

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 TO EXCLUDE CERTAIN PORTIONS OF THE
REBUTTAL TESTIMONY OF MARGARET OWENS**

The Makah Tribe moves to exclude paragraph numbers 107-117, 114 (second),¹ and 129-130 of Margaret Owens’ rebuttal testimony, titled “Rebuttal to the Declaration of Chris Yates , NMFS.” In the identified paragraphs Ms. Owens opines on Makah history and culture and makes broad, prejudicial accusations regarding the Tribe’s intent in seeking to resume whaling. Ms. Owens does not provide a basis for her many allegations and does not claim or establish any expertise in Makah history or culture. The Tribe therefore moves to exclude the noted paragraphs for unfair prejudice, lack of foundation, and Ms. Owens’ lack of relevant expertise. While the Federal Rules of Evidence do not formally bind these proceedings, application of Federal Rules of Evidence 403, 602 and 702 demonstrates that Ms. Owens’ testimony is not “reliable, probative, and substantial” and thus is barred by the Administrative Procedure Act, 5 U.S.C. § 556(d).²

¹ This paragraph is mislabeled as “114” in Ms. Owens’ testimony and immediately follows paragraph number 117. It appears that Ms. Owens restarted numbering at this point. The Tribe refers to the second usage of paragraph 114 as “114 (second).” Otherwise each reference to a paragraph number in this Motion is to the first usage of that number in Ms. Owens’ rebuttal testimony.

² For further discussion of applicable evidentiary standards, see NMFS’ “Motion to Limit Issues and Testimony” at 5-6.

Under Federal Rule of Evidence 403, relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice. Under Rule 602, a “witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” And under Rule 702, witness opinions regarding specialized knowledge are only admissible if the witness demonstrates applicable expert credentials and sufficient facts or data as the basis of the opinion. FRE 702; *see also* FRE 701(c) (lay opinion testimony not allowed for scientific or technical matters or other specialized knowledge subject to Rule 702). An administrative law judge properly excludes testimony where the testimony lacks foundation beyond speculative opinion. *See Joslin v. Dir., Office of Worker's Comp. Programs*, Civ. No. 96-70892, 1998 U.S. App. LEXIS 12857, at *2 (9th Cir. June 11, 1998).

Ms. Owens’ testimony repeatedly makes prejudicial assertions regarding the history, culture, and intent of the Tribe with no demonstration of personal knowledge and no cited documentary evidence. In paragraph 107, she states: “It is no secret that the Makah tribal members who have pushed for resumption of whaling since at least the early 1990's have been whaling descendants.” Ms. Owens makes no claim that she has personal knowledge on which to base this assertion and provides no citation to support it. Indeed, the claim that it is “no secret” suggests that Ms. Owens is basing this assertion on information she has obtained from unidentified third parties, not on her personal knowledge.

Similarly, paragraphs 108-110 and 114-117 and the first sentence of 114 (second) concern the alleged motivation and intent of the Tribe, with no basis. Ms. Owens is not a Tribal member, does not claim to have studied Tribal history or culture, does not purport to be an expert on the Makah Tribe, and does not refer to any documentary evidence to support her assertions.

These prejudicial allegations lack foundation and should be excluded. *See* FRE 403, 602 and 702; 5 U.S.C. § 556(d).

The prejudicial and unfounded nature of Ms. Owens' assertions is illustrated in paragraph 114 (second), in which Ms. Owens asks the reader to "put all that ego-boosting 'positive outcome' on one side of a scale, along with some hunks of whale meat, and some trickle-down whale oil for the 'lesser people' each year," and then weigh that hypothetical outcome against her opinion of potential impacts of the proposed hunt. This "testimony" denigrates the deeply held beliefs of the Makah Tribe regarding the importance of whaling, reduces the importance of whale products to the Tribe to "some hunks of whale meat," and then claims that an entire of class of tribal members is comprised of second-class citizens ("lesser people" in Ms. Owens' prejudicial terminology) who would not receive the full benefits of a hunt. Ms. Owens provides no basis – either in her personal knowledge or expert opinion – for these statements. Such prejudicial, unfounded statements have no place in the hearing or administrative record.

Some of Ms. Owens' statements purport to have a documentary basis. In paragraphs 111 and 112, Ms. Owens ascribes quotes to Makah Tribal members, and purports to cite print and television media as the basis for those quotes. However, because Ms. Owens does not provide the original media materials to corroborate and authenticate her assertions, these statements lack foundation and are hearsay.

In paragraph 113, Ms. Owens selectively quotes a sentence from Dr. Ann Renker's report on the role of whaling in modern Makah culture, writing:

The Tribe's anthropologist bemoaned "the introduction of American values" in the 1800's, such as "the American philosophy of of social equality", [sic] and how that social equality "made it difficult for Makahs to continue to staff and organize whaling canoes , and therefore households, according to ancient patterns." (DEIS 2008, pg.30) "Staff " missing in the canoes? ...that would be the newly freed slaves.

Ms. Owens' testimony misrepresents Dr. Renker's report, and Ms. Owens' italicized suggestion lacks any basis in documentary evidence or personal knowledge.

Dr. Renker did not “bemoan” the introduction of American values. What Dr. Renker actually wrote was that the whaling crew was made up entirely of “men who could physically and mentally withstand the rigors of intensive ritualized training, possessed the hereditary access to the position and its ritualized knowledge, and/or a underwent a supernatural encounter which engendered the gift of whaling ability.”³ Dr. Renker ascribed the decline of whaling in the late 1800s to a decline in whale populations caused by non-Makah hunting, the rise of commercial sealing, efforts by the United States government to force the Makahs to adopt an agricultural economy, devastating epidemics introduced by Euro-American settlers, bans on ceremonial activities, and the federal schooling system.⁴ The report summarizes: “The combined effects of massive epidemics, boarding schools, and government acculturation policies had drastically changed the delicate and complex social dynamic which had supported the traditional Makah whale hunt.”⁵ In that context, Dr. Renker explained that “the American philosophy of social equality made it difficult for Makahs to continue to staff and organize whaling canoes, and therefore households, according to the ancestral patterns. *Whale hunting was no longer the sole avenue to a position of ceremonial and political importance as the headman of a large longhouse.*” (emphasis added).

Dr. Renker made no mention of slaves being used to staff whaling canoes at any time. Read in context, her reference to the difficulties created by the American philosophy of social equality concerned new avenues to obtain ceremonial and political importance that competed

³ See NMFS Ex. 1-5, “Whale Hunting and the Makah Tribe: A Needs Statement” (Renker 2002) at 843.

⁴ *Id.* at 853-57.

⁵ *Id.* at 856.

with whaling as a means of attaining social status. Ms. Owens' assertion that the inability to staff canoes with slaves caused a decline in whaling is wholly without basis in Dr. Renker's report, and Ms. Owens does not have or claim any other basis for that assertion, either in her personal knowledge or any claimed expertise.⁶

In paragraph 114, Ms. Owens suggests that the Tribe seeks to undermine its democratic selection of leaders by pursuing whaling, citing her own organization's comments from 2008. However, there is nothing in paragraph 114 or her organization's 2008 comments that suggests that Ms. Owens has any personal knowledge to support this claim. To the contrary, the Makah Tribe adopted a Constitution in 1936 that mandates regular election of leaders.⁷

In short, while paragraphs 111-114 purport to have some documentary basis, the documents are not provided or are inadequate to establish that Ms. Owens has any personal knowledge of the matters asserted or to provide some independent foundation for her testimony. And, it remains the case that Ms. Owens lacks the requisite expertise to opine on Makah culture.

While the Tribe recognizes that Ms. Owens is a volunteer and holds passionate beliefs, and generally is willing to accord her some latitude in presentation of evidence, the Tribe moves to exclude the paragraphs identified in this motion because the identified statements are especially prejudicial and unfounded. Ms. Owens may not like Makah whaling culture, and plainly disagrees with the Tribe's effort to resume hunting whales under its treaty right, but that does not mean she is entitled to make up evidence for this hearing. While the paragraphs at issue

⁶ Dr. Renker's thoroughly researched report contradicts Ms. Owens testimony in many additional ways. For example, Dr. Renker performed a community household survey of Tribal members and determined that "an overwhelming majority (93.9%) of the village believes that the resumption of the whale hunt has positively affected the Tribe, and 51.6% specifically cited moral and social changes as the most important benefit." *See* NMFS Ex. 1-5, "Whale Hunting and the Makah Tribe: A Needs Statement" (Renker 2002) at 833.

⁷ *See* NMFS Ex. 1-5, 2008 DEIS, at 149-50.

might be within the permissible scope of argument, there is no foundation for their admission as testimony. The Tribe respectfully requests that paragraphs 107-117, 114 (second), and 129-130 be excluded for lack of foundation, Ms. Owens' lack of expert credentials, and unfair prejudice.

Respectfully submitted this 16th day of August, 2019.

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