sup> Circuit) halted Makah whaling activities (Barker, 2005). This resulted from two cases the court reviewed. The first, *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000), found that the United States government had violated the National Environmental Policy Act of 1969 (NEPA) by not preparing an Environmental Assessment (EA) "at the earliest possible time" (Section IV, Part B, para. 7). Such assessments are conducted to determine how an activity will affect the environment. The Tribe had entered into a contract with the United States

government and initiated steps to obtain a whaling quota from the IWC prior to pursuing an EA. The court felt that this contract restricted the autonomy of the government to conduct a quality EA (Metcalf v. Daley, 2000: Section IV, part B, para. 9). Thus, the court ruled that the government was in a predisposition to assign a Finding of No Significant Impact (FONSI), which would not hinder their application process, rather than conduct a possibly negative Environmental Impact Statement (EIS). As such, the court invalidated the FONSI and suspended the contract between the government and the Tribe (Metcalf v. Daley, 2000: Section V, para. 6). In addition, they ordered the NEPA process to be started afresh.

Following this decision, the case of *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004), was brought before the 9<sup>th</sup> Circuit to again challenge the Tribe's bid to resume the hunting of whales. As with the *Metcalf v. Daley* case, the court again ruled that the United States government had again violated the correct NEPA procedures. They felt that the government's filing of a FONSI instead of an EIS was inappropriate (e.g., may have reflected a pro-whaling stance rather than a neutral stance), and thus, the validity of the Tribes impact on the environment was questionable (*Anderson v. Evans*, 2004: Opinion, para. 3). Therefore, the court ruled that the FONSI was to be put aside in favor of an EIS, the government's contract with the Tribe was suspended and the whaling quota they had acquired was void (*Anderson v. Evans*, 2004: Section II, Part E, FN 17, para. 5-8). This case became important because it officially stated that that the Tribe is subject to MMPA regulations (*Anderson v. Evans*, 2004: Opinion, para. 3). Due to the precedence of this case, the Tribe must comply with a much more length application process (i.e., the completion of both an EIS and must acquired MMPA appropriate waivers and forms) prior to receiving the endorsement of the courts (McCarty).

## **Discussion**

To evaluate the structural integrity of the Makah whaling institution, the research information collected was analyzed in accordance with the Institutional Analysis and Development (IAD) framework (Ostrom, 1990). Of the multiple factors contributing to the issues surrounding their whaling (i.e., Native American treaty rights), this research sought to analyze the actors and rules that functioned within the institution. This research was conducted from this perspective to understand the relationship between the Tribe and the common-pool resource (CPR) of California gray whales. The focus of this paper will be examination of the following IAD rules: boundary rules, position rules, authority rules, scope rules, aggregation rules, information rules and payoff rules. This will conclude with a short discussion on the structural integrity of the institution.

### **Boundary Rules**

Historically, the determination for inclusion in Makah whaling and, to an larger extent, membership within the Makah Tribe, was dictated by an individual's societal status. Prior to the signing of the Treaty of Neah Bay, Makah society was differentiated into a three-tiered, hereditarily derived class system (Goodman, 2003; Swan, 1870). Tribal membership was reserved for individuals of the chief and commoner classes. The third class, slave, was excluded from this societal recognition (Colson, 1953). Although heredity strongly dictated ones position within society, an individual could ascend to a higher status or descend to a lower status depending on their actions. This class fluidity allowed commoners to ascend to the chief class if they were particularly skilled in a vital occupation (e.g., fishing). This freedom of movement, however, was not extended to individuals of the slave class. Any ancestral or social (i.e.,

marriage to an individual of the slave class) affiliation would negate membership within the tribe and place any offspring in the slave class.

The chief class also contained individuals other than heads of families. This class also included their immediate family (i.e., wife/husband and children). Although privilege could be transmitted through either lineage, the first-born son of the family head usually became the next head chief (Goodman, 2003). As family head, the head chief was encouraged to amass enough wealth (e.g., whale oil and other non-momentary resources) to maintain the whaling equipment and sponsor the whaling trips (Kirk, 1986). His wealth and prestige also granted him the honor of holding the position of harpooner. The rest of the whaling crew was male relatives of the head chief (further discussion on the role of the harpooner and the whaling crew will be found in the position rules section). Kinship affiliation and social status were the overarching boundary rules, therefore, the right and privilege to hunt whales was reserved for male members of the chief class.

The signing of the Treaty of Neah Bay would profoundly affect the established norms associated with tribal membership and ultimately restructure admittance into the whaling ritual and participation in the hunt. After the signing, tribal membership was no longer restricted by societal position. Presently, membership is reserved for individuals that can meet three requirements (Colson, 1953; "Constitution and Bylaws", 1936). First, they must contain Indian blood. Second, the Tribe must recognize them as a member. Third, membership within the Makah Tribe must not conflict with membership within another tribe. Although slave ancestry is still seen as a stigma (e.g., members debating an individual right to participate in whaling ceremonies and activities), it no longer bars individuals from tribal decisions. The privilege of decision making once reserved for the chief class, transferred to an elected tribal council (Makah Cultural and Research Center). The council was designed to allow any tribal member the opportunity to participate in decisions affecting the Tribe. To achieve this, all individuals deemed at least one-fourth Makah are eligible to run for a tribal council seat (Goodman, 2003). This restructuring of tribal membership and political eligibility initiated a redefinition of membership boundaries within all membership-based societal entities.

Hunting whales is the defining cultural identity of the Tribe (Makah Cultural and Research Center). Due to its societal importance, ritual and hunting rights were reserved for male members of the chief class (Goodman, 2003; Kirk, 1986; McMillan, 1999). Their whale-hunting prerogative did not solely result from their hierarchical status, for male members of the chief class were the only societal members who could acquire large stores of luxury goods (e.g., whale meat, rugs and beads) (Colson, 1953). Their wealth formed the invisible boundary that permitted chiefs to whale and excluded all others. The boundary existed until the Tribe was forced to cease the hunting of whales in the 1920s, due to commercial overwhaling. During the 70-year hiatus, the exclusivity gave way to a concerted tribal initiative to resume whaling. This unity relaxed the boundaries surrounding whaling participation by the time the gray whale was removed from the endangered species list in 1994. Whaling participation was redefined to include all male members of the Tribe regardless of ancestry. After the successful hunt in 1999, this boundary definition gave way to the traditional hieratically based definition. Although societal stratification no longer exists, whaling is one facet of society that has seen the reemergence of traditional family based boundary norms.

## Position Rules

Historically, the Makah whaling institution was limited to the Tribe and its native trading partners. The tribal chiefs would perform the rituals, conduct the hunts and determine the allocation of whale products (Goodman, 2003). Excess goods, especially whale oil, were traded to neighboring tribes (Colson, 1953). The hierarchical equilibrium existed until the Treaty reorganized the Tribe's governing system. The lack of politically strong, tribally recognized leaders (Swan, 1870) put the Tribe in a disadvantage when they sought to reestablish traditional whaling traditions. By this time, unified opposition to whaling had arisen, forcing the Tribe into unfamiliar legal territory (Cantzler, 2007). As such, tribal position rules changed over time; therefore, both historical and modern rules must be examined.

Prior to the Treaty, tribal members ascribed to one of three general positions within the whaling institution. The first and most coveted position was that held by the whaling crew. The crew comprised of one harpooner, one steersman and six paddlers (Barker, 2005; Coast Salish, 1974; Doig, 1980; Sullivan, 2000; Swan, 1870). Of these eight members, the harpooner, held the most prestigious position (Waterman, 1967). To obtain this position, firstly the individual had to be the head male chief of a family. Secondly, the crews under his charge had to be successful. This success was attributed to the harpooner's pre-hunt rituals, which were privately acquired after conducting a spirit quest (Makah Cultural and Research Center; Wright, 1991). These rituals (e.g., bathing) were strictly adhered to, for if they were not, misfortune would beset the whaling crew. His prestigious position not only dictated his responsibilities as leader of the whaling party, but it also gave him the privilege of determining the distribution of whale products. This privilege was extremely important within Makah society, for wealth and power was defined by the potlatch system (Colson, 1953). Within this system, status is obtained through the acquisition and distribution of material goods (i.e., whale oil and meat) to influential members of the society for the purpose of gaining and/or maintaining support (Barnett, 1938; Rosman, 1972). Therefore, powerful and esteemed harpooners had to both, lead successful whale hunts and give away large quantities of goods during potlatches.

The whale hunt itself contained many crew responsibilities (Waterman, 1967). The bow of the canoe was reserved for the harpooner who would harpoon the whale on the port or right side of the vessel. Although in charge overall, the harpooner did not give orders during the pursuit of a whale. The steersman, usually an elderly experienced whaler positioned at the rear of the canoe, gave the signals and orders. As soon as the whale was struck, the paddlers' objective was to make sure the harpoon lanyard and hair seal floats cleared the canoe. Simultaneously, they also back paddled to ensure the canoe would not capsize or be destroyed by the wounded whale. From a safe distance, floats were added to exhaust the whale. One member was then responsible for killing it with a long spear-like device. This instrument was driven into the base of the skull (Doig, 1980). After the whale was killed, a member of the crew known as the diver entered the water to sowed the whale's mouth closed to prevent the body from sinking and lashed a rope to the whale for towing (Makah Cultural and Research Center). Despite the whaling crew holding the most prestigious general position within Makah society, the other two positions are equally important to the functioning of the whaling institution.

The wives of the whalers held the second general position within the whaling institution. Although they were not directly involved with the whale hunt, they did however, have an important indirect role. The whalers' wives followed certain position rules depending on whether their husband was preparing for or conducting the whale hunt. During the time their husband was preparing for the hunt, they often assisted in their husband's preparation rituals (Waterman,

1967). Even though they were allowed to interact during this highly spiritual time, the two were forbid from occupying the same bed. This resulted from the belief that sexual relation could lead to misfortune during the hunt. The hunt itself saw another set of positional rules that the wives followed. As soon as the whaling party departed for the hunt, the wives would lay down in a dark room with a straw mat covering their head and body. The wives would remain in this position without eating or drinking until the whaling party returned (Barker, 2005; Waterman, 1967). This action allowed them to support the whaling crew in spirit. Outside the whaling institution, they performed typical duties assigned to Makah women such as cleaning and dressing fish and collecting berries (Swan, 1870).

Recognized tribal members held the final general position within the whaling institution. Their involvement with the institution was a function of indirect support and advantageous relationships. During the hunt, tribal members spoke and moved quietly and respectfully due to the belief that captured whales required the whalers' village to be a pleasant orderly place (Barker, 2005). Upon the news of a successful hunt, tribal members would sing to welcome the whale to the village and to assist its spirit's journey to the afterlife (Makah Cultural and Research Center). When the whale was brought onto the beach, tribal members joined the whaling crew in praying over the whale. Although not all tribal members were directly involved in the preparation or execution of the hunt, their spiritual support was crucial for the institution to function correctly.

The three above positions still exist in the present day Makah whaling institution; however, now other non-native actors occupy positions within the institution. These positions are held by three actors, which historically (pre-treaty) did not affect the Tribe. The first is the United States government. Of the three non-native actors, the U.S. government has had the most profound impact on the Tribe. From the signing of the Treaty to the mid to late Twentieth Century, the government's position within the institution was governed by the goal of assimilation and termination of tribal governance and identity (Barker, 2005; Colson, 1953). Through the establishment of the Neah Bay branch of the Indian Service, the U.S. government was able to monitor the Tribe's progression toward Americanization. Following this period, the government's positional goal changed. Starting with the delisting of the gray whale, the government's position has shifted to helping the Tribe reestablish its whaling rights. This new position has caused the U.S. government to both facilitate the IWC whaling quota acquisition process and defend the Tribe against the U.S. legal system and animal rights activists. The positional rules that the U.S. government abides by are now designed to ensure the Tribe's cultural identity and desire to whale are paramount, rather than the source of persecution.

The second non-native actor holding a position within the present Makah whaling institution are animal rights activists. The Tribe's attempt to reestablish whaling has caused a dilemma that divides the animal activist community. Activist groups like Greenpeace have not taken a stand against the Tribe's desire to whale because of the treaty rights issues involved (Sullivan, 2000). On the other side of the divide, groups like the Sea Shepherd Conservation Society are using legal (e.g., filing court injunctions against the Tribe's whaling application process) and other means (i.e., directly confronting the Makah whalers during the 1999 hunt) to impede the Tribe's whaling goal. The positional rules that this group of animal activists follow stem from the New Environmental Paradigm or NEP (Cantzler, 2007). Within this paradigm, human activity must be strictly governed and animals have the right to a life free from human malice. Therefore, they see rules and laws allowing humans to negatively affect animals as wrong and have thus established animalcentric rules to govern their actions.

The third non-native actor holding a position within the present Makah whaling institution is the International Whaling Commission (IWC). The IWC serves a regulatory function within the institution. Prior to the establishment of the IWC, the Tribe was able to hunt whales as they pleased. Following its establishment, the Tribe had to obtain a quota of allowable whale kills during a certain length of time. This is exemplified by the IWC awarding them a quota of 20 whales over a five-year period prior to the 1999 hunt (Barker, 2005). The IWC's regulatory position within the institution is interesting since it is not governed solely by the United States government. The IWC was designed to serve as a multinational whaling regulation body; therefore, membership is open to any country that willingly adheres to the 1946 International Convention for the Regulation of Whaling (International Whaling Commission, 2009a). As such, any new rules or purposed deletion of rules must be voted on and passed by the member countries. As long as countries are members of the IWC, this form of governance works. If, however, a country does not agree with the rules or an imposed penalty, they have the right to leave the IWC. In such a cause, the effectiveness of the IWC is diminished since that country would no longer fall under the power of the IWC. The country would therefore be free to whale as it saw fit. The United States is currently a member of the IWC, so the Tribe must follow its rules. In this time of global public opinion, the United States is unlikely to break from the IWC; however, if it did, the IWC would no longer have a position within the Tribes whaling institution. The absence of the IWC's positional rules would eliminate a major hurdle in the Tribe's path toward the restoration of traditional whaling rights.

### **Authority Rules**

Authority rules within the Makah whaling institution are closely bound with position rules, thus a separate discussion pertaining to authority rules will not be made.

### **Scope Rules**

The scope rules affecting the Makah whaling institution have evolved dramatically during its existence. To examine these rules, the institution is divided into three chronological periods to show rule evolution though time. Each period has not only seen the addition of scope rules, but existing rules were examined and redesigned to conform to acceptable, non-Indian social norms.

The first period affecting the institution's scope rules lasted from the inception of the institution to the signing of the Treaty. Although this period contained the greatest amount of time, the amount of scope rules affecting the institution was scant as compared to the two succeeding periods. The rules created and abided by at this time were designed to facilitate harmonious relations with nature and the maintenance of acceptable tribal norms regarding whaling. One such rule pertained to the selection of the whale to be hunted. The whalers saw the importance of allowing young whales mature; therefore, tribal law prohibited the hunting of calves and mothers with calves (Makah Cultural and Research Center). Hunting the whales at any other stage was allowable. This rule, therefore, only restricted them from taking a select few individuals as compared to the overall whale population.

A second rule governed the commercial use of whale meat and other associated products. These products were traded to other tribes in exchange for goods (i.e., blankets and decorative shells) which the Tribe did not create or could not otherwise acquire (Colson, 1953). The desirability of the whale meat and oil made those who traded it wealthy and powerful within both the tribe and the trade network. The arrival of Europeans saw the establishment of rules barring

the outsiders from purchasing the valuable resource. The resource could be traded to traditional native trading partners; however, the Tribe forbid the selling of any part of the whale for monetary gain (Makah Cultural and Research Center). This rule did however, have an exception. Artwork made from whalebone was permissible to sell. It is likely this exception was the result of European manufactured tools replacing locally made whalebone derived tools. The Tribe, following the tradition of using every part of the whale (Swan, 1870), looked for another way to use the bone. Carvings and other artwork made of whalebone solved this dilemma. Using this framing, the Tribe understandably allowed for the sale of these whale products. These two rules exemplify the scope rules during this period. The next period would see the ushering in of more numerous and complex rules.

The second period affecting the Tribe's whaling institution was characterized by the United States government's policy of forcibly requiring Native Americans to relinquish all traditional norms. This period commonly referred to as the assimilation and termination era, lasted from the signing of the Treaty to the mid to late Twentieth Century (Barker, 2005). During this time, every aspect of Makah societal and cultural norms was analyzed according to Euro-American social norms and ideals. Both sets of norms greatly conflicted, and thus, American officials sought a solution (i.e., the termination of the potlatch system due to its preceded wasteful and anti-assimilationistic nature). To assure that the Tribe was conforming to the government's policy, an Indian Agency agent was stationed on the reservation and Makah children were sent to boarding schools (Colson, 1953; Goodman, 2003). This period particularly affected the whaling institution negatively, for it was destabilized by two factors.

The first factor was the government's drive to transition the Tribe to agriculture (Riley, 1968). The land on which the Makah's territory sat held much less importance than the ocean (Coast Salish, 1974), and thus, the government's idea of obtaining subsistence from land-based sources came foreign to the Tribe. Tribal members were forbidden to whale to ensure the Tribe complied with the transition to farming. Government officials soon realized that enforcing scope rules, which forbade whaling and forced them to farm, was not practical. The land found on the reservation was extremely poor quality and the Tribe's skill at whaling could be profitable through the sale of whale products. Around the turn of the Twentieth Century, the rules forbidding whaling were repealed allowing the tribe to resume this means of subsistence.

The second factor that destabilized the whaling institution was commercialized whaling. During the 1850s, American and European whalers found the Baja California birthing grounds of the California gray whale and exploited this resource at its source, rather than searching their long migratory path (Barker, 2005; Sullivan, 2000). During this time, the Tribe was forbidden to whale, while conversely, commercial whalers decimated the whale population. When the Tribe was allowed to resume whaling again, the once abundant resource no longer existed. By the 1920s, the Tribe decided to suspend whaling once again in response to the all but complete lack of whales. The scope rules, which prohibited the Tribe from whaling, did not apply to the commercial whalers. Therefore, they hunted indiscriminately, almost causing the extinction of the gray whale. The transition from this period to the third and final period saw the government switch to a more favorable attitude. However, the institution faced new opposition.

Beginning with the 1994 delisting of the California grey whale from the endangered species list, the Makah whaling institution entered its third chronological period. During this period, the United States government's focus was to aid the tribe in reestablishing their whaling traditions; however, new actors filled the antagonist position left vacant by the government. As described in the position rule section, animal rights activist have assumed the role of opposing

the Tribe's bid for whaling reestablishment. Its reestablishment depends on the satisfying of two requirements, which the activist content are not being met correctly.

One requirement they must comply with is the adherence to International Whaling Commission (IWC) rules. Under normal circumstances, the IWC forbids the hunting of whale; however, exceptions are made if two major scope rules are satisfied (International Whaling Commission, 2009b). The first and most important to the IWC is that the hunting activity does not increase the risk of extinction. Before the Tribe was given a quota in the late 1990s from the IWC, the Scientific Committee of the IWC had to first establish if the Tribe's whaling would satisfy this rule. After conducting their analysis (see International Whaling Commission 2009c), it was determined that the Tribe's request of 5 whales a year fell well below the Scientific Committee's judgment of 463 allowable whales (Makah Cultural and Research Center). Therefore, the Tribe satisfied this rule.

The second rule, which is the most contested by the animal rights activists, is the group must show cultural and nutritional needs (International Whaling Commission, 2009b). The activists believe that since the Tribe "voluntarily" stopped whaling in the 1920s, the Tribe does not show proof of continual cultural importance (Sea Shepherd Conservation Society, 2009). The Tribe counters this argument based on evidence found at the Makah village of Ozette (see Samuels, 1991), which shows ancient continual whaling. As such, the Tribe states that their whaling is continual since it dates back thousands of years and they were forced to stop whaling due to the extremely low whale population (Makah Cultural and Research Center). This rule is contested due to definitions rather than evidence. The IWC currently has not specifically defined cultural and nutritional need. Rather, they leave this determination to each individual country from which a group is requesting a whaling quota. The ambiguous defining of the two needs creates a gray area, for which, the disagreement originates. Until the IWC specifically defines cultural and nutritional needs, a point of contention will perpetuate.

The second requirement that the Tribe must satisfy before the reestablishment of whaling is, they must complete a Marine Mammal Protection Act (MMPA) wavier. The MMPA was established to protect marine mammals from extinction (Eberherdt, 1977). As such, commercial whaling operations are forbidden under the Act (Marine Mammal Commission, 2007). There are however, provisions allowing for the aboriginal hunting of whales. The MMPA makes this exception because of the cultural importance whale hunting has for tribes like the Makah. The Tribe contends that it qualifies for the exception, which the enforcer of the MMPA, the National Marine Fisheries Service, has agreed with; therefore, one part of the Act has been satisfied. The second part, which has continued to bar the Tribe from obtaining the wavier, is the completion of an Environmental Assessment. The assessment, whose precedence was derived from *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000), determines the impact of an activity on the environment. To satisfy the assessment, the United States government had the choice of issuing a less rigorous Finding of No Significant Impact (FONSI) or conduct the rigorous and time consuming Environmental Impact Statement (EIS). The government chose to issue a FONSI, which the United States Court of Appeals for the Ninth District has continued to site as improper, therefore hindering the Tribe's MMPA wavier process. Until an EIS is conducted, which could keep the Tribe from reestablishing whaling (e.g., if the statement concludes that the Tribe's hunt affects the environment in a significant negative manner), the Tribe is unlikely to receive a court approved MMPA wavier.

The IWC and MMPA by themselves are not scope rules, but they affect the Makah whaling institution by establishing and managing rules which can allow or forbid the Tribe from

whaling. Both serve to protect marine species through regulations which the Tribe traditionally did not have. Prior to the establishment of the IWC and MMPA, the Tribe's scope rules revolved around the idea of respecting nature as a whole, therefore, they do not see whales as individuals but parts of a whole whale population. The scope rules they must follow now force them recognize the whales as individuals, which clashes with their traditional beliefs. These beliefs are the reason the Tribe is trying to reestablish whaling, and thus, these rules will be a major point of contention for the Tribe.

### **Aggregation Rules**

Although the Tribe has seen and continues to see whaling as their cultural identity, prior to the signing of the Treaty there was also an economic side. Whalers were not wealthy since they were of the chief class; they became so because they were able to amass a huge stockpile of whale products and other goods for distribution during a potlatch. The chief was able to amass his wealth because he was in charge of not only the whaling hunt, but also all important economic commodities such as hunting grounds and berry patches (Goodman, 2003). Their control over those economic commodities allowed them to control trade with other tribes. The most valuable resource, which contributed to a large part of their wealth, was whale oil derived from whale blubber (Makah Cultural and Research Center). The more oil they acquired to either trade or give away, the wealthier the chief became. This aggregation wealth system ceased after the United States government forbid both whaling and potlatching. The Tribe would once again see an aggregation system; however, it would be in the form of aggregation rules regulating their whaling institution.

The aggregation rules that affect the whaling institution today derive from the IWC. Throughout most of the institution's existence, the Tribe was able to hunt as many whales as they saw fit; however, this is no longer the case. In order to acquire the legal rights to whale they must obtain an allowable whale kill quota from the IWC. The IWC gives aboriginal groups whaling quotas or "catch limits" in five-year blocks (International Whaling Commission, 2009c). To ensure that the quota is not exceeded, each group requesting a quota states that they will not catch more than a certain amount of whales each year. During the 1999 hunt, the Tribe had acquired a quota for the five-year period of 1998-2002. They were allowed to catch five whales a year for a total of twenty five whales during that period. The Tribe only received this quota after lowering their catch request and agreeing to share a quota with the native Russian group the Chukotkas (Makah Cultural and Research Center). Currently the Tribe shares a quota of 620 whales for the period of 2008-2012 with the Chukotkas and cannot exceed 140 whales in any year (International Whaling Commission, 2009d). Until the Tribe can favorably settle the legal issues surrounding the institution, this quota will likely pass without the Tribe taking advantage of it.

### **Information Rules**

The information rules found within the Makah whaling institution are designed to ensure that a spiritual connection between the whaler and nature is established. In preparing for the hunt, the whaler goes off by himself to perform a ritual that is personal to each individual (Makah Cultural and Research Center; Waterman, 1967). Before an individual begins training as a whaler, they, as a child, spend time away from the village fasting to obtain their guardian spirit. Their guardian spirit would endow them with the powers they needed to perform the job that they were given, such as: halibut fisher, seal hunter or most desired, whaler (Colson, 1953). Upon

learning their future profession, they would rejoin their village and prepare themselves. This information was kept secret from the rest of the village; however, village members were able to identify which occupation they had been given based on their actions.

After being given guidance for their whaling preparation, each whaler would not disclose the particulars of their ritual to the other members of the tribe. The rituals were established to maintain personal communication with nature; therefore, the rest of the tribe was excluded from this information. An exception to this rule was made for their wives. Their wives assisted in the preparations by helping with activities like bathing (Waterman, 1967). Through this secretive preparation, the whalers determined the success of future hunts.

The information rules within the Tribe's whaling institution are very secretive and personal; however, the Tribe must also follow information rules externally imposed on the institution. The information rules that were added as part of their reestablishment of whaling process are based on openness. One example of this occurred during the 1999 hunt. During the hunt, the United States Coast Guard protected the whalers from the animal rights activists trying to stop the hunt (Sullivan, 2000). As part of the agreement for this protection, the Tribe had to signal to the Coast Guard when they had captured a whale. When this occurred, a member of the whaling party signaled the Coast Guard with an orange flag stating that they had captured the whale and were heading back to their village. Before this sort of regulation, only the village of the whalers would know that a whaling expedition was in process. Now, the whalers must let the appropriate governmental officials (i.e., National Marine Fisheries Service officers) know about all aspects of the hunt so they can file appropriate paperwork. Federal regulations and United States court ruling (e.g., *Metcalf v. Daley*) have made information that was reserved for a very select few of individuals, common knowledge. As such, the Tribe must learn to integrate rules that require openness of information into their whaling institution if they wish to reestablish their whaling rights.

### **Payoff Rules**

When the Makah whaling institution was functioning unimpeded, the payoff rules were centered on the distribution of whale meat and blubber. The central figure in charge of implementing and monitoring them was the harpooner who sponsored the hunt (this was also the individual who first harpooned the whale). Not only did he receive the most choice piece of blubber, the u-butsk or saddle (this blubber came from the area extending from the head to the dorsal fin), he was also responsible for distributing the remaining whale products (Barker, 2005; Doig, 1980; McMillan, 1999; Swan, 1870; Waterman, 1967). The products were distributed for one of two reasons, an individual received a cut of meat because either they were previously promised a piece or they helped with the hunt. The members of the crew and those who helped from the other canoes used their portion of the whale blubber for personal consumption. The harpooner, on the other hand, took the saddle and prepared it for consumption (see Swan 1870), after which it was used to feed guests during the harpooner's potlatch. Whatever was not eaten during the ceremony was given to the guests to take home. The harpooner's possession and distribution of the saddle and power over the selection of whale products greatly contributed to his status within the tribe.

The path to the reestablishment of their traditional whaling rights has seen the emergence of new payoff rules. The new rules are punitive in nature, rather than, favorable. If any member of the Tribe captures a whale without the proper permits, they are assessed a fine with the possibility of jail time. This was exemplified by a September 2007 hunt in which five tribal

members captured a whale without proper documentation (The Economist, 2007). Seattle prosecutors had sought charges which could have forced the individuals to spend a year in jail and be fined up to \$100,000. The five agreed to plead guilty to the charges and received a misdemeanor for violating the MMPA (The Associated Press, 2008). This form of payoff rules has replaced the rules formally seen, further causing the institution to evolve.

## Conclusion

The Makah whaling institution has faced many changes, like the Tribe itself, brought on by outside entities. The institution was extremely successful when the Tribe was allowed to practice whaling without the interference of outside actors and groups. The Tribe's long association with whaling had woven itself into the fabric of society so tightly that they were willing to give up a majority of their land-based territory for the right to whale. The Tribe sees the Treaty of Neah Bay as a binding agreement they made with the United States government, which guarantees that right. The Tribe holds on to the static notion that since they can show the anthropological and historical importance and continuum of tribal whaling, whaling practices should always be a part of their culture. Their whaling institution not only connects them to their ancestor, but also contributes to a cultural identity all their own. Therefore, their exclusion from whaling goes far beyond protecting the whales since the exclusion bars them from a major part of their culture, leading to a potential loss of cultural self. Non-whaling cultural identifiers (i.e., their language) still exist; however, the government's attempt to eradicate the Tribes "Indianhood" left them with a fragment of their former culture. The Tribe's participation with whaling today is more a spectator event (e.g., listening to stories and reading about historical hunts), rather than a hands-on experience.

The rules affecting the Tribe's whaling institution today result from a culturally foreign, ever-changing world. The tribe's insistence on keeping the institution as it was is causing strife with those who see the need for change. The institution was able to survive both the adverse affects of governmental and non-native whaler involvement within the action arena. Despite surviving this, the institution now faces opposition by way of the courts and other actors, which has left it extremely fragile. If it is to survive, the Tribe must learn to integrate outside regulatory rules into the institution. Makah whaling historically was a robust system; however, rules imposed onto the institution by outside actors have left it extremely fragile. Therefore, unless the present situation drastically shifts in the favor of the institution, it will likely fail.

## References Cited

- Anderson V. Evans. United States District Court for the Western District of Washington 2004. *Coast Salish and Western Washington Indians III*. American Indian Ethnohistory: Indians of the Northwest. New York,: Garland Pub., 1974.
- "Constitution and Bylaws of the Makah Indian Tribe of the Makah Indian Reservation Washington." Ed. Department of the Interior, Office of Indian Affairs. Washington D.C.: Government Printing Office, 1936.
- Barker, Joanne. *Sovereignty Matters : Locations of Contestation and Possibility in Indigenous Struggles for Self-Determination*. Contemporary Indigenous Issues. Lincoln, Nebraska: University of Nebraska Press, 2005.
- Barnett, H. G. "The Nature of the Potlatch." *American Anthropologist* 40 3 (1938): 349-58.

- Cantzler, J. M. "Environmental Justice and Social Power Rhetoric in the Moral Battle over Whaling." *Sociological Inquiry* 77 3 (2007): 483-512.
- Center, Makah Cultural and Research. "Makah.Com". Neah Bay, Washington. Official website of the Makah Indian Tribe. 2009. <<http://www.makah.com/index.html>>.
- Colson, Elizabeth. *The Makah Indians; a Study of an Indian Tribe in Modern American Society*. Minneapolis, Minnesota: University of Minnesota Press, 1953.
- Commission, International Whaling. "Aboriginal Subsistence Whaling". 2009b. 21 December 2009. <<http://www.iwcoffice.org/conservation/aboriginal.htm>>.
- . "Catch Limits & Catches Taken". 2009d. 23 December 2009. <<http://www.iwcoffice.org/conservation/catches.htm#aborig>>.
- . "Commission Information". 2009a. 16 December 2009. <<http://www.iwcoffice.org/commission/iwcmmain.htm>>.
- . "Revised Management Procedure". 2009c. 21 December 2009. <<http://www.iwcoffice.org/conservation/rmp.htm>>.
- Commission, Marine Mammal. "Marine Mammal Protection Act as Amended 2007." Washington, D.C.: Government Printing Office, 2007.
- Doig, Ivan. *Winter Brothers : A Season at the Edge of America*. 1st ed. New York: Harcourt Brace Jovanovich, 1980.
- Economist, The. "An Inconvenient Hunt." *Economist* 385 8551 (2007): 60.
- Gibbs, George. *Indian Tribes of Washington Territory*. Fairfield, Washington: Ye Galleon Press, 1967.
- Goodman, Linda, and Helma Ward. *Singing the Songs of My Ancestors : The Life and Music of Helma Swan, Makah Elder*. The Civilization of the American Indian Series. Norman, Oklahoma: University of Oklahoma Press, 2003.
- Kirk, Ruth. *Tradition & Change on the Northwest Coast : The Makah, Nuu-Chah-Nulth, Southern Kwakiutl, and Nuxalk*. Seattle, Washington: University of Washington Press, 1986.
- McCarty, Micah. "Telephone Interview." 23 October 2009.
- McMillan, Alan D. *Since the Time of the Transformers : The Ancient Heritage of the Nuu-Chah-Nult, Ditidaht, and Makah*. Pacific Rim Archaeology,. Vancouver, British Columbia: UBC Press, 1999.
- Metcalf V. Daley. United States District Court for the Western District of Washington 2000.
- Ostrom, Elinor. *Governing the Commons : The Evolution of Institutions for Collective Action*. New York: Cambridge University Press, 1990.
- Riley, Carroll. "The Makah Indians: A Study of Political and Economic Organization." *Ethnohistory* 15 1 (1968): 57-95.
- Rosman, Abraham, and Paula G. Rubel. "The Potlatch: A Structural Analysis." *American Anthropologist* 74 3 (1972): 658-71.
- Samuels, Stephen R. *Ozette Archaeological Project Research Reports*. 3 vols. Pullman, Washington: Dept. of Anthropology, Washington State University, 1991.
- Society, Sea Shepherd Conservation. "Makah Tribe- Fighting to Kill More Whales". 2009. 21 December 2009. <<http://www.seashepherd.org/whales/makah-tribe.html>>.
- Sullivan, Robert. *A Whale Hunt*. New York: Scribner, 2000.
- Swan, James Gilchrist, et al. *The Indians of Cape Flattery, at the Entrance to the Strait of Fuca, Washington Territory*. Smithsonian Contributions to Knowledge. Washington: Smithsonian Institution, 1870.

- The Associated, Press. "Washington: Plea in Whale Killing." *New York Times*, 2008: 17.
- Waterman, T. T. *The Whaling Equipment of the Makah Indians*. Seattle, Washington: The University, 1967.
- Wright, Robin Kathleen, and Thomas Burke Memorial Washington State Museum. *A Time of Gathering : Native Heritage in Washington State*. Monograph (Thomas Burke Memorial Washington State Museum). Seattle, Washington: University of Washington Press, 1991.