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METCALF V. DALEY:
CONSIDERATION OF THE SIGNIFICANT IMPACT
ON THE GRAY WHALE POPULATION
IN AN ENVIRONMENTAL ASSESSMENT

Rosemary Fowles^{*}

I. INTRODUCTION

In *Metcalf v. Daley*,¹ a Congressman, various conservation organizations, and a member of the Makah Tribe² brought an action against government officials of the National Oceanic and Atmospheric Administration (NOAA) and the National Marine Fisheries Service (NMFS)³ alleging that their actions violated the National Environmental Policy Act (NEPA).⁴ The Makah Tribe joined as intervenor. Both parties filed cross motions for summary judgement on the merits. The Defendants' motion was granted. The Plaintiffs appealed to the Ninth Circuit Court of Appeals.

The appeal invited the court to determine if the Environmental Assessment (EA) of the proposed Makah Tribe whaling along with the subsequent issuance of a Finding of No Significant Impact (FONSI) was adequate and in compliance with NEPA regulations. The court determined that the EA was untimely, not in compliance with NEPA, and thereby had to be redone. The court declined, however, to rule on the adequacy of the EA. What must now be determined is whether the new EA will result in a FONSI or an Environmental Impact Statement (EIS).

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1. 214 F.3d 1135 (9th Cir. 2000).

2. The Plaintiffs-Appellants were Jack Metcalf, Congressman (R-Washington); Australians for Animals; Beach Marine Protection; S'Tassawood of the Cheaba Family of the Makah Nation, (Alberta N. Thompson, who opposes the whale hunt); The Fund for Animals; Tim Walsh; Lisa Lamb; Sue Miller; Stephen Dutton; and Deep Sea Charters, Inc.

3. The Defendants-Appellees were William Daley, Secretary of Commerce; James Baker, Administrator, National Oceanic and Atmospheric Administration; Rolland A. Schmitt, Director, National Marine Fisheries Service; and Makah Indian Tribe as Defendant-Intervenor-Appellee.

4. 42 U.S.C. §§ 4321-47 (1994).

This Note considers the cumulative and indirect impacts the Makah whaling proposal may have on the gray whale population. The impacts from present actions and reasonably foreseeable future impacts are discussed. This Note concludes that the agencies should issue an EIS. Finally, the public policy advantages to a thorough EIS are presented.

II. THE DEVELOPMENT OF WHALING RIGHTS AND ENVIRONMENTAL POLICY

A. *The Makah Tribe's Legal Right to Hunt the Gray Whale*

In the 1855 Treaty of Neah Bay,⁵ the Makah Tribe⁶ explicitly reserved "the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations."⁷ Although the Makah Tribe had not hunted the gray whale for seventy years prior to 1998,⁸ the United States must still uphold the Treaty of Neah Bay if the treaty remains valid law. The United States Supreme Court affirmed the validity of treaties such as this one when it held in *Board of Commissioners v. United States*⁹ that "state notions of laches and statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise."¹⁰ Therefore, the

5. Treaty with the Makah Tribe, Jan. 31, 1855, U.S.-Makah Tribe, 12 Stat. 939.

6. The Makah reservation is in the northwest corner of Washington state. The estimated population is 2200. The Treaty with the United States reduced the size of their lands to about one-tenth of its original size. Alma Soongi Beck, *The Makah's Decision to Reinstate Whaling: When Conservationists Clash With Native Americans Over an Ancient Hunting Tradition*, 11 J. ENVTL. L. & LITIG. 359 n. 1 (1996).

7. Treaty, *supra* note 5, art. 4. Article 4 in total states: "The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens." *Id.*

8. Scott Sunde and Ed Penhale, *Makahs Hail Go-Ahead for Whale Hunts; But Legal and Other Shoals Lie Ahead*, SEATTLE POST-INTELLIGENCER, Oct. 24, 1997, at A1 ("[a] 1,500 year tradition here, whaling was stopped [in 1920] when the grays faced extinction"). The Makah Tribe explains that "[w]haling has been a tradition of the Makah for more than 2000 years. We had to stop in the 1920s due to the scarcity of gray whales. . . . There has been an intensification of interest in our own history and culture since the archeological dig at our village of Ozette in 1970, which uncovered thousands of artifacts bearing witness to our whaling tradition." The Makah Nation, *Makah Whaling* at <http://www.makah.com/whales.htm> (last visited August 22, 2000) [hereinafter Makah Nation].

9. 308 U.S. 343 (1939).

10. *Id.* at 351.

Makah Tribe asserted that it had a legal right to resume whaling.¹¹ The Tribe requested the assistance of the United States in seeking approval from the International Whaling Commission (IWC) for the right to resume whaling.¹²

The Whaling Convention Act of 1949¹³ prohibits whaling in violation of the IWC.¹⁴ Although the IWC imposed a moratorium on commercial whaling in 1982, two exemptions to the moratorium exist: the scientific research exemption and the aboriginal subsistence exemption.¹⁵ The latter includes an exception for meat products used for local consumption by aborigines.¹⁶ The Makah Tribe has a culture deeply rooted in whaling. Recent anthropological evidence also supports this tradition.¹⁷ To be included in the aboriginal subsistence exemption, indigenous peoples must "justify their activities through the government which represents them at the IWC."¹⁸

11. The Makah Tribe's position regarding its legal right to hunt whales is that "[u]nder the treaty made by the United States with Makahs in 1855, the United States promised to secure to the Makahs the right to engage in whaling. This is the only treaty ever made by the United States which contains such a guarantee. The treaty, which was ratified by the United States Congress in 1855, is the law of the land under the U.S. Constitution and has been upheld by the federal courts and the U.S. Supreme Court. To us, the Makah Treaty is as powerful and meaningful a document as the U.S. Constitution is to other Americans, it is what our forefathers bequeathed to us." Makah Nation, *supra* note 8.

12. *Metcalf v. Daley*, 214 F.3d 1135, 1138 (9th Cir. 2000). Because of the exploitation of stocks of whales, the Convention for the Regulation of Whaling was convened in 1931. In 1937, the International Agreement for the Regulation of Whaling was established, giving priority to conservation over commercial interests. The International Whaling Commission (IWC) was also established. The IWC is composed of a representative from each member nation. Originally, the membership consisted mainly of pro-whaling nations, but now, the majority of members are from non-whaling countries. In 1982, the IWC issued a moratorium on commercial whaling. Lawrence Watters and Connie Dugger, *The Hunt for Gray Whales: The Dilemma of Native American Treaty Rights and the International Moratorium on Whaling*, 22 COLUM. J. ENVTL. L. 319, 326-28 (1997).

13. 16 U.S.C. § 916-916(l) (1994).

14. *Id.* § 916c(a).

15. For general information on the aboriginal subsistence exception, see e.g., Nancy C. Doubleday, *Aboriginal Subsistence Whaling: The Right of Inuit To Hunt Whales and Implications for International Environmental Law*, 17 DENV. J. INT'L L. & POL'Y 373 (1989).

16. *Id.* at 384.

17. Ed Penhale, *Makahs Seek OK to Hunt Whales; 'Tradition' Argument is Opposed*, SEATTLE POST-INTELLIGENCER, Oct. 16, 1997, at B1. A whaling village known as Ozette, covered by a mudslide 400 years ago, produced artifacts testifying to the whaling tradition.

18. Doubleday, *supra* note 15, at 388.

Although the IWC does not have jurisdiction over subsistence whaling, it does set quotas on hunts for species that are in danger of depletion.¹⁹ The Makah submitted a request to NOAA and to NMFS to present their proposal of a yearly quota of five whales under the aboriginal subsistence exception.²⁰ The procedure that the agencies must follow in agreeing to represent the Makah Tribe is set out by NEPA. The IWC ultimately approved a four-whale annual quota for the Makah Tribe.²¹

*B. NEPA Regulations Concerning Actions
Which Might Significantly Impact the Environment*

Congress recognized the need for a unified national environmental policy by enacting NEPA.²² The first section of NEPA sets forth its broad national policy goals.²³ The legislative history highlights the “action-forcing” provisions to initiate reform.²⁴ NEPA further established the Council on Environmental Quality to set forth regulations to assist agencies in complying with NEPA.²⁵

19. *Id.* at 385.

20. *Metcalf v. Daley* 214 F.3d 1135, 1138 (9th Cir. 2000).

21. Sunde, *supra* note 8. The Makah successfully harpooned a whale in 1998 after the Defendants were granted summary judgement in the lower court. *See also* Mike Barber et al., *Makah Whaling Decision Reversed; But Court Ruling May Not Stop Tribe From Hunting*, SEATTLE POST-INTELLIGENCER, June 10, 2000, at A1.

22. 42 U.S.C. §§ 4321–47 (1994).

23. *Id.* § 4331(b) (1994). The policy contains six goals for the nation: 1) to serve as “trustee of the environment;” 2) to assure a “safe, healthful, productive, and esthetically and culturally pleasing surroundings;” 3) to attain beneficial use of the environment without “degradation, risk to health or safety, or other undesirable and unintended consequences;” 4) to preserve the historic, cultural, and natural aspects of our national heritage, and to maintain “an environment which supports diversity and variety of individual choice;” 5) to “achieve a balance between population and resource;” and 6) to “enhance the quality of renewable resources.” *Id.*

24. *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (citing 115 CONG. REC. 40416, 40419 (1969)); *see also* H.R. REP. NO. 91-378 at 2751 (1969) (“The purpose of the bill, . . . [is] to advise . . . on steps which may and should be taken to improve the quality of that environment.”).

25. 40 C.F.R. § 1500.1 (1999). The CEQ regulations are binding on all federal agencies. *See also* *Fritiofson v. Alexander*, 772 F.2d 1225, 1236 (5th Cir. 1985) (stating that the CEQ regulations are “designed to ‘tell’ federal agencies what they must do to comply with the procedures and achieve the goals of [NEPA]”) (alteration in original). In *Fritiofson*, the Army Corps of Engineers did not prepare an EIS prior to issuing a permit authorizing a housing developer to construct a canal system. The court held that the cumulative impact study was inadequate. *Id.* at 1249.

The CEQ regulations direct an agency to consider connected, cumulative, and similar actions.²⁶ Additionally, the CEQ regulations require alternatives to be considered.²⁷ The agency must consider if the action is related to other actions so that, together, the impact is significant. Three different types of possible impacts are direct, indirect, and cumulative.²⁸

Primarily, the agency must make a threshold decision to determine if the proposed federal action's environmental impact is significant.²⁹ The CEQ requires the preparation of an EA containing evidence and analysis to substantiate this threshold determination.³⁰ If the proposed action is significant, NEPA requires the preparation of an EIS.³¹ If an agency determines the impact is insignificant, a FONSI must be prepared detailing the reasons why an impact statement is not necessary.³²

An EA and a resulting FONSI are subject to judicial scrutiny. The agency must show that a "hard look" at environmental concerns has been

26. 40 C.F.R. § 1508.25(a) (1)–(3) (2000). Connected actions are those which are "closely related" and automatically trigger other actions; cannot proceed unless other actions are taken previously or simultaneously; or depend on the larger action for their justification. Cumulative actions are those that when viewed "with other proposed actions have cumulatively significant impacts." Similar actions "have similarities that provide a basis for evaluating their environmental consequences together." *Id.*

27. *Id.* § 1508.25(b). Alternatives include no action, other reasonable courses of action, and mitigating measures. *Id.*

28. Direct impacts are "caused by the action and occur at the same time and place." *Id.* § 1508.8(a). Indirect impacts are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* § 1508.8(b). Cumulative impacts are "incremental impact[s] of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.* § 1508.7.

29. The regulations require that a consideration of significance include both context and intensity. In *Metcalf*, the context would be the impact on the gray whale. The intensity refers to the severity of the impact. The regulations delineate ten aspects that should be considered in evaluating intensity: 1) beneficial and adverse impacts; 2) the degree the proposed action affects public health or safety; 3) unique characteristics of the area; 4) if the effects are likely to be highly controversial; 5) likelihood the effects are highly uncertain or involve unknown risks; 6) if the action may establish a precedent for future actions; 7) cumulative impact even if each action's impact is insignificant; 8) the degree the action affects Historic Places; 9) the degree the action may affect endangered or threatened species or its habitat; and 10) if the action threatens to violate federal, state, or local law. *Id.* § 1508.27.

30. *Id.* § 1508.9.

31. *Id.* (an environmental assessment "provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact").

32. *Id.*

taken.³³ “In reviewing an agency decision to forego an EIS, the court must apply the highly deferential ‘arbitrary and capricious’ standard.”³⁴ The court may not substitute its judgment for that of the agency.³⁵ The Supreme Court in *Robertson v. Methow Valley Citizens’ Council*,³⁶ stated that “NEPA merely prohibits uninformed—rather than unwise—agency action.”³⁷ Review of the record is based on the administrative record that was before the agency,³⁸ or any other information that “more fully explicates an agency’s decision.”³⁹

III. THE *METCALF* DECISION

In *Metcalf v. Daley*,⁴⁰ various animal rights groups⁴¹ filed a complaint against the Secretary of Commerce, the Director of NOAA, and the Director of NMFS alleging their actions violated NEPA.⁴² At the center of the dispute was the agencies’ authorization and promotion of the Makah Nation’s whaling proposal.⁴³ The district court granted summary judgment for the defendants, and thereby allowed the Makah Tribe to resume whaling.⁴⁴

33. *Fritiofson v. Alexander*, 772 F.2d 1225, 1238 (5th Cir. 1985). The Army Corp of Engineers did not generate a study or report on cumulative impacts. The court noted that this “smacks of post hoc rationalization, for there is no study in the record to support the claim.” *Id.* at 1246. Thus, the court concluded it was unreasonable to prepare a FONSI because a hard look at these impacts was not undertaken. *Id.* at 1246–47.

34. *Save Our Wetlands, Inc. v. Conner*, No. 98-3625, 2000 U.S. Dist. LEXIS 10496, at *11 (E.D. La. July 20, 2000) (quoting *Sabine River Auth. v. U.S. Dep’t of Interior*, 951 F.2d 669, 677–78 (5th Cir. 1985)). The Supreme Court explained that an agency is acting as ‘arbitrary or capricious’ when the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or it is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut.*, 463 U.S. 29, 43 (1983).

35. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut.*, 463 U.S. at 43.

36. 490 U.S. 332 (1989).

37. *Id.* at 351.

38. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971).

39. *Friends of the Earth, Inc. v. U.S. Army Corps of Eng’rs.*, Nos. CIV.-A. 98-0801, 98-1699, 98-2439, 2000 WL 1145514, at *4 (D.D.C. Aug. 10, 2000) (citing *Beach Communications, Inc. v. FCC*, 959 F.2d 975, 987 (D.C. Cir. 1992)).

40. 214 F.3d 1135 (9th Cir. 2000).

41. See *Plaintiffs-Appellants supra* note 2.

42. *Metcalf v. Daley*, 214 F.3d at 1137.

43. *Id.* at 1138. NOAA and NMFS had agreed to represent the Makah Tribe at the IWC in seeking approval of a five gray whale quota. *Id.*

44. *Id.* at 1141. The district court also denied the plaintiff’s motion to compel production of administrative records and denied a motion to supplement the record. *Id.* The

NOAA and the Makah Tribe entered an agreement, which provided that the Makahs would prepare a statement of need. NOAA agreed to make a formal proposal to the IWC for the Makahs.⁴⁵ The proposal would allow the Makahs to utilize the gray whale for subsistence and ceremonial use.⁴⁶ A draft EA was distributed for public comment. Subsequently, a new agreement⁴⁷ was signed between NOAA and the Makah Tribe after the original proposal became controversial at the IWC annual meeting. Four days after the new agreement, a final EA and a FONSI were issued. The appellants filed a complaint that same day.⁴⁸

The appellants asserted that the federal defendants violated NEPA because the EA was untimely.⁴⁹ Additionally, they contended that the EA was inadequate and that an EIS should be prepared instead of the FONSI that was issued. Appellants cited *Conner v. Burford*⁵⁰ for the court's interpretation of NEPA's timing requirement. *Conner* held that an EA or

court of appeals determined that this issue was moot because the defendants must prepare a new EA. *Id.* at 1146.

45. Gray whales, *Eschrichtius robustus*, are found only in the North Pacific Ocean. They migrate between their winter calving lagoons off Mexico and summer feeding areas in the Northern Bering Sea. At one time, gray whales were found in the North Atlantic and the Western Pacific but were nearly hunted to extinction. They swim more slowly than other whales and stay near to shore. The IWC banned the hunting of gray whales in 1947. The population has made a remarkable recovery and now has a population estimated to be more than 20,000. The gray whale was removed from the endangered species list in 1994. Bernd G. Wursig, *Gray Whale*, MICROSOFT® ENCARTA® ONLINE ENCYCLOPEDIA 2000 at <http://encarta.msn.com/find/Concise.asp?ti=06E95000> (visited Aug. 20, 2000).

46. The first agreement was on March 22, 1996. The agreement provided that a statement of need would be prepared by the Makah Tribe and that NOAA, through the U.S. Commissioner to the IWC, would make a formal proposal on behalf of the Makah Tribe. Additionally, the agreement delineated the means NOAA, in cooperation with the Makah Tribe, would use to manage the gray whale harvest. *Metcalf v. Daley*, 214 F.3d at 1139.

47. The second agreement was signed on October 13, 1997. This agreement was almost identical to the first except that it confined the area where the hunting of whales would take place. *Id.* at 1139-40.

48. Congressman Metcalf, Australians for Animals, and Beach Marine Protection filed a complaint in the United States District Court for the District of Columbia. After granting the Makah Tribe's motion to intervene, the case was transferred to the Western District of Washington. *Id.* at 1140.

49. *Id.* at 1149. Specifically, Appellants contended that "by making a commitment to authorize and fund the Makah whaling plan, and then drafting a NEPA document which simply rubber-stamped the decision[,]” Defendants were predisposed to the plan and thus failed to consider the environmental values affected. *Id.* at 1143.

50. 848 F.2d 1442 (9th Cir. 1988). In *Conner*, wildlife federations and others filed a claim that the sale of oil and gas leases in a vast area of National Forest violated NEPA because an EIS was not prepared. The Court held that an EIS was required before the point of commitment, defined as the point when the government no longer has the ability to prohibit the action. *Id.* at 1446.

an EIS had to be prepared “before any irreversible and irretrievable commitment of resources.”⁵¹ Appellants offered that the Makah proposal EA confirms this pre-commitment. The EA stated, “[i]n early 1996, [NOAA and the Makah Tribal Council] signed an agreement in which the United States committed to make a formal request to the IWC.”⁵²

Appellees argued that even if the EA were prepared after a commitment of resources, the issue was moot.⁵³ The only relief available in such a situation was the preparation of an adequate EA, which, they asserted, had already been accomplished.⁵⁴ Appellees relied on *Realty Income Trust v. Eckerd*⁵⁵ where the court refused to remand a case based on an untimely EIS. The court in *Eckerd* held that an adequate EIS already existed and preparation of a new one was unnecessary. The appellees in *Metcalf* argued that an adequate EA was prepared regardless of the timing of the agreement between the agency and the Makah Tribe. Therefore, following *Eckerd*, the appellees argued that the court should not remand the case to district court.

The court reviewed the agency decision in preparing the EA and FONSI under the “arbitrary and capricious” standard.⁵⁶ In making a firm commitment to the Makah Tribe before preparing an EA, the court held that NEPA was violated, the defendants had failed to take a “hard look” at environmental consequences.⁵⁷ The court stated that the decision in *Thomas v. Peterson*⁵⁸ supported this reasoning.⁵⁹ The *Thomas* Court held that the preparation of an EA and subsequent EIS had to be accomplished before deciding whether to approve a proposed road project.⁶⁰ Because the

51. *Metcalf v. Daley*, 214 F.3d at 1143 (9th Cir. 2000) (citing *Conner v. Burford*, 848 F.2d at 1446).

52. *Id.* (alteration in original).

53. *Id.* at 1145.

54. *Id.*

55. 564 F.2d 447 (D.C. Cir. 1977). The construction of a federal office building was challenged because a prospectus was prepared before the EIS. The court stated the draft EIS should have been filed with the prospectus but that “equity should not require the doing of a vain or useless thing . . . by enjoining [them] from continuing [the construction of the building.]” *Id.* at 458.

56. *Metcalf v. Daley*, 214 F.3d at 1141.

57. *Id.* at 1143.

58. 753 F.2d 754 (9th Cir. 1985). Interested parties (landowners, ranchers, outfitters, miners, hunters, anglers, recreational users, and conservation and recreational organizations) brought action against the Forest Service to enjoin construction of a timber road. The plaintiffs alleged that NEPA was violated because a FONSI was issued instead of an EIS. The Court held that the Forest Service must consider all combined impacts and therefore an EIS must be prepared. *Id.* at 754–55.

59. *See Metcalf v. Daley*, 214 F.3d at 1145.

60. *Thomas v. Peterson*, 753 F.2d at 755–56.

agreement between NOAA and the Makah Tribe was made before the preparation of the EA, the court stated that this agreement “probably influenced their evaluation of the environmental impact of the proposal.”⁶¹

The court distinguished *Eckerd* and stated that appellees’ reliance on that case was inappropriate.⁶² Unlike *Eckerd*, appellants here contended that the EA was defective. Consequently, the court reversed and remanded the case back to the district court and ordered that the FONSI be set aside and a new EA be prepared.⁶³

Justice Kleinfeld, in his dissent, criticized the majority’s decision in three respects: 1) the interpretation of the objectivity requirement for preparing an EA; 2) the construction of the timing regulation controlling the preparation of an EA; and 3) the remedy of requiring a new EA.⁶⁴

The preparation of an EA must be objective. Justice Kleinfeld cited *Association of Public Agency Customers v. Bonneville Power Administration*⁶⁵ to support his contention that an agency does not have to be impartial when preparing an EA/EIS. The court’s inquiry should be on the text of the EA and not on the motivation to prepare an EA, Justice Kleinfeld concluded.⁶⁶

Next, Justice Kleinfeld took issue with the court’s holding regarding the timing of the EA. Justice Kleinfeld relied on the test set out in *Conner v. Burford*⁶⁷ to contend that the preparation of the EA did not relinquish control over the whaling decision. Before whaling could begin, the proposal still had to be approved by the IWC. Therefore, he stated, the agreement between the Makah Tribe and NOAA was not an “irreversible and irretrievable commitment.”⁶⁸ Thus, Justice Kleinfeld asserted, the timing was not inappropriate, and that the court erred in requiring an EA before any action occurs.⁶⁹

Finally, Justice Kleinfeld asserted that the court erred in requiring the preparation of a new EA without first finding the existing EA defective.⁷⁰

61. *Metcalf v. Daley*, 214 F.3d at 1145.

62. *Id.* at 1146.

63. *Id.* The court noted that the manner of preparing the EA should be objective and in good faith and that the process of insuring this will be left to the relevant agencies. *Id.*

64. *Id.* at 1147 (citing 42 U.S.C.A. § 4332(2)(D) (1994) and 40 C.F.R. § 1502.14(a) (1999)).

65. 126 F.3d 1158 (9th Cir. 1997).

66. *Metcalf v. Daley*, 214 F.3d at 1147.

67. 848 F.2d 1441 (9th Cir. 1988).

68. *Metcalf v. Daley*, 214 F.3d at 1148.

69. *Id.*

70. *Id.* at 1149–50. Justice Kleinfeld relies on *Realty Income Trust v. Eckerd*, for this assertion and adopts the *Eckerd* Court’s sentiment that “equity should not require the doing

NEPA requires an agency to take a "hard look" before moving ahead with a proposal. Consequently, the value of the EA, Justice Kleinfeld reasoned, is that the agency evaluates its policy choices and publicizes them to solicit the reactions of others. Justice Kleinfeld contended that NOAA did that and the result is now a "clash of values between those who care more about whale hunting from the point of view of the hunter, and those who care more from the viewpoint of the whale."⁷¹ This conflict, he stated, does not permit the court to interfere; rather that is the role of the "political organs of government."⁷²

IV. DISCUSSION

The EA prepared by NOAA found that a five-whale taking would have no significant impact on the present whale population. Although five whales alone may be insignificant, a threshold determination must also consider any other foreseeable and reasonable actions.⁷³ Moreover, significance "can result from individually minor but collectively significant actions taking place over a period of time."⁷⁴ Thus, the new EA must make a threshold determination of the proposed action's impact and the cumulative effects of all reasonably foreseeable impacts.⁷⁵

First, the EA should include not only the quota of five whales requested, but also other similar actions. 'Similar actions' is defined as "actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common

of a vain or useless thing." *Metcalf v. Daley*, 214 F.3d at 1150 (citing *Realty Income Trust v. Eckerd*, 564 F.2d 447, 458 (D.C. Cir. 1977)).

71. *Metcalf v. Daley*, 214 F.3d at 1151.

72. *Id.*

73. 40 C.F.R. § 1508.27(b)(7) (2000) (significance requires a consideration of "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts").

74. *Id.* § 1508.7 (defining cumulative impact).

75. See, e.g. *Scientists' Institute for Public Information v. A.E.C.*, 481 F.2d 1079, 1092 (1973) (holding that "reasonable forecasting and speculation is implicit in NEPA"); *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (stating that the Department of Transportation must include the impact of likely commercial and industrial development that will result from the construction of a freeway exchange); the court referred to the impact as a secondary impact or what the CEQ regulations now refer to as an "indirect effects." "Indirect effects . . . are caused by the action and are later in time or farther removed in distance but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (1999).

timing or geography.”⁷⁶ Any other proposed hunting of gray whales would thereby qualify as a similar action.

The former EA failed to mention a combined proposal of the U.S. and Russian Federation to the IWC for a five-year block of six hundred and twenty gray whales⁷⁷ for both countries. This block number includes an estimated average of one hundred and twenty gray whales allotted to Eskimos from the Chukotka coast of Russia. Although only twenty whales of this five-year block quota represent the Makah Tribe’s proposed take, the gray whale will certainly be impacted by the combined annual harvest. Thus, the EA must consider both of these proposed takings of gray whales in the threshold determination of significance.⁷⁸

Furthermore, the EA acknowledged that the removal of injured gray whales resulting from the hunt would raise the actual total of gray whales taken by the Makah Tribe from twenty to forty-one in a five-year period.⁷⁹ A similar analysis must be done for the Chukotka quota. In summary, the cumulative impact of the total proposed quota and predicted injured whale takings must be considered in determining significance.⁸⁰

After a successful Makah proposal, other tribes also will likely submit proposals for a quota.⁸¹ The CEQ regulations require an agency to consider “[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.”⁸² Presently, thirteen Canadian tribes are claiming a treaty right similar to that of the Makah Tribe to hunt whales.⁸³ The likelihood of granting quotas to these tribes under the aboriginal subsistence exception must be considered in a threshold determination of significance.

Moreover, because the Makahs have not hunted whales for seventy years, giving them a quota under the aboriginal subsistence exception may

76. 40 C.F.R. § 1508.25(3) (1999).

77. *Metcalf v. Daley*, 214 F.3d at 1140.

78. *See Kleppe v. Sierra Club*, 427 U.S. at 390, 410 (1976) (holding that when several pending proposals exist that will have cumulative or synergistic impacts on a region, then they must all be considered together).

79. *Metcalf v. Daley*, 214 F.3d at 1140.

80. 40 C.F.R. § 1508.7 (1999) (defining cumulative impact as that “from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what . . . person undertakes such other actions”).

81. *Watters*, *supra* note 12, at 337 (“While it is true the Makah request for five whales is unlikely to threaten the gray whale population, this action could be the tip of the iceberg. A successful petition from the Makah could touch off a chain reaction of subsistence requests from indigenous groups across the world.”). *Id.*

82. 40 C.F.R. § 1508.27(b)(6) (1999).

83. *Watters*, *supra* note 12, at 337.

alter the definition of the exception. A nutritional need would no longer be included as a requirement to the exception. Other indigenous people who included whaling in their cultural background would thus be inclined to request a quota.⁸⁴

Additionally, some commentators note that approval of the Makah plan may create adverse repercussions from other IWC nations, most notably Japan.⁸⁵ Allowing Makah to whale on purely cultural grounds might seem inconsistent and unfair to Japanese whalers.⁸⁶ Japan has repeatedly made petitions to the IWC for whaling rights for small-type coastal whaling (STCW).⁸⁷ Japan asserts that STCW is very similar to aboriginal subsistence whaling and that cultural dependency on whales exists in some coastal villages in Japan. Japan has argued that this dependence should qualify them for an exception to the IWC ban on whaling.⁸⁸ A successful Makah proposal could conceivably result in the IWC feeling the pressure to grant an exception to Japan, thereby further affecting the whale population.⁸⁹

Although the Makah proposal's EA did acknowledge Japan's STCW, analysis of this impact was lacking.⁹⁰ The EA concluded that the government "sees a fundamental difference between Japan's small type coastal whaling, which is inherently commercial in nature, and the Makah proposal

84. Sunde, *supra* note 8 at A1. ("Allowing a hunt on solely cultural grounds could open the door to whaling by other groups . . . 'What nation in the whole world that has an ocean coast doesn't have whaling in its past?' Metcalf asked.")

85. See, e.g., Watters, *supra* note 12, at 337; Beck, *supra* note 6, at 393-9.

86. See, e.g., Sharon Moshavi, *Japanese Whalers Lament Pariah Status in the Modern World*, BOSTON GLOBE, March 5, 2000, at A4 ("Japanese whaling advocates accuse the anti-whaling movement of a double standard. They point out that other groups, like some Native Americans, have been given 'subsistence' rights to catch large whales. Japanese whalers . . . have applied for such rights and have been denied . . . [M]any Japanese view the whaling ban as an attack on their country.")

87. Beck, *supra* note 6, at 394 (citing *Forty-second Report of the International Whaling Commission 1990-91*, 11, 34 (1992), "Japan again 'requested the recognition of a third category of whaling between commercial and aboriginal subsistence.'").

88. Stephen M. Hankins, *The United States' Abuse of the Aboriginal Whaling Exception: A Contradiction in United States Policy and a Dangerous Precedent for the Whale*, 24 U.C. DAVIS L. REV. 489, 494 (1990-91).

89. See, e.g., Beck, *supra* note 6, at 390 ("Another concern is how an IWC acceptance of the Makah hunt could impact the IWC's ability to continue denying Japan's repeated requests for small-type coastal whaling.")

90. An EA must include both evidence and analysis. 40 C.F.R. § 1508.9. In *Friends of the Earth, Inc. v. United States Army Corps of Engineers*, the Court stated that "[C]onclusory remarks . . . do not equip a decision maker to make an informed decision about alternative courses of action or a court to review the [agency's] reasoning." *Friends of the Earth, Inc. v. United States Army Corps of Engineers*, 2000 WL 1145514 (D.D.C.) at *12.

in which the sale of whale meat is explicitly prohibited.”⁹¹ A FONSI requires an explanation why the action will not have a significant impact and “it relies on the Environmental Assessment’s scientific analysis and data as its informed basis and justification.”⁹² Simply stating that a difference exists between Japan and Makah whaling is not an analysis regarding what significant effects may result.⁹³ Therefore, STCW must be reassessed in the new EA.

Finally, the impact a successful Makah proposal may have on commercial whaling must be included in the assessment. As discussed earlier, the United States has an obligation to uphold the Treaty of Neah Bay. When negotiating on behalf of the Makah Tribe, the United States may be required to make concessions to other whaling nations requesting quotas in order to support its obligations and maintain its credibility.⁹⁴ Although the likelihood of these concessions is not readily apparent, precedent for concessions regarding United States whaling quotas does exist. For example, the United States was forced to compromise with some whaling nations when it was trying to reinstate the Alaskan Inupiat bowhead whale hunt.⁹⁵ The estimated result of these negotiations is not insignificant. One commentator calculated “that each Bering Sea bowhead secured by U.S. negotiators at the IWC translates into approximately 146 whales being killed in other oceans.”⁹⁶ Similar concessions may have to be made while negotiating the Makah proposal.⁹⁷

91. Ed Penhale, *Makahs Seek OK to Hunt Whales; ‘Tradition’ Argument is Opposed*, SEATTLE POST-INTELLIGENCER, Oct. 16, 1997 at B1.

92. *Coalition for Canyon Preservation v. Slater*, 33 F. Supp. 2d 1276, 1280 (D. Mont. 1999) (holding that the National Park Service’s EA for a proposed parking lot in Glacier National Park lacked scientific analysis and supporting data to support a FONSI).

93. See *Brooks v. Volpe*, 350 F. Supp. 269, 279–80, *supplemented by* 350 F. Supp. 287 (W.D. Wash. 1972), *aff’d*, 487 F.2d 1344 (9th Cir. 1973). The Court stated that NEPA required scientific analysis to expose environmental effects. This included initiating and developing methods and procedures to quantify data or by referring to other studies.

94. *Watters*, *supra* note 12, at 338–39.

95. *Id.* See also Beck, *supra* note 6, at 389. The United States has lobbied the IWC to allow the Alaskan Eskimos to continue hunting the endangered bowhead whales in the Bering Sea. In 1977 the IWC adopted an amendment deleting the subsistence exception for the bowhead. The United States consequently lobbied the IWC and a limited whaling was allowed to continue in 1978. Hankins, *supra* note 81, at 516.

96. Michael Chiropolos, *Inupiat Subsistence and the Bowhead Whale: Can Indigenous Hunting Cultures Coexist with Endangered Animal Species*, 5 COLO. J. INT’L ENVTL. L. & POL’Y 213, 231 (1994).

97. The CEQ regulations support this by requiring that a determination of significance includes “the degree to which the action may establish a precedent for future actions with significant effects.” 40 C.F.R. § 1508.27(b)(6) (2000).

Pursuant to the CEQ regulations, NOAA must consider all impacts together, even if each is insignificant on its own. The EA is a “concise public document . . . [which] [b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.”⁹⁸ If the action significantly affects the environment, the agency moves on to an environmental impact statement.⁹⁹ The aforementioned impacts are cumulative and could together significantly affect the gray whale population¹⁰⁰ and, thus, an EIS should be prepared.¹⁰¹

V. CONCLUSION

Requiring an EIS to be prepared before Makah whaling resumes has many advantages. First, an EIS does not always mean the proposed project will be terminated. If mitigation measures are proposed¹⁰² to address the impact, then a FONSI may issue. The Agency could suggest policies for the IWC to adopt which would alleviate impacts on gray whales. The aboriginal subsistence exception could be defined to specify what cultural background and what nutritional needs are required. Clear-cut guidelines may limit the number of indigenous peoples able to obtain quotas. Furthermore, with the anticipated increase in proposals by other tribes, the

98. *Id.* § 1508.9(a)(1).

99. *Id.* § 1501.4.

100. One commentator reports that the sustainable yield of gray whales estimated by the IWC is approximately six hundred and seventy whales per year. Walters, *supra* note 12, at 335.

101. Alternatively, another reason an EIS should be prepared, which is not addressed in this note, is the CEQ explanation of “significant” which states: “The degree to which the effects on the quality of the human environment are likely to be highly controversial.” 40 C.F.R. § 1508.27(b)(4) (2000). In *Save the Yaak Comm.*, the court noted that “[i]f substantial questions are raised regarding whether the proposed action *may* have a significant effect upon the human environment, a decision not to prepare an EIS is unreasonable.” *Save the Yaak Comm. V. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (*citing* Foundation for North Am. Wild Sheep v. United States Dep’t of Agric., 681 F.2d 1172, 1178 (9th Cir. 1982)). The Ninth Circuit defined ‘highly controversial’ as a “substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (*citing* Greenpeace Action v. Franklin, 14 F.3d 1324, 1335 (9th Cir. 1993); *Sierra Club v. United States Forest Service*, 843 F.2d 1190 (9th Cir. 1988)).

102. Although mitigation measures or alternatives may be addressed in an EA “the agency’s duty to consider alternatives in preparing an EA is a lower duty than the duty to consider alternatives in preparing an EIS.” *Jackson Hole Conservation Alliance v. Babbitt*, 96 F. Supp. 2d 1288, 1298 (D. Wyo. 2000) (comparing 40 C.F.R. § 1508.9(b) with § 1502.14).

suggestion of a block quota could be made in the EIS.¹⁰³ The burden would be on the participating tribes to apportion quotas, but the total number of allowable takings would remain constant. Thereby, the gray whale population could be maintained at a sustainable level.

If an EIS is prepared, and the determination is made that the proposed whaling will proceed with adequate safeguards, then likely opposition to the hunt will be decreased. The Makah contend that organized groups who have disseminated propaganda about the impact incite much of the opposition.¹⁰⁴ The EA ensures that scientific analysis and supporting data would be released to the public informing them of the report's findings and any safeguards in place. Informed opinions rather than emotional outcries might result, allowing the Makah Tribe to resume a cultural practice in a manner "consistent with conservation of natural resources."¹⁰⁵

103. Beck, *supra* note 6, at 400 (using the case of *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1096 (1976) as an example, the conclusion is drawn that "this problem could be reconciled through a process involving a single court decision or negotiated agreement"). The author states that the correct question to ask is "[h]ow many whales in total are native peoples allowed to take?" Beck, *supra* note 6, at 400. Questions regarding who is allowed to take the whales do not impact the conservation question of sustaining the whales. *Id.* at 400–01.

104. "[W]e are also aware that much of this opposition [to the hunt] has been whipped up deliberately by organized groups who have put out a blizzard of propaganda attacking us and urging the public to oppose us. Unfortunately much of this propaganda contains misinformation, distortion and outright falsehoods. The anti-whaling community is very well organized and very well financed and puts out a steady stream of propaganda designed to denigrate our culture and play on human sympathy for all animals. Perhaps what is lost in all of their rhetoric is an appreciation of the value of preserving the culture of an American Indian Tribe—a culture which has always had to struggle against the assumption by some non-Indians that their values are superior to ours." Makah Nation, *supra* note 8.

105. Makah Nation, *supra* note 8.

