

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

IN RE: :

:

Proposed Waiver and Regulations

Governing the Taking of : **Docket No. 19-NMFS-0001**

Eastern North Pacific Gray :

Whales by the Makah Tribe : **RIN: 0648-BI58 and**

: **RIN: 0648-XG584**

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REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS
 NOAA ADMINISTRATIVE PROCEEDING
 HEARING ON RULEMAKING
 DAY 6 of 6

Jackson Federal Building
 915 Second Avenue
 Seattle, Washington
 Thursday, November 21, 2019

BEFORE:

THE HONORABLE GEORGE J. JORDAN
 ADMINISTRATIVE LAW JUDGE

Also Present:

Heather L. MacClintock, Esquire, Attorney Advisor
 Chang Zhou, Esquire, Attorney Advisor

Timekeeper:

Joseph Heckwolf, Attorney Advisor, NOAA

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

APPEARANCES :

FOR NATIONAL MARINER FISHERIES SERVICE:

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

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

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
Marc Slonim, Esquire

FOR MARINE MAMMAL COMMISSION:

4349 East-West Highway, Room 700
Bethesda, MD

By: Michael L. Gosliner, Esquire, General Counsel

FOR SEA SHEPHERD CONSERVATION SOCIETY:

2226 Eastlake Avenue, East #108
Seattle, WA 98102
Sea Shepherd Legal

By: Brett Sommermeyer, Esquire
Catherine Pruett, Esquire
Darius Fullmer, Esquire

FOR ANIMAL WELFARE INSTITUTE:

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

By: William Eubanks, Esquire
Elizabeth Lewis, Esquire
Donald John "DJ" Schubert

FOR PENINSULA CITIZENS FOR THE PROTECTION OF WHALES:

612 Schmitt Road
Port Angeles, WA 98683

By: Margaret Owens

P R O C E E D I N G S**(Start time 09:30.)**

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3 THE COURT: All right, we are on the record
4 for the final session of the proposed waiver and
5 regulations governing the taking of North Pacific Gray
6 Whales by the Makah Indian Tribe, docket #19-NMFS-0001.

7 Again, I'd like to just make sure the parties
8 are all here for NMFS?

9 MS. BEALE: Present.

10 THE COURT: The Makah?

11 MR. GRUBER: Present.

12 THE COURT: MMC?

13 MR. GOSLINER: Present.

14 THE COURT: AWI?

15 MR. EUBANKS: Present.

16 THE COURT: Sea Shepherd?

17 MR. SOMMERMEYER: Present.

18 THE COURT: And Peninsula?

19 MS. OWENS: Present.

20 THE COURT: Okay. All right. Okay, the
21 purpose for today's hearing is to just to make sure we
22 are all on the same page as to the next phase of the
23 hearing which will be the sections that I am mostly
24 concerned will be 50 C.F.R. 228.19 and 20. And the
25 main issue is about § 228.19, which is the argument.

1 And again, the parties here wanted all of us to have
2 written arguments versus oral arguments at the end of
3 the hearing.

4 So we are going down with (b) in the Section.
5 Now § 228.19(b) does not use the term party, it used
6 the term interested person. So what I'm going to do
7 because it allows interested person to file comments on
8 the record. Now what we will do is we will, when the
9 transcript is ready which we are assuming will be about
10 the 16th of December and we will arrange with NOAA to
11 publish a notice in the *Federal Register* giving
12 interested persons thirty days to file any comments.

13 We will use the language, we will take the
14 language right out of (b). Now it also allows them to
15 file proposed rules and waiver including argument,
16 comments on the proposed rules and waiver including
17 proposed finding and conclusions and written arguments
18 or briefs. I doubt any one of the interested persons
19 will be doing that, but again, that is what I would
20 hope from the parties if the parties wish they can do
21 that. Now under the APA I have to rule on those. So I
22 will. And again, but the main part will be your brief.
23 And any proposed findings please cite directly to the
24 transcript as best as possible for your authorities for
25 why I should be making particular findings.

1 MR. SOMMERMEYER: Your Honor?

2 THE COURT: Yes.

3 MR. SOMMERMEYER: Is it, did we not agree on
4 45 days?

5 THE COURT: Oh no.

6 MR. SOMMERMEYER: Okay.

7 THE COURT: I was saying for interested
8 persons.

9 MR. SOMMERMEYER: Okay, thank you.

10 THE COURT: For interested persons we are
11 going to publish in the *Federal Register* and give them
12 30 days to file comments.

13 MR. SOMMERMEYER: Oh, I thought the 45 days
14 applied to both to the comments.

15 THE COURT: And 45 days for the parties.
16 Once the record is ready the parties will be able to,
17 we have agreed to 45 days for the parties. Now, can
18 make 45 days for both interested persons and parties if
19 you wish.

20 MR. SOMMERMEYER: Yeah, that would be -- that
21 was my understanding, or Sea Shepherd's understanding
22 that the 45 days applied to both interested persons and
23 the parties.

24 THE COURT: Again, it doesn't. When it, all
25 it says is, "A reasonable period of time". And that's

1 one of the reasons that we are going to have the
2 discussion. We could make that reasonable period of
3 time, again, for outside comments as well as inside
4 comments. It can be 45 or 60 days, and that's, again,
5 in a major rule-making it would normally be 90 days, or
6 60 or 90 days in a major rule-making. Normal rule-
7 makings it's either 30 or 45.

8 But again, I'm treating this for purposes of comment
9 I'm trying to treat this as a rulemaking as possible.
10 So, I have no problem making it 45 days for both.

11 MR. SOMMERMEYER: Thank you.

12 THE COURT: Is that in agreement? Any issues
13 on that?

14 MR. McNULTY: Good morning, Your Honor, Chris
15 McNulty from NMFS. We agree with Mr. Sommermeyer that
16 in the Hearing Management Proposal you had ruled 45
17 days for interested persons in addition to the parties.
18 Having heard the Court's suggestion of 30 days for
19 interested persons, we think it would make sense
20 potentially to stagger those deadlines. So if it was
21 to be 30 days for the interested persons, I think it
22 would make sense for the parties to be able to see
23 those comments before we submitted anything in writing
24 ourselves.

25 So maybe one proposal would be 30 days for

1 them, for interested persons and an additional 30 days
2 for the parties. Though I appreciate the Makah's
3 concern about, you know, too much time dragging on post
4 the hearing itself.

5 THE COURT: Again, my view is its, because
6 again, we go through, I know we go through two sets of
7 comments or several sets. When I make the recommended
8 decision then there's another comment period, and then
9 yet another comment period when the decision, after the
10 administrator. So, I -- that's one of the reasons we
11 are discussing this. Does that -- Ms. Owens?

12 MS. OWENS: I would just ask you to please
13 make it the longer for the interested parties to -- I
14 mean for the persons, you know, in the public. I think
15 they are going to have a harder time going through that
16 transcript, a harder time groping with how to submit
17 comments. I think more time for them is kind of
18 essential.

19 THE COURT: Well again, the vast majority,
20 I'm assuming the vast majority will be comments on the
21 regs, like we would have in a normal notice and comment
22 one. I mean, if someone was not here and is reading a
23 cold transcript and the thousands and thousands of
24 pages of exhibits I'm not expecting that I'm going to
25 be seeing a significant amount of proposed findings and

1 conclusions of law from the public. I'm expecting
2 that's going to be from the parties.

3 MS. OWENS: Well I, at least I'd like to ask
4 for the 45 for each if that's as good as we can get, 45
5 days for all comments.

6 THE COURT: Okay, but again also, NOAA's also
7 raised the issues of staggered in order that the
8 parties who have actually be part of this whole process
9 have the ability to maybe apply or raise issues based
10 on that. And again, it's open, it's a
11 reasonable time, it's my discretion here, so...

12 MR. EUBANKS: Yeah, so if I could throw one
13 possible compromise would be 45 days for interested
14 person especially with the intervening Christmas
15 holiday, New Years' Holiday.

16 THE COURT: I recognize that we have the
17 holidays in here too.

18 MR. EUBANKS: So, 45 day, I think, especially
19 since there may be some additional experts who, you
20 know, hopefully will be weighing in for the Court and
21 for the parties. And then that staggered 30 day period
22 afterwards for briefs that seems to strike a reasonable
23 compromise. So that would be 45 days for interested
24 persons, an additional 30 days after that for proposed
25 hearing briefs. And that seems to be about the

1 shortest possible time that would reasonable under the
2 circumstances.

3 THE COURT: That would give the parties
4 significant time to review the briefs and whatever. I
5 was, does that work for NMFS, is that a?

6 MS. BEALE: Could we confer for just a
7 moment?

8 THE COURT: Forty-five, and then at the end
9 of that 45, 30 more days for the parties to file after
10 they've been able to review and they would have the
11 opportunity, it would give them more time over the
12 holidays to prepare their proposed findings of fact and
13 then peruse the record that is established which may be
14 larger it may be small to see if there's any benefits
15 that can be brought from then which I would know about
16 in order to, you know, render the best decision.

17 MR. GRUBER: Well, Your Honor just --

18 THE COURT: I know the Makah's issues has
19 been timing a lot.

20 MR. GRUBER: And in our agreed Hearing
21 Management Order, and again, we are kind of talking
22 about altering that. So I'll just remind the Court
23 that we all agreed that there would be a single
24 deadline for post-hearing submissions both by the
25 parties and interested persons. And that was 45 days

1 after the transcripts have been made available.

2 THE COURT: Right.

3 MR. GRUBER: So now we are talking about 45
4 days and Mr. Eubanks suggested another 30 days, so
5 that's 75. And this is just another example of how in
6 the Tribe's view small delays add up to be, end up
7 being significant delays. So we would prefer a tighter
8 timeframe. And while we're not saying that we
9 absolutely must stick with the earlier agreement, we
10 would like to have this be fairly tight timeframe.

11 So in my view, the original proposal that
12 NMFS suggested, 30 and then another 30, which is about
13 15 addition days from that we had agreed prior to the
14 hearing would be acceptable. And I think we want to
15 make clear what date that timeframe begins on.

16 MR. EUBANKS: Again, I just wanted to,
17 regardless of how Your Honor rules on this, just to
18 have the record reflect that we've already provided
19 un rebutted testimony that several leading gray whale
20 experts were contacted in this matter and specifically
21 could not provide testimony because of the time
22 constraints.

23 THE COURT: Um-hmm.

24 MR. EUBANKS: That have been imposed here.
25 So we would respectfully request that the court

1 provide, you know, the most time possible. We
2 recognize that Tribe's concerns. But if this is about
3 developing a full record, we would submit that that has
4 not been accomplished yet in this case. And I don't
5 even know that it could be within the 45 day period for
6 interested persons.

7 MS. BEALE: Your Honor, with respect, I
8 object to that characterization of the deadlines. I am
9 not aware that Mr. Eubanks or Animal Welfare Institute
10 requested a delay of the August 6th, 2019 deadline to
11 submit rebuttal testimony. So showing up at this stage
12 and saying that that time wasn't sufficient when they
13 didn't object to it during the timeframe where Your
14 Honor, would have had the benefit of potentially
15 briefing from the parties on whether it was appropriate
16 to extend that deadline, I think is inappropriate.

17 And to clarify, the regulations do not
18 contemplate submission of additional written testimony,
19 expert or otherwise. And in this stage of the
20 proceedings --

21 THE COURT: Let me be clear, right now. What
22 we are opening this for is for comment. They can make
23 comments, they can refer to the testimony of record and
24 make proposed findings. Testimony in this matter was
25 closed yesterday. I will, and this has to be, this is

1 an on the record one.

2 Now, if there's new and credible testimony,
3 or if in my review I determine that I need new evidence
4 I will have to re-open the hearing to take new
5 evidence. So, again, if they wish to file something
6 they may make comments, they may comment on the record,
7 they may make their comments as to what they believe is
8 important.

9 But, I will not be relying on what they
10 submit to find, make new findings of fact. Because
11 that was not brought here, they were not subject to
12 cross-examination and was not part of the record. But
13 their comments are welcome and their comments could be
14 very illuminating and could help me and that's the
15 whole purpose of notice and comment rule-making.

16 (Brief pause.)

17 THE COURT: So, if we did -- 45 days for
18 public plus 15 additional days for the parties?

19 MR. McNULTY: Your Honor, we would support
20 the Tribe's proposal consistent with what he have
21 suggested which was 30 and 30, so that would be our
22 position, which I think was the Tribe's.

23 THE COURT: Thirty, in the *Federal Register*
24 for comments. And again, after those comments are
25 closed 30 additional days for the parties to submit

1 their full, you know.

2 Again, I really do not anticipate proposed
3 findings of fact and conclusions of law to be very, to
4 be fully broad based from interested persons. I mean,
5 I'm, it's primarily to make sure that we get the
6 general comments that would be generally there. And
7 that also refers to the -- I think the --

8 MR. GRUBER: A question about the Federal
9 Register notice, Your Honor. Is that at the time the,
10 your intent would be to issue that notice at the time
11 the transcript was made available to the public?

12 THE COURT: The transcript? We will arrange
13 that, when we know that the transcript -- I'm sorry.
14 The other issue was we were looking at 30 days, for the
15 parties, this is a complex transcript. What we are
16 going to put out initially will be the draft transcript
17 and the parties can review it. What we are looking for
18 are just corrections. We believe that we have a solid
19 transcript of what occurred here. But if there are
20 typos, errors in names or, I mean, there's a lot of
21 scientific terminology that has been used. There's a
22 lot of Makah words that have been used. So, we are
23 thoughtful, we will make sure the parties by email,
24 normally we have a transcript and right now we have,
25 our contractor is working to prepare the transcript.

1 But while we are working here I've got, you
2 know, the primary reporter she is preparing parts of
3 it, we have others who we have sent this to and they
4 are preparing it. So when we have this all together
5 and it is in decent form, we will send it out and we
6 will make sure that the parties will probably get it
7 first to help with corrections.

8 And then we will set a date for publication
9 in *Federal Register* to so the parties -- and anything,
10 the timing will all go from the date of the *Federal*
11 *Register* for the expectations.

12 MS. OWENS: Oh, Your Honor, during our phone
13 conferences I think it took so long for the Prehearing
14 transcript to come out that there was kind of a, an
15 assumption I thought that these transcripts wouldn't be
16 ready perhaps until after the first, after the holiday
17 season. And that gave me great relief to know that it
18 could be out on December 16th is kind of a shock because
19 it, you know, everything leading up to the holidays is
20 so time consuming and stressful that to do, be
21 preparing already during this end of, the end of
22 December, you know, is going to be really hard. I
23 thought we had talked about bumping these things would
24 be bumped until after the first.

25 (Inaudible comment)

1 MS. OWENS: I know, but this is a place where
2 we can have a dialogue.

3 MR. EUBANKS: So, if I may.

4 THE COURT: Yes.

5 MR. EUBANKS: One other, do you know, for the
6 record we continue, AWI continues to believe that 45
7 days for interested persons would be most appropriate.
8 You know, 30 days to review a very complicated
9 transcript. And then to be able to formulate
10 responsive and substantive comments is a very difficult
11 thing to do. Nevertheless, if the Court is inclined to
12 go with the 30 days for interested persons and then an
13 additional 30 days for the parties which is think is
14 what the Tribe had proposed. We would ask that it not
15 start until after the New Years' holiday.

16 So, you know, the publication in the *Federal*
17 *Register* would at least get the transcript out to
18 member of the public so that they have gotten through
19 their Federal holiday period.

20 If the Court does not do that, I'd just like
21 to lodge a continuing objection.

22 THE COURT: Any position from NMFS? I mean,
23 if we went the, I mean, right now we can virtually
24 guarantee a transcript published in the first week of
25 January, for the public.

1 COURT REPORTER: With corrections.

2 THE COURT: A corrected transcript.

3 MS. IMAKI: Your Honor, I think NMFS would
4 continue to support the proposal of 30 days and 30
5 days. And in terms of when that starts we are prepared
6 to move forward as soon as the Court is ready with the
7 transcripts. So I, we don't see any need for
8 additional time. And there is no Federal holiday for
9 us, so we'll be in the office (inaudible word).

10 THE COURT: Right.

11 MR. GRUBER: And Your Honor, I think while
12 the transcript is certainly very important and there
13 was new testimony that came in, a few new exhibits,
14 we've all had the written testimony since at least
15 September 11th. And anyone who is contemplating
16 submitting comments could certainly have those
17 available, they are in the reading room. The parties
18 assist in disseminating that information. And from the
19 Tribe's perspective that's the bulk of the testimony
20 that is involved in this matter.

21 THE COURT: Again, the only parties that we
22 are talking maybe getting benefits from the, I think
23 NOAA's the one who raised the issue of having, of being
24 able to -- what if we just go, the parties will get the
25 transcripts about the 15th of December for their review.

1 We will publish approximately the first week
2 of January the record for requesting interested parties
3 to file comments as well as setting the date of 45 days
4 from then for the parties and the respondents and
5 interested persons to file comments.

6 Now, the Parties will have access to those
7 comments as they come in, so you can review those
8 comments as they are coming in. So instead of having a
9 period of time for the parties to review, we'll just
10 keep the 45 day comment period for both sides, for both
11 public and parties. But what will happen is the
12 parties with their review, they can start working on
13 their submissions based on the uncorrected transcript
14 and, we will work to get the corrected transcript out
15 for the first week of January.

16 And one more.

17 MR. GOSLINER: One potentially complicating
18 factor and that may align, which if we have a
19 continuing resolution for December 20th, then we
20 wouldn't start the clock and have the possibility of a
21 shutdown. But that's my question for you, if there is
22 a Government shutdown?

23 THE COURT: Yes.

24 MR. GOSLINER: Well, then within that comment
25 period --

1 THE COURT: As of, my understanding as of
2 last night the Senate is supposed to be taking up the
3 CR, or should have taken it up at 11:30 Eastern Time
4 today, and we don't have one yet, and this President
5 has not signed one yet.

6 We also have a problem that if a CR as I
7 anticipate this CR will be issued it expires on the 20th
8 of December. And the last time that happened I had a
9 number, it took me months to get my hearings back in
10 the schedule. So, this could all blow up if there's
11 another shutdown. I will set up a contingency plan for
12 the day of this, we will get -- we will do our best to
13 get this out before the 20th with an email to the
14 parties which will lay out if there is a shutdown
15 that's going to create a delay.

16 It will still be, we have to give the
17 interested persons 45 days from whenever we get back
18 and can publish the *Federal Register* notice. And as I
19 understand it, I think they are moderately close to an
20 agreement, which is why they are saying they can do it
21 if they can do it if they get to December 20th. I hope
22 that would be the case.

23 We have hope that works with the case,
24 because the only agency that I think that can outside
25 of that might be Homeland Security, and unfortunately I

1 work for Homeland Security. So that could create
2 another issue. We won't, we have dealt with it before,
3 we will deal with it again. We will do our best to
4 find a way to move this along as fast as possible at
5 that time. Okay. So --

6 MR. McNULTY: Your Honor, just one logistics
7 point on the *Federal Register* notice, we anticipate
8 that comments submitted by an interested person would
9 be collected on Regulations.gov.

10 THE COURT: Yes. I would imagine, that would
11 be the, interested persons will go to Regulations.gov
12 and they are available to the world there. And we
13 we'll make sure everyone has the right citation, it's
14 the right regulatory identification number and
15 everything else. And anyone can -- any of the parties
16 can constantly check on Regulations.gov about the
17 mechanism, about how to view comments that are posted.

18 Okay, following that, I will then, once
19 that's all together I will collect all this information
20 and I will prepare my recommended decision as soon as
21 possible.

22 Now, turn to the next issue which is the
23 parties are aware that NMFS has filed a Motion
24 requesting revisions to the regulations. And again, I
25 want to ask that the parties give a, you know, make a

1 separate section about any issues they have in their
2 submissions concerning this Motion. Now, I'd like to --
3 could NMFS please put a brief, my understanding of this
4 is that we are reconciling, the revisions will
5 reconcile the term struck to match IWC definitions.
6 Just let me hear -- we are aware where we are with
7 that.

8 MS. BEALE: Yeah, I'm not sure that that
9 characterization is entirely correct, I can't recall
10 off the top of my head the IWC definition. The intent
11 of the revision was to clarify that under the Proposed
12 Regulations, and this is stated in the preamble to the
13 Proposed Rules, the assumption is that any whale that
14 is struck would die as a result. And Mr. Schubert had
15 raised in his testimony that there was an ambiguity in
16 how the regulation was written to suggest that multiple
17 strikes on the same whale would count against the
18 strike limits.

19 THE COURT: Okay.

20 MS. BEALE: So the clarification was a slight
21 redefinition to clarify that intention. And there were
22 a couple of other minor technical corrections in
23 response to issues raised by Mr. Schubert in particular
24 about a few places where we probably could clarify the
25 intention. And that is actually noted in the

1 submission that we provided. There's two versions that
2 we submitted one version of the regs had highlighted
3 showing the --

4 THE COURT: Highlighted, and one is a plain
5 clean one.

6 MS. BEALE: With a comment and it did have an
7 explanation.

8 THE COURT: Right.

9 MS. BEALE: And there was a substantive
10 proposed change that was in response to an issue the
11 Tribe raised about the ability for Tribal members to
12 consume edible products if they live off the
13 reservation within their own residences.

14 THE COURT: Okay.

15 MS. BEALE: And that was --

16 THE COURT: Okay, that was the other side.
17 The other side is basically a, it's a relaxation of the
18 rule for enrolled members of the tribe who live off
19 reservation. Yeah.

20 So those are the two which are in there,
21 which again, I'm taking this as a request that I modify
22 the rule as -- in my decision and my recommendation to
23 accomplish that. And so the parties, again, please
24 make their comments on that.

25 We also notified the parties that we did

1 receive an ex parte communication from the Assistant
2 Secretary of the Department of the Interior, Assistant
3 Secretary for Indian Affairs. And again, we will, this
4 has been placed in the record, it will not be
5 considered as part of the record. It will be added
6 when -- it will be appended to the comments. It will
7 be treated just as a comment. And again, the views of
8 another Agency.

9 All right. Are there any other questions or
10 any issues that we need to discuss before recess?

11 MR. GOSLINER: Yes, Your Honor, I have two --
12 the first of which is I'd like to seek clarification of
13 what you will take judicial notice of, and
14 specifically, the historic *Federal Register* notices,
15 and the like.

16 THE COURT: Again, under the APA I can take
17 official notice of anything in which a court of law
18 would normally take judicial notice of. If you've got
19 a citation to law, or citation, just make a citation,
20 you don't, I don't have to take, I automatically have
21 noticed of all court law and all statutes, or
22 regulations. If it is a guidance document or a non-
23 regulatory document that's been filed or scientific
24 papers that have been regularly filed and are in a
25 public domain, I will -- I can take I will take

1 official notice of those documents.

2 MR. GOSLINER: Thank you. And my other
3 question was do you intend, or will consider setting
4 page limits for the briefs?

5 THE COURT: This has been a very complex
6 matter with multiple witnesses. I would again, what
7 will not be helpful would be giant documents -- if you
8 are going to be filing, and again, no more exhibits are
9 to be filed, just again references in briefing. And
10 so, can the parties get it said in 75 pages?

11 MS. BEALE: I hope so.

12 MR. GOSLINER: So do I.

13 THE COURT: All right.

14 MR. SLONIM: Your Honor, is that inclusive of
15 proposed findings and conclusions or is that a brief?

16 THE COURT: Comments and conclusions, what we
17 will do is I will send the parties a format for making
18 comments and conclusions. I would, those would be
19 separate from your brief and reasons therefore. Again
20 they would be enumerated by each finding of fact and I
21 want, and findings of fact should basically be a
22 sentence or two long with a citation to the record
23 where they intend, what you are dealing with. I don't
24 want to see large conclusory two paragraph or three
25 paragraph findings because I have to rule on it.

1 I would like, because again you are probably
2 going to be referencing them in your, you can reference
3 them, the findings and explanations in your brief. I
4 would try to keep it somewhere between 35 and 50 pages.
5 You know again, and the conclusions -- and again a
6 finding of fact really means a finding of fact. And
7 again if the parties wish, they can ask that they --
8 since the regs are using it I guess I'm not.

9 Normally what I do is I give the parties the
10 option of saying, this is a findings of fact as would
11 be done in the courts of law. Because under the APA I
12 have to review and make findings on each one. So, but
13 this is through the APA and this is a full APA one. So
14 I will treat it and have to make, I will be issuing
15 separate orders, you know, reviewing and making my
16 findings on the conclusions and on your findings of
17 fact and conclusions of law. And it will be part of
18 my, and it will be all appended to my recommended
19 decision.

20 MR. EUBANKS: And Your Honor, just --

21 THE COURT: We have a format that we can,
22 we'll send the parties a format that we generally
23 recommend for the presentation of findings of fact and
24 conclusions of law.

25 MR. EUBANKS: And would it be helpful for

1 Your Honor, I know a lot of judges, Article Three
2 Judges they want proposed findings and conclusions
3 submitted both in PDF format for proper submission, and
4 then also in Word format to make it easier to do
5 whatever you need to do. So you, however you find.

6 THE COURT: We would greatly appreciate it in
7 both formats. And so you file it electronically, yes.
8 Because it makes it so much easier than taking it --
9 and again, for the record in PDF and again a separate
10 courtesy copy in Word. That makes it a lot easier to
11 do the review.

12 MR. GRUBER: Your Honor, this is more of a
13 housekeeping issue, but regarding exhibits that were
14 introduced during the hearing.

15 THE COURT: Yes.

16 MR. GRUBER: I just wanted to, maybe we all
17 want to be clear about what's been offered and has been
18 admitted, or if there is a request to admit. So I'd
19 like, for the Tribe during the very last part of Mr.
20 Scordino's testimony we introduced Exhibit M-0311 it
21 was a IWC Scientific Committee document and relating to
22 the Russian harvest of gray whales, and I believe Your
23 Honor admitted it, although --

24 THE COURT: Again, if it came in and was
25 discussed on the record, it's admitted.

1 MR. GRUBER: Okay, and so --

2 THE COURT: We just need to make sure, and
3 when you get the record, if there were, well during the
4 correction period, if there are any exhibits which you
5 believe should be in, that were, just point where it
6 should be in the record and we will make sure it gets
7 in the record.

8 MR. GRUBER: Okay, and then during my cross
9 of Mr. Schubert I introduced three exhibits and I
10 didn't refer to them by the footer that I put on there,
11 I would like to do that if possible.

12 THE COURT: And those are in the record.

13 MR. GRUBER: Okay, and I shared those with
14 everyone as well.

15 THE COURT: Yeah.

16 MR. GRUBER: Thank you very much.

17 THE COURT: And the only thing I think, and
18 Mr. Sommermeyer will be sending us that copy. We have
19 the link, I believe it's, we've been given the link.

20 MR. SOMMERMEYER: You have the whale book.

21 MS. PRUETT: No, no, we are not talking about
22 that. The documents that you submitted previously,
23 that you said --

24 MR. SOMMERMEYER: Yeah, there's also, yeah,
25 right. And then the three IWC documents, from the IWC

1 website (inaudible few words). Yeah, I can send those
2 by email, would probably be easiest.

3 THE COURT: That is fine. Those are the ones
4 that were submitted, I know we don't have a hard copy
5 of that now, it disappeared.

6 MR. SOMMERMEYER: Yeah.

7 THE COURT: We will get an email version of
8 that. That is the one that Doctor Scordino reviewed,
9 that was the list of, it was an IWC document that
10 listed how many whales were taken in various places.
11 And it was given to the witness and we didn't, it
12 didn't come back, it went somewhere. And we do have a
13 link to it but I'd like to, if we get a hard copy that
14 would be great to add to the record.

15 MR. SOMMERMEYER: And just to clarify, the
16 three exhibits that were proposed by the Tribe on the
17 internet, the comments on whaling that during Doctor
18 Villegas-Amtmann's testimony, my understanding is that
19 those did not come in they were not referred to in the
20 record.

21 THE COURT: She didn't see it.

22 MR. SOMMERMEYER: Right.

23 THE COURT: I mean, the problem is, it is in
24 the record because all documents that are filed,
25 period. Because in the administrative law even if

1 there is a letter that comes in or whatever, whatever
2 documents are filed.

3 MR. SOMMERMEYER: Right.

4 THE COURT: In the record are a part of the
5 record. So, it's in the record, but again, it wasn't
6 referred to by the witness, and that's --

7 MR. SOMMERMEYER: Okay, thank you.

8 THE COURT: She didn't see it.

9 MR. SOMMERMEYER: No, she did not.

10 MS. BEALE: I wanted to make one note, Your
11 Honor. Brian, is one of the exhibits you were
12 referring to the Listing Petition?

13 MR. GRUBER: Yes, that was Schubert Cross
14 Exhibit M-03, but we also, we have discussed with the
15 witness, and he referred to the three exhibits during
16 that cross.

17 MS. BEALE: I asked because I don't propose
18 submitting this into the record or anticipate there is
19 a need to do so because it's published in *Federal*
20 *Register*. But NMFS did provide a response, an official
21 response to that Petition. And it looks like that's
22 located at 66 FR 32305. I presume having that other
23 document introduced allows us to refer to this more
24 (inaudible word).

25 MR. GRUBER: Yeah, I have no objection to

1 that additional, it's a *Federal Register* cite, so it
2 sounds like that's something --

3 MS. BEALE: Correct, I don't propose
4 submitting it, I just wanted to make that clear.

5 MR. GRUBER: Okay, thank you.

6 THE COURT: Okay. All right.

7 MR. McNULTY: One other, Your Honor, if you
8 would indulge me.

9 THE COURT: I will.

10 MR. McNULTY: For purposes of planning do you
11 have any sense of when we might expect a recommended
12 decision? There's many things that happen as soon as
13 we receive that recommended decision, so that's why I
14 ask.

15 THE COURT: What we will be doing, while this
16 is happening, again, we will be working on the
17 structure of a decision. Then I go through, and I will
18 be reviewing the record and my staff and I will be
19 working diligently. I have set up my schedule to
20 minimize the hearings that I'm doing in the interim. I
21 don't want to make a promise I can't keep because I
22 haven't seen all the record, but we, the rules call for
23 me to promptly issue a recommended decision and again I
24 am hoping within, once I have a final record in front
25 of me that I'm clicking through everything and going

1 through and finishing off.

2 I can't make a promise, but we will do it as
3 fast as we can. I am looking at, we have the next, the
4 first three months of the year we have really laid out
5 having very few hearings to be able to spend an awful
6 lot of time reviewing this record and getting a
7 recommended decision out and up to administrator. So
8 we have dedicated a lot of time for that. And in the
9 interim I'm trying to knock off a whole bunch of
10 decisions in between so by the time I get the full
11 record I don't have that many other cases in my
12 wheelhouse.

13 MR. McNULTY: We appreciate that, thank you,
14 Your Honor.

15 THE COURT: Okay. Anything further? All
16 right, MMC are you -- AWI?

17 MR. EUBANKS: Nothing from AWI, Your Honor.

18 THE COURT: Sea Shepherd?

19 MR. SOMMERMEYER: No, Your Honor.

20 MS. OWENS: I can't think of anything.

21 THE COURT: Okay. The Makah?

22 MR. GRUBER: No, no Your Honor.

23 THE COURT: Okay, and NMFS, I think we are
24 all set?

25 MS. BEALE: Yes, Your Honor.

1 THE COURT: Okay, I want to thank you. I
2 want to thank you for your professionalism, and I want
3 to thank you, we have a lot of evidence, a lot of
4 information. And I will, we will work once the record
5 is complete we will work to get the recommended
6 decision out to you as soon as possible. Thank you
7 very much. We are adjourned.

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9 (At 9:46 Pacific Time the proceedings are
10 adjourned.)

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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, hearing heard on Friday, November 15, 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 two hundred thirty-one 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 10th day of December, 2019 and Corrections 1-21-2020.

Sally S. Gessner

Sally S. Gessner, CER
Certified Electronic Court Reporter