

Condition Report Addendum



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An overview of Tribal, state, and federal co-management relationships in Washington¹

Jurisdictional Overview

When the National Oceanic and Atmospheric Administration established the Olympic Coast National Marine Sanctuary (OCNMS) under the Marine Protection, Research, and Sanctuaries Act in 1994, it recognized that the primary mandate for the regulation and management of fish stocks for a healthy fishery rests with existing fishery management agencies and will be in accordance with *U.S. v. Washington*² and other applicable law. The Designation Document and the 1994 Management Plan, which were part of the Final Environmental Impact Statement establishing the OCNMS, specifically affirm the continued management of fisheries by fishery management agencies.³

The management of marine resources found in the OCNMS is part of a comprehensive, complex mixture of federal, state and tribal jurisdictions. The OCNMS lies within the Usual and Accustomed treaty fishing areas of the Quileute, Makah and Hoh tribes, and the Quinault Indian Nation (Coastal Tribes). The Coastal Tribes are the co-managers, with the State of Washington

¹ The Intergovernmental Policy Council developed this overview to assist in understanding the historical and cultural significance of fishing activities in the sanctuary as management plan review begins. The Intergovernmental Policy Council was formed in 2007 by the Hoh Indian Tribe, Makah Indian Tribe, Quileute Indian Tribe, Quinault Indian Nation, the State of Washington, and the National Marine Sanctuaries Program of the National Oceanic and Atmospheric Administration. It is a forum for marine resource managers with regulatory jurisdiction over the marine resources and activities within the boundaries of the Olympic Coast National Marine Sanctuary to enhance their communication, policy coordination and resource management strategies.

² *United States vs. State of Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), and subsequent subproceedings.

³ The Olympic Coast National Marine Sanctuary's Final Environmental Impact Statement, the 1994 Management Plan, and the Designation Document, are available online at: <http://olympiccoast.noaa.gov/protection/pubdocs/welcome.html>

and the United States, of fishery and related marine resources off the Olympic Coast. All four tribes are federally recognized and independent sovereign governments, representing peoples with whom the United States of America has entered into a treaty relationship through the Treaty of Olympia (1855) or the Treaty of Neah Bay (1855).

In the Pacific Northwest, each co-manager is responsible for managing natural resources and regulating the fisheries within its jurisdiction to collectively create a coordinated and comprehensive approach to management. The State of Washington and the treaty tribes have cooperatively managed fisheries since the early 1980's. The mission statement for the Washington Department of Fish and Wildlife contains a provision for the agency to work with tribal governments to ensure that fish and wildlife management objectives are achieved. This involves jointly determining optimal spawning abundance and annual harvest levels. Each co-manager then adopts and enforces regulations for its fishers to harvest within these levels.

Historical Reliance

The environment and abundant resources of the Olympic Peninsula and associated marine waters form an economic base for many coastal communities and are essential to the coastal treaty tribes' economies and cultures. For thousands of years, native peoples have made their homes along the Olympic Coast, shifting location with the season to establish villages at the best food producing sites (Barbara Lane - U.S. exhibits in *U.S. v. Washington*). The Coastal Tribes maintained extensive commerce and trade networks in the Pacific Northwest.

In the mid 1800's, Isaac Stevens, governor and superintendent of Indian affairs of the Washington Territory, was authorized to conduct treaty negotiations with the Coastal Tribes on behalf of the United States government. The Treaty of Olympia (1855) and the Treaty of Neah Bay (1855) were eventually signed by representatives of the Coastal Tribes and Governor Stevens and subsequently ratified by the United States. Through the treaties, the Coastal Tribes ceded title to thousands of acres of land to allow for the peaceful settlement of the Washington Territory by non-Indian settlers and to provide for a peaceful co-existence by recognizing tribal resource rights. In return, the Coastal Tribes were to receive reservation homelands for their exclusive use and were promised assistance from the United States. Importantly, the treaties reserved the rights of the Coastal Tribes to continue to hunt and gather resources at their usual and accustomed places to maintain their life styles and economies.

At treaty times, the Coastal Tribes had a strong reliance on their surrounding natural resources. Fish was a staple food of the communities and fishing constituted the principal economic activity (Barbara Lane - U.S. exhibits in *U.S. v. Washington*):

“The right to fish for all species available in the waters from which, for so many ages, their ancestors derived most of their subsistence is the single most highly cherished interest and concern of the present members of the plaintiff tribes...” U.S. v. Washington
384 F. Supp. 340.

From the earliest known times, up to and beyond the time of the Stevens' treaties, the Indians comprising each of the treating tribes and bands were primarily a fishing,

hunting, and gathering people, dependent almost entirely upon the natural animal and vegetative resources of the region for their subsistence and culture...The treaty-secured rights to resort to the usual and accustomed places to fish were a part of larger rights possessed by the treating Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to their existence than the atmosphere they breathed. The treaty was not a grant of rights to the treating Indians, but a grant of rights from them, and a reservation of those not granted.” U.S. v. Washington 384 F. Supp. 406-407.

Wealth, power and maintenance of cultural patterns were indelibly linked to the tribes’ surrounding natural resources. The Coastal Tribes enjoyed a high standard of living as a result of their marine resources and extensive marine trade and sought to retain the right to continue these activities. Freedom to continue traditional practices was a primary concern of the tribes during the treaty negotiations. The treaty negotiators for the United States were aware of and acknowledged the commercial nature and value of the maritime economy (U.S. v. Washington, 384 F. Supp. 350, 406).

Both the Treaty of Olympia and the Treaty of Neah Bay contain common language: “the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with the citizens of the territorytogether with the privilege of hunting, gathering roots and berries, and pasturing their horse on open and unclaimed lands.” An additional clause regarding traditional practices was contained in the Treaty with the Makah (1855) reflective of the coastal tribes’ extensive connection to marine resources: “and of whaling or sealing” (U.S. v. Washington, 384 F. Supp. 312, 349-350 (W.D. Wash. 1974)).

Treaty Rights

Under Article VI, Section 2 of the United States Constitution, treaties with Indian tribes are considered the supreme law of the land: “the Constitution... of the United States... and all Treaties made, or which shall be made, under authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.”

These treaties were not a grant of rights to the tribes, but rather a grant of rights from the tribes and a reservation of those rights not expressly granted (United States v. Winans, 198 U.S. 371 (1905)). Because the right of taking fish is a reservation of the tribes’ pre-existing rights, and because the right to take any species, without limit, predated the Stevens Treaties, the right of taking fish is without any species limitation (Rafeedie Decision 1994).

Clarification and implementation of treaty fishing rights in the Pacific Northwest has a long legal history. Conflicts over the management and regulation of treaty fisheries arose by the mid-1880’s and continued for the next one hundred years. Throughout this time, the federal court system has been a consistent guardian of Indian treaty fishing rights, affirming them on seven separate occasions. Below are some of the key cases involving treaty Indian fishing rights:

United States v. Winans (1905) - the right to fish and to access traditional fishing grounds off-reservation;

State v. Towessnute (1915), State v. Alexis (1915), State v. Tulee (1939) – the right to fish without state license;

Makah Indian Tribe v. McCauly (1941), Makah Indian Tribe v. Schoettler (1951) - prohibit enforcement of state restrictions on fishing gear;

Department of Game v. Puyallup Tribe I, II & III (1968, 1973, 1977) - prohibit state management of treaty fishing;

United States v. Oregon - Belloni Decision (1969) and United States v. Washington - Boldt Decision (1974) - determination of “fair and equitable” share;

Washington v. Washington State Commercial Passenger Fishing Vessels Ass’n (1979) and Hoh v. Baldrige (1981) – refinement of accounting for 50 percent harvest sharing; and

United States v. Washington - Rafeedie Decision (1994) – extension of treaty rights to shellfish.

The courts have determined that tribes are entitled to a specific share of the available harvest of resources available at their usual and accustomed grounds and stations and to manage the use of those resources.

“The state may regulate fishing by non-Indians to achieve a variety of management or ‘conservation’ objectives. Its selection of regulations to achieve these objectives is limited only by its own organic law and the standards of reasonableness required by the Fourteenth Amendment. But when it is regulating the federal right of Indians to take fish at their usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them. The state may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource. The measure of the legal propriety of a regulation concerning the time and manner of exercising this ‘federal right’ is, therefore, ‘distinct from the federal constitutional standard concerning the scope of the police power of the State.’ To prove necessity, the state must show there is a need to limit the taking of fish and that the particular regulation sought to be imposed upon the exercise of the treaty right is necessary to the accomplishment of the needed limitation.” U.S. v. Washington 384 F. Supp. 346.

“The State’s police power to regulate the off-reservation fishing activities of members of the treaty tribes exists only to the extent necessary to protect the resource. This power does not include the authority to impair or qualify the treaty right by limiting its exercise

to State-preferred times, manners or purposes except as such limitation may be necessary for preservation of the resource and protection of the interests of all those entitled to share it. This power does not include the power to determine for the Indian tribes what is the wisest and best use of their share of the common resource.” U.S. v. Washington 384 F. Supp. 401-402.

Trust Responsibility

The treaties, associated federal statutes, Executive Orders, and court rulings have established a unique legal relationship, an overarching federal trust responsibility of the United States to Indian tribes. The trust responsibility establishes legal obligations of the United States to Indian tribes, including the protection of treaty fishing rights. The United States government recognizes the sovereignty of Indian tribes and as a matter of policy, works with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources and treaty fishing and other rights.

Co-management

Fisheries of the Coastal Tribes, by tradition, tribal law, and by their nature, are primarily place-oriented, depending upon fish being available at their respective usual and accustomed areas. Each of these tribes regulates and controls tribal fishing at these locations in accordance with tribal law and judicially prescribed fishery management responsibilities. Each tribe regulates its fisheries with the objectives of maintaining the long-term productivity of the resource and carrying out its determinations regarding the use of its share of the fishery resources.

Each of the Coastal Tribes maintains its own fisheries management and enforcement staffs, regulate fisheries and engage in a wide variety of research, restoration, and enhancement activities to improve the scientific basis for resource stewardship. These tribes also participate in domestic and international multi-jurisdictional processes such as the International Pacific Halibut Commission, the Pacific Fishery Management Council, and the Pacific Salmon Commission.

Tribal, state and federal resource managers operate within a management framework that has sufficient flexibility to meet the following requirements: 1) resource conservation; 2) sustainable fisheries; and 3) assure that treaty and non-treaty fishers are afforded the opportunity to harvest or utilize (subject to their respective regulatory authorities) their share. This is the basic approach that the co-managers follow whether participating within international management forums (e.g., International Pacific Halibut Commission or United States/Canada Pacific Salmon Commission), regional management forums (e.g., Pacific Fishery Management Council or North of Cape Falcon), or localized state/tribal management processes.

This cooperative management approach has proven to be effective in meeting the conservation needs of the resources and social, economic, and cultural needs of treaty and non-treaty fisheries. Undoubtedly, Co-management will continue to evolve to address changing resource and management needs. This co-management framework has provided a reliable and transparent planning forum for addressing resource conservation and allocation issues. Its success and functionality over the past decade led the National Oceanic and Atmospheric Administration to conclude that primary responsibility for fisheries management should remain within existing

tribal, state and federal authorities and not with the National Marine Sanctuary Program or the OCNMS. It was envisioned that the OCNMS would focus on research to enhance the management and conservation of fishery and other resources within the boundaries of the OCNMS to assist the primary fishery co-managers⁴.

The Intergovernmental Policy Council (IPC), an advisory body established by the Coastal Tribes, State of Washington and the OCNMS in 2007, is an example of the coordination envisioned. Implementation planning is currently under way within the IPC forum regarding the tribal/state Ocean Ecosystem Initiative. This initiative seeks to strengthen management practices of the ocean and coastal resources along the northern Washington Coast. Of primary focus is improving the regional capability of forecasting stock status and abundance of rockfish stocks. This will be accomplished by developing a finer scale biological database through the application of genetic stock identification research conducted by the Makah Fishery Program, expansion of the rockfish stock assessment program of the Washington Department of Fish and Wildlife, and augmentation of the existing fishery sampling programs conducted by the state and Coastal Tribes. An essential element of this effort includes collaborating on a research plan with OCNMS that assists in completion of seafloor relief and substrate mapping of the northern Washington Coast, a necessary first step to determine the extent and distribution of rockfish habitat.

⁴ This was an initial goal of the OCNMS; see OCNMS Final EIS, Part V, Management Plan, available at: <http://olympiccoast.noaa.gov/protection/pubdocs/welcome.html>