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April 10, 2008

VIA FACSIMILE AND MAIL

Robert Lohn
Regional Administrator
NMFS, Northwest Region
7600 Sand Point Way NE
Seattle, WA 98115-00700

Re: Quileute Pacific Whiting Fishery

Dear Mr. Lohn:

This firm represents the Quileute Indian Tribe with respect to its fisheries. As you are aware, by letter dated January 10, 2008 and pursuant to 50 C.F.R. § 660.324(d), the Quileute Tribe provided NMFS with written notification of its intent to participate in the Pacific whiting fishery commencing in 2009. By reply letter dated April 2, 2008, you advised the Tribe that its request had been forwarded to the Pacific Fishery Management Council (PFMC) for consideration at its April meeting, which is presently taking place. Additionally, you further advised the Tribe that "any whiting allocation will be an overall tribal allocation, and the intertribal distribution of the overall tribal allocation is an intertribal issue."

By letter also dated April 2, 2008, counsel for the Makah Tribe wrote you about issues related to the Pacific whiting fishery. In particular, the Makah Tribe requested it be allocated of 17.5% of the Optimum Yield ("OY") and that a "separate allocation" be made for the Quileute Tribe. The unstated implication of the Makah's request is obvious—to limit the Quileute's whiting fishery to that "separate allocation." The Quileute Tribe hereby responds to that and other issues raised in the Makah's letter.

There is no basis to and it would be entirely inappropriate for NMFS to allocate any fishery, including Pacific whiting, on a tribe-by-tribe basis. Tribal allocations of all federally-managed fisheries, including Pacific whiting, have always been made to all affected tribes, leaving it up the tribes to decide the appropriate intertribal distribution. Indeed, the federal groundfish regulations make clear that NMFS must make groundfish allocations to "the tribes" as a whole, not separate allocations to individual tribes as Makah requests. Specifically, the groundfish regulations state in pertinent part that once a tribe makes a written request to participate in a fishery, NMFS will implement those "through an allocation of fish **that will be managed by *the tribes***... ." 50 C.F.R. § 660.324(d) (emphasis added). Consistent with this regulatory authority, NMFS has always designated its Pacific whiting allocation in the federal regulations as a "tribal allocation." *See, e.g.*, 50 C.F.R. § 660.385(e).

Contrary to Makah's claim, NMFS made abundantly clear during the 1999 regulatory process that its allocation was for all four coastal tribes. That year the Quileute Tribe had expressed its interest in participating in the Pacific whiting fishery on an experimental basis in which one of its fishers would use low-volume nets, not a high-volume trawler. Quileute and the Makah Tribe submitted a joint proposal whereby the total tribal allocation would be only slightly increased by 2,500 mt to factor in the low-volume Quileute experimental net fishery. In response to the joint proposal, NMFS made clear that its allocation would be an overall tribal allocation, leaving the tribes to decide the proper intertribal distribution: "**NMFS believes that the intertribal distribution of the overall tribal allocation is an internal tribal issue, and herein issues only a total allocation for the affected tribes.**" 64 Federal Register 27,929 (May 24, 1999) (emphasis added). After the Quileute Tribe withdrew its request, NMFS issued its overall "tribal allocation" which was subsequently challenged by non-tribal parties in the *Midwater Trawlers* case. On appeal, the Ninth Circuit acknowledged that the matter concerned a challenge to "**a federal regulation that increased the amount of Pacific whiting fish *allocated to four Indian tribes.***" *Midwater Trawlers Co-operative v. Department of Commerce*, 282 F.3d 710, 714 (9th Cir. 2002) (emphasis added). Passing references to the "Makah allocation" and the like simply reflect the fact that Makah has been the only participant in the fishery to date. That fact, however, does not somehow vest Makah with a perpetual and exclusive entitlement to the entire tribal allocation.

In short, the Quileute Tribe does not object to the Makah's request to dispose of the sliding scale approach in favor of an allocation equaling 17.5% of the OY. Nor does the Quileute Tribe object to increasing the ***total tribal allocation*** to account for its expected participation in this fishery starting in 2009. However, the Tribe strenuously objects to issuance of a "separate allocation" to the Quileute or any other action which purports to restrict Quileute's right to harvest from the overall "tribal allocation." NMFS would not only exceed its limited regulatory authority with such unprecedented action, it would open floodgates to litigation between the tribes and the federal government.

Regardless of whether NMFS sets the tribal allocation using the sliding scale approach or a fixed percentage of the OY, there can be no question that the Quileute has the treaty right to harvest from that allocation. In attempting to justify the sliding scale approach in 2002 and 2003, NMFS asserted that declarations from William L. Robinson and Dr. Richard Methot, Jr. represented the "best scientific information currently available" on the distribution and migratory pattern of the Pacific whiting stock. *See, e.g.*, 68 Federal Register 11,228 (March 7, 2003). In sum, those declarations, which are attached hereto, explained that because "all mature whiting" of a harvestable size annually migrate from California and Baja north along the coast to Canada they pass through the Makah U&A. The declarants, NMFS and Makah maintained that because Makah therefore had the right to catch 50% of the OY in any year, the sliding scale methodology, calling for an allocation of between 14-17.5%, was inherently reasonable and well-within the treaty right. The district court and the Ninth Circuit Court of Appeals agreed and upheld the sliding scale approach as being supported by the best available science. *Midwater Trawlers Cooperative v. Department of Commerce*, 393 F.3d 994 (9th Cir. 2004).

This "best available science" makes clear that as the entire mature whiting stock migrates from California to Canada and along the coast, it necessarily passes through the Quiluete U&A which is directly south of the Makah U&A. Like Makah, Quileute therefore has the equal, treaty-secured right to catch up to 50% of the entire OY in any given year. Consequently, there can be no question that Quileute is entitled to harvest from the overall "tribal allocation" which has historically been between 14-17.5% of the OY.

Last, Makah's concerns about "observer coverage for and bycatch in" the Quileute whiting fishery are unfounded and premature. Quileute intends to research, study and potentially model their observer programs and bycatch procedures after those employed by the Makah Tribe. Considering that Quileute fishers do not intend to enter this fishery until 2009, there is more than ample time for the Tribe to develop an adequate observer program and steps to minimize bycatch, such as time and area restrictions.

If you have any questions or would like to discuss this matter further, please contact me directly at (206) 816-1340.

Sincerely,

GARVEY SCHUBERT BARER

By
Seth J. Berntsen

via facsimile only

cc: Mel Moon
David West
Eileen Cooney
Frank Lockhart
Marc Slonim

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HONORABLE BARBARA JACOBS ROTHSTEIN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MIDWATER TRAWLERS COOPERATIVE, et al.,

v.

UNITED STATES DEPARTMENT OF COMMERCE, et al

Defendants.

No. C96-1808BJR
No. C99-1500BJR (consolidated)

DECLARATION OF WILLIAM L. ROBINSON

I, William L. Robinson, declare under penalty of perjury:

1. I am the Assistant Regional Administrator for Sustainable Fisheries (1987 - present), Northwest Region, National Marine Fisheries Service (NMFS), Seattle, Washington. From 1980-1987, I was the Chief, Fisheries Management Division, Alaska Region, NMFS, Juneau, Alaska. From 1984 - 1985, while on leave from NMFS, I was an advisor to the Australian Fisheries Service. From 1970 - 1979, I was employed by the Fish Commission of Oregon (later the Oregon Department of Fish and Wildlife), managing the Columbia River fisheries

2 I have a B.S. degree (1967) in molecular biology from the University of California, Santa Barbara, and a B.S. degree (1970) in Fisheries Science from Oregon State University.

3. As Assistant Regional Director for Sustainable Fisheries, my current job duties include representing NMFS on the Pacific Fishery Management Council (Council), which makes

recommendations to NMFS on fishery management plans and amendments, and regulations, for the Pacific groundfish and other federally-managed fisheries. My division also provides data and regulatory guidance to the Council, reviews the Council's regulatory proposals, and makes initial recommendations on their approval and implementation. I am responsible for ensuring that regulatory proposals fully comply with the Magnuson-Stevens Act and all other applicable laws, including Indian treaty rights.

4 I have reviewed the Declaration of Dr. Richard D. Methot, Jr., Northwest Fisheries Science Center, NMFS (dated April 18, 2002) concerning the scientific basis for the Indian tribal allocation of Pacific whiting to the Makah Tribe, using the abundance-based "sliding scale" allocation methodology. Dr. Methot concludes that four declarations submitted by NMFS and by the Makah Tribe in U.S. v. Washington, Sub-proceeding 96-2, 143 F. Supp. 2d 1218 (W.D. Wash 2001), and attached to his declaration, continue to be the best scientific information available on the distribution and migration pattern of the Pacific whiting stock, and that the Indian treaty allocations that NMFS has made to the Makah Tribe using the sliding scale methodology fall within the legal parameters established for the treaty right.

5. Based on Dr. Methot's conclusions, NMFS relies on the four declarations as the best scientific information available for the Makah treaty allocation of Pacific whiting, and concludes that the Indian treaty allocations that NMFS has made to the Makah Tribe using the sliding scale methodology fall within the legal parameters established for the treaty right. While the declarations speak for themselves, and adequately explain the scientific basis for the allocation, the following discussion provides additional explanation in the event that further information is desired.

6. In its opinion issued on March 6, 2002 in Midwater Trawlers v. Department of Commerce, 282 F.3d 710, the Ninth Circuit upheld the Indian tribal treaty right to Pacific whiting, upheld the usual and accustomed ocean fishing area of the Makah Tribe, and found that the Makah Tribe is entitled, pursuant to the Treaty of Neah Bay, "to one-half 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, whichever is less." The

reference to "one-half the harvestable surplus of Pacific whiting that passes through its usual and accustomed fishing grounds" is sometimes referred to as "pass through" methodology

7. With respect to the sliding scale method for allocating Pacific whiting to the Makah Tribe that is currently in use by NMFS, the Ninth Circuit found that the specific allocation in 1999 to the Makah Tribe was inconsistent with the scientific principles set forth in the Magnuson-Stevens Act, which requires that NMFS base fishery conservation and management measures on the best scientific information available, because NMFS did not adequately support the 1999 allocation set forth in the 1999 Federal Register notice. The Court stated that "a remand to the NMFS is required to either promulgate a new allocation consistent with the law and based on the best available science, or to provide further justification for the current allocation that conforms to the requirements of the Magnuson-Stevens Act and the Treaty of Neah Bay." The Court also stated that "[w]e affirm in part and reverse in part, with instructions to the district court to remand to the agency for more specific findings "

8. Beginning in 1999, NMFS has set the tribal allocation according to an abundance-based sliding scale allocation method first proposed by the Makah Tribe in 1998. See, 64 F.R. 27928, 27929 (May 29, 1999); 65 FR 221, 247 (January 4, 2000); 66 FR 2338, 2370 (January 11, 2001). Under the sliding scale allocation method, the tribal allocation varies in relation to the level of the U.S. whiting Optimum Yield (OY), ranging from a low of 14 percent (or less) of the U.S OY at OY levels above 250,000 mt, to a high of 17 5 percent of the U.S. OY at an OY level at or below 145,000 mt

9 In 2001, this allocation method was considered by Judge Rothstein in U.S. v Washington, Case No. C70-9213, Phase I, Sub-proceeding No. 96-2, 143 F Supp. 2d 1218 (W.D. Wash.2001). In that case, the Court considered the scientific affidavits submitted by NMFS and the Makah Tribe (attached to Dr. Methot's Declaration), and found that "the allocation agreed on by the Secretary is a lawful exercise of his obligation to comply with the treaties guaranteeing Indian tribes their aboriginal right to take fish at their usual and accustomed fishing grounds." 143 F. Supp. 2d 1218, at 1224. The Court concluded: "The sliding scale allocation method advocated by the Secretary and Makah shall govern the United States aspect of

the Pacific whiting fishery until the Secretary finds just cause for alteration or abandonment of the plan, the parties agree to a permissible alternative, or further order issues from this court." Id.

10. The Makah Tribe's usual and accustomed (u & a) fishing grounds are located in the Pacific Ocean south of the international boundary with Canada, north of 48°02'15" N. latitude (Norwegian Memorial), and east of 125°44'00" W. longitude. 50 C.F.R. 660.324(c)(1). In quantifying the treaty right of the Makah Tribe to Pacific whiting, the question is. what is one-half the harvestable surplus of Pacific whiting that passes through the Makah Tribe's u & a grounds?

11 The following information is excerpted from relevant portions of the four declarations attached to Dr. Methot's Declaration, which NMFS deems the best scientific information available on the distribution and migration pattern of the stock. The four declarations are the Declaration of Dr. Richard D. Methot, Jr., dated March 5, 2001 ("Methot Declaration 1"); the Declaration of Ransom A. Myers January 18, 2001 ("Myers Declaration 1"); the Declaration of Ransom A. Myers in Response to Oregon's Motion for Summary Judgment dated February 14, 2001 ("Myers Declaration 2"), and the Declaration of Ransom A. Myers In Response to Oregon's Opposition to Makah's Motion for Summary Judgment dated March 7, 2001 ("Myers Declaration 3").

12. There are four populations of Pacific whiting on the West Coast: the coastal population, the Strait of Georgia population, the Puget Sound population, and a small-bodied hake that is found off southern Baja California. Only the coastal population, which is the subject of both U S. and Canadian fisheries, is at issue here. (Methot Declaration 1 at ¶ 5.)

13. Pacific whiting is a schooling, migratory species with transitory patterns of distribution. It is a midwater, pelagic species, i.e., it is wide-ranging and free-swimming as opposed to other types of groundfish, which dwell on the bottom. It inhabits the California current system, which is composed of four main currents. Spawning takes place primarily during January and February off central California to Baja California. During April-October, adults are distributed along northern California to the northern end of Vancouver Island, Canada, with the largest fish found furthest north. Recruitment [entry of similarly-aged fish into the fishable stock

of older fish] occurs at a relatively young age, and is more influenced by environmental factors than by spawning biomass. Whiting make a significant contribution to the U S. fishery by age 3 Although the maximum age is about 20, whiting older than age 12 are uncommon in the U.S fishery. Whiting begin appearing in the Canadian fishery at age 3, but a major contribution usually does not occur until age 5. (Methot Declaration 1 at ¶ 6)

14. In general, marine species in the California Current respond to environmental conditions (particularly El Niño conditions) in a variety of ways, including changes in growth, reproductive effort, and spatial distribution Both active migration and transport by currents may change the latitudinal distribution of whiting during El Niño years. For example, age 3 whiting were common in Canadian waters during the 1983 El Niño. It has also been noted that strong year classes[1] only occur in warm-water years. High water temperatures were also associated with an increased proportion of Pacific whiting in the Canadian zone during the 1982-1983 and 1991-1992 El Niño events, whereas low water temperatures were associated with a decreased proportion in the Canadian zone in 1989. Results of recent analyses suggest that El Niño events promote the northward movements of Pacific whiting via intensified northward currents during the period of active migration. Additional research is needed to better understand the distribution of whiting. (Methot Declaration 1 at ¶ 7.)

15. The general migration pattern and the large influence of oceanographic factors on the annual extent of the northward distribution of Pacific whiting is described in Dorn, Martin W., "The Effects of Age Composition and Oceanographic Conditions on the Annual Migration of Pacific Whiting, Merluccius Productus," Alaska Fisheries Science Center, National Marine Fisheries Service, CalCOFI Rep , Vol. 36, 1995, attached as Exhibit 2 to Dr Methot's Declaration. The proportion of the biomass observed in Canadian waters has ranged from approximately 10% in cold water years to 50% in warm El Niño years such as 1998. The large influence of ocean conditions on the annual migration is further exemplified by the occurrence of numerous age zero and age one whiting off Oregon, Washington and British Columbia following

[1] "Year class" means fish born in the same year that have recruited into the population.

the large El Niño events in the 1990's, which presumably caused a northward displacement of the spawning location. (Methot Declaration at ¶ 8.)

15 The exact pathway of northern movement has not been intensively studied, but early observations by Soviet fishery scientists and the rapid appearance of fishable aggregations off Canada in May-June suggests that the northward movement predominately occurs somewhat off the edge of the continental shelf followed by onshore movement to the shelf. However, there is not sufficient information to quantify this migratory pathway and determine the proportion of the Canada-bound whiting that move through the Makah usual and accustomed area. The hydroacoustic survey of whiting is conducted by the National Marine Fisheries Service in July-August, which is after the migration has been completed, so is not pertinent to this calculation. Some whiting aggregations are found offshore of the continental shelf in summer, but the degree of mixing between offshore and shelf aggregations each summer is not known. Most whiting remain on these summer feeding grounds through at least November, then migrate southward to the winter spawning grounds. (Methot Declaration 1 at ¶ 9.)

16 The migratory behavior of Pacific whiting is strongly age-dependent. Since the extent of northward migration is related to age, the spatial distribution of the population is also affected by changes in the population age structure independent of any environmental factor. (Methot Declaration 1 at ¶ 10.)

17. Overall, the coastal stock of Pacific whiting exhibits a "remarkable hundredfold variation" in year class strength, a phenomenon that has been present during at least the past few centuries. As a result of the great variations in recruitment, there is also a large variation in stock abundance. However, until an environmental predictor of recruitment is identified, short-term forecasts of whiting potential yield will remain imprecise. (Methot Declaration 1 at ¶ 11.)

18 Whiting's transitory patterns of distribution complicate both stock assessment and fishery management. The primary controls on fishing are annual quotas set by the U.S. and Canada. Other U.S. regulations control gear, area, and season, primarily in response to bycatch

concerns. Our current understanding of the dynamics of whiting distribution makes it extremely difficult to allocate whiting internationally. In summary,

> [R]eaching an agreement that will be appropriate for the indefinite future may be difficult. An agreement based on current climatic conditions could be inappropriate in future conditions. The U.S. and Canadian fisheries have largely developed during a warm period, from 1966 to the present. Under some scenarios for climate change, global warming might result in persistent El Niño-like conditions on the west coast of North America, which could lead to high migration rates to the Canadian zone. Alternatively, a regime shift to cooler conditions is also possible in the near future, leading to decreased migration rates to Canada. The long-term performance of the Canadian fishery for Pacific whiting depends somewhat on climatic conditions. The U.S. fishery is less vulnerable, since it can fish over a much wider latitudinal range within the migration limits of the resource.

The same biological uncertainties that make it difficult to achieve a U S.-Canada allocation agreement also affect the portion of the whiting stock that passes through the Makah Tribe's u & a grounds. (Methot Declaration 1 at ¶ 12.)

19. Given the biological context described above, the sliding scale proposal for treaty allocations within the U.S. fishery made by the Makah Tribe is reasonable, and will fall within the legal parameters established for the treaty right. (Methot Declaration 1 at ¶ 13)

20 Mature whiting undergo an annual migration from spawning grounds (northern Baja to central California) to feeding grounds (northern California to Queen Charlotte Islands). Younger whiting inhabit a brood area extending along the coastal shelf and slopes of California and, at times, into Oregon. (Myers Declaration 1 at ¶ 17.)

21. The available data suggest that when whiting migrate north, the migrations take place within, not seaward of, Makah u & a grounds That is, all migrating coastal whiting are potentially exploitable by the Makah The most recent coastwide acoustic survey, carried out in 1998, confirmed this pattern (Myers Declaration 1 at ¶ 18.)

22. The extent of the northward migration varies from year-to-year and is influenced by environmental conditions, but cannot be predicted in advance. This potential for large portions of the stock to migrate far north into Canadian waters is very clear in the 1998 coastwide acoustic survey which was carried out by NMFS and the Canadian Department of Fisheries and Fisheries and Oceans. (Myers Declaration 1 at ¶ 19)

23. Older whiting tend to migrate farther north than juveniles, hence whiting in Makah u & a grounds tend to be older than those harvested to the south in the U.S. fishery This allows the Makah fishery to avoid the juveniles, and thus the migration implies that over time, all whiting are potentially available in the Makah u & a grounds. (Myers Declaration 1 at ¶ 20.)

24. The State of Oregon asserts that "[r]ecent evidence from expanded acoustic surveys . . suggests that a substantial portion of the stock may migrate in an area generally west of the relevant u & a's." However, examination of the results of a comprehensive acoustic survey of the Pacific whiting resource conducted in 1998 by the National Marine Fisheries Service (Wilson et al 2000)[2] shows that Oregon's interpretation is incorrect. (Myers Declaration 2 at ¶ 4)

25. The 1998 survey is consistent with previous studies and supports the biological basis for the Makah claim. The surveys showed a large amount of whiting in the Makah u & a area. For example, the abstract of Wilson et al. (2000) reports that one of the three heaviest concentrations of whiting occurred "near the U.S. (Washington)-Canada border," i.e., in and near the Makah u & a grounds Moreover, on page 10 of Wilson et al it is stated that "the densest concentration occurred over bottom depths of 100-200 m from 44° N to 50° 30' N." That is, in the areas north of, within, and south of the Makah u & a area, whiting usually occur at depths that are completely within the Makah u & a grounds. (Myers Declaration 2 at ¶ 5.)

26. One of the maps produced by the acoustic survey appears to show whiting concentrations northwest of the Makah u & a area. This map is reproduced as Figure 12 to the 1998 Stock Assessment. However, this map does not support Oregon's claim that a substantial portion of the whiting migration takes place west of the Makah u & a area. Because the depth contours are oriented from southeast to northwest in the vicinity of Makah's u & a area (reflecting the orientation of Vancouver Island and the northern part of the Olympic Peninsula), as whiting move along these depth contours they will be found north and west of Makah's U&A

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[2] Echo Integration-trawl Survey of Pacific Hake, *Merluccius productus*, off the Pacific Coast of the United States and Canada During July-August, 1998 by C D Wilson, M A Guttormsen, K Cooke, M W Saunders, and R Kieser. NOAA Technical Memorandum NMFS-AFSC-118 U S Department of Commerce September 2000

areas. This does not change the fact, supported by all of the surveys, that the primary migratory path runs along these depth contours and therefore within, and not west of, Makah's u & a area. (Myers Declaration 2 at ¶ 6.)

27. This distribution is confirmed by the location of the fishery. A depiction of fishing locations of vessels participating in the Canadian fishery is found in Figure 4 to the 1998 Stock Assessment, and shows that the fishery is concentrated just north of the Makah u & a area and in the vicinity of the 100 meter depth contour. Similarly, a depiction of the location of vessels participating in the U.S fishery (Figure 5 to the 1998 Stock Assessment) shows that it occurs overwhelmingly east of 125° 44' W longitude. Because these figures represent tow locations throughout the season (in contrast to the snapshot in time provided by the acoustic survey), they provide a more reliable indication of the location of the resource, and further support the proposition that the bulk of the stock moves through Makah's u & a grounds. (Myers Declaration 2 at ¶ 8)

28. In sum, the available data suggest that when whiting migrate north, the migrations take place within, not seaward of, Makah usual and accustomed fishing grounds, and that all migrating coastal whiting are potentially exploitable by the Makah. The coastwide acoustic survey carried out in 1998 confirmed this pattern. (Myers Declaration 2 at ¶ 9) I would also point out, however, that just because it is plausible that all migrating coastal whiting are potentially exploitable withing the Makah u & a grounds, there is no evidence that all migrating coastal whiting actually do migrate through the Makah u&a grounds during some period of their life history. It is more reasonable to assume that some lesser proportion of the total population actually migrates through the Makah u & a grounds.

29. Based on an analogy to anadromous fish, the State of Oregon has argued that the "pass through" methodology should only consider whiting that pass through Makah fishing grounds in a single year, instead of considering all whiting that are destined to pass through Makah fishing grounds over their entire lives. However, this assertion is based on an incorrect description of allocation principles applied to anadromous fish, and provides no support for Oregon's approach to whiting. (Myers Declaration 3 at ¶ 7.)

30. When applied to anadromous fish, such as sockeye salmon, the pass through methodology is applied on a life-time basis. For anadromous Pacific salmon, the early life-history stages take placed in freshwater, the fish migrate to the ocean, and in most cases are harvested after fully completing their growth. This entire life-cycle takes between 2 and 7 years, and the harvest, which typically occurs during the spawning migration, usually takes place only once per generation, not once per year, as Oregon asserts. (Myers Declaration 3 at ¶ 8.)

31. Under Oregon's approach, a non-treaty harvest of immature salmon, either in freshwater or on marine feeding grounds, would not count for allocation purposes if the fish were not destined to "pass through" tribal u & a grounds in the year of the harvest Just as there would be no merit to such an approach to salmon allocations, there is no merit to Oregon's claim that harvests of younger whiting that are not yet old enough to migrate to Makah fishing grounds should not count for allocation purposes. (Myers Declaration 3 at ¶ 9.)

32 Oregon's approach makes other fundamental errors in its claim regarding the percentage of fish that pass through the Makah u & a grounds, including the following: (1) the assumption that the total biomass represents the biomass that should be fished to obtain Maximum Sustainable Yield (MSY); (2) the assumption that the NMFS triennial acoustic surveys represents the proportion of fish that pass through the Makah u & a grounds, and (3) the assumption that whiting found just west of the Makah u & a grounds in the acoustic survey never passed through the Makah u & a grounds. (Myers Declaration 3 at ¶ 10)

33. One objective of fisheries management, which is reflected in the Magnuson-Stevens Fishery Conservation and Management Act, is to achieve, "on a continuing basis, the optimum yield," which is usually known as the Maximum Sustainable Yield (MSY). From this perspective, the distribution of fish, per se, is not the issue, but rather than the distribution of the size/age class that would result in MSY if fished. In the case of anadromous salmon this condition is usually satisfied by harvesting the correct fraction of mature fish, i.e., the salmon have completed their growth and are at a size and age that would produce maximum sustainable yield if harvested at the correct rate. (Myers Declaration 3 at ¶ 11.)

34 Oregon does not deny that younger whiting primarily inhabit the waters off of California and Oregon. It is well-established that older fish are found further north, and it is more efficient and conservative not to catch juvenile fish. A fishery that takes younger fish will reduce the eventual catch of alternative fisheries. In particular, the shore-based fisheries that are based in Oregon capture fish younger than the Makah fishery; this will have a detrimental effect on the Makah fishery. Oregon's approach to the "pass through" methodology, which does not count any fish that do not pass through Makah's u & a grounds in a given year, fails to account for this fact. Instead, Oregon's approach would allocate all younger fish to harvests off the Oregon coast, regardless of the fact that, if allowed to mature, these fish would provide larger, more efficient and more conservative harvests farther north, including in the Makah u & a grounds. As discussed above, this is analogous to arguing that harvests in a fishery that targets immature salmon should not be counted for allocation purposes because the fish are not available to fisheries targeting mature salmon in the same year. (Myers Declaration 3 at ¶ 12.)

35. I have used accepted NMFS values for all population parameters and have investigated the trade-offs involved in fishing at different locations along the West Coast. Based on accepted biological principles, I suggested that it is crucial to determine the trade-off between yield and lifetime egg production that will result from any allocation. My analysis showed the inevitable decline in yield that occurs from fishing on the juvenile fish that occur off the coast of Oregon. As a result of such fishing and the declines in yield, MSY cannot be achieved. In fact, if MSY were the goal, one could argue that no fishing should occur off the Oregon coast because it inevitably would result in lower than maximum sustainable yield because of the harvesting of too many young fish. (Myers Declaration 3 at ¶ 13.)

36. Oregon also errs when they state that "at least 25% of the whiting that reach the latitude of the U&A migrate west of the U&A and do not pass through it." In making this statement, they rely on the hypothesis that fish just west of Makah's u & a grounds would never pass through the Makah u & a grounds. This hypothesis of fish migration requires that whiting undergo complex trajectories, so that they can avoid the Makah u & a grounds. It assumes that whiting never move around to search for food. This contradicts common sense, any experience of

commercial and recreational fishermen, and scientific observation. As any fishermen knows, fish do not travel in straight lines. When fish are in feeding aggregations, they typically move from place to place in search of food. The heavy concentration of the Canadian harvest just north of the Makah u & a grounds, and the location of vessels participating the U.S. fishery, shows that the area in question is an area of major feeding aggregations, and whiting undoubtedly exhibit east-west as well as north-south movements in this area Thus, a "snapshot" of whiting west of the Makah u & a grounds in no way demonstrates that 25% of the fish migrate west of the Makah u & a grounds. (Myers Declaration 3 at ¶ 14)

37. Oregon also presents a "cartoon" to support their claim that the whiting migrate west of the Makah u & a grounds. This figure was originally published in 1982 by Bailey and coworkers to illustrate the general pattern of whiting movement; it was not, and was not meant to be, quantitatively correct. For example, it shows movements 300 km offshore, while in words it states that the movement is over the continental slope, which is typically 50 km offshore in the region. Using this map for the Oregon claim that whiting migrate west of the Makah u & a grounds is as absurd as making the claim that the map adequately describes the size of individual whiting (which would be 30 km long according to the scale of the map). (Myers Declaration 3 at ¶ 15.)

38. The most liberal possible quantification of the Makah treaty right to take whiting would be to assume that all mature whiting of a size which would produce MSY and which have the potential to pass through the Makah u&a grounds actually do migrate through the Makah u&a grounds sometime during their lifetimes. This assumption would result in a Makah allocation of 50 percent of the allowable U.S. harvest in any year, an amount well above that requested by the Tribe. Even is something less than the entire coastal whiting population actually migrated through the Makah u & a grounds, it is a safe assumption that the sliding scale allocation methodology that is currently in use falls well within a quantification of the Makah treaty right based on 50 percent of the adult population that actually does pass through the Makah u & a grounds.

39 The Makah Tribe is entitled by the Treaty of Neah Bay to take up to half the harvestable surplus of Pacific whiting that passes through their u & a grounds. The best scientific information currently available (see Methot Declaration and four declarations described above) shows that the sliding scale allocation methodology that is currently in use falls well within the legal parameters established for the treaty right.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 26, 2002.

William L. Robinson

Honorable Barbara Jacobs Rothstein

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al., Plaintiffs, vs. STATE OF WASHINGTON, et al., Defendants	No C96-1808BJR No. C99-1500BJR (consolidated) DECLARATION OF DR RICHARD D. METHOT, JR

I, Dr. Richard D Methot, Jr., hereby declare:

1. I have a Ph.D. degree (1981) in Biological Oceanography from Scripps Institution of Oceanography, University of California, and a B.S degree (1975) in Fisheries from the University of Washington

2. I have been employed by the National Marine Fisheries Service since 1981 in the following capacities:

2000-present: Senior Advisor on Groundfish Issues, Northwest Fisheries Science Center, National Marine Fisheries Service, Seattle, Washington

1995-2000 Director, Fishery Resource Analysis and Monitoring Division, Northwest Fisheries Science Center, National Marine Fisheries Service, Seattle, Washington.

1993-1995: Program Manager in Resource Ecology and Fisheries Management Division of Alaska Fisheries Science Center, National Marine Fisheries Service, Seattle, Washington.

1988-1993 Fishery Biologist, Resource Ecology and Fisheries Management Division of Alaska Fisheries Science Center, National Marine Fisheries Service, Seattle, Washington.

1981-1987. Fishery Biologist, Southwest Fisheries Center, National Marine Fisheries Service, La Jolla, California.

3. In the course of my employment with the National Marine Fisheries Service, I have had responsibility for assessment of West Coast groundfish, including Pacific whiting, since 1988. Since 1988, I have served as a stock assessment scientist, a Program Manager supervising assessment scientists (including Martin W. Dorn, who conducted most whiting assessments during the 1990s), and a Division Director with responsibility for an expanded West Coast groundfish research and assessment program. I served as chairman of the Pacific Fishery Management Council's Groundfish Management Team for five years, and have been the lead technical consultant in support of the U.S. delegation's negotiations with Canada regarding allocation of Pacific whiting.

4. I have conducted research and assessment of marine fish since 1981, and have focused on West Coast groundfish since 1988. I developed a statistical model specifically for assessment of West Coast groundfish that was widely used throughout the 1990s I have personally engaged in numerous assessments, including assessments of Pacific whiting (also known as Pacific hake). In addition to many other technical documents, I co-authored (with Martin W. Dorn) Chapter 14 of the book Hake: Biology, Fisheries, and Markets (Chapman & Hall, London 1995). Chapter 14 is entitled "Biology and fisheries of North Pacific hake (M. productus)," and is attached as Exhibit 1 to this Declaration. Exhibit 2 to this Declaration is a paper authored by Martin W. Dorn, Alaska Fisheries Science Center, National Marine Fisheries Service, Seattle, Washington, on "The Effects of Age Composition and Oceanographic Conditions on the Annual Migration of Pacific Whiting, Merluccius Productus" which was published in CalCOFI Rep., Vol. 36, 1995.

5. I have reviewed the existing information on the amount of Pacific whiting that passes through the Makah Tribe's usual and accustomed fishing grounds, which are defined as the area located in the Pacific Ocean south of the international boundary with Canada, north of 48°02'15" N. latitude (Norwegian Memorial), and east of 125°44'00" W. longitude. 50 C.F.R. 660.324(c)(1). Information we reviewed includes the scientific information submitted by NMFS

and the Makah Tribe in U.S. v Washington, Sub-proceeding 96-2, 143 F. Supp. 2d 1218 (W.D. Wash.2001), particularly the Declaration of Dr Richard D. Methot, Jr , dated March 5, 2001; the Declaration of Ransom A. Myers January 18, 2001; the Declaration of Ransom A. Myers in Response to Oregon's Motion for Summary Judgment dated February 14, 2001; and the Declaration of Ransom A. Myers In Response to Oregon's Opposition to Makah's Motion for Summary Judgment dated March 7, 2001. These declarations (with their attachments) are attached.

6. A "sliding scale" abundance-based allocation methodology for Pacific whiting has been in use to determine the treaty Indian and non-treaty shares since 1999. Under the sliding scale allocation method, the tribal allocation varies in relation to the level of the U.S. whiting Optimum Yield (OY), ranging from a low of 14 percent (or less) of the U S. OY at OY levels above 250,000 mt, to a high of 17.5 percent of the U S. OY at an OY level at or below 145,000 mt. The treaty right is up to one-half the harvestable surplus of Pacific whiting that passes through the Makah Tribe's usual and accustomed fishing grounds, or that much of the harvestable surplus as is necessary for tribal subsistence, whichever is less.

7. NMFS has no new information that alters the information (described in paragraph 4 above) submitted in Subproceeding 96-2 on the distribution and migration pattern of the Pacific whiting stock Therefore, this information continues to be the best scientific information available Based on this information, I conclude that the Indian treaty allocations that NMFS has made to the Makah Tribe using the sliding scale methodology fall within the legal parameters established for the treaty right.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 18, 2002.

Richard D. Methot, Jr.