Annex 9

THE CROWN RIGHT TO WHALES

Introduction

1. The purpose of this paper is to provide background about the right of the Crown in Scotland to certain larger whales. The nature of this ancient Crown right in Scotland is archaic, but of continuing relevance due to the increasing number of whales stranded on the Scottish coast.

2. A statement by the CEC in 2005 listing its interests in Scotland included the Crown right to whales. However, the Crown right which the CEC described in the statement was not the right of the Crown in Scotland, but a right of the Crown under English law in the rest of the UK. The CEC was also mistaken in claiming even the correct right as part of the Crown Estate in Scotland because, as explained in this paper, responsibility for the administration of the right of the Crown in Scotland to certain whales is devolved to the Scottish Executive.

Whales in Scottish Waters

3. There was commercial whaling in Scotland’s territorial sea during the first half of the 20th century. A Norwegian owned whaling operation was established in 1903 at Loch Tarbert, Harris, and carried out whaling around the Western and Northern Isles during 1904-28 and then briefly in 1950-1.

4. During the first 25 year period, they caught over 8,000 large whales. They included (with average species length in brackets) 395 blue whales (22-30 metres), over 6000 fin (18-25 m) and 2,000 sei (12-18m) whales with smaller numbers of sperm (15-18 m), humpback (11-16 m) and northern right (14-18 m) whales.

5. There has been a statutory ban on whaling in Scotland’s territorial sea for several decades.

6. The Natural History Museum, London, has been recording whales, dolphins and porpoises (i.e. cetaceans) stranded on the UK coastline for more than a hundred years. The number of strandings has increase significantly in recent years, more or less doubling in the period 1994-2004. The attached table shows the number of strandings on the Scottish coast in 2000-2005.

7. The table shows that there are now over 200 recorded strandings a year in Scotland. In a significant number of instances, the dead whales have to be cleared from the shore in the interests of public and environmental health. The normal option is to remove them to landfill. This can prove an expensive operation, depending on the size and location of the dead whale.

8. A recent example was a dead sperm whale on the west coast of Harris in the first week of March 2006. It was 48 foot long (14.5 m) and weighed 48 tonnes. It cost c.£14K to remove

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1 “Crown Estate Interests in Scotland” CEC, October 2005
2 Average lengths from Field Guide to Mammals of Britain and Europe F.H Van Den Brink (Collins 1967)
3 Catch data: “The Marine Environment: Cetaceans” SNH Information Note 2004;
4 for example, the Wildlife and Countryside Act 1981 provides for the protection of all cetaceans found in UK territorial waters (section 9) and the Fisheries Act 1981.
to landfill, with the costs shared more or less equally between getting it to the landfill site and the landfill tax\(^1\). In April, there was a 60 foot long, 60 tonnes Fin whale at Borgue in Kirkcudbrightshire\(^2\).

9. ‘Mass strandings’ are likely to be more expensive, for example, the six sperm whales that stranded in Cruden Bay, Aberdeenshire, in January 1996 cost £30K to clear.

**The Crown Right**

10. One of the ancient rights of the Crown in Scotland, part of the *regalia minora*, is the right to large whales. This right has traditionally been described as the right to “great fish”\(^3\).

11. These whales are also often described as “royal fish”. This is because the Crown’s right is to the whales themselves and not as with other species (i.e. salmon, oysters, mussels), the right to take (i.e. hunt, collect, harvest,...) the species.

12. This right of the Crown in Scotland dates from medieval times and is thought to have originated with stranded whales, as reflected in the right to the whales themselves – a right of first claim.

13. This ancient right of the Crown in Scotland in Scots law is entirely separate from an equivalent held by the Crown in English law, where an Act in 1324 granted the Crown all rights to cetaceans stranded on or caught in the waters of England and Wales.

14. In England and Wales, the Crown gifted its right to others in specific areas including the Duchy of Cornwall and various Lords of the Manor. No incidences of this seem noted in Scotland.

15. The Crown's right in England and Wales is to all cetaceans (whales, dolphins and porpoises), while the right of the Crown in Scotland is only to larger whales:- “*according to the Law of Scotland: “whales, when large, belong to the Sovereign; when small, to the captors*”\(^4\)

16. The right is also traditionally described in Scotland as “*all large whales, other than the Bottle-nosed and caa'ing species*”\(^5\) However, it is not clear in other respects what species or size of whales are involved.

17. The suggestion is made that a whale counted as a large whale if it was “*too large to be drawn to land by a wain pulled by six oxen*”\(^6\). However, the origin of this is not known and it does not sound like a prescription in Scots law.

18. The question of which whales should or should not be claimed on behalf of the Crown became an issue in October 1927, when 168 false killer whales were stranded near Dornoch. As a result, it was decided that the exceptions to the category of whales belonging to the Crown in Scotland would:

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\(^1\) Information from Comhairle nan Eilean Siar
\(^2\) Scottish Farmer 8\(^{th}\) April 2006
\(^3\) Scottish Land Law Wm. Gordon (Green & Co, 1989)
\(^4\) Instruction to the Receivers of Wrecks “Fishes Royal” 1929 (supplied Maritime and Coastguard Agency April 2006)
\(^5\) as note 1: Presumed to be the North Atlantic Bottle-nosed whale (average length 7 – 9.5 metres) and the long finned Pilot Whale (4 – 8.5 m); “caa” means in Scots *the driving of whales into shallow water; a drove of whales’ Chambers Scots Dictionary 1975.*
\(^6\) e.g. Scottish Executive (Nov 1995) “Royal Fish: Guidance for dealing with stranded Royal Fish (e.g. whales over 25’) in Scotland” http://www.scotland.gov.uk/Topics/Environment/Wildlife-Habitats/19887/royalfishguidance
“be more clearly expressed to include, in addition to Bottle-nosed and caa’ing species, any whale (whatever species) of a length of less than 25 feet. Measurements should be taken from the snout or beak to the middle of the tail”\(^1\).

19. The “25 feet rule” is still applied now. The question of whether the Crown’s right in Scotland also applies to whales taken by others in Scotland’s territorial seas\(^2\), is potentially not relevant while whaling is banned in Scotland’s seas\(^3\).

**Administration of the Right**

20. There has been a long association between wrecks and stranded whales in public administration. The right to wrecks in Scotland’s territorial seas is also an ancient right of the Crown in Scotland and part of the *regalia minora*. However, the right has been administered on a UK wide basis with the equivalent Crown right in the rest of UK waters since at least the Merchant Shipping Act 1854, when wrecks became the responsibility of the Receiver of Wreck.

21. In England and Wales, the Crown’s right to wreck and royal fish seem to have always been managed together because they occur together in the statute of 1324 which states “…also, the King shall have (wreck of the sea) throughout the realm, whales and great sturgeons taken in the sea or elsewhere, except in certain places privileged by the Crown”\(^4\).

22. While whales are not mentioned in the Merchant Shipping legislation, Scotland’s Crown right to whales was also managed by the Receiver of Wreck from 1854. In 1993, the role of the Receiver of Wreck was centralised and moved from HM Custom and Excise to what is now the Maritime and Coastguard Agency (MCA).

23. At devolution, the administration of the Merchant Shipping Act 1995 was a reserved function under the Scotland Act 1998. The Receiver of Wreck is therefore still responsible for administering wreck matters in Scotland as well as the rest of the UK. However, the Merchant Shipping Act does not mention the administration of the Crown rights to royal fish\(^5\). As a result, the right of the Crown in Scotland to larger whales was not a reserved function and passed to the Scottish Executive and is now administered by the Environment and Rural Affairs Department (SEERAD) (Marine Management Division)\(^6\).

**Crown Liability**

24. The Receiver of Wreck has long recognised a liability to pay for the burial or other disposal of whales claimed by the Crown in certain circumstances where disposal is necessary\(^7\) and arrangements have been in place for the local authorities to be refunded for the costs of some disposals\(^8\).

25. During the pre-devolution period, 1993-1999, the Receiver of Wreck made 14 payments for the disposal of 29 stranded whales of 25’ or more in Scotland (see attached Table 7). The

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\(^1\) Decided by the Board of Trade who administered the right at the time and issued an instruction to this end on 5\(^{th}\) March 1929. (MCA papers April 2006)

\(^2\) Scottish Land Law op cit

\(^3\) the position regarding the Crown’s right with the whaling in Scottish waters during the 20\(^{th}\) century has not been investigated.

\(^4\) MCA papers 10\(^{th}\) April 2006

\(^5\) The Crown’s right is a prerogative right and not mentioned in any legislation

\(^6\) “Guidance…” op.cit

\(^7\) for example, in papers introducing the 25’ rule in 1929 (cited above)

\(^8\) The arrangements in England and Wales only apply to whales stranded on Crown or public foreshore and do not cover Council staff time, only the costs of equipment, contractors, landfill etc on proposals agreed in advance.
total amount of the payments was £121,128. While this gives an average of £8,650 per incident, half the overall total was paid for two incidents that involved more than one whale.

26. Since devolution, SEERAD provides financial assistance with disposals at its discretion. In the period 2000-06, the Scottish Executive made payments for the disposal of 36 whales of 25’ or more totaling £110,000 (Table 7). The re-fund can be for 100% of the local authority’s costs if the disposal proposal is agreed in advance.

Recording Scheme

27. The Natural History Museum (NHM) in London started recording stranded whales in the late 19th century. In 1913, the NHM reached an Agreement with the Board of Trade over stranded whales. The Board of Trade was responsible for administering the Crown rights through the Receiver of Wreck.

28. The Receiver of Wreck does not now have a copy of the Agreement. However, the understanding is “that this agreement simply allows that the NHM will be informed in the event of a stranding and will have right to first refusal for educational / scientific purposes.”

29. In England, the nature of the Crown’s right means the agreement applies to all cetaceans, while in Scotland it only covers whales larger than 25’. When that rule was introduced in 1929, the Board of Trade was concerned that the NHM’s interest in any stranded whales less than 25’ in Scotland, should not result in the Receiver of Wreck ending up liable for its disposal.

30. Following the international “Agreement on the Conservation of Small Cetaceans of the Baltic and North Sea” (ASCOBANS) in 1991, the monitoring and recording of stranded whales in the UK has been funded by the UK Department of Environment, Food and Rural Affairs (DEFRA) as the UK Cetaceans Strandings Investigation Project. DEFRA contracts the Institute of Zoology (IOZ), the NHM and Scottish Agricultural College (SAC).

31. SAC’s first contract was in 1992 and having a co-ordinator in Scotland produced an immediate and substantial increase in the records from Scotland, as previously all records had to be supplied to London. The project co-ordinator for Scottish strandings is based at the Scottish Agricultural College in Inverness. Virtually all Scottish records go through the SAC co-ordinator and there is a separate Scottish database and tissue store. The UK records are collated at the NHM and copied to the National Museums of Scotland. The results are also publicly available. Information is supplied to Scottish Natural Heritage (SNH) if requested.

Issues

(i) CEC Position

32. The CEC include in their list of Crown Estate Interests in Scotland “the right to whales, porpoises, dolphins and sturgeon caught in territorial waters”. This appears wrong as:

1 MCA papers April 2006
2 See SEERAD guidance at http://www.scotland.gov.uk/Topics/Environment/Wildlife-Habitats/19887/royalfishguidance
3 see “Guidance…” (op.cit.)
4 MCA 10th April 2006
5 DEFRA was the Department of Environment when the funding first started.
6 Initially DEFRA funded each body separately. The last contract was to the NHM and SAC and the IOZ subcontracted to them. The current contract is to IOZ which has separate sub-contracts with the NHM and SAC.
7 CEC 19th October 2005
the right quoted is the right of the Crown in England and Wales and not the right of the
Crown in Scotland;
− the Crown right in Scotland, while an extant right, is not part of the Crown Estate in
Scotland.

33. The CEC acknowledges that it has no part in managing the right. The right can not
therefore be part of the Crown Estate, as that is defined simply as “the property rights and
interests under the management of the Commissioners”.

34. As has been noted, if the CEC is claiming the right, the CEC might be expected to pay the
Scottish Executive’s costs administering the right.

(ii) Scottish Interest

34. The right of the Crown in Scotland to larger whales is interesting in this context because it is
not part of the Crown Estate. The right has not only always belonged in Scotland, but since
devolution it has also been administered in Scotland by the Scottish Executive.

35. This raises the question of why other such property rights of the Crown in Scotland that do
still form part of the Crown Estate in Scotland, are not administered in Scotland? Obvious
examples in this Report are the rights of the Crown in Scotland to naturally occurring oysters
and mussels. These could also be managed in Scotland by SEERAD’s Marine Division as
with the Crown right to whales.

36. At the same time, there is also the situation where:
− the Scottish Executive is administering one of the Crown in Scotland’s ancient marine
right and the Executive’s costs of administering the right are only likely to get greater;
− none of the substantial net income from other ancient marine rights of the Crown in
Scotland contributes to these costs, as the rights are still administered by the CEC.

(iii) Scottish Administration

37. The Scottish Executive has been successfully managing the Crown right to whales for over
six years and has published Guidance on dealing with stranded whales.

38. There is some scope for the Guidance to refine its representation of the nature of the
Crown’s right in Scotland and it might be more helpful to refer to the Board of Trade’s 1929
25 feet rule than the suspect ‘wain and oxen’. The label ‘Royal Fish’ is also archaic.

39. The 25’ rule is also simply that - a rule. It is a pragmatic decision made by the Board of
Trade nearly 80 years ago, not a law. It provides an arbitrary cut off for the local authorities
between no re-fund at all and possibly a 100% re-fund. Table 6 suggests, for example, that
a more rational cut off might be 10 or 20 feet.

40. Local authorities might consider that, while SEERAD claims that it “has no legal obligation to
assist with the costs of disposal of ‘Royal Fish’, it is time to review the 25’ rule as the

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1   CEC 6th July 2006
2   Crown Estate Act 1961 Section 1(1)
3   MCA April 2006
4   http://www.scotland.gov.uk/Topics/Environment/Wildlife-Habitats/19887/royalfishguidance
5   in considering whether dolphins are covered by the Crown right, the only members of the dolphin family
(Delphinidae) likely to reach 25’ are both known as whales – killer and pilot.
6   Guidance op cit,
number of stranded cetaceans increases in absolute terms and the proportion requiring removal increases due to stricter public and environmental regulations. It might also be more appropriate to consider an arrangement where it was the cost of an agreed disposal that provided the threshold for Scottish Executive assistance rather than the length of the whale.

41. More generally, there seems scope for the Scottish Parliament to abolish the Crown in Scotland’s archaic property right in certain whales in Scotland as part of land law reform and to deal with all such matters under the Parliament’s wildlife legislation.

42. There is also scope to bring the recording scheme more into line with devolution without undermining the role of the NHM in co-ordinated UK results. The 1913 Agreement between the Board of Trade and NHM might, for example, be replaced by a modern agreement between the Scottish Executive and SAC as the parties responsible for the right and the recording in Scotland.

43. The role of SAC in managing the system of recording in Scotland, including the Scottish database and tissue store, might also be expected to become managed by the Scottish Executive. Scotland is likely to continue to want to have such a scheme, but the funding by DEFRA through the Institute of Zoology might be considered insecure. The Scottish Executive Marine Management Division have already responded to a cut in DEFRA funding to SAC for necropsies, by providing some funding to maintain a higher level of these post-mortems.¹.

44. More generally, the Scottish Executive might integrate the monitoring and recording of stranded whales by SAC under SNH as the Executive’s existing lead agency for other matters related to free-living whales. The recording scheme could have better coverage if SNH Area staff were more directly involved.

¹ Information from Scottish Co-ordinator, SAC (September 2006)
Table 6
The Number of Stranded Cetaceans Record
for the Scottish Coast 2000-2005

(i) Totals 2000-2005

<table>
<thead>
<tr>
<th></th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>Overall Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>UK Strandings</td>
<td>421</td>
<td>549</td>
<td>655</td>
<td>774</td>
<td>799</td>
<td>699</td>
<td>3897</td>
</tr>
<tr>
<td>Scottish Strandings</td>
<td>139</td>
<td>135</td>
<td>130</td>
<td>150</td>
<td>166</td>
<td>226</td>
<td>946</td>
</tr>
<tr>
<td>Scottish as % of UK</td>
<td>33%</td>
<td>25%</td>
<td>20%</td>
<td>19%</td>
<td>20%</td>
<td>32%</td>
<td>24%</td>
</tr>
</tbody>
</table>

Notes
(a) The strandings are essentially of dead whales. Live strandings are "a tiny percentage of the annual total. The successful rescues are usually of the smaller cetaceans (dolphin, porpoise, etc)." (i.e. 2-3 metres in length)
(b) The Museum’s "data show that most of the larger species of cetaceans are both sighted and stranded on the Scottish coast". "The greater numbers of cetacean strandings in the rest of the UK are due to large numbers of common dolphins and porpoises, which make up the bulk of numbers recorded each year"
(c) The Highlands and Islands account for half the total length of the UK’s coastline and strandings in the region are thought to be very significantly under-recorded due to remoteness and the limited number of observers.

(ii) Size Categories 2000-2005

<table>
<thead>
<tr>
<th>Range (feet)</th>
<th>Total</th>
<th>Species &gt;25'</th>
</tr>
</thead>
<tbody>
<tr>
<td>0’ to &lt;5’</td>
<td>368</td>
<td></td>
</tr>
<tr>
<td>&gt;5’ to &lt;10’</td>
<td>219</td>
<td></td>
</tr>
<tr>
<td>&gt;10’ to &lt;15’</td>
<td>46</td>
<td></td>
</tr>
<tr>
<td>&gt;15’ to &lt;20’</td>
<td>37</td>
<td></td>
</tr>
<tr>
<td>&gt;20’ to &lt;25’</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>&gt;25’ to &lt;30’</td>
<td>13</td>
<td>11 Minke</td>
</tr>
<tr>
<td>&gt;30’ to &lt;35’</td>
<td>3</td>
<td>2 Minke, 1 Sperm</td>
</tr>
<tr>
<td>&gt;35’ to &lt;40’</td>
<td>4</td>
<td>4 Sperm</td>
</tr>
<tr>
<td>&gt;40’ to &lt;45’</td>
<td>6</td>
<td>5 Sperm, 1 Humpback</td>
</tr>
<tr>
<td>&gt;45’ to &lt;50’</td>
<td>3</td>
<td>3 Sperm</td>
</tr>
<tr>
<td>&gt;50’ to &lt;55’</td>
<td>3</td>
<td>3 Sperm</td>
</tr>
<tr>
<td>&gt;55’ to &lt;60’</td>
<td>2</td>
<td>2 Fin</td>
</tr>
<tr>
<td>total</td>
<td>719</td>
<td></td>
</tr>
<tr>
<td>no length reported</td>
<td>227</td>
<td></td>
</tr>
<tr>
<td>overall total</td>
<td>946</td>
<td></td>
</tr>
</tbody>
</table>

(Source: Papers supplied by Natural History Museum UK Cetacean Strandings Investigation Project (April 2006))
**Table 7**

Number of whales of 25 feet or more in length on which payments were made for disposal by the Receiver of Wreck and Scottish Executive (SEERAD)

<table>
<thead>
<tr>
<th>Receiver of Wreck</th>
<th>SEERAD</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993-95</td>
<td>14</td>
</tr>
<tr>
<td>95-96</td>
<td>6</td>
</tr>
<tr>
<td>96-97</td>
<td>0</td>
</tr>
<tr>
<td>97-98</td>
<td>6</td>
</tr>
<tr>
<td>98-99</td>
<td>3</td>
</tr>
<tr>
<td>99-00</td>
<td>0</td>
</tr>
<tr>
<td><strong>totals</strong></td>
<td><strong>29</strong></td>
</tr>
</tbody>
</table>

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2000-01</td>
<td>7</td>
</tr>
<tr>
<td>01-02</td>
<td>5</td>
</tr>
<tr>
<td>02-03</td>
<td>8</td>
</tr>
<tr>
<td>03-04</td>
<td>4</td>
</tr>
<tr>
<td>04-05</td>
<td>3</td>
</tr>
<tr>
<td>05-06</td>
<td>9</td>
</tr>
<tr>
<td><strong>totals</strong></td>
<td><strong>36</strong></td>
</tr>
</tbody>
</table>

**Note**

Not all whales over 25' need to be cleared away.

For the 5 year period 2000/01 to 04/05, Table 6 shows that the UK recording scheme recorded 34 whales of 25' or more stranded in Scotland, while Table 7 shows that payments were made to dispose of 27 whales.

(Source: MCA & SEERAD, 2006)