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6 UNITED STATES OF AMERICA
7 Department of Commerce
8 National Oceanic and Atmospheric Administration

9 *In re:* Proposed Waiver and Regulations
10 Governing the Taking of Eastern North
11 Pacific Gray Whales by the Makah Indian
Tribe

Hon. George J. Jordan
Hearing Docket No. 19-NMFS-0001

12
13 **RESPONSE TO MAKAH TRIBE’S MOTION**
RE ISSUES TO BE ADDRESSED AT THE HEARING

14 Sea Shepherd Legal (SSL) and Sea Shepherd Conservation Society (SSCS) (collectively
15 “Sea Shepherd”) file this response in opposition to the Makah Indian Tribe’s (Tribe) Motion re
16 Issues To Be Addressed at the Hearing. Without conceding any other points, Sea Shepherd focuses
17 its response on the Tribe’s attempt to (1) introduce evidence regarding whaling under the Treaty of
18 Neah Bay and associated alleged cultural issues, and (2) add new issues to the Final Hearing
19 Agenda.

20 With respect to the first point, Sea Shepherd refers Administrative Law Judge (ALJ) Jordan
21 (Judge Jordan) to the arguments made in Sea Shepherd’s Motion To Exclude Evidence Regarding
22 Treaty Right and Cultural Significance of Whaling (Motion to Exclude), as well as to the
23 supplementary arguments made below. With respect to the second point, Sea Shepherd observes
24 that the Tribe’s request is in violation of the Federal Register language permitting “motions to
25 *exclude* any issues listed in the Final Hearing Agenda by August 9, 2019,” as well as the parties’

1 partial stipulation submitted on June 10, 2019. *Announcement of Change in Hearing Date*
2 *Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals*, 84 Fed.
3 Reg. 37837, 37837 (col. 3) (Aug. 2, 2019) (emphasis added); Dkt. No. 40, Partial Stipulation Re
4 Scope of Issues to Be Addressed at Hearing (Partial Stipulation).

5 ARGUMENT

6 **I. Evidence Concerning the Tribe’s Treaty Right to Whale and Associated Cultural Issues** 7 **Must Be Excluded.**

8 In its motion, the Tribe insists that its right to hunt whales and engage in associated activities
9 under the Treaty of Neah Bay is properly a part of the upcoming hearing. *See* Motion re Issues To
10 Be Addressed at the Hearing, at 8-10. As Sea Shepherd explained in its Motion to Exclude, this
11 factual issue finds absolutely no purchase within the legal framework governing this matter.

12 The purpose of the present hearing is (1) to determine whether a waiver of the Marine
13 Mammal Protection Act’s (MMPA) take prohibition should be granted to allow the Tribe to hunt for
14 Eastern North Pacific (ENP) gray whales, and (2) if a waiver is granted, to determine the regulatory
15 framework that will implement that waiver. *See Announcement of Hearing Regarding Proposed*
16 *Waiver and Regulations Governing the Taking of Marine Mammals*, 84 Fed. Reg. 13639, 13639
17 (col. 3) (“The hearing involves a proposed waiver under the Marine Mammal Protection Act
18 (MMPA) and proposed regulations governing the hunting of eastern North Pacific (ENP) gray
19 whales by the Makah Indian Tribe in northwest Washington State.”); *see also* 16 U.S.C. §
20 1371(a)(3)(A); 16 U.S.C. § 1373(b).

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22
23 Having conceded that the Treaty of Neah Bay is not an “international treaty [or] agreement
24 obligation[] of the United States” for purposes of section 103 of the MMPA, 16 U.S.C. § 1373(b)(2),
25 the Tribe has abandoned the only possible (however incorrect) statutory argument in support of its

1 position. *See* Motion re Issues To Be Addressed at the Hearing, at 8 (“As the Final Agenda
2 recognizes, the Treaty of Neah Bay is between the United States and the Makah Tribe. It is not an
3 international treaty or agreement[.]”). As more fully described in Sea Shepherd’s Motion to Exclude
4 (filed on August 9, 2019), there is not any legal basis for admission of evidence in this proceeding
5 concerning the Tribe’s treaty right and related cultural issues. The treaty right is absolutely
6 irrelevant to the science-based factors governing issuance of a waiver under the MMPA. Rather
7 than repeating the grounds demonstrating this lack of relevance, Sea Shepherd incorporates those
8 arguments by reference herein. *See* Motion to Exclude.
9

10 In addition to reasserting the points in its Motion to Exclude, Sea Shepherd observes that the
11 Tribe’s latest filing underscores the practical importance of Judge Jordan’s decision on the Tribe’s
12 motion. Specifically, the Tribe asks Judge Jordan to review, and consider in his decision-making, a
13 large volume of irrelevant (and unduly repetitious) evidence — evidence that has no bearing on
14 whether the proposed hunt satisfies the MMPA waiver factors. Even if there is only limited cross-
15 examination of the Tribe’s treaty and cultural witnesses, the Tribe inappropriately asks Judge Jordan
16 to devote considerable time and resources to issues that should not inform his final decision.
17

18 The Tribe asks Judge Jordan to modify the Final Hearing Agenda to include the following
19 content regarding the Treaty of Neah Bay:

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

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

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

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

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

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

9 *Id.* at 10.

10 Compared with the current iteration of the waiver hearing agenda incorporating (albeit
11 incorrectly) consideration of the treaty right, the Tribe’s proposal seeks to significantly *enlarge* the
12 introduction of irrelevant treaty evidence. *Compare id. with Announcement of Hearing and Final*
13 *Agenda Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals*
14 *(Final Hearing Agenda)*, 84 Fed. Reg. 30088, 30090 (col. 2) (June 26, 2019) (setting forth point
15 II.A.2.a.). As Sea Shepherd explained in its Motion to Exclude, the Tribe introduced significant
16 testimony on the Treaty of Neah Bay and the cultural significance of whaling, including five lengthy
17 declarations and associated exhibits. The Tribe’s motion signals that it intends for Judge Jordan to
18 consume a significant amount of time on the statutorily irrelevant issues of the Tribe’s treaty right to
19 whale and the cultural significance of whaling. Sea Shepherd respectfully submits that Judge Jordan
20 should decline the Tribe’s invitation to indulge in this wasteful and legally irrelevant exercise.

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22 **II. The Tribe’s Request To Add Content to the Final Hearing Agenda Is Improper.**

23 In its motion, the Tribe asks Judge Jordan to “reinstate” two issues not appearing in the Final
24 Hearing Agenda:
25

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

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

7 Motion re Issues To Be Addressed at the Hearing at 4 (quoting Dkt. 41, Notice and Agenda:
8 Prehearing Conference (June 10, 2019), at 2-3); *contra Final Hearing Agenda*, 84 Fed. Reg., at
9 30089 (not including these issues).

10 The Tribe notes, and Sea Shepherd does not dispute, that these issues appeared in the
11 preliminary Notice and Agenda disseminated by Judge Jordan prior to the Prehearing Conference.
12 Dkt. 41, Notice and Agenda: Prehearing Conference (June 10, 2019). Yet, these issues do *not*
13 appear in the Final Hearing Agenda. Thus, however one views the matter, the Tribe is attempting to
14 *add*, not exclude, issues to the hearing.
15

16 This type of request is not contemplated by the August 2, 2019 Federal Register notice
17 providing the Parties with an opportunity to file limited motions. *Announcement of Change in*
18 *Hearing Date Regarding Proposed Waiver and Regulations Governing the Taking of Marine*
19 *Mammals*, 84 Fed. Reg. 37837, 37837 (col. 3) (Aug. 2, 2019). That notice permits only “motions to
20 *exclude* any issues listed in the Final Hearing Agenda by August 9, 2019.” *Id.* at 37837 (col. 3)
21 (emphasis added). The Tribe has not pointed to any language in the August 2nd Federal Register
22 notice that allows parties to *add* (or “reinstate”) issues to the universe of topics contained in the Final
23 Hearing Agenda. Of course, the Tribe’s failure to identify such language is understandable — it
24 does not exist.
25

1 In the face of the obvious inconsistency between the parameters of the August 2nd Federal
2 Register notice and the Tribe’s request, the Tribe argues that the above issues should be resuscitated
3 because the predicate evidence “is within the scope of the evidence allowed by the parties’ partial
4 stipulation submitted on June 10, 2019.” Motion re Issues To Be Addressed at the Hearing, at 7.
5 The Tribe bases its contention on the Partial Stipulation’s statement that “evidence concerning the
6 various populations, stocks, or groups of gray whales recognized or supported by the scientific
7 literature may be considered.” Partial Stipulation, at 4.

9 There is a fundamental problem with the Makah’s position. The language cited by the Tribe
10 is but the second portion of a clause reading as follows:

11 For example, *while the Parties agree that this hearing and the associated waiver*
12 *rulemaking are not the appropriate vehicles for identifying or challenging the*
13 *identification of any particular population stock under the MMPA*, the Parties agree
14 that evidence concerning the various populations, stocks, or groups of gray whales
15 recognized or supported by the scientific literature and the impacts of the proposed
16 waiver on them may be considered.

17 *Id.* (emphasis added). The Tribe conveniently ignores the first part of this stipulation. The Tribe
18 carries this selective quotation farther in attacking the National Marine Fisheries Service’s argument
19 at the Pre-Hearing Conference that evidence should not be introduced that challenges existing stock
20 determinations. In particular, the Tribe omits the only reason contemplated by the parties to the
21 stipulation for admission of evidence concerning “populations, stocks, or groups” — that is “*the*
22 *impacts of the proposed waiver on them.*” See Motion re Issues To Be Addressed at the Hearing, at
23 7-8 (emphasis added). By selectively omitting this crucial phrase (“the impacts of the proposed
24 waiver on them”), the Tribe completely misrepresents the actual intent of the parties to the
25 stipulation in agreeing to the limited introduction of stock-related evidence.

1 Selective quotation is, of course, strategically necessary to the Tribe’s request. There is no
2 way for the Tribe to request insertion of Issues I.A.1.a. and I.A.1.b. (as enumerated above) while still
3 remaining faithful to the parties’ agreement “that this hearing and the associated waiver rulemaking
4 are not the appropriate vehicles for identifying or challenging the identification of any particular
5 population stock under the MMPA[.]” *Id.*

6
7 Contrary to the Tribe’s position, the parties clearly agreed to allow the consideration of
8 “evidence concerning the various populations, stocks, or groups of gray whales recognized or
9 supported by the scientific literature and the impacts of the proposed waiver” *not* for the purpose of
10 challenging the government’s *designations* of stocks, but for the purpose of engagement with the
11 waiver factors. Such evidence is only relevant and within the scope of the Partial Stipulation to the
12 extent that it is offered in connection with the statutory factors of “distribution, abundance, breeding
13 habits, and times and lines of migratory movements[.]” 16 U.S.C. § 1371(a)(3)(A). The purpose
14 proposed by the Tribe, in contrast, is completely out of bounds.
15

16 Judge Jordan did not err in excluding the above-mentioned issues from the version of the
17 Final Hearing Agenda published on June 26, 2019. Reinstating these issues would run afoul of both
18 the August 2, 2019 Federal Register notice and the parties’ Partial Stipulation.

19 CONCLUSION

20 For the foregoing reasons, Sea Shepherd respectfully asks Judge Jordan to deny those
21 portions of the Tribe’s motion seeking to (1) introduce evidence regarding whaling under the Treaty
22 of Neah Bay and associated alleged cultural issues, and (2) add new issues to the Final Hearing
23 Agenda.
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1 Dated this 19th day of August 2019

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