UNITED STATES OF AMERICA
Department of Commerce
National Oceanic and Atmospheric Administration

In re: Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Gray Whales by the Makah Indian Tribe	Hon. George J. Jordan Hearing Docket No. 19-NMFS-0001

MOTION TO EXCLUDE EVIDENCE REGARDING TREATY RIGHT AND CULTURAL SIGNIFICANCE OF WHALING

Sea Shepherd Legal (SSL) and Sea Shepherd Conservation Society (SSCS) (collectively "Sea Shepherd") move to exclude all testimony and documentary evidence seeking to establish, or otherwise relating to, the Makah Indian Tribe's (Tribe) treaty right to hunt for gray whales and the cultural significance of whaling. This evidence is irrelevant to the purposes of the present hearing under the Marine Mammal Protection Act (MMPA) and associated regulations.

Alternatively, should Administrative Law Judge (ALJ) Jordan (Judge Jordan) determine that such evidence is admissible, such a finding would imply that evidence regarding the co-tenancy rights of other United States citizens to engage in non-consumptive uses of gray whales is likewise admissible. Accordingly, should Judge Jordan deny its motion to exclude, Sea Shepherd requests an order declaring the admissibility of all co-tenancy evidence as a matter of law.

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BACKGROUND

On February 14, 2005, the National Marine Fisheries Service (NMFS) received a request from the Tribe for a waiver of the MMPA moratorium on the take of marine mammals to allow for take of Eastern North Pacific (ENP) gray whales. *Announcement of Hearing Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals* (*Announcement of Hearing*), 84 Fed. Reg. 13639, 13640 (col. 2) (April 5, 2019). Approximately ten years later, on March 13, 2015, NMFS released a draft environmental impact statement (DEIS) to analyze the proposed waiver in response to this request. *Id.*; *Draft EIS: The Makah Tribe Request to Hunt Gray Whales*, announced in 80 Fed. Reg. 13373 (March 13, 2015).

On April 5, 2019, NMFS notified stakeholders and the public at large that a formal hearing would take place later this year. *Announcement of Hearing*, 84 Fed. Reg. at 13639 (col. 3). In addition to establishing the date of the hearing (which would later be postponed), the announcement set forth the basic issues of fact and law at stake, a deadline for individuals and organizations to express their interest to participate as parties, a deadline to submit initial written direct testimony, and a deadline to submit rebuttal testimony. In compliance with the announcement and governing regulations, 28 C.F.R. § 228.1 *et seq.*, several individuals and entities, including Sea Shepherd and the Tribe, became parties to the proceeding. Sea Shepherd, the Tribe, and other parties then proceeded to submit initial direct testimony by the May 20th deadline.

The materials submitted by the Tribe contain significant amounts of testimony and documentary evidence dedicated to (1) establishing and explaining the nature of the Tribe's right to hunt for ENP gray whales pursuant to the Treaty of Neah Bay, and (2) articulating the cultural importance of whaling to the Tribe. *See generally* Dkt. Nos. 31.A. (Reid Decl.) & 33 (Arnold, Green, Pascua, & Debari Decl.). In fact, the Tribe submitted five declarations that do not engage in any way with the legally relevant criteria (discussed below), concentrating instead on extra-statutory considerations.

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First, the testimony of Joshua L. Reid — spanning approximately 214 pages in direct testimony and exhibits — focuses exclusively on the history and nature of the Tribe's treaty right. *See generally* Reid Decl. This description is not the result of Sea Shepherd's subjective evaluation. Rather, it is precisely how Reid characterizes his testimony, stating as follows: "Because my testimony focuses on the Tribe's treaty whaling rights and the constellation of historical and contemporary activities associated with those rights, rather than the specific components of NMFS's proposal, I was not asked to take a position on NMFS's published issues for the hearing[.]" Reid Decl. at ¶ 5.

Similarly, the declarations of Greig Arnold, Daniel J. Greene, Sr., Maria Pascua, and Paula Debari all contain substantial amounts of testimony related to the treaty issue. All four declarants state that they "believe that whale hunting is an essential element of Makah subsistence and culture, that the Treaty of Neah Bay secured to the Makah Tribe the right to hunt whales, and that the Tribe's treaty right supports the National Marine Fisheries Service's proposed waiver and regulations that are the subject of the hearing." Arnold Decl. at ¶ 2; Greene Decl. at ¶ 2; Pascua Decl. at ¶ 2; DeBari Decl. at ¶ 2. The declarants also speak to the importance of the treaty right in several other ways. *See, e.g.,* Arnold Decl. at ¶ 18 ("For me, the Treaty of Neah Bay was our ancestors' way of showing that whales, seals, fish and other resources were of utmost importance and were worth sacrificing most of our land to protect. It gives us the right for all time to go out and get those resources as the Treaty says — throughout our Usual and Accustomed areas."); Greene Decl. at ¶ 18 ("The treaty means everything; we gave up so much to hold onto those rights, which are a way of life and represent who we are as a people."); Pascua Decl. at ¶ 17 ("When I think about what the Treaty right means, I am thankful that our ancestors insisted that Makahs always have the right to harvest one of our biggest food sources, even though we have an abundance of other marine life around us."); DeBari Decl. at ¶ 15 ("Our ancestors felt it was so important they put our main source of food and spirituality in the Treaty.").

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The balance of these four declarations is devoted to explaining each tribal member's appreciation for the Tribe's whaling tradition. For instance, Mr. Arnold recounts the ways in which whaling is "central" to the Makah identity, Arnold Decl. at ¶ 7; summarizes his involvement in hunting activities in 1999 and 2000, *id.* at ¶¶ 8-10; and opines that the absence of whaling has led to cultural erosion, including the loss of traditional knowledge and customs related to whaling, *id.* at ¶¶ 10-12, 17. For her part, Ms. Pascua likewise describes her involvement in the 1999 and 2000 hunts, ceremonial activities associated with those hunts, and her impressions of how the hunts revitalized traditional Makah culture. Pascua Decl. at ¶¶ 8, 11-14. In addition, Ms. Pascua describes her work teaching the Makah language, including its special emphasis on words and expressions related to whaling. *Id.* at ¶¶ 5-8. The other two declarations share similar experiences and perspectives. *See generally* Greene Decl. & DeBari Decl.

As explained below, while these outlooks may be important in another context, they are not in any way germane to the legal framework governing the present regulatory undertaking.

STANDARD OF REVIEW

Pursuant to Section 556(c) of the Administrative Procedure Act (APA), an ALJ has ample authority to conduct the proceedings associated with formal rulemaking. This authority is akin to that of a federal district judge in a bench trial, and it includes the power to "regulate the course of the hearing" and to "dispose of procedural requests or similar matters[.]" 5 U.S.C. § 556(c)(5),(9). Likewise, under the regulations governing MMPA waiver hearings, the presiding ALJ has the power to "rule upon motions[.]" 50 C.F.R. § 228.6(b)(3).

In formal proceedings under the APA, an ALJ is directed to "receive relevant evidence." 5 U.S.C. § 556(c)(3). Complementing this rule, the APA states that the pertinent agency (here, NMFS) "shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d). NMFS has implemented this command through the regulations governing waiver hearings. Those regulations provide that written "[d]irect testimony . . . shall become a part of the

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record *subject to exclusion of irrelevant and immaterial parts thereof*." 50 C.F.R. § 228.17(a); *see also* 50 C.F.R. § 228.6(b)(3) (providing that the ALJ shall "rule upon . . . admissibility of direct testimony"); *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 149 (4th Cir. 1991) (noting that "an ALJ is always free to exclude irrelevant, immaterial or unduly repetitious evidence").

Ultimately, the admission of irrelevant evidence can provoke reversal upon judicial review. Under the APA, a court will set aside an agency decision if it is "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). As a corollary, the admission of irrelevant testimony calls into question the evidentiary basis for the agency's final decision.

ARGUMENT

I. Neither the MMPA Waiver Factors Nor the Statutory Language Governing the Promulgation of Associated Regulations Permits the Consideration of the Tribe's Treaty-Related and Cultural Evidence

The purpose of this hearing is (1) to determine whether a waiver of the MMPA's take prohibition should be granted to allow the Tribe to hunt for ENP gray whales, and (2) if a waiver is granted, to determine the regulatory framework that will implement that waiver. *See Announcement of Hearing*, 84 Fed. Reg. at 13639 (col. 3) ("The hearing involves a proposed waiver under the Marine Mammal Protection Act (MMPA) and proposed regulations governing the hunting of eastern North Pacific (ENP) gray whales by the Makah Indian Tribe in northwest Washington State."); *see also* 16 U.S.C. § 1371(a)(3)(A); 16 U.S.C. § 1373(b).

Whether in court or before a federal agency, it is a basic tenet of law that evidence is "irrelevant" if it does not bear a connection to the issues that matter under the legal scheme in

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question. Although the Federal Rules of Evidence are not applicable in administrative proceedings, the basic test for relevance provided by Rule 401 remains instructive: Evidence is only relevant if "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) *the fact is of consequence in determining the action*." Fed. R. Evid. 401 (emphasis added). As a review of sections 101 and 103 of the MMPA reveals, the existence and nature of the Tribe's treaty right is simply not germane to the statutory analysis. The same goes for evidence related to the cultural significance of whaling.

A waiver determination is governed exclusively by the waiver factors set forth in section 101 of the MMPA. 16 U.S.C. § 1371(a)(3)(A). Section 101 provides that NMFS may only grant a waiver if the agency has given "due regard" to the following scientific variables associated with the animals in question: (1) distribution; (2) abundance; (3) breeding habits; and (4) times and lines of migratory movements. *Id.* A determination is guided by these factors to ensure that a waiver is compatible with the conservation principles of the MMPA. *See id.* (providing that these factors inform the agency's discernment of whether "it is compatible with this chapter to waive the requirements of this section so as to allow taking," and that the agency "must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter"). This determination is largely about science. The statutory factors are clear, and they do not include consideration of a treaty right or the cultural significance of whaling.

If NMFS grants a waiver, the agency then proceeds to issue regulations governing the authorized take under section 103 of the MMPA. Like section 101, section 103 provides a list of factors — here, factors that NMFS must consider when designing regulations. These factors include

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"(1) existing and future levels of marine mammal species and population stocks; (2) existing international treaty and agreement obligations of the United States; (3) the marine ecosystem and related environmental considerations; (4) the conservation, development, and utilization of fishery resources; and (5) the economic and technological feasibility of implementation." 16 U.S.C. § 1373(b).

It is important to note that the second factor concerns *international* treaty and agreement obligations of the United States. Had Congress intended for treaties with tribes to be included in the analysis, it would have omitted the word "international" or otherwise included additional clarifying language. By mentioning "*international* treaty and agreement obligations," Congress clearly meant to exclude other forms of agreements. *See* A. SCALIA & B. GARNER, READING LAW 107 (2012) ("Negative-Implication Canon[:] The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*).").

This conclusion is further bolstered by the fact that the MMPA references "international treaties" in another section, section 102, which provides an exception to the MMPA's blanket moratorium on the taking of marine mammals when takes have been "expressly provided for by an international treaty, convention, or agreement to which the United States is a party and which was entered into before or by any statute implementing any such treaty, convention, or agreement." 16 U.S.C. § 1372(a)(2). In earlier litigation involving the Tribe, the Ninth Circuit analyzed whether this exception applied as a result of decisions by the International Whaling Commission (IWC) purporting to authorize a hunt under the International Convention for the Regulation of Whaling (ICRW). *See generally Anderson v. Evans*, 314 F.3d 1006 (9th Cir. 2002). The court held that the exception did not apply for several reasons. For present purposes, however, the most interesting

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feature of the decision is that no one — not even the Tribe — argued that the Treaty of Neah Bay qualified as an "international treaty, convention, or agreement to which the United States is a party[.]" 16 U.S.C. § 1372(a)(2); *see also Anderson*, 314 F.3d at 1023 ("Defendants maintain that the MMPA does not apply because the Tribe's whaling quota has been expressly provided for by an international treaty [*i.e.*, the ICRW], or, in the alternative, because the Tribe has an Indian treaty whaling right that is not affected by the MMPA.").

II. NMFS Has Confirmed that the Tribe's Treaty-Related and Cultural Evidence Is Irrelevant

In responding to the Tribe's proposed issues of fact, NMFS confirmed the treaty right's irrelevance to this proceeding. On May 20th, in support of the lengthy initial direct testimony proffered on the issue, the Tribe wrote as follows: "The Tribe's treaty right provides further support for NMFS's proposed waiver and regulations, which would enable the Tribe to exercise its right to hunt gray whales and meet cultural and subsistence needs of the Makah people (to the extent allowed by the regulations)." Dkt. 30, Makah Tribe's Proposed Issues of Fact, at 4. In its June 12th response, NMFS wrote that it "did *not* consider the Tribe's treaty right in evaluating whether the proposed waiver and regulations are consistent with the MMPA requirements." NMFS's Response to Makah Tribe's Proposed Findings of Fact at 2 (emphasis added) (disseminated to parties via email on June 12, 2019).

In fact, NMFS has consistently taken the position that the relevant portions of the MMPA, including section 103, are concerned only with international treaties and agreements. In the preamble to the proposed regulations published on April 5, 2019, NMFS described its analysis of the international treaty factor as follows:

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> (b) Existing International Treaty and Agreement Obligations of the United States
>
> The proposed regulations limit the harvest of ENP gray whales consistent with the ICRW Schedule, Article 13, and the U.S.-Russia bilateral agreement. In March 2018 the U.S. requested that the IWC Scientific Committee (specifically the Standing Work Group on Aboriginal Subsistence Whaling Management Procedures or AWMP) evaluate a potential Makah gray whale hunt under the proposed regulations. The goal of the AWMP's review was to determine if the aboriginal harvest of gray whales under hunt proposals by the U.S. and the Russian Federation would meet the IWC's conservation objectives. Those objectives focus on ensuring that aboriginal hunt requests (1) do not seriously increase risks of extinction (highest priority), (2) enable hunts ''in perpetuity,'' and (3) maintain stocks at the highest net recruitment level (and if below that, ensure they move towards it). After modeling the available data (i.e., biology, ecology, abundance and trends, removals including direct hunting, ship strikes and bycatches), the AWMP agreed (and the Scientific Committee supported) that the proposed hunt management plan for a Makah tribal hunt meets the IWC conservation objectives for ENP gray whales as well as for PCFG and WNP gray whales (IWC, 2018b).

Proposed Regulations Governing the Takings of Marine Mammals, 84 Fed. Reg. 13604, 13614 (April 5, 2019) (col. 2). As this quote demonstrates, NMFS did not consider the Treaty of Neah Bay in its analysis of "existing international treaty and agreement obligations of the United States." This is because the Treaty of Neah Bay is not an *international* treaty or agreement.

More recently, and as discussed in further detail below with respect to the final hearing agenda, NMFS once again confirmed that it "did not rely on the treaty right in evaluating whether the proposed waiver and regulations satisfy MMPA standards." Third Declaration of Chris Yates, at ¶ 4. There is, of course, a simple explanation for NMFS's decision to structure its evaluation in this manner: At this stage, the Treaty of Neah Bay is immaterial to the MMPA analysis.

It is important to note that NMFS's interpretation of the statute is entitled to significant deference. Sea Shepherd, the Tribe, and other parties might offer persuasive interpretations of sections 101 and 103 of the MMPA, but, in the final analysis, such takes are not entitled to any

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special weight. As the federal agency charged with administering the MMPA, NMFS is in an entirely different position.

Under *Chevron*, federal courts apply a two-step framework when reviewing agency interpretations of statutes that they administer. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). During the first step, courts ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If the intent of Congress is clear, then the courts "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. At step two, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Courts have applied *Chevron* to NMFS's interpretations of the MMPA in several instances. *See, e.g., Humane Soc'y of the United States v. Locke*, 626 F.3d 1040, 1054 (9th Cir. 2010) ("We are not persuaded by plaintiffs' argument that NMFS's interpretation of the MMPA is impermissible or unreasonable under the *Chevron* framework."); *Black v. Pritzker*, 121 F. Supp. 3d 63, 87 (D.D.C. 2015) ("The Court agrees with Defendants that NOAA's interpretation of the MMPA to exempt only the unintentional, incidental take of marine mammals by commercial fishers in the course of commercial fishing is reasonable"); *Humane Soc'y of the United States v. Bryson*, 924 F. Supp. 2d 1228, 1237 (D. Or. 2013) ("The Court also holds that *Chevron* deference applies to NMFS's interpretation of the Section 120 standard and that NMFS's application of that standard was not arbitrary or capricious.").

In the present case, the analysis should likely end at step one. Sections 101 and 103 are equally clear with respect to the precise question at issue, *i.e.*, whether a non-international treaty and the cultural significance of whaling matter at the present stage. Yet, if a court were to conclude that

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the MMPA is somehow ambiguous on this point, the Tribe would fare no better. NMFS determined that these factors are not legally cognizable; that conclusion is eminently reasonable and entitled to deference. Furthermore, even if the courts were to conclude that another deference regime applies in lieu of *Chevron*, the agency's view on the matter — which is antagonistic to the Tribe's position — would still be entitled to significant weight. *See, e.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (extending deference to agency interpretations insofar as they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (stating that an agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted). No matter the analysis, NMFS's understanding of the statute and associated regulations prevails.

III. The Decision in *Anderson* Does Not Support the Tribe's Position

In an attempt to defeat the obvious, the Tribe points to a footnote in *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2002), as support for adding its treaty right to the list of factors considered in granting a waiver. Sea Shepherd respectfully disagrees with the Tribe's interpretation of the *Anderson* dicta concerning the alleged relevance of the treaty right to this proceeding.

In relevant part, the *Anderson* court wrote as follows:

> Having determined that the procedures of the MMPA apply to the Tribe, in light of the conservation principle and the "in common with" language of the treaty, we need not resolve the abrogation issue presented by the plaintiffs: The NMFS might authorize prescribed whaling to proceed under the MMPA, albeit with conditions designed to ensure the perpetuation of the resident whale population. Unlike other persons applying for a permit or waiver under the MMPA, the Tribe may urge a treaty right to be considered in the NMFS's *review of an application* submitted by the Tribe under the MMPA.

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Id. at 501, n. 26 (emphasis added).

The emphasized language, in the context of the full reference, does not support the Tribe's conclusion that the *Anderson* court held that the Tribe can urge the treaty right as a basis for obtaining a waiver under section 101 of the MMPA. The court was merely observing, again in dicta, that the Tribe could ask NMFS to consider the treaty right in making its initial, threshold decision as to whether to move forward following the Tribe's application. The *Anderson* court did not state that the Tribe may urge a treaty right to be considered *in the waiver analysis itself*; the court stated that "the Tribe may urge a treaty right to be considered in the NMFS's *review of an application* submitted by the Tribe under the MMPA." *Id.* (emphasis added). Unlike a non-tribal entity making such an application, the Tribe was able to assert this right as a basis for allowing the application to go forward. We find ourselves at the stage of a hearing precisely because NMFS has already recognized this treaty right and is now proceeding to consider whether a waiver is appropriate under the statutory waiver factors. The *Anderson* court's dicta statement certainly did not sanction consideration of the treaty right at *this stage* of the waiver process.

Stated simply, the essential point here is that the treaty right is the "ticket" for entry into the waiver process in the first place. There is not any room for substantive consideration of any aspect of the treaty right (or the cultural significance of whaling) in deciding upon a waiver. That decision is guided by science using the exclusive waiver factors.

IV. The *Anderson* Court Cannot Modify the Express Terms of a Statute

Even assuming the Tribe is correct in its interpretation of the *Anderson* dicta, a court cannot modify or add to the express terms of a statute. Stated differently, even if the *Anderson* dicta objectively means what the Tribe suggests, that does not make a legally cognizable difference.

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A court is permitted to interpret a statute and resort to extrinsic evidence to aid in that interpretation if the statutory provision is ambiguous. However, a court cannot add to or otherwise amend the requirements of a statute (by dicta or otherwise). *See Miller v. French*, 530 U.S. 327, 336 (2000) ("[W]here Congress has made its intent clear, we must give effect to that intent.") (internal quotation marks omitted); *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) ("RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court."). Thus, the *Anderson* court's dicta should not be read to add a new factor — a tribal treaty right — to the requirements for issuing a waiver under section 101 of the MMPA or promulgating regulations under section 103. And, again, it is significant that NMFS has not interpreted the *Anderson* decision to suggest as much.

V. The Final Hearing Agenda Should Not Be Read as Sanctioning the Admission of the Tribe's Treaty-Related and Cultural Evidence

Although it should not matter in light of the exclusive nature of the governing law, a proper construction of the final hearing agenda provides additional support for the present motion. While the Tribe might attempt to argue that the agenda contemplates testimony regarding the Treaty of Neah Bay, a thorough read of the agenda precludes this position.

In relevant part, the final hearing agenda provides as follows:

> II. Do NMFS's proposed regulations satisfy the regulatory requirements in 16 U.S.C. 1373?
>
> A. Did NMFS Consider all Enumerated Factors in Prescribing Regulations?
> . . .
>
> 2. Facts pertaining to existing international treaty and agreement obligations of the United States (16 U.S.C. 1373(b)(2)):

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> a. What is the relevance in this proceeding of the Treaty of Neah Bay, between the Makah Tribe and the United States, which explicitly protects the tribe's right to hunt whales?

Announcement of Hearing and Final Agenda Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals, 84 Fed. Reg. 30088, 30090 (col. 2) (June 26, 2019).

At first blush, it appears that the Treaty of Neah Bay is enshrined (however temporarily) within the agenda. However, the section mentioning the Treaty of Neah Bay (Part II.A.2.a.) is simply a sub-section of that portion of the agenda addressing 16 U.S.C. § 1373(b)(2) (a.k.a., section 103 of the MMPA). As established above, the Tribe's treaty is not an "international treaty or agreement" that would fall within this section 103 factor. At most, the "international treaty" factor in this case is limited to whether the quota in the bilateral agreement meets the IWC's "conservation objectives." Thus, the Tribe cannot insert consideration of its treaty right under this agenda item.

Yet again, it is important to consider NMFS's position on the matter. On August 7, 2019, Assistant Regional Administrator Chris Yates testified as follows:

> One issue identified in the Final Hearing Agenda does *not* fall within any of the enumerated factors for issuance of a waiver and regulations under the Marine Mammal Protection Act (16 U.S.C. §§ 1361 et seq.) (MMPA). This is Issue II.A.2(a) – "What is the relevance in this proceeding of the Treaty of Neah Bay, between the Makah Tribe and the United States, which explicitly protects the tribe's right to hunt whales?" 84 Fed. Reg. 30,090. *NMFS does not interpret the requirement of MMPA section 103(b)(2), which relates to "international" treaty obligations of the United States, as applying to treaties between the United States and Native American tribes.* NMFS acknowledges and respects the Tribe's treaty right but did not rely on the treaty right in evaluating whether the proposed waiver and regulations satisfy MMPA standards.

Third Declaration of Chris Yates, at ¶ 4 (emphasis added). As stated above, this interpretation of the governing statute and regulations is entitled to considerable deference.

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Of course, Judge Jordan is not precluded from removing the treaty issue from the agenda. After all, the notice published by NMFS on August 2nd contemplates changes of this nature. *See Announcement of Change in Hearing Date Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals*, 84 Fed. Reg. 37837, 37837 (col. 3) (Aug. 2, 2019) ("The parties may file motions to exclude any issues listed in the Final Hearing Agenda by August 9, 2019."). If Judge Jordan grants the present motion, the above portion of the hearing agenda should be excised.

VI. If the Tribe's Treaty-Related and Cultural Evidence Is Admitted, then Co-Tenancy Evidence Must Also Be Admitted

If Judge Jordan is inclined to allow introduction of evidence regarding the Tribe's treaty right and the cultural importance of whaling, then that opens the door to consideration of the co-tenancy rights of all citizens of the United States. If extra-statutory evidence is to be considered, fairness requires that it not be confined to evidence favoring the Tribe.

The *Anderson* court held that the 1855 Treaty of Neah Bay did not grant the Makah Tribe an exclusive right to use, or otherwise interact with, whales. The court reached this conclusion because, *inter alia*, the treaty states that the Tribe has the right to use whales "in common with" all citizens of the United States. *See Anderson*, 371 F.3d at 500 (quoting Treaty of Neah Bay). As a result, the court found that the treaty language creates a "co-tenancy" in the "resource." *See id.* ("We have recognized that the 'in common with' language creates a relationship between Indians and non-Indians similar to a cotenancy, in which neither party may 'permit the subject matter of [the treaty] to be destroyed.'") (quoting *United States v. Washington*, 520 F.2d 676, 685 (9th Cir. 1975)). The court explained the upshot of this co-tenancy relationship in the following terms: "[T]he Makah cannot, consistent with the plain terms of the treaty, hunt whales without regard to processes in place

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and designed to advance conservation values by preserving marine mammals or to engage in whalewatching, scientific study, and other non-consumptive uses." *Id.* at 501. Simply put, the Treaty of Neah Bay is a two-way street: It grants certain rights to the Tribe, but it also grants certain rights to non-tribal citizens who wish to enjoy whales in a very different manner.

If the Tribe is permitted to introduce testimony concerning its treaty right into this proceeding — despite the fact that it is not relevant to any of the MMPA factors — then other citizens of the United States, including Sea Shepherd and its members, have a right to introduce testimony concerning the non-consumptive uses of whales by non-tribal members.

CONCLUSION

For the foregoing reasons, Sea Shepherd respectfully asks Judge Jordan to exclude all testimony and other evidence regarding the Tribe's treaty right and the cultural significance of whaling. More specifically, if this motion is granted, Sea Shepherd respectfully asks Judge Jordan to exclude the entirety of the testimony submitted by Joshua Reid, Greig Arnold, Daniel J. Greene, Sr., Maria Pascua, and Paula Debari.

Should Judge Jordan deny Sea Shepherd's motion, Sea Shepherd requests an order declaring the admissibility of competing co-tenancy evidence as a matter of law.

Dated this 9th day of August 2019

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