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

9 *In re:* Proposed Waiver and Regulations
10 Governing the Taking of Eastern North
11 Pacific Gray Whales by the Makah Indian
Tribe

Hon. George J. Jordan
Hearing Docket No. 19-NMFS-0001

12
13 **RESPONSE TO NATIONAL MARINE FISHERIES SERVICE'S**
MOTION TO LIMIT REBUTTAL ISSUES AND TESTIMONY

14 Sea Shepherd Legal (SSL) and Sea Shepherd Conservation Society (SSCS) (collectively
15 “Sea Shepherd”) file this response in partial opposition to the National Marine Fisheries Service’s
16 (NMFS) Motion To Limit Rebuttal Issues and Testimony. Sea Shepherd focuses its response on
17 NMFS’s request to exclude evidence regarding co-tenancy rights related to gray whales.

18 As explained below, the right of non-tribal citizens of the United States to engage in non-
19 consumptive uses of gray whales is both (1) clear as a matter of law, and (2) relevant to the present
20 rulemaking under the MMPA. Alternatively, should Administrative Law Judge (ALJ) Jordan (Judge
21 Jordan) be inclined to agree with NMFS that evidence regarding co-tenancy rights is not strictly
22 relevant to this proceeding, Sea Shepherd asserts that this evidence should be admitted as a matter of
23 fundamental fairness. Because NMFS “does not object to limited testimony about the treaty right as
24 background information” despite the agency’s conclusion that such testimony is irrelevant, *see*
25 NMFS’s Motion to Limit Rebuttal Testimony at 4, a similar opportunity should be afforded to Sea

1 Shepherd to introduce a reasonable amount of testimony regarding co-tenancy rights and activities
2 associated with those rights. A decision to the contrary would unlawfully disadvantage Sea
3 Shepherd and other parties opposed to the waiver by providing a unique evidentiary privilege for the
4 Makah Indian Tribe (the Tribe) without furnishing any corresponding opportunity for other non-
5 tribal parties.

6 **ARGUMENT**

7 **I. Evidence Regarding Co-Tenancy Rights Is Relevant Under Ninth Circuit Precedent.**

8 In its Motion To Limit Rebuttal Issues and Testimony, NMFS identifies a small portion of
9 Carrie Newell’s testimony as problematic. In fact, NMFS targets only four statements within Ms.
10 Newell’s declaration. Those statements are contained in paragraphs 9, 10, 11 and 46.¹ NMFS’s
11 Motion to Limit Rebuttal Testimony at 4-5 & n. 13. For ease of reference, the relevant statements
12 are set forth in the following table:

13 Testimony from Ms. Newell’s Declaration Identified by NMFS as Subject To Exclusion
14 “I understand that the 1855 Treaty of Neah Bay grants the Makah Tribe a right to fish and 15 hunt whales ‘in common with all citizens of the United States.’ The ‘in common’ language 16 has been interpreted to prevent the Makah from hunting whales without regard to the 17 nonconsumptive use of whales by non-tribal members of the public. Such uses include 18 whale watching and scientific study.” Decl. of C. Newell at ¶ 9.
19 “The Makah have introduced substantial testimony about the importance of whaling to 20 their culture and allege that the waiver of the MMPA is justified by their treaty right. What 21 the Makah Tribe’s witnesses fail to include in this discussion is the ‘in common’ right for 22 nonconsumptive use of whales by non-tribal members of the public.” <i>Id.</i> at ¶ 10.

22 ¹ Although Ms. Newell’s declaration contains additional testimony related to non-consumptive uses
23 of whales, *see* Decl. of C. Newell at ¶¶ 12-18, NMFS did not identify this testimony in its motion to
24 exclude. Accordingly, Sea Shepherd assumes that NMFS does not take issue with this additional
25 testimony. At any rate, NMFS has waived the right to challenge this testimony by not identifying it
by the appropriate deadline.

1 “The ‘right in common’ is an extremely important right for the thousands of people with
2 whom my company and I communicate about whales on a daily basis. By directly
3 witnessing the natural splendor exhibited by these amazing wild creatures, our whale
4 watching clients quickly get to know and love each whale that they meet out on the ocean.
5 Through my business, I interact with at least 100 whale watching clients each day, and I
6 have a following of tens of thousands of fellow whale watchers. Many of my clients tell
7 me that I have given them the best day of their lives. I share with my whale watchers not
8 only the name of each whale, but also its history, including sex, age, number of calves,
9 orca attacks, and feeding techniques. In addition, I am also showcasing specific individual
10 whales on social media so that tens of thousands of people can learn about these specific
11 individual gray whales.” *Id.* at ¶ 11.

12 “The loss of PCFG whales will also have grave consequences for scientific research
13 concerning these unique whales. As noted above, the right to conduct such research is one
14 that I hold in common with the Makah under the Treaty of Neah Bay. A primary
15 motivation for publishing my guidebook and sharing my research through my museum
16 was to impart knowledge about the comprehensive body of work that exists about PCFGs.
17 Given their high site fidelity, curious personalities, and near-shore distribution, PCFGs
18 have represented an extremely unique opportunity for whale scientists to intimately study
19 details about large cetaceans not readily obtainable with other whale populations. From the
20 fine idiosyncrasies of feeding dynamics to progressive body condition changes that have
21 been catalogued – this is absolutely critical information that we cannot afford to lose,
22 particularly during this era of rapid changes to climate and prey abundance. If the
23 individual PCFG whales that we have had the benefit of studying so closely are lost to a
24 hunt, this collective body of work will remain unfinished and incomplete. As a result, our
25 ability to properly manage cetaceans and the every-growing threats that they face will be
significantly compromised.” *Id.* at ¶ 46.

19 NMFS argues that this testimony is subject to exclusion because “[n]either Sea Shepherd nor
20 Ms. Newell identify any MMPA requirement or issue of fact to which the proffered testimony
21 regarding Ms. Newell’s alleged treaty right to carry out research could be relevant.” NMFS’s
22 Motion to Limit Rebuttal Testimony at 5. NMFS is incorrect. Sea Shepherd’s position is supported
23 by controlling precedent from the U.S. Court of Appeals for the Ninth Circuit.

24 In *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004), the court held that the Tribe’s right to
25 whale under the Treaty of Neah Bay is limited by the rights of non-tribal citizens to “use” whales “in

1 common with” the Tribe. The court’s holding flowed naturally from the treaty language itself,
2 which provides the Tribe with a right to fish and hunt whales “in common with all citizens of the
3 United States.” 12 Stat. 939, 940 (1855). The court explained that this language creates a situation
4 of co-tenancy, writing as follows:

5 We have recognized that the “in common with” language creates a relationship
6 between Indians and non-Indians similar to a cotenancy, in which neither party may
7 “permit the subject matter of [the treaty] to be destroyed.” *United States v.*
8 *Washington*, 520 F.2d 676, 685 (9th Cir. 1975). See also *United States v.*
9 *Washington*, 761 F.2d 1404, 1408 (9th Cir. 1985) (recognizing that “in common
10 with” has been interpreted to give rise to cotenancy type relationship). While this “in
11 common with” clause does not strip Indians of the substance of their treaty rights, see
12 *Washington v. Washington Commercial Passenger Fishing Vessel Ass’n*, 443 U.S.
13 658, 677 n. 22 (1979), it does prevent Indians from relying on treaty rights to deprive
14 other citizens of a fair apportionment of a resource.

15 *Id.* at 500.

16 Providing more detail, the court went on to note that “whale-watching” and “scientific study”
17 are prime examples of the non-consumptive uses that must be balanced with any authorized hunting.
18 The court’s instruction on this point was clear:

19 Just as treaty fisherman are not permitted to “totally frustrate . . . the rights of the non-
20 Indian citizens of Washington” to fish, *Puyallup Tribe v. Dept. of Game of Wash.*,
21 433 U.S. 165, 175 (1977), the Makah cannot, consistent with the plain terms of the
22 treaty, hunt whales without regard to processes in place and designed to advance
23 conservation values by preserving marine mammals or to engage in whalewatching,
24 scientific study, and other non-consumptive uses. See *Wash. v. Wash. Commercial*
25 *Passenger Fishing Vessel*, 443 U.S. at 658.

Id.

Were there any doubt that evidence of non-consumptive uses ought to inform MMPA waiver
decisions, the Ninth Circuit dispelled that doubt with the following lines:

Mindful of th[e] recognition [that regulation for conservation is permissible despite
the existence of treaty rights], we conclude that to the extent there is a “fair share” of
marine mammal takes by the Tribe, the proper scope of such a share must be
considered in light of the MMPA through its permit or waiver process. The MMPA
will properly allow the taking of marine mammals *only when it will not diminish the*

1 *sustainability and optimum level of the resource for all citizens.* The procedural
2 safeguards and conservation principles of the MMPA ensure that marine mammals
3 like the gray whale can be sustained as a resource for the benefit of the Tribe and
4 *others.*

4 *Id.* at 501 (emphasis added).

5 In other words, the Ninth Circuit held that co-tenancy rights, and non-consumptive uses
6 encompassed by those rights, are relevant to the waiver analysis. Accordingly, Sea Shepherd must
7 be given the opportunity to introduce such co-tenancy evidence to demonstrate (1) the extent of its
8 “fair share” of the whale “resource” and (2) whether, after application of the waiver factors, that
9 share will be impaired by the Tribe’s proposed take of gray whales.

10 Significantly, the admission of this co-tenancy evidence does not then invite the ALJ’s
11 consideration of the Tribe’s treaty evidence. The Tribe has already been given the opportunity to
12 “urge” its treaty right in its application for a waiver of the MMPA protections for gray whales. As
13 admitted by NMFS, now that the Tribe’s application (based upon its treaty right) has been approved
14 and the waiver process has commenced, the treaty right has no particular relevance under the MMPA
15 waiver factors. *See* NMFS’s Response to Makah Tribe’s Proposed Findings of Fact at 2; Third
16 Declaration of Chris Yates at ¶ 4.

17 In contrast, Sea Shepherd has not been afforded the same threshold opportunity to introduce
18 its related co-tenancy rights. In order to make a fully informed decision on the requested waiver, the
19 ALJ must also have the opportunity to understand the nature and extent of these competing rights
20 and whether, when viewed through the lens of the scientific waiver factors, other (non-tribal)
21 citizens would be deprived of a “fair apportionment” of the subject “resource.” As discussed below,
22 absent introduction of this evidence, Sea Shepherd will be severely disadvantaged in its ability to
23 present its case in this proceeding.

24 Sea Shepherd relies upon Carrie Newell for the presentation of this critical co-tenancy
25 evidence. Through her testimony, Ms. Newell has introduced valuable evidence regarding two

1 important activities (research and whale-watching) in which non-tribal citizens participate as a
2 legitimate exercise of their co-tenancy rights. Excluding this evidence—especially if the Tribe is
3 permitted the opportunity to introduce evidence regarding its consumptive rights under the treaty—
4 would at once fly in the face of *Anderson* and unsettle the balance that the MMPA so carefully
5 attempts to achieve.

6 In an attempt to defeat this conclusion, and somehow reconcile its opposition to Sea
7 Shepherd’s evidence with its tolerance of “limited” treaty-right testimony offered by the Tribe,
8 NMFS advances a distinction with no basis in the law. Specifically, in response to Sea Shepherd’s
9 Motion to Exclude, NMFS argues that it is acceptable to allow some testimony by the Tribe because
10 the Tribe has sought an MMPA waiver. “In contrast,” NMFS writes, “Sea Shepherd has not sought
11 an MMPA waiver or other MMPA authorization to which Sea Shepherd’s asserted ‘co-tenancy’
12 rights could be relevant[.]” NMFS’s Combined Response to Parties’ Motions to Exclude at 5.

13 Incredulously, NMFS is asserting that Sea Shepherd (and any other party, for that matter)
14 could only properly introduce testimony regarding whale-watching and research if Sea Shepherd had
15 sought an MMPA waiver related to those activities. Taken to its logical conclusion, if this
16 unsupported assertion were true, it would be impossible for a non-tribal citizen to ever introduce
17 evidence of its co-tenancy rights in opposing a treaty-based request for an MMPA waiver in order to
18 “harvest” whales. This inequitable result follows from the fact that there would, of course, never be
19 an occasion in which a non-tribal citizen would be submitting such a waiver request related to the
20 non-consumptive uses of whales.

21 While the MMPA regulates some aspects of whale-watching and research operations, *see*,
22 *e.g.*, 50 C.F.R. § 216.3 (defining “take” to include “the negligent or intentional operation of an
23 aircraft or vessel, or the doing of any other negligent or intentional act which results in disturbing or
24 molesting a marine mammal”); *Approach Regulations for Humpback Whales in Waters Surrounding*
25 *the Islands of Hawaii Under the Marine Mammal Protection Act*, 81 Fed. Reg. 62010 (Sept. 8, 2016)

1 (setting forth specific guidelines for whale-watching of humpback whales near Hawaii), no one has
2 suggested that the non-consumptive uses discussed by Ms. Newell in her testimony would require an
3 MMPA waiver—nor would there be a recognized basis for such a suggestion. Thus, NMFS is
4 asking for something (an application for a waiver of the “take” prohibition) that makes no sense
5 under the relevant law and facts.

6 In sum, NMFS fails to provide a principled basis for the simultaneous admission of evidence
7 relating to one side of the co-tenancy coin (*i.e.*, consumptive uses) and exclusion of evidence related
8 to the other side of the co-tenancy coin (*i.e.*, non-consumptive uses). NMFS, therefore, has no legal
9 or factual grounds for its motion to exclude the identified portions of Ms. Newell’s testimony.

10 **II. If the Tribe Is Permitted To Introduce Evidence Regarding Its Treaty Right, Sea**
11 **Shepherd Should Be Permitted a Similar Opportunity As a Matter of Fundamental**
12 **Fairness**

13 Even if Judge Jordan concludes that Sea Shepherd’s co-tenancy evidence is irrelevant, equity
14 may, depending on his decision vis-à-vis the Tribe’s evidence, counsel in favor of admission. If
15 Judge Jordan agrees with NMFS’s position that the Tribe should be allowed to offer “limited
16 testimony about the treaty right as *background* information,” NMFS’s Combined Response to
17 Parties’ Motions to Exclude at 5 (emphasis added), then equity dictates a similar opportunity for Sea
18 Shepherd to offer its own “background” evidence concerning co-tenancy rights.

19 The Administrative Procedure Act (APA) articulates the basic rule that “[a] party is entitled
20 to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to
21 conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5
22 U.S.C. § 556(d). Further, the Supreme Court has held that “the Due Process Clause forbids an
23 agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.”
24

1 *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n. 4 (1974). Here,
2 NMFS comes dangerously close to violating these principles.

3 Although Sea Shepherd contends that Ms. Newell’s testimony regarding co-tenancy rights *is*
4 legally relevant pursuant to *Anderson*, a decision to exclude *all* evidence regarding uses of whales
5 under the Treaty of Neah Bay would at least have the benefit of consistency. However, if the ALJ
6 follows NMFS’s suggestion to admit only the Tribe’s evidence while excluding Sea Shepherd’s
7 evidence offered in rebuttal, this decision would threaten the principles of fair play protected by the
8 Due Process Clause.

10 In addition, NMFS’s artificial line-drawing fails on its own terms. NMFS asserts that it does
11 not object to the Tribe offering an indeterminate quantity of treaty evidence as “background
12 information.” NMFS’s Motion To Limit Rebuttal Testimony at 4; NMFS’s Combined Response to
13 Parties’ Motions to Exclude at 5. From one perspective, NMFS’s position may sound reasonable.
14 If, however, a proper understanding of the “background” is the goal, then the *full and unbiased*
15 background needs to be provided. A full and unbiased background necessarily includes the co-
16 tenancy evidence offered by Ms. Newell. Stated differently, if NMFS’s theory is that (a) the Tribe’s
17 treaty evidence is not legally relevant, but (b) it is acceptable because it helps to frame what is at
18 stake, then the logical conclusion is that Sea Shepherd’s evidence is also admissible. Any other
19 conclusion stacks the deck in favor of the Tribe—and does so without any lawful justification.

20 CONCLUSION

21 For the foregoing reasons, Sea Shepherd respectfully requests that Judge Jordan deny
22 NMFS’s motion insofar as it seeks to exclude rebuttal evidence regarding the co-tenancy rights of
23 non-tribal citizens. Alternatively, should Judge Jordan be inclined to agree with NMFS that
24 evidence regarding co-tenancy rights is not strictly relevant to this proceeding, Sea Shepherd
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1 requests an order permitting the introduction of evidence on this issue commensurate with the
2 amount of any permitted evidence concerning the Tribe's treaty right.

3 Dated this 26th day of August 2019.

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