

Quileute Natural Resources QUILEUTE INDIAN TRIBE

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NOV 10 2008

PFMC

November 3, 2008



BY MAIL AND HAND DELIVERY

Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 200
Portland, OR 97220-1384

Re: 2009 Tribal Allocation for Whiting

Dear Council Members:

On behalf of the Quileute Tribe, I request that the PFMC recommend to NMFS that it make clear that any tribal whiting allocation is a **total tribal allocation** which the tribes are responsible for managing, without any language regarding separate "set asides" or "management shares."

Background

As the PFMC is aware, the Quileute Indian Tribe intends to participate in the Whiting fishery starting in 2009. Nearly one year ago, the Tribe announced its intent to participate in the fishery, and asked NMFS to take action necessary to implement the Tribe's treaty right. NMFS Regional Administrator D. Robert Lohn not only acknowledged the Tribe's proper request, but expressly represented in writing to the Tribe that: *"Any whiting allocation will be an overall tribal allocation, and the intertribal distribution of the overall tribal allocation is an intertribal issue."* I have attached a copy of Mr. Lohn's April 2, 2008 letter for your reference.

In the spring of 2009, NMFS requested information about the anticipated size of the Quileute whiting fleet and harvest levels. Quileute responded with some preliminary numbers. At the time, however, the Quileute understood, based on NMFS's own written statement, that the only issue was what would be an appropriate total tribal allocation. The Quileute made clear that it did not object to setting the 2009 tribal allocation at 20.5% of the OY, or approximately 50,000 metric tons.

Unfortunately, however, during the PFMC's June meeting, a motion was made to not only set the 2009 whiting allocation at 50,000 metric tons but to divide that quota into two shares, giving the Makah 42,000 metric tons and 8,000 metric tons for the Quileute. Again, the Quileute did not object to the

50,000 metric ton tribal whiting allocation, but objected to any intertribal allocation or individual management shares. Despite the Tribe's objections, the motion (number 49) passed. Subsequent to the June meeting, the Quileute continued to object to the intertribal allocation language and advised NMFS that it anticipated that it would have three to four vessels participating in its 2009 whiting fishery, with the capacity to catch up to 24,000 metric tons. The Tribe requested that NMFS set a total tribal whiting allocation which took into account the Quileute Tribe's anticipated harvest.

We have recently learned that NMFS plans to adopt the recommendation contained in motion 49 and divide the total tribal whiting allocation of 50,000 metric tons into two "individual Tribal set asides" for the Makah and Quileute at 42,000 and 8,000 metric tons, respectively. We ask PFMC to recommend to NMFS that it change course. NMFS has no authority or need to set separate tribal shares. Intertribal allocation is a matter for the tribes to resolve amongst themselves on a government to government basis. NMFS has consistently recognized this and has never set intertribal allocations in any fishery. We, therefore, ask that PFMC recommend to NMFS that it delete any reference to "set asides" or "tribal management shares" from the regulation and simply follow its prior practice of setting a single tribal allocation of 50,000 metric tons.

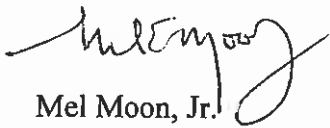
Furthermore, while the Quileute do not object to the 50,000 metric ton share as long it is an undivided total treaty allocation, if NMFS insists on setting separate tribal allocations, the allocation must be sufficient to allow the Quileute to take its anticipated harvest of 24,000 metric tons, an amount well within its treaty share. Although the Quileute informed NMFS of its expected harvest capacity on several occasions, NMFS has indicated it intends to provide only 8,000 metric ton for the Quileute. NMFS's only justification for disregarding the Tribe's anticipated harvest levels is its claim that the Tribe did not submit that information in a timely manner. NMFS's position is unfair for two reasons.

First, there is no written or binding deadline for the submission of anticipated harvest information; there is merely a deadline for indicating intent to participate in the fishery. Indeed, NMFS has not yet issued proposed whiting regulations for 2009. In fact, it is expected that final management measures will not be implemented until March 2009. Second, at the time NMFS sought input from the Quileute in the spring of 2008, the Quileute understood, based on NMFS's own written statement, that the only issue was the amount of the total treaty allocation. The Quileute agreed that the total treaty allocation of 50,000 metric tons was acceptable. It agreed on the assumption that NMFS would be true to its word and continue its practice of not setting separate tribal allocations and that the Quileute would work with the Makah to determine appropriate management measures for the treaty fishery. Thus, the Quileute's input on the treaty quota was timely. It was only after the June 2008 PFMC meeting that it became clear that NMFS was intending to alter course and establish separate tribal allocations. At that time, the Quileute reiterated its objection to separate shares. It also informed NMFS that an 8,000 metric ton set aside was insufficient since it expected to harvest 24,000 metric tons, an amount that is well within its treaty rights.

Request

The Tribe believes PFMC can rectify this situation by taking the following action. Given that implementation of the 2009 harvest specifications and management measures has been delayed until March 2009, PFMC should recommend to NMFS that it make clear that the 50,000 metric tons is a **total tribal allocation** which the tribes are responsible for managing jointly, just like in every other fishery. However, if, despite the Quileute's objection, NMFS insists on setting separate tribal amounts, it must not unfairly limit the Quileute to 8,000 metric tons when the Tribe has indicated that it expects to harvest 24,000 metric tons, and should increase the treaty allocation if necessary.

Sincerely,

A handwritten signature in black ink, appearing to read "Mel Moon, Jr.", with a stylized flourish at the end.

Mel Moon, Jr.
Director, Quileute Natural Resources

cc: D. Robert Lohn, NMFS Northwest Regional Administrator
Frank Lockhart, NMFS Assistant Northwest Regional Administrator for Sustainable Fisheries

Agenda Item H.5.b
Supplemental NMFS Report
April 2008



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northwest Region
7500 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115

APR 02 2008

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

Dear Mr. Woodruff,

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

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

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

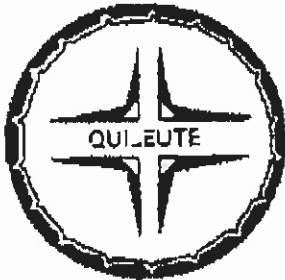
Please contact Frank Lockhart at 206-526-6142 in order to coordinate further discussions on this matter.

Sincerely,

D. Robert Lohn
Regional Administrator

Cc: Mel Moon





**Quileute Natur
QUILEUTE IND**

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Phone (360)-374-5695 • F

D del JS _____
File _____ Action SED
To [Signature] CC: _____
Pls prepare 2 responses

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January 10, 2008

APR 0 8 2008

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

PFMC

RE: Quileute Tribal Request for Whiting Allocation or Regulation

Dear Mr. Lohn:

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

Sincerely,

QUILEUTE INDIAN TRIBE

[Signature]
Russell Woodruff, Jr.
Chair, Quileute Tribal Council

ZIONTZ, CHESTNUT, VARNELL, BERLEY & SLONIM
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Via Telefax and First Class Mail

April 2, 2008

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

Re: Treaty Indian Groundfish Fisheries in 2009 and 2010

Dear Mr. Lohn:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. (italics in original; underlining added).

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

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

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

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

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

Very truly yours,

ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM

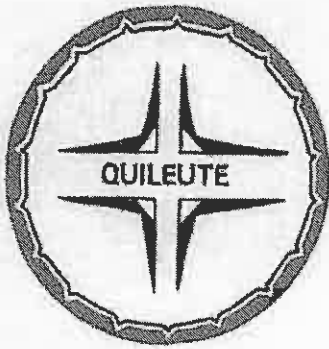


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D. Robert Lohm
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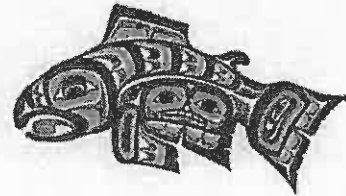
cc (via fax):

Frank Lockhart
Eileen Cooney
Russ Svec
Steve Joner



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Testimony of Mel Moon in Support of Tribal Request for Whiting Allocation

As the National Marine Fisheries Service ("NMFS") and the Pacific Fishery Management Council ("PFMC") are well aware, the Quileute Indian Tribe intends to participate in the Pacific whiting fishery commencing in 2009. Since late 2007, the Tribe has made its intentions clear, both in writing and orally, to NMFS and the PFMC. The Tribe is here today to again reiterate its intention to participate in the 2009 Pacific whiting fishery and, more specifically, to support the Makah Tribe's request for an increase in the tribal whiting allocation to 20.5% of the United States Optimum Yield ("OY").

As you know, the Secretary of Commerce, through NMFS, has issued regulations allocating whiting to the coastal tribes since approximately 1996. The Quileute Tribe has not previously participated in this fishery. In 2009, however, one or more Quileute members intend to participate in this fishery. The Tribe informally advised NMFS of its intent to enter this fishery at the last PFMC meeting in November, 2007. By letter dated January 10, 2008 and pursuant to 50 C.F.R. § 660.324(d), the Quileute Tribe formally provided NMFS with written notification of its intent to participate in the Pacific whiting fishery commencing in 2009. By reply letter dated April 2, 2008, NMFS advised the Tribe that its request had been forwarded to the PFMC for consideration at its April meeting. At that time, NMFS advised that "any whiting allocation will be an overall tribal allocation, and the intertribal distribution of the overall tribal allocation is an intertribal issue." At the April 2008, PFMC meeting, the Tribe again reiterated its intent to participate in the 2009 Pacific whiting fishery.

Subsequently, the Quileute Tribe has met in good faith with other coastal tribes and NMFS to further discuss the specifics of the coastal whiting fishery. Specifically, on May 2, 2008, representatives of the Quileute, Makah, and Quinault tribes met with representatives of NMFS to discuss the tribal whiting fishery. At that time, and pursuant to NMFS's request, the Quileute Tribe provided additional information about the nature and scope of its anticipated 2009 whiting fishery. Specifically, Quileute:

- (1) Anticipated one vessel between 95 – 125 feet to participate in the 2009 whiting fishery,
- (2) Estimated a whiting harvest of approximately 4,000 to 8,000 metric tons based on historical catches of similarly sized vessels,

- (3) Indicated that its whiting fishery would take place between May 15-December 15, 2009 for catcher/processor or "mothership", and June 15-December 15, 2009 for shore-based delivery.
- (4) Provided estimates of its bycatch based upon the groundfish management team's weighted average approach;
- (5) Stated that it would be working with the NOAA staff and regional science center for time and area management measures to minimize bycatch in the Quileute whiting fishery.

Subsequent to this meeting, the Quileute, Quinault, and Makah tribes engaged in further discussions about the 2009 whiting fishery. At that point, the Quinault tribe made clear that it would not be participating in the whiting fishery until at least 2010. Thereafter, the Quileute and Makah tribes agreed that the total tribal allocation for 2009 should be 20.5% of the OY, which represents a 3% increase on the maximum amount of the prior tribal allocation under the "sliding scale" approach. Accordingly, the Quileute Tribe hereby supports the Makah's request for a total tribal allocation of 20.5% to meet the needs of the Quileute and Makah Tribes who will be participating in this fishery in 2009. Considering that the best available science shows that all harvestable whiting pass through the Quileute and Makah U&As, this amount is clearly well-within their treaty right to harvest up to 50% of the OY.

Although the Quileute and Makah tribes agree upon the total tribal whiting allocation for 2009, they are continuing to negotiate over the proper intertribal distribution of that allocation. To be clear, however, any tribal whiting allocation must be made to the coastal tribes as a whole, and must not be split-up by tribe or made to any specific tribes. In all of its discussions with NMFS, PFMC, and other tribes, the Quileute Tribe has been very clear that NMFS must, as it has in every prior year and in every other federally managed fishery, make a *total tribal whiting allocation* and must not take the unprecedented step of allocating groundfish on a tribe-by-tribe basis. Tribal allocations of all federally-managed fisheries, including Pacific whiting, have always been made to *all coastal tribes*, leaving it up to the tribes to decide the appropriate intertribal distribution. The federal regulations make clear that once NMFS receives a tribal request to participate in a groundfish fishery, as it has here, it must implement that right "through an allocation of fish **that will be managed by the tribes...**" 50 C.F.R. § 660.324(d) (emphasis added). In other words, it is up to the tribes to decide how to manage a total tribal groundfish allocation. NMFS could not have been more clear on this point in 1999 when it stated in federal regulations 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.**" 64 Federal Register 27,929 (May 24, 1999) (emphasis added). The Quileute Tribe would strenuously object to issuance of any "separate allocation" to the Quileute or any other action which purports to restrict Quileute's right to harvest from the overall "tribal allocation."

Last, the Quileute Tribe's participation in the whiting fishery will not result in the excessive harvest of overfished species. First, the Quileute Tribe intends to model its observer and bycatch-avoidance programs after those successfully implemented by the

Makah Tribe. The Quileute Tribe continues to research and study those programs and looks forward to working with the Makah tribe to better understand its processes. The Quileute Tribe is confident that by the time it commences this fishery nearly one year from now that it will have an adequate observer program and other steps to minimize bycatch, such as time and area restrictions. Second, although new to this fishery, Quileute fishermen are responsible and very experienced in other fisheries. They have a proven track record of successfully minimizing bycatch in other fisheries, such as halibut and blackcod. Third, there is no evidence suggesting that the Quileutes's U&A is home to higher concentrations of sensitive or protected species of groundfish. To the contrary, analysis of variance (or ANOVA) studies of the bycatch rates for overfished species for the years 2003 to 2007 for the non-tribal at-sea fleets showed no significant differences in the concentration of overfished species between the various tribal U&As.

In short, the Quileute Tribe hereby joins and supports the Makah Tribe's request for a total tribal whiting allocation in 2009 of 20.5% of the OY. This represents a relatively minor increase to the total tribal allocation and remains well-within the treaty right.