Northwest Indian Fisheries Commission

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DEPARTMENT OF COMMERCE
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NATIONAL MARINE FISHERIES SERVICE

RE: 2008 Makah DEIS

Dear Mr. Stone,

The Northwest Indian Fisheries Commission appreciates this opportunity to provide comments on the Draft Environmental Impact Statement for Proposed Authorization of the Makah Whale Hunt. As you may be aware the Commission is composed of twenty federally recognized Indian tribes with treaty-reserved rights to fish and hunt in Puget Sound or along the Washington coast. These fishing and hunting rights are key components of the culture, economies, and heritage of the Commission's member tribes, including the Makah Tribe.

The proposed action crafted by the Makah Tribe (alternative 2) represents a careful and conservative proposal for the resumption of the Tribe's treaty reserved right to hunt whales. The Makah Tribe's proposal provides greater protection for Eastern North Pacific Gray Whales than would be required under the well-established "conservation necessity" principles for state regulation of Indian treaty rights (see discussion at DEIS 1-10-11) and assures that gray whales in the Pacific Coast Feeding Aggregation will continue to be functioning components of the ecosystem. *C.f.*, DEIS at 1-19 (NMFS may not restrict the Tribe's exercise of its treaty right absent showing that MMPA's conservation purpose is not being met).

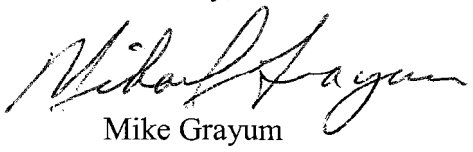
The Commission notes that there are some who argue that the Makah Tribe's decision in the 1920's to stop whaling in order to conserve the species after over-exploitation by non-Indian commercial whalers amounts to "abandonment" of its treaty-reserved right to take whales. *C.f.*, DEIS at 1-33. The Tribe's application for a waiver details the historical and contemporary importance of whaling to the Tribe. *See* DEIS Appendix A at 8-9. The Tribe's decision to stop whaling in the 1920's does not reflect an abandonment of the tradition any more than a farmer's decision to not divert water when the stream is dry reflects an abandonment of a water right. Moreover, the raids by federal agents over the last 50 years searching for whale meat in the homes of Makah tribal members certainly indicates the federal government's belief that the Tribe had not abandoned its tradition. *See* DEIS at 1-32. Moreover, throughout the Draft the ongoing

importance of whaling to the fabric of Makah culture, ceremony and subsistence is amply demonstrated.

The DEIS correctly notes that the tradition of whaling is not unique to the Makah Tribe and that other Pacific Northwest Indian tribes traditionally harvested marine mammals and have expressed relatively recent interest in doing so. *See e.g.*, DEIS at 4-198. *Accord United States v. Washington*, 384 F. Supp. 312, 372 (W.D. Wash. 1974). The connection of other treaty tribes to whaling continues to this day. *See* DEIS at 1-38 (ceremonial involvement of four canoes from various Washington Indian tribes in the landing of whale harvested by Makah Tribe in 1999). Whether or when any other Washington Indian tribe may seek to assert and exercise a treaty-reserved right to hunt whales is entirely speculative and cannot be determined in this NEPA process. While some may attempt to portray the Makah Tribe's request for a waiver as the "tip of the iceberg," the fact remains that the Makah Tribe is uniquely situated and is moving forward on its own. In addition, the evidence before the agency unequivocally indicates that there is no clear cause and effect relationship between granting a waiver and future requests for waivers. DEIS at 4-198 (no evidence that Alaska walrus waiver prompted requests for additional waivers). Accordingly, there is no current basis to assume that granting the Makah Tribe's request for a waiver will influence other tribes to seek to embark on the same pathway.

Again, the Commission appreciates this opportunity to provide comments and encourages NOAA Fisheries to continue its efforts to work cooperatively with the Makah Tribe as it seeks to exercise its treaty rights, while assuring that legitimate conservation needs are met.

Sincerely,



Mike Grayum
Executive Director