

Animal Welfare Institute Positions on Aboriginal Subsistence Whaling Issues at IWC59



ANIMAL WELFARE INSTITUTE POSITION ON ABORIGINAL SUBSISTENCE WHALING

The Animal Welfare Institute (AWI) finds all whaling to be cruel since there is no humane way to kill a whale. However, AWI recognizes the need for certain native peoples to whale in order to survive and does not oppose Aboriginal Subsistence Whaling (ASW) provided that the following conditions can be met:

- (A) such whaling fulfills a legitimate and continuing subsistence need;
- (B) such killing is limited to only the number of whales who are needed;
- (C) the targeted whale populations can sustain such kills;
- (D) the whale be fully utilized by those responsible for his/her death;
- (E) the whaling be done using the least cruel techniques available; and
- (F) continuing efforts are made to reduce the time till death and thus the cruelty of the hunt.

In regard to current ASW actions approved by the International Whaling Commission (IWC), AWI believes that the above conditions are not being met and has grave concerns with the way ASW is handled by IWC. In particular, AWI is concerned by: the lack of legitimate means within IWC to adequately assess, manage and enforce conditions (A), (B), and (D); the acceptance by IWC, despite acknowledging condition (C), that even endangered species facing many other anthropogenic stressors can be consistently hunted without respite; and the lack of progress in achieving the objectives of conditions (E) and (F).

The following represents the views of the Animal Welfare Institute with regard to the various and inter-related ASW issues that are expected to be discussed at IWC59.

INTRODUCTION

ASW is anticipated to have a prominent role at the upcoming 59th meeting of the International Whaling Commission (IWC59). This is because all the five-year quotas that the Commission approves for whales that are hunted by native¹ people in several countries are due for renewal. The quotas can either pass by consensus or with a three-fourths majority vote of the IWC members.

At the last IWC meeting where ASW quotas were renewed, the United States and the Russian Federation sought a joint quota for bowhead whales which was blocked by pro-whaling nations. This decision was overturned at a special IWC meeting convened a few months later. At that same meeting and since then, the United States' stance on whaling has weakened significantly.

At last year's IWC meeting, for the first time in decades, the pro-whaling nations achieved a simple majority on a single vote in favor of the St. Kitts Declaration which called into question the legitimacy of the current whaling moratorium and promoted the erroneous claim that whales are adversely impacting fish populations.

There are currently upward of 72 IWC member nations with almost an equal make-up of pro versus anti whaling members. Whatever the numbers at IWC59, it is anticipated that an attempt will be made to once again block the bowhead quota as a means to leverage the United States to weaken its stance further on other issues, including, *inter alia*, a proposal by Japan for a resumption of its commercial coastal whaling industry.

Consequently, there is concern that the United States has been seeking and will continue to seek at the IWC59, ways to ensure that the quota for bowhead whales passes. One way it may try to achieve this is through a proposal to "bundle" all the ASW quotas together so that the Commission has to vote to approve or reject all ASW quotas. In other words, if the "bundling" proposal is accepted, denial of the bowhead quota would result in the denial of all other ASW quotas and vice versa.

In addition to the inherent cruelty of ASW, the bowhead whale quota, and the proposal to "bundle" all ASW quotas into a single package, other items with direct relevance to ASW that are on the agenda or are expected to be raised, are:

- i) a Japanese proposal to remove the term "aboriginal" from the phrase "aboriginal subsistence whaling";

¹ The term "native" for the purpose of this document is used to describe indigenous or aboriginal people and all three terms being used interchangeably. A suggested definition of subsistence whaling conducted by native or indigenous people is included under the section entitled "Removing the Term 'Aboriginal' from the Schedule."



- ii) a Japanese proposal to partially lift the whaling moratorium to allow for a resumption of Japanese community-based whaling; and

- iii) a joint proposal by the United States and Russian Federation for an ASW quota of Eastern North Pacific (ENP) gray whales.

THE INHERENT CRUELTY OF ASW WHALING

Even if whale populations were sufficiently robust such that a resumption of commercial whaling would be biologically benign, whaling is inherently cruel. This is because even the most advanced whaling methods cannot render the animals insensitive to pain prior to slaughter, as is the usual requirement for domestic food animals.

Modern whaling involves the use of exploding harpoons fired into large, moving targets from moving platforms on a shifting sea, often under extreme weather conditions. The probability of obtaining a clean strike with a swift death is extremely low and animals can take hours to die. While some whalers claim death can be achieved within minutes, the data to support these claims is "self-collected" by the whalers and therefore questionable.

THEREFORE AWI BELIEVES:

- Whaling, including ASW, is inherently cruel.
- IWC member countries must consider the inherent cruelty of whaling when rendering their votes on any proposal.

THE BOWHEAD WHALE QUOTA

It is expected that the United States and the Russian Federation will be submitting a joint request for the renewal of their five-year quota of bowhead whales at IWC59.

Bowhead whales are hunted by Alaskan and Russian natives. Both countries have submitted separate Needs Statements for the IWC59 meeting which attempt to explain why the natives of each country satisfy the ASW requirements of the IWC in relation to the need to hunt and use bowhead whales.

At the 2002 IWC meeting when the quotas were last due for renewal, the pro-whaling nations, led by Japan, blocked the passage of the United States/Russian Federation joint request for a bowhead whale quota. After a special meeting of the IWC was convened later that year, the bowhead whale quota was restored. This was the product of an unprecedented move by the United States that, for the first time ever, voted in favor of a Japanese proposal to resume its coastal whaling industry. Since that time the United States - once the

staunchest defender of the whales - has become progressively weaker on whaling issues.

It is anticipated that an attempt will be made to once again block the bowhead quota as a means to leverage the United States to weaken its stance further on other issues, including, a proposal submitted by Japan seeking approval to renew its coastal whaling industry. Consequently, there is concern that the United States has been seeking and will continue to seek ways to ensure that the quota for bowhead whales passes.

Though the United States' National Marine Fisheries Service (NMFS) has been repeatedly warned by Senator Ted Stevens (R-AK) and others to not engage in deal-making to secure Japan's commitment not to interfere with the bowhead whale quota, there remains considerable reason to question whether NMFS will comply. AWI strongly opposes any overt or covert deal made between the United States and Japan to secure the United States bowhead whale quota.

AWI Position on the Bowhead Whale Quota Request

Under United States federal law, a federal agency must ensure that the environmental impacts of its actions are adequately considered before the action is allowed to proceed.

In AWI's opinion, the decision by the United States to request a quota of bowhead whales at IWC59 constitutes an action requiring evaluation of its environmental impacts before the request is made and the action taken. This analysis has been initiated by the United States, but has not been completed. Therefore AWI believes that the United States is violating federal law by seeking a bowhead whale quota at IWC59 prior to meeting its domestic legal obligations. The current bowhead whale quota remains valid through 2007.

THEREFORE AWI BELIEVES:

- The United States cannot lawfully seek a bowhead whale quota at IWC59.
- All or some of the Alaskan aboriginal subsistence whalers have a legitimate subsistence need to whale but since their existing quota does not expire until the end of 2007, they will not be significantly impacted if the United States does not seek a quota at this IWC meeting.
- The United States must satisfy all of its domestic legal obligations and request the new bowhead whale quota at IWC60 to be held in 2008.

BUNDLING ASW QUOTAS

One avenue that the United States may attempt to pursue in order to secure the passage of the bowhead whale quota is by proposing that all the ASW quotas be “bundled” together and decided upon *en masse*. Such a “bundle” would include all the whales of different species currently hunted by peoples of the United States (gray whales and bowhead whales), the Russian Federation (gray whales and bowhead whales), St. Vincent and the Grenadines (humpback whales) and Greenland (fin whales and minke whales).

The decision to “bundle” the quotas need only be made by consensus or a simple majority vote. If the proposal to “bundle” the quota was successful, approval of the quotas contained in the “bundle” would require consensus or a three-fourths majority vote of IWC-member countries. If approved, then all quotas would be accepted without the opportunity for specific analysis of each quota. If rejected, then all ASW quotas would be denied, likely resulting in independent votes on each proposed quota thus providing an opportunity for IWC-member countries to identify specific deficiencies or concerns with individual quotas on a case by case basis.

AWI Position on Bundling ASW Quotas

The principal concern with “bundling” all the ASW quotas into one package is the likelihood of members using it as an opportunity to insert or delete language into the International Convention for the Regulation Whaling (ICRW) Schedule or to add additional species or increased numbers of animals in the “bundle.”

Japan may for instance use the “bundling” proposal to attempt to strike the word “aboriginal” from the phrase “aboriginal subsistence whaling” and to insert language such that its proposal for a resumption of coastal whaling could be included in the “bundle.”

Moreover, controversial quotas may be passed if

“bundled.” For example the Eastern North Pacific (ENP) gray whale quota proposal may be too controversial to pass alone because the Makah Tribe cannot satisfy the criteria for subsistence whaling (e.g., because it cannot demonstrate a traditional continual reliance on whaling) yet, in a “bundle,” it would be unlikely to fail.

The concern that some countries may take advantage of this proposal to add species or increase the number of whales targeted under their ASW quota is not merely theoretical. Greenland announced prior to the meeting that it has received the support of Denmark in requesting a quota of ten humpback whales as part of its quota request for its natives at IWC59, with a projection for a future request of 30 humpback whales. Since the IWC Scientific Committee has yet to conduct a status review of the targeted humpback populations, a stand alone quota would be unlikely to pass. Yet, if included as part of a “bundle” it may be more likely to pass and would be subject to less debate.

At the meeting itself, members may become so preoccupied with proposals to amend language, add species, strike language and increase numbers, that they may find it hard to keep track of the discussions and may fail to ensure that adverse amendments are appropriately challenged. Changes to the Schedule language proposed by floor amendment can be very dangerous without the necessary advanced forethought and deliberation.

THEREFORE AWI BELIEVES:

- “Bundling” ASW quotas may result in a “free for all” at the meeting where in an effort to pass agreeable quotas, less favorable ones get passed.
- IWC member countries must oppose any proposal to bundle all ASW quotas.



REMOVING THE TERM “ABORIGINAL” FROM THE SCHEDULE

Japan has indicated its intent to propose that the term “aboriginal” be removed from paragraph 13 of the ICRW Schedule because it claims the term is considered by some to be derogatory. Currently ASW and scientific research whaling are the only types of whaling allowed by the IWC.

If the word “aboriginal” is removed from the Schedule the category of whaling now referred to as “aboriginal subsistence whaling” would become “subsistence whaling” potentially resulting in Japan and other countries seeking “subsistence whaling” quotas for their coastal communities while avoiding a label that it considers to be derogatory.

According to anecdotal information obtained from the United States government, the Alaskan Eskimo Whaling Commission, and other reliable sources, neither the Makah tribe, Alaskan Inuits, nor Russian natives are offended by the term “aboriginal.” It, therefore, appears that concern over the term “aboriginal,” may be restricted to a small number of native groups.

AWI Position on the Proposed Removal of the Term “Aboriginal” from the Schedule

The removal of the word “aboriginal” from the Schedule category currently referred to as ASW could possibly open the door for new proposals seeking IWC approval for “subsistence whaling” quotas which could dramatically increase the number of whales killed annually by native groups.

Since “subsistence” has not been formally defined by the Commission, it is possible that this word also may become open to discussion and interpretation at IWC59. This is particularly true given the questionable subsistence needs of some native people who have previously been approved to whale under an ASW quota even though they do not technically qualify for such approval (e.g., the Makah tribe, see later discussion).

If the term “aboriginal” is removed from the Schedule, there is also the possibility of the creation of a new category of whaling called “community-based,” “traditional” or “small-type.” This too, if approved, would lead to new proposals to significantly increase the number of whales killed by native groups.

It is important in debating the legitimacy of the term “aboriginal,” that the purpose of IWC’s intent when crafting the phrase “aboriginal subsistence whaling” is not lost. The purpose was to create a special category of whaling solely for native people who have traditionally and continuously relied on whaling for their very survival.

THEREFORE AWI BELIEVES:

- IWC member countries must oppose any substantive change to paragraph 13 of the ICRW Schedule that would weaken the existing language and/or allow for an expansion of ASW whaling.
- If the term “aboriginal” is deemed by the majority of IWC-member countries to be offensive and these countries desire to replace it with a less offensive word, then the replacement word must have the same intended meaning as “aboriginal.”
- In particular, the replacement word must connote “the non-commercial and not-for-profit killing of whales to provide food, shelter, clothing and other products to be used solely by those killing the whales and their families or extended families, all of whom are able to demonstrate a continuous and uninterrupted reliance on whale products over many centuries or since record-keeping began in their communities, such that without the killing of whales, their existence and continued way of life would have ceased.”



RESUMPTION OF SMALL-TYPE COASTAL WHALING

Japan has proposed that a new paragraph 10(f) be inserted into the Schedule. This paragraph would allow for a resumption of small-type coastal whaling of minke whales in Japanese coastal waters. Japan has submitted similar schedule amendment proposals for decades and has always been unsuccessful. This time the proposal has been worded to remove obvious references to the commercialism of the proposed practice and also to stress the need to reinstate “traditional” and “local practices” which it claims, have been eroded because of the commercial whaling moratorium.

Moreover, in order to make this proposal appear more attractive, Japan has offered to reduce the number of whales that it kills through special permit whaling (i.e., scientific whaling) by the number it wishes to kill through its small-type coastal whaling proposal.

AWI Position on the Proposed Resumption of Small-type Coastal Whaling

A resumption of coastal whaling by Japan will result in a partial lifting of the current commercial whaling moratorium. This is an inevitable result of this proposal, if passed, because there is no legitimate mechanism by which Japan can ensure that the products of this proposed hunt are not sold commercially considering that whale products obtained through its so-called scientific whaling program are sold for profit. As a result, the hunt will be inherently commercial.

This will also lead to the continued erosion of the moratorium by Japan and other nations in the future and will have a direct impact on the international treaty that governs trade in whale products, which is referred to as CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora). Currently under CITES, all of the great whales are listed in Appendix I. As a result, the international trade of all great whales and their products is banned. The Appendix I listing of the great whales is largely due to the IWC moratorium. In addition, CITES member countries have adopted a resolution that gives deference to the IWC in the management of whales.

The next CITES Conference of the Parties (CoP) takes place immediately following the IWC meeting and Japan has introduced a proposal to be debated at the CoP that calls for the status review of all whales to determine if the current Appendix I designation for these species is accurate. If the moratorium is lifted, even partially, then there is little to prevent the status review process from moving forward with the possible removal of some or all of the great whales from CITES protection. This, in turn, would allow for the resumption of trade in whale products. Once international trade in whales is permitted, Japan will actively develop an

expanded market for whale meat and by-products, thereby further increasing a global economic incentive for business enterprises to commence widespread commercial whaling.

Japan may purport that the whale stocks potentially affected by its small-type coast whaling proposal can sustain commercial hunting. This is not true. Whale populations have not sufficiently recovered enough to sustain hunting, especially given the other anthropogenic threats that presently threaten whales. These threats include: toxic pollutants such as DDT, PCBs and mercury; deadly high intensity sounds produced by military sonar and airguns; bycatch (resulting in approximately 300,000 dolphins and whales lost annually as a result of drowning after becoming entangled in fishing nets and other fishing gear); over-fishing of prey species; ship strikes; habitat destruction; and climate change affecting habitat, migration routes and prey species availability.

The minke whales that Japan proposes to hunt are from the so-called ‘O’ stock of minke whales. Another population of minke whales - ‘J’ stock - is critically endangered and at certain times of the year, intermingles with ‘O’ stock. It is impossible for Japan to ensure that J stock animals, which already suffer from bycatch and other threats, won’t be inadvertently targeted by coastal whaling operations.

The claim that Japanese coastal towns have suffered economically because of the moratorium is disingenuous because it is Japan’s own scientific research whaling program which is largely to blame for any economic decline in the coastal whaling towns. When the Japanese pelagic research whaling program commenced after the imposition of the moratorium (which Japan has no objection to), it flooded the market with whale meat and pushed prices down, causing the local fishermen, who also hunt non-IWC cetacean species to suffer. To mitigate this impact, Japan has employed some of its coastal fishermen in its JARPN research whaling program.

THEREFORE AWI BELIEVES:

- IWC member countries must oppose any lifting, even if partial, of the current commercial whaling moratorium by opposing any proposal to allow the resumption of small-type coastal whaling.
- A resumption of Japanese coastal whaling is a lifting of the commercial whaling moratorium.
- A lifting of the commercial whaling moratorium could result in a CITES downlisting of great whales.
- Whales are facing significant and increasing anthropogenic stressors without a resumption of commercial whaling.

THE ENP GRAY WHALE QUOTA

ENP gray whales are currently hunted only by natives of the Russian Federation. The Makah Tribe of Washington State in the United States, who stopped hunting ENP gray whales over 75 years ago, believe it also has a right to hunt these whales for traditional and subsistence purposes under a treaty negotiated with the United States government in 1855 (see Makah Whaling Chronology overleaf). The United States has thrice requested a quota of gray whales on behalf of the Makah Tribe at IWC. The request has been successful twice.

Only one ENP gray has been hunted and killed to date by the Makah because of domestic litigation that successfully challenged United States compliance with domestic law in allowing the Tribe to whale. A domestic court order currently prohibits the hunting ENP gray whales until the United States complies with its domestic laws and, in particular, the National Environmental Policy Act (NEPA) and Marine Mammal Protection Act (MMPA). The United States is in the process of preparing the required environmental impact statement though this analysis, begun over four years ago, has yet to be completed. In addition, the Makah Tribe has applied for a waiver from the general prohibition on the “take” of marine mammals under the MMPA and that process has also not been completed. A draft Environmental Impact Statement is scheduled to be released for public review in the summer of 2007. The process may take a further year or more to conclude, assuming the documentation is in order and depending on any legal challenges to the final decision.

The United States first approached the IWC for a quota of ENP gray whales for the Makah Tribe in 1996 but withdrew its request due to a lack of support from IWC-member countries. In 1997 the United States tried again and combined its request with the Russian Federation. The quota passed, but only after over fifteen member countries expressed concerns that the Makah Tribe lacked a subsistence need. Despite these concerns, the proposal was approved. In doing so, the language of the Schedule was amended to insert “whose traditional subsistence and cultural needs have been recognized” into the ASW Schedule provision for ENP gray whales. The United States erroneously interpreted this language claiming that the Makah’s subsistence needs had been recognized by the IWC and that it could independently recognize the need of its aboriginal groups. These conclusions were quickly challenged by, among others, the Australian delegation who made clear that the IWC had not agreed that the Makah had a legitimate subsistence need and reemphasized that it was the roll of the IWC, and not any country acting unilaterally, to make the determination of need. The IWC has never defined “subsistence and cultural needs” and in 2004 the United States co-sponsored

a successful effort to remove the “recognized” language from the Schedule.

Although the Makah Tribe has not hunted whales (except one) since being first granted a quota in 1997, it continues to believe it has a subsistence and cultural need to whale and the United States will again submit a joint request with the Russian Federation for a quota of ENP gray whales to IWC59.

AWI Position on the ENP Gray Whale Quota Request

The Makah Tribe does not have a legitimate subsistence need to hunt ENP gray whales. The Tribe has survived for over 75 years without subsisting on whale meat. During the non-whaling years, those Makah with practical knowledge of how to hunt, flense and prepare whale meat have disappeared, and thus there is no living Tribe member with that knowledge. This lack of whaling ability necessitated the Tribe sending members to Russia to be taught hunting techniques by the Russian natives. The tribe is prohibited by a federal court ruling from whaling at this time and cannot resume whaling until the United States has complied with both NEPA and the MMPA. Until the requirements of these laws are met, the United States is acting prematurely and illegally in seeking an ENP gray whale quota.

The IWC is the appropriate body to determine the subsistence needs of members whose native people desire to whale. To date the IWC has not determined if the Makah Tribe has a legitimate subsistence need to whale. It is anticipated that should the United States be successful in securing a quota of ENP gray whales on behalf of the Makah Tribe, it will use this quota to illegally predetermine both the outcome of the required NEPA analysis and of the MMPA waiver process. This would set a very dangerous precedent for the future in that it would allow the United States to continue to seek approval for actions in international fora for which it has not satisfied its domestic legal requirement and could allow other native groups or parties, who also have no legitimate subsistence need, to seek similar authorizations from the United States government.

THEREFORE AWI BELIEVES:

- IWC member countries must oppose a United States proposal for a gray whale quota until and unless it has complied with all of its domestic legal obligations.
- The United States cannot lawfully seek a ENP gray whale quota at IWC59 and, by doing so, is violating federal law.
- The Makah Tribe does not have a legitimate subsistence need to whale and is prohibited from whaling by a federal court order.
- The United States should withdraw any proposal to seek a quota of ENP gray whales on behalf of the Makah Tribe.

MAKAH TRIBE WHALING CHRONOLOGY

1855—The United States Government (USG) and Makah Tribe entered into the Treaty of Neah Bay which secured “[t]he right of taking fish and of whaling or sealing at usual and accustomed grounds and stations...in common with all citizens of the United States.”

LATE 1920S—The Makah Tribe ceased whaling after the population of eastern North Pacific (ENP) gray whales significantly declined, due largely to commercial whaling. After the Tribe stopped whaling, its subsistence need for whale meat disappeared.²

1946—USG signed the ICRW and joined the IWC. In 1949 it enacted the Whaling Convention Act (WCA) implementing the ICRW and making it unlawful to whale in violation of the ICRW, the IWC Schedule, or a United States Secretary of Commerce.

1970—Gray whales were listed as “endangered” under the United States Endangered Species Conservation Act, a precursor to the 1973 Endangered Species Act (ESA). In 1972 the Marine Mammal Protection Act (MMPA) was enacted forbidding the unpermitted taking of marine mammals except by “Alaskan Natives...for subsistence, or [f]or purposes of creating and selling authentic native articles of handicraft and clothing...to an Indian, Aleut or Eskimo.”

1994—USG removed ENP gray whales from the ESA listing and began a five-year monitoring program.

1995—The Makah Tribe notified the USG of its interest in resuming the hunting of ENP gray whales for a “ceremonial and subsistence harvest”³ and asked the USG to seek IWC approval for a quota.

1997—After submitting and then withdrawing a proposal for a quota of ENP gray whales at the 1996 IWC meeting, the USG submitted a joint proposal with the Russian Federation for 620 ENP gray whales, of which 20 were for the Makah Tribe. The proposal was approved by IWC consensus after the insertion into the ICRW Schedule of the term “whose traditional subsistence and cultural needs have been recognized.”

1997—A lawsuit was filed against the USG challenging the adequacy of the USG’s compliance with domestic law, namely the National Environmental Policy Act (NEPA) which requires adequate and transparent analysis of federal actions with significant environment impact.⁴

1998—With litigation ongoing, NMFS allocated the quota to

the Makah Tribe the 1999 season under the WCA. In the same year, summary judgment was made in favor of the USG. The decision was appealed.

1999—A single ENP gray whale was struck and landed. Later that year the USG ended its 5-year monitoring program of the ENP gray whales and concluded that the population should remain de-listed from the ESA.

2000—An appeal against the lawsuit judgement was successful and prevented the Makah Tribe from whaling legally until the USG complied with the law. The USG recommenced its domestic legal obligations and completed its NEPA responsibilities in 2001. A further lawsuit was filed in 2002 challenging the adequacy of the NEPA compliance and citing a violation of the MMPA.⁵

2002—With litigation ongoing, the USG submitted a joint IWC proposal with the Russian Federation for an aboriginal subsistence quota of 620 ENP gray whales, of which 20 were for the Makah tribe for the period 2003 through 2007.

2002—After initial summary judgment in favor of the USG, the decision was overturned on appeal. The USG was forced to recommence its NEPA obligations and require that the Makah tribe seek a waiver to the MMPA to hunt whales. The Makah Tribe was again prevented from legally whaling.

2004—The IWC adopted by consensus a USG co-sponsored proposal to strike the language relating to the IWC having to recognize the “traditional aboriginal subsistence and cultural needs” of aboriginal subsistence whalers of ENP gray whales, that had been inserted prior to the approval of the 1997 Russian-US ENP gray whale quota request.⁶

2005—The Makah Tribe requested a waiver to the MMPA. The USG commenced its domestic legal obligations under NEPA and the MMPA. The process is ongoing and may take at least a year to conclude, assuming the documentation is in order and depending on any legal challenges to the final decision.

² The 2007 Needs Statement submitted by the United States at IWC59 (IWC/59/ASW9) states the “subsistence benefits [were] reintroduced to the Makah community ...in 1999.”

³ “Chronology of Major Events Related to Makah Tribal Whale Hunt,” NMFS Northwest Regional Office.

⁴ *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000) on appeal.

⁵ *Anderson v. Evans*, 371 F.3d 475, 500 (9th Cir. 2004) on appeal, after two refusals by the court to allow defendants requests for en banc review.

⁶ Annual Report of the International Whaling Commission, Sorrento, Italy. 2004.