

HONORABLE GEORGE J. JORDAN
ADMINISTRATIVE LAW JUDGE

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

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

PARTIAL STIPULATION RE HEARING MANAGEMENT PROPOSAL

This Partial Stipulation is made by and between the following parties to this proceeding:
Animal Welfare Institute, Makah Indian Tribe, Marine Mammal Commission, National Marine
Fisheries Service (NMFS), Peninsula Citizens for the Protection of Whales, Sea Shepherd
Conservation Society, and Sea Shepherd Legal (“Stipulating Parties”). The Stipulating Parties,
by and through their duly authorized undersigned representatives, stipulate as follows:

Attached hereto as Attachment 1 is a Hearing Management Proposal developed by the
Stipulating Parties with the goal of developing a fair and efficient process to conduct the hearing
for this proceeding in five and a half court days. The Proposal is based upon the current hearing
time and date of 1:00 p.m., November 14, 2019. Where the Stipulating Parties were unable to
reach agreement on a particular issue, the Stipulating Parties have set forth their position and
rationale supporting their position to allow the Court to resolve the issue.

Attached hereto as Attachment 2 is a Proposed Order that the Court may utilize to adopt
the Proposal. The Stipulating Parties are providing a Microsoft Word version of the Proposal so

that the Court may revise the Proposal as it sees fit to adapt the Proposal as an attachment that will set forth the Court's Hearing Management Order for the conduct of this proceeding.

SO STIPULATED this 26th day of September, 2019.

CHRIS MCNULTY
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Counsel for the National Marine Fisheries Service

SO STIPULATED this 26th day of September, 2019.

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SO STIPULATED this 26th day of September, 2019.

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SO STIPULATED this 26th day of September, 2019.

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*Representative for the Peninsula Citizens for the
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SO STIPULATED this 26th day of September, 2019.

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*Counsel for Sea Shepherd Legal & Sea Shepherd
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SO STIPULATED this 26th day of September, 2019.

Marine Mammal Commission

By: /S/ (per email authorization)

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ATTACHMENT 1—HEARING MANAGEMENT PROPOSAL

Joint Hearing Management Proposal—September 26, 2019

Points upon which the parties were not able to reach agreement are highlighted, and a description of each parties' position is included below the contested provision for the Court's consideration and decision.

- 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 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. At its discretion, 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 will count against the party's allocation. 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 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.

NMFS's Position: 30 Days: NMFS believes 30 days is an appropriate time period to allow for filing of post-hearing briefs and public comment per § 228.19(b). All other court filings will be available to the parties and the public as the hearing progresses. We anticipate there will be a fairly significant period of time for the court reporter to prepare the hearing transcript in final form. We believe 45 days extends the hearing process longer than is necessary to allow for preparing of the post-hearing briefs or comments by interested persons.

Makah's Position: 30 Days. Makah concurs with NMFS's rationale for filing of the parties' post-hearing briefs and any comments of interested persons within 30 days of the date when the hearing transcript in its final form is made available to the public. The Tribe emphasizes that the time for interested persons' filings under § 228.19(b) should run concurrently with the parties rather than consecutively. Not only is 30 days a fairly typical public comment period for agency rulemaking, but in reality, interested persons will have access to the initial direct testimony for at least 6 months before the deadline and most rebuttal testimony for at least 3 months because of the testimony's availability in advance of the hearing and the length of time it will likely take the court reporter to prepare the final transcript after the hearing.

AWI/PCPW/Sea Shepherd's Position: 45 Days: Sea Shepherd, AWI, and PCPW support a 45-day comment period. Requesting an additional 15 days is more than reasonable given the thousands of pages of submissions, much of which is complex scientific testimony and supporting materials. Additionally, the hearing transcript, which is anticipated to span at least 5.5 days, will only add to the volume of materials that must be reviewed before drafting post-hearing briefs (by the Parties) and drafting effective comments (by interested persons). Of note, with respect to the 2015 DEIS, NMFS allowed a 90-day public comment period for reviewing and formulating comments on a considerably smaller quantity (1230 pages) of material. In addition, irrespective of the total number of days selected, the comment period should also be timed to exclude (or otherwise avoid) holidays, including the Christmas and New Year holidays.

MMC's Position: The MMC somewhat favors a 45-day comment period, but would also be amenable to a 30-day comment period provided that the final transcript is not available, and the clock does not start running, until about January 1, 2020.

- g) Encourage the Court to rule in advance of the hearing on any pending motions, establish the hearing schedule, and address other hearing issues to preserve hearing time for witness cross-examination and redirect.

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.

Makah's Position: A substantial amount of testimony was submitted as rebuttal direct testimony, including on the UME issue. Because the hearing regulations do not provide an opportunity to respond to such testimony in writing, Makah propose as a matter of fairness that a party's witnesses may rebut such testimony orally at the hearing. This would be an efficient way of responding to such written rebuttal testimony and would not extend the hearing because it would count against a party's (or party group's) allocated time. The Tribe agrees that a party should be able to recall a witness with the Court's leave.

NMFS's Position: NMFS supports Makah's position. NMFS interprets the hearing regulations, in particular, 50 CFR 228.17, as allowing for oral testimony at the hearing responding to the previously-submitted written rebuttal testimony to the extent such testimony bears on the issues of fact subject to decision, because such testimony is not otherwise documented for the record. NMFS notes that 50 CFR 228.17(b)(4) allows for both cross and direct examination of witnesses. NMFS interprets 50 CFR 228.17(a)'s directive that previously-submitted written testimony not be read into evidence as intended to further the regulatory objective of providing for efficient conduct of the proceeding by avoiding the repetition of testimony already in the record, not to preclude relevant direct oral testimony that is not documented in the record. *See, e.g.*, 50 CFR 228.6(b)(8). Also, NMFS supports allowing for a party to recall a witness by leave of the Court. NMFS both bears the burden of proof and has agreed to present its witnesses first in order at the hearing. Under these circumstances, NMFS believes it would be appropriate to allow NMFS to recall a witness after the other witnesses have testified, if needed to clarify any issues and if expressly permitted by the Court. NMFS proposes that any party could rely on this provision. Additionally, time spent on such testimony would count against the party's time allocation, therefore including this provision would not increase the length of the hearing.

AWI/PCPW/Sea Shepherd's Position: AWI, PCPW, and Sea Shepherd oppose both of these provisions. Sea Shepherd disagrees with the sur-rebuttal proposal and the ability to recall a witness to the stand. This proposal has the strong potential to significantly increase the time for the hearing. Sea Shepherd believes that, as contemplated by the hearing regulations, cross-examination of rebuttal witnesses is the most appropriate procedural mechanism for addressing rebuttal testimony, including direct testimony against rebuttal testimony. In effect, this proposal introduces substantial additional direct testimony. Such an addition is contrary to NMFS's previously stated position that "the hearing should be focused on cross-examination and redirect-

examination.” If this proposal is included, it should also be expressly stated that the sur-rebuttal or recalled witness time will count against that Party’s time allocation. However, even if so allocated, there is a significant chance it will result in additional hearing time, as the management plan does allow for an extension of the hearing beyond 5.5 days.

MMC’s Position: The MMC supports this proposal. The goal of the hearing is to generate a complete record that will form the basis for the parties’ arguments and the ALJ’s recommended decision. Each party should have an opportunity to make its factual case clearly and completely. To the extent that this opportunity is precluded or encumbered because of the sequence of written submissions or order of witnesses, that opportunity should be made available at the hearing. Presumably, the limited time available for each party and oversight by the judge (e.g., to cut off duplicative testimony) will help ensure that these privileges are not abused.

- 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’s Position: NMFS proposes the following allocation of time:

- NMFS (30 percent or 9.9 hours)
- MMC (6.66 percent or 2.2 hours)
- Makah and Inanna McCarty (20 percent or 6.6 hours)
- AWI, Sea Shepherd, PCPW (30 percent or 9.9 hours)
- General hearing/Court’s questions of witnesses/non-party time (13.33 percent or 4.4 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.

NMFS believes the above allocation strikes a fair balance among the parties. We make this proposal keeping in mind NMFS’s burden of proof, the NGO’s collective opposition to the proposed waiver and regulations, and the Makah Tribe’s general support of the proposed waiver and regulations.

Makah’s Position: Makah supports NMFS’s proposal. While the three NGOs have a common purpose, support each other’s positions, and are fully able to coordinate their efforts, that is not true of Makah and NMFS. As the party that requested the waiver,

Makah has an interest in exercising its treaty right that is unique from NMFS's interest in administering the MMPA, and Makah has made arguments and presented evidence that NMFS has either contested or not advanced on its own (such as the importance of hunting whales under the Treaty to Makah subsistence, culture and identity, the equivalence between the IWC's and MMPA's conservation standards, population dynamics modeling of the impacts of the proposed hunt, genetic evidence demonstrating that the PCFG is not a stock under the MMPA, the best available science regarding stock structure of WNP whales, and the unduly restrictive nature of the provision regarding off-reservation consumption of whale products in Makah households). Given this divergence of interests and positions and the inability of the Tribe to coordinate with NMFS because of the ex parte rule, it is not fair to lump Makah with NMFS for purposes of comparing their combined time allocation with the NGOs. Nor is it fair to give the NGOs collectively three times as much time as Makah. Also, the Tribe notes that Ms. Inanna McCarty is a separate party from the Tribe, and her position on the issues in the hearing is unknown. The Tribe is willing to accommodate Ms. McCarty within its 20 percent allocation of hearing time, but does not agree that a lesser allocation is appropriate given Ms. McCarty's status as a separate party. NMFS's proposed allocation provides a more equitable division of the available time, recognizes NMFS has the burden of proof, and still gives the NGOs more time collectively than is assigned to Makah.

MMC's Position: The MMC was willing to accept lesser time than other parties based on the understanding that it would go last in the order of examinations. The Commission assumes that other parties will have asked some of the questions or explored some of the areas on which the Commission otherwise would have spent its time.

AWI/PCPW/Sea Shepherd's Position: Sea Shepherd's, AWI's, and PCPW's proposed allocation is:

- NMFS (30 percent or 9.9 hours)
- MMC (6.66 percent or 2.2 hours)
- Makah and Inanna McCarty (12.5025 percent or 4.125825 hours)
- AWI, Sea Shepherd, PCPW (37.5075 percent or 12.377475 hours)
- General hearing/non-party time (13.33 percent or 4.4 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.

In the opinion of Sea Shepherd, AWI, and PCPW, the allocation proposed by NMFS is unfair to the other Parties. The most equitable allocation would be to assign the Tribe the same amount of time as the other interested Parties. This assignment is more appropriate because NMFS is the only Party with the burden of proof under the APA. Moreover, most of NMFS's testimony is in line with the Tribe's position – as further confirmed by the Tribe's agreement with the majority of NMFS's proposed facts. While it is true that the NGO parties oppose issuance of a waiver, it is not equitable to ignore the individuality of their respective positions by requiring them to share a single block of time that has no connection with the actual number of parties included within that block.

Each NGO party has unique positions to assert at the hearing and should, therefore, have the same opportunity to present its case as all other interested parties.

- 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.

HONORABLE GEORGE J. JORDAN
ADMINISTRATIVE LAW JUDGE

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

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) Docket No. 19-NMFS-0001
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)

[PROPOSED] ORDER RE HEARING MANAGEMENT

Based upon the partial stipulation of the parties setting forth a Hearing Management Proposal dated September __, 2019, and upon further consideration by the Court, it is hereby ordered that hearing in this proceeding will be conducted in accordance with the provisions set forth in the Attachment to this Order.

By _____
—
George J. Jordan
Administrative Law Judge

Done and dated this __ day of _____, 2019, at
Seattle, Washington.