

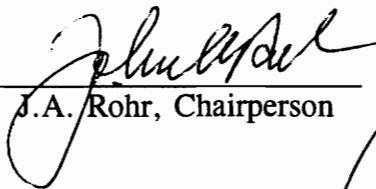
MANAGING EXTINCTION: THE UNITED STATES' DECISION TO END  
THE ESKIMO HUNT OF THE ENDANGERED BOWHEAD WHALE


by

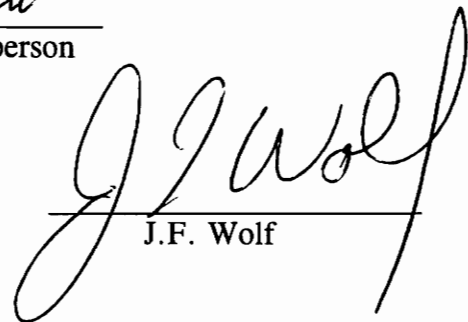
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Roddy Moscoso

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Center For Public Administration and Policy

(ABSTRACT)

EFFECTIVE NATURAL RESOURCE MANAGEMENT BY THE FEDERAL GOVERNMENT IS SELDOM ACHIEVED WITHOUT ENGENDERING SOME DEGREE OF CONTROVERSY. THE COMPETING NEEDS OF VARIOUS PLANT AND ANIMAL SPECIES OFTEN PLACE THE GOVERNMENT IN THE POSITION OF HAVING TO CHOOSE BETWEEN THE NEEDS OF ONE SPECIES OVER ANOTHER. OCCASIONALLY, THE CHOICE DIRECTLY INVOLVES THE NEEDS OF HUMAN BEINGS, CREATING A SITUATION WHERE PUBLIC ADMINISTRATORS MUST WEIGH THE IMPACTS OF THEIR ACTIONS ON BOTH A SPECIES THEY ARE CHARGED TO PROTECT AND THE PUBLIC THEY SERVE.

IN 1977, THE FEDERAL GOVERNMENT WAS PLACED IN THE POSITION OF HAVING TO CHOOSE BETWEEN THE NEED TO AFFORD GREATER

PROTECTION TO THE ENDANGERED BOWHEAD WHALE AND THE SOCIAL AND CULTURE NEEDS OF ALASKAN ESKIMOS WHO HAVE HUNTED THE BOWHEAD FOR OVER FOUR THOUSAND YEARS. AT THE TIME, THE DECISION EXEMPLIFIED THE ROLE OF THE FEDERAL GOVERNMENT AS AN ARBITRATOR OF SURVIVAL, A SITUATION THAT IS BECOMING INCREASINGLY COMMONPLACE AS THE CONTINUED DEVELOPMENT OF THE WORLD'S NATURAL RESOURCES, ALONG WITH AN EVER-EXPANDING HUMAN POPULATION, HAS RESULTED IN NUMEROUS DECISIONS THAT EFFECTIVELY CHOOSE BETWEEN ONE SPECIES OR THE OTHER.

AN EXAMINATION OF THE DECISION-MAKING PROCESS ESTABLISHED BY THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION OF THE UNITED STATES DEPARTMENT OF COMMERCE TO RESOLVE THE 1977 CONTROVERSY INVOLVING THE ESKIMOS AND THE BOWHEAD WHALES PROVIDES USEFUL LESSONS AND INSIGHTS ON HOW SUCH DECISIONS CAN BE MADE IN AN OPEN FORMAT THAT ALLOWS AFFECTED CONSTITUENCIES, NOTWITHSTANDING THE WHALES, ADEQUATE OPPORTUNITY FOR COMMENT AND INPUT.

## ACKNOWLEDGEMENTS

I would like to thank the many people who assisted me on this study. First and foremost is former Commissioner to the International Whaling Commission and Current Director of the Alaska Science Center for the National Oceanic and Atmospheric Administration's National Marine Fisheries Service, Dr. William Aron. Dr. Aron's personal assistance and encouragement to pursue this project exemplifies its ultimate goal: to provide insight to other public administrators who face similar controversies.

Furthermore, I would like to thank the following people who also contributed greatly to my understanding of the issues involved in the case study: Dr. Michael Tillman, Dr. Howard Braham, Dean Swanson, Becky Rootes, Rod Moore, Lynn Sutcliffe, Prudence Fox, and Ken Hollingshead.

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## I. INTRODUCTION

### *Managing Life*

For man, being God is not easy. Genesis 1:26 says, "Let us make man in our image...and let them have dominion over the fish in the sea and over the fowl in the air...and over every creeping thing that creepeth upon the earth." The responsibility that God imparted to man, to protect and rule over all living creatures, is enormous and sometimes requires that man choose between the competing needs of living things. In the United States, such decisions are often made by the federal government.

Not surprisingly, the process by which the federal government manages the competing needs of living things is complex, incorporating the use of various statutes designed to ensure the viability of endangered species, protect the health of individuals from environmental contaminants, and sustain the use of renewable resources. However, beyond the legal constraints associated with such decisions lie the more fundamental, moral and cultural issues that require man to make "God-like" judgements.

In 1977, the United States was forced to choose between the competing needs of a species on the brink of extinction and the endangered culture and tradition of native Americans. At the time, the decision exemplified the role of government as an



arbitrator between the needs of man and other living things, a function of government that is becoming increasingly prevalent in today's world. The rationale that human needs are inextricably linked with all other life on earth has forced government to see many decisions within the framework of winners and losers in what has become managed survival and unnatural selection. Indeed, the continued development of the world's natural resources, along with the ever-increasing needs of an expanding human population, will undoubtedly result in numerous decisions that choose between one "creeping thing" and another.

The following case study explores the 1977 decision of the National Oceanic and Atmospheric Administration (NOAA) of the United States Department of Commerce to end the hunt of the critically endangered bowhead whale by Alaskan Eskimos. In developing the record used in making this decision, NOAA solicited input from numerous sources in and out of government, held public hearings and thoroughly reviewed the legal implications of alternative decisions. Although no such process is without fault, and one conclusion of this study is that the need to make this decision may well have been avoided, the process utilized by NOAA may provide useful lessons and insights to other public administrators on how such decisions can be made in an open format that allows affected constituencies, notwithstanding the whales, adequate opportunity for comment and input.

This study focuses on the relatively short period of time when the record was developed and does not attempt to review closely the impacts of the decision itself. Furthermore, although a significant factor in the decision involved the biological status of the whales, this study does not claim to represent adequately the complexity of determining the viability of bowhead whales or provide a knowledgeable critique of the methods employed to determine the whales' status at the time of the decision. Rather, the purpose of this study is to demonstrate how public administrators determined long and short-term policy given the "knowns" and "unknowns" of their time. Therefore, the analysis is of the individuals themselves and their ultimate decision, made in their best judgement with full knowledge of the various agenda of competing groups, due consideration of their legal mandates and their own personal convictions as to the proper role of government. The preceding statement, of course, is tantamount to American governance in at least two of its three branches. The topic of this study, then, though unremarkable by the prevalence of such scenarios, should provide useful information to public administrators.

The study begins with a description of the development of the global and American whaling industries and their impact on bowhead and other whale stocks. The analysis then traces the formation of the international body designed to manage the world's whaling stocks, the current International Whaling Commission. The predominant section of this study then uses the case study method to review more closely the 1977

controversy. This includes a focused look at the legal battle which became a significant aspect of the controversy. Beyond the moral, political and scientific dilemma surrounding the 1977 decision to end the hunt by the Eskimos was the technical question of whether the United States government actually had the discretion to choose at all. District and appellate courts reached different decisions in this intricate case. The ultimate ruling set important precedents for the future, especially relating to the numerous obligations the United States faces through various international environmental treaties. Finally, the conclusion briefly analyzes the overall decision-making process utilized by NOAA in developing United States' policy on the native hunting of bowhead whales.

Today, the multinational environmental agenda is laden with potential opportunities for global management of the world's resources. However, advances in supranational organizations have recently found themselves stifled by a renewed sense of nationalism. The 1977 bowhead whale decision contributed to the legal controversy regarding the amount of sovereign authority surrendered by the United States through international commitments.

The controversy surrounding the hunting of whales continues to this day and includes not only subsistence hunters, but also nations whose rich heritage of whaling has threatened the breakup of the International Whaling Commission (IWC). In the

summer of 1992, Norway announced to the world that it intended to resume large-scale commercial hunting of whales without sanction from the IWC. Norway justified its intention to take such action by asserting that the IWC was being dominated by nations, the United States specifically, that base decisions regarding the taking of whales on non-scientific factors. This news was another blow to the viability of the IWC following Iceland's announcement only a few months earlier to leave the IWC in order to create a new whale management organization designed to allow commercial whaling on stocks believed to be healthy enough to stand some level of hunting.

Today, then, the controversy stems from a more optimistic situation. Many whale stocks have benefitted from a moratorium on high-seas whaling initiated by the IWC in 1985, and have rebounded to population levels that can stand some level of predation by commercial hunters. The role for the United States, so long the advocate of reduced hunting on the basis of biology, has become fluid. At the annual meeting of the IWC in May 1993, the United States voted with other nations in favor of maintaining the moratorium. However, pressure from nations seeking a resumption of whaling on healthy stocks continues to grow. In voting against efforts to resume whaling on healthier stocks, the United States has found itself in the position of having to argue *against* the biological status of certain whales. This is the second time the United States has had its own arguments used against it. The first was in 1977 and is the subject of this study. However, in 1977 the issue was not

what level of take an increasingly healthy population of whales could stand; it was rather a question of survival for either a species of whale or a human culture. Both were thought to be on the brink of extinction, and there appeared to be only one question: which would survive?

## II. A BRIEF HISTORY OF WHALE KILLING AND GLOBAL MISMANAGEMENT

In January 1977, members of the International Whaling Commission (IWC), the individuals charged with managing the Earth's whales, were becoming increasingly sensitive to the biological needs of these animals. The nations most actively involved in commercial whaling were, more than ever, basing harvesting quotas on the actual health of individual species. This responsible management was due, in large measure, to the efforts of the United States and other non-whaling nations that lobbied diligently for years for responsible whaling if, for no other reason, than that healthier populations would lead to greater harvest levels. By January 1977, it appeared that these arguments were working. Unfortunately for the United States, this success was about to instigate a major controversy, and Dr. Michael Tillman, research biologist for the National Oceanic and Atmospheric Administration's (NOAA) Marine Mammal Laboratory, could see it coming.

The problem was simple -- the world was running out of bowhead whales. The population of bowheads in the Arctic was critically low following decades of commercial utilization that decimated the species. Although bowheads had not been commercially hunted since 1947, Alaskan Eskimos continued to kill 10 to 20 each

year, continuing a tradition of several thousands of years.<sup>1</sup> This small hunt by the Eskimos had little, if any, impact on the bowhead population. However, the discovery of the Arctic bowhead stock by America's "Yankee whalers" a century earlier quickly tipped the balance against the whales.<sup>2</sup> By January 1977, the Eskimo take had become a problem due to the extremely low population level of the bowheads as well a recent increase in the Eskimo take. Tillman knew the Eskimo harvest was becoming a problem and that members of the IWC were hinting at the possibility of calling for an end to the hunt. Tillman and other people at NOAA familiar with the issue also knew that such action by the IWC would place the United States in an extremely difficult position of having to choose between its international environmental agenda and the Eskimo culture itself. But NOAA headquarters in Washington, D.C., had developed a plan to rectify the problem before a major controversy erupted. Unfortunately, the plan would fail, and in 1977, a major domestic and international controversy involving the Commerce, Interior and State Departments, the White House, Congress, the Supreme Court and a multitude of special interest groups, from whale lovers to whale eaters, occurred. Tillman, like

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<sup>1</sup> Final Environmental Impact Statement: *International Whaling Commission's Deletion of Native Exemption for the Subsistence Harvest of Bowhead Whales* (U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, October 1977), 37. Richard K. Nelson, *Hunters of The Northern Ice* (Chicago: University of Chicago Press, 1969), 9.

<sup>2</sup> Norman A. Chance, *The Eskimo of North Alaska* (New York: Holt, Rinehart and Winston, 1966), 14.

many others at NOAA who had watched the events which led to the controversy unfold, cursed the generations before him that had let the populations of whales deteriorate to such low levels. He wondered how history had brought him and the whales to this difficult time: January 1977.

The world's whaling history can best be described by F.D. Omamanney's observation: "The history of whaling is made up of a number of chapters each covering a few centuries and all more or less repeating the same pattern...Each began with new discovery and hopeful enterprise, passed through a fierce competition and ruthless exploitation with improving techniques and ended at length in diminishing resources, exhaustion and failure."<sup>3</sup> Indeed, such is also the legacy of most of the world's early and, to some extent, contemporary fisheries management efforts.

Managing living resources, to which no specific property rights are assigned, is a difficult task. The limitless exploitation of a given species by an unrestrained number of hunters naturally leads to the rapid decline of that species. When such a resource is no longer viable and the population becomes so scarce that the cost of finding it is greater than its value landed, the next logical step is to seek out other resources. Of course, looking to other fisheries or whale stocks makes perfect sense as long as other

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<sup>3</sup> James E. Scarff, "The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment," *Ecology Law Quarterly*, Vol. 6, numbers 2 and 3 (1977), 343.



resources remain. For hundreds of years, the world's oceans maintained a bounty of exploitative opportunities. However, man is the most efficient animal that ever lived, and our ability to exhaust living resources is limited only by the number of resources on the planet.

Although Eskimo whaling in the Arctic had been occurring for four thousand years, the first western whaling efforts began with the Basques in the Bay of Biscay in the 11th or 12th centuries. The Basques focused on the right whale, which was so named because it swam slowly near shore and floated when killed. The technology of the age was well-suited to harvest the right whale in limited numbers.<sup>4</sup> Nonetheless, early whalers were able to deplete coastal right whale stocks by the 13th century.<sup>5</sup> The lure of additional right whales farther offshore spurred the advent of technology in gear and ship design which allowed the Basques to continue pursuing right whales.

Basque technology was soon adopted by other western nations which sought to develop catching, processing and support industries. By the 17th century, Holland maintained the world's largest whaling industry.<sup>6</sup> Additional technological advances

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<sup>4</sup> Ibid., 344.

<sup>5</sup> Frances Diane Robotti, *Whaling and Old Salem* (New York: Fountainhead Publishers, 1962), 3.

<sup>6</sup> Ibid., 4.

led to exploitation of new species, such as the Atlantic bowhead or Greenland right whale. The capacity of the world industry quickened the pace of exploration as newly-discovered stocks were more quickly depleted. As the industry pushed west in search of new species, the establishment of a whaling industry in the American colonies soon followed.

Native American Indians had long used whales that were stranded on New England shores. Whale oil was used for heat and illumination, the meat for food and the bones for construction.<sup>7</sup> When the Europeans arrived in search of additional right whale stocks, they also used stranded whales as mass-strandings in New England were commonplace. The frequency and volume of the strandings hinted at the possibility of large stocks off the coast, and this led to the construction of new whaling ships in New England. This state-of-the-art fleet succeeded in severely depleting local New England and mid-Atlantic right whale and Atlantic bowhead stocks by the beginning of the 18th century.

The newly-created industry was on the verge of collapse as a result of the over-exploitation of the right and bowhead whales in 1712 when, by chance, the Europeans discovered a new species that was stranded on the New England coast: a large sperm

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<sup>7</sup> Edouard A. Stackpole, *The Sea-Hunters* (Philadelphia: J.P. Lippincott Company, 1953), 15.

whale.<sup>8</sup> The Indians, settlers and the English Crown all claimed ownership to the whale.<sup>9</sup> The oil of the sperm whale was found not only to be more plentiful per pound, but also superior as an illuminant. Although sperm whale meat was considered generally unpalatable, the extraction of sperm whale oil proved to be extremely profitable -- the industry was saved.

Following increased familiarity with the use of sperm whale oil as an illuminant, demand grew steadily in both the Colonies and England during the first half of the 18th century. The price of sperm whale also rose with demand; in 1731, the price of was 7 pounds sterling per ton; by 1768, 17 pounds per ton, and at the beginning of the Revolutionary War, 40 pounds per ton.<sup>10</sup>

With increases in demand and prices, the American industry continued to grow as did the size and capacity of new whaling ships which could sail for extended voyages and completely process whales on board. American ships began to hunt whale stocks

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<sup>8</sup> James E. Scarff, "The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment," *Ecology Law Quarterly*, Vol. 6, numbers 2 and 3 (1977), 345.

<sup>9</sup> Charles Maurice and Charles W. Smithson, *The Doomsday Myth: 10,000 Years of Economic Crises* (Stanford, California: Hoover Institution Press, 1984), 63.

<sup>10</sup> *Ibid.*, 63.

around the globe on individual voyages lasting as long as four years.<sup>11</sup> Right whale stocks located off the coasts of Australia, New Zealand and South Africa were prime targets. However, the increasing dependency on sperm whale oil as the preferred fuel for lamps, along with the commensurate increases in prices that accompanied its scarcity, made sperm whales the preferred whale for the world's industry at that time.<sup>12</sup>

The New England fleet was partially destroyed during the Revolutionary War, but rebuilding efforts began quickly in 1784, and by 1788, the industry had recovered to pre-War levels.<sup>13</sup> In an effort to establish its own whaling industry and squelch the development of the new United States industrial base, England imposed a tariff of 18 pounds sterling per barrel on all American whale oil, effectively eliminating the British market.<sup>14</sup> However, the United States maintained good relations with France which provided a solid market for American whale oil. Unfortunately, the French market closed during the French Revolution in the late 18th century, and the United

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<sup>11</sup> James E. Scarff, "The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment," *Ecology Law Quarterly*, Vol. 6, numbers 2 and 3 (1977), 345.

<sup>12</sup> Ibid.

<sup>13</sup> Charles Maurice and Charles W. Smithson, *The Doomsday Myth: 10,000 Years of Economic Crises* (Stanford, California: Hoover Institution Press, 1984), 63-64.

<sup>14</sup> Ibid., 64.

States fleet itself was nearly completely destroyed in the War of 1812.<sup>15</sup> Peace, however, brought a time of relative calm for the American whaling industry. The fleet was rebuilt, and Americans quickly became the world's dominant whalers.

By the mid-19th century, the United States whaling industry had blossomed far beyond the combined capacity of the rest of the world's whaling fleets. By 1846, the United States had 729 large whaling ships and the industry employed over 70,000 people.<sup>16</sup> The entrepreneurial exploits of the American fleet was limited only by its ability to find whales. However, the world was growing smaller rapidly as a result of American capacity. As the Civil War approached, signs of collapse were already becoming apparent. The price of sperm whale oil skyrocketed due to a lack of supply, and exports of whale meat were falling for the same reason.

The advent of the Civil War nearly resulted in the complete destruction of the United States whaling fleet. Unfortunately, the reprieve granted the whales as a result of the war was too short to allow for any meaningful rebuilding of the stocks given the long life cycle of leviathans. Following the war, initial attempts to rebuild the industry were stifled by the depleted status of whales themselves. By this time, however, the

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

entrance of petroleum into the lubrication and illumination market was also contributing to the industry's woes.

It has been argued that the discovery and development of crude oil occurred as a *result* of the downfall of the whaling industry. This argument is based on the rationale that the increased scarcity and rising prices of whale oil precipitated the need to explore the possibilities of alternatives. Although petroleum had been slowly bubbling-up in scattered places like Oil Creek, Pennsylvania, and the benefits of crude as a lubricant and smelly illuminant were, by then, well known, the limited supply of crude oil along with the availability of whale oil at reasonable prices did little to encourage exploration and alternative uses of crude. However, by 1856, the average price of whale oil had jumped 143% in less than a decade to 80 cents a barrel.<sup>17</sup> By this time, various small rock oil (coal) refineries had been created and were attempting to market a more refined oil as an illuminant as the refining process had alleviated much of the odor associated with burning straight crude. Unfortunately, the refining process was expensive, and the coal-oil produced could not compete directly with whale oil. However, the worsening supply and increasing prices of whale oil encouraged continued development and exploration, and in 1859, Edwin L. Drake's converted salt brine well in Oil Creek "came in."<sup>18</sup> By 1861, crude oil was selling

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<sup>17</sup> Ibid., 65.

<sup>18</sup> Ibid., 67.

for 10 cents a barrel, and many of the existing coal refineries converted to crude production.<sup>19</sup> The alternative to whale oil had been found.

The destruction of the whaling industry during the Civil War allowed the newly-formed petroleum industry to take hold of the illumination and lubricant sectors. In fact, although the supply of crude had never been more plentiful, oil producers in Pennsylvania formed a cartel, the first OPEC, and artificially inflated the price of crude to \$4.00 a barrel in 1862. Of course, by this time, crude was no longer an alternative, but a sole source. The attempt to revive the whaling industry following the Civil War failed due to the dilapidated state of most whale stocks. By the 1870s, the east coast whaling industry was dead, and only a few unexploited species remained. Nonetheless, they would be exploited.

During the last quarter of the nineteenth century, the newly-developed west coast whaling industry began hunting the California gray whale, a species previously not hunted due to its low oil extraction rate and the unpalatableness of its meat. However, the grays were plentiful, and almost all the whale product was used in some fashion, though commanding a lower price than had previously been enjoyed when the industry was more dominant. The grays migrated close to the shore and were easy targets. However, when their calving grounds were discovered in small

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<sup>19</sup> Ibid.

lagoons in Baja, California, the grays were decimated and considered biologically extinct in 1890.<sup>20</sup>

During this period, the first whaling ships crossed the Bering Straits and discovered the land of the bowhead whales as well as the Eskimos. The bowhead stocks were aggressively hunted for their baleen (plankton filters) which were fashioned into various products as an early form of plastic. In less than 20 years, the Yankee whalers had decimated the bowhead stocks and left the Eskimos with a commercially extinct population with which to maintain their culture. Though of no use to the commercial whalers, sufficient bowheads would survive to allow the Eskimos to continue their modest hunt, with some improvements in technology. The Eskimos were quick to incorporate the "shoulder gun," which fired a small harpoon with an explosive charge into a whale, as part of their traditional hunt.

By the turn of the century, the world's right, Atlantic bowheads, Northern humpbacks and gray whales were on the brink of extinction. The whales which remained in abundance, the rorqual whales such as the blue and fin whales, were not considered catchable due to their speed and tendency to sink quickly once harpooned. However, technology was to provide another opportunity for exploitation of these species.

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<sup>20</sup> James E. Scarff, "The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment," *Ecology Law Quarterly*, Vol. 6, numbers 2 and 3 (1977), 346.



During the demise of the American whaling industry in the late nineteenth century, other nations had begun to exploit new methods of hunting the rorqual stocks known to exist. Norway was at the forefront of this technological development. New steam-powered boats provided the speed, exploding gun-fired harpoons provided the firepower and compressed air pumps kept the carcasses afloat once killed.<sup>21</sup> The rorquals had become catchable, and North Atlantic stocks were heavily exploited. The familiar pattern of discovery, exploitation, depletion, and the search for new stocks had again emerged. By the advent of the twentieth century, only the Antarctic was considered unexplored and unexploited, largely ignored because of the violence of its waters. However, whaling ships had become larger and more powerful.

In 1904, the first Antarctic shore station was constructed by the Norwegians in South Georgia Island.<sup>22</sup> The Antarctic stocks were substantial, and more whales would be killed from this base point in the next four decades than had been killed in the previous four centuries.<sup>23</sup> The first species exploited was the slower, coastal humpbacks. In 1911 alone, 8,500 humpbacks were killed. Once the humpbacks became scarce, the fleets focused on the more difficult-to-catch blue whales. By

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<sup>21</sup> Ibid.

<sup>22</sup> Ibid., 347.

<sup>23</sup> Ibid.

1922, the annual landing of blue whales was 5,700 -- humpbacks had become so scarce that only 9 were killed that year.<sup>24</sup>

Although the industry was affected by World War I as many boats were converted to military use, whaling continued, and the world catch, dominated by the Antarctic-based industry, killed over 10,000 whales annually.<sup>25</sup> After the war, the industry continued to expand dramatically, and in 1931, the world catch was 43,129 whales -- an order-of-magnitude increase in just over ten years.<sup>26</sup> Discovery, exploitation, depletion, and the search for new stocks had, once again, run its course.

Unfortunately, the Earth held no sea left unexplored. International recognition of the poor state of the world's whale stocks led whaling nations to begin considering the idea of global, collective management.

The Convention for the Regulation of Whaling was signed on September 24, 1931.<sup>27</sup> Although it may be considered a landmark by gaining membership from the dominant whaling powers of the time (Norway and Great Britain), the treaty itself was

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> R. Gambell, "The International Whaling Commission-quo vadis?," *Mammal Review*, Vol. 20, no. 1 (Great Britain, 1990), 31.

considered weak, applying only to baleen whales with no specific quotas for individual species.<sup>28</sup> Furthermore, Japan, Germany, Argentina, Chile and the Soviet Union, though comparably smaller in their whaling effort, failed to sign the accord.<sup>29</sup> Agreement was reached, however, on affording protection to the critically-endangered right and bowheads. Of course, this was no great sacrifice as nations considered both species commercially extinct. Despite the failure of the 1931 Convention to provide meaningful controls, the meeting did initiate a dialogue between nations that would provide the framework for later management efforts. However, an effort to self-regulate by the whaling companies would be attempted the following year.

In 1932, all the major whaling companies initiated an agreement to limit the production of whales. The motivation for the agreement, however, was to increase prices of whale oil and other products, not conservation.<sup>30</sup> This whale OPEC established a standard whale measure, the "blue whale unit," designed to assign quotas fairly across species. This profit motive afforded the most hunted species some relief from the tremendous pressure of the period. Unfortunately, the cartel

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<sup>28</sup> Ibid., 32.

<sup>29</sup> Ibid.

<sup>30</sup> James E. Scarff, "The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment," *Ecology Law Quarterly*, Vol. 6, numbers 2 and 3 (1977), 350.

failed after only two years following allegations of cheating among participants.<sup>31</sup>

Although additional efforts were made to strengthen the existing convention over the next several years, the advent of World War II effectively ended international negotiations. However, the end of the war would provide greater opportunity than had before existed for whale conservation.

As during World War I, the second global conflict provided the whales marked relief as many whaling vessels were converted to military uses. Between 1939 and 1945, 82,000 whales were killed in the world's oceans. Comparatively, over 269,000 were killed during the previous six years before the War.<sup>32</sup> Following the war, the two nations most adamantly opposed to the establishment of an international regulatory body, Germany and Japan, were no longer in a position to openly oppose such efforts. Nonetheless, the dominance of Great Britain and Norway as the primary whaling powers would not allow for meaningful regulation when the next conference was held.

In November 1945, whaling nations met in London to set quotas for the upcoming 1946-1947 season. However, no quota reductions from pre-war levels were imposed as whaling nations were convinced stocks had been given time to recover during

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid., 51.

wartime. However, the 1946 harvest returns were poor and clearly indicated that the stocks had not recovered measurably.<sup>33</sup> Seeing an opportunity for negotiating a stronger treaty, the United States called for a new convention, and a meeting was held on November 20, 1946, in Washington, D.C.<sup>34</sup> The dire biological situation of the stocks at last provided the necessary incentive to initiate the development of a truly regulatory international body.

On December 2, 1946, the International Convention for the Regulation of Commercial Whaling was signed by 14 nations, including Norway and Great Britain.<sup>35</sup> The Convention established the International Whaling Commission (IWC) which remains today as the sole management body regulating the hunting of whales on the high seas. The Convention does not cover the taking of smaller whales, such as dolphins and pilot whales, which remain under national jurisdiction as the majority of these populations live within the territorial waters of individual nations.

The preamble to the Convention states, "that it is in the common interest to achieve the optimum level of whale stocks" to "make possible the orderly development of the

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid., 352.

<sup>35</sup> Ibid., 353.

whaling industry."<sup>36</sup> In this sense, the IWC is a management body, designed to preserve the hunting of whales over time. The term "optimum level" is based on the establishment of the largest population size for each species, supporting the largest annual hunt without diminishing the overall stock size. Unfortunately, the charter does not define how one determines the optimal level, and despite the agreed meaning by member nations, the necessary means to achieve these levels are not prescribed in charter. Furthermore, the charter did not address the capacity of the world's industry at the time, which was grossly over-built. Efforts to rebuild stocks to optimum levels could only be achieved if specific caps were placed on the level of effort (number of boats, processors, etc.). As the issue went unaddressed, the world was left with too many whaling vessels chasing too few whales. Adhering to quotas designed to allow for the recovery of various species, therefore, could not be achieved without making the hunting of whaling unprofitable on a per-boat basis. The early history of the IWC, then, did not result in immediate conservation of depleted stocks. Nonetheless, the IWC would eventually take on a stronger a role, and its existence today, though somewhat tenuous, is testimony to the merits of its stated mandates.

The IWC maintains three permanent committees: 1) Finance and Administration; 2) Scientific; and 3) Technical. The Scientific Committee is charged with reviewing

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<sup>36</sup> "International Convention for the Regulation of Whaling with Schedule of Whaling Regulations," 2 December 1946, 62 Stat. 1716, T.I.A.S. no. 1849, 161 U.N.T.S. 72.

catch data from previous years and ongoing research programs, making recommendations to the full Commission concerning quotas, rates of increases and depletions in individual stocks and research needs.

The Scientific Committee played an insignificant role for much of the early existence of the IWC with the full Commission ignoring almost all of the Committee's recommendations. However, the United States and other conservation-minded nations realized that a strengthened Scientific Committee was critical if the IWC was to begin making decisions based on biology rather than industry concerns. To do so, the IWC Schedule needed to be formally amended in order to institutionalize the change sought by the United States and others. For many years, this change would not come.

In 1972, the United States was pushing hard for the IWC to adopt a 10-year moratorium on all commercial whaling due to the poor condition of most stocks. Although sympathy was growing for the notion of a moratorium, the United States would be unsuccessful. However, international support for the idea of affording greater protection to individual species most in need was mounting, and in 1974, Australia offered an alternative plan which allowed for selective moratoria on

individual species.<sup>37</sup> The plan was accepted and regulations instituting it, called the New Management Procedure, were implemented in 1975.<sup>38</sup>

Under the New Management Procedure, each identifiable whale stock was classified as either a Sustained Management Stock, Initial Management Stock or Protection Stock.<sup>39</sup> These classifications were based on how close each population stock was to its Maximum Sustainable Yield (MSY), a term used previously by the IWC that provides an independent measure of the biological status of the whales.<sup>40</sup> Stocks at or near MSY were considered Sustained or Initial, respectively, and could be hunted -- Protection stocks, well below MSY, could not be taken in any number.

With the advent of the New Management Procedure, the Scientific Committee was now playing a key role in the IWC by making the determinations of MSY for the many stocks managed on the IWC Schedule. The stature and importance of the Committee had been steadily increasing during the late 1960s and early 1970s, and

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<sup>37</sup> J.G. Van Beek, "Historical Review of the Management Measures Taken by the International Whaling Commission," *Lutra*, Vol. 30, 1987, 172.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid., 173-174.

<sup>40</sup> Ibid.



the advent of New Management Procedure solidified its ability to achieve the Committee's original mandate.

### III. BOWHEAD HUNTS ON THE RISE: A NEW GENERATION TAKES HOLD

By 1970, the Alaskan Eskimo hunt of the bowhead whale was changing for the first time in its four-thousand year history. More important than the weaponry advances of the previous 100 years, the change in the nature of those hunting the bowheads was altering the hunt in a way that did not go unnoticed. Of course, this change was only reflecting the change in Eskimo culture brought on by the spread of the newest and most powerful commodity ever introduced to the Eskimos, money.

The material bounty which could be provided by money was staggeringly seductive for an Eskimo youth. There was nothing a young male Eskimo wanted more than to emulate the most respected figure in the Eskimo community, the whaling captain. Of course, the only way to become a whaling captain in the Eskimo community was to learn slowly the manner and means of the hunt. For thousands of years, the only way to gain the means, primarily, a whale boat (*umiak*), was to watch and assist the whaling captain.<sup>41</sup> Serving him well and proving one's worth, knowledge and skill over many years would lead a chosen few to the "highest office" in the community. However, there were suddenly a great deal of Americans roaming the dominion of the Eskimo in search of a slippery black substance for which they would spend large amounts of money -- Eskimo culture would be changed forever.

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<sup>41</sup> Wendell H. Oswalt, *Alaskan Eskimos* (San Francisco: Chandler Publishing Company, 1967), 206.

By 1977, oil production activities in Alaska were in full swing. Of course, the possibility of exploiting a major new source of domestic oil had become important not only to industry, which had watched nervously the increased American dependence on Middle-East reserves, but also to the political establishment in Washington, D.C., which recognized the potential for job creation in both the development of the reserves, construction of a service mechanism (the pipeline) and the refining sector.

The proliferation of money as a commodity in the Eskimo community and, more importantly, the availability of this money to young Eskimos hired by the oil companies as manual labor, began to change the hierarchy of advancement in the community. A young, inexperienced Eskimo could subvert tradition, buy an umiak and become a whale captain in a relatively short period of time. The significance of this change in the traditional Eskimo order would have, of course, lasting impacts in the community. But, more quickly, the result was a new generation of inexperienced Eskimos traversing the Arctic sea in search of bowheads.

The advent of the younger Eskimo whalers had immediate impacts not only for the community hierarchy, but for the whales themselves. The degree of skill necessary for an individual to use a shoulder gun is quite limited, point and shoot. Conversely, all other aspects of whaling are extremely complex, especially when one considers the vessel being used is a fraction of the size of the animal being killed and captured.

The ability to accurately fire a harpoon and quickly kill a whale, keep the carcass afloat once dead, and properly attach it to the boat are skills not easily learned or implemented. Other weapons, such as the darting gun, which increase the likelihood of capturing a whale once shot, were also available to young Eskimos. However, the use of these weapons required a degree of skill inexperienced Eskimos simply did not have -- the shoulder gun became the weapon of choice. Consequently, the inexperienced Eskimo whalers quickly became experts at shooting exploding projectiles into bowheads. However, they were generally unsuccessful at capturing whales once shot.<sup>42</sup>

The effect of the explosive-charge of a shoulder gun on a whale is catastrophic. The barbed harpoon enters the whale creating an initial wound of only a few centimeters, but the subsequent charge explodes into the interior of the animal, destroying internal tissue and often causing a fatal wound.<sup>43</sup> The standard whale response to being hit by a shoulder gun is, not surprisingly, to dive. Although not fully understood by biologists, whales are able to withstand the pressure of a dive of many hundreds of feet by converting the oxygen-filled air from their lungs into solution in their blood. Because of this, whales become negatively buoyant when diving. As the response of

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<sup>42</sup> Michael F. Tillman, "A Scientific Perspective of the Bowhead Whale Problem," *Marine Fisheries Review*, September-October, 1980, 4.

<sup>43</sup> *Ibid.*, 2.

the whale to the strike is to dive, becoming negatively buoyant, the failure of the hunter to attach lines adequately to the animal often results in the loss of the whale due to its sinking following death. Inexperienced Eskimos struck and lost many bowheads. NOAA had figures on the total number of whales struck, struck-but-lost, and total number landed dating back to the mid-1960s. These figures were provided annually to the IWC. In 1972, members of the Scientific Committee began to notice a trend in Eskimo subsistence hunts. The struck-but-lost category, which had been relatively steady since records had been kept, was on the rise. The Committee officially expressed its concern regarding the increase in its report to the Commission. The line in the sand had been drawn -- it was now only a matter of time before the issue was to explode.

The Scientific Committee's interest in the Eskimo bowhead hunt, though instigated as a result of concern for the bowheads, hinted at possible regulation of the Eskimo harvest. Prior to this time, the IWC Charter of 1947 had not been applied to whales taken by subsistence hunters. These groups had never been regulated by the IWC. However, the issue as to whether the IWC maintained the authority under charter to do so had not been fully explored if for no other reason than that it had never been tried. The original 1947 charter did not mention subsistence hunting of whales. However, the advent of the IWC Schedule in 1948 specifically exempted native hunting stipulating that whales taken by native groups be used only for subsistence

needs -- the exemption provided no definition or explanation of "subsistence."

However, the first whaling convention signed by the United States in 1932 defined aboriginal whaling through the method of the hunt: "They [aborigines] only use canoes, pirogues or other exclusively native craft propelled by oars or sails...they do not carry firearms."<sup>44</sup> Under this definition, of course, the Eskimos would not qualify as subsistence hunters given their use of shoulder guns as well as outboard motors. Nonetheless, this more detailed definition was not part of the 1947 charter. The result, then, was no clear policy as to whether the IWC retained the authority to regulate the Eskimo harvest.

The United States' response to the Committee's 1972 request to study the bowhead problem was to continue to monitor the Eskimo take, as had been done before, and continue its general research program on the bowheads. This, in effect, could not be viewed as a substantial increase in agency effort on the issue. Consequently, at the next meeting of the Scientific Committee in 1973, the Committee's report referenced the United States' submission of data indicating a total of 37 bowheads taken in calendar year 1972 and reiterated its earlier request to understand more about the Eskimo hunt: "The Committee repeats its request to the Commission to urge the

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<sup>44</sup> Memorandum from Carmen J. Blondin, Assistant Director for International Fisheries, National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce (DOC), to Robert E. Schoning, Director, NMFS, NOAA, DOC, 29 July 1977.

United States to continue to study the [bowhead] problem, and in addition to take steps to determine both the actual kill and the number of bowhead whales as well as the status of this stock in relation to the MSY level."<sup>45</sup>

When William Aron attended the Scientific Committee meeting in 1974 as a member of the United States delegation from NOAA's Office of Ecology and Environmental Conservation, he was forced to report that the information the Committee had requested in 1973 was still being developed, but that it would be available for the next meeting. The Committee, now growing increasingly concerned over reports that the overall take of bowheads was rising further, again asked the United States to continue its research and provide the Committee with the necessary information as soon as possible.<sup>46</sup> Of course, the reason the United States was returning empty-handed was because the necessary research funds had not been provided to the Alaska Science Center by NOAA headquarters.

The 1975 meeting of the Scientific Committee was almost a carbon copy of the 1974 meeting. Again, NOAA provided the Committee with data from the years' hunt which showed increases in the total number of bowheads struck by the Eskimos as

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<sup>45</sup> Final Environmental Impact Statement: *International Whaling Commission's Deletion of Native Exemption for the Subsistence Harvest of Bowhead Whales* (NMFS, NOAA, DOC, October 1977), 13.

<sup>46</sup> *Ibid.*, 14.

well as those struck-but-lost.<sup>47</sup> Again, however, this would be all the data NOAA would provide. As expected, the Committee again requested an increased effort by the United States "to obtain better biological data" concerning the status of the bowheads.<sup>48</sup>

In 1976, Dr. Michael Tillman, research biologist for NOAA's Marine Mammal Laboratory, attended the meeting of the IWC Scientific Committee to report that the numbers of total bowheads struck and struck-but-lost had increased further, and again, Tillman was forced to report that there remained no estimates for either a current or historical population size.<sup>49</sup> Committee members were now becoming quite concerned that the United States was failing to address what they perceived to be a significant problem. Of course, neither Tillman, Aron or other knowledgeable NOAA officials would disagree that the bowhead situation was, indeed, becoming a major problem and was being exacerbated by their continued inability to obtain the funds necessary to conduct the research to answer the questions raised by the Scientific Committee.

In 1976, however, the issue was elevated to the full Commission when a resolution on the bowhead situation was agreed to by member nations which read: "The

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid., 16.



International Whaling Commission, Having noticed the evidence for an increased effort on bowhead whales in the North American Arctic which species generally is protected in all Oceans; concerned that the continued relatively high loss rate of struck whales in Alaska should be reduced (without increasing total take); noting the recommendations of the Scientific Committee to improve assessments of current population; RECOMMENDS That Contracting governments [United States] as early as possible take all feasible steps to limit the expansion of the fishery and to reduce the loss rate of struck whales." The resolution was adopted without opposition.

The resolution, then, could not have made it more clear to the United States that it needed, finally, to allocate the necessary resources to answer the persisting questions regarding the biological status of the bowheads as well as take measures to reduce the Eskimos' overall take. However, 1976 would end without almost no action having been taken by NOAA to satisfy either of the Commission's requests.

#### IV. MANAGING EXTINCTION

##### *What You Don't Know Can Hurt You*

On 7 January 1977, Michael Tillman released a paper entitled "Progress Report on Gray and Bowhead Whale Research" within which the tenuous state of the bowhead whale was outlined in detail, along with the equally tenuous data estimating the current size of the population.<sup>50</sup> Knowing all there was to know about the status of the bowheads, Tillman's official position was, roughly, "not good."<sup>51</sup> The science to support a more definitive position simply did not exist. Along with reporting the current state of knowledge on the bowheads, the report also included a brief chronology of recent Eskimo hunts and the observed increases in whales struck-but-lost.<sup>52</sup>

By this time, a plan had been developed at NOAA headquarters in Washington, D.C., to initiate a process to bring the bowhead problem, as it applied to the Eskimo hunt, under control. Tillman and Douglas Chapman at NOAA's Marine Mammal Laboratory were charged with developing the supporting scientific documentation

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<sup>50</sup> Marine Mammal Division, Northwest and Alaska Fisheries Center, NMFS, NOAA, DOC, "Progress Report on Gray and Bowhead Whale Research," report prepared by Michael F. Tillman, Seattle, Washington, 7 January 1977.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid., Table 2.

necessary for the plan to work, although neither of them had been fully informed of their role in this larger effort. NOAA's plan was to initiate, for the first time, federal regulation of the hunt in order to reduce the number of bowheads the Eskimos could kill each year. Tillman, more than any of his agency counterparts, could appreciate the significance of the government forcibly telling the Eskimos how many bowheads they could hunt, for Tillman is one of them. Tillman was born in Southeast Alaska though raised in Seattle, Washington. He is a Tlingit -- his father being caucasian of German/Irish descent and his mother a member of a small tribal village in Southeast Alaska.

First and foremost, however, Tillman was a scientist, and his assessment of the scientific and practical basis for the decision to regulate the hunt was the following: 1) the status of the bowheads was unknown but generally agreed to be critical; 2) the effects of the Eskimo hunt on the bowheads was increasing commensurate with the increases in both total whales landed and those that were struck-but-lost; and 3) the IWC was seriously considering banning the hunt altogether.<sup>53</sup> Tillman and officials at NOAA headquarters knew that if the IWC took such action, the United States might not be legally able to comply based on existing data, thereby significantly reducing United States' credibility in the IWC. Given the IWC's concern, NOAA believed its

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<sup>53</sup> Dr. Michael F. Tillman, interview by author, Silver Spring, Maryland, 19 March 1993.

most prudent option was to begin taking the steps necessary to scale back the hunt through official regulation. If it could be done, it would benefit the whales and, hopefully, appease the IWC's concerns sufficiently to avoid a total ban. Tillman's ability to assess accurately the status of the bowheads was critical if NOAA's plan was to succeed. Enlisting the Eskimos' understanding and acceptance of the need for regulation of the hunt was also a key element to ensure any regulation was to be successfully implemented.

On 7 January 1977, the assistant special agent in charge at NOAA Fisheries' Alaska Law Enforcement Branch in Juneau, sent a letter to the Village Council (a headquarters, of sorts, for various Eskimo villages) in Wainwright, Alaska, expressing interest in discussing the Eskimos' increased take of bowheads.<sup>54</sup> The letter stated, "We hope that experienced leaders in coastal towns may be able to suggest practical ways to reverse the increasing trend of the whale kill."<sup>55</sup> The letter deftly alluded to NOAA's data that indicated the significant increases in the Eskimo hunts and the increasing attention the hunt was receiving, both domestically and internationally.<sup>56</sup> Despite the obvious humor in the immortalized cliché, "We're the

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<sup>54</sup> Mil Zahn, Assistant Special Agent in Charge, Law Enforcement Branch, NMFS, NOAA, DOC, Juneau, Alaska, to Village Council, Wainwright, Wainwright, Alaska, 7 January 1977.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

government, and we're here to help you," it would not be lost on the Eskimos that the first contact made by the government, which sent this friendly letter asking for their assistance in resolving a problem, came from public servants who carried guns.

Four days later, then director of the Alaska Region for Fisheries, Harry Rietze, sent a memo to Fisheries headquarters in Washington, D.C., informing them that the enforcement letter had gone out and that steps were underway to explore the regulation of the Eskimo hunt. "We have no guarantee of gaining any popular support but believe this approach to be making the best of a bad situation," the memo stated.<sup>57</sup> Another important issue raised in the memo was the "humaneness" of the hunt itself, referring to pressures from environmental communities which were opposed to the hunt on moral grounds. "Waste and inhumaneness were intentionally not mentioned in the subject letter [to the Eskimos] but will be discussed in person," the memo stated.<sup>58</sup> So, the objective of the meetings was clear -- armed government agents were going to chat with Eskimos about the morality of their culture.

Before the memo arrived in Washington, a similar memo on the subject of the Eskimo harvest and the potential need for government intervention in the hunt was sent by

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<sup>57</sup> Memorandum from Harry L. Rietze, Director, Alaska Region, NMFS, NOAA, DOC, Juneau Alaska, to Director, NMFS, NOAA, DOC, Rockville, Maryland, 11 January 1977.

<sup>58</sup> Ibid.

Robert Ayers at Fisheries headquarters in Washington, D.C., to the Alaska Science Center in Seattle: "Although we can expect pressure to regulate the native harvest...that possibility must be explored."<sup>59</sup> Of course, the possibility was already being explored by NOAA's enforcement division. Although Ayers and others at NOAA headquarters were attempting to downplay the possibility of immediate regulation, the legal basis for such action was now under development.

The question of regulating the hunt was, first and foremost, a legal one. For NOAA to regulate the hunt, it would have to override the exemption granted the Eskimos under the United States Marine Mammal Protection Act (MMPA). The MMPA specifically states that its requirements do not apply to Eskimos.<sup>60</sup> However, the MMPA does set forth conditions when Eskimo activities can be regulated in order to protect marine mammals. In order to take action to control the hunt, NOAA would have to issue an official "finding" that the bowheads were a "depleted" species, as defined by the MMPA.<sup>61</sup> Knowing this, Ayers requested that the Science Center provide headquarters with an "appraisal of the status of the bowhead stocks, estimates

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<sup>59</sup> Memorandum from Robert J. Ayers, Acting Assistant Director for Fisheries Management, NMFS, NOAA, DOC, Washington, D.C., to Dr. Dayton L. Alverson, Director, Northwest and Alaska Fisheries Center, Seattle, NMFS, NOAA, DOC, Washington, 13 January 1977.

<sup>60</sup> 16 U.S. Code 1371, Section 101(b).

<sup>61</sup> Ibid.

of size of the population, and advise whether you can determine an optimum sustainable population," in order to list the bowheads as depleted.<sup>62</sup>

The Science Center's response to Ayers' memo contained no population estimate, no estimate for OSP and stated, "There is inadequate data to tell whether the stocks are stable, decreasing, or increasing."<sup>63</sup> The official government position on the status of the bowheads remained unchanged, not good. As one would expect, this information did not bode well for proposed federal regulation.

The United States Department of the Interior's Bureau of Indian Affairs was also familiar with the issue. In a letter of 10 January 1977, Curtis Bohlen, Acting Interior Assistant Secretary for Fish and Wildlife and Parks wrote to Acting NOAA Administrator, Robert White, and mentioned the problem as well as Interior's interest in protecting the "well-being" of both the whales and the Eskimos.<sup>64</sup> In the letter,

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<sup>62</sup> Memorandum from Robert J. Ayers, Acting Assistant Director for Fisheries Management, NMFS, NOAA, DOC, Washington, D.C., to Dr. Dayton L. Alverson, Director, Northwest and Alaska Fisheries Center, Seattle, NMFS, NOAA, DOC, Washington, 13 January 1977.

<sup>63</sup> Memorandum from Dayton L. Alverson, Center Director, Northwest and Alaska Fisheries Center, NMFS, NOAA, DOC, to Robert J. Ayers, Acting Assistant Director for Fisheries Management, NMFS, NOAA, DOC, 21 January 1977.

<sup>64</sup> E. Curtis Bohlen, Acting Assistant Secretary for Fish, and Wildlife and Parks, U.S. Department of the Interior, Washington, D.C., to Dr. Robert M. White, Acting Administrator, NOAA, DOC, Washington, D.C., 10 January 1977.

Bohlen specifically addressed the issue of controlling the hunt: "We believe that the present situation regarding the bowhead whale is sufficiently serious to warrant an immediate review by your agency and the imposition of regulations..."<sup>65</sup> The letter cites and even *quotes* from the section of the MMPA pertaining to conditions under which NOAA can promulgate regulations.

The situation with the Eskimo hunt and the need for potential regulation was also known by NOAA's official advisory board on marine mammal issues, the Marine Mammal Commission. On 28 February 1977, John Twiss, executive director of the Commission, sent a letter to the new director of Fisheries, Robert Schoning, recommending that efforts to list the bowhead whale as depleted begin immediately.<sup>66</sup> Although not bound by any Commission recommendation, NOAA is obliged to consider, with some prejudice, Commission guidance. In line with this relation, Schoning responded in a letter dated 23 March 1977: "We are currently undertaking extensive discussions with native groups...We are also conducting an expanded research effort in the first part of this year on the affected populations to improve our data base. I believe that when these two efforts are completed we will have a better

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<sup>65</sup> Ibid.

<sup>66</sup> John R. Twiss, Executive Director, Marine Mammal Commission, Washington, D.C., to Mr. Robert W. Schoning, Director, NMFS, NOAA, DOC, Washington, D.C., 28 February 1977.



understanding of the necessity of designating the bowhead...as depleted."<sup>67</sup> NOAA's response, then, hinted at the lack of data supporting a listing. However, the response was also an affirmation that government intervention in the hunt was proceeding. Within a very short time period, it appeared that all organizational levels at NOAA, including its outside advisory board and the Department of Interior, were like-mindedly taking steps to pursue regulation of the hunt. This synchronicity of effort would not go unnoticed by those who would later bring suit against the agency in which the word "conspiracy" would be used more than once.

Also at this time, Tillman was informed by NOAA's Regional headquarters in Seattle that new monies were being allocated to supplement marine mammal research needs. Although the message was relayed to Tillman without specifically mentioning the bowhead situation, he gathered his new found fortune was part of a larger plan about which he had not been briefed. Of course, he would immediately begin using the funds on bowhead research. Unfortunately, there was little time to make full use of the funds in advance of the upcoming IWC Scientific Committee meeting in June 1977. Nonetheless, he was happy to try.

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<sup>67</sup> Robert W. Schoning, Director, NMFS, NOAA, DOC, Washington, D.C., to John R. Twiss, Jr., Executive, Director, Marine Mammal Commission, Washington, D.C., 23 March 1977.

On 25 March 1977 Alaska Regional Director, Rietze, forwarded the report filed by enforcement agent, Mil Zahn, describing his trip to various Eskimo villages, to Fisheries Director Schoning.<sup>68</sup> Zahn's report described the Eskimos' interest in NOAA's potential involvement in their whaling activity by stating that they were "apprehensive that their subsistence privilege might be taken away...they asked about 'stateside' opposition to [the hunt]."<sup>69</sup> Zahn also reported that issues relating to "waste" and "humaneness" were generally lost on the Eskimos who, not unexpectedly, could not identify with the context of Zahn's questions regarding the morality of killing bowheads.<sup>70</sup> The report also reinforced the Eskimos' perception that their cultural identity is defined by the hunt.

Although Zahn was clearly moved by his visit to the villages, at one point referring to his trip as a "mission," he recognized that significant cooperation with the Eskimos would be necessary if regulations were ever to be enforced adequately stating, "[federal] enforcement on whaling grounds could be little more than a token gesture."<sup>71</sup> Furthermore, Zahn had become concerned that current efforts to control

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<sup>68</sup> Memorandum from Harry L. Rietze, Director, Alaska Region, NMFS, NOAA, DOC, Juneau, Alaska, to Robert, J. Ayers, Acting Assistant Director for Fisheries Management, NMFS, NOAA, DOC, Washington, D.C., 25 March 1977.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

the hunt quickly could backfire: "If [Fisheries] moves hastily into regulatory proposals that are not clearly warranted, we can lose the public confidence entirely."<sup>72</sup>

Nonetheless, he remained optimistic that his trip had been worthwhile in conveying to the Eskimos NOAA's concerns regarding their activities. Zahn even went so far as to suggest that, as a result of his communications with various Eskimo whaling captains, "the community concern stirred by these discussions will result in some self restraint [in bowhead kills] this season [spring 1977 hunt] and may carry over for several years."<sup>73</sup> Unfortunately for Zahn, NOAA, the Eskimos, and other interested parties, just the opposite would happen.

By the end of March, NOAA's General Counsel's Office had prepared the first detailed review of the legal options available to begin regulating the hunt. A draft memo entitled "Interim Memorandum" was prepared by staff attorney, Pamela Paige Murphy, and was sent to Peter Jensen at Fisheries headquarters for review.<sup>74</sup>

Although Section 103 of the MMPA provides the legal authority for NOAA to begin regulating the hunt through a depleted listing, the Endangered Species Act (ESA), passed one year after the MMPA, added an additional legal hurdle for NOAA -- the

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Memorandum from Pamela Paige Murphy, Staff Attorney, Office of the General Counsel, NOAA, DOC, Washington, D.C., to Peter Jensen, Marine Mammal and Endangered Species Division, NMFS, NOAA, DOC, Washington, D.C.

Secretary of Commerce must also find that the native hunt "materially and negatively affects the threatened or endangered species."<sup>75</sup> The ESA also specifically references Section 103 of the MMPA which "requires a hearing on the record and determination of several biological parameters such as the estimated existing levels of the species and population stocks, the expected impact of the proposed regulations on the optimum sustainable population of such species, etc."<sup>76</sup> Murphy suggested that the most appropriate way to satisfy the MMPA and ESA requirements was to prepare an environmental impact statement (EIS), as stipulated under the National Environmental Policy Act.<sup>77</sup> However, Murphy cautioned that this approach would be lengthy and that it "may be ineffective to provide immediate protection for rapidly diminishing bowhead stocks."<sup>78</sup> Clearly, the collective effort in Washington was to provide a mechanism, as soon as possible, to begin controlling the Eskimo harvest. However, the relatively poor state of knowledge concerning bowheads was thwarting available legal options.

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<sup>75</sup> 16 U.S. Code Sec. 1539(a)(4).

<sup>76</sup> Memorandum from Pamela Paige Murphy, Staff Attorney, Office of the General Counsel, NOAA, DOC, Washington, D.C., to Peter Jensen, Marine Mammal and Endangered Species Division, NMFS, NOAA, DOC, Washington, D.C.

<sup>77</sup> 52 U.S. Code, Sec. 4231.

<sup>78</sup> *Ibid.*

Nonetheless, Murphy was able to identify a previously unexplored opportunity for NOAA to regulate at least a portion of the hunt. Under both the MMPA and the ESA, the native exemption is qualified to the extent that Eskimos do not take the bowheads in a "wasteful manner."<sup>79</sup> The data indicating an increase in struck-but-lost whales, Murphy reasoned, "is attributable to wasteful methods."<sup>80</sup> Therefore, a particular method of hunting or type of gear used could be prohibited following a finding by the Secretary of Commerce that the method or gear is wasteful. Murphy noted that such prohibitions could be instigated without a public hearing or the preparation of an EIS. Unfortunately, the difficult issue of enforcement appeared to effectively squelch the idea. For example, although it may be easy to prohibit the use of shoulder guns and replace them with more efficient devices, it would require a substantial enforcement presence during whaling operations to ensure that the devices were being used in an appropriate manner.

Murphy closed the memo by mentioning the possibility of self-regulation of the hunt as well as Fisheries ongoing efforts to explore this idea stating, "At this time, [Fisheries] is attempting to effect a reduction of the excessive take of bowhead whales by natives through native government organizations."<sup>81</sup> This was the second NOAA

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

headquarters allusion to efforts by Fisheries to solicit the assistance of the Eskimos in regulating the hunt. Of course, Mil Zahn's sole visit to Wainwright, Alaska, was the only such effort. Staff in Washington, D.C., would repeatedly cite this as an example of proactive efforts to enlist the support and cooperation of the Eskimos. Unfortunately, this limited effort would ultimately worsen NOAA's credibility with the Eskimos when the real controversy began.

On 31 March 1977 a second letter from John Twiss at the Marine Mammal Commission was received by Bob Schoning at NOAA's Fisheries Service. Twiss reiterated the Commission's position regarding the biological status of the bowheads, stating, "As far as the Commission is concerned, there is no question that the bowhead is depleted and we feel that it should be so designated immediately."<sup>82</sup> Twiss also mentioned that the ESA "requires" such a listing if a species is listed as "endangered" under the ESA.<sup>83</sup> However, NOAA did not consider the listing of the bowhead as endangered tantamount to a depleted listing under the MMPA. Although it appears logical that a species which is listed as endangered might also be considered depleted, NOAA's general counsel clearly felt uncomfortable proceeding with a

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<sup>82</sup> John R. Twiss, Jr., Executive Director, Marine Mammal Commission, Washington, D.C., to Robert W. Schoning, Director, NMFS, NOAA, DOC, Washington, D.C., 28 March 1977.

<sup>83</sup> Ibid.

depleted listing without satisfying the biological or regulatory processes outlined in both the ESA and the MMPA.

Twiss, of course, was aware that NOAA headquarters had begun to question its authority to initiate a depleted listing and that NOAA was preferring, instead, to await the outcome of ongoing efforts to achieve self-regulation of the hunt by the Eskimos. Twiss had telephoned Doug Chapman in Seattle, and Chapman had informed him that NOAA headquarters had decided that "it would be appropriate to hold formal regulatory action in abeyance pending a review of the success of the voluntary conservation program..."<sup>84</sup> Twiss was annoyed by this decision and specifically mentioned Chapman's disagreement with this course of action in his letter, "Dr. Chapman is unaware of any [overall] agreement not to designate the population depleted."<sup>85</sup> Twiss closed the letter stating that efforts to initiate self-regulation by the Eskimos would likely be facilitated if a depleted listing occurred. However, it was an option NOAA had relinquished as impractical and not supported by available data on the bowheads.

Over the next several weeks, little action was taken on the issue given the legal conundrum within which NOAA staff members found themselves. Tillman and

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<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

Chapman began developing an escalated research strategy on the bowhead given the influx of dollars received in Seattle. Their goal was to gather the data necessary to develop a credible population estimate for the bowheads. A more intensive monitoring of the spring hunt was also planned to ensure that any "positive" data would be collected.

At NOAA headquarters in Washington, D.C., there was little to do but wait for the results of the spring harvest. Bill Aron was especially aware of his pending increased involvement in the issue. Since NOAA Administrator-designate, Richard Frank, had yet to be confirmed by the United States Senate, Aron reasoned that it was highly probable that he would be asked to serve as United States Commissioner, a post normally held by the NOAA Administrator, for the June meeting of the IWC in Canberra, Australia. Although he had earlier hoped that the United States would be able to attend the meeting and provide clear evidence to the Commission that efforts to control the Eskimo harvest were underway, Aron could do little more than offer additional commitments to study the problem. He knew the increased funding recently allocated for additional bowhead research activities would be helpful to this end. However, he also knew that the IWC Scientific Committee's sole focus would be on the results of the Eskimos' spring hunt.



In the second week of May 1977, preliminary results of the harvest arrived in Seattle, and the news could not have been worse; 26 whales landed, 2 killed but lost, and 77 struck-but-lost (a 100 percent increase in struck-but-lost whales over 1976).<sup>86</sup> The news was received grimly at all NOAA levels. For Tillman and Chapman, there was little to be done but brace themselves for the IWC's reaction. The Scientific Committee meeting was to begin on 6 June 1977 in Canberra, and both Tillman and Chapman attended.

President Carter had campaigned vigorously as both an ardent environmentalist and benefactor of native Americans rights. In fact, NOAA (Aron and others) had assisted in the preparation of the new President's Environmental address of 23 May 1977 in which Carter stated:

"Sharing the worldwide public concern about the condition of marine mammals, especially whales, I have directed the Secretary of Commerce, with the foreign policy guidance of the Secretary of State to: 1) prohibit commercial whaling within our 200-mile (Exclusive Economic Zone); 2) pursue negotiations within the International Whaling Commission for a stronger international conservation regime for whales and other cetaceans affording protection for them throughout their range; 3) maintain firm United States' support for a ten-year worldwide moratorium on the commercial killing of whales; and 4) report to me within 60 days any actions by other countries that have diminished the effectiveness of the International Whaling Commission's conservation program."<sup>87</sup>

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<sup>86</sup> Final Environmental Impact Statement: *International Whaling Commission's Deletion of Native Exemption for the Subsistence Harvest of Bowhead Whales* (NMFS, NOAA, DOC, October 1977), 18.

<sup>87</sup> *Ibid.*, 25.

Of course, the timing of the President's remarks, one week before Canberra, could not have been more unfortunate. The "hard line" Carter was espousing regarding the protection of whales would be challenged immediately and would also fuel the argument for ending the Eskimo hunt.

At NOAA headquarters, the data on the spring hunt renewed calls for action. Aron was officially appointed United States Commissioner for the June 22 meeting of the full Commission. Given the data, he decided to take whatever steps possible to enlist the support of the Eskimos, environmental organizations and other interested parties on how to address the bowhead problem in advance of the meeting. On 20 May 1977 Fisheries headquarters sent a memo to 72 people representing NOAA, the Interior and State Departments, the environmental community, Members of Congress, and the Eskimos inviting them to an "informal" meeting on June 8 in Washington, D.C. to "solicit advice and comments regarding possible regulations of the bowhead harvest, and the methods by which the harvest could be regulated..."<sup>88</sup>

This meeting was clearly an effort by NOAA to solicit public support for the notion of regulation. Although legal obstacles remained, the idea of enlisting wider understanding of the implications of the increased take by the Eskimos was thought to

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<sup>88</sup> Memorandum from Kessler, Cannon, Conservation Coordinator, NMFS, NOAA, DOC, Washington, D.C., to Distribution [72 people, various locations], 20 May 1977.

solidify NOAA's argument for pursuing regulation. Aron, Tillman, Chapman, and others familiar with the recent history at the IWC, knew the data collected from the spring hunt was sufficient to warrant action. Even if the IWC did not take steps to reduce the hunt or ban it altogether, the United States stood to be chastised by IWC members looking for any opportunity to make the United States appear hypocritical with regard to whale conservation, thereby strengthening the position of whaling nations in the IWC.

Aron and others at NOAA headquarters feared the idea of being reprimanded by whaling nations over the bowhead issue.<sup>89</sup> The significant milestones achieved by the United States toward more responsible management through the New Management Procedure (NMP) had been hard-fought. A move by the United States contrary to the NMP would jeopardize the continuation of responsible whale management. The push for a ten-year moratorium would also be weakened greatly if the United States were put in a position of having to defend the bowhead hunt to the IWC. The only position considered defensible to IWC questioning was clear evidence that the United States had taken steps to regulate and reduce the Eskimo hunt. Unfortunately, the early 1977 exploration of this idea bore no fruit prior to the June meeting. The best the United States could do was to commit again to taking action to do so.

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<sup>89</sup> Dr. William Aron, interview by Author, Seattle, Washington, 5 October 1992.

The June 8 meeting might have been construed to provide the IWC *some* evidence of the United States' intentions to regulate the hunt. However, the inability of the United States to regulate the hunt was only part of what America had failed to do despite IWC requests; there remained no accurate assessment of the historical size of the bowhead population and no estimate for OSP. With Tillman and Chapman in Canberra for the Scientific Committee meeting, Aron went to the June 8 meeting with the knowledge that either IWC or United States' action was imminent. Unfortunately for both Aron and NOAA, the June 8 meeting made matters worse, not better.

The June 8 meeting was confrontational, occasionally hostile and ended with opposing sides more fervent in their positions than before it began. For the meeting, Fisheries had prepared a short report presenting detailed data on the spring hunt. The report explored the potential causes for the apparent expansion of the Eskimo hunt stating, "[the increase] might be correlated to the economic impacts of the Alaska Native Claims Settlement and the exploitation of north slope petroleum."<sup>90</sup> The report, then, attempted to explain that the expansion of the hunt might be due to the effects of oil development and money on the Eskimo community. Nonetheless, Eskimos attending the meeting felt targeted and became defensive. Arnold Brower, an experienced Eskimo whaling captain from Barrow, Alaska, explained to the group that the figure

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<sup>90</sup> *Marine Mammal News*, vol. 3, no. 6, June 1977.

of 77 bowheads struck-but-lost was due to an unusual number of mechanical failures.<sup>91</sup> Representatives of the environmental community, however, were unconvinced by either explanation -- nothing short of a ban or significant reduction in the Eskimo hunt would appease most of the environmental representatives.

At the meeting, Aron expressed concern that the United States faced a difficult battle at the upcoming IWC meeting if some resolution to the bowhead problem could not be reached quickly. He also stated that the credibility of the United States might be compromised given the bowhead situation: "Unless we take some sort of credible action, the position of the United States within the IWC on other whaling issues will be substantially weakened."<sup>92</sup>

Using the justification of United States' credibility in international environmental negotiations to support the need for regulating the hunt meant nothing to the Eskimos. The only argument that potentially could have led to consensus was a biological one. Unfortunately, the data was weak, and the Eskimos were adamant that the United States' estimate of approximately 1,000 bowheads was far too low. Furthermore, Eskimos attending the meeting were incensed that both the government and the environmental community seemed to believe that the Eskimos intended to hunt the

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<sup>91</sup> Ibid.

<sup>92</sup> Ibid., 2.

bowheads to extinction. Dale Stotts, Eskimo and representative of the North Slope Borough stated, "The bowhead is life to us and we're not going to let [extinction] happen."<sup>93</sup> This statement represented an important moral and ideological divide between the Eskimos and the "white man." It was *presumed* that, regardless of the biological status of the bowheads, the Eskimos would nonetheless continue hunting them, even at an increasing rate, until there were no more, just as white men had done since western whaling began six centuries earlier. The Eskimos, of course, had been hunting bowheads for at least four thousand years, and although their take was small relative to the bowhead's historical population, their symbiotic relationship with the whales was unique to their culture. The Eskimos believed that their argument that they would never cause the extinction of the bowheads should be entirely credible and that, despite recent demographic changes in their community, they should be trusted with taking the necessary steps to preserve both their culture and the whales. The culture of the white man, however, was such that this argument could not be accepted. Because of these differences, the meeting resulted in an increase in tension between the Eskimos and the government. However, it was a separate event at the June 8 meeting that solidified the animosity between NOAA and the Eskimos.

Shortly after Aron presented the Fisheries report and indicated the need to find a way to bring the hunt under control, he left the meeting due to a scheduling conflict.

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<sup>93</sup> Ibid.

Although other NOAA representatives remained in attendance, Aron, now serving as United States Commissioner to the IWC, was seen by the Eskimos as *their* representative and the individual to whom an understanding of Eskimo needs had to be conveyed. Aron's absence also changed the tenor of the meeting. The government was no longer facilitating discussion, and the representatives of the environmental community took ample opportunity to comment on the Eskimos' activities, which they generally considered deplorable. Outspoken critics of the Eskimo hunt, such as Craig Van Note, representing the Fund for Animals, the International Fund for Animal Welfare, Let Live, and the Rare Animal Relief Effort, chastised the Eskimos' unrestrained killing of bowheads given the clear evidence that the whales were critically endangered.<sup>94</sup> Van Note, and other environmental representatives suggested that alternative food sources, provided by the government, would be sufficient to satisfy the nutritional needs of the Eskimos in lieu of the bowhead. Again, the Eskimos felt their position was not understood. Furthermore, Aron's absence, coupled with the adamancy of the environmental community, led the Eskimos to conclude that they had been "set up" by the government which had resigned itself to severely regulating or ending the hunt.<sup>95</sup> Based on this belief, the Eskimos planned their next move, one that displayed a degree of political savvy many

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<sup>94</sup> Ibid.

<sup>95</sup> S. Lynn Sutcliffe, interview by author, Rockville, Maryland, 12 March 1993.

did not believe they had and which would, ultimately, bring NOAA's efforts to resolve the controversy to a grinding halt.

The Eskimos, nonetheless, did find a sympathetic ear from each of the congressional representatives in attendance. Rod Moore and Steve Perles of Congressman Young's (R-AK) and Senator Steven's (R-AK) offices respectively, supported the Eskimos at the June 8 meeting, stating they were unconvinced that the viability of bowhead survival was threatened by the Eskimo harvest.<sup>96</sup> Unfortunately, Moore and Perles did not work for the branch of government that was making the decision to regulate the hunt. Furthermore, the Alaska congressional delegation was entrenched in another environmental controversy surrounding the proposed Alaska Lands Bill, that would have set aside millions of acres in Alaska as protected wilderness on which commercial development, including oil and gas exploration, would be prohibited.<sup>97</sup> The bowhead controversy caused additional strain on the Alaska delegation's ongoing negotiations with the larger environmental community over the Lands Bill. The congressional waters sufficiently muddied, the Eskimos turned their sights away from continued dialogue.

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<sup>96</sup> Roderick Moore, Staff to Congressman Don Young of Alaska, interview by author, Washington, D.C., 13 December 1992.

<sup>97</sup> Ibid.



The June 8 meeting represented a marker of sorts, between the government (NOAA) and the Eskimos. The Eskimos felt excluded from a public process designed to resolve a problem that was, first and foremost, an international one. The government, torn between its international obligations and strategic goals, had alienated the one group that held the key to the resolution of the issue in the most effective and painless way. The establishment of this adversarial relationship would haunt NOAA in both the short- and long-terms. The June 8 meeting at NOAA was not the only notable whale-related activity occurring in Washington, D.C. that day. The environmental group, Center for Environmental Education, staged unannounced visits to both the Soviet and Japanese embassies and delivered 36 mail bags purported to contain 150,000 individual petitions calling for an end to all commercial whaling.<sup>98</sup> Both visits resulted in short, informal meetings with Soviet Secondary Secretary, Igor Lebedev, and Japanese Counselor, Tazio Watanabe.<sup>99</sup> Lebedev, reportedly, listened intently, but offered no commitments to the group. Watanabe, however, attempted to explain the cultural and traditional aspects whaling represents to Japan. Nonetheless, Watanabe agreed to accept the dictates of Japanese scientists when setting harvest quotas on individual species.<sup>100</sup>

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<sup>98</sup> *Marine Mammal News*, vol. 3, no. 6, June 1977, 6.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

The unannounced visits complemented a more formal ceremony held in New York on May 22 where the Whale Protection Committee of the Connecticut Cetacean Society presented United States Ambassador to the United Nations (UN), Elliot Richardson, with a list of 20,000 names of people who signed a petition calling for the inclusion of a provision extending protection to all marine mammals in the draft "Law of the Sea" treaty, then under consideration by the UN.<sup>101</sup> The May 22 ceremony, coupled with the Soviet and Japanese embassy visits, kept the issue of increased whale protection on the agenda of the more powerful IWC members, as well as garnishing increased press coverage on the "plight" of the whales. These events were not lost on Aron who realized that the United States was moving headlong into this controversy, and it was possible that it would not be on the side of saving whales. Aron and others at NOAA headquarters were committed to taking some action in advance of the IWC meeting, and a previously discarded idea was resurrected in an attempt to illustrate to the IWC that the United States was serious about taking steps to control the Eskimo harvest.

Despite the sparsity of Tillman's collective data, on 10 June 1977 NOAA headquarters published a proposal in the Federal Register to list the bowhead whale as

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<sup>101</sup> Ibid.

a depleted species under the MMPA.<sup>102</sup> The notice stated, "If this proposal is adopted, the [Fisheries] Director may prescribe regulations upon the taking of bowhead whales for subsistence purposes or for the purposes of creating authentic articles of handicraft..."<sup>103</sup> The idea of restricting bowhead landings in order to cut down on handicraft production was new. NOAA headquarters reasoned that the money gained from selling Eskimo handicrafts made from bowhead whales was, to some degree, driving up the level of harvest. Under the MMPA, Eskimos are granted an exemption to sell crafts made from the bowhead -- all other United States citizens are prohibited from selling any product made from marine mammals killed after 1972. NOAA saw the issue of selling handicrafts made from bowheads as an effort to strengthen the argument for a depleted listing. However, NOAA's initial review of its legal position with regard to pursuing a depleted listing for the bowheads was thwarted by Tillman's inability to determine the bowhead's current population size or optimum sustainable population. This data was essential to pursuing a depleted listing and had been requested of Tillman by Fisheries headquarters in January 1977 when the idea of regulating the hunt was first being explored.

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<sup>102</sup> Final Environmental Impact Statement: *International Whaling Commission's Deletion of Native Exemption for the Subsistence Harvest of Bowhead Whales* (NMFS, NOAA, DOC, October 1977), 21.

<sup>103</sup> *Ibid.*

Nonetheless, Aron and other NOAA officials went ahead with the Federal Register notice to list the bowhead as depleted in order provide some evidence to the IWC that the United States had taken steps which may result in regulation of the hunt. Of course, the only thing for Aron and the Eskimos to do at the time was to wait for the IWC to act. Authority over United States citizens and its natural resources had been delegated to Canberra, Australia, and the 38 members of the Scientific Committee of the International Whaling Commission.

#### *The IWC Acts to End the Hunt*

On June 14, Mike Tillman telephoned Bill Aron in Washington, D.C., to inform him that the Scientific Committee meeting had completed its annual report to the full Commission and that it included a recommendation that the exemption granted the Eskimos to hunt the bowhead whales be deleted.<sup>104</sup> The report read, "The Committee believes that any taking of bowhead whales could adversely affect the stock and contribute to preventing its eventual recovery, if in fact such a recovery is possible."<sup>105</sup> The Scientific Committee's consideration of the spring data was unemotional and straightforward. Tillman and Chapman's presentation of the data did not attempt to explain further the various factors which *may* have contributed to an

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<sup>104</sup> Dr. Michael F. Tillman, interview by author, Silver Spring, Maryland, 19 March 1993.

<sup>105</sup> International Whaling Commission, "Report of the Scientific Committee," Canberra, Australia, 6 June 1977, 67.

increase in struck-but-lost whales. The business of the Scientific Committee is only to present and review the latest data regarding the status of whales under its auspices - there is no opportunity for significant political or ideological discussions. The bowhead data provided by Tillman and Chapman led the Committee to recommend to the full Commission that the Eskimo hunt be stopped.

The next week, Aron came to Canberra as United States Commissioner leading the delegation which included staff from both the Interior and State Departments. The Commission considered numerous issues of import to various member nations. Of note beyond the bowhead controversy was the Commission's acceptance of nearly a 90 percent reduction in the North Pacific sperm whale quota, from 7,200 in 1977 to only 763 for the spring 1978 season.<sup>106</sup> The dramatic reduction was due to the use of a new population model for sperm whales implemented by the Scientific Committee. Japan and the Soviet Union maintained a heavy interest in sperm whale harvests, and both argued that their respective scientists should have the opportunity to review the use of the new model.<sup>107</sup> Given the significance of the quota change, the Commission relented and called for a special meeting of the Scientific Committee to review the issue more closely in November 1977. If the Committee were to recommend a change to the sperm whale quota, a special full Commission meeting would be held

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<sup>106</sup> *Marine Mammal News*, vol. 3, no. 7, July 1977, 2.

<sup>107</sup> *Ibid.*

shortly thereafter to consider making the change in advance of the scheduled spring harvest. The disagreement over the new sperm whale quota would ultimately play a pivotal role in the resolution of the bowhead controversy.

On 24 June 1977 the vote came on the Scientific Committee's recommendation to delete the Eskimos' exemption, and Aron offered a statement to the Commission: "I feel it necessary to note the significance of the Commission setting precedent by applying, for the first time, the standing 1947 Charter to subsistence takers."<sup>108</sup> In the days before the vote, he had attempted to lay this as the foundation for his argument with other member nations. Aron argued the IWC did not have jurisdiction over subsistence users since its interpretation of the charter had always exempted these groups. The response to Aron's appeal was silent rejection by Commission members.

Aron's direct knowledge of the Eskimos he had gained while working at NOAA, along with the time he had spent personally in Alaska, provided him with what he believed was a sound appreciation of the impacts an end to the hunt would have on the Eskimos and their culture. Conversely, his employment as Commissioner gave him a unique appreciation of the international ramifications of a United States' objection to the Scientific Committee's recommendation. The situation, then, for both

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<sup>108</sup> Dr. William Aron, interview by author, Seattle, Washington, 5 October 1977.

Aron and the United States, was a quandary, and Aron had three options before him as the Commission considered the recommendation of the Scientific Committee.

The Commission's vote on the Scientific Committee's recommendation was recorded; 16 in favor, none against, with the United States abstaining. Upon voting, Aron offered an additional statement to the IWC on the issue:

"We are committed to meeting the requirements of this Commission with respect to bowhead whales...We ask the Commission to recognize the most difficult position in which we find ourselves. Our commitment to honor the recommendation of the Scientific Committee and any action by the Commission is both sincere and deeply felt. We intend to implement these recommendations and actions as promptly and equitably as possible, recognizing the limitations that may be imposed by domestic law. We are forced, however to abstain on this issue, lest an affirmative vote [later] suggest that the difficult issues which we face have been resolved."<sup>109</sup>

The effect of Aron's abstention constituted a delay in the United States' decision. Under IWC charter, member nations which abstain have 90 days to make a final decision once officially notified through documentation. NOAA later received the official notification of the IWC action on 24 July 1977 making 24 October 1977 the deadline for a final decision by the United States.

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<sup>109</sup> Statement of Dr. William Aron, U.S. Commissioner to the International Whaling Commission, 24 June 1977, Lakeside International Hotel, Canberra, Australia.

If Aron had "objected," the United States could have allowed the Eskimo hunt to continue. However, this would have subjected the United States to intense criticism from IWC whaling nations attempting to resist United States' pressure to reduce commercial whaling, and, more presently, calls for the ten-year moratorium. Had Aron "accepted" the IWC decision, the United States would have been expected to end the hunt before the spring 1978 season. By abstaining, Aron had made enemies on all sides of the issue. His non-decision was lambasted by groups representing both the Eskimos and the bowheads.

Overall, the meeting in Canberra represented an important milestone for the IWC. It was the first time the Commission accepted all recommendations of the Scientific Committee without modification.<sup>110</sup> Furthermore, the Commission, on average, reduced quotas on all species by 36 percent -- the largest one-year reduction in IWC history.<sup>111</sup> Ironically for the United States, the significance of these achievements would exact a price that would diminish its strength in future IWC deliberations.

#### *The United States' Response*

Returning from Canberra, Aron found himself squarely at the center of the controversy -- all stakeholders in the bowhead issue were incensed at his abstention.

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<sup>110</sup> *Marine Mammal News*, Washington, D.C., vol. 3, no. 7, 2.

<sup>111</sup> *Ibid.*



On June 28, NOAA held a post-IWC briefing. With one notable absence, the Eskimos, attendance was nearly identical to the previous stakeholder meeting on June 8. At the meeting, Aron explained that his decision not to accept the IWC position was based on the legal uncertainties: "We weren't sure we had the legal authority to support a zero quota for bowheads," Aron said.<sup>112</sup> Of course, Aron's concern was that the June 10 proposal to list the bowheads as depleted may not be formally adopted due to NOAA's poor population data. Without securing a depleted listing, NOAA would be unable to regulate the hunt making a commitment by the United States to the IWC on the imposition of a zero quota impossible.

Participants of the June 28 meeting, primarily representatives of the environmental community, pressed Aron on the fact that NOAA had taken little action since the IWC meeting in 1976 when the United States committed to taking all possible steps to reduce the Eskimo whaling effort and reduce the number of struck-but-lost whales. Of course, there was no substantive response Aron could offer to justify NOAA's failure to act on the IWC's request. "For one reason or another," Aron explained, "no action had been taken. We were forced to report [to the IWC] that the loss rate had increased and the fishing effort had increased."<sup>113</sup> Although the meeting included mostly representatives of the environmental community, it was clear that there was no consensus among participants as to what position to take in the controversy. Despite

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<sup>112</sup> Ibid., 1.

<sup>113</sup> Ibid.

the conservationists' seemingly unanimous position to protect the bowheads prior to the IWC meeting, the "either-or" choice involving the Eskimos was difficult for many groups committed to protecting the rights of native Americans. As an example of this emerging "split" in the environmental community, a letter of 7 July 1977 to Fisheries Director Schoning supporting the IWC decision and calling for acceptance by the United States was signed by only 11 of 22 environmental groups under the umbrella organization, Monitor, Inc.<sup>114</sup> The lack of consensus among these groups would continue throughout the controversy. This disagreement, however, was not nearly as troubling for NOAA as was the variety of positions and opinions from within the administration itself.

Two interagency meetings were held at NOAA's request following the IWC meeting. During the first meeting on July 6, the divisions among federal stakeholders became more defined. Participants included representatives from the Marine Mammal Commission, the White House Council on Environmental Quality (CEQ), the State Department, the Interior Department's Bureau of Indian Affairs, and NOAA. Both CEQ and the Marine Mammal Commission recommended acceptance of the IWC decision, albeit for different reasons. As previously noted, the MMC had consistently taken the position that the bowheads were in such a critical state that action to regulate or terminate the hunt was necessary to protect the animals. CEQ, however,

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<sup>114</sup> Ibid.

focused on the international implications of a United States' objection to the IWC and reasoned that acceptance in order to avoid problems with other nations was preferable.<sup>115</sup> In fact, immediately following the IWC meeting, CEQ had informed both the Commerce and State Departments that no objection should be lodged.<sup>116</sup> At the Interior Department and NOAA, however, there was a lack of internal consensus on exactly what position to take. Although the Bureau of Indian Affairs (BIA) had been leaning in favor of supporting the Eskimos and, therefore, recommending an objection, the BIA's Juanita Alvarez stopped short of offering this as the official recommendation of either the Bureau or the Interior Department.<sup>117</sup> At NOAA, the primary concern centered on whether its proposal to list the bowheads as depleted would ultimately be adopted given its lack of good population data. Any discussion on exactly how to regulate the hunt would have to wait until the bowheads were officially listed as depleted -- NOAA could not pursue regulation without it. Nonetheless, various opinions expressed within NOAA on whether or not to object to the IWC's action would be based on ideological as well as legal grounds.

One other important purpose of the July 6 meeting was to decide whether the preparation of an Environmental Impact Statement (EIS), as prescribed by the

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<sup>115</sup> Dr. William Aron, interview by author, Seattle, Washington, 5 October 1977.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Marine Mammal News*, Washington, D.C., vol. 3, no. 7, July 1977, 1.

National Environmental Policy Act (NEPA), was required. NEPA requires an EIS be completed when a decision to take action, or not to take action, might impact American environmental or human resources.<sup>118</sup> For example, an EIS is required for most activities conducted by the United States Army Corps of Engineers. The overall consensus from participants was that an EIS was not only legally required by NEPA, but would serve as the appropriate vehicle to clearly identify the issues facing NOAA as presented by all government and non-government stakeholders. Given the already evident divergence of opinion among the agencies, the EIS was also viewed as the proper vehicle to officially document these differing federal perspectives.

On July 12, NOAA Administrator-designate, Dick Frank, testified before the Senate Commerce Committee on the matter of his confirmation. Senator Ted Stevens (R-AK) raised the bowhead controversy only to ask Frank why the situation had been allowed to develop into such a difficult position for the agency. Frank would only respond that, had he been at NOAA a year earlier, and had the issue then been called to his attention, things might have been different.<sup>119</sup> Of course, Aron and numerous others in and out of government were not heartened by this response, believing that they had most certainly raised this issue to the appropriate levels several years in advance of the 1977 controversy, and that their concerns had simply been ignored by

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<sup>118</sup> 52 U.S. Code, Sec. 4231.

<sup>119</sup> *Marine Mammal News*, Washington, D.C., vol. 3, no. 7, July 1977, 1.

senior NOAA staff. "Crisis management" arguments fit well with the bowhead issue.

Following his confirmation hearing, Frank requested a detailed chronology of the events preceding the IWC's decision on the bowhead issue from NOAA Fisheries Director Schoning. The inquiry stemmed from questions as to whether NOAA had "dropped the ball" with regard to the issue as well as to determine whether NOAA had responded appropriately to previous IWC requests to study the problem since the issue was first raised by the Scientific Committee in 1972. A memo of 14 July 1977 prepared by Fisheries outlined this chronology: "We believe that the above actions [detailed in the memo] taken by NMFS were consistent with the June 1976 recommendations of the IWC that the United States take all steps feasible to limit the expansion of the fishery and to reduce the loss rate of struck whales."<sup>120</sup> One of the memo's milestones included a telephone conversation with a manufacturer of "whale bombs" to "explore the feasibility of technological improvements in these firearms which could lead to reduction in the struck/lost ratio."<sup>121</sup> However, that telephone conversation occurred on 9 June 1977.<sup>122</sup>

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<sup>120</sup> Memorandum from Thomas Andrews, Chief, Marine Mammal and Endangered Species Division, NMFS, NOAA, DOC, Washington, D.C., to Robert W. Schoning, Director, NMFS, NOAA, DOC, Washington, D.C., 14 July 1977, 4.

<sup>121</sup> *Ibid.*, 3.

<sup>122</sup> *Ibid.*

The above memo was prepared by Thomas Andrews, Chief of Fisheries' Marine Mammal and Endangered Species Division and was clearly written in a defensive tenor. Of course, Aron, Tillman, Chapman, and others disagreed with the supposition that "all feasible steps" had been taken with regard to bowheads.<sup>123</sup>

Clearly, the question of whether NOAA had complied with the IWC request was one of utilization of agency resources, and new monies to address the bowhead problem had not arrived in Seattle until early 1977. Assigning blame, then, had become a matter of interest to the new NOAA political leadership. However, this interest abated quickly when it became clear to Frank and others that earlier decisions were based simply on agency priorities, and allocating increased resources to study the bowhead situation was low on the list of top NOAA problems. Of course, Aron and Tillman had seen the controversy coming. However, the redistribution of resources in any significant way is often difficult when the basis for doing so is the *possibility* of controversy -- "need" is a subjective determination.

For Tillman in Seattle, the advent of the controversy was more troubling. Tillman had attended the meetings of the Scientific Committee prior to 1977 not only as a NOAA representative but as a marine biologist and whale specialist. In this former capacity, Tillman watched and accepted the direct tasking by the IWC. Of course, Tillman was in no position to allocate the resources necessary to comply with the

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<sup>123</sup> Dr. William Aron, interview by author, Seattle, Washington, 5 October 1977.

IWC requests. Upon his return to Seattle, Tillman could only pass-on the IWC requests of the United States, to which he had already committed, to the NOAA hierarchy that would make the ultimate decision as to whether the issue warranted action. Returning to the IWC in subsequent years, it was especially difficult for Tillman to report that the United States had failed to address the issue. It was a blight on his professional and personal stature, as well the nation's integrity that things had not been done. Of course, questions of accountability arise when an international body directs a United States government agency at any level.

Although a final decision on the bowhead issue was still months away, NOAA and the Departments of State and Interior were attempting to determine the implications of either decision. For the State Department, the primary concerns were the international implications of objecting to an IWC decision. However, more pressing for NOAA and Interior was what to do about the Eskimos if the IWC directive was accepted and the bowhead hunt was banned. Juanita Alvarez requested that the BIA prepare a memo outlining the alternatives to address the Eskimos' subsistence needs in the event of a ban. On 14 July 1977 John Gordon, Acting Director of the Office of Trust Responsibilities, sent a memo to Alvarez stating, "We are convinced, at this time, that it will be impossible to explore properly what alternatives, if any, exist without a substantial joint effort by persons with expertise in whales and Arctic

ecology and persons with expertise in Alaska Native religion and culture."<sup>124</sup> The memo also mentioned the unlikelihood of using existing programs, such as food stamps or ration coupons, given the remoteness of many of the villages. Given the short time frame, Alvarez and the Interior Department had no choice but to begin development of alternatives identifying and using any available expertise. Alvarez was aware that NOAA was attempting to release a draft EIS in early August, and she knew the Interior Department's comments would be critical if a comprehensive federal perspective were to be incorporated officially into the decision document.

The BIA memo to Alvarez also raised the issue of exactly how appropriate "native" input regarding possible alternatives would be considered.<sup>125</sup> The BIA was attempting to respond to the Eskimo complaint that their opinions had been ignored by the federal government. However, the BIA was concerned that Eskimo contact was necessary from a legal standpoint: "There may be substantial legal questions if the federal government fails to provide the Alaskan natives with an adequate opportunity

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<sup>124</sup> Memorandum from John Gordon, Acting Director, Office of Trust Responsibilities, Bureau of Indian Affairs (BIA), U.S. Department of the Interior (DOI), Washington, D.C., to Juanita Alvarez, Assistant to the Assistant Secretary for Fish and Wildlife and Parks, DOI, 14 July 1977, 1.

<sup>125</sup> *Ibid.*, 3.



to be heard prior to prohibiting the taking of bowhead whales."<sup>126</sup> Indeed, this issue would be raised by the Eskimos later during legal proceedings.

The possibility of an end to the Eskimo hunt also raised serious concerns at NOAA Fisheries' Office of Enforcement as to how, logistically, a ban could be enforced. In response to this concern, the office prepared a briefing paper for Fisheries Director Schoning on July 17.<sup>127</sup> Based on previous enforcement experience and an understanding of the general resistance of Eskimos to government intervention into their activities, the enforcement office's prognosis was grim: "We strongly believe that a total ban will engender total resistance from the native group and their supporters so as to make enforcement of the ban impossible and thus destroy opportunities for a viable conservation program...We urge refraining from a zero quota."<sup>128</sup> This point of view did not surprise Aron. His knowledge of the Eskimo culture led him to the conclusion that the imposition of a total ban would likely result in bloodshed.<sup>129</sup> The paper also acknowledged the inability of a limited number of officers to enforce a ban across the vast terrain where hunts occur: "Under a total

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<sup>126</sup> Ibid.

<sup>127</sup> "A Preliminary Review of the Enforcement of a Ban on Bowhead Hunting," NMFS, NOAA, DOC, Washington, D.C., 15 July 1977.

<sup>128</sup> Ibid., 5.

<sup>129</sup> Dr. William Aron, interview by author, Seattle, Washington, 5 October 1977.

ban, we anticipate that some bowheads will be shot and either brought to shore surreptitiously or left on the ice and become valued items for salvage."<sup>130</sup>

Furthermore, enforcement officers realized that, under a ban, *possession* would also be illegal and would lead to arrests of "all people in the village, including children and elderly ladies carrying baskets of whale meat from the site."<sup>131</sup> Concerned with the possibility of being "treated like an invading army," the Office of Enforcement clearly feared having to enforce a ban.<sup>132</sup>

Also on July 15, acting General Counsel for Fisheries, Pamela Paige Murphy, sent a memo to update Bill Aron on the most recent findings of Murphy's new "Legal Task Force" that included attorneys from the Marine Mammal Commission and the Departments of State, Justice, Interior, and Commerce. The memo attempted to assess the legal basis and implications of either accepting or objecting to the IWC decision and identified plausible arguments under both scenarios. This, of course, meant that either option could be challenged effectively by an outside group -- specifically, the Eskimos or the environmental community. Of note in the discussion of possible legal arguments that could be made by the Eskimos was the notion that, if the government accepted the IWC's decision, the United States may be forced to

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<sup>130</sup> Ibid., 2.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid., 1.

impose the ban on hunting bowheads *immediately*, thereby denying the Eskimos an opportunity for public hearing through a rulemaking process. This potential interpretation was made following a review of the Whaling Convention Act of 1949 which implements the United States' compliance with IWC actions. The Act suggests that regulations imposed by the IWC are to be implemented and enforced by the United States immediately upon acceptance of IWC decisions and the publishing of the IWC regulations in the Federal Register.<sup>133</sup>

The threat of litigation, of course, has a powerful influence in public decision-making. Unfortunately for NOAA, the collective opinion of task force members was that NOAA would be going to court no matter which decision was made: "While the United States can legally object to or accept the IWC zero-quota, it seems that, regardless of the approach taken, litigation will probably ensue."<sup>134</sup> Although the environmental community had been experiencing a lack of consensus regarding which position to take on the bowhead issue, it was generally agreed that at least a handful of groups would sue NOAA if an objection were filed. Furthermore, the possibility of legal action on behalf of the Eskimos became more clear to NOAA with the receipt of the first letter from a law firm representing them.

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<sup>133</sup> 16 U.S. Code Sec. 916.

<sup>134</sup> Memorandum from Paige Murphy, staff attorney, NOAA, DOC, Washington, D.C., to Dr. William Aron, Director, Office of Ecology and Environmental Conservation, NOAA, DOC, Washington, D.C., 15 July 1977, 9.

Commenting on NOAA's proposal to list bowhead whales as depleted under the MMPA, the law firm of Van Ness, Curtis, Feldman and Sutcliffe sent a letter to Fisheries Director Schoning on 11 July 1977 that argued against NOAA's legal rationale for a depleted listing for the bowhead: "the proposed designation is defective in that it contains no legally valid basis for making such proposed designation [as depleted]."<sup>135</sup> The letter argued against the notion that a listing of endangered under the ESA constituted the basis for a finding of depleted. The letter, signed by S. Lynn Sutcliffe, also stated that it would "not address the issues of: a) subsistence taking or, b) the manner in which NOAA, the U.S. government and international organizations have treated our clients in total disregard of their rights for due process. We are confident that other forums will be available for us to pursue such matters."<sup>136</sup>

The letter, part of a larger package presented to NOAA entitled, "Unlawful Efforts to Impose a Moratorium on the Taking of Bowhead Whales for Subsistence Purposes by the Inuit Eskimos," included copies of correspondence between NOAA and the Marine Mammal Commission from early 1977 in which the question of whether the bowheads were, in fact, a depleted species was discussed. Sutcliffe used the letters as evidence that NOAA had insufficient data to pursue designation of the bowhead as a

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<sup>135</sup> Letter from S. Lynn Sutcliffe, attorney, Van Ness, Curtis, Feldman and Sutcliffe, Washington, D.C., to Robert Schoning, Director, NMFS, NOAA, DOC, Washington, D.C., 11 July 1977, 1.

<sup>136</sup> Ibid.

depleted species and did not, at that time, agree with the Commission's interpretation that the bowhead's designation as an endangered species was tantamount to a finding that they were depleted as well.

Sutcliffe's package, though not going into any detail on the matter, appeared to threaten suit on the issue of NOAA's denial of procedural due process to the Eskimos if the United States were to accept the IWC's decision to end the hunt. As noted in Murphy's Legal Task Force memo, accepting the IWC's decision to end the hunt could be interpreted to obviate the need for further regulatory action by the United States, making the ban on hunting bowheads effective immediately upon acceptance.<sup>137</sup> If the United States took this interpretation and immediately imposed a ban on hunting bowheads after accepting the IWC's decision, the Eskimos would lose their opportunity for a hearing on the record as required by both the ESA and the MMPA during the normal rulemaking process to list the bowheads as a depleted species.<sup>138</sup> Although Sutcliffe did not expound on this point in his letter to NOAA, he realized that any denial to the Eskimos of an opportunity to testify at a public hearing, or even to offer comment to a federal action affecting them, would make a powerful legal

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<sup>137</sup> "Unlawful Efforts to Impose a Moratorium on the Taking of Bowhead Whales for Subsistence Purposes by the Inuit Eskimos, Briefing Book," Van Ness, Curtis, Feldman and Sutcliffe, Washington, D.C., 19 July 1977.

<sup>138</sup> 16 U.S. Code, Sections 1539 (a)(4) and 1371 (b).

argument that they were being denied their rights as outlined in the ESA and the MMPA.

The package also contained a research proposal, developed for the Eskimos by the North Slope Borough, for a cooperative research program between NOAA and the Eskimos to better assess the bowhead population through the use of advanced technology. The proposal stated, "If part of the role of national governments is to rationally manage resources for the common good, the question can be asked: How can you manage something if you do not know what it is?"<sup>139</sup> Of course, Aron and Tillman could not agree more with this rationale.

By this time, Bill Aron had been presented with a variety of viewpoints on the pending decision, not only from outside of NOAA, but internally as well. In a memo of 18 July 1977, Donald Martineau, acting Associate NOAA Administrator for Marine Resources, offered the official position of his division in support of an objection to the IWC decision: "We take the position...that an objection be presented to the IWC with an endorsement of the spirit and intent of the recommendation and the imposition of a management regime that will achieve the intent of the IWC

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<sup>139</sup> Charles Edwardson, North Slope Borough, Alaska, and Arctic Enterprises, Inc., Severna Park, Maryland, "Proposed Scope of Work for an Ocean Information System to Identify and Keep Track of the Bowhead Whale and to Permit Specie Management," July 1977, 3.

recommendation without seriously impacting the Eskimo culture and subsistence. In my view, it is *not* an issue of adherence to an IWC recommendation in the face of world opinion and responsibility" [emphasis added].<sup>140</sup>

Of course, Aron was not surprised by the variety of opinions expressed by NOAA staff -- identical arguments were occurring in his own mind. The lack of a clear administrative, legal or, arguably, moral direction contributed to an atmosphere where no opinion could be easily discounted. As United States Commissioner, Aron was in the unfortunate position of having to choose among these opinions, and he now knew that either a decision to object or accept would result in legal proceedings and general upheaval. Fortunately for Aron, circumstances surrounding a separate issue were evolving in a way that would present a third option.

On 20 July 1977 Prudence Fox, Foreign Affairs Officer in Fisheries International Negotiations Division, drafted a memo outlining the possibility of renegotiation with the IWC of its decision to end the hunt.<sup>141</sup> Fox, who worked in the section of NOAA

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<sup>140</sup> Memorandum from Donald P. Martineau, Acting Associate Administrator for Marine Resources, NOAA, DOC, Washington, D.C., to William Aron, Director, Office of Ecology and Environmental Conservation, NOAA, DOC, 18 July 1977, 1.

<sup>141</sup> Memorandum from Prudence I. Fox, Foreign Affairs Officer, International Negotiations Division, NMFS, NOAA, DOC, Washington, D.C., to Henry R. Beasley, Chief, International Negotiations Division, NMFS, NOAA, DOC, Washington, D.C., 20 July 1977.

most acutely aware of the international ramifications of objecting to the IWC decision, was fearful: "An extreme possibility would be destruction of the IWC conservation regime and the U.S. policy supporting conservation of marine mammals."<sup>142</sup> She also mentioned the disparity of views within NOAA and among the various federal agencies stating, "higher level officials in three major agencies are not sure whether the U.S. should object or not object."<sup>143</sup>

Fox recommended that Aron ask the IWC Chairman to poll member nations by mail to see if they would agree to reconsider the bowhead ruling at the special meeting of the Scientific Committee scheduled for 21 November 1977 which was planned to review the data concerning the new sperm whale quota. Fox believed that the special meeting of the Scientific Committee was likely to result in a revision of the sperm whale allocation. This would require a special meeting of the full Commission to reconsider the sperm whale quota. In fact, the Commission had already alerted member nations to this possibility and had tentatively scheduled 6 December 1977 for such a meeting. If the Scientific Committee recommended reconsideration of the bowhead issue, the Commission would then be in a position to overturn its earlier decision in advance of the spring 1978 Eskimo hunt.

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<sup>142</sup> Ibid.

<sup>143</sup> Ibid.



Fox further reasoned that a special meeting of the Commission would give the Eskimos a more formal opportunity to "concretely show that they are interested in conserving the bowheads."<sup>144</sup> Such an opportunity, Fox believed, would also show that the United States government was "willing to go out of its way to give the natives a full chance to prove themselves...[and] could prove beneficial if a court case becomes necessary."<sup>145</sup>

Fox's idea was presented to Aron, and he immediately initiated a dialogue with the IWC to pursue the possibility of considering the bowhead issue at the November meeting of the Scientific Committee. While waiting to see if this opportunity would materialize, Aron spent his time developing the EIS and noting the differing opinions within NOAA on whether to file an objection.

On 25 July 1977 a lengthy memo was presented to NOAA Administrator Frank which detailed the official recommendations of the NOAA elements involved in the bowhead issue. The memo stated, "We are unable to agree on a recommendation to make to the Secretary of Commerce to allow her to advise the Secretary of State on whether

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<sup>144</sup> Ibid.

<sup>145</sup> Ibid.

we should file an objection on the bowhead issue."<sup>146</sup> Of the four divisions represented in the memo, the Offices of Marine Resources, General Counsel, Ecology and Environmental Conservation, and Fisheries, two were in favor of filing an objection and two were against. Marine Resources and Fisheries favored an objection and recommended additional public hearings be held "to obtain a complete public record on the issue of filing an objection."<sup>147</sup> The General Counsel and Ecology and Environmental Conservation offices recommended no objection be filed. Frank, only recently confirmed in the position of NOAA Administrator, immediately found himself as the lead person on the issue. However, Frank continued to allow Aron to serve as IWC Commissioner despite his confirmation, though Frank recognized that given the level of increasing interest in the issue, he would ultimately assume the title of United States Commissioner to the IWC when recommending which option to take to the Secretaries of Commerce and State.

The above memo mentioned, for the first time, the issue of exactly which federal agency would be making the decision to object or not object to the IWC ruling.

Although Aron, serving as Commissioner at the June meeting, could have made either decision as a representative of the United States government, the effect of his

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<sup>146</sup> Memorandum from the offices of Ecology and Environmental Conservation, Marine Resources, and the General Counsel, NOAA, DOC, Washington, D.C., to Richard A. Frank, NOAA Administrator, DOC, Washington, D.C., 25 July 1977, 1.

<sup>147</sup> Ibid.

abstention and the subsequent delay in the decision-making process outside the framework of the Commission structure, led to the collective conclusion that the ultimate decision, being of an international nature, would be made by Secretary of State, Cyrus Vance. The State Department's assertion of its jurisdiction on the issue was not challenged by any of the participating members of the administration. The State Department's position was consistent with prior United States' policy when negotiating similar issues. For example, although NOAA Fisheries maintains a division dedicated to international negotiation in the establishment of quotas for world-wide fisheries, protection of endangered species, etc., the State Department normally acts as the official conduit for transmitting United States' policy. The balance of the negotiation, however, occurs at the staff level at NOAA Fisheries. Of course, the fact that the State Department had the "final say" did concern both government and non-government stakeholders who feared that international concerns would take precedence in the decision-making process.

NOAA's top international official at the time was Carmen Blondin, Assistant Director of NOAA for International Fisheries. On 29 July 1977 Blondin sent a memo to Fisheries Director Schoning identifying what he believed would be the international reaction to a decision by the United States to object to the IWC ruling.<sup>148</sup> Blondin's

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<sup>148</sup> Memorandum from Carmen J. Blondin, Assistant Director for International Fisheries, NMFS, NOAA, DOC, Washington, D.C., to Robert W. Schoning, Director, NMFS, NOAA, DOC, Washington, D.C., 29 July 1977.

prognosis was bleak: "It is quite possible that the future of the Commission may depend upon continued U.S. credibility...Several members of the IWC Scientific Committee from other member nations and the IWC Secretary have indicated they feel the IWC would be destroyed if the United States were to lodge an objection."<sup>149</sup> Since the June meeting, Blondin had been polling various members of the Scientific Committee to determine their feelings. In effect, he was validating the notion that an objection would have severe impacts on American environmental credibility. However, his concern that the IWC itself might collapse as a result of a United States' objection was new.

Blondin attributed this sentiment to the more recent reputation the United States had acquired in IWC negotiations: "The U.S., as the leading supporter of...a 10-year moratorium on all commercial whaling, has taken a radical and very often antagonistic stand favoring the most conservative measures of protection of whales. The U.S. has forced the Commission to no longer consider the well-being of the industry and has been influential in making it extremely difficult for [nations] to object to IWC decisions."<sup>150</sup> Blondin, then, had become concerned that major environmental goals for the United States might be compromised by an objection if the viability of the IWC were to be jeopardized. International and biological concerns

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<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

had become synonymous. Only one issue remained: what do you do with the Eskimos?

In an effort to continue dialogue with all interested parties in government, Aron called for another interagency meeting on 3 August 1977 and included participants from the Departments of Commerce, Interior, State, Justice, the Marine Mammal Commission and the White House Council on Environmental Quality (CEQ). The Justice Department had become an active participant at the request of NOAA's General Counsel's office which believed litigation was inevitable and, therefore, Justice Department involvement as well. CEQ remained involved as a result of NOAA Administrator Frank's efforts to make the political hierarchy aware of the complexity of the issue and the potential impact either decision would have on President Carter.

The August 8 meeting, to no one's surprise, did not result in consensus. Aron chaired the meeting and announced that the draft EIS would be made public shortly and that he had attempted to ensure that it would be a "non-advocacy" document.<sup>151</sup> Rather, the EIS was constructed in a way to present all necessary information which would serve as a basis for a later decision. Aron also announced that public hearings were being scheduled for the first two weeks in September 1977 primarily to afford

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<sup>151</sup> Wedin, NOAA, DOC, Washington, D.C., "Draft Notes -- Interagency Meeting on Bowhead Whales, DOC, 8/3-77."

sufficient opportunity for native communities to present their position. In announcing the hearings, Aron recalled the 8 June 1977, meeting where the Eskimos felt they had been "subjected to unfair questions," and stressed that this situation must be avoided in the future.<sup>152</sup> The meeting ended without substantive conversation on the issues. By that time, participants were sufficiently familiar with the disparity of viewpoints amongst themselves, and they knew the upcoming release of the EIS would provide ample opportunity to present these views in a more official manner. Aron returned to make final preparations for the distribution of the document taking special care to ensure that it would be quickly transmitted to Eskimo representatives and their legal counsel.

#### *The Environmental Impact Statement*

The EIS was designed to layout clearly the rationale for the decision either to object or accept the IWC's decision to ban the Eskimo hunt. The draft version attempted to pull-together all available biological information as well as the legal factors affecting the agency. Although efforts had been underway since early in the year to provide the legal basis for regulating the hunt through the depleted listing of the bowhead whale under the MMPA, and NOAA's proposal to do so had been published in the Federal Register for comment in June 1977, NOAA had yet to act on the matter. NOAA's reluctance to proceed with the formal designation of the bowhead as

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<sup>152</sup> Ibid., 2.

depleted was due to its continued inability to obtain adequate population data on the species. Without acquiring solid population data that supported the notion that the bowheads were a depleted species, NOAA was vulnerable to a legal challenge from the Eskimos it was likely to lose. As noted earlier, the exemption granted by the MMPA allowing Eskimos to hunt bowheads could only be overridden through a finding by NOAA that the bowhead whale was a depleted species.<sup>153</sup> Following such a finding, NOAA would then have to proceed with the development of federal regulations to control the hunt through a formal rulemaking process. As NOAA had failed to act on its proposal to list the bowheads as depleted, regulation of the hunt was impossible, notwithstanding and acceptance of the IWC's decision. Nonetheless, the information contained in the EIS would be structured in such a way as to support the need for regulation.

The draft EIS was made public on 12 August 1977 and NOAA requested that comments be submitted as soon as possible.<sup>154</sup> Aron's goal was to receive comments and issue a final EIS in early October, a few weeks in advance of the 24 October 1977 deadline for the United States to officially respond to the IWC. The contents of the draft included a review of the existing biological information on the status of the

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<sup>153</sup> 16 U.S. Code 1371, Section 101(b).

<sup>154</sup> Draft Environmental Impact Statement: *International Whaling Commission's Deletion of Native Exemption for the Subsistence Harvest of Bowhead Whales* (NMFS, NOAA, DOC, August 1977).

bowheads, a discussion on the relationship between the bowhead and Eskimo life, a review of executive guidance on the issue, and the impact of alternative actions.

Notwithstanding the likelihood of legal action and the State Department's role as the ultimate decision-maker, NOAA Administrator Frank did enjoy a great deal of discretion in making the decision. Contributing to this discretion was the sheer lack of supervisory guidance he had received on the issue. To be sure, both the office of the Secretary of Commerce, senior officials at both the State and Interior Departments, and the White House (CEQ) were particularly aware of the situation and had expressed interest in what NOAA's decision would be. Unfortunately for Frank, the nature of the issue was so difficult, with believable and justifiable positions on both sides of the argument that straightforward ideological, legal, or pragmatical guidance was hard to come by. This situation contributed to Frank's dependence upon Aron and other NOAA officials for guidance.

### Review of Biological Information

Tillman was charged with assembling the most complete and up-to-date information regarding the biological status of the bowheads for incorporation into the EIS. As reported in the EIS, by the summer of 1977, the method most commonly used to make population estimates on the bowheads was a simple, two-step process: 1) sit on



the ice during the bowhead's spring migration time and count the number of animals you see go by; and 2) extrapolate that data via mathematical model and estimate the total population size.<sup>155</sup> Clearly, such a method allowed for a certain degree of error.

Tillman's 7 January 1977 report remained NOAA's most recent assessment of the bowhead population. However, Tillman had attempted to enhance the sparsity of his data during the spring 1977 migration by adding an additional ice station in Point Hope, Alaska, to track the bowheads further than Barrow as they migrated into the Chukchi Sea. Of course, Tillman's ability to do so came as a result of the new money he and Chapman received earlier in the year. Unfortunately, the data from the new ice station did not inspire increased confidence in his earlier assessments. As a scientist, however, it was all Tillman had, and he was resigned to make the best of it.

Of course, the current population estimate was considered useless if an original population figure was unknown; calculating MSY is not possible without it. Despite the IWC's repeated requests that NOAA review historical log books to estimate a healthy population for several years, there were only a few varying estimates available in the summer of 1977. Independent researcher Dale Rice in 1974 estimated

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<sup>155</sup> Dr. Michael F. Tillman, interview by author, Silver Spring, Maryland, 19 March 1993.

a healthy arctic bowhead stock to be 4000-5000 animals based on peak whale bone production between 1868 and 1884, the years of greatest commercial exploitation.<sup>156</sup> However, two separate estimates made in early 1977 by Canadian biologist Edward Mitchell concluded the original population to be much higher.<sup>157</sup> Through mathematical models based on catch rates of American whalers during the peak exploitation years, Mitchell arrived at a historical bowhead population size of 18,000 animals.<sup>158</sup> Howard Braham, also working with NOAA's Marine Mammal Laboratory, further concluded in 1977 that Rice's figure was probably too low. The official NOAA estimate in the EIS was 12,260 bowheads and was based on Mitchell's calculations with some modifications to his assumptions.<sup>159</sup> Nonetheless, NOAA had failed to conduct a thorough review of historical logbooks from the exploitation period despite IWC requests.

The EIS, then, did not present compelling scientific data -- there was simply no solid understanding of how many bowheads existed in 1977 and what the significance of this figure was in a historical context. For NOAA management, the data did not

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<sup>156</sup> Final Environmental Impact Statement: *International Whaling Commission's Deletion of Native Exemption for the Subsistence Harvest of Bowhead Whales* (NMFS, NOAA, DOC, October 1977), 32.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid., 34.

<sup>159</sup> Ibid.

support any argument. For Tillman and others, however, scientific conservatism dictated the presumption of the "worst case." Under this mandate, the bowhead situation was grave.

Knowledge of biology of the bowheads was equally sparse. No reliable data existed for the bowhead mating season, gestation, calving and lactation periods.<sup>160</sup> Although analysis of stomach content of captured whales did allow for the collection of data regarding feeding habits and migration routes, the lack of information concerning reproductive biology exacerbated the situation regarding the status of the population. It was nearly impossible to determine whether the population was stable, increasing or decreasing. Nonetheless, for purposes of the EIS, the official NOAA estimate for the bowhead population was 12,260 animals. Exactly in what context this figure should be analyzed, however, was not stated in the report.

#### Determining Executive Policy

The bowhead controversy was born, unfortunately, in the early days of the Carter Presidency. The official transition was in progress, and Frank was one of only a few political appointees in place at NOAA when the Canberra meeting occurred.

Nonetheless, the controversy was straightforward enough to put the new

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<sup>160</sup> Ibid., 26-28

administration in a difficult political situation given the President's commitments to both the environment and to native Americans.

As noted earlier, President Carter had campaigned as a proponent of both environmental concerns and of native Americans rights. In fact, NOAA (Aron and others) had assisted in the preparation of the new President's Environmental Address of 23 May 1977. Of course, Carter surely had no idea his statement would become controversial so quickly. Advocating the protection of whales was likely seen by the White House as a "safe" position to take as it was presumed there would be little, if any, domestic opposition to saving whales. Of course, NOAA faced competing needs when drafting the language for the President's speech. The timing of the Address was perfect for enlisting strong executive support for the ten-year moratorium proposal in advance of the Canberra meeting. The United States posture would undoubtedly be strengthened. However, Aron and Tillman were also aware of IWC concerns regarding bowheads and the possibility of a major controversy if the IWC acted to restrict or to end the hunt. However, the need to stand firm on environmental issues took precedence over the *possibility* of problems. Unfortunately for President Carter, it was a gamble he neither knew he was taking nor could fully appreciate at the time.

Carter was also on record for supporting the rights of native Americans. In a campaign statement published by the Democratic National Committee, he had stated, "I am deeply concerned with the present condition of American Indians...I pledge an all-out effort to assist in the protection of their land, water and their civil rights."<sup>161</sup> Unfortunately, given the strength of Carter's environmental message in May 1977, the competing needs of both the Eskimos and the whales resulted in policy stalemate -- the ideologies of protecting the decimated population of the bowhead whales and the decimated culture of American Indians canceled each other out. The specific guidance to NOAA from the White House down the political chain-of-command was, then: "work it out." Secretary of Commerce Kreps, next in line, having nothing to contribute to the scientific debate and fully appreciating the political controversy, passed on the same direction to NOAA Administrator Frank. The political burden fell onto Frank's shoulders. Although the EIS did not state this conclusion directly, the lack of other information beyond Carter's May speech and the campaign statement suggests that NOAA was on its own.

Congressional Interest in the issue was high, but received only a passing reference in the EIS. Of course, the Alaska delegation had the benefit of being a bit more focused. If the choice were to come to choosing between Eskimos and the whales,

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<sup>161</sup> Jimmy Carter, Pre-Convention Statement, no. 92, Democratic National Committee, Washington, D.C., 1976.

the Eskimos would win every time.<sup>162</sup> Nonetheless, Alaska members were also under constant pressures from the environmental community to preserve the wildlife of America's "last frontier." In many cases, environmental protection efforts were consistent with native rights issues. However, as previously mentioned, the pending Alaska Lands Bill commanded great interest from the delegation.<sup>163</sup> The environmental community was pushing hard for adoption of the bill while the Alaska delegation was attempting to scale-back the breadth of the language to include less acreage and less restrictions on the land to be protected. Direct congressional involvement, though not absent, was significantly muted by these events. Supervisory guidance from this branch of government, then, was also in short supply.

#### Eskimo Dependency on the Bowheads

A review of the Eskimo relationship to the bowheads constituted a significant portion of the EIS. As previously noted, the hunting of bowhead whales had been considered synonymous with the Eskimo culture itself. Aron and others within the agency had an appreciation of the significance of the hunt to the Eskimos in terms of identity and hierarchy in their social structure. The leaders of the Eskimo communities were all whaling captains who spent years emulating their elders in learning the skills of the

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<sup>162</sup> Roderick Moore, Staff to Congressman Don Young of Alaska, interview by author, Washington, D.C., 13 December 1992.

<sup>163</sup> Ibid.

hunt. Small, technological advances that slightly modified Eskimo culture had occurred as a result of western influence but had never threatened its survival. Indeed, it was the Yankee whalers who introduced dogs to the Eskimos as well as the shoulder gun. The oil development on the North Slope, however, was having a measurable impact on the social structure of the Eskimos through the influx of money and the power it brought to those who had it. The younger, inexperienced captains were harming not only the whales with their premature hunting exploits, but the only hierarchy and leadership structure the Eskimos had ever known. The captain of the umiak and the leader of the community were no longer the same individual. This change in Eskimo society not only contributed to the crisis at hand, but also provided grist for the argument that the hunt should be stopped since the Eskimo culture was dying anyway.<sup>164</sup> This sentiment was widely held by one faction of the environmental community. For NOAA, the responsibility was to detail more precisely the dependency of the Eskimo culture on the hunt. The EIS attempted to present these views as clearly and as unbiased as possible.

The portion of the EIS that described the relationship of the bowheads to the Eskimos was taken, primarily, from documents prepared by the Bureau of Indian Affairs at the Interior Department. As previously stated, the BIA maintained a predisposition toward assisting the Eskimos, advocating an objection to the IWC decision from the

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<sup>164</sup> Dr. William Aron, interview by Author, Seattle, Washington, 5 October 1992.

start of the controversy. Nonetheless, the information provided by the BIA more clearly outlined the relationship of the bowheads to the Eskimos.

Limited studies of the Eskimo culture had been undertaken by the BIA and others in advance of the controversy. Following the Canberra meeting, members of the BIA conducted interviews with various village members and whaling captains in an attempt to understand their position better. NOAA's EIS reviewed existing information in terms of Eskimo dependence on the bowhead in the following areas -- diet and health, social and political structure, village economy, and the Eskimo relationship to the non-native world.<sup>165</sup>

The BIA found the bowhead to be an extremely significant food source to most of the villages surveyed, with specific villages, such as Point Hope, almost completely dependent upon bowhead products.<sup>166</sup> Despite the seasonal nature of the hunt, Eskimo villages maintain stores of muktuk (frozen whale blubber), to be consumed during the winter and summer months. Three ounces of muktuk provide 50 percent of the dietary protein, 140 percent of the iron, and 50 percent of the riboflavin required by

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<sup>165</sup> Final Environmental Impact Statement: *International Whaling Commission's Deletion of Native Exemption for the Subsistence Harvest of Bowhead Whales* (NMFS, NOAA, DOC, October 1977), 89-90.

<sup>166</sup> *Ibid.*, 48.



an average man.<sup>167</sup> The BIA report prepared for the EIS entitled, "Alaska Nutrition" repeatedly espoused the health benefits of consuming whale meat.<sup>168</sup> Although other villages, like Barrow, had access to various fruits, vegetables, and beef and were, therefore, less dependent on bowheads, the BIA had difficulty acknowledging the availability of acceptable alternative food sources. Nonetheless, any effort by the government to regulate or end the hunt would require the provision of alternative food sources to the Eskimos by the government.

Generally, the BIA, NOAA and others agreed that the removal of the bowhead from the Eskimo diet could not be offset by hunting other species such as walrus, seals, migratory birds, rabbit, fish, and occasionally, polar bears which they also utilized as food sources.<sup>169</sup> Additionally, the most likely substitute, beef, would be unacceptable to the Eskimos due to "its very different taste."<sup>170</sup> Furthermore, the criterion given by the BIA for consideration of an alternative could easily rule out anything: "Unless the alternative food source meets the practical requirement of being one which will be

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<sup>167</sup> Ibid., 49.

<sup>168</sup> "Alaska Nutrition -- Series of memos and interviews dealing with Alaskan native nutrition," Indian Health Service, Bureau of Indian Affairs, U.S. Department of the Interior (DOI), 1977.

<sup>169</sup> Ibid.

<sup>170</sup> Final Environmental Impact Statement: *International Whaling Commission's Deletion of Native Exemption for the Subsistence Harvest of Bowhead Whales* (NMFS, NOAA, DOC, October 1977), 49.

eaten by those families who rely most heavily on subsistence work for their food, avoiding the physical, psychological, or cultural trauma which accompanies any drastic and forced diet change, it will not serve as an acceptable substitute."<sup>171</sup>

Although a rational conclusion, the BIA requirement sounds much like a prescription for the proper care and maintenance of captive wild animals.

The BIA estimated that about 70 percent of the villages obtained most of their food from the hunt with Eskimos in larger, more modern villages such as Barrow, also dependent on bowhead products for about half of their foodstuffs.<sup>172</sup> Because only 40 percent of the eligible adult Eskimo population was considered to be in the labor force, dependence on bowheads was increased further by significant unemployment in the villages.<sup>173</sup> Although activity around the hunt provided a great deal of work during the spring and fall harvests, the off season provided little employment within the villages causing some younger Eskimos to make seasonal trips to Anchorage and Fairbanks in search of alternative employment.<sup>174</sup> However, most villagers did not leave, fearing the uncertainty of the non-native culture and the competitive

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<sup>171</sup> Ibid.

<sup>172</sup> Ibid., 50.

<sup>173</sup> Ibid., 54.

<sup>174</sup> Ibid., 55.

disadvantage they would face in the job market in larger cities.<sup>175</sup> Although the BIA maintained a cooperative agreement with the State of Alaska to provide employment assistance, efforts to find suitable jobs during the non-whaling season were generally unsuccessful and often became simple relocation programs.<sup>176</sup>

The BIA also provided various income services to the Eskimos. However, the only program able to accommodate the subsistence lifestyle of the Eskimo was the BIA Social Services Program which provided winter relief for villages as well as relief for urban migrants and unemployment compensation.<sup>177</sup> Unfortunately, the BIA considered this a short-term program that was insufficient to address chronic income deficiency caused by a general lack of employment opportunities in any sector.<sup>178</sup>

The BIA's report for the EIS reiterated the significance of the hunt to the social and political structure of most villages stating, "it [the hunt] ties the entire community together. Village feasts and festivals, arts and religious items revolve around the hunt

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<sup>175</sup> "Federal Programs and Alaska Natives," Bureau of Indian Affairs, DOI, 1977.

<sup>176</sup> Ibid.

<sup>177</sup> Final Environmental Impact Statement: *International Whaling Commission's Deletion of Native Exemption for the Subsistence Harvest of Bowhead Whales* (NMFS, NOAA, DOC, October 1977), 55.

<sup>178</sup> Ibid.

and its products."<sup>179</sup> Again, the importance of the hunt as a staple of the Eskimo culture was not disputed by any group, regardless of position. Disagreement occurred on the question of whether the culture itself was worth saving.

The adaptation of the Eskimos to the non-native world, then, became a focus of concern for the BIA and other involved parties who sought either to reduce these intrusions into Eskimo culture or hasten the assimilation of the Eskimos into western society. Studies regarding the impact of recent commercial development in native villages that had been conducted before the controversy began had found a strong relationship between an influx of personality disorders, juvenile delinquency, violent behavior, and physical problems such as alcohol abuse and the presence of military, industrial and commercial development projects.<sup>180</sup> However, at the time of the controversy, limited efforts to mitigate these consequences had been initiated by the Eskimos. Native organizations, like the North Slope Borough, were emerging and had begun playing an important role in social and political interactions with the non-native world. The North Slope Borough had contributed in negotiations on the Alaska Native Claims Settlement Act of 1976. Younger, more highly-educated Eskimos had become involved in the preservation of the village culture. United States government representatives were somewhat surprised at the political sophistication of these

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<sup>179</sup> Ibid., 53.

<sup>180</sup> Ibid., 57.

organizations. As a result, the relationship between the villages and the non-native groups had become antagonistic, as the preservation of Eskimo rights often led to heated debate between village elders and government or commercial representatives.<sup>181</sup> Perhaps most importantly, due to the influx of dollars to the native communities, these organizations had the financial wherewithal to hire legal counsel to fight the government or other interests.

#### Outlining the Decision: Object or not Object

The draft EIS attempted to describe the impact of either decision on both the Eskimos and the United States' international environmental position. Much of the text is devoted to the potential impact on the Eskimos if the United States decided not to object based on social, health, and economic factors. However, the EIS also includes a section entitled, "Mitigating Measures," that recommends specific government actions that could be taken to alleviate the problems caused by an end to the hunt.<sup>182</sup> Income assistance programs, aid to dependent children, food stamps, vocational training, and economic development assistance are all suggested as possible alternatives for the Eskimos.<sup>183</sup> Specifically, the EIS recommends expansion of the BIA Social Service Income Assistance Program and the Food Stamp Program

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<sup>181</sup> Ibid., 58.

<sup>182</sup> Ibid., 68.

<sup>183</sup> Ibid., 58-72.

administered by the Department of Agriculture.<sup>184</sup> Potential problems associated with the administration of either of these programs, including the BIA's concern that no acceptable food substitute for the bowheads is known to exist, are well-documented in the EIS. However, solutions to these problems go unaddressed. Nonetheless, the EIS does suggest that, if the hunt were banned, it may be possible for the hunt to resume some time in the future if research and vocational training result in more efficient hunting of bowheads.<sup>185</sup>

The construct of the section outlining the impacts of a United States' decision to "object" also supports an argument either to end or, at least, to regulate the hunt. The "Impact on Bowhead Whale" portion is only two sentences and again supports the ultimate need to regulate the Eskimo harvest stating, "The assurance of the bowhead population recovery, if a recovery is still possible, will be reduced commensurate with the degree of control which can be effected by regulations under the MMPA of 1972, or in accordance with any amendments to the IWC Schedule."<sup>186</sup> In other words, any recovery of the bowheads was inextricably linked to the imposition of some level of control on the Eskimo hunt. Finally, in describing the impact of an objection to the Eskimos, the EIS indicates that "it is expected that an objection would

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<sup>184</sup> Ibid., 69.

<sup>185</sup> Ibid., 73.

<sup>186</sup> Ibid., 75.

be accompanied by Federal regulation of the bowhead hunt, and that such regulation would reduce the take of bowheads by Eskimo villages.<sup>187</sup> Therefore, the EIS suggests that, even if the United States objects to the IWC decision, regulation of the hunt is inevitable.

The section that addresses the impact of an objection to the United States' international environmental position details the expected loss of both power and stature in the world community as an advocate of responsible resource management and conservation. Specifically, it suggests that an objection by the United States would have a dramatic impact on the functions of the IWC as an organization and would lead to additional objections to Scientific Committee recommendations and an overall weakening of existing whale conservation measures.<sup>188</sup> Furthermore, the EIS states that the United States' negotiating position in other international environmental treaties, such as the Endangered Species Convention and the Inter-American Tropical Tuna Commission (regulating dolphin deaths in tuna fisheries) would be damaged.<sup>189</sup>

This section also addresses the need to regulate the hunt, regardless of the outcome: "if the U.S. does object to the IWC action, it *must* enforce a quota on the take of

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<sup>187</sup> Ibid., 76.

<sup>188</sup> Ibid., 76-81.

<sup>189</sup> Ibid., 80.

bowhead whales" (emphasis added).<sup>190</sup> The document outlines the difficulties of enforcing such regulations, ultimately recommending a detailed, self-regulated approach designed in cooperation with Eskimo groups.

The construction and content of the draft EIS, then, attempts to outline clearly the factors affecting the decision to object and the potential impact of either choice on the United States and the Eskimos. However, the document appears predisposed to the notion of either ending the hunt, accepting the IWC decision, or, at the very least, taking immediate action to regulate the bowhead harvest. A detailed explanation of the impact of either decision on the bowhead population is noticeably sparse, possibly due to the aforementioned lack of knowledge regarding the true status of the bowhead. Nonetheless, the heavy emphasis on the potential negative impact on the United States' geo-political position in environmental conservation efforts effectively diminishes the significance of the impact of either decision on the bowheads or the Eskimos and, therefore, hints that these considerations are secondary to international concerns. This perceived construct, of course, was not lost on the various groups who reviewed and commented on the draft EIS.

The draft EIS was released with a 30-day comment period, although NOAA requested that comments be submitted as soon as possible. The EIS became the focus of debate

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<sup>190</sup> Ibid., 81.



among interested parties who sought to participate in, and influence, NOAA's decision-making process. Three informal public hearings were scheduled during this period: one in Washington, D.C., on 8 September 1977 and two in Barrow and Kotzebue, Alaska, on September 12 and 16, respectively.

The weeks following the issuance of the draft EIS were extremely hectic for Aron and Frank as they tackled preparations for the public meetings as well as the development of responses to incoming comments which needed to be incorporated into the final Environmental Impact Statement. During this time, the State of Alaska offered its official position on the controversy. Not surprisingly, both the Governor and the Alaska State Legislature recommended that NOAA object to the IWC decision to end the hunt. Governor Jay Hammond wrote to Commerce Secretary Kreps on 6 August 1977 stating, "A complete closure would unnecessarily hasten the disintegration of a culture already embattled with western technology."<sup>191</sup> On 16 August 1977 the Interim Committee on Subsistence of the Alaska State Legislature wrote to Kreps as well: "we would like to protest this action [to end the hunt]...No input from area residents affected was sought."<sup>192</sup> The response to the Alaska State Legislature from

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<sup>191</sup> Letter from Jay Hammond, Governor of the State of Alaska, Juneau, Alaska, to Juanita Kreps, Secretary, U.S. Department of Commerce, Washington, D.C., 6 August 1977.

<sup>192</sup> Letter from Dorothy M. Larson, staff assistant, Alaska State Legislature (House), Juneau, Alaska, to Juanita Kreps, Secretary, U.S. Department of Commerce, Washington, D.C., 16 August 1977.

Fisheries Director Schoning dated 9 September 1977 stated that attempts to involve the Eskimos in the issue had been made in early 1977. "In order to carry this concern to the Eskimos, a member of the National Marine Fisheries Service visited the Alaska whaling communities of Cambell, Savoonga, Kivalina, Point Hope, and Barrow, and meetings were held with Eskimo leaders in Nome and Kotzebue during February and March 1977."<sup>193</sup> Of course, what appears to be an allusion to a substantial effort by Fisheries to communicate concern with the Eskimos was, in fact, Mil Zahn's lone trip. Somewhat contradictory, the letter from Schoning also states, "The United States had no prior knowledge that the IWC would take the action that it did regarding bowhead whales."<sup>194</sup>

### *Public Hearings*

The first public hearing, held on 8 September 1977 in Washington, D.C., at the Commerce Department, included representatives of the federal government, the environmental community, the United States Congress and the State of Alaska. The meeting was generally uneventful, with 18 speakers offering testimony.<sup>195</sup> However,

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<sup>193</sup> Letter from Robert W. Schoning, Director, NMFS, NOAA, DOC, to Dorothy M. Larson, staff assistant, Alaska State Legislature, Juneau, Alaska, 9 September 1977.

<sup>194</sup> Ibid.

<sup>195</sup> Final Environmental Impact Statement: *International Whaling Commission's Deletion of Native Exemption for the Subsistence Harvest of Bowhead Whales* (NMFS, NOAA, DOC, October 1977), 102.

there were a few surprises. The third person to testify was Alaska's North Slope Borough Mayor Eben Hopson who stated, "the action of the IWC to ban subsistence hunting of the bowhead, whether objected to or not, has no legal force or effect with respect to Eskimo subsistence hunting...even if the IWC action had force and effect, the Alaskan Eskimo community would not stop hunting the bowhead whale."<sup>196</sup> This, of course, raised the eyebrows of NOAA employees and added weight to the Enforcement Office's concern that there would be gross violations if an attempt to ban the hunt were made.

Members of the environmental community, such as Craig Van Note, speaking on behalf of the Monitor, Inc., and Scott McVay from the Environmental Defense Fund, argued against a United States' objection.<sup>197</sup> However, the Eskimos found a surprising ally in the environmental group, Friends of the Earth (FOE). Pamela Rich, speaking on behalf of FOE, was the lone environmental representative who recommended an objection stating, "[FOE] regretfully must urge the U.S. to file an objection to the zero quota...and begin work immediately with the Eskimo...to establish take levels above zero but below the annual recruitment rate and consistent with subsistence needs."<sup>198</sup> Conversely, Marion Edey, representing the White House

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<sup>196</sup> *Marine Mammal News*, Washington, D.C., vol. 2, no. 9, September 1977, 1.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

(CEQ) testified that if the United States were to object to the IWC decision, American credibility would be greatly impaired, especially as it applies to the global protection of whales.<sup>199</sup> Edey's comments were said not to be indicative of official White House policy, but only CEQ's opinion on the information known at that time.

Rod Moore offered testimony on behalf of Congressman Don Young (R-AK) citing a letter opposing the IWC's attempt to ban the hunt that was being sent to Fisheries Director Schoning. However, Moore also stated that, reluctantly, Young might support an alternative in which NOAA would not offer an objection, but would work to seek the immediate reimposition of the Eskimo exemption with the IWC at the June 1978 meeting.<sup>200</sup> This support, however, would require that Fisheries work cooperatively with the whaling community to develop and instigate regulations to provide "for a continuing adequate subsistence harvest."<sup>201</sup> Of course, NOAA had determined that it would have to enforce a total ban if the United States did not file an objection.

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<sup>199</sup> Ibid.

<sup>200</sup> Roderick Moore, Staff to Congressman Don Young of Alaska, interview by author, Washington, D.C., 13 December 1992.

<sup>201</sup> Ibid.

Testimony on the impact of bowhead whales as a food source was offered by Margarete Smith from the Indian Health Service at the United States Department of Health, Education and Welfare.<sup>202</sup> Smith stated that many of the proposed substitutes to whale meat, including beef, were not acceptable alternatives if for no other reason than that these foods would not be eaten by the Eskimos, resulting in nutritional deficiency. Smith continued by saying that the Eskimos would lose "psychological nourishment because of [the bowhead's] significant place in Eskimo culture."<sup>203</sup>

The meeting concluded with North Slope Borough Mayor Hopson mentioning the recent formation of the Alaskan Eskimo Whaling Commission (AEWC) in which 70 whaling captains from numerous locations met in a "historical gathering" to initiate policies to enforce traditional hunting methods and develop a research and conservation program for the bowhead whale.<sup>204</sup> The creation of the AEWC, of course, was of keen interest to officials at NOAA, as they immediately saw an opportunity to use this group as an example that cooperative activities to protect the bowhead were underway.<sup>205</sup> However, the formation of the AEWC also occurred as a result of concerns raised by Lynn Sutcliffe, the Eskimos' legal counsel in

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<sup>202</sup> *Marine Mammal News*, Washington, D.C., vol. 2, no. 9, September 1977, 2.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

<sup>205</sup> Dr. William Aron, interview by Author, Seattle, Washington, 5 October 1992.

Washington, D.C., who saw the value in having a sole representative body for the Eskimos.

Participants in the hearing of 12 September 1977 in Barrow, Alaska, were, almost exclusively, Eskimos. Their participation in the hearing was less formal than the preceding hearing in Washington. At the start of the hearing, Eskimo whaling captain, Arnold Brower, requested that he be allowed to testify in his native "tongue" and that NOAA translate his testimony since all testimony was being tape-recorded.<sup>206</sup> The NOAA representative administering the hearing denied the request, stating that although recordings were being made, reviewers of the tapes in Washington, D.C., who would be working quickly to incorporate testimony into the final EIS, would not understand the language and would have insufficient time to have the tapes translated.<sup>207</sup> Following the denial, another Eskimo proceeded to violently argue against the impropriety of having to testify in English and immediately called upon all Eskimos to leave the hearing. At his insistence, approximately one dozen Eskimos, representing one-quarter of the total number of people at the hearing, walked out.<sup>208</sup>

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<sup>206</sup> Memorandum from Hugh J. Dolan, Chairman, Appeals Board, DOC, Washington, D.C., to William C. Brewer, General Counsel, NOAA, DOC, Washington, D.C., 20 September 1977.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

The next day, Brower testified, in English, at the hearing at Kotzebue, Alaska, which was uneventful and again dominated by the Eskimos. During this hearing, NOAA officials were informed by sympathetic Eskimos that the previous walk-out had been staged in retaliation for the treatment of the Eskimos at the meeting of 8 June 1977 in Washington, D.C., which Brower had attended.<sup>209</sup> Following Kotzebue, the hearings ended and NOAA felt that sufficient opportunity for public comment had been granted for the development of the EIS. The larger problem NOAA still faced was reconciliation of the disparity of views within NOAA and between other parts of the administration.

#### *The Search for Consensus - Distilling Options*

Although NOAA had not received confirmation that the IWC's Scientific Committee would consider the bowhead issue in November, which might lead to reconsideration by the full Commission if a special meeting were to occur in December, NOAA had begun to identify the kind of material that would be needed to make a credible argument that it had, finally, taken measurable steps to mitigate the bowhead problem. Key to the success of this argument would be a viable research plan, underscored by specific dollar commitments that NOAA and other agencies such as the BIA, would commit in order to enhance the knowledge base regarding both the

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<sup>209</sup> Ibid.

whales and the Eskimos.<sup>210</sup> In line with this need, NOAA solicited the assistance of the Marine Mammal Commission (MMC) in reviewing the framework of a plan that had been developed previously by Tillman and Chapman.

In a letter of 14 September 1977 Schoning, MMC Executive Director, John Twiss, presented what he considered to be the necessary components of a credible research proposal and approximate funding needs for such a program.<sup>211</sup> Of course, Twiss remained predisposed to regulating the hunt, as had been his position since early 1977. However, through the evolution of the controversy, Twiss' position had become more pragmatic, and he recognized that the ability of the United States to control its own destiny by convincing the IWC to allow some limited hunt, would be preferable to either an objection or an end to the hunt altogether. Furthermore, Twiss recognized the need to include the Eskimos in the development of an effective research program and indicated that consultation with the Eskimos was underway.<sup>212</sup>

By late September, NOAA had received tentative confirmation that the special meeting of the Scientific Committee would allow the opportunity for the bowhead

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<sup>210</sup> Dr. William Aron, interview by Author, Seattle, Washington, 5 October 1992.

<sup>211</sup> Letter from John R. Twiss, Jr., Executive Director, Marine Mammal Commission, Washington, D.C., to Robert W. Schoning, Director, NMFS, NOAA, DOC, Washington, D.C., 14 September 1977.

<sup>212</sup> Ibid.



issue to be raised by the United States. With this knowledge, the pursuit of the "third" option was embraced by all levels at NOAA and other agencies as well. Of course, this would not prevent NOAA from having to decide whether to object since the deadline for a decision was October 24, and the Scientific Committee meeting was scheduled for late November.

On 26 September 1977 Prudence Fox, the initiator of the third option to have the hunt reinstated by the IWC at the special meeting in December 1977, sent a memo to Richard Roe, NOAA's Acting Director for Marine Mammals and Endangered Species, stating her concern that any research proposal submitted by NOAA must completely satisfy all previous IWC requests for bowhead research: "If we were to go to the special meeting with a report that we were again unable to undertake the requested scientific work, the result could be a quick reestablishment of a zero quota."<sup>213</sup> Fox was acutely aware of the scrutiny any new proposal would receive and wanted to ensure that, from a scientific perspective, NOAA's proposal could not be challenged. To address this concern, NOAA was developing the most ambitious research proposal for any one species of marine mammal ever attempted.<sup>214</sup>

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<sup>213</sup> Memorandum from Prudence I. Fox, Foreign Affairs Officer, NMFS, NOAA, DOC, Washington, D.C., to Richard B. Roe, Acting Director, Marine Mammal and Endangered Species Division, NMFS, NOAA, DOC, Washington, D.C., 26 September 1977.

<sup>214</sup> Michael F. Tillman, "Introduction: A Scientific Perspective of the Bowhead Whale Problem," *Marine Fisheries Review*, September-October 1980, 5.

Despite the uniform effort to develop the argument for the upcoming meeting of the Scientific Committee, there remained disparate opinions within NOAA on which decision to make in October. Frank, feeling little comfort with the credibility of legal arguments for either decision, began polling select NOAA staff on their positions on the larger issues. In response to this request, NOAA General Counsel, William Brewer, wrote Frank a memo detailing his personal views on the bowhead issue: "In my judgement...it is doubtful that the whale hunt can ever again be confined to the traditional practices on a voluntary basis."<sup>215</sup> Brewer, recommending acceptance of the IWC decision, went on to suggest that an objection might result in bowhead extinction and a permanent end to the Eskimo culture.<sup>216</sup>

Frank's effort to understand the issue from different perspectives indicated its overall complexity. The legal argument could go either way. Science supported both grave and optimistic population estimates, and the impact on Eskimo culture was subject to speculation. Only on the international front was the issue precise -- there was complete consensus that United States' credibility regarding the conservation of whales would be damaged significantly by a decision to object. Ultimately, the clarity of this position would prove dominant.

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<sup>215</sup> Memorandum from William C. Brewer, Jr., General Counsel, NOAA, DOC, Washington, D.C., to Richard A. Frank, Administrator, NOAA, DOC, Washington, D.C., 26 September 1977.

<sup>216</sup> Ibid.

### *The Decision*

On 7 October 1977 Terry Leitzel, special assistant to Dick Frank, sent a bowhead whale "options paper" to the Departments of State, Interior, and Justice, CEQ, the Marine Mammal Commission, and White House staffer Kathy Fletcher.<sup>217</sup> The memo requested that each agency's position on the options be returned, in writing, to NOAA by October 11. The memo provided two options: 1) object to the IWC decision immediately, thus removing the need for the United States to comply with the directive; or 2) do not object and accept the IWC ban on subsistence hunting for bowheads.<sup>218</sup> Under the second option, the memo stated that NOAA would pursue restoration of the hunt during the special meeting in November. By design, the paper contained no recommendation.

While awaiting official comment from the various agencies, Frank expressed interest in continuing a dialogue with the Eskimos. On 11 October 1977 a meeting was held in Washington, D.C., with a few members of the AEWIC, the unofficial representative of Eskimo whalers, and NOAA Fisheries. The meeting was designed to present the Eskimos with NOAA's ideas on the research needs that would be faced

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<sup>217</sup> Memorandum from Terry L. Leitzel, Special Assistant to the Administrator, NOAA, DOC, Washington, D.C., to Morris Busby (U.S. Department of State), Juanita Alvarez (U.S. Department of the Interior), Peggy Strand (U.S. Department of Justice), Gerry Bertrand (U.S. Council on Environmental Quality), and Robert Eisenbud (Marine Mammal Commission), 7 October 1977.

<sup>218</sup> *Ibid.*

by the agency and the Eskimos irrespective of the final decision.<sup>219</sup> The meeting was brief and cordial and resulted in no formal commitment by the AEWG to work with NOAA. Not unexpectedly, the Eskimos continued to feel as if they were "being told" what to do, even from a research standpoint. Nonetheless, Fisheries would report to Frank that, as a result of the meeting, "lines of communication for future cooperation were held open."<sup>220</sup>

On 12 October 1977 the bowhead issue was elevated to the top of the Executive branch, landing on the desk of President Jimmy Carter when a hand-delivered letter from Senator Alan Cranston (D-CA) arrived at the White House: "I want to express my strong view that the survival of the bowhead whale, the posture of the United States as champion of the IWC, and the future of the IWC itself may well depend upon your decision, as President of the United States, *not* to file an objection," (emphasis in original).<sup>221</sup> Although Kathy Fletcher had been aware of the issue for some time, it was Cranston's letter that pushed it to the forefront of the President's agenda. However, the letter was not the only view the President would hear on 12 October 1977.

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<sup>219</sup> International Negotiations Division files, "Native Involvement Strategy," NMFS, NOAA, DOC, Washington, D.C.

<sup>220</sup> Ibid.

<sup>221</sup> Letter from Alan Cranston, U.S. Senator from the State of California, Washington, D.C., to Jimmy Carter, President of the United States, Washington, D.C., 12 October 1977.

At the time the President was reading the letter from Cranston, Senator Ted Stevens (R-AK) was on the Senate Floor, supporting the Eskimos' right to hunt bowhead whales. Stevens specifically mentioned the formation of the AEWC, and he entered into the Congressional Record an AEWC statement recommending an objection to the IWC ruling.<sup>222</sup> Nonetheless, the impact of both Cranston's and Stevens' activities did not provide the President with an appreciation of issue sufficient for him to take action to engage himself directly in the controversy. Rather, the President asked only that the White House be kept informed of the latter stages of the decision-making process. In other words, the decision remained NOAA's and the State Department's to make.

On 10 October 1977 the Department of Interior decided to make its official decision on the bowhead issue. On that date, Acting Secretary, James A. Joseph, sent a letter to Secretary of State Vance stating, "The Department of the Interior recommends that the United States object to the June 1977 ruling of the International Whaling Commission...Since our trust responsibility to this Native American population cannot be ignored or subjugated to other concerns, an objection is the only option..."<sup>223</sup> The

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<sup>222</sup> U.S. Congress, Senate, Senator Ted Stevens speaking on behalf of bowhead whaling in Alaska, 12 October 1977, *Congressional Record*, 17080.

<sup>223</sup> Letter from James A. Joseph, Acting Secretary of the U.S. Department of the Interior, Washington, D.C., to Cyrus R. Vance, Secretary, U.S. Department of State, Washington, D.C., 10 October 1977.

Interior Department made the letter immediately available to all interested parties, including the press, much to the chagrin of NOAA, which immediately reminded Interior that the final decision, being a matter of foreign policy, would be made by the State Department on the advice of the Secretary of Commerce. The Justice Department was equally dismayed by Interior's actions and correctly interpreted the statement as fodder for legal challenge.

During the course of the following week, NOAA worked frantically to develop communication plans to ensure all stakeholders would be immediately informed of the decision as soon as it was made. Assignments were given to various offices in the agency to inform the necessary domestic and international constituents.<sup>224</sup> All these plans included action items for either decision to object or accept and indicated no predisposition towards one decision.

On 17 October 1977 NOAA Administrator Frank decided to pursue one of the pre-established options. Because the decision was officially the State Department's, the formal press release would be distributed there, although the language was developed primarily at NOAA. Since 24 October 1977 (the deadline for the United States'

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<sup>224</sup> Office of the Administrator files, "Eskimo Strategy," NOAA, DOC, Washington, D.C., 13 October 1977.

decision) fell on a federal holiday, Columbus Day, NOAA and the State Department decided to announce the decision late in the week before.

On 20 October 1977 the Department of State issued Press Release #477 entitled "Statement on Bowhead Whales."<sup>225</sup> The statement read, "In order both to protect the Eskimo subsistence hunting and to maintain and improve international cooperation to protect whales, the U.S. has decided *not* to present an objection at this time to a recent International Whaling Commission action regarding bowhead whales" [emphasis added].<sup>226</sup> The statement also committed the United States to conduct the following activities: 1) seek the cooperation of the Eskimo community to expand scientific research on bowheads; 2) seek the cooperation of the Eskimo community to limit the number of total whales killed and minimize struck but lost whales; 3) undertake informal consultations with IWC member nations to seek their support for a subsistence hunt of bowheads for the Eskimos; 4) ask the IWC Scientific Committee to consider the new American scientific research and conservation program for bowheads; 5) actively seek IWC approval of an Eskimo hunt at the likely special

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<sup>225</sup> U.S. Department of State, "Statement on Bowhead Whales," official press release, no. 447, 20 October 1977.

<sup>226</sup> Ibid.

meeting of the full Commission in December; and 6) take appropriate action following any decision made at the December meeting.<sup>227</sup>

The decision, then, was to end the Eskimo hunt of the endangered bowhead whale. Although NOAA would immediately pursue the third option to reimpose the hunt through the special meetings of the IWC in November and December, the impact of the decision not to object was clear -- given all available knowledge on 20 October 1977 NOAA, on behalf of the United States, had agreed that the hunt of the bowhead by the Eskimos could end.

Stakeholders were effectively notified of the decision by the press offices of NOAA and the State Department. At the time of the announcement, there were few constituents who were surprised at the decision. Most participants in the process were aware that the "international credibility" issue had never been questioned, and it is difficult to rationalize or offer substantive argument against a such a position as it is generally outside the official bailiwick of most federal agencies and the non-government sector.

Despite the variety of views in and outside of government, the announcement did not result in significant outcry. However, for employees of one federal agency, the actual

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<sup>227</sup> Ibid.



decision was irrelevant -- only the fact that it had been made was significant. For them, the battle had just begun, and all they could do at the Justice Department was wait for someone to file suit against the United States' action. They would not have to wait long.

## V. THE CASE: BURGER TO THE RESCUE

In July 1977, Eskimo whaler Arnold Brower and several other whaling captains walked into the legal offices of attorney S. Lynn Sutcliffe at the Washington D.C. law firm of Van Ness, Curtis, Feldman and Sutcliffe to secure legal representation on behalf of the Eskimos. Sutcliffe's firm had been formed only a few months before, and Sutcliffe, who had left his position as General Counsel for the United States Senate Commerce Committee to start the firm, had never argued a case in court.<sup>228</sup> The Eskimos became aware of the firm during work conducted by partner William Van Ness on the Alaska Native Claims Settlement dispute.<sup>229</sup> Van Ness had been the General Counsel for the United States Senate Interior Committee prior to the establishment of the firm. Sutcliffe became familiar with the Eskimos in early 1977 while working on a case involving Indian housing rights. Given Sutcliffe's prior position and his knowledge of the MMPA, he got the job to represent the Eskimos on the bowhead issue.

Sutcliffe's first recommendation was for the Eskimos to create a structure that provided representation for all whaling Eskimos. Although the formation of such a group was not intended to precipitate litigation, Sutcliffe knew that any action on behalf of the Eskimos would be in the form of a class-action suit, and he needed a

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<sup>228</sup> S. Lynn Sutcliffe, interview by author, Rockville, Maryland, 12 March 1993.

<sup>229</sup> Ibid.

structure to define them. Furthermore, Sutcliffe was concerned that the Eskimos, by virtue of the inherent differences associated with a variety of tribes and their locations, might not present a consistent viewpoint to the United States government. Working with the Eskimos, Sutcliffe helped create the Alaska Eskimo Whaling Commission (AEWC). Following securing Sutcliffe as their legal counsel, the Eskimos returned to Alaska to solicit participants in the group. As noted earlier, the AEWC membership included over 70 whaling captains who represented Eskimos from every part of the state where whaling occurred.

When NOAA telephoned Sutcliffe to inform him of the decision, he began preparing the paperwork necessary to file suit. Because there was little time to report to the IWC before the October 24 deadline, Sutcliffe had only Friday, 21 October 1977 to convince a federal court that NOAA's decision was incorrect and to seek legal remedy to compel NOAA to offer an objection to the IWC. Although Sutcliffe anticipated NOAA's ultimate decision to accept the IWC ruling, he had taken only limited steps to prepare for legal action to challenge it at the time he was notified. He had decided only a few days earlier that he could even attempt a court challenge.

Personally, Sutcliffe did not give the construction of his legal argument and, for that matter, the Eskimos, much hope of affecting change to the United States' position.<sup>230</sup>

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<sup>230</sup> Ibid.

For Sutcliffe, the pursuit of all possible legal avenues to obtain relief for the Eskimos would satisfy both his professional obligations and his personal belief in the Eskimo position. During the time he spent developing the case, Sutcliffe visited Alaska and had become convinced that the Eskimo culture would face irreparable harm if the hunt were banned. Going into court to argue the Eskimos' case would, even with a loss, put the Eskimo position on record and provide Sutcliffe an opportunity to satisfy what he believed was his personal responsibility to help the Eskimos in any way he could. However, and much to his surprise, Sutcliffe would achieve far more than he had anticipated.

Immediately following the announcement, Sutcliffe compiled his paperwork for submission to the United States District Court for the District of Columbia seeking injunctive relief for the Eskimos. At 5:20 p.m. the same day, Sutcliffe telephoned Robert N. Ford, Chief of the Civil Division in the United States Attorney's Office, to inform him that he was submitting an application for a temporary restraining order from the District Court and that he would provide the United States Attorney with a copy of his application shortly.<sup>231</sup> This being done, the only thing left to do was for Sutcliffe to prepare to argue the case in court the next day -- something he had never done before.

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<sup>231</sup> United States District Court for the District of Columbia, "Certificate Under Rule 1-12," Civil Action no. 77-1834, Washington, D.C., 21 October 1977.

On 21 October 1977 Sutcliffe submitted a motion to the United States District Court for the District of Columbia for a Temporary Restraining Order (TRO) enjoining Secretary of State, Cyrus Vance, from withholding a decision to object to the IWC's deletion of the exemption granted the Eskimos and "requiring him [Vance] to file such an objection by midnight Greenwich mean time (GMT), October 24, 1977."<sup>232</sup> The motion also required that Vance maintain such an objection until the District Court gave further orders.

Sutcliffe's case was based on the failure of Secretary of State Vance to meet three statutory and common law obligations that must be fulfilled before determining whether to object to the IWC decision. Under these obligations, the United States must: 1) determine the full impact on the Eskimos of the decision to object; 2) ensure the implementation of the government's trusteeship obligations to the Eskimos; and 3) comply with the statutory requirements of the MMPA and the ESA.<sup>233</sup>

On the morning of 21 October 1977 Sutcliffe stood before Judge John J. Sirica of the United States District Court for the District of Columbia to argue the Eskimos' case. Sutcliffe had estimated that he would be granted no more than 20-30 minutes to define

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<sup>232</sup> United States District Court for the District of Columbia, "Plaintiffs' Points and Authorities in Support of Motions for Temporary Restraining Order and Preliminary Injunction," Civil Action no. 77-1834, 10.

<sup>233</sup> *Ibid.*, 4.

the basis of his argument. However, after standing to initiate his presentation, he would not sit again for over two hours.<sup>234</sup>

In order to secure the TRO, Sutcliffe's argument had to pass the legal tests established in the case of *Virginia Petroleum Jobbers Association v. F.P.C.*, 259 F.2d 921, 925 (D.C.1958). To pass these tests, Sutcliffe's argument had to provide evidence that: 1) there was a substantial likelihood that the Eskimos would "prevail on the merits" during a complete hearing process; 2) the Eskimos would "suffer irreparable harm" if the TRO were not granted; 3) the defendants (the United States government) "would not suffer substantial harm" if the TRO were issued; and 4) the "public interest would be served" by issuance of the TRO.<sup>235</sup>

Sutcliffe argued the likelihood that the Eskimos would prevail on the merits because NOAA's EIS, upon which Vance's decision was based, violated the National Environmental Policy Act (NEPA) by failing to consider reasonable alternatives to accepting to the IWC decision.<sup>236</sup> Specifically, Sutcliffe argued that, under the IWC Charter, the United States had the option to withdraw an objection. Therefore, Vance

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<sup>234</sup> S. Lynn Sutcliffe, interview by author, Rockville, Maryland, 12 March 1993.

<sup>235</sup> United States District Court for the District of Columbia, "Plaintiffs' Points and Authorities in Support of Motions for Temporary Restraining Order and Preliminary Injunction," Civil Action no. 77-1834, 5.

<sup>236</sup> Ibid.

could have issued a "limited objection" that would have given NOAA additional time to work out a compromise with the IWC. Sutcliffe further argued that NOAA could have sought an objection by another IWC member which would have provided an additional 90 days for the United States itself to decide what to do. He also claimed that the United States could have requested an extension in the IWC's decision-making process to provide an opportunity for reconsideration of the issue at the upcoming special meetings.<sup>237</sup>

Sutcliffe's presentation on the question of merits raised the issue of the validity of the scientific data on bowheads. In doing so, Sutcliffe quoted from NOAA's EIS that commented on the lack of reliable data regarding the population of bowhead whales: "As far as we know, no data are available which would yield information on the trend of the bowhead population."<sup>238</sup>

Finally on the issue of merits, Sutcliffe raised the United States' trust responsibility, specifically referencing the letter of 10 October 1977 from Acting Secretary of Interior, Joseph, to Vance that recommended an objection based on the trust issue. Sutcliffe also cited "numerous government declarations" where the "courts, Congress, and the executive branch have affirmed repeatedly the United States' fiduciary

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<sup>237</sup> Ibid., 7.

<sup>238</sup> Ibid., 8.

obligations to Alaskan natives."<sup>239</sup> These included previous cases, the exemption granted the Eskimos under both the MMPA and ESA and, of course, the Department of Interior's recommendation.

In attempting to satisfy the test of irreparable harm to the Eskimos, Sutcliffe cited directly from the EIS: "'There are no readily available alternative food supplies and obviously no substitute for the whaling activities in Eskimo culture.' The EIS documents the severity and irreversibility such an event will have on plaintiff and the other Eskimos."<sup>240</sup> Of course, even within the framework of the alternative food sources available to the Eskimos identified in the EIS, it included substantial information critical to all alternatives -- NOAA had effectively built this argument for the Eskimos.

Sutcliffe would have more difficulty in satisfying the third test, proving that the United States government would not suffer substantial harm due to the issuance of the TRO. In response to the many arguments that United States' standing in the IWC and the world as a leader in responsible conservation and management would decline substantially, Sutcliffe could state only that since the United States had committed to seeking the opportunity to reinstate the Eskimo hunt at the upcoming IWC special

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<sup>239</sup> Ibid., 9.

<sup>240</sup> Ibid., 13.



meetings anyway, the issuance of the TRO would have "no different result."<sup>241</sup> As noted earlier, it is often difficult to argue against large, nebulous, geo-political issues that are based, primarily, on speculation. The success of these arguments, then, rested with the government's ability, as defendants, to persuade the Court that the United States would suffer "substantial harm" by not objecting.

The government's case was presented by Justice Department Attorney, Margaret Strand. The government's primary argument in response to Sutcliffe's application for the TRO was that the District Court lacked jurisdiction over the case because the issue of whether to object to the IWC decision falls under the "foreign affairs prerogative" of the Executive Branch and, therefore, is not subject to judicial review.<sup>242</sup>

Furthermore, Strand argued that the issuance of the TRO would, in reality, be a Writ of Mandamus, which cannot compel the performance of a discretionary act by the executive.<sup>243</sup> The government's case, then, was prefaced by jurisdictional and logistical arguments either of which could result in the quick dismissal of Sutcliffe's application. Of course, Strand would also counter Sutcliffe's arguments on the four "tests."

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<sup>241</sup> Ibid., 16.

<sup>242</sup> United States District Court for the District of Columbia, Margaret Strand, Attorney, U.S. Department of Justice, "Memorandum in Opposition to Motion for Temporary Restraining Order," Washington, D.C., Civil Action no. 1834, 4.

<sup>243</sup> Ibid., 5.

In response to the argument that the Eskimos would suffer irreparable harm as a result of a cessation of the bowhead harvest, Strand stated, "...the United States acknowledges the sincere interest asserted by these plaintiffs...however, there is no imminent threat of injury to [the Eskimos'] interests."<sup>244</sup> Strand's justification of no threat of injury was the government's commitment to "convince the Commission to change its decision [on bowheads]."<sup>245</sup> Furthermore, Strand stated that if the IWC rejected United States' arguments to reinstate the hunt, *then* "the U.S. government, or this Court, can act to protect the interests asserted by the plaintiffs," [emphasis added].<sup>246</sup> In other words, Strand was asking for the opportunity for NOAA to attempt to convince the IWC of something it had already tried and failed to do in June 1977.

Strand's argument that substantial injury would occur if the United States were forced to object to the IWC decision was far more detailed and lengthy. In referencing the opinions of numerous sources regarding the potential negative impact on United States' credibility, Strand summed-up the argument by stating that, following the

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<sup>244</sup> Ibid., 7.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

issuance of the TRO requested by plaintiffs, "it might well be impossible to undo the damage to our foreign policy created by objecting to the Commission's regulation."<sup>247</sup>

In addressing the public interest test, Strand stated only that, based on the United States signing of the IWC Charter and the passage of both the MMPA and the ESA, "the public interest lies on the side of protection of the whales through commitment to the International Whaling Commission."<sup>248</sup> However, following the above statement, which implies that the Eskimos are not part of the public alluded to, Strand reiterated the government's commitment "to making a strong effort at the December 1977 meeting of the Whaling Commission to assure that there can be a well managed whale hunt in the spring of 1978."<sup>249</sup>

Finally, in addressing the test of success on the merits, Strand argued that because of the aforementioned jurisdictional issue, "the case should be dismissed."<sup>250</sup> However, Strand went on to say that, even if the court were to consider the merits by claiming jurisdiction, the plaintiffs would have little likelihood of prevailing. Strand's rationale for this opinion was that, since the issue is one of foreign affairs and there is a

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<sup>247</sup> Ibid., 9.

<sup>248</sup> Ibid., 8.

<sup>249</sup> Ibid., 11.

<sup>250</sup> Ibid.

"substantial body of law" that supports the position that the government's views are of "controlling interest" even when an action affects the rights of private citizens, the Eskimos could not, ultimately, prevail.<sup>251</sup>

Following the completion of the oral presentation, Judge Sirica retired to his chambers to review the case material in more detail. Although Sirica had offered little comment during the presentations of both Sutcliffe and Strand, the questions he did ask of the presenters indicated that he was of the mind that the United States District Court did have jurisdiction over the case. This, of course, gave Sutcliffe hope and worried Strand.

At 4:20 p.m. 21 October 1977 Judge Sirica signed a Temporary Restraining Order requiring Secretary of State Cyrus Vance "to present an objection by midnight GMT, October 24, 1977 to the International Whaling Commission..."<sup>252</sup> Sutcliffe was pleasantly shocked and immediately telephoned AEWC representatives in Washington, D.C., and Alaska to inform them of the good news while Strand, the rest of the Justice Department, NOAA, and State Department team who had contributed to the

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<sup>251</sup> Ibid.

<sup>252</sup> John J. Sirica, United States District Judge, United States District Court for the District of Columbia, Washington, D.C., "Temporary Restraining Order," Civil Action no. 77-1834, 21 October 1977, 1.

development of the government's case, walked directly to the Clerk of the District Court to file an appeal.

Sirica's judgement in favor of the Eskimo's position was based on two assumptions: 1) the United States would suffer no substantial harm by objecting to the IWC's decision to end the hunt; and 2) the Eskimos would lose their opportunity to "meaningfully present their claims" to the IWC since acceptance of the IWC decision by the United States may terminate further deliberation on the matter and initiate immediately the ban on hunting bowheads.<sup>253</sup> Sirica agreed with Sutcliffe's argument that the United States could issue an objection to the IWC as a temporary position and retain its discretion to withdraw the objection after the December 1977 special meeting if efforts to have the hunt reinstated were unsuccessful. Based on this argument, Sirica decided that the Eskimos should have the opportunity to present their case to the IWC rather than being placed in the position of having to get back what they had already lost.

It was now late Friday afternoon, October 21, and Aron had the unfortunate task of attempting to contact the IWC main office in London, England to alert them of the possibility of an objection by the United States. He succeeded in leaving the necessary messages that would soon find their way to other IWC Commissioners.

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<sup>253</sup> Ibid.

Though disappointed and anxious, the government "team" immediately began development of a more detailed argument before the United States Court of Appeals for the District of Columbia Circuit that would take place on Monday, 24 October 1977: Columbus Day.

In order to supplement its case, the government team prepared and submitted to the appellate court four affidavits to show substantial harm to the United States if an objection were to be made to the IWC decision. The affidavits were offered by Aron, Patsy Mink, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs, former NOAA Administrator, Robert White, and California congressional Representative, Paul McCloskey. The team's weekend activities were frantic and Aron, deeply concerned that an objection was inevitable, regretfully began planning his explanation to the IWC on just how American government operates sometimes.

On Monday, 24 October 1977 oral arguments were presented to the Court of Appeals. Shortly following the arguments and a brief review in chambers by Judges Leventhal, Robinson, and Wilkey, the Court of Appeals reversed the District Court's ruling stating in its Order, "The District Court assumed that there would be no injury to the United States if an objection were filed...However the possibility of injury to the United States even from a provisional objection is set forth in the affidavits filed in

this Court."<sup>254</sup> The Court offered no formal opinions in its ruling and would not do so until January 17, 1978.<sup>255</sup> With the order vacating the District Court's TRO, Aron, Strand and the rest of the government team breathed a heavy sigh of relief. However, it was not yet midnight, GMT, and Sutcliffe had one more opportunity to get the Eskimos their objection.

In anticipating the possibility of a reversal by the Court of Appeals, Sutcliffe had pursued the possibility of appealing to the Supreme Court. In doing so, he had learned that, due to the Columbus Day holiday, the only Justice available to review a petition for certiorari to the Supreme Court was Thurgood Marshall. Sutcliffe was heartened by the possibility of arguing before Marshall, believing that of all the Justices, Marshall was most likely to be sympathetic to the Eskimos' minority position.<sup>256</sup> Following the issuance of the appellate court's order, Sutcliffe filed the petition to the Supreme Court and oral arguments before Marshall was set for mid-afternoon.

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<sup>254</sup> Judges Leventhal, Robinson and Wilkey, Circuit Judges, United States Court of Appeals for the District of Columbia, Washington, D.C., "Order," Civil Action no. 77-1834, 25 October 1977.

<sup>255</sup> Milo Mason, "The Bowhead Whale Controversy: Background and Aftermath of Adams Vance," *The Harvard Environmental Law Review*, vol. 2, Developments of 1977, 1978, 363.

<sup>256</sup> S. Lynn Sutcliffe, interview by author, Rockville, Maryland, 12 March 1993.

Surprisingly, and much to Sutcliffe's chagrin, twenty minutes before the arguments were to be heard, Chief Justice Burger arrived at the Court, announced that there would be no oral argument and retired to his chambers to review the petition and written material. Shortly thereafter, Burger, through his clerk, denied Sutcliffe's petition, although it was never officially docketed or acted upon.<sup>257</sup> Allegedly, after learning that oral arguments were scheduled before Justice Marshall, the Justice Department was able to locate Chief Justice Burger, who was out of town at the time, and fly him to Washington to deny the petition.<sup>258</sup>

The legal battle ended, Aron called the IWC office in London and informed them that the United States had, in fact, accepted the IWC's decision to delete the exception granted to the Eskimos to hunt bowhead whales. Sutcliffe knew the success in the District Court was extremely significant for the Eskimos and that their position and legal strength would not be underestimated by the government again. On the personal side, Sutcliffe's first case had been memorable. NOAA immediately began developing its plan to fulfill its most recent promise to persuade the IWC to reinstate the Eskimo bowhead hunt.

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<sup>257</sup> Milo Mason, "The Bowhead Whale Controversy: Background and Aftermath of Adams Vance," *The Harvard Environmental Law Review*, vol. 2, Developments of 1977, 1978, 364.

<sup>258</sup> *Ibid.*



## VI. THE SPECIAL MEETING OF THE IWC

Following the case, Frank immediately requested the preparation of an options paper outlining what actions NOAA should take based on its success or failure to reinstate the bowhead hunt for the 1978 season. On 26 October 1977 NOAA General Counsel Brewer sent Frank a draft plan detailing the options available to NOAA under varying scenarios.<sup>259</sup> These options included the possibility of the United States either withdrawing from the IWC or ignoring the IWC ruling in the event of an affirmation of its decision to end the Eskimo hunt. Although highly unlikely, the possibility of these radical measures was raised to underscore the legal implications of any decision inconsistent with either the MMPA, ESA or the Whaling Convention Act.

Brewer realized that any action taken by NOAA that was inconsistent with the IWC Act would subject NOAA to a legal challenge it was likely to lose. Conversely, any action to regulate the hunt under the MMPA that did not have the support of the Eskimos would likely lead to a legal challenge NOAA was also likely to lose. Assuming that NOAA would not leave or ignore an IWC ruling, the preferred option was to work closely with the Eskimos, through the AEWG, to develop a plan for submission to the IWC in December. Unfortunately, because NOAA was still considering its decision on whether to list the bowheads as depleted under the

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<sup>259</sup> Memorandum from William C. Brewer, Jr., General Counsel, NOAA, DOC, Washington, D.C., to Richard A. Frank, Administrator, NOAA, DOC, Washington, D.C., 26 October 1977.

MMPA, communication with the Eskimos could be considered "forbidden ex parte communications" and used against them in the event of further suit.<sup>260</sup>

Nonetheless, cooperation with the Eskimos was paramount in pursuing almost any action. For Brewer, the legal questions would continue, and he could offer little solace to Frank regarding the complexities facing the agency: "In sum, we are following a rather rocky channel with a number of bricks close aboard on either side, some of them uncharted. With luck we can stay off them."<sup>261</sup>

Following review of Brewer's memo, Frank ordered Fisheries' Alaska Region to develop draft bowhead regulations to be issued under the authority of the MMPA. The draft regulations were designed provide the basis for conversation with the Eskimos as well for the IWC in December. Harry Rietze, Director of the Alaska Region, transmitted draft regulations to Dick Schoning on 31 October 1977.<sup>262</sup> The regulations included a firm regime regarding the number of bowheads the Eskimos could kill annually: "The total number of bowhead whales authorized to be taken in

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<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> Memorandum from Harry L. Rietze, Director, Alaska Region, NMFS, NOAA, DOC, Juneau, Alaska, to Robert W. Schoning, Director, NMFS, NOAA, DOC, Washington, D.C., 31 October 1977.

any calendar year shall not exceed 30 struck or 15 landed whichever occurs first."<sup>263</sup>

The regulations included provisions that required Eskimo whaling captains to secure permits prior to hunting. In a memo to Schoning, Rietze indicated that he would begin discussing the draft regulations with the Eskimos in early November, although Rietze knew the Eskimos would not endorse them.<sup>264</sup> At that time, Frank was busy planning meetings with other important stakeholders -- various Commissioners to the IWC.

By this point, Frank was comfortable increasing his role within the IWC itself. He announced that he was "personally assuming the responsibility" for presenting the United States' position at the upcoming IWC meeting.<sup>265</sup> However, he had not assumed the status of IWC Commissioner, which remained Aron's role. Nonetheless, Frank knew that he would be leading the charge at the December meeting, stating publicly that he had "a very personal commitment to seeing that the Eskimos get a reasonable subsistence hunt."<sup>266</sup> Meanwhile, Aron had arranged for himself and Frank to visit IWC Commissioners from the United Kingdom, France, the Netherlands, Denmark, and Norway during the week of 14 November 1977.

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<sup>263</sup> Ibid.

<sup>264</sup> Ibid.

<sup>265</sup> *Marine Mammal News*, Washington, D.C., vol. 3, no. 10, October 1977, 1.

<sup>266</sup> Ibid.

While the draft regulations were being discussed both in and out of the agency, Fisheries Director Schoning became concerned that Frank had forgotten that the regulations could not be issued unless "the Secretary [of Commerce] declares such species [bowheads] as depleted."<sup>267</sup> Of course, Brewer had been "sitting" on that option in fear of further suit by the Eskimos. However, Schoning was fearful that if the bowheads were not listed as depleted soon, there would be insufficient time to have regulations issued and implemented before the spring 1978 hunt. On 7 November 1977 Schoning sent a stern memo to Frank, reminding him that the depleted listing was necessary immediately.<sup>268</sup> Following receipt of the memo, Frank ordered Brewer to proceed with the listing, and a Notice in the Federal Register was published on November 25 announcing that the bowhead whale was a depleted species as defined by the MMPA.<sup>269</sup>

On November 15 NOAA had completed "The United States Conservation Program for the Bowhead Whale" to be submitted by Mike Tillman and Doug Chapman at the

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<sup>267</sup> Memorandum from Robert W. Schoning, Director, NMFS, NOAA, DOC, Washington, D.C., to Richard A. Frank, Administrator, NOAA, DOC, Washington, D.C., 7 November 1977.

<sup>268</sup> Ibid.

<sup>269</sup> *Federal Register*, "Regulations Governing the Taking and Importing of Marine Mammals," vol. 42, no. 227, 25 November 1977, 60149.

November 21 special meeting of the Scientific Committee in Cronulla, Australia.<sup>270</sup>

The program was immediately sent to the Department of Interior and the AEWG for review, although NOAA knew there was little time to consider changes. The Program included the draft regulations calling for 30 struck or 15 landed bowhead whales for the 1978 season. The plan also included commitments to fund a \$670,000 bowhead research effort in 1978.<sup>271</sup>

Response to the plan was generally unfavorable. During Fisheries' visit with the Eskimos on November 4, at which the Conservation Program was presented in draft, the Eskimos generally ignored the plan and offered little discussion.<sup>272</sup> Their response, of course, was likely influenced by Sutcliffe's prior commitment to the Eskimos that he would file suit against NOAA if it attempted to regulate. Despite losing the recent court challenge, the Eskimos felt their standing and influence over NOAA had been increased considerably during the recent legal battle. Conversely, NOAA personnel had seen the tenuousness of their position over that same period. The relationship had been altered forever, and all meetings to follow between NOAA and the Eskimos became debates between equals.

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<sup>270</sup> NMFS, "The United States' Conservation Program for the Bowhead Whale (*Balanea Mysticetus*) in the Bering, Chukchi, and Beaufort Seas, NOAA, DOC, Washington, D.C., 15 November 1977.

<sup>271</sup> *Ibid.*

<sup>272</sup> S. Lynn Sutcliffe, interview by author, Rockville, Maryland, 12 March 1993.

The BIA at the Department of Interior was not pleased with the plan either. Despite mentioning the BIA's new position and "general agreement" to the United States' decision not to object, it was still acting as a strong supporter of Eskimos interests. In a statement of 20 November 1977, Assistant Secretary of Interior for Indian Affairs, Forrest Gerard, formally objected to NOAA's failure to include the Eskimos in the development of the plan as well as the number of whales that would be struck or landed.<sup>273</sup> More personally, in mentioning the "special relationship the Interior Department maintains with Alaskan Eskimos," the statement added that the BIA should "be a full partner in the development and implementation of any regulatory regime adopted by the U.S. Government."<sup>274</sup> For these reasons, the Department of Interior officially recommended that the publication of regulations implementing the plan be delayed by NOAA "until such time as requisite details of the plan and Interior's role therein can be negotiated."<sup>275</sup> Aron, along with most everyone else at NOAA involved in the issue, read the Interior Department's statement with dismay.

The environmental community was not heartened by the plan either. However, the escalation of the issue that occurred during the legal battle had muted the adamancy of

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<sup>273</sup> Office of the Secretary, U.S. Department of the Interior, "Comments of the Department of the Interior on the Proposed Regulations Under the Marine Mammal Protection Act Regarding Bowhead Whales," Washington, D.C., 20 November 1977.

<sup>274</sup> *Ibid.*, 2.

<sup>275</sup> *Ibid.*

many groups toward advocating complete protection for the bowheads. In a detailed letter from the environmental group, Defenders of Wildlife, to Dick Frank dated 29 November 1977 the *manner* of the hunt was raised, and the group recommended that NOAA do more to "bring an end to the waste...and cruelty... which has characterized the bowhead hunt."<sup>276</sup> Of course, NOAA was already exploring opportunities to increase the efficiency of the Eskimo take and reduce the number of whales struck-but-lost.

On 21 November 1977 the special meeting of the Scientific Committee was convened in Cronulla, Australia to review data regarding the population size of sperm whales and the possibility of revising the quota for sperm whales for the 1978 season. As a result of the persistence of Aron and other NOAA officials, the Scientific Committee was prepared to review some "new" data regarding the status of the bowhead whale and the United States' research proposal for the bowhead.<sup>277</sup> Tillman and Chapman had gone to Australia with the specific task of convincing the Scientific Committee that there was just cause for the Committee to recommend to the full Commission that the ban on hunting bowheads be reevaluated. Achieving this goal was critical, for if the Committee did not include a provision in its report to the Commission that the

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<sup>276</sup> Letter from Tom Garrett, Legislative Coordinator, Defenders of Wildlife, Washington, D.C., to Richard Frank, Administrator, NOAA, DOC, Washington, D.C., 29 November 1977.

<sup>277</sup> NOAA, DOC, "Conservation Program for the Bowhead Whale," 15 November 1977.

June decision on bowheads should be reconsidered, the full Commission could not take-up the matter in December.

Following the presentation of the bowhead research plan, Tillman and Chapman were not surprised to find other members of the Scientific Committee unimpressed.<sup>278</sup> Of course, there was little in the way of new data that indicated the bowhead population was healthier than had been estimated in June. As scientists, Tillman and Chapman were hard-pressed to offer a convincing argument that the bowhead decision, from a biological standpoint, should be changed. Nonetheless, their orders had been explicit, and Tillman devised a plan that would get the bowhead issue in the Scientific Committee's report and on the table for the December Commission meeting. There was only one problem, Chapman hated it.

No two people were more aware of the significance of how the Scientific Committee of the IWC had evolved from an unimportant, ignored body, to the dominating force it had become in 1977 than were Tillman and Chapman. For decades, United States officials had struggled to elevate the status of the Scientific Committee and purge political influence from its recommendations. By 1977, it appeared as though these efforts had resulted in a Scientific Committee of a biologist's dream. As noted

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<sup>278</sup> Dr. Michael F. Tillman, interview by author, Silver Spring, Maryland, 19 March 1993.



earlier, 1977 marked the first year every recommendation made by the Committee was adopted by the Commission without modification. It was, therefore, quite disheartening to Chapman when Tillman suggested that the Committee recommend that the full Commission may want to review the bowhead issue on the basis of non-biological factors.

Tillman held draft language in his hand that, if incorporated into the Committee's report, guaranteed the issue would be reviewed by the full Commission on 6 December 1977.<sup>279</sup> Chapman refused to support the language, and Tillman found himself in the uncomfortable position of having to argue with him. This was especially difficult for Tillman as Chapman had been one of Tillman's graduate school professors and for whom Tillman had a great deal of respect. Ultimately, Chapman relented, and Tillman was able to add the language to the report. On 22 November 1977 the special meeting of the IWC Scientific Committee issued a report stating that the sperm whale quota established in June 1977 could be increased significantly. Regarding the bowhead issue, the report stated: "The Committee reiterates its statement of June 1977 that the taking of any bowhead whales could adversely affect the stock and contribute to preventing its eventual recovery, if in fact such a recovery

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<sup>279</sup> Ibid.

is still possible."<sup>280</sup> However, the Committee also stated that the full Commission "may wish to discuss other considerations...which are beyond the expertise of the Scientific Committee."<sup>281</sup> Their mission completed, Tillman and Chapman left Australia in silence, while in Washington, Frank, Aron and others were ecstatic -- NOAA now had a chance to reinstate the hunt without sacrificing its international environmental standing.

The two weeks prior to the IWC full Commission meeting in Tokyo were hectic as Frank and Aron prepared the United States' presentation. During this time, the AEWC was invited by NOAA to attend the IWC meeting.<sup>282</sup> Although the Eskimos remained adamant in their opposition to the quotas in NOAA's Conservation Plan, Sutcliffe knew the Eskimos had to attend if the IWC was to change its position. Eskimos dressed in local garb and speaking their tongue would certainly add drama to the United States' argument. Based on numerous conversations with other IWC Commissioners and the fact that, to the great satisfaction of both Japan and the Soviet Union, the sperm whale quota was now likely to be increased, Frank and Aron were

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<sup>280</sup> International Whaling Commission, "Chairman's Report of the Special Meeting, Tokyo, December 1977," Ministry of Foreign Affairs, Tokyo, Japan, 7 December 1977, 3.

<sup>281</sup> Ibid.

<sup>282</sup> Dr. William Aron, interview by Author, Seattle, Washington, 5 October 1992.

becoming cautiously optimistic that they might prevail in securing a small hunt for the Eskimos.<sup>283</sup>

When it came time to leave for the special Commission meeting, Frank called Aron into his office and informed him that he was assuming the position of United States Commissioner, making Aron his chief advisor.<sup>284</sup> The experience and knowledge gained over the many struggles involved in this issue had provided Frank with a sufficient understanding of the IWC and NOAA's role in it for him to feel comfortable assuming the title that was officially assigned to him. For Aron, repeatedly chastised for his abstention in June and now presented with the opportunity for some vindication by a reestablishment of the hunt by the Commission, Frank's decision, though not unexpected, was disappointing.

On December 5, the eve of the Commission meeting, Prudence Fox chaired a meeting with United States participants, including the Eskimos, in Tokyo. The meeting was held in an attempt to build consensus for the presentation of the United States' position. At that time, NOAA asked Eskimo Arnold Brower to present the Eskimos' views on the bowhead issue, including NOAA's proposed research plan. Brower declined, fearing that any testimony he offered would appear to support the American

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<sup>283</sup> Ibid.

<sup>284</sup> Ibid.

position seeking a quota levels of 15 landed and 30 struck whales for the 1978 season.<sup>285</sup> Fox, however, knew the Eskimos needed to speak, realizing the limited value in their silent presence.<sup>286</sup>

On December 6, the United States offered its Conservation and Research Plan to the full Commission. During a coffee break in the middle of the afternoon, Fox again approached Brower with the idea of speaking. Brower, who had become somewhat frustrated by the day's discussion of the bowhead issue by the Commissioners, relented. Brower spoke extemporaneously but clearly presented the Eskimos' position.<sup>287</sup> He stated that the official Eskimo estimate of the bowhead population was 6,000 whales.<sup>288</sup> Frank, and the rest of the United States delegation were pleased by Brower's statements as well as the tentative commitments they had received from various Commissioners to support a limited hunt.

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<sup>285</sup> Memorandum from Prudence I. Fox, Foreign Affairs Officer, International Negotiations Division, NMFS, NOAA, DOC, Washington, D.C., to The Record, 21 December 1977.

<sup>286</sup> Prudence I. Fox, interview by author, Silver Spring, Maryland, 19 March 1993.

<sup>287</sup> Memorandum from Prudence I. Fox, Foreign Affairs Officer, International Negotiations Division, NMFS, NOAA, DOC, Washington, D.C., to The Record, 21 December 1977.

<sup>288</sup> Ibid.

When the time to vote came, Frank offered the official government statement: "The United States is requesting Commission action to allow a modest aboriginal subsistence taking of bowhead whales. We ask this in light of two significant factors. First, we are convinced that the subsistence and cultural needs of the Alaskan Eskimos compel the allowance of a continued, albeit very modest, hunt. Second, the U.S. has established a major scientific research program that should provide answers to important population dynamics and other questions about bowhead whales..."<sup>289</sup>

United Kingdom Commissioner, Dr. Roe, expressed concern at the American proposal: "Those of us who would like to support the United States' proposal are in the unfortunate position that it would appear to be rejecting [Scientific Committee] advice."<sup>290</sup> In response, Frank said "we are simply asking for relief for one year, after which time there would certainly want to be reconsideration by the Commission of the issue."<sup>291</sup> Frank also referenced Tillman's language in the Scientific Committee's report regarding "other considerations" stating, "Indeed we have done

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<sup>289</sup> Richard Frank, Administrator, NOAA, DOC, Washington, D.C., "Statement on Bowhead Whales by Richard Frank, United States Commissioner, International Whaling Commission, Special Meeting, Tokyo, December 6-7, 1977," 3 December 1977, 1.

<sup>290</sup> International Whaling Commission, official transcript, "Chairman's Report of the Special Meeting, Tokyo, December, 1977," Ministry of Foreign Affairs, Tokyo, Japan, 7 December 1977, 50.

<sup>291</sup> Ibid.

so, and I believe that those needs inevitably lead to the conclusion that the Alaskan Eskimos should be able to hunt a very modest number of whales."<sup>292</sup>

Following Frank's remarks, the Chairman called the vote on the amendment to the IWC Schedule which was a modified version of the United States' proposal allowing the Eskimos the opportunity to strike only 18 whales, regardless of how many were landed. The vote was read: 6 in favor, 6 against and three abstentions. The measure failed to achieve the necessary three-quarters majority, not including abstentions, needed to pass.<sup>293</sup>

At this point, Norway Commissioner Rindal suggested that the amendment be changed to allow 12 whales to be landed, which, he reasoned, should be more beneficial to the bowheads given previous United States' commitments to all but eliminate struck-but-lost whales. Frank agreed, but asked that the figure of 12 be replaced with 15.<sup>294</sup> The Chairman granted Frank's request and proceeded to call the vote on the amended measure. The vote was read: 5 in favor, 3 against, and seven abstentions -- the measure had failed again.<sup>295</sup>

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<sup>292</sup> Ibid.

<sup>293</sup> Ibid., 51.

<sup>294</sup> Ibid., 52.

<sup>295</sup> Ibid., 53.

After a long pause, the Chairman turned to the original proposal offered by Norway for 18 struck or 12 landed bowheads, whichever came first, and called for another vote. Frank knew that it was NOAA's last chance to secure an Eskimo hunt. The vote was read: 10 in favor, 3 against, and 2 abstentions.<sup>296</sup> The IWC Schedule had been amended, and the June 1977 decision had been overturned.

On December 7, the special meeting of the IWC concluded and issued a report that increased the sperm whale quota from 763 to 6,444 and permitted the Alaskan Eskimos to take 12 or strike a total of 18 bowheads, whichever came first.<sup>297</sup> At the reading of the report, Brower and the other Eskimos walked out angrily, complaining that 12 whales were insufficient to satisfy their subsistence needs.<sup>298</sup> However, the Eskimos' walkout had been preplanned. Fox knew the Eskimos were planning to stage such an event, and she was convinced that the fact that they waited until the last minute to do so was an indication of some level of cooperation between NOAA and the Eskimos.<sup>299</sup> Again, however, on more equal footing.

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<sup>296</sup> *Ibid.*, 54.

<sup>297</sup> *Marine Mammal News*, Washington, D.C., vol. 3, no. 12, December 1977, 1.

<sup>298</sup> *Ibid.*

<sup>299</sup> Memorandum from Prudence I. Fox, Foreign Affairs Officer, International Negotiations Division, NMFS, NOAA, DOC, Washington, D.C., to The Record, 21 December 1977.

Following the meeting, Frank stated "Given the depleted nature of this species, the IWC action was reasonable."<sup>300</sup> Alaska North Slope Mayor Hopson, also in Tokyo for the meeting, said that the Eskimos would continue to try to persuade IWC members of the importance of the subsistence hunt. However, Hopson also said that if the IWC failed to address the Eskimos' concern in the future, "the Eskimos are prepared to exercise full legal remedies."<sup>301</sup> Sutcliffe had prepared his clients well -- the Eskimos had arrived.

On the trip back from Tokyo, Frank savored the "victory." Although many hurdles remained regarding exactly how, legally, NOAA would proceed to regulate and enforce the IWC quota, it was now apparent that the destruction of both United States' international conservation policy and the relationship between the Eskimos and the government had been avoided narrowly. In Seattle, Tillman and Chapman began the difficult task of planning for the massive bowhead research effort to come in 1978. At his desk in Washington, Aron contemplated his role in the bowhead controversy during the course of the year, 1977. 'It will be hard to top that,' he thought.<sup>302</sup>

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<sup>300</sup> *Marine Mammal News*, Washington, D.C., vol. 3, no. 12, December 1977, 1.

<sup>301</sup> *Ibid.*

<sup>302</sup> Dr. William Aron, interview by Author, Seattle, Washington, 5 October 1992.



## VII. CONCLUSION: A QUICK ASSESSMENT

As noted at the beginning of this paper, the bowhead controversy is unremarkable in the sense that public administrators often find themselves in the role of decision-maker where they must exercise their best judgment with full knowledge of the desires of competing groups, due consideration of legal mandates, and their own personal convictions as to the proper role of government. However, the United States' response to the bowhead issue also raises questions regarding the ability of government officials to understand adequately the impact of their actions on the public they serve.

To be sure, the United States government is not always in a position of having to understand a community as distinct as the Eskimos. However, the ability of the United States to understand the needs of the various *cultures* now within America's boundaries is critical if problems, such as the bowhead controversy, are to be avoided. It can be argued that such events as the L.A. riots of 1992 and the repeated ethnic clashes in South Florida are examples of government's failure to understand adequately the cultural needs of these groups. These events, caused by a lack of understanding and ignored until they erupted, might have been averted if the cultures involved had been better understood. Unfortunately, it is easier to ignore such problems than to attempt to understand them -- learning about a culture is hard work.

Of course, one of the greatest knowledge gaps in the bowhead controversy was the lack of a good population estimate for the whales. A better relationship between the Eskimos and the government might not have filled this gap. However, a better relationship might have provided the opportunity for earlier, cooperative measures that could have diffused the controversy. After all, although the IWC had expressed concern regarding the Eskimo harvest as early as 1972, Mil Zahn would not visit the Eskimos for five more years.

Unfortunately, NOAA's pursuit of sufficient understanding of the Eskimos' cultural needs was secondary to its scientific agenda. Science, of course, is NOAA's mission, and the fact that it was unable to "build bridges" between themselves and the Eskimo community does not mean, necessarily, that NOAA acted improperly. Tillman, Aron, Chapman and countless others in and out of NOAA knew the bowhead situation required attention well before 1977, and these people had raised red flags requesting support and financial assistance to begin answering the IWC's questions regarding the biological status of the bowheads. However, until the controversy engulfed Washington, D.C., there was little response to their calls for assistance. Not being trained sociologists, there was nothing more the three scientists, Tillman, Chapman and Aron could do. This explains why the first attempts at outreach on the issue came from Zahn who worked in NOAA's Office of *Enforcement*. Right idea, wrong man, and too late.

The bowhead issue also raises concerns regarding the management of the competing needs of the environment and human beings. Immediately, one thinks of the spotted owl controversy. In such examples, the issue usually revolves around the affected *human* constituencies. Of course, the bowheads and spotted owls surely "know" it's getting harder to get a date anymore. Perhaps, however, they can take some comfort in knowing that their fate is inextricably linked to a simple government decision -- they will live or die based on it. The decision is clearer when only animals are involved because the government knows that if it makes a decision that favors one species over another, the other will die. More simply, the government cannot tell animals: "just deal with it, adapt to a new world." Animals aren't always very good at that, but man is the very best at it! Therefore, when it came to the Eskimos, "just deal with it" was a real option for the government. To some degree, this resulted in a significant bias against the Eskimos, less obvious in some respects, more direct in others. It was not until Sutcliffe got the TRO that the Eskimos had the opportunity to tell the government the same thing: "we need bowheads to survive -- deal with it!" For the Eskimos, like other groups, cultures, species, the issue was clear -- preservation of their culture outweighed all other considerations.

As noted in the introduction to this paper, the bowhead controversy might have been avoided. However, the actions that NOAA would have had to have taken to avoid it are substantial, and it is difficult to see them occurring under NOAA's current

operating structure and its own cultural orientation, science. This is not to say that it could not have been done through increased cooperation with the Eskimos and through a more appropriate conduit, such as the Interior Department's Bureau of Indian Affairs. However, for NOAA alone, it was too difficult.

Of course, the Department of Interior maintained its own cultural orientation during the bowhead controversy. The Bureau of Indian Affairs positioned itself as an advocate of Eskimo rights and, therefore, the preservation of Eskimo tradition through the continuation of the bowhead hunt. For employees of the BIA, positioning themselves as supporters of the Eskimos' desire to continue hunting bowheads was consistent with their perceptions of their proper role in the debate; to protect the needs and wishes of their "clients." To NOAA, the Eskimos were not clients at all but members of the general public who were utilizing the public resources of the United States (the bowheads), over which NOAA had stewardship responsibility, in a way that was becoming detrimental to those resources. To the Department of State, the Eskimos represented an anomaly to United States' international environmental agenda. The hunt of the endangered bowhead whales by the Eskimos made President Carter's specific instructions in his May 1977 environmental address to protect all whales worldwide appear hypocritical. To the State Department, the Eskimos were simply a foreign policy nightmare.

The State Department, unlike NOAA or the BIA, was fortunate in that its position in favor of accepting the IWC's decision was never in question throughout the controversy. There was no doubt among State Department officials that objecting to the IWC's decision to end the hunt was bad for United States' foreign policy in environmental protection. In fact, all agencies involved in the controversy understood the State Department's point of view. The clarity of the State Department's position only served to strengthen its influence over the myriad of views emanating from NOAA and the Department of Interior. Of course, to the State Department, the fact that the bowhead controversy involved human beings was irrelevant. If the controversy had centered on the issue of nuclear safety and an international body had decided that a specific United States nuclear facility must be shut down at the same time America was pushing for increased global nuclear safety, the State Department would have recommended the facility be closed. Of course, in the bowhead controversy, it was not the State Department's role to *recommend* a course of action - its role was as the decision-maker.

As mentioned earlier in the paper, Bill Aron could have objected or accepted the IWC's decision to end the hunt in June 1977 while serving as United States Commissioner. At that time, the decision rested with NOAA given the Administrator of NOAA normally serves as Commissioner. Serving as U.S. Commissioner in Canberra, Australia, in June 1977, Aron bore the burden of having to represent the

bowheads, the Eskimos and United States' foreign policy. In doing so, it was not surprising that Aron's decision was to not decide. Of course, once he abstained, decision-making authority was abdicated to the State Department where the parameters of the final decision quickly became more focused.

Had NOAA and the Department of Interior worked more collaboratively with each other and with the Eskimos prior to the June 1977 meeting, an agreed-upon course of action could have been chosen to deal with any IWC action that affected the hunt. Furthermore, under this scenario, the State Department's position would not have been preeminent, but only considered by the United States' Commissioner to the IWC, a NOAA employee. Unfortunately for Aron, in June 1977, he faced disparate views inside his agency, among other federal agencies and within his own mind. The issue had simply not been discussed sufficiently among stakeholders for any consensus to exist or for him to feel compelled to take one course of action. By delaying the decision, Aron initiated the dialogue which could have taken place well in advance of the June meeting. His delay, of course, would change irrevocably the distribution of decision-making authority in the controversy.

Aron, along with others at NOAA, could have initiated a dialogue with the Eskimos and the Department of Interior long before June 1977. However, to do so would have been extremely difficult, taking great time and effort. Of course, people,

including public servants, have a tendency to avoid dealing with difficult problems. Nonetheless, it can be argued that any agency must be accountable to the public impacted by its actions, regardless of whether taking the steps necessary to be accountable are difficult or even consistent with the mission of that agency. Under this edict, NOAA fulfilled its scientific mission during the bowhead controversy but failed in its role as public servant in not taking appropriate action to prevent it in the first place.

In summary, the government allowed the bowhead controversy to occur. A great deal of time and effort were expended prior to and after the IWC's decision to end the Eskimo hunt. However, relatively little effort was made to effectively engage the Eskimos in a dialogue which could have appeased the IWC's concerns prior to 1977. Such a dialogue could have prevented the controversy and would have certainly benefitted the bowheads. Unfortunately, when knowledgeable officials at NOAA, the Department of the Interior, the State Department and other government agencies devised United States' policy on this issue, they left the Eskimos "out in the cold."

APPENDIX A  
NAMES AND TITLES OF CASE STUDY PARTICIPANTS  
(in order of appearance)

Dr. Michael Tillman, Research Biologist for the National Oceanic and Atmospheric Administration's (NOAA) Marine Mammal Laboratory.

William (Bill) Aron, United States Commissioner to the International Whaling Commission.

Dr. Douglas Chapman, Research Biologist for NOAA's Marine Mammal Laboratory.

Harry Rietze, Director of NOAA's National Marine Fisheries Service Alaska Region.

Robert Ayers, Acting Director of NOAA's National Marine Fisheries Service.

Curtis Bohlen, Acting Assistant Secretary for Fish and Wildlife and Parks for the United States Department of the Interior.

Robert White, NOAA Administrator.

John Twiss, Executive Director of the Marine Mammal Commission.

Robert Schoning, Director of NOAA's National Marine Fisheries Service.

Mil Zahn, Special Agent for NOAA's National Marine Fisheries Service Office of Enforcement.

Pamela Paige Murphy, Staff Attorney for NOAA's Office of the General Counsel.

Peter Jensen, NOAA's National Marine Fisheries Service.

Richard (Dick) Frank, NOAA Administrator.

Jimmy Carter, President of the United States.

Arnold Brower, Eskimo whaling captain, Barrow, Alaska.

Dale Stotts, Eskimo.

Craig Van Note, representative of Monitor, Inc.



Rod Moore, staff of Congressman Don Young (R-AK).

Steve Perles, staff of Senator Ted Stevens (R-AK).

Igor Lebedev, Soviet Secondary Secretary, Soviet Embassy, Washington, D.C.

Tazio Watanabe, Japanese Counselor, Embassy of Japan, Washington, D.C.

Elliot Richardson, United States Ambassador to the United Nations.

Juanita Alvarez, United States Department of the Interior's Bureau of Indian Affairs.

Ted Stevens, Republican United States Senator from State of Alaska.

Thomas Andrews, Chief of NOAA's National Marine Fisheries Service Marine Mammal and Endangered Species Division.

S. Lynn Sutcliffe, Attorney, law firm of Van Ness, Curtis, Feldman and Sutcliffe.

Donald Martineau, Acting Associate NOAA Administrator for Marine Resources.

Prudence Fox, Foreign Affairs Officer, NOAA's National Marine Fisheries Service.

Cyrus Vance, Secretary of State.

Carmen Blondin, Assistant Director of NOAA for International Fisheries.

Dale Rice, independent whale researcher.

Edward Mitchell, Canadian research biologist.

Juanita Kreps, Secretary of Commerce.

Jay Hammond, Governor of Alaska.

Eben Hopson, Mayor of Alaska's North Slope Borough.

Scott McVay, Environmental Defense Fund.

Pamela Rich, Friends of the Earth.

Marion Edey, Council on Environmental Quality, Executive Office of the President.

Margarurete Smith, Indian Health Service, United States Department of Health, Education and Welfare.

William Brewer, NOAA General Counsel.

Terry Leitzel, special assistant to NOAA Administrator Richard Frank.

Kathy Fletcher, White House staff.

Alan Cranston, Democratic Senator from California.

James Joseph, Acting Secretary of the United States Department of the Interior.

William Van Ness, Attorney, law firm of Van Ness, Curtis, Feldman, and Sutcliffe.

Robert Ford, Civil Division Chief, office of the United States Attorney.

John J. Sirica, Federal Judge, United States District Court for the District of Columbia.

Margaret Strand, Staff Attorney, United States Department of Justice.

Patsy Mink, Assistant Secretary of State for Oceans and International Environmental and Scientific Affairs.

Paul McCloskey, Democratic Congressman from the State of California.

Judges Leventhal, Robinson, and Wilkey, United States Court of Appeals for the District of Columbia.

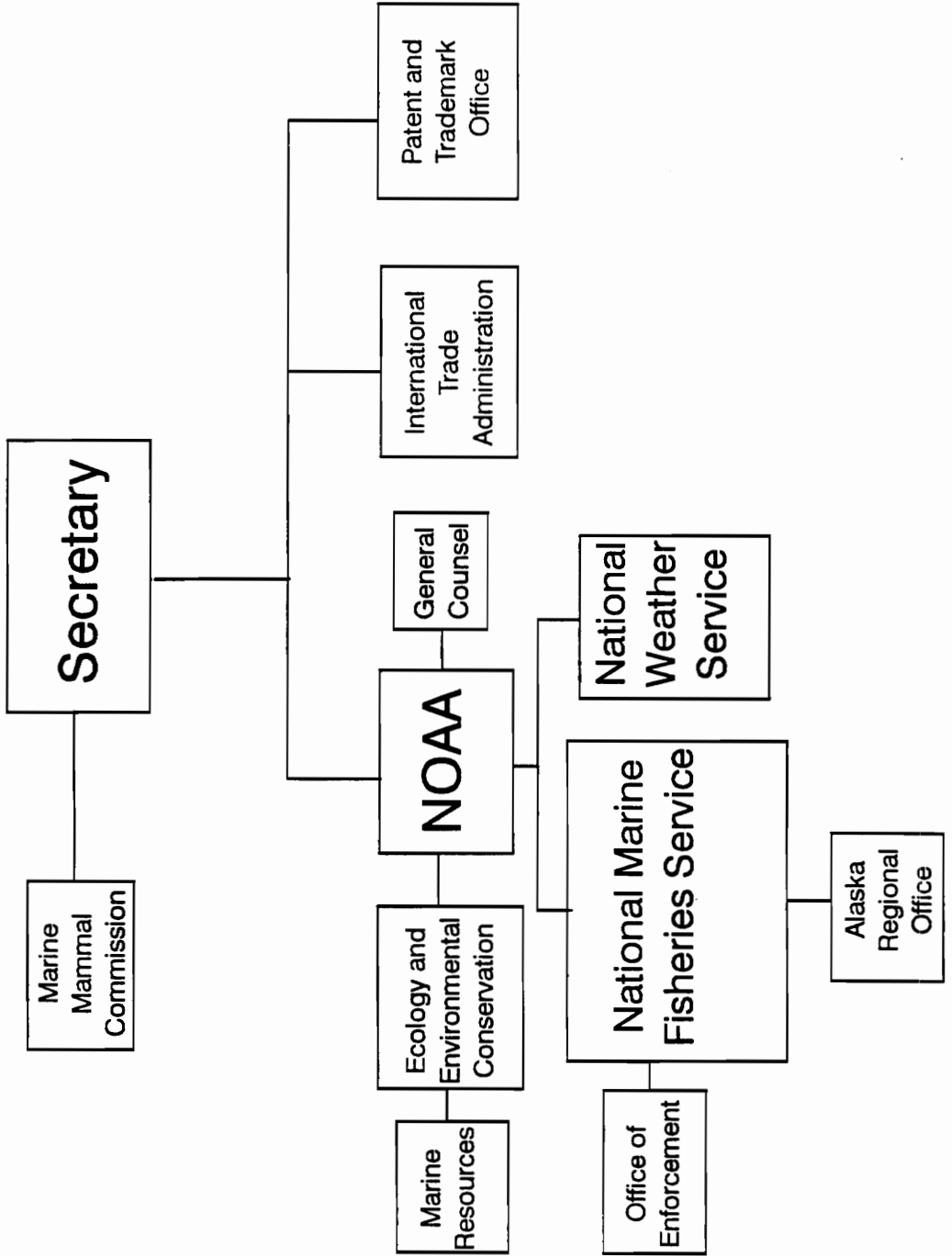
Thurgood Marshall, Justice, United States Supreme Court.

Warren Burger, Chief Justice of the United States Supreme Court.

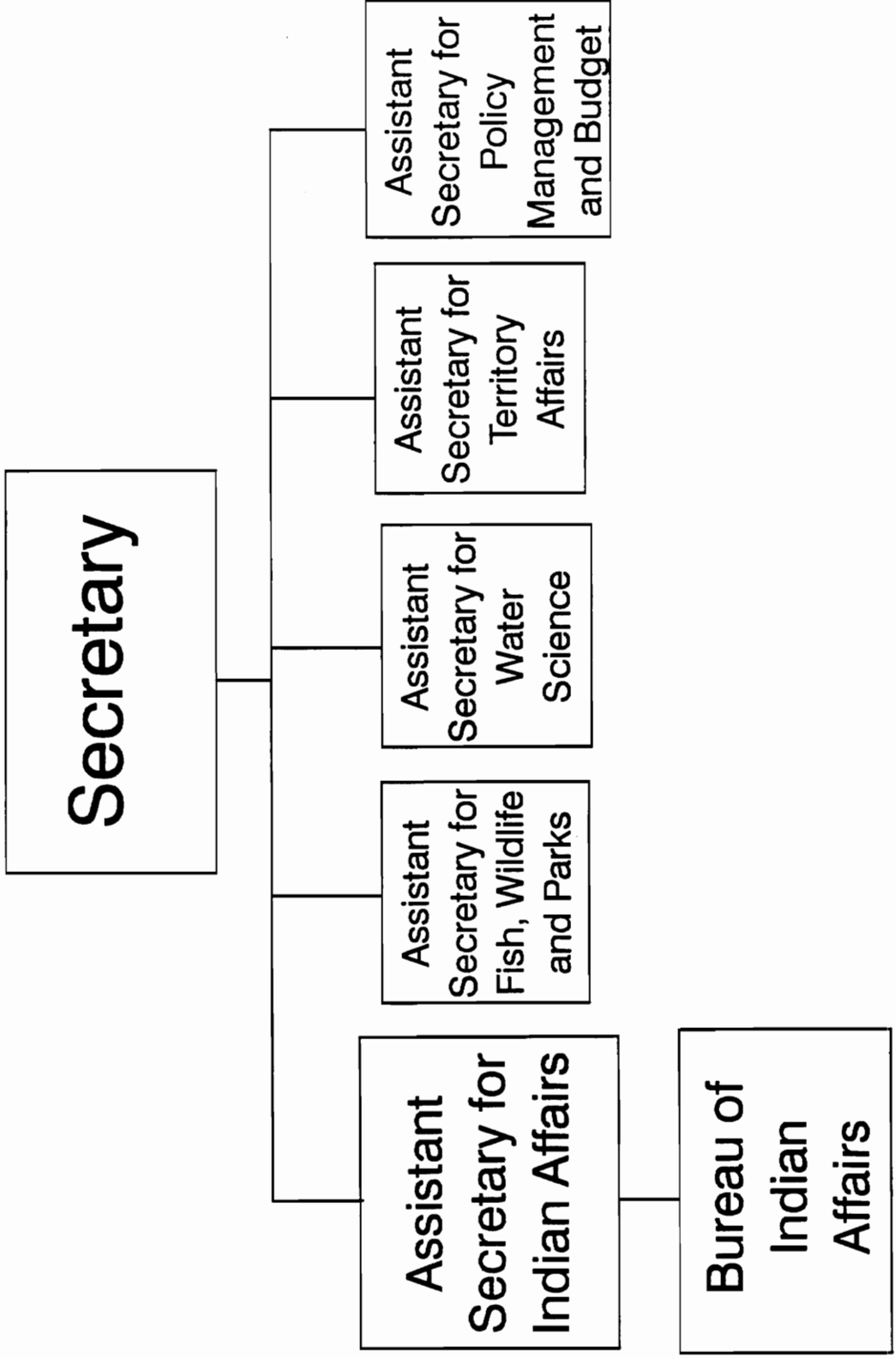
Dr. Roe, Commissioner to the International Whaling Commission for the United Kingdom.

Mr. Rindal, Commissioner to the International Whaling Commission for Norway.

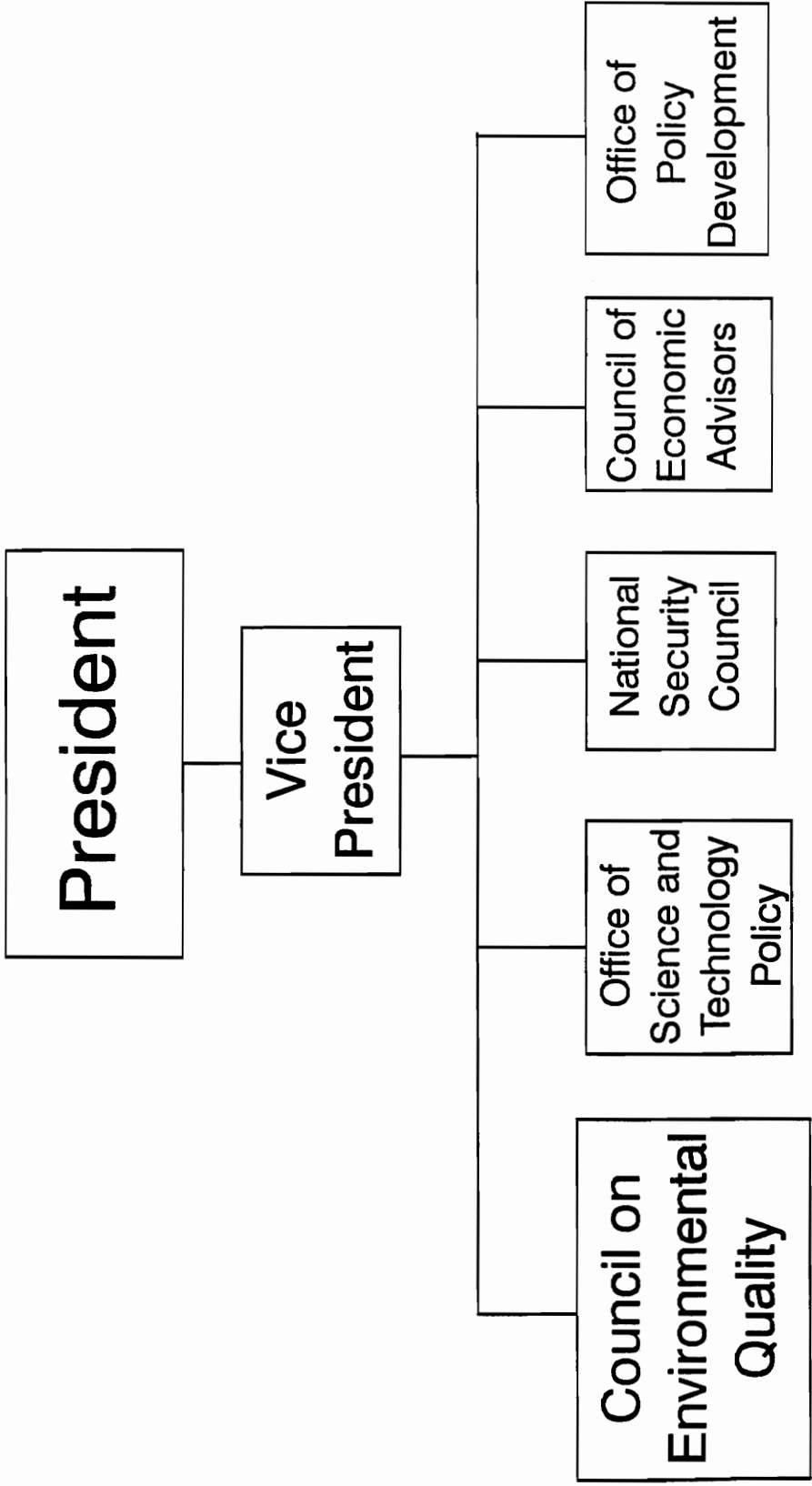
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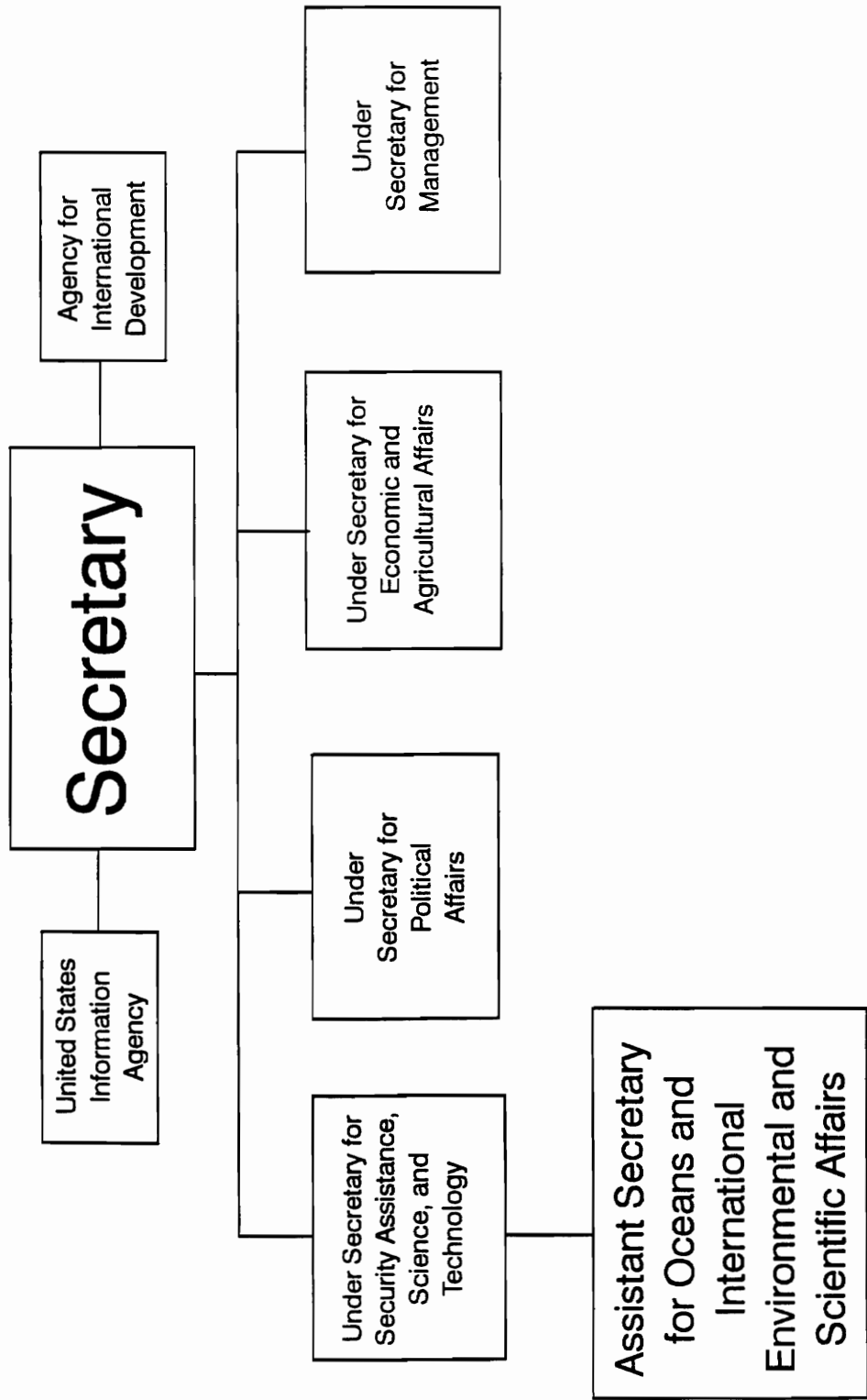
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# Executive Office of the President



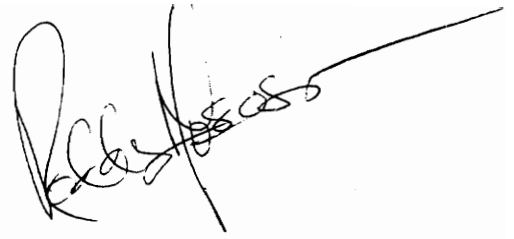
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**APPENDIX C  
LIST OF ABBREVIATIONS**

<b>AEWC</b>	<b>Alaska Eskimo Whaling Commission</b>
<b>BIA</b>	<b>Bureau of Indian Affairs, United States Department of the Interior</b>
<b>CEQ</b>	<b>Council on Environmental Quality, Executive Office of the President</b>
<b>EIS</b>	<b>Environmental Impact Statement</b>
<b>ESA</b>	<b>Endangered Species Act</b>
<b>FOE</b>	<b>Friends of the Earth</b>
<b>GMT</b>	<b>Greenwich Mean Time</b>
<b>IWC</b>	<b>International Whaling Commission</b>
<b>MMC</b>	<b>Marine Mammal Commission</b>
<b>MMPA</b>	<b>Marine Mammal Protection Act</b>
<b>MSY</b>	<b>Maximum Sustainable Yield</b>
<b>NEPA</b>	<b>National Environmental Policy Act</b>
<b>NMFS</b>	<b>National Marine Fisheries Service</b>
<b>NOAA</b>	<b>National Oceanic and Atmospheric Administration</b>
<b>NMP</b>	<b>New Management Procedure</b>
<b>OSP</b>	<b>Optimal Sustainable Population</b>
<b>TRO</b>	<b>Temporary Restraining Order</b>
<b>UN</b>	<b>United Nations</b>

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**George Mason University**, Fairfax, VA. Bachelor of Science in Economics, 1989.

### **Experience**

#### **Policy Analyst**

National Performance Review Task Force (NPR), Office of the Vice President, the White House (April 1993-present). Work as policy and research analyst to develop recommendations to be included in the Vice President's reinventing government initiative. Work directly with the Vice President and senior White House and Administration officials to develop changes to existing policy consistent with NPR goals. Supervise the operations of the NPR Speakers Bureau charged with assigning appropriate NPR staff to conduct presentations on the Vice President's reinventing government reform efforts to government and outside groups. Respond to congressional and media inquiries into NPR recommendations.

#### **Congressional Liaison Officer**

Office of Legislative and Intergovernmental Affairs, U.S. Department of Commerce (May 1992-January 1993). Worked directly with the Assistant Secretary of Commerce. Maintained direct contact with Members of Congress, their staff and congressional committees. Responded to congressional inquiries into Departmental activities. Researched the potential impact of proposed congressional legislation through direct and continuous contact with agency program administrators, legal counsel and political staff. Recommended policy alternatives to the Assistant Secretary and program administrators based on legal authority, political considerations and programmatic goals. Wrote and reviewed congressional testimony, correspondence and official Statements of Administration Policy.

#### **Public Affairs Officer**

National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce (April 1990-May 1992). Responded directly to national media inquiries into NOAA policies and programs. Promoted agency initiatives through interviews with broadcast and print media journalists. Wrote press releases and background articles for national distribution. Worked directly with program directors in researching and developing strategies to increase public support for agency activities.

**References and writing samples available upon request**