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From: Tara M. Sweeney

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COMMENTS:

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United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

NOV - 7 2019

The Honorable George J. Jordan
U.S. Administrative Law Judge
Department of Homeland Security
United States Coast Guard
915 Second Avenue, 4th Floor Auditorium
Seattle, Washington 98174

Dear Judge Jordan:

As the Assistant Secretary – Indian Affairs (AS-IA) within the United States Department of the Interior (Department), I write in support of the Makah Tribe's (Tribe) Marine Mammal Protection Act (MMPA) waiver request to engage in subsistence whaling. Ocean food resources, including the subsistence hunting of whales, are critical to the sustenance of the Tribe's culture, traditions, and society. Nowhere is this more evident than the fact that in the 1855 Treaty of Neah Bay (Treaty), the Tribe reserved the specific right to take fish, whale, and seal at the Tribe's usual and accustomed grounds. This explicit reference to whaling, a unique provision in Indian treaties, underscores the paramount importance that whaling continues to play for the Tribe.

The United States has signed 375 treaties and adopted statutes, regulations, and policies that define the government-to-government relationship with Tribes across all Federal agencies. In exchange for the surrender and reduction of Tribal lands and removal of Tribes from their original lands, the United States assumed a duty of responsibility and trust. Supporting treaty rights is one of the Federal Government's paramount responsibilities with regard to Indians.

The Supreme Court has repeatedly recognized and emphasized this "distinctive obligation of trust incumbent upon the Government in its dealings" with Indian tribes. *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)). As such, "[i]n carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party." *Seminole Nation*, 316 U.S. at 296-97. Rather, the United States "has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards." *Id.* Recognizing that "Indian tribes are the wards of the nation" and "owe no allegiance to the States, and receive from them no protection . . . due to the course of dealing of the Federal Government with them and the treaties in which it has been promised," the Supreme Court has noted that "there arises the [federal] duty of protection." *United States v. Kagama*, 118 U.S. 375, 383-84 (1886).

These principles – the existence of Tribal nations and sovereignty, the exclusion of State authority, and the Federal protection of Indian nations – form the basis of the special trust

relationship between the United States and Indian tribes. The Federal Government has charged itself with moral obligations of the highest responsibility and trust. *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2324-25 (2011). This duty of protection is not limited to the Bureau of Indian Affairs but the Federal trust extends to the component agencies, bureaus and offices of the Department and other Federal agencies. See, e.g., *Marceau v. Blackfeet Housing Auth.*, 519 F.3d 838, 844 (9th Cir. 2008) (Department of Housing and Urban Development); *Gros Ventre Tribe v. Bureau of Land Management*, 469 F.3d 801, 810 (9th Cir. 2006) (Bureau of Land Management); *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (Indian Health Service).

Treaties are “not a grant of rights to the Indians, but a retention of rights from them – a reservation of those [rights] not granted.” *United States v. Winans*, 198 U.S. 371, 381 (1905). This fundamental principle – that Indian tribes were not granted authorities or rights by the United States, but hold such powers inherently and prior to European contact – undergirds the entirety of the Federal Government’s relationship with Tribes. These treaties established unique sets of rights in exchange for the cession of millions of acres of homelands to the United States. The Tribe’s Treaty-based whaling right recognizes their longstanding authority to engage in subsistence whaling.

As the agency with oversight management of Indian Affairs, the Department takes its support of treaty-based subsistence rights seriously. Most recently, the Department joined the United States Department of Justice in defending the Crow Tribe’s right to engage in off-reservation subsistence hunting before the United States Supreme Court in *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019). The Supreme Court agreed with the United States and held that the Crow Tribe’s hunting rights, which were a key guarantee in exchange for which the Crow ceded vast swaths of its ancestral territory, remain viable to the present day. The Department further supported treaty signatories in Washington State in *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff’d*, 138 S. Ct. 1832 (2018), which prohibited the State of Washington from building culverts that interfered with runs of treaty-guaranteed salmon. The Department is also engaged in ongoing negotiations with the State of Michigan and several Michigan Tribes concerning Tribal treaty fishing rights in the Great Lakes.

Whaling is very much part of my own Iñupiat community and family. From my roots within Alaska’s North Slope, I have a deep and personal understanding of the importance of subsistence whaling to Native American culture, spirituality and identity. My community has based its social and cultural existence upon the bowhead whale for millennia, using all parts of the whale, including its oil. We teach our subsistence whaling and sharing practices to our children beginning at a very early age. Our whaling captains celebrate each successful harvest by feeding their entire communities. The gift of the whale is shared amongst the crew, including all who lend their support. From there, the whale is shared with family, extended family, villages and those in need. We continue sharing throughout the year at holidays and community celebrations.

More importantly, whaling and subsistence hunting is the fabric of our identity, community relations and social structure. It gives us individual responsibilities and family and social ties that form identity, define culture, and enable us to pass our traditions to future generations. Access to these vital practices and the ability to participate in the traditions that define us as a people reinforces social cohesion and gives our young people a future. Like us, the Makah seek

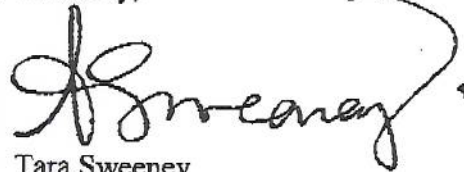
to maintain the practices that define them, that define and reinforce their social structure, and that give their children a future.

With the importance of these practices and the animals that sustain us, the Iñupiat, like the Makah, are devoted to sound conservation. Our traditional whaling practices ensure that our whale populations remain healthy and our harvests are sustainable. We both celebrate the whale as central to our existence and recognize our fundamental right to take whale to sustain our people and our culture.

The Department recognizes that Makah whaling activities represent the Tribe's commitment to its culture, its traditional way of life, and the well-being of its people. I strongly encourage the National Marine Fisheries Services to protect the Tribe's whaling rights and authorize the requested MMPA waiver.

Thank you for considering the Department's support for the Tribe.

Sincerely,

A handwritten signature in black ink, appearing to read "Tara Sweeney". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Tara Sweeney
Assistant Secretary – Indian Affairs