

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

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<i>In re:</i>	) Administrative Law Judge
	) Hon. George J. Jordan
<b>Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Gray Whales by the Makah Indian Tribe</b>	) Docket No. 19-NMFS-0001
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	) RINs: 0648-BI58; 0648-XG584
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**MAKAH TRIBE’S COMBINED RESPONSE TO MOTIONS TO EXCLUDE  
TESTIMONY AND ISSUES FOR THE HEARING**

The Makah Tribe submits the following combined response to three motions filed on August 9, 2019: 1) Sea Shepherd’s Motion to Exclude Evidence Regarding Treaty Right and Cultural Significance of Whaling; 2) Animal Welfare Institute’s Motion in Limine to Exclude Testimony and Evidence; and 3) National Marine Fisheries Service’s Motion to Limit Issues and Testimony.

Sea Shepherd’s motion seeks to exclude the “entirety of the testimony” submitted by the Tribe on May 20, 2019 regarding: (a) the 1855 Treaty of Neah Bay, which expressly secures the Tribe’s right to hunt whales and is the basis for the Tribe’s waiver request; (b) historical and contemporary Makah whaling practices; and (c) the personal knowledge and experiences of tribal members who have participated in the Tribe’s whaling activities, are leaders in the community, and can speak to the cultural and subsistence benefits of whaling to Makahs. Sea Shepherd Motion at 16 (requesting exclusion on the basis of relevance of the testimony of historian Joshua Reid and tribal members Greig Arnold, Daniel J. Greene, Sr., Maria Pascua and Polly DeBari). NMFS does not seek to exclude the entirety of the Tribe’s treaty testimony but requests that such testimony be “limited.” NMFS Motion at 16 (arguing that treaty testimony is

not relevant for purposes of the hearing). NMFS's motion does not address testimony regarding the cultural significance of whaling.

Animal Welfare Institute's (AWI) motion seeks to exclude the "portions of the direct testimony offered by Drs. Scordino, Bickham, and Brandon related to the status of the WNP gray whale stock," contending that it is irrelevant as an improper attack on the WNP's listing status under the Endangered Species Act (ESA). AWI Motion at 8. On the same WNP stock issue, NMFS seeks to exclude part of the testimony of Jonathan Scordino and Dr. John Bickham because, the agency asserts, it is a collateral challenge to NMFS's identification of population stocks under Section 117 of the MMPA and, pursuant to the partial stipulation submitted by certain parties on June 10, 2019 ("Partial Stipulation re Scope"), is outside the scope of the hearing. NMFS Motion at 10 & n.14. NMFS's motion also addresses additional issues to which the Tribe provides a brief response.

These motions should be denied as they pertain to the Tribe's initial direct testimony and supporting documentary evidence and the specific issues for the hearing discussed below. The Tribe's effort to exercise its treaty right to hunt whales was the central animating purpose for the 2005 request for an MMPA waiver. The Ninth Circuit, in requiring the Tribe to obtain a waiver and permit under the MMPA, affirmed the treaty right's relevance to NMFS's review of such a request, which must include the factual record established at the hearing and the Presiding Officer's recommended decision. The Tribe's treaty right is a federal law with equal status under the Constitution to the MMPA and, as such, NMFS must harmonize it with the MMPA when making a decision on the waiver request. A threshold issue in harmonizing the two laws is a proper interpretation of the treaty right, which begins with the Indians' understanding of the treaty. Moreover, the Tribe should have a voice in this proceeding, which it sought over 14 years

ago, to explain its treaty right and the ongoing cultural and subsistence importance of hunting whales. Excluding the Tribe's testimony, as Sea Shepherd requests, would silence that voice.

The Tribe's submission of expert scientific testimony from Jonathan Scordino, the Tribe's marine mammal biologist, and Dr. John Bickham, a geneticist, regarding the stock structure of "WNP" gray whales is directly related to important scientific issues the Presiding Officer, and ultimately NMFS, must address in making decisions on the proposed regulations. The partial stipulation expressly contemplates and allows such testimony, and Animal Welfare Institute's and NMFS's arguments that the testimony is an impermissible challenge to the WNP stock's listing status under the ESA and the MMPA's Section 117 stock identification process are without merit. Rather, the testimony of Mr. Scordino and Dr. Bickham<sup>1</sup> presents information from the scientific literature, including the evaluation by the Scientific Committee of the International Whaling Commission (IWC) of the proposed Makah hunt, that must be considered under the MMPA's requirement that the waiver and regulations be based on the "best scientific evidence available." 16 U.S.C. §§ 1371(a)(3)(A), 1373(a).

**I. The Tribe's Testimony on the Treaty Right and the Cultural Importance of Whaling is Relevant and Necessary to Harmonize the Treaty of Neah Bay with the Marine Mammal Protection Act.**

The Makah Tribe secured the treaty right to hunt whales in negotiations that resulted in the 1855 Treaty of Neah Bay, which contains the only express right "of whaling" reserved by any Indian tribe in a treaty with the United States. The treaty right embodies Makah's historical and contemporary reliance on whales to meet the Tribe's cultural, subsistence, and spiritual

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<sup>1</sup> The testimony of Dr. John Brandon addresses the IWC's evaluation of the proposed Makah hunt in the context of aboriginal subsistence whaling catch limits and the relationship of that evaluation to the MMPA's objective that marine mammal stocks maintain or achieve an optimum sustainable population level. Therefore, it falls outside the scope of AWI's motion, which is focused on testimony regarding the stock structure and ESA listing status of WNP gray whales. Cf. NMFS Motion at 10 n.14 (seeking to exclude testimony of Bickham and Scordino, but not Brandon).

needs, and, as the Tribe's witnesses explain in their testimony, it is central to the identity of the Makah people. *See, e.g.*, Declaration of Greig Arnold ¶¶ 7, 16-17, 22; Declaration of Polly DeBari ¶ 15; Declaration of Maria Pascua ¶ 20; Declaration of Daniel J. Greene, Sr. ¶ 15. Since the Eastern North Pacific (ENP) stock of gray whales was removed from the ESA list of threatened species in 1994, Makah's efforts to resume whaling have been motivated by the desire to exercise the right secured in the treaty and meet the Tribe's subsistence and cultural needs by once again hunting whales. Thus, testimony by the four tribal member witnesses and expert testimony by historian Joshua Reid is a critical part of the waiver proceeding. It is relevant because the Ninth Circuit expressly contemplated that this type of evidence could be presented when the Tribe sought a waiver following *Anderson*, it is necessary to properly harmonize the treaty right and the MMPA in NMFS's final decision on the waiver and regulations, and, as a matter of fundamental fairness, it is essential that the Tribe be permitted to establish in the hearing record its view of the treaty right, the historical and contemporary importance of hunting whales, and the cultural and subsistence benefits that the Tribe would realize if it is able to resume whaling under the waiver, regulations and subsequent NMFS authorizations.

In *Anderson v. Evans*, the Ninth Circuit declined to address the issue whether the treaty right had been abrogated by the MMPA, but in doing so, stated that the Tribe could urge consideration of the treaty right in NMFS's review of a waiver request:

Of course, in holding that the MMPA applies to the Tribe, we need not and do not decide whether the Tribe's whaling rights have been abrogated by the MMPA.<sup>26</sup> We simply hold that the Tribe, *to pursue any treaty rights for whaling*, must comply with the process prescribed in the MMPA for authorizing a "take" because it is the procedure that ensures the Tribe's whaling will not frustrate the conservation goals of the MMPA.

<sup>26</sup> Having determined that the procedures of the MMPA apply to the Tribe, in light of the conservation principle and the 'in common with' language of the treaty, we need not resolve the abrogation issue presented by the plaintiffs: The NMFS might authorize prescribed whaling to proceed under the MMPA, albeit

with conditions designed to ensure the perpetuation of the resident whale population. *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.*

371 F.3d 475, 501 & n.26 (9th Cir. 2004) (emphasis added). Thus, while the court required the Tribe to obtain a waiver and permit under the MMPA “to pursue any treaty rights for whaling,” it expressly authorized the Tribe to advocate for consideration of the treaty right in NMFS’s review of its waiver request. This is precisely what the Tribe has done throughout the waiver process, from its February 2005 request to the submission of five declarations in this proceeding that explain the treaty right and its importance to the Makah people.

Sea Shepherd, which seeks to exclude the Tribe’s treaty testimony in its entirety, argues that *Anderson* does not support the inclusion of treaty testimony in the hearing. Sea Shepherd Motion at 11-12. Although it acknowledges the *Anderson* court’s approval of the Tribe “ask[ing] NMFS to consider the treaty right in making its initial, threshold decision as to whether to move forward following the Tribe’s [waiver request],” Sea Shepherd argues that consideration of the treaty right must stop after NMFS makes an initial determination to propose the waiver. *Id.* at 12. There is no principled reason for allowing the treaty right to be urged – and considered – in NMFS’s review of the Tribe’s request *prior to* the hearing, but not in its review of the entire hearing record and the Presiding Officer’s recommended decision *after* the hearing concludes. The hearing is an integral part of the waiver process outlined by the MMPA, and the record established in the hearing forms the basis for the NMFS Assistant Administrator’s ultimate decision on the Tribe’s request. 16 U.S.C. § 1373(d) (“Regulations prescribed to carry out [Section 103] with respect to any species or stock of marine mammals must be made on the record after opportunity for an agency hearing *on both the Secretary's determination to waive the moratorium pursuant to section 101(a)(3)(A) and on such regulations.*”) (emphasis added); 50

C.F.R. § 228.21 (Assistant Administrator’s decision). Thus, when the *Anderson* court stated that the treaty right could be urged as part of “NMFS’s review” of a waiver request, it necessarily contemplated the entire process of reviewing the request, from the agency’s initial determination to a final decision on the request by the Assistant Administrator. Sea Shepherd’s attempt to bifurcate the waiver process into one part where the treaty is a valid consideration and another where it is not is without basis in *Anderson*, the MMPA or its implementing regulations, and the Tribe should be allowed to “urge” the treaty right through its testimony and to include this evidence in the hearing record.

NMFS argues that because it did not consider the treaty right in making its initial determination on the waiver, evidence about the treaty right “is of limited relevance.”<sup>2</sup> NMFS Motion at 8. Unlike Sea Shepherd, NMFS “does not object to limited testimony regarding the Tribe’s treaty rights” even though both parties view such evidence as “not relevant for purposes of determining whether the proposed waiver and regulations comply with MMPA section 103.” *Id.* at 16; Sea Shepherd Motion at 5-9. However, not only does NMFS fail to address the *Anderson* court’s statement about use of the treaty right in the waiver process, as discussed above, but the agency does not recognize its obligation to harmonize the treaty right, which it “acknowledges and respects,” NMFS Motion at 16, with its implementation of the MMPA.

NMFS’s review of and decision on the Tribe’s waiver request implements two federal laws of equal legal standing under the Constitution – the Treaty of Neah Bay with its express

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<sup>2</sup> Although NMFS’s West Coast Region, which made the initial determination and is the proponent of the proposed waiver and regulations in this proceeding, disclaims any reliance on the treaty right, the NMFS Assistant Administrator has not participated in this effort to date (and will not participate in the hearing). Therefore, the Tribe should be able to make a record at the hearing so that it can “urge” the treaty right when the Assistant Administrator reviews the recommended decision and the entire hearing record and makes a final decision on the proposed waiver and regulations under 50 C.F.R. § 228.21.

right of hunting whales and the MMPA.<sup>3</sup> Here, a conflict between the treaty right and the MMPA is possible because Sea Shepherd, Animal Welfare Institute and Peninsula Citizens for the Protection of Whales have taken a position opposing the waiver, which would, if NMFS's Assistant Administrator agrees, result in the Tribe once again being unable to hunt whales notwithstanding its express right to do so. When there is a potential conflict between a treaty and a federal statute it raises the issue of whether the treaty has been abrogated by the later-enacted federal statute. For a court to find abrogation there must be either explicit statutory language or clear and plain congressional intent because "Indian treaty rights are too fundamental to be easily cast aside." *United States v. Dion*, 476 U.S. 734, 738-39 (1986). The stringent standard established by the Supreme Court for abrogation requires "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 740; *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999).

As discussed above, the *Anderson* court expressly disclaimed that it was deciding whether the MMPA had abrogated Makah's treaty whaling right and affirmatively authorized the Tribe to urge the treaty right in the waiver process. 371 F.3d at 501 & n.26. Where two legally valid federal laws are implicated and "an apparent conflict exists between [the two federal laws], then the courts must strive to harmonize the two laws, giving effect to both laws if possible." *Ass'n of Am. R.Rs. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010). Here, the obligation to harmonize the treaty right and the MMPA to give effect to both laws rests on NMFS as it reviews and responds to the Tribe's waiver request.

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<sup>3</sup> The issue of ensuring that NMFS considers and acts consistently with both the treaty right and the MMPA was raised by the Tribe at the pre-hearing conference. See Pre-hearing Conference Tr. at 113-15.

An initial step in harmonizing these laws is to properly interpret the treaty, which begins with the Indians' understanding. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979) (treaty must be construed, "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians") (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)); *Mille Lacs*, 526 U.S. at 196 ("we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them"); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1699 (2019) (same); *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011 (2019) ("language of the treaty should be understood as bearing the meaning that the [tribe] understood it to have in 1855"). The testimony of Joshua Reid and the four tribal members is clearly relevant to Makah's understanding of its treaty whaling right. Dr. Reid's testimony demonstrates how the Tribe understood the treaty, including that it encompassed the broad constellation of Makah's whaling activities, especially the whale hunt itself. Declaration of Joshua L. Reid ¶¶ 3-4 & pp. 10-11. The testimony of Greig Arnold, Polly DeBari, Maria Pascua, and Daniel Greene, Sr. support this understanding and explain the critical connection between the Tribe's culture, subsistence and identity and the exercise of the treaty right. *See, e.g.*, Greene Decl. ¶ 2 ("I believe that whale hunting is an essential element of Makah subsistence and culture."); Arnold Decl. ¶ 16 ("[Hunting whales] will be beneficial to our community, invigorate our cultural practices and sense of place, identity and connection between generations, and it will increase Makahs' consumption of natural foods by making whale products available on a regular basis in the community."); Pascua Decl. ¶ 11 ("Whaling is the biggest part of our culture. . . . When we resumed exercising our treaty whaling rights in the 1990s, it was exciting to see traditional gear in use and the whalers – including several members of my family – providing for our people.");

DeBari Decl. ¶ 15 (“Through our oral history we know that whaling is who Makahs are as a people.”). Accordingly, the Tribe’s testimony that Sea Shepherd seeks to exclude from the hearing is relevant and necessary to interpreting the treaty and harmonizing the treaty right and the MMPA, which must occur as part of NMFS’s decision on the Tribe’s waiver request. The motions to exclude (or limit) this testimony should therefore be denied.<sup>4</sup>

Finally, as a matter of fundamental fairness, the Tribe should be able to submit evidence about the treaty right at the hearing using witnesses and documentary support of its choice. This entire proceeding arises from the Tribe’s desire to exercise its treaty right and realize the benefits to its culture and subsistence from hunting whales. Notwithstanding NMFS’s statements in its motion to exclude, the agency has acknowledged the central role that the treaty right occupies in the Tribe’s request and NMFS’s response. In the 2015 DEIS,<sup>5</sup> NMFS described the proposed action, including approving the waiver and promulgating regulations, and explained the purpose and need of both the Tribe and the agency. *See* 2015 DEIS at 1-1 to 1-2, 1-27. Specifically, the DEIS states that the treaty right and the MMPA are integral to the purpose and need for the proposed action for both the Tribe and NMFS:

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<sup>4</sup> Sea Shepherd requests, in the event its motion is denied, an order declaring that testimony regarding the right of non-tribal members to non-consumptive use of whales is admissible. Sea Shepherd Motion at 1, 15-16. This request should be denied because such evidence does not assist in understanding the intentions of the parties to the treaty – the Tribe and the United States – and is, therefore, not relevant to the interpretation of the treaty. Moreover, Sea Shepherd’s “co-tenancy” argument does not seek to actually share the whales; rather, it seeks to reserve *all* the whales for non-tribal members, thereby precluding the Tribe from taking any whales pursuant to the right of whaling that was secured in the treaty and thus depriving the Tribe of any rights as a “co-tenant.” *See, e.g.*, Declaration of Carrie Newell ¶ 43 (“The killing of even a single female could result in a multi-generational impact”); *see also* AWI Motion at 8 n.4 (“the take of even one individual [PCFG whale] could have dire consequences for the stock’s recovery”). The Tribe notes that Sea Shepherd’s submission of extensive testimony relating to whale watching - its preferred means of using gray whales - contradicts and undermines its effort to exclude as irrelevant all evidence relating to exercise of the Makah treaty right to hunt whales.

<sup>5</sup> The 2015 DEIS is available online at: <https://www.fisheries.noaa.gov/west-coast/makah-tribal-whale-hunt>.  
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16 **1.3 Purpose and Need for Action**

17 **1.3.1 Purpose for Action**

18 The Makah Tribe's purpose is to resume its traditional hunting of gray whales under its treaty  
19 right, as described in detail in Subsection 2.3.2, Alternative 2 (Proposed Action). NMFS' purpose  
20 is to implement the laws and treaties that apply to the Tribe's request, including the Treaty of  
21 Neah Bay, MMPA, and WCA.

22 **1.3.2 Need for Action**

23 The Makah Tribe's need for the action is to exercise its treaty whaling rights to provide a  
24 traditional subsistence resource to the community and to sustain and revitalize the ceremonial,  
25 cultural, and social aspects of its whaling traditions. NMFS' need for this action is to implement  
26 its federal trust responsibilities to the Makah Tribe with respect to the Tribe's reserved whaling  
27 rights under the Treaty of Neah Bay. In meeting this need, NMFS must also comply with the  
28 requirements of the MMPA and the WCA. Under the MMPA, we must protect and conserve the  
29 gray whale population; under the WCA, we must regulate whaling in accordance with the ICRW  
30 and IWC regulations.

2015 DEIS at 1-27.

It would also be unfair to preclude the Tribe from presenting testimony about its understanding of the treaty right and the importance of whaling to the Makah people (for cultural, subsistence and other purposes), when almost every other party has submitted evidence about the treaty right. For example, the 2015 DEIS includes substantial information about the treaty right, cultural and community values associated with hunting whales, historic and contemporary whaling activities, and potential impacts to the Tribe of various alternatives to the proposed hunt – but it does so from NMFS's perspective, not the Tribe's. *See, e.g.*, 2015 DEIS at 1-7 to 1-10 (legal framework of the Treaty of Neah Bay), 1-36 to 1-41 (summary of Makah whaling 1998-2014), 2-22 to 2-24 (describing alternatives of a non-lethal hunt and “subsistence use of drift whales” and the reasons for eliminating them from detailed analysis), 3-282 to 3-284 (social environment of the Tribe relative to exercising the treaty whaling right), 3-295 to 3-306 (historic Makah community, Makah historic whaling, and factors responsible for discontinuation of the hunt), 3-309 to 3-316 (whaling in contemporary Makah society), 4-193 to 4-201

(evaluating the impact of no whaling on the Tribe's ceremonial and subsistence resources). NMFS intends to introduce the 2015 DEIS as evidence at the hearing. Third Declaration of Chris Yates ¶ 12 (citing 50 C.F.R. § 228.16(b)). Thus, if the Tribe's treaty testimony is excluded, the factual record from the hearing will be largely devoid of the Tribe's perspective on *its* treaty right. In addition to the 2015 DEIS, Sea Shepherd, Animal Welfare Institute and Peninsula Citizens for the Protection of Whales all submitted as exhibits their comments on the DEIS containing the organizations' views and interpretation of the Tribe's treaty right. *See* Declaration of DJ Schubert Ex. 1 at 17-18, 37, 94, 114-15; Declaration of Brett Sommermeyer, Ex. 2 at 15-19; Declaration of Margaret Owens Att. 1 at 44-48, 51. Each organization also submitted testimony addressing the treaty right. *See, e.g.*, Sommermeyer Decl. ¶¶ 59-63; Schubert Decl. ¶¶ 7, 48; Declaration of Carrie Newell ¶¶ 9-10; Margaret Owens Rebuttal to the Declaration of J. Scordino at 1; Margaret Owens Rebuttal to the Declaration of Chris Yates at 23-24 (¶¶ 104, 107, 109). Simply put, the Tribe deserves a meaningful opportunity to testify at the hearing about the treaty right and the cultural importance of whaling to its people, particularly in response to Sea Shepherd and other parties who oppose any authorization of whaling. It would be inequitable and unjust to grant the motion and silence the Tribe on this issue.

**II. The Tribe's Testimony Regarding the Stock Structure of WNP Gray Whales Is Within the Scope of the Parties' Partial Stipulation and Will Assist the Presiding Officer and NMFS in Making Decisions Based on the Best Scientific Evidence Available with Respect to the Whales Potentially Affected by the Hunt.**

The Tribe's testimony presents substantial scientific information on the stock structure of gray whales, including those that feed at Sakhalin Island off Russia and migrate either along the coast of Asia or to wintering grounds off Mexico. *See, e.g.*, Declaration of Jonathan Scordino at 64-78; Declaration of John W. Bickham at 6-10, 19-31. As the Tribe explained in its Motion re

Issues to be Addressed at the Hearing, this scientific evidence is relevant to the conservation purposes and policies of the MMPA, which focus their protections on marine mammal population stocks. Makah Motion at 4-6 (citing 16 U.S.C. § 1361(2)). Scientific information about the “WNP” stock is also relevant because NMFS has determined that the potential effect of the hunt on the WNP stock is an additional relevant factor that should be considered in the proposed regulations. 84 Fed. Reg. 13604, 13614 (April 5, 2019). Thus, in considering this additional factor, it is important to evaluate scientific evidence regarding the stock structure of these whales, including whether the whales that migrate from Sakhalin Island to North America are part of a group to which additional protections may apply due to their “depleted” status under the MMPA and “endangered” status under the ESA. The Tribe’s position is that evidence regarding stock structure of both the “WNP” stock and the Pacific Coast Feeding Group (PCFG) is relevant and must be considered to satisfy the requirement that the Presiding Officer’s recommended decision and NMFS’s final decision on the waiver and regulations be based on the “best scientific evidence available.” Makah Motion at 5-6; 16 U.S.C. §§ 1371(a)(3)(A), 1373(a).

In contrast to the Tribe, Animal Welfare Institute takes the position that stock structure evidence about the WNP is not relevant and should be excluded,<sup>6</sup> but then does an about-face on stock structure evidence applicable to the PCFG, arguing it is “entirely relevant to the instant proceeding.” AWI Motion at 1, 8 n.4. Animal Welfare Institute’s contortions extend to its argument that evidence regarding the structure of the “WNP” stock is not admissible because the focus of this proceeding is on the ENP stock, which it immediately contradicts by asserting that

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<sup>6</sup> In seeking to exclude the testimony on WNP stock structure of all three of the Tribe’s scientific experts, Animal Welfare Institute’s Motion is overbroad, as Dr. John Brandon does not address this issue other than to report on the IWC’s stock structure hypotheses in the context of his detailed analysis of the IWC’s evaluation of the proposed hunt. His testimony should not be affected in the event AWI’s motion is granted.

evidence regarding the “collateral effects on the WNP stock is certainly ‘of consequence’” and admissible. AWI Motion at 5 n.2, 6.

NMFS’s position is that any stock structure evidence besides what is summarized in its stock assessment reports (SARs) for the ENP and WNP gray whale stocks is an impermissible collateral attack on the MMPA’s Section 117 stock identification process. While NMFS’s position at least has the benefit of being internally consistent, neither of these positions can withstand scrutiny, and the motions to exclude should be denied.

Animal Welfare Institute’s contradictory position, which lacks scientific and legal coherence in order to advance its preferred outcome, fails for several reasons. First, the Partial Stipulation re Scope provides 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.” Partial Stipulation re Scope at 4. This encompasses scientific papers on genetics and the IWC’s evaluation of the proposed Makah hunt, among others, and applies equally to the WNP and the PCFG as “populations, stocks, or groups of gray whales recognized or supported by the scientific literature.” Thus, AWI’s distinction between the two groups for purposes of introducing stock structure evidence is unsupportable. Indeed, at the pre-hearing conference, Animal Welfare Institute’s attorney agreed with the Tribe’s argument that the partial stipulation broadly allowed evidence regarding gray whale populations recognized in the scientific literature (and made no distinction between the WNP and PCFG):

AWI actually agrees with [the Tribe’s] assessment, and we were under the impression that we also agreed that, again, while this will not be a formal challenge, we could still put on evidence, because we do believe that the evidence -- the stock issue is inextricably intertwined with the waiver issue. And again, while we're not formally challenging the stock designation, we do believe that that issue is relevant.

And as you can see from the full stipulation, we did not waive our ability to put on evidence or discuss those issues in this proceeding.

Pre-hearing Conference Tr. at 79.

Second, Animal Welfare Institute ignores the basis for considering the WNP stock, and the potential effects of the hunt on it, in the first place, namely NMFS's determination that it is an additional relevant factor to be considered in the proposed regulations. While the ENP stock is the subject of the proposed waiver and the criteria enumerated in 16 U.S.C. § 1371(a)(3)(A), the "WNP" stock is properly considered at the hearing under the MMPA's criteria for evaluating regulations proposed for the take of marine mammals. *Id.* § 1373(b); 84 Fed. Reg. at 13614. This should include testimony about the stock structure of the whales that migrate from Sakhalin Island to North America, which NMFS considers part of the stock.

Third, Animal Welfare Institute's argument that the Tribe's testimony about WNP stock structure is a collateral attack on the ESA listing status of WNP gray whales misses the mark. As the Tribe explained, Makah Motion at 5-6, its testimony demonstrates that whales migrating from Sakhalin Island to North America are not the geographically isolated WNP stock that remained listed as endangered under the ESA after the ENP stock was de-listed in 1994. *See, e.g.,* Scordino Decl. at 65-66, 68-69, 71, 77, 82. The stock identity of such whales may have consequences for the evaluation of the proposed hunt because, as Animal Welfare Institute acknowledges, the MMPA automatically confers "depleted" status on ESA-listed stocks, AWI Motion at 4, and, as a result, the "WNP" stock is assigned a lower recovery factor in the formula for potential biological removal (PBR) than would a stock of unknown, *i.e.*, non-depleted, status. *Compare* Second Declaration of Dr. Shannon Bettridge Ex. 2-12 at 13 (recovery factor of 0.1 for the endangered WNP stock) *with id.* at 5 (discussing reasons for assigning a recovery factor of 0.5 to the PCFG, which is the default value for "stocks of unknown status"); *see also* Scordino

Decl. at 71 (explaining how ESA listing status affects recovery factor in the PBR formula). Thus, if Sakhalin whales migrating to North America were not listed as endangered (and were not otherwise designated as “depleted”), their default recovery factor would be five times greater than in the current WNP SAR, likely also increasing the calculated PBR as long as the other variables remained constant. *Cf.* Second Bettridge Decl. ¶ 7 (“The final 2018 SAR . . . estimates a PBR of 0.12 WNP gray whales per year, or approximately one whale every 8 years.”). While relevant to consideration of the hunt proposal, the Tribe’s testimony regarding the stock structure of whales migrating from Sakhalin Island to North America does not challenge the WNP stock’s listing status under the ESA and will have no direct impact on that status.<sup>7</sup> Rather, the Tribe’s testimony addresses whether the whales that migrate to North America (and may potentially be affected by the proposed hunt) are part of the ESA-listed stock for purposes of the MMPA.

Finally, Animal Welfare Institute, which sought at the pre-hearing conference to add the term “best scientific evidence available” to many issues for the hearing “just to make clear that the burden of proof is still on NMFS and that the standard is the best available science standard,” appears to abandon that approach when it comes to evidence regarding a scientifically supportable stock structure for “WNP” gray whales. Pre-hearing Conference Tr. at 49-52. Rather, it asserts in conclusory fashion that “it is beyond dispute that the WNP stock is a single stock listed as endangered under the ESA,” AWI Motion at 4, while presenting no evidence to refute the testimony of Dr. Bickham and Mr. Scordino. *See* Rebuttal Testimony of DJ Schubert ¶¶ 57-60. The MMPA does not call for blind faith in NMFS’s SARs, but instead requires the application of the best scientific evidence available by the Presiding Officer and NMFS in

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<sup>7</sup> This proceeding under the MMPA cannot affect the listing status of a species listed as threatened or endangered under the ESA. The primary means to challenge listing status is in federal district court under Section 11 of the ESA, 16 U.S.C. § 1540(g)(1)(C), to address non-discretionary duties under ESA Section 4, 16 U.S.C. § 1533. Docket No. 19-NMFS-0001  
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making decisions on the proposed waiver and regulations. The testimony submitted by the Tribe on the stock structure of WNP gray whales falls squarely within – and is necessary to satisfy – this statutory mandate.

Although NMFS’s position is at least consistent as to PCFG and WNP stock structure testimony, its arguments for the exclusion of the Tribe’s WNP stock structure testimony fares no better than Animal Welfare Institute’s. First, as it did when this issue was argued at the pre-hearing conference, Pre-hearing Conference Tr. at 75-77, NMFS fails to mention the portion of the partial stipulation where the parties agreed that “evidence concerning the various populations, stocks, or groups of gray whales recognized or supported by the scientific literature . . . may be considered.” Partial Stipulation re Scope at 4; NMFS Motion at 9-10. This should be the beginning and end of the matter. NMFS’s emphasis on the MMPA’s Section 117 stock identification process and the agreement in the partial stipulation that the hearing is not the proper vehicle “for identifying or challenging the identification of any particular population stock under the MMPA” is of no consequence because, as the Tribe explained, the presentation of scientific evidence for purposes of evaluating the proposed waiver and regulations against the MMPA’s criteria is not a formal challenge to NMFS’s two gray whale SARs and would not change them regardless of how the Presiding Officer addresses this issue in the recommended decision. Pre-hearing Conference Tr. at 77-79; Makah motion at 7. Rather, presentation of such testimony is entirely consistent with the MMPA’s “best scientific evidence available” mandate, which is applicable to both the waiver and regulations. Instead of allowing the parties to present scientific evidence on the whales potentially affected by the proposed hunt, including the groups or stocks to which they belong, NMFS urges a “trust but don’t verify” approach. Prehearing Conference Tr. at 76-77 (“our position is that for this proceeding, that the Court would accept that there are two stocks that have been identified, the WNP and the ENP stock, and that the Pacific Coast Feeding Group is

considered a part of the ENP stock”); NMFS Motion at 10. This is contrary to a fundamental requirement of the MMPA and should be rejected.

### **III. Response to Additional Issues Raised by NMFS.**

NMFS’s motion raises several other issues to which the Tribe provides a brief response.

#### **A. Issues Subject to the ICRW and WCA.**

The Tribe agrees that certain issues related to whether Makah qualifies for an aboriginal subsistence whaling catch limit approved by the IWC should be excluded as beyond the scope of the hearing. However, NMFS’s request that Issues II.A.2.b.vi.A-E<sup>8</sup> be excluded in their entirety should be denied. Rather, as the Tribe explained above and in its motion, the components of this issue that relate to the Tribe’s treaty right are relevant and should be retained and moved with Issue II.A.2.a to a new, stand-alone Section III of the Final Agenda focused on the Tribe’s treaty right. Makah Motion at 8-10.

#### **B. Testimony Related to MMPA Section 104.**

NMFS seeks to exclude certain testimony on the basis that the parties agreed in the partial stipulation to exclude evidence challenging the manner of taking, “including whether the manner of taking whales is ‘humane’ . . . or would pose risks to human safety.” NMFS Motion at 9 (quoting Partial Stipulation re Scope at 4). The Tribe joined the partial stipulation and agrees that testimony regarding safety issues or the “humaneness” of the hunt are outside the scope of the hearing. However, the Tribe wishes to clarify, consistent with its explanation at the pre-hearing conference, that the stipulation would not exclude evidence regarding the “mechanics of the hunt,” including testimony describing the Tribe’s proposed method of hunting and the process for developing that method. Pre-hearing Conference Tr. at 30-31.

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<sup>8</sup> Issues II.A.2.b.vi and II.A.2.b.vi.C both incorrectly replace “subsistence” with “substance”.

### C. The Relevance of *Anderson v. Evans* to this Proceeding.

NMFS seeks to exclude Issue II.A.6.a from the Final Agenda regarding the appropriate degree to which the analysis in *Anderson* should be considered in the hearing. NMFS Motion at 14. While this is a legal, not a factual, issue, and thus seems ill-suited as an issue for the hearing, the Tribe disagrees with NMFS that the MMPA portion of *Anderson* is irrelevant. The Tribe and NMFS are both seeking to implement the Ninth Circuit's mandate that the Tribe must obtain a waiver before exercising its treaty whaling right and that NMFS must review the Tribe's waiver request. Thus, the portion of *Anderson* addressing the MMPA's requirements is, at a minimum, relevant to the MMPA waiver process.<sup>9</sup>

### IV. Conclusion.

For these reasons, the motions should be denied as they pertain to the Tribe's initial direct testimony and supporting documentary evidence and the specific issues for the hearing identified above.

Respectfully submitted this 19th day of August, 2019.

ZIONTZ CHESTNUT

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<sup>9</sup> Contrary to NMFS's motion, the Third Declaration of Chris Yates, ¶ 30, does not state that the *Anderson* court's MMPA holding is irrelevant "because the Tribe is now seeking MMPA authorization as directed." NMFS Motion at 14 (citing Third Yates Decl. ¶ 31).