June 2. 2008

Donald K. Hansen, Chairperson
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, OR 97220-1384

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

Dear Mr. Hansen and Mr. Lohn:

The purpose of this letter is to describe and explain the basis for the Makah Indian Tribe’s proposals for Indian treaty allocations in the Pacific whiting fishery in 2009 and 2010. In accordance with 50 C.F.R. § 600.324(d), our attorneys wrote to Mr. Lohn on April 2, 2008, settling our requests for treaty allocations and regulations in the 2009 and 2010 groundfish fisheries. A copy of that letter is attached hereto. This letter supplements our attorneys’ April 2 letter with respect to our proposal for the whiting fishery in light of discussions that have taken place since April 2nd.

For 2009, we propose that 17.5 percent of the U.S. optimum yield be allocated to meet the needs of and be managed by the Makah Tribe and that 3.0 percent of the OY be allocated to meet the needs of and be managed by the Quileute Tribe. This would yield a total treaty allocation of 20.5 percent of the OY, which we believe is within the total treaty entitlement. Our proposal for a 17.5 percent Makah allocation is based on our experience in the fishery over the past 12 years, and is more fully explained in our attorneys’ April 2 letter and in the discussion below. Our proposal for a 3.0 percent Quileute allocation is based on Quileute’s representations to the National Marine Fisheries Service and to us that it will have one boat participating in the fishery in 2009, with an anticipated catch of 4,000 to 8,000 metric tons, and that it will work with the Groundfish Management Team to make realistic estimates of the projected bycatch associated with this level of whiting harvest.

For 2010, we again propose that 17.5 percent of the U.S. optimum yield be allocated to meet the needs of and be managed by the Makah Tribe. However, we propose that the Council and the Secretary defer recommending or adopting a 2010 allocation for Quileute or Quinault pending completion of the 2009 fishery and receipt of further information from Quileute or Quinault that provides a realistic estimate of the needs of their respective fisheries in 2010.

We also propose that a rollover mechanism be established so that whiting not harvested in the treaty fisheries can be rolled over to the non-treaty fisheries and that a portion of
the projected bycatch of other species in the treaty fisheries, as shown on the Council’s bycatch scorecard, can be rolled over to non-treaty fisheries if it is not needed in the treaty fisheries.

The following background information provides the context for and explains the basis of our proposals.

The May 2 Meeting.

After the April 2008 Council meeting, the National Marine Fisheries Service scheduled a meeting of those tribes that had expressed interest in participating in the 2009 or 2010 whiting fishery for May 2, 2008. NMFS requested that each tribe provide a reasonable projection of its whiting harvest and the bycatch of rebuilding species associated with that harvest at the meeting. In particular, in an April 18, 2008, email, Frank Lockhart stated “we would like to discuss the specifics of the tribal proposals, including the amount of whiting you are seeking, the amount of effort you anticipate (including number of boats and size of boats), the timing of the proposed fishery, the anticipated bycatch, and the tribal management and monitoring scheme, in terms of both bycatch and whiting.”

The May 2 meeting was attended by representatives of the Makah Indian Tribe\(^1\), the Quinault Indian Nation, the Quileute Indian Tribe, and the National Marine Fisheries Service. The Coastal Program Coordinator for the Northwest Indian Fisheries Commission also attended the meeting.

In the following paragraphs, we discuss the information provided by each tribe at the May 2 meeting, and then describe a proposal presented by the Makah Tribe at the conclusion of that meeting.

\textit{Makah}

Consistently with our attorneys’ April 2 letter, we projected a Makah whiting harvest of 17.5 percent of the U.S. optimum yield in 2009 and 2010 and bycatch levels consistent with the scorecard values we have provided to the Council and NMFS in recent years. Our projections were based on our experience in the fishery since 1996, our present fleet size of five catcher boats, our existing arrangements with two processors to process the catch, and the management measures we have implemented over the past 12 years to harvest whiting and minimize bycatch. We have described the particulars of our fishery,

\(^{1}\) Two members of the Makah Tribal Council, including either the Chairman or Vice-Chairman, the Director of Makah Fisheries Management, and our Chief Biologist attended each of the meetings described in the text. To our knowledge, no member of the Quinault or Quileute Tribal Councils attended any of the meetings, although both tribes sent senior fisheries managers and Quileute sent representatives of its Fish Committee.
including the number and size of boats, the timing of the fishery, and our management and monitoring scheme, on many occasions to the Council and NMFS.

To date, no other tribe has participated in the whiting fishery. As a result, the other tribes were unable to provide the specific information requested by NMFS.

**Quinault**

The Quinault Indian Nation had written to Mr. Lohn on April 4, 2008, requesting “information regarding NOAA Fisheries’ procedures, protocols, and timeframes for consideration of requests for tribal participation in the whiting fishery.” The letter stated Quinault anticipated “that [its] entry into the whiting fishery may occur as early as 2009,” but did not propose a particular allocation or regulation for the Quinault fishery or provide any information regarding its projected effort or harvest. At the May 2 meeting, a Quinault representative stated that Quinault did not intend to participate in the whiting fishery in 2009, but might do so beginning in 2010 or 2011. Quinault’s representative did not indicate what level of effort or harvest Quinault anticipated for 2010 or 2011.

**Quileute**

The Quileute Indian Tribe had written to Mr. Lohn on January 10, 2008, stating that one or more of its members would participate in the whiting fishery commencing in 2009. Its letter stated Quileute was “not presently requesting an increase in the whiting allocation to all coastal tribes,” but was “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.”

When we learned about this proposal, we had several significant concerns about it. First, since its inception in 1996, the treaty allocation in the whiting fishery has been based on requests from and has been designed to accommodate the needs of only one tribe – Makah. We attach a memorandum from our attorneys that sets forth the regulatory history and confirms that the treaty whiting allocations have been designed solely to meet the needs of the Makah Tribe. By proposing to enter the fishery without requesting an increase in the treaty allocation, Quileute was proposing an allocation that would not be adequate to meet the combined needs of both tribes. Thus, Quileute was proposing to enter the fishery in a manner that was directly adverse to the interests of the established Makah fishery.

Second, Quileute’s proposal contained no provision for each tribe to manage its own share of the allocation, and thus raised the possibility of a race for fish between the tribes. Our ability to minimize bycatch in our fishery is dependent on careful time and area management of the fishery in cooperation with experienced fishermen and an experienced mothership. By creating the potential for a race for fish, Quileute’s proposal threatened to jeopardize our successful bycatch management regime. As Frank Lockhart
pointed out at the May 2 meeting, NMFS’ statistics demonstrate that when conditions for a race for fish are created, such as when NMFS announces the closing date for the fishery, bycatch goes up. By jeopardizing bycatch management, particularly for rebuilding species, Quileute was proposing to enter the fishery in a manner that is contrary to the conservation goals embodied in the rebuilding plans and the Magnuson-Stevens Act, and that was potentially adverse to almost every participant in west coast groundfish fisheries.

Third, Quileute’s proposal did not address projected bycatch levels in its own fishery or any management measures it planned to implement to minimize bycatch. At the April Council meeting, a Quileute representative indicated that it would pattern its bycatch management on the measures employed by the Makah Tribe. The difficulty with this approach is that the Makah management regime: (1) depends on managing for a fixed amount of whiting, not conducting a race for fish with another tribe; (2) is tailored to Makah’s fishing area, and cannot simply be copied in another area in which the timing and distribution of whiting and bycatch species are different; and (3) is based on the personal experience gained by the Makah fleet and the mothership in the Makah fishing area over the past 12 years. Thus, Quileute’s proposal indicated that it had little understanding of the challenges facing its fishery in terms or bycatch management or a sound plan for addressing them.

In light of these concerns, our April 2 proposal was for a treaty allocation of 17.5 percent of the U.S. optimum yield to meet the needs of the Makah fishery plus an additional amount to accommodate the Quileute fishery. In order to avoid a race for fish, and to enable Quileute to develop bycatch management measures for its fishery and to project realistic bycatch levels, we proposed that each tribe receive a separate allocation for its fishery.

During the course of the April Council meeting, Quileute provided a copy of an April 10, 2008, letter from its attorneys to Mr. Lohn. In their letter, Quileute’s attorneys argued that the prior treaty allocations in the whiting fishery had been tribal allocations available to any tribe, and that the Secretary could not legally make separate allocations to each tribe. We asked our attorneys to respond to these arguments, and their response is set forth in the attached memorandum. They note, among other things, that these arguments are directly contrary to claims Quileute has made in court – where Quileute has previously asserted that the treaty allocations in the whiting fishery were available only to the Makah Tribe, and that the Secretary is legally required to make separate allocations to each tribe. Our attorneys also note that the Ninth Circuit Court of Appeals has held expressly that the prior treaty allocations in the whiting fishery were to the Makah Tribe only – not to Quileute, Hoh or Quinault. It should also be noted that Quileute’s attorneys themselves stated that Quileute did not “object to increasing the total tribal allocation to account for its expected participation in this fishery starting in 2009,” thus acknowledging, at least implicitly, that the current allocation does not account for Quileute’s planned participation in the fishery.
At the May 2 meeting, a Quileute representative indicated that Quileute anticipated it would have a single catcher boat, of between 95 and 125 feet in length, participating in the 2009 fishery, and that it anticipated a whiting harvest of between 4,000 and 8,000 metric tons. Quileute also indicated that it would work with the Groundfish Management Team to project bycatch impacts associated with this level of harvest in its fishing area. Quileute’s representative stated the tribe anticipated increased levels of effort and harvest in 2010, but did not specify what those levels would be.

The Makah Proposal.

On the basis of this information, at the conclusion of the May 2 meeting we proposed an overall treaty whiting allocation for 2009 of 17.5 percent of the U.S. optimum yield to accommodate the Makah fishery and an additional 4,000 to 8,000 metric tons to accommodate the Quileute fishery, with each tribe responsible for managing its fishery consistently with its projected whiting harvest and bycatch levels. We also proposed that a rollover mechanism be developed to release whiting that is not harvested in the treaty fisheries and any portion of the projected bycatch levels that is not needed in the treaty fisheries. We proposed to defer the overall treaty allocation for the 2010 fishery until Quinault and Quileute were able to provide realistic projections of effort, harvest and bycatch for 2010.

NMFS’ representatives who attended the May 2 meeting indicated that they believed this proposal would be workable. However, neither Quinault nor Quileute agreed to the proposal on May 2.

The May 6 Meeting.

The tribes and the Coastal Program Coordinator for the Northwest Indian Fisheries Commission met again, this time without NMFS, on May 6, 2008. At this meeting a Quileute representative re-stated Quileute’s (new) legal position that the Secretary cannot lawfully make separate allocations to each tribe, and stated it intended to fish under the “tribal” allocation of 17.5 percent of the U.S. optimum yield in 2009. Quileute’s representative also stated that, because Pacific whiting migrate from south to north in the spring, Quileute would be able to harvest the fish before Makah, and Quileute intended to use this advantage to preempt the Makah fishery. These comments, of course, increased our concern that Quileute’s approach would lead to a race for fish, with adverse consequences for both tribes’ fisheries, for efforts to minimize bycatch, and potentially for nearly every participant in west coast groundfish fisheries. This is particularly true because bycatch rates are higher in the early months of the season – that is, precisely when Quileute apparently intends to concentrate its harvest so as to preempt the Makah fishery.
However, later in the meeting, Quileute’s representatives appeared willing to consider a management agreement in which each tribe would separately manage a portion of the overall quota that was sufficient to meet the needs of its fishery. Given the current U.S. optimum yield, and the likelihood of a similar level in 2009, it appeared that an overall 2009 allocation of 20.5 percent of the OY, with 17.5 percent to be managed by Makah and 3 percent (about 8,000 metric tons) to be managed by Quileute would be adequate to meet each tribe’s needs.

Near the end of the meeting, a Quinault representative stated that Quinault might participate in the 2009 fishery after all, with as many as three to five boats, and that he would need to confer with the Quinault Tribal Council before supporting any kind of inter-tribal management agreement. Nevertheless, the Makah and Quileute representatives agreed to have the Northwest Indian Fisheries Commission’s Coastal Program Coordinator prepare a draft Inter-Tribal Whiting Management Agreement for 2009, which was to provide for harvest guidelines for each tribe (Makah, Quileute and Quinault) and an overall tribal allocation. The harvest guidelines, which would guide each tribe’s management of its own fishery, would not be designated as “allocations” and would not set a precedent for future years. Although the tribes contemplated a Makah harvest guideline of 17.5 percent of the OY and a Quileute harvest guideline of 3.0 percent of the OY, all of the amounts would be left blank in the draft agreement pending further information from Quinault. The meeting was adjourned to give Quinault time to consider whether it would participate in the 2009 fishery and, if so, what level of effort and harvest would be involved.

Following the May 6 meeting, NMFS informed us that it had received an email from Quinault stating Quinault had decided to participate in the whiting fishery in 2009, but that the email did not provide any information on the level of effort or harvest Quinault anticipated. As jointly requested by Makah and Quileute, the Northwest Indian Fisheries Commission’s Coastal Program Coordinator circulated a draft management plan among the tribes, which provided for an overall treaty allocation and separate harvest guidelines for each tribe. Quinault’s representative responded by email that the plan was unacceptable because Quinault would not agree to “separate allocations.” The Coastal Program Coordinator informed us that Quileute objected to the first draft for the same reason.

**The May 15 Meeting.**

At the conclusion of the May 6 meeting, the tribes had agreed to meet again on May 15. Makah and Quileute representatives, along with the Coastal Program Coordinator, attended the meeting. Quileute’s representative and the Coastal Program Coordinator informed us that they had been contacted by Quinault’s representative, who said that Quinault had decided not to participate in the whiting fishery in 2009 and therefore would not be attending the May 15 meeting. As it was relayed to us, the Quinault representative
also stated that Quinault would have five or six catcher boats in the 2010 fishery and anticipated a harvest of about 7,000 metric tons per boat.

Quileute’s representative indicated that Quileute still anticipated it would have a single catcher boat that would participate in the 2009 fishery, and that it anticipated a harvest of 4,000 to 8,000 metric tons. On this basis, Makah again proposed an overall treaty allocation of 20.5 percent of the U.S. optimum yield in 2009, with 17.5 percent of the OY to be managed by Makah and 3.0 percent of the OY (about 8,000 metric tons) to be managed by Quileute.

In response, Quileute’s representative provided copies of a second draft Inter-Tribal Whiting Management Agreement for 2009, which had been prepared by the Northwest Indian Fisheries Commission’s Coastal Program Coordinator after Quinault’s and Quileute’s objections to the inclusion of “separate allocations.” This draft deleted the provision for individual harvest guidelines for each tribe that had been included in the first draft. Quileute’s representative stated that Quileute would not agree to the inclusion of such harvest guidelines or any other language that referenced individual tribal allocations. Instead, Quileute would agree only to manage its fishery for the overall tribal allocation.

Quileute’s representative also stated that an overall tribal allocation of 17.5 percent would be adequate to meet its needs in 2009 and 2010. Although Quileute’s representative stated that Quileute would have five catcher boats participating in the 2010 fishery, with an anticipated harvest of 35,000 metric tons of whiting, he stated that an overall allocation of 17.5 percent of the OY in 2010 would be adequate for the Quileute Tribe because Quileute could harvest the fish before they reached the Makah fishing area and thereby preempt the Makah fishery. Quileute’s representative stated that if Makah believed a larger allocation was needed to accommodate the Makah fishery, it would be up to Makah to obtain it.

We responded by again explaining that we could not support a management plan that would create the conditions for a race for fish, and that an overall allocation of 20.5 percent of the OY, with 17.5 percent to be managed by Makah and 3.0 percent to be managed by Quileute, was needed to meet the needs of both tribes in 2009. When Quileute continued to reject any separate harvest guidelines or allocations for the tribal fisheries, we suggested that the tribes agree that we would each propose an overall treaty allocation of 20.5 percent for the 2009 fishery, with the understanding that we would each submit our own testimony in support of the proposal in light of our differences with respect to the need for separate harvest guidelines. This suggestion was for the 2009 fishery only, and Quileute agreed to it.

*Makah’s Proposal for 2009.*
On the basis of the discussions summarized above, and as set forth at the beginning of this letter, we propose a 2009 allocation of 17.5 percent of the U.S. optimum yield to meet the needs of and be managed by the Makah Tribe and 3.0 percent of the OY to meet the needs of and be managed by the Quileute Tribe, for a total 2009 treaty whiting allocation of 20.5 percent of the OY. We also propose that a rollover mechanism be established so that whiting not harvested in the treaty fisheries can be rolled over to the non-treaty fisheries and that a portion of the projected bycatch of other species, as shown on the Council’s bycatch scorecard, can be rolled over to non-treaty fisheries if it is not needed in the treaty fisheries.

As explained above, our proposal for the Makah allocation is based on the demonstrated needs and harvesting capacity of the Makah fishery, while our proposal for the Quileute allocation is based on Quileute’s representations to NMFS and to us that it will have one boat participating in the fishery in 2009, anticipates a harvest of 4,000 to 8,000 metric tons, and will work with the Groundfish Management Team to develop realistic estimates of bycatch associated with this level of whiting harvest. We are also relying on the most recent information we have from Quinault, which is that it does not intend to participate in the fishery in 2009. On these bases, we believe our proposal will meet the needs of the two tribes (Makah and Quileute) that intend to participate in the 2009 whiting fishery, as determined by the tribes themselves. No tribe can object to an allocation that is large enough to meet its anticipated needs.

Moreover, we believe an overall treaty allocation of 20.5 percent is within the total treaty entitlement. The Ninth Circuit has held that where the tribes themselves request less than the full treaty entitlement, it is appropriate for the Secretary to allocate the requested amount to the tribes. See Midwater Trawlers Co-operative v. Department of Commerce, 393 F.3d 994, 1004 (9th Cir. 2004).

Assuming Quileute, working with the Groundfish Management Team, is able to project bycatch levels associated with its anticipated whiting harvest, we are hopeful that the bycatch levels associated with each tribe’s harvest will be consistent with current rebuilding plans and will not trigger formal treaty – non-treaty allocations of bycatch species. As NMFS and the Council know, we have successfully managed bycatch in our fishery in order to meet these goals.

Finally, we continue to believe it is imperative that the Council recommend, and that Secretary provide, that the overall treaty allocation will be separately managed by each tribe so as not to exceed its projected harvest levels for whiting and its projected bycatch levels. As discussed above, without such a provision, an overall allocation will create the potential for a race for fish between the tribes, which will result in increased bycatch and jeopardize the rebuilding plans for key species. Moreover, a provision for separate management will facilitate the sovereign management authority of each tribe, allowing each tribe to structure its own fishery in a manner that maximizes its opportunity to
harvest whiting, minimizes bycatch, and meets the needs of its fishermen and the processors who are engaged to process the catch.

As set forth in the Pacific Groundfish Fishery Trawl Rationalization EIS (at 4), the Council’s goal for the capacity rationalization plan in the trawl sector is to “increase[] net economic benefits, create[] individual economic stability, provide[] for full utilization of the trawl sector allocation, consider[] environmental impacts, and achieve[] individual accountability of catch and bycatch.” Quileute’s proposal for the treaty allocation in the whiting fishery, which would create a race for fish in which a new entrant to the fishery deliberately seeks to preempt the established fishery of a long-term participant, runs directly counter to every element of the Council’s goal. In contrast, Makah has long managed its fishery with these objectives in mind, and our proposal to allow each tribe to manage a portion of the overall treaty allocation will promote these objectives as new tribal participants enter the treaty fishery.

Finally, as discussed in the accompanying memorandum from our attorneys, a provision for each tribe to manage its own portion of the overall allocation is well within the Secretary’s legal authority. This is particularly true where, as here, such a provision is necessary for conservation of depleted species and to prevent one tribe from attempting to preempt the established fishery of another tribe. Under current circumstances, such a provision would not put the Secretary in the position of making an inter-tribal allocation decision, since the needs of each tribe’s fishery have been determined by each tribe itself.

*Makah Proposal for 2010.*

As also set forth above, we propose that 17.5 percent of the U.S. optimum yield be allocated to meet the needs of and be managed by the Makah Tribe in 2010, again based on the demonstrated needs and capacity of the Makah fishery. However, we propose that the Council and the Secretary defer recommending or adopting a 2010 allocation for Quileute or Quinault pending completion of the 2009 fishery and receipt of further information from Quileute or Quinault that provides a realistic estimate of the needs of their respective fisheries in 2010.

To date, we have received no information from Quileute or Quinault regarding the bases for their projected effort or harvest levels in the 2010 fishery. They are proposing, in the first or second year of their participation in the whiting fishery, to achieve effort and harvest levels that we did not achieve for many years in our fishery under more favorable conditions in terms of competition and bycatch constraints. Neither tribe has identified the number of tribal fishermen who have expressed interest in participating in the fishery, the number of such fishermen who have the ability to acquire catcher boats to do so, the number of tribal members available to crew the boats, the boats that will be acquired, the processing capacity available to the tribes, or other pertinent information. Similarly, we have received no information from Quileute or Quinault regarding bycatch levels.
associated with their projected 2010 whiting harvests, or management measures they will employ to minimize bycatch.

Under these circumstances, we continue to believe it is premature to consider an overall treaty allocation for 2010. When combined with the established Makah fishery, the preliminary 2010 effort and harvest levels currently proposed by Quileute and Quinault would likely trigger the need: (1) to quantify the total treaty entitlement to Pacific whiting and bycatch species; (2) to determine an inter-tribal allocation of Pacific whiting and bycatch species; and (3) to adjudicate the western boundary of the Quileute and Quinault usual and accustomed grounds for purposes of both the total treaty entitlement determination and the inter-tribal allocation. There is no need to trigger these difficult determinations pending more realistic effort and harvest projections from Quileute and Quinault.

Thank you for your consideration. We will be prepared to answer any questions you may have at the June 2008 Council meeting.

Sincerely,

Russ Svec, Director
Makah Fisheries Management

Steve Joner, Chief Biologist
Makah Fisheries Management

cc: Members of the Pacific Fishery Management Council
Frank Lockhart
Eileen Cooney
Mariam McCall
Jean Rice
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
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:

<table>
<thead>
<tr>
<th>U.S. Harvest Guideline</th>
<th>Makah Allocation</th>
<th>Quileute Allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 145,000 mt</td>
<td>17.5% of U.S. Harv. Guide.</td>
<td>2,500 mt</td>
</tr>
<tr>
<td>145,001 to 175,000 mt</td>
<td>25,000 mt</td>
<td>2,500 mt</td>
</tr>
<tr>
<td>175,001 to 200,000 mt</td>
<td>27,500 mt</td>
<td>2,500 mt</td>
</tr>
<tr>
<td>200,001 to 225,000 mt</td>
<td>30,000 mt</td>
<td>2,500 mt</td>
</tr>
<tr>
<td>225,001 to 250,000 mt</td>
<td>32,500 mt</td>
<td>2,500 mt</td>
</tr>
<tr>
<td>Over 250,000 mt</td>
<td>35,000 mt</td>
<td>2,500 mt</td>
</tr>
</tbody>
</table>

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
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 not to 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.”
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
MEMORANDUM

TO: Russ Svec and Steve Joner
    Makah Fisheries Management

FROM: Marc Slonim
    Ziontz, Chestnut, Varnell, Berley & Slonim

DATE: June 2, 2008

RE: Indian Treaty Allocations in the Pacific Whiting Fishery

You have asked us to review and comment on an April 10, 2008, letter from attorneys for the Quileute Indian Tribe to Robert Lohn, Regional Administrator of the National Marine Fisheries Service. In their letter, Quileute’s attorneys object to the Makah Tribe’s April 2, 2008, proposal that the Secretary of Commerce allocate 17.5 percent of the U.S. optimum yield in the 2009 Pacific whiting fishery to the Makah Tribe and make a separate, additional Indian treaty allocation to meet the needs of the Quileute Tribe. Quileute’s attorneys do not explain how the Quileute Tribe would be harmed by a separate allocation that is adequate to meet its needs, but argue on purely legal grounds that it would be unlawful for the Secretary to make separate allocations to each of the tribes.

In particular, Quileute’s attorneys assert that “[t]here 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.” This is a curious argument for the Quileute Tribe to make. In 1997, the Quileute Tribe sued the Secretary of Commerce challenging the Secretary’s allocations in the black cod fishery. In that lawsuit the Quileute Tribe argued that the Secretary acted unlawfully in making a single, overall allocation to all four coastal tribes, and that the Secretary was legally required to make separate allocations to each tribe. See Petition for Judicial Review of Final Agency Action at 6-8, filed Feb. 4, 1997, in Quileute Indian Tribe v. Daley, No. C97-5071 (W.D. Wash.). Quileute’s attorneys make no attempt to reconcile their current position with the opposite position Quileute took in court in 1997.1

---

1 The Court did not reject Quileute’s position. The case was dismissed for failure to join indispensable parties. See Order Granting Federal Respondent’s Motion to Dismiss and Denying Petitioner’s Motion for Consolidation (filed May 21, 1997).
In support of their current position, Quileute's attorneys first assert that "[t]ribal allocations of all federally-managed fisheries, including Pacific whiting, have always been made to all affected tribes, leaving it up to the tribes to decide the appropriate intertribal distribution." Similarly, they assert that, "[c]ontrary to Makah's claim, NMFS made abundantly clear during the 1999 regulatory process that its allocation was for all four coastal tribes."

These assertions are erroneous. We append to this memorandum a summary of the Indian treaty allocations in the Pacific whiting fishery. That summary shows that, with a limited exception in 2000, the Indian treaty allocations in the Pacific whiting fishery always have been made to a single tribe -- the Makah Tribe -- not to all of the coastal tribes. Indeed, in 1997, Quileute objected when it interpreted a Federal Register notice to provide for a whiting allocation to all of the coastal tribes, and only withdrew its objection after NMFS stated in court filings that the allocation was only for the Makah Tribe. In 2001, Quileute submitted a brief in the Ninth Circuit Court of Appeals in which it argued that it had never received an allocation in the whiting fishery -- and the Court agreed. Here too Quileute's attorneys make no attempt to reconcile their current position with the opposite position Quileute previously took in court.

Moreover, in addition to the Makah-only whiting allocations, a special Federal regulation for Indian treaty midwater trawl fisheries has, since its adoption in 1996, been limited explicitly to the Makah Tribe. See 50 C.F.R. § 600.324(k).

Furthermore, there are several circumstances pertaining to the 2009 Pacific whiting fishery that have not been present previously. These new circumstances provide the basis for separate allocations to the tribes in 2009, whether or not the Secretary has previously made such separate allocations.

First, with limited exceptions in 1999 and 2000, no tribe other than Makah has sought to participate in the Pacific whiting fishery. In 1999 and 2000, the other tribes seeking to participate in the fishery (Quileute in 1999 and Hoh in 2000) sought small allocations and agreed to manage their fisheries within those allocations. In contrast, for 2009 (and beyond), Quileute insists it is entitled to harvest the entire treaty allocation, and is unwilling to agree to manage its fishery for a portion of the overall treaty allocation that would meet the needs of its fishery. Indeed, you have informed us that a Quileute representative has stated openly and repeatedly that Quileute intends to use its perceived geographic advantage to preempt the Makah fishery. These positions create, for the first time, circumstances that could give rise to a race for the fish in the treaty whiting fishery, with adverse consequences for both tribes' fisheries and for bycatch management.

Second, some of the species taken as bycatch in the Pacific whiting fishery have been declared overfished and are now subject to mandatory rebuilding plans that constrain all west coast groundfish fisheries. Thus, by creating the conditions of a race for fish, Quileute's proposed entry into the fishery in 2009 presents serious conservation
concerns, with potential adverse consequences for the affected species and for all participants in west coast groundfish fisheries.

Under these circumstances, the Secretary has authority to make separate allocations to each tribe so as to prevent a race for fish, conserve depleted species taken as bycatch, and prevent preemption of the Makah fishery. The Secretary’s Magnuson-Stevens Act authority to take regulatory action to prevent a race for fish under very similar circumstances was upheld recently in Starbound LLC v. Guiterrez, 2008 WL 1752219 (W.D. Wash. Apr. 15, 2008). In that case the plaintiff had acquired limited entry permits to participate in the catcher/processor sector of the 2007 Pacific whiting fishery. However, just before the fishery opened, the Secretary promulgated an emergency regulation barring participation by any vessel without a history of sector-specific participation in the fishery. This had the effect of barring the plaintiff from the 2007 fishery. See id. at *1.

The Court explained that, in order to carry out the purposes of the Magnuson-Stevens Act, which include rebuilding overfished stocks, the Council conducts an annual stock assessment, which is used to determine an optimum yield, which is then allocated to the three different sectors within the non-treaty fishery (after subtracting the treaty allocation). “The rationale for allocating portions of the optimum yield to these three sectors is to reduce the incentive for a ‘derby-style race for fish’ that might upset the desired balance of fish species.” Id. The emergency rule adopted by the Secretary had been recommended by the Council “based on a belief that certain recent developments could lead to a ‘race for fish’” in the 2007 season. Id. at *2.

The plaintiff argued that, because there was much greater potential for excessive bycatch levels in the shoreside sector, it was arbitrary to limit its entry into the catcher/processor sector. The Court rejected this argument for two reasons. First, even if bycatch rates are “much higher” in the shoreside sector, it was undisputed that catcher/processors contribute to the problem to some degree. Id. at *5. Second, “because bycatch rates are higher in the early months of the season, intensive fishing at those times presents of heightened risk of a ‘disaster tow’ and early closure of the Fishery.” Id. at *6.

The plaintiff also argued that it was willing to join the Pacific Whiting Conservation Cooperative in order to avoid a race for fish, and that opposition to its entry into the PWCC proved that “[t]his is an allocation issue, not a conservation, safety, or economic disaster issue.” Id. The Court rejected this argument as well. It reasoned that, while “this appears to be both an allocation issue and a conservation issue,” it was primarily a conservation issue for the Secretary.

The parties agree that cooperation and communication in the catcher/processor sector by members of the PWCC has contributed greatly to the stability of the Fishery. This system, however, is a voluntary one, the absence of which produces the paradigmatic “tragedy of the commons,” in which individual fishing interests have an incentive to aggressively fish early in the season, when bycatch levels are high, in
order to ensure their own yield. If all participants behave this way, as they are pressed to once the cooperative structure breaks down, they reach bycatch limits early and the whole Fishery closes prematurely. This was clearly a main concern upon which the Council relied in making its recommendation, ... and whatever motives Plaintiffs would ascribe to the PWCC, it is fundamentally about conservation from Defendants' standpoint.

_Id._

There are even greater concerns about a potential race for fish in our situation. You have informed us that Quileute's representative has stated openly and repeatedly that Quileute intends to exploit its geographic advantage to preempt the Makah fishery. Thus, unlike the _Starbound_ plaintiff, Quileute is not seeking to avoid a race for the fish, but is openly promising to engage in a race for the fish, which will concentrate harvests early in the season, disrupt cooperative fishing patterns in the established Makah fishery, and increase bycatch of depleted species. Under these circumstances, the _Starbound_ decision makes it clear that the Secretary has authority under the Magnuson-Stevens Act to take regulatory action to prevent a race for the fish, regardless of incidental allocative effects.

Moreover, in our situation, the Makah Tribe is not proposing to prohibit the Quileute Tribe from entering the fishery. Rather, it is proposing only that the Secretary make a separate allocation to the Quileute Tribe, based on the Quileute Tribe's own projected 2009 harvest. Thus, the Secretary would not be in the position of making an inter-tribal allocation decision, but would simply be allocating to each tribe an amount of whiting that each tribe has said it expects to harvest. In the absence of an agreed tribal management plan, and in the face of Quileute's explicit threats to preempt the Makah fishery, such an allocation is a reasonable and necessary conservation measure. The Secretary's authority to adopt such measures for the treaty fishery is well established. See, e.g., _Washington v. Washington Commercial Passenger Fishing Vessel Ass'n_, 443 U.S. 658, 682 (1979); _Makah Indian Tribe v. Brown_, No. C85-1606R, Order on Five Motions Relating to Treaty Halibut Fishing at 6-7 (W.D. Wash. Dec. 29, 1993); _see also United States v. Washington_, No. 9213, Subproceeding 96-1, Order Re: Granting Preliminary Injunction at 5 (W.D. Wash. Mar. 22, 1996) (enjoining Quileute Tribe from unrestricted use of pot gear in black cod fishery because of impacts on established fisheries of other tribes).

Quileute's attorneys also argue that a provision in the Framework Regulation NMFS adopted in 1996 to implement Indian treaty fishing rights in the groundfish fishery makes "it clear that NMFS must make groundfish allocations to 'the tribes' as a whole, not separate allocations to individual tribes as Makah requests." In particular, Quileute's attorneys cite the provision in 50 C.F.R. § 660.324(d) which states that such rights "will be implemented either through an allocation of fish that will be managed by the tribes, or through regulations in this section that will apply specifically to the tribal fisheries." According to Quileute's attorneys, "[c]onsistent 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)."

There is nothing in the language of the regulation that precludes Makah’s request for separate allocations to be managed by each tribe – as Quileute insisted was legally required in its 1997 lawsuit. An allocation of fish that contains a component to be managed by the Makah Tribe and a component to be managed by the Quileute Tribe is still “an allocation of fish that will be managed by the tribes.” And, a directive to each tribe to manage for a particular portion of the allocation is a “regulation[... that . . . appl[ies] specifically to the tribal fisheries.” Under the circumstances present here, such an approach is reasonable and necessary for conservation, and there is nothing in § 660.324 that disclaims the Secretary’s authority to adopt reasonable and necessary conservation measures.

Moreover, as indicated above, in every year except 2000, NMFS has made it clear that its “tribal allocations” in the Pacific whiting fishery have been for the Makah Tribe only. The Quileute Tribe objected to the 1997 allocation until NMFS clarified that it was only for the Makah Tribe, and Quileute insisted in 2001 that it had never received an allocation in the whiting fishery. Moreover, the midwater trawl regulation currently codified at 50 C.F.R. § 660.324(k) has, since its adoption in 1996, been limited explicitly to the Makah Tribe. Thus, from the beginning, NMFS has interpreted the framework regulation as authorizing it to make allocations to or regulations for individual tribes, and Quileute has both recognized this and insisted that NMFS do so.

Quileute’s attorneys also point to two statements relating to the 1999 allocation in support of their position. First, they note that in response to a joint Makah-Quileute proposal for separate allocations in 1999, NMFS stated that it “believe[d] 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 Fed. Reg. 27,929 (May 24, 1999). However, as noted above, in making a joint proposal for the 1999 fishery, Makah and Quileute had reached agreement on separate allocations and neither tribe was threatening to preempt the other tribe’s fishery. The situation today is very different. As discussed above, Quileute has refused to enter into an agreement providing for separate tribal harvest guidelines or allocations, and it is openly threatening to preempt the Makah fishery. This creates the potential for a race for fish, which adverse consequences to each tribe’s fishery and to conservation of species taken as bycatch. These conservation concerns are especially acute given the declarations of overfished species and the adoption of rebuilding plans since 1999. In analogous circumstances, the Starbound court held that the Secretary could take action to prevent a race for fish notwithstanding that such action presented both a conservation and an allocation issue.

Second, Quileute’s attorneys quote the first sentence in a Ninth Circuit opinion in which the Court stated it was considering “a challenge by fishing industry groups and the States of Oregon and Washington 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).
However, later in its opinion the Court noted more precisely that, “[i]n 1999, Midwater and Oregon challenged in Oregon federal district court another NMFS regulation, which increased the 1999 amount of Pacific whiting allocated to the Makah Tribe to 32,5000 metric tons.” *id.* at 716 (emphasis added). Before reaching the merits, the Court considered whether Midwater Trawlers had standing to challenge the definition of the Quileute, Hoh and Quinault usual and accustomed fishing areas in the Framework Regulation. It held Midwater Trawlers did not have standing to do so because “NMFS has not allocated any Pacific whiting to them”; according to the Court, the “only tribal allocation properly at issue is that to the Makah Tribe.” *Id.* When it reached the merits, the Court made it clear that it was addressing only the rights of the Makah Tribe under the Makah treaty (the Treaty of Neah Bay), not the rights of the Quileute, Hoh or Quinault Tribes under their treaty (the Treaty of Olympia), because the challenged allocation was only to the Makah Tribe. *Id.* at 718 -- 721. Thus, any ambiguity created by the Court’s opening statement is resolved by the Court’s holding with respect to Midwater Trawlers’ standing to challenge the description of Quileute, Hoh and Quinault’s usual and accustomed grounds, and by its discussion of the merits of the 1999 allocation.

Quileute’s attorneys claim that “[p]assing references to the ‘Makah allocation’ and the like simply reflect the fact that Makah has been the only participant in the fishery to date.” It is true that the Makah Tribe has been the only tribe to participate in the treaty whiting fishery to date. However, the many references to the “‘Makah allocation’ and the like” are not simply “passing references” but accurate descriptions of the allocations that have been made in the fishery. Under the Framework Regulation, a tribe seeking to participate in the fishery must make a request for an allocation or regulation from NMFS and, with the very limited exceptions discussed in this memorandum, Makah has been the only tribe to do so. Accordingly, NMFS has consistently limited the treaty allocations in the whiting fishery to the Makah Tribe.

Finally, it is important to note that, contrary to the suggestion in the Quileute attorneys’ letter, the Makah Tribe does not claim that it has “a perpetual and exclusive right to the entire tribal allocation.” Makah has never opposed Quileute’s (or any other tribe’s) entry into the fishery, and has affirmatively proposed an increase in the total allocation to accommodate Quileute’s stated intent to participate in the fishery, both in 1999 and again for 2009. Makah also supported an allocation that included the Hoh Tribe in 2000, and has made it clear in other years that the overall allocation should accommodate the needs of all tribes that seek to participate in the fishery.

The issue that divides Makah and Quileute today is not whether Quileute is entitled to enter the fishery but how to structure its entry into the fishery. Quileute insists that there be a single overall allocation with no separate harvest guidelines or allocations to manage each tribe’s fishery, and has threatened to preempt the established Makah fishery in a race for fish. In the face of Quileute’s adamant refusal to enter into any agreement that specifies a harvest guideline for its fishery, the issue for the Council and the Secretary is whether they must stand by while Quileute creates a race for fish, undermines conservation values embodied in rebuilding plans for depleted species, and
threatens to preempt an established tribal fishery. For the reasons discussed above, we believe the Council and the Secretary have ample legal authority to make separate allocations to the tribes to prevent this.
Summary of Indian Treaty Allocations in the Pacific Whiting Fishery

The 1996 Allocation.


NMFS is establishing a framework to implement the Washington coastal treaty Indian tribes’ rights to harvest Pacific groundfish. NMFS also announces the allocation of 15,000 metric tons (mt) of Pacific whiting to the Makah Indian Tribe (Makah) for 1996 only, under the provisions of the regulatory framework.

Id. at 28,786 (emphasis added).

NMFS explained the basis for the whiting allocation in a section of the Federal Register notice entitled “Allocation of Pacific Whiting to the Makah.” Id. at 28,787 (emphasis added). NMFS explained that the allocation followed Makah’s June 1995 announcement that it intended to exercise its treaty right to harvest Pacific whiting. Id. According to NMFS, after Makah’s announcement NMFS published a proposed framework rule to accommodate the tribal right to harvest groundfish “and sought public comment on the amount of whiting that should be set aside for exclusive harvest by the Makah in 1996.” Id. (emphasis added). NMFS stated that, although NMFS and Makah disagreed “on the appropriate quantification of the Makah treaty right to Pacific whiting,” NMFS adopted “a compromise proposal by the Makah that reflected the minimum amount of whiting necessary to initiate a fishery in 1996 by the Tribe.” Id. (emphasis added); see also id. at 28,791-28,793 (discussing quantification of Makah treaty right and concluding that “15,000 mt allocated to the Makah for 1996 . . . is within the range of the treaty right”) (emphasis added).

These statements make it clear that the 1996 Indian treaty allocation in the Pacific whiting fishery was based on a request from the Makah Tribe, was intended to meet the minimum needs of the Makah Tribe, and was for the exclusive use of the Makah tribe. This is confirmed by another feature of NMFS’ June 6, 1996, rulemaking. To accommodate rockfish bycatch in the Makah whiting fishery, NMFS adopted a provision authorizing “Makah tribal members” to use midwater trawl gear to take and retain groundfish for which there is no tribal allocation, subject to the trip landing and frequency and size limits applicable to the limited entry fishery.” 61 Fed. Reg. at 28,787 (emphasis added). As codified by NMFS, this provision applied only to Makah tribal members. Id. at 28,795 (§ 663.24(k)).

The reason the whiting allocation and midwater trawl rule were limited to the Makah Tribe is that the Makah Tribe was the only tribe seeking to participate in the
whiting fishery. Under the Framework Regulation adopted by NMFS, treaty rights to harvest groundfish would be implemented “either through an allocation of fish that will be managed by the tribes, or through regulations in this section that will apply specifically to the tribal fisheries.” *Id.* (§ 663.24(d)). Such an allocation or regulation would be “initiated by a written request from a Pacific Coast treaty Indian tribe to the Regional Administrator” and developed “in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.” *Id.* Because Makah was the only tribe seeking to participate in the whiting fishery, the whiting allocation and midwater trawl rule were limited to the Makah Tribe.

*The 1997 Allocation.*

*Administrative Proceedings.*

In the Fall of 1996, the Makah Tribe made a two-year interim allocation proposal for its whiting fishery under the Framework Regulation. In a November 7, 1996, letter to NMFS, Makah summarized the results of its 1996 fishery and explained the basis for its proposal for 1997 and 1998:

[In May 1996 the Tribe received an initial allocation of 15,000 metric tons to begin its whiting fishery. This represented approximately 7.1% of the 1996 U.S. harvest guideline of 212,000 metric tons. The Makah fishery took place in the summer of 1996, with a brief “mop-up” fishery in October. The fishery was very successful, fully harvesting the 15,000 ton allocation. Three tribal members acquired boats and gear to participate in the fishery. Dozens of tribal members obtained jobs on the catch[er] boats or on the processor serving the tribal fishery. Our experience in the first year confirms that the whiting fishery can be an important source of badly needed employment and income on our remote reservation.

We are now preparing for the second year of the fishery, to take place in 1997, and have sought an allocation of 25,000 metric tons. This would represent about 10.8% of the 1997 U.S. harvest guideline of 232,000 metric tons. This modest increase in the Makah allocation is extremely important to our ability to develop the fishery. It would enable one or two new boats to enter the fishery, which, in turn, would enable us to more closely manage the fishery to reduce bycatch. With the addition of one or two boats, our management staff can use time, area or depth restrictions to try to avoid bycatch without disrupting the economic viability of the whiting operation.

Makah also noted that, using a three-part test employed by NMFS in 1996, its proposal did not present a conservation concern but, to the contrary, had important conservation benefits as a result of the age and size of fish in the Makah fishing area. In order to give the parties time to continue discussing a long-term solution to the allocation issue, Makah
proposed that its allocation should remain at 10.8 percent of the harvest guideline in 1998.

As in 1996, Makah was the only tribe seeking to participate in the whiting fishery in 1997 or 1998. No other tribe made a request for an allocation in the whiting fishery in 1997 or 1998 under the Framework Regulation.

NMFS announced the 1997 allocation along with other groundfish specifications in a January 6, 1997, Federal Register notice. See 62 Fed. Reg. 700 (Jan. 6, 1997). At the outset, NMFS noted that it had "received three public comments regarding the allocation of Pacific whiting (whiting) to the Makah Indian Tribe prior to publication of these specifications," and stated that it was addressing those comments in Part V of its notice. Id. at 700 (emphasis added). In Part V, NMFS explained that it could not accept the Council’s recommendation that "no whiting be allocated to the Makah Tribe in 1997," and found that "the tribal proposal of 25,000 mt (10.8 percent) in 1997 to be an acceptable compromise given all of the uncertainties." Id. at 708 (emphasis added). According to NMFS, this short-term compromise was "not intended to set a precedent regarding either quantification of the Makah treaty right or future allocations." Id. (emphasis added). NMFS added that, in the absence of a resolution of the appropriate allocation in 1998, "NMFS may again provide the tribes 10.8 percent of the U.S. HG." Id.

Notwithstanding the reference to the "tribal proposal" and to the possibility of "again" providing the "tribes" 10.8 percent of the harvest guideline in 1998, the entire context of NMFS' discussion makes it clear that it was considering Makah's interim allocation proposal and had decided to make an allocation to the Makah tribe alone on the basis of that proposal. The "tribal proposal" of 25,000 metric tons or 10.8 percent of the harvest guideline was the Makah Tribe's proposal, and it was based on the needs of the Makah Tribe's fishery and on the whiting available in the Makah Tribe's fishing area. NMFS referred specifically to public comments on the allocation "to the Makah Indian Tribe," the Council’s recommendation regarding the amount of whiting to allocate "to the Makah Tribe," and NMFS' intention not to set a precedent regarding quantification of the "Makah treaty right." Moreover, the provision for tribal members to use midwater trawl gear to harvest groundfish for which there is no tribal allocation, although recodified at 50 CFR § 660.324(k), remained limited to Makah tribal members. Id. at 717.

Judicial Proceedings.

Any doubt regarding NMFS' intention in making the 1997 allocation was resolved in United States v. Washington. On February 5, 1997, the Quileute Indian Tribe filed a motion to amend and supplement its response to the Makah Tribe's pending request for determination regarding Pacific whiting in Subproceeding 96-2. Quileute explained that, as stated in the 1996 rule, Quileute understood "the 1996 treaty whiting allocation was strictly proposed for the Makah Tribe alone under its treaty rights." Memorandum in Support of Motion to Amend at 3. However, referring to the language in the 1997 Federal Register notice quoted above ("in 1998, NMFS may again provide
the tribes 10.8 percent of the U.S. HG”), Quileute stated it “appears that NMFS has established its 1997 compromise with the Makah as a treaty allocation the four Washington Coastal Treaty Tribes.” *Id.* at 4.

Quileute stated that it “did not agree that 10.8 percent of the U.S. harvest guideline is an appropriate allocation for all four coastal Tribes . . . .” *Id.* Accordingly, based on its assumption that NMFS had made an allocation to all four coastal tribes, Quileute sought to supplement its response to challenge to the 1997 allocation. *Id.*

In opposing Quileute’s motion, the United States asserted that the motion was “founded on a misunderstanding of the import of the challenged rule which likely arises from an unfortunate typographical error.” United States’ Opposition to Motion to Amend at 2. According to the United States, “[t]he Quileute Tribe has never, to date, sought an allocation of whiting and therefore the regulation did not purport to address an allocation of whiting to any tribe other than Makah.” *Id.* (emphasis added). The United States went on to state:

In 1996, and again in 1997, the Secretary of Commerce published regulations which set aside for the Makah Tribe an allocation of Pacific Whiting. 61 Fed. Reg. 28786 (June 6, 1996), 62 Fed. Reg. 700 (January 6, 1997). In both cases, the Makah allocation was based on a compromise intended to allow the parties time to work out the complex legal and factual issues involved in determining the appropriate allocation. As the Quileute Tribe correctly states, no tribes other than Makah sought whiting allocations in either 1996 or 1997, and so the quantification did not address any tribe other than Makah.

***

The 1997 Compromise Treaty Allocation is for the Makah Tribe Alone. Quileute’s fears that the 1997 regulation applies to all treaty tribes instead of just to Makah are unfounded. They are apparently the result of an unfortunate typographical error which said the 10.8% treaty allocation would be for the tribes rather than for the tribe. Based on this typographical error, the Quileute Tribe assumes that the 1997 allocation is for all four coastal tribes. This assumption is not correct. Only the Makah Tribe expressed the intent to exercise its treaty right to harvest whiting and

---

2 Quileute also sought to amend its response to “agree[] with the methodology proposed by NMFS to determine the Makah Tribe’s treaty share in so far as that methodology is based on a determination of the proportion of the available coastwide Pacific whiting biomass found in the Makah usual and accustomed area.” Proposed Amended and Supplemental Quileute Response to Makah RFD re: Whiting at 2 (Feb. 5, 1997). As discussed below, NMFS ultimately rejected the “biomass” approach to quantifying Makah’s treaty right on the grounds that it was not required for conservation, underestimated the quantity of fish that pass through the tribe’s usual and accustomed fishing area, and illegally discriminated against the treaty fishery, and the courts upheld this determination. Based on the April 20, 2008, letter from Quileute’s attorneys, it appears that Quileute has abandoned its prior support for the biomass methodology.
only Makah asked for an allocation in 1997 pursuant to the tribal groundfish framework rule found at 50 C.F.R. 660.324(d) . . .

In short, NMFS did not conclude that 25,000 mt., or 10.8% of the harvest guideline, is the appropriate allocation for all four treaty tribes, nor did NMS base the allocation on the biomass available in the usual and accustomed fishing areas of the four tribes. The 1997 allocation is a short-term compromise allocation to the Makah – nothing more.

Id. at 3, 5-6 (some emphasis added).

The assurances provided by the United States in its response were apparently satisfactory to Quileute. On March 12, 1997, it entered into a stipulation with the United States withdrawing its proposed challenge to the 1997 allocation (but not its support for the biomass methodology; see note 2 above).

The 1998 Allocation.

Makah remained the only tribe seeking a whiting allocation in 1998 under the Framework Regulation. Consistently with its two-year interim allocation proposal, Makah sought a 1998 allocation of 10.8 percent of the harvest guideline. Because the harvest guideline was the same in 1998 as it had been in 1997, Makah again sought an allocation of 25,000 metric tons.

NMFS announced the 1998 allocation in a January 6, 1998, Federal Register notice. See 63 Fed. Reg. 419 (Jan. 6, 1998). The notice explained that “treaty Indian fisheries for sablefish, black rockfish, and whiting are separate fisheries, not governed by the limited entry or open access regulations or allocations.” Id. at 442. It described the rules governing tribal fishing for rockfish with fixed gear, including a tribal trip limit for thornyheads taken with longline gear. Id. NMFS then noted that “[f]or other groundfish species, Makah tribal members may use midwater trawl gear to take and retain groundfish for which there is no tribal allocation; those who do so will be subject to the trip landing and frequency and size limits applicable to the limited entry fishery (50 CFR 660.324(k)).” Id. (emphasis added).

Next, NMFS stated that “[t]he tribal allocations for black rockfish and whiting are the same in 1998 as in 1997, and are based on the same rationale. The whiting allocation remains in effect as discussions on the quantification of the treaty right continue in 1998.” Given the context from 1997, the fact that Makah had made a two-year interim allocation proposal for 1997 and 1998, the Government’s explicit assurances in Court that the 1997 allocation was for the Makah Tribe alone, the on-going discussions between NMFS and Makah over the appropriate quantification of the Makah treaty right, and the fact that no other tribe had sought an allocation in 1998, it is clear that this reference to the 1998 “tribal” whiting allocation was to an allocation for the Makah Tribe alone.

To remove all doubt, NMFS stated:
For the reasons stated above, the Assistant Administrator (AA) announces the following tribal allocations for 1998, including those that are the same as in 1997: . . .

Whiting: 25,000 mt for the Makah tribe in 1998, 10.8 percent of the HG.

Id. (emphasis added).

In sum, Makah remained the only tribe seeking to harvest whiting under the Framework Regulation, and the allocation and midwater trawl rule continued to be limited to the Makah Tribe alone. The allocation itself was based on Makah’s proposal and was designed to meet the needs of the Makah fishery. The fact that NMFS referred to the whiting allocation as one of several “tribal” allocations did not change the fact that the whiting allocation was made expressly to the Makah Tribe alone.

The 1999 Allocation.

Administrative Proceedings.

In 1998, the Quileute Tribe expressed interest in participating in the whiting fishery commencing in 1999. On May 8, 1998, Makah made a written five-year proposal for Makah and Quileute harvests in the Pacific whiting fishery, to cover the period from 1999 to 2003. As explained in its May 8, 1998, memorandum, Makah prepared the proposal after consulting with the Quileute Tribe regarding Quileute’s planned participation in the fishery. Makah also had consulted with the Hoh Indian Tribe and Quinault Indian Nation, and had been informed that Hoh had no present plans to participate in the whiting fishery and that Quinault had made no determination regarding its participation in the fishery.

The 1998 proposal called for separate allocations to Makah and Quileute. Makah’s allocation would be based on the U.S. harvest guideline each year; if the harvest guideline were 145,000 metric tons or less, the Makah allocation would be 17.5 percent of the harvest guideline; if the harvest guideline were from 145,001 to 200,000 metric tons, the Makah allocation would be 25,000 metric tons; if the harvest guideline were from 200,001 to 250,000 metric tons, the Makah allocation would be 30,000 metric tons; and if the harvest guideline was over 250,000 metric tons, the Makah allocation would be 35,000 metric tons. In contrast, the proposed Quileute allocation would be 2,500 metric tons per year, regardless of the harvest guideline.

Makah and Quileute clearly contemplated that these allocations would be separate allocations to be separately managed by each tribe. The proposal stated that if Quileute could not fully utilize its allocation, the unused portion would be released to the Makah fishery (there was no proposal for the release of the Makah allocation to Quileute). Both tribes proposed that bycatch in their whiting fisheries would be subject to the same trip landing and frequency and size limits adopted for the non-treaty limited entry fishery.
until specific treaty allocations or harvest specifications for bycatch species were determined. However, for its fishery, Makah proposed that instead of requiring the discarding of fish in excess of those limits, such fish would be retained and forfeited to the Tribe for charitable, non-commercial uses. Makah explained that this would provide a disincentive to harvesting these fish (since they would have to be handled, stored and off-loaded by the catcher and processor without remuneration), would provide more accurate accounting of bycatch, and would avoid waste. There was no similar proposal for the Quileute fishery.

Makah stated that it assumed there would be no objection to “the small allocation sought by the Quileute Tribe,” and thus devoted the remainder of its memorandum to the proposed Makah allocation. The memorandum addressed Makah’s proposal from a conservation and allocation perspective in the context of the Makah fishery in the Makah fishing area, giving particular emphasis to the migration of older, larger fish to the Makah fishing area and the conservation benefits of harvesting such fish as opposed to younger, smaller fish in areas to the south. The proposed Makah allocation was not based on the needs of other tribes or on fish available in the fishing areas of other tribes. As Makah explained:

The Makah proposal is driven by the Tribe’s needs for the maintenance of a commercial maritime economy. As has been the case in other coastal fishing communities, the Tribe has witnessed a dramatic decline in its salmon fisheries and is now facing a devastating reduction in its black cod fishery, and must actively participate in groundfish and other fisheries in order to survive. Its experience over the past two years has shown that the harvest levels proposed in this memorandum can support a viable treaty fishery with vessels wholly owned and crewed by tribal members. This limited diversification of the Tribe’s fishing economy is essential to provide jobs and income to tribal members and to maintain its maritime industry. Under the Supreme Court’s decisions, the Tribe’s proposed harvest levels are reasonable and well within its treaty entitlement.

On August 14, 1998, representatives of the National Marine Fisheries Service, the Bureau of Indian Affairs, the Washington Department of Fish and Wildlife, the Oregon Department of Fish and Wildlife, and the Makah, Quileute and Quinault tribes met to discuss Makah’s May 8, 1998, proposal. As a result of suggestions from the other participants in the meeting, Makah revised the proposal to limit it to three years (1999–2001), added a series of “re-openers” – conditions under which the proposed allocations could be reconsidered during the course of the three-year period – and changed the proposed Makah allocations to add additional breakpoints. The proposed allocations as revised were set forth in the following table:

<table>
<thead>
<tr>
<th>U.S. Harvest Guideline</th>
<th>Makah Allocation</th>
<th>Quileute Allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 145,000 mt</td>
<td>17.5% of U.S. Harv. Guide.</td>
<td>2,500 mt</td>
</tr>
<tr>
<td>145,001 to 175,000 mt</td>
<td>25,000 mt</td>
<td>2,500 mt</td>
</tr>
<tr>
<td>175,001 to 200,000 mt</td>
<td>27,500 mt</td>
<td>2,500 mt</td>
</tr>
<tr>
<td>200,001 to 225,000 mt</td>
<td>30,000 mt</td>
<td>2,500 mt</td>
</tr>
<tr>
<td>225,002 to 250,000 mt</td>
<td>32,500 mt</td>
<td>2,500 mt</td>
</tr>
<tr>
<td>Over 250,000 mt</td>
<td>35,000 mt</td>
<td>2,500 mt</td>
</tr>
</tbody>
</table>

One of the re-openers made it clear that the proposal involved only allocations to the Makah and Quileute tribes, not to the other coastal tribes (Quinault and Hoh). It provided that the agreement could be re-opened if "the Hoh Indian Tribe or the Quinault Indian Nation seeks an allocation to participate in the Pacific whiting fishery."

NMFS announced the 1999 tribal whiting allocation in a May 24, 1999, Federal Register notice. See 64 Fed. Reg. 27,928 (May 24, 1999). NMFS noted that, in 1999, "the Quileute treaty tribe for the first time joined the Makah tribe in expressing interest in whiting, and the two tribes submitted a proposal for determining annual tribal allocations." Id. at 27,929. NMFS set forth the tribal proposal, but added a column showing the total allocation derived by adding the Makah allocation and the Quileute allocation together. Id. NMFS stated that it "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." Id.

However, NMFS then noted that, at the March 1999 Council meeting, "the Quileute indicated that they would not be harvesting whiting in 1999." Id. According to NMFS, "[t]his reduced the tribal proposal for 1999 by 2,500 mt.," and resulted in a revised tribal proposal, based on a U.S. optimum yield of 232,000 mt, of 32,500 metric tons. Id. As set forth above, this was the amount proposed by Makah for its own allocation.

Since Makah was again the only tribe requesting an allocation, NMFS' issuance of "a total allocation for the affected tribes" was, once again, an allocation for the Makah Tribe alone. NMFS made this clear throughout its Federal Register notice. First, in explaining the amount of the tribal allocation, NMFS stated it "believes the Makah have a treaty right to harvest half of the harvestable surplus of whiting found in the tribe's usual and accustomed fishing area" and that, under applicable legal principles, "the question becomes one of attempting to determine what amount of fish constitutes half the harvestable surplus of Pacific whiting in the Makah's usual and accustomed fishing area, determined according to the conservation necessity principle." Id. at 27,930 (emphasis added). NMFS stated this was a difficult issue but concluded that "[t]he Makah have made a proposal for 32,500 mt of whiting in 1999 that NMFS accepts as a reasonable accommodation of the treaty right for 1999 in view of the remaining uncertainty surrounding the appropriate quantification." Id. (emphasis added). It added that this amount was "not intended to set a precedent regarding either quantification of the Makah treaty right or future allocations." Id. (emphasis added).

Second, in responding to comments that challenged the existence of a treaty right to whiting, NMFS pointed to the Ninth Circuit's decision in the shellfish litigation, in which the court held that the tribes have treaty rights to all species of fish in their usual and accustomed fishing areas, and noted that "[t]his would cover the Makah treaty right
to whiting.” *Id.* (emphasis added). Similarly, NMFS rejected the argument that a passage from the legislative history of the Magnuson-Stevens Act “provides a basis to deny a whiting allocation to the Makah tribe.” *Id.* at 27,931 (emphasis added). In these passages, NMFS made it clear that what was at issue was an allocation to the Makah Tribe, not an allocation to the other coastal tribes.

NMFS made this point absolutely clear in the following passage:

Comment 4: Commenters objected to allocation of whiting to the Hoh, Quileute, and Quinault tribes because the courts have not adjudicated the western boundary of their usual and accustomed fishing areas.

Response: The only one of these three tribes that had requested an allocation for 1999 was the Quileute Tribe. However, the Quileute tribe has since advised NMFS it does not plan to harvest whiting in 1999, and is not seeking an allocation in 1999. Therefore, in 1999, the only tribal allocation of whiting is for the Makah Tribe.

*Id.* (emphasis added).

Finally, in announcing specifications and allocations for the 1999 whiting fishery, NMFS added the following provision regarding the “tribal allocation”: “The allocation of whiting is 32,500 mt for the Makah Tribe.” *Id.* at 27,933 (emphasis added).

*Judicial Proceedings.*

Midwater Trawlers Cooperative and others filed a lawsuit to challenge the 1999 allocation. The lawsuit confirmed that the 1999 allocation was an allocation for the Makah Tribe only. Indeed, the Quileute and Quinault tribes themselves took this position during the course of the lawsuit.

In its lawsuit, Midwater Trawlers challenged the definition of the Quileute, Hoh and Quinault tribes’ usual and accustomed fishing areas as set forth in the Framework Regulation. Quileute and Quinault jointly filed an amicus brief in the Ninth Circuit Court of Appeals which addressed this issue. They pointed out that, as of April 2001 when the brief was signed, the Secretary had not allocated any whiting to Quileute, Hoh or Quinault:

The Secretary made an initial allocation of 15,000 mt of Pacific whiting to the Makah Tribe. 61 Fed. Reg. at 28787. The Secretary, however, made no initial allocation of Pacific whiting to the Quileute, Hoh or Quinault Tribe. See *id.* at 28786-28787. To this day neither the Quileute, Hoh nor Quinault Tribe has received any allocation of Pacific whiting, and no allocation of whiting has been based on the scope of their U&As. See 64 Fed. Reg. at 27931 (Makah SER 26).
Quileute and Quinault *Amicus* Br. at 12 (emphasis added).

On the basis of these facts, Quileute and Quinault argued that Midwater Trawlers *could* challenge the allocation of whiting to the *Makah Tribe*, but *could not* challenge the description of the *Quileute, Hoh, or Quinault* usual and accustomed grounds. They explained:

Midwater has standing to challenge the *allocation of Pacific whiting to the Makah Tribe* because this allocation results in a reduction in the non-treaty whiting allocation. *Washington v. Daley*, 173 F.3d 1158, 1165 (9th Cir. 1999). By contrast, *Midwater has alleged no injury from the description of the Quileute, Hoh and Quinault U&As in the Framework Regulation.*

***

The Secretary has *never made any whiting allocation to the Quileute, Hoh and Quinault tribes* and *has not based any whiting allocation on the scope of their U&As as described in the Framework Regulation.* Moreover, there is *no evidence that a whiting allocation to any of these tribes is imminent.* See 64 Fed. Reg. at 27931 (Makah SER 26). Midwater's challenge to the description of the U&As of the Coastal Tribes is therefore a request for an advisory opinion from this Court on an issue that is not ripe for decision. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

Quileute and Quinault *Amicus* Br. at 13, 15 (emphasis added).

The Ninth Circuit agreed with Quileute and Quinault's argument. It held that Midwater Trawlers *could not* challenge the description of the Quileute, Hoh or Quinault usual and accustomed grounds in the Framework Regulation because the Secretary had not allocated any whiting to them. The Court explained:

Midwater lacks standing to challenge that portion of the Framework Regulation that identified U & A areas for the Hoh, Quileute, and Quinault Tribes beyond three miles. In order to have standing, a plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *U.S. v. Hays*, 515 U.S. 737, 743 (1995). Although none of the tribes disclaims its right to seek an allocation through the Framework Regulation in the future, the *NMFS has not allocated any Pacific whiting to them.* Thus, any injury Midwater suffered in connection with the Hoh, Quileute, and Quinault Tribes was "conjectural or hypothetical" rather than "actual or imminent." In short, *Midwater has not suffered the requisite injury in fact and lacks standing to challenge the portion of the regulation identifying U & As with respect to
the Hoh, Quileute, and Quinault Tribes. Thus, the only tribal allocation properly at issue is that to the Makah Tribe.

Midwater Trawlers Co-operative v. Department of Commerce, 282 F.3d 710, 716 (9th Cir. 2002) (emphasis added).

Quileute’s Arguments.

As noted in the text of our memorandum, in their April 10, 2008, letter to Mr. Lohn, Quileute’s attorneys cite two statements relating to the 1999 allocation to argue that the allocation was an “overall” allocation available to all four coastal tribes. First, they point to NMFS’ statement in its May 24, 1999, Federal Register notice that “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.” However, as we explained above, NMFS went on to note that Quileute had withdrawn its request for an allocation in 1999 and, therefore, the actual 1999 treaty whiting allocation was only for the Makah Tribe since it was the only tribe seeking an allocation. As we noted, NMFS stated explicitly that “[t]he [1999] allocation of whiting is 32,500 mt for the Makah Tribe.” 64 Fed. Reg. at 27,933 (emphasis added).

Quileute’s attorneys also quote the first sentence in the Ninth Circuit’s opinion, in which the Court stated it was considering “a challenge by fishing industry groups and the States of Oregon and Washington to a federal regulation that increased the amount of Pacific whiting fish allocated to four Indian tribes.” 282 F.3d at 714 (emphasis added). However, as noted above, later in its opinion the Court stated more precisely that, “[i]n 1999, Midwater and Oregon challenged in Oregon federal district court another NMFS regulation, which increased the 1999 amount of Pacific whiting allocated to the Makah Tribe to 32,500 metric tons.” Id. at 716 (emphasis added); see also id. at 715 (Framework Regulation “made a specific allocation of 15,000 metric tons of Pacific whiting to the Makah Tribe for 1996”) (emphasis added). Moreover, any ambiguity created by the Court’s opening statement is resolved by the Court’s holding with respect to Midwater Trawlers’ standing to challenge the description of Quileute, Hoh and Quinault’s usual and accustomed grounds. As discussed above, the holding was based explicitly on the fact that the Secretary had allocated no whiting to those tribes. Finally, the Court’s discussion of the merits of the 1999 allocation made it clear that it was addressing an allocation to the Makah Tribe alone. The Court stated:

[W]e conclude that the specific allocation in 1999 to the Makah Tribe was inconsistent with the scientific principles set forth in the Magnuson-Stevens Act.

The starting point for any examination of the rightful allocation of Pacific whiting to the Makah Tribe must be the tribe’s right under the Treaty of Neah Bay.
Applying these general principles to the case at hand, 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.

The immediate origins of the present controversy date to 1996, when the NMFS sought public comment on its initial proposal to determine the Makah allocation based on a “biomass” theory.

The Makah Tribe argued that the NMFS should employ a harvest-based approach... based on the Makah Tribe’s assertion that the majority of the unitary stock of whiting pass through the Makah Tribe’s usual and accustomed area.

The NMFS never implemented the biomass-based methodology... Instead, the NMFS and the Makah Tribe entered into a compromise agreement, under which the Tribe was to be allocated 15,000 metric tons in 1996.

Subsequently, the tribe proposed a two-year interim allocation of 10.8% of the United States Harvest Guidelines for 1997 and 1998. After determining that the proposal would have a negligible biological impact, the NMFS approved the proposal.

In 1998, the Makah Tribe made a five-year compromise proposal to the NMFS, under which the tribe would receive a treaty share not to exceed 17.5% of the United States harvest guideline in any one year. In 1999, the NMFS proposed an allocation to the Makah Tribe, in accordance with the compromise agreement.

Subsequently, the NMFS published a proposed rule requesting comments on (1) the Makah Tribe’s sliding-scale proposal, which under the 1999 United States Harvest Guidelines would result in an allocation of 32,500 metric tons, or 14% of the total United States harvest; (2) a “status quo” allocation of 25,000 metric tons.

In an environmental assessment prepared for the 1999 tribal allocation, the NMFS concluded that the Makah proposal would have no significant impact on the environment.

In the end, the NMFS approved the Makah proposal... In doing so, the agency stated:

*The Makah have made a proposal for 32,500 mt of whiting in 1999 that NMFS accepts as a reasonable accommodation of the treaty right for 1999 in view of the remaining uncertainty surrounding the*
appropriate quantification. This 1999 amount of 32,500 mt (14 percent of the 232,000-mt OY) is not intended to set a precedent regarding either quantification of the Makah treaty right or future allocations.

The difficulty with the published justification for the rule is, of course, that it is devoid of any stated scientific rationale. . . . Although the NMFS allocation may well be eminently fair, the Act requires that it be founded on science and law, not pure diplomacy.

For these reasons, a remand to 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.

Id. at 718-21 (emphasis added). The Court’s repeated references to the Makah Tribe cannot be dismissed as “passing references” with no legal significance. Throughout this discussion, the Court made no reference to allocations to any other tribe or to the rights of any other tribe; what was at issue was an allocation to the Makah Tribe alone.

The 2000 Allocation.

In June 1999, the Hoh Tribe wrote to NMFS to request “a whiting set-aside for the Hoh Tribe” so that it could begin participating in the whiting fishery in 2000. In September 1999, Makah submitted its request for treaty groundfish fisheries pursuant to the Framework Regulation. It proposed that “the Makah set-aside for whiting should be as previously proposed by the Makah Tribe.”

In November 1999, the Hoh Tribe wrote to the Pacific Fishery Management Council to confirm its request for a “2000 MT set-aside for Pacific whiting.” In support of this small request, Hoh reported that it had negotiated a vessel lease agreement, identifying the lessor and the vessel, stated it had obtained a commitment for shoreside processing with a Westport processor, “details of which we have shared with National Marine Fisheries Service,” explained arrangements it had made to crew the vessel, and agreed to “coordinate its participation in the Treaty Whiting harvest with the Makah and other coastal tribes and the Washington Department of Fish and Wildlife.” (It should be noted that this is a much more complete and open description of its planned fishery than Quileute has provided for 2009 or that either Quileute or Quinault have provided for 2010.)

No other tribe requested a whiting allocation for 2000. In discussions with NMFS, Makah agreed to support an overall allocation of 32,500 metric tons to accommodate both the Makah and Hoh fisheries. In announcing the allocation, NMFS explained:
Initially for 2000, the Makah proposed 32,500 mt for the Makah tribe alone, which was based on a long-term proposal developed by the tribe in 1998, which had varying levels of Makah allocation based on the level of the whiting OY. In addition, the Hoh tribe proposed 2,000 mt of whiting for a Hoh fishery. In subsequent discussions with a representative of the Makah tribe, the Makah representative indicated that the tribe is not fully certain that it will harvest the entire 32,500 mt in 2000. This is because the Makah allocation in 1999 was larger than the 1998 allocation and the tribe did not take the entire amount. In addition, because the Hoh fishery is new, and questions have been raised about it, it is uncertain how much of the 2,000 mt requested would actually be harvested. Therefore, NMFS believes the 32,500 mt should be adequate for the two tribes in the transitional year of 2000.


To this day, the 2000 allocation has been the only allocation made by NMFS that was intended for another tribe in addition to Makah. In making this allocation, NMFS relied on the tribal proposals, including the understanding that Hoh would only harvest “up to 2000 mt”:

Taking into account the existing case law in U.S. v. Washington, the proposal and supporting arguments of the Makah tribe, the Hoh proposal, the comments from the Council and the public, and the existing uncertainty surrounding the appropriate quantification described above, NMFS is allocating 32,500 mt again in 2000 to the coastal tribes. NMFS anticipates that, based on the tribal proposals, the Hoh tribe will harvest up to 2000 mt and the Makah tribe will harvest the remainder of the allocation. This 2000 amount of 32,500 mt is not intended to set a precedent regarding either quantification of the Makah or Hoh treaty rights or future allocations.

Id. (emphasis added). Although NMFS stated that is was allocating 32,500 mt “again in 2000 to the coastal tribes,” it is clear that that preceding allocations had been to the Makah Tribe alone; only the amount was the same in 1999.

NMFS described the 2000 whiting allocation as a “tribal allocation.” Id. However, it is clear from the NMFS’ discussion that the 2000 allocation was only for the Makah and the Hoh tribes; no other tribe requested an allocation and NMFS’ decisions was based explicitly on the Makah and Hoh proposals.

As it turned out, Hoh did not participate in the fishery in 2000. Once again, Makah was the only participant.

The 2001 Allocation.
Makah was the only tribe that sought to participate in the whiting fishery in 2001. NMFS allocated 27,500 mt to Makah based on the tribe's 1998 sliding scale proposal. In announcing the allocation, NMFS stated that it was proposed by "the tribes," but made it clear that Makah was the only tribe proposing to participate in the fishery and that the allocation was for the Makah Tribe alone:

For 2001, the tribes proposed a Pacific whiting allocation of 27,500 mt, and the Council voted to adopt this proposal. The 2001 allocation is based on a "sliding scale" proposal presented by the Makah Tribe in 1998 that determines the tribal allocation based on the level of the overall U.S. OY. The "sliding scale" was previously used in 1999 and 2000 to determine the tribal allocation. As discussed earlier, the U.S. whiting OY is reduced in 2001, based on lower estimated stock abundance, to 190,400 mt. Under the 1998 Makah "sliding scale" proposal, a 190,400 mt U.S. OY results in a 27,500 mt Makah whiting allocation. No other tribes proposed to harvest whiting in 2001.

66 Fed. Reg. 2,338, 2,370 (Jan. 11, 2001) (emphasis added). After discussing the pending litigation concerning existence and quantification of the treaty right, NMFS stated that it "will allocate 27,500 mt of Pacific whiting in 2001 to the Makah Tribe." Id. at 2,371 (emphasis added). Although NMFS again described the allocation as a "tribal allocation," without specifying which tribe it was for, id., its discussion of the basis for the allocation made it clear it was for the Makah Tribe alone.

The 2002 Allocation.

Makah submitted its proposal for 2002 groundfish fisheries under the Framework Regulation on September 7, 2001. With respect to the whiting fishery, the Tribe stated that "[i]f Makah is the only tribe seeking an allocation of Pacific whiting, the Indian treaty allocation should continue to be governed by Makah’s allocation proposal, which was approved by the Court in United States v. Washington, Subproceeding 96-2." However, the Tribe added that, "[i]f other tribes seek an allocation of Pacific whiting, the allocation should accommodate the needs of each tribe, consistent with treaty allocation principles." No other tribe requested an allocation in the whiting fishery in 2002.

NMFS announced the 2002 allocation in an April 15, 2002, Federal Register notice. See 67 Fed. Reg. 18,117 (Apr. 15, 2002). It began by noting that, since 1999, it had "set the tribal allocation according to an abundance-based sliding scale allocation method proposed by the Makah Tribe in 1998." Id. at 18,119. It explained that, under the sliding scale, "the tribal allocation varies in relation to the level of the U.S. whiting OY . . . . For 2002, the Makah Tribe has requested, and the Council has recommended, a tribal allocation of 22,680 mt, using the sliding scale allocation method. No other tribes have requested allocations for 2002." Id.

NMFS then noted that the sliding scale had been the subject of two recent court decisions. First, in United States v. Washington, 143 F. Supp. 2d 1218 (W.D. Wash.
2001), the Court "considered several scientific affidavits submitted by NMFS and the Makah Tribe, 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.'" 67 Fed. Reg. at 18,119, quoting United States v. Washington, 143 F. Supp. 2d at 1224 (emphasis added). Those affidavits concerned the proportion of the Pacific whiting stock that passes through the Makah Tribe's fishing area, not the fishing areas of the other coastal tribes. In its decision, the Court stated explicitly that it was addressing only the rights of the Makah Tribe in approving the sliding scale allocations:

Other Indian tribes that have recognized rights to fish for whiting at their usual and accustomed fishing grounds are the Hoh and Quileute Tribes and the Quinault Indian Nation. Because these tribes have not joined in these proceedings and do not, currently, seek to participate in the whiting fishery, the court need not address their various rights and entitlements.

United States v. Washington, 143 F. Supp. 2d at 1220 n.1 (emphasis added); see also id. at 1223 ("tribal allocation agreed upon by NMFS and Makah appears to be wholly whiting the tribe's treaty right to a fair share of whiting"); "Oregon also attempts to limit Makah's harvest opportunities to a portion of the total number of individual fish that actually enter tribal usual and accustomed fishing grounds") (emphasis added).

Second, NMFS noted the very recent issuance of the Ninth's Circuit's decision regarding the 1999 allocation (discussed above). NMFS explained:

[T]he Ninth Circuit upheld the tribal treaty right to Pacific whiting, upheld the usual and accustomed 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." However, the Court also found that the specific allocation in 1999 to the Makah Tribe was inconsistent with the scientific principles set forth in the Magnuson-Stevens Fishery Conservation and Management Act (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 document. Accordingly, the Court issued instructions to the District Court to remand to the agency for more specific findings. On remand, NMFS will be 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."

NMFS stated that, because the Ninth Circuit’s decision had just been issued, it had to announce the 2002 allocation before the formal remand took place. *Id.* at 18,120. It then stated it had reviewed the best available scientific information on the distribution and migration pattern of Pacific whiting (including scientific information submitted by NMFS and Makah in *United States v. Washington*), and was relying on that information in making the allocation. *Id.* Based on that information, NMFS concluded that “an allocation of 22,680 mt of Pacific whiting to the Makah Tribe in 2002 is within the tribal treaty right as described by the District Court in U.S. v. Washington, Sub-proceeding 96-2, and by the Ninth Circuit in the Midwater Trawlers decision.” *Id.* (emphasis added). NMFS added that, [s]ince this [was] the amount requested by the Tribe, NMFS also concludes that it is sufficient to meet tribal subsistence needs for 2002, even though it may be less than the full treaty entitlement.” *Id.* (emphasis added).

As noted, the scientific information submitted by NMFS and the Makah Tribe in *United States v. Washington* concerned the distribution and migration of whiting in Makah’s usual and accustomed fishing area. NMFS’ discussion in its 2002 Federal Register notice thus made it clear that the 2002 allocation was for the Makah Tribe alone, that it was based on Makah’s request to meet the needs of the Makah fishery, and that it was based on scientific information regarding the distribution and migration of whiting in Makah’s usual and accustomed fishing area. Accordingly, although NMFS continued the practice of listing the whiting allocation as a “tribal allocation,” *id.* at 18,128, its discussion of basis for the allocation made clear that the 2002 allocation was for the Makah Tribe alone.

The 2003 Allocation.

*Administrative Proceedings.*

The Makah Tribe was again the only tribe seeking a whiting allocation for the 2003 fishery. NMFS’ Federal Register notice announcing the allocation explained the basis for its adoption of the Makah proposal – “25,000 mt to be taken by the Makah Tribe” – and the basis for its rejection of the biomass methodology. 68 Fed. Reg. 11,181, 11,228 (Mar. 7, 2003) (emphasis added). NMFS’ explanation thus made it clear that the 25,000 mt “tribal allocation,” *id.*, was being made to and for the Makah Tribe alone.

*Judicial Proceedings.*

Shortly after NMFS announced the 2003 allocation, the United States District Court for the Western District of Washington issued an order in the *Midwater Trawlers* case. The District Court explained that the case was on remand from the Ninth Circuit and involved NMFS’ “allocation of the yearly Pacific whiting harvest to the Makah Tribe.” *Midwater Trawlers Cooperative v. United States Department of Commerce, 2003 WL 24011242* at *1* (W.D. Wash. Apr. 11, 2003) (emphasis added). The Court noted that, since the Ninth Circuit’s ruling, “NMFS has issued final rules establishing annual
allocations of Pacific whiting to the Makah.” *Id.* (citing the 2002 and 2003 allocations) (emphasis added).

On the merits, the Court found that the scientific information on which NMFS was relying was the best scientific information available, and that it supported NMFS’ decision to make the allocations on the basis of Makah’s sliding scale proposal as opposed to the biomass methodology. *Id.* at *2-3.* The Court’s discussion of the best available scientific information makes it clear that NMFS’ allocations, and the Court’s decision, concerned on the rights of the Makah Tribe alone:

According to [the best scientific information available], the bulk of the Pacific whiting stock moves through the Makah’s U & A grounds. Robinson Decl ¶ 27-28; Myers Decl ¶ 18 (Jan. 18, 2001) (filed originally in *U.S. v. Washington*, Subproceeding 96-2) (“The available data suggest that when whiting migrate north, the migrations take place within, not seaward of, Makah usual and accustomed fishing grounds. That is, all migrating coastal whiting are potentially exploitable by the Makah.”) (emphasis added). Accordingly, a sliding scale methodology, which allocates the Makah’s rights on the basis of the entire U.S. yield, is based on the best scientific information available despite potential gaps and imperfections in the information.

*Id.* at *3* (emphasis added) (footnote omitted).

The Ninth Circuit affirmed the District Court’s decision in 2004. *Midwater Trawlers Cooperative v. Department of Commerce*, 393 F.3d 994 (9th Cir. 2004). The Ninth Circuit’s decision, like the District Court’s decision, makes it clear that NMFS’ allocations were to and involved only the rights of the Makah Tribe. The following excerpts are illustrative:

[Midwater Trawlers] challenge the Secretary of Commerce’s decision to allocate a portion of the U.S. harvest of Pacific whiting to the Makah Indian Tribe . . . .

In an earlier appeal in this case, we concluded that [NMFS] had failed to explain its allocation of Pacific whiting to the Makah Tribe using the best available scientific information. Accordingly, we remanded for [NMFS] to promulgate a new allocation to the Makah Tribe consistent with the law and based on the best available science, or to provide further justification that the current allocation conforms to the requirements of the Magnuson-Stevens Act and the 1855 Treaty of Neha Bay.

This appeal arises out of a series of four consolidated suits challenging the Secretary of Commerce’s decisions to allocate a portion of the U.S.

---

1 As noted above (see note 2), the biomass methodology was the approach Quileute supported in 1997.
harvest of Pacific coast whiting to the Makah Tribe under the Treaty of Neah Bay.

In 1996, the Fisheries Service promulgated a “Framework Regulation,” codified at 50 C.F.R. § 660.324, that recognized the treaty rights of four coastal tribes – the Hoh, Makah, and Quileute Indian Tribes, and the Quinault Indian Nation – to harvest groundfish in the tribes’ “usual and accustomed” fishing areas. . . . Pursuant to the Framework Regulation, the Department of Commerce has made allocations of Pacific whiting to the Makah Tribe every year since 1996.

In its [United States v. Washington] subproceeding, the Makah Tribe disagreed with [NMFS] over the method to be used for calculating the tribe’s allocation of Pacific whiting. The Makah Tribe argued that the biomass method lacked scientific support and disagreed with [NMFS] on the definition of the “harvestable surplus,”

The problem with the biomass method is that it fails to account for the annual migration patterns of Pacific whiting, which can be influenced by ocean conditions, age, and food sources. This means that the abundance of Pacific whiting in a particular area may dramatically differ from day-to-day as the fish migrate for food or because of ocean conditions. Consequently, the biomass’s snapshot method will only count those fish present in the Makah Tribe’s usual and accustomed fishing grounds during the particular survey period, likely resulting in an underestimate of the actual numbers of Pacific whiting passing through those fishing grounds.

[The Makah Tribe had long argued that a sliding scale methodology provided a better way to calculate its treaty share of the annual Pacific whiting harvest. Under the sliding scale method, the amount of Pacific whiting allocated to the tribes varied, based on the amount of the U.S. Optimum Yield. The data supporting this approach indicates that the “bulk” of migratory Pacific whiting pass through the Makah Tribe’s usual and accustomed fishing grounds, thereby entitling the Makah Tribe to fifty percent of the bulk of the migratory Pacific whiting harvest. . . . When estimates of the Optimum Yield are less that 145,000 metric tons (“mt”), the Makah Tribe would be allocated 17.5 percent of the Optimum Yield. After the estimate reached 250,000 mt, the tribe’s portion would remain at 35,000 mt.

Before making the 1999 Pacific whiting allocation, [NMFS] sought public comment on two allocation proposals. One proposal would have kept the tribe’s 1999 allocation the same as it had been for 1997 and 1998. The other proposal would have relied upon the sliding scale methodology
proposed by Makah, which varied the tribe's allocation as a percentage of the U.S. Optimal Yield.

[In our 2002 decision], we upheld the Framework Regulation that recognized and implemented the treaty rights of the four coastal tribes to harvest groundfish in their usual and accustomed fishing grounds. Midwater II, 282 F.3d at 719 (holding 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"). However, we further concluded that the 1999 allocation of Pacific whiting to the Makah Tribe did not comply with the Magnuson-Stevens Act because [NMFS] failed to explain the allocation on the basis of the best available scientific information.

Following our remand in Midwater II, [NMFS] issued its 2002 Pacific whiting allocation. . . . Additionally, in January 2003, [NMFS] sought public comment on its proposed rule to allocate [the] Makah Tribe's treaty share using the sliding scale method. In March 2003, [NMFS] issued its final rules establishing the 2003 allocations of Pacific whiting. . . . In so doing, [NMFS] stated that the allocations were based on the "best scientific information currently available." . . . Again, [NMFS] explained it had

no additional information that would change the conclusions in the [declarations of William L. Robinson and Dr. Richard D. Methot, Jr., submitted in Midwater Trawlers Cooperative v. Department of Commerce] on the distribution and migratory pattern of the [Pacific whiting] stock. Therefore, [NMFS] is relying on the information in those declarations as the best scientific information currently available. Accordingly, [NMFS] finds that the 2003 treaty Indian allocation of Pacific whiting (25,000 mt to be taken by the Makah Tribe), which is based on the sliding scale methodology that has been in use since 1999, is based on the best scientific information available, and is within the Indian treaty right as described in Midwater Trawlers Cooperative v. Department of Commerce, 282 F.3d 710, 718 (9th Cir. 2002).

According to the district court, the biomass method was not based on the best scientific information available. Rather, the best available scientific information supported the sliding scale method. That information established that most Pacific whiting pass through the Makah Tribe's usual and accustomed fishing grounds. In making the 2002 and 2003 allocations, [NMFS] relied on the sliding scale methodology after finding no additional information to change its scientific conclusions regarding Pacific whiting migration patterns. . . . Therefore, the district court
concluded, “a sliding scale methodology, which allocates the Makah Tribe’s rights on the basis of the entire U.S. yield, is based on the best scientific information available. . . .

According to [NMFS'] scientists, available data suggests that when Pacific whiting migrate north, their migrations take place within Makah Tribe’s usual and accustomed fishing grounds such that the bulk of Pacific whiting stock pass through the tribe’s usual and accustomed fishing grounds. Recognition of this migration pattern is significant because it means that all migrating coastal Pacific whiting are potentially exploitable by Makah. Simply put, the biomass method’s “snapshot” approach fails to account for this migratory pattern and, thereby underestimates the numbers of fish passing through the tribe’s fishing grounds.

The sliding scale method, however, does account for the Pacific whiting’s migratory patterns and, thus, overcomes the failing of the biomass approach. Under the sliding scale method, the Makah Tribe would be allocated a percentage ranging from 14 and 17.5 percent of the U.S. Optimum Yield.

Because the Pacific whiting’s migratory pattern takes it through the Makah Tribe’s usual and accustomed fishing grounds, Makah is entitled to fifty percent of all migrating coastal whiting.

We have previously concluded that the 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, whichever is less.” . . . Nothing, however, supports the notion that a tribe is obligated to take its full 40 percent entitlement. That the tribe opts to not take its full treaty share does not put [NMFS] in the position of justifying a tribe’s lower allocation request. Rather, [NMFS] 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.

By relying on the Optimum Yield, the sliding scale method presumes that the bulk of Pacific whiting passes through and is exploitable by Makah. This presumption is supported by [NMFS'] data concerning migration patterns.

We agree with the district court that “a sliding scale methodology, which allocates the Makah Tribe’s rights on the basis of the entire U.S. yield, is based on the best scientific information available despite potential gaps and imperfections in the information.”

Id. at 997 - 1005 & n.11 (emphasis added) (footnotes omitted).
The 2004 Allocation.

Makah was the only tribe to seek a whiting allocation in 2004. Pursuant to the Framework Regulation, we wrote to the Regional Administrator on June 16, 2003, to set forth the Tribe’s requests for treaty allocations and regulations in the 2004 groundfish fishery. We stated that the Tribe proposed to continue, with two exceptions, “the treaty regulations and allocations in effect in 2003, including the Makah allocation in the Pacific whiting fishery,” with changes to reflect changes in the optimum yields as determined for 2004.

In a proposed rule published on January 8, 2004, NMFS stated that the 2004 tribal whiting allocation would be based on Makah’s sliding scale proposal, and would be calculated “once the final whiting OY is determined.” 69 Fed. Reg. 1380 (Jan. 8, 2004). NMFS noted that “[n]o other tribes have proposed to harvest whiting in 2004.” Id.

NMFS adopted a final rule establishing 2004 specifications for the whiting fishery on April 30, 2004. With respect to the tribal allocation, NMFS provided the following background:

A tribal allocation is subtracted from the species OY before limited entry and open access allocations are derived. The tribal whiting fishery is a separate fishery, and is not governed by the limited entry or open access regulations or allocations. To date only the Makah Tribe has participated. It regulates, and in cooperation with NMFS, monitors this fishery so as not to exceed the tribal allocation.

69 Fed. Reg. 23,667, 23,669 (Apr. 30, 2004) (emphasis added). NMFS then noted that the treaty allocations were still the subject of pending litigation but that, since 1999, it had “set the tribal allocation according to an abundance-based sliding scale allocation method, proposed by the Makah Tribe in 1998.” Id. NMFS stated that, using this method, the 2004 tribal allocation would be 32,500 mt, and noted that the Makah were “the only Washington Coast tribe that requested a whiting allocation for 2004.” Id.

NMFS’ statement that the Makah Tribe regulated and monitored the fishery “so as not to exceed the tribal allocation” makes it clear that NMFS understood that the tribal allocation was only available to the Makah Tribe. If other tribes could participate in the fishery without first making a proposal to do so under the Framework Regulation, Makah could not regulate or monitor the fishery to remain within the tribal allocation.


Commencing with 2005-2006, NMFS began adopting biennial specifications in the groundfish fishery. On April 1, 2004, we wrote to NMFS setting forth Makah’s proposals for treaty fishery allocations and regulations in 2005 and 2006, “including the Makah allocation in the Pacific whiting fishery.” NMFS published a proposed rule for
the 2005-2006 specifications on September 21, 2004. 69 Fed. Reg. 56,550 (Sept. 21, 2004). NMFS provided the same information as it had in its January 8, 2004, proposed rule, and again noted that no tribe other than Makah “proposed to harvest whiting in 2005 or 2006.” Id. at 56,570.

NMFS published final rules for the 2005 and 2006 whiting fisheries on May 3, 2005, and May 22, 2006, respectively. In each year, it stated that tribal allocation was based on the sliding scale methodology and that “[t]he Makah are the only Washington Coast tribe that requested a whiting allocation” for the year in question. 70 Fed. Reg. 22,808, 22,809 (May 3, 2005); 71 Fed. Reg. 29,257, 29,259 (May 22, 2006).

On August 31, 2005, NMFS adopted an emergency rule to establish a salmon conservation zone for the non-treaty Pacific whiting fishery. 70 Fed. Reg. 51,682 (Aug. 31, 2005). In announcing this rule, NMFS noted that, “of the four groundfish treaty tribes, only the Makah Tribe conducts a whiting fishery.” Id. at 51,684. NMFS stated that it had consulted with the Makah Tribe regarding salmon bycatch and that the Tribe was “implementing tribal fishery regulations to close the tribal whiting fishery shoreward of 100-fm (183-m) and is beginning testing a salmon bycatch excluder device that has been successfully used to exclude salmon bycatch in Alaska Pollock fisheries.” Id. (emphasis added).

NMFS’ approach was consistent with its understanding that the tribal whiting allocation was available only to the Makah Tribe. If any coastal tribe could enter the whiting fishery at any time, Makah would not have been in a position to adopt fishing regulations “to close the tribal whiting fishery” shoreward of the 100-fm line, and NMFS would have needed to consult with all of the tribes regarding salmon bycatch. Instead, as its annual Federal Register notices make clear, NMFS was relying on the fact that no other tribe had requested a whiting allocation under the Framework Regulation. Until they did so, Makah was the only tribe authorized to participate in the treaty whiting fishery, and the annual allocations were designed solely to meet the needs of its fishery.

This understanding was again confirmed in 2007. Using Makah’s sliding scale proposal, NMFS adopted a tribal allocation of 32,500 mt for the 2007 whiting fishery, which was down from 35,000 mt in 2006 due to a reduction in the optimum yield. 72 Fed. Reg. 19,390, 19,392 (Apr. 18, 2007). In so doing, NMFS noted that Makah was the only tribe that had participated in the fishery to date and that it was the only tribe requesting a whiting allocation for 2007. Id.

On September 18, 2007, NMFS published a final rule correcting the tribal 2007 allocation because the 2006 amount was still listed in the Code of Federal Regulations. 72 Fed. Reg. 53,165, 53,166 (Sept. 18, 2007). In making this change, NMFS noted that “[t]he Makah tribe is aware of the appropriate 2007 tribal whiting allocation and plans to stay within the 2007 allocation which they proposed; therefore, prior notice and opportunity for public comment is unnecessary.” Id. Again, NMFS viewed the allocation as an allocation exclusively for the Makah Tribe since no other tribe had requested an allocation for 2007.
NMFS set the 2008 treaty whiting allocation based on Makah's slicing scale proposal. 73 Fed. Reg. 26,325, 26,326 (May 9, 2008). It again noted that Makah was the only tribe to have participated in the fishery to date, that Makah regulates and monitors the fishery "so as not to exceed the tribal allocation," and that Makah was the only tribe that requested a whiting allocation for 2008. Id.

Given the history and context of these allocations, it is clear that the recent treaty allocations in the whiting fishery – like all of the treaty allocations since 1996, with a minor exception in 2000 – have been for the exclusive benefit of the Makah Tribe. The other coastal tribes are entitled to request an allocation to participate in the fishery in future years under the Framework Regulation. However, to premise such a request on the claim that the tribal allocations have been for the benefit of all of the coastal tribes all along is contrary to the administrative record that has been compiled since 1996, to repeated court rulings, and to the positions of the tribes (including, in particular, the Quileute Tribe).