

The Makah Indian Tribe and Whaling: Questions and Answers

Makah Tribal Council and Makah Whaling Commission
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1. Why does the Tribe want to hunt whales?

Whaling has been one of our traditions for over 1,500 years and is a right secured to us by treaty with the United States. We had to stop in the 1920's due to the scarcity of gray whales. Their full recovery to pre-commercial whaling levels and 1994 removal from the Endangered Species List made it possible to resume the hunt. There has been an intensification of interest in our own history and culture since the archeological dig at our village of Ozette in 1970, which uncovered thousands of artifacts bearing witness to our whaling tradition. Many Makah feel that our health problems result, in some degree, to the loss of our traditional diet of seafood and marine mammal meat. We would like to restore the meat of the whale to our diet. Many of us also believe that the problems besetting our young people stem from lack of discipline and pride. We believe that the restoration of whaling will help to restore that discipline and pride.

2. What secures the Makah Tribe's legal right to hunt whales?

Under the treaty made by the United States with the Makah Tribe in 1855, the Tribe agreed to give up its rights to hundreds of thousands of acres of land on the Olympic Peninsula. In return, the United States promised to secure to the Makah the right to engage in whaling. This is the only treaty ever made by the United States which contains such a guarantee. The treaty which was ratified by the United States Congress in 1855, is the law of the land under the U.S. Constitution, and has been upheld by the Federal Courts and the Supreme Court. To us, the Makah Treaty is as powerful and meaningful of a document as the U.S. Constitution is to other Americans; it is what our forefathers bequeathed to us.

3. How did a whaling clause come to be written in the Treaty of Neah Bay?

Prior to entering into negotiations with the Makah, the United States government was well aware that our people had lived around Cape Flattery for several thousand years and that we subsisted primarily on whale, seal, and fish. They knew that we hunted whales and that we had a thriving commerce in whale oil. When the United States territorial Governor, Isaac Stevens arrived at Neah Bay in December of 1855, he entered into three days of negotiations with our leaders. They made it clear to him that while they were prepared to cede their lands to the United States, they wanted guarantees of their traditional rights on the ocean and specifically of the right to take whale. The Treaty minutes record Governor Stevens as saying to the Makahs: "The Great Father knows what whalers you are—how you go far to sea to take whale. Far from wanting to stop you, he will help you—sending implements and barrels to try the oil." Stevens presented

the written treaty to the Makahs and explained, through an interpreter, that the Treaty contained an express guarantee by the United States of the right to continue to take whales. The Treaty was then accepted by the Tribe.

4. Did the Marine Mammal Protection Act abrogate the Treaty of Neah Bay?

There is no evidence that Congress was even aware of our unique treaty right to take marine mammals when it enacted the MMPA, much less that it chose to abrogate those rights. On the contrary, neither the MMPA nor its legislative history even mention Indian treaty rights until Congress amended the MMPA in 1994. Far from abrogating those rights, the 1994 Amendments expressly preserved them. Section 14 of the 1994 Amendments provides: “Nothing in this Act including any amendments to the Marine Mammal Protection Act of 1972 made by this Act alters or is intended to alter any treaty between the United States and one or more Indian Tribes.” Pub. L. 103-238, § 14 (Apr. 30, 1994); *see* Historical and Statutory Notes to 16 U.S.C. § 1361. Congress’s stated intent in enacting this disclaimer was to “reaffirm that the MMPA does not in any way diminish or abrogate protected Indian treaty fishing or hunting rights.” S. Rep. No. 220, 103rd Cong., 2nd Sess, 1994 USCCAN 514, 534. The language and legislative history of the MMPA thus evince absolutely no Congressional intent to abrogate the Tribe’s Treaty right to take marine mammals.

5. Didn’t the Court of Appeals say that the Tribe couldn’t hunt whales?

No. In *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004), the Ninth Circuit Court of Appeals decided that the Tribe must obtain a waiver of the MMPA’s take moratorium before it may exercise its Treaty whaling rights. However, the Court emphasized that it was not holding that the Treaty had been abrogated.

The Tribe intends to comply with the Court’s directive and will file a comprehensive waiver request with the Secretary of Commerce in February 2005. The Secretary’s approval of our waiver request will include a full environmental impact statement under the National Environmental Policy Act and an agency rulemaking with extensive opportunities for public involvement.

6. What species will be hunted?

Only gray whales from the Eastern North Pacific stock (*Eschrichtius robustus*) will be hunted.

7. How many whales does the Tribe intend to take?

The International Whaling Commission quota allows us to take twenty gray whales from 2003 to 2007, with a maximum of up to five whales per year. We will only permit whaling if there is an unmet traditional subsistence or cultural need for whale in the community.

8. Does the proposed level of Makah whaling pose any conservation threat to the species?

No. The 1994 amendments to the MMPA adopted the potential biological removal (PBR) approach for evaluating human-caused mortality to marine mammal stocks. The PBR is defined in the Act as “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population” 16 U.S.C. § 1362(20). A total level of human-caused mortality that is less than the PBR is considered sustainable and consistent with the MMPA’s goal of managing marine mammal stocks to achieve their optimum sustainable population level.

Using the most recent abundance estimate for the Eastern North Pacific stock of approximately 17,000 whales, the PBR for the stock is calculated to be 366 gray whales per year. It is also important to note that the Scientific Committee of the IWC provided management advice in 2002 that a take of up to 463 whales per year is sustainable for at least the medium term (~30 years). The Tribe’s request of a maximum of 5 whales per year is well within the sustainable harvest level for of this stock.

The Tribe does not want to ever again see the Eastern North Pacific stock of gray whales cease being a significant, functioning element of the Washington marine ecosystem and would not undertake in activities that would threaten or endanger the long-term viability of gray whales in our waters.

9. How many gray whales has the Tribe harvested since it was de-listed in 1994?

We hunted in 1999 and 2000 and harvested one gray whale.

10. Will the Makah Tribe harvest calves or females accompanied by calves?

No. This is specifically prohibited by the International Whaling Commission and will not be permitted under Tribal regulations.

11. What about impacts to the gray whales observed in the summer months off the Pacific Northwest?

Approximately 200 to 250 whales from the Eastern North Pacific stock of gray whales spend the summer and fall feeding along the Pacific coast south of Alaska instead of migrating north to the Bering Sea. These whales have been referred to by scientists as the Pacific Coast Feeding Aggregation (PCFA). The PCFA is not recognized as a separate whale stock by the IWC or the U.S. Government under the Marine Mammal Protection Act. Nevertheless, to ensure that gray whales remain abundant off our coast during the summer and fall, we will hunt whales only during the southbound and northbound migrations and will cease hunting between June 1 and November 30 when whales from the PCFA are most likely to be present. Additionally, we will only hunt in offshore waters, not in the inside waters of the Strait of Juan de Fuca. Finally, as a

further safeguard, the Tribe will compare photographs of each whale it lands with an extensive catalogue of archived photographs of individual gray whales from the PCFA. If this photo analysis indicates the Tribe will exceed a conservative pre-determined level of unintentional harvest of non-migratory whales, then we will cease hunting for the rest of that year.

12. How is the Tribe going to conduct the hunt?

We have given much thought and time to the planning of the hunt. We will conduct it in a way that is as consistent as possible with our traditional manner of whale hunting, but also with the requirement of the International Whaling Commission and the Marine Mammal Protection Act that the killing of the whale be done in as humane a manner as possible, and at the same time with as much safety as possible for our hunters.

In 1999 and 2000, we had a crew of 8 whalers in a 36 foot long canoe which was carved from a single cedar log. The harpooner was in the bow of the canoe and used a stainless steel harpoon mounted on a wooden shaft approximately seven feet long, connected by ropes to buoys and to the canoe. The rifleman was stationed on a chaseboat and fired a specially designed .50 caliber rifle soon after the harpoon was thrown to dispatch the whale. The configuration of this rifle achieves immediate unconsciousness and death of the whale when fired at the target area near the base of the skull. It is the most humane method that can be employed.

After the death of the whale, a Makah diver went into the water to lash the whale's jaws shut to prevent it from sinking. He also attached lines to enable the whale to be towed back to shore. The carcass was beached at one of the Makah's traditional beaches and whaling family representatives carved the blubber and meat and distributed it in accordance with traditional Makah practice.

13. Are the Tribe's hunting methods humane?

The Marine Mammal Protection Act defines "humane" in the context of taking a marine mammal as "that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved." 16 U.S.C. § 1362(4). While it is true that use of a high-powered rifle is not a traditional method for the Makah, it is far more humane than the traditional Makah practice of plunging spears into the whale to cause internal bleeding and ultimate death.

14. Will the Makah Tribe sell any of the whale meat?

Absolutely not. We will abide by federal and international laws which prohibit commerce in whale meat. Our Tribal law also prohibits any sale of whale meat or whale products, except for artifacts made by Makah carvers out of whale bone.

15. What will the Makah Tribe do with a harvested whale?

The meat will be distributed to all members of the Tribe, which presently numbers 1,356 persons living on the Reservation. Any meat remaining will be frozen in meat lockers for later distribution.

16. Aside from history and tradition, is there any cultural purpose served by taking whales now?

Yes. Whaling and whales have remained central to Makah culture. They are in our songs, our dances, our designs, and our basketry. Our social structure is based on traditional whaling families. The conduct of a whale hunt requires rituals and ceremonies which are deeply spiritual. Whale hunting imposes a purpose and a discipline which we believe will benefit our entire community.

17. Do all tribal members support the pursuit of whaling?

While there is overwhelming support for whaling within the Tribe, there is some dissent. We respect the right of all Tribal members to express their own opinions on any issue, even though some of the dissenters have been aggressively exploited by anti-whaling groups. In 2001, a household survey revealed that 93% of the Tribe supported the Tribe continuing to pursue its Treaty right of hunting of gray whales. The Tribe is governed by a democratically elected five-member council and the council recognizes that whaling is the mandate of an overwhelming majority of the Tribe.

18. Is the Tribe aware that the Tribe's intentions of whaling has aroused intense opposition within the United States and abroad?

Yes. We are not insensitive to this. But we are also aware that much of this opposition has been whipped up deliberately by organized groups who have put out a blizzard of propaganda attacking us and urging the public to oppose us. Unfortunately much of this propaganda contains misinformation, distortion, and outright falsehoods. The anti-whaling community is very well organized and very well financed and puts out a steady stream of propaganda designed to denigrate our culture and play on human sympathy for all animals. Perhaps what is lost in all of their rhetoric is an appreciation of the value of preserving the culture of an American Indian Tribe—a culture which has always had to struggle against the assumption by some non-Indians that their values are superior to ours. There is no denying that this kind of animosity has been extremely upsetting to our people. But our opponents would have us abandon this part of our culture and restrict it to a museum. To us this means a dead culture. We are trying to maintain a living culture. We can only hope that those whose opposition is most vicious will be able to recognize their ethnocentrism—subordinating our culture to theirs.

19. Will whaling be regulated, and if so, by whom?

Yes, whaling will be regulated. The Makah Tribe has previously adopted a highly detailed whale management plan and intends to do so again. The plan was carried into an agreement with National Marine Fisheries Service and both the plan and the agreement commit the Tribe to regulate whaling, and cooperation with the National Marine Fisheries Service. The regulations included the following provisions: 1) strict reporting requirements; 2) area restrictions designed to ensure we did not impact the Pacific Coast Feeding Aggregation; 3) a prohibition against the taking of suckling calves or female whales accompanied by calves; 4) a prohibition against sale of any whale meat or products except for traditional native handicrafts; 5) National Marine Fisheries Service monitoring of the hunt; and 6) prosecution and punishment of any Tribal whalers who violate Tribal regulations adopted to carry out the terms of the memorandum of understanding with the National Marine Fisheries Service.

In the future if our waiver request is approved, Makah whaling will occur in accordance with regulations promulgated by the Secretary of Commerce under the Marine Mammal Protection Act. These regulations will be issued only after a full environmental impact statement review and after opportunities for extensive public involvement. The Tribe anticipates that these federal regulations will permit hunting under Tribal regulations that will be at least as restrictive as the plans previously approved by the National Marine Fisheries Service.

Conclusion

We appreciate the action taken by the United States government to secure approval of the Makah whale hunt by the International Whaling Commission. We pledge our continuing efforts to cooperate with the Federal government and the decisions of the Court to insure that our hunt is carried out in a proper and legal manner.

We ask the public to remember that throughout the history of the United States there has been a sad record of intolerance of Indian culture. We hope that thoughtful Americans will ask themselves whether they can and should respect the efforts of a small Tribe which is trying to preserve its culture in ways that are consistent with the conservation of natural resources.