

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

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| In re: |) | Docket No. 19-NMFS-0001 |
| |) | |
| Proposed Waiver and Regulations Governing |) | RIN: 0648-BI58 and |
| the Taking of Eastern North Pacific Grey |) | RIN: 0648-XG584 |
| Whales by the Makah Tribe |) | |

ORDER APPROVING HEARING MANAGEMENT PROPOSAL

On September 26, 2019, the following parties submitted a partial stipulation regarding the hearing management plan for the hearing scheduled to begin on November 14, 2019: Animal Welfare Institute, Makah Indian Tribe, Marine Mammal Commission, National Marine Fisheries Service, Peninsula Citizens for the Protection of Whales, Sea Shepherd Conservation Society, and Sea Shepherd Legal (“Stipulating Parties”). Ms. Inanna McCarty is the only party who did not sign the partial stipulation.

I held a conference call with the parties on September 30, 2019 to resolve certain issues about which the parties had been unable to reach an agreement. Representatives of all the Stipulating Parties were present, but Ms. McCarty was not. The parties presented argument regarding their positions on the disputed issues.

After reviewing the proposal and considering the arguments, the proposal is ACCEPTED with the following modifications:

- Subparagraph 2.d.iv is MODIFIED to reflect that each witness made available for cross examination shall introduce and give a brief summary of his or her written direct testimony (approximately five to ten minutes). Previously, the summary was at the

discretion of the parties. This is necessary to ensure that observers have a basic sense of what the witness will be testifying about.

- Subparagraph 2.f is MODIFIED to reflect that post-hearing briefs will be due 45 days after the final transcript is made publicly available. Due to the size and scope of the record, I found a 45-day timeline would be more appropriate than 30 days, and the additional time would not significantly affect my timeline in issuing a Recommended Decision.
- Subparagraph 3.c is ACCEPTED as drafted. Certain parties believed it would be improper to permit the recall of witnesses, but I determined that, provided any testimony on recall counted toward a party's time allocation, there was minimal risk of recalls unduly prolonging the proceedings.
- Subparagraph 3.g is MODIFIED to reflect the following allocations of time:
 - NMFS: 9.9 hours
 - MMC: 2.2 hours
 - Makah and Inanna McCarty: 6.5 hours
 - AWI, Sea Shepherd, and PCPW: 12 hours
 - General hearing/Presiding Official/non-party: 2.4 hours

The Hearing Management Plan is set forth in its entirety in Attachment 1 to this Order.

IT IS SO ORDERED.



George J. Jordan
Administrative Law Judge

Done and dated this 25th day of October, 2019, at
Seattle, Washington.

ATTACHMENT 1— APPROVED HEARING MANAGEMENT PLAN

- 1) The parties propose an agreed upon schedule and procedures for the hearing to be submitted to the Court by September 20, 2019. To the extent this proposal constitutes a modification of the process for the introduction of testimony under 50 CFR 228.17(b), the parties agree that no party will be prejudiced by such modification. However, this agreement as to the lack of prejudice only extends to matters for which there is consensus among the parties.
 - a) Goal = develop a fair and efficient process to conduct the hearing in five and a half court days.
 - b) Focus of hearing should be cross-examination and redirect.
 - c) The proposal is based upon the current hearing start date of 1:00 p.m. on November 14, 2019.
- 2) Proposals for Efficiencies
 - a) Dispense with opening statements.
 - b) Instead, parties may present their prehearing positions through prehearing briefs. Submit prehearing briefs seven calendar days before the commencement of the hearing (*i.e.*, November 7 based on the current hearing date of November 14).
 - c) Do not spend hearing time reading written direct testimony. A party may elect to ask its witness to summarize written direct testimony after it is introduced (no more than 10 minutes per lay witnesses and 15 minutes per expert witness). Such time spent summarizing the witness's testimony would count against the party's allocation of time.
 - d) The parties agree that all written direct or rebuttal testimony submitted will be considered part of the official record for this matter for purposes of 50 C.F.R. § 228.17(a), regardless of whether the testimony is introduced at the hearing by a witness, in accordance with the provisions below.
 - i) Any written direct or rebuttal testimony identified by the ALJ as not bearing upon the issues of fact as identified in the Final Hearing Agenda (as may be subsequently modified by the ALJ) is not relevant for the hearing. While such testimony will remain part of the official record for this matter, it will not be addressed at the hearing or be considered for purposes of the ALJ's recommended decision.
 - ii) Any written direct testimony that the ALJ excludes as irrelevant, immaterial, or inadmissible is not relevant for the hearing. While such testimony will remain part of the official record for this matter, it will not be addressed at the hearing or be considered for purposes of the ALJ's recommended decision.
 - iii) Notwithstanding 50 C.F.R. § 228.17(a), if no party intends to cross-examine a particular witness, that witness need not be called to testify and will be considered to have met the requirements of 50 C.F.R. § 228.17(b) through the submission of written testimony. The parties will confer and attempt to reach an agreement on which witnesses fall into this category. The parties will submit this list of witnesses to the

court no later than 10 days before the commencement of the hearing to allow the court the opportunity to request that the witness attend the hearing for purposes of examination by the court.

- iv) Witnesses available for cross-examination will quickly introduce written direct testimony in accordance with the requirements set forth in the regulations at 50 C.F.R. § 228.17(b)(1)-(3), and provide a brief summary of the written direct testimony (approximately five minutes, unless a party determines a more thorough summary is warranted). Such time will count against the party's allocation. Parties thereafter will proceed directly to appropriate cross and direct examination per 228.17(b)(4) and as ordered by the Court under Section 3(c) below. After cross-examination, the witness will be subject to re-direct examination.
 - v) For those witnesses that no party intends to cross-examine, the party who submitted the witness's direct testimony may, but need not, call the witness to the stand for purposes of quickly introducing (and, at the party's election, summarizing for no more than 10 minutes per lay witnesses and 15 minutes per expert witness) his or her written direct testimony in accordance with the requirements set forth in the regulations at 50 C.F.R. § 228.17(b)(1)-(3). The time spent introducing (and summarizing) the witness's testimony would count against the party's allocation of time.
 - e) Omit closing arguments (50 C.F.R. § 228.19(a)).
 - f) Instead, use post-hearing briefs and proposed findings of fact/conclusions of law as provided in the hearing regulations (50 C.F.R. § 228.19(b)). Post-hearing briefs and any written comments from interested persons under 50 C.F.R. § 228.19(b) will be due 45 days after the hearing transcript in its final form is made available to the public at the ALJ's Electronic Reading Room for this proceeding. The Court will notify the parties as soon as the hearing transcript is posted to the Reading Room.
- 3) Proposed Organization
- a) In order to accommodate witness schedules, unanticipated circumstances, etc., the witness order may be changed by agreement of the parties or upon order of the Court. The parties propose the following, initial order:
 - i) NMFS witnesses
 - ii) Makah Tribe (and Inanna McCarty) witnesses
 - iii) AWI, Sea Shepherd, and PCPW witnesses (precise order to be determined no later than 7 days before the hearing date)
 - iv) MMC witnesses
 - b) As part of the scheduling of witnesses and provided their testimony is not excluded by the Court, the parties will agree upon a firm date and time for the Makah Tribe's four lay witnesses (Arnold, Greene, Pascua and DeBari) and one expert historian witness (Reid) to testify during the hearing (*e.g.*, the morning of hearing day 3).

- c) A witness may provide direct testimony to rebut any rebuttal testimony submitted on August 6, 2019, or September 11, 2019, after the witness's written direct testimony is introduced (and, at the party's election, summarized). With leave of Court, a party may also recall a witness to provide direct testimony to rebut testimony provided at the hearing after the recalled witness has already testified at the hearing. Such time will count against the party's allocation.
- d) Group the parties by interest for cross-examination and allocation of time.
- e) The order of cross-examination for all witnesses, unless otherwise agreed by the parties or ordered by the Court will be: 1) NMFS; 2) Makah Tribe and Inanna McCarty; 3) AWI, Sea Shepherd, and PCPW; and 4) MMC.
- f) Use chess-clock format to track the available time for the hearing to ensure efficient use of hearing time and a fair allocation. The allocations below assume roughly 33 hours of hearing time (6 hours a day, plus 3 hours for the half day). NMFS will provide the clock and a designated individual or individuals to track the time on behalf of the Court.
- g) Time will be allocated among the parties as follows:
- NMFS: 9.9 hours
 - MMC: 2.2 hours
 - Makah and Inanna McCarty: 6.5 hours
 - AWI, Sea Shepherd, PCPW: 12 hours)
 - General hearing/Court's questions of witnesses/non-party time: 2.4 hours). In the event additional time were required by the Court beyond the allocated hours, that time could be deducted pro rata from the parties or taken from the unallocated time that would be available on the morning of Friday, November 22.
- h) The parties respectfully request the Court to maximize hearing time to the extent possible to allow for the full use of time during the hearing for witness examination.
- i) Parties grouped together will share their allocated time and utilize that time as they see fit. The parties are not proposing to set a limit on the number of cross-examiners each party group may utilize. However, each cross-examiner may only question a witness once, *i.e.*, a cross-examiner may not ask additional questions of a witness after another cross-examiner has begun to question the same witness.
- j) If additional time for witness examinations becomes available, *e.g.* if sessions are longer than anticipated or more general time is available, that time would be allocated to the parties as the hearing progresses in accordance with the percentage of time allotted to each party. Additionally, any party may agree to allocate a portion of its unused time to another party.
- k) For the order of cross-examination of witnesses, MMC will generally be allowed to be the last party to cross-examine a witness.
- l) To monitor time spent, the parties suggest the following additional procedures:

- i) NMFS will identify a person(s) to be the full-time clock monitor during the hearing. NMFS will notify the Court and the parties no later than November 4, 2019 of the identified individual(s).
- ii) The clock monitor would keep a running tally available to all parties at all times.
- iii) The clock would be kept in 1 minute increments.
- iv) A party would be on the clock when their turn for examination starts, *i.e.*, as soon as the Court informs the party it is their turn to examine the witness.
- v) If another party objects during examination, the clock would still run for the examining party, but we would expect the Court to ensure the objecting party was not taking undue amounts of time with objections.
- vi) The clock would stop when the party's examination of the witness concludes.
- vii) The clock would start for the next party when the Court informs the party that its turn for examination is beginning, etc.
- viii) If the Court examines a witness, time spent on the question(s) and answer(s) would count against the general hearing/non-party allocation of time.