

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

In Re:)	
)	
Proposed Waiver and Regulations))	Docket No. 19-NMFS-0001
Governing the Taking of Eastern))	
North Pacific Gray Whales)	
by the Makah Indian Tribe)	RIN 0648-B158 and
)	RIN 0648-XG58

PREHEARING CONFERENCE

HON. GEORGE J. JORDAN

ADMINISTRATIVE LAW JUDGE

Jackson Federal Building
915 Second Avenue
Seattle, Washington

Reported by: Patrick J. Heard, CCR No. 3302

Roger G. Flygare & Associates, Inc.
Professional Court Reporters,
Videographers & Legal
Transcriptionists
1715 South 324th Place, Suite 250
Federal Way, WA 98003
(800) 574-0414 - main
www.flygare.com - scheduling
RGFlygare@aol.com - email

1 APPEARANCES

2 FOR NATIONAL MARINE FISHERIES SERVICE:

3 U.S. Department of Commerce

4 Office of General Counsel

5 National Oceanic & Atmospheric Administration

6 7600 Sandpoint Way NE

7 Seattle, Washington 98115

8 By: Laurie Beale

9 Donna Darm

10 Caitlin Imaki

11 Chris McNulty

12 Rachel Morris

13 Brittany Pugh

14 Steve Stone [via telephone]

15 Nancy Young [via telephone]

16

17 FOR THE MAKAH TRIBE:

18 Ziontz Chestnut

19 2101 Fourth Avenue

20 Suite 1230

21 Seattle, Washington 98121

22 BY: Brian Gruber

23 Marc D. Slonim

24 Wyatt Golding

25 Jonathan Scordino [via telephone]

1 APPEARANCES - CONTINUED

2 FOR MARINE MAMMAL COMMISSION:

3 By: Michael L. Gosliner, General Counsel

4

5 FOR SEA SHEPHERD CONSERVATION SOCIETY:

6 Sea Shepherd Legal

7 By: Brett Sommermeyer

8 Catherine Pruett

9 Nick Fromherz [via telephone]

10

11 FOR ANIMAL WELFARE INSTITUTE:

12 Meyer, Glitzenstein & Eubanks LLP

13 4115 Wisconsin Avenue NW, #210

14 Washington, D.C. 20016

15 By: Elizabeth Lewis

16 Georgia Hancock [via telephone]

17 Donald John "D.J." Schubert [via telephone]

18

19 FOR PENINSULA CITIZENS FOR THE PROTECTION OF WHALES:

20 By: Margaret Owens [via telephone]

21

22

23

24

25

P R O C E E D I N G S

10 A.M.

---oOo---

JUDGE JORDAN: All right. Good morning. I'm Judge Jordan, and this is the prehearing conference in the matter of the Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Gray Whales by the Makah Indian Tribe, Docket Number 19-NMFS-30001.

The RIN number for the Federal Register recording is RIN 0648-B158 and 0648-XG584.

And again, what we will be preparing today, after we finish, will be the final agenda -- or at least our first attempt at a final agenda -- to be published in the Federal Register and to schedule the hearing.

So the intent today is -- what I first want to do is have everyone here introduce themselves into the record, take your appearances, and then we're going to go through and then lay out -- because one of the things that's required in the notice is the parties' interest and who will be representing them. And we're going to go through the witnesses that the parties intend to be introducing, and then we're going to go through -- I have already sent -- all

1 the parties have received my review of the parties'
2 interest that have been submitted so far, both by
3 NOAA and by other interested parties, and what I
4 believe to be the factual issues. And we'll find
5 out if we agree with those issues, if issues can be
6 taken out, if we need to add issues in order to set
7 a framework for the hearing.

8 And we'll also discuss -- I understand there's
9 some -- might be some issues concerning the date of
10 the hearing. We'll make sure that's also on the
11 agenda, and again, we'll go through the matters.

12 And also, then, we'll also try to get as far,
13 also, into if there are questions about how to
14 handle the hearing; and if there's any special needs
15 for any witnesses, or anything else that we need to
16 discuss, to make sure that's all agreed to any
17 particular needs for charting or charts or
18 computerized equipment, computerized
19 representations.

20 Again, we'll try to get the parts of that. Most
21 of those additional issues, my staff will work with
22 you, between now and the hearing, to get that all
23 worked out.

24 So again, let's start.

25 Again, everyone chose their own seats; so we have

1 no idea who anyone is yet. So if you, please, the
2 parties would introduce themselves. Again, NOAA's
3 got the burden in this matter; so NOAA starts.

4 MS. BEALE: Would you like us to stand?

5 JUDGE JORDAN: No, you don't have to stand.

6 MS. BEALE: Anyway, my name is Laurie Beale. I'm
7 an attorney with the NOAA Office of General Counsel,
8 representing the National Marine Fisheries Service.

9 JUDGE JORDAN: Very good.

10 MR. MCNULTY: And I'm Chris McNulty. I'm also
11 with NOAA Office of General Counsel on behalf of
12 NMFS.

13 MS. IMAKI: Good morning. My name is
14 Caitlin Imaki, also with Laurie and Chris, from the
15 Office of General Counsel.

16 MS. MORRIS: Good morning. I'm Rachel Morris,
17 also with the Office of General Counsel.

18 MS. PUGH: Good morning. Brittany Pugh, Office
19 of General Counsel.

20 MS. DARM: I'm Donna Darm, and I work for NOAA
21 Fisheries.

22 JUDGE JORDAN: Okay.

23 MR. GOSLINER: And I'm Michael Gosliner,
24 G-o-s-l-i-n-e-r, and I'm the general counsel with
25 the Marine Mammal Commission.

1 MS. BEALE: Your Honor, I would clarify, for the
2 court reporter and the judge, that NOAA Fisheries is
3 also another name for the National Marine Fisheries
4 Service. So those are, in fact, the same entities.

5 JUDGE JORDAN: Right. They are the same, yes.

6 For a number of years, I used to preside over
7 NOAA cases.

8 MR. DEPOE: Patrick Depoe, D-e-p-o-e, Makah
9 Tribal Council.

10 MR. GRUBER: Good morning. Brian Gruber,
11 attorney for the Makah Tribe.

12 JUDGE JORDAN: Okay. Mr. Gruber.

13 MR. STONE: Good morning. Mark Stone. I'm also
14 an attorney for the Makah Tribe.

15 MR. GOLDING: Good morning. Wyatt Golding, also
16 attorney for the Makah Tribe.

17 MS. HAZZARD: Good morning. Cara Hazzard, with
18 two Zs, paralegal for the Makah Tribe.

19 JUDGE JORDAN: Okay.

20 MS. LEWIS: Okay. Elizabeth Lewis with Meyer,
21 Glitzenstein & Eubanks. We are counsel for AWI.

22 MR. SOMMERMEYER: Brett Sommermeyer, director of
23 Sea Shepherd Legal and also here for Sea Shepherd
24 Conversation Society. My name is Sommermeyer. It's
25 S-o-m-m-e-r-m-e-y-e-r.

1 MS. PRUETT: Catherine Pruett, executive director
2 of Sea Shepherd Legal. I'm here on behalf of
3 counsel for Sea Shepherd Legal and Sea Shepherd
4 Conversation Society. My name is spelled
5 P-r-u-e-t-t.

6 JUDGE JORDAN: Very good. All right.

7 And for the persons on the phone, could they
8 also? And again, any persons on the phone who are
9 from NMFS or from NOAA?

10 MR. STONE: This is Steve Stone with NOAA
11 Fisheries.

12 MS. YOUNG: And this is Nancy Young for NOAA
13 Fisheries.

14 JUDGE JORDAN: Okay. Anyone on the line from the
15 Makah Tribe?

16 MR. SCORDINO: This is Jonathan Scordino.

17 JUDGE JORDAN: Spell your name, please, for the
18 court reporter.

19 MR. SCORDINO: Jonathan, J-o-n-a-t-h-a-n,
20 Scordino, S-c-o-r-d-i-n-o.

21 JUDGE JORDAN: Very good.

22 And for the Marine Mammal Commission?

23 MR. GOSLINER: No one.

24 JUDGE JORDAN: No one.

25 Okay. For Sea Shepherd Conversation Society?

1 MR. FROMHERZ: Yes. This is Nick Fromherz.
2 That's F-r-o-m-h-e-r-z.

3 JUDGE JORDAN: Okay. The Animal Welfare
4 Institute?

5 MR. SCHUBERT: Yes. Thank you, Your Honor. This
6 is D.J. Schubert. Full name is Donald John
7 Schubert, S-c-h-u-b-e-r-t, representing the Animal
8 Welfare Institute.

9 And Your Honor, if I may, would it be possible
10 for everyone to speak up a little bit? I don't know
11 if the others on the phone are having the same hard
12 time I am, but it's difficult to hear the other
13 people in the room. Thank you.

14 JUDGE JORDAN: Okay. We'll try to keep it a
15 little louder. All right.

16 MS. HANCOCK: Yes. This is Georgia Hancock, and
17 I'm also with the Animal Welfare Institute, and I
18 would make the same request that D.J. just did.

19 JUDGE JORDAN: And your first name?

20 MS. HANCOCK: Georgia, G-e-o-r-g-i-a, like the
21 state. Last name, Hancock, H-a-n-c-o-c-k.

22 JUDGE JORDAN: All right. Now, is Ms. Innana
23 McCarty on the line?

24 Okay. Is there anyone from the Peninsula
25 Citizens for the Protection of Whales?

1 MS. OWENS: Yes. Good morning, Your Honor, and
2 everybody. This is Margaret Owens, O-w-e-n-s, and I
3 am representing the Peninsula Citizens for the
4 Protection of Whales out here on the Olympic
5 Peninsula, and I would concur with D.J. that it was
6 very hard to hear anyone but the judge; so I agree
7 there's a problem.

8 JUDGE JORDAN: Okay. They're laid out -- they're
9 spread out in the room; so people, when they're
10 speaking, just make sure you're...

11 Okay. Thank you.

12 Is there anyone else from Peninsula Citizens for
13 the Protection of Whales?

14 MS. OWENS: No. It's just me.

15 JUDGE JORDAN: Very good. Thank you.

16 MS. OWENS: You're welcome.

17 JUDGE JORDAN: All right. Again, what we're
18 going to be doing is moving to the discussion.
19 We're moving the phone a bit; hopefully, that will
20 make it easier.

21 MR. SOMMERMEYER: Your Honor, I have a point of
22 clarification. It's a question. Brett Sommermeyer
23 from Sea Shepherd.

24 JUDGE JORDAN: Yes.

25 MR. SOMMERMEYER: My understanding is that

1 today's conference was limited to parties. I
2 understand we have -- my understanding is
3 Jonathan Scordino is a witness for the Makah Tribe.
4 Is that appropriate for this hearing? We don't have
5 any of our expert witnesses here today. I'm just
6 curious how that works.

7 JUDGE JORDAN: Again, the purpose is to have the
8 parties there. Some of the parties, like Peninsula
9 and others, will just be that individual.

10 MR. SOMMERMEYER: Right.

11 JUDGE JORDAN: The objection in particular? Is
12 that a witness?

13 MR. SOMMERMEYER: We have an expert witness who
14 has been identified as an expert witness for the
15 Makah Tribe, and we don't have any other expert
16 witnesses here to answer any technical, scientific
17 issues that he might bring up today.

18 My understanding was it was limited to parties,
19 but please correct me if I'm wrong.

20 JUDGE JORDAN: Right now, I don't believe that
21 we're going to -- we're not going to be getting into
22 any substantive issues --

23 MR. SOMMERMEYER: Okay.

24 JUDGE JORDAN: -- as a witness at this time here;
25 so again -- so I don't -- I'm not seeing any

1 tremendous reason to object to that at this time.

2 MR. SOMMERMEYER: Okay. Thank you, Your Honor.

3 JUDGE JORDAN: Okay. All right. So right now,
4 we know that NOAA is -- everyone other than NOAA is
5 considered, generally, to have an adverse interest
6 in this matter, even though we do recognize that the
7 Makah are the subject of the waiver, but they also
8 have issues concerning the handicraft issues and
9 others, and the use of marine mammal products that
10 are the scope of the restrictions of the regulation
11 is an issue there.

12 And all the other -- and even the Marine Mammal
13 Commission, which is in general support, is, again,
14 generally considered an adverse party.

15 So again, other than NOAA basically being the
16 proponent of the rule, is there any other issue that
17 you wish to put in?

18 Again, the first thing I put in are a list of the
19 participants and their interest in the case, and
20 it's my understanding that NOAA's interest would
21 be -- this being the proponent of the rule?

22 MS. BEALE: Yes, Your Honor.

23 JUDGE JORDAN: Anything further?

24 MS. BEALE: No.

25 JUDGE JORDAN: All right. And for the Makah

1 Tribe, the Makah Tribe's interest is?

2 MR. GRUBER: Brian Gruber for the tribe.

3 Your Honor, as you know, the tribe applied for
4 this waiver over 14 years ago, and we generally
5 support the proposed waiver of regulations as
6 Your Honor noted.

7 We do have some objections to some of the
8 specific regulations, but in general, we're
9 supportive of the proposed waiver and regulations.

10 I would note that depending on how all the fact
11 issues are presented, we may have some differences
12 with NOAA on that, but in terms of our official
13 position, the question of edible products off the
14 reservation is the single -- the sole area where we
15 have formal objections to the proposed regulations.

16 JUDGE JORDAN: Very good. Thank you.

17 For Marine Mammal Commission?

18 MR. GOSLINER: Michael Gosliner for the Marine
19 Mammal Commission. Our interest is as an agency
20 tasked with overseeing implementation of the Marine
21 Mammal Protection Act, and I think our role is
22 different than that of the National Marine Fisheries
23 Service, who's the proponent of the rule, and I
24 think we're the proponent of making sure that the
25 requirements of the Marine Mammal Protection Act are

1 followed.

2 I think that unlike probably every other party to
3 this, they have a preconceived objective, and I
4 think ours is a process objective to make sure that
5 the requirements of the statute are met. And if
6 they are, then the waiver should be issued; if they
7 aren't, then either the waiver should be tailored to
8 fix those deficiencies, or the waiver shouldn't be
9 issued.

10 So I think we don't have an end goal in this.
11 We're more of a process, factual-oriented agency
12 that doesn't have a preconceived position of the
13 outcome.

14 JUDGE JORDAN: Okay.

15 MS. BEALE: Your Honor, with respect to the
16 Marine Mammal Commission, our position is that the
17 National Marine Fisheries Service is actually
18 charged with the implementation of the Marine Mammal
19 Protection Act and interpretation of those
20 requirements by statute, and that the Marine Mammal
21 Commission's role is a role of a scientific advisory
22 body. So I just wanted to clarify our position for
23 the record.

24 JUDGE JORDAN: Okay. Very good. All right.

25 Sea Shepherd Conservation Society and Sea

1 Shepherd Legal, and I should -- does Sea Shepherd
2 wish -- do the two parties wish to be separately
3 considered?

4 MS. PRUETT: No. Thank you.

5 JUDGE JORDAN: Okay.

6 MS. PRUETT: Okay. And Sea Shepherd's position
7 here is that we have -- of course, our mission is to
8 protect marine wildlife and habitat.

9 With that said, we are looking at the waiver not
10 favorably, and we are looking at it both in terms of
11 potential procedural problems with it as well as the
12 potential impact it will have on marine wildlife.

13 JUDGE JORDAN: And the Animal Welfare Institute?

14 MS. LEWIS: Good morning, Your Honor. Elizabeth
15 Lewis for AWI.

16 We have a longstanding interest in this matter.
17 Several employees of the organization have been
18 involved in the Makah hunt issue since the 1990s.
19 AWI itself as an organization has been involved
20 since 1999.

21 AWI's concerned that the proposed waiver does not
22 meet the standards articulated in the Marine Mammal
23 Protection Act, and they are specifically concerned
24 about the proposed waiver's impacts on the
25 Pacific Coast Feeding Group and on the western

1 population of the Pacific Gray Whale.

2 JUDGE JORDAN: Okay. And the Peninsula Citizens
3 for the Protection of Whales? Ma'am? Have we lost
4 --

5 MS. OWENS: Am I there now?

6 JUDGE JORDAN: Yes.

7 MS. OWENS: Oh, sorry. Okay. Peninsula Citizens
8 for the Protection of Whales is opposed to the
9 issuance of this waiver for many reasons.

10 JUDGE JORDAN: Okay. Could you, also, for the
11 court reporter, give your name again one more time?

12 MS. OWENS: Margaret, M-a-r-g-a-r-e-t, Owens,
13 O-w-e-n-s.

14 And I would note again -- and maybe there's
15 nothing that can be done about it, but it was almost
16 impossible to hear Catherine. It's just very hard.
17 It's sort of a muffled effect.

18 JUDGE JORDAN: All right. We'll see what we can
19 do as we move along. Thank you.

20 MS. OWENS: Thank you.

21 JUDGE JORDAN: All right. Now, the next phase --
22 again, I'll start with NOAA about the witnesses.

23 Right now, is NOAA going to be submitting any
24 other or supplemental testimony in this matter?

25 MR. MCNULTY: Your Honor, Chris McNulty on behalf

1 of National Marine Fisheries Service.

2 We have not -- we may be submitting additional
3 testimony that could have additional witnesses as
4 part of rebuttal testimony.

5 At this time we've only identified the four
6 witnesses that are already in the record; so at this
7 point it's four witnesses. We would like to
8 preserve the right to provide additional witnesses,
9 if needed.

10 JUDGE JORDAN: Only for rebuttal.

11 So basically, the NOAA case that NOAA intends to
12 rely upon for the rule is the case that has been
13 uploaded into the system?

14 MR. MCNULTY: That's correct, Your Honor.

15 JUDGE JORDAN: That is in the docketing center.
16 Okay.

17 MR. MCNULTY: Yes.

18 And while I'm standing, I'm not sure at what
19 point it would be appropriate to raise this, given
20 the agenda, but we do have some ideas about how to
21 conduct the hearing and the order in which we might
22 present the witnesses and how to get the parties
23 maybe to agree to do that.

24 So whenever you feel like that would be
25 appropriate to bring up, we would like to have an

1 opportunity to address that.

2 JUDGE JORDAN: That's going to be a little bit
3 more on the logistic side, and again, we'll probably
4 try, because we have to also -- one of the things
5 we'll work out will be the order and scope of
6 cross-examination, particularly the order of
7 cross-examination.

8 We are in the APA, and the APA is not limited to
9 the scope of direct; so there's broad
10 cross-examination authorization allowed here. So
11 the question is what is also going to be the order
12 of cross-examination and issues that need to be
13 addressed as to if an issue -- my biggest concern is
14 getting into cumulative cross-examination where one
15 party -- where the question reaches -- where it
16 reaches a point of exhaustion, because we're going
17 to -- given the number of witnesses over the days of
18 this hearing, I'd like to try to sit back.

19 And if the parties opposed wish to designate, for
20 a particular witness, a primary examiner and then
21 have an additional examiner for any follow-up, that
22 would be a preferred mechanism.

23 But I would want -- one of the things I want to
24 give the parties time to is, you're all here today.
25 If there can be some mutual discussions, during the

1 break or whatever in that matter, so we can reach an
2 idea about how we can approach, in effect, allowing
3 all of these parties to have their -- have an
4 appropriate say, so that I'm getting all of the
5 evidence I need from you, at the same time not being
6 overly cumulative in the time that we have allotted.

7 We have the hearing. We're going to try to do it
8 and try to get the hearing done in a full week.
9 Okay.

10 The Makah.

11 MR. GRUBER: Good morning. Brian Gruber again
12 for the Makah Tribe.

13 We have submitted a number of witnesses'
14 testimony. At this time we are still considering
15 whether -- or what type of rebuttal to submit, and I
16 think we're maybe in the same situation that NOAA
17 is: We're still considering that.

18 I would say, in general, we're not anticipating
19 any witnesses for rebuttal.

20 We also may consider, if there are new issues for
21 the hearing that come out of the final agenda, that
22 we may be submitting additional testimony. But
23 again, I think we would likely be using the existing
24 witnesses that have already submitted testimony.

25 JUDGE JORDAN: All right. Thank you.

1 Marine Mammal Commission.

2 MR. GOSLINER: Michael Gosliner again.

3 Right now, we have not submitted any testimony.
4 I need to go back to my principals following this
5 meeting, and I think it's dependent upon how the
6 issues are identified here.

7 I think the two areas where we're contemplating
8 either submitting direct testimony following the
9 hearing or rebuttal testimony is on the question of
10 the impacts of the unusual mortality of the gray
11 whales.

12 And here, I'm kind of turning to the National
13 Marine Fisheries Service to wonder if you're
14 considering supplementing and putting some
15 information on the extent and potential impact of
16 that, and we might fill the void there.

17 The other issue -- and it depends on how that
18 issue is couched at this conference -- is putting on
19 a witness as to what the IWC has or has not
20 authorized in the issuance, and I guess whether the
21 waiver would be consistent with what the IWC has
22 authorized.

23 JUDGE JORDAN: Okay. Sea Shepherd.

24 MR. SOMMERMEYER: Brett Sommermeyer for Sea
25 Shepherd.

1 Margaret, can you hear me?

2 MS. OWENS: Yes.

3 MR. SOMMERMEYER: Excellent.

4 We are looking into our rebuttal witnesses. We
5 have two that are definitely going to be rebuttal
6 witnesses and a third that we're working on.

7 So to what extent do we need to disclose entities
8 of rebuttal witnesses today? Can it come out when
9 rebuttal is due, on July 9th, or do we need to
10 disclose testimony today?

11 JUDGE JORDAN: Again, rebuttal will be -- was one
12 of the issues I wanted to discuss later today, about
13 how supplemental evidence is going to be treated.

14 I believe as direct evidence is there, you know
15 what rebuttal you're going to bring in. We're going
16 to be setting a date so that the primary rebuttal
17 direct testimony would also be -- we'll set a date
18 today for how that will be introduced in order to
19 keep the requirement that direct testimony comes in
20 written form.

21 And then what we do is we'll bring the witnesses
22 in, the witnesses will identify their -- and then be
23 available for cross.

24 That's the mechanism that we're trying to use
25 here to the extent possible.

1 If there's any issues coming up concerning --
2 issues concerning the qualification of an expert, et
3 cetera, then that's an issue we will have to deal
4 with as that witness comes up, and we'll deal with a
5 voir dire at that time for the acceptance of
6 witnesses, if there are issues concerning the
7 qualifications.

8 MR. SOMMERMEYER: Okay. And just one other
9 point, another question. I was unclear from the
10 rules how the sort of direct testimony -- I
11 understand you have to have the witness appear in
12 person and present their kind of summary and go from
13 there to make the record.

14 JUDGE JORDAN: Right.

15 MR. SOMMERMEYER: Does the same rule apply
16 to rebuttal witnesses?

17 JUDGE JORDAN: I believe that the rule will apply
18 to rebuttal witnesses. By the time -- you will know
19 what the witnesses in chief will have testified to
20 before the hearing.

21 And so I'd like to try to keep the hearing moving
22 by having the parties then file their rebuttal
23 direct testimony prior to the hearing, so that when
24 we move along, they'll be able to come in, and we'll
25 work with that as we go along.

1 Now, again, if there's new evidence that comes up
2 at the hearing, obviously, that would not apply
3 to -- if new evidence comes in during
4 cross-examination, and then someone wants to offer
5 rebuttal to that, that would be the normal course of
6 -- the normal course of examination.

7 MR. SOMMERMEYER: Okay. Thank you.

8 JUDGE JORDAN: AWI.

9 MS. LEWIS: Elizabeth Lewis again for AWI.

10 We are still in the process of identifying our
11 rebuttal witnesses, and we'll present those in
12 accordance with the rules that you just set forward.

13 JUDGE JORDAN: By the date. Okay.

14 MS. LEWIS: Thank you.

15 JUDGE JORDAN: Okay. And you also have witnesses
16 -- you have not identified witnesses to date, have
17 you?

18 MS. LEWIS: We submitted the testimony of
19 D.J. Schubert.

20 JUDGE JORDAN: Okay. So that witness -- the
21 witnesses of anyone you've already submitted
22 testimony of will be appearing?

23 MS. LEWIS: Yes, sir. Yes, Your Honor.

24 JUDGE JORDAN: Very good.

25 Also, just one note. We understood today that

1 for the purposes of the public record where you can
2 view the matter -- we understand that we just
3 received today some more testimony from the Makah
4 Tribe that couldn't be uploaded, and that was sent
5 to us by disk. That's further scientific evidence.
6 We haven't even had a chance to review it yet, and
7 we're trying to confirm that the Baltimore office,
8 where this is being uploaded for the public, has
9 also received it and that they will be uploading it
10 and making sure they can upload it. But there was a
11 problem, again, receiving it electronically; so
12 apparently, it was sent by CD.

13 MR. GRUBER: Right. Could I speak to this?
14 Brian Gruber for the tribe.

15 There has been quite a bit of e-mails exchanged
16 with the docketing center to try to explain how the
17 tribe submitted its various filings.

18 We submitted, on DVDs to the docketing Center in
19 Baltimore, expert testimony from Joshua Reed, who is
20 an historian, and from three science experts. So
21 those all appear in the ALJ's reading room online.

22 JUDGE JORDAN: They're already in it. Okay.

23 MR. GRUBER: And they're not live links.

24 So we also served on all the parties by
25 FederalExpress, and we also sent a courtesy copy to

1 Ms. Maclintock, and I hope you did receive that
2 after May 20th.

3 MS. MACCLINTOCK: We've been traveling; so we've
4 been out of the office a lot, and so I hadn't
5 received it until just recently; actually, like
6 going up to our mailroom and getting it. Our
7 mailroom also takes a little while to get things.

8 MR. GRUBER: Maybe we should have FedExed it.

9 I also want to say that these discussions have
10 extended to other filings we made.

11 For example, on Friday the 7th, we submitted a
12 proposed agenda; we e-mailed it to everyone. It's a
13 small document. It should have been received by the
14 whole list.

15 We've been in touch with the docketing center.
16 As of this morning, it was not posted, even though
17 the person we spoke to indicated she posted it, and
18 it should be visible.

19 So we are having a number of difficulties, and we
20 hope to -- by way of saying that we're trying our
21 best to make sure that everybody has all of our
22 information.

23 JUDGE JORDAN: Okay. I will check with the
24 docketing center to make sure that those are dealt
25 with as fast as possible, because I want to make

1 sure the whole record is in the Public Reading Room.

2 Okay. Peninsula Citizens.

3 MS. OWENS: Yes. We do not at this time have any
4 witnesses prepared to come to Seattle. I may be
5 speaking for a whole lot of people, just myself.

6 JUDGE JORDAN: Okay. Very good.

7 All right. Again, can you prepare as part of
8 that a written statement so that we can add that to
9 the record?

10 MS. MACCLINTOCK: You have it.

11 JUDGE JORDAN: We already have it?

12 Okay. You have a written statement already
13 filed, their declaration of the --

14 MS. OWENS: Yes.

15 JUDGE JORDAN: Okay.

16 MS. OWENS: Yes.

17 JUDGE JORDAN: Okay. And you don't have any
18 further comments of this right now?

19 MS. OWENS: No, I don't.

20 JUDGE JORDAN: Okay. But you'll be at the
21 hearing.

22 And again, if people have any questions
23 concerning, you will be subject to cross-examination
24 on that statement. Okay?

25 MS. OWENS: Yes.

1 JUDGE JORDAN: Very good. All right.

2 All right. Other than rebuttal witnesses, who
3 will be filed later, the listed witnesses in the
4 original presentations are the ones which will be
5 adding to the final agenda.

6 Thank you very much.

7 Okay. Now, of those witnesses, do any of your
8 witnesses have any special needs that we need to
9 address at the hearing?

10 Anyone that needs any ADA issues or anything else
11 that you know of?

12 No? Very good.

13 All right. What we're going to go through now is
14 basically going through my determination of the
15 issues.

16 Before we get there, are there any issues? I
17 know that there has been a stipulation of some of
18 the parties that certain issues should not be --
19 should not be within the scope of this hearing.

20 Is that an agreement with -- have all the parties
21 received that stipulation?

22 MR. GOSLINER: Michael Gosliner for the Marine
23 Mammal Commission. We have received it. We're, I
24 think, the only ones in this room -- I don't know if
25 other people who are on the phone have signed onto

1 it. We have not signed onto it.

2 I left a message with the NOAA counsel, saying
3 that we were interested in signing onto it, but we
4 have not done so.

5 I think to the extent that it addresses those two
6 issues, that we could sign onto it with maybe one
7 clarification.

8 So again, I'm not sure what the process is now
9 that it's been filed -- how we would go about doing
10 that. So I think --

11 JUDGE JORDAN: Well, again -- now, if there is an
12 objection, basically, as I understand it, it's
13 basically a motion, in effect, for me to accept the
14 joint -- a stipulation of certain parties. I can
15 either bind those parties who stipulate -- again,
16 this is one of the issues. If it's opposed, then I
17 have to make a ruling.

18 MR. GOSLINER: So by clarification, there's a
19 whereas clause at the very end where NMFS did not
20 take a position. We will also not take the position
21 on that particular point.

22 JUDGE JORDAN: And I understand the stipulation
23 primarily deals with the mechanics of the hunt.

24 MR. GOSLINER: Yes.

25 JUDGE JORDAN: And the nature -- and again, one

1 of the issues which I had raised as a new issue that
2 was not raised in the original one was the public
3 safety issue, and I understand the public safety
4 issue is one of the matters that has been agreed to
5 hold to the permitting process versus the --

6 MR. GOSLINER: So if I may?

7 JUDGE JORDAN: Yes.

8 MR. GOSLINER: I think one of the points was
9 adequacy of NEPA compliance being an issue. We
10 agree with that.

11 As to whether or not the manner and location of
12 hunting are relevant issues, we note that they are
13 both issues that are identified as possible
14 regulatory measures under Section 103 of the Marine
15 Mammal Protection Act, but if the other parties
16 don't want to pursue that, I guess we would
17 acquiesce to that position as well.

18 We don't want to be bringing issues, but it may
19 be, depending upon how one reads the Marine Mammal
20 Protection Act, that if you're going to impose such
21 limits, the rule-making is the place to do it. That
22 provision could also be read as discretionary, that
23 you can address those issues in the rule-making but
24 could defer them.

25 So again, I think we're willing to acquiesce to

1 the positions of the other parties if they don't
2 want to pursue those particular issues.

3 JUDGE JORDAN: Okay.

4 MR. GRUBER: Brian Gruber for the Makah Tribe.

5 I wanted to weigh in on this
6 mechanics-of-the-hunt issue.

7 The stipulation which everyone has is specific to
8 any facts or conclusions about whether the taking of
9 whales is humane and also issues of human safety.
10 We do not view that as foreclosing all testimony
11 about the method of hunting. Not only is that sort
12 of central to understanding what the tribe is
13 proposing to do, but it also appears called for in
14 one of your other questions.

15 And we don't think that you have to avoid talking
16 about how the tribe has developed its hunt and its
17 proposed methodology and still avoid getting to the
18 question of -- the legal question of whether the
19 hunt is humane.

20 So we don't think a stipulation forecloses from
21 presenting testimony on the method of the hunt.

22 JUDGE JORDAN: Okay. And anyone else on this
23 issue? Because it's one of the issues that I
24 identified as a new issue, and was not in the NOAA
25 one originally, and NOAA and the others have -- and

1 Sea Shepherd, you're a party to that stipulation.

2 What is the issue? Do you consider that
3 testimony -- that the Makah testimony on -- some
4 testimony in the -- that doesn't preclude testimony
5 on the mechanics, just not that you don't want me to
6 make a decision on that?

7 MR. SOMMERMEYER: My understanding -- Brett
8 Sommermeyer -- is that it would preclude that. This
9 is something that should be properly considered
10 in the permitting phase -- the issue of how the hunt
11 is conducted is something that should be dealt with
12 at the permitting phase when we get a permit versus
13 the waiver proceeding here, our petition on that
14 specific issue.

15 JUDGE JORDAN: All right. Okay. And AWI is also
16 in opposition. You are a signatory. Is that AWI's
17 position, also?

18 MS. LEWIS: Yes, Your Honor. Elizabeth Lewis for
19 AWI. Yes, Your Honor. That is also AWI's position.
20 We believe that the issues should be addressed
21 during the permitting stage.

22 JUDGE JORDAN: Okay. Now, I also wanted to
23 speak -- clarification here. The permitting
24 stage -- while parties can request a public hearing,
25 a public hearing is not mandated for the permitting

1 stage; so the parties understand that NOAA may
2 decide to, even if someone requests a public
3 hearing, to issue the permit using just notice and
4 comment.

5 MS. LEWIS: Yes, Your Honor, AWI does understand
6 that. And it is AWI's understanding, also under the
7 MMPA, that implementing regulations -- that we would
8 be able to challenge that permit in federal court as
9 with all the permits issued under the Marine Mammal
10 Protection Act.

11 JUDGE JORDAN: Right. Okay. I just want to make
12 sure I understand the parameters of the parties'
13 stipulation here.

14 Again, so the issue's not necessarily that
15 evidence that comes in is not necessarily
16 incompetent, but you don't expect me to make a
17 decision related to the methodology or humaneness or
18 public safety issues at this stage because that's
19 still being developed for the permitting stage.

20 MS. LEWIS: That's correct, Your Honor.

21 And I'd like to just make a couple of quick
22 points about that.

23 Subsequent to submitting the stipulations, we
24 circulated to the parties a list of the issues from
25 the ALJ list of issues that fell within the

1 stipulation, and circulated that for the parties to
2 indicate their agreement or not.

3 We got -- some of the responses we didn't receive
4 until Friday or over the week; so we have not yet
5 had an opportunity to sort of collate that
6 information and see if there are specific facts on
7 your list to which all the parties agree and/or some
8 others to which we could agree, but maybe we need to
9 have some additional discussion.

10 From looking over the replies just initially, it
11 looked like there were some issues where the parties
12 were not agreeing as to the interpretation of the
13 stipulation, but I just want to make you aware that
14 we had undertaken that effort.

15 And then with respect to the permit issues, our
16 position is that Section 104 does not provide for a
17 formal rule-making in order to issue the permit.

18 That section has, as you mentioned, its own
19 public notice and comment requirement and its own
20 provision for judicial review.

21 JUDGE JORDAN: Right. It has its own separate
22 provision for public hearing; it's just that it's
23 not a mandated one, unlike it is for this matter.

24 Sea Shepherd.

25 MR. SOMMERMEYER: Brett Sommermeyer for Sea

1 Shepherd. I just have a question.

2 So I understand that because the notice was not
3 received -- did not receive all of the parties'
4 positions on portions of your agenda with respect to
5 the stipulation, that they didn't have time to
6 collate it. But with respect to today, it seems
7 like we could still -- I think there's agreement on
8 a substantial portion of those, and some, we don't
9 agree on. I think it could be dealt with. In the
10 context here, it's probably necessary to establish a
11 final agenda to address those agreed stipulations.

12 JUDGE JORDAN: One of the problems we have with
13 the regulation -- I'll be very blunt. I've got a
14 regulatory deadline, which is -- initially, seems
15 daunting, but the realities of publishing something
16 in ten days in the Federal Register is very
17 daunting. I have to issue my final agenda by
18 Wednesday in order to get published in the Federal
19 Register in the time allotted by the regulation.

20 Now, I am very amenable because of that time, if
21 parties come up and I have to do a supplemental,
22 final agenda based on the agreements of the parties
23 in later discussions of the parties -- that's a
24 possibility, but we have to -- under the reg, I have
25 to publish my final agenda within ten days of this

1 hearing.

2 Well, unfortunately, I don't -- it's not my
3 Federal Register notice. It's NOAA's Federal
4 Register notice. It has to get -- go to NOAA, be
5 signed by NOAA, go to the Federal Register, and so
6 we have -- we'll be done -- we'll be doing this
7 sometime before Wednesday in order to get it to NOAA
8 in order to publish it.

9 So I would -- if we can work -- during the
10 breaks, if people can try to get some things
11 together, if we can -- I would gladly -- if everyone
12 agreed to the final agenda, if can get that, that
13 would make -- it would make the hearing process a
14 lot easier, but I think that's going to be -- that's
15 going to be a bit of a lift. We'll see if we can
16 get there.

17 MR. SOMMERMEYER: And Your Honor, that's why I
18 bring it up. I think there may be some -- I believe
19 there will be some ability to get through some of
20 the issues based on that secondary stipulation of
21 the parties entering into that as to your agenda.

22 JUDGE JORDAN: Okay.

23 MR. SOMMERMEYER: Thank you.

24 JUDGE JORDAN: Again, NOAA, you're just starting
25 to review some of those. Can we at least go through

1 the elements which the parties are in agreement from
2 the agenda that we developed, the issues that we
3 developed versus what the parties believe should be
4 the limitations on?

5 And again, before we do that, do the parties want
6 to take about a ten-minute break in order to -- get
7 a bit of a break before we start getting into the
8 line-by-line analysis of what we had come up with
9 based on the initial submissions of all the parties?
10 We're going to take a break for about ten minutes,
11 also give the court reporter a break.

12 [SHORT
13 RECESS TAKEN]

14 JUDGE JORDAN: All right. For the persons on the
15 phone, during the break, which was extended, the
16 parties were trying to come to an agreement
17 concerning the proposed agenda.

18 How fruitful were your discussions back there?

19 MS. BEALE: Yes, Your Honor.

20 Noting that we did not have the benefit of
21 conference with the Peninsula Citizens for the
22 Protection of Whales --

23 JUDGE JORDAN: Right.

24 MS. BEALE: -- the remaining parties agreed to
25 some issues that we believe can be removed from the

1 list of facts for hearing based on the stipulation
2 that was previously filed, including the Marine
3 Mammal Commission.

4 JUDGE JORDAN: Okay.

5 MS. BEALE: The first is --

6 JUDGE JORDAN: All right. The only thing is, I
7 don't have a copy of that yet.

8 Making sure I have the most recent...

9 MR. SLONIM: Your Honor, Marc Slonim for the
10 Makah Tribe. So we discussed these by reference to
11 your list of issues and can identify them by the
12 numbers on your list of issues.

13 JUDGE JORDAN: This is by the number -- the NOAA
14 numbers that we have here, the Marine -- NOAA's
15 Proposed Issues of Fact?

16 MR. SLONIM: No. It's by your list of proposed
17 issues for your proposed hearing agenda.

18 JUDGE JORDAN: My proposed?

19 MR. SLONIM: Yeah.

20 JUDGE JORDAN: Okay.

21 MS. BEALE: We are now following numbering that
22 you have provided in the notice.

23 JUDGE JORDAN: Oh, okay. All right.

24 MS. BEALE: Beginning under roman numeral Ibi,
25 the facts state "In light of NMFS's assertions that

1 most effect of the hunt will be temporary and
2 localized, does the environmental rule impact the
3 small group of whales feeding in Makah U&A
4 necessitate separate consideration?"

5 The parties agreed that that fact does not need
6 to be addressed at the hearing.

7 JUDGE JORDAN: Okay.

8 MS. BEALE: And of course, parties, please
9 interrupt if I misstate anything.

10 JUDGE JORDAN: Ms. Owens, do you have the copy of
11 the -- of my proposed issues of fact?

12 MS. OWENS: Yeah. And in fact, I think I was
13 among one of the first to send it in. I did not
14 receive a confirmation e-mail back from Laurie, but
15 I believe others received it. I agreed with all of
16 NMFS's proposals except for four, which I just
17 listed by their numbers.

18 So I'm surprised that you're not coming up with
19 my -- I got right on it.

20 MS. BEALE: Yes. I apologize. That is correct.
21 We received not a list but an e-mail, which I have
22 not, as I mentioned, collated all the replies.

23 MS. OWENS: I did send it in maybe a week and a
24 half -- I mean, quite a number of days ago.

25 MS. BEALE: Okay. So anything, Margaret, that is

1 not on your list of the four items we can assume
2 that you do agree with?

3 MS. OWENS: Yes, ma'am.

4 MS. BEALE: Okay.

5 And I will just read for the Court. I have an
6 e-mail from Ms. Owens. This is dated June 13th,
7 2019. She states that "PCPW agrees with the
8 majority of NMFS's proposals. A few comments."

9 And then it says "roman numeral IA1a," the
10 comment is "We prefer the original wording."

11 The next on the list is 1A2B. "We prefer the
12 original wording."

13 Roman numeral IIA3iii, "We prefer do not strike."

14 And the fourth is roman numeral IIB4vii, "We
15 prefer do not strike."

16 So as I go through these, I'll just try to
17 cross-reference that with the list from Margaret,
18 and I apologize for omitting that from the
19 beginning.

20 JUDGE JORDAN: Thank you. All right. So let's
21 --

22 MR. SLONIM: If we could go back to the first
23 item that Ms. Beale mentioned, which was IBIBii --

24 JUDGE JORDAN: Okay.

25 MR. SLONIM: -- regarding Temporary Localized

1 Effects. So I believe the agreement was not to
2 strike that issue but to add "under the MMPA" at the
3 end of the statement that Judge Jordan has of that
4 issue.

5 MS. BEALE: That wasn't my notes.

6 JUDGE JORDAN: So we're agreed that's not an
7 issue?

8 MS. MACCLINTOCK: I'm sorry, Your Honor.

9 Was there agreement that we're adding "under the
10 MMPA" to the end of this sentence?

11 MS. BEALE: Yes.

12 MR. SLONIM: Correct.

13 MS. MACCLINTOCK: Okay. So we're not striking it
14 entirely from the document?

15 MS. BEALE: We're not.

16 MR. GOSLINER: There's an agreement that NEPA or
17 other consideration is not a part of the hearing.

18 MS. MACCLINTOCK: Okay.

19 MS. BEALE: Okay. The next -- and we did agree
20 to remove this one. It is roman numeral 1b1Div,
21 "Given that the waiver only applies to the ENP
22 stock, will an incidental take permit be required
23 under the Endangered Species Act" --

24 Do you want me to read the entire facts into the
25 record?

1 JUDGE JORDAN: Yes.

2 MS. BEALE: -- "(ESA) to account for the
3 possibility of a WNP whales being taken?"

4 And Margaret, I do not see that on your list; so
5 I assume that you are also okay with omitting that
6 fact from our issues?

7 MS. OWENS: Yes.

8 MS. BEALE: Okay. Thank you.

9 The next is roman numeral IIA2B.

10 JUDGE JORDAN: Okay.

11 MS. PRUETT: We've agreed to modify this fact --
12 no. I'm sorry. We've agreed to remove this fact,
13 with a modification as to how it was originally
14 worded.

15 JUDGE JORDAN: Okay.

16 MS. BEALE: The original facts state "The
17 United States is a signatory to the International
18 Convention for the Regulation of Whaling (ICRW).
19 The ICRW establishes the International Whaling
20 Commission (IWC) which sets catch limits for average
21 and all subsistence whaling by member states."

22 We propose to strike the last three words of that
23 statement and substitute the words "for stocks."

24 MR. GOSLINER: I have a question on this. If
25 we're striking the issue, do we need to even bother

1 editing?

2 MS. BEALE: That is what you had requested.

3 MR. GOSLINER: Well, I know.

4 MR. MCNULTY: This is Chris McNulty.

5 So I think -- I thought the agreement was we were
6 going to stipulate to that fact; so it doesn't need
7 to be considered an issue.

8 MR. GOSLINER: Okay.

9 MR. MCNULTY: All the parties will stipulate to
10 that fact and delete "by member states."

11 MR. GOSLINER: Yeah.

12 MR. MCNULTY: So, as stated, with that deletion,
13 it would be stipulated to by the all the parties; so
14 it would not need to be contested.

15 JUDGE JORDAN: Not need to be.

16 So this is a stipulation of the parties?

17 MS. BEALE: That's correct.

18 JUDGE JORDAN: And not just for B and not the
19 subs, not the -- not the subparagraphs?

20 MS. BEALE: I believe that's correct. Just the
21 facts as I read it.

22 JUDGE JORDAN: Okay. All right.

23 MS. BEALE: The next one is a stipulation to the
24 facts with a modification of wording. Let me make
25 sure it's not on Margaret's list.

1 Okay. The fact as written is -- this is roman
2 numeral IIA3ii. As written, it states "Is
3 consideration of cumulative impacts, including those
4 from military exercises, marine energy, and coastal
5 development, and climate change necessary?"

6 The stipulation would add at the end of that
7 sentence "under the MMPA," and the parties stipulate
8 that that is a relevant fact.

9 JUDGE JORDAN: Okay. Stipulate that's a relevant
10 fact.

11 MS. BEALE: As written, the issue states "Were
12 all local impacts discussed in Anderson v. Evans,
13 371 S. 3rd 475, 9th Circuit, 2002, adequately
14 considered?"

15 The parties agree to modify this fact to state
16 "Were all local impacts that must be considered
17 under the MMPA adequately considered?"

18 So we agree that that's a relevant fact as
19 reworded. And I must add that that fact is on
20 Ms. Owens' list. She prefers the original wording.

21 But Margaret, you did not have the benefit of our
22 discussion; so if you like, I could read again what
23 the other parties were agreeing to substitute.

24 MS. OWENS: Oh, okay.

25 MS. BEALE: So the agreement was to state "Were

1 all local impacts that must be considered under the
2 MMPA adequately considered?"

3 MS. OWENS: Are you asking me?

4 MS. BEALE: Yes. Whether you would agree with
5 that modification.

6 MS. OWENS: Well, I would say no.

7 MS. BEALE: No. Asking whether you agree to
8 modify the language.

9 JUDGE JORDAN: That's a relevant fact for me to
10 consider.

11 MS. OWENS: Yes. I'd like you to consider that,
12 yes.

13 MR. GOSLINER: Just one editorial. Should that
14 be an "are" versus "were," present tense instead of
15 past tense, so it's "Are they being adequately
16 considered"?

17 MS. BEALE: We're referring to the proposed rule
18 that was published by the National Marine Fisheries
19 Service in April.

20 MR. GOSLINER: Okay.

21 JUDGE JORDAN: Yeah. This is something that
22 occurred -- this is whether or not in the
23 preparation, were the procedural mandates met?
24 Okay.

25 MS. BEALE: Okay. The next -- we've agreed to

1 remove part of one of your issues of fact,
 2 Your Honor, as identified, roman numeral iiBliiii.
 3 The second sentence of this issue reads "Is the
 4 proposed use of PCFG strike limits and low abundance
 5 triggers, rather than the potential biological
 6 removal (PBR) based approach contained in the DEIS
 7 complex and novel enough to require supplemental
 8 study, notice, and comments?"

9 The parties have agreed, based on the
 10 stipulation, to strike that second sentence from the
 11 issues for hearing.

12 JUDGE JORDAN: That is, "Is the proposed use" --
 13 that sentence?

14 MS. BEALE: Correct.

15 Again, the parties agree that arguments about
 16 compliance with the National Environmental Policy
 17 Act is not appropriate or -- I won't characterize
 18 it, but it will not be addressed at the hearing.

19 JUDGE JORDAN: Will not be a part of. Okay.

20 MS. BEALE: The next issue is roman numeral
 21 IIB3ii, and the parties have agreed that this issue
 22 can be stricken and does not need to be addressed at
 23 the hearing.

24 JUDGE JORDAN: This is the issue of "Questions
 25 have been raised about"?

1 MS. BEALE: Yes. It reads "Questions have been
2 raised about whether the alternative proposed in the
3 DEIS are sufficiently similar to the even/odd
4 structure contemplated by the proposed waiver and
5 regulations or whether they are different enough as
6 to require supplemental study, notice, and comment."

7 We agree to not address that issue at the
8 hearing.

9 JUDGE JORDAN: Okay.

10 MS. BEALE: The next is roman numeral IIB4i.
11 Similarly, the parties have agreed this does not
12 need to be addressed at the hearing.

13 The issue reads "Are the limitations on
14 authorized strikes (successful and unsuccessful)
15 training exercise restrictions, landing limits, and
16 methods of identifying and accounting for whales in
17 the proposed waiver and regulations sufficiently
18 similar to those in the DEIS, or is supplemental
19 study, notice, and comment required?"

20 JUDGE JORDAN: And you wish to have this one
21 removed?

22 MS. BEALE: Correct.

23 JUDGE JORDAN: Okay.

24 MS. BEALE: We have also agreed that issue of
25 fact roman numeral IIB4 vi may be removed from the

1 list of issues for hearing.

2 The issue reads "NMFS has not specified the
3 precise methods by which the hunt may be
4 accomplished, stating that this will be included in
5 the permit. Must the regulations prescribe the
6 criteria NMFS will use to determine that the methods
7 are humane and to assess the risks to public
8 safety?"

9 JUDGE JORDAN: Okay. It will not be discussed
10 here because they will be discussed in the
11 permitting process.

12 MS. BEALE: Correct.

13 And I have one more on the list that the parties
14 have agreed to strike from the list of issues for
15 hearing. It's roman numeral IIBIi. "Do the
16 mechanics of the hunt fall under this factor. If
17 so, have any such techniques been identified, and do
18 they merit discussion during this proceeding?"

19 For the same reasons as the prior issues, the
20 parties have agreed that this does not need to be
21 addressed in the hearing.

22 JUDGE JORDAN: All right.

23 MS. BEALE: And that's all I have. Thank you.

24 JUDGE JORDAN: Okay.

25 MS. BEALE: And there may be a few other facts

1 that with additional discussions the parties could
2 agree to, but that's what we have at this time.

3 JUDGE JORDAN: All right. Okay. Now, have we
4 reached agreement as to what need not be in the
5 hearing?

6 Are there any -- does any party have any
7 significant disagreement with other issues that I've
8 identified, first of all, under Section I?

9 MS. LEWIS: Your Honor, AWI has a couple of
10 concerns with Section I.

11 First of all, we understand that the requirement
12 is to make sure that any such takings are in accord
13 with the sound principles of resource protection and
14 conservation.

15 We would like to see added to that "As provided
16 in the policies and purposes of the MMPA" to reflect
17 that statutory language.

18 We would like to make clear that the principles
19 of resource protection and conservation -- we would
20 like to make clear that those are to be determined
21 within the context of the Marine Mammal Protection
22 Act, which is more protective than other wildlife
23 statutes.

24 If you would like me to pause and allow the
25 parties to respond or let me know if you would like

1 me to proceed.

2 JUDGE JORDAN: I mean, I thought this section --
3 what we're doing is this section was -- the issue
4 raised by the general section of the MMPA on this
5 issue. So clearly -- I mean, you're adding that to
6 make sure it's -- the principles of the MMPA are --
7 that we're adapting or...

8 MS. LEWIS: We would just like -- AWI's position
9 is that -- you're saying "In accord with sound
10 principles of resource protection and conservation,"
11 but without defining what those principles are.

12 We understand that this was just introductory
13 language, but we would like to see just that
14 additional statutory language added to the
15 introduction to make it abundantly clear that it is
16 within the context of the policies of the first
17 section of the Marine Mammal Protection Act, which I
18 believe is Section 1761.

19 JUDGE JORDAN: Okay. All right. Initially,
20 we're not going to include -- is there any other --

21 MS. LEWIS: AWI is also concerned -- this is more
22 of an overarching issue that I mentioned that we
23 would be raising to the other parties.

24 Throughout the agenda, the words used are, you
25 know, "Is this appropriate? Is this determination

1 appropriate?"

2 The standard, even under the waiver, is the best
3 available science, and so AWI would like to see that
4 standard reflected in the wording of the agenda.

5 For example, turning to -- under Section 1a as in
6 apple -- 1a -- this is just an example -- the agenda
7 says "Is NMFS's determination that there are two
8 stocks of gray whales under the MMPA, the Eastern
9 North Pacific (ENP), and Western North Pacific (WNP)
10 stock appropriate."

11 AWI would prefer throughout the agenda to see
12 language more like "Has NMFS established that by the
13 best available science, that there are two stocks,
14 the ENP and WNP," just to make clear that the burden
15 of proof is still on NMFS and that the standard is
16 the best available science standard.

17 JUDGE JORDAN: Supported by the -- supported by
18 the evidence? Because some places may not be just
19 the scientific standard.

20 MR. GOSLINER: I might be able to help here.

21 I think there's been -- there's confusion; you
22 recognized that when you sent it out, and I think
23 all of us in our submissions have been grappling
24 with how do you separate the factual issues from the
25 legal issues?

1 And I think this is one where the legal issue is
2 what is the evidentiary standard?

3 And it's substantial evidence under formal
4 rule-making -- that's best available science -- is
5 what we should be applying and maybe to have some
6 stipulation that wherever we say "is it
7 appropriate," we mean is it appropriate under the
8 applicable evidentiary standards?

9 Does that make sense?

10 JUDGE JORDAN: I think -- I think maybe the
11 better term would be -- I mean, to me, the -- I have
12 before me a proposed rule, and the issue is whether
13 or not the evidentiary basis for that rule is
14 supported by a preponderance of the evidence. If
15 the evidence is observational, it's observational
16 evidence. If it's scientific evidence, it's the
17 nature of the scientific, which would in this case
18 sometimes be biological evidence, and other times,
19 it would be what the mechanism was used to --
20 whether or not -- you know, what imaging
21 technology -- the imaging technology issues here.

22 So I think if we say -- where we're saying was it
23 appropriate, is it supported by the evidence,
24 whether it's scientific or not, is -- if one of the
25 evidentiary standards is the best scientific

1 evidence under the MMPA -- because I've already said
2 is the regulation supported under the MMPA? If that
3 is one of the evidentiary standards to use, I would
4 be applying that throughout the rule-making.

5 MS. LEWIS: Yes, Your Honor. That also applies
6 to the waiver as well, that standard, the best
7 available -- the best scientific evidence available.

8 JUDGE JORDAN: Right.

9 MS. LEWIS: And you know, with respect -- in
10 AWI's view, you're determining by a preponderance of
11 the evidence whether NMFS has established, by the
12 best available science, that a waiver is
13 appropriate, and AWI would like to see that
14 reflected -- that language reflected in the hearing
15 agenda.

16 JUDGE JORDAN: The only issue -- again, we could
17 always have debates over what is -- science is a
18 questioning mechanism, and there's always a debate
19 over which -- scientists have great debates over
20 which is the best methodology, the best -- what
21 is -- what constitutes the best scientific evidence.

22 So to me, scientific evidence is going to be a
23 large part of this, and I will be applying -- trying
24 to apply the appropriate standard throughout the
25 hearing.

1 So I'm just -- I still think "supported by the
2 evidence" is the appropriate term generally, and
3 where that evidence falls about a scientific matter,
4 the most -- then the -- the acts -- application of
5 the best available science would apply.

6 Does that sound -- is anyone -- does that sound
7 like the mechanism of the scope of review that I
8 should be applying, or do the parties have any
9 questions on that?

10 I think NOAA agrees.

11 MS. BEALE: I am not sure what the question was.

12 JUDGE JORDAN: Again, the question was, they're
13 asking me if I should apply the best scientific
14 evidence rule throughout. And to me, whatever the
15 factual issue is, to me, it's evidence in general.
16 If scientific evidence is the mechanism used, the
17 best -- you know, I just don't want to lock myself
18 into that this could be a better mechanism. I don't
19 want to get in the gradations of the quality of
20 various scientific methodologies or theories.

21 MS. BEALE: Your Honor, I would say that NMFS
22 does not object to the fact as it's characterized,
23 but we would interpret, for example, lala, "Is this
24 appropriate" as meaning is it appropriate given the
25 legal standards.

1 JUDGE JORDAN: Given the legal standards that are
2 before me, there's -- we try to use that generic
3 term so that people would have -- be able to argue
4 that it's inconsistent with the law, it's
5 inconsistent with the science. That's why we try to
6 use the general one rather than going back and doing
7 it -- well, it could be factually supported but
8 legally unsupported.

9 That's one reason we try to use that term as a
10 generic term, knowing we were going to have to apply
11 both -- both scientific evidence in some places and
12 applying the law in other places; so that's why the
13 generic term was used.

14 Can we say whenever that's used, that's what
15 we're talking about?

16 MS. LEWIS: AWI is fine with that.

17 JUDGE JORDAN: Okay.

18 MS. LEWIS: As long as that's understood by all
19 parties.

20 JUDGE JORDAN: Okay.

21 MS. LEWIS: Thank you.

22 And then just in terms -- this is -- we were just
23 on Part I -- correct? -- of the hearing agenda? You
24 asked if there were additional issues, or are we not
25 to that part of the agenda yet? I don't want to get

1 ahead of myself or anybody else here.

2 MR. GOSLINER: Are we just talking about the
3 "chapoed" one or all of the elements under 1?

4 JUDGE JORDAN: Isn't this part of your
5 stipulation -- I mean, 1a is one of the
6 stipulations.

7 MS. LEWIS: I was just using that as an example.

8 JUDGE JORDAN: Okay.

9 MS. LEWIS: Yeah. I apologize for the confusion.
10 I was just using that as an example.

11 JUDGE JORDAN: Right. Okay. So that is one
12 which we have stipulated to. Okay. All right.

13 MS. LEWIS: And then I was just curious. Are we
14 going to be doing -- just in this conference today,
15 are we going to be doing kind of like a line-by-line
16 in the agenda and then proposing agenda issues that
17 we believe should be included, or are we doing that
18 all right now?

19 JUDGE JORDAN: Again, right now, I thought,
20 because you folks have done that, how much -- that's
21 why I was trying to get -- why don't we -- first,
22 let's try to quickly go through if there are any
23 issues concerning, again, the issues that we've
24 identified concerning distribution and abundance
25 that either need to be added to, that I've missed,

1 that now -- also, let me be clear, also.

2 We also are going to be -- one other section of
3 my agenda will be the issues that are new issues.
4 And as I understand it, the new issues will be the
5 impact of the possibility of Western North Pacific
6 Whales, WNP, population intermingling with the ENP
7 population. That was the new issue raised that was
8 not in the original -- that was not covered by the
9 original -- the other issues which have now been put
10 off the table with the public safety issues.

11 The other new issues were whether or not there
12 are a particular group of whales in the usual and
13 accustomed area that are separate as a subset of the
14 Pacific Coast Feeding Group.

15 MS. BEALE: Your Honor, the potential impacts to
16 the Western North Pacific Gray Whales was addressed
17 in our testimony. I don't believe that that is a
18 new issue --

19 JUDGE JORDAN: Okay.

20 MS. BEALE: -- from our perspective.

21 JUDGE JORDAN: I'm just wondering whether for
22 additional parties to come in on the ones, but I
23 don't believe that the issue of the localized group
24 -- that the existence or nonexistence of a localized
25 group of whales in the U&A, in the Makah U&A, and

1 whether or not they would be -- I'm sorry. I
2 believe that's the Peninsula's issue.

3 MS. OWENS: Yes.

4 MS. BEALE: Your Honor, I might need to confer,
5 but I don't believe we consider that to be a new
6 issue. The reason that it is not, I guess, more
7 explicitly addressed in our testimony is because we
8 don't have scientific evidence that would allow us
9 to examine the effects to such a group.

10 MS. DARM: If I may, Your Honor? Donna Darm with
11 NMFS.

12 JUDGE JORDAN: Yes.

13 MS. DARM: It might be -- it might make more
14 sense to ask Margaret to clarify what they think
15 that issue is.

16 JUDGE JORDAN: All right.

17 MS. DARM: I think this is their issue.

18 JUDGE JORDAN: Yeah. This is your -- Ms. Owens?

19 MS. OWENS: Yes. Yes, sir.

20 JUDGE JORDAN: Yes. We're trying to discuss
21 whether or not the group of whales that apparently
22 -- that Pensinsula believes frequents the Makah
23 area, the area defined for hunting and the area that
24 has been -- whether or not that is a subset of the
25 Pacific Coast Feeding Group, and you believe that

1 that would have -- that the hunting would overly
2 adversely effect that one group of approximately 30
3 or so individuals?

4 MS. OWENS: Yes, I agree completely with that
5 statement, and there is -- there's 20 years of
6 citing documentation of individually identified PCFG
7 Gray Whales who show extreme flexibility to the
8 strait way into the east of the strait, east of
9 Port Angeles, and out to the bay and down the coast.

10 There's abundant evidence for -- in the 2015
11 DEIS, NMFS picked the number 33 to represent the
12 average number of Makah U&A whales. I think quite a
13 few people could add to that that are in the group
14 here today.

15 MS. BEALE: Your Honor, we believe that the
16 evidence Margaret's referring to, including the 2015
17 DEIS, is within the evidence that we have submitted.

18 JUDGE JORDAN: Okay. So this is in the evidence
19 whether -- that's the number of whales commonly seen
20 in the area, whether or not this is a group that
21 does not -- the issue, I guess, is whether or not
22 this is a nonmigratory group?

23 MS. OWENS: Are you asking me?

24 JUDGE JORDAN: That this is part of this --

25 MS. OWENS: I believe that they do migrate south

1 to give birth into the lagoons, or close to it, if
2 they need to. They do not migrate to the far north
3 with the main group of ENP whales.

4 JUDGE JORDAN: Okay. But NMFS believes that is
5 covered in the -- that the evidence that has been
6 submitted -- that these are part of the
7 Pacific Coast Feeding Group?

8 MS. BEALE: Yes, that's our position.

9 MS. DARM: And again, if I may?

10 JUDGE JORDAN: And the sole purpose here is
11 whether or not additional participants -- the sole
12 purpose is whether or not this is sufficiently
13 different information that I should identify it to
14 allow new participants to be added to the -- to the
15 group.

16 And I think since the issue is being discussed
17 and defined by the evidence that's in the record, I
18 don't think we need to add to it as an expanded
19 issue, as I believe it's going to be discussed.

20 Sea Shepherd.

21 MR. SOMMERMEYER: My review -- my recollection of
22 looking at the DEIS and evidence at issue right now,
23 I don't recall seeing specific reference to the
24 so-called 33 -- the so-called 33 of the highest
25 fidelity to the area that PCP whales is referring

1 to.

2 So to me, it seems like a new issue. It's just
3 relevant to local impacts, what happens if you
4 decimate the small population that's in that area.

5 So I think it's -- from my recollection of
6 reviewing the evidence, it wasn't in there, but feel
7 free to correct me if I'm wrong.

8 MR. SLONIM: Your Honor, what we're discussing is
9 whether to add something to your list of issues. It
10 seems to me this is already covered by your list of
11 issues.

12 JUDGE JORDAN: No. No. I'm sorry. What this is
13 about is one of the other elements I have to
14 identify in my agenda is issues that were not
15 covered -- the original agenda issued by -- issued
16 by NMFS so that new parties have the opportunity to
17 say they wish to be heard at the hearing.

18 MR. SLONIM: Okay.

19 JUDGE JORDAN: So that's the whole -- I recognize
20 this issue was raised by the parties and it's here
21 with the parties, and it was -- the issue for me is
22 whether or not I have to put it in there, and that a
23 party who wishes to be heard on those new issues,
24 who otherwise said I didn't get notice in the
25 original Federal Register notice -- that they now,

1 Oh, wait a minute, I have an interest, and I want to
2 be heard, also.

3 MR. SLONIM: Okay. And this is Mark Slonim for
4 the record. So you have this issue in your list of
5 issues, and then I guess the question is whether you
6 call it out twice or in some other fashion.

7 JUDGE JORDAN: Another place -- another part of
8 the reg will be a small section saying these were
9 the issues which I have identified that were not
10 covered by the original list of issues brought by --
11 that were published with the Federal Register.

12 MR. SLONIM: Okay. And I'll defer to the
13 discussion between NOAA and Sea Shepherd on that.

14 The issue that I saw where this is raised is in
15 roman numeral I, Part A, Part 3, subparts DII. Your
16 statement of the issue is "Is the PCFG further
17 delineated as a subgroup with distinct feeding
18 areas, PCFG whale randomly feeding areas, or are
19 they internally or externally recruited in
20 subgroups?"

21 So I believe that's very close, if I am
22 understanding it, to the issue we're talking about.

23 JUDGE JORDAN: Yeah.

24 MR. SLONIM: And then whether to call that out as
25 a new issue or not, I'll defer.

1 MS. BEALE: And Your Honor, one option is we
2 would be happy to submit for your review the
3 excerpts from the drafted environmental impact
4 statement that speaks to this issue, later today, or
5 whatever would be convenient, if that would help in
6 determining -- we don't believe that this is a new
7 issue, and we don't believe that Ms. Owens has
8 submitted new scientific information that speaks to
9 this issue either.

10 JUDGE JORDAN: Okay. Let me -- let me take this
11 under consideration for a little bit. We'll get
12 back to this issue. Sea Shepherd's position is it
13 should be a new issue for the purposes -- or do you
14 believe that Sea Shepherd -- I'm not saying that
15 Sea Shepherd can introduce, if it wishes, new
16 evidence in this issue.

17 The question I have is, I believe that the
18 parties that are representing here the participants
19 have clearly identified between the opposition
20 groups and whatever -- that there's -- the issue is
21 whether or not it's a sufficiently new issue --
22 sufficiently new that would be -- say that -- that I
23 should open it up for new participants.

24 MR. SOMMERMEYER: And I was reminded that it is
25 actually mentioned in DEIS, and if there's a

1 willingness to bring it in through that, that's fine
2 with Sea Shepherd.

3 JUDGE JORDAN: It's going to be -- the issue is
4 before us. We're going to discuss it. The issue is
5 only whether or not it's a new issue or whether or
6 not it's covered.

7 MR. SOMMERMEYER: Right.

8 And Your Honor, while I have the floor, there was
9 a clarification. We had an issue in our direct
10 testimony we brought up was precedential effects
11 that is not in the agenda; so we wanted to -- to
12 explain why we think it should be in the agenda, if
13 that's an appropriate time now to do it.

14 JUDGE JORDAN: Yes.

15 MR. SOMMERMEYER: Then I would defer to our
16 counsel, Nick Fromherz, on the phone.

17 MR. FROMHERZ: Yes. Hello, everyone.

18 First, can everyone hear me okay? Okay. Just
19 making sure.

20 So this is Nick Fromherz on behalf of
21 Sea Shepherd, and I'll just try to make my comments
22 very brief and to the point.

23 In the declaration of Bret Sommermeyer submitted
24 by Sea Shepherd, the issue of precedential effects
25 was raised at paragraphs 59 through 63.

1 And again, based upon our reading of the agenda,
2 it does not appear that that factual issue is
3 included in the agenda. I think there are a couple
4 of possible places where it could go in, but we
5 wanted to raise that.

6 And just to be clear about what we mean by that
7 term "precedential effects," just the idea that a
8 decision to grant a waiver now could make it more
9 likely for other future hunts, which would, in turn,
10 have additional impacts on the gray whales that are
11 at issue.

12 So for instance, if the Makah Tribe is granted a
13 waiver, then other tribes in the northwest, or I
14 suppose potentially elsewhere, could also see a
15 legal advantage in pursuing a waiver and a leg up in
16 that pursuit.

17 There's a decision by the 9th Circuit, the Makah
18 Indian Tribe vs. Quileute Indian Tribe. That's at
19 873 App. 3d 1157. And in that case, the 9th Circuit
20 in 2017 said that the treaty at issue between the
21 U.S. and the tribes in its reference to fish and
22 fishing rights actually included whales and possibly
23 whaling rights.

24 So I just mention that because we do think that
25 there's something here. It isn't just an abstract

1 point. And I'd be happy to provide some other
2 examples, but that starts to get into the actual
3 kind of substance of what we're talking about here,
4 but I'll leave it at that now, unless there are
5 other questions or thoughts.

6 MS. LEWIS: I would also just like to point out
7 that AWI also included precedential effects in its
8 declaration, and D.J. can give you the paragraph
9 citations on the phone.

10 JUDGE JORDAN: Okay. Well, again, we were trying
11 to limit the agenda to issues of fact. This is more
12 of an issue of law on whether or not the impact of a
13 waiver, and a waiver is within agency discretion,
14 premised on meeting the criteria of the statute.

15 But if there's a motion or an argument that is in
16 the record that I have to consider, you know, in
17 rendering my decision, because I don't know what
18 evidence we would be putting in, other than the fact
19 that if I grant a waiver, then other -- then there
20 may be some other -- another tribe may seek a waiver
21 in the future, but that's going to now be allocated
22 against what -- if the Makah takes so many whales,
23 then the amount of whales taken by the Makah are
24 going to be -- there's only X number of whales
25 allocated by the International Whaling Commission,

1 if that number's even correct.

2 So the parties may make an argument concerning
3 precedential effect and the impact of that, and I
4 should consider it. I just don't know how we
5 develop any evidentiary elements about that.

6 And again, I see no -- well --

7 MR. SOMMERMEYER: I was just going to point out
8 your characterization at the beginning was a legal
9 issue. We looked at it more broadly. It's also a
10 factual issue. Because of the effects of, for
11 example, the waiver factor of abundance, if we have
12 more hunts -- if you have more hunts later, because
13 of the way the treaty language has been interpreted
14 recently to the right to fish and take whales, you
15 have more tribes, not only in the United States, but
16 other people's around the world, in Japan, for
17 example.

18 And then, you're right, there's a question of
19 what happens with the IWC. Presumably, those groups
20 then seek a larger quota, but as far as the
21 evidentiary issue and how to -- [inaudible] on that,
22 we can use expert testimony as to those types of
23 issues. But it is definitely a future possibility
24 from granting the waiver now, but it does have a
25 factual and legal element and goes back to the

1 waiver factors.

2 MR. GRUBER: We disagree that this should be
3 heard as part of the criteria for considering
4 whether the proposed waiver and regulations are
5 adequate under -- or appropriate to meet the
6 standards of the MMPA. I think it's pretty clear
7 this is grasping at some potential future effect on
8 abundance.

9 We have lot of very clear data on abundance. The
10 possibility that a tribe sometime in the future may
11 apply, through all the processes that the Makah
12 Tribe has had to go through over the last 20 years,
13 is outside of the realm of reasonable consideration
14 for this forum, and we don't think we should spend
15 valuable hearing time on what could be a lot of
16 speculation about what might happen some day in the
17 future.

18 JUDGE JORDAN: And does NOAA as the proponent of
19 the rule?

20 MS. BEALE: Your Honor, we would agree that this
21 seems to be a possible legal argument. I'm not
22 clear that it's relevant or how it fits under the
23 MMPA requirements, but if the parties were able to
24 articulate, as a legal matter, that it's relevant,
25 we -- our position is that they would be welcome to

1 make those legal arguments at the appropriate time.

2 Given that they did raise it in the direct
3 testimony already submitted, we don't believe they
4 should be permitted to provide additional expert
5 testimony, because that deadline has passed.

6 JUDGE JORDAN: It was included in your testimony,
7 is it not, the issue of precedence? Sea Shepherd.

8 MR. SOMMERMEYER: Yes, Your Honor, it is in -- it
9 is included in our direct testimony, and AWI's as
10 well. It's not just on the agenda. That's why we
11 raised it.

12 JUDGE JORDAN: It's not -- again, I personally
13 feel that right now what is before me is a waiver
14 under the MMPA from a particular tribe at a
15 particular place. I believe that the abundance
16 issue is going to become a factor in any further
17 applications by other tribes that's going to have a
18 greater impact, and that is -- and the evidence is
19 there, allow people to put it in there.

20 Let me consider about how we make sure that its
21 image -- I don't consider -- again, it's a legal
22 issue more than a factual issue, other than the fact
23 that we are discussing the abundance issue, and
24 further applications by other tribes at another
25 date, another time, another location could have

1 impacts on abundance, but it's not what's before me
2 right now; it's whether or not this waiver is going
3 to have an impact on the abundance of Eastern North
4 Pacific Gray Whales at this point in time; if there
5 could be a major change, the triggers we're going to
6 effect, and the moratorium would go back into
7 effect.

8 So I don't think we need to add it as an extra
9 factor. We will consider what's in the record is
10 there, and the parties can argue it, and they can
11 also raise it as a legal -- as a legal issue in
12 their briefing. So...

13 MR. SOMMERMEYER: Thank you, Your Honor.

14 Nick Fromherz wanted to have one last word on it,
15 if that's okay, unless you want to move on.

16 JUDGE JORDAN: Sure.

17 MR. SOMMERMEYER: Thank you.

18 MR. FROMHERZ: Your Honor, thank you. And I
19 promise to be very, very brief. Just one last
20 thing. I know there are other issues to get to.

21 As a final, I guess, point we do see this as akin
22 to an analysis of cumulative impacts. And again,
23 not trying to argue that as a NEPA issue, but to the
24 extent that cumulative impacts are, if you will,
25 opening up the scope of analysis beyond the impact

1 of this particular waiver, we do see precedential
2 effects akin to that. Maybe we call them "future
3 cumulative impacts."

4 So that would, I suppose, be our response for why
5 we think it belongs and why we think there are some
6 actual factual issues there, and I'll end with that.
7 Thank you.

8 JUDGE JORDAN: Okay. Thank you.

9 MR. GOSLINER: One more. We're still on the
10 distribution and abundance?

11 JUDGE JORDAN: Yes.

12 MR. GOSLINER: One point of clarification, and
13 I'm looking at 1E, the Unusual Mortality Event, as
14 I'm interpreting this, the second question is "Does
15 this merit further consideration before a waiver may
16 be granted?"

17 And we agree that, yes, that's a relevant issue,
18 and it should be considered, but am I correct in
19 interpreting this to mean we have wide parameters on
20 how we think it should be considered, or is it now
21 the time to say we think this might be a relevant
22 way to be looking at that particular issue?

23 JUDGE JORDAN: Well, actually, that is one of the
24 other new issues potentially raised, is the unusual
25 mortality event. It was not mentioned in the regs,

1 and it did occur, and NOAA has recognized it; so
2 that was the one factor I was going to lay out as a
3 new issue, is the unusual mortality event. And if
4 additional -- if additional parties had relevant
5 material to introduce concerning it on the date
6 allowed, we would -- that would -- I don't know how
7 we get around it, because that was not part of the
8 materials that were submitted, because this is an
9 event that has occurred since then. And that was
10 going to go off as a -- added to it as a new issue,
11 because at least three parties have alluded to it,
12 that it was not in the system.

13 MR. GOSLINER: Right. So we would support adding
14 it, but I guess I'll be more specific in my
15 question, which, for instance, should the question
16 be "And how should the regulations be" -- do they
17 need to be adjusted or at what point do -- it's both
18 a legal and a biological issue. At what point does
19 a decline in the stock breach --

20 JUDGE JORDAN: That's covered in the -- the
21 trigger issues are covered in the regulation. So
22 the question is, is the impact of this unusual
23 mortality event one on the triggers? And two,
24 whether or not evidence about it can be brought in
25 because it wasn't part of the original evidence.

1 So I would allow the parties to submit any new
2 evidence concerning doubts that exist. I do
3 recognize that the unusual mortality event would
4 clearly have an impact on the triggers if it reached
5 that point, and I -- again, all I have from this,
6 for the most part, is not necessary for the record,
7 other than the parties have raised it. And at the
8 time it was raised, the numbers keep fluctuating as
9 to what people consider. So I don't want to
10 speculate. I would rather see some evidence as to
11 what's considered; so...

12 MR. GOSLINER: Well, I appreciate that, yes, to
13 some extent, it's captured, but it only is captured
14 up to the point that the regulations are excluded.
15 What if it's an ongoing or recurrent episode? Can
16 you build that into your regulation, or do you need
17 to --

18 JUDGE JORDAN: Well, that's one of the factors to
19 be considered. There are triggering mechanisms that
20 if there's a -- the abundance level -- the OSP
21 reaches -- there are a number of triggers which
22 would trigger the moratorium again and prohibit
23 whaling, and the issue that comes up is whether or
24 not this event here is significant enough, but if it
25 became significant enough, a continuing event

1 reached that point --

2 MR. GOSLINER: Okay. As long as you think it's
3 sufficiently covered, then we prefer the ability to
4 raise that issue if the evidence suggests we should.

5 JUDGE JORDAN: Again, I know it's there, and I do
6 believe that when we have the supplemental day for
7 evidence, if parties have evidence concerning it one
8 way or the other, then we'll put that in for the
9 ability of people -- of parties to supplement the
10 record. I know that NOAA has designated it.

11 If I understand, NOAA has used that -- does
12 designate this as a unusual mortality event.

13 MS. BEALE: That is correct.

14 Your Honor, we do apologize. We did have issues
15 on abundance before you go on.

16 JUDGE JORDAN: Yeah.

17 MS. LEWIS: AWI would like to ask for a point of
18 clarification related to the abundance question, and
19 particularly as it pertains to the PCFG population.

20 In AWI's view, the relevant questions are
21 whether, by best available science, has NMFS
22 established that PCFG is not a population. If it is
23 a population, has NMFS established that it's within
24 OSP range?

25 If it is within OSP, has NMFS determined that the

1 taking will not reduce the population below OSP?
2 And if it is below OSP, will the Makah take --
3 impede the attainment of OSP?

4 In our view, these issues are incorporated within
5 several points in the agenda. AWI just wanted to
6 confirm that.

7 And also, particularly with regard to the last
8 two items, if the PCFG is within OSP, has NMFS
9 determined that the take will not reduce the
10 population, and if it is below, will the Makah take
11 it to the attainment?

12 We believe that this is included under this
13 broader item, 1a1D1, where you ask "Would this
14 reduction have any impact on ENP or PCFG abundance?"

15 But we just wanted to confirm that those issues
16 would be incorporated within that question. We just
17 wanted to ensure that that included considerations
18 related to the optimum sustainable population, the
19 OSP.

20 JUDGE JORDAN: But I thought we considered that
21 in B2.

22 MS. LEWIS: In B2? The facts related?

23 JUDGE JORDAN: On page 5.

24 MS. LEWIS: Oh, on page 5? Okay. All right.

25 Yeah. No, I see that. I apologize. AWI just

1 wanted to make sure that those issues were --

2 JUDGE JORDAN: Okay. So the ones that -- okay.

3 MS. LEWIS: Thank you, Your Honor.

4 JUDGE JORDAN: All right.

5 MS. BEALE: Your Honor?

6 JUDGE JORDAN: Yes.

7 MS. BEALE: Can I go ahead with distribution and
8 abundance?

9 JUDGE JORDAN: Certainly.

10 MS. BEALE: With respect to 1A1A and 1A1B, NMFS
11 believes that those issues were subject to the
12 stipulation where it states that "The parties agree
13 that this hearing, and the associated waiver
14 rule-making, are not the appropriate vehicles for
15 identifying or challenging the identification of any
16 particular population stock under the MMPA."

17 And the reason for that position -- the reason it
18 was proposed by NMFS to begin with, and then the
19 parties agreed for their own reasons, but our
20 position is that the identification of stock is
21 subject to a different section of the MMPA,
22 Section 117.

23 There's a specific procedure that Congress has
24 established, and NOAA also has fairly detailed
25 implementing guidance for the identification of

1 groups that qualify as stocks under the MMPA
2 definition.

3 And under Section 117, as I say, it's a detailed
4 procedure. It includes the issuance of draft stock
5 assessment reports that go out for public comment,
6 and those are informed by regional scientific review
7 groups that are also set up on under Section 117.

8 The Marine Mammal Commission has input in those
9 reports, and that's the vehicle by which NMFS
10 designates and identifies units that are considered
11 stocks per the MMPA definition.

12 And we don't believe that that decision should be
13 subject to basically what would be a collateral
14 attack in a formal, rule-making context, and could
15 create a lot of problems. And it would essentially
16 eliminate the procedures that Congress set up under
17 117, as you said, with scientific review groups,
18 notice and comment, et cetera.

19 We'd be happy to provide our legal basis to the
20 Court; however, it does seem to us that that was an
21 important part of what the parties agreed to in the
22 stipulation that was previously filed.

23 So in other words, our position is that for this
24 proceeding, that the Court would accept that there
25 are two stocks that have been identified, the WNP

1 stock and the ENP stock, and that the Pacific Coast
2 Feeding Group is considered a part of the ENP stock.

3 JUDGE JORDAN: And this has now been -- the
4 stipulating parties have agreed to that? Is there
5 any party -- is there any major party who have
6 disagreed?

7 MR. GRUBER: This is Brian Gruber for the Makah
8 Tribe. We are a party to the stipulation; however,
9 I think it's key to read the whole paragraph from
10 which Ms. Beale just read.

11 In particular, after the part about "identifying
12 or challenging the identification of particular
13 stocks," it states that "The parties agree that
14 evidence concerning the various populations, stocks,
15 or groups of gray whales, recognized or supported by
16 the scientific literature and the impacts of the
17 proposed waiver on them, may be considered."

18 And in our view -- we've heard a lot today
19 already about best available evidence -- best
20 available scientific evidence. In our view, this
21 does not create -- we present evidence on various
22 groups of gray whales because that's the criteria
23 under which NMFS must ultimately make a decision on
24 the proposed waiver and regulations.

25 It's not a formal challenge to the separate

1 identifications through the stock assessment review
2 process that Ms. Beale just described, under
3 Section 117, that is also part of the mix. It's the
4 evidence -- the scientific information that NMFS
5 collected in those stock assessment reports that is
6 part of this process.

7 But other information -- scientific information
8 that may not have been considered in that process
9 that is more recent than the most -- the current
10 stock assessment process -- we think that's
11 necessary for the presiding officer to consider when
12 you review whether the best available scientific
13 evidence supports the proposed waiver or has some
14 other outcome on this issue and ultimately should be
15 part of the record, because ultimately, NMFS is
16 going to have to make a decision, based on the best
17 available scientific evidence, whether the cite for
18 a waiver and regulations are satisfied.

19 And so simply locking in what -- and not
20 accepting additional evidence, more than what is in
21 the stock assessment reports, we think, is not --
22 this process should allow for additional information
23 and for a full exploration of the scientific
24 information.

25 And we thought that we agreed to that, while we

1 also agreed that this was not the place to lodge a
2 formal challenge to what is in the stock assessment
3 reports, and that certainly was our sense, that
4 we're not asking you to reverse or render an opinion
5 on what's in there.

6 JUDGE JORDAN: Okay.

7 MS. LEWIS: AWI actually agrees with that
8 assessment, and we were under the impression that we
9 also agreed that, again, while this will not be a
10 formal challenge, we could still put on evidence,
11 because we do believe that the evidence -- the stock
12 issue is inextricably intertwined with the waiver
13 issue.

14 And again, while we're not formally challenging
15 the stock designation, we do believe that that issue
16 is relevant. And as you can see from the full
17 stipulation, we did not waive our ability to put on
18 evidence or discuss those issues in this proceeding.

19 JUDGE JORDAN: All right. We will take it into
20 consideration under NOAA's official count elements
21 in this matter. And again, you're saying that the
22 -- that NOAA's position basically is there's -- I
23 still should be considering the Pacific Coast
24 Feeding Group issues solely, for those are the ones
25 that are most likely to be impacted by these hunts,

1 because they're the ones who are most likely going
2 to be -- more likely to be in the hunt-designated
3 area than the whole ENP.

4 MS. PRUETT: Correct, Your Honor.

5 And as explained in the declaration we filed of
6 Dr. David Weller, there has been a fairly lengthy
7 history and process by which NMFS has examined
8 information pertaining to this group in order
9 expressly to determine if they warrant designation
10 as a separate stock --

11 JUDGE JORDAN: Right.

12 MS. PRUETT: -- going back to 2012, and based on
13 the evidence from that time, and evidence available
14 until recently, has maintained that that group is
15 properly considered part of the ENP; however, that
16 group could, based on new information, be considered
17 for designation in the future.

18 NMFS uses the best available evidence when it
19 makes those stock assessment reports; and therefore,
20 for purposes of the waiver, and as a matter of
21 policy, expressly incorporated protections for that
22 group.

23 JUDGE JORDAN: Okay. Sure. Okay. All right.

24 So, therefore, we will be making considerations
25 about the numbers and elements of them, just that

1 they're considered to be part of the ENP stock?

2 MS. BEALE: Correct.

3 JUDGE JORDAN: Okay.

4 MS. BEALE: And relatedly, a comment and a
5 question for Your Honor.

6 Also under Distribution and Abundance, 1A1B, NOAA
7 believes that because the PCFG are not a separate
8 stock, it's not appropriate, for example, to
9 calculate optimum sustainable population for that
10 group.

11 We don't have, currently, the information to do
12 that, and that's a calculation that expressly
13 applies to unit at the stock level, and not below.

14 And part of my question is, given the time that
15 we have today, perhaps those sorts of comments
16 should be raised later as a legal argument or part
17 of a prehearing argument, or Your Honor had
18 potentially needing revisions to the agenda.

19 I'm asking how much detail, as we go through
20 these, you would like from the parties regarding,
21 you know, sort of the more detailed --

22 JUDGE JORDAN: Again, I appreciate -- and we can
23 move that along as we go through the issues and say
24 if there are places where we can use sub briefing or
25 sub information, gladly, we'll put it in, make it

1 part of the record, and part of the reading area as
2 we move along to develop the record.

3 The purpose here is solely to meet that final
4 agenda requirement and either lock in our -- and
5 lock in our hearing date if that is an issue.

6 Now, before we go much further, is there -- there
7 was some discussion earlier about -- are we -- are
8 all the parties still online for our August hearing
9 date? Because you know, there had been some
10 questions about whether or not there was a
11 possibility of an extension of time and whether I
12 would generally deny certain issues here, because I
13 want to make sure that I hold a conference -- I'll
14 hold the bulk of the evidentiary matters when
15 there's clear funding to do that, because I want to
16 make sure that the tribe gets -- that this waiver is
17 considered and that the bulk of the evidence comes
18 in while there is a -- because there's this -- these
19 are not inexpensive proceedings, and we had the
20 moneys funded for this fiscal year. And I don't
21 know it's working to try to see if it can be
22 expanded beyond this fiscal year, but nobody knows
23 what the budget is going to even look like come
24 October. So...

25 MR. SOMMERMEYER: We were holding on discussing

1 the extension issue until we saw what the final
2 agenda -- or an idea of what issues help inform
3 that, as far as witnesses and that a kind of thing.

4 From our perspective, we still need -- we still
5 think the extension is necessary. We tried to
6 secure agreement among the parties, to no avail so
7 far, but we read your ruling on our motion for an
8 extension of the various deadlines to not preclude
9 asking for extension of the hearing date, because
10 that's not -- that doesn't require prejudice.

11 Your ruling limited that to movement of changing
12 the rules versus a hearing date. And in your order,
13 you identified the issue as you just did now, of the
14 refinancing with having a new contract with the ALJ
15 through the defense, which we understand is in
16 progress.

17 In the interim, there's a couple of changes since
18 that -- since your ruling. We're asking for a
19 smaller time period until September 16th, I believe,
20 sometime in September.

21 Another thing that came up is the CITES
22 secretariat on June 12th that is rescheduling the
23 conference of the parties now for August 17th,
24 beginning August 17th. This was previously
25 scheduled, I believe, in May, in Sri Lanka, but then

1 there was violence, and it was canceled. And we
2 were anticipating it would be scheduled later. But
3 the secretary has decided, in his wisdom, that he
4 wanted it in mid-August, which poses a problem for
5 Sea Shepherd, because at least two of us were
6 planning to attend the last conference of the
7 parties.

8 This is the 18th conference of the parties, moved
9 to the 17th, and we were planning to attend. It was
10 part of our work for the year. And so if the
11 hearing were held right on the 12th, it would cause
12 major difficulty in our schedules there.

13 The other issue I wanted to raise is that we --
14 the witnesses we have spoken to for rebuttal have
15 issues with August. I'm not saying they can't be
16 available, but it would cause hardship for one of
17 them to be here in that time period.

18 So those are our issues on the extension.

19 MS. LEWIS: AWI agrees and reiterates what
20 Sea Shepherd has said, particularly with regard to
21 the CIDES conference of the parties.

22 D.J. Schubert is on the phone. He is AWI's lead
23 for CIDES issues, and he does attend on behalf of
24 the organization.

25 In addition, several of our witnesses are also

1 scheduled to attend the CoP, and it would be very
2 difficult, if not impossible, to secure their
3 participation on both parts.

4 And D.J., I don't know if you have anything else
5 that you would like to add with regard to the
6 difficulties that your organization faces.

7 D.J.?

8 JUDGE JORDAN: For AWI on the phone, there was a
9 question.

10 MR. SCHUBERT: Oh, I'm sorry. I wasn't clear
11 that that question was directed at me. Apologies
12 for that, Your Honor.

13 Yes. Thank you to Ms. Lewis and
14 Sea Shepherd Legal for raising the CIDES CoP issue
15 as noted.

16 The CIDES secretariat modified the dates as a
17 result of the original postponement of the CoP that
18 was supposed to be in Sri Lanka as a result of the
19 Easter Sunday terrorist attacks.

20 Neither AWI nor Sea Shepherd Legal, or anyone,
21 frankly, had a role in issuing those dates. It was
22 really up to the CIDES secretariat and the
23 members -- 13 or 14 country members of the CIDES
24 standing committee.

25 As noted by Ms. Lewis, I'm the lead for AWI on

1 CIDES issues, and in addition to the fact that the
2 CoP itself would start on August 17th, there is a
3 standing committee meeting on August 16th, and then
4 there's also a meeting of the Species Survival
5 Network, a coalition of over 100 organizations that
6 work on wildlife trade issues, of which AWI is a
7 member, that would occur on the 15th; so obviously,
8 I can't be in two places at once.

9 I recognize that extending the hearing date may
10 not be of interest to some of the parties in the
11 room, but I would ask that all the parties consider
12 the possibility of finding a date, perhaps in
13 mid-September, that might work for all the parties
14 and any potential witnesses, so that AWI and others
15 affected by the rescheduling of CoP, that also are
16 interested in the Makah issue before this court, are
17 able to adequately both prepare for and fully
18 participate in the CIDES CoP.

19 Thank you, Your Honor.

20 JUDGE JORDAN: Okay.

21 MR. SOMMERMEYER: Your Honor, Sea Shepherd is
22 also a member of the Species Survival Network as
23 well, and we attended -- we do also attend those
24 meetings as well.

25 JUDGE JORDAN: All right. Peninsula?

1 MS. OWENS: PCPW would have a comment on this
2 topic. It's hard for me to follow where the opening
3 is for me to speak.

4 JUDGE JORDAN: Okay. Is Peninsula -- they have
5 an issue with this too?

6 MS. OWENS: Yes. Thank you.

7 I submitted my reasons for requests for
8 postponement, and it has to do with the timing.
9 Mid-August is peak tourism season. I work in a
10 small local history museum here, out in rural
11 Clallam County. It's the worst possible time for me
12 to be gone from my job.

13 When the date first was posted, I really took it
14 to mean that it would be wrapped up in one day, and
15 somehow that would be doable for me. It is a six-
16 to eight-hour round trip from where we live to where
17 this is all taking place in Seattle. I figured I
18 could figure that out for one day. When it became
19 apparent that that was just the starting date, you
20 know, we really panicked here.

21 I may be the only person involved in this group
22 that not only is not being paid to attend and do all
23 the work involved, but it costs us. And not to
24 sound abjectly prophetic, but we live on a very low
25 income, and my job during the summer is more full

1 time than it is the whole rest of the year. We
2 depend on these wages. My employer depends on my
3 expertise at my post at the height of tourism
4 season. It's just kind of a nightmare to
5 contemplate for me, but I'm just one person.

6 JUDGE JORDAN: All right.

7 MR. GRUBER: Brian Gruber for the Makah Tribe.

8 A lot has been said here. Frankly, I wish this
9 would have been submitted as a written motion, but
10 it sounds like you're ready to consider it; so we'd
11 like to be able to respond as best we can.

12 And I will say that we appreciate that
13 Sea Shepherd and Animal Welfare and Margaret had
14 given us, through e-mail communication, in
15 particular the CIDES issue that came up last week, a
16 heads up, with some general points that they were
17 planning to raise this; so we appreciate that we're
18 not blind-sided.

19 At the same time, we still have very little
20 information about some specifics of the exact
21 conflict.

22 First of all, we disagree that the legal standard
23 is not the same as what Your Honor held to be
24 applicable when you ruled on the prior expedited
25 extension motion. And the reason we think that's

1 true is that while the hearing date is the focus
2 here, I think what's being discussed is an extension
3 of the whole rest of the process, just as it was the
4 first time around.

5 I don't think it's realistic to think that once a
6 hearing date gets extended, there wouldn't be,
7 immediately, another request for all the other
8 deadlines to be pushed out given that what you heard
9 was there's several participants who attend or would
10 like to go to this meeting in Switzerland, starting
11 on August 17th, or possibly a day or two for
12 premeetings related to the CITES meeting.

13 So we think that all the reasons that the tribe
14 stated earlier, and that we believe you agreed with
15 in denying that motion, are still applicable;
16 namely, we've been waiting for over 14 years for
17 this hearing, and it's small, incremental delays
18 that have contributed. There have been other
19 contributions, but that has been a big part of it.

20 Your Honor, we don't know if September 16th is at
21 all a realistic date for this hearing to be held.
22 That's a date that's been thrown out by some
23 parties, with very little, I believe, conferral with
24 the other parties.

25 Now, there's probably 30 or 40 people that need

1 to be consulted on whether their schedule will work.
2 We have done some initial polling of our witnesses.
3 We know that one expert witness -- because since
4 April, he was planning to be in Seattle the week of
5 August 12th -- decided that September 11th through
6 the 18th was a good week for a family vacation; so
7 he's not going to be available for part of that
8 week.

9 Another witness is a professor at the University
10 of Washington, and he heads up a research institute
11 which is having a retreat from September 18th to the
12 22nd.

13 The university's academic calendar begins on
14 September 25th, and while he didn't specify
15 commitments he has related to that, you can imagine
16 they're significant.

17 With respect to the conflict of the CIDES
18 meeting, we think that since this meeting, this
19 hearing, not only today, but August 12th, was on the
20 record and announced -- and everybody in this room
21 was aware of it on April 5th -- that this should
22 take precedence over later-scheduled meetings that
23 have nothing to do with the topic of the proposed
24 waiver and regulations on Makah whaling.

25 Now, I understand that these international

1 meetings are significant. Makah, we, send people to
2 the International Whaling Commission, and that's a
3 very significant meeting. At the same time, it's a
4 12-day meeting, and arriving a day or two late,
5 while creating the possibility to attend this
6 hearing the week of August 12th, we think,
7 diminishes and minimizes the potential hardship.

8 And I will say some of the meetings on the 15th
9 and 16th that were referenced -- I'm not sure of the
10 nature of those. I'm not as familiar with CIDES;
11 however, it sounds like Species Survival Network is
12 more a meeting of nongovernmental organizations in
13 advance of the meeting, and not necessarily part of
14 the formal agenda or formal schedule.

15 So we think that those concerns could be --
16 concerns about hardship could be limited by keeping
17 the August 12th date and allow -- and essential
18 saying that folks who want to attend both meetings,
19 the hearing and the meeting, they need to make a
20 choice about which one to attend, and then arriving
21 a day or two late in Geneva is not the worst.

22 I would briefly like to address Ms. Owens's
23 concerns, and we understand that is a significant
24 hardship, what she described, not only today but in
25 e-mails. We think that in a couple ways, there

1 would be ways to accommodate her particular schedule
2 and to minimize the hardship to her and make sure
3 her organization is really represented in this
4 hearing.

5 First of all, her testimony was short. It was
6 one of the shortest declarations that you received,
7 and I don't think it's unrealistic that her
8 in-person testimony, and any cross-examination,
9 would take more than a half a day; so I think that
10 her time at the hearing could be very limited, if
11 she so chose to limit it just to her testimony and
12 any cross-examination.

13 I don't know much about the museum that she is
14 employed at. I did look up the Joyce, Washington
15 History Museum, and it appears that in the summer,
16 it has -- it is open from Thursday through Monday;
17 so if that's at all correct still, it appears that
18 Tuesday and Wednesday are not open days and would
19 not therefore be work days for Ms. Owns.

20 And I would -- the tribe would be very willing to
21 work with all the parties to accommodate her
22 testimony on one of those two days.

23 I'd also suggest that Charles Owens, who is also
24 a member of the Peninsula Citizens for the
25 Protection of Whales, has been involved, and to my

1 understanding is very knowledgeable about Makah
2 whaling issues.

3 Our suggestion would be that he could attend. We
4 don't know of any work conflict he may have. He
5 could attend the hearing on the other days and cover
6 the issues for Peninsula Citizens.

7 And finally, as I think Your Honor can tell from
8 discussions today and the materials submitted, the
9 Peninsula Citizens is largely in step with the other
10 NGOs who will be well represented at this hearing,
11 and it's not as if those issues and points of view
12 won't be represented if you hold the hearing, as the
13 tribe believes you should, on August 12th.

14 JUDGE JORDAN: What is NOAA'S position?

15 MR. SCHUBERT: Your Honor, this is D.J. Schubert.
16 Can I make an additional remark here?

17 JUDGE JORDAN: Certainly.

18 MR. SCHUBERT: Yeah. Thank you, Your Honor.

19 I just wanted to provide a little bit more
20 information regarding the CIDES meeting and
21 premeetings that Mr. Gruber mentioned.

22 So I attended four of these CoPs, and I can
23 attest that showing up halfway through is not the
24 best way to adequately participate in this meeting,
25 because it is a meeting that's structured into

1 plenary sessions and then committee sessions and
2 then plenary sessions.

3 In addition, the Species Survival Network meeting
4 that was mentioned, that is currently scheduled for
5 August 15th, is, in fact, a meeting of over 100
6 nongovernmental organizations, or at least those
7 organizations that are able to get to Geneva.

8 And I would note that I've already heard that
9 several of the key members of the Species Survival
10 Network, those with decades of experience of CITES,
11 are unable to make this meeting because of other
12 commitments that they can't get out of.

13 In my case, I'm one of the remaining veterans of
14 CITES that is part of a nongovernmental organization
15 and part of the SSN that has the knowledge and
16 experience of CITES that will now become extra
17 valuable given that these other individuals are not
18 able to make the meeting, assuming the parties can
19 agree to some alternative hearing dates in this --
20 for this important -- this important case.

21 Finally, I would just note that at the moment,
22 the Animal Welfare Institute and another NGO are
23 hosting a side event on the illegal co-tu-aba
24 (phonetic) trade that will be on August 17th or
25 18th, and I am scheduled to speak at the side event.

1 There's really no one else that can step in and take
2 my role at the event.

3 So again, that creates another conflict for the
4 Animal Welfare Institute that I hope will be
5 considered as we try to figure out, you know, what
6 date is appropriate for this hearing.

7 JUDGE JORDAN: NOAA.

8 MS. IMAKI: This is Caitlin Imaki on behalf of
9 NMFS, and NMFS's position is that we are willing to
10 consider a modest extension of the hearing date.

11 And I would like to also update the Court and the
12 parties on the agreement.

13 In light of the potential for schedule changes,
14 and to accommodate things such as the ALJ's need for
15 time to complete matters post hearing, NMFS did
16 initiate an extension of the agreement between NOAA
17 and the Coast Guard.

18 We completed the first -- the very first stage of
19 that, and we are now working with our Department of
20 Commerce attorneys to modify the agreement itself,
21 and we do expect it to be completed before the
22 expiration of the current agreement. We expect it
23 to take about another four weeks. There's no
24 guarantee that that will be completed in that time,
25 but we do hope that it will be.

1 If we are successful in extending the agreement,
2 it will preserve the funding, and it will be
3 available. At this point we're requesting it
4 through the next fiscal year.

5 JUDGE JORDAN: Okay. The main concern I have
6 with the funding is I believe that the agreements --
7 when we created these agreements with the agency,
8 once I have the record, it doesn't matter. I would
9 still continue. The agency has an obligation to
10 continue to pay me -- to pay my staff to deliver a
11 decision; so I'm not -- I'm not going to be having
12 to deliver a decision by the 1st of October, as I
13 doubt the parties are going to be finished with
14 their briefings by the 1st of October and comments
15 that are going to be allowed posthearing
16 information.

17 My main concern was having the -- one of the
18 major expenses are the court reporters and other
19 mechanisms of actually conducting the hearing, and
20 that was the main issue I wanted to make sure was
21 properly funded, because once I've heard the
22 hearing, there's a general obligation of an agency
23 to continue to fund me until I've actually finalized
24 the hearing, but the other costs are the ones which
25 could have gone up in the year.

1 The other concern I have is if we go beyond the
2 30th of September, I have no idea -- I spent -- I am
3 -- I'm going off next week to hear hearings that
4 were postponed after the last shutdown, and I have
5 no idea if they're going to be forced into another
6 shutdown October 1st or not; so we'll take this
7 under advisement right now.

8 I understand that there's -- that the parties
9 have major issues. I will tell them -- make sure
10 the Makah understand I am -- I am not -- I am trying
11 to see a way of getting this hearing completed by
12 the 30th of September, even if I knew that we were
13 going to have to continue -- I don't want to go off
14 into October, because I don't know what the days are
15 going to be like.

16 MS. IMAKI: If I may --

17 JUDGE JORDAN: Yes.

18 MS. IMAKI: -- just add a few more comments.

19 NMFS does also share the concern about the
20 potential for, you know, the uncertainty after
21 October 1st, first of all.

22 And then I will say we did explore the
23 possibility of days in September -- the weeks of the
24 9th, 16th, and 23rd.

25 JUDGE JORDAN: Of September?

1 MS. IMAKI: Correct.

2 And as far as we can tell, it looks like there
3 may be some conflicts with the auditorium that we
4 were planning to hold the hearing within. It looks
5 like it's not available during those weeks, to the
6 best of our knowledge.

7 We did explore alternate sites at the University
8 of Washington, but that site is also not available
9 in September for our use.

10 JUDGE JORDAN: Right.

11 MS. IMAKI: We do have some challenges with some
12 of our NOAA participants, in terms of conflicts,
13 being unavailable during those weeks as well.
14 They're, you know, detailed; so I could provide
15 those later if necessary.

16 The one window we did identify as being a
17 possibility was Wednesday, September 4th through
18 Tuesday, September 10th. That's the week right
19 after the holiday, and so it would be a partial of
20 two weeks, but that seems to be a possibility, if
21 the room was available, that we have not been able
22 to confirm.

23 JUDGE JORDAN: Yeah. Unfortunately, again, the
24 end of September's a problem for me, and we have
25 other staff issues, beginning of September, about

1 trying to accomplish it.

2 We're trying to -- the 16th -- that week is not
3 -- the only week that's even possible for me in
4 September, overall, is the 16th of -- the week of
5 the 16th, which we -- again, the location here is
6 not available. We would have to find another
7 location.

8 I also raise to the parties the possibility of a
9 bifurcated hearing in August and finding sometime in
10 September.

11 Is that a potential option so that we would have
12 the opportunity to start around the 12th, hear some
13 of the initial testimony?

14 MS. IMAKI: Just one other issue for
15 consideration, Your Honor, is that NMFS is
16 considering hiring an AV contractor to help with the
17 hearing, and so I don't know what impact bifurcating
18 that would take, because they need a whole half-day,
19 at least, to set up.

20 JUDGE JORDAN: Yeah.

21 MS. IMAKI: Just another consideration.

22 JUDGE JORDAN: My expectation would be that the
23 bifurcation -- as long as I don't go over the fiscal
24 year, you can have a contract that says you can have
25 these dates and this date. I'm hoping it would not

1 require two separate contracts.

2 MR. MCNULTY: Your Honor, Chris McNulty on behalf
3 of NMFS. I do think it would add initial expenses.
4 Right now, the quotes we're getting for a one-week
5 hearing is around \$20,000 --

6 JUDGE JORDAN: Right.

7 MR. MCNULTY: -- roughly. If we had to split up
8 that time, and they would have to break down and set
9 up twice, you're going to add additional expense.

10 JUDGE JORDAN: It would be additional expense for
11 the setup and breakdown.

12 MR. MCNULTY: Right. But in terms of structuring
13 under one contract, I would agree that's likely. We
14 can do that.

15 JUDGE JORDAN: All right. The court reporter has
16 been going on for awhile. Let's take a ten-minute
17 break. Why don't we take -- why don't we take --
18 let's take a ten-minute break right now, and we'll
19 try to move as much of this through.

20 I want to -- I'm going to ask the parties to
21 brief me on the dates, because the days are
22 something we can always change with a quick Federal
23 Register notice. And let me plan those dates,
24 because we are not sure what the dates -- and how we
25 would have to do it, and I'm supposed to publish the

1 date of the hearing with my final agenda.

2 So let's take a ten-minute break now, and we'll
3 come back to figure out how we're going to attack
4 all this. Thank you.

5 [SHORT
6 RECESS TAKEN]

7 JUDGE JORDAN: All right. We're back on the
8 record again.

9 As we unfortunately found out, we've got an issue
10 trying to move through some of the last issues here
11 for today.

12 Now, the problem is, we have a -- we're down to
13 less than an hour with our court reporter; so I'd
14 like to try to quickly get through some ideas to see
15 if we can move this through.

16 I'm going to take under advisement the issue with
17 the timing, because that's going to have to be a
18 meeting with the principals from each of the groups
19 later to try to figure out what date -- whether or
20 not we're going to continue with the date that has
21 been scheduled in the Federal Register or not, or
22 what the possibilities are.

23 So I'd ask the parties -- I don't need a full
24 legal brief, but I just need some information on the
25 -- by the parties as to their position. I think it

1 was well laid out today.

2 If we're at the point where I'm issuing a final
3 agenda, I will use the current publish date as the
4 date, but noting that the parties indicated
5 significant issues and that, if need be -- which I'm
6 considering, and if need be, I will be issuing a
7 separate Federal Register notice to reschedule the
8 hearing, if necessary.

9 So that's the only way I can really deal with
10 that this time and to make sure I've heard
11 everyone's arguments and find out the best way to
12 deal with it.

13 MR. MCNULTY: Your Honor, one comment and one
14 question. Do you have a date by which -- the
15 question is do you have a date by which you have the
16 parties file those briefs?

17 JUDGE JORDAN: I would say the next two weeks,
18 the 2nd of July.

19 MR. MCNULTY: Maybe I can make my comment before
20 you set the date?

21 JUDGE JORDAN: Sure.

22 MR. MCNULTY: Okay. We have several things we
23 need to do -- I'm sure the other parties do too --
24 in terms of making arrangements. Like the AV
25 contract is a good example --

1 JUDGE JORDAN: Yes.

2 MR. MCNULTY: -- knowing when that's going to be,
3 and if the contractor's available, you know, if
4 we're targeting August 12th versus a different date
5 might create an issue whether -- which contractor's
6 available; so the sooner we know the date, the
7 better.

8 We also are making arrangements for things like
9 hotel rooms, trying to get a block of rooms.

10 And so, you know, we had everything kind of on
11 hold, waiting to hear what the final hearing date
12 was going to be, and so I'm a little worried, if it
13 remains unsettled for another three or four weeks,
14 that it would -- we're going to run out of time to
15 put in place what we'll need to put into place.

16 So I guess I would -- from my perspective --

17 JUDGE JORDAN: A week is fine.

18 MR. MCNULTY: Yeah. Sooner is better.

19 JUDGE JORDAN: Sooner is better, if the parties
20 can do that, because everyone's arguments are well
21 prepared. I'm not going to be able to touch it --
22 again, you've got next week, a little over a week,
23 because I'm going to be gone -- I'm on a -- I'm on a
24 hearing next week. I'll be out of the office.

25 The moment I get back, I'll be able to make a --

1 look at what you guys have said, and we'll probably
2 be in touch for a -- if each of the parties can
3 leave the name and number of the participants of a
4 principal that we can reach out to, so we can have a
5 very brief telephone conference call to set, you
6 know, the person in charge of the logistics who's
7 got that down.

8 So we'll put that down as I will have a brief
9 four- or five-party -- you know, four- or
10 five-person telephone conference call, after I read
11 your arguments for dates and times, and we'll be
12 able to then set that. And that person should, you
13 know, be a person fully involved with the ability of
14 knowing your logistics.

15 Okay. And if necessary, I can even -- since I'll
16 be doing my hearing on the East Coast, I can even do
17 it after my hearing some time out there.

18 MS. LEWIS: I'm sorry. Just to confirm,
19 Your Honor, you would like this by June 24th, one
20 week from today?

21 JUDGE JORDAN: Yes.

22 MS. LEWIS: Thank you.

23 JUDGE JORDAN: All right. So can we -- facts
24 concerning distribution and experience, in that
25 whole area, through 1, are there any other issues

1 that really need to be addressed, or are you in
2 general agreement with what we had come up with?

3 MS. PRUETT: Your Honor, I'd just like to
4 clarify, recognizing the time limits for today, we
5 are happy to reserve any comments, provided that
6 those aren't waived in terms of providing legal
7 argument in a prehearing or posthearing brief or
8 other format, as to certain -- as issues subsumed
9 into the broader issue might not be relevant or
10 mischaracterized as a matter of law.

11 JUDGE JORDAN: That's fine.

12 We can -- you know, right now, this was -- what
13 everybody raised -- what we could see gleaned from
14 everyone's submission, you've already -- parts of
15 your submissions -- most of these issues have
16 already been raised in the written evidence that has
17 been proffered.

18 The question is are there any other -- and you
19 people have identified the areas where we can make
20 stipulations or other areas; so this is the purpose
21 of advising the world of the broad elements of what
22 we're looking at.

23 And if the parties can reach further stipulation
24 between now and the hearing, we can address those at
25 the hearing.

1 This is the notice to the world as to the scope
2 of this -- the scope of the facts that we're
3 considering, and there's evidence supporting most of
4 what's here in the record.

5 MR. MCNULTY: Chris McNulty, Your Honor, for
6 NMFS. Just to clarify, and also if the parties --
7 one or more of the parties would like to file
8 motions to exclude particular motions from hearing,
9 I just want to make sure we have the ability to do
10 that.

11 JUDGE JORDAN: Yes.

12 MR. MCNULTY: Okay. Thank you.

13 JUDGE JORDAN: Again, the issue of these proposed
14 agendas -- these agenda items is simply to give the
15 world notice as to the scope of our hearing. If
16 there's other issues that come up, that motion and
17 my ruling -- my motion, replies, and the ruling are
18 all going to be part of the public agenda, and so it
19 will all be -- and my ruling will be considered.
20 All of those will be considered.

21 MR. SOMMERMEYER: Your Honor, a point of
22 clarification. Is there a briefing schedule you'd
23 like to impose or a timeframe to submit motions?

24 JUDGE JORDAN: Sure.

25 Again, using what is here with the agreements

1 that have been made already, if this was the basis
2 for the agenda, would approximately -- what's six
3 weeks from now? The 19th of July? If there's any
4 issues for motions about exclusion of evidence from
5 the evidence already put in, could we receive those
6 by the 12th of July? Response time would be ten
7 days.

8 And again, I will try -- if we're all committed
9 on the same time, we'll try to generate my orders
10 concerning granting those or -- and again,
11 generally, what the APA says is oral testimony is
12 admissible as long as it's relevant.

13 So phrasing your arguments should basically be on
14 relevance or being cumulative, because here, the
15 issue is written testimony is in lieu of oral
16 testimony. I would be very lenient.

17 I will be looking at as if the written testimony
18 was oral testimony; so I would be using the oral
19 testimony standards rather than the documentary
20 evidence standards and reviewing whether or not
21 elements are relevant.

22 And again, the main issues usually, if relevant,
23 it comes in under administrative law, and the only
24 other element for general refusal will be if it's
25 cumulative.

1 MS. LEWIS: Are we going to set a date for the
2 rebuttal testimony as well?

3 JUDGE JORDAN: Okay. If there's going to be
4 rebuttal testimony, parties have had a chance to
5 introduce that and --

6 MR. MCNULTY: Your Honor, the date set in the
7 notice of hearing was July 2nd for rebuttal
8 testimony.

9 JUDGE JORDAN: Okay.

10 MR. MCNULTY: The parties have conferred, and
11 Makah and NMFS were both willing to agree to a
12 one-week extension of that to July 9th. That was
13 reflected in the materials we filed for the
14 prehearing conference.

15 JUDGE JORDAN: Okay.

16 MR. MCNULTY: The other parties may prefer a
17 different date so they can take this opportunity --
18 the parties can take the opportunity to ask for a
19 different date if they would like; however, I think
20 all the parties were in agreement to move that date
21 one week, to July 9th.

22 The testimony, rebuttal testimony, and also any
23 direct testimony on new issues would be due the same
24 day, July 9th. That's our proposal.

25 JUDGE JORDAN: Okay. So in order to speed things

1 along, rather than doing this, are there any other
2 real issues in my list of issues that the parties
3 think I got wrong and they really need to be
4 addressed?

5 MS. LEWIS: Your Honor, if we could just return
6 really quickly on the specific issue of the rebuttal
7 testimony. We agree to the 9th date, if that's what
8 works for the parties.

9 JUDGE JORDAN: Okay.

10 MS. LEWIS: And we would, however, respectfully
11 request that the July 12th date does not give us
12 much time to review the rebuttal testimony and make
13 any motions we would need; so we respectfully
14 request that date be pushed back by one week --

15 JUDGE JORDAN: Okay.

16 MS. LEWIS: -- because --

17 JUDGE JORDAN: So you agree to the 9th --

18 MS. LEWIS: Yes.

19 JUDGE JORDAN: -- for the submission of rebuttal
20 testimony?

21 MS. LEWIS: Yes, Your Honor.

22 JUDGE JORDAN: And any motions concerning that
23 rebuttal testimony by what: The 19th?

24 MS. LEWIS: Yes, Your Honor.

25 JUDGE JORDAN: All right. Again, because

1 everyone's had a chance to see the other one, I'm
2 giving the 12th for the general testimony and
3 objections. I'll give to the 19th for any further
4 rebuttal --

5 MS. LEWIS: Thank you, Your Honor.

6 JUDGE JORDAN: -- if there's any issues for
7 exclusion or any motions concerning that.

8 MR. SOMMERMEYER: Your Honor, one other question.
9 For our opening motions on the extension, there were
10 replies. Will there be replies here or just the
11 open motions?

12 JUDGE JORDAN: Just a motion and a reply is what
13 I prefer. I will accept further responses only on a
14 motion for cause.

15 MR. MCNULTY: And Your Honor, as long as we're
16 talking dates, one other I would like to propose is
17 that you task the parties with coming up with what's
18 essentially an agreed-to schedule for the hearing,
19 with the goal of completing the hearing within one
20 week and that we would do our best to reach
21 agreement among the parties how we would allocate
22 time, organize witnesses within that one-week time
23 slot.

24 And then to the extent we were unable to reach
25 agreement, we could at least submit something to the

1 Court where we do have agreement, and the parties'
2 position where we disagree in a single filing that
3 would allow the Court, then, to rule and set what
4 the hearing schedule would be.

5 JUDGE JORDAN: Okay. I am perfectly -- I think
6 that's -- that works for me. I think the parties
7 have already been talking.

8 In order to have a decent amount of time as to
9 the schedule, I think the 12th -- because that would
10 be -- that would be at the same time as when the
11 parties will have had examined all of the initial
12 testimony.

13 If you guys -- if the parties can confer and come
14 up with a schedule, we will try to do our best to
15 accommodate that schedule. If not, again, the
16 regulations mandate this prehearing conference.
17 Nothing prohibits me from holding another -- my job
18 under the APA is to manage the hearing, and that
19 would include setting hearing and witness schedules,
20 trying to accommodate witness schedules, seeing if
21 they can testify by video conference, if possible.
22 If they are unable to appear in person at a
23 particular time, we'll gladly schedule a prehearing
24 conference to get into the logistics.

25 In this conference today we tried to get to the

1 logistics. We're not going to get there today, but
2 on the logistics issue, I will gladly hold as many
3 conferences as possible, once we've set a date for
4 the hearing, to set down what exactly is going to be
5 the process and procedure.

6 And again, if the parties can get as many
7 agreements as -- you people were -- gave a lot of
8 time today, and we got a lot accomplished today by
9 giving the parties time to talk that out.

10 And if you guys can meet and come up with a
11 proposed schedule, just point out where there seems
12 to be difference, and I'll make my rulings as
13 required to try to put it together, because I do
14 want to get it done in one week.

15 MR. GRUBER: Good morning, Your Honor. Sorry. I
16 guess we're already in the afternoon.

17 I did want to raise an issue in response to your
18 invitation to talk about significant issues that
19 should be added in the partial stipulation.

20 Your Honor saw that there's a dispute about the
21 relevance of the treaty right. And I think while
22 we're all here, it would be fair, and we'd request
23 an opportunity to argue to you about why the tribe
24 believes it's relevant for you to consider the
25 treaty as part of this hearing and as part of the

1 waiver process.

2 You've identified it in your set of issues.

3 JUDGE JORDAN: Yes.

4 MR. GRUBER: We're not objecting to it being
5 there. We have some concern about the second
6 mention of it, and I can get to that in a second,
7 but I do want to say that the 9th Circuit in
8 Anderson made it, we think, quite clear that it
9 contemplated that the treaty right would be part of
10 this proceeding when it said in Footnote 26 that
11 "Unlike other persons applying for a permit or
12 waiver under the MMPA, the tribe may urge that
13 treaty rights be considered in the NMFS's review of
14 an application submitted by the tribe under the
15 MMPA."

16 And so in our view, there are two federal laws,
17 not just the MMPA, but the treaty right as a federal
18 law should be considered in this process both as a
19 matter of the factual presentation and as a matter
20 of law.

21 We think that the treaty is essential and
22 essential to the decision on the waiver, both your
23 recommended decision and NMFS's ultimate decision.
24 Because in our view, because there are two federal
25 laws here, NMFS must issue a decision that is

1 consistent with both of them, and not just follow
2 all the standards we've been talking about for the
3 MMPA, but must consider the treaty right.

4 Your Honor, in the 9th Circuit's decision
5 discussing whether the treaty right could be part of
6 this process, we think it's quite clear that it
7 weighed in in favor of the treaty right being
8 something the tribe could put forward.

9 As Your Honor knows, we submitted testimony from
10 four tribal member witnesses, who talk about the
11 treaty right, the importance of whaling to them, and
12 to their community.

13 We've also submitted extensive expert report and
14 testimony from Professor Reed, who talks about both
15 historical and contemporary importance of the treaty
16 rights to the Makah people.

17 In our view, the decision here needs to include
18 findings and a factual basis for the treaty right,
19 because your decision and the decision that the
20 agency ultimately makes is going to have a
21 tremendous impact on the Makah people and their
22 treaty right.

23 So we, in our view, strongly believe not only
24 that the Anderson court opened the door for treaty
25 evidence to be presented here for it to be

1 considered as part of the ultimate decision on the
2 waiver and your own decision at the recommended
3 decision, but it's also fair for the Makah Tribe to
4 be heard in this process.

5 It's been a long time. The treaty right is
6 extraordinarily important to the tribe. It's the
7 only reason we're here. This is not an abstract
8 exercise in applying the MMPA. It's extraordinarily
9 important to the tribe. It's the only way -- it's
10 the way that the courts have said is the way to
11 exercise their treaty right, and so we think it's
12 critical that the treaty right be part of this
13 proceeding.

14 Thank you.

15 JUDGE JORDAN: Very good. Thank you.

16 MR. SOMMERMEYER: And Your Honor, with full
17 respect to the tribe's treaty right, we look at it
18 in a different fashion. We look at it -- the MMPA
19 waiver -- I'll try to speak slowly. The MMPA waiver
20 looks at those certain factors. It looks at
21 distribution, abundance, breeding habits, times and
22 lines of migratory movements of marine mammals.

23 So nowhere in those factors is a mention of
24 treaty rights. It's not mentioned. Those are
25 factors for waiver that must be considered.

1 These factors ensure that waiver is compatible
2 with the conservation principles of the MMPA.

3 This determination is largely about science, and
4 that's -- most of the issues that were discussed
5 earlier in this proceeding are about science.

6 The factors are clear and do not include
7 consideration of a treaty right.

8 And you have not seen this, but in the party's
9 exchange of relevant facts, the Makah had proposed
10 facts, and NMFS responded to the proposed facts, and
11 one of the issues that the Makah raised was the
12 treaty right.

13 And in response -- I'll view the whole thing for
14 the record.

15 The tribe said in their June 12th response --
16 their June 12th -- I'm sorry. In NMFS's June 12th
17 response to the tribe, this is what was indicated.
18 The tribe is saying "The tribe's treaty right
19 provides further support for a NMFS proposed waiver
20 and regulations, which would enable the tribe to
21 exercise its right to hunt gray whales and meet
22 cultural and subsistence needs of the Makah people
23 (to the extent allowed by the regulations.)"

24 In response to this, NMFS took no position but in
25 comments stated, "NMFS did not consider the tribe's

1 treaty right in evaluating whether the proposed
2 waiver and regulations are consistent with the MMPA
3 requirements."

4 So to us, NMFS's communicating that the waiver
5 did not consider the treaty right was not a relevant
6 issue, because with the waiver, you look at the
7 scientific factors -- those factors I listed.

8 With respect to the Anderson decision, the tribe
9 points to a footnote in Anderson as support for
10 having the treaty right, a dicta footnote. But a
11 court cannot modify or add to the requirements of a
12 statute, in dicta or otherwise. It's not
13 appropriate for a court to do that.

14 What the court was doing there, as we interpret
15 the footnote, was saying unlike other -- unlike
16 tribal members who have a treaty right, nontribal
17 members don't have a treaty right to bring to them
18 to say we want a waiver. It's a prerequisite to
19 getting a waiver that the tribe can show we have a
20 treaty right.

21 And then if the -- if NMFS agrees that it was a
22 treaty right, then they proceed to considering the
23 factors to determine whether or not on a scientific
24 basis that treaty right -- excuse me -- that the
25 hunt authorized by the treaty right will impact the

1 status -- the conversation status of the gray whales
2 in this case.

3 So we don't -- that footnote cannot be
4 interpreted as broadly as the tribe is doing. The
5 Court cannot modify a statute.

6 And that, in a nutshell, is our position.

7 JUDGE JORDAN: All right. These are the
8 arguments which I think -- this is a prehearing
9 conference. These are arguments that we raise in
10 closing at the hearing, and these are all issues,
11 which again, the issue of the treaty right I raised
12 as an issue, the expansion of it, and whether or not
13 MMPA controls, and whether or not the nature -- we
14 looked at -- the Anderson issue will be clearly --
15 the Anderson court decision -- we'll be looking at
16 that as part of this hearing.

17 So these are all factors which will come up at
18 the hearing, and after full cross-examination of all
19 the witnesses and other matters, I'll listen to all
20 these comments in preparing my decision.

21 So it's a little premature to get into the
22 arguments here today at the prehearing conference,
23 as to the scope of that.

24 So as we -- are there any -- so it is my belief
25 what I'm going to do, unless there's any major

1 objections, we're going to adopt -- as changed here,
2 this as a framework. We're going to add as a new
3 issue the -- sorry. Make sure I'm right -- the
4 unusual mortality event, and we will set a date --
5 or do we -- was the original reg set already for
6 when other interested parties must --

7 MR. MCNULTY: Your Honor, if you look at
8 Attachment 2 to the NMFS submission for the
9 prehearing conference, it has a sample Federal
10 Register notice that the Court may use.

11 JUDGE JORDAN: Yeah.

12 MR. MCNULTY: And that includes provisions for
13 notifying parties that they have additional
14 opportunity to intervene on those new issues, and I
15 believe it's ten days. I think that's --

16 JUDGE JORDAN: I believe it's so many days from
17 the date of the publication.

18 MR. MCNULTY: From the publication in the Federal
19 Register notice.

20 JUDGE JORDAN: So we'll identify that, and they
21 will have so many days if any new parties wish to be
22 intervened on that issue alone. That appears to be
23 the only new issue not otherwise covered.

24 And so are there any other issues that we need to
25 discuss right now? Again, I am more than willing to

1 hold additional conferences for logistics and to try
2 to move the hearing along, but for the purposes of
3 this mandatory hearing, I think we have covered, not
4 as well as I'd like to have, but we've covered most
5 of the issues.

6 Are there any -- is there anything more from NOAA
7 right now?

8 MR. MCNULTY: Your Honor had the proposal for how
9 to get the notice published in the Federation?

10 JUDGE JORDAN: Yes, we have that.

11 MR. MCNULTY: So we're happy to address that if
12 the parties have questions.

13 JUDGE JORDAN: We have been using a version -- we
14 have been using that as our framework for this --
15 for what we're submitting.

16 Anything further from the tribe?

17 MR. GRUBER: No, Your Honor. Thank you.

18 JUDGE JORDAN: Anything from the MMC?

19 MR. GOSLINER: No.

20 JUDGE JORDAN: Okay. Sea Shepherd?

21 MR. SOMMERMEYER: Of course, Your Honor.

22 Just a clarification. Will you be issuing an
23 order from this conference providing your deadlines
24 and the timelines we have discussed?

25 JUDGE JORDAN: Yes. That's all part of it.

1 MR. SOMMERMEYER: Excellent.

2 JUDGE JORDAN: And from AWI?

3 MS. LEWIS: We just have a question regarding
4 service of Innana McCarty. I believe that someone
5 had been trying to procure an e-mail address for
6 her. Is she still -- can NOAA speak to that?

7 JUDGE JORDAN: We have been dealing with the same
8 issue. She filed -- we have sent her notices.

9 MS. MACCLINTOCK: I do have her e-mail address,
10 but I don't think she wants that to be her, like,
11 method of service, as far as I know, unless she's
12 changed. So I did e-mail her a courtesy copy,
13 because I wasn't sure it would get -- the mail would
14 get to her in time, because she had e-mailed us.
15 But other than that, I've been trying to use mail as
16 a service for her.

17 MS. LEWIS: So we should continue to use the
18 address provided?

19 JUDGE JORDAN: Right. Yes.

20 MS. LEWIS: Thank you.

21 And then I apologize if I missed this, but is the
22 date for submission on this -- is that, then, ten
23 days as provided in the regulation?

24 JUDGE JORDAN: Yes.

25 MS. LEWIS: Okay. Thank you very much.

1 JUDGE JORDAN: Anything from Peninsula?

2 MS. OWENS: I don't have any comments right now.

3 JUDGE JORDAN: Very good. Thank you.

4 All right. I appreciate the time and the effort.
5 We will prepare this initial agenda. If the parties
6 -- if things come up that we need to change or
7 modify, we will. Again, we'll keep -- I will expect
8 -- wait for your dates concerning proposed dates,
9 and if the parties can work together, if they can
10 come up with alternative dates that we can discuss
11 with my staff that we can try to work with, it's
12 probably -- it would be welcome. But right now,
13 we'll continue with the 12th of August date for now,
14 recognizing that there are significant problems with
15 witness availability and issues with the parties,
16 which we will have to make a ruling on. So that's
17 it. Thank you very much. This conference is
18 closed. Thank you.

19 [PROCEEDINGS ADJOURNED AT 1:55 P.M.]

20 --oOo--

21

22

23

24

25

A F F I D A V I T

I, Patrick J. Heard, CCR, do hereby certify that the foregoing transcript prepared under my direction is a true and complete record of proceedings taken on June 17, 2019 at the hour of 10 a.m., at Seattle, Washington.

This document has been digitally signed in accordance with Washington Court Rules GR 30(D)(2)(B).

PATRICK J. HEARD, CCR, RPR
Washington State CCR No. 3302
Seattle, Washington 98102
realtimepatrick@gmail.com