

Resolution No.: 01-12

Date Enacted: January 9, 2012

Subject Matter: Revised Makah Exclusion Act 9.4.10
Emergency Exclusion

RESOLUTION NO. 01 -12 OF THE MAKAH TRIBAL COUNCIL

WHEREAS, the Makah Tribal Council is the governing body of the Makah Indian Tribe of the Makah Indian Reservation in Washington by authority of the Constitution and By-Laws of the Makah Indian Tribe as approved on May 16, 1936 by the Secretary of the Interior; and

WHEREAS, by Resolution 168-03A, dated August 10, 2004, the Makah Tribal Council enacted the Makah Exclusion Act, Title 9 of the Makah Law & Order Code; and

WHEREAS, by Resolution 181-08, dated October 20, 2008, the Makah Tribal Council enacted revisions to the Exclusion Act and Title 9 of the Makah Law and Order Code; and

WHEREAS, by Resolution 118-10, dated October 11, 2010, the Makah Tribal Council enacted the combination of the Exclusion Act and Title 9 of the Makah Law and Order Code; and

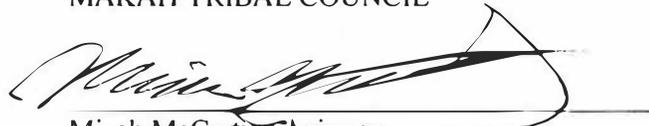
WHEREAS, the Makah Tribal Council finds that Section §9.4.10 Emergency Exclusion requires clarification; and

NOW THEREFORE BE IT RESOLVED that the Makah Tribal Council hereby approves and enacts the amendments to the Makah Law and Order Code, §9.4.10 Emergency Exclusion; and

BE IT FURTHER RESOLVED, that this amendment to the Makah Law and Order Code, §9.4.10 is not intended to change the original intent but rather is intended to clarify and ensure for a process under §9.4.10 Emergency Exclusion; and

BE IT FURTHER RESOLVED that this resolution shall remain in effect until rescinded or superseded by further action of the Makah Tribal Council.

MAKAH TRIBAL COUNCIL



Micah McCarty, Chairman

CERTIFICATION

The foregoing resolution was adopted at a regular meeting held on January 9, 2012, at which time a quorum was present, and the resolution was adopted by a vote of 3 FOR and 0 AGAINST, the Chairman or the Vice-Chairman being authorized to sign the resolution.



Misty J. Smith, Tribal Secretary

EXCLUSION ACT
OF THE
MAKAH INDIAN TRIBE

TITLE 9 OF THE MAKAH LAW & ORDER CODE

October 2010

Amended January 9, 2012

October 2010

TITLE 9: EXCLUSION

CHAPTER 1

Title, Findings, Purpose, and Authority

§ 9.1.01 Title

This Title shall be known as the Exclusion Act of the Makah Indian Tribe, to be codified as Title 9 of the Makah Law and Order Code.

§ 9.1.02 Findings

The Makah Tribal Council finds that the exclusion power of the Makah Tribe is a fundamental attribute of sovereignty inextricably tied to the Tribe's ability to protect the integrity and order of its territory and the health and welfare of its members and other residents of the Reservation. Exclusion is an internal tribal matter over which the Tribe has retained sovereign governmental authority.

The Tribal Council finds that the Tribe has maintained and recognized the Reservation as a defined geographical and political territory in which nearly all of the land is held in trust by the United States for the Tribe or individual Indian members of the Tribe. The territorial integrity of the Reservation and its status has been recognized by all three branches of the federal

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Law & Order Code
Enacted 2/27/80, Resolution 52-89
Amended 8/10/01, Resolution 168-03A
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Amended 01/09/12, Resolution 01-12

government since the creation of the Reservation in 1855. The conduct of nonmembers within the Reservation may threaten or affect the health and welfare of the Tribe and its members. The exercise of the Tribe's exclusion powers is necessary to protect tribal self-government and to prevent conduct that threatens or has a direct effect on the political integrity, economic security, or the health or welfare of the Tribe or its members.

The Tribal Council finds that the exercise of the Tribe's exclusion authority is an exercise of its tribal judicial authority as well as a political act of the Tribe for the purpose of asserting territorial control over the Makah Reservation. Exclusion is a reasonable and necessary means to maintain tribal political and territorial integrity as well as law and order within the Reservation, and the health and welfare of the Tribe and its members. The inherent sovereign exclusion authority of Indian tribes has been repeatedly recognized and reaffirmed by the United States Supreme Court, the Congress, and the Executive Branch of the United States government

The Tribal Council recognizes that the assertion of tribal governmental authority over all persons must include consideration of and respect for individual rights and freedoms that may be affected by tribal governmental action, including providing due process and the other civil rights provisions of the Indian Civil Rights Act, 25 U.S.C. 1301, *et seq.*, and parallel provisions of the Makah Constitution.

The Tribal Council recognizes that the exercise of the exclusion power necessarily involves an assertion of authority and jurisdiction over persons who may not directly participate

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in the internal political processes of the Tribe. However, the exercise of governmental authority over such persons is not unusual or unprecedented and, in fact, is quite common given the mobility of modern society. The Tribal Council recognizes that even though, under existing tribal law, nonmembers of the Tribe may not participate formally and directly in the political processes of the Tribe or hold tribal office, as citizens of the United States and the state within which they reside, nonmembers have direct and meaningful access to and participation in federal and state political processes which bear upon and influence the tribal-state and tribal-federal relationships.

The Tribal Council finds that enactment of this tribal exclusion law, which provides for judicial exclusion of nonmembers from the Makah Reservation, is necessary and appropriate and affords due recognition and respect of the individual rights and freedoms of all persons who come within the territory of the Makah Indian Tribe.

§ 9.1.03 Purpose

Nonmembers of the Makah Tribe are guests of the Tribe while within the Reservation. When nonmembers act in disregard of tribal law, destroying tribal fish and game, desecrating cultural properties, trespassing upon tribal property, polluting tribal lands and waters, illegally manufacturing and dealing and using controlled substances and other illegal drugs, destroying real and personal property of the Tribe and its members, or otherwise acting in a manner that is harmful to the political integrity, economic security, and health and welfare of the Tribe and its

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members and all other persons within the Reservation, it becomes necessary for the Tribe to assert its inherent authority to exclude such nonmembers from the Reservation or to determine conditions upon which they may remain. It is the purpose of this Title to provide grounds and procedures for exclusion, including expulsion, of nonmembers from the Reservation consistent with fundamental principles of due process and individual rights and freedoms.

§ 9.1.04 Authority

This Title is adopted under the authority of article VI, section 1(g), (i), and (j) of the Constitution and Bylaws of the Makah Indian Tribe, approved by the Secretary of the Interior on May 16, 1936. Article VI, section 1(g), explicitly empowers the Tribal Council to exclude from the territory of the Tribe persons not legally entitled to reside thereon, or trespassers upon the Reservation, under ordinances subject to review by the Secretary of the Interior. The authority to exclude nonmembers from the Reservation and territory of the Makah Tribe is an inherent sovereign power of the Tribe recognized in article 2 of the Treaty with the Makah of January 31, 1855 (12 Stat. 939). The exclusion power of the Tribe is also recognized and delegated to the Tribe by the United States pursuant to the laws and acts of the executive and legislative branches of the federal government, including, without limit, the Treaty of 1855 and the Constitution and Bylaws of the Makah Indian Tribe, approved by the Secretary of the Interior pursuant to the Indian Reorganization Act of 1934.

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CHAPTER 2

DEFINITIONS

§ 9.2.01 Nonmember

"Nonmember," or "nonmember of the Tribe," as used in this Title, means any person whose name at the time of the incident or action that is the ground for exclusion was not included on the official rolls of the Makah Indian Tribe as an enrolled member of the Tribe, regardless of Indian or Makah blood quantum and regardless of any other indicia of tribal membership or Indian status.

§ 9.2.02 Reservation

"Reservation," as used in this Title, means and includes all lands within the Makah Indian Reservation as reserved by the Tribe in the Treaty with the Makah of January 31, 1855 (12 Stat. 939), as now or hereafter enlarged, extended, or otherwise modified by executive order, act of Congress, proclamation or declaration by the Secretary of the Interior or other authorized federal official, or in any other manner, notwithstanding the issuance of any patent, and, including rights-of-way running through the Reservation.

§ 9.2.03 State Law

"State Law" refers to the laws of the fifty United States, unless Washington State law is expressly stated.

§ 9.2.04 Tribal Council

"Tribal Council" and "Council" as used in this Title, shall mean the governing body of the Makah Indian Tribe, known as the Makah Indian Tribal Council, which is organized pursuant to article III of the Constitution and Bylaws of the Makah Indian Tribe.

§ 9.2.05 Tribal Court

"Tribal Court" and "Court," as used in this Title, shall mean the Tribal Court of the Makah Indian Tribe established by the Tribal Council under article VI, section 1(i), of the Constitution and Bylaws of the Makah Indian Tribe.

§ 9.2.06 Tribe

"Tribe" and "tribal," as used in this Title, mean and refer to the Makah Indian Tribe.

CHAPTER 3

GROUNDS FOR EXCLUSION

§ 9.3.01 Who May Be Excluded

A nonmember of the Tribe may be excluded from the Reservation.

§ 9.3.02 Grounds for Exclusion

A nonmember of the Tribe may be excluded from the Reservation on one or more of the following grounds:

- (1) Entering or remaining on any tribal or trust land in violation of a lawful order, resolution, court order, or official action of the Tribal Council designating such area as closed because of health, safety, or fire hazard or any other reason that may endanger the health, safety, or welfare of the Tribe, its members, or other persons within the Reservation.
- (2) Failing or refusing to pay any tax, rent, or other fee charged legally due and owing to the Tribe or any tribal entity, after reasonable notice and opportunity to pay.
- (3) Cutting or removing any timber or vegetation, or intentionally removing or damaging any flora or fauna, mining, beachcombing, or other use, abuse, or damage to tribal or Indian property without prior express authorization from the Tribe, the Indian landowner, or where required under federal law, the Secretary of the Interior.

- (4) Committing any intentional act causing physical loss or damage of any nature to property of the Tribe, or the person or property of any tribal member or any resident of the Reservation, regardless of whether said act is punishable by applicable criminal laws.
 - (5) Committing any act within the Reservation that would be a felony crime, as defined by state law, punishable by imprisonment for one year or more, regardless whether criminal charges have been brought for such act.
 - (6) Committing any act within the Reservation that would be a Class AA or Class A crime under tribal law, regardless whether criminal charges have been brought for such act.
 - (7) Conviction for any felony crime, as defined by state or federal law, whether committed within or off the Reservation.
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- (8) Conviction for any crime defined as a "major crime" under 18 U.S.C. § 1153, any federal felony involving violence or physical harm to any person, any federal felony involving theft or dishonesty, whether committed within or off the Reservation.
 - (9) Using, possessing, manufacturing, or selling within the Reservation any narcotic, drug, or controlled substance in violation of tribal, federal, or Washington state law, regardless whether criminal charges have been brought.
 - (10) Entering and remaining upon the Reservation with no settled, legal habitation, place of residence, or domicile within the Reservation, no job or other legal

means of support, and who, by virtue of such condition, disrupts the public peace or causes a public nuisance or disorderly conduct under tribal law or the common law.

- (11) Trading or conducting business within the Reservation in violation of tribal or federal law.
- (12) Failing to pay any tribal member reasonable compensation for labor or service within the Reservation of any nature done at the request of the nonmember. For purposes of this Act, there shall be irrefutable presumption that any oral or written agreement as to the amount of compensation shall be deemed reasonable compensation.
- (13) Hunting, fishing, beachcombing, or gathering without lawful authority or prior express permission of the Tribe or individual Indian landowner, or in violation of tribal or federal law.
- (14) Unauthorized taking or removal of any Indian or tribal property of any form from the Reservation.
- (15) Exploring or excavating items, sites, or locations of historic, religious, cultural, or scientific significance within the Reservation without the lawful authority or permission of the Tribe or Indian landowner, or in violation of tribal or federal law.
- (16) Failing to obey any lawful order of the Tribal Court or any lawful order, resolution, ordinance, or regulation promulgated by the Tribal Council.

(17) Any violation of this Code or any ordinance or regulation of the Tribe.

(18) Breach of the peace.

One act or series of acts may constitute a violation of more than one of the above grounds.

CHAPTER 4

Procedure

§ 9.4.01 General Procedure

Exclusion may be ordered only by the Makah Tribal Court on the petition of the Tribal Prosecutor or Special Counsel brought on the instruction of the Tribal Council. The following procedures shall govern the exclusion process. The Tribal Police, or any member of the Tribe, may make a request for exclusion. The request for exclusion must be in writing, state the facts supporting exclusion, and be delivered to the Tribal Prosecutor. Upon receipt of such written request, the Prosecutor shall investigate whether there are adequate grounds for exclusion. Upon completion of the investigation, the Prosecutor shall draft and submit to the Tribal Council a report that includes: (a) a copy of the initial request for exclusion; (b) a summary of the Prosecutor's factual investigation and results thereof; and (c) the Prosecutor's legal analysis and conclusion on whether there are adequate grounds for exclusion under Section 9.2.02 of this Code. After review of the Prosecutor's report, the Tribal Council will determine whether to direct the Prosecutor or the Tribe's legal counsel to petition the Court. If a majority of a quorum of the Council, by affirmative vote, determines that exclusion is appropriate, it will direct the Prosecutor or Special Counsel to begin exclusion proceedings under the procedures set forth below.

§ 9.4.02 Notice of Proposed Exclusion

Within five days following the Tribal Council's decision to proceed with exclusion, the Tribal Prosecutor or Special Counsel shall file a Petition for Exclusion with the Tribal Court and shall cause notice to be served personally or by certified mail upon the person that is to be

excluded. The notice shall state the reason for the proposed exclusion and shall state a time and place at which the nonmember may appear before the Court to show cause why he should not be excluded from the Reservation.

The hearing shall be held between ten and thirty calendar days after the time of service or mailing, whichever is later, provided that if the Judge has reasonable cause to believe that an emergency exists, and the notice so states, the hearing may be held after 24 hours from the time of service or mailing, whichever is later.

§ 9.4.03 Hearing on Exclusion Before Tribal Court

At the time set forth in the notice, the Court shall hold a hearing to decide whether a preponderance of the evidence shows that the nonmember should be excluded from the Reservation. The nonmember shall be given an opportunity to present his defense at the hearing and may be represented by counsel. After the hearing, or after the time set for the hearing if the nonmember does not appear, the Court may order him excluded from the Reservation or may permit him to remain upon the Reservation on such conditions as the Court sees fit to impose. An order of exclusion shall remain in force until revoked by the Court, unless the order specifically provides otherwise.

§ 9.4.04 Standard of Proof

The standard of proof to be applied by the Tribal Court in an exclusion proceeding shall be a preponderance of the evidence.

Where a ground for exclusion under § 9.3.02 requires conviction for the commission of certain crimes, such element may be established by filing with the Tribal Court a certified copy

of a final adjudication of guilt by a court of competent jurisdiction recognized by the Tribal Court. All other grounds for exclusion shall be established by the Tribe by a preponderance of the evidence presented at the exclusion hearing. Such evidence must be both relevant and trustworthy.

§ 9.4.05 Findings of Fact and Conclusions of Law

Following the exclusion hearing, the Tribal Court judge shall prepare and sign written findings of fact and conclusions of law that establish and support the Court's determination. The findings of fact shall separately state each and every fact relied upon by the Court to support the stated grounds for exclusion under this Title. Such findings of fact and conclusions of law shall be implemented by an appropriate written order of the Court.

§ 9.4.06 Failure to Appear, Continuance

At the request of the nonmember, the Tribe, or on its own motion, the Tribal Court may, in its discretion, grant a continuance of the hearing.

If the nonmember, after being duly served with notice, fails to appear at the hearing without having been excused by the Court prior to the hearing, the Court shall determine whether sufficient facts exist to exclude. If the Court finds that sufficient facts exist to exclude, by testimony or other evidence, the Court shall prepare written findings and conclusions as set forth in § 9.4.08 and order the non-member excluded.

§ 9.4.07 Temporary or Permanent Exclusion Orders

An exclusion order of the Tribal Court may provide for temporary or permanent exclusion depending upon the seriousness of the ground(s) for exclusion.

Temporary exclusion shall be ordered by the Court for any finding that the nonmember's conduct violated § 9.3.02 of this Title. The duration of exclusion is at the sole discretion of the Tribal Court based on the duration and seriousness of the violation, except as provided below.

Mandatory five (5) year exclusion shall be ordered by the Tribal Court if the nonmember is found to have violated § 9.3.02(5) through (9) of this Title. For a second violation of any such grounds, exclusion shall be permanent.

Permanent exclusion shall be ordered by the Court only in extreme circumstances involving a single serious or repeated acts adversely affecting or threatening the life, health, property, safety or well-being of the Tribe, its members, or other persons, within the Reservation; or demonstrating a lack of respect or contempt toward the Reservation community, tribal treaty or other rights, the tribal government, its agencies, departments, officers and employees, or the Tribe and its members as a whole.

§ 9.4.08 Conditional Exclusion Orders

If the Tribal Court determines not to exclude the nonmember, the Court may impose conditions upon such nonmember's continued presence within the Reservation. Such conditions may include, but shall not be limited to: payment of all taxes, interest, and penalties owed to the Tribe; payment of restitution to any person or to the Tribe for damage or injury caused by the nonmember; performance of community labor; or payment of a civil fine not to exceed \$500.

Any civil fine levied and paid under any exclusion order shall not be construed as a criminal penalty, but shall be for the purpose of defraying the costs of enforcement of this Title and protecting the health, safety, and welfare of all persons within the Reservation, and property within the Reservation.

Any violation of a conditional exclusion order shall result in immediate exclusion under a writ of exclusion under § 9.4.09, as the Tribal Court may deem just and proper.

§ 9.4.09 Writ of Exclusion -- Enforcement of Order of Exclusion

If any nonmember ordered excluded from the Reservation by the Tribal Court does not promptly and fully obey an exclusion order of the Court, and upon presentment of sufficient evidence of the same, the Tribal Court shall issue a written writ of exclusion, which shall order any police officer to:

- (a) remove the nonmember and any of his or her property from the Reservation, at the nonmember's expense, and
- (b) prevent the re-entry of the nonmember onto the Reservation.

Any police officer executing a writ of exclusion shall use only so much force as is necessary to effect removal or prevent re-entry. The Tribal Council, the tribal police, or the tribal prosecutor may also refer the matter to the appropriate state or federal jurisdiction.

§ 9.4.10 Emergency Exclusion

In cases posing an immediate and serious danger or threat to the life, health, property or well-being of the Tribe, its members, or other persons or where delay would result in irreparable

damage or harm to the Tribe, its members, or other persons, the Tribal Court, in lieu of a hearing as provided by § 9.3.03 of this Title, may issue an emergency writ of exclusion without a hearing. A request for an Emergency Write of Exclusion may be submitted to the Court by the Tribal Prosecutor, who shall provide notice of such action to the General Manager and the Tribal Council as soon as practical.

The Emergency Writ of exclusion shall order any police officer immediately to remove the nonmember and any of his or her property from the Makah Reservation. The Tribal Court shall provide a separate written decision setting forth findings of fact and conclusions of law supporting the decision to execute an emergency writ of exclusion.

The police officer executing the emergency writ shall use only such force as is necessary to effect the removal. If the service of the notice provided for in § 9.3.02 of this Title has not already been made on the nonmember, the Tribal Court shall order the police officer to serve the notice upon the nonmember at the time of removal, concurrent with the writ of exclusion. An emergency writ of exclusion shall remain in force until revoked or vacated by the Tribal Court or until the hearing provided for in § 9.3.03 of this Title, whichever occurs first. .

A nonmember subject to an emergency writ of exclusion shall be notified by the Court of the time and manner in which he or she may re-enter the Reservation in the company of a tribal police officer for the purpose of attending an exclusion hearing before the Court. The nonmember must be accompanied by a tribal police officer at all times during his or her presence within the Reservation.

§ 9.4.11 Petition for Reentry

An excluded person may at any time petition the Tribal Court to vacate the order of exclusion. The Court may, but need not, hold a hearing to rule on the petition.

§ 9.4.12 Finality of Exclusion Order

All exclusion orders shall remain in effect unless revoked or modified by the Tribal Court. A Tribal Court order of exclusion shall be final for purposes of appeal on the date of issuance. Any person excluded by an order of the Tribal Court may apply to the Tribal Court to have the order modified or vacated at such time as the order provides, or if the order makes no such provision, within ten (10) calendar days of the order. All exclusion orders shall remain in effect by their terms, unless and until reversed or stayed by the Makah Tribal Court of Appeals or revoked or modified by the Tribal Court. The filing of a motion to modify or vacate the order, or the filing of a notice of appeal pursuant to § 9.5.01 of this Title shall not automatically stay the exclusion order.

CHAPTER 5

Exclusion Appeals

§ 9.5.01 Appeal to Makah Tribal Court of Appeals

An appeal of a final Exclusion Order to the Makah Tribal Court of Appeals shall be governed by the provisions of Title 1, Chapter 9 Appellate Proceedings and the tribal Rules of Appellate Procedures adopted pursuant to Title 1, Chapter 9 of this Code.

§ 9.5.02 Stay of Execution

An Exclusion Order is not automatically stayed by filing an appeal. Any party may seek a stay of execution of the exclusion order. A stay may be granted in the discretion of the Makah Tribal Court of Appeals upon receipt of a formal written request. If the stay is granted, the exclusion order shall not be executed unless and until affirmed by the Makah Tribal Court of Appeals.

§ 9.5.03 No Further Appeals or Review

The decision of the Exclusion Makah Tribal Court of Appeals is final and unreviewable.

CHAPTER 6

Severability

§ 9.6.01 Severability

The provisions of this Title are severable such that if any provision of this Title or its application to any person or circumstance is declared invalid by a court of competent jurisdiction, the remainder of this Title, or the application of the provision to other persons or circumstances, shall continue to be valid and enforceable.

§ 9.6.02 No Limitation on Exclusion Authority

Nothing in this Title shall be construed to limit the authority of the Tribal Court to impose, pursuant to applicable tribal law, the remedy of exclusion where such remedy is authorized by any other provision of the Makah Law and Order Code, tribal law or ordinance, rule of court, or other tribal enactment.

§ 9.6.03 Criminal Jurisdiction Not Effected

Nothing in this Title shall be construed to limit the inherent sovereign authority of the Makah Indian Tribe to prosecute persons who commit crimes or offenses, including criminal contempt.