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Midwater Trawlers Co-Operative v. Department Of Commerce: A Troublesome Dichotomy Of Science And Policy

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MIDWATER TRAWLERS CO-OPERATIVE v. DEPARTMENT OF COMMERCE: A TROUBLESOME DICHOTOMY OF SCIENCE AND POLICY

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I. INTRODUCTION

In March 2002, the United States Court of Appeals for the Ninth Circuit ruled in *Midwater Trawlers Co-operative v. Department of Commerce*[1] that the National Marine Fisheries Service's (NMFS)[2] promulgation of a regulation allocating the Makah tribe a portion of the optimum yield (oy) of the Pacific whiting fish was arbitrary and capricious pursuant to the Administrative Procedure Act.[3] The court held that NMFS' action was not in compliance with the Magnuson-Steven's Fishery Conservation and Management Act[4] ("Magnuson-Stevens Act" or "the Act") in that its decision was the result of political compromise and not based on the best available scientific information as required by the Act.[5] The court remanded this issue to NMFS for review in compliance with its decision.[6]

This Note examines the dichotomy between the political nature of treaty law and the scientific requirements of the Magnuson-Stevens Act and advocates that the court's opinion in *Midwater* overlooked the essential nature of political compromise in the fulfillment of Native American treaties with the United States. While the Ninth Circuit Court of Appeals'

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1. Midwater Trawlers Coop. v. Dep't of Commerce, 282 F.3d 710 (9th Cir. 2002).

2. The National Marine Fisheries Service (NMFS) operates within the regulatory structure of the National Oceanic and Atmospheric Administration (NOAA), which derives its authority from that of the United States Department of Commerce.

3. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2001).

4. Magnuson-Stephens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–82 (2002).

5. *Midwater Trawlers Coop.*, 282 F.3d at 720–21; 16 U.S.C. § 1853.

6. *Midwater Trawlers Coop.*, 282 F.3d at 721.

ruling that the absence of scientific information justifying NMFS' regulation was cause for reversal, the court nevertheless failed to recognize the importance of political compromise in this regulatory process.[7] Despite the court's failure to encourage NMFS to promulgate regulations utilizing scientific information in concert with political compromise in order to ensure continued compliance with applicable law, the agency's re-promulgation action must be based on a balancing of scientific information *and* the political negotiation already achieved with the Makah.

II. BACKGROUND

A. The Magnuson-Stevens Fishery Conservation and Management Act

The Magnuson-Stevens Act[8] was enacted by Congress in order to preserve the commercial fishery resources of the United States.[9] The Act expanded the U.S. fishing zone to 200 miles and imposed a regulatory scheme for the management of fishing within the zone.[10] The Act vested NMFS, under the Department of Commerce, with the authority to issue regulations for the purpose of managing the nation's fishing resources.[11] These regulations, issued by the Secretary of Commerce ("Secretary"), exclusively control the harvest of United States fishery resources.[12] Congress was explicit in its requirement that any regulations promulgated by NMFS must be consistent with "applicable law," including fishing rights granted to Native American tribes in United States treaties.[13] Congress also required that the Secretary explain the nature and extent of any tribal fishing right based on "the best scientific information available."[14]

B. The Treaty of Neah Bay

In January, 1855, the United States government entered into a treaty with the Makah tribe now known as the Treaty of Neah Bay ("Treaty").[15] Article 4 of the Treaty gave the Makah "the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations . . . in

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7. *Id.* at 720–721.
8. 16 U.S.C. §§ 1801–82.
9. *Id.* at § 1801.
10. *Id.* at § 1801(b)(1); 16 U.S.C. § 1453.
11. *See id.* at §§ 1853, 1855.
12. *See id.* at § 1811.
13. Paravano v. Babbitt, 70 F.3d 539, 544 (9th Cir. 1995).
14. 16 U.S.C. § 1851(a)(2) (2002).
15. Treaty with the Makah, Jan. 31, 1855, U.S.-Makah Tribe, 12 Stat. 939.

common with all citizens of the United States."[16] The Treaty is similar to those negotiated with multiple Northwestern tribes[17] and was made for the dual purposes of securing the United States' sovereignty over the land occupied by the Native Americans and preserving peaceful relations between the tribes and the United States.[18] In their issuance of regulations, NMFS must uphold the rights granted in this treaty.[19]

C. NMFS Regulation:

In 1996, NMFS promulgated a regulation that limited the number of Pacific whiting to be harvested in a year and issued a framework within which the fish would be allocated to several tribes, including the Makah.[20] In the original proposed rule NMFS suggested a biomass methodology for determining tribal allocation but it accepted a proposal, made through comment by the Makah, to adopt a "sliding scale" methodology[21] that allowed the Makah a greater yield, presumably without any harm to conservation principles. NMFS determined the "usual and accustomed" fishing areas prescribed by the "Stevens Treaties" to extend about forty miles off the coast of Washington[22] and allocated 15,000 metric tons (mt) of Pacific whiting to the Makah for 1996 based on the proposed methodology.[23]

In 1999, NMFS promulgated a regulation that increased the Makah Tribe's allocation of Pacific whiting to 32,500 mt for the year 1999 based on the methodology set forth in 1996.[24] The preamble to this final rule

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16. *Id.* at art. 4.

17. The treaty of Neah Bay was one of several treaties negotiated with tribes in the Northwest. Washington's first Territorial Governor and the first Superintendent of Indian affairs, Isaac I. Stevens, negotiated these treaties. Accordingly, this body of treaties came to be known as the "Stevens Treaties."

18. Treaty with the Makah, *supra* note 15, at art. 9.

19. Paravano v. Babbitt, 70 F.3d 539, 544 (9th Cir. 1995), Washington Crab Producers, Inc. v. Mosbacher, 924 F.2d 1438, 1440-41 (9th Cir. 1990).

20. Pacific Coast Groundfish Fishery; Framework for Treaty Tribe Harvest of Pacific Groundfish and 1996 Makah Whiting Allocation, 61 Fed. Reg. 28,766 (June 6, 1996) (to be codified at 50 C.F.R. § 300).

21. United States v. Washington, 143 F. Supp. 2d 1218, 1221 (W.D. Wash. 2001). The proposed "sliding scale" methodology "defined the tribal allocation of whiting according to a variable percentage of the overall U.S. harvest in metric tons. The proposal laid out an allocation table, wherein the harvest percentage reserved for tribal fishers was to decrease as the coast wide harvest guideline increased, and would never exceed 17.5%."

22. Pacific Coast Groundfish Fishery; Framework for Treaty Tribe Harvest of Pacific Groundfish and 1996 Makah Whiting Allocation, 61 Fed. Reg. at 28,793.

23. *Id.*

24 *Id.*

articulated NMFS's intention to accommodate the rights of the treaty tribes, provide an equitable allocation of whiting, and promote the goals and objectives of the Pacific Groundfish Fishery Management Plan.[25]

In its 1999 regulation, NMFS considered the Pacific Council's determination that the acceptable biological catch (ABC) for Pacific whiting in the United States in 1999 would be 232,000 mt[26] in their decision to allocate 32,500 mt to the Makah. NMFS' original proposed allocation for the Makah was 25,000 mt, but they accepted the Makah proposal of 32,500 mt with the understanding that the amount equaling fourteen percent of the United States' ABC would not set a precedent for future allocations.[27] NMFS stated that it hoped to develop an appropriate methodology for future allocation through negotiation with the Makah and indicated that this allocation would be determined by the "sliding scale" methodology proposed in 1996 by the Makah.[28]

III. THE SUBJECT CASE

A. Factual Background

The Pacific whiting is a unitary stock fish in that it has no subspecies or geographical subgroups. The stock seasonally travels the Pacific Coast of the United States and Canada, annually passing through the Makah tribe's usual and accustomed fishing ground.[29] The Secretary has promulgated several regulations to control fishing harvests of Pacific whiting. The 1996 framework regulation designating the "sliding scale" methodol-

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25. The Magnuson-Stevens Act provides that eight Regional Fishery Management Councils be formed to ensure compliance with the Act in the different coastal regions of the United States. 16 U.S.C. § 1852 (2002). In 1982 the Pacific Council issued the Pacific Coast Groundfish Fishery Management Plan for the purpose of managing fisheries. The issue of the power of the Regional Councils has been a controversial one and exercise of control over the Councils by NMFS has been viewed as a sort of safeguard protecting the integrity of fishery management from specific state interests. Teresa M. Cloutier, Note, *Conflicts of Interest on Regional Fishery Management Councils: Corruption or Cooperative Management?* 2 OCEAN & COASTAL L.J. 101 (1996) (questioning how much power a Council filled with members protecting both private and state special interests should be afforded).

26. Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Final 1999 ABC, OY, and Tribal and Nontribal Allocations for Pacific Whiting, 64 Fed. Reg. 27,928, 27,930 (May 24, 1999) (to be codified at 50 C.F.R. pts. 600 & 660).

27. *Id.*

28. *Id.*

29. United States v. Washington, 143 F.Supp. 2d 1218, 1220 (W.D. Wash. 2001).

ogy for determining tribal allocation and the 1999 yearly allocation based on this methodology is in question in *Midwater. Midwater* is a consolidation of four cases. Two of the cases challenge the 1996 "framework" regulation[30] while the others challenge the specific 1999 whiting allocations to the Makah. Essentially, at issue in this case is whether the framework used by NMFS is arbitrary and capricious in its allocation of the whiting catch to the Makah.[31]

B. District Court Decision

The District Court decision was precipitated by cross-motions for summary judgment. The court granted summary judgment to the defendant agency, holding that: (1) NMFS' allocations were not arbitrary and capricious; (2) the tribe's usual and accustomed fishing areas extended past the States' three mile territorial limit; (3) the language added by the Secretary to the regulation did not violate the public process requirement; and (4) NMFS' establishment of allocation by compromise between the agency and the tribe was not arbitrary and capricious.[32]

The court, relying on the Administrative Procedure Act (APA), deemed that the arbitrary and capricious standard of review was required by the Magnuson-Stevens Act.[33] This standard requires that the court set aside

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30. Pacific Coast Groundfish Fishery; Framework for Treaty Tribe Harvest of Pacific Groundfish and 1996 Makah Whiting Allocation, 61 Fed. Reg. at 28,786. Each year the United States and Canada perform a stock assessment to determine the combined U.S.-Canada maximum sustainable yield (MSY) for whiting. In recent years the United States has received an eighty percent share of the catch and such a share is assumed by the Pacific Council in their calculations. In certain years, Canada has converted the U.S. catch into a seventy percent share resulting in a yield in excess of the determined MSY. The Makah allocation is based on a percentage of the United States' eighty percent share of the MSY. Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Final 1999 ABC, OY, and Tribal and Nontribal Allocations for Pacific Whiting, 64 Fed. Reg. at 27,929.

31. Midwater Trawlers Coop. v. Dep't of Commerce, 282 F.3d 710, 715–16 (9th Cir. 2002). In prior adjudication of these cases multiple issues existed–including issues of standing, dismissal pursuant to Federal Rule of Civil Procedure 19, failure to join an indispensable party, and questions as to whether the issues raised were moot. By the time the Ninth Circuit United States Court of Appeals heard the case in 2002, all of these issues had been adjudicated and the court was left only to adjudicate the issue of whether the agency action was arbitrary and capricious.

32. *See* Midwater Trawlers Coop. v. United States Dep't of Commerce, 139 F. Supp. 2d 1136 (W.D. Wash. 2000), *rev'd* 282 F. 3d 710 (9th Cir. 2002).

33. *Id.* at 1140.

discretion, or otherwise not in accordance with the law."[34] In proceedings such as these an agency is normally accorded due deference by the courts unless the action taken can be determined to be arbitrary and capricious.[35]

In its opinion, the district court rejected all of Midwater's arguments regarding the arbitrary and capricious nature of the Secretary's promulgation of both the 1996 and 1999 final rules.[36] The court was not persuaded that the Stevens Treaties should not be considered applicable law and accordingly ruled that the tribe's fishing rights to whiting are secured by these treaties.[37] The court ruled that the federal defendant did not act arbitrarily and capriciously in recognizing the tribes' right to harvest whiting.

Midwater also contested NMFS' determination of the Makah tribe's usual and accustomed fishing area (U&A). Midwater advanced two arguments: that no tribe has the right to extend their U&A outside of Washington's territorial waters, and that the U&A had not been judicially determined for all of the tribes in question.[38] The District Court found both of Midwater's arguments against the U&A determination flawed, citing *Washington v. Washington State Commercial Fishing Vessel Ass'n*[39] as precedent for expanded U&A. In *Washington State Commercial Fishing Vessel Ass'n,* the Supreme Court held that the Magnuson-Stevens Act gives

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34. *Id.* (referencing 5 U.S.C. § 706(2)(A) (2001)). This requirement under the Administrative Procedure Act ensures that the courts judge only the reasonableness of the agency administrator's actions in light of appropriate statutory construction. This rule requires the courts to review these issues only and prevents judges from substituting their own judgment for that of the agency.

35. Chevron, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). The *Midwater* District Court relies on *Chevron* as precedent for determining the limits that statutory construction and congressional intent place on an agency's freedom in the promulgation of regulations. In *Chevron,* the Supreme Court ruled that the agency (the EPA) should be afforded deference unless its regulation is contrary to the statutory construction of the law and the congressional intent implicit in the statute or legislative history.

36. *Midwater Trawlers Coop.*, 139 F. Supp. 2d at 1139.

37. *Id.* at 1141–42. The court relies on Article 4 of the Treaty of Neah Bay and on Judge Rafeedie's decision that the treaty language extends the Native American's fishing rights to the harvest of any species regardless of whether or not the species was harvested prior to the negotiation of the treaty.

38. *Id.* at 1142. At the time of trial the courts had ruled that the Makah's usual and accustomed area could extend outside of Washington's territorial waters but no such adjudication had been made for other tribes claiming similar areas.

39. Washington v. Washington State Commercial Fishing Vessel Ass'n, 443 U.S. 658 (1979).

responsibility to the United States, not the individual States, for management of fishery resources and that the U&A of the Makah could be delegated outside of an individual state's territory.[40] While this case was not an adjudication of all tribes' U&A, the District Court ruled that NMFS did not act arbitrarily and capriciously in their extension of any of the tribes' U&A. The District Court's ruling was based on both precedent and evidence presented at trial such that all of the tribes engaged in fishing activities out to twenty-five to fifty miles from the shore.[41]

Midwater further challenged the merit of the 1999 regulation issuing specific allocations of whiting to the Makah.[42] The court explained that NMFS originally proposed a methodology for allocation which based the allocation on the amount of whiting biomass within a tribe's U&A while taking into account the conservation necessity principle.[43] NMFS never used this methodology and subsequently adopted the "sliding scale" method in 1996.[44] The court further explained that NMFS made its 1996, 1997, and 1999[45] allocations to the Makah based on compromise with the tribe regarding methodology. Midwater challenged these allocations on the ground that NMFS' action was arbitrary and capricious because it was based on political compromise rather than on scientific information as required by the Magnuson-Stevens Act.

The court did not find this argument persuasive and ruled that NMFS "declined to use its own proposed methodology not because it refused to apply scientific information, but because it acknowledged that there were significant legal and technical reasons why its methodology might be

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40. *Midwater Trawlers Coop.*, 139 F. Supp. 2d at 1142 (quoting *Washington State Commercial Fishing Vessel Ass'n*, 443 U.S. at 688). This is consistent with Congress' expansion of the territorial waters of the United States to be regulated in the Magnuson-Stevens Act. It can be argued that the plain language of the statute provides that any regulations proffered by NMFS can regulate waters up to 200 miles off of the United States Coast and that NMFS is the sole regulatory body for fishery management under the Act. Although the Act provides for input and regulatory power from the eight regional councils including the Pacific Council, NMFS has the final authority over regulatory proposals from the councils.

41. *Midwater Trawlers Coop.*, 139 F. Supp. 2d at 1144. The court relied on a 1985 opinion from the Regional Solicitor General that identified the fishing areas of the tribes in question as distinguished in the amicus brief of the Quileute Tribe and Quinault Nation.

42. Midwater Trawlers Coop. v. Dep't of Commerce, 282 F. 3d 710, 716 (citing Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Final 1999 ABC, OY, and Tribal and Nontribal Allocations for Pacific Whiting, 64 Fed. Reg. 27,928 (May 24, 1999) (to be codified at 50 C.F.R. pts. 600 & 660).

43. *Midwater Trawlers Coop.*, 139 F.Supp.2d at 1146–1147.

44. *Id.* at 1147.

45. The 1998 allocations have never been challenged.

flawed."[46] The court went on to reason that the methodology proposed by NMFS had been rejected by the courts in adjudication of halibut allocations. NMFS relied on compromise because the "conservation necessity principle"[47] and surrounding methodology had not yet been adjudicated. Because the compromise between the Makah and NMFS only allocated fourteen percent of the catch to the tribe and no specific conservation concerns had been raised, the court ruled that, pending a decision regarding methodology in the sub-proceeding, *United States v. Washington,* the Secretary had not acted in an arbitrary and capricious way in granting the allocation.[48]

C. United States v. Washington[49]

Prior to the appellate decision in *Midwater* the issues of methodology for whiting allocation were adjudicated in *United States v. Washington.*[50] Here, the District Court ruled that the "sliding scale" methodology proffered by the Secretary as a framework for determining whiting allocation to the Makah was legal.[51] The court ruled that the sliding scale methodology "embodies NMFS' reasoned opinion on how to best manage the nation's fisheries resources while honoring the country's treaty commitments."[52]

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46 *Midwater Trawlers Coop.,* 139 F.Supp.2d at 1147.

47. The "conservation necessity principle" provides that the amount of fish available for harvest must be based solely upon resource conservation needs. *Id.* NMFS proposed to account for this principle by including a multiplier to increase the percentage of the biomass in Makah U&A area. *Id.* at 1148. The Makah argued in commentary on the proposed rule that the whiting compose a unitary stock, all of which would pass through the Makah's U&A area, thus entitling the Makah up to fifty percent of the catch. *Id.*

48. *Id.* at 1147. Because NMFS recognized that the outcome of this issue could result in a greater allocation for the Makah, it chose to negotiate the allocations until the issues had been resolved in the pending sub-proceeding.

49. United States v. Washington, 143 F. Supp. 2d 1218 (W.D. Wash. 2001). The sub-proceeding initially vindicated NMFS in its ruling that NMFS compromise with the Makah and adoption of the "sliding scale" methodology were legal. *Id.* at 1224. The District Court's decision in the sub-proceeding was, however, effectively overruled by the Ninth Circuit's ruling in *Midwater.* Midwater Trawlers Coop. v. United States Dep't of Commerce, 282 F.3d 710 (9th Cir. 2002).

50. United States v. Washington, 143 F. Supp. 2d at 1221–24.

51. *Id.*

52. *Id.* at 1224.

D. Midwater Ninth Circuit Opinion

In the most recent adjudication of the issues regarding the Makah tribe's whiting allocations, the Ninth Circuit reversed the District Court's holding that the Secretary's promulgation of the framework and 1999 allocation to the Makah were not arbitrary and capricious.[53] The appellate court held that the promulgation of these regulations was arbitrary and capricious in that they were based on "pure political compromise" rather than scientific evaluation as required by the Magnuson-Stevens Act.[54] The court remanded this issue to NMFS requiring it to either promulgate new allocations that are both consistent with the law and based on the best available science or to further justify that the current allocations are based on the best available science and are therefore in compliance with the Magnuson-Stevens Act.[55]

While the court recognized that the tribal treaty rights under the Treaty of Neah Bay[56] must be the starting point for any rightful allocation decision, it was not persuaded that these rights could not exist harmoniously with a need to base allocations on scientific findings.[57] The court stated that NMFS had made all efforts to follow the letter of the law regarding the Stevens treaties but insisted that the lack of any stated scientific rationale was contrary to the Magnuson-Stevens Act and therefore unlawful.[58]

The court held that when NMFS decided, based on comment from the Makah, to abandon the biomass theory methodology in favor of the "sliding scale" methodology it relied on political rather than scientific information.[59] The court further delineated the standard of review required and stated that an agency action can be characterized as arbitrary and capricious when it relies on factors which Congress has not intended it to consider or fails to consider those factors enumerated by Congress.[60] Here, the court found that there was no doubt that Congress intended NMFS to rely on scientific evidence, as provided in the plain language of the Magnuson-Stevens Act, and that no such evidence appeared in NMFS' justification for the rule.[61]

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53. *Midwater Trawlers Coop.*, 282 F.3d at 720–21.
54. *Id.*
55. *Id.*
56. Treaty with the Makah, *supra* note 15.
57. *Midwater Trawlers Coop.*, 282 F.3d at 718–21.
58. *Id.* at 714, 720.
59. *Id.* at 719.
60. *Id.* at 720.
61. *Id.* at 720–21.

IV. DISCUSSION

The *Midwater* court is correct in remanding the regulation back to NMFS in that the Secretary's action was arbitrary and capricious under the Administrative Procedure Act; but the Court's suggestion that NMFS could possibly promulgate new allocations based only on scientific information leaves room for the abrogation of the Treaty of Neah Bay and ignores the importance of politically negotiated rights conferred by treaties.

A. Preservation of Treaty Rights

Article V of the Treaty[62] has been interpreted by the courts to mean that up to fifty percent of the catch of a stock fish like the Pacific whiting may be allocated to a Native American tribe.[63] The courts have also ruled that only conservation efforts may interfere with full and complete compliance with treaty grants.[64]

In the case at hand, NMFS has an undeniable right to regulate the Makah's catch of Pacific whiting because the regulatory necessity is of a conservationist nature. It is clear from the Makah's proposals to NMFS that the tribe understands the agency's authority as well as the need for regulation. It can be assumed, based on the tribe's proposal, that the tribe understands the commercial demands placed on non-tribal harvesters. In 1999, the Makah proposed that the framework used for determining allocations of Pacific whiting maintain a ceiling of seventeen and a half percent of the total United States catch.[65] The Makah's determination that the percentage of their allocation should never rise above this ceiling shows a willingness on the part of the tribe to compromise with the government's agendas of conservation and commerce. This willingness should not be ignored by NMFS in a turn towards a singular reliance on scientific information.

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62. Treaty with the Makah, *supra* note 15.

63. United States v. Washington, 143 F. Supp. 2d 1218, 1222 (W.D. Wash. 2001). There the Court construed similar treaty language providing native American fishing rights to mean that the tribe could take up to fifty percent of the catch. While this ruling was made in a case involving salmon, the Ninth Circuit found the cases analogous with regard to determination of U&A for stock fish in the region. *Midwater Trawlers Coop.*, 282 F.3d at 717-18.

64. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 682 (1979).

65. Fisheries off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Final 1999 ABC, OY, and Tribal and Nontribal Allocations for Pacific Whiting, 64 Fed. Reg. 27,928, 27,929 (May 24, 1999) (to be codified at 50 C.F.R. pts. 600 & 660).

Such a reliance on the part of the agency would be based on dubious policy and would likely place the new regulation outside compliance with applicable law also required by the Magnuson-Stevens Act.[66] While NMFS can regulate the catch of the Makah for conservation purposes, a disagreement with the tribe over how much of the conservation burden must fall on the tribe could be costly and could interfere with the purpose of the Magnuson-Stevens Act.[67] Adherence to a system of political compromise that is rooted in scientific information will avoid future litigation for NMFS.

The language of the Treaty[68] encourages political compromise on issues such as these. Article IV of the Treaty of Neah Bay states that "the right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States."[69] This language specifically grants the tribe the right to harvest fish in their U&A, but is ambiguous as to the definition of usual and accustomed. Further, the treaty does not anticipate the need for regulatory allocation and is therefore silent as to appropriate percentages. It is an established principal of treaty interpretation that when ambiguities exist in the language of a treaty the ambiguity shall be resolved in favor of the tribe.[70] In light of this principal it is only natural that NMFS would seek to resolve ambiguities and disagreements with the tribe itself rather than through litigation.

In the District Court's opinion in *Midwater,* the Court supports NMFS' communication and negotiation with the Makah.[71] During the proceedings, Midwater contested consultations between NMFS and the Makah, claiming that they amounted to ex-parte communication under the Administrative Procedure Act[72] and violated the Magnuson-Stevens Act's open public

66. 16 U.S.C. § 1811 (2002).

67. The purposes listed in the Magnuson-Stevens Act are numerous, but those most applicable include: (1) taking *immediate* action to conserve and manage United States fishery resources, (2) to promote domestic commercial and recreational fishing under sound conservation and management principals, (3) to provide for the preparation of national standards for fishery management in order to maintain the optimum yield from each fishery, (4) to establish Regional Fishery Management Councils to exercise judgment over the fisheries that take into account the needs of the state, and (5) to promote protection of essential fish habitat. *Id.* at § 1801(b).

68. Treaty with the Makah, *supra* note 15.

69. *Id.*

70. Winters v. United States, 207 U.S. 564, 576 (1908).

71. Midwater Trawlers Coop. v. United States Dep't of Commerce, 139 F. Supp. 2d 1136, 1146 (W.D. Wash. 2000).

72. 5 U.S.C. § 554(d) (2001).

process requirements.[73] The District Court ruled that "the federal government may consult with the Tribes over the application of their treaty rights" based on a trust relationship shared by the government and the tribes.[74] The Ninth Circuit affirmed the District Court's decision on this claim, indicating that while the court did not instruct NMFS to consider political compromise with the Makah in their re-promulgation of rules, they did not object to the nature of previous communications.

B. NMFS's Responsibilities in Re-promulgation

The court's opinion requires that NMFS either provide scientific information in favor of its current regulation or that it promulgate new regulations. However, the opinion provides NMFS with no warning of the import of avoiding the possible destruction of treaty rights granted to the Makah by the United States.[75]

In its promulgation of any new allocation framework, NMFS must be careful not to allow dependence on scientific information to tip the scales pushing the regulations outside of compliance with the treaty. While the tribe is entitled to up to fifty percent of the United States catch and may only be limited by conservation necessity, it is unclear how much may be equitably taken from the Makah without violating the Treaty of Neah Bay. While the court was essentially correct ruling the way it did, its silence on the issue of political compromise could lead NMFS into more troubled waters. NMFS must recognize that while the court requires that it comply with the Magnuson-Stevens Act in its use of scientific information it must be wary of creating new regulations that are not in compliance with other provisions of the Magnuson-Stevens Act and the Treaty of Neah Bay.

V. CONCLUSION

It would seem that while scientific information must be provided supporting NMFS' final allocation methodology per the rule of the court, this scientific information should become the cornerstone of political negotiations between NMFS and the Makah. If NMFS were to place too much emphasis on the requirement that scientific information accompany and support any regulation proffered under the Magnuson-Stevens Act, collaboration with the Makah could be undermined.

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73. 16 U.S.C. §§ 1801(b)(5)(A), 1852 (h)(3) (2001).
74. *Midwater Trawlers Coop.*, 139 F. Supp. 2d at 1145.
75. *See id.*

In this context, abandoning political compromise could, at worst, endanger the integrity of the treaty between the tribe and the United States, and would almost certainly cause years of litigation between the Department of Commerce and the Makah. It is well within the best interests of both NMFS and the courts that political compromise remains a key element of NMFS' regulatory construction.