

Makah hunt (as well as aboriginal subsistence whaling in general and the other subsistence hunts) on its website, available at: <https://iwc.int/aboriginal>. The Tribe prepared a Description of the Makah Hunt, which was posted on the IWC's website at least 90 days before the start of the meeting pursuant to the procedures approved for the meeting (around the middle of June 2018). The Tribe's description includes a summary of the proposed alternating season hunt plan, which the National Marine Fisheries Service (NMFS) had requested the IWC's Scientific Committee review earlier in 2018. The Tribe's Description of the Hunt is available at <https://iwc.int/makah-tribe>. A true and correct copy is attached as Exhibit 2.

4. Because of court decisions that required additional environmental review and a waiver under the MMPA in order for the Tribe to exercise the "right of ... whaling" secured for the Tribe in the 1855 Treaty of Neah Bay, the Makah Tribe has not been able to undertake a hunt since 2000. In that time, many elders in our community have died without the opportunity to eat whale meat, blubber and oil or to engage in the ceremonies, songs, dances, and other cultural practices that are integral to whaling and the use of whale products. At the same time, an entire generation of young Makahs has been born and grown to adulthood without experiencing a whale hunt by our people. Whaling is central to our identity as Makahs, and the long process to obtain a waiver has denied us the ability to exercise our treaty whaling right and meet our subsistence and cultural needs.

5. We have learned in this waiver process that delays of days tend to turn into weeks, weeks become months, and months become years. When we submitted our request for a waiver over 14 years ago, no one could have imagined it would take so long simply to get to the point where NMFS has made a proposal to issue the waiver, much less the required hearing on that proposal and the accompanying proposed regulations and a final decision on the waiver and

regulations. The delay requested by AWI and Sea Shephard would add to the long cumulative delay that has already caused significant harm to the Tribe in this process.

6. The Tribe has been working very hard to prepare its testimony for this hearing, and we anticipate that we will be able to submit that testimony by the May 20 deadline established in NMFS's federal register notice of April 5.

7. We also know that the hearing is part of a larger administrative process, and if NMFS ultimately approves the waiver, the Tribe would need to obtain more authorizations before we go whaling. It is therefore all the more important that the hearing proceed as scheduled so that all interested parties present their evidence about the proposal and the process can move forward.

I declare, under penalty of perjury under the laws of the United States, that the foregoing is true and correct to the best of my knowledge, information and belief.


Patrick DePoe

Dated: 5/15/19

From: [DJ Schubert](#)
To: [Brian Gruber](#); patrick.depoe@makah.com
Subject: Intervention final
Date: Wednesday, September 12, 2018 12:26:35 PM
Attachments: [Draft Makah Intervention Final.pdf](#)

Hi Brian and Patrick,

Here's the final of the intervention that you requested a copy of. Sorry for the delay in sending it.

DJ

Agenda item 8.4.2

Aboriginal Subsistence Whaling Catch Limits Eastern North Pacific Gray Whales

Jeff Pantukhoff

The Whaleman Foundation

This intervention is made on behalf of the Whaleman Foundation, Animal Welfare Institute, legaSeas, and Whale and Dolphin Conservation. We thank the United States and the representative from the Makah Tribe for their presentations and the information presented to this Commission about the Makah's historic tradition of whaling. We don't dispute that tradition but we are concerned that the Commission continues to approve an Aboriginal Subsistence Whaling quota for the Makah tribe without scrutinizing whether the Makah qualifies for an ASW quota and whether the United States is even able to allocate a quota.

Given the 78 years from 1921 to 1999 and from 2000 to the present during which time the Makah tribe legally killed only a single whale, the Makah can't satisfy the standards to obtain an ASW quota which include a continuing traditional dependence on whaling and the use of whales and evidence of a cultural, nutritional, and subsistence need for whales. Furthermore, while we recognize that the Makah Tribe and the US government have developed a new management plan in an attempt to reduce the impact of a hunt on the critically endangered Western North Pacific gray whale and the Pacific Coast Feeding Aggregation gray whales, both of which number only 200 animals, any hunt that may cause the loss of a whale from either of these populations is not appropriate.

We recognize that in 1997 this Commission approved an Eastern North Pacific gray whale ASW quota which included the US request for the Makah. However, the record from that meeting suggests this was done primarily to satisfy the needs of the Chukotkan whalers of Russia and should not be interpreted as support for the US catch/strike limit request for the Makah.

Finally, Mr. Chairman we note that, since 2002, United States domestic legal requirements have prohibited the allocation of any ASW quota to the Makah Tribe. These are complex legal issues that may still require years to complete thereby calling into question why the United States has even brought this request to this Commission versus deferring its request until its domestic legal obligations have been met.

In light of these issues, we would respectfully request that the IWC resurrect its efforts to more closely scrutinize ASW needs statements or what are now referred to as descriptions of the hunt to ensure that when ASW catch/strike limit requests are approved they are for qualifying ASW hunts.

Thank you.



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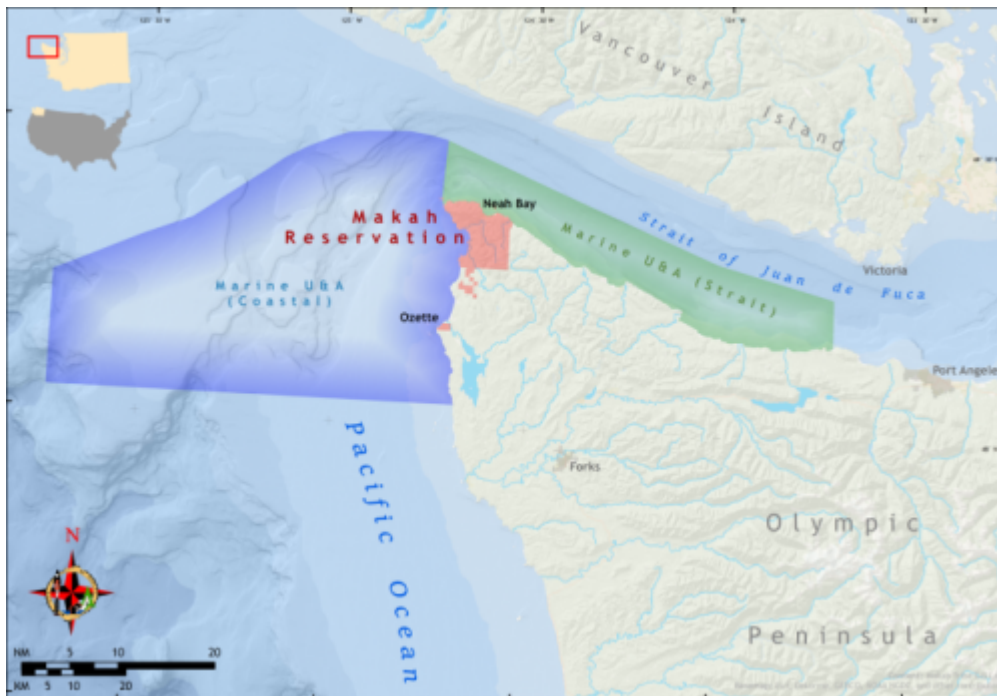
Towing the whale to shore, 1999

Description of the USA Aboriginal Subsistence Hunt: Makah Tribe

1. Introduction

The Makah Indian Tribe requests a status quo catch limit of an average of four gray whales per year, with a maximum of five gray whales in any one year. This level, which was approved by the IWC in 1997, 2002, 2007 and 2012, reflects the Tribe's cultural and subsistence need for up to five whales per year. It asks for one whale for each traditional Makah village and is based on a calculation of the per capita amount of meat, oil and blubber that five whales would provide for the community as measured by the number of Makahs living on the reservation today. It should be noted, however, the Tribe's hunt is subject to additional domestic legal requirements imposed by the United States.

The Makah Tribe occupies a reservation located on the remote, northwestern tip of Washington State where the Strait of Juan de Fuca meets the Pacific Ocean. Historically, Makahs lived in five permanent villages – Neah Bay (**di-ya**), Biheda (**bi?id?a**), Tsoo-yess (**c'u.yas**), Waatch (**wa?ač'**), and Ozette (**?use-?it**), – with several seasonal or temporary locations situated to access different food resources. Since time immemorial, the Makah people have depended on the reliable and abundant resources from the ocean for their subsistence, culture and economy. Hunting whales, seals and other sea mammals and catching halibut, salmon and other marine fish have always been integral and essential to Makah life. The centrality of ocean resources led the Makah Tribe to insist on retaining a perpetual right to harvest whales, seals and fish when it signed a treaty with the United States in 1855. During the negotiation of the Treaty of Neah Bay, a tribal leader declared, "I want the sea. That is my country." This statement is a testament to the Makahs' inherent connection to the ocean and reliance on its bounty for their survival. The treaty is unique in another way – of the hundreds of treaties the United States made with tribes, it is the only one that expressly secures the right to hunt whales.



The Makah Indian Reservation is approximately 47 square miles and is more than a four-hour drive from Seattle and nearly two hours from the nearest city of Port Angeles. Makah culture and traditions, in conjunction with the remoteness of the reservation, make the Tribe especially reliant on subsistence resources, with 99% of households relying on fishing and hunting for a portion of their diet. The Tribe has 2,692 enrolled members, with 1,160 members living in the reservation community of Neah Bay. Life on the reservation presents many challenges for Makahs, including high rates of poverty and unemployment due to limited economic opportunities and the seasonality of fisheries and tourism. Alcohol, drug abuse and crimes such as burglary and domestic violence are unfortunate realities on the reservation. Although the Tribe's traditional whaling, sealing and fishing areas in the ocean and strait are part of a highly productive ecosystem that has sustained the Makah people for thousands of years, changing ocean conditions, freshwater habitat degradation and variations in international and domestic management requirements have affected the stability, reliability of and access to the ocean resources on which the reservation community depends.

Makahs have hunted whales for subsistence purposes for at least 1,500 years. The historic, ethnographic and archaeological record conclusively demonstrates that whale products formed a central – and likely the dominant – component of Makahs' traditional diet for over two thousand years. Makah whale hunting was disrupted in the late 19th and early 20th centuries by the devastating effects of European diseases, forced assimilation, and the near extirpation of gray, humpback and other whales by non-Native commercial whalers. The Tribe resumed exercising its treaty right to hunt gray whales in the late 1990s after the Eastern North Pacific stock had recovered from commercial exploitation and landed its first whale in seventy years in 1999. Consistent with international and domestic law, the Tribe's hunt is for subsistence and cultural purposes only and prohibits the commercial sale of edible whale products.

Whaling remains essential to Makah culture, identity, ceremonies and subsistence and is, simply put, part of who the Makah are. Gray whales are a predominant component of the ocean resources that have always sustained the Tribe and cannot be replaced by other resources. In addition to providing for the Tribe's subsistence needs, whale hunting and the associated activities of processing, preparing and eating whale products had – and continue to have – important ceremonial and social functions in the Makah community. The central and pervasive importance of whaling to Makahs over time is illustrated and confirmed by songs and dances specific to whaling; basketry, carving and other artwork featuring whale images; deeply spiritual ceremonies; and the Tribe's historical and contemporary whaling practices on display at the Makah Cultural and Research Center. The cultural and social aspects of whaling benefit extended families and individual households and can provide the reliable community structure and cohesiveness necessary to overcome social ills present on the reservation. The Makah people continue to express strong support for the Tribe's pursuit of whaling in the 21st century, and the vast majority of Makahs want whale meat, oil, and blubber as well as bone and baleen in their households on a regular basis.

2. Information on the History, Culture, and Nutritional Significance of the Hunts

The Makah people are the southernmost of the Nuuchahnulth tribes, and are the only member of the Wakashan-speaking people within the United States. The traditional name for the Makah Tribe is *qwidiččaʔa-t̓x̓* which means "People who live by the Rocks and Sea Gulls." The name "Makah" was given by neighboring tribes and means "generous with food."

The relationship between the culture and subsistence of Makah people and whales is one of great antiquity. For at least 1,500 years, whale hunting and the associated activities of processing, preparing and eating whale products have had important ceremonial and social functions in the Makah community, in addition to their more obvious subsistence benefits. The Makah whale hunt established a social order for Makah society, governing wealth, status, marriage preferences and ceremonial displays. Makah whalers, or headmen, were at the top of the social order because they could offer prestige, protection and resources to kin and non-kin members of their longhouses. Their prominent role in Makah society was fortified by the rigorous physical and spiritual preparations necessary to successfully hunt and land a whale. The community-at-large also contributed to the success of the hunt by processing, preserving and preparing whale products for use by the community.

On January 31, 1855 the Makah Tribe entered into the [Treaty of Neah Bay](#) with the United States. In the treaty, which under the U.S. Constitution is the “supreme law of the land,” the Makah Tribe reserved its inherent sovereign rights to natural resources and cultural practices in exchange for ceding 469 square miles of Makah territory to the United States. The treaty reaffirms the Makahs’ longstanding cultural tradition of resource ownership and of stewardship of the ocean by reserving, in Article IV, “the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations.”

The Makah Tribe continued whaling and whales continued to provide a substantial portion of the Makahs’ subsistence after the treaty and into the early 20th century, when non-Native commercial whaling nearly extirpated gray whales. This led to a necessary, but highly adverse and disruptive, hiatus in Makah whale hunts from the 1920s to the 1990s. When the Eastern North Pacific (ENP) gray whale population had recovered sufficiently to be removed from the United States Endangered Species Act list, the Tribe immediately sought to resume whaling and worked with the United States government to obtain IWC approval of a gray whale catch limit. Through joint requests submitted by the United States (on behalf of the Tribe) and the Russian Federation (on behalf of the Chukotka Natives), the IWC has approved four aboriginal subsistence whaling catch limits covering the period 1998-2018 and reflecting the cultural and subsistence needs of both Makahs and Chukotkans to hunt gray whales.

Following the IWC approval of the Tribe’s first catch limit in 1997 (for the period 1998-2002), the Tribe conducted its first successful hunt in seventy years when a Makah whaling crew landed a gray whale in Neah Bay on May 17, 1999. The Makah community joined in celebration of this event and welcomed the use of whale products back into their homes, communal ceremonies and daily lives. More detail on the history of Makah whaling from pre-contact times through the 1999 hunt can be found in the 2018 Needs Statement (p16 (History), p36 (Pre-contact) and p48 (1998-2002 Quota Period)).

However, soon after the 1999 hunt and notwithstanding the express “right of ... whaling” in its Treaty, United States federal courts ruled that the Tribe must obtain a waiver from a moratorium on taking marine mammals in the United States Marine Mammal Protection Act (MMPA) and that, before issuing such a waiver, the United States Department of Commerce, acting through the National Oceanic and Atmospheric Administration (NOAA) must complete a comprehensive environmental review of the hunt. The processes for the possible issuance of the waiver and completion of the environmental review under United States domestic law are complex, impose exacting standards for the protection of marine mammals, and entail extensive scientific review and opportunities for public input. The Tribe has been working diligently with NOAA to comply with these requirements but, as a result, has been unable to hunt since 2000.

Makah elders and professional anthropologists trace the decline of the social and physical health of the Tribe to the elimination of the whale hunt and its associated ceremonial and social rigors. The revitalization of the hunt in the 1990s provided Makahs with an additional mechanism to connect traditional tribal values about health and spirituality to modern life. This was particularly important after generations of Makahs had been subjected to government policies – commonly implemented through boarding schools – designed to separate tribal members from their language, culture, community, and ceremonial and subsistence practices. The restored hunt helped to reestablish and strengthen the connection between Makahs and their traditional foods and way of life and assisted young and old in conquering the challenges of modern life.

Whaling remains an integral part of Makah life on the reservation even though it has been nearly twenty years since the last hunt. Whale images are everywhere on the reservation. They are the dominant art icon in Neah Bay and adorn T-shirts, jackets, jewelry, and signage. A good deal of the public art in the village, including images inside and outside of the public school and the Tribe’s buildings, contains whales. People adorn their homes with photos of their whaling ancestors and whaling canoes full of gear.

This connection between Makah people and the Tribe’s whaling traditions is an enduring one. Parents, grandparents, and other relatives sing Makah songs to infants, tell family histories and stories, and bring children to potlatches and other native gatherings. If children do not learn any Makah language from their family members, instruction in school begins in their preschool years and continues through high school. Lessons on Makah language in the public school include learning the terms for whales and whaling equipment. Children also learn about the Tribe’s whaling practices, personalities involved in historic whaling activities, and in middle school and high school, learn about the treaty right to hunt whales as well as the IWC process and the domestic legal process. Field trips to the Makah Cultural and Research Center are common, where the Tribe’s historical and contemporary whaling pursuits are on display for Makahs and the many other visitors to this facility. More information on the cultural and ceremonial aspects of Makah whaling is found in the 2018 Needs Statement (p15).

Makahs have drawn their subsistence from the ocean since time immemorial. Gray whales are a predominant component of the ocean resources that have always sustained the Tribe and cannot be replaced by other resources. This was true for thousands of years and, if anything, is even more true today. For example, halibut, salmon and other ocean fisheries vary in abundance and are now subject to national and international management restrictions, fluctuations in productivity, and the demands of other harvesters. The increasing variability in catch limits diminishes the reliability of these and other marine resources on which Makahs have always depended. Other environmental pressures, such as changing ocean conditions (ocean acidification, hypoxia, and temperature increases), harmful algal blooms, pollution, increasing vessel traffic (and the associated increase in noise and risk of a catastrophic oil spill), and other factors beyond the control of the Tribe exert additional pressure on the ability of the ocean to meet the Tribe's subsistence, economic and cultural needs. And, for many in a community suffering from high unemployment rates, alternative sources of subsistence remain limited. Gray whales are an abundant and reliable resource that have provided substantial nutritional benefits for millennia and that cannot now be replaced by other traditional marine resources.

Regular availability of whale products would provide significant nutritional benefits to Makahs. For at least 2,000 years, Makahs have relied on whales to provide the cornerstone of their diet, with whale meat, blubber and oil constituting a significant percentage of their food in pre-contact and historic times. Whale oil in particular was extensively utilized with dried fish, other traditional foods, and, after contact with Euro-Americans, for dressing and dip on potatoes, bread and processed foods. As James Swan observed from his time with the Makahs in the mid-1800s, "all their other food is usually greased with a plentiful supply of whale oil."

Whale products can help Makahs, many of whom have low incomes and struggle to provide food for their families, ensure that more of their fundamental nutritional needs are met with a traditional, local food source. A combination of whale meat, blubber and oil will assist Makah families (including their non-Makah household members) in meeting caloric and nutrient requirements with a healthier food source that costs them less than the western foods they would replace. This nutritional benefit also has profound implications for Makah identity and culture, as it allows Makahs to connect with their ancestors' food traditions and fulfill the guarantee secured in the Treaty of Neah Bay of continued utilization of whales.

Whale products also provide a natural means of combatting [many of the health problems linked to diet](#) that have plagued Makahs and other Native American populations since the American government introduced processed western foods such as refined sugar and flour, beef and lard to reservations in the historic period and interrupted their traditional pattern of food use heavy in fish and marine mammal oils. Research has indicated a genetic link between native people and their traditional diet, and this may be a contributing factor to many of the diet-related health issues facing Makahs in the 21st century. Reintroduction of whale products, particularly whale oil, presents an opportunity to improve health results because marine mammal oil is high in n-3 polyunsaturated fatty acids (PUFAs), which have been demonstrated to have beneficial effects on cardiovascular and metabolic health. More information on the nutritional benefits of Makah whaling is in the 2018 Needs Statement (p81).

When they are available, Makahs utilize whale products such as meat, blubber, and oil rendered from blubber for food and non-edible parts like bone for carving and other artwork. Modern Makahs have rediscovered their ancestral appetite for whale products, expressing a strong desire for more access to whale products in a 2018 survey of Makah Reservation households: 80.4% of surveyed households would like whale oil on a regular basis, 85.7% would like whale meat on a regular basis. 88.1% would like access to whale bone on a regular basis. Most Makahs also indicated they wanted more information on preparing meat, blubber and oil and working with whale bone. The 2018 household survey also demonstrated that Makahs overwhelmingly view whaling as having positive effects on culture and language, sense of community, pride in being Makah, and interactions with other tribal people. Therefore, it is unsurprising that overall nearly 96% of Makahs surveyed in 2018 support the Tribe's continuing efforts to hunt whales and secure the subsistence and cultural benefits that would accompany regular gray whale hunts. More information on the 2018 household survey (and previous surveys) is in the 2018 Needs Statement (p 74).

Despite not being able to hunt for almost two decades, the Makah Tribe has also remained committed to responsible management and scientific research on gray whales and other marine mammals in its traditional ocean territory. In 2003, the Tribe established a Marine Mammal Program (MMP) with a goal of ensuring that the Tribe had the scientific knowledge to conduct all whale hunts in a sustainable manner. The MMP conducts research on most of the cetaceans and pinnipeds within the Tribe's traditional hunting area, manages a stranding network for the area, is a responder for large whale entanglements as a member of the NOAA West Coast Region Large Whale Disentanglement Network and assists the Makah Fisheries Management Department with studies of non-marine mammal species. This work has resulted in several peer-reviewed publications and numerous unpublished papers presented to the IWC's Scientific Committee or NOAA. Marine mammal biologists of the MMP have actively engaged in intercessional, plenary and sub-committee meetings of the Scientific Committee since 2004. More detail on the research and other activities of the MMP can be found in the 2018 Needs Statement (p54).

3. Information on Recent Catches

In the mid-1990s, after the recovery of the Eastern North Pacific gray whale population, the Makah Tribe immediately sought to resume whaling and worked with the U.S. government to obtain IWC approval of a gray whale catch limit. Consistent with the International Convention for the Regulation of Whaling and the United States Whaling Convention Act, the Tribe's hunt is for subsistence and cultural purposes only and prohibits the commercial sale of edible whale products. Following the IWC's approval in 1997 of an aboriginal subsistence catch limit for the years 1998-2002, the Tribe conducted its first successful hunt in seventy years in 1999.

On May 17, 1999, the Makah Tribe celebrated a pivotal moment in its long history. At 6:54 am, the Creator allowed a Makah crew to realize a collective dream that the Makah Tribe had stored in its minds and hearts for seventy years: they brought a whale home to the Makah people. This event riveted the attention of the Makah community, and energized Makah Tribal members who believed in, and worked toward, the restoration of this significant cultural and subsistence practice. Five days later, the Makah Tribe paid tribute to the whale which provided so much to the Tribe, and celebrated a new chapter in its history. Thousands of people attended the parade held during the day, and the feast held in the high school gymnasium later that afternoon. In addition to the local Makahs who attended these events, many Makahs journeyed home to participate.

Unfortunately, the revival of the Makah whale hunt was put on hold shortly after the successful 1999 hunt. Despite IWC authorization to hunt gray whales since 1998, the Tribe has not been able to exercise its treaty right to hunt whales for most of those years, including the entire period since 2002 because of complex – and highly protective – domestic legal requirements. The Tribe will not be able to resume its hunt until it satisfies these requirements.

Under United States law, the Secretary of Commerce, acting through the National Oceanic and Atmospheric Administration (NOAA), must authorize the Makah hunt before it may take place. In a decision first issued in 2002, and finalized in 2004, a United States appellate court held that NOAA must prepare an Environmental Impact Statement (EIS), the highest level of environmental review under American law, before authorizing the Makah whale hunt. In addition, the court held that the Secretary of Commerce must waive the take prohibition in the United States Marine Mammal Protection Act (MMPA) before a Makah harvest of gray whales can take place. The MMPA imposes exacting standards for the protection of marine mammals and requires thorough scientific review and analysis before a waiver may be issued. Moreover, the waiver process requires an on-the-record hearing before an administrative law judge, and opponents of Makah whaling would have an opportunity to participate and present testimony and other evidence.

Although the Makah Tribe strongly disagreed with this court decision, the Tribe halted its hunting efforts in order to comply with it. The Tribe began the administrative process to obtain an MMPA waiver from the Secretary of Commerce by submitting a [waiver application](#) to NOAA in February 2005. As required by the court, NOAA began preparing an EIS after it received the MMPA waiver application from the Tribe. The preparation of an EIS is an involved process, often taking two or more years to complete. However, as a result of new scientific discoveries relevant to gray whales in the Tribe's hunting area, the EIS process for the Tribe's hunt has resulted in two draft EISs, the most recent of which was issued in [March 2015](#). The Tribe's waiver application is still being processed by NOAA; any decision by NOAA to approve the waiver would be preceded by a public notice and the on-the-record hearing mentioned above.

The 2015 draft EIS, which evaluates potential impacts of the Makah whale hunt on the environment (including impacts to local populations of gray whales, the ENP stock as a whole, and whales migrating between the western and eastern Pacific Ocean), and a subsequent final EIS will inform NOAA's decision whether to grant an MMPA waiver.

More information on the legal impediments to the Tribe's hunt from 2002 to the present is available in the 2018 Needs Statement (p62).

Based on the Tribe's experience, it is highly likely that any decision by NOAA to authorize a Makah hunt will be challenged in court. All of the Tribe's efforts to increase tolerance and understanding of its whale hunt, a hunt which is a spiritual manifestation of the connection between Makahs and their Creator and a realization of the right their ancestors secured through the Treaty of Neah Bay, have not prevented continued opposition to Makah whaling. Thus, despite the substantial adverse effects on the Tribe from the hiatus in whaling caused by the depletion of gray whales by non-Native whalers, despite the fact that the Tribe delayed exercising its Treaty right until the ENP gray whale population had returned to healthy numbers, despite the Tribe's efforts to limit the scope of its hunt and comply with all IWC humane kill requirements, despite the Tribe's diligent efforts to comply with the extraordinarily complex and time-consuming domestic management process, despite the Tribe's compliance with additional restrictions resulting from that process, and despite the Tribe's contributions to the body of scientific knowledge about gray whales, opponents of Makah whaling will likely ensure that any new decision by NOAA to authorize a Makah hunt – no matter how limited – will be reviewed in United States federal courts.

4. Information on Hunting Methods

The Tribe's hunt includes measures that will ensure that the hunt is conducted in the most humane manner practicable consistent with the Tribe's goal of providing opportunities for a traditional ceremonial and subsistence hunt. To achieve this objective of blending traditional and modern methods, the whaling crew will approach the whale in a cedar canoe led by a

whaling captain, and all whales will be harpooned with a toggle-point harpoon with floats attached before being dispatched with a .50 or larger caliber rifle shot to the central nervous system (brain and upper spinal cord). The rifleman will approach the harpooned whale in a motorized chase boat and will be accompanied by a safety officer following strict rules regarding when to shoot to ensure safety of the public and efficiency of dispatch. One or more motorized support boats will ensure that the whale will be towed to shore, where it will be butchered, processed and distributed to the crew members and the Makah community. More information on the Tribe's hunting method is in [IWC/58/WKM&AWI 15](#) which describes the Tribe's traditional hunting methods and development of the method utilized in the 1999 hunt.

Although the domestic legal process has not yet resulted in a decision by NOAA as to whether it will approve the Tribe's MMPA waiver application, substantial information is currently available about the potential regulatory limits on a Makah hunt. When the Tribe applied for a waiver under the MMPA in 2005 it proposed certain requirements that would ensure a safe, humane and efficient hunt and included a management plan that would conserve gray whale populations in the Tribe's hunting area. The management plan of the proposed hunt was reviewed by the IWC's Scientific Committee in the gray whale implementation review between 2010 and 2013 and found to satisfy the IWC's conservation objectives. More recently, the U.S. government submitted a new proposed management plan for the Makah hunt to the Scientific Committee that, if approved, would modify some of the requirements proposed by the Tribe in 2005. In the following paragraphs, the hunt proposed by the Tribe in 2005 is described first, followed by the more recent hunt proposal reviewed by the Scientific Committee. It is the more recent – and more restrictive – hunt proposal that the Tribe would seek to implement if it is approved by NOAA.

In 2005, [the Makah Tribe proposed](#) a hunt that would take no more than five whales in any single year with an annual strike limit of seven whales and struck and lost limit of three whales. This hunt would be limited to the migratory season (December 1 - May 31) and would be restricted to the portion of the Tribe's traditional fishing area in the Pacific Ocean (excluding the Strait of Juan de Fuca). These restrictions were designed to target whales from the Eastern North Pacific population and limit impacts to the Pacific Coast Feeding Group (PCFG). Although the PCFG is not defined as a separate stock under the MMPA or by the IWC, the Tribe's waiver request was designed to prevent depletion of whales that exhibit inter-annual site fidelity to the portion of the PCFG range in which whales have highest interchange with the hunt area (Oregon to Southern Vancouver Island (ORSVI)). Several measures implement these protective measures. The Tribe would take photographs of all landed whales, and, in consultation with other scientists, compare the photographs with the existing photo-identification catalog for the PCFG, which includes any gray whale that has been photographed south of Alaska between June 1 and November 30 in any year. The Tribe would cease hunting in a calendar year when photographic analysis indicates that suspension of the hunt is necessary to prevent the number of harvested whales from the PCFG catalog from exceeding an annual limit calculated by applying the MMPA's potential biological removal methodology to a conservative abundance estimate based on the number of gray whales that exhibit site fidelity (i.e., seen in more than one year) in the ORSVI survey area between June 1 and November 30.

In 2018, the United States government requested that the Scientific Committee review a different and more conservative proposal that would further restrict the number of strikes and landed whales to limit the hunt's potential impact on: (1) PCFG whales; and (2) Western Feeding Group (WFG) gray whales that migrate through the Tribe's hunting area but which feed at Sakhalin Island in the western Pacific Ocean. The new protections for these two groups of whales include **alternating** hunting seasons, with the hunt limited to the migratory season (when impacts on the PCFG would be minimized but western whales could be present) in even years and the feeding season (when PCFG whales would be present but western whales would not) in odd years. The new proposal would also limit the waiver's duration to ten years (rather than the unlimited duration proposed by the Tribe in 2005).

To further protect PCFG whales, under the new proposal the hunt could only occur in years in which the PCFG was above a minimum abundance threshold, only two whales could be struck and only one whale could be landed in a hunt during the feeding season (July 1 – October 30), only three whales could be struck in a hunt during the migratory season, and fixed limits for the total number of PCFG whales and PCFG females that could be killed over a ten-year period would be imposed. Each of these provisions is new and more restrictive than the Tribe's 2005 proposal.

The **alternating** season hunt and three strike limit during the migratory season would also provide further protections to any whales migrating to or from the western North Pacific – those whales would not be vulnerable to the hunt in years in which the hunt was limited to the feeding season, and the three strike limit during the migratory season would further reduce the already very low chance that they would be struck during a migratory season hunt. In addition, if a western whale were struck during a migratory season hunt, such hunts would cease for the remainder of the 10-year waiver period. These provisions are also new and more restrictive than the Tribe's 2005 proposal.

The new proposal is more conservative than the Tribe's 2005 waiver application in order to reduce the already low probability of striking western whales and to further reduce the limited impacts to PCFG whales, while still providing annual (albeit very limited) hunting opportunities for the Tribe. The blend of traditional and modern methods (i.e., canoe, harpoon, chase boat, high-powered rifle, etc.) and the restriction to hunting in the Pacific Ocean remain the same as the Tribe proposed in 2005. The proposed hunt management plan was reviewed by the Rangewide Workshop and Scientific Committee in 2018 and was found to satisfy the IWC's conservation objectives for all affected populations of gray whales (eastern, western and PCFG).

5. Most recent IWC Scientific Committee Advice on the Whale Populations

The general approach to the provision of scientific advice to the IWC for all ASW hunts is through the use of a *Strike Limit Algorithm*.

The IWC Scientific Committee integrates the available data (biology, ecology, abundance and trends, removals including direct hunting, ship strikes and bycatches, requested catches from the relevant ASW countries) to provide scientific advice to the Commission.

The most recent Scientific Committee advice (from the 2018 Scientific Committee meeting) for this population of gray whales is provided below. Note that the request for Scientific Committee advice on an annual strike limit of 140 whales is from the Russian Federation and that there is an agreement between the Russian Federation and the U.S. regarding the allocation of the catch limit between the two countries for their respective aboriginal subsistence whaling hunts (Chukotka Natives and Makah Tribe).

The Scientific Committee's management advice, which is located in Section 8.2.2. of the 2018 Scientific Committee Report, is as follows:

The Russian Federation (SC/67b/AWMP/17) had requested advice on the following provision:

'For the seven years 2019, 2020, 2021, 2022, 2023, 2024 and 2025, the number of gray whales taken in accordance with this sub-paragraph shall not exceed 980 (i.e. 140 per annum on average) provided that the number of gray whales taken in any one of the years 2019, 2020, 2021, 2022, 2023, 2024 and 2025 shall not exceed 140.'

The Committee therefore:

- (1) **agrees** that the Gray Whale SLA remains the best available way to provide management advice for the gray whale hunts;
- (2) **advises** that an average annual strike limit of 140 whales will not harm the stock and meets the Commission's conservation objectives;
- (3) **notes** that its previous advice that the interannual variation of 50% within a block with the same allowance from the last year of one block to the first year of the next remains acceptable
- 4) **advises** that the Makah Management Plan (see Item 7.1.3.2) also is in accord with the Commission's management objectives.

The Scientific Committee's conclusions and recommendations regarding the U.S. proposed management plan for the Makah Tribe's hunt, which appear in Section 7.1.3.2. of the 2018 Scientific Committee Report, are as follows:

The Committee reviewed a US Management Plan for a Makah hunt of gray whales off Washington State (the Committee had evaluated a previous plan in 2011 - IWC, 2011; 2012), using the modelling framework developed for its rangewide review of gray whales (SC/67b/Rep07). In conclusion, the Committee:

- 1) **agrees** that the performance of the Management Plan was adequate to meet the Commission's conservation objectives for the Pacific Coast Feeding Group, Western Feeding Group and Northern Feeding Group gray whales;
- (2) **notes** that the proposed management plan is dependent on photo-identification studies to estimate PCFG abundance and the mixing proportions of PCFG whales available to the hunt (and to bycatch in its range);
- (3) **stresses** that its conclusions are dependent on the assumption that these studies will continue in the future; and
- (4) **expresses its great thanks** to Punt, Brandon and Allison for their excellent work in developing and validating the testing framework and running the trials.

6. Information on International and National Regulations

The 1855 Treaty of Neah Bay expressly secures the right of whaling in addition to the right to take fish, engage in sealing, and hunt land animals. Under Article 6 of the U.S. Constitution, treaties between the U.S. Government and sovereign nations are the "supreme law of the land."

The IWC is charged with the conservation of whales and the management of whaling under the 1946 International Convention for the Regulation of Whaling (ICRW). The IWC sets catch limits for aboriginal subsistence whaling in Paragraph 13 of the Schedule, pursuant to advice of the Scientific Committee. From 1998 through the present, the IWC has approved four separate multi-year aboriginal subsistence whaling catch limits for hunting gray whales based on joint requests from the United States (Makah Tribe) and Russian Federation (Chukotka Natives). These catch limits for the periods 1998-2002, 2003-2007, 2008-2012, and 2013-2018 authorized the taking of an average of 124 gray whales per year, with a maximum of 140 in any one year. Under bilateral agreements between the United States and the Russian Federation, the catch limit is allocated by allowing an average of 4 whales per year (and a maximum of 5 in any one year) to be taken in the Makah hunt and any unused portion of the Makah allocation would be transferred for use in the Chukotka hunt.

The United States has implemented the ICRW through the Whaling Convention Act (WCA). Pursuant to the WCA, NOAA has adopted aboriginal subsistence whaling regulations which are set out at 50 C.F.R. Part 230. The regulations permit whaling captains designated by a Native American whaling organization which has been recognized by NOAA to engage in subsistence whaling in accordance with IWC catch limits and regulations.

Domestically, whales are protected and managed by NOAA under the Marine Mammal Protection Act (MMPA) and WCA. The MMPA prohibits the take (harassment, hunting, capturing, collecting, or killing) of marine mammals in U.S. waters, but authorizes NOAA to grant waivers and permits (i.e., incidental take for commercial fisheries, scientific research, capture for public display, Department of Defense operations, etc.). The Marine Mammal Commission provides science-based oversight of the domestic and international policies and actions affecting marine mammals and their ecosystems. Several whale species are listed as threatened or endangered under the Endangered Species Act (ESA), including the Western North Pacific stock of gray whales. Potential adverse effects of the hunt on listed species would require additional review under the ESA. An MMPA waiver would also be subject to the National Environmental Policy Act (NEPA), which requires federal agencies to assess the environmental impact of their proposed actions, such as approving a waiver for the Makah hunt, and to inform the public about such impacts prior to making a final decision. The scope of NEPA also extends beyond marine mammals and considers impacts on other resources, including human health and cultural resources.

More information on the Tribe's treaty right and the regulation of whaling under international and United States law is available in the Tribe's 2005 [waiver application](#) (pp 6-8 and 13-20) and the [2015 Draft EIS](#) prepared by NOAA (pp 1-6 to 1-28). In addition, much of the regulatory history following the 2005 waiver application is available at [NOAA's website dedicated to Makah whaling](#).

Despite IWC authorization to hunt gray whales since 1998, the Tribe has not been able to exercise its treaty right to hunt whales for most of those years, including the entire period since 2002 because of the complex – and highly protective – domestic legal requirements described above. Even if the IWC approves a gray whale catch limit beyond 2018, the Tribe must still satisfy these requirements before resuming its hunt. And, it is likely that, even if the Tribe receives domestic authorization for its hunt, there will be a legal challenge to it. For additional details regarding these matters, see the section entitled Information on Recent Catches above.