

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF COMMERCE
NATIONAL OCEANOGRAPHIC AND ATMOSPHERIC ADMINISTRATION

In re:

**Proposed Waiver and Regulations Governing
the Taking of Eastern North Pacific Grey
Whales by the Makah Tribe**

:
:
:
: Docket No. 19-NMFS-0001
:
:
:
:
:
:
:
:
:

**RIN: 0648-B158 and
RIN: 0648-XG584**

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
NOAA ADMINISTRATIVE PROCEEDING
TELEPHONIC PREHEARING CONFERENCE

Jackson Federal Building
915 Second Avenue
Seattle, Washington
Monday, July 29, 2019

BEFORE:

THE HONORABLE GEORGE J. JORDAN
ADMINISTRATIVE LAW JUDGE

Also Present:

Heather L. MacClintock, Esquire, Attorney Advisor

Sally Sybert Gessner, CER
Official Court Reporter,
Administrative Law Judge Office
Baltimore, Maryland 21202-4022

APPEARANCES:**FOR NATIONAL MARINE FISHERIES SERVICE:**

U.S. Department of Commerce
Office of General Counsel
National Oceanic & Atmospheric Administration
7600 Sandpoint Way, NE
Seattle, WA 98115

By: Chris McNulty, Esquire
Laurie K. Beale, Esquire
Caitlin B. Imaki, Esquire
Rachel Morris, Esquire
Steve Stone, Esquire
Brittany Pugh

FOR THE MAKAH TRIBE:

Ziontz Chestnut, Attorneys at Law
2101 4th Avenue, Suite 1230
Seattle, Washington 98121-2331

By: Brian Gruber, Esquire
Wyatt Golding, Esquire
Cara Hazard

FOR MARINE MAMMAL COMMISSION:

4349 East-West Highway, Room 700
Bethesda, MD

By: Michael L. Gosliner, Esquire, General Counsel

FOR SEA SHEPHERD CONSERVATION SOCIETY:

Sea Shepherd Legal

By: Brett Sommermeyer, Esquire
Catherine Pruett, Esquire
Nick Fromherz, Esquire

FOR ANIMAL WELFARE INSTITUTE:

900 Pennsylvania Avenue, SE
Washington, D.C. 20016

By: Donald John "DJ" Shubert, Esquire
Elizabeth Lewis, Esquire

FOR PENINSULA CITIZENS FOR THE PROTECTION OF WHALES:

2226 Eastlake Avenue, East #108
Seattle, WA 98102

By: Margaret Owens
Chuck Owens

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE COURT: All right, this is a prehearing conference in the matter of the Proposed Waiver and Regulations governing the taking of Eastern North Pacific Grey Whales by the McCaw Indian Tribe. This is docket #19-NMFS-0001. This is Judge Jordan. I'd like to start with appearances for the parties beginning with NOAA.

MR. McNULTY: Thank you, Your Honor. This is Chris McNulty on behalf of NOAA and NMFS and with me in our conference room are Brittany Pugh our paralegal and Rachael Morris one of the attorneys involved and I believe we have at least two of our attorneys also on the phone.

THE COURT: Okay, thank you.

MR. McNULTY: Yes, sir. And maybe for the record, Your Honor, I'll say it is Laurie Beale and Caitlin Imaki and I believe that's everyone for NMFS unless I've missed somebody.

THE COURT: Very good. Thank you very much.

MR. STONE: I'll add, this is Steve Stone as well on the phone from National Marine Fishery Service.

THE COURT: Okay. Very good. Okay, and for the Marine Mammal Commission?

MR. GOSLING: This is Mike Gosliner for the Marine Mammal Commission and I'm the only representative on the call.

THE COURT: Very good. And for the Makah Tribe?

MR. GRUBER: Brian Gruber and Wyatt Golding and our

1 Legal Assistant Cara Hazard is also with us.

2 THE COURT: Very good. All right, for Sea Shepard?

3 MR. SUMMERFIELD: This is Brett Sommermeyer, also on
4 the call is Catherine Pruett and Nick Fromherz.

5 THE COURT: Very good. And for the Animal Welfare
6 Institute?

7 MR. SHUBERT: Good morning Judge Jordan, this is D.J.
8 Shubert for the Animal Welfare Institute. And I believe Elizabeth
9 Lewis is on the call as well.

10 MS. LEWIS: That is correct.

11 THE COURT: Okay, very good. And for the Peninsula
12 Citizens?

13 MS. OWENS: Yes, good morning, this is Margaret Owens,
14 my husband Chuck Owens is here as well.

15 THE COURT: All right. Thank you very much. Is there
16 anyone else who wishes to be noted as an appearance?

17 (No audible response.)

18 THE COURT: Okay, also on the line, my clerk is also
19 on the line, separately we are in different locations today. So,
20 we may have to wait a second or two while I'm getting a
21 communication or two if I've forgotten something.

22 All right, the main purpose of this call is that as we
23 know that we have issued an order that would continue the case
24 from the August, the currently scheduled date. And we have been
25 working diligently to try to manage individual schedules along

1 with the availability of the hearing space. And we have attempted
2 unsuccessfully to find other alternative hearing spaces that would
3 be adequate to hold the hearing. So right now we are still
4 intending the best space that we have is still the space here at
5 the federal building.

6 Now, where it stands now we had looked at early
7 October that had issues and still might have some issues even
8 though it looks like less of a problem with the budget. But, it
9 still could have budget issues because that bill for
10 appropriations still not passed both houses of Congress. But, I
11 understand that a number of the parties had issues with the early
12 October dates also. So, what we are looking at right now are
13 these dates in November. And as I understand it most parties are
14 amenable to those dates. Ms. Owens, you are one of the parties,
15 you do have an issue with those dates?

16 MR. GRUBER: Your Honor, this is Brian Gruber for the
17 Tribe, can I be heard on sort of this going right to November
18 dates issue?

19 THE COURT: Certainly.

20 MR. GRUBER: Your Honor and for all, obviously a lot
21 of work went into preparing the spreadsheet, we all have things
22 that are important to us and things that we have on our calendars.
23 I would like to point out that by looking to November, that's
24 ninety days after the August 12th, the original date for the
25 hearing that's the same type of extension that the NGO's requested

1 early in this proceeding and which Your Honor found a delay of the
2 proceedings of that magnitude would be prejudicial to the Tribe.

3 We're concerned because the information provided here
4 is very general and pretty vague and does not allow in my view
5 what we should be doing which is working hard to see if we can see
6 if we can accommodate the hearing in the October timeframe. And
7 some of these notices in the table and I assume, Your Honor, you
8 have a copy of this, you are able to look at it.

9 THE COURT: I was just given a copy of it just this
10 morning, because I had tried to let this be out there so that I
11 wouldn't be viewing anything ex parte. So, now that everyone is
12 here I have called up a copy of it.

13 MR. GRUBER: Okay, well Your Honor, again, just the
14 point about just jumping to November as the first date of
15 convenience for the parties is troubling to the tribe because we
16 are not able to go forward with our efforts to exercise treaty
17 whaling rights until this process reaches a conclusion. Say what
18 you will about when the Tribe might actually be whaling in the
19 future, but what's clear is that before that can happen we need to
20 have the hearing, a recommended decision from Your Honor, and a
21 final decision from NMFS. And none of that can happen before we
22 have this hearing.

23 Every week and month that this gets delayed, it's
24 another week in which the Tribe is sitting on the beach and not
25 whaling. In our view we should work harder and look hard at the

1 dates in October to understand specifically what the conflicts
2 are, I mean that includes NMFS on the October 7th week, individuals
3 who appear to be having travel whether its work or personal,
4 witnesses that may have the same issue. We would prefer to go
5 through and see if there's some way to accommodate the hearing in
6 October, particularly the week of, well any of those weeks in
7 October.

8 And I would just point out a couple things. One, in
9 the briefing you received following the prehearing conference
10 where the parties indicated their concern with the August 12th date
11 and then the potential for the September 16th date. Animal Welfare
12 Institute said in D.J. Shubert's declaration that they had no
13 intention of asking for additional delays in this matter. But, if
14 you look at this table what is very evident is that AWI's
15 attorneys, and I believe they have three that have appeared in
16 this matter, are essentially, have indicated they have conflicts
17 the entire month of October. And so to us it's concerning on a
18 number of levels. Not only do you have what Mr. Shubert
19 represented to Your Honor earlier, but we have very generalized
20 indications of a conflict here without understanding whether
21 there's some way to accommodate them.

22 For example the week of October 7th, AWI's co-lead
23 counsel will be in Ohio for a wedding of an immediate family
24 member. Well, is that all of the week or part of the week? They
25 have three attorneys, do they need all three attorneys there for

1 every day of the hearing? These are the kinds of questions we
2 think Your Honor should work through so that we can make sure that
3 this hearing cannot, can truly not be accommodated in October.

4 THE COURT: All right.

5 MR. SHUBERT: Your Honor, this is D.J. Shubert, may I
6 respond -- from the Animal Welfare Institute -- may I briefly
7 respond to Mr. Gruber's comment?

8 THE COURT: Certainly.

9 MR. SHUBERT: Yeah, I just wanted to point out that
10 the information in my Declaration is accurate, we did not request
11 further delay in these proceedings. We were responding to, I
12 believe information submitted to the parties from NMFS suggesting
13 that the October dates would be problematic for its lawyers and/or
14 experts. So, I just wanted to make that clear. I can't speak for
15 AWI's co-lead counsel in terms of what their issues are for the
16 month of October, Elizabeth Lewis is on the call so she could
17 speak to any concerns she has with those dates. But, Bill Eubanks
18 is not on the call so we would have to confer with him separately.

19 THE COURT: Now, from our point of view, again, trying
20 to match availability of a hearing space with the availability of
21 parties we had desired which later in October after, other than
22 those first two weeks of October, other than the period of time in
23 where we'd also have a lock in there because we have a holiday in
24 there that creates a problem.

25 We also had issues with other, with not having

1 availability of the hearing space in much of that timeframe. So,
2 we did have availability in those first, the week of October 7th
3 and the week of September 30th on. Now, we were requested by the
4 people who handle the finances of this matter that the week of
5 September 30th because of the problems that we are dealing with
6 over the fiscal years and the possibility of the, the strong
7 possibility that we would have some issues concerning
8 appropriations at that period of time I did not want to convene a
9 hearing solely to have to put a halt to it in order to that. So,
10 I wanted to take that week out of the equation. The week of the
11 7th was the only week that we could possibly have done, had a whole
12 week available in October from them. So, those are the issues I
13 have.

14 Because once we lost that time, and again it is still
15 extremely close to any issue, of any issues, I do not want to have
16 -- I want to have a date for this hearing so that we can move
17 forward and try to leave here today with a no further continuance
18 date that we can get this hearing in and move this thing along.
19 And, the problems I had were I did not want to start, put a
20 hearing date out in October that could just as easily, by no fault
21 of anyone, be forced to be kicked, kicked back because of the
22 fiscal issues. And then we'd be scrambling then to try to
23 probably get a hearing date later than this one in November.

24 So, I've tried to -- I just want to make sure the
25 parties understand that we, I think that given the uncertainties I

1 would rather have a certain date in November than dealing with a
2 partial date in October, that potential date in early October. We
3 do not have the facility October 16th, that week is not available.
4 So, I recognize the Tribe's frustration.

5 Again, I also recognize that the reasoning which I am
6 now using to actually try to accommodate the parties for a hearing
7 is a slightly different procedural ground and I do intend to try
8 to move this hearing along as quickly as possible recognizing the
9 delays and delays that have been, that are occurring here. I
10 recognize the Tribe's frustration but we are trying to make sure
11 that all parties can be heard.

12 MR. GRUBER: I appreciate -- this is Brian Gruber
13 again, Your Honor -- and I appreciate that very much. I, would it
14 be possible to look closely of October 21st if that's after the
15 week that the --

16 THE COURT: That is a week in which we were unable to
17 secure -- we looked at those dates and we were unable to secure
18 the facility for that date.

19 MR. GRUBER: The week of October 21st, I know you
20 mentioned --

21 THE COURT: That is correct. And we have reached out
22 to the Federal District Court and the Federal Court of Appeals to
23 see if their facilities were available, and again, an Appellate
24 Court facility really doesn't have the provisions for witnesses.
25 It might have the space for the parties but the facility, the

1 possibility would -- and it also, many of those dates would also
2 interfere with Ninth Circuit proceedings. So, we've looked at
3 other locations. And we do think this is the best location and we
4 hope this will be able to move. Wait a minute.

5 (Brief pause.)

6 THE COURT: Yes. And also we also did look at, there
7 was a potential hearing room in Federal Center South, but we
8 examined that facility and that really was inadequate, we felt
9 that would be an inadequate facility to hold this hearing in.
10 That we would not have the space and the ability for people to be
11 able to attend and have facility be available. So, we have tried,
12 but that's where --

13 The best facility we keep finding is the one here.
14 It's the only auditorium in the federal building and it is booked
15 out. We had booked out the August dates originally many months
16 before. And unfortunately it is booked in -- not booked for a
17 whole week, but again we also have the issue is we are trying to
18 do this all in one week. So we just can't really have a two-day
19 hearing here, split for a couple of days and then come back.

20 And that's one reason we are suggesting we start on
21 the 14th so we can get two days of hearing in and then have a whole
22 week to finish the hearing.

23 And I'm trying to make sure we can sit back today and
24 recognize that this would be a, we will do our best to accommodate
25 witnesses, take witnesses out of order if necessary. But I want a

1 date or a hearing that we can actually work on and move forward.

2 So, I just don't find October, unfortunately I do not
3 find a date in October that we can work with. We will still do
4 our best to move this given the delays, I will do my level best to
5 give the parties a record so they can make their comments on it
6 and then issue my final decision as rapidly as possible.

7 MR. GRUBER: Your Honor, Brian Gruber again, I guess
8 the week of October 7th which I believe still would be available
9 forum, for the auditorium is that is it worth going through and
10 understanding what the conflicts are? I guess I just would like
11 to make sure we don't leave any stone unturned in terms of whether
12 this is something that can be worked in during that week. Whether
13 it's a witness who is out for a day or two and can be available
14 for testimony. You know, the spreadsheet doesn't lend itself well
15 to understanding the precise nature of the conflict.

16 THE COURT: Okay, I, given the fact that I really
17 believe that we are putting ourselves at significant risk of
18 having even a larger delay if there is an issue with
19 appropriations. I'm just afraid we would have a greater delay and
20 I don't think anyone wants to see this in December. I really
21 don't want to have any greater delay. And I would rather go with
22 dates that I know we can use than a date which has still got a lot
23 of -- my initial feeling was let's try to get this hearing moved
24 off of, when we moved off of August as fast as possible that we
25 could accommodate the witnesses.

1 The potential issues that I have been informed of by
2 our financial people lead me to believe that we still could be
3 facing a significant issue in that week. So I really would rather
4 have a fixed date where we are not going to have to change then
5 take that chance. I understand the frustration, trying to get a
6 date working with GSA has been an issue.

7 From NOAA's standpoint I do not know if NOAA has an
8 issue. NOAA was going to be providing audio-visual assistance.
9 Did they have, do your contracting people have issues concerning
10 having a contract out early in the fiscal year?

11 MR. McNULTY: Your Honor, this is Chris McNulty, I
12 don't know the answer to that. My understanding is we would
13 likely enter into, once we have the date, the hearing date we
14 would be turning to the bidding process for the AV contractor and
15 I believe we'll be able to sign that contract this fiscal year and
16 the work could carry into the next fiscal year.

17 THE COURT: This fiscal year, okay.

18 MR. McNULTY: I'm not a fiscal expert, however, but
19 that is my understanding.

20 THE COURT: I understand completely and I have been
21 working with, considering the nature of this Memorandum of
22 Understanding from us which is one reason why it became patently
23 clear to me that we were not able to, that anything that worked
24 over the two fiscal years had a high likelihood of creating a
25 significant problem for us with the MOU.

1 So, that's one reason, but I really did want to try to
2 get it the next week but I just, the other problem I have is
3 that's gives us only one week. And I know that the parties
4 believe that they can get everything in in one week, but again,
5 this way here we have got now seven hearing days scheduled if we
6 can start on the 14th and go forward until the 22nd.

7 MR. GRUBER: Your Honor, it's Brian Gruber again for
8 the Tribe, by email NMFS had raised the issue of when, or how long
9 it would take the AV contractor to set up the room, and so it
10 actually may not, depending on what the availability of the day
11 before, we may not have the morning of the 14th.

12 THE COURT: That is correct. I want to make sure that
13 we, we will be meeting with GSA on Monday or Tuesday of next week
14 to be able to try to accommodate exactly how quickly the AV person
15 can get in there or if we can make an arrangement for the AV
16 people to be able to come in early during the day or the night
17 before.

18 MS. MACCLINTOCK: And Judge, this is Heather the
19 clerk. I did ask GSA if they could tell us what time the
20 reservation ended the previous day on the 13th and if it would be
21 possible for the AV people to get in there afterward but I haven't
22 gotten the response on that yet. So as soon as I do then we can
23 work with that.

24 MR. GOLDING: And Your Honor, this is Wyatt Golding
25 with Makah, at the, when we visited the conference, the site

1 prehearing, that AV technician said they could show up any time in
2 the morning, you know, one, two a.m. whatever it took to get ready
3 for a hearing in the morning.

4 THE COURT: Right. That was one of the contractors,
5 to my understanding.

6 MR. McNULTY: Yeah. So, Your Honor, this is Chris
7 McNulty so we do not have an identified AV contractor yet. We did
8 have one potential contractor who did go view the space with us so
9 at least that contractor potentially has flexibility. We don't
10 yet know who the identified contractor will be or what the precise
11 constraints would be on their ability to set up at odd hours. But
12 in general we are anticipating we'll at least, they'll at least
13 need four hours for set up. And, you know, once we have the
14 hearing date we will diligently work towards identifying who the
15 AV contractor will be consistent with, you know, Federal
16 Procurement requirements.

17 THE COURT: Right.

18 MR. McNULTY: And then we can work out some of those
19 details. But I don't think we can say for sure that the AV
20 contractor would be able to set up at, you know, outside of
21 business hours at this point.

22 THE COURT: Right. And there are issues here in the
23 building. Basically, the building here opens at, is available at
24 6:00 a.m. and effectively closes at 5:30 p.m. It would have to
25 get, GSA would have to have to have extra provisions in there if

1 they had to come in after 5:30. But again, the building is
2 available, open and available at, from 6:00 a.m. So, I'm hoping
3 that we would be able even in a worst case scenario be able to
4 start by 10:00 or 10:30 in the morning on the first day.

5 And these issues would also appear if we started on
6 Monday because again the weekend, whether or not there would have
7 been availability for AV to come in. So no matter what day, no
8 matter when we are if we had started on a Monday unless the AV
9 contractor were able to come in on a Friday and leave their
10 equipment over the weekend we would be having a similar issue with
11 being able to try to start at around 10:00 a.m. on the very first
12 day to allow for the AV people to at least be able to get most of
13 their equipment in place.

14 MR. McNULTY: Yes, Your Honor, this is Chris McNulty,
15 just a couple points related to this. So we will also need to be
16 setting the room up to accommodate the arrangement of the tables
17 and chairs for all the parties as well as setting up the rest of
18 the space for the public attendance as well as media attendance.

19 THE COURT: Right.

20 MR. McNULTY: So, there are some other logistics we'll
21 have to deal with whenever we are able to access the space. And
22 then I would, I guess we'll try and find out when, we are still
23 waiting, or Heather is still waiting to hear, Ms. MacClintock's
24 still waiting to hear from GSA.

25 THE COURT: Yes.

1 MR. McNULTY: But, I would just, we will need to
2 publish another Federal Register notice with the updated hearing
3 date which would likely also include the hearing time, when the
4 hearing would actually be starting. And so, I would just
5 encourage that we be cautious in thinking that 10:00 a.m. would be
6 the start date because we don't know how difficult it will be for
7 the AV contractor to set things up. And so, anyway I just think
8 that's a relevant factor.

9 THE COURT: I understand that, and I think right now
10 if we have a good list of witnesses and know when and that's one
11 of the things I, we'd like to try to make sure we can work with is
12 that recognizing that this is NOAA's regulation, the initial
13 beginnings I wanted NOAA to basically, NOAA is the proponent of
14 the rule I wanted NOAA to go first. And then, but after that
15 everyone else is considered adverse and we would come up with a
16 schedule as to the benefit of their witnesses so that we can
17 minimize the disruption for everybody else, the rest of the
18 witnesses to come in.

19 MR. McNULTY: Yeah, Chris McNulty again, Your Honor.
20 Yes, we agree, NMFS agrees with that. And just to inform the
21 Court, the parties have been working on a proposed hearing, a
22 hearing management proposal that they would be sharing with the
23 Court. We had been working towards that proposal consistent with
24 what we discussed at the prehearing conference when all of the
25 dates, you know, when the hearing was continued and then the other

1 prehearing dates, deadlines were extended four weeks we put that
2 proposal on hold. But, the parties, my belief is the parties do
3 intend to pick that back up. And so we, I would suggest that we
4 consider setting a deadline for when we would submit that.
5 Because that would help inform the witness order and things like
6 that as well. And so, when the time is right, we may want to
7 bring that back up.

8 THE COURT: And again, that's the purpose of these
9 types of calls is to be able to get to there and to sit back.
10 Now, I recognize that the Tribe wishes this case to move ahead as
11 soon as possible. Recognizing that I just, my belief is that the
12 soon as possible date would be the 14th of November.

13 Now, does any other party have any major issue between
14 the dates, the 14 November to 22 November dates?

15 Recognizing if a party was only going to be again, the
16 parties will have access to the transcript, they will have access
17 to the witness testimony for their later comments or whatever.
18 Again, it is just, the main issues are and the parties are working
19 out their witness management. I just need to know if there is any
20 party that has got a significant issue with those dates.

21 MR. SHUBERT: Judge Jordan, this is D.J. Shubert from
22 the Animal Welfare Institute as reflected in the spreadsheet
23 ideally, I would like to be back home in New Jersey by the morning
24 of the 20th. However, if the hearing does extend beyond that point
25 I will work with my spouse to see if we can come up with some

1 other option that would allow me to stay in Seattle a little bit
2 longer, thank you.

3 THE COURT: Okay again, you have co-counsel that could
4 possibly be there or, we'll make sure your, any witness testimony
5 or testimony you are particularly involved in cross-examination,
6 that would be part of the management program. And again, we are
7 going to do our best to try to accommodate issues. But again,
8 most of the parties have got, some of them again other than
9 Peninsula, has got multiple, have got counsel who might be able to
10 substitute for certain, to assist so that if counsel really have
11 any real issues. My main issue is making sure witnesses are there
12 and available for cross-examination. And that the principle
13 cross-examiner be available.

14 MS. LEWIS: Hi, this is Lizzy with AWI, and DJ will be
15 one of our witnesses. And so, we would respectfully request that
16 efforts be made to accommodate his schedule with respect to his
17 capacity as a witness. But counsel for AWI will be available
18 throughout that November week. So, the cross-examiner and counsel
19 for AWI will be able to be present.

20 THE COURT: Okay. Well, what we'll do is again, that
21 should be, I ask that the parties consider that in their plan.
22 And if that still becomes a matter for a dispute then that's what
23 these conferences are about and I will make a determination about
24 that.

25 MS. LEWIS: Thank you, Your Honor.

1 THE COURT: Okay. So again, I am recognizing the
2 Tribe's objection. Is everyone else okay with the issue of the
3 14th through the 22nd? We will begin on the 14th and we will try to
4 conclude before the 22nd. But, and we will await the parties
5 proposed witness schedule and a schedule for the conduct of the
6 hearing. And what we will do is as we will get closer, if we get
7 this general agreement once we have heard from GSA about the
8 availability for the audiovisual what we will do is we will set
9 the date for the 14th.

10 I think it's probably safe to say again, if we say
11 that it will begin at 1:00 p.m. on the 14th, that's a safe time to
12 allow all the parties to come in, have all the parties set up, all
13 their equipment together, have all the set up and we can get at
14 least four hours in that first day and then begin in earnest the
15 next morning and get a full day in that day. And then keep doing
16 that through the 22nd. We can move ahead as fast as possible with
17 the Federal Register notice to make sure all the parties that the
18 world knows exactly when we are moving ahead with this.

19 Any other issues? Are there any issues from any party
20 about that suggestion I just made?

21 MR. McNULTY: Yeah, Your Honor, this is Chris McNulty,
22 just a couple related points. One, we agree that 1:00 p.m. sounds
23 like a reasonable time to set the hearing. And then in terms of
24 publishing a Federal Register notice with the updated hearing
25 information we would suggest the same process that was used for

1 the final hearing agenda be used this time around as well. And
2 the NMFS Regs Unit is aware that a second notice may be sent to
3 them. And so, we would just suggest that that same process be
4 followed.

5 THE COURT: That is exactly the process. I mean, I do
6 not have direct access to the Federal Register, so we would be
7 using the same procedure.

8 MR. McNULTY: Thank you, Your Honor. And then the
9 second point -- Chris McNulty again -- is we would suggest that
10 the Court establish a deadline for the parties to submit that
11 hearing management proposal for the Court's consideration. And
12 we, if the hearing date is going to be November 14th, then we would
13 suggest Friday, September 20th as the deadline to submit that
14 hearing management proposal. By that time we should know who all
15 the witnesses are and we will hopefully have a good sense of
16 everybody's availability and can work with the parties to submit
17 something on that deadline. But we are open to other deadlines
18 but our suggestion is September 20th.

19 THE COURT: Is any, is that date agreeable to the
20 other parties? Because that will allow all the --

21 MS. MACCLINTOCK: This is Heather, I apologize, I
22 accidentally disconnected.

23 THE COURT: Okay. But would September 20th be an
24 acceptable date? Is there any party that would agree with or
25 suggest an earlier or later date?

1 (NO AUDIBLE RESPONSE.)

2 THE COURT: Okay hearing no objections, we will set
3 that as the date for when the parties will submit their joint
4 proposal as to the witness scheduling. And I will try to, if
5 there's any objections or issues that need to be discussed by
6 that, we would try to set a prehearing conference on this for the,
7 is the 25th or 26th of September appropriate? Will any party have
8 an issue with that date?

9 (NO AUDIBLE RESPONSE.)

10 THE COURT: So we will set another prehearing
11 conference for the 25th after the parties have submitted their
12 agreement. If the parties are able to come to a joint agreement
13 earlier, please just notify Heather and we will still keep that
14 25th date for a prehearing conference to discuss any issues that
15 might be needed to deal with witness scheduling, if there's any
16 issues that come out of that so we can keep this moving ahead.

17 All right. Is there anything else that we need to
18 discuss right now?

19 MS. LEWIS: Your Honor, this is Elizabeth Lewis with
20 AWI, and I was wondering now that the hearing has been set in
21 November if the parties would object to an extension of the
22 remaining dates for motions and the submission of rebuttal
23 testimony?

24 THE COURT: Okay.

25 MR. GOSLINER: And if I may respond to that, this is

1 Mike Gosliner with the Marine Mammal Commission.

2 THE COURT: Yes.

3 MR. GOSLINER: Which is, I think we've already
4 extended the submission of rebuttal testimony deadline and the
5 submission of direct testimony on the UME issue. The one
6 outstanding date is the rebuttal testimony on the UME. And I
7 would agree to an extension of that by perhaps a week to still fit
8 in within the timeframe before the prehearing conference and
9 submitting the joint stipulation.

10 But I don't think there's a need to extend the ones
11 that have already been extended by a month. But that one deadline
12 is still shorter than the rest so I would agree to an extension of
13 that one.

14 MR. SOMMERMEYER: This is Brett Sommermeyer from Sea
15 Shepherd. I think it makes sense, maybe we don't need a month but
16 given that the hearing date is now November 14th that we extend the
17 other deadlines somewhat still accommodating the prehearing
18 conference date that can still be done with an extension. It
19 doesn't make sense to keep these earlier deadlines now, now that
20 we have a date for the conference, for the hearing now in
21 November.

22 So, we would support an extension a longer extension,
23 not necessarily a month but some sort of extension the parties
24 could agree to.

25 MR. GRUBER: Brian Gruber for the Tribe. Your Honor,

1 we object to this and if it's not abundantly transparent what the
2 strategy here is, is move one deadline then move all the rest.

3 Your Honor, as you know, there's a substantial amount
4 of material that's already been submitted primarily by Ella
5 (phonetic) and the Tribe. And it also seems clear that the NGO's,
6 Sea Shepherd, Animal Welfare Institute, and maybe Peninsula
7 Citizens for the Protection of Whales will be submitting a
8 majority of their testimony on rebuttal Your Honor and the rest of
9 the parties deserve a fair shot at evaluating that. And the more
10 we move these deadlines the more difficult that's going to be.

11 Your Honor, you are also potentially going to receive
12 motions regarding the hearing issues or potential exclusion of
13 witnesses or testimony. That's already on the schedule as well.
14 I assume that would also be moved back if this request is
15 approved. We think that the deadlines which all of the parties
16 except the Tribe previously agreed to should stay in place. We
17 should get all the testimony in and then go forward from there so
18 we can present testimony and do cross-examination in an efficient
19 way.

20 Your Honor seems already a little concerned that the
21 time available to us in November may be a difficult squeeze given
22 the information. Pushing these, the testimony and resolution of
23 any motions later in the calendar is not going to help in terms of
24 presenting things efficiently.

25 For the Tribe, we're not taking international trips in

1 October and we plan to be working on this and the sooner we can
2 have that information according to the schedule that the parties
3 already agreed to we would appreciate that.

4 And in regards to Mr. Gosliner's request for
5 essentially one more week on the rebuttal, if I understand it
6 correctly, one more week on rebuttal testimony on the UME issue,
7 that sole issue, the Tribe would not object to an additional week
8 for rebuttal testimony on the UME issue.

9 THE COURT: All right.

10 MR. McNULTY: Objection, Your Honor. This is Chris
11 McNulty for NMFS, we agree that the deadlines that have already
12 been established, the other prehearing deadlines, we would oppose
13 extending those although we would agree to Mr. Gosliner's request
14 of moving the August 28th date for rebuttal UME testimony.

15 THE COURT: Give me a second, just looking at one
16 thing here.

17 (Brief pause.)

18 THE COURT: Just one second. All right. So, as I
19 understand it right now we have an August 28, 2019 date for the
20 final submission of rebuttal testimony and concerning issues of
21 fact -- concerning the unexplained, issues of fact that were not
22 included in the original Notice of Hearing. I do agree that I
23 think that it would make some sense to extend that, I'll extend
24 that to September 11th.

25 The other dates I'm going to keep the same so that

1 that will allow the parties -- and I think we've already had an
2 extension from the notice and it was a, we've already had
3 extensions I think we'll keep those dates the same. But on the
4 issues of fact not included in the Notice of Hearing we will
5 extend that. That was in order to try to accommodate a date
6 early, the earlier date of the hearing. And that would still give
7 some time so that we can have a discussion about that at the
8 prehearing conference if any issue come up about it. So, I think
9 that is an acceptable date for moving that, I do agree with that.

10 But the other dates I want to keep the same. All
11 right? Anything further?

12 MR. McNULTY: Yes, Your Honor. It's Chris McNulty.
13 We have a few issues related to the transcript we just wanted to
14 bring to the parties and the Court's attention.

15 THE COURT: Okay.

16 MR. McNULTY: So the first is the, so following up on
17 the prehearing conference transcript, our paralegal, Brittany Pugh
18 did receive a copy of the transcript from the ALJ's office. But
19 she has not shared that with the other members of the NMFS's team.
20 And she had inquired whether that transcript had been sent to the
21 other parties and whether it was going to be posted on the reading
22 room. And we wanted to follow-up to see where that stood. So,
23 that was our first transcript question.

24 THE COURT: Okay.

25 MS. MACCLINTOCK: This is Heather. I was not the one

1 who provided that transcript so she, I think, got it from somebody
2 else in our program. I have not provided the transcript to anyone
3 at this time. But I did talk to Mr. Johns in our Docketing Center
4 and he agreed with me that it should be posted to the reading
5 room. I will follow up and make sure that that gets done within
6 the next couple days.

7 MR. McNULTY: All right.

8 THE COURT: All right, and if she got one that might
9 have been did we have someone else looking at it for review?

10 MS. MACCLINTOCK: I was under the impression that it
11 was being sent to me in hard copy and I would get it when I'm back
12 in the office. But apparently it was actually sent in an
13 electronic version.

14 THE COURT: Okay.

15 MS. MACCLINTOCK: But I have not had the opportunity
16 to do anything with it this past week. So I will confirm with the
17 Docketing Center about it being uploaded and once I definitely get
18 the confirmation then I'll also make sure that a copy goes out to
19 all the parties.

20 MR. GOSLINER: And this is Mike Gosliner, I have a
21 related question. When this first came up I raised it with NMFS
22 contracting issue, have you had a chance to revisit your contract
23 and I'm looking forward to the other transcripts whether or not
24 your contract allows you to share them or whether individual
25 parties will be expected to pay for them if they want hard copies.

1 So, there may be a contracting issue here as well.

2 THE COURT: Right now --

3 MS. MACCLINTOCK: I'm not the one who set up the
4 contract so I'm, that's what I said, I'll double check again with
5 Mr. Johns and make sure that we are free to do that.

6 THE COURT: Right. Normally, the way these are when
7 they come in, this is a contract, this is not like a deposition, a
8 regular deposition, where this one here is for a public hearing.
9 I believe that the transcript of these prehearing conferences
10 again would fall under that elements of the APA and that they
11 would be, we would be publishing it. Just as we will eventually
12 publishing the transcript of the hearing.

13 MR. GOSLINER: Okay, I'm just speaking from experience
14 of the last one of these hearings was the Cook Inlet Beluga
15 Rulemaking and it turned out the parties actually had to buy their
16 own copies even though that was a similar proceeding because there
17 was a clause in the contract that NMFS decided needed to be
18 honored.

19 THE COURT: Okay. I believe that we made the
20 arrangements here through that.

21 MR. GOSLINER: Okay.

22 THE COURT: We generally do it, again this was a
23 contract to provide to us and if we publish, again, because it's a
24 public document.

25 MR. GOSLINER: Okay, great. That's the answer I want.

1 I just want to make sure it doesn't come back and bite us later on
2 when we haven't budgeted.

3 THE COURT: You have now, and I am now intrigued, I
4 have to now go back and make sure that they understand that any
5 contractor that we are contracting for the performance of a
6 contract and it is not proprietary to the contractor so that they
7 get, so that each party had to pay that. And I do not under, and
8 in our earlier practice that was not usually our case. Normally
9 we would have provided them. But, NMFS may be, we'll have to look
10 at how it was done. But, I will make sure that if it is arranged,
11 that we will make sure it is said that the purpose is providing a
12 transcript as part of a public hearing which is part of the public
13 record.

14 MR. GOSLING: Good, thank you.

15 THE COURT: All right.

16 MR. McNULTY: And, Your Honor, this is Chris McNulty
17 again, our second issue related to transcripts was the hearing
18 transcript itself. And we had been making some inquiries to find
19 out what the process and timing would be for that hearing
20 transcript. And so we would like to continue to work with Ms.
21 MacClintock to hopefully get some answers to just the timing and
22 process that we would be able to share with the parties. And you
23 know, the timing of the transcript whether it would be a draft,
24 for example, whether the parties would get an opportunity to
25 review a draft, to correct errors, things like that --

1 THE COURT: Sure.

2 MR. McNULTY: -- are relevant, the timing is relevant
3 for when post-hearing briefs would be filed and when the public
4 process surrounding the post-hearing submissions would be due.
5 So, that's why we are interested in understanding how, what the
6 process will be for that final hearing transcript.

7 THE COURT: I understand that. And we will make sure
8 that the parties are aware that you have got -- right now we had,
9 right now we have an issue that the way we had originally planned
10 to, we were going to be using our court reporters who work for the
11 Coast Guard at the hearing initially. Now, that's up in the air
12 right now we have scheduled at least one Coast Guard reporter for
13 the whole part of the hearing, we had wanted two. We have an
14 issue with the second court reporter right now.

15 So we do not, we are still working to find the best
16 way to be able to get a transcript that is produced in the fastest
17 way possible to the parties so that we can continue to move the
18 post-hearing part of the hearing ahead as fast as possible. So
19 that is an issue that's up in the air, which I am discussing with
20 the, again, you have heard the name Mr. Johns, he is the, one of
21 the people who has been dealing with the contract between us and
22 NMFS. And we will decide, we are making determinations as to the
23 best way to get a transcript to the parties as fast as possible.

24 MR. McNULTY: This is Chris McNulty, thank you, Your
25 Honor.

1 THE COURT: We will work with the parties to make sure
2 they have it and they have an opportunity to suggest if there are
3 corrections, to suggest corrections. And then, so that I can
4 verify a transcript.

5 MR. McNULTY: Thank you, Your Honor.

6 THE COURT: Okay, are there any other issues right
7 now?

8 MR. McNULTY: Not from NMFS, Your Honor.

9 THE COURT: Okay. Anything from the Tribe right now?

10 MR. GRUBER: No, nothing more from us, Your Honor.

11 THE COURT: Okay. From the Marine Mammal Commission?

12 MR. GOSLINER: Nothing further.

13 THE COURT: Okay. AWI?

14 MS. LEWIS: Nothing further.

15 THE COURT: Hello, AWI?

16 MS. LEWIS: All right, nothing further.

17 THE COURT: Okay. Sea Shepherd?

18 MR. SOMMERMEYER: No, Your Honor.

19 THE COURT: Nothing else. And Peninsula?

20 MS. OWENS: Nothing else, Your Honor.

21 THE COURT: Very good. Okay, well, I thank you for
22 your attendance. Again, we will prepare a memorandum of this. We
23 also, this has been recorded, we will be preparing a transcript of
24 this prehearing conference. And again, we will issue and order
25 and we will again work through the process of setting forth the,

1 both the order extending the period of time on rebuttal testimony
2 for issues that were not made out in the history. We will be
3 setting our new prehearing conference schedule and an order
4 directing the date for when the parties will submit their proposed
5 hearing schedule. And we will also be resubmitting and setting
6 those dates in the Federal Register for the dates of the hearing,
7 okay?

8 Well, I think you very much, have a very good day.
9 (AT 19:33 the prehearing conference concluded.)

10

11

12

13

14

15

16

17

18

19

20

CERTIFICATION

This certificate is valid only for a transcript accompanied by my original signature required on this page.

I hereby certify that the proceedings in the matter of National Oceanographic and Atmospheric Administration, Docket number 19-NMFS-0001, telephone conference heard on Monday, July 29, 2019, before the Honorable George J. Jordan, were recorded by means of audiotape.

I further certify that, to the best of my knowledge and belief, page numbers one to thirty constitute a complete and accurate transcript of the proceedings as transcribed by me.

I further certify that I am neither a relative to nor an employee of any attorney or party herein, and that I have no interest in the outcome of this case.

In witness whereof, I have affixed my signature this 25th day of July, 2019.

Sally S. Gessner

Sally S. Gessner, CER
Certified Electronic Court Reporter