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September 10, 2007

William T. Hogarth, Ph.D.
Assistant Administrator
NOAA Fisheries
1315 East West Highway, SSMC3
Silver Spring, MD 20910

**Re: Request to Suspend MMPA Waiver Process and Initiate Enforcement
and Contempt Action Concerning the Makah Indian Tribe's Unlawful
Taking of a California Gray Whale**

Dear Dr. Hogarth:

On behalf of The Humane Society of the United States ("The HSUS") and its ten million members and constituents, I am writing to request that the National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NMFS") suspend its consideration of the Makah Indian Tribe's ("Tribe") request for a waiver of the moratorium on the taking of marine mammals under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*

The MMPA prohibits the taking of marine mammals absent a permit or waiver. *Id.* § 1371(a)(1), (3)(A). In 1998, NMFS announced a quota permitting the Tribe to take gray whales, 63 Fed. Reg. 16,701 (Apr. 6, 1998), but the United States Court of Appeals for the Ninth Circuit twice found that NMFS violated the National Environmental Policy Act ("NEPA") by failing to prepare an environmental impact statement ("EIS") prior to approving the whaling quota. *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000); *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004). In its most recent ruling, the Court held that "federal defendants and the Tribe did not satisfy the permit or waiver requirements of the MMPA, and . . . they must do so before any taking of a marine mammal." 371 F.3d at 501-02.

Given the Court's order, NMFS is currently preparing an EIS in order to determine whether to grant such a waiver to the Tribe. *See* 71 Fed. Reg. 9781 (Feb. 27, 2006); 70 Fed. Reg. 57,860 (Oct. 4, 2005); 70 Fed. Reg. 49,911 (Aug. 25, 2005).

However, without authorization from NMFS, and in blatant violation of the Court's order, members of the Tribe harpooned, shot, and killed a California gray whale on September 8, 2007. According to media reports, the whale suffered a slow and agonizing death over a period in excess of nine hours. Moreover, those involved in this action have not only expressed no remorse, but have actually celebrated this cruel and flagrantly illegal act.

Celebrating Animals, Confronting Cruelty

In light of this willful criminal conduct – which raises grave questions about the Makah’s ability to manage a lawful whale hunt in the future – The HSUS asks that NMFS cease its consideration of the Tribe’s waiver request until a thorough investigation of the killing is complete and those responsible are fully prosecuted. Such an investigation should, at a minimum, include a determination:

- (1) Whether anyone at NMFS or the U.S. Coast Guard had advance notice of the hunt, and when they found out;
- (2) What steps NMFS and the Coast Guard took to stop it;
- (3) How the Makah members gained access to the weapons used for the whale hunt if this was not a tribe sanctioned hunt;
- (4) Whether anyone in the Tribal government had advance notice of the hunt, and when they found out;
- (5) What steps the Tribal government took to stop the hunt;
- (6) What measures are in place to control Makah from further unauthorized hunts; and
- (7) How this event affects the assumptions and analysis in the EIS, and the assertions made in the Tribe’s application for the waiver, including assumptions and assertions about (1) the protection of resident whales; (2) the humaneness of the proposed hunt; (3) the Tribe’s ability to manage and monitor a whale hunt; and (4) NMFS’s and the Coast Guard’s ability to oversee the program.

The HSUS also requests that NMFS seek criminal and civil penalties against each of those individuals or entities involved under the MMPA. 16 U.S.C. § 1371. Since the violators are also in willful contempt of the Court’s order in *Anderson v. Evans*, and since this type of intentional environmental crime has apparently been committed by Makah members in the past, *see U.S. v. Baker*, 641 F.2d 1311 (9th Cir. 1981) (upholding criminal contempt conviction of two Makah tribal members for taking salmon in violation of federal court order), The HSUS requests that NMFS join us in seeking a contempt citation against those involved in this brutal killing.

I look forward to receiving your prompt response to this important and deeply disturbing matter.

Sincerely,



Jonathan R. Lovvorn, Esq.