109TH CONGRESS 1st Session | HOUSE OF REPRESENTATIVES | REPORT 109–283

EXPRESSING THE SENSE OF THE CONGRESS UPHOLDING THE MAKAH TRIBE TREATY RIGHTS

NOVEMBER 10, 2005.—Referred to the House Calendar and ordered to be printed

Mr. POMBO, from the Committee on Resources, submitted the following

R E P O R T

[To accompany H. Con. Res. 267]

The Committee on Resources, to whom was referred the concurrent resolution (H. Con. Res. 267) expressing the sense of the Congress upholding the Makah Tribe treaty rights, having considered the same, report favorably thereon with amendments and recommend that the concurrent resolution be agreed to.

The amendments are as follows:

Strike out all after the resolving clause and insert the following:

That the Congress disapproves of requiring the Makah Tribe to obtain a waiver and a permit under the Marine Mammal Protection Act of 1972 before taking gray whales, and expresses its intent that the Government of the United States should uphold the treaty rights of the Makah Tribe.

Amend the preable to read as follows:

Whereas the United States and the Makah Tribe signed a treaty at Neah Bay on January 31, 1855, which was ratified by Congress on March 8, 1859;

Whereas under the treaty, the Tribe ceded to the United States approximately 300,000 acres of its aboriginal homelands on the Olympic Peninsula in the State of Washington;

Whereas in exchange for the cession of land benefiting the United States, a reservation was established for the Tribe and several rights were secured to the Tribe, including the right under Article 4 of "whaling", which had been a tradition for more than 1,500 years;

Whereas the Tribe voluntarily and temporarily ceased whaling in the 1920's prior to protections being implemented and the gray whale population being listed as endangered under the Endangered Species Act of 1973;

Whereas the United States has now scientifically concluded that the gray whale population is presently neither threatened nor endangered, in 1994 the population was removed from the endangered species list, and the population has repopulated to a level that can be harvested by the tribe on a sustainable basis;

Whereas the Tribe sought to restore its ancient tradition of whaling, and took a gray whale in 1999 pursuant to its treaty right;

Whereas the tribe's ability to exercise its treaty rights with respect to such takings are being seriously impaired by the Marine Mammal Protection Act of 1972;

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Whereas the Makah Tribe has been required to apply for a waiver under the Marine Mammal Protection Act of 1972, but the procedures under such Act for obtaining a waiver are burdensome, costly, and contrary to the letter and spirit of the Tribe's treaty rights, and it will take years for the Tribe to obtain a waiver; and

Whereas the National Congress of American Indians adopted Resolution #MOH–04–025 and the Affiliated Tribes of the Northwest Indians adopted Resolution No. 98–35 in full support of the Tribe's treaty rights: Now, therefore, be it

PURPOSE OF THE BILL

The purpose of H. Con. Res. 267 is to express the sense of the Congress upholding the Makah Tribe treaty rights.

BACKGROUND AND NEED FOR LEGISLATION

H. Con. Res. 267 expresses support for upholding the right of the Makah Tribe to hunt whales under the Treaty of Neah Bay. The Tribe is prevented from enjoying its treaty right by a ruling of the Ninth Circuit U.S. Court of Appeals under the Marine Mammal Protection Act. The concurrent resolution is necessary because the federal government has an obligation to honor deals the United States made with Indian tribes under treaties.

During the 19th century, the United States entered into a number of treaties with sovereign tribes in the West. The government's goal was to acquire the tribes' lands to make room for non-Indian settlement and expansion of U.S. territory. These treaties of "cession" usually involved deals under which the tribes gave up significant amounts of land in exchange for reservations under the jurisdiction of the tribe, and for the protection of certain rights. Such rights often included the right of tribal members to hunt and fish in certain areas.

The Makah Tribe resides on westernmost reservation in the United States, on the Olympic Peninsula in the State of Washington. Under the Treaty of Neah Bay of 1855, the Tribe ceded about 300,000 acres of its aboriginal homelands to the United States. Article 4 of the treaty secured whaling rights to the Tribe, the only such American Indian tribe with whaling rights under treaty.

The Tribe hunted gray whales for subsistence until it ceased hunts in the 1920s when the whale population was reduced by commercial whaling. However, gray whales were still hunted until 1946 when an international commercial harvest ban was put into place. Whale populations have rebounded in recent decades and a subsistence quota was approved for the Tribe to harvest up to 20 gray whales from 1998 through 2002, and for 20 whales between 2003 and 2007 (with no more than five allowed to be taken in any one year). The quota is implemented in the U.S. through the Whaling Convention Act.

The Tribe took one gray whale until lawsuits by animal rights activists blocked additional hunts. In 2004, the Ninth Circuit Court of Appeals required the Tribe to seek a waiver under the Marine Mammal Protection Act of 1972 (MMPA) to harvest a whale, irrespective of the Tribe's treaty right.

While the Tribe has not conceded its treaty right, in February 2005 it requested a MMPA waiver from the National Marine Fisheries Service. There is no guarantee the waiver will be granted, leaving the Tribe with costly paperwork, studies and legal burdens that may last years with no certain outcome.

More importantly, the Tribe is being forced to pursue a process that is contrary to its treaty. The precedent set by this decision could affect other treaty rights of other tribes. This is why the National Congress of American Indians (NCAI) and the Affiliated Tribes of Northwest Indians adopted Resolutions #MOH–04–025 and #98–35, respectively, in support of the Makah Tribe treaty rights. The NCAI resolution notes that the MMPA ruling "sets a dangerous precedent that threatens the Treaty hunting and fishing rights of Tribes across the United States and Alaska."

Specifically, H. Con. Res. 267 measure expresses the sense of Congress that requiring the Tribe to adhere to the MMPA waiver process is contrary to the Tribe's treaty. It further expresses that the government should uphold the Tribe's treaty right to hunt gray whales. During the full committee markup of the concurrent resolution, the Chairman offered two amendments. The amendment to the resolving clause clarifies that Congress disapproves of making the Tribe obtain a waiver under the MMPA to pursue its treaty right to hunt gray whales. The underlying text of the concurrent resolution expresses disapproval of an "abrogation" of the Tribe's treaty right. While the word "abrogation" was intended to make a strong statement, it is not an appropriate term to use in the context of treaty rights, and the term is accordingly deleted by the amendment.

The amendment to the preamble makes technical corrections, except for the amendments to the seventh and eighth "whereas" clauses. The seventh and eight clauses are amended to clarify that Congress finds that the Tribe's treaty rights are seriously impaired, not legally abrogated as declared in the underlying resolution.

COMMITTEE ACTION

H. Con. Res. 267 was introduced on October 17, 2005, by Resources Committee Chairman Richard W. Pombo (R–CA). The bill was referred to the Committee on Resources. On October 19, 2005, the Full Resources Committee met to consider the concurrent resolution. Chairman Pombo offered an amendment to the resolving clause to clarify that Congress disapproves of requiring the Makah Tribe to obtain an MMPA waiver. It was adopted by voice vote. Chairman Pombo then offered an amendment to the preamble to make several technical corrections, and to clarify that Congress finds that the Tribe's treaty rights are seriously impaired. It was adopted by voice vote. The concurrent resolution was then ordered favorably reported to the House of Representatives by a roll call vote of 21 to 6, as follows:

COMMITTEE ON RESOURCES
U.S. House of Representatives
109th Congress

Date: October 19, 2005

Convened: 10:00 a.m.
Adjourned: 10:41 a.m.

Meeting on: H.Con.Res. 267, *"Expressing the sense of the Congress upholding the Makah Tribe treaty rights."* - **Ordered favorably reported to the House of Representatives, as amended, by a Roll Call Vote of 21 Yeas, and 6 Nays.**

☐ Attendance ☒ Recorded Vote Vote Number: 22 Total: Yeas 21 Nays 6

	YEA	NAY	PRESENT		YEA	NAY	PRESENT
Mr. Pombo, CA, Chairman	✔			*Mrs. Napolitano, CA*		✔	
Mr. Rahall, WV		✔		Mr. Walden, OR	✔		
Mr. Young, AK				*Mr. Tom Udall, NM*		✔	
Mr. Miller, CA				Mr. Tancredo, CO			
Mr. Saxton, NJ				*Mr. Mark Udall, CO*		✔	
Mr. Markey, MA				Mr. Hayworth, AZ	✔		
Mr. Gallegly, CA				*Mr. Grijalva, AZ*		✔	
Mr. Kildee, MI	✔			Mr. Flake, AZ	✔		
Mr. Duncan, TN	✔			*Mr. Cardoza, CA*			
Mr. DeFazio, OR				Mr. Renzi, AZ	✔		
Mr. Gilchrest, MD	✔			*Ms. Bordallo, Guam*	✔		
Mr. Faleomavaega, AS				Mr. Pearce, NM	✔		
Mr. Calvert, CA	✔			*Ms. Herseth, SD*	✔		
Mr. Abercrombie, HI	✔			Mr. Brown, SC	✔		
Mrs. Cubin, WY				*Mr. Costa, CA*			
Mr. Ortiz, TX				Mrs. Drake, VA	✔		
Mr. Radanovich, CA	✔			*Mr. Melancon, LA*			
Mr. Pallone, NJ				Mr. Fortuño, PR	✔		
Mr. Jones, NC				*Mr. Boren, OK*			
Mrs. Christensen, VI				Miss McMorris, WA	✔		
Mr. Cannon, UT				Mr. Jindal, LA	✔		
Mr. Kind, WI				Mr. Gohmert, TX			
Mr. Peterson, PA				Mrs. Musgrave, CO	✔		
Mr. Inslee, WA		✔		***Vacancy***			
Mr. Gibbons, NV	✔						
				Total	21	6	

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. This is a sense of the Congress resolution and therefore it will have no impact on the federal budget.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. General Performance Goals and Objectives. This bill does not authorize funding and therefore, clause 3(c)(4) of rule XIII of the Rules of the House of Representatives does not apply.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes in existing law.

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