

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

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

**MAKAH TRIBE’S SUPPLEMENTAL SUBMISSION RE REQUEST TO POSTPONE
HEARING**

For the reasons stated in its response to prior motions to postpone the hearing in this proceeding and at the pre-hearing conference, the Makah Tribe opposes a postponement of the hearing currently scheduled for the week of August 12, 2019. However, as requested at the pre-hearing conference, Makah has investigated the availability of its witnesses and counsel for a hearing during the week of September 16, 2019.¹ Makah’s principal contact for further discussions regarding the schedule is Brian Gruber, who can be reached at bgruber@ziontzchestnut.com or 206 448 1230.

In addition to the reasons previously stated, postponing the hearing to the week of September 16, 2019, would be prejudicial to Makah for several reasons. First, one of Makah’s expert witnesses, Dr. John Bickham, has a scheduled family vacation through Wednesday, September 18. Given his current schedule, Dr. Bickham could not be in Seattle until Friday, September 20, although it is possible he could change travel plans and arrive by Thursday, September 19. However, even if Dr. Bickham could arrive in time to testify at the hearing, his absence during the first three days of the hearing would prejudice Makah.

¹ It is Makah’s understanding that the week of September 16 is the only week in September potentially available for a hearing, based on Judge Jordan’s schedule.

Dr. Bickham is a geneticist specializing in the genetics of natural populations of fish and wildlife and a professor emeritus in the Department of Wildlife & Fisheries Sciences at Texas A&M University. Bickham Declaration at 1 (¶ 1). Since 2003, Dr. Bickham has served as a member of the U.S. delegation to the International Whaling Commission (IWC) Scientific Committee (SC) and, since 2011, has studied gray whales as part of the Joint Program for the Okhotsk-Korean Gray Whale Population Monitoring off the North-East Coast of Sakhalin Island funded by Exxon and Shell and as a consultant to the Makah Tribe on issues related to stock structure. Bickham Testimony at 1. His areas of expertise include genetics (cytogenetics, population and evolutionary genetics, genomics, genetic ecotoxicology, and evolutionary toxicology) of natural populations of fish and wildlife. *Id.* He has published more than 240 papers in peer-reviewed literature. *Id.* In addition, Dr. Bickham has been a participant in the IWC's Rangewide Review of the Population Structure and Status of the North Pacific Gray whale. *See id.* at 5 describing the range-wide review. Because of Dr. Bickham's unique expertise and his familiarity with the proceedings of the IWC related to gray whales, his presence throughout the hearing is critical to the Makah Tribe's ability to present and cross-examine witnesses.

Another one of Makah's expert witnesses, Professor Josh Reid, has limited availability during the week of September 16, 2019. Professor Reid is scheduled to return from a two-week trip to Europe on Sunday, September 15, and has a strong preference not to testify on Monday, September 16, because of potential complications from jet lag. Professor Reid is available on Tuesday and Wednesday (September 17 and 18) but will be out-of-town and unavailable to testify on Thursday or Friday (September 19 and 20).

At this point, Makah's other expert witnesses and some of its lay witnesses are available during the week of September 16. However, Makah has been unable to confirm the availability of

all its lay witnesses for that week. One of Makah's lay witnesses is Greig Arnold, a Makah whaler and former Chairman, Vice-Chairman and member of the Makah Tribal Counsel. Mr. Arnold is part of a committee working with the Makah Cultural and Resource Center (the Makah Museum) that is scheduled to travel to the Smithsonian Institution's National Museum of the American Indian in September to choose artifacts that will be loaned to the Makah Museum. The precise dates of the visit will be determined by the National Museum of the American Indian. Mr. Arnold is committed to this trip which involves the culturally significant act of selecting Makah artifacts to be brought home. Depending on the dates selected by the National Museum of the American Indian, the trip could conflict with the hearing in this case if the hearing is scheduled for the week of September 16.

Another Makah lay witnesses, Daniel Greene, Sr., is the skipper of a mid-water trawl vessel that participates in the Makah Tribe's treaty fishery for Pacific whiting. Mr. Greene is endeavoring to find a substitute skipper for the week of September 16 but has not yet been able to do so. Because the substitute skipper must be a Makah tribal member and must be an experienced skipper of a mid-water trawl vessel, there are very few potential candidates.

A third Makah lay witness is Maria Pascua. Ms. Pascua is a Native Makah speaker and is the Neah Bay High School Makah language teacher. School starts on September 3 and is in session the week of September 16. It is challenging to find a substitute teacher for Ms. Pascua because she is the only certified teacher who also teaches Makah language, and because Neah Bay's remote location provides a limited pool of substitute teachers. An additional concern is that Ms. Pascua must be absent the week of September 23rd to attend classes at the University of Victoria as part of her pursuit of a Master's degree in Indigenous Language Revitalization. She reports that it

would be detrimental to her students' learning and extremely difficult administratively for her to miss additional class time in September.

In addition to these issues, two of Makah's attorneys, Marc Slonim and Wyatt Golding, have conflicts with federal court litigation in Minnesota during the week of September 16. The court has set a September 30 deadline for the completion of fact discovery and the parties are currently in the process of scheduling up to 20 depositions of fact witnesses. To allow time for the completion of written discovery and document production, and following discussion among all counsel, the best available weeks for the depositions appear to be the weeks of September 16 and 23. Even if were possible to extend the September 30 deadline and schedule the depositions during the weeks of September 23 and 30, holding the hearing in this case during the week of September 16 would interfere materially with Mr. Slonim and Mr. Golding's preparation for the depositions.

Finally, Makah notes that it may be prejudicial to the Tribe to relocate the hearing if the currently reserved auditorium in the Henry M. Jackson Federal Building is unavailable the week of September 16. The Federal Building has a distinct advantage in that it has established security screening and security staff. The presence of security is important to Makah because past whaling-related events have attracted disruptive protests and threats to Makah tribal members. Relocating to a non-federal facility would likely either prejudice Makah due to lack of security or result in significant expense in hiring security.

Respectfully submitted this 24th day of June, 2019.

ZIONTZ CHESTNUT

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