MAKAH TRIBAL COUNCIL

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IN REPLY REFER TO:

By Facsimile (503) 230–5441 & First-Class Mail

August 14, 2008

Steve Stone
NOAA Fisheries Northwest Region
1201 NE Lloyd Blvd.
Suite 1100
Portland, OR 97232

Re: Makah Indian Tribe's Comments on Draft EIS (May 2008)

Dear Mr. Stone,

Attached are the comments of the Makah Indian Tribe on the Draft Environmental Impact Statement for Proposed Authorization of the Makah Whale Hunt (May 2008). Thank you for this opportunity to comment. The Tribe sincerely appreciates the substantial time and effort you and your colleagues at NOAA have dedicated to producing this document. If you have any questions please contact Jonathan Scordino, Makah Marine Mammal Biologist, at (360) 645-3176 or by email at mtcmmbiologist@centurytel.net.

Sincerely yours,

Micah McCarty
Chairman, Makah Tribal Council

DEPARTMENT OF COMMERCE
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GENERAL COMMENTS

Overall, as measured by the breadth and depth of the resources and impacts evaluated, the analysis presented in this Draft EIS is extremely thorough. More than just a long document, the substance of the agency's analysis represents a hard look at all resources likely to be impacted by the Tribe's proposal to resume ceremonial and subsistence whaling under the rights guaranteed by the Treaty of Neah Bay. In particular, the Draft EIS responds to the concerns of the Ninth Circuit in *Anderson v Evans* by carefully examining the local impacts of the hunt on gray whales that are present in the Makah U&A and other southern areas of the ENP stock's summer range.

The Tribe appreciates the extensive analysis of the Makah people and culture and their relationship to whaling, which includes the substantial information gathered from visits to Neah Bay and discussion with the tribal community. In the often polarized public debate over whaling in the twenty-first century, the focus is too frequently limited to the impacts on the gray whale rather than on the substantial impacts that a decision to approve or reject the Tribe's waiver request will have on Makah subsistence, ceremonial, cultural and spiritual needs and values. It is, after all, the "human environment" that NEPA requires the agency to analyze, and just as the impacts to the gray whale are a central topic for the EIS, so too must be the impacts of the agency decision on the Tribe. This Draft EIS goes a long way toward educating the agency decision makers and the public about the potential impacts on both sides of the Tribe's waiver request.

The five action alternatives and the no-action alternative represent a reasonable range of alternatives to the Tribe's proposed action. The alternatives represent both more and less restrictive approaches than the proposed action and clearly demonstrate the impacts that the Tribe's proposed time, area, and PCFA whale limits will have on affected resources. In doing so, the Draft EIS analyzes the principal conservation measures proposed by the Tribe in the waiver request. Moreover, the range of alternatives highlights that the proposed action is modest in scope and was carefully crafted so as to reflect both the Tribe's needs and the objective of minimizing the impacts to gray whales present in the southern portion of the summer range. The conservative nature of the Tribe's proposal is made clear when comparing Alternative 2 (the Tribe's proposal) with Alternatives 3 and 6, which are less restrictive in time, area, and/or limits on PCFA whales.

WHALE WATCHING

Whale watching may have greater impacts on gray whales than is suggested in this document. Gray whale calf counts in the lagoons of Baja California have declined persistently over the past decade while gray whale population numbers in general have increased. The decreased use of the lagoons also coincides with increased ecotourism and whale watching efforts. This observation may show that disturbance from whale

watching is either reducing survival of individuals using lagoons or it is displacing the whales to breeding areas that were not seen as favorable areas in the past.

HOT HARPOONS/PENTHRITE GRENADES

The Tribe has concerns about the analysis of penthrite grenades under Chapter 3 and Chapter 4. First, there needs to be some analysis on the expense of buying the grenades. The EIS should also analyze how the whale will be killed using a penthrite grenade, *i.e.* a "hot harpoon." Because (unlike bowhead whales) gray whales sink when killed, an exploding harpoon with a penthrite grenade cannot be used as the weapon to dispatch the whale and at the same time be the initial harpoon delivered on the whale. A single harpoon is not likely to be sufficient to retrieve a dead and sinking whale because the harpoon is likely to tear out under the strain of retrieval. A more accurate representation of this method of hunting would be the use of one or two cold harpoons, followed by the use of penthrite grenade harpoon to dispatch the animal. Based on this method, it is likely that use of a large caliber rifle aimed at the whale's central nervous system, as proposed by the Tribe, would result in a shorter time-to-death compared with the realistic use of a penthrite grenade. In addition, the effective range of the rifle is much longer than the effective range of a penthrite grenade harpoon.

USE OF DRIFT WHALES FOR CONSUMPTION

The legal basis for the subsistence use of drift whales by Makah tribal members needs to be clarified. *See* Sections 2.4.2 and 4.10.3.1. The Tribe believes that the Treaty of Neah Bay authorizes the use of drift and stranded marine mammals without prior approval from NMFS. However, there is no agreement between the Tribe and NMFS governing the subsistence use of drift whales, and NMFS' policy on this issue has never been formalized in writing. There is an agreement, which was referenced in the EIS, which allows subsistence use of marine mammals taken incidentally to fishing. The beachcombers' clause within the MMPA does not allow the consumption of edible tissues, only the collection of tissues for scientific or educational purposes. Therefore, neither of these resolves the legal uncertainty described above. Absent formal written guidance expressly authorizing Tribal members to utilize stranded marine mammals the use of this resource may be significantly less than assumed the analysis of Alternative 1.

USE OF WHALE PRODUCTS FOR MANUFACTURE AND SALE OF TRADITIONAL HANDICRAFTS

The legal basis for the Tribe's use of non-edible whale products for manufacture and sale of artwork and traditional handicrafts needs to be clarified. On page 4-123, lines 23-25, the Draft EIS states "With the possible exception of products from drift whales or whales caught in fisheries, there would be no potential for households to consume whale meat and blubber or use non-edible whale products for the manufacture and sale of traditional handicrafts." The clause "with the exception of" implies that products from

drift whales can be used for such purposes under Alternative 1. In Section 4.7.3.2.1 on page 4-124 the document states "Compared to the no action alternative, the potential for whale products for ... making and selling handicrafts would increase..." This language again implies that Makah tribal members can currently utilize whale products for art sold commercially and that agency authorization of a hunt would only increase the opportunities for utilization of such products in the manufacture and sale of handicrafts. Yet Section 2.3.3.2.6 at page 2-14 states that the use of whale products is strictly part of analysis for action alternatives, thus implying that use of whale products is not included under the no-action alternative (Compare Section 2.3.1 at page 2-4 to 2-5).

NORTHWARD MIGRATION CHARACTERISTICS AND ASSUMPTIONS REGARDING MOST LIKELY HUNTING TIMES

At Pages 3-65 and 3-66, the Draft EIS discusses the characteristics of the northward migration, particularly that mother and calf pairs constituted the second migratory phase and are the last to leave the wintering areas. Page 3-67 notes that 90% of this phase is made of cow-calf pairs. In Chapter 4, the Draft EIS makes some logical assumptions (with the exception noted below), including that the timing of a hunt under Alternatives 2 and 4 (*see, e.g.*, Page 4-5) would most likely be in the late Spring. The Draft EIS should make the connection between the characteristics of the second phase of the northward migration and the assumption as to likely hunting in April and May, which may affect hunting opportunities given the prohibition on striking calves and females accompanied by a calf.

ASSUMPTIONS UNDER ALTERNATIVE 5

Alternative 5 includes more restrictive limits than the proposed action. The Tribe would be limited to 3 strikes, 2 whales harvested, and 1 struck and lost. However, the agency's assumption, without spelling out the details as it does for Alternative 2 at page 4-7 (bottom), concludes that "all three whales potentially killed could be PCFA whales." (4th line from bottom. Note that the sentence starts off incorrectly as "Alternative 3" instead of Alternative 5). In alternatives 2, 3, 4 and 6, it is assumed that the combination of struck and lost (3), maximum harvest (5) and strike limit (7) results in the potential for up to 7 whales to be killed in any given year for the reasons stated at the bottom of Page 4-7. Applying the same reasoning to Alternative 5 yields a potential of *two* (not three) whales killed in any given year. This is because whaling for the year will have to cease once (1) 2 whales are harvested; (2) one whale is harvested and one is struck and lost; or (3) one is struck and lost. The maximum potential killed whales is therefore two, and the strike limit provides no actual restriction. This error should be corrected, or addressed as suggested below. If corrected to two potential kills, it would affect the assumptions in the rest of Section 4.1.5 and the analysis in other parts of the Draft EIS, such as in the comparison of alternatives (Page 4-57, bottom).

An alternative approach to making the change suggested above would be to alter the parameters of Alternative 5 to a limit of two (2) whales struck and lost annually. Under this scenario, the assumption of 3 potential whale kills per year would be valid. In addition, it would be a more realistic limit, since it would be very restrictive if the first hunt of the year led to a struck and lost whale and this single struck and lost event resulted in a closure of the hunt for the entire year.

BEST AVAILABLE SCIENCE

Throughout this document there is a need to note that the data on gray whale abundance is the best science available. These estimates have been collected by experienced researchers for NMFS and have been validated by the leading international authority on large whales, the International Whaling Commission. Noting that this analysis of populations is based on the best science available will help decisionmakers and the public review the EIS and understand that the best science was used.

SPECIFIC EDITS OR COMMENTS

Page 1-13: states "Congress specified that the primary objective of the marine resource management under the MMPA is to maintain the health and stability of the marine ecosystem." It needs to be recognized that historically and currently Native Americans have been part of the ecosystem. The Makah Tribe and other tribes of the Pacific Northwest have hunted marine mammals since time immemorial.

Page 1-33, line 19. "s" should probably be "Chukotka Natives".

Page 2-7, Table 2-1. There is a random "2" after U&A in Alternative 6. Also for Alternative six, the row for maximum harvest, struck and struck and lost should read "Same as Alternatives 2, 3, and 4".

Page 2-10, line 28. Appendix A contains the Tribe's waiver request, but it is not "discussed in detail" there.

Table 2-2. Page 2-34 (Tourism). Alternative 6 should be "Similar to Alternative 2". Same with "Public Safety" on Page 2-38. page 2-37, Ceremonial and Subsistence Resources, Alternative 5 should conclude with "compared to Alternative 2." Page 2-44 (Media Observers, Alternative 6) was probably intended to refer to Alternative 3. Page 2-49 (Indigenous People Worldwide, Alternatives 2-6) should probably read "Similar to Alternative 1" for consistency throughout the table and ease of reference by the reader.

Page 3-11, line 9. "sunset" should probably be "sunrise".

Page 3-27, Figure 3-2. Cape Johnson appears to be mislabeled. It is north of La Push.

Page 3- 79, line 28 states that identified whales reappeared "at least 93.3 miles away" from where they were seen in previous year. Instead of "at least," the sentence should read "up to 93.3 miles away" to be consistent with the example from the preceding sentence.

Page 3-87. In the analysis of PCFA whales it is noted that survey results are analyzed for population numbers under the assumption that all whales observable are seen. This document needs to discuss how close this assumption is to reality. While it is not unheard of in wildlife sciences to make the assumption that all individuals are observed, normally this is only done for animals that are highly visible, like African elephants, or have abnormally high effort, like Southern Resident killer whales. PCFA whales have neither traits of high visibility nor abnormally high observation effort. Therefore, any estimates under these assumptions are very conservative as the assumption is unlikely to be satisfied.

Page 3-112, lines 19-22, portrays the hunt as a single harpoon being thrust into the animal before the whale is shot in the central nervous system with a large caliber rifle. This description is not accurate. As noted above, gray whales sink after they have died (unlike bowhead whales). A single harpoon may not be sufficient to retrieve a whale that has sunk to the ocean floor. Therefore, two or even more harpoons should be in the whale before the whale dies to prevent losing a struck whale. The additional harpoons can be applied before or immediately after the whale is dispatched with the rifle, as occurred in the 1999 hunt (see Page 1-38).

Page 3-116, lines 22-23. The caliber of bullet used for the majority of the 16 shots in the unauthorized 2007 hunt was known to be .460 caliber. One of the shots may have come from the .577 caliber rifle, but likely not more.

Page 3-121, line 13. Should insert "gray" in the sentence "Although Alaska natives hunted *gray* whales . . . ." Note also that this appears to be contradicted by Table 3-9 (Page 3-122), showing 2 gray whales harvested in 1995.

Page 3-122, Table 3-9 is missing information regarding IWC allocations.

Section 3.4.3.6.9 at Page 3-134 should note that in the past gray whales have been entangled in Makah fishing nets. During the late 1970s and early 1980s a few whales were accidentally captured in nets. This appears to be referenced in Page 2-21, lines 11-13 (citing Angliss and Outlaw 2008). Failing to note that gray whales have been incidentally captured in tribal fishing gear in the past may lead a reader to conclude that under the no-action alternative, if a whale is caught in a net, the fishermen caught the whale intentionally. Documentation that gray whales are occasionally caught in tribal fishing gear will promote greater public understanding of this issue.

Chapter 4 should include line numbers for consistency and ease of reference.

Page 4-9, line 12 should be corrected. It is not whales "after June 1"; rather it is whales between June 1 and November 31st. Similar changes to page 4-7 as appropriate.

In Chapter 4 there is analysis on social benefits of the Makah hunt on Page 4-126, Section 4.7.3.3.3. Under the analysis it is stated that, "There is insufficient information to determine whether the potential social benefits to Makah Tribe would offset potential adverse social effects." This analysis did not reference or neglected to consider Dr. Ann Renker's 2007 report. There, it was found that 88.8% of Makah households surveyed in a randomized sample want to return to whaling. Clearly, the vast majority of Makah Tribal members would benefit if whale hunting were renewed.

Section 4.8.3.1 at Page 4-133 needs to have the words "might" and "perceived" stricken from the last sentence. The lack of respect for treaty rights would be present, and not just "perceived," if Alternative 1 is chosen. Also, Makah tribal members, and those of other tribes, *will* feel increased tension and frustration if the no-action alternative is chosen, not "might".

Section 4.10.3.2.2 at Pages 4-145 to 1-146 substantially overestimates the number of whales available under the no-action alternative for subsistence use. There may be 1 whale that dies in tribal fishing gear (see comment above) or drifts in to tribal beaches every 5 years, but it is unlikely that any drift whale that is caught or comes ashore would be in edible condition. Whales have a thick blubber layer that traps the heat of their body. As a result, after they die the process of autolysis is quicker in whales than other animals due to the ability of a whale's body to retain heat given their immense size and thick blubber layer. An edible whale is unlikely to come to shore more often than once every 20-30 years. Eating a whale that has decomposed through autolysis may make tribal members sick and for this and other reasons does not fulfill the Tribe's treaty right.