

Washington Department of Fish and Wildlife Comments on Amendment 9 – August, 2000

6.0 Treaty Indian Fishing Rights

Oregon fishermen began harvesting Pacific sardine during the summer of 1999, when the FMP was implemented. Oregon fishermen continued fishing in 2000, and Washington fishermen also entered the fishery. The coastal pelagic species fishery now extends to the usual and accustomed fishing grounds of Indian tribes that have treaties with the U.S. involving certain fishing rights. This issue was not addressed in the FMP.

6.1 Legal Considerations

Treaties between the United States and numerous Pacific Northwest Indian tribes reserve to these tribes the right of taking fish at usual and accustomed grounds and stations ("u & a grounds") in common with ~~other~~ all citizens of the United States. See U.S. v. Washington, 384 F. Supp. 312, 349-350 (W.D. Wash. 1974).

The National Marine Fisheries Service recognizes the tribes that have u & a grounds in the marine areas managed by this FMP are the Makah, Hoh, and Quileute tribes, and the Quinault Indian Nation. The Makah Tribe is a party to the Treaty of Neah Bay, Jan. 31, 1855, 12 Stat. 939. See 384 F. Supp. at 349, 363. The Hoh and Quileute tribes and the Quinault Indian Nation are successors in interest to tribes that signed the Treaty with the Quinaeilt, et al. (Treaty of Olympia), July 1, 1855, 12 Stat. 971. See 384 F. Supp. at 349, 359 (Hoh), 371 (Quileute), 374 (Quinault). The tribes' u&a grounds do not vary by species of fish. U.S. v. Washington, 157 F. 3d 630, 645 (9th Cir. 1998).

The treaty fishing right is generally described as the opportunity to take a fair share of the fish, which is interpreted as up to 50 percent of the harvestable surplus of fish that pass through the tribes' u&a grounds.

~~Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 685-687 (1979) (salmon); U.S. v. Washington, 459 F. Supp. 1020, 1065 (1978) (herring); Makah v. Brown, No. C85-160R, and U.S. v. Washington, Civil No. 9213 - Phase I, Subproceeding No. 92-1 (W.D. Wash., Order on Five Motions Relating to Treaty Halibut Fishing, at 6, Dec. 29, 1993) (halibut); U.S. v. Washington, 873 F. Supp. 1422, 1445 and n. 30 (W.D. Wash. 1994), aff'd in part and rev'd in part, 157 F. 3d 630, 651-652 (9th Cir. 1998), cert. denied, 119 S.Ct. 1376 (1999) (shellfish); U.S. v. Washington, Subproceeding 96-2 (Order Granting Makah's Motion for Summary Judgment, etc. at 4, November 5, 1996) (Pacific whiting). The harvestable surplus is the number of fish that can be taken without diminishing the number in future years, which is consistent with the conservation necessity principle. Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 177 (1977); United States v. Washington, 520 F.2d 676, 686 n.3 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). The harvestable surplus must be determined according to the conservation necessity principle, which holds that the amount of fish available for harvest must be based solely on resource conservation needs. Passenger Fishing Vessel, 443 U.S. at 682; Antoine v. Washington, 420 U.S. 194, 207-208 (1975); Puyallup Tribe v. Washington Game Dept., 391 U.S. 392, 402 n. 14 (1968) Puyallup I); Tulee v. Washington, 315 U.S. 681, 684 (1942). The court applied the conservation necessity principle to federal determinations of harvestable surplus in Makah v. Brown, No. C85-160R/United States v. Washington, Civil No. 9213 - Phase 1, Subproceeding No. 92-1, Order on Five Motions Relating to Treaty Halibut Fishing, at 6-7 (W.D. Wash. Dec. 29, 1993). The conservation necessity standard applies to federal as well as state regulation. Makah v. Brown, No. C85-160R, and United States v. Washington, Civil No. 9213 - Phase I, Subproceeding No. 92-1 (W.D. Wash., Order on Five Motions Relating to Treaty Halibut Fishing, at 6, Dec. 29, 1993).~~

The treaty right was originally adjudicated with respect to salmon and steelhead. However, it is now

recognized as applying to all species of fish and shellfish within the tribes' u&a grounds. As stated in U.S. v. Washington, 873 F.Supp. 1422, 1430, aff'd 157 F. 3d 630, 644-645 (9th Cir. 1998), cert. denied, 119 S.Ct. 1376:

The fact that some species were not taken before treaty time - either because they were inaccessible or the Indians chose not to take them - does not mean that their right to take such fish was limited. Because the 'right of taking fish' must be read as a reservation of the Indians' pre-existing rights, and because the right to take any species, without limit, pre-existed the Stevens Treaties, the Court must read the 'right of taking fish' without any species limitation.

The original 1974 District Court decision in U.S. v. Washington specifically references Quileute tribal fishing for sardines at treaty times. U.S. v. Washington, 384 F.Supp. 312, 372 (W.D. Wash. 1974).

The National Marine Fisheries Service recognizes the areas set forth in the framework below as marine u&a grounds of the four Washington coastal tribes. The Makah u&a grounds were adjudicated in U.S. v. Washington, 626 F.Supp. 1405, 1466 (W.D. Wash. 1985), aff'd 730 F.2d 1314 (9th Cir. 1984). The u&a grounds of the Quileute, Hoh, and Quinault tribes have been recognized administratively by NMFS. See, e.g., 64 Fed. Reg. 24087-24088 (May 5, 1999) (u&a grounds for salmon); 50 C.F.R. 660.324(c) (u&a grounds for groundfish); 50 C.F.R. 300.64(i) (u&a grounds for halibut). The u&a grounds recognized by NMFS may be revised as ordered by a federal court.

The legal principles described above support the conclusion that treaty Indian fishing rights apply to coastal pelagic species that pass through the coastal tribes' ocean u&a grounds. The quantity of this right has not yet been determined or adjudicated.

6.2 Prospective Tribal Fisheries for CPS

With the resurgence of Pacific sardines, and their movement north along the West Coast, it is likely that some of the Pacific Northwest ocean fishing tribes may wish to exercise their treaty fishing rights on CPS in their u&a grounds. Currently, no regulatory impediment to tribal fisheries exists because the tribes' u&a grounds are in CPS Subarea A, which is an open access area with its own allocation of one-third of the coast wide harvest guideline (65 Fed. Reg. 3890-3892, January 25, 2000). However, it is possible that specific treaty Indian allocations may be necessary in the future. To anticipate this eventuality, and to establish an orderly process for implementing treaty fisheries, it is proposed to include a treaty Indian fishing rights framework in the FMP.

Two alternatives are described below. Both options are designed to give the Council prior notice of proposed treaty fisheries so that allocation and other issues can be addressed before fisheries commence. In addition, both options would recognize the Indians' treaty rights; describe the u&a grounds of the four ocean fishing tribes; provide an orderly procedure, through the Council process, for implementation of treaty rights; and contain various measures related to the exercise of treaty rights.

Alternative 1: Adopt and include in the FMP a framework process similar to that used for treaty Indian fisheries under the Pacific Coast Groundfish Fishery Management Plan. Specifics of the proposed framework are as follows:

- (a) Pacific Coast treaty Indian tribes have treaty rights to harvest CPS in their usual and accustomed fishing areas in U.S. waters.
- (b) Pacific Coast treaty Indian tribes means the Hoh, Makah, and Quileute Indian Tribes and the Quinault Indian Nation.

(c) The Pacific Coast treaty Indian tribes' usual and accustomed fishing areas within the fishery management area (FMA) are set out below. Boundaries of a tribe's fishing area may be revised as ordered by a Federal court.

(1) Makah – That portion of the FMA north of 48 degrees 02'15" N. lat. (Norwegian Memorial) and east of 125 degrees 44'00" W. long.

(2) Quileute – That portion of the FMA between 48 degrees 07'36" N. lat. (Sand Point) and 47 degrees 31'42" N. lat. (Queets River) and east of 125 degrees 44'00" W. long.

(3) Hoh – That portion of the FMA between 47 degrees 54'18" N. lat. (Quillayute River) and 47 degrees 21'00" N. lat. (Quinault River) and east of 125 degrees 44'00" W. long.

(4) Quinault – That portion of the FMA between 47 degrees 40'06" N. lat. (Destruction Island) and 46 degrees 53'18" N. lat. (Point Chehalis) and east of 125 degrees 44'00" W. long.

(d) Procedures. The rights referred to in paragraph (a) will be implemented by the Secretary of Commerce, after consideration of the tribal request, the recommendation of the Council, and the comments of the public. The rights will be implemented either through an allocation of fish that will be managed by the tribes, or through regulations that will apply specifically to the tribal fisheries. An allocation or a regulation specific to the tribes shall be initiated by a written request from a Pacific Coast treaty Indian tribe to the NMFS Southwest Regional Administrator, at least 120 days prior to the start of the fishing season as specified at 50 C.F.R. 660.510, and will be subject to public review according to the procedures in 50 C.F.R. 660.508(d). The Regional Administrator generally will announce the annual tribal allocation at the same time as the annual specifications. The Secretary recognizes the sovereign status and co-manager role of Indian tribes over shared Federal and tribal fishery resources. Accordingly, the Secretary will develop tribal allocations and regulations in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.

(e) Identification. A valid treaty Indian identification card issued pursuant to 25 CFR Part 249, Subpart A, is prima facie evidence that the holder is a member of the Pacific Coast treaty Indian tribe named on the card.

(f) Fishing (on a tribal allocation or under a federal regulation applicable to tribal fisheries) by a member of a Pacific Coast treaty Indian tribe within that tribe's usual and accustomed fishing area is not subject to provisions of the CPS regulations applicable to non-treaty fisheries.

(g) Any member of a Pacific Coast treaty Indian tribe must comply with any applicable federal and tribal laws and regulations, when participating in a tribal CPS fishery implemented under paragraph (d) above.

(h) Fishing by a member of a Pacific Coast treaty Indian tribe outside that tribe's usual and accustomed fishing area, or for a species of CPS not covered by a treaty allocation or applicable federal regulation, is subject to the CPS regulations applicable to non-treaty fisheries.

Any revision to the framework would require an FMP amendment. Implementing regulations would refer

to the framework in the FMP.

Alternative 2: Authorize adoption of the framework to accommodate treaty fishing rights in the implementing regulations. The initial proposed regulations would be as set out in the framework described above.