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The Importance of Whaling in Makah Culture:
Self-Determination and Cultural Continuity

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Abstract: Treaties represent initial instances of legal pluralism between Europeans and Indigenous peoples in what is now known as North America; treaty rights are eternal, yet as societal norms change these rights are drawn into question and their strength tested. This paper examines specifically the Makah Nation, located in Washington state, who signed the Treaty of Neah Bay in 1855, which assured them that in exchange for ceding a large portion of their land they would preserve their right to whale (Article IV, Treaty of Neah Bay). In the last 100 years, non-Indigenous norms have shifted from participating in commercial whaling to largely condemning it because of animal rights beliefs often place the rights of whales above many mammals due to their complex social life (Gupta 1741). These changing norms have led to costly court cases for the Makah and have generally changed legislation and regulations for whaling practices, impeding the Makah's right to whale. Legal Indigenous environmental rights - meaning the rights of Indigenous peoples to decide how to interact with the environment - act as opportunities for Indigenous peoples to exercise their rights to self-determination and are necessary to the cultural survival of Indigenous peoples. However, in an environment of legal pluralism, different bodies can attempt to undermine Indigenous culture and self-determination by arguing animal rights are of greater import; the Makah not only have their right to whale at stake, but the right to cultural continuity.

Treaties represent initial instances of legal pluralism between Europeans and Indigenous peoples in what is now known as North America. Brian Tamanaha, in "Understanding legal pluralism: Past to present, local to global," discusses the various definitions to which legal pluralism can lend itself, and ultimately suggests that, although a singular definition of law may never be achieved, legal pluralists may work with the understanding that any behaviour a society adheres to – such as waiting in lines or shaking hands – can be deemed law (Tamanaha 393). Unwritten norms, or day-to-day behaviour (393), shape communities' norms. This paper will examine how the norms of members outside an Indigenous group can effect the policies that impact Indigenous rights, specifically the Makah people's right to whale, and simultaneously what effect these altered rights will have on the future of Indigenous peoples. Treaty rights are eternal, yet as societal norms change these rights are drawn into question and their strength tested by the multiple forces of legal pluralism.

The Makah Nation, located in Washington state, signed the Treaty of Neah Bay in 1855, which assured them that in exchange for ceding a large portion of their land they would preserve their right to whale (Article IV, Treaty of Neah Bay). In the last 100 years, non-Indigenous norms have shifted from participating in commercial whaling to largely condemning it because of animal rights beliefs that place the rights of whales above many mammals due to their complex social life (Gupta 1741). These changing norms have led to costly court cases for the Makah and have brought about changes in legislation and regulations for whaling practices, impeding the Makah's right to whale. Legal Indigenous environmental rights – meaning the rights of Indigenous peoples to decide how to interact with the environment – act as

opportunities for Indigenous peoples to exercise their rights to self-determination¹ and are necessary to the cultural survival of Indigenous peoples. However, in an environment of legal pluralism, different bodies can attempt to undermine Indigenous culture and self-determination by arguing animal rights are of greater import. Thus, the Makah not only have their right to whale at stake, but their right to cultural continuity. I will refer to Janine Bowechop's article "Contemporary Makah Whaling: A Northwest Coast tribe works towards reviving a core cultural tradition", which details the cultural significance of whaling for the Makah, and Emily Brand's article "The Struggle to Exercise a Treaty Right: An Analysis of the Makah Tribe's Path to Whale," which offers an overview of the Makah's legal struggle to revive their whaling rights. Together these perspectives demonstrate how the legal plurality around whaling rights precipitated into enormous legal obstacles for the Makah to exercise not only their Treaty right, but also their right to cultural continuity.

A brief history of Makah whaling will allow for greater clarity in understanding the complexity of this contested right. The Makah have been whaling for several thousand years (Bowechop 7), since before signing the treaty of Neah Bay in 1855. This treaty stated that the Makah have "the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States" (Article IV, Treaty of Neah Bay). Between 1915 and 1995 decreased whale populations, due to commercial whaling, led the Makah to cease whaling, but in 1995 the Tribal Council announced the tribe would resume whale hunting. In 1997 the Makah were included in the International Whaling Commission's (IWC) Indigenous whaling quota in 1997 (Bowechop 10), meaning that subject to the IWC's regulations on hunting methods and whale numbers the Makah had the right

¹ "Self-determination refers to the power of peoples to govern themselves and to exercise autonomy over their affairs" (Sarfaty 468).

to whale, which they did. The Makah successfully hunted a gray whale in 1999 (11). However, after animal rights activists sued the National Oceanic and Atmospheric Administration (NOAA) in *Metcalf v. Daly* the NOAA rescinded support of the Makah quota. A year later, the NOAA issued a new quota to the Makah, animal rights activists again sued NOAA in *Anderson v. Evans* (Brand 296-299). The outcome of *Anderson* left the Makah in a difficult position, having to wait for the Marine Mammal Commission to establish that Makah whaling was in accordance with the Marine Mammal Protection Act (MMPA) and then for their whaling rights to be reinstated (302-304). However, the Makah ultimately will have to wait for a federal government decision that will either sanction their right or abrogate their treaty right (318). The Makah continue to wait for the Marine Mammal Commission's (MMC) approval before they resume whaling.

The Makah must contend with international and federal policy as well as the normative beliefs of NGOs and animal rights activists as they battle to revive their right. The International Whaling Commission (IWC), formed in 1946, influences and attempt to restrict whaling internationally through its "International Convention for the Regulation of Whaling", however the IWC grants quotas to Indigenous peoples for subsistence whaling and granted the Makah "a quota of 20 gray whales from 1998-2002" (Brand 297). On the federal scale, the United States has passed at least five acts pertaining to the protection of oceans and sea mammals (289). These acts reflect the bureaucratic obstacles the Makah must overcome as they attempt to revive their right to whale.

Mary Clark in *In Search of Human Nature* proposes two broad models of how different groups perceive the world. Clark's models include the billiard ball model "one of the most basic images of reality on which the Western world view rests is that all entities in the universe are isolated, discrete objects that have distinct boundaries" (Clark 6) and the Indra's net model which

Clark broadly attributes to most groups outside of Western culture and which sees "everything in the universe is seen to belong to a single, interconnected whole" (8). In her analysis, Clark uses the term "Western" to describe the interpretive models she has created. However, one could also frame these models in terms of Indigenous (Indra's net) and non-indigenous (billiard balls) rather than in a West-rest dichotomy. This dichotomy is preferable insofar as it works toward acknowledging the *sui generis* nature of Indigenous peoples. Despite the fact that these models cannot be applied totally to the Indigenous, or the non-Indigenous groups, they do offer a basic understanding of a key difference in the worldviews of some Indigenous and non-Indigenous peoples. That is to say, these two models offer perspective into how different peoples perceive their relationship to non-humans, specifically their relationships with whales.

Animal rights and environmental activists present an obstacle to the Makah's rights to whaling and cultural continuity by preventing them from exercising their Treaty rights. Activists in recent years have been suing the NOAA to prevent Makah from whaling, specifically, because their world-views on the relationship between whales and humans conflict with those of the Makah. Non-Indigenous environmentalist groups, such as Sea Shepherd, seek to protect oceans from humans and although Sea Shepherd represents the radical end of animal rights activists their stance on Indigenous whaling illuminates one form of animal-human relationship. On the webpage devoted to the Makah on Sea Shepherd's website² they describe the Makah's gray whale hunt as "murder," personifying the whale and endowing it with individual rights equal to those of human beings – this maneuver attempts to place the whales' right to life above the Makah's Treaty rights and cultural rights. Furthermore, their word choice also attempts to draw on readers' emotions by referring to the whale as "young", which adds a sentimental and tragic

² <http://www.seashepherd.org/whales/makah-tribe.html>

mood to the description of the hunt. Interestingly the Makah also afford whales with a place of respect and upon landing a whale in the 1999 hunt, "the whale was sung to, prayed over, and thanked for giving its life in order that the community might thrive" (Bowe chop 13). This ritualization demonstrates the Makah's respect and connection to whales. Although both parties respect whales, Sea Shepherd's relationship creates greater distance between whales and humans by applying an isolating, billiard ball type model of individualistic rights in which humans do not interact with whales. Bowe chop describes how "the elders talked again and again of the need to return to whaling. The young people began to see the importance of reconnecting the spiritual and cultural relationship between whales and people" (Bowe chop 9). Although "Makahs were characterized as vicious, savage, and bloodthirsty by animal rights activists" (11), their relationship with whales is not one of slaughter and domination, but a spiritual and cultural one. In "Indigenous Knowledge of Ecological Variability and Commons Management: A Case Study", Brenda Parlee and Fikret Berkes explore the Gwich'in people's traditional knowledge pertaining to berries and berry harvesting and how this knowledge is used to manage resources. Parlee and Berkes note that the Gwich'in do "not to use the term 'rules' in this context [traditional knowledge]; they simply say 'ways we respect each other and the berries'" (Parlee and Berkes 519). Although this quote comes from the Gwich'in, it demonstrates again the relationship of respect for the environment and nature that often exists in Indigenous peoples' traditional knowledge and practices.

The intimate relationship forged between Indigenous whalers and whales leads to a wealth of traditional environmental knowledge, however, outsiders often neglect to recognize this knowledge as valuable in formulating policy on whaling. Animal rights activists opposing whaling and international legislation determining how Indigenous peoples extract their resources

often overlook the connection between Indigenous peoples, the land and the use of their traditional knowledge. The Makah do not hunt whales with an attitude of domination, but as a renewal of a relationship between themselves and whales, and between themselves and their culture. Although the IWC added a clause into the "International Convention for the Regulation of Whaling" to allow Indigenous groups to whale for subsistence, it failed to include any co-management or consultation, and instead assumes non-Indigenous forms of science are better equipped to judge the health of whale populations. In an amendment to the Convention the IWC prefaces most of the clauses with "according to the advice of the Scientific Committee" (International Convention for the Regulation of Whaling: Schedule) and makes no mention of consulting Indigenous peoples. Even communities such as the Inuit, who have maintained their whaling rights since colonization, struggle to have their traditional knowledge recognized as having the same value as scientific knowledge. In Milton Freeman's book, *Inuit, Whaling and Sustainability*, Freeman describes Inuit elders struggle to have their methodologies and knowledge systems considered when estimating whale populations:

At issue were bowhead biologists' population estimates that suggested that there were only from 600 to 2,000 animals at that time (1977). Inuit elders argued that the scientists had seriously underestimated the number of whales in the population because they counted only whales observed in open water near shore-fast ice, and they failed to count the whales migrating hundreds of kilometres further offshore (Freeman 119).

This demonstrates not only the lack of weight given to traditional knowledge, but also the shortcomings of a strictly scientific approach to regulating Indigenous peoples' environmental rights. Furthermore, this kind of one-sided approach to regulating harvesting rights demonstrates the maintained colonial and paternalistic attitudes that treat Indigenous peoples and

their knowledge systems as inferior to non-Indigenous systems and ultimately seek to control Indigenous rights and peoples. The Makah similarly face colonial, paternalistic attitudes and regulations regarding their traditional knowledge and whaling practices, such as through the imposition of IWC quotas that fail to consult Indigenous peoples about the whale populations in their regions. Bowechop emphasizes the accuracy of traditional knowledge of the Makah and refers to the excavation of the Ozette Makah village, which was discovered after being buried under a mudslide for over three decades (Bowechop 8). Bowechop states, "nearly everything the Makah elders had taught younger Makah or told earlier ethnographers could be supported by the artifacts excavated from Ozette" (9), which demonstrates the wealth and health of traditional knowledge. Parlee and Berkes explain how access rules to berries for the Gwich'in link to environmental factors influencing the health of the resource and state "when comparing these access rules to the nature of the resource, there appears to be significant correspondence between the ecological predictability and abundance of the species" (Parlee and Berkes 522). A general observation can be gleaned from the link between harvesting and maintaining resource health: based on the Gwich'in explanation, Indigenous traditional knowledge insures resources will be harvested responsibly because of Indigenous peoples' awareness of resource fluctuations.

The degree of autonomy Indigenous peoples have over their environment is evident in their legal environmental rights, which reveal to what extent a group has achieved self-determination or continues to struggle under colonial regimes. Indigenous environmental rights offer action-based opportunities to exercise rights to self-determination. Sarfaty, in "International norm diffusion in Pimicikamak Cree Nation: A model of legal mediation", lays out how the Pimicimak Cree Nation used environmental rights as a catalyst for self determination by refusing government payouts for environmental damage created by a government dam (Sarfaty 455-458)

and instead sought international aid and were influenced by international discourse surrounding self-determination and Indigenous rights (466-468). Sarfaty also discusses the different manifestations of self-determination and states, "economic self-determination, for instance, describes a people's control over the development of its land and natural resources" (468). To achieve this kind of self-determination the Makah must gain control of their right to whale. Sarfaty mentions "the international human rights norm that is most frequently invoked and most internalized among [I]ndigenous peoples is the right to self-determination" (268), yet animal rights activists place this internationally recognized right below the rights of whales. Animal rights activist groups, such as Sea Shepherd, prioritize animal rights over Indigenous rights and diminish treaty and self-determination rights. Sea Shepherd's website states that:

the treaty that the Makah cite as evidence of their right to whale specifically states that they have the right to whale 'in common with the people of the United States.' When the treaty was signed, all Americans had the right to kill whales. When whaling was outlawed for all Americans it included the Makah as the rights are 'in common' and not separate. There cannot be unequal rights granted in a system that promotes equality under the law. This is tantamount to extra special rights for a group of people based on race and/or culture and is contrary to the guarantee of equality under the law as guaranteed by the U.S. Constitution (Sea Shepherd).

The ideology expressed by Sea Shepherd seeks to save whales at the cost of perpetuating colonialism at the cost of extinguishing Indigenous rights, title and culture, ultimately perpetuating colonialism. This passage also raises questions of the extent of Sea Shepherd's knowledge regarding ongoing debates about Treaties and Indigenous rights. By attempting to equate the Makah to a special interest group Sea Shepherd is demonstrating their lack of

awareness of the *sui generis* nature of Indigenous rights and title; *sui generis* meaning of its own kind. Based on the *sui generis* nature of Indigenous rights and title Sea Shepherd's argument about equal rights can be understood as an attempt to assimilate the Makah, therefore continuing the colonial project. The Makah's struggle to revive traditional whaling is not just about hunting whales, but rather represents a material expression of their right to self-determination.

Environmental rights, such as the right to practice whaling, can be granted to Indigenous peoples either out of acknowledgement of self-determination or out of a paternalistic desire to protect Indigenous cultures. Cheri Metcalf, in "Indigenous Rights and the Environment: Evolving International Law", makes the distinction between granting rights while denying self-determination and granting Indigenous environmental rights while acknowledging self-determination. Metcalf's two models of how policy making bodies approach Indigenous environmental issues are as follows: the first approach entitles Indigenous peoples to environmental rights on the grounds of cultural integrity - "the cultural integrity model allows for the development of international environmental law based on a human rights approach to environmental quality" (Metcalf 105) - whereas the second model follows that

[I]ndigenous rights with respect to the environment are recognized because [I]ndigenous peoples are accepted to have a right of self-determination. Indigenous peoples' existence as distinct communities supports an inherent degree of autonomy and control over their own development. The legitimacy of [I]ndigenous peoples' rights to make decisions regarding their lands and resources derives from this inherent right to determine the evolution of their own society (106).

Although both models grant Indigenous environmental rights, one maintains the paternalistic assumptions of colonialism by seeming to give environmental rights, insinuating that those rights

belong to nation states, not Indigenous nations and furthermore performs a pan-Indigenous generalization which is similarly problematic because it fails to extend any form of voice to Indigenous peoples. The IWC's reluctance to acknowledge Indigenous self-determination is evident given the lack of Indigenous voice in the Commission. Indigenous peoples wishing to renew or gain a whaling quota must gain their government's support and then a representative from the government, not the Indigenous nation, may appeal to the IWC (Brand 296-297). Furthermore, the knowledge base for determining appropriate quotas and hunting methods comes from purely non-Indigenous scientific research, with no consultation of traditional knowledge. This lack of incorporation of traditional knowledge and Indigenous participation in assessing whale stocks reveals the ideology the IWC upholds in regards to Indigenous environmental and resource rights.

The federal level of environmental policy making also adheres to Metcalf's first model of environmental rights, evident in all the legal obstacles faced by the Makah. However, the Makah have demonstrated a traditional connection to whaling that entitles their environmental rights to be granted under Metcalf's model of self-determination. Ever since the Makah were granted a quota to harvest whales in 1999 and performed their first successful whale hunt in the last 70-some years, animal rights activists have been fighting within the United States to prevent any further whale hunts. Two court cases *Anderson v. Evans* as well as *Metcalf v. Daley* are instances where animal rights activists sought legal action to prevent the Makah from exercising their whaling rights. Brand indicates in regards to the *Daley* case that the "plaintiffs were concerned with the government taking the appropriate legal steps to prevent inhumane whaling" (298) and in the *Metcalf* case this same issue was at stake, as were added concerns, mentioned in a press release referred to by Brand, that "NOAA's failure to 'adequately study the ways in which the

Makah whale hunt could set a dangerous precedent and adversely affect the environment'" (299-300). These cases both ruled in favour of the animal rights parties and have added further bureaucratic processes and obstacles to the Makah's path towards whaling. Following the *Anderson* case the Makah were required to submit a waiver to the MMPA (301) to have their whaling rights reassessed. It is notable that, since its submission in 2005, the Makah's claim has yet to be responded to, which demonstrates the power imbalance that allows the United States to prevent Indigenous peoples from practicing their Treaty rights. Brand describes the waiver submitted by the Makah to the Marine Mammal Commission in an attempt to gain whaling rights; in the waiver the Makah claim their relationship with whales provides "a primary means of subsistence as well as essential social and cultural functions" (291). This special bond is emphasized and recognized by Treaty of Neah Bay, signed by the United States and the Makah. Brand points out the significance of this treaty:

the Treaty states, 'The right of taking fish and of whaling ... is further secured' The Makah were willing to make great sacrifices to protect their way of life. Ultimately, the Tribe ceded 91% of their land (300,000 acres) to the U.S. in order to retain their whaling rights. This is the only treaty that the U.S. signed with a Native American tribe that specifically retains the right to whale (292).

Despite the Makah's historical sacrifice of land to retain their whaling rights and their cultural and spiritual connection to whaling their right to whale has been questioned due to the period in which they ceased the practice. The Makah did not continue their whaling practices like many other Indigenous groups because "in the 1920s, international consensus found the gray whale was near extinction. In recognition of the consensus and out of respect for the species, the Makah Tribe voluntarily ceased whaling" (293). The cease in whaling practices left the Makah

vulnerable to outside parties deeming it no longer a traditional practice, unlike the Inuit peoples of the north who have continued to whale throughout colonial rule. The failure of the United States and the IWC to recognize whaling as a traditional Makah right demonstrates the denial of a colonial past and colonial present. Claiming the Makah did not practice whaling because it was no longer a traditional or integral practice denies the effectiveness of Makah traditional knowledge.

A question raised by those opposed to Makah whaling concerns the time in which the Makah did not whale, Brand refers to how in *Anderson* "the court was particularly concerned with the IWC requirement of 'continuing traditional dependence,' since the Tribe stopped whaling for seventy years" (Brand 300-301). Bowechop points out how "because of the increased difficulty of bringing whales to Makah shores and concern for whale populations, Makah whalers chose to stop pursuing whales" (Bowechop 7) and

though whaling was not a regular activity after 1915, whaling and whales remained an important part of the Makah imagination. Women continued to weave whaling scenes into baskets ... Thunderbirds and whales continued to figure prominently in Makah carving and two-dimensional designs (7).

Cultural outsiders should not determine what constitutes a "continuing traditional dependence". By attempting to assert the cultural value of whaling for the Makah, international and federal bodies are falling back on colonialist habits of assuming to know what constitutes so-called authentic traditional Indigenous culture. Bowechop's description of the continued importance of whaling in Makah collective imagination defies suggestions that Makah culture no longer relies on whaling.

Attaining or maintaining self-determination is important for Indigenous peoples because it allows them to ensure the survival of their cultures. Michael Lee Rose, in *First Nations Sacred Sites in Canada's Courts*, discusses the integral role that sacred sites play in the continuation of Indigenous cultures and claims, "colonialism's trajectory promises no future for [I]ndigenous peoples" (Ross 171). 'Colonialism's trajectory' is ultimately the assimilation of Indigenous peoples, assimilation includes the denial of traditional cultural rights, such as whaling. Bowechop describes how "one young man who participated in the 1999 whale hunt said that he used to look at ... whaling gear and wonder what it would be like for the man who used that gear. He wondered about the spiritual and physical training, the power and the life of the man" (Bowechop 9). Whaling connects living Makah and their ancestors, which Bowechop reinforces by claiming whaling will close "the gap between the past and present" (9). Without the right to whale the Makah are denied the right to continue the existence of their culture. As Ross points out, the refusal of a nation to allow Indigenous peoples to control the fate of their culture not only violates constitutional rights, but also violates international norms on the rights of Indigenous peoples (Ross 171).

Denial of Indigenous environmental rights as a result of normative opposition to hunting practices demonstrates the valuation of animal rights above Indigenous rights and furthermore, illustrates a prioritization of the lives of whales over the continuation of Makah culture. The imposition of a billiard ball model based values on Indigenous peoples deny them the right to maintain their Indra's net world-view that connects them to their environment, traditions and culture. Regulation of Indigenous environmental rights not only effect harvesting rights, but also cultures' entire ontological systems. Despite impeding the Makah's right to whale, the combination of treaty rights, international policy, national policy and dissent among non-

Indigenous peoples, animal rights activists, all demonstrate the varied norms and laws that influence peoples' relationships to animals, the land and each other. Indigenous peoples' rights to autonomy over their environment are crucial for protecting cultures and self-determination offers an opportunity to claim these rights. The continuing struggle for the Makah's right to whale demonstrates the need for new and evolving interpretation of treaty rights as a majority population of non-Indigenous people oppose the norms within treaties; treaties are eternal nation to nation contracts and state law must be adaptive in honouring Indigenous rights in the face of opposition.

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