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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 **SEA SHEPHERD’S PRE-HEARING BRIEF**

14 Sea Shepherd Legal (SSL) and Sea Shepherd Conservation Society (SSCS) (collectively  
15 “Sea Shepherd”) submit this pre-hearing brief in accord with Administrative Law Judge (ALJ)  
16 Jordan’s October 25, 2019 order approving the final hearing management plan. Dkt. No. TBA  
17 (Order Approving Hearing Management Plan).

18 As previously articulated through written testimony and other filings, Sea Shepherd contends  
19 that the present rulemaking is unjustified under the Marine Mammal Protection Act (MMPA),  
20 associated regulations, and governing case-law. Sea Shepherd is confident that its evidentiary  
21 submissions will demonstrate that the proposed waiver and associated regulations unlawfully  
22 authorize activities that will (1) produce significant disturbances to gray whales targeted by, and in  
23 the vicinity of, those activities, (2) pose a substantial threat to Pacific Coast Feeding Group (PCFG)  
24 gray whales, due in part to the fact that PCFG gray whales exhibit a considerable degree of site  
25 fidelity within areas such as the Makah Indian Tribe’s (Tribe) usual and accustomed fishing grounds

1 (Makah U&A), (3) infringe upon the rights in common of non-tribal citizens to engage in non-  
2 consumptive uses of gray whales, and (4) combine with other threats and impacts, including (most  
3 significantly) the ongoing Unusual Mortality Event (UME), to produce a scenario fraught with  
4 uncertainty and the potential for catastrophic consequences.

5 While the purpose of this hearing is susceptible to a narrow characterization — to produce a  
6 final record to inform ALJ Jordan’s recommended decision on a “limited” waiver of the MMPA —  
7 far more hangs in the balance. NMFS has not authorized a whale hunt in the contiguous United  
8 States since 1999. If NMFS’s proposed waiver is approved, this critical step would create  
9 considerable momentum in favor of the first legal whale hunt in twenty years — and the first of the  
10 present millennium. The upcoming hearing will, in large measure, determine whether that happens.  
11 For the whales themselves, this proceeding is anything but a purely technical exercise.

12 For the country as a whole, this hearing marks an inflection point. The United States has  
13 long been a global leader in cetacean conservation. The MMPA erects a strong default rule against  
14 the intentional taking of whales. This default rule is to be modified in only the rarest of  
15 circumstances, with the burdens of proof and persuasion resting squarely with the proponent of a  
16 waiver. Those circumstances, and the burdens that accompany them, are absolutely not satisfied in  
17 the present case.

## 18 **BACKGROUND**

19 On February 14, 2005, the National Marine Fisheries Service (NMFS) received a request  
20 from the Tribe for a waiver of the MMPA moratorium on the take of marine mammals to allow for  
21 take of Eastern North Pacific (ENP) gray whales. *Announcement of Hearing Regarding Proposed*  
22 *Waiver and Regulations Governing the Taking of Marine Mammals (Announcement of Hearing)*, 84  
23 Fed. Reg. 13639, 13640 (col. 2) (April 5, 2019). Approximately ten years later, on March 13, 2015,  
24 NMFS released a draft environmental impact statement (DEIS) to analyze the proposed waiver in  
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1 response to this request. *Id.*; *Draft EIS: The Makah Tribe Request to Hunt Gray Whales*, announced  
2 in 80 Fed. Reg. 13373 (March 13, 2015).

3 On April 5, 2019, NMFS notified stakeholders and the public at large that a formal hearing  
4 would take place later this year. *Announcement of Hearing*, 84 Fed. Reg. at 13639 (col. 3). In  
5 compliance with the announcement and governing regulations, 28 C.F.R. § 228.1 *et seq.*, several  
6 individuals and entities, including Sea Shepherd, became parties to the proceeding.

7 From that point on, the record developed quickly, with the parties submitting a substantial  
8 volume of initial direct and rebuttal testimony. Sea Shepherd’s rebuttal submissions included  
9 testimony by Dr. Stella Villegas-Amtmann and Carrie Newell, M.S. Dkt. 56 (Rebuttal Testimony of  
10 Dr. Stella Villegas-Amtmann) (“Villegas-Amtmann Rebuttal”); Dkt. 56 (Rebuttal Testimony of  
11 Carrie Newell, M.S.) (“Newell Rebuttal”). On August 6 and September 11, respectively, several  
12 parties submitted direct and rebuttal testimony on the new issue of the “unusual mortality event”  
13 (UME) affecting gray whales along the west coast.

14 In addition to these submissions, the parties engaged in significant motion practice regarding  
15 certain procedural and evidentiary issues. ALJ Jordan issued orders on these motions over time,  
16 including a ruling on several motions *in limine* on October 9, 2019. Dkt. 93 (Order on Motions *in*  
17 *Limine*).

### 18 **STATUTORY AND REGULATORY FRAMEWORK**

19 The purpose of this hearing is (1) to determine whether a waiver of the MMPA’s take  
20 prohibition should be granted to allow the Tribe to hunt for ENP gray whales, and (2) if a waiver is  
21 granted, to determine the regulatory framework that will implement that waiver. *See Announcement*  
22 *of Hearing*, 84 Fed. Reg. at 13639 (col. 3); *see also* 16 U.S.C. § 1371(a)(3)(A); 16 U.S.C. § 1373(b).

23 A waiver determination is governed exclusively by the waiver factors set forth in section 101  
24 of the MMPA. 16 U.S.C. § 1371(a)(3)(A). Section 101 provides that NMFS may only grant a  
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1 waiver if the agency has given “due regard” to the following scientific variables associated with the  
2 animals in question: (1) distribution; (2) abundance; (3) breeding habits; and (4) times and lines of  
3 migratory movements. *Id.* A determination is guided by these factors to ensure that a waiver is  
4 compatible with the conservation principles of the MMPA. *See id.*

5  
6 If NMFS grants a waiver, the agency then proceeds to issue regulations governing the  
7 authorized take under section 103 of the MMPA. Like section 101, section 103 provides a list of  
8 factors — here, factors that NMFS must consider when designing regulations. These factors  
9 include: “(1) existing and future levels of marine mammal species and population stocks; (2) existing  
10 international treaty and agreement obligations of the United States; (3) the marine ecosystem and  
11 related environmental considerations; (4) the conservation, development, and utilization of fishery  
12 resources; and (5) the economic and technological feasibility of implementation.” 16 U.S.C. §  
13 1373(b).

14  
15 Procedurally, NMFS’s decision to grant a waiver and issue associated regulations is  
16 governed by the formal rulemaking provisions of the Administrative Procedure Act (APA), 5 U.S.C.  
17 §§ 556-557, along with the complementary provisions set forth in 50 C.F.R. Part 228. Under this  
18 rubric, “the proponent of a rule or order [here, NMFS] has the burden of proof[.]” 5 U.S.C. § 556(d).

19  
20 Ultimately, a waiver and any associated regulations may not be issued unless they are  
21 consistent with the law “and supported by and in accordance with the reliable, probative, and  
22 substantial evidence.” *Id.* Upon judicial review, a court will set aside an agency decision if it is,  
23 *inter alia*, “unsupported by substantial evidence” or “arbitrary, capricious, an abuse of discretion, or  
24 otherwise not in accordance with law.” 5 U.S.C. § 706(2)(C) & (E).

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1 **DISCUSSION**

2 **I. The final record evidence will show that the proposed waiver and regulations**  
3 **would authorize activities that would produce significant disturbances to those**  
4 **gray whales targeted by, and in the vicinity of, those activities.**

5 NMFS and the Tribe contend that the various hunting and training approaches that do not  
6 result in lethal takes will produce only “temporary and localized” effects. Dkt. No. 5 (Direct  
7 Testimony of David Weller) (“Weller Direct”), at ¶ 50; *see also* Dkt. No. 31 (Initial Direct  
8 Testimony of Jonathan Scordino) (“Scordino Direct”), at ¶ 102 (“Non-lethal impacts from training,  
9 approaches, and unsuccessful harpoon attempts are unlikely to cause changes in the behaviors of  
10 gray whales because the level of harassment and injury caused by those activities are similar to or  
11 even less than permitted scientific research that is not thought to negatively impact gray whale  
12 behaviors or to cause shifts in gray whale distributions.”).

14 The position advanced by NMFS and the Tribe is based in part on the assertion that “there is  
15 no evidence that Chukotkan hunts [of grey whales in Russia] cause shifts in gray whale distributions  
16 or abundance.” Scordino Direct at ¶ 26. That is not true. As Dr. Villegas-Amtmann testifies, the  
17 underlying study cited by Scordino regarding the Chukotkan hunts (Blokhin and Litovka (2011) and  
18 Blokhin *et al.* (2017)) did *not* reach conclusions as to the extent to which those hunts caused shifts in  
19 abundance or distribution *in the hunt area* (focusing instead on impact to the overall stock numbers  
20 in Russia). The study Scordino cites also did *not* analyze whale behavior in response to the hunting  
21 activities. Furthermore, the study did *not* even attempt to ascertain if the same whales return to the  
22 limited study area each year, “rendering it impossible to know whether whales that survived  
23 previous hunting seasons in the subject small observation area actually return the following year.”  
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1 Villegas-Amtmann Rebuttal, at ¶ 7. In fact, the underlying study suggests that numbers varied  
2 considerably over the years, which would be consistent with the inference that “the extreme  
3 fluctuations in reported numbers [of whales] are due to disturbance related to the hunts.” *Id.*

4 In addition, Dr. Villegas-Amtmann explains how the timing of the proposed training  
5 exercises and non-lethal strikes would likely serve as an aggravating factor. As Dr. Villegas-  
6 Amtmann observes, “[t]he proposed even year hunt (December-May), and a portion of the training  
7 exercises, would occur during the northward migration toward the foraging grounds for the ENP  
8 whales and upon arrival at foraging grounds for the PCFG whales.” *Id.* at ¶ 24. At this point in their  
9 northward migration, the whales are more likely to be in an emaciated state and thus more  
10 vulnerable to consequential energy loss from non-lethal disturbances. *Id.* Additionally, the hunt and  
11 training exercises would encounter vulnerable pregnant female whales (early in the season) and  
12 females with calves (later in the season, during an odd-year hunting season). *Id.* at ¶ 25. Pregnant  
13 females have higher energy requirements. *Id.* As a result, “disturbance at the beginning of the  
14 feeding season may place them at greater risk” of, *inter alia*, suffering an aborted fetus. *Id.* As for  
15 mothers with calves, this population is especially “vulnerable to disturbance given the energetic  
16 constraints of supporting themselves and a calf through lactation.” *Id.*

17 For her part, gray whale expert Carrie Newell submits powerful testimony contradicting  
18 Scordino’s proposition that “permitted scientific research” — which the Tribe contends is analogous  
19 to, or even more benign than, non-lethal hunting and training activities — “is not thought to  
20 negatively impact gray whale behaviors or to cause shifts in gray whale distributions.” Scordino  
21 Direct, at ¶ 102. Newell points to the case of a PCFG gray whale called “Ginger” as a prime  
22 example of how seemingly “non-intrusive” scientific research can have lasting and significant  
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1 impacts. Newell Rebuttal, at ¶ 22-23. Newell observed Ginger, a PCFG whale, for over five years.  
2 *Id.* at ¶ 22. Until the 2019 season, Ginger engaged in predictable and consistent breathing and  
3 feeding patterns. *Id.* Those patterns changed dramatically in 2019, when a research vessel began to  
4 follow Ginger to collect fecal samples. *Id.* at ¶ 23. The vessel’s close trailing of Ginger provoked  
5 her to change her diving and swimming patterns significantly (expending more energy by diving for  
6 longer periods of time and swimming faster) and, ultimately, to abandon her normal feeding area  
7 near Depoe Bay. *Id.*

9 In addition, Newell points to a pair of other research operations focused on the Depoe Bay  
10 PCFG gray whales — including an operation in which she partnered with Scordino — that produced  
11 significant disturbances to the whales. *Id.* at ¶ 24. In the operation with Scordino, most of the  
12 whales left the area after being hit with an “arrow” used to collect DNA samples. *Id.* Although “[a]  
13 few of the whales returned days later, . . . some never returned.” *Id.* In the mid-2000s, a similar  
14 outcome was produced when another researcher came into the Depoe Bay area to satellite tag some  
15 of the PCFG gray whales. *Id.* As was the case in the operation with Scordino, most of the whales  
16 departed the area. *Id.*

18 On balance, the hearing record will show that the non-lethal portion of the contemplated  
19 activities would produce significant adverse disturbances to both ENP gray whales and PCFG gray  
20 whales, rendering NMFS’s proposal untenable under sections 101 and 103 of the MMPA.

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1           **II. The final record evidence will show that the proposed waiver and regulations**  
2           **would authorize activities posing a substantial threat to PCFG gray whales, due**  
3           **in part to the fact that PCFG gray whales exhibit a considerable degree of site**  
4           **fidelity to areas such as the Makah U&A.**

5           Although NMFS limits its proposed MMPA waiver to ENP gray whales, other smaller  
6           populations of gray whales are intermingled with the ENPs. One such group is the summer resident  
7           gray whales (a/k/a the PCFGs), of which there are only 243 individuals. These PCFGs have high  
8           site fidelity and spend a considerable time in close proximity to passive whale watching tours where  
9           they are enjoyed by thousands of whale watchers every year along the Pacific coast. Newell  
10          Rebuttal, at ¶¶ 16, 33-41. The other group is the endangered Western North Pacific (WNP) gray  
11          whales that are protected under the Endangered Species Act. Not only is it impossible for the for the  
12          hunters to distinguish between ENPs, PCFGs, and WNP during a hunt, but the PCFGs in particular  
13          are so accustomed to having vessels nearby that they are virtual “sitting ducks.” Newell Rebuttal, at  
14          ¶ 16. Accordingly, the extreme risks to these smaller populations from the proposed Makah hunt  
15          further supports denial of the MMPA waiver.

16           In its submitted testimony, Sea Shepherd focuses on the threats to the PCFG gray whales.  
17          NMFS and the Tribe insist that any such threats are minimal. They base this argument, in part, on  
18          the notion that the Makah U&A is of marginal importance to the PCFG gray whales. NMFS and the  
19          Tribe opine that PCFG gray whales exhibit minimal levels of site fidelity to areas like the Makah  
20          U&A. *See, e.g.*, Scordino Direct, at ¶¶ 42-43, 57, 101-102. Specifically, Scordino contends that  
21          PCFG gray whales “generally do not show strong fidelity to areas of coastline of less than 60  
22          kilometers,” and he observes that the Makah U&A covers a shorter stretch of coast. *Id.* at ¶¶ 57,  
23          24          101. Thus, according to this point of view, if the Makah U&A becomes an inhospitable  
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1 environment, the PCFG gray whales can simply transition to a different feeding ground with little to  
2 no inconvenience.

3 Scordino’s position is not supported by the best available science. First, Scordino incorrectly  
4 asserts that the *only* variable that meaningfully influences PCFG distribution with respect to feeding  
5 grounds is prey availability. While acknowledging that prey availability is an important factor in  
6 gray whale distribution, Newell explains that this is not the *only* factor. *Id.* at ¶ 31. For the PCFG  
7 gray whales, additional factors driving their preferred feeding locations may include shorter  
8 migration distances (compared to the Arctic feeding grounds), a longer feeding period (same), and  
9 reduced energy loss due to the warmer temperatures (same). *Id.* In contrast, Scordino attempts to  
10 argue that PCFG gray whale distribution is driven by prey availability. *See* Scordino Direct, at ¶ 59  
11 (“I expect fluctuations in numbers and distribution of whales in the PCFG range and on northern  
12 feeding grounds to continue whether or not the Makah Tribe is whaling due to changes in the  
13 availability and quality of prey.”). By downplaying the other factors that influence PCFG  
14 distribution and migration patterns, Scordino’s opinion ignores the evidence that PCFG gray whales  
15 choose sites based on a variety of factors and paints an overly simplistic picture of PCFG behavior.  
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18 Based upon decades of on-the-water experience, expert Carrie Newell testifies that PCFG  
19 gray whales exhibit strong site fidelity to limited areas of coastal waters, for example, near Depoe  
20 Bay, Oregon. Newell Rebuttal, at ¶¶ 33-36. Newell has observed PCFG gray whales such as  
21 “Ginger,” “Comet,” “Yogi,” “Morisa,” and “Scarback” consistently feeding in small areas (*e.g.*, two  
22 square miles) for months at a time, and often year after year. *Id.* at ¶¶ 34-35.  
23

24 Rather than marking an inconsistency with the scientific literature (*i.e.*, where Newell’s  
25 experience indicates one state of affairs, but the literature suggests another), Newell’s observations

1 can be completely reconciled with the literature referenced by Scordino. *See* Newell Rebuttal, at ¶¶  
2 38-41. In his testimony, Scordino relies heavily on Lagerquist *et al.* (2019) for the proposition that  
3 “PCFG whales are commonly observed using a range of sites that exceeds 60 nautical miles (on a  
4 north-south gradient), a distance greater than the north to south extent of the Makah U&A.”  
5 Scordino Direct, at ¶ 57. However, as Newell notes, the findings by Lagerquist *et al.* (2019) could  
6 be due to a number of factors, including a different temporal focus in the Lagerquist tagging study  
7 (as opposed to photo-identification studies) and small sample size. Newell Rebuttal, at ¶¶ 38-41.  
8 More fundamentally, even if it appears that *some* PCFG gray whales tend to exhibit fidelity to sites  
9 over 60 nautical miles in length, this does not mean that *all* (or even a majority) of PCFG gray  
10 whales conform to this pattern. *Id.* at ¶ 41. Again, Newell’s research and direct observation show  
11 that a significant number of PCFG gray whales show strong site fidelity to areas much smaller than  
12 60 nautical miles in a north-south orientation. *Id.*

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15 In short, Newell’s testimony demonstrates that PCFG gray whales exhibit strong site fidelity.  
16 Accordingly, the proposed hunting activities will adversely impact the ability of PCFG gray whales  
17 to use their preferred feeding grounds in violation of sections 101 and 103 of the MMPA.

18 **III. The final record evidence will show that the proposed waiver and regulations**  
19 **would authorize activities that would infringe upon the rights in common of non-**  
20 **tribal citizens to engage in non-consumptive uses of gray whales.**

21 In previous filings, *see, e.g.*, Dkt. No. TBA (Sea Shepherd’s Motion to Exclude Regarding  
22 Treaty Right and Cultural Significance of Whaling), Sea Shepherd described how the governing case  
23 law establishes that non-tribal citizens hold co-tenancy rights in the “uses” of gray whales. In  
24 *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2002), the Ninth Circuit held that the 1855 Treaty of  
25 Neah Bay did not grant the Tribe an *exclusive* right to use, or otherwise interact with, whales. The

1 court reached this conclusion because, *inter alia*, the Treaty of Neah Bay states that the Tribe has the  
2 right to use whales “in common with” all citizens of the United States. *Id.* at 500 (quoting the Treaty  
3 of Neah Bay). As a result, the court found that the treaty language creates a “co-tenancy” in the  
4 “resource.” *Id.* The court explained the upshot of this co-tenancy relationship in the following  
5 terms: “[T]he Makah cannot, consistent with the plain terms of the treaty, hunt whales without  
6 regard to processes in place and designed to advance conservation values by preserving marine  
7 mammals or to engage in whalewatching, scientific study, and other non-consumptive uses.” *Id.* at  
8 501.

10 To provide a concrete example of the non-consumptive uses that the proposed waiver would  
11 threaten, Sea Shepherd offered the testimony of Carrie Newell. Newell Rebuttal, at ¶¶ 9-18. Ms.  
12 Newell’s career and livelihood depend upon healthy populations of ENP gray whales in general and  
13 PCFG gray whales in particular. As the founder and owner of Whale Research EcoExcursions  
14 (WREE), Ms. Newell has operated whale-watching tours in the Depoe Bay area since 2005. *Id.* at ¶  
15 1. Before that, starting in 1992, Ms. Newell began observing whales as a naturalist on board vessels  
16 in Depoe Bay and Newport. *Id.* at ¶ 3. Since 1992, Newell has photographed PCFG gray whales  
17 “almost daily” during the summer feeding months, compiling photographic data and vast volumes of  
18 other scientifically reliable data that contribute to scientific understanding of the PCFG gray whales.  
19 *Id.* at ¶ 3.

21 Newell’s work relating to the PCFG gray whales is not only legally grounded in co-tenancy  
22 rights; it is critically important to Newell’s human clients, to the state of the science on PCFG gray  
23 whales, and to her ability to earn a living. Through her whale-watching business, Newell interacts  
24 with 100 or more clients every day. *Id.* at ¶ 11. Many of these clients tell Newell that she has  
25

1 “given them the best day of their lives.” *Id.* In addition to sharing these experiences with clients, the  
2 presence of PCFG gray whales in and near Depoe Bay allows Newell to participate in the multi-  
3 million-dollar business that is whale-watching in Oregon. *Id.* at ¶ 13. Whale-watching is critical to  
4 the local economy of Depoe Bay — so much so that this municipality of less than 1,500 full-time  
5 residents is host to three other whale-watching businesses. *Id.*

6  
7 Of equal importance, Newell’s whale-watching work directly contributes to data compilation  
8 regarding gray whales off the Central Oregon coast. Newell’s photo-ID work has produced an  
9 unparalleled data set. *Id.* at ¶ 12. In addition to meticulously identifying these summer resident  
10 whales, Newell knows “many other things about them, including their personalities, site preferences,  
11 approximate ages, sex, unique behaviors, calving history, body conditions, exposure to recent orca  
12 attacks, and companions.” *Id.* If “even one individual” is eliminated from this data set due to the  
13 proposed hunt activities, this would result in the “loss of much valuable information.” *Id.*

14  
15 On the topic of risks to the PCFG gray whales that frequent Depoe Bay, Newell testifies that  
16 she “know[s] that at least some of the whales that [she] observe[s] year after year in Depoe Bay  
17 travel to Neah Bay.” *Id.* In fact, the whale that was killed illegally in 2007 was an individual that  
18 Newell had photographed two weeks earlier in Depoe Bay. *Id.* Far from representing an abstract  
19 threat to the whales that Newell studies and relies upon for her livelihood, the proposed waiver and  
20 hunting activities pose a genuine danger to this population.

21  
22 In his October 9<sup>th</sup> Order, ALJ Jordan states that Sea Shepherd “has not explained why  
23 evidence concerning non-consumptive uses of whales by either tribal or non-tribal members would  
24 be relevant.” Order on Motions *in Limine*, at 19. The ALJ further concludes that “[n]on-  
25 consumptive uses are not a mandatory factor for consideration in the waiver analysis.” *Id.* Sea

1 Shepherd respectfully, but strenuously, disagrees with these statements on two primary grounds.  
2 First, as set forth in Sea Shepherd’s briefing (both in its motion to exclude treaty evidence and in  
3 response to NMFS’s motion to exclude certain Newell testimony), the *Anderson* court has already  
4 spoken on this issue – directly holding that co-tenancy rights “must be considered” during the waiver  
5 process:  
6

7 Mindful of th[e] recognition [that regulation for conservation is permissible  
8 despite the existence of treaty rights], we conclude that to the extent there is a  
9 “fair share” of marine mammal takes by the Tribe, the proper scope of such a  
10 share *must be considered* in light of the MMPA through its permit or waiver  
11 process. The MMPA will properly allow the taking of marine mammals only  
12 when it will not diminish the sustainability and optimum level of the resource for  
13 all citizens. The procedural safeguards and conservation principles of the MMPA  
14 ensure that marine mammals like the gray whale can be sustained as a resource  
15 for the benefit of the Tribe and others.

16 371 F.3d. at 501 (emphasis added).

17 Second, and as also encompassed by the above quote from *Anderson*, the non-consumptive  
18 use of whales cannot be “diminished” by the Tribe’s taking of whales through its hunts. As  
19 established by the testimony of Carrie Newell, there is a significant risk that the proposed hunts will  
20 remove the very whales that she studies and exposes countless of individuals and families to through  
21 her whale watching excursions every year. The decisionmaker in this proceeding is, thus, bound to  
22 consider and weigh this risk (among many others) in determining whether to grant a waiver of  
23 MMPA protections. As asserted by Sea Shepherd in its response to NMFS’s request to exclude  
24 Newell’s testimony on non-consumptive uses, the “ALJ must also have the opportunity to  
25 understand the nature and extent of these competing [non-consumptive] rights and whether, when  
viewed through the lens of the scientific waiver factors, other (non-tribal) citizens would be deprived

1 of a “fair apportionment” of the subject “resource.” Dkt. No. 88 (Sea Shepherd’s Response to  
2 NMFS’s Motion to Limit Rebuttal Issues and Testimony), at 5.

3           Apparently following the cue from NMFS’s arguments in its motion to exclude Sea  
4 Shepherd’s rebuttal evidence, ALJ Jordan further observes that “to my knowledge, . . . [no] other  
5 person or group submitted an application for a waiver under the MMPA to ‘take’ gray whales for  
6 non-consumptive purposes (for example, to engage in behaviors that may be deemed harassing or  
7 annoying to the whales).” Order on Motions *in Limine*, at 19. Respectfully, this statement (like the  
8 equivalent assertion by NMFS) erects a nearly insurmountable barrier to the consideration of non-  
9 consumptive use evidence – a barrier not in any way contemplated by *Anderson* and, in fact, directly  
10 contrary to the holding of that case emphasizing the importance of the co-tenancy rights of non-tribal  
11 members.<sup>1</sup> Stated more specifically, the *Anderson* court mandated the consideration of such  
12 evidence *in a waiver proceeding brought by a tribe*, not by a non-tribal party, and further explained  
13 why this evidence was important to that particular proceeding. Accordingly, *Anderson* clearly and  
14 explicitly supports the right of a non-tribal citizen to introduce evidence of its co-tenancy rights in  
15 opposing a treaty-based request for an MMPA waiver in order to “harvest” whales. The admission  
16 of this evidence into the record (and its consideration in making a waiver decision) is not  
17 discretionary but rather mandated by law.  
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21 <sup>1</sup> Citing *Herrera v. Wyoming*, ALJ Jordan also questions whether the Ninth Circuit interpreted the  
22 phrase “in common with all citizens of the United States,” as the signatories to the Treaty of Neah  
23 Bay “would have understood it to mean.” Order on Motions *in Limine*, at 18, n.2. However, the  
24 U.S. Supreme Court’s decision in *Herrera* does not undermine the *Anderson* interpretation of this  
25 treaty language. In reaching its holding on this point, the *Anderson* court relied upon well-settled  
case law (including Supreme Court case law) that followed principles of treaty interpretation left  
unassailed by *Herrera*. See *Anderson*, 371 F.3d. at 500. Thus, the co-tenancy argument has already  
been resolved by a court of competent jurisdiction.

1           **IV. The final record evidence will show that the proposed waiver and regulations**  
2           **would authorize activities that, when combined with the ongoing UME, would**  
3           **produce a scenario fraught with uncertainty and the potential for catastrophic**  
4           **consequences.**

5           Although the final record evidence in this proceeding will demonstrate significant impacts to  
6           the gray whales – and most especially PCFG and WNP gray whales – from the proposed hunt, even  
7           if such evidence were not introduced, there is a single factor sufficient (standing on its own) to  
8           preclude granting a waiver to the Tribe. That factor is, of course, the present and UME declared by  
9           NMFS for gray whales earlier this year. Notably, evidence of this potentially catastrophic mortality  
10          event is directly relevant to the waiver proceeding, as the statutory language authorizing waivers  
11          instructs NMFS to conduct the analysis with, inter alia, “due regard to the distribution, *abundance*,  
12          breeding habits, and times and lines of migratory movements of such marine mammals[.]” 16 U.S.C.  
13          § 1371(a)(3)(A) (emphasis added).

14          In her testimony, Ms. Newell highlights the UME as a prime example of the way that NMFS  
15          and the Tribe have “fail[ed] to account for the additive effect of such disturbance [from hunt  
16          activities] in conjunction with other environmental stressors.” Newell Rebuttal, at ¶ 25. Contrary to  
17          NMFS and the Tribe, it is Newell’s expert opinion that the UME “places [gray whales] at an  
18          extremely high risk – particularly the very small population of PCFGs.” *Id.* Newell noted that gray  
19          whales are “negatively buoyant,” meaning that they tend to sink when they die. *Id.* Although  
20          NMFS acknowledges this fact – the agency estimated that the 191 whales that had washed ashore as  
21          of the date of Newell’s declaration represented only 3.9% to 13% of the total number of gray whales  
22          that had succumbed to the UME – it does not seem to appreciate the upshot. *Id.* Using NMFS’s  
23          own estimates, Newell observed “that between 1,469 and 4,897 gray whales ha[d] been lost” due to  
24          the UME as of the date of her declaration. *Id.* Newell observes that this UME has not only led to a  
25

1 die-off, but it has also left many surviving whales emaciated. *Id.* at ¶ 26. As Newell explained, “any  
2 further disturbance will exacerbate the issue.” *Id.*

3         Since Sea Shepherd submitted Ms. Newell’s declaration in early August, many more gray  
4 whales have washed ashore along the Pacific Coast. With the current number at over 212 whales,  
5 the actual number of dead whales is likely closer to 5,400 – a number representing up to 20 percent  
6 of the total ENP population (assuming, for the sake of argument, that only ENPs have been lost in  
7 the UME) – and there are no signs that the UME is abating. While the precise cause of the UME has  
8 not been determined, the evidence collected to date strongly suggests that the gray whales are  
9 starving to death. *See, e.g.*, Dkt. No. 72 (Rebuttal Testimony of Donald J. (“DJ”) Schubert)  
10 (“Schubert Rebuttal”), Ex. 37 (F. Ronzón-Contreras et al., Gray whales’ body condition in Laguna  
11 San Ignacio, BCS, México, during 2019 winter breeding season SC/68A/CMP/13) & Ex. 38 (S.  
12 Martínez-Aguilar, et al., Gray whale (*Eschrichtius robustus*) stranding records in Mexico during the  
13 winter breeding season in 2019, SC/68A/CMP/14). Yet, NMFS has admitted that any results of its  
14 investigation into the UME will not likely be disclosed for years. *See* Fourth Declaration of Chris  
15 Yates, ¶ 2; Third Declaration of Dr. Shannon Bettridge, ¶ 12.

16         As emphasized in the rebuttal testimony submitted by AWI, this waiver proceeding should  
17 not go forward in the face of the extreme uncertainty associated with the actual impact and  
18 anticipated duration of the UME. *See* generally, Dkt. No. 72 (Schubert Rebuttal). Even assuming  
19 the efficacy of the proposed measures to allegedly protect WNP and PCFG gray whales (*e.g.* low  
20 abundance triggers for PCFG whales), such measures were not conceived with the present UME in  
21 mind. Indeed, at this point (again assuming *arguendo* that only ENPs have been lost during the  
22 UME), the ENP population has rapidly decreased by up to 20%. Given that NMFS calculated the  
23 probability that WNP gray whales will be hit during a hunt based on the estimated population of  
24 ENP gray whales before the UME, NMFS will now need to recalculate the risk to WNP gray whales  
25 – a risk that certainly could increase with a decrease in the ENP population. *See* Second Declaration



1 of Dr. Jeffrey Moore ¶ 8. Moreover, for its part, NMFS cannot provide any assurances that the  
2 vulnerable WNP and PCFG gray whale populations have not been impacted by the UME – or  
3 impacted in ways that already fatally undermine the proposed protections for these populations.

4 In light of the continuing UME and the great uncertainty surrounding its cause, duration, and  
5 effect on vulnerable gray whale populations, this waiver proceeding should, at the very least, be  
6 postponed to allow for the completion of a thorough scientific investigation. In this regard, when  
7 enacting the MMPA, Congress mandated that conservation, including maintaining healthy  
8 populations of marine mammals, is of highest priority. The legislative history of MMPA makes it  
9 clear that the *precautionary principle must be applied and that any bias must favor marine*  
10 *mammals*. See H.R. REP. NO. 92-707, at 24 (1971); 118 CONG. REC. S15680 (daily Ed. Oct. 4,  
11 1971) (statement of Sen. Packwood). Given the importance of the precautionary principle to the  
12 protection of marine mammals under the MMPA, NMFS should not be permitted to point to a lack  
13 of scientific certainty regarding the UME as a basis for allowing a waiver to go forward.

#### 14 CONCLUSION

15 Based upon the above testimony and the evidence to be elicited during the upcoming hearing,  
16 Sea Shepherd submits that the final record will show that the present rulemaking is unjustified under  
17 governing law.

18 Dated this 7th day of November 2019

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