UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

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*In re:* ) Administrative Law Judge

) Hon. George J. Jordan

**Proposed Waiver and Regulations Governing** ) Docket No. 19-NMFS-0001

**the Taking of Eastern North Pacific Gray** )

**Whales by the Makah Indian Tribe** ) RINs: 0648-BI58; 0648-XG584

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**Marine Mammal Commission’s Brief on Proposed Rescheduling of the Hearing Date**

At the pre-hearing conference held on June 17, 2019, Administrative Law Judge Jordan requested that the parties submit briefs on pending requests to change the date of the hearing in this matter, currently scheduled to begin in Seattle, Washington, on 12 August 2019.

As with other parties, the Marine Mammal Commission’s counsel, experts, and potential witnesses have several demands on their time. Since the August 12 date was announced in the National Marine Fisheries Service’s (NMFS) notice of hearing published in the *Federal Register* on April 5, we have avoided scheduling conflicting events for that week and the Commission’s full team will be available the week of August 12. This is not to say that our full team could not also be available at other times. However, one key team member has a conflicting international commitment and would not be available the week of September 16, the one potential alternative for the hearing identified by Judge Jordan at the prehearing conference. Therefore, the Commission would prefer to retain the original date over the September 16 alternative.

 Nevertheless, the Commission is sympathetic to many of the arguments made by other parties concerning scheduling of the hearing and is willing to continue to explore alternative dates that work for all of the parties. We recognize this may mean considering dates that extend into the next Fiscal Year and this may not be acceptable to NMFS and the Administrative Law Judge’s office due to funding and logistical considerations. As a federal agency, the Commission appreciates the uncertainty that comes with a new Fiscal Year, including the possibility of another government shutdown or funding constraints under a continuing resolution. However, this matter is important enough and has been going on long enough, that some risk of funding interruptions is worth taking to ensure that each party has a full and fair opportunity to make its case.

 The Commission also appreciates the Makah Tribe’s reluctance to agree to any postponement in this proceeding. It has been more than 14 years since the Tribe submitted its original rulemaking petition in this matter and the Tribe has shown remarkable patience in abiding by the nearly glacial pace with which the rulemaking has progressed. It is easy to see why the Tribe does not want to countenance any further delay. Given this history, it is also understandable that proponents of changing the hearing date will make the argument that, since this has been going on for more than 14 years, what difference does a few more months make? The real question, from the Commission’s perspective, is whether delaying the hearing will have an appreciable impact on the Tribe’s ability to hunt whales if the proposed hunting seasons are adopted.

 Under the proposed rule, the forthcoming “even-year” hunting season would begin December 1, 2019, and run through May 31, 2020. The next “odd-year” hunt would not begin until July 1, 2021. Thus, the real question is whether it is reasonable to expect the rulemaking to be completed, a permit issued, and hunting activities planned and carried out before the end of May 2020. If the even-year hunting window is missed, the next hunting opportunity would not occur for more than a year and a short delay likely would be of little consequence. The Commission is not in a position to predict whether hunting is likely to be authorized and occur before May 31 and defers to Judge Jordan and NMFS on when they envision completing the various steps after completion of the hearing – briefing by the parties, issuance of a recommended decision by the judge, public comment on the recommended decision, completion of a final environmental impact statement (EIS), issuance of final regulations, any delays in the effective dates of those regulations or the underlying EIS (i.e., cooling-off periods), preparation and submission of a permit application by the Tribe once the regulations become effective, publication of notice of the permit application, public comment (including a possible hearing) on the application, consideration of comments and issuance of a permit. The Commission can see completion of all of these steps stretching well into next year. If it is unlikely that the steps will be completed before May, then delaying the hearing by a few months should not have any appreciable impact on the Tribe’s ability to hunt whales. If, however, these steps can realistically be completed in time to enable the Tribe to hunt whales during the 2020 season, then the equities would weigh in favor of the Tribe’s positions that no further delay should be allowed and the hearing should not be rescheduled.

 The Commission also empathizes with the non-governmental organization parties (NGOs), given the situation in which they find themselves. They had no say in selecting the original hearing date or in re-scheduling the CITES Conference of Parties (CoP), which has created the current conflict. Also, NGO representatives often have broader portfolios than representatives of some other parties, requiring them to balance their responsibilities. The CoP is a major international meeting that occurs biennially and has major implications for conserving endangered and threatened species worldwide. It is understandable that NGO representatives charged with tracking and influencing CITES decisions would not want to, and in some cases may not be able to, miss it.

 Moreover, the Commission shares the concern expressed by NGO representatives about the voluminous record created so far, and the prospect that it will continue to grow as additional testimony is submitted. It would be preferable to have more time to digest these documents before the hearing begins, if that can be done in a way that does not prejudice the Tribe’s interest in being able to hunt in 2020 and can be accommodated within existing funding and logistical constraints. As noted above, the Commission thinks it important for each party to have a full and fair opportunity to make its case. If this can best be accomplished by selecting alternative dates for the hearing, the Commission would be willing to explore workable alternatives.

 Respectfully submitted, this 24th day of June, 2019.

 

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Marine Mammal Commission