



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northwest Region
7800 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115

APR 02 2008

Russell Woodruff
Chair, Quileute Tribal Council
Quileute Natural Resources
P.O. Box 187
La Push, WA 98350

Dear Mr. Woodruff,

Thank you for providing written notification of the Quileute Tribe's interest in harvesting Pacific whiting starting in 2009. Consistent with the process described at 50 CFR § 660.324 (d), I am forwarding your letter to the Pacific Fishery Management Council (Council) for inclusion in the April 2008 briefing book and for Council consideration under the 2009-2010 fishery specifications and management measures. As stated in section 660.324(d), the National Marine Fisheries Service (NOAA Fisheries) will develop tribal allocations and regulations in consultation with the affected tribes and, insofar as possible, with tribal consensus. NOAA Fisheries will make the allocation after consideration of the tribal allocation request, recommendations of the Council, and comments from the public.

At the Council's November 2007 meeting, the Makah tribal fishery representatives indicated that a new tribal allocation framework would be submitted to NOAA Fisheries for 2009-2010. We have not yet, however, received a new tribal allocation framework proposal. As Frank Lockhart, my Assistant Regional Administrator for Sustainable Fisheries, discussed with Mel Moon at the March Council meeting, we strongly urge you to coordinate with the Makah tribe to present a unified tribal proposal. Any whiting allocation will be an overall tribal allocation, and the intertribal distribution of the overall tribal allocation is an intertribal issue. NOAA Fisheries is available to work with the tribes on this issue, but both interested tribes must be involved. We also urge that the State of Washington, and possibly Oregon, be involved in discussions on the matter.

NOAA Fisheries recognizes the co-managers role of the Coastal Treaty Tribes over the shared federal and tribal resources. For NOAA Fisheries to meet its obligation for total catch accounting under the Magnuson-Stevens Fishery Conservation and Management Act, we will need to collect routine catch information on both Pacific whiting and incidentally caught species. We, therefore, think that a discussion of data gathering and reporting and potential bycatch issues should be included in the discussions. NOAA Fisheries generally collects catch information weekly during the fishing season.

Please contact Frank Lockhart at 206-526-6142 in order to coordinate further discussions on this matter.

Sincerely,

A handwritten signature in black ink that reads "D. Robert Loh".

D. Robert Loh
Regional Administrator

Cc: Mel Moon





Quileute Natur
QUILEUTE IND

401 Main Street • Pos
LaPush, Washing.
Phone: (360) 374-5695 • F

D. del JS
File _____ Action SFD
PLS prepare response
To SFD CC: _____

RECEIVED

APR 03 2008

PFMC

January 10, 2008

Robert Lohn
Regional Administrator
NMFS, Northwest Region
7600 Sand Point Way NE
Seattle, WA 98115-0070

RE: Quileute Tribal Request for Whiting Allocation or Regulation

Dear Mr. Lohn:

As you know, Washington coastal Indian Tribes, including the Quileute Tribe, have treaty rights to harvest groundfish, including Pacific whiting (or hake, *Merluccius productus*), within their respective usual and accustomed fishing grounds and stations ("U&A"). The Secretary of Commerce, through NMFS, has issued regulations allocating whiting to the coastal tribes since approximately 1996. The Quileute Tribe has not previously participated in this fishery. However, the Tribe anticipates that one or more of its members will do so commencing with the 2009 fishery. The Tribe communicated its intent to enter this fishery to Frank Lockhart of your office during a recent PFMC meeting in San Diego, California. The Tribe is not presently requesting an increase in the whiting allocation to all coastal tribes. However, pursuant to 50 C.F.R. § 660.324(d), the Tribe is hereby advising NMFS of its intent to participate in this fishery and requesting that NMFS take any action that may be necessary to implement the Tribe's right. If you would like to discuss this matter or believe that additional action by the Tribe is necessary, please contact Mel Moon, Director of Quileute Natural Resources, at (360) 374-3133.

Sincerely,

QUILEUTE INDIAN TRIBE

Russell Woodruff, Jr.
Chair, Quileute Tribal Council

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Via Telefax and First Class Mail

April 2, 2008

D. Robert Lohn
Regional Administrator
National Marine Fisheries Service
7600 Sand Point Way NE
Seattle, WA 98115-0070

Re: Treaty Indian Groundfish Fisheries in 2009 and 2010

Dear Mr. Lohn:

We have been asked to write to you on behalf of the Makah Indian Tribe. Pursuant to 50 C.F.R. § 660.324(d), the Tribe requests that provision be made for harvest of groundfish by Pacific coast treaty Indian tribes in 2009 and 2010 by continuing, with the exceptions noted below, the treaty regulations and allocations in effect in 2007 and 2008.

The exceptions are as follows. First, as in 2007 and 2008, the Tribe proposes that Tribal fisheries be subject to the Limited Entry trip limits in place at the beginning of each year for both shortspine and longspine thornyheads. However, the Tribe proposes that it be able to combine those trip limits for all periods and all midwater trawl vessels in the Makah fleet, and utilize the total amount in a way that minimizes bycatch of other species.

Second, the Tribe requests that its allocation in the Pacific whiting fishery be equal to 17.5 percent of the Optimum Yield for whiting, instead of using the sliding scale allocation table that has been in use since 1999. Moreover, if the Quileute Tribe intends to participate in the Pacific whiting fishery, an additional allocation should be provided for the Quileute Tribe and appropriate measures should be developed to address observer coverage for and bycatch in the Quileute fishery.

The Tribe's proposals for the Pacific whiting fishery are based on the following considerations. The sliding scale allocation table was first presented to the Pacific Fishery

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Management Council in September 1998 as a three-year proposal. At that time, Quileute had expressed interest in participating in the fishery. Accordingly, the sliding scale allocation table explicitly provided for separate Makah and Quileute allocations, as follows:

U.S. Harvest Guideline	Makah Allocation	Quileute Allocation
Up to 145,000 mt	17.5% of U.S. Harv. Guide.	2,500 mt
145,001 to 175,000 mt	25,000 mt	2,500 mt
175,001 to 200,000 mt	27,500 mt	2,500 mt
200,001 to 225,000 mt	30,000 mt	2,500 mt
225,002 to 250,000 mt	32,500 mt	2,500 mt
Over 250,000 mt	35,000 mt	2,500 mt

At the March 1999 Council meeting, Quileute announced that it would not be participating in the whiting fishery in 1999. Accordingly, NMFS used the sliding scale allocation table to make an allocation of 32,500 mt to Makah, based on an OY of 232,000 mt. See 64 Fed. Reg. 27,928, 27,929 (May 24, 1999).

Although the allocation was a "tribal" allocation, all parties understood that it had been requested by and was designed to meet the needs of the Makah Tribe alone. This was confirmed by the Ninth Circuit Court of Appeals when Midwater Trawlers Cooperative challenged the 1999 allocation. Among other things, Midwater argued that the allocation was based on an overly expansive definition of the coastal tribes' usual and accustomed grounds. The Court held Midwater lacked standing to challenge the usual and accustomed grounds of Hoh, Quileute or Quinault because "NMFS has not allocated any Pacific whiting to them." *Midwater Trawlers Co-op v. Department of Commerce*, 282 F.3d 710, 716 (9th Cir 2002) (emphasis added). Rather, "the only tribal allocation properly at issue is that to the Makah Tribe." *Id.*

Quileute has not requested an allocation in any other year, until now. In each year, Makah was the only Tribe requesting an allocation in the whiting fishery and the "tribal" allocation was based on the sliding scale allocation table to meet the needs of the Makah fishery.

Since the Makah Tribe proposed the sliding scale allocation table ten years ago, its fishery has developed and matured. Today, the Makah whiting fleet comprises five vessels that consistently participate in the fishery and fully harvest the Makah allocation. The Tribe has contractual arrangements with both an at-sea and a shore-based processor to harvest the catch. It has observer coverage on-board the at-sea processor and at the shore-based facility. It has a full retention policy for all bycatch and intensively manages the fishery to minimize bycatch of depleted groundfish species and chinook salmon.

Given the development of its fishery, the Tribe believes an allocation of 17.5 percent of

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the OY would better meet its needs while still remaining well within the scope of its treaty right. A straight 17.5 percent allocation would avoid sudden changes in the Tribe's allocation as a result of small changes in the OY. Also, the Tribe's understanding of the fishery, as a result of twelve years of experience, means that it can fully harvest a 17.5 percent allocation at higher OY levels with its existing fleet, while still minimizing bycatch.

In upholding the sliding scale allocation table, the Ninth Circuit began with the proposition that the Tribe "is entitled to one half of the Pacific whiting passing through its usual and accustomed fishing grounds." *Midwater Trawlers v. Department of Commerce*, 393 F.3d 994, 1003 (9th Cir. 2004). It then noted that NMFS' data suggest that Pacific whiting's migration pattern takes the bulk of the stock through the Makah Tribe's usual and accustomed fishing grounds. *Id.* This is significant because it means that all migrating coastal Pacific whiting are potentially exploitable by Makah. *Id.* at 1004. Accordingly, basing the Makah allocation on a percentage of the OY was consistent with the best available science and treaty allocation principles. *Id.* at 1004-05.

Under the sliding scale allocation table, "the Makah Tribe would be allocated a percentage ranging from 14 [to] 17.5 percent" of the OY. *Id.* at 1004. Midwater argued that NMFS failed to explain the scientific basis for this range. *Id.* at 1004 n.11. In rejecting this argument, the Ninth Circuit made it clear that a 17.5 percent allocation is well within the scope of the Makah's treaty right.

Contrary to Midwater's argument, [the] Fisheries Service is not required to establish that these percentages are supported by the best scientific information available. We have previously concluded that Makah's treaty rights entitle it to 50 percent "of the harvestable surplus of Pacific whiting that passes through its usual and accustomed fishing grounds, or that much of the harvestable surplus as is necessary for tribal subsistence." *Midwater II*, 282 F.3d at 719. Nothing, however, supports the notion that a tribe is obligated to take its full 50 percent entitlement. That the tribe opts to not take its full treaty share does not put [the] Fisheries Service in the position of justifying a tribe's lower allocation request. Rather, [the] Fisheries Service is required only to support its decision to use the U.S. Optimum Yield as the basis from which to measure the tribe's allocation. And, we conclude that [the] Fisheries Service has met this obligation.

Id. (italics in original, underlining added).

Accordingly, Makah's current proposal for an allocation of 17.5 percent of the OY will remain well within the scope of its treaty right and, indeed, will remain less than "its full treaty share."

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In order to avoid potentially significant disruption to the Makah fishery, Quileute's participation should be based on a separate allocation as contemplated when the sliding scale allocation table was first proposed in 1998. Quileute has not contacted the Makah Tribe to notify it of Quileute's plans to participate in the fishery, and has not provided any information to Makah regarding the number of Quileute vessels that will participate, the anticipated harvest of whiting, or the projected bycatch of other species. The Makah Tribe, its fishermen, their crews, and the processors have all made significant investments to establish and develop the Makah whiting fishery, and have foregone opportunities to participate in other fisheries. Makah's allocation requests have been designed to meet the needs of its fishery and to remain well within the scope of its treaty right. If Quileute wants to participate in the fishery, an additional allocation should be made to accommodate its fishermen, rather than simply diverting an unknown portion of the Makah allocation to them.

The need for a separate, additional allocation to Quileute is particularly acute given bycatch concerns, especially for widow and canary rockfish. The Makah Tribe intensively manages its fishery to reduce impacts on these species and to accommodate the needs of non-treaty fisheries within the constraints of current rebuilding plans. Quileute has provided no information concerning projected impacts on these or other species in its fisheries, its plans for observer coverage, or on management efforts it intends to implement to reduce bycatch.

Under these circumstances, if Quileute intends to participate in the whiting fishery in 2009 or 2010, the "tribal" allocation should include an additional allocation, over and above the 17.5 percent allocation to Makah, to accommodate the Quileute fishery, and appropriate measures should be developed to address observer coverage for and bycatch in the Quileute fishery. The Makah Tribe intends to contact the Quileute Tribe to discuss these matters and to attempt to coordinate the Tribes' respective fisheries.

Makah representatives will be available to discuss any questions you or your staff may have regarding these matters at the upcoming Council meeting.

Very truly yours,

ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM



Marc D. Slonim

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cc (via fax):

Frank Lockhart
Eileen Cooney
Russ Svec
Steve Joner