

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

<i>In re:</i>) Administrative Law Judge
Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Gray Whales by the Makah Indian Tribe) Hon. George J. Jordan
) Docket No. 19-NMFS-0001
)
) RINs: 0648-BI58; 0648-XG584
)

MAKAH TRIBE’S PROPOSED ISSUES OF FACT

The Makah Indian Tribe (Makah or Tribe) submits the following proposed issues of fact for consideration at the hearing scheduled to commence on August 12, 2019 in the above-captioned matter. The Tribe’s proposed issues of fact supplement the issues of fact published by the National Marine Fisheries Service (NMFS) on April 5, 2019, 84 Fed. Reg. 13639, 13641-43 (Apr. 5, 2019), and provide further support (with one exception)¹ for NMFS’s proposed waiver and regulations, 84 Fed. Reg. 13604 (Apr. 5, 2019).

Pursuant to NMFS’s regulations governing the hearing, the Tribe is submitting declarations from four expert witnesses and four lay witnesses listed below in support of NMFS’s proposed waiver and regulations (with the exception noted above). The direct testimony of the Tribe’s witnesses supports the proposed issues of fact below and explains why such issues should be considered at the hearing. 50 C.F.R. § 228.7(c).

1. **Jonathan Scordino** is a marine mammal biologist employed by the Tribe since 2007 who conducts scientific research on gray whales and other marine mammals, directs the Tribe’s Marine Mammal Program, and provides scientific advice to the Tribe to support its efforts to obtain a waiver from NMFS under the Marine Mammal Protection Act

¹ Proposed issue of fact #20 addresses provisions in NMFS’s proposed regulations regarding the use of edible whale products outside of the Makah Reservation and supports a modification of those provisions.

(MMPA) and resume hunting gray whales under the 1855 Treaty of Neah Bay. Mr.

Scordino will provide expert testimony and testimony based on his personal knowledge.

2. **John W. Bickham, Ph.D.**, is a geneticist specializing in the genetics of natural populations of fish and wildlife and a professor emeritus in the Department of Wildlife & Fisheries Sciences at Texas A&M University. Dr. Bickham is contracted by the Tribe's legal counsel to provide expert testimony and testimony based on his personal knowledge of the International Whaling Commission's (IWC) review of the proposed hunt.
3. **John R. Brandon, Ph.D.**, is a biometrician specializing in population dynamics modeling, statistical analyses, management strategy evaluation, and survey design. Dr. Brandon is contracted by the Tribe's legal counsel to provide expert testimony and testimony based on his personal knowledge of the International Whaling Commission's review of aboriginal subsistence whale hunts and the Tribe's proposed hunt.
4. **Joshua L. Reid, Ph.D.**, is a historian specializing in American Indians and the indigenous Pacific and a professor at the University of Washington. Dr. Reid is contracted by the Tribe's legal counsel to provide expert testimony in this matter.
5. **Greig Arnold** is a member of the Makah Tribe and a former Chairman, Vice Chairman, and member of the Makah Tribal Council.
6. **Polly DeBari** is a member of the Makah Tribe.
7. **Maria Pascua** is a member of the Makah Tribe.
8. **Daniel J. Greene, Sr.** is a member of the Makah Tribe.

A. THE MAKAH TRIBE'S TREATY RIGHT TO HUNT GRAY WHALES

1. The 1855 Treaty of Neah Bay between the Makah Tribe and the United States provides that the "right of taking fish and of whaling or sealing at usual and accustomed grounds

and stations is further secured to said Indians in common with all citizens of the United States.” Reflecting the great importance of hunting whales to the Makahs, the treaty is the only such agreement between a tribe and the United States that expressly protects the right of whaling. (Testimony of G. Arnold, M. Pascua, P. DeBari, D. Greene, and J. Reid)

2. Whaling is central to the identity of the Makah people, and over time it has been (and remains) an essential element of the Tribe’s culture and subsistence. (Testimony of G. Arnold, M. Pascua, P. DeBari, D. Greene, and J. Reid)
3. In 1999 the Tribe successfully hunted a gray whale for the first time in decades, an event which brought unity, meat, blubber and other whale products, reinvigoration of songs, dances, language and other aspects of Makah culture, physical health and discipline, and many other benefits to the whaling crew, their families, and the Makah community as a whole. Nearly twenty years later, this historic event remains a vivid and emotional experience for Makahs who were alive at the time. (Testimony of G. Arnold, M. Pascua, P. DeBari, D. Greene, and J. Reid)
4. The Treaty of Neah Bay secures the right of hunting whales. It is the entire constellation of activities involved in a whale hunt – the whaling crew’s spiritual and physical preparation; the acts of hunting, supporting a whaling crew and bringing home a whale to the Makah people; the whale products consumed and shared among the community, family and friends; and the ceremonies, songs, dances and other activities associated with whale hunting – that is integral to Makah culture, subsistence and identity. It is not possible to substitute whale watching or another non-hunting activity and still meet the Tribe’s cultural and subsistence needs or fulfill the promise made by the United States in

the treaty. (Testimony of G. Arnold, M. Pascua, P. DeBari, D. Greene, and J. Reid)

5. The Tribe's treaty right provides further support for NMFS's proposed waiver and regulations, which would enable the Tribe to exercise its right to hunt gray whales and meet cultural and subsistence needs of the Makah people (to the extent allowed by the regulations). The treaty right therefore is a relevant issue in this proceeding, as the Ninth Circuit Court of Appeals confirmed in its 2004 opinion requiring the Tribe to obtain an MMPA waiver and permit before conducting further whale hunts and sending the Tribe down the long and complex process leading to the August 12 hearing. *Anderson v. Evans*, 371 F.3d 475, 501 n.26 (2004) ("Unlike other persons applying for a permit or waiver under the MMPA, the Tribe may urge a treaty right to be considered in the NMFS's review of an application submitted by the Tribe under the MMPA.").

(Testimony of G. Arnold, M. Pascua, P. DeBari, D. Greene, and J. Reid)

B. NMFS'S PROPOSED WAIVER AND REGULATIONS

1. For over 20 years, large-scale collaborative studies have been conducted on the Pacific Coast Feeding Group (PCFG). These studies have resulted in a more thorough understanding of the PCFG than nearly any other group of large whales, including other feeding groups of gray whales. (Testimony of J. Scordino)
2. The IWC's Rangewide Review on the Status of North Pacific Gray Whales, which was recently completed after five workshops from 2014 through 2018, brought together scientific experts from gray whale range states (*e.g.*, South Korea, Japan, Russian Federation, United States, Canada, and Mexico) to review and synthesize available information relevant to stock structure, genetics, population dynamics, incidental human caused mortality levels, and conservations risks. An important goal of this process was to

develop a set of stock structure hypotheses for North Pacific gray whales that included plausible alternative scenarios representing underlying spatial-temporal mixing patterns across stocks. The Rangewide Review provides the best general assessment of the stock status of gray whales based on currently available scientific information. (Testimony of J. Bickham and J. Brandon)

3. Under the MMPA's definition of "population stock" and NMFS's Guidelines for Assessing Marine Mammal Stocks (GAMMS), the Pacific Coast Feeding Group (PCFG) is not a stock. The best available scientific information indicates that PCFG whales interbreed with and are a feeding aggregation of the large Eastern North Pacific (ENP) stock of gray whales. The analysis and results of the International Whaling Commission's Rangewide Review on the Status of North Pacific Gray Whales, where every plausible stock structure hypothesis classified the PCFG as a distinct feeding group and management area but not a breeding stock, is consistent with this conclusion. (Testimony of J. Scordino and J. Bickham)

4. The stock structure of gray whales that feed during the summer and fall off of Sakhalin Island in the western North Pacific and migrate to wintering grounds off of Mexico in the eastern North Pacific is more complex than for the PCFG. Under the MMPA's definition of "population stock" and the GAMMS, these whales should be considered a stock based on available information of genetic differences. However, the best available scientific information, including stock structure hypotheses developed by the IWC's Rangewide Review, indicates these whales are not the same stock that remained listed as endangered under the Endangered Species Act (ESA) when the ENP stock of gray whales was delisted in 1994 and was listed as critically endangered by the IUCN. The WNP stock

described in the ESA and IUCN listings corresponds to the Western Breeding Stock (WBS) in the Rangewide Review's stock structure hypotheses, which does not migrate to the eastern North Pacific under any of the most plausible hypotheses. (Testimony of J. Scordino and J. Bickham)

5. Under the stock structure hypotheses considered most plausible by the IWC's Rangewide Review (3a and 5a), the gray whales that feed off of Sakhalin Island in the western North Pacific and migrate to wintering grounds in the eastern North Pacific (including potentially through the Makah U&A) are part of the Western Feeding Group (WFG). The WFG is a feeding aggregation of the Eastern Breeding Stock (EBS), which is equivalent to the ENP stock and is different from the ESA- and IUCN-listed WBS (or WNP stock). (Testimony of J. Scordino and J. Bickham)
6. NMFS's current stock assessment report (SAR) for the WNP stock describes the stock as comprising whales that feed off of Sakhalin Island and migrate to wintering grounds either off the west coast of North America or off the coast of Japan and China, *i.e.*, "not all whales in the WNP share a common wintering ground." The WNP gray whale SAR identifies these whales as a single stock that is listed as endangered under the ESA. The SAR's description of stock structure does not reflect the best available science from the IWC's Rangewide Review, in which the endangered WBS (if it is not extinct) winters in Asian waters, is distinct from the WFG and EBS, and does not migrate to the eastern North Pacific (including the area of the Makah hunt). (Testimony of J. Scordino and J. Bickham)
7. Even though the PCFG is not a stock, NMFS's proposed regulations include a number of protections that ensure the Tribe's hunt will not disadvantage PCFG gray whales or

otherwise result in impacts to them that are inconsistent with the purposes and policies of the MMPA. These protections, which place additional constraints on the hunt compared to the Tribe's 2005 waiver request, include: significantly reduced overall strike and landing limits; new strike limits for PCFG whales and PCFG females; a new minimum abundance threshold of PCFG whales, based on actual and projected abundance, that must be met for the hunt to be conducted in any year; new requirements related to photographic and genetic matching and new restrictions on additional strikes until such matching has been conducted; the continued restriction of the hunt to the Pacific Ocean portion of the Tribe's usual and accustomed (U&A) area; and a new 10-year sunset on the waiver. (Testimony of J. Scordino and J. Brandon)

8. The conservation objectives of the IWC for aboriginal subsistence hunts, which include the Tribe's hunt, are the same as the MMPA's conservation objective to maintain stocks at their optimum sustainable population (OSP) or, if a stock is below its OSP, to allow the population to increase to OSP. OSP is typically considered an abundance level equal to or greater than 60% of the stock's carrying capacity. IWC evaluations of aboriginal subsistence whaling catch limits employ the same general scientific methods, *i.e.*, computer simulations, used to develop the quantitative specifications for the MMPA's potential biological removal (PBR) management tool. (Testimony of J. Scordino and J. Brandon)
9. The IWC's Rangewide Review and Scientific Committee thoroughly evaluated the impacts of the Tribe's hunt, as constrained by NMFS's proposed regulations, in 2018 and determined that if the PCFG were treated as a stock, the proposed regulations would meet the conservation objectives of the IWC (and thus, of the MMPA) for ensuring the long-

term stability of PCFG whales above 60% of their carrying capacity for a 100-year period. (Testimony of J. Scordino and J. Brandon)

10. The Tribe's hunt, as constrained by NMFS's proposed regulations, would not cause localized depletion of gray whales, including during the summer and fall feeding season. The use of the Makah U&A by PCFG whales is highly variable by month and year and is primarily affected by prey availability. Because gray whales move substantial distances while feeding in the PCFG range (and outside that area), limited removals of whales by the Tribe's hunt would not lead to observable changes in abundance estimates or observations of whales within the portion of the PCFG range comprising the Makah U&A and areas adjacent to it. In addition, a number of gray whales recruit into the PCFG from the larger ENP stock each year, and the degree of such external recruitment is also likely influenced by prey availability. External recruitment into the PCFG is sufficiently robust that it would offset low levels of human-caused mortalities of PCFG whales, including those removed in a Makah hunt, and could possibly offset relatively high levels (*e.g.*, up to 10 animals per year) of human-caused PCFG mortalities. (Testimony of J. Scordino)

11. The Tribe's hunt would not discernably affect gray whales' use of the Makah U&A, including PCFG whales feeding during the summer and fall. Non-lethal impacts from approaches, unsuccessful harpoon attempts, and training activities would not cause more than temporary changes in the behavior of the whales. (Testimony of J. Scordino)

12. Even though the proposed waiver only applies to takes of gray whales of the ENP stock, NMFS's proposed regulations include a number of protections that ensure the Tribe's hunt will not disadvantage gray whales that feed off of Sakhalin Island and migrate to

wintering grounds in the eastern North Pacific or otherwise result in impacts to those whales that are inconsistent with the purposes and policies of the MMPA. These protections, which place additional constraints on the hunt compared to the Tribe's 2005 waiver request, include: an alternating season structure where hunting in odd-numbered years would occur outside of the migratory season and provide one-month buffers on both ends of the migratory season (June and November); significantly reduced overall strike and landing limits; new requirements related to photographic and genetic matching and restrictions on additional strikes until such matching has been conducted; a new provision for the suspension of the hunt in the extremely unlikely event that a strike of a gray whale migrating from feeding grounds off of Sakhalin Island is confirmed; and a new 10-year sunset on the waiver. (Testimony of J. Scordino and J. Brandon)

13. The IWC's Rangewide Review and Scientific Committee thoroughly evaluated the impacts of the Tribe's hunt, as constrained by NMFS's proposed regulations, along with impacts from ship strikes and fisheries bycatch, on the Western Feeding Group (WFG) in 2018 and determined that the proposed regulations would meet the conservation objectives of the IWC (and thus, of the MMPA) for ensuring the long-term stability of WFG whales above 60% of their carrying capacity for a 100-year period.. (Testimony of J. Scordino and J. Brandon)
14. The only stock structure hypothesis evaluated by the IWC's Rangewide Review in which Western Breeding Stock (WBS) gray whales (*i.e.*, the stock corresponding to NMFS's WNP stock), migrate to wintering grounds in the eastern North Pacific was determined to be of lower biological plausibility than hypotheses 3a and 5a. This hypothesis was modeled along with the more plausible hypotheses, and the IWC determined that the

Tribe's hunt, as constrained by NMFS's proposed regulations, would not cause a conservation concern for the WBS. (Testimony of J. Scordino, J. Bickham, and J. Brandon)

15. In adopting new catch limits for aboriginal subsistence hunts of gray whales by the Makah Tribe and Chukotka Natives for the period 2019 through 2025, the IWC considered and relied on the thorough evaluation of the Rangewide Review and Scientific Committee of the potential impacts of the Tribe's hunt, as constrained by NMFS's proposed regulations, including the expert scientific determination that the Makah hunt plan meets the IWC's conservation objectives for all affected populations of gray whales:

The [Scientific] Committee reviewed a US Management Plan for a Makah hunt of gray whales off Washington State (the Committee had evaluated a previous plan in 2011 - IWC, 2011; 2012), using the modelling framework developed for its rangewide review of gray whales (SC/67b/Rep07). In conclusion, the Committee:

*(1) **agrees** that the performance of the Management Plan was adequate to meet the Commission's conservation objectives for the Pacific Coast Feeding Group, Western Feeding Group and Northern Feeding Group gray whales*

The conclusion of the Scientific Committee represents the best available science with respect to the potential impacts of the Makah hunt plan on gray whales. (Testimony of J. Scordino and J. Brandon)

16. Notwithstanding differing views on stock structure, the probability that the Tribe's hunt, as constrained by NMFS's proposed regulations, would result in a strike of a gray whale migrating through the U&A from feeding grounds off of Sakhalin Island (whether or not it is ESA-listed) is extremely low. Additional constraints on the hunt in the event such a whale is struck (and identified by photograph or genetic matching) and the 10-year sunset on the proposed waiver ensure that the Tribe's hunt would not disadvantage whales

migrating from Sakhalin Island or otherwise result in impacts to them that are inconsistent with the purposes and policies of the MMPA. (Testimony of J. Scordino and J. Brandon)

17. The 10-year sunset on the proposed waiver provides substantial additional protections for all affected populations of gray whales. It ensures that the Tribe's hunt would not continue past this finite and limited period of time without an opportunity for NMFS, the Tribe and other interested parties to fully evaluate new scientific information on gray whales and their environment and information gained from a decade of implementing the hunt under NMFS's proposed regulations and the Tribe's management. Moreover, reasonably foreseeable cumulative impacts on gray whales over the 10 years are very unlikely to cause conservation concerns. (Testimony of J. Scordino)

18. The Tribe carefully developed its hunt method over many years in consultation with experts in whale physiology, ballistics and firearm safety and has presented it to the IWC and other entities with expertise in whale hunting methods. (Testimony of J. Scordino)

19. The Tribe intends to conduct its whale hunts using a blend of traditional and modern methods, including approaching the whale in a canoe and striking the whale for the first time with a hand-thrown harpoon with a toggle-point and dispatching the whale with a large-caliber rifle fired from a motorized vessel. If the designed hunt method is carried out by a trained and well-equipped whaling crew, it will likely result in an efficient hunt that strikes, secures, and dispatches the whale in a short period of time and protects the safety of the whaling crew, support vessels, and any bystanders. (Testimony of J. Scordino)

20. The proposed regulations regarding sharing and consuming edible whale products outside

of the Makah Reservation, §§ 216.113(b)(i)-(ii), 216.115(a)(14), 216.115(b)(2), make it very difficult (if not impossible) for Makahs who live off-reservation to share whale meat, blubber and oil with non-Makah members living in their household. The burdensome rules are contrary to a central purpose of the treaty right and the Tribe's objective in seeking a waiver – to provide for the subsistence needs of Makahs and their families. NMFS should modify these rules so Makah households outside of the reservation can use edible whale products in the same way Makah households can use edible whale products on the reservation.

Respectfully submitted, this 20th day of May, 2019.

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