

2 TREATY TRUST RESPONSIBILITY



From left, Vivian Lee, Hoh tribal chairman; Micah McCarty, Makah tribal chairman; Washington Gov. Chris Gregoire; Daniel Basta, director of NOAA's Office of National Marine Sanctuaries; Scott Rayder, NOAA Chief of Staff (standing); Chris Morganroth, Quileute tribal policy representative; and Fawn Sharp, Quinault Indian Nation tribal chairman complete the signing of the charter to create the Intergovernmental Policy Council (May 2007)

This section was prepared by a working group of tribal and NOAA ONMS representatives to provide background information for NOAA's policies, operations, program planning and program implementation that assists in satisfying the requirements of the federal trust responsibility to the sovereign tribal governments of the Hoh, Makah, Quileute tribes and the Quinault Nation (collectively the Coastal Treaty Tribes).

NOAA seeks to work directly with the Coastal Treaty Tribes on a government-to-government basis to promote a healthy ecosystem in the waters adjacent to the Olympic Peninsula for the support and enhancement of tribal treaty rights and resources, cultural resources and activities, tribal self-determination and sovereignty. In addition, NOAA supports and works with the Olympic Coast Intergovernmental Policy Council (IPC) to obtain guidance and the collective views of the Coastal Treaty Tribes and the state of Washington on maintaining a healthy marine ecosystem in the waters off the Olympic Peninsula for the benefit of all citizens and for future generations. NOAA believes these activities are mutually supportive of both the federal government's treaty trust responsibility as well as its responsibilities under the National Marine Sanctuaries Act (NMSA).

2.1 COASTAL TREATY TRIBES, THE TREATY RIGHT TO FISH, AND THE MAGNUSON-STEVENSON FISHERY CONSERVATION ACT

The marine ecosystem off the Olympic Peninsula provides habitat for a wide variety of marine and terrestrial birds, fish, mammals and plants. Through treaties with the United States, the Coastal Treaty Tribes reserved hunting, fishing, and gathering rights to access and utilize the plants, mammals, fish and other resources of the Olympic Peninsula and its adjacent waters in their respective treaty areas in perpetuity. The marine ecosystem and its associated natural resources form an essential foundation for the economies and cultures of the Coastal Treaty Tribes, and the Coastal Treaty Tribes view the continued ability to harvest and utilize water, plants, mammals, fish and other resources of this region as being critical to the protection of their treaty rights and the continuity of their distinct societies.

The treaties of the Coastal Treaty Tribes are part of the “Stevens treaties.” These treaties were negotiated in the mid-1850s throughout the lands that are now western Washington with Governor of the Washington territory, Isaac Stevens. The 1855 Treaty of Neah Bay with the Makah Indian Tribe and the 1855 Treaty of Olympia with the Hoh Indian Tribe, Quileute Indian Tribe and the Quinault Indian Nation govern the relationships between the federal government and the Coastal Treaty Tribes.

In the 1970s American Indian tribes in the state of Washington sought to have greater access to their treaty resources and uphold their treaty rights in federal court. The outcome of this arduous legal path re-established these treaties as the supreme law of the land and culminated in the seminal case of *United States v. Washington*, written by Judge George Boldt and often referred to as the “Boldt” decision. (*U. S. v. Washington*, 384 F. Supp. 312, 353(W.D. Wash. 1974), *aff’d* 520 F.2d 676 (9th Cir. 1975), *aff’d sub nom. State of Washington et al. v. Washington State Commercial Passenger Fishing Vessel Association et al.* 443 U.S 658, 99 Ct. 3055 (1979)). In arriving at the decision upholding the treaty rights, Judge Boldt traced the history of the salmon fishing tribes of the state of Washington to treaty-time signing periods. Judge Boldt’s decision recounts:

“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.” 384 F. Supp 312, 406 (W. D. Wash. 1974)

“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 nor 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.” 384 F. Supp. 312, 407 (W. D Wash. 1974).

The treaty right to fish is constrained only by the requirement to ensure fishery resources are preserved and maintained. *U.S. v. Washington*, 384 F. Supp. 312, 402 (W.D. Wash. 1974). Further, the Coastal Treaty Tribes’ fishing rights are:

“...not limited as to species of fish, the origin of fish, the purpose or use, or the time or manner of taking except to the extent necessary to achieve preservation of the resource and to allow non-Indians an opportunity to fish in common with treaty right fishermen outside the reservation boundaries.” 384 F. Supp. 312, 401(W.D. Wash. 1974).

The state of Washington may regulate tribal fisheries only in very limited circumstances:

“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 fishery 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 limitations 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.” 384 F. Supp. 401-402. (W.D. Wash. 1974).

Circumstances under which the United States may limit the exercise of the treaty right are broader than the State’s. Congress has plenary authority to modify the exercise of American Indian treaty rights through the enactment of laws and statutes, subject to Constitutional limitations. The federal courts are very reluctant to interpret federal statutes as abrogating or modifying an Indian treaty absent an explicit statement by Congress to do so. In its role as co-manager of the ocean fisheries, the United States acts in concert with the Coastal Treaty Tribes to preserve and maintain marine resources for future generations.

Because the Coastal Treaty Tribes’ right to fish is held “in common with” the non-Indian citizens of present-day Washington and Oregon, Judge Boldt determined the tribes are “co-managers” of the fishery resource (*U. S. v. Washington*, 384 F. Supp. 312, 403 (W. D. Wash. 1974)). Thus, each of the Coastal Treaty Tribes regulates and controls tribal fishing at its usual and accustomed grounds in accordance with tribal law and judicially prescribed fishery management responsibilities, maintains its own fisheries management and enforcement staff, enters into management agreements with other co-managers, and engages in a wide variety of research, restoration and enhancement activities to improve the scientific basis for resource stewardship.

In state waters, the Coastal Treaty Tribes are co-managers of the fishery with the state of Washington. In federal waters (beyond three miles off shore), the Coastal Treaty Tribes are co-managers with the federal government through the implementation of the Magnuson Stevens Fishery Conservation Act (Magnuson Stevens Act; 16 U.S. 1801et seq.) by NOAA’s National Marine Fisheries Service (NMFS). This tribal/federal/state co-management framework has evolved as a reliable planning forum for all aspects of fishery management, including but not limited to planning harvest time, place and manner, and constraining fishing mortality. The co-managers are charged with the responsibility for managing all aspects of fishery resources and for coordinating their efforts through the development, adoption and implementation of fishery management plans under the Magnuson Stevens Act. The NMSA provides authority for the

ONMS to regulate activities in marine sanctuaries for comprehensive and coordinated conservation and management in a manner which complements existing regulatory authorities (15CFR 922.2(b)(2)) and to develop and implement coordinated management plans for the protection and management of the sanctuary together with the state of Washington and the Coastal Treaty Tribes (15 CFR 922.2(b)(6)).

Over the years, the federal courts have become the chief protectors of the exercise of American Indian treaty rights and many cases and sub-proceedings have been brought in Washington and Oregon courts to interpret tribal rights under the Stevens' treaties. In the 1990s, the United States Government, in exercise of its trust responsibility, asked the federal courts to establish the rights of Stevens' treaty tribes in western Washington to access shellfish beds across private lands and to an equitable harvest of the shellfish resource (*U. S. v Washington*, 873 F. Supp. 1422 (W. D. Wash. 1994), *aff'd in part, rev'd in part*, 135 F.3d 618 (9th Cir. 1998), *amended* 157 F. 3d 630 (9th Cir. 1998), *cert. den.*, 526 U.S. 1060 (1999)). The resulting decision established the tribal right to harvest not just shellfish, but also any species of fish, finned or not finned, in the usual and accustomed area of a tribe. In recent years, the United States has sought to ensure the State of Washington does not allow the treaty fishery resource to be adversely impacted by state-sanctioned activities impeding fish migration and production and diminishing the available fish resource (*U. S. v Washington*, (CV9213RSM August 22, 2007) 2007 WL 2437166 (W. D. Wash. 2007) (also known as the Culverts Case)).

2.2 OCNMS AND TRIBAL TRUST AND TREATY RESPONSIBILITIES

NOAA's implementation of the NMSA and its duty to implement the federal trust responsibility toward American Indian tribes complement and support one another. The purposes and policies of the NMSA include the following, "*to maintain the natural biological communities in national marine sanctuaries, and to protect, and where appropriate restore and enhance natural habitats, populations, and ecological processes.*" This statutory mission supports NOAA's implementation of its trust responsibility for the protection of treaty trust resources, tribal access to treaty resources and the sustainable development of treaty rights. One of the purposes and policies of the NMSA is "*to develop and implement coordinated plans for the protections and management of [sanctuaries] with ...Native American Tribes and organizations...and other public and private interests concerned with the continuing health and resilience of these marine areas.*" This policy statement in the NMSA supports OCNMS' efforts to defer to tribal management plans that achieve the statutory mission and obligations of OCNMS.

Finally, the NMSA's objective "*to facilitate to the extent compatible with the primary objective of resource protection, all public and private uses of the resources of*" national marine sanctuaries supports implementation of NOAA's trust responsibility to protect the exercise of treaty rights, now and in perpetuity. The NMSA and the federal trust responsibility provide one basis, among many, for the determination OCNMS regulations do not restrict the ability of Coastal Treaty Tribes to exercise their treaty protected rights (15 CFR 122.152(f)). The Coastal Treaty Tribes and NOAA strive to develop joint activities and projects, and to engage in the collaborative development and implementation of coordinated plans for the management and protection of treaty resources, to ensure resilience of those resources, and to promote the continuing health of the OCNMS ecosystem.

In summary, to the extent consistent with federal law, NOAA implements its trust responsibility toward the Coastal Treaty Tribes and discharges its statutory mission under the NMSA to:

- Protect and conserve treaty trust resources;
- Protect the exercise of treaty rights by the Coastal Treaty Tribes;
- Support the development of and deference to tribal treaty resource management plans meeting the objectives of the NMSA; and
- Consult with the Coastal Treaty Tribes on a government-to-government basis when proposing to take an action that may affect treaty resources or tribal treaty rights or resources of cultural or historical significance (15 CFR 922.153(g)(h)).

2.3 CONSULTATION WITH COASTAL TREATY TRIBES

Executive Orders 12875 and 13175 (Appendices D and I) direct federal agencies to consult with Native American tribes on a “government-to-government” basis when proposing to take an action affecting tribal sovereignty or tribal trust resources or tribal treaty rights. Executive Order 13175 also requires federal agencies to encourage American Indian tribes to develop their own policies to achieve program objectives, defer to tribally established standards, and preserve the prerogatives and authority of Indian tribes to the extent permitted by federal law. Executive Order 12898 (Appendix E) on Environmental Justice, specifies that federal agencies must ensure that environmental justice requirements are applied to American Indian tribes and their subsistence consumption of fish and wildlife. These policies are also reflected in the *Department of Commerce American Indian and Alaska Native Policy, 1995* (Appendix J) and in *Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act* (Appendix F).

Whenever it is determined by a Coastal Treaty Tribe or NOAA that actions proposed or authorized by the NMSA may impact tribal trust resources, the exercise of tribal treaty rights, Indian lands, or tribal self- government and determination, NOAA will consult with, and seek the participation of, the affected Coastal Treaty Tribe(s) in accordance with the executive orders and other agency guidance relating to such consultation.

2.4 TRIBAL CONSULTATION PROCEDURES

Tribal consultations are planned, structured meetings between the OCNMS superintendent or Director of ONMS and the affected tribe(s) or their designees. They refer to meetings, either in person or via phone/video teleconference, between officials of ONMS and the affected tribe(s) or their designees, which are planned, structured and understood by both parties to be consultation. Communications outside of consultation meetings may be part of the overall consultation process, but these communications are not consultations themselves.

As used in this document, tribal consultation means the process of seeking, discussing, and considering the views of the tribal government(s) at the earliest time in ONMS’ decision-making about the management of OCNMS. Tribal consultation is more than simply providing information about what ONMS is planning to do and allowing comment. Rather, tribal consultation means respectful, meaningful, and effective two-way communication that works towards the goal of consensus reflecting the concerns of the affected Coastal Treaty Tribe(s)

before ONMS makes its decision or moves forward with its action. The objective is to promote cooperative decision making on activities that may impact treaty trust resources or the exercise of tribal rights on American Indian lands and waters.

Individual Coastal Treaty Tribes may choose to work with ONMS to develop more specific, individually defined tribal consultation procedures beyond those outlined here. The tribal consultation procedures outlined above reflect the guiding objective and basic process that will be enacted. These procedures may be modified as a result of the Department of Commerce Consultation Procedures initiative being conducted in response to Executive Order 13175 (Appendix I).