AMERICAN ENVIRONMENTALISM AND CROSS-CULTURAL CONFLICT: AN EXAMINATION OF THE MAKAH NATIVE AMERICAN TRIBE'S STRUGGLE FOR RECLAMATION OF WHALING RIGHTS

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One of the key debates within American environmentalism over the past forty years has been over its applicability beyond our cultural context. Its staunchest critics find that many of its precepts (most notably the wilderness concept at its heart) are founded on ethnocentric, indeed perhaps colonialist, suppositions. Its proponents however argue that there is an overriding truth to this, one that transcends the need for moral agreement and cultural respect.

This thesis examines one case in which the precepts of American environmental thought were put to the test: the Makah Native American tribe's struggle for whaling rights. In this concept the Makah's ancient tradition of whaling came up against heated opposition from environmentalist critics, many of whom argued that whaling would harm the integrity of the ecosystem and of the whaling stocks, and that therefore the tradition should not be revived. This thesis will argue that ultimately this conflict shows the extent to which American environmentalism relies on ethnocentric presuppositions (including but not limited to the wilderness concept) to make its claims, and that therefore it requires a new path.

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Chapter One: Introduction

In the context of relations between the US government and indigenous tribes within the United States, it can be said that there is a deep history of mistrust and fear that grounds the current status of native politics (Bruyneel 2005). This element has resulted in a long history of marginalization in politics but also in popular culture (Ellingson 2001). Beyond the element of racism however there is a deep philosophical conflict that exists between native tribes and the dominant environmental discourse in the United States that is quite complicated and multi-faceted. It is an acknowledgement of this fundamental conflict as a matter of misrecognition, alienation, cultural essentialization, and non-avowal (Kim 2015) that grounds the question this thesis seeks to ask.

In the case of the Makah (a Native American tribe residing in Neah Bay, WA), there has been a long and deep history of marginalization of their cultural traditions that led to their near-decimation (Reid 2015, Cote 2005, Tweedie 2002). At the center of this is the withdrawal of their right to whale on their traditional grounds, which is arguably the crux of their cultural vitality. In its heyday it brought about social organization, sense of purpose, and other essential elements of a vibrant, dynamic culture (Cote 2005). Ultimately this tradition was ended in the 1920s owing in large part to the rise of commercial whaling (NOAA). When the tribe first attempted to revive their sacred tradition in the early 1990s, they ran into a number of problems. The International Whaling Conventions had designated the Grey Whale as an endangered species, creating a legal problem. Beyond this however there was a burgeoning movement centered around the complimentary yet somewhat disparate issues of

ecosystem health, environmental protection, and animal rights and had consequently created a discourse that was diametrically opposed to the increase in whale hunts, albeit on disparate and perhaps even contradictory grounds (Cote 2005, Russel 2010). This created a very unfavorable political and ideological climate for the Makah, and it is this confluence of factors that has led to a legal battle that has lasted more than two decades now (NOAA).

This conflict has legal, rhetorical, and philosophical dimensions that must be accounted for. Within the existing literature most attention has been paid towards the legal and rhetorical dimensions of this conflict. However, the deep normative conflict at the heart of this rhetoric has not been sufficiently accounted for. And when it has been discussed, those analyzing it have primarily focused upon the animal rights angle, which I will argue is but one side of this conflict and a comparatively narrow one at that. It is the goal of this paper to get at the full flavor of this conflict, in order to make up for these shortcomings. In order to get to that point however, we must first understand the history that grounds this conflict.

Historical Background

The Makah people historically have had a whaling tradition that has been found to go back at least 4,000 years (Cote 20), and quite possibly up to 9,000 (Miller 175). This tradition was a major activity of the tribe that goes to the roots of not only their subsistence but their social organization and cultural consciousness as such (Miller 175). Key to this tradition as a matter of cultural consciousness and social organization was the potlatch. This ceremony involved a highly systematized form of giving of the whale to the tribe in such a way that social organization and tribal status was reaffirmed.

It was also a means of giving surplus and sharing among the tribe as a totalized entity which in turned reaffirmed a cultural identity that transcended social organization (Cote 34). As far as sustenance is concerned, whale oil, meat and blubber constituted 80% of their diet and played a major role within the day-to-day lives of the Makah (Miller 181) Even beyond this, it reaffirmed this cultural identity as one of place and of tradition that relied upon the whale as sacred, and the whale's contribution to tribal sustenance as a sacred gift (Cote 41). This tradition relied upon the continued hunt of whales whose existence can be traced back far before the emergence of European traders and colonists in the 1800s.

The emergence of these traders and governmental bodies in Makah territories was an unforeseen development that led to a debate that continues to rage today. These invaders brought diseases the tribe had no immunity to resist, which came with a detrimental loss of tribal knowledge (Cote 47). The treaty signed in 1855 (which led to the tribe ceding much of their sacred lands in exchange for vague rights to access (Miller 196-198) led to a 'disposal of interior lands' (qtd. in Miller 197) that was detrimental to their social organization (van Ginkel 120). Assimilationist policies on the part of the US government led to a social, physical, and intellectual dislocation of the tribe (Cote 2010). These included the supplanting of indigenous governance systems and educational systems as well as the introduction of the capitalist market into an economy otherwise based on subsistence (Cote 2010). The advent of commercial whaling from the 1840s on depleted the whale stocks to a detrimental point, and this eventually led to a cease of whaling practices completely by 1928 (Gaard 4, Miller 179), and hence the above continuous traditions that kept their culture as such alive and

thriving. In 1937 the US government banned the hunting of grey whales, and later the species was formally designated at endangered, putting the nail in the coffin for this tradition until 1994 (van Ginkel 63)

Combined, the forces above took the Makah into the last ten years. When the Grey Humpback whale was removed from the endangered species list, the Makah began working with NOAA to develop a subsistence quota under the International Whaling Convention for the revitalization of this tribal practice they held to be vital to the revitalization of their cultural identity.

This has led to two major legal battles, the first of which was Metcalf v. Daley. In this case an amalgamation of environmentalist and animal rights organizations sued NOAA for allegedly violating the National Environmental Policy Act for not thoroughly evaluating the environmental impacts of the prospective whale hunt, and the Whaling Convention Act for not properly going through International Whaling Convention procedures for obtaining a quota. This case led to the drafting of a new Environmental Assessment, but the actual whale hunt that came from this was challenged in Anderson v. Evans on the grounds that it violated not only NEPA and the WCA, but also the Marine Mammal Protection Act's moratorium on whaling. This ultimately resulted in the Makah needing to draft an Environmental Impact Statement, a much more exhaustive process.

This battle was quite high-profile and gained much attention in the mainstream press, largely due to the influence of the groups involved that were quite committed to gaining public awareness of the situation. As a consequence of this, there was much rhetoric deployed by the opposition that was quite contentious. An eminent example of

this is the Open Letter to the Makah Nation, in which they simultaneously appeal to the "spiritual tradition" of the Makah while creating a false equivalency between the Makah and other such traditions. This is an example of what is called "noble savage" rhetoric, and this played out in a number of insidious ways in this conflict.

In light of this state of affairs, there are normative dimensions to this conflict that require further analysis. This document seeks to ask what exactly these are, and further seeks to ask the question of what lessons we can draw from this conflict as to how we typically think of environment and our place in it. In order to get to this however, we must first look at the ways in which this conflict has been looked at in the past.

Past Characterizations: A Groundwork for Future Analysis

Critiques of the Law: A Matter of Treaty Rights and US Political Arrangements

At the surface here there is a basic debate over the superimposition of the IWC over the treaty rights of the Makah, as well as whether or not the US is upholding its treaty obligations. There is a far wider context of US settler-colonial practices that has led to this. Cote and Reid both give excellent outlines of this history, pointing to an extremely complicated relationship between the Makah and the Washington government that began with the original 1853 Treaty of Neah Bay (2005, 2015). Once this treaty was instituted, the battle to whittle away what little protections it afforded commenced for the next century and a half, leading to this crisis (Cote 2005, Reid 2015). Miller attempts to locate the Makah struggle within a larger context of the struggle for self-determination (2000). He asks the question "who has the right to choose how to use the animals and whales that native peoples want to utilize? For

tribes, hunting and using certain animals is a cultural, traditional and even a religious issue, and often they are trying to preserve centuries old customs, traditions, ways of life and subsistence lifestyles" (244). Brand notes that "Neither the original MMPA language nor legislative history mentioned Indian treaty rights" (295), meaning that there was a blindness to indigenous concerns present when the Marine Mammal Protection Act was passed (2008). This means that there was an institutional blindness towards these concerns that contributed to the start of this conflict. Miller also cites the Federal Trust responsibility (a legal doctrine that sets out a unique relationship between the Federal Government and the tribes as caretaker) as key to understanding US-tribal interactions. The key question he points to is whether not allowing the Makah to whale on their sacred lands is an abrogation of this responsibility (224-25). Waters and Dugger note that there are key differences in interpretation of the following legal elements: documentation of subsistence need, the "objective and independent confirmation" of this need and of the prospective health of the whale stocks, and the review and monitoring of the International Whaling Convention as well as the original Neah Bay Treaty (350-51, 1997). It is these differences of interpretation that are part of the core of the legal battle, and will be acknowledged as essential to any cogent analysis of this conflict.

Critiques of Rhetoric: A Rootedness in Racist Iconography

At the next level of this conflict there have been characterizations of this conflict as a war of words, or a conflict with distinct rhetorical dimensions. Questions of cultural authenticity, cultural essentialism (the 'othering' of a culture by the idea that it is static, unchanging, and therefore primitive or rooted in the past), and cultural misrecognition

are at the core of these critiques. Van Ginkel most directly addresses the question of representation in the case of the Makah debate, pointing to a combination of noble savage rhetoric, cultural essentialism, and outright racism as being responsible for the structure of the opposition's argument (Van Ginkel 2004). This contributes to my argument by giving an excellent setup for my expected primary claim. Ellingson backs up and augments Van Ginkel's argument (and by extension my own), finding that the specific representation of the "ecologically noble savage" (Ellingson 371) is responsible (2001). Claire Jean Kim agrees, saying that the "ecological Indian trope" (231) is one of the most present fuels of the fire of the opposition. Russell finds that this image in this context and in others is primarily used to "silence or discredit distinct Indian voices that are not always aligned with green politics or concerns" (164, 2010). From this it can be concluded that there is a distinct dimension to this debate that is based on the silencing of Native voices through the use of representations that have their roots in much deeper philosophical constructions. This ultimate conclusion amplifies my argument by giving room for an in-depth grounded philosophical analysis that has not yet taken place.

Critiques of Philosophy: Some Possible Directions

Going down one more level, there has also been some characterization of this conflict as a matter of deeply held moral/philosophical claims. This is the approach I wish to pursue because it is at the heart of the legal and rhetorical dimensions explained above, and it has for the most part been neglected. However, there are hints as to where such an analysis might go.

One side of this debate that is more talked about is animal liberationism as such. Gaard, Calicott, and Cote both speak of Peter Singer and Tom Regan's work on animal

ethics as being highly influential (2001, 1980) on animal welfare arguments in general, and this claim can certainly be applied to the case of the Makah. I intend to go beyond this discourse however, as it is limited at best for getting at the full flavor of this conflict.

Cote notes a striking similarity and indeed relationship between the arguments that the animal liberationists have made and arguments made by deep ecologists (2005). This is because the animal liberationists are making arguments rooted in the following principles: 'right to life', and 'ecosystem health'. I agree with Cote's analysis, and hence intend to show how oppositional arguments are representative of a deep ecological worldview. This is the direction I intend to take this paper, because it would seem to capture a broader discourse than those discussing animal liberation have been able to get at thus far.

Research Question

This neglect of the environmentalist dimensions of this conflict by most of the existing literature leaves the following question: what is the discourse in ideas that is at the heart of this conflict? What can we draw from it? This is a question that in large part remains unanswered in the existing literature because they focus not on the philosophy but on how it has played out (which will certainly be addressed herein).

Approach and Content

In order to answer this question I will first show the arguments given on both sides through two different kinds of primary sources: legal documents (e.g. the briefs as shown above) and out-of-court statements. These cater to two distinct types of audiences, and hence have two different goals in mind. The legal documents consist of

arguments that are for the most part environmentalist on their face (e.g. NEPA violations). However these arguments are also quite procedural in nature and hence can only give us possible clues as to the underlying normative impulses of the opposition. The out-of-court statements (consisting of the statements of philosophy given by the organizations involved as well as the 1996 Open Letter to the Makah Nation) will provide a lens into the kinds of arguments both sides were making out of court, and how they intended to present their views to the public. This in turn will reveal how the public was conceived to view the two parties, giving us more clues as to the motivations behind the kinds of arguments made here.

I will then seek to undertake an analysis of these ideas as provided in both sets of documents through a philosophical reconstruction of their logic. This will be done by looking for ideas contained within these documents that are connected to larger arguments found within American environmentalist thought. This will be done in reference to two main strains of American environmentalist thought: the Leopoldian Land Ethic and Deep Ecology.

Leopold's Land Ethic: A Primer for American Environmentalism

One of the foremost texts in American environmental thought is Aldo Leopold's *Sand County Almanac*. In this text he discusses an ethic of environmental protection which he terms the 'land ethic'. Its fundamental precept is that humanity is not the 'conqueror' or 'taskmaster' of nature, but rather a member of a community of interdependent life forms. Central to this land ethic is leaving ecosystems alone wherever possible, and this is arguably one of the primary origins of the 'wilderness concept'. Thomas Heberlein in his text *Navigating Environmental Attitudes* finds

Leopold's thought to be central to the American environmentalist psyche. It is for this reason that I will attempt to reconstruct his work here as a representative of some of the opposition's key claims.

Deep Ecology: A More Recent and Radical Strand

Deep Ecology is also one of the most influential schools of environmental thought in terms of its impact on the contemporary movement. Its fundamental precept is that nature (or the ecosystem) should be left alone and that humans should drastically scale back or even eliminate their impacts in order to provide for the preservation of 'unspoilt nature' or wilderness. Many of the opposition's arguments can be reconstructed and unpacked using this school of thought, and I intend to do so here in order to show the depth of disagreement over what constitutes a healthy relationship to our environment.

Of particular interest is Arne Naess' platform for Deep Ecology, which gives a sense of how Deep Ecology as a movement had formed. Naess wrote this platform not as a polemic but rather an assessment of where Deep Ecology had gone at the time of his writing (1993). Therefore this document is trustworthy as an assessment and account of the values of what he had called the "deep ecology movement" (Naess 1993). George Sessions and Robert Devall are noted Deep Ecologists whose work can be considered somewhat representative of what Naess is assessing. It is also noteworthy that these are American deep ecologists, and hence their work has particular significance to American contexts. Sessions' defense of the wilderness concept is hence of particular interest, and it is my intent to show how their work is at the heart of this conflict by linking it to the

opposition's reliance on ideas of wilderness, primitiveness, culture, and the biosphere that are in the end non-recognizant of traditional ecological knowledges.

Accounting for the Makah and their Contrast with the above

Once this has been achieved I will attempt to reconstruct the Makah viewpoint that is not as easily accounted for in the primary documents. I will do this through a variety of primary philosophical sources. First and foremost among these is Richard Atleo's *Tsawalk*. This is a comprehensive manifesto of the Nuu-cha-nuulth, a tribe that is closely related to the Makah. Though there are differences in terms of their respective philosophies that are difficult to document, this gives an account of a worldview based on a unique ontology that implies the world as an interconnected network one with itself, and hence a much different view of the practice of whaling.

Charlotte Cote's *Spirits of Our Whaling Ancestors* also provides an excellent lens into the cultural practices in regards to whaling and their significance to the Makah, further pointing out the nature of their mission to revitalize their culture. A thorough account of the philosophy and cultural traditions provided herein will give further grounding to this philosophical analysis.

Argument: American Environmentalist Discourse Ethnocentric in Justification, Argumentation

My hypothesis in this document is that the ideas given by the conservationist opposition are ethnocentric in their justification and argumentation, and are in fact racialized at these levels. Claire Jean Kim notes how in the case of the Makah environmentalist rhetoric became deeply entwined in misrecognition, prejudice, and consequent mistreatment of the Makah, leading to a denial of their culture as a dynamic

non-primitive entity that has meaning in this present time (2015). Russell gives further credence to this idea, finding a critique of their culture as 'non-ecological' within the opposition rhetoric. This critique for him comes from a misconception of Makah culture that comes from the trope known as the Ecological Indian (in Roos 2010). As we will see later, Cronon and others detail how the supposedly 'ecological' leanings of such opposition comes from a standpoint of racial superiority. Therefore there is a racialization at play here, embedded deeply within the justification and argumentation of the environmental thought presented here.

Implication: A Different Ethic is required

If shown to be correct, this hypothesis can be used to point to the distinct possibility that much of what constitutes American environmentalism is non-applicable to indigenous contexts without substantive negative moral conflict. This leads to the question: where to go from here? There are a few possibilities, and I seek to draw them out in the concluding portion of this thesis.

Chapter Two: Legal Arguments (Framing the Controversy Part One)

Introduction

This conflict between the Makah and the alliance of environmental and animal rights groups that opposed them was based on whether or not they had the right to revive their culturally enshrined yet discontinued practice of whaling. This conflict took a couple of different forms: that which took place in court and that which took place out of court. While each of these is an important empirical piece of the puzzle as to making any claims regarding the nature of this battle, it is important to treat them in differing ways because each is being catered with a very specific audience in mind. This chapter is dedicated to the legal arguments made in a court of law, specifically because they must be given their own weight and mode of analysis.

The lawsuits filed in courts of law by the opposition sparked this conflict in terms of its public exposure. These cases gave public attention to the controversy, and captured it in the public imagination via the out-of-court press coverage and public statements made by both sides. Given the power that these cases themselves, and also the way in which they unfolded, had on the trajectory of this conflict, it is essential to attempt to figure out why those opposed to whaling made the arguments that they did. It is a vital part of reconstructing their arguments on a philosophical level, which is a large part of the argument I wish to make in this document.

That being said, this is a difficult task for a number of differing reasons. The first of these which is the nature of these documents. They are formal legal documents submitted to a court of law. This means that they need to be making an actual legal claim with a legally permissible reason for doing so. This constrains the

discussion by virtue of needing to stake claims on particular grounds that are enshrined in current law. In this case, conservation-based claims are given more weight by the opposition in terms of the structuring of their argument. It is highly probable that this is because a conservationist perspective is much more enshrined in US law than an animal rights perspective. This is because animal rights as a visible perspective is a much more recent phenomenon, and hence has not been mainstreamed to near the extent that conservationism has. That being said, the law also requires a very particular conceptualization of what conservation is in order for it to stand in a court of law.

The arguments made here reflect this need in a couple of different ways. The first of these is that they rely on "scientific evidence" of a "significant impact" on the whale stocks[1]; reflecting a data-driven conception of conservation as opposed to a strictly absolutist moral viewpoint. The second of which is the nature of an overriding "conservation necessity". One way in which this is framed in the arguments given is again based on data and scientific evidence. But another way in which it is presented (in the same document no less) is the idea that the balance of the 'public interest' favors further analysis because of the sheer 'possibility' of harm being done. It is important to note this conceptualization specifically because it makes very clear the underlying motive of the opposition. That being the case, it can be said at the very least that the way in which these conservationist arguments are framed in the legal documents is a result of strategic interest.

However, there is also a case to be made here that constraint and strategy are but one element at play. The appellants in both cases make very particular claims under the National Environmental Policy Act that could possess underlying normative

[1] As provided for in the National Environmental Policy Act and related case law

impulses. This is particularly evident when one considers that they could have just as easily made an argument primarily based on public safety (as seen in the appellant briefs). Yet they did not, and chose instead to incorporate these conservation-based arguments. As we will see later, the reasoning behind these arguments can be analyzed in such a way that the normative impulse behind them can at least be somewhat illuminated. These are important therefore not just in framing the controversy but in gaining one particular piece of the normative puzzle at heart here, and hence are vital to my ultimate claims herein.

This section will hence consist of a thorough analysis of arguments given by the appellants in the two major court cases of this conflict. These cases were Metcalf vs. Daley and Anderson vs. Evans. It will systematically go through each claim in order to draw out the conservationist normative impulse inherent in each. It will also point out the arguments that are out-of-place within this common thread, and will explain why they are important to note in this context. This will get us to the conclusion that, while there are certainly arguments in here that are procedural in nature, many of the arguments present here frame the controversy in a particular environmentalist way that is important for getting at the motives of the opposition.

A Note on the Analysis to Follow

The analysis that will take place herein involves delving deep into the legal and procedural documents that constitute the two major cases. These documents are very technical and procedural in nature, and hence a fair bit of time will be spent here sorting out what it is in particular they are talking about, and also to what this means in the context of the conflict as a whole. It is important to do this, as without this

accounting we would not get a sense of the full flavor of this conflict or the specific arguments the opposition makes and why. This is essential to make any definitive claims regarding the value disagreements that underlie this conflict, as well as any claims regarding the nature of the opposition's value-set.

Arguments in a Nutshell

The following is a table of the key claims made in these two cases. The most important arguments are highlighted in bold as these are most central to the claims I wish to make. However other arguments are noted as well so as to capture the full flavor of what is going on here.

Legal Claim	Empirical Claim	Normative Claim	Metcalf v Daley Appellant Brief	Metcalf v Daley HSUS Amicus Curae Brief	Anderson v Evans Appellant Brief
Alternatives to Whaling not "rigorously explored" under NEPA	**Alternatives rejected out of hand rather than explored in any "reasonable depth"**	**If alternatives had been "rigorously explored", they would not have been rejected because they are the most moral paths forward.**	X		X
Would create "precedential effect" that warrants further analysis	**Administrative records of Makah and IWC of IWC meetings as well as the EA acknowledge this could occur, therefore an EIS**	**Could have a harmful effect on the environment through this precedential effect, must further**	X	X	X

	must be prepared	**analyze it through EIS**			
Scientific "controversy" as to effects on resident whale population	**Expert testimony, acknowledgement of possible effects in EA point to need to further analyze through EIS**	**If this is true, then it is a violation of moral principles regarding the environment, right to life. Must be analyzed through EIS**	X	X	X
Possibility of threat to "public safety"	Expert testimony, possibility of whales attacking humans, use of high-caliber bullets warrants further analysis	If this is true, it violates moral principles regarding the sanctity of the 'environment', human life. Must be analyzed through EIS	X		X
Violates IWC because of no "direct authorization", NOAA decision "arbitrary and capricious"	No precedent for US unilateral designation of Makah as an "aboriginal subsistence group"	If exempt from treaty, exempt from moral principles that are established legally through "customary international law"	X	X	X

No "cultural need" for whaling (under IWC)	**Makah had ceased whaling decades prior and had survived, therefore no need to revive tradition**	**If the Makah can survive without it, then generally accepted moral principle dictate they should not restart this tradition.**		X	
No "continuing tradition" under IWC	**Same as above**	**Same as above**		X	
No "absolute nutritional reliance" under IWC	**Same**	**Same as above**		X	
MMPA abrogates Native American Treaty Rights	**There is an overriding "conservation necessity" in the case of the Makah that allows the MMPA to do so.**	**The necessity of conservation means that the Makah's treaty rights should not be upheld because they are in contradiction with the moral principles of conservation and preservation**			X

Balance of Public Interest Favors Plaintiffs	**There is aesthetic, emotional, public safety, environmental, and economic harm that is worth analyzing further (per above arguments)**	**There is moral harm per these public interests that must be taken into account here. Worth analyzing further through EIS**			X

The First Case: Metcalf v. Daley

The first case that began this conflict in earnest was Metcalf v. Daley. This came about as a result of a number of different events. In 1995 NOAA made an agreement to "work with" the Makah in order to have their request for a whaling quota be heard by the IWC (Metcalf Appellants 2). NOAA subsequently began to prepare an Environmental Assessment, which in the end resulted in a Finding of No Significant Impact. As soon as this was released on behalf of the Makah, the appellants in this case (Congressman Jack Metcalf, Australians for Animals, BEACH Marine Protection, et al) sued on the grounds that they had violated the National Environmental Policy Act, the Whaling Convention Act, and the Administrative Procedures Act in supporting the Makah in this way. The court initially granted NOAA and the Makah's motion for summary judgement on the merits of the case, on which the appellants appealed. It is the arguments made by the opposition at this point in the case that I wish to analyze here.

There are three different main claims in this case. The first of which is that the proposed whaling violated the National Environmental Policy Act. They argued

that two specific clauses of NEPA were violated: that requiring a ‘rigorous review’, and that this situation met the conditions for an Environmental Impact Statement rather than an Environmental Assessment. The second is that it would have violated the International Whaling Convention and Whaling Convention Act. Specifically, it does so because the US pooled their quota request with Russia’s, and because the US claimed it could unilaterally designate the Makah to be a group in need of a subsistence quota. The third is that the Administrative Procedures Act was violated when the court allowed the Makah to withhold 1/5 of the records requested by the appellees.

This combination of arguments is interesting for a couple of different reasons. The first of which is that they would seem to point towards an environmentalist impulse. The second is that, in light of this, invoking the Administrative Procedures Act would appear to be out of place in the grand scheme of things. Hence in laying out these arguments I will show that there is a combination of procedural interest and normative impulse inherent in these arguments that can give us possible clues as to their motivations for framing the controversy in this way.

National Environmental Policy Act Claims

The first set of claims the appellants make in this case is that the National Environmental Policy Act was violated in two different ways. The first of which is that they did not undertake the “rigorous review” required by NEPA. The second is that the Environmental Assessment they conducted was insufficient under NEPA. This set of arguments is fairly linear, and contribute to the basic claim that NEPA standards were not followed by NOAA. This set of arguments is important to

note because they frame the controversy as specifically around an environmental issue, giving us clues as to how they wanted this conflict to be seen.

No Rigorous Review under NEPA

The first claim the appellants make under NEPA is that NOAA failed to engage in required review under the National Environmental Policy Act before negotiating a pre-existing agreement with the tribe. In their view, this eliminated the opportunity adequately to explore alternatives because they had already made an agreement and hence tainted the whole review process. The appellants' specific argument here is that as a result of these alternatives to whaling were not "rigorously explored" (Metcalf v. Daley Appellant Brief 13) Their support for this claim is that the alternatives mentioned in the draft Environmental Assessment had been rejected out of hand rather than actually explored in any reasonable depth. For example, they note that the Makah's rejection of the five-year monitoring program under the ESA for the recently de-listed gray whale was based on the assumption that it would ignite a "difficult controversy" with the US government (Metcalf v. Daley Appellant Brief 13). This implied, appellants argued, a pre-existing bias on the part of NOAA towards the tribe that was carried through in this document. The appellants also viewed with disdain the Makah's rejection of whale-watching as an alternative. They viewed the rejection as counter to the original proposal, which had named this as a "commercial enterprise" in which consumable whale products would be sold "intentionally" (Metcalf Appellants 13). This is interesting in that the opposition forms this argument under the assumption whaling were thoroughly a profit-seeking venture, or as though profits were their primary motive (something the Makah and others would hotly dispute). This is in

complete ignorance of the cultural significance of this tradition, which is important to note as we go on in terms of their general treatment of 'culture'.

This claim that alternatives to whaling had not been rigorously explored is interesting in that the appellants do not seem to give a clear definition of this term. They base their claim on the fact that alternatives were, in their view, summarily dismissed. Further, they do not provide alternatives that would have allowed for more rigorous explanation, suggesting that the only alternative would have been not to reject them at all. This would seem to be the underlying claim here for a number of reasons, most notably because there is no burden of proof provided here. Furthermore, their argument seems to rest on the fact that the whole NEPA process was "belated" (13) and therefore rushed in some unreasonable way. The arguments they *do* provide against the rejections of alternatives rely on quotations from discrete individuals at IWC meetings as well as the fact that they raised the whaling plan "at the first instance" as a commercial enterprise (13). Therefore there would appear to be no solid basis for what they are trying to say here. This argument would be repeated briefly by the Humane Society of the United States in their amicus brief, showing that this claim is a primary driving force (or at least a claim that they thought would stick). There is moreover a distinct possibility of a moral undertone here because, other than out-of-context statements, no empirical proof is provided. This would be based on a very particular conception of what constitutes the best alternative (i.e. not whaling) that would come from conservationist and animal rights-based ideals. Hence, given the available information, this claim does represent one particular pole of this value disagreement and is worth examining as such.

Environmental Assessment Unlawful Under NEPA

The next claim that the appellants make under NEPA is that the Environmental Assessment that cleared the way for the Makah was prepared unlawfully. They claim that there is enough controversy in terms of precedential effects, environmental impacts, and public safety to warrant the preparation of an Environmental Impact Statement (a much more in-depth document) to dispel the controversy. These arguments, while united in their opposition to the EIS, are disparate in terms of their logical coherence and the value-sets that seemingly underlie each. One the one hand there are arguments based in the need for conservation and preservation of the environment and ecosystem which would seem to come from a particular preservationist (or even biocentric) worldview. On the other hand are very anthropocentric arguments surrounding public safety. This is important to note in order to properly analyze these claims, because here we can see where strategy and values align and disconnect for the opposition.

The first claim the appellants make under this is that whaling would create a precedent that warrants further analysis. They claim that other aboriginal groups in the US and in other countries (particularly Japan and Russia) would jump on the loophole that would be created with the acceptance of the Makah's quota, which they back up with the administrative records of IWC meetings as well as the EA, which acknowledges that this could occur (which is interesting in itself in that the Makah have a unique treaty right to whale that none of the other groups mentioned possess). They believe that the EA and the court that made the initial decision in this case failed to

evaluate these effects in light of the Makah's own acknowledgements, and hence the EA should be tossed.

The second claim they make under this is that there is substantive scientific controversy as to the effect that whaling would have, particularly on what they deem the "resident" population (that is, the population of whales that they deem to routinely come back at least once a year). They note that comments from several whale biologists and other experts given at IWC meetings and in other venues including the court itself were ignored under the EA, and that there was no "convincing statement of reasons" as to why per these comments this is not a practice whose impact is "highly controversial" in the sense that there is enough dispute to warrant further analysis (Metcalf v Daley Appellant Brief 16). The appellants found the dismissal of these comments to be quite speculative, and hence dismissible in favor of the preparation of an EIS. They also claimed harm to the "unique characteristics" of the National Marine Sanctuary compelled the preparation of an EIS on similar grounds.

What must be noted about these claims is that they imply a genuine concern for the environment and the impact that whaling would have on it that is in keeping with a preservationist worldview. The argument regarding the unique characteristics of the Marine Sanctuary adds to this, because it implies a desire for preservation not only of the whales, but of the general ecosystem. These arguments would seem to imply a preservationist impulse in spite of the fact that they are more readily usable in a legal setting[2] for a couple of different reasons. The first is that they are in keeping with the general ethos of these organizations as stated in their own philosophies. The second is that the appellants specifically decided to rely on these

[2] See above comments on how conservationist arguments are more easily called upon in a court of law

arguments when they could have just as easily gone with a pure public safety argument or an argument based on “rigorous exploration” or the administrative record. And while these arguments are more readily available, they are not the only ones they could have used (and indeed are not). Therefore it is fair to say that at least here there is a normative impulse towards preservationism at heart.

The final claim the appellants make as to why the EA was unlawful is that there would be a threat to public safety as a result of the types of weapons the whalers would use that was not analyzed. The appellants also claim that the whales themselves would possibly pose significant harms to humans in such conditions. The appellants find the dismissals in the EA to be wholly inadequate, once again in light of public and expert comments.

This argument about public safety is rather strange to see among all the environmentally oriented arguments. While the use of military weapons in a public space could be considered contentious in and of itself, it is worth it to note the seeming out-of-place nature of this argument. This is particularly evident when you consider that the lead plaintiffs are not typically concerned with threats to ‘public safety’ per se, particularly when it is only humans who would be in danger. This could signal any number of different things. It could mean that the appellants were not confident that the other arguments would work. Or it could be that they were attempting to gain traction by making an anthropocentric claim that would make the court more sympathetic. Either way this is quite odd, and is interesting to note here in terms of the logical coherence of their case as a whole as well as the coherence of the underlying moral strands within it.

IWC, WCA Claims

In addition to the multiplicity of claims made under NEPA, appellants also made two distinct claims under the International Whaling Convention and Whaling Convention Act. These claims are that NOAA's recognition of the Makah's cultural need to whale in absence of direct authorization by the IWC body was "arbitrary and capricious", and that there was no explanation of how this hunt would cooperate with WCA regulations. These arguments also important to note because of their contribution to the framing of this controversy as also being of an environmental issue.

NOAA recognition of Makah need "Arbitrary and Capricious"

The first of which is that NOAA's recognition of their cultural need to whale in absence of direct IWC authorization is "arbitrary and capricious" in the sense that it goes against precedent and hence customary international law. This is further complicated in their view by the fact that the EA assured the public that the only way to solve this issue would be a direct ruling from the IWC while the Makah and NOAA pursued a path that would not get a direct ruling but rather would couple the Makah's quota with that of Russia's. Keep in mind that this occurred because of a particular diplomatic setup between the United States and Russia that would allow them to exchange quotas on their own terms. Furthermore, there was no established mechanism for direct IWC authorization, as the Makah response brief points out (14). They make the case that there were very real diplomatic and political considerations in that there were individual IWC delegations that did not wish to vote "for" Makah whaling because of their constituents, and hence a joint request between the United States and the Russian Federation was the best way to approach the situation from an international

politics standpoint. Furthermore the IWC could have just as easily rejected the very clearly spelled out portion of the quota (20 whales) for the Makah tribe (14).

No Explanation of Cooperation with WCA Regulations

The appellants further claim that there was a failure to explain how they would cooperate with WCA regulations. They view the claim that the US can unilaterally authorize a subsistence whaling quota for a particular group as disingenuous and in violation of WCA regulations because the IWC was never consulted. They add to this claim by pointing out that this unilateral change in policy was never subject to public comment. This is interesting in that they are making a transparent appeal to the 'public interest' even in this argument. This is because it would seem to point to a normative impulse that preservation is in fact in the 'public interest'. If this is the case, a further assumption is made that the public agrees with them, which is interesting to note. This is because such an assumption further points to the ways in which this kind of preservationism manifests itself in the public imagination as well as in the minds of the opposition. This is important to note if we are to get at the depth at which this mindset fuels the opposition's motives and argumentation and hence get to the value claims that underlie said argumentation.

Administrative Procedures Act Violation

The final claim this brief makes (wholly unrelated to claims regarding the environment and the need for conservation) is that they should win because the initial court committed a "grievous error" by allowing more than one-quarter of the administrative records the plaintiffs requested under FOIA to be withheld by NOAA. These are records relating to the decision-making process that NOAA undertook when

deciding whether or not to authorize the Makah quota. They claim that the court violated numerous precedents, claiming that the Administrative Procedures Act requires that all decisions be made "in light of the *whole* record". NOAA responds in their brief that this withholding was a matter of what was actually relevant to the decision as opposed to "every single piece of paper" peripherally related to it (Metcalf v Daley Appellee Brief 23).

This claim, while not particularly relevant to the overarching issues of this conflict, is interesting in that they make a claim wholly unrelated to the scope of the case, essentially saying that even if the court does not buy any of these arguments they should win based on an administrative technicality. That they placed this at the bottom of their brief after all of their other arguments implies the nature of this argument as being a safety net, a means of winning legally if they cannot win on the more ideological grounds they put forth in previous claims.

Humane Society of the United States Amicus Curae Arguments

More telling about the motives underlying the opposition (particularly the NEPA claims) than the appellant brief is the amicus curae brief filed by the Humane Society of the United States. This organization sought to encapsulate the arguments made by the appellants as well as hone in on a few key points. As we will see, these arguments constitute a particular discourse on this issue that contributes to the way in which this conflict is about cultural misrecognition, essentialization, etc.

There are two claims here. The first of which is that the IWC and WCA standards for cultural need were never actually met or recognized. There were two standards at heart here: "cultural need" and "continuing tradition". These arguments are

interesting in that they indirectly purvey a discourse of authenticity that is found in the Open Letter to the Makah Nation (seen in the next chapter). Hence these arguments are of particular significance, because there is much more of a chance that these arguments had a specific motive and character that transcends legal strategy. The second argument put forth here is that it was illegal under these for the USA to unilaterally designate the Makah as an aboriginal subsistence group. This argument is more likely than not procedural in nature, but again it is important to lay out to frame this controversy effectively.

IWC, WCA Standards for Cultural Need Not Recognized

The HSUS first repeats the claim found in the appellant brief that the IWC has not authorized the Makah whale hunt, citing both the administrative record showing multiple statements on the part of IWC commissioners against the Makah hunt but also the fact that the IWC had never updated their list of authorized aboriginal whalers to include the Makah or anyone else in the United States other than the Alaska Inuits. This to them meant that NOAA's decision could be struck down because aboriginal whaling required a *direct* IWC authorization (using their standards/opinions of what constitutes subsistence, etc.) as opposed to the United States issuing a quota using their definitions of those terms (HSUS Brief 4-8).

The HSUS further elaborates on this argument by stating that relevant IWC, WCA standards were not incorporated into NOAA's decision in the first place not only because of this but because they were using different definitions of these words. Where this gets interesting is the way in which the HSUS justifies this claim.

The HSUS claims fundamentally that the Makah cannot show a true "cultural need" to hunt whales (6). This to them is shown through several facts. The first of which is that the Makah had ceased whaling many decades prior, and had survived in spite of it in terms of subsistence, livelihood, etc. This to them is the difference between the Makah and, say, the Alaska Inuits.

Similarly, the HSUS finds a lack of a "continuing tradition" for the same reasons (7). They claim that while bolstering the Makah's "cultural pride" in this way is a "worthy endeavor", it does not mean that it fits the IWC's criteria for issuing an aboriginal subsistence quota. They also claim that for the above reasons the Makah cannot meet the "nutritional" or "subsistence" standards of the IWC (7). They claim past precedent as stating that in order to meet these requirements there must be an "absolute nutritional reliance" (7) on meat or other things mentioned. They state that there is no evidence of nutritional deficiency as a result of the absence of whale meat, but rather that the Makah "would like" to include whale meat in their diets. This is an interesting and very strict interpretation of the accompanying case law. This is important to note because they are setting up boundaries that no reasonable person would be able to follow. In the Makah's case it was by necessity that they ceased whaling because commercial whaling had made it wholly unsustainable. It is important to note that this has no bearing as to the cultural or practical significance of whaling, but only that they had no real choice in the matter if they wished the species to continue (a goal that, supposedly, the opposition holds in common).

The implications of the above arguments will be fleshed out in later portions of this document, but it is worth noting at this point that they reflect a certain perspective

on how culture works. As Van Ginkel points out, these arguments reflect a very particular view of culture as a linear "progression" (28)' it implies that a given practice must remain constant and consistent in order to be considered an integral aspect of a given culture; and that should a culture abandon that practice, it cannot return to [or: readopt] it, because its abandonment implies that said practice was view as 'primitive' or 'backward'. This implies something about the nature of the Western environmental thought they draw on that is shown through their arguments in its conception of time. This will be expanded on in later sections.

US Cannot Unilaterally Designate the Makah as an "Aboriginal Subsistence Group"

The HSUS further finds that this constitutes an interpretation of the regulations that "defies logic" (9). They claim that while the language of the clause itself is unclear on its face, legislative history shows that the intent was to allow aboriginal whaling only for IWC-recognized groups (9). The HSUS further claims that it goes against the US's own "past behavior" (9). In the past the US had applied "customary international law" within its' domestic courts' decisions, and now they appear to be going against that precedent. Customary international law in the past has meant that states must applied precedent to their actions as well as the acknowledgement of other states' behavior. Here the HSUS is claiming that the US has gone against customary international law by going against its own and others' past behavior on this issue.

Repetitions of Arguments from the Appellant Brief

Beyond these unique claims, the HSUS gives a fair amount of repetition from the appellant brief in this section. First, they repeat the "precedential effect" argument given in the appellants' opening brief, adding evidence from the IWC

administrative record showing that Japan has repeatedly petitioned the IWC for a subsistence quota under the premise that certain coastal whaling communities should be seen as aboriginal groups (9). Also present is the claim that if the court upholds the US's 'unilateral' designation of the Makah as an aboriginal group then others will do the same thus drastically increasing the amount of whaling that occurs to unsustainable levels. They further claim that the United States' strong role in establishing the IWC moratorium means it should not go against it. These repetitions could represent not only a commonality with the appellants in the privileging of these claims as supposedly the ones with the most effect, but also in terms of a concern for the environment.. This gives some credence to the idea that there is a common view of the environment and nature at work here at least to an extent. This will be expanded on in later sections.

The Second Case: Anderson v Evans

As a result of the ruling in Metcalf v Daley that called for a new Environmental Assessment that was free of the previous agreement between NOAA and the Makah, on July 12 2001 NOAA published a final Environmental Assessment that expanded the hunt in several key respects. It eliminated restrictions on time and location, making the scientific determination that no "resident population" of whales actually exists, and hence there is no need to restrict whaling for the Makah. This new finding prompted a new lawsuit on the grounds that this newly authorized expanded hunt violated not only NEPA, but also the Marine Mammal Protection Act and the court's mandate the Metcalf v Daley ruling. The lead plaintiffs were the Fund for Animal, the Cetacean Society International, Australians for Animals, and a host of other organizations both animal rights and conservation-focused. This continues the trend of animal rights

organizations and environmental organizations combining forces, which makes the argumentational thread here most interesting but also more difficult to separate out. This important complication will be elaborated on in later sections.

There are three main claims under this case as well. The first of which is that NEPA was violated, in quite a similar fashion as argued in the first case. They bring up new evidence to re-evaluate this claim. The second is that the Marine Mammal Protection Act would be violated, because under it is a moratorium on whale hunting. This argument is interesting in that it is new, and could have been brought up in the previous case as well, theoretically. The third and final claim here is that the balance of harms favors the plaintiffs, and that as such not resuming whaling would be in the public interest. With analysis of these claims I will further show the extent to which we can gain substantive clues as to the motivations the opposition had for making these particular claims.

NEPA Claims: Repeated in light of 'new evidence'

The first claim the appellants make in their opening brief is that defendants have violated NEPA (a repeat of the claims in Metcalf v Daley) and the court's mandate under Metcalf v Daley (Anderson v Evans Appellant brief 20). The expansion of the whale hunt authorization for which the final Environmental Assessment provided meant that one had to undergo the NEPA evaluation process anew in their view. Furthermore, in their view, a "convincing statement of reasons" (Anderson v Evans Appellant brief 20) as to why an Environmental Impact Statement need not be written must be provided under this expanded authorization for a number of reasons (again a repeated argument)

Threat to Public Safety Given New Weight

In this case old arguments about public safety were given new weight under the expanded hunt, with expert testimony pointing to the risk it would potentially pose to humans involved and the surrounding areas. They view the deference to the tribe's hired expert on the part of NOAA to be a violation of the court's mandate under Metcalf, which required an 'objective' reevaluation of environmental impacts "free of the previous taint" of NOAA's previous agreement with the Makah (Anderson v Evans Appellant brief 29-30). They also claim that they did not explain why, even if this report were 'objective', there was not at least a "controversy" sufficient to warrant the preparation of an EIS (31).

This reasoning is quite odd. Firstly, that they would once again repeat an argument not related to the rest is interesting because it would imply, once again, that they were not confident in the other claims they were making. Secondly, as the Makah note in their response document, they do not question the substance of the Makah's expert findings but instead question whether or not the evaluator was truly "independent" (Anderson v Evans Makah Brief 22). This would imply a suspicion on their part that quite possibly stems from a mistrust of the Makah as a whole (or quite possibly of NOAA). This is interesting to note as we go on, because it could imply that they suspected their case was on shaky legal ground.

Scientific Controversy Reignited

The appellants make a similar claim regarding the existence of "sufficient controversy" as to the effect of the hunt on the resident whale population. They note that while the EA does acknowledge the display of "site fidelity" (i.e. the

continual return to a particular location) on the part of up to 60% of the whale population it dismisses the danger by saying that the whale hunt "does not appear" to have a large enough effect to warrant controversy. They contend that this is contrary to scientific evidence as well as NOAA's own acknowledgements in the EA. They further contend that the failure to even acknowledge the need to further study this constitutes a violation of NEPA. This is interesting to note because they appear to be taking a stance that invokes the precautionary principle. Such precaution on their part is interesting because such precaution tends to come from a moral rather than scientific viewpoint (as evidenced by NOAA's data showing there is no reason to have such precaution in the first place).

The appellants also claim that the hunt will have "uncertain or unknown effects" as a result of its expansion. These effects are outlined in the above arguments, but this is another clause of NEPA that they use to defend their claims. They also state that other criteria set by the Council on Environmental Quality (a regulatory body of the executive branch) are involved, such as the impact on the sanctuary (again a repeat of Metcalf v Daley arguments).

The appellants also claim that the precedential effect was not sufficiently analyzed, another holdover from Metcalf v. Daley. They add new evidence to this argument from the language of the environmental assessment, which acknowledges that other tribes were considering submitting their own requests based on the outcome of the assessment. They further claim that in spite of the low odds of others countries seizing on the newly created loophole that the EA state, the "reality" is that this will occur (Anderson v Evans Appellant Brief 45). They do not substantiate this claim further.

They also claim that the US's stance within the whaling community as a nation who advocated for the IWC moratorium will be significantly weakened if they apply an aboriginal exception to it, thus weakening the strength of the accord itself.

This last claim is particularly interesting in that they make a specific claim that the moratorium is something that cannot be weakened even if it means granting a particular cultural group a unique exception based on their pre-existing treaty rights. This makes the stakes for them very clear as to why they are making the case that they make, and also makes clear the underlying moral strand, whether it be for conservation or simple animal rights purposes.

It is crucial here to note the possible implications of the placement of these repetitions of arguments. The first possibility is that the appellants thought these claims would be more likely to stick given their claims of "new evidence" and the expanded nature of the final NOAA authorization of the Makah whale hunt. However, it can also mean that they believe these arguments to be the key thrust for their underlying moral claims. Given the fact that these arguments were repeated with a similar set of plaintiffs however there would seem to be more than merely a strategic reason for this, particularly given that they could have filed a case purely on MMPA grounds (see below section on MMPA claims). This is key to keep in mind as we proceed here.

MMPA Claims: A New Twist

The new and unique argument laid out in the appellant's brief is that the MMPA was violated because they did not go through the MMPA process for an exception to the take moratorium the MMPA imposes (46). This process would have involved obtaining a waiver, which in their view would only have been granted "in

accordance with sound principles of resource protection and conservation" per accompanying case law (46). They do not provide an explanation as to what these principles are in this section, which is interesting. They refer back to the "principles and policies" of the MMPA, but not in an explicit way. They do add the following in their first response to the Makah's petition for rehearing: "...shall give full consideration to…existing and future levels of marine mammal species and population stocks…marine ecosystem and related environmental factors" (Plaintiff first response to petition 7). That they would bring this up again implies a stricter definition of "full consideration" that would imply a moral prerogative in favor of the plaintiffs. This is because consideration had been given and a different answer to their question had been produced up to that point prior to them making this claim. As the Makah point out, the EA gives full consideration to these factors, hence making their claims suspect at best.

No Exception Provided For in MMPA

The appellants further claim that the Makah do not fall under previously provided for exceptions because they are not Native Alaskan, Inuit, Eskimo, etc. (46). Again this is interesting in that they make this case based on the premise that the Native Alaskans *should* get this Per exception because it is "critical to their ongoing subsistence needs" (52). By extension, they believe the Makah should not get this exception for the previously stated reason that this "critical need" is *not* 'ongoing' and hence should not be considered in the same way. They also make a critical distinction between physical and cultural needs that is implied in the way they set this argument up,

implying that cultural needs are not a significant contributor to overall well-being[3] (or at the very least not worthy of a consideration as a justification for an exception to the need for 'conservation'). This gets back to the previous discussion regarding the Western view of culture as a linear "progression", and adds a new twist to this line of reasoning in that they view culture as not being worthy of consideration in the same way as explicitly physical needs. This argument gets to these viewpoints quite explicitly and hence deserves noting as a means of getting to these questions that are central to understanding the conflict as a whole and the philosophical positions that underlie the claims herein.

Overriding Conservation Necessity

The appellants also claim that the that the MMPA's plain language regarding the take moratorium makes perfectly clear what the restriction is, and as a result of this it cannot be said that the Makah's treaty rights are not abrogated by the MMPA (as it says in the EA) (48). They further back this up with accompanying case law, stating that there is an overriding "conservation necessity" in doing this that is backed up by precedent, and further They characterize Congress's power to abrogate treaty rights as "undisputed" (50). This is an interesting claim for a number of reasons. The first of which is the presumption that "conservation necessity" (per their definition in the case law) overrides the need to maintain cultural identity. The second is the presumption that Native American treaty rights (established, from the tribe's point of view) to maintain some level of independence and separation from the West's viewpoints) should be made to comply with their definition of general moral principles. This presumption is

[3] The Makah have a response to this in their contention that cultural harms override the plaintiffs' definition of the 'public interest' (Anderson v Evans Makah Response Brief)

particularly important to note because it implies a very particular viewpoint as to the state of Native interests in contrast to 'US interests' (i.e. that they are by definition superior because they are 'generally accepted'). As such, this is key to understanding the opposition's underlying premises.

Exemption for Makah Not Expressly Authorized Under International Treaty

Furthermore, the appellants claim that the Makah exemption was not "expressly authorized" under any international treaty (including the IWC), which means that they cannot apply the exception to international treaties provided for in the MMPA either (52). Their use of "expressly authorized" here implies a very strict interpretation of what this means. Given the previously stated fact that the IWC quota was the "maximum authorization" the Makah could have obtained (Metcalf v Daley Makah response brief 14) this is an interesting claim to repeat here. This claim as a whole is important to note because it sets up a very particular boundary of what is fair and legally permissible that is, per the Makah's own previous accounting, is legally impossible to overcome. It sets up a situation in which the court has no choice but to give the plaintiffs the victory by default, which is very arbitrary in a way. This gives us a sense as to the extent they wished to overrule the very clear claims the Makah make, as well as their underlying sense that this is how they had to do it.

Implications of MMPA Claims

The above set of arguments under the MMPA are very interesting for a number of different reasons. The first of which is that they are new arguments introduced by a wider set of plaintiffs than we find in Metcalf v Daley. This means that the argument they wish to put forth is, while certainly repetitive to a large extent, at

least somewhat different in its underlying thrust. By invoking the MMPA, it adds an explicit new dimension of animal conservation to the picture while preserving the elements of broader environmental conservation we find in Metcalf v Daley (indeed the MMPA argument and the public interest claim are the only unique arguments found here). In spite of this new element, they attempt to wrap their new claims into the same framework as their existing ones, framing it as an issue of general environmental conservation. It is entirely possible that this is a primarily legal strategy, particularly given the primary plaintiffs in this case. However, it is also important to note that they used the "conservation necessity doctrine" which specifically provides for a data-driven approach as to the whale population stocks (as opposed to an absolute moral stance against killing whales). This could be because it was the only option available to them, and indeed there is no way to know for sure. Regardless, it is still important to note as a matter of getting to the flavor of this conflict as it is presented here.

Another presumption in here, as stated above, is that the treaty rights of an indigenous people with a differing worldview can be abrogated in the name of 'conservation' without their consent. Again, this is interesting because it implies a privileging of Westerns morals regarding 'conservation' as inherently superior. I note this again here just to state its importance to all of the claims above, and to carry it through as we go on. This will be expanded on in the section of philosophical analysis.

Public Interest Argument: The Backstop

The appellants' last argument is that the balance of the public interest demands a preliminary injunction. They base this on the tangible harms pointed out in previous arguments, as well as the fact that it has been stated by some tribal leaders that

whaling is “not even a priority” (63). This is an interesting way to make their case for a number of reasons. The first of which is that while some stated that it was not a priority, others vehemently disagreed. Therefore while there may certainly have been disagreement within the tribe, this does not mean that there is not a fundamental cultural position at stake regardless of its ‘prioritization’. That being said, it is impossible to tell what side of this disagreement is actually ‘representative’. Therefore there is some merit to being cautious about making claims in either direction.

What is most interesting about this argumentational thread however is the way the appellees responded to it. In the response brief filed by the Makah tribe they rebut the emotional, economic, and safety harms put forth by the plaintiffs in favor of another set of harms that they feel should be given greater weight: harms towards cultural identity. They claim that Makah tribal members would suffer an equal if not greater loss of cultural identity as a result of the inability to revive their tradition. They claim that the centrality of this tradition to the Makah culture is indisputable not only in the evidence record but in the historical record of the tribe as a whole. They further state that as a result of this centrality the revival of the whaling tradition would provide a great service to the tribe by allowing them to “…instill the traditional values of the Tribe which help young and old to conquer the vicissitudes of modern life” (Anderson v Evans Makah Brief 55), meaning in essence it would allow them to continue as they always have and return their culture to being a vibrant relevant entity in today’s world. They wrap up their claim with the point that the continued stalling of the revitalization of their culture as a result of the continued non-meritorious litigation of this case outweighs the “emotional, aesthetic, and economic harms” the plaintiffs put forth (67).

This is where the core clash of ideas to an extent becomes clear. The plaintiffs are citing harms to nature, the environment, and the economy that are harms to a particular way of life and a particular conception of nature, the environment, and man's relation to it. The Makah respond by pointing to the harm to their way of life, and by extension their cultural conception of what the relation between humanity, nature, and society is. We will see this laid out in the following section on "public arguments" much more explicitly, however this makes it clear exactly what the stakes were in this conflict, even if some of the arguments and their phrasing may have been the result of strategic or political considerations.

Conclusion

This conflict in the legal realm is multi-faceted, with many legal and moral strands threaded within it that are seemingly contradictory or out of place when you actually spell out what they are as standalone arguments. Figuring out which arguments are actually relevant to consider when making philosophical inferences is a complicated process fraught with potential landmines. However this section attempted to provide a cogent outline for how such a process can be carefully undertaken within this conflict. This gives us a place to start in terms of figuring out where the opposition and Makah stand on these issues, and gives us things to look for in the section on the public arguments in this case. This is therefore one piece of the puzzle, and one that must be supplemented with a thorough analysis of the arguments made out of court. It is in this way that we can begin to see the motivation for the arguments made in this conflict, and hence get to the normative conflict that was created here.

Chapter Two: Public Arguments (Framing the Controversy Part Two)

Introduction

This conflict between the Makah and the coalition of anti-whaling and pro-conservation groups that opposed their attempt to revive their whaling tradition took two distinct dimensions. The first of which is what took place in courts of law (which was explored in depth in the previous section). This sparked the conflict by giving it a widely covered public face. This resulted in much media and press coverage, as well as statements being made out of court in attempts to persuade the public. This constitutes the second dimension of this conflict: the public discourse. It is this discourse that will be the subject of this third chapter.

It is necessary to cover this because the nature of the legal debate is such that it cannot be relied on in and of itself. As mentioned in the previous section, the nature of the law is such that certain arguments need to be made in its confines in order to be considered legally admissible. Given the fact that conservation as an ethic is deeply enshrined in American law (as opposed to pure animal rights concerns), this means that the legal debate will be heavily slanted towards conservationist concerns.

While the legal debate does possess this inherent slant, this does not mean that the conservationist perspective is not genuinely present in this conflict. It will be the ultimate argument of this document that this perspective was actually a much broader consensus than the animal rights perspective, and hence worth analyzing here on its own terms. This argument will be given through an analysis of the ‘non-legal’ side of this debate.

To do this we will begin with an analysis of the media coverage of this debate. Here we will get a sense of what the most radical arguments were here, and hence the ones that the media covered the most. This will give us a fuller flavor as to the way this conflict was spun by more radical organizations, showing us how this debate (in the public sphere at least) was portrayed as quite one-sided.

Then we will look at the statements of organizational philosophy given by four representative involved organizations: Ocean Defense International, the Humane Society of the United States, Australians for Animals, and the Earth Island Institute. Looking at the first three will give us a flavor as to how animal rights organizations did predominantly take the lead in this case, and hence skewed the media debate in a very particular direction on terms that were quite different from those of the legal debate. The Earth Island institute and its contemporaries provided a contrast to this, and a conservationist undertone to these actions that while may not have been as visible provided a particular viewpoint to this discourse that is worth analyzing on its own terms.

Then finally we will look at an open letter put out in 1996 that was signed by 300 different environmental and conservationist organizations that wound up either being lead plaintiffs or co-sponsors/endorsers of these cases. This will give us a sense as to how conservationist and animal rights arguments were deeply intertwined, in part because of how deeply enshrined the conservationist ethic is in the American environmentalist psyche. This realization will give us an opening to engage in the analysis that the next section will attempt to undertake.

Media Coverage: Legal, Procedural, Sensationalist

Much of the media coverage in this conflict is procedural in nature. It does not shed light on the underlying value disagreements, instead choosing to focus on the legal disagreement. Many of these articles, for example, talk about the NEPA claims without discussing why they were made at all (see Register-Guard 2002, Moscow-Pullman News 2001, etc.). While much of this is to be expected in the context of news articles that are meant to be 'objective', it is interesting to note the extent to which the law penetrates even public coverage of this conflict and covers over the actual disagreements that spawned it in the first place. This gets to why these organizations made the arguments they did.

The one exception to the media's blackout on actually discussing the ideology of this conflict was the Sea Shepherd Conservation Society (see Register-Guard Feb 3 2001, Spokesman Review Nov 23 1998). Their arguments were important to the structure of the way this conflict was covered, which is why we will discuss them here. They are not however, relevant to the argument of this paper. This organization was one of the most vocal operators in this conflict and was also the most radical. They are specifically a marine life protection organization, with a stated emphasis on protecting whales. They released a list of reasons why the Makah should not whale that is quite explicitly rooted in animal rights discourses. An example of these is below:

"Whales should not be slaughtered anytime or anywhere by any people. These are socially complex, intelligent mammals whose numbers worldwide have been diminished severely. Sea Shepherd is dedicated to the objective of ending the killing of all whales in the world's oceans forever. In this effort we speak for the whales as

citizens of the Earth whose right to live and survive on this planet must be defended" (qtd. in Kim 232).

It is because of arguments like that that the Sea Shepherds get talked about far more in the press coverage that is cited here than any of the other organizations involved. And while it is certainly possible that many of the more animal-rights inclined organizations could privately sympathize with these declarations while presenting a more nuanced public face, it is fair to say that this is certainly not the universally shared view or even necessarily a common theme. Therefore for the purposes of this document arguments made by and/or on the behalf of the SSCS will be discounted as irrelevant to the much more widely shared value disagreements in this conflict that we seek to study here. That the media devoted so much attention to these arguments is far more likely a symptom of the need to generate readership than a desire to get at the legitimate heart of this conflict.

In spite of this trend towards sensationalism and focus on animal rights, it is worth it to note that conservationist organizations were mentioned as involved parties even in the press coverage. Earth First! is a notable example, even if they themselves are a radical organization on their face (see Register-Guard 2001). This shows the extent to which conservationist parties were a notable part of this conflict even if they were not necessarily taking the lead.

Representative Statements of Organizational Philosophy

There are a diverse array of organizations involved in this conflict that have a constellation of differing yet overlapping views. Some of them are more animal-rights focused (e.g. Humane Society of the United States), and others are more

environmentally focused (e.g. Earth Island Institute). There is a significant amount of overlap between the two, as we will see. Some of the animal-rights based organizations themselves state environmental protection as an active rationale in the work that they do. Furthermore, many of the pure animal rights-based organizations engage in environmentally based argumentation when writing for the public and the courts, showing the extent to which even when fighting for 'animal rights' one must engage with the mindset of the audience one is trying to reach which is predominantly conservationist/preservationist in nature. The unique situation of this conflict in which there is almost seamless overlap makes it difficult to determine the ultimate sourcing of many of these arguments. In spite of this difficulty however it is clear that there is a distinct conservationist/protectionist viewpoint independent of animal rights that must be spoken for in order to get at the full flavor of this conflict.

One of the prominent organizations in this conflict is Ocean Defense International. They were plaintiffs in both cases and contributed to the writing and funding of the Open Letter to the Makah nation. Their stated motto is: "Healthy aquatic ecosystems free from human abuse and neglect" (http://oceanicdefense.blogspot.com/). This can be interpreted as a defense of 'ecosystem health' of sorts. While animal protection certainly factors into this for them, this would not appear to be purely an animal-rights based ethos. That they mention ecosystem health implies that they wish to place their animal protection in the context of a wider pro-environment imperative. This means that there is a distinct possibility that their true motives in this conflict went beyond simple animal protection for its own sake.

Australians for Animals similarly places their animal protection advocacy in an environmental context. They are an organization dedicated to the protection of animals as such, and are not necessarily environmentally focused. However they state that their primary rationale for the work they do as the following: “to ensure that future generations, human and non-human survive in a healthy environment” (ibid.). They also state a primary rationale for the work that they do as being “ecosystem health” (http://www.australiansforanimals.org.au/). They believe that whaling is a profound harm to the ecosystem, and that therefore restoring the place of the whales is commensurate to restoring the ecosystem. This organization exerted much influence in this conflict and are hence worthy of consideration here.

Another dominant player in this case is the Humane Society of the United States. This organization submitted the amicus curae brief in the Metcalf v. Daley case that honed in on the Makah’s lack of a “continuing tradition” and their supposed lack of ability to meet the subsistence requirements under the IWC and WCA. Their stated organizational focus is much more explicitly animal rights, stating “We are the leading animal advocacy organization, seeking a humane world for people and animals alike” (www.hsus.org). This angle should be taken into consideration when analyzing the arguments they put forth. This serves to further complicate the situation, as this means that there were explicit animal liberation-based motives present. However it is also important to note that the information they submitted was not necessarily new, but rather presented in a much more clear and focused way (meaning that their intent was to emphasize these points). Therefore their reasoning was for the most part shared among the others even if they felt the need to insert their own amicus curae brief.

As an example of the conservationist side of this debate, The Earth Island Institute was also a key player and a legitimate force in this conflict. They are important to discuss even if they were not a lead plaintiff specifically because they were the most prominent conservationist voice in this conflict. They co-signed (and co-wrote) the Open Letter to the Makah Nation and were quite vocal in this conflict (including endorsing both cases made by the opposition). Their stated purpose is environmental preservation and conservation, in line with a preservationist viewpoint (http://www.earthisland.org/index.php/aboutUs/). Their stated goal is to be "a hub for grassroots campaigns dedicated to conserving, preserving, and restoring the ecosystems on which our civilization depends" (ibid.). As such, their key mission to sponsor "creative approaches" to environmental preservation. Their input was particularly key to the early stages of this conflict, particularly in terms of the Open Letter, and helped to set its tone.

Open Letter to the Makah Nation: A Confluence of these Elements

These and many other organizations came together to co-write and co-fund an open letter to the Makah in early 1996 when a quota was being discussed by the IWC. This letter made significant waves within the public sphere, in part because it was undersigned by more than 300 environmental and animal rights organizations, many of whom wound up as primary or secondary plaintiffs in the ensuing court cases. There are many less visible organizations listed as co-signers, many of whom are more environmentally focused than those who became the lead plaintiffs (such as the Center for Environmental Information, Citizen's Environmental Coalition, etc.). This is important to note because while animal rights organizations may have taken more of a

predominant role in terms of constructing the court arguments, here we see a much more equitable mix of animal rights and environmentally focused organizations, reflecting the extent to which this conflict to many was a legitimate environmental issue, as well as the extent to which they knew that they could get support for their cause through the use of environmentally-themed arguments.

They begin the letter by stating that "People from many cultures worldwide hold whales to be sacred and consider each species a sovereign nation unto itself, worthy of respect and protection" (qtd. in Kim 222). This is an interesting opening remark because it plays on the Makah's argument that whaling is central to their cultural identity and should be respected as such. It also sets the stage for an argument centering around the validity of identity-based claims, as they set other 'cultural claims' as equal to those of the Makah and therefore impossible to evaluate on their own terms. This creates the conditions necessary for the rest of their argument by rendering the Makah's unique cultural claims null and void by making them 'equivalent' to others, which is quite an approach for people who consider themselves to be sensitive to the need to preserve cultural identity.

Another interesting claim made in here is the following: "Gray whales migrate vast distances each year and bring joy to many thousands of whale watchers. They only pass briefly through Makah waters" (ibid.). This is contradictory to court documents written by the lead plaintiffs that co-authored this paper that make claims of scientific controversy primarily on the basis of what would happen to the "resident whale population" (see appellant briefs in both cases). The implications of this are fascinating. Either arguments regarding the resident whale population were

disingenuous (i.e. plotted in order to gain the most sympathy) or the argument made in this letter is equally false. It is impossible to tell as to which is which, except to say that arguments made explicitly to the public are generally more tailored to what is most likely to capture the public imagination (as opposed to a court of law where there is a set standard of admissibility).

They then make the claim that "The resumption of the slaughter of these benign and trusting beings would bring to your nation swift and ongoing worldwide condemnation" (ibid.). This is again interesting, as it is written with quite an alarmist tone (again to capture the public imagination). The use of the term "slaughter" amplifies the extent to which this is the case, though there are certainly a fair number of organizations who funded this letter who would sympathize with it on an ideological level. The claim of "swift and ongoing worldwide condemnation" is also interesting in that they are attempting to construct a groundswell of opposition by claiming that it already exists. Given that this is a very preliminary document in terms of the timeline of this conflict, this would seem to be their motive here.

This document also makes the fundamental presumption that there would be such a groundswell of support. While there is a fair presumption that there would be a fair bit of opposition to this given the general trajectory of US environmental and to a lesser degree animal rights discourses up to this point, that they would make such a firm statement implies that they believe this exists to an extent beyond what is fair to assume. This implication gets to the heart of the moral prerogative they believe they possess, which comes from the assumption that the world is on their side.

They then say that “We submit that important spiritual traditions must be observed in the context of a planet whose wildlife are being destroyed by habitat reduction, human overpopulation and exploitation, competition for food, and the proliferation of toxic chemicals” (Ibid.). This again is interesting in that they simultaneously make an appeal to cultural relativism (in affirming the ‘importance’ of these traditions) while affirming their claimed prerogative to pre-empt the ultimate values of these cultures that they claim to be “important” and worthy of respect on their face. They further claim that this attempt to revive an aboriginal whaling tradition is commensurable with worldwide issues such as “human overpopulation and exploitation” and “habitat reduction”. While it may be fair on its face to claim that one should not add to these issues when possible, it is interesting to note the power differential inherent in the way they phrase this. For example, they claim that it is the tribes who observe these “important spiritual traditions” should be the ones to change, rather than the wealthy powerful nations who purely on am empirical level are far more prevalent in causing these issues. What in their mind is their obvious superiority in this case can be construed as a continuation of this privileged discourse (Van Ginkel 2004, Kim 2015) and hence is important to see as we continue because it underpins the value disagreement in fairly insidious ways. This will be discussed further in later sections.

They end this letter with the following: “As global neighbors also committed to healing our spiritual connection to the natural world, we appeal to you to work with us to pursue creative alternatives to your planned whaling, avoiding a conflict that will have no winners” (Ibid.). The implication here is that they share a commitment with the Makah to this “healing”, which is interesting because they avoid

any attempts to actually explain what their idea of a “spiritual connection to the natural world” is or how it differs from that of the Makah nation. Their appeal in this regard is most certainly tailored to the public, the vast majority of whom (empirically speaking) know little about the intricacies of the spiritual traditions held by native tribes. It also makes clear their biases and ignorance in this regard that are tied up in this disagreement of value that make it much more complicated and insidious than it would first appear to many.

Implications for a Philosophical Analysis

From this letter we see a variety of different perspectives (animal rights, environmental protection, et al) encapsulated in a single document that shows the constellation of philosophical values underlying this conflict. From here, in light of this and the statements of philosophy the respective organizations involved put out, we can say that the motives underlying the opposition in this conflict are quite ambiguous. This means that this conflict is far more complicated than it has been portrayed in the past. From the statements they put out regarding this conflict and the legal arguments they made in court, we can begin to trace the underlying philosophical discourse they were tapping into, and hence attempt to capture the broadest consensus of those opposed to whaling by the Makah.

This means getting past the majority of the media coverage and visible public discourse of this conflict and looking at the commonalities among the broadest slice of the involved parties and the national discourse they tapped into. First and foremost, we must dismiss the most visible parties (e.g. the Sea Shepherd Conservation Society) as being out of step with this broader consensus because their articulation of

these views is not represented by nearly any of the other organizations involved. Furthermore, it means looking at the underlying psyche that even the animal rights groups were tapping into when they wrote the legal and public statements they put out: that of the American conservationist impulse. It is this that we will attempt to look at through a few different lenses in the following section, in order to point out the fundamental problems inherent in this consensus that stem not only from the ethnocentrism and racialization of these environmentalist viewpoints but more fundamentally a non-recognition of the nature of this conflict as two fundamentally different ontologies that demand recognition on their own terms. This will get us to the conflict that underlies the reason why this conflict captured the public imagination so much even as animal rights remained an outlying issue on the American political radar.

Chapter Four: A Philosophical Reconstruction of the Conservationist Opposition

The conflict over the right to whale on their traditional whaling grounds that took place between the Makah and its opposition took on its life in both the legal and public arenas as seen in the previous two sections. As seen from analyses of the arguments given in each, we can find two distinct camps within the opposition: those opposed to it on animal rights grounds and those opposed to it on the grounds that it would harm the environment. The uniting of these forces in this conflict makes the constellation of philosophical views in this conflict quite complicated in many respects. It will be the goal of this section to draw out the conservationist perspective that while was in this conflict was largely absent from the media coverage as well as previous analyses of the philosophy behind this conflict. In order to get to this however, more explanation of the distinct philosophical contours of this conflict is required.

The Philosophical Conflict: Animal Rights and Conservationist Prongs

The legal and public conflict that took place between the Makah and its anti-whaling opposition discussed in the past two sections had two distinct underlying philosophical conflicts. The first of which is a fairly straightforward dialogue about the nature of the rights of animals. This was the most visible element of this opposition, partially as a consequence of the fact that it was primarily animal rights organizations who took the lead in suing NOAA and the Makah tribe. As mentioned in the previous section, the most vocal and consequently most covered organization involved was the Sea Shepherd Conservation society, which took an explicitly pro-animal approach to the situation.

According to Charlotte Cote, this kind of ethical dialogue is most philosophically animated by two key thinkers: Tom Regan and Peter Singer (160-161). Each of these makes a sustained argument under utilitarian and other formal ethical frameworks as to why animals should have the same moral rights as humans. Singer in particular asks the question "should animals suffer?" and answers that question with a firm 'no' on a utilitarian basis (that is that pain in itself has no utility, does not create happiness, etc.) (1972). Regan makes the claim that moral principles regarding suffering, utility, etc. extend beyond humans because moral principles should apply to more than merely those who can think and express them (1983). Furthermore, he argues that the 'right to life' is in itself a moral framework that extends beyond the human realm for this reason.

We find many of these arguments coming from media coverage of this conflict, as well as a portion of the statements made by the opposition themselves. Indeed it constitutes the most visible part of this conflict, specifically because the most vocal proponents were pushing this angle. I intend to argue here, however, that this is but one part of a much larger story.

To start, there is the fact that while animal rights organizations took the lead in this case, in a court of law they made primarily conservation-based arguments. On the surface, this is an indicator of strategy. That is, they believed that these arguments would be the most effective strategy to win in a US court of law. The reason for this is that conservation as an ethic is deeply enshrined in existing US law, and hence it is these arguments that make the most sense to make. What this means on a deeper level however is that there is a very particular discourse of conservation and

preservation that was worked into existing US law, by legislation that was fueled at least in part by extremely popular social movements. As Thiele points out, environmentalism and the laws that resulted from it were a result of a particular popular discourse that sustained itself by virtue of the near-universality of its concerns (2004). This is one piece that points to an underlying environmentalist psyche within the public-at-large that paid attention to this conflict and animated it much than it would have been otherwise.

Another piece pointing in this direction is the fact that they made environmental claims even in statements made to the public directly. In the Open Letter to the Makah Nation discussed above, they seamlessly mixed in animal rights claims with arguments for conservation, preservation, and the health of the environment and the ecosystem in which the whales resided. In addition to claims regarding the sacredness of whales to "many cultures" and their worthiness of "respect and protection", they also make claims pointing towards whaling as being in tandem with other environmental harms (such as habitat reduction, human overpopulation, proliferation of toxic chemicals, etc.) that in reality take place on a much grander scale than a small native tribe whaling for cultural and subsistence purposes (qtd. in Kim 222-23). This attempt to conflate whaling with these much larger (empirically speaking) environmental harms may show that they recognized that their arguments regarding animal rights would not sway the public imagination of this conflict in their favor by themselves. Instead, they attempted to draw in the much larger pro-conservation movement by making a grand sweep that addressed all of their simultaneous concerns regarding the overpopulation of the planet, the overconsumption of its resources, the

reduction of habitat and wilderness areas, etc. This move implies that they knew of the existence of a much broader environmental discourse that they could use to their distinct advantage even if this was not indeed their ultimate end.

It is this broader discourse they desired to tap into that I wish to discuss in this section, in order to reconstruct the logic of these arguments that animal rights organizations made in its name. I do this for two reasons. The first of which is to tell the rest of the story of this conflict that most media organizations and academic scholars alike either ignore or do not discuss in the necessary philosophical depth. The second is to draw out a fundamental problem with this discourse that can be critiqued not only in the context of this particular conflict but in many such conflicts: the claimed universality of this environmentalism that ultimately erases other ways of looking at our relation to our surroundings, environment, etc. that we ultimately must recognize and work with.

To this end, I intend to discuss two main strands of environmental thought in this country. The first of which is the conservation or land ethics coined by Aldo Leopold in the early 1950s. This more mainstream environmentalism is most explanatory for the laws that we see cited in the court documents, and according to Heberlein forms a large part of the American environmentalist psyche (2004). This will give us a sense as to the most prominent underlying discourse of this conflict insofar as it is foundational to mainstream environmentalist discourse in this country.

Then we will look at a more radical strand of environmentalism that proliferated in the years leading up to this conflict: Deep Ecology. This was articulated in America by the wilderness preservation writings of George Sessions, and represented

internationally by Arne Naess. An analysis of these writings will illuminate the more contemporary environmentalism that not only influenced the discourse of this conflict, but is also deeply tied up in discourses of the 'right to life' that we also find, interestingly enough, in animal rights-oriented arguments.

This mapping will lead to a comparison with the statements the organizations made in court and in public. This will lead to an illumination of the sources of the themes of the arguments the opposition made. This will lead to an opening for a philosophical analysis of how this environmentalism compares to the ontology of the Makah that will take place in the following section.

Aldo Leopold and the Land Ethic

This first strand of environmental thought is foundational in the American environmentalist psyche. It finds its predecessors in such luminaries as John Muir, and follows Muir's strain of environmental experience insofar as it draws on man's natural affinity with the world around him. This affinity, both of these views claim, is not adequately explored in our industrial society that naturally separates man from the world around him.

He starts from the premise that the 'land ethic' he proposed was simply an extension of ethical processes that humans have undertaken for millennia. He states that all ethics have rested on a single premise: that "the individual is a member of a community of interdependent parts" (172). He believes that this naturally leads to cooperation as a form of restraint on the pure competition that would ensue without the notion of "community" (ibid.). He states that a 'land ethic' comes as an evolutionary step and an "ecological necessity" that comes from the idea of man as "plain citizen" in

a “biotic community”, which to him is the next step in forming ethical relations with one’s surroundings (173).

This notion of community is important to take into account as foundational to his way of thinking. More importantly, it is this notion that humanity is as equally a part of the biotic community as any other part of it. This comes with a particular responsibility for him to minimize our impacts, and to respect the rights of other members of the community to exist. This is fundamental to a philosophical opposition with the Makah, as even though they too believed in the notion of an ecological community, the way in which this manifests for them is profoundly different.

He saw this notion of the biotic community as a means of correcting what he saw as the excesses of industrial society that resulted in the progressive estrangement of humanity from its natural community (173). He found that while conservation had certainly made its way into American discourse, the problem with it was that conservation was based solely on “economic motives” (177). The problem with this, in his view, is that “most members of the land community have no economic value” (ibid.). This means that there must be a different mode of valuation, one based on inherent rather than economic worth.

His ultimate goal here is hence to define conservation in non-economic terms. He does this so that a new form of ethics based on the preservation of the natural world can be achieved. In this spirit, he defines his form of conservation as “a state of harmony between men and land” (175). This means a number of things for him. The first of which is the protection of the ‘biotic pyramid’, which means the acknowledgement of nature as a series of interdependent energy circuits, or lines of

dependency (180). This means that "when a change occurs in one part of the circuit, many other parts must adjust themselves to it" (182). He argues that while change in itself is necessary and inevitable within a framework of evolutionary movement, man has cultivated a particular ability to produce changes of "…unprecedented violence, rapidity and scope" (182). This kind of change to him harms the integrity of the biotic community such that it cannot adjust within its natural evolutionary framework, and therefore must be curtailed. More concretely, this means that one can and should not infringe on the right of a particular member of the biotic community (e.g. a particular species, such as a whale) to make its way within this complex system of interdependencies (e.g. by reducing its habitat, killing off its population such that integrity of the food chain is harmed, etc.).

To underpin this analysis, he states that it is inconceivable that "...an ethical relation to land can exist without love, respect, and admiration for land, and a high regard for its value" (187). What he means by this is an upending of the relationship of man as 'taskmaster' over the land, and by extension the notion of 'nature' as something to be tamed. He would do this with the above acknowledgement of man as 'plain citizen' (e.g. equal to all other parts) of the biotic community, and an understanding of nature as best left in its 'natural' or 'integral' state. It also means an acknowledgement that "it cannot be right…for a farmer to drain the last marsh, graze the last woods, or slash the last grove in his community, because in doing so he evicts a fauna, a flora, and a landscape whose membership in the community is older than his own ,and is equally entitled to respect" (531). This is important to note because empirically speaking this

does not necessarily mean the banning of whaling for subsistence purposes (though the oppositions frames this issue as “controversial” at best).

Stemming from the above is a systematic critique of hunting. He states that the preservation of hunting for its own sake “achieves one form of conservation by destroying another, and thus subverts the integrity and stability of the community” (ibid.). While in context this is an indictment of the then-prominent hunting lobby who sought to do away with regulations such as quotas, licenses, etc. it is important to note this statement in the context of this conflict because it can be seen as an indictment of ‘primitive’ cultural traditions that harm the ‘integrity and stability’ of the biotic community in the view of many. This is key because it is this kind of thinking that bled into the Makah opposition, particularly in letters to the editor as well as the court documents.

Elaborating on this critique of hunting, he states that “The test of skill [in hunting] is confined almost entirely to the act of killing, itself. Its value as a human experience is reduced accordingly” (285). What he means by this is that killing a thing in and of itself does not contribute to a positive experience of ‘nature’ or ‘wilderness’ as such, which he believes there is inherent cultural value in. He states to this effect that there is a fundamental difference between “the adventures of the chase and the adventures of wilderness travel”, and that an acknowledgement of this difference should fuel any real notion of conservation or preservation of the natural landscape. He puts this as “Production of game for the chase can, with proper skill, be superimposed upon agriculture and forestry and can thus be indefinitely perpetuated. But the wilderness cannot be superimposed upon anything” (267). What he means is that that there must

be an appreciating of 'wilderness' as something to be experienced as such (rather than altered, tamed, etc.). It is this 'appreciation' for him that leads to the kind of conservationist ethic he calls for.

The Land Ethic and this Conflict: A Conservationist Thrust

As Thiele and Heberlein both point out, the Leopoldian land ethic is one that is deeply ingrained in the American environmentalist psyche, and gave rise in varied forms to the modern mainstream environmental movement. Heberlein in particular points out the importance of direct experience of the environment that Leopold discusses as central to these environmental viewpoints. In particular he points out how Leopold's ideas regarding direct experience are deeply embedded in the concept of preservation, protection, etc. because of the "affinity" that humanity feels towards its counterparts in nature (15).

As we can see from the arguments made in court, this concept is deeply enshrined in American law in a number of different arenas. The opposition makes several arguments geared towards the goal of environmental conservation and preservation in a Leopoldian sense of the term. The logic of the laws they cite is Leopoldian in that they heavily draw on the wilderness concept as he articulated it. This is very important to note in the context of this conflict because it would appear the opposition, while primarily composed of animal rights organizations, is tapping into a distinctly conservationist rationale in their approach.

In the legal debate, many of the arguments made under NEPA are much closer to a Leopoldian land ethic than to Deep Ecology. Leopold was indeed "profoundly influential" in the formation of the ideas behind it in our national discourse (even as

they were more directly popularized by Rachel Carson), and as such should be taken into account when looking at the legal side of this debate (Plater 19, Thiele 1999). We see this logic put forth in a few different ways. The opposition points to potential impacts on the "resident whale population" and the "unique characteristics" of the National Marine Sanctuary that the Makah wish to whale in (Metcalf v Daley Appellant Brief 18). They make these arguments on the basis that there is "scientific controversy" as to whether or not these impacts will be adverse that was not addressed in the Environmental Assessment that was drafted by NOAA. Leopold's arguments for preservation were distinctly rooted in the stability and integrity of the biotic community, as shown above. These claims directly point to possible impacts on the stability of the ecosystem both in terms of resident whale populations and the national marine sanctuary as a whole. Given that this law was passed in light of a mainstream environmental movement that was deeply affected by Leopold's ideas on this subject, it can be said that Leopold deeply influenced these arguments to a substantial degree.

The Open Letter to the Makah Nation also draws on these sentiments. Its attempt to conflate Makah whaling to habitat reduction, overconsumption, etc. can also be considered a Leopoldian concept if not uniquely so. This is more in line with a Deep Ecological viewpoint in its terminology (as we will see below), but it is difficult to separate out the two in terms of the American environmental consciousness. An analysis of Deep Ecology will develop this further.

Deep Ecology: A Modern Preservationist Environmentalism

The other main strand of environmental thought we see in this conflict is Deep Ecology. This mode of thought proliferated in the early 1970s and continues to be

prominent even in the present day. Its core principle, as a more radical extension of Leopold-derived environmental thought, is the inherent worth of living beings that is independent of human use or human purposes. It draws heavily on the Leopoldian wilderness concept, and takes it in a much more radical direction. It further calls for a new kind of "ecocentrism", as opposed to a more anthropocentric environmental ethic.

One of its core principles is that environmentalism centered on human needs or human experiences is "shallow". That is, it does not challenge our utmost assumptions about humanity being superior to other forms of life. The challenging of these assumptions naturally leads to a "deep" ecology, because is a changing of fundamental principles that leads to "deep" changes in the way we think about the environment and our relation to it, resulting in "necessary" changes to environmental practices and policies. Arne Naess in his essay "The Shallow and the Deep" points to Deep Ecology as a "rejection of the man-in-environment image in favor of the relation, total-field image. Organisms as knots in the biospheric net or field of intrinsic relations" (151). While this may seem to be a rejection of the wilderness concept as a thing separate from man, in fact it is a radical affirmation of it because it discusses the need to "protect natural processes" (152) that are, in its view, wholly independent of humanity.

Naess further articulates these principles in his essay "The Deep Ecology Movement". In it he provides a platform for Deep Ecology that he perceived as a consolidation or cataloguing of the various points that Deep Ecology seeks to make. His first point is that "The well-being and flourishing of human and non-human life have value in themselves". He follows this up with "Richness and diversity of life forms contribute to the realization of these values and are also values in themselves", and

"Humans have no right to reduce this richness and diversity except to satisfy vital needs" (68). This particular logic unfolds in such a way that for Naess it results in drastic changes such as reduction in human populations, reduction of human meddling in ecosystems, and the preservation of areas that are completely free of human impacts.

George Sessions elaborates on these principles in his essay "Ecocentrism, Wilderness, and Global Ecosystem Protection". He argues for the existence of "free nature" that is free of human impacts and a 'rezoning' of the planet such that around a third of it is left completely alone. He believes this should be the case in order to "protect natural processes" (366). This is an extension of Naess's platform in a direction towards a purist preservation, which is important to note in light of this conflict.

Another important strand to note within Deep Ecology that is elaborated upon by Sessions is its claimed affinity with indigenous and native viewpoints of the environment. In Sessions' essay "Ecocentrism and the Anthropocentric Detour", he states that "…the cultures of most primal (hunting/gathering) societies throughout the world were permeated with Nature-oriented religions that expressed the ecocentric perspective" (158). He makes an analogy to the supposed Native concept of the Circle of Life (ibid.) as an example of this. He argues that with the beginning of agriculture, most of these 'ecocentric' cultures were "gradually destroyed, or driven off to remote corners of the Earth" (Ibid.). He further argues that in light of this religious traditions became more anthropocentric, and lost the ecocentric thread of these "primal cultures". This culminated for him in the development of Greek Philosophy (which privileged human rationality as making them 'different' from animals and other forms of life), and later the Cartesian view of the Cogito and its granting of the right to "conquer and

dominate" nature because of its irrationality (159). He continues accounting for this 'detour' with the rise of 'modern science' and the mechanistic worldview that it lent itself to. He argues that in effect ecocentrism did not get revived until the 1960s, and is now in fact seeing a renaissance.

This is interesting for a number of reasons. To begin with, he commits an act of cultural essentialization by first labeling all indigenous cultures as "ecocentric". In doing so he lumps all native and indigenous cultures into a single group, which is quite ignorant of the many cultural differences between these groups. He makes the argument for a distinctly linear thread of native cultures to modern thought that does not have much in the way of variation. He also makes the claim that most of these cultures were ultimately destroyed, which is certainly not the case. This puts his argument in an interesting position. By clearing the way for ecocentrism as a direct derivative of native cultures he commits a grave error by not acknowledging either the distinct ways in which these cultures vary from one another and from Western environmentalism or the ways in which his own version of ecocentrism has been developed in light of and in response to the developments of Western thought. This puts him in a particularly precarious position because his premises would appear to create a structure of justification that is quite flawed. Here we can see the groundwork being laid for a kind of latent cultural misunderstanding and essentialization that plays out in a number of different ways in this conflict.

Deep Ecology and this Conflict: A More Radical Fuel

To begin with, we see the kind of cultural misunderstanding that Deep Ecology justifies itself with within the Open Letter to the Makah Nation. As mentioned, they

make specific appeals to “spiritual traditions” that consider whales to be “sacred” in an attempt to consider Native traditions in an appeal to generic cultural relativism (qtd. in Kim 232). These appeals to cultural relativism are important to understand as a device to appear tolerant while simultaneously dismissing the ultimate nature of their claims. They state that “important spiritual traditions” must be observed in a context of human overpopulation, overconsumption, etc. This attempt to equate the Makah’s subsistence tradition with these much larger impacts on the environment shows a fundamental lack of understanding of the difference between a cultural tradition and industrial acts on a grand scale. It also likely shows that they do not legitimately care about the Makah’s culture or its tradition as such, and attempt to subsume them in favor of a universal reality of overconsumption, habitat reduction etc. This is in itself therefore a document shot through with cultural misunderstanding, or at the very least a non-desire to seriously consider the claims of other cultures even as they make blanket appeals (albeit in a manner that misattributes much) to such cultures.

We also see a more Deep Ecological line of thought within the Open Letter in terms of its appeal to the need to preserve the environment in light of human impacts. The lines regarding overpopulation in particular is much more in line with a Deep Ecology-based argument, as population is a central question it seeks to address. Naess in particular points to the need to reduce overall consumption of natural resources, drastically reduce environmental impacts, etc. in much more vivid terms than Leopold. Sessions makes the point that habitat reduction is in itself an important issue because of the need to protect “natural processes”. They state these things explicitly because these were the most important issues for the time in which they wrote in which people were

coming to a much more explicit consciousness of these as important issues. Given Deep Ecology's prominence within particular strands of the environmental movement at this point (particularly within organizations such as the Earth Island Institute which explicitly endorse such a viewpoint), it can be said that these are also to an extent arguments that find their origin in Deep Ecology.

Beyond conservationism however, it is also interesting to note a distinct overlap between Deep Ecology and the animal rights discourse in this conflict. Central to the Deep Ecology platform is an inherent 'right to life' that transcends all other valuations (human or otherwise). While Regan, Singer, and others make the case for a 'right to life' on its own terms, Naess incorporates this argument into a holistic environmental argument. He says that as a result of this inherent value of life and its "diversity and richness", we should drastically scale back our impacts on the environment and on ecosystems. He does not delve into the arguments regarding individual suffering that Regan and Singer do, nor does he make an explicit argument regarding animals a "benign and trusting beings" (Open Letter to the Makah Nation). However, the fact that there is an overlap here is significant in and of itself for a variety of reasons. It plays to the opposition's advantage in that they can sway both animal rights and Deep Ecology advocates, something that undoubtedly helped their cause. It also means that the constellation of philosophical viewpoints incorporated into the opposition is that much more complicated and difficult to separate. This makes our job here that much more difficult.

Conclusion: A Conservationist Discourse Tapped Into

In order to draw a conclusion here, we must first acknowledge the following: that it is truly difficult to say what the 'true' motives of these organizations were. The lead plaintiffs in this case were predominantly animal rights groups, but some had a stated conservationist focus in the work that they did. Furthermore, they made explicitly conservationist arguments both in courts of law and to the public. Given this there would seem to be a kind of duplicity in the way this conflict unfolded, which was only made worse by the fact that the media focused on its most visible and vocal elements (e.g. the Sea Shepherd Conservation Society). A preponderance of the evidence would suggest that this conflict was fueled both by animal rights and conservationist concerns, as shown in the previous section. However it is impossible to say this in a truly definitive nature for previously stated reasons. Therefore for the rest of this paper the motives of these organizations will be treated as secondary to this conflict, rather than a primary fuel.

The underlying fuel for this conflict was a discourse that unfolded in this conflict that the opposition, regardless of its motives, decided to tap into with great effect. This discourse, not talked about as much in the literature on this conflict thus far, is a discourse of conservation and preservation of the 'natural' world that humanity is but one part of. This is a distinct ontology that implies the need to drastically scale back 'human impacts' and in some manifestations even come close to eliminating them. This draws heavily on the concept of wilderness, which likewise draws on a concept of nature as something separate from humanity, to be untouched, untainted, etc. by its impacts. This has manifested itself in profound ways within the American

environmentalist psyche, first through Leopold and Carson and later through the work of Naess and Sessions. It is this discourse that this section has attempted to reconstruct, in order to give full voice to these concerns that this conflict tapped into in a profound way. From here we can begin to trace out the fundamental conflict such an ontology has with the worldview of the Makah, in order to give full voice to the underlying value disagreement that the American environmentalist discourse that the opposition tapped into has with a Makah worldview. From there we can begin to draw conclusions as to how this disagreement is one example of the fundamental issue with the universalization of American environmentalism as a fundamental ontology when dealing with indigenous contexts.

Chapter Five: The Makah Worldview and its Conflict with the Opposition

Introduction

The work done in this document up to this point can give us the following conclusion: there are deep and fundamental philosophical contours that go beyond the way this conflict has been analyzed and portrayed up to this point in the existing literature. The way in which the opposition (composed of animal rights groups and conservationist organizations) made their case points to a much deeper underlying debate regarding the meaning of a healthy relationship with our environment that goes beyond the animal rights discourses that animated the most vocal proponents of this conflict. Given this conclusion, it can be said that much of this debate is a matter of fundamental environmental ontology, with much deeper principles at stake than anybody gives this conflict credit for.

In the last section we saw that the opposition took on two distinct philosophical strands: Leopoldian land ethics and Deep Ecology as put forth by Naess and Sessions. These two distinct but interrelated strands of environmental thought share a common thread: that ‘nature’ is something to be taken care of, and in the best case scenario left alone, by humanity. This makes the underlying assumption that humanity is something separate from nature, and that there is a such thing a ‘untainted wilderness’ that should be preserved on its own terms. This assumption underlies many of the arguments the opposition makes, particularly those in the legal arena and in the Open Letter, as seen in the previous section.

The Makah possess a much different view of things. They see themselves as already enmeshed in a natural system of reciprocity and community. This is much different from the opposition's perspective, specifically because it does not believe that we are separate from anything, but in fact always a part of nature and of the world around us. This translates into a much different view of the situation, as we will see.

This will be done through a reconstruction of their viewpoint through two philosophical manifestos: *Tsawalk* by Richard Atleo and *Spirits of Our Whaling Ancestors* by Charlotte Cote. These are accounts that show the significance of whaling to a Makah worldview, and to a different view of humanity's relation to its surroundings. This task is somewhat complicated by the fact that these are texts attributed more to the neighboring tribe of the Nuu-Cha-Nuulth. There are differences between these two tribes that due to lack of documentation are quite difficult to clarify. However, this is the best way to get at the clearest possible exposition of the key tenets of the Makah worldview, particularly given Cote's firm statement of the interrelatedness of the Makah and the Nuu-Cha-Nuulth in their basic philosophical thrust (6-7).

The Makah/Nuu-Cha-Nuulth Ontology

To begin, Atleo states that the Nuu-Cha-Nuulth ontology "…assumes a spiritual primacy to existence. Creation, the physical world, is considered a manifestation or reflection (as in a shadow or image) of its spiritual Creator" (xvi). This is important because it creates the notion of a common ancestry, and thus a community, between the human and the non-human. He further states that there is an implicit union

of the physical and the spiritual in Nuu-Cha-Nuulth origin stories, and in particular the story "How the Raven Captured the Day" (10). These fundamental precepts can be seen as the underpinning of the Nuu-Cha-Nuulth worldview, with all else stemming from these notions.

Stemming from the precepts is the notion that all species come from the same "life essence" (62). What this means is not only that everybody has a common ancestry, but that as a result of this it cannot be said that any species or being is truly different from one another. Atleo states that "Observed differences between the human form and other life forms are products of transformations that have resulted in the adoption of outward "clothing" by each…when they all take off their clothing, it will be found that each is like the other in spirit, in essence" (Ibid.). This is another statement of fundamental ontology that underpins their way of life, and the centrality of this whaling tradition

From this is derived the notion of "community as a natural state" (12). This flows from the precept of "interdependence as given" (ibid.). There are many things implied here that are deeply embedded in the Makah and Nuu-Cha-Nulth social structures. For our purposes, the most important thing to note is that they believe is that one is not in one's 'natural state' if one is not engaged in this interdependent community. This is a key concept, because for the Makah and Nuu-Cha-Nuulth this community extends beyond humanity, for humanity is but one species in this interdependent community that they see themselves as already involved in.

Up to this point the Makah and Nuu-Cha-Nuulth agree with not only Leopoldian land ethics and Deep Ecology, but also most discourses of animal rights. Leopold,

Naess, and Sessions start with very similar precepts regarding man as a member of the "biotic community or a "part of nature" (without beginning from a Creator however). As do Singer and Regan (1981, 1973), who respectively start from a precept of animals as man's fellow and as fellow experiencers of the "subject-of-a-life". Each of these is taken to radically different conclusions in their respective philosophies, but so far each of these agree as to the state of nature as a place where humans exist in relative equality with animals.

The disagreement begins in a couple of different places. The first of which is the nature of hunting and subsistence. Atleo states that one of the implications of this notion of common ancestry is the "development of laws to govern relationships" (62). This begins from the notion that all life forms must be shown respect (ibid.). It must be noted that this notion of respect can be manifested in a profoundly different way than the typical Western notion of 'respect'. In this case, two hereditary chiefs of the BC first nation explain it as follows: "[we] believe that both humans and animals, when they die, have the potential to be reincarnated. But only if the spirit is treated with appropriate respect. If bones of animals and fish are not treated with that respect, thereby preventing their reincarnation, then they will not return to give themselves up to humans" (qtd. in Atleo 62-63).

There are a few statements of ontology here. The first of which is that within the interdependent community of human and non-human there is an inherent understanding of animal's role in this community (by humans and animals alike) as being in a subsistence role. In humans showing animals the proper respect as beings from the same common ancestry, a kind of reciprocity is achieved. . This is achieved by the process of

‘asking the whale for help’, which for the Makah and Nuu-Cha-Nuulth is an essential part of showing the whale respect in the context of this interdependent community. This concept of reciprocity is a key tenet of this worldview, because it implies that there is no injustice in one killing an animal for subsistence purposes.

More to the point, this concept of the interdependent community between humans and animals completely contradicts the notion of whaling in this context as being harmful to ecosystem health. In fact, it upholds the ecosystem as an interdependent community because humans are relying on whales for their survival, and hence whales give themselves to the humans. All the while humans give whales the respect (through protocols) to make sure they have the potential to be reincarnated.

Cote adds to Atleo’s account of these notions. She states as a fundamental precept that “We are all part of the natural world, and predation is also part of life and integral to the world we live in” (163). This implies that the killing of animals in the way undertaken by the Makah and Nuu-Cha-Nuulth has a place as a part of the world we live in, in which beings rely on other beings for their survival.

She treats this precept as a fundamental part of the strength of the Makah and Nuu-Cha-Nulth cultures, stating that “Our cultures thrived in a world of reciprocity between us and our environment. Our relationship with animals has always been one based on respect and gratitude, and there is a sense of sacredness attached to the spirit of the animal for giving itself to us for sustenance” (164). Furthermore, within this relationship was the understanding that “death is ultimately integrated into life” (Ibid.). This is very important to understand on its own terms. Within this ontology it is not

harmful to kill whales at all, but rather essential to the sustenance of humanity and the interdependent community in which it lives.

With this in mind, it is important to note that within this ontology the Makah see themselves as being wholly sustainable in a way that does not damage the integrity of the ecosystem, but in fact quite the opposite. The Nuu-Cha-Nuulth Tribal Council defended their hunting practices in *Treaties and Trees: A Nuu-Cha-Nuulth perspective*. In this document, it is pointed out that they treated the animals thy killed for sustenance with respect…because they knew that wiping out individual…stocks would irreparably harm the intricate web of animal and plant life in the surrounding forest. Millennia before the words "sustainable development" gained vogue, Nuu-Cha-Nulth people had fully embraced the concept. They had to. It's what kept them alive" (qtd. in Cote 163-164). This puts the Nuu-Cha-Nuulth/Makah ontology is a very distinct light, because it shows that "sustainable development" as such is not something unique to modern-day environmental and animal rights activists. Furthermore, it show that their notion of sustainability was based on the very real issue of day-to-day survival, something that these activists have never actually experienced for themselves. This is important to note, specifically because it feeds into the ethnocentrism that will be discussed later.

Most importantly, within this context the Nuu-Cha-Nuulth and Makah see themselves as participators in an ecosystem that specifically requires human killing of animals. Cote paraphrases words by director of the Makah Natural Resources Department: "...the Makah want to introduce gray whales back into their culture through the sustainable use of the whale as a resource; the environmental and animal rights people want to protect them at all cost" (164). She goes on, saying that

"…humans are also part of the ecosystem and have a role to play in helping to balance its resources. When humans are prohibited from utilizing certain resources, such as harbor seals, this can have a negative impact on other resources-for example, fish populations have been threatened because of the overpopulation of seals" (Ibid.). Cote shows how this is the case in the context of whaling. She points out that the highest natural death rate of gray whales recorded was in 1998-89, and that many biologists pointed to the distinct possibility that there may have been an overpopulation that resulted in the straining of their feeding grounds (Ibid.). Therefore there is at least some scientific basis for human control of resources in this context through sustainable subsistence practices, per their analysis.

As we can see from the above, the Makah and its opposition at a fundamental philosophical level share many precepts regarding the nature of humanity as a member of an interspecies community that should be preserved. Where they disagree is the nature of this community, whether humanity has a right to kill animals and whether or not said killing harms the 'integrity' of an ecosystem. Leopoldian thought believes in a state of nature as a system of interdependent relations that should not be harmed lest the stability and integrity of the whole system be destroyed. As a precept this agrees with the Makah and Nuu-Cha-Nulth, and indeed the government and NOAA agreed with the Makah that their practices would not hurt the stability or integrity of the ecosystem-at-large or the whale stocks themselves. However, it was argued in court and to the public that this was not the case, on grounds that were at least partially Leopoldian in their outlook, if you look at the philosophical climate in which our current environmental legal structure was formed (Lindstrom and Smith 19). This shows that there is at least

the possibility that there was a profound disagreement on these grounds that should be treated as such.

Deep Ecology took many of the precept of the Land Ethic in a much more radical direction by calling for a complete departure from what it deemed "anthropocentrism". This for it meant drastic reduction in human population and the sectioning off of large zones of land as "untainted wilderness". The Makah would seem to have a disagreement here with both of these modes of thought, as each has built into it a fundamental separation between humanity and the natural. As we will see, this is a fundamental issue for the structure of both environmental arguments.

Wilderness: The Underlying Structure of Deep Ecology and Land Ethics

In his essay "The Trouble with Wilderness" William Cronon provides a thorough examination of the wilderness concept, showing it to be a construct rooted in a distinctly American cultural imaginary (1998). He talks about it as rooted in two distinct but interrelated concepts: the 'romantic sublime' and the 'frontier'. The romantic sublime for him came about as a result of people like Wordsworth and Muir who wrote about nature as something that was literally "awe-inspiring", in a deity-like fashion. Cronon talks about Muir and Wordsworth as "…contributing to the same myth: mountain as cathedral" (12). This writing of the experience of wilderness is crucial to the development of the imagination of wilderness, because it contributes to the "direct experience" of wilderness that is crucially important in the American environmentalist psyche.

The discourse of the frontier for Cronon is equally important if not more so than the romantic sublime to the construction of wilderness. This is because it cements the

cultural notion of wilderness as "the last unspoilt land" in a long history of America conquering and 'taming' the area surrounding it (15. He states that "…wilderness came to embody the national frontier myth, standing for the wild freedom of America's past and seeming to represent a highly attractive alternative to the ugliness of modern civilization" (15). This is because a very particular narrative was created (most notably by authors such as Turner and Wister) of wilderness as an idyllic place where a 'simpler way of life' could take place, free of the advances and corruption of civilized society (15-16). This narrative held much power in America particularly in the years following the civil war, and for Cronon this ultimately led to the notion of the "setting aside" of national parks, as they represented the last areas unspoilt by modern civilization (12).

His main critique of both of these presumptions (and particularly the discourse of the frontier) is that they imply that truly 'unspoilt' (as in uninhabited) wilderness actually exists in the first place. He notes a particular irony in that national parks being set aside coincided quite neatly with the removal of Indians from their land and subsequently placing them on reservations (16). This among many other factors for him represents the concept of wilderness as one that erases actual history in favor of a non-existent mythic past (Ibid.). He states that the ultimate trouble with wilderness is that "it quietly reproduces the very same values its devotees seek to reject" (11). What he means by this is the following: "The dream of an unworked landscape is very much the fantasy of people who have never themselves had to work the land to make a living" (ibid.) He ultimately states that "Only people whose relation to the land was already alienated could hold up wilderness as a model for human life in nature, for the romantic

ideology of wilderness leaves precisely nowhere for human beings actually to make a living off the land" (Ibid.).

This ultimately for him adds up to a dualistic vision of human as completely outside the natural (12). This is fundamentally a problem because, as mentioned above, not only are humans a natural phenomenon but they have successfully integrated themselves into their ecosystems in a number of different instances. The emergence of traditional ecological knowledges (such as those of the Nuu-Cha-Nuulth) show that there is at least the possibility of humanity living in actual harmony with nature. It is this notion of the impossibility of this that Cronon seeks to criticize, and I certainly agree with this. The existence of indigenous cultures such as the Nuu-Cha-Nulth that are often moved away from their native lands even as governments attempt to preserve these lands would seem to point to the wilderness concept as being largely a fallacy.

This is a compelling argument as to how the structure of the Deep Ecological argument is built on ethnocentric foundations. Furthermore, it would seem to perpetuate the power of the dominant culture (whomever it might be) to erase minority cultures in the pursuit of the preservation of what they see as 'untainted wilderness'. This is because the notion of man as separate from nature is something that is founded on the presumption that no indigenous cultures existed, and that wilderness is something that is simultaneously a "cathedral" and "unspoilt" (Cronon 1989). In light of this it would seem the deep ontological disagreement present here is one that is based on profoundly different notions of nature and man's status in it, but also (at least at the level of the texts) whether or not indigenous knowledge truly gets a place in environmentalist

thought. This is not to say that this philosophy is factually wrong, but merely that the structure of its argument and justification puts it in a potentially damning position.

Leopold's land ethic is not quite innocuous either, in the sense that it is the source of this wilderness concept. While the way Leopold articulates his ethic is not necessarily essentialist towards native culture, it still puts forth a portrayal of wilderness that is antithetical to the Makah's understanding of nature. And while the Makah and Leopold would certainly agree a fair bit as to how resource conservation plays out, it would seem as though the implications of this land ethic were able to be used by the opposition because of its privileging of wilderness. Therefore it is fair to say that this ethic is also at the heart of this conflict, and is arguably the source of its underlying discord even as Deep Ecology took it in a much farther direction.

Beyond this fundamental issue of wilderness however, there is a particular ethnocentrism embedded in Deep Ecology and the way it presents itself. As we will see below, these structures of justification played out in fairly insidious ways in this conflict, and gave it a distinctly ethnocentric direction.

The Problems of Deep Ecology in its Justification

As seen in the previous section, Sessions draws a direct lineage from primitive "ecocentrism" to the development of modern "anthropocentrism" in order to defend his thought as a return to ecocentrism in a way that is quite insidious. As noted above, he lumps almost all native cultures together under a banner of "ecocentrism", which is in itself an act of cultural essentialization. That he draws a direct lineage between these 'primal' cultures and our modern 'ecocentric' environmental movement, which is also in itself problematic on its own terms. This act erases difference not only between the

various cultures he draws upon but also between said cultures and the modern American environmental movement.

This is a problem because ultimately this setup involves the use of an ultimately fake standard of what an “Indian” is. There are two interrelated cultural constructions at work here: the “noble savage” and the “ecological Indian” (Russel 2015, Ellingson 2001, Kim 2015). The “noble savage” is defined simply as the idea of a primitive culture as being more good and just, as they are free of the corrupting influences of civilization (Ellingson 2001). This notion was at the heart of Rousseau’s description of indigenous people as “in a state of nature” (qtd. in Ellingson 82), which is arguably the foundation of the term and its modern usage. It refers to a notion of indigenous people as being in a state of “primordial innocence”, which the “civilized man” cannot be returned to (ibid.). It is this notion that became a cultural trope that was widely pervasive in our discourse, and used mainly to put native cultures in a space where they are forever primitive because they are not ‘in civilization’ (Owens 2001). This discourse became particularly prominent in the wake of films such as Dances with Wolves, in which civilized man ‘finds himself’ in his encounter with native culture (Owens 125). It is this discourse that establishes a particular lineage of cultural progression such that native culture can never be considered a part of ‘modern life’, and as such renders them null and void in the minds of many.

Related to this discourse of the noble savage is the notion of the ‘ecological Indian’. This is the idea that as a result of their primitivity they possess an ‘attunement’ to the environment that civilized man cannot possess (Russell 162-163). Rousseau again built this discourse with his imagery of primitivity, but this particular manifestation of

the noble savage as “eco-Indian” (Ibid.) came about as a particular result of using “pan-Indian spirituality to legitimize ecopolitical goals” (Ibid.). This trope manifests itself as a kind of fake litmus test for whether or not a native culture is actually ‘authentic’ (the logic being that if they were authentic they would care about the environment in the same way that environmentalists do) (Van Ginkel 24). This setup gives anybody deploying this image a potent weapon. If anyone wants to challenge the authenticity of a native culture, one need merely point to this dissonance in ideology between the actual native culture and this fake representation.

As seen above, Sessions develops and contributes to this discourse in a way that can be considered quite dangerous. In an attempt to draw a lineage between modern environmental thought and the ‘ecocentrism’ of native cultures, he creates a narrative in which native culture bows to the wishes of conservationists and ecologists by virtue of being their ideological forebears. This is a problem because, as we see, there are vast differences between the ontology of Deep Ecology and that of the Makah.

It is this pattern of putting native culture in a box that is impossible to escape that plays out in fairly insidious ways in this conflict. Van Ginkel in his study of the rhetoric of this conflict shows the many ways in which the question of whether or not the Makah were ‘authentic’ played into the opposition’s response to this conflict on a number of different levels. For example, many accused the Makah of not actually engaging in a revival of their tradition because they engaged in modernity through their use of modern equipment (Van Ginkel 22). The logic of this being, if they were an actual primitive culture attempting to revive their primitive tradition, they would do so in a way in keeping with their primitive ways (ibid.). While it could certainly be

suggested that this modern equipment had the potential to significantly alter their tradition in a way detrimental to the environment, this could have been mitigated through regulation and tribal practice.

Yet others questioned whether or not the 'purity' of their culture had been compromised by change in other respects to the point where their tradition could even be revived in a meaningful way (Van Ginkel 23). This is an interesting argument because it implies that a particular cultural tradition is valid only if it was part of said culture from the very beginning. This is in fact contrary to most theories of cultural change (Benhabib 2004) and invalidates the natural evolution that cultures undergo, particularly when in contact with other cultures. The expectation that the Makah are to remain in this box of antiquation and primitivity is quite a presumption, and ultimately one that does not hold up to scrutiny.

As we can see, Deep Ecology's structures of justification and its presentation of itself have deep rhetorical consequences for the way in which its followers portray native cultures who do not fall in line with its ultimate vision. As Cote points out, native cultures are often only recognized as authentic "...when the Indians are doing what the ecologists and animal rights activists want them to do" (161). We see this play out in this conflict, and it shows that this environmental perspective in particular is quite tinged with tendencies towards ethnocentrism particularly in its practice.

Conclusion: An Ontological Disagreement Intermixed With Cultural Misunderstanding, Non-Avowal

Within this conflict we can see that there is a fundamental ontological disagreement here: is humanity a member of an interspecies community of equals in

which predation is a natural part of the ecosystem and death is ultimately integrated into life? Or is humanity something that needs to "protect natural processes" that are inherently separate from its own existence by divorcing itself from them to the largest degree possible? While this is certainly an oversimplification (as most reductions of this sort are), it is important to note this fundamental dichotomy at the heart of this conflict between what the Makah and the conservationist opposition seek in terms of what is sustainable, fair, and just towards the planet, nature, and humanity. And while there are certainly points of agreement between the two groups in terms of our need to be sustainable and our status as a 'part of nature', there is an ultimate disagreement as to the existence of 'wilderness' and our need to protect it that is present even within Leopold. Wilderness and its direct experience is a particular cultural trait within our society (as seen from Cronon's analysis), and it has a lot of power in terms of how we see our relationship to the environment and our need to protect it (Heberlein 2015). We see this concept employed as a fundamental precept in Deep Ecology and Land Ethics, and it is the way in which this concept is deeply embedded in our environmental culture that has caused this disagreement to manifest itself.

This ontological disagreement is shot through with ethnocentric tendencies for two reasons: the concept of untainted wilderness that shows up in both Deep Ecology and Land Ethics, as well as the uniquely ethnocentric self-presentation of Deep Ecology. Whether or not these arguments are factually correct is certainly up for debate. However, as seen from the above analysis, this argumentation surrounding the need to protect untainted wilderness and ecosystems ultimately puts the Makah in a position where they have no real power to determine themselves as a culture because per this

ethic, cultural traditions must subsume themselves to this greater urgent need. This is a problem because it re-inscribes a particular relation in which the dominant culture of settler-colonialists gets to determine what this 'greater need' is, and hence have power over the Makah that they have no ability to wrest themselves free of. And while there is the ability to make an argument that a particular cultural tradition causes enough harm to be questioned, the way in which this conflict has played out has given the Makah no opportunity for self-determination (Miller 2001). Hence the argumentation of the opposition needlessly perpetuates a power relation that ultimately should be done away with as part of any cross-cultural environmental movement (Guha 1989).

The conclusion I wish to draw here ultimately is that regardless of the factual correctness of any of these ontologies, we need to be very clear about the implications of the structures of these arguments for the implementation of the programs they put forth. Given the above analysis we can come to the conclusion that legitimate questions of sustainability, preservation and the health of the environment are often embedded with cultural essentialization, misunderstanding, and misattribution. From this a fundamental question can be drawn: what is the state of American environmentalism in light of this problem? Can it continue to function as a universalizing ethic in light of unique cultural claims that cannot simply be reduced to primitivity, barbarism, or non-consideration of the planet/environment? It is clear that there is a fundamental problem here, and one that is not easy to even begin to solve. As such the concluding chapter of this document will attempt to discuss pathways towards reconciling the paradoxical nature of American environmentalism that has been discussed in this thesis.

Concluding Chapter: An Environmental Ethic In Need of Recalibration

Introduction

This document has attempted to give a full analysis of the conflict between the Makah Native American tribe and the opposition to its whaling tradition, in order to expose the full scope of this conflict and draw conclusions from it. This conflict took place in courts of law and in the sphere of the public media. We took a look at both of these venues in order to begin to trace the philosophical underpinnings of this conflict in the broadest possible way. This led us to reject the notion that this conflict was purely about animal rights for most of those opposed to it, but rather a matter of conservation and environmental protection.

This led us to examine two of the most prominent schools of environmental thought: Leopoldian Land Ethics and Deep Ecology. From this analysis we concluded the following: that in this conflict the environmentalist discourse that played out was ethnocentric in its justification and argumentation. From this the following question can be asked: what is the state of American environmentalism? Can it be applied to cross-cultural environmental conflict? Or is it merely a provincial way of thinking, and one that will not get us very far in these types of situations?

It is my argument in this section that this is not an irremediable situation. There are many lessons that can be drawn from this conflict as to how American environmentalism and other cultures interact. It will be the object of this concluding chapter to spell these problems out, and point to some areas where it can go to fix these issues.

American Environmental Thought: Key Problems

As stated before, the conclusion of this paper is that American environmental thought as shown in this conflict is ethnocentric in its justification and argumentation. This occurred in a couple of different ways.

The first of which is the reliance on the wilderness concept. The previous chapter showed why it is that this concept is not only ethnocentric, but also nonexistent once we look beyond the worldview of those of us who have never had to live in a deep intimate relationship with our surroundings. As Cronon shows, this mentality of wilderness as untainted, unspoilt, and unconquered is at odds with the empirical reality that humans lived in interaction with its ecosystems long before we decided to build modern civilization. Furthermore, it erases all the ways in which indigenous cultures continue to live in relative harmony with their respective surroundings, and all the traditional ecological knowledge that has been built up as a result of this lineage. Therefore it can be said that the wilderness concept ultimately comes from a mentality of us as the conqueror, which is a fundamentally European idea.

The second of which is the way certain strands of environmental thought justify themselves. Deep Ecology brands itself as a return to indigenous philosophies by way of labeling both itself and indigenous cultures as ‘ecocentric’. As mentioned in the previous chapter, this erases difference not only among the various traditions it calls upon, but also differences between these cultures and the modern American environmental movement. Deep Ecology hence bases itself on a simultaneous act of cultural essentialization and erasure, making itself ultimately an imposition upon all other ways of knowing the environment.

From here we can conclude the following: that there are problems with the structure and justification of American environmental thought that make it difficult to apply in situations of conflict where it goes up against the ontology of another culture. This is something it must overcome if it is to have staying power in an age where environmental problems continue to multiply.

Given this conclusion, what can we do to fix these issues? The next sections will attempt to answer this by providing philosophical ground to move beyond wilderness thinking in a couple of different ways. The first of which is to acknowledge the value of humans within their ecosystems, or at the very least the possibility that we can have good impacts upon those ecosystems. The second is to move towards an understanding of environmentalism as part of a broader movement away from Capitalism, arguably at the center of the environmental crisis as we know it (Klein 2015).

Towards a Non-Ethnocentric Land Ethic

Aldo Leopold's land ethic has staying power in our culture for a variety of reasons. As stated before, it was "profoundly influential" on the development of our current environmental legal structure, and also on the American environmental psyche more generally (Heberlein 2015). It is centered on humanity as an equal member of the biological community in which it lives, and the idea that each member of this community has a right to continuance. However, in the form Leopold puts it in, it privileges wilderness because of the "inherent cultural value" in our experiencing of it. He puts it squarely in terms of a separation between wilderness and the "corrupting

influences" of modern civilization, which as Cronon showed is fallacious at best and an obfuscation at worst.

In spite of this however it would seem that Leopold and many indigenous philosophies agree on one thing: that we should live in relative harmony with our surrounding ecosystem rather than live in a position of dominance over it. How then, do we de-couple this concept from an ethnocentric understanding of wilderness as "untainted"?

Contemporary environmental ethicist J Baird Callicott gives us a place to start in this regard. He states in his "Critique of the Wilderness Idea" that "If we are a part of nature, then we have a rightful place and role in nature as much as any other creature" (439). This acknowledges the precept that we are a part of nature and hence have a right to take place within it. He further states "If the ecological impact of bees and elephants can be either good or bad, then why can't the ecological impact of human activities be good as well as bad? Measured by the wilderness standard, all human impact is bad…because human beings are not a part of nature" (439).

Taking these ideas to heart within American environmentalism would go a long way towards making it more salient in dealing with environmental problems where cultural worldviews are at stake. It would make it much less ethnocentric by allowing for the possibility that traditional ecological knowledges are built upon a unique understanding of the ecosystem that we who live in industrial societies simply cannot comprehend because we are so separated from our surroundings via the processes of industrialization, urbanization, etc. This would make it much easier for us to put forth our environmental views as a "plain citizen" of the global sphere, in

recognition that our view of the environment is but one, and that we needn't impose our views on the world in order to accomplish vitally important environmental goals.

Getting Beyond Wilderness Thinking: An Ethic of Mutual Interdependence

Another approach that can be taken is one that is found within the Makah and Nuu-Cha-Nuulth traditions: that of mutual interdependence. This would begin with Richard Atleo's assertion that "community is itself a natural state", and that from it there are certain responsibilities to each other life form. He states that in such a worldview it is understood that there are relational values in addition to personal ones, and that first and foremost among these is a "helpfulness to the common good" (Atleo 14). This would involve acknowledgement of the needs of the whole ecological system, while also acknowledging that we are part of such a system and as such have a right to participate in its workings albeit in a productive fashion conducive to the system's continued survival.

Related to this is the concept of Isaak, or loosely translated, "respect" (Atleo 15). This is included in the Nuu-Cha-Nuulth concept of community, because it is the duty that comes from being a part of said community. This respect in the Nuu-Cha-Nuulth context comes from presumption that the Creator created all, and holds all in high esteem that we should all reciprocate and practice (Ibid.). This justification, while certainly powerful, may not be necessary to come to similar conclusions regarding the need for such a practice.

The principle that would tie such an ethic together is that of balance. Atleo notes that in many indigenous relationships it is the delicate interdependent balance between life forms that constitutes their law (62). To this end, in the Nuu-Cha-

Nuulth context, there is constant deference to protocols between life forms that ensure their representation in manmade decisions over, say, land use. This is another instance where while we may not necessarily share this belief (that we could communicate in such a way), we could certainly derive a sense of urgency as to the need to pay attention to such concerns.

This ethic would have profound implications for our actions towards our ecosystems that would not rely on an understanding of ourselves as separate from our ecosystems, much like Callicott's offering seen above. Indeed, in this sense these sets of ethical principles do not find much in disagreement, at least in terms of implications. What we find in each is a detailed system of mutual interdependent relations that are constituted by us and others in an active system that has always already been present. However where this approach differs is in its indigenous origins, which perhaps can be taken as having a certain value in itself in that it is indigenous stakeholders who have devised it. Furthermore, it can be said that traditional ecological knowledge on its face deserves fairer representation in our schema of environmental ethics than it has in our history. Therefore this approach too should be considered on its own terms.

Conclusion: An Ethics of Avowal?

In order to conclude here we must first acknowledge the following: American environmentalism is not ethnocentric in its ultimate goals but rather in its justification and argumentation. We saw this result in the utter non-avowal of the Makah tradition in the conflict analyzed. This was not a result of incorrect motivation or factual incorrectness of these environmentalists, but rather of their inability to see beyond their own worldview, ontology, etc. This is a problem that comes from being in

a mentality of moral superiority that is based on your notion of environmentalism being "progressive" and indigenous practices being "regressive". As Van Ginkel points out, this discourse of progress played out insidiously in the Makah conflict, making this conflict an example of a wider problem with the way American environmental thought justifies itself.

To avoid this problem, we can begin with the simple premise that cultural traditions and ontologies should be given weight on their own terms, as equal participants in the global sphere of ideas. Claire Jean Kim proposes such, and calls it simply an "ethics of avowal" (287). This allows for genuine cross-cultural communication, because it first proceeds from the premise that a worldview has value unto itself in the context of a functioning and vital cultural entity. She provides what could have made this conflict go much better in the context of this conflict: "…animal and environmental activists who chose to fight the resumption of Makah whaling would begin by recognizing their own racial situatedness and its implications for this story. They would learn about and respectfully engage Makah ontological claims about humans and whales, even if they ultimately disagreed with these claims and their implications" (250). Starting from a place of mutual respect would have, hence, made this go much better than it did.

She further states that "Rather than treating the question of whaling as an isolated issue that can be detached from the context of US-Makah relations, they would situate the critique of whaling within a larger framework of justice that challenges multiple interconnected forms of domination (including colonial domination) at once" (250). In other words this conflict could have been approached from a completely

different vantage point, one that took into account the situatedness of white environmentalism in a colonial context, and it could have gone much differently.

In light of the finding that American environmentalism has ethnocentric foundations that mean it is inapplicable to cross-cultural contexts, it can be said that what is needed above all is a mutual respect of clashing ontologies that can lead to a fruitful dialogue based on the legitimate facts of a given situation. An ethics stemming from this mutual respect can prove to be a starting point in cross-cultural dialogue with American environmentalism. Regardless of what other paths are taken in this regard, it would seem that this is the most immediate remedy for the problems faced in this and other conflicts. It is this hence that creates the necessary conditions for an environmental movement that is lasting, impactful, and supportive of all the human beings it is in the end supposed to protect in all of their various aspects in the pursuit of a more sustainable and more just future.

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