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**PRESERVING THE NATION'S FISHERIES:
ATTEMPTS TO TAKE AWAY WHAT THE UNITED STATES GRANTED THE INDIANS**

*Midwater Trawlers Co-operative v. Department of Commerce*¹

I. INTRODUCTION

The state of the nation's fisheries has been declining since the government began its regulation in 1976.² Many individuals, including co-operatives whose purpose is to assist in the protection of fisheries, place the blame on the allocation given to Indian tribes. In numerous treaties with the Indians, the United States obtained land in return for the protection of Indian fishing rights, which comprised the livelihood of many tribes.³ Courts continuously rule that this is an undisturbed right of the Indian tribes, granting them the right to take up to fifty percent of fish that pass through their usual and accustomed fishing grounds.⁴ While they are entitled to this allocation, controversy has arisen over the calculation of the fish that pass through their usual and accustomed fishing grounds.⁵ Moreover, this allocation may not be harming the fisheries as many suggest.

II. FACTS AND HOLDING

The Treaty of Neah Bay, entered into in 1855 between the United States and many Indian tribes, recognized the tribes' rights to fish in their "usual and accustomed" fishing areas.⁶ In 1995, the Makah Indian Tribe notified the National Marine Fisheries Service (Fisheries Service) that it would begin to exercise its treaty rights.⁷ According to the Magnuson-Stevens Act,⁸ the allocation of Pacific whiting to the Makah Tribe is subject to regulation by the Fisheries Service.⁹ Any regulations performed by the Fisheries Service must be consistent with the Magnuson-Stevens Act as well as with the law set forth in the Treaty of Neah Bay.¹⁰ The Makah Tribe, which intended to harvest Pacific whiting in their "usual and accustomed" fishing areas, was authorized to take half of the Pacific whiting that passed through these areas.¹¹

The controversy over the allocation of Pacific whiting to the Makah Tribe concerns the method used by the Fisheries Service to calculate the tribe's share of harvest.¹² The first suit challenging the allocation of Pacific whiting to the Makah Tribe was filed in 1996 by Midwater Trawlers Co-operative (Midwater) and the states of Oregon and Washington.¹³ Then, the Makah Tribe initiated a subproceeding because they believed the biomass method used to calculate their portion of the harvest deprived them of the amount they were entitled to

¹ *Midwater Trawlers Co-operative v. Dep't of Commerce*, 393 F.3d 994 (9th Cir. 2004).

² Jonathan H. Adler, *National Fisheries Law and Policy Legal Obstacles to Private Ordering in Marine Fisheries*, 8 ROGER WILLIAMS U. L. REV. 9, 9 (2002) [hereinafter "National Fisheries Law"].

³ See Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939.

⁴ *Midwater Trawlers*, 393 F.3d at 1000.

⁵ See *id.* at 998.

⁶ *Id.* at 997 n.3.

⁷ *Id.* at 998.

⁸ 16 U.S.C. § 1801 (2000).

⁹ *Midwater Trawlers*, 393 F.3d at 998. Pacific whiting are members of the cod family. *Id.* at 997 n.1. The Fisheries Service is authorized to regulate the harvest of Pacific whiting in order to observe "all conservation needs that prevent demonstrable harm to the stock." *Id.* at 998 n.4.

¹⁰ *Id.* at 998.

¹¹ *Id.*

¹² *Id.* at 999.

¹³ *Id.* at 998.

under the Treaty of Neah Bay.¹⁴ The biomass method did not consider the migration patterns of Pacific whiting, which caused large amounts of fish to travel through the Makah's fishing grounds.¹⁵

At the time of the subproceeding, the Makah Tribe suggested that the Fisheries Service use the sliding scale method to calculate their allocation of Pacific whiting.¹⁶ Under this methodology, the allocation would vary based on the maximum sustainable amount, or Optimum Yield.¹⁷ Before the Fisheries Service allocated the Pacific whiting to the Makah Tribe in 1999, they submitted their proposals for public comment, as consistent with the Administrative Procedures Act (APA).¹⁸ In response to public comments on the proposed allocations, the Fisheries Service accepted the Makah Tribe's suggestion and allocated 32,500 metric tons of Pacific whiting to the tribe.¹⁹ Again, Midwater and Oregon challenged this allocation as not being based on the best available scientific information when it brought suit in district court.²⁰ This suit was consolidated with the 1996 suit, and summary judgment was granted to defendants, indicating that the rulemaking was proper and based on the best available scientific evidence.²¹

On appeal from summary judgment, the Ninth Circuit held that the Makah Tribe was entitled to half the harvestable Pacific whiting passing through their "usual and accustomed fishing grounds."²² However, the court of appeals remanded the case to the district court after finding that the Fisheries Service did not adequately explain the allocation of Pacific whiting using the best available scientific information.²³ The court determined that the allocation was "a product of pure political compromise, not reasoned scientific endeavor."²⁴ Moreover, the court stated that, "[a]lthough the Fisheries Service's allocation may well be eminently fair, the Act requires that it be founded on science and law, not pure diplomacy."²⁵

On remand, the district court ruled that the sliding scale method was the best method of allocation and consistent with the requirements of the Magnuson-Stevens Act.²⁶ The court further held that the sliding scale method would thus "govern the United States aspect of the Pacific whiting fishery until the Secretary finds just cause for alteration or abandonment of the plan, the parties agree to a permissible alternative, or until further order issues from this court."²⁷ Subsequently, the Fisheries Service made its 2002 and 2003 allocations to the Makah Tribe based on the sliding scale methodology.²⁸

¹⁴ *Id.* at 999

¹⁵ *Id.* Under the biomass method, the "amount of harvestable fish is calculated by taking snapshots of the geographic distribution of Pacific whiting at given points in time." *Id.* This method, however, does not take the migration patterns of the fish into account, therefore underestimating the number of Pacific whiting that travel through the Makah Tribe's "usual and accustomed fishing grounds." *Id.*

¹⁶ *Id.*

¹⁷ *Id.* The sliding scale method takes into account that most migratory Pacific whiting travel through the Makah Tribe's fishing grounds, thus entitling the tribe half of this amount. *Id.* However, as consistent with a sliding scale, when the numbers of Pacific whiting are less than 145,000 metric tons, the Makah Tribe would be entitled to 17.5 percent, and if the estimate reached 250,000 metric tons, the allocation would stay at 35,000 metric tons. *Id.*

¹⁸ *Id.* The APA requires any agency to submit rulemaking for public notice and comment prior to declaring a rule. 5 U.S.C. § 553 (2000).

¹⁹ *Midwater Trawlers*, 393 F.3d at 999.

²⁰ *Id.* at 1000. Rulemaking under the APA must also be explained and can be challenged if the agency's decision was not based on the best scientific information available. *Id.* This forced the agency to take public comments into consideration when making their final rule. *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 1001. The Fisheries Service did seek public comment on the sliding scale allocation used in 2003. *Id.* In the final rule, the Fisheries Service explained that the sliding scale method was based on the best scientific information available. *Id.* It further stated

Following this final rule, Midwater sought an order directing the Fisheries Service to conduct new rulemaking.²⁹ Further, the Fisheries Service sought to supplement the administrative record in order to further explain the scientific foundation of the sliding scale method.³⁰ The district court allowed the Fisheries Service to supplement the record, and consequently granted summary judgment in their favor.³¹ The court found that the sliding scale method met the requirements of the Magnuson-Stevens Act.³² Following summary judgment, Midwater made this appeal, arguing that the sliding scale method of allocation is not based on the best scientific information available.³³

On this appeal, Midwater argued (1) that the Fisheries Service did not base its allocation of Pacific whiting on the best scientific information available when utilizing the sliding scale methodology;³⁴ (2) that the district court should have remanded to the Fisheries Service for further public rulemaking proceedings;³⁵ and (3) that the district court should not have allowed the Fisheries Service to supplement the administrative record in order to further support the sliding scale method.³⁶ The court of appeals found for the Fisheries Service on all arguments, affirming summary judgment in favor of appellees.³⁷

First, the court held that the Fisheries Service has proven that the sliding scale methodology is based on the best available scientific information.³⁸ In reaching this conclusion, the court noted that the biomass method recommended by Midwater did not adequately account for the amount of Pacific whiting passing through the Makah Tribe's fishing grounds.³⁹ Therefore, the court found that the sliding scale method was based on the best scientific information available.⁴⁰

Further, the court of appeals rejected Midwater's argument that the district court should have required further rulemaking proceedings by the Fisheries Services.⁴¹ The court properly followed the Supreme Court's holding in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,⁴² which held that courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA.⁴³ The Fisheries Service complied with the APA by conducting the notice and comment requirements and utilizing the rulemaking procedures.⁴⁴ Since they followed the required APA procedures, the district court did not have the authority to require another rulemaking proceeding.⁴⁵

Finally, the court of appeals held that the district court properly allowed the Fisheries Service to supplement the administrative record to further explain their use of the sliding scale methodology.⁴⁶ When the

that the biomass method underestimated the amount of fish passing through the Makah Tribe's fishing grounds, which would "illegally discriminate against tribal fishing" since the biomass method was not used in allocation of non-treaty fishing. *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1002.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1003.

³⁵ *Id.* at 1005.

³⁶ *Id.* at 1007.

³⁷ *Id.* at 1008.

³⁸ *Id.* at 1003. The court stated that although the "initial adoption of the sliding scale method may have been the result of a [political] compromise," the method has subsequently been explained to be the best method currently available, which meets the requirements under the Magnuson-Stevens Act and the APA. *Id.*

³⁹ *Id.* at 1004 n.10.

⁴⁰ *Id.*

⁴¹ *Id.* at 1006.

⁴² 435 U.S. 519 (1978).

⁴³ *Id.* at 524.

⁴⁴ *Midwater Trawlers*, 393 F.3d at 1007.

⁴⁵ *Id.*

⁴⁶ *Id.*

record provided to the court is found inadequate to explain the agency's decision, federal courts have allowed supplementation as consistent with precedent.⁴⁷ After the record was supplemented, the district court properly granted summary judgment in favor of the Fisheries Service upon finding that the record sufficiently explained that the sliding scale method was based on the best scientific information available.⁴⁸

III. LEGAL BACKGROUND

A. *The Treaty of Neah Bay*

The United States and the Makah Tribe entered into the Treaty of Neah Bay in 1855.⁴⁹ The United States entered into the Treaty to secure portions of land that are now part of the State of Washington.⁵⁰ Although the Treaty established reservations on which they were to live, the Treaty benefited the Makah Tribe because it provided protection of their "right of taking fish at usual and accustomed grounds and stations."⁵¹

The Supreme Court held in *Tulee v. State of Washington* that treaties with Indians are to be construed in the sense in which the Indians understood them, "and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people."⁵² Further, "a treaty is not a grant of rights to the Indians, but a grant of rights from them."⁵³ Federal courts have stressed that the Indians have pre-existing rights, and thus any right not expressly granted in a treaty is reserved for the Indians.⁵⁴

B. *The Magnuson-Stevens Act*

The Magnuson-Stevens Act, passed in 1976, vested in the Secretary of Commerce the authority to regulate fisheries in the United States fishery conservation zone.⁵⁵ At the time the Act was passed, many species were over fished, threatening their survival.⁵⁶ Congress acknowledged that while many fish were in danger, "commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation."⁵⁷ All regulation by the Secretary of Commerce, who acts through the National Marine Fisheries Service, must be consistent with the Magnuson-Stevens Act, as well as other applicable law.⁵⁸ The Ninth Circuit has held that other applicable law includes Indian treaty fishing rights.⁵⁹

The Magnuson-Stevens Act provides that Regional Fishery Management Councils are to be formed to

⁴⁷ *Id.*

⁴⁸ *Id.* at 1008.

⁴⁹ See Treaty with the Makah Tribe, Jan. 31, 1855, 12 Stat. 939.

⁵⁰ See *id.*

⁵¹ *Id.* at art. IV. The right to continue fishing was critical to the existence of the Makah Tribe because their means of living had always come from fishing in the Pacific Ocean. *United States v. State of Washington*, 384 F.Supp. 312, 363 (W.D. Wash. 1974). The Makahs would trade any unneeded fish in order to obtain their other basic needs. *Id.* The Makah Tribe became a very wealthy and powerful tribe because of their fishing resources. *Id.* at 364.

⁵² 315 U.S. 681, 685 (1942).

⁵³ *United States v. State of Washington*, 873 F.Supp. 1422, 1428 (W.D. Wash. 1994). The Court made clear that this does not mean treaties are to be interpreted "according to the Indians' preferences" and does not give courts the right to rewrite or extend such treaties. *Id.*

⁵⁴ *Id.*

⁵⁵ 16 U.S.C. § 1811(a) (1976). See *State of Washington v. Daley*, 173 F.3d 1158, 1161-62 (9th Cir. 1999). The fishery conservation zone "extends from three to two hundred nautical miles offshore." *Id.* at 1162.

⁵⁶ 16 U.S.C. § 1801(a)(2).

⁵⁷ *Id.* § 1801(a)(3).

⁵⁸ *Midwater Trawlers Co-Operative v. Dept. of Commerce*, 393 F.3d 994, 998 (9th Cir. 2004). See *Parravano v. Masten*, 70 F.3d 539, 544 (9th Cir. 1995).

⁵⁹ *Midwater Trawlers*, 393 F.3d at 998; *Wash. State Charter Boat Ass'n v. Baldrige*, 702 F.2d 820, 823 (9th Cir. 1983).

make recommendations of a fishery management plan to the National Marine Fisheries Service, which will then review all plans and publish them in the Federal Register for notice and comment.⁶⁰ The Pacific Fishery Management Council, the regional council for Washington, Oregon, and California, prepares plans for Pacific whiting and makes the recommendations for allocations to the Makah Tribe.⁶¹ The council has made such allocations since the 1980s and in doing so has recognized Indian fishing rights contained in the Treaty.⁶²

C. The State of Washington Decisions

The Washington litigation concerning allocation of Pacific whiting to the Makah Tribe began in 1996 when the Makah Tribe instituted an action in district court to recognize their treaty right to an allocation of Pacific whiting.⁶³ The Makah Tribe was granted partial summary judgment.⁶⁴ Again in 1996, Midwater Trawlers filed a complaint alleging that the allocation to the Makah Tribe violated the Magnuson-Stevens Act, the APA,⁶⁵ the Fifth Amendment, the Endangered Species Act (“ESA”),⁶⁶ the National Environmental Policy Act (NEPA),⁶⁷ and the Regulatory Flexibility Act.⁶⁸ However, the court dismissed this proceeding for failure to join the Tribes as necessary parties.⁶⁹ Subsequently, the court granted summary judgment against Midwater on the claims concerning the Regulatory Flexibility Act and the ESA.⁷⁰ Midwater then appealed, and the Ninth Circuit ultimately consolidated the two aforementioned cases in *State of Washington v. Daley*.⁷¹

In *Daley*, the Ninth Circuit stated that their only function when reviewing regulations under the Magnuson-Stevens Act “is to determine whether the Secretary has considered the relevant factors and articulated a rational connection between the facts found and the choice made.”⁷² First, the court reviewed the Regulatory Flexibility Act claim, addressing the rule that “final regulatory flexibility analysis is required for any rule that will have a significant economic impact on a substantial number of small entities.”⁷³ The Secretary found that allocation of Pacific whiting to the Makah Tribe would result in one to three percent reduction in gross revenues for Midwater.⁷⁴ While this constituted an economic impact for Midwater, the parties had agreed that a significant economic impact is defined as over five percent.⁷⁵ The court ultimately affirmed summary judgment on Midwater’s claims.⁷⁶

⁶⁰ 16 U.S.C. §§ 1852-1861; *State of Washington v. Daley*, 173 F.3d 1158, 1162 (9th Cir. 1999).

⁶¹ *Daley*, 173 F.3d at 1162.

⁶² *Id.*

⁶³ *Id.* at 1163. In its 1995 recommendation to the Fisheries Service, the Pacific Council advised against recognition of Indian treaty rights to Pacific whiting because the Makah Tribe did not historically harvest Pacific whiting, and the right to harvest fish exists only “for those species to which the tribe can show historical catch or access at the time the treaty was signed.” *Id.* While the Fisheries Service rejected this recommendation, eventually allocating 15,000 metric tons to the Makah Tribe, the Makahs brought suit to assure that their taking of Pacific whiting would not violate prior district court decisions. *Id.* See *United States v. State of Washington*, 459 F.Supp. 1020, 1037-38 (W.D. Wash. 1978).

⁶⁴ *Daley*, 173 F.3d at 1163.

⁶⁵ 5 U.S.C. § 706.

⁶⁶ 16 U.S.C. § 1531.

⁶⁷ 42 U.S.C. § 4321.

⁶⁸ 5 U.S.C. § 601. See *Daley*, 173 F.3d at 1164.

⁶⁹ *Id.* See Fed. R. Civ. P. 19.

⁷⁰ *Daley*, 173 F.3d at 1164.

⁷¹ *Id.*

⁷² *Id.* at 1169 (quoting *Alliance Against IFQs v. Brown*, 84 F.3d 343, 345 (9th Cir. 1996)).

⁷³ *Id.* at 1171 (citing 5 U.S.C. § 605(b) (2000)).

⁷⁴ *Id.* at 1171.

⁷⁵ *Id.*

⁷⁶ *Id.*

The second Washington case addressing Pacific whiting allocation to the Makah Tribe was a consolidation of four previous cases.⁷⁷ In 2000, the Western District of Washington decided *Midwater Trawlers Cooperative v. United States Dept. of Commerce*.⁷⁸ In that case, Midwater argued the following: (1) in adopting the 1996 Final Rule which allocated a portion of Pacific whiting to the Makah Tribe, the Secretary acted not in accordance with the law because no court had held that Pacific whiting was recognized in Indian treaty rights;⁷⁹ (2) the Secretary acted arbitrarily in extending the Makah's usual and accustomed fishing grounds;⁸⁰ and (3) the Secretary acted in an arbitrary and capricious manner when he failed to utilize the biomass method for determining the allocation to the Makah Tribe, and instead compromised with the tribe.⁸¹

In addressing these arguments, the district court ruled that "the Secretary need not await a specific adjudication prior to carrying out his obligation to promulgate regulations consistent with treaty rights."⁸² Further, it had been previously held that Indian treaty rights are not limited by the species of fish harvested or the history of the tribes harvest of that species of fish.⁸³ Indian treaty rights "are not a grant of rights to the Indians, but a grant of rights from them."⁸⁴ Because of this rule of interpretation, the Makah Tribe's usual and accustomed fishing grounds cannot be limited by the jurisdiction granted to the Fisheries Service in the Magnuson-Stevens Act.⁸⁵ Therefore, the Secretary's decision to extend the Makah's usual and accustomed fishing grounds was held not arbitrary and capricious.⁸⁶

Finally, while the court refused to determine the proper methodology for the allocation of Pacific whiting to the Makah Tribe, they did hold that the Secretary did not act arbitrarily when relying upon a compromise allocation.⁸⁷ After all, the Fisheries Service had acknowledged that the biomass method, which they had used in the past, may be flawed.⁸⁸ The court held that pending litigation to determine the proper method of allocation the compromise was appropriate.⁸⁹

The proceeding to determine the proper method of allocation of Pacific whiting to the Makah Tribe ultimately was decided in the 2001 decision, *United States v. State of Washington*.⁹⁰ While the previous allocations of whiting were made by compromise, the Makah Tribe proposed a long-term management plan in which the tribe and the Fisheries Service agreed upon.⁹¹ Oregon and Washington however opposed this method of allocation, arguing that it provided an excessive amount of Pacific whiting to the Makah Tribe.⁹² They

⁷⁷ *Midwater Trawlers Co-operative v. Dep't of Commerce*, 139 F.Supp.2d at 1136, 1139 (W.D. Wash. 2000).

⁷⁸ *Id.*

⁷⁹ *Id.* at 1141.

⁸⁰ *Id.* at 1142. Midwater argued that usual and accustomed fishing grounds could not extend beyond Washington's fishery conservation zone, which extends three nautical miles into the Pacific Ocean. *Id.*

⁸¹ *Id.* at 1147.

⁸² *Id.* at 1141. Further, an order had been granted which held that the Makah Tribe had the right under the Treaty of Neah Bay to an allocation of Pacific whiting. *Id.*

⁸³ *Id.* at 1141.

⁸⁴ *Id.* at 1143. See *United States v. State of Washington*, 873 F.Supp. 1422, 1430 (W.D. Wash. 1994).

⁸⁵ *Midwater Trawlers*, 139 F.Supp.2d at 1143.

⁸⁶ *Id.* at 1144.

⁸⁷ *Id.* at 1148. While the Fisheries Service proposed utilization of the biomass method for the 1996 allocation, the Makahs argued that almost all of the United States' harvest of Pacific whiting passed through their usual and accustomed fishing grounds. *Id.* at 1147. The Makahs brought suit to determine whether they were in fact entitled to a percentage of all the United States' harvest. *Id.* The Fisheries Service made a compromise with the Makahs that until the issue was dissolved in court, they would allocate 15,000 metric tons of Pacific whiting to the Makah Tribe. *Id.*

⁸⁸ *Id.* at 1148.

⁸⁹ *Id.*

⁹⁰ *United States v. State of Washington*, 143 F.Supp.2d 1218 (W.D. Wash. 2001).

⁹¹ *Id.* at 1221. This plan, eventually known as the sliding-scale method, allocated Pacific whiting based on a variable percentage of the entire United States harvest. *Id.* The agreement was that the allocation would never exceed 17.5 percent, and could be adjusted in the future. *Id.* This proposal was used in the 1999, 2000, and 2001 allocations. *Id.*

⁹² *Id.* at 1223.

contended that allocation should be based on the biomass method.⁹³

The district court rejected the biomass methodology as proper for allocation, stating that it was unacceptable.⁹⁴ The court adamantly indicated that the sliding-scale method was more appropriate.⁹⁵ The court stated that the biomass method “is a more complicated and more cumbersome method than treating the whiting run as a unit, and tends to produce less accurate results.”⁹⁶ Further, the migration patterns of Pacific whiting does not require biomass allocation because they do not relate to depth-distribution patterns as seen in the biomass method.⁹⁷

In 2002, the Ninth Circuit reviewed the district court’s decisions in *Midwater Trawlers Cooperative v. United States Dept. of Commerce* set out above.⁹⁸ While affirming the extension of the usual and accustomed fishing areas, the court rejected the 1999 compromise allocation of Pacific whiting as inconsistent with scientific principles.⁹⁹ The court held that “The Magnuson-Stevens Act requires the Secretary to describe the nature and extent of the tribal fishing right based on the best scientific information available.”¹⁰⁰ The Ninth Circuit found that this was a result of pure political compromise, and not consistent with the requirements of the Magnuson-Stevens Act.¹⁰¹ The case was remanded to the district court so that the Fisheries Service could either promulgate a new rule providing for the allocation, or supplement the record with further justification of the existing allocation.¹⁰²

IV. INSTANT DECISION

In the instant decision, the court of appeals first addressed the question of whether the Fisheries Service’s decision to base the allocation of Pacific whiting to the Makah Tribe on the sliding scale methodology was reasoned upon the best available scientific information.¹⁰³ All treaty and non-treaty fish allocations are required by the Magnuson-Stevens Act to be “based on the best scientific information available.”¹⁰⁴ Even if the information available is not complete or definitive, it can be the basis of the decision as long as it is the best information available to the Fisheries Service.¹⁰⁵ Further, the location of the fish does not have to be taken into account.¹⁰⁶ It has been found that the majority of Pacific whiting pass through the Makah Tribe’s “usual and accustomed fishing grounds” because of their migration patterns.¹⁰⁷ This therefore indicates that all such Pacific whiting are available for fifty percent allocation to the Makah Tribe.¹⁰⁸

The sliding scale, unlike the biomass method, takes the migration patterns of Pacific whiting into

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* The court went on to determine that the biomass method would underestimate the allocation of Pacific whiting to the Makah Tribe. *Id.*

⁹⁷ *Id.* at 1224.

⁹⁸ *Midwater Trawlers Co-operative v. State of Oregon*, 282 F.3d 710 (9th Cir. 2002).

⁹⁹ *Id.* at 718.

¹⁰⁰ *Id.* at 720. See 16 U.S.C. § 1853(a)(2) (2000); *id.* § 1851(a)(2). The rule published in the Federal Register regarding the 1999 allocation merely stated that a compromise had been made with the Makah Tribe which took into consideration their treaty rights. *Midwater Trawlers*. 282 F.3d at 720.

¹⁰¹ *Id.*

¹⁰² *Id.* at 721.

¹⁰³ *Midwater Trawlers Co-Operative v. Dept. of Commerce*, 393 F.3d 994, 1003 (9th Cir. 2004).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1004.

account.¹⁰⁹ Based on the administrative record of the Fisheries Service, the court concluded that this was the best method currently available.¹¹⁰ Further, the court held that while the Makah Tribe is entitled to fifty percent of the optimum yield, they are not required to take their full share.¹¹¹

Midwater argued that the Fisheries Service did not adequately explain its allocation of between 14 and 17.5 percent, which the Fisheries Service determined through the sliding scale method.¹¹² While the treaty provides the Makah Tribe fifty percent of all Pacific whiting passing through its fishing grounds, the range actually allocated is significantly less.¹¹³ This amount is justified since the Makah Tribe can request a lesser amount.¹¹⁴ The court held that the sliding scale method and actual percentage of allocation used by the Fisheries Services was in conformance with all obligations because it was based on the best scientific information available.¹¹⁵

The court further found against Midwater's argument that the Fisheries Service should have been required to engage in more public rulemaking proceedings.¹¹⁶ The court followed Supreme Court precedent when stating that "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA."¹¹⁷ Under the APA, agencies are required to provide notice of proposed rulemaking and offer a thirty day public comment period before executing a final rule.¹¹⁸ Prior to its 2002 and 2003 allocations of Pacific whiting to the Makah Tribe, the Fisheries Service provided notice and comment consistent with APA requirements.¹¹⁹ Since the Fisheries Service followed the requirements of the APA, no other requirements could be ordered by the courts.¹²⁰

Finally, the court held that an agency is allowed to supplement the administrative record if found to inadequately explain the agency's decision.¹²¹ Midwater argued that the district court should not have allowed supplementation of the record, and should have instead based its decision on whether the Fisheries Service utilized the best scientific information available based on the explanation provided in the administrative record.¹²² The Ninth Circuit has consistently held that "supplementation is permitted (1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) when the agency has relied on documents not in the record, or (3) when supplementing the record is necessary to explain technical terms or complex subject matter."¹²³

The Fisheries Service was properly allowed to supplement its record in order to explain why the biomass method was inadequate, and to show that the majority of Pacific whiting passed through the Makah Tribe's

¹⁰⁹ *Id.* at 1004. The biomass method merely takes a snapshot over a specific period of time, which quite likely will not account for numerous fish during their migration patterns. *Id.* at 999. Since the Makah Tribe is entitled to fifty percent of all fish that pass through their fishing grounds, it is critical to take into account the fish that are present for short periods of time simply during migration. *Id.* Therefore, the biomass method critically underestimates the presence of Pacific whiting in the tribe's fishing grounds, thus not granting the Makah Tribe its share of Pacific whiting as required by the Treaty of Neah Bay. *Id.*

¹¹⁰ *Id.* at 1004.

¹¹¹ *Id.* at n.11.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1005.

¹¹⁶ *Id.* at 1007.

¹¹⁷ *Id.* at 1006.

¹¹⁸ *Id.* at 1005; 5 U.S.C. 553 (2000).

¹¹⁹ *Midwater Trawlers*, 393 F.3d at 1005.

¹²⁰ *Id.* at 1006.

¹²¹ *Id.* at 1007.

¹²² *Id.*

¹²³ *Id.*; *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). *See Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988); *see also Camp v. Pitts*, 411 U.S. 138, 142-43 (1973).

fishing grounds during migration.¹²⁴ The agency is required to consider all relevant factors and explain its decisions.¹²⁵ Therefore, the district court did not err when allowing the Fisheries Service to supplement the record in order to fully explain their decision to use the sliding scale method to determine the allocation of Pacific whiting to the Makah Tribe.¹²⁶

V. COMMENT

The nation's fisheries have been under government regulation since 1976, when the power to regulate was vested in the Secretary of Commerce by the Magnuson-Stevens Act.¹²⁷ The purpose of this regulation was to manage the fish species which were in danger of over fishing.¹²⁸ Although under government regulation, "the overall state of the world's fisheries is much worse today than 45 years ago."¹²⁹

It has been suggested that the problem with the nation's fisheries begins with "the Tragedy of the Commons."¹³⁰ When dealing with natural resources, "everybody's property is nobody's property."¹³¹ In essence, one does not have the incentive to preserve natural resources as their own property.¹³² When dealing with common property, everyone will act in their own self-interest and not in the interest of all.¹³³ One solution to this problem is to create privatization in order to create an incentive to preserve the resource.¹³⁴ "Where resources are owned, there is less concern about their overuse. Property owners have both the ability to protect the owned resource, and a substantial incentive to ensure that the value of their property – both to themselves and to others – is maintained."¹³⁵

The tragedy of the commons is best explained through the use of an example. Ecologist Garrett Hardin has used the example of an unowned pasture that is available to everyone.¹³⁶ All herders will have the incentive to add to their own herd and maximize their own use of this pasture.¹³⁷ While the incentive of adding to the herd is seen only by the herder, the costs are distributed to every user.¹³⁸ All herders will therefore maximize their own use of the pasture, which will cause the pasture to be overgrazed.¹³⁹ Thereafter, the pasture will not be an asset to any herder.¹⁴⁰ However, if the pasture was privately owned by a single herder, that herder will have the incentive to maximize its value to ensure its future use.¹⁴¹

While decisions such as *Midwater Trawlers* continue to come down from the courts, the issue of the failure of fishing regulation has not been discussed. Co-operatives such as *Midwater Trawlers* are persistently

¹²⁴ *Midwater Trawlers*, 393 F.3d at 1008.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 16 U.S.C. § 1811(a) (1976).

¹²⁸ See Adler, *supra* note 2, at 9.

¹²⁹ *Id.* The American Fisheries Society estimates that "forty-four percent of fish stocks are fully to heavily exploited, sixteen percent are over-exploited, and six percent are depleted. *Id.* at n.2 (citing Louis W. Botsford, *The Management of Fisheries and Marine Ecosystems*, 277 Sci. 509, 509-10 (1997)).

¹³⁰ *Id.* at 11-12.

¹³¹ *Id.* at 11.

¹³² *Id.*

¹³³ *Id.* at 12. It has been said that "freedom in a commons brings ruin to all." *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 13.

¹³⁶ *Id.* at 11.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 13.

pursuing change in the management of fisheries in order to prevent such over fishing and exploitation.¹⁴² These co-operatives assist in the allocation of shares, the management of fisheries, and pursue the solution of privatization as discussed above.¹⁴³ However, when it comes to the allocation of certain species of fish to the Indian tribes, the co-operatives have consistently fought to take away or at least reduce the tribal rights to fishing.

When analyzing tribal rights to fishing, it is imperative to keep in mind that the Indians have pre-existing fishing rights, which the United States has procured from them.¹⁴⁴ In return for the Indian's land, the United States allowed the Indians to keep their rights to fish.¹⁴⁵ Therefore, any rights the United States has to fish in these areas were granted by the Indians.¹⁴⁶ It seems therefore that the Indians have a property right in fish located in certain areas.

Based on this analysis, it can be suggested that the Indians actually do have a private property interest in the fish. As stated in the *National Fisheries Law* article, the privatization of natural resources may be the solution to the depletion of the nation's fish population by overcoming the "tragedy of the commons."¹⁴⁷ Therefore, if the private fishing rights of Indians were recognized, a good argument may exist that the fishery problem would be improved. The Indians definitely have the incentive to preserve this critical resource. The fish of the Pacific Ocean have always been the livelihood of the Makah Tribe.¹⁴⁸ What fishing resources the Makahs did not use for their own subsistence, they traded to other tribes for materials they needed to maintain daily life in their village.¹⁴⁹ The Makah continue to do this today, utilizing their resources to maintain tribal existence.¹⁵⁰ Furthermore, the Makah Tribe regulates their own fishermen in order to preserve this natural resource that is vital to their existence.¹⁵¹

It is the combination of these factors that cause one to believe that the Makah Tribe, as well as other Indian tribes, actually do have a private property interest in their fishing resources. This would ultimately decrease the tragedy of the commons. Prior to government regulation, the fisheries were much stronger and not under the threat of over fishing.¹⁵² The tribes realized how crucial this resource was to their existence, and had every incentive to ensure its longevity. Because of their continued reliance on the fishing resource for their very subsistence as well as for trade, the Makahs still have the incentive to ensure the preservation of the fisheries.

The privatization of Indian fishing rights however does not eliminate the problem of other marine fisheries, sportsmen, and commercial fishermen. These fishermen have only the incentive to catch as many fish as possible in the shortest time period, especially since the government created fishing seasons, and limits on fishing areas and boat size.¹⁵³ The more fish these fishermen catch, the more revenues they will bring in. They ultimately have nothing to lose, and no incentive to catch fewer fish in order to preserve the resources.

Instead of finding an efficient way to address the problem created by fishermen without an incentive to preserve the species, the government as well as private co-operatives have persistently tried to limit the allocation provided to the Indian tribes. Suits are constantly being brought by private co-operatives such as Midwater Trawlers whose purpose is to help conserve the fish population. However, it seems that by

¹⁴² *Id.* at 35-6.

¹⁴³ *Id.*

¹⁴⁴ *United States v. State of Washington*, 873 F.Supp. 1422, 1428 (W.D. Wash. 1994).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Adler, *supra* note 2, at 9.

¹⁴⁸ *United States v. State of Washington*, 384 F.Supp. 312, 363 (W.D. Wash. 1974).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 365.

¹⁵² Adler, *supra* note 2, at 9.

¹⁵³ *State of Washington*, 384 F.Supp. at 385.

attempting to reduce the Indian's allocation, they are targeting the wrong party. The Makah Tribe is allowed an allocation of up to fifty percent of all fish that pass through their usual and accustomed fishing grounds.¹⁵⁴ Past allocations to the Makahs have allowed them to take only fourteen to seventeen percent.¹⁵⁵ Based on these allocations, the Makahs are actually assisting in the preservation of this troubled resource by not insisting on those allocations they are entitled to.

Further, the biomass methodology of calculating these allocations in the past reduced the Makah's allotment even more by underestimating the number of Pacific whiting that passed through their usual and accustomed fishing grounds. However, reductions of the allocation to the Makah Tribe may not actually assist in preserving the fish population. As suggested above, the Makahs have the incentive to maximize the value of their personal property interests and thus preserve the fish resources. If the government or private co-operations continue seeking to reduce the Indian's share of fishing rights they are essentially causing further harm to the fish population. Were the Indian's actually given a private property right of fifty percent of the fish in their usual and accustomed fishing grounds as they are entitled to, they would most likely use the portion of the population needed for their own livelihood, and allow the excess to multiply. The incentive to do so would be the increase of the fish population, which would allow a larger allocation for everyone involved.

The Ninth Circuit in *Midwater Trawlers* did seek to increase the allocation of Pacific whiting to the Makah Tribe.¹⁵⁶ Utilizing the sliding scale methodology as opposed to the biomass method is not only based on the best available scientific information, it also provides the Makah Tribe with more private property rights in this resource.¹⁵⁷ While the court based its holding on the requirements of the APA, the decision's holding may be more beneficial to the fisheries resource than initially intended.¹⁵⁸

VI. CONCLUSION

The arguments raised by Midwater Trawlers in the *Midwater Trawlers* case seem futile at best. It is ironic that a co-operative insisting on the preservation of the nation's fisheries has fought for years to further reduce the allocation to the Indians. The Makah Tribe is entitled to fifty percent of all fish that pass through their usual and accustomed fishing grounds.¹⁵⁹ Yet Midwater Trawlers continues to bring arguments concerning the method of calculation when ultimately the Makahs are only asking for up to seventeen percent. What Midwater turns a blind eye to is the Makah's efforts to preserve the fish population by not taking their full allocation. It is arguable that the Makahs have a private property interest in fifty percent of the harvestable surplus of Pacific whiting, and yet they are constantly being taken to court when they ask for a mere fraction. Fisheries prospered prior to regulation by the United States government. While it would be detrimental to the fish populations to cease regulation, those attempting to assist in the preservation of fisheries may be targeting the wrong group of individuals.

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¹⁵⁴ *Midwater Trawlers Co-Operative v. Dept. of Commerce*, 393 F.3d 994, 998 (9th Cir. 2004).

¹⁵⁵ *Midwater Trawlers Co-operative v. Dep't of Commerce*, 139 F.Supp.2d at 1136, 1148 (W.D. Wash. 2000).

¹⁵⁶ *Midwater Trawlers*, 393 F.3d at 999.

¹⁵⁷ *Id.* at 1004-05.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 1000.