UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
NATIONAL OCEANOGRAPHIC AND ATOMOSPHERIC ADMINISTRATION

In re:	)	Administrative Law Judge
	)	Hon. George J. Jordan
	)	Docket No. 19-NMFS-0001
	)	
Proposed Waiver and Regulations	**)**	RIN: 0648-BI58 and
Governing) the Taking of Eastern North	)	RIN: 0648-XG584
Pacific Gray Whales by the Makah Tribe	)	
	)	

SEA SHEPHERD LEGAL AND SEA SHEPHERD CONSERVATION SOCIETY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Sea Shepherd Legal and Sea Shepherd Conservation Society (collectively, "Sea Shepherd") submit the following proposed findings of fact and conclusions of law regarding the National Marine Fisheries Service's (NMFS) proposed waiver and regulations that would allow the Makah Tribe to take North Pacific gray whales in the course of a ceremonial hunt. In the interest of administrative efficiency, Sea Shepherd generally, and by specific reference, incorporates herein the Proposed Findings of Fact and Conclusions of Law submitted by the Animal Welfare Institute (AWI).

PROPOSED FINDINGS OF FACT

I. Facts Relevant to the Appropriateness of Granting a Waiver of MMPA Protections Allowing the Makah Tribe To Take North Pacific Gray Whales

A. The population-level effect of taking PCFG gray whale females

1. Pacific Coast Feeding Group (PCFG) gray whales engage in matrilineal teaching of feeding behaviors and techniques. (2nd Decl. of D.J. Schubert, Ex. 8, p. 11; Tr. Vol. 4, p. 143, ll. 1-16).

2. PCFG gray whales engage in matrilineal teaching of feeding locations. (Decl. of David Weller, Ex. 3-38, p. 7; 2nd Decl. of D.J. Schubert, Ex. 8, at 11; Tr. Vol. 4, p. 171, ll. 11-24).

3. PCFG gray whale abundance is maintained primarily through internal recruitment of calves by PCFG gray whale females. (Tr. Vol. 4, p. 169, l. 18-p. 173, l. 1).

4. PCFG gray whales are accustomed to the proximity of vessels, including whale watching vessels. (Decl. of Carrie Newell, at ¶ 16; Tr. Vol. 5, p. 87, ll. 2-5).

5. PCFG gray whales exhibit nearshore distribution and regional foraging preferences. (Decl. of Carrie Newell, at ¶¶ 16 & 33; Tr. Vol. 4, p. 155, ll. 6-12).

6. PCFG gray whales do not migrate to the northern feeding grounds with ENP gray whales but rather remain in the region between northern California and northern Vancouver Island. (Decl. of David Weller, at ¶ 16). Within this region, PCFG gray whales have been observed to spend substantial amounts of time in particular areas that are foraging hotspots, including Depoe Bay, Oregon. (*See, e.g.,* Tr. Vol. 4, p. 145, l. 23-p.148, l. 21).

7. Approximately 28% of ENP gray whale sightings in the Makah Tribe's U&A during the migration period of December 1 through May 31 are PCFG whales During the summer feeding period, roughly 50% of ENP gray whales sighted in the Makah Tribe's U&A are PCFG whales. (Decl. of Chris Yates, Ex. 1-7, at 12).

8. The Makah Tribe's U&A occupies a nearshore area. (Decl. of Chris Yates, Ex. 1-7, at 5, Figure 1).

9. Because PCFG gray whales are accustomed to the proximity of vessels (including whale watching vessels), exhibit nearshore distribution, and are found within the Makah Tribe's U&A, PCFG gray whales will be at a higher risk during the hunts than non-PCFG gray whales. (*See* Tr. Vol. 5, p. 87, ll. 6-14 (describing PCFG gray whales as "sitting ducks")).

10. PCFG gray whale females cannot be identified with certainty during hunting or training activities. (Decl. of Carrie Newell, at ¶ 45).

11. Because PCFG gray whale females cannot be identified with certainty during hunting or training activities, there is a high risk of PCFG gray whale females being targeted during hunting and training activities. (Decl. of Carrie Newell, at ¶ 45).

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12. The loss of PCFG gray whales females would cause the loss of community knowledge, including knowledge of specific feeding areas and feeding techniques. (Decl. of Carrie Newell, at ¶ 43; Decl. of David Weller, Ex. 3-38, at 7).

13. The loss of even a single PCFG gray whale female would result in a multi-generational impact, as future generations of PCFG gray whales will not benefit from the knowledge passed from mother to calf, including the location of specific feeding areas and feeding techniques. (Decl. of Carrie Newell, at ¶ 43; Decl. of David Weller, Ex. 3-38, at 7; 2nd Decl. of D.J. Schubert, Ex. 8, at 13).

14. Because PCFG gray whale females cannot be identified with certainty during hunting and training activities, any regulatory restrictions on the hunt cannot avoid the negative impact on the PCFG gray whale population resulting from the loss of a PCFG gray whale female. (Decl. of Carrie Newell, at ¶ 45).

15. Based on the evidence presented during this proceeding, the Makah Tribe did not support its claim that external recruitment "is sufficiently robust to offset low levels of human caused mortalities to PCFG whales." (Decl. of Johnathan Scordino, at 74).

16. In light of the unavoidable, multi-generational negative impact on the PCFG gray whale population, NMFS did not support its assertion that "most effects of the hunt would be temporary and localized." (Decl. of Chris Yates, Ex. 1-7, at 31).

17. In light of the unavoidable, multi-generational negative impact on the PCFG gray whale population, the Makah Tribe failed to prove that "the Makah whale hunt will not disadvantage the PCFG or cause it to cease functioning as an element of its ecosystem." (Decl. of Jonathan Scordino, at 102).

B. The population-level effects of non-lethal activities such as attempted strikes, training approaches and training harpoon throws on gray whale health and behavior

18. The proposed waiver and regulations would authorize alternating hunt seasons in even and odd years, with even-year hunts occurring during the gray whale migration season—purportedly to reduce the risk to PCFG whales—and odd-year hunts occurring during the feeding season—purportedly to reduce the risk to WNP whales. (Regulations Governing the Taking of Marine Mammals, 84 Fed. Reg. 13,604, 13,619 (Apr. 5, 2019)).

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19. The Makah Tribe is proposing to take gray whales by hunting or by attempting to hunt. (Tr. Vol. 1, p. 56, ll. 24-25-p. 57, l. 1).

20. NMFS's proposed regulations define the various hunt-related activities that would be authorized pursuant to the waiver. (84 Fed. Reg. at 13,619).

21. The following definitions are relevant to the Waiver Proceeding:

    a. "Strike" is defined to mean "to cause a harpoon, darting gun, or other weapon, or a projectile from a rifle or other weapon, to penetrate a gray whale's skin or an instance in which a gray whale's skin is penetrated by such a weapon or projectile during hunting." (NMFS's Mot. Requesting Revisions to Proposed Regulations, ALJ Dkt. No. 75 Attach. A at 5).

    b. "Unsuccessful strike attempt" is defined as "any attempt to strike a gray whale while hunting that does not result in a strike." (84 Fed. Reg. at 13,619).

    c. A "training approach" means "to cause, in any manner, a training vessel to be within 100 yards of a gray whale." (84 Fed. Reg. at 13,619).

    d. A "training harpoon throw" is defined to mean "an attempt to contact a gray whale with a blunted spear-like device that is incapable of penetrating the skin of a gray whale." (84 Fed. Reg. at 13,619).

22. Acknowledging that approaches and attempted strikes fall within the ambit of the take prohibition, NMFS proposes limits on such "non-lethal" hunt activities. (84 Fed. Reg. at 13,610).

23. The proposed waiver and regulations would also authorize up to 353 approaches of Eastern North Pacific (ENP) gray whales, "including both hunting and training approaches," each calendar year, of which "no more than 142 could be of PCFG whales." (84 Fed. Reg. at 13,610).

24. Reproductive gray whale females are the most significant determining factor in population growth or decline. (Decl. of Stella Villegas-Amtmann, SVA-3, at 2; Tr. Vol. 5, p. 112, l. 25-p. 113, l. 2).

25. Reproductive female gray whales must acquire almost all of the energy required for migration and reproduction during a relatively short period of their annual cycle at the foraging grounds. (Decl. of Stella Villegas-Amtmann, SVA-4, at 168).

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26. Reproductive female gray whales have higher energetic needs than male gray whales. (Decl. of Stella Villegas-Amtmann, SVA-4, at 179; Tr. Vol. 5, p. 113, ll. 2-7.; Tr. Vol. 5, p. 117, ll. 14-15; Tr. Vol. 5, p. 118, l. 25-p. 119, l. 7).

27. Successful reproduction depends on gray whale females acquiring sufficient energy at foraging grounds. (Decl. of Stella Villegas-Amtmann, SVA-3, at 9 & SVA-4, at 168; Tr. Vol. 5, p. 117, ll. 15-23).

28. A "biologically significant disturbance" is defined as "a disturbance resulting in reductions of net energy intake, compromising maternal condition, leading to reduced fecundity, energy delivery to offspring, offspring survival, and when high enough, increased adult mortality." (Decl. of Stella Villegas-Amtmann, SVA-4, at 169).

29. Pregnant gray whales are most suspectable to energetic losses. (Decl. of Stella Villegas-Amtmann, at ¶ 10 & SVA-4, at 179; Tr. Vol. 5, p. 125, ll. 4-17).

30. Female gray whales who are nursing calves are also highly vulnerable to energetic losses. (Decl. of Stella Villegas-Amtmann, at ¶ 16; Tr. Vol. 5, p. 125, ll. 13-17).

31. Energy losses may occur anywhere throughout a gray whale's migration: at the foraging ground, at the breeding ground, or along the migratory route. (Tr. Vol. 5, p. 123, l. 16-p. 124, l. 13).

32. Energetic losses in gray whales are cumulative. (Tr. Vol. 5, p. 124, l. 10-13).

33. If the Makah Tribe's U&A represents a foraging stop over for migrating gray whales, it might be of crucial importance for the whales' survival to travel through that area to replenish their energy stores. (Decl. of Stella Villegas-Amtmann, at ¶ 10).

34. Energy losses during the northward migration are most likely to have negative biological consequences for gray whales. (Decl. of Stella Villegas-Amtmann, at ¶ 10; Tr. Vol. 5, p. 124, l. 14-p. 125, l. 3; Tr. Vol. 5, p. 172, ll. 6-19).

35. Even year hunts are most likely to result in a biologically significant disturbance to a pregnant gray whale female because the hunts occur during the northward migration. (Decl. of Stella Villegas-Amtmann, at ¶¶ 11 & 25; Tr. Vol. 5, p. 126, l. 23-p127, ll. 1-24).

36. An energetically depleted, pregnant gray whale female arriving in the Makah Tribe's U&A during her northward migration is most susceptible to a

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biologically significant disturbance, increasing the risk that she will abort her calf. (Decl. of Stella Villegas-Amtmann, at ¶ 17).

37. It is not possible to distinguish pregnant gray whale females from other gray whales during hunting or training activities. (Tr. Vol. 4, p. 173, l. 21-p. 175, l. 10; Tr. Vol. 5, p. 127, l. 25-p. 127, ll. 2-11).

38. Because it is not possible to distinguish pregnant gray whale females from other gray whales during hunting or training activities, there is a high risk of pregnant gray whale females being targeted during hunting and training activities. (Tr. Vol. 4, p. 173, l. 21-p. 174, ll. 6-10).

39. During northward migrations, gray whales travel closer to the shore than during southward migrations. (Tr. Vol. 4, p. 129, l. 23-p. 130, ll. 1-7).

40. Pregnant gray whale females will be migrating through the hunt area during even-year hunts. (Decl. of Stella Villegas-Amtmann, at ¶ 25; Tr. Vol. 5, p. 126, l. 23-p. 127, ll. 1-24).

41. A pregnant gray whale female subject to a biologically significant disturbance outside of the foraging grounds will not be able to alleviate the negative energy consequences by resting or otherwise compensating for the loss due to the disturbance. (Tr. Vol. 5, p. 128, l. 12-p. 129, l. 2).

42. A pregnant female gray whale subject to a biologically significant disturbance inside the foraging grounds will not be able to alleviate the negative energy consequences by resting. (Tr. Vol. 5, p. 128, l. 12-p. 129, l. 2).

43. Whether a pregnant female gray whale subject to a biologically significant disturbance inside the foraging grounds will be able to alleviate the negative energy consequences of the disturbance by foraging depends upon the availability of an alternative foraging patch in the same area (if the area of the disturbance is spatially limited) or in another area. (Decl. of Stella Villegas-Amtmann, at ¶ 26; Tr. Vol. 5, p. 128, l. 12-p. 129, l. 2).

44. If environmental conditions have reduced foraging opportunities, that circumstance would impact a gray whale's ability to alleviate the negative energy consequences of a biologically significant disturbance. (Decl. of Stella Villegas-Amtmann, at ¶ 21; Tr. Vol. 5, p. 129, l. 3-p. 130, l. 5). In particular, if the disturbance occurs in an area where there are not any nearby, alternative forage patches, the gray whale would not be able to easily compensate for the energy lost to the disturbance. (Tr. Vol. 5, p. 161, l.14-p. 162, l.4).

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45. Any disturbance that a gray whale female may experience when migrating with a calf has the potential risk of the female weaning the calf at an earlier age. (Decl. of Stella Villegas-Amtmann, at ¶¶ 16 & 25).

46. A gray whale calf that is weaned at an earlier age has a lower probability of survival. (Decl. of Stella Villegas-Amtmann, at ¶ 16).

47. An energetic loss of between 1.6% and 6% is sufficient to result in an unsuccessful pregnancy in gray whales. (Tr. Vol. 5, p. 122, l. 19-p.123, l. 6).

48. The same conclusions reached using the bioenergetic model regarding the energetic requirements of, and effects of disturbance on, ENP and Western North Pacific (WNP) gray whales could be applied to PCFG gray whales. (Tr. Vol. 5, p. 200, l.21-p. 200, l.21). Thus, pregnant PCFG gray whale females that forage in the Makah Tribe's U&A at the end of their northward migration would face similar energy losses to disturbance as pregnant ENP gray whale females. (Tr. Vol. 5, p. 203, l. 21-p. 204, l.4).

49. The precise energetic cost to gray whales of training and hunt-related disturbances is unknown. (Tr. Vol. 5, p. 163, l. 25-p. 165, l. 24).

50. Because the energetic costs of training and hunt-related disturbances is unknown, the number of such disturbances that would be biologically significant is unknown. (Tr. Vol. 5, p. 163, l. 25-p. 165, l. 24).

51. NMFS has admitted that non-lethal take, including by approach and vessel noise, can displace marine mammals from important feeding or breeding areas, causing "significant" impacts on individuals and populations. (*See* 83 Fed. Reg. 19,711, 19,722-23 (May 4, 2018) (discussing marine mammal behavioral responses to underwater sound, including vessel noise); Decl. of Stella Villegas-Amtmann, at ¶ 13).

52. NMFS has admitted that approaching gray whales to within 100 yards or less has the potential to disrupt gray whale behaviors, such as migration, breathing, or feeding. (Tr. Vol. 2, p. 10, ll. 10-12 (testimony by Dr. Weller that gray whale responses to disturbances are "highly variable," ranging from little to no response to a "middling" response to a "more direct[]" response); Tr. vol. 2, p. 14, ll. 6-17 (testimony by Dr. Weller that gray whales will "likely" exhibit behavioral responses when subjected to an unsuccessful strike attempt or training harpoon throw).

53. Accordingly, while the precise energetic cost to gray whales of training and hunt-related disturbances is unknown, the evidence establishes that there is a

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high likelihood that such disturbances would be biologically significant – especially to pregnant or lactating gray whale females.

54. Endangered WNP gray whales have greater energy requirements than ENP gray whales. (Decl. of Stella Villegas-Amtmann, at ¶ 19 & SV-4, at 176; Tr. Vol. 5, p. 156, ll. 5-23).

55. Because endangered WNP gray whales have greater energy requirements than ENP gray whales, endangered WNP gray whales are more susceptible to biologically significant disturbances from hunting and training activities. . (Decl. of Stella Villegas-Amtmann, at ¶¶ 19-20; Tr. Vol. 5, p. 130, ll. 10-16).

56. Evidence presented by NMFS and the Makah failed to support their claim that, despite the allegedly more extreme hunting methods employed in the Chukotkan hunts, there are not any shifts in gray whale distribution or abundance in the area of those hunts. (Decl. of Stella Villegas-Amtmann, at ¶¶ 7-9; Tr. Vol. 5, p. 131, l. 1-p. 134, l. 6).

C. The potentially negative impact of climate change on the ability of gray whales to compensate for disturbance-related energy losses through alternative foraging opportunities

57. It is unclear how climate change will impact the prey resources of gray whales. (Tr. Vol. 5, p. 129, ll. 13-22; Tr. Vol. 5, p. 202, ll. 2-9).

58. Gray whales that feed in and around the Bering Strait and Chukchi Sea are regularly seen migrating farther north, and there is some indication that prey resources, particularly in the traditional foraging grounds, are no longer as abundant as they once were. (Decl. of Stella Villegas-Amtmann, at ¶ 18).

59. If the current trend of gray whales migrating farther north and experiencing less abundant prey resources continues, the energetic costs will be greater, and thus gray whales will likely become more sensitive to disturbance. (Decl. of Stella Villegas-Amtmann, at ¶ 18).

60. Prey shifts due to environmental changes may alter the gray whale's foraging behavior, requiring more energetically costly feeding behavior, such as deeper dives to access higher quality prey patches. (Decl. of Stella Villegas-Amtmann, at ¶ 21; Tr. Vol. 5, p. 129, l. 9-p. 130, l. 5). The more energetically costly feeding behavior occasioned by these prey shifts will make it more difficult for gray whales, and particularly pregnant or lactating gray whale females, to compensate for energy losses due to disturbance. (Tr. Vol. 5, p. 129, l. 3-p. 130, l. 5.)

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D. The effect of allocating the Makah Tribe's catch share of ENP gray whales to the Russian Federation

61. The United States is a signatory to the International Convention for the Regulation of Whaling (ICRW). The ICRW establishes the International Whaling Commission (IWC), which, among other things, establishes catch limits for aboriginal subsistence whaling (ASW) by member States. (Announcement of Hearing Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals, 84 Fed. Reg. 13639, 13641 (Apr. 5, 2019)).

62. Since 1997, the IWC has routinely approved an aboriginal subsistence catch limit for ENP gray whales for joint use by the United States and the Russian Federation. (84 Fed. Reg. 13639, 13641).

63. The United States and the Russian Federation have been routinely, and currently are, parties to a bilateral agreement that allocates the IWC catch limit between the two countries and allows either country to transfer to the other any unused allocation. (84 Fed. Reg. 13639, 13641).

64. The United States has routinely transferred its unused share of the IWC catch limit to the Russian Federation for use by Chukotkan hunters. (84 Fed. Reg. 13639, 13641).

65. NMFS asserts that "Based on long-standing practice and the current United States-Russian Federation bilateral agreement, the United States would likely continue to transfer any unused IWC catch limit to the Russian Federation for use by Chukotkan natives, so that the net effect of the hunt on ENP gray whale abundance would be the same with or without the proposed waiver." (84 Fed. Reg. 13639, 13641).

66. The Makah Tribe claims that "preventing the Makah hunt will not eliminate or reduce strikes on ENP whales because any whales not used by the Makah in the shared catch limit with Russia will be utilized by Chukotkan natives." (Decl. of Jonathan Scordino, at 30).

67. For the 6-year period from 2013 to 2018, the IWC set a total ENP gray whale quota of 744 whales, an average of 124 per year. (Tr. Vol. 3, p. 170, ll. 14-24).

68. For the 6-year period from 2013 to 2018, the Russian Federation used 722 out of the 744 ENP gray whale quota allocated to that period. (Tr. Vol. 3, p. 173, ll. 5-19). Thus, the Russian Federation did not utilize the full quota of ENP gray whales for the 6-year period from 2013 to 2018.

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69. As of 2019, the IWC increased the ASW quota for ENP gray whales that is allocated pursuant to the United States-Russian Federation bilateral agreement. (Tr. Vol. 2, p. 66, l. 22-p. 67, l. 3).

70. Given that the Russian Federation did not utilize the full quota of ENP gray whales for the 6-year period from 2013 to 2018, and that quota has now been increased, NMFS failed to support its assertion that the net effect of the hunt on ENP gray whale abundance would be the same with or without the proposed waiver.

71. Given that the Russian Federation did not utilize the full quota of ENP gray whales for the 6-year period from 2013 to 2018, and that quota has now been increased, the Makah Tribe failed to prove that any ENP gray whales not used by the Makah in the shared catch limit with Russia will be utilized by Chukotkan natives.

72. There is no evidence demonstrating that PCFG gray whales are taken in the Chukotkan hunts. (Tr. Vol. 2, p. 69, ll. 6-10).

73. PCFG gray whales will likely be killed if the proposed waiver is approved. (Tr. Vol. 2, p. 69, ll. 11-14; *see, infra.,* ¶¶ 4-9).

74. Given that PCFG gray whales are only at risk of being killed in a hunt if the proposed waiver is approved, NMFS failed to support its assertion that the net effect of the hunt on ENP gray whale abundance would be the same with or without the proposed waiver.

E. The relevance of the Makah Tribe's treaty rights to the waiver determination

75. NMFS did not consider the Tribe's treaty right in evaluating whether the proposed waiver and regulations are consistent with the MMPA requirements. (Sea Shepherd Motion to Exclude Evidence Regarding Treaty Right and Cultural Significance of Whaling, Aug. 9, 2019, at 8).

II. The Relevance of Non-Tribal Members' Non-Consumptive, Co-Tenancy Rights to Gray Whales

76. Gray whales have a significant value to non-tribal members of the public who engage in whale watching. (Tr. Vol. 5, p. 95, l. 5-17).

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77. The "right in common" described by the court in *Anderson v. Evans* is an important right for the thousands of people who participate in whale watching activities. (Decl. of Carrie Newell, at ¶ 11).

78. Whale watching is a multi-billion dollar global business. (Decl. of Carrie Newell, at ¶ 13).

79. Whale watching is a multi-million dollar business in the Pacific Northwest. (Decl. of Carrie Newell, at ¶ 13).

80. Some gray whales display regional preferences. (Tr. Vol. 4, p. 133, l. l1-17; Tr. Vol. 4, p. 146, l. 3-p. 147, l. 16; Vol. 4, p. 150, ll. 9-22; Vol. 4, p. 151, ll. 2-4; Vol. 4, p. 152, l. 22-p. 153, l. 5; Vol. 4, p. 154, l. 3-p. 156, l. 16).

81. The town of Depoe Bay, OR, a municipality of less than 1,500 full-time residents, is home to four whale watching businesses. Whale watching provides a significant economic benefit to Depoe Bay, OR. (Decl. of Carrie Newell, at ¶ 14).

82. Sea Shepherd presented the testimony of Carrie Newell, founder and owner of Whale Research EcoExcursions (WREE). Through her whale watching business and research activities, Ms. Newell has compiled a large data set for PCFG gray whales off the central Oregon coast. (Decl. of Carrie Newell, at ¶ 12).

83. Ms. Newell has compiled a data set identifying individual whales based upon their markings, along with information on their personalities, site preferences, approximate ages, sex, unique behaviors, calving history, body conditions, companions, and exposure to recent orca attacks. (Decl. of Carrie Newell, at ¶ 12).

84. Based upon her extensive data set collected over the last several decades, Ms. Newell has written a photo-identification book on the PCFG gray whales, called "A Guide to Summer Resident Gray Whales along the Oregon Coast." (Decl. of Carrie Newell, at ¶ 4). Now in its fifth edition, the guidebook describes the unique characteristics of each PCFG gray whale, assigns them specific names, and cross-references them with Cascadia Research Collective (CRC) numbers assigned to the cataloged PCFG whale. (Decl. of Carrie Newell, at ¶ 4; *see, e.g.,* Tr. Vol. 4, p. 138, l. 23-p.145, l. 19).

85. Through her whale watching business and associated published guidebook, Ms. Newell has attracted the interest of tens of thousands of people to the

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unique PCFG gray whales that she observes in the vicinity of Depoe Bay, Oregon. (Tr. Vol. 4, at p. 166, l. 24-p. 167, l. 2.).

86. PCFG gray whales will likely be killed if the proposed waiver is approved. (Tr. Vol. 2, p. 69, ll. 11-14; *see, infra.,* ¶¶ 4-9).

87. At least some of the same PCFG gray whales that Ms. Newell (and her clients) observe in Depoe Bay, Oregon, are likely to travel, and have travelled, to the Makah U&A. (Tr. Vol. 4, p. 162, l. 20-p. 163, l. 3). In fact, the PCFG gray whale killed by members of the Makah Tribe in a 2007 illegal hunt was one of the whales catalogued by Ms. Newell in Depoe Bay, Oregon. (Decl. of Carrie Newell, ¶ 12; Tr. Vol. 4, p. 164, ll. 5-17).

88. Taking one individual gray whale out of Ms. Newell's data set would result in a loss of valuable scientific information. (Decl. of Carrie Newell, at ¶ 12).

89. Given the large following, and thriving whale watching business, garnered by Ms. Newell for the uniquely identified PCFG gray whales that spend large amounts of time in the vicinity of Depoe Bay, Oregon, the loss of any of these PCFG gray whales would likely have a negative effect on Ms. Newall's whale watching business, as well as other whale watching businesses in the area.

PROPOSED CONCLUSIONS OF LAW

I. Applicable Legal Standards

Sea Shepherd incorporates by reference the Applicable Legal Standards as set forth in AWI's Proposed Findings of Fact and Conclusions of Law.

II. The Makah Tribe's Right To Whale under the Treaty of Neah Bay Is Not Relevant to this Waiver Proceeding

1. A waiver determination is governed exclusively by the waiver factors set forth in section 101 of the MMPA. 16 U.S.C. § 1371(a)(3)(A). The statutory factors do not include consideration of the Tribe's treaty right or the cultural significance of whaling. (Sea Shepherd's Motion to Exclude Evidence Regarding Treaty Right and Cultural Significance of Whaling, Aug. 9, 2019, at 6).

2. If NMFS grants a waiver, the agency then proceeds to issue regulations governing the authorized take under section 103 of the MMPA. Like section 101, section 103 provides a list of factors that NMFS must consider when designing regulations. None of the listed factors include consideration of the

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Tribe's treaty right. (Sea Shepherd's Motion to Exclude Evidence Regarding Treaty Right and Cultural Significance of Whaling, Aug. 9, 2019, at 6-7).

III. The Proposed Waiver and Regulations Authorize Activities that Infringe Upon the Rights in Common of Nontribal Citizens To Engage in Non-Consumptive Uses of Gray Whales

3. In *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2002), the Ninth Circuit held that the 1855 Treaty of Neah Bay did not grant the Makah Tribe an exclusive right to use, or otherwise interact with, whales. (Sea Shepherd's Pre-Hearing Brief, Nov. 7, 2019, at 10).

4. The court in *Anderson v. Evans* concluded that the Treaty of Neah Bay states that the Makah Tribe has the right to use whales "in common with" all citizens of the United States. (Sea Shepherd's Pre-Hearing Brief, Nov. 7, 2019, at 10-11).

5. The court in *Anderson v. Evans* found the Treaty of Neah Bay creates a "co-tenancy" in the "resource." (Sea Shepherd's Pre-Hearing Brief, Nov. 7, 2019, at 11).

6. The court in *Anderson v. Evans* explained the significance of the co-tenancy created by the Treaty of Neah Bay in the following terms: "[T]he Makah cannot, consistent with the plain terms of the treaty, hunt whales without regard to processes in place and designed to advance conservation values by preserving marine mammals or to engage in whalewatching, scientific study, and other non-consumptive uses." (Sea Shepherd's Pre-Hearing Brief, Nov. 7, 2019, at 11).

7. The admission of co-tenancy evidence does not invite consideration of the Tribe's treaty evidence. The Tribe has already been given the opportunity to "urge" its treaty right in its application for a waiver of the MMPA protections for gray whales. Now that the Tribe's application, based upon its treaty right, has been approved and the waiver process has commenced, the treaty right has no particular relevance under the MMPA waiver factors. (Response to NMFS Motion to Limit Rebuttal Issues and Testimony, Aug. 26, 2019, at 5).

8. The court in *Anderson v. Evans* held that these co-tenancy rights "must be considered" during the waiver process. (Sea Shepherd's Pre-Hearing Brief, Nov. 7, 2019, at 13).

9. As established by substantial evidence, there is a significant risk that the proposed hunts will remove the PCFG gray whales that she studies and relies

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on for her whale watching excursions every year. NMFS failed to consider and weigh this risk in determining whether to grant a waiver of MMPA protections.

10. The court in *Anderson v. Evans* held that these co-tenancy rights cannot be "diminished" through the Tribe's taking of whales. (Sea Shepherd's Pre-Hearing Brief, Nov. 7, 2019, at 13).

11. As established by substantial evidence, there is a significant risk that the proposed hunts will remove the whales that Ms. Newell studies and relies on for her whale watching excursions every year. A grant of the waiver would therefore diminish Ms. Newell's co-tenancy rights and those of her tens of thousands of whale watching clientele who derive great enjoyment from observing the unique and irreplaceable behaviors and physiological features of PCFG gray whales.

12. The court in *Anderson v. Evans* interpreted the "in common" language of the Treaty of Neah Bay as preventing the Makah Tribe from hunting whales without regard to the non-consumptive use of whales by non-tribal members of the public. (Sea Shepherd's Pre-Hearing Brief, Nov. 7, 2019, at 11).

13. In failing to consider the value of PCFG gray whales who display regional preferences to non-tribal members of the public, NMFS did not adequately consider the non-consumptive use of whales by non-tribal members of the public as required by *Anderson v. Evans*.

IV. NMFS Has Not Satisfied the Legal Requirements for Waiving MMPA Protections In Order To Allow the Makah Tribe To Conduct a Ceremonial Hunt for North Pacific Gray Whales

14. NMFS failed to prove, by substantial evidence, that it gave "due regard" for the effects of the proposed MMPA waiver of the take moratorium on the affected stock's "distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals." 16 U.S.C. § 1371(a)(3)(A).

15. NMFS failed to prove, by substantial evidence, that the proposed MMPA waiver of the take moratorium is based on the "best scientific evidence available." 16 U.S.C. § 1371(a)(3)(A).

16. NMFS failed to prove, by substantial evidence, that the proposed MMPA waiver of the take moratorium is "in accord with sound principles of resource protection and conservation." 16 U.S.C. § 1371(a)(3)(A).

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17. NMFS failed to prove, by substantial evidence, that, in issuing regulations to implement a waiver of the take moratorium, it based those regulations on the best scientific evidence available, prescribed in consultation with the Marine Mammal Commission, and consistent with the purposes and policies set forth in 16 U.S.C. § 1361. 16 U.S.C. § 1373(a).

18. NMFS failed to prove, by substantial evidence, that, in issuing regulations to implement a waiver of the take moratorium, it insured "that such taking will not be to the disadvantage of those species and population stocks." 16 U.S.C. § 1373(a).

Dated this 20th day of March 2020

s/ Brett W. Sommermeyer
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