

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

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

MAKAH TRIBE’S MOTION RE ISSUES TO BE ADDRESSED AT THE HEARING

Pursuant to the Notice of Hearing and Final Agenda published in the Federal Register on June 26, 2019, 84 Fed. Reg. 30088, the Makah Indian Tribe (Makah or Tribe) submits the following motion regarding the Issues to be Addressed at the Hearing, *id.* at 30089-91, and other matters contained in the Notice.¹

I. Background re Issues of Fact for the Hearing.

In the Notice of Hearing published on April 5, 2019, the National Marine Fisheries Service (NMFS) identified approximately 65 Issues of Fact that May Be Involved in the Hearing, 84 Fed. Reg. 13639, 13641-43. On May 24, 2019, NMFS circulated a list of proposed findings of fact for the parties’ review, which represented a sub-set of the issues identified in the Notice of Hearing. On May 29, 2019, the Tribe circulated to the parties a separate list of proposed findings of fact for the parties’ review. Concurrent discussions among the parties led to agreement by NMFS, Makah, Animal Welfare Institute (AWI), Sea Shepherd Legal and Sea Shepherd Conservation Society (collectively SS), and Peninsula Citizens for the Protection of Whales (PCPW) to a Partial Stipulation re Scope of Issues to be Addressed at the Hearing, which was

¹The filing deadline for such a motion was extended to August 9, 2019. *See* July 9, 2019, Order Granting Motion to Extend Remaining Filing Dates; Notice of Change to the Hearing Date and Related Deadlines, 84 Fed. Reg. 37837 (Aug. 2, 2019).

submitted on June 10, 2019 (“Partial Stipulation re Scope”). The parties to the partial stipulation agreed, *inter alia*, that:

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.

Partial Stipulation re Scope at 3-4.

Also on June 10, 2019, shortly before the partial stipulation was submitted, the Presiding Officer issued a Notice and Agenda: Prehearing Conference, which contained a preliminary determination of issues to be addressed at the hearing. The Presiding Officer explained that the list was “drawn from all the filings in the record” and was compiled “as a non-exclusive determination of factual issues to be considered.” *Id.* at 2. The notice also provided that “[d]uring the prehearing conference, the parties will have the opportunity to state their positions as to whether significant issues have been omitted or any issue(s) designated here are

inappropriate for consideration [and] will also have the opportunity to stipulate to any acts which are not in dispute.” *Id.*

On June 12, 2019, NMFS proposed a second stipulation of facts based on the previously submitted partial stipulation and the Presiding Officer’s preliminary determination of the issues for the hearing. The parties exchanged views on the proposal in advance of the prehearing conference.

At the June 17, 2019, prehearing conference, the Presiding Officer invited the parties to confer regarding the potential to reach a stipulation on the preliminary determination of issues of fact. Following the parties’ discussion, NMFS summarized the agreement, which involved modifying some issues of fact, excluding other issues of fact based on the partial stipulation, and identifying one fact issue that all parties agreed to. Transcript of June 17, 2019, Prehearing Conference at 36-47.

Although many of the issues in the Presiding Officer’s preliminary determination of issues for the hearing were discussed at the prehearing conference, there was insufficient time for the “line-by-line analysis and discussion” that the Presiding Officer had envisioned in the agenda for the prehearing conference. Accordingly, the parties were afforded an opportunity to “file motions to exclude any issues listed in this notice [*i.e.*, the Final Agenda] by July 12, 2019,” a deadline later extended to August 9, 2019. 84 Fed. Reg. at 30088; 84 Fed. Reg. at 37837; Prehearing Conference Tr. at 105-07. The Tribe’s motion identifies certain fact issues stipulated to by the parties (and reported to the Presiding Officer) at the prehearing conference but which were not reflected in the Final Agenda, requests the modification and/or exclusion of certain fact issues based on the June 10, 2019, partial stipulation, and seeks reinstatement of two fact issues that are not subject to the partial stipulation. Finally, the motion requests a modification of the

Final Agenda's description of the "Stipulations of the Parties" to accurately reflect the parties' agreement submitted in the June 10, 2019, partial stipulation.

II. Reinstatement, Modification and Exclusion of Facts Issues for the Hearing.

Based on the parties' two stipulations and the applicable standards under the MMPA, several fact issues should either be: a) reinstated from the preliminary determination of issues; or b) modified and/or excluded altogether as issues to be addressed at the hearing.

A. Fact Issues Regarding Stock Structure Should be Reinstated.

In the Final Agenda, two issues identified in the preliminary determination of issues were removed without explanation by the Presiding Officer. These included:

I.A.1.a. Is NMFS's determination that there are two stocks of gray whales under the MMPA, the Eastern North Pacific (ENP) and Western North Pacific (WNP) stock appropriate? In particular, is NMFS's determination that the Pacific Coast Feeding Group (PCFG) is a subset of the ENP stock, rather than a separate stock, appropriate?

I.A.1.b. Is NMFS's definition of the PCFG as "gray whales observed between June 1 and November 30 within the region between northern California and northern Vancouver Island (from 41°N. lat. to 52°N. lat.) and photo-identified within this area during two or more years" appropriate?

Notice and Agenda: Prehearing Conference at 2-3; *cf.* 84 Fed. Reg. at 30089.

These issues are relevant to NMFS's proposal to waive the MMPA's moratorium on the taking of marine mammals to allow, and to prescribe regulations governing, a Makah hunt. The MMPA requires that a waiver of the moratorium be consistent with sound principles of resource conservation as provided in the purposes and policies Act. 16 U.S.C. § 1371(a)(3). The purposes and policies of the MMPA, in turn, are geared to the protection of "species and population stocks." *Id.* § 1361(2). Similarly, NMFS's proposed regulations must ensure the protection of the affected "species and population stocks." *Id.* § 1373(a). Both the proposed waiver and regulations must be based on the "best scientific evidence available." *Id.* §§

1371(a)(3)(A), 1373(a). Therefore, the proper identification of the “population stocks” or “stocks” at issue is central to the application of these provisions and the MMPA’s overarching requirement of science-based decision-making.

Makah requests that the Presiding Officer retain these issues in the Final Agenda so that Makah can present evidence regarding them. Makah agrees with NMFS’s determination that there are currently two stocks of gray whales under the MMPA, that the PCFG is a subset of one of those stocks (the ENP stock), that NMFS’s definition of the PCFG is appropriate, and that impact of the Makah hunt on the ENP stock and the PCFG is consistent with the purposes and policies of the MMPA. However, Makah seeks to present additional evidence, not presented by NMFS, that provides further support for these determinations. In particular, Makah seeks to present expert analysis of genetic and other evidence that confirms the PCFG is not a “stock” within the meaning of the MMPA.

Makah also agrees with NMFS’s determination that there is only a very remote possibility that its hunt will impact a “WNP” whale. However, Makah takes issue with NMFS’s characterization of the contemporary WNP stock as endangered under the Endangered Species Act and, therefore, depleted under the MMPA. Makah’s evidence will show that the WNP stock that was listed under the ESA was the remnant of a historic WNP population of gray whales that utilized feeding, migratory and breeding areas in the western North Pacific Ocean and, therefore, was geographically isolated from the ENP stock. In contrast, there is now substantial evidence that many “WNP” whales utilize migratory and breeding areas in the eastern North Pacific Ocean and are not geographically isolated from the ENP stock. Moreover, the best scientific evidence available, derived from an extensive range-wide review of gray whale stock structure conducted by the International Whaling Commission (IWC), indicates that the contemporary

WNP stock is either a mixed stock aggregation derived from the historic WNP and ENP stocks or is derived solely from the ENP stock and that, in either case, no descendants of the historic WNP stock migrate through the area of or are vulnerable to the Makah hunt.

The evidence Makah seeks to submit is within the scope of the evidence allowed by the parties' partial stipulation submitted on June 10, 2019. The stipulation expressly allows the parties to submit "evidence concerning the various populations, stocks, or groups of gray whales recognized or supported by the scientific literature" Partial Stipulation re Scope at 4. However, if Issues I.A.1.a and I.A.1.b were stricken from the hearing agenda, the relevance of such evidence may be questioned.

In sum, because these issues are relevant to NMFS's proposed waiver and regulations and reflect the MMPA's "best scientific evidence available" standard and because the parties stipulated that evidence related to them could be presented at the hearing, they should be restored to the Final Agenda.

At the prehearing conference, NMFS argued that these issues were subject to the partial stipulation, but with the opposite effect – that the parties agreed to exclude them based on the stipulation's statement that the "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." Partial Stipulation re Scope at 4; *see also* Prehearing Conference Tr. at 75-81. NMFS further argued at the prehearing conference that including the issues in the hearing would allow a collateral attack on the agency's stock identification process that was not contemplated under the MMPA. Prehearing Conference Tr. at 76.

NMFS's argument is flawed in three respects. First, the MMPA requires a waiver and regulations to be based on the best scientific evidence available, *see, e.g.*, 16 U.S.C. §§

1371(a)(3)(A), 1373(a), which in this proceeding includes significant relevant evidence about the stock structure of north Pacific Ocean gray whales, specifically including the status of the ENP, PCFG and WNP under the MMPA. To the extent that removing Issues I.A.1.a and I.A.1.b from the issues to be addressed at the hearing would result in the exclusion of such evidence, it would deprive the Presiding Officer (and NMFS's ultimate decision-makers) of relevant and important evidence bearing directly on the question of whether NMFS's proposed waiver and regulations satisfy this core requirement of the MMPA. Put another way, if the only evidence that can be considered regarding stock structure is the evidence presented in NMFS's recently published stock assessment reports (SARs) for ENP and WNP gray whales, 84 Fed. Reg. 28489 (June 19, 2019),² it will not be possible to determine whether the proposed waiver and regulations are based on the best scientific evidence available, as required by the MMPA.

Second, presentation of evidence at the hearing about gray whale stock structure does not equate – as NMFS argues – to a collateral attack on its stock determinations under Section 117 of the MMPA. Rather, those determinations, *i.e.*, the 2018 SARs, would not be changed by the scientific evidence presented in the hearing or the Presiding Officer's recommended decision. However, if other relevant scientific information is presented at the hearing it would be appropriate under the MMPA for the Presiding Officer and NMFS to consider such evidence in making a recommended decision and final decision, respectively, on the waiver and regulations – in addition to the information contained in the SARs. The SARs would be undisturbed until the next time NMFS itself reviewed and updated them to incorporate such scientific information.

Finally, as discussed above, the partial stipulation expressly states that “evidence concerning the various populations, stocks, or groups of gray whales recognized or supported by the

² The 2018 SARs for gray whales are available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region> (SARs for the Pacific Ocean).

scientific literature . . . may be considered.” Partial Stipulation re Scope at 4. In arguing for the exclusion of Issues I.A.1.a and I.A.1.b, NMFS did not explain how such evidence would be used in this proceeding.

For these reasons, Makah respectfully requests that Issues I.A.1.a and I.A.1.b be restored to the Final Agenda.

B. Certain Fact Issues Should Be Modified and/or Excluded.

1. Fact Issues Regarding the Treaty Right Should be Modified and Retained.

Issue II.A.2.a and certain sub-parts of Issue II.A.2.b address the Makah Tribe’s treaty right to hunt whales, which, as the Tribe explained at the prehearing conference, is relevant to the waiver process (including the hearing on the proposed waiver). Prehearing Conference Tr. at 112-15. These issues should be modified from their current form in the Final Agenda to more accurately and precisely define the issue for the hearing. In addition, some sub-parts of Issue II.A.2.b relate to a separate issue – whether the Makah Tribe qualifies for an aboriginal subsistence whaling (ASW) catch limit established by the IWC – which the parties agreed should be excluded from this proceeding.

The Final Agenda revised Issue II.A.2.a to focus on the “relevance in this proceeding of the Treaty of Neah Bay, between the Makah Tribe and the United States, which explicitly protects the tribe’s right to hunt whales.” 84 Fed. Reg. at 30090. However, it continued to locate the issue in the section for “[f]acts pertaining to existing international treaty and agreement obligations of the United States.” *Id.* As the Final Agenda recognizes, the Treaty of Neah Bay is between the United States and the Makah Tribe. It is not an international treaty or agreement, and it would be preferable to avoid this potential confusion by relocating the issue as a new section “III” (see below).

The five sub-parts of Issue II.A.2.b.vi are unchanged from the preliminary determination of the issues and continue to reflect a misunderstanding and conflation of two distinct issues: 1) the proper interpretation and importance of the Makah Tribe's treaty right; and 2) the criteria for obtaining an ASW catch limit from the IWC. The former is relevant to the waiver process and this hearing in particular. However, the latter issue of the IWC's criteria for ASW catch limits and whether the Makah Tribe has satisfied such criteria is outside the scope of the MMPA. Instead, to determine whether NMFS considered the effect of its proposed regulations on the United States' "existing international treaty and agreement obligations," 16 U.S.C. § 1373(b)(2), the Presiding Officer need only consider testimony that, since 1997, the IWC has repeatedly approved an ASW catch limit for ENP gray whales based on joint requests by the United States (on behalf of Makah) and the Russian Federation (on behalf of the Chukotka Natives). *See* Declaration of Dr. Michael F. Tillman (filed August 6, 2019); Declaration of Dr. David Weller (filed April 5, 2019) ¶ 9; Declaration of DJ Schubert (filed May 20, 2019) ¶ 8. Moreover, the parties advocating for this issue to be addressed at the hearing (AWI and SS) agreed in the partial stipulation that issues of fact for the hearing "shall relate to whether the proposed waiver and regulations comply with the procedural and substantive requirements of the MMPA" and specifically reserved their right to raise issues regarding compliance with other laws in subsequent legal proceedings. Partial Stipulation re Scope at 3-4. Accordingly, the Presiding Officer should modify the sub-parts in Issue II.A.2.b.vi to eliminate the conflation of these distinct issues. For the reasons discussed above regarding the domestic nature of the Treaty of Neah Bay, it would be appropriate to include these sub-parts under the relocated Issue II.A.2.a, *i.e.*, in a new treaty right section III as follows:

III. What is the relevance in this proceeding of the Treaty of Neah Bay, between the Makah Tribe and the United States, which explicitly protects the tribe's right to hunt whales?

A. Is the Makah treaty right to hunt whales central to Makah tribal subsistence, culture, and identity?

B. Does the Makah treaty right to hunt whales encompass the entire constellation of activities involved in hunting whales?

C. Is it possible for the Makah Tribe to substitute other, non-lethal activities and still exercise its treaty right to hunt whales? If not, is the proposed waiver necessary to enable the Makah Tribe to exercise its treaty right to hunt whales?

D. Are the provisions in the proposed regulations regarding the off-reservation consumption of whale meat in Makah households consistent with the Makah treaty right to hunt whales?

E. Is it possible to harmonize the requirements of the MMPA with the Makah treaty right to hunt whales?

2. Certain Issues Should Be Excluded Based on the Parties' Stipulation during the Prehearing Conference.

At the June 17, 2019, prehearing conference, the parties agreed that Issue I.B.1.d.iv regarding whether an incidental take permit under the Endangered Species Act would be required was subject to the partial stipulation and should be excluded from the Final Agenda. Prehearing Conference Tr. at 40-41. Issue II.A.2.b regarding the International Convention for the Regulation of Whaling (ICRW) and IWC was agreed (with a modification) as a stipulated fact, *id.* at 41-42, and therefore should be noted as such to distinguish it from contested issues for the hearing. Finally, the parties agreed that Issue II.A.3.b should include the phrase "under the MMPA" at the end of the first sentence. *Id.* at 43.

Although it was not addressed at the prehearing conference, Issue II.B.4.b should be modified to exclude the second sentence – "Are consultations with other Federal and state agencies necessary (see 16 U.S.C. 1382)?" 84 Fed. Reg. at 30091. This question follows the first sentence regarding the definition of "land" and "landing" in the proposed regulations, but it is not an issue that "relate[s] to whether the proposed waiver and regulations comply with the

procedural and substantive requirements of the MMPA” and should be excluded. Section 112(a) of the MMPA, 16 U.S.C. § 1382(a), states that “[t]he Secretary, in consultation with any other Federal agency to the extent that such agency may be affected, shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this Act.” This provision authorizes the Secretary to promulgate regulations for implementing the MMPA as a whole. It does not relate to the specific process for prescribing regulations governing take of marine mammals under Section 103, 16 U.S.C. § 1373, at issue in this proceeding. Accordingly, the issue of “consultations with other [agencies]” is not relevant to the hearing and should be excluded.

Issue II.B.4.e relates to the requirement under the National Environmental Policy Act (NEPA) that an agency must consider a reasonable range of alternatives in the environmental impact statement (EIS), and it should be excluded pursuant to the partial stipulation which limits the scope of issues for the hearing and reserves NEPA issues for subsequent legal proceedings.

The Final Agenda states the issue as:

Should the potential for an offshore hunt to result in the taking of more migratory ENP whales and fewer PCFG/Makah U&A whales be considered?

NMFS did consider an offshore hunt as an alternative and included it in the 2015 Draft EIS, in part because PCPW requested such an alternative in comments on the 2008 Draft EIS. However, in proposing a waiver and regulations, NMFS did not select the offshore alternative, but rather made a different proposal and tailored regulations to that specific proposal. The hearing should focus on whether the specific waiver and regulations proposed by NMFS satisfy the requirements of the MMPA, not whether some different proposal that NMFS might have made (but did not) would also satisfy the statutory criteria.

3. Two Modifications Should be Made to Clarify Terminology.

The Presiding Officer should modify terminology in the Final Agenda to avoid confusion related to two issues. Issue I.B.1.a states:

Is the northern California Current ecosystem the appropriate ecosystem to focus on for this proceeding? Should the focus instead be on a smaller biologically relevant scale such as the northern Washington coastal environment or an even more localized area such as the Makah U&A?

As drafted, Issue I.B.1.a suggests that the “northern Washington coastal environment” is a broader area than the “Makah U&A.” However, NMFS intended the term “northern Washington coastal environment” to be *equivalent* to the “coastal portion of the Makah U&A” and not, as the issue suggests, a broader area. *See* 84 Fed. Reg. at 13613 (“Although it is not considered a separate ecosystem, even at the scale of the northern Washington coast (the coastal portion of the Makah U&A)...”); Declaration of Chris Yates NMFS Ex. 1-7 (Biological Report on the ENP Gray Whale Stock) at 26 (“The following discussion also describes the effects of the proposed regulations on the environment of the northern Washington coast (the coastal portion of the Makah U&A)...”), 29 (“At the scale of the northern Washington coast (the coastal portion of the Makah U&A)...”). Therefore, for clarity, the second sentence of Issue I.B.1.a should be revised to read: “Should the focus instead be on a smaller biologically relevant scale such as the northern Washington coastal environment (the coastal portion of the Makah U&A)?”.

Second, unless the Presiding Officer removes Issue II.B.4.e regarding the offshore hunt (as requested above), the language should be modified to eliminate the term “Makah U&A whales,” which are not a biologically recognized group of gray whales. The revised issue would thus state:

Should the potential for an offshore hunt to result in the taking of more migratory ENP whales and fewer PCFG whales be considered?

Alternatively, the issue could be revised as follows to retain the reference to the Makah U&A while avoiding a biological misnomer:

Should the potential for an offshore hunt to result in the taking of more migratory ENP whales and fewer whales that utilize the Makah U&A?

C. The Description of the Stipulations of the Parties Should be Modified.

Following the Issues To Be Addressed at the Hearing, the Final Agenda describes under the heading “Stipulations of the Parties” an agreement on certain issues that the participants in the prehearing conference presented to the Presiding Officer. 84 Fed. Reg. at 30091. Although, as discussed above, the parties did present a stipulation as to certain fact issues at the prehearing conference, the parties’ June 10, 2019, partial stipulation addressed scientific evidence about various gray whale populations, groups and stocks and the impact of the proposed waiver on such whales, *see* Partial Stipulation re Scope at 4, and any statements by the parties at the prehearing conference were necessarily based on that partial stipulation and did not represent an agreement to modify it. The description of the June 10, 2019, partial stipulation in the Final Agenda should be corrected to reflect that agreement, which is quoted above in relevant part, *supra* at 2. Makah proposes the following modification of the Final Agenda to clarify that the partial stipulation expressly allows the parties to present evidence regarding gray whale populations, stocks, or groups recognized in the scientific literature *as well as* impacts on them (and for the Presiding Officer to consider such evidence):

The parties also agreed that, while evidence concerning the various populations, stocks, or groups of gray whales recognized or supported by the scientific literature and the waiver’s impact on such various stocks and populations of gray whales recognized or supported by the scientific literature may be considered, the parties will not challenge the identification of any particular whale populations, stocks, ~~or groups~~ under the MMPA during this hearing.

Respectfully submitted this 9th day of August, 2019.

ZIONTZ CHESTNUT

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