

HONORABLE GEORGE J. JORDAN  
ADMINISTRATIVE LAW JUDGE

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

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*In re:* )  
 ) Docket No. 19-NMFS-0001  
**Proposed Waiver and Regulations Governing** )  
**the Taking of Eastern North Pacific Gray** ) RIN: 0648-BI58 and  
**Whales by the Makah Indian Tribe** ) RIN: 0648-XG584  
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**PARTIAL STIPULATION RE SCOPE OF ISSUES  
TO BE ADDRESSED AT THE HEARING**

This Partial Stipulation is made by and between the following parties to this proceeding: Animal Welfare Institute, Makah Indian Tribe, National Marine Fisheries Service, Peninsula Citizens for the Protection of Whales, Sea Shepherd Conservation Society, and Sea Shepherd Legal (“Stipulating Parties”).<sup>1</sup> The Stipulating Parties, by and through their duly authorized undersigned representatives, state as follows:

WHEREAS, on April 5, 2019, through publication of a Notice of Hearing (84 Fed. Reg. 13,639) and a Proposed Rule (84 Fed. Reg. 13,604), the National Marine Fisheries Service (NMFS) announced proposed decisions under the Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.* (MMPA), to issue a waiver and associated regulations that would authorize the Makah Indian Tribe to carry out a tribal hunt for eastern North Pacific gray whales;

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<sup>1</sup> Parties the Marine Mammal Commission and Inanna McCarty have not responded to the proposed stipulation.

WHEREAS, pursuant to sections 101(a)(3)(A) and 103 of the MMPA, 16 U.S.C. §§ 1371(a)(3)(A), 1373, NMFS's proposed decisions to issue a waiver and regulations must be made on the record after opportunity for a hearing;

WHEREAS, the Notice of Hearing established the date of June 17, 2019 for the prehearing conference to be held in accordance with 50 C.F.R. § 228.11;

WHEREAS, under 50 C.F.R. § 228.11, the presiding officer will make a preliminary determination of issues of fact that may be addressed at the hearing at least five days before the prehearing conference, and, within ten days of the conclusion of the prehearing conference, the presiding officer will issue a final hearing agenda that will identify, *inter alia*, the issues to be presented at the hearing, the direct testimony that bears on those issues, and the witnesses that are expected to testify (50 C.F.R. § 228.12);

WHEREAS, the Stipulating Parties recognize that the purpose of this hearing is to evaluate whether NMFS's proposed waiver and regulations, as described in the Notice of Hearing and Proposed Rule, satisfy the requirements of the MMPA and any applicable regulations;

WHEREAS, the Stipulating Parties further recognize that, subsequent to the agency hearing on this matter, NMFS must take additional actions in order to issue final agency decisions regarding the proposed waiver and regulations, and that other federal laws in addition to the MMPA may apply to any final decisions by NMFS on this matter;

WHEREAS, in efforts to conserve the presiding officer's resources and the resources of the parties and to facilitate the presiding officer's development of the hearing agenda, the Stipulating Parties have engaged in good-faith negotiations to determine whether agreement

could be reached to limit the scope of the issues of fact to be addressed at the hearing and have reached partial agreement, as provided below;

WHEREAS, the Stipulating Parties were unable to reach agreement as to whether the Makah Indian Tribe's treaty right to whale, including the significance of whaling to the Tribe, should properly be part of the issues of fact presented at the hearing, with the Makah Indian Tribe maintaining that such information is relevant, Animal Welfare Institute, Peninsula Citizens for the Protection of Whales, Sea Shepherd Legal, and Sea Shepherd Conservation Society maintaining that such information is not relevant, and NMFS taking no position;

NOW, THEREFORE, without prejudicing the position of any party with respect to whether the Makah treaty right issue should properly be part of the issues of fact presented at the hearing, and without otherwise waiving or relinquishing any legal rights, claims, or defenses they may have other than as expressly provided in this stipulation, the Stipulating Parties hereby STIPULATE as follows:

1. All issues of fact raised by the Stipulating Parties shall relate to whether the proposed waiver and regulations comply with the procedural and substantive requirements of the MMPA and any regulations that apply to the determination of whether to waive the moratorium on taking and importing marine mammals and adopt regulations under sections 101(a)(3)(A) and 103 of the MMPA.

2. To the extent that those procedural and substantive requirements involve issues of fact that may also be relevant under other statutes (*e.g.*, evidence that may also relate to compliance with the National Environmental Policy Act), the Stipulating Parties shall be free to raise such issues in the present proceeding for purposes of challenging, or defending, the proposition that NMFS has satisfied the MMPA insofar as it relates to the waiver determination.

- a) For example, while the Parties agree that this hearing and the associated waiver rulemaking are not the appropriate vehicles for identifying or challenging the identification of any particular population stock under the MMPA, the Parties agree that evidence concerning the various populations, stocks, or groups of gray whales recognized or supported by the scientific literature and the impacts of the proposed waiver on them may be considered.
- b) In addition, because it pertains to different provisions of the MMPA, the Parties agree that this hearing will not be used to challenge the manner of taking, which would be identified, if necessary, through subsequent permitting processes, including whether the manner of taking of whales is “humane,” as that term is defined in the MMPA, or would pose risks to human safety.

3. No party to this stipulation waives or relinquishes any legal rights, claims, or defenses respecting any final agency action taken by NMFS in this matter, including but not limited to whether any final agency action taken by NMFS complies with the United States Constitution (including all arguments related to the legality of the appointment of the assigned Administrative Law Judge under the Appointments Clause), the MMPA, the National Environmental Policy Act, the Endangered Species Act, the Whaling Convention Act, the Administrative Procedure Act, or other applicable federal or state laws. In addition, no party to this stipulation waives or relinquishes any legal rights, claims, or defenses respecting the existence, scope, historical basis, or implementation of any treaty right relevant to subsequent agency proceedings.

Respectfully submitted this 10th day of June, 2019.

SO STIPULATED this 10<sup>th</sup> day of June, 2019.

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SO STIPULATED this 10<sup>th</sup> day of June, 2019.

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SO STIPULATED this 10<sup>th</sup> day of June, 2019.

Makah Indian Tribe

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SO STIPULATED this 10<sup>th</sup> day of June, 2019.

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SO STIPULATED this 10<sup>th</sup> day of June, 2019.

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