

Authority: 16 U.S.C. 1801 *et seq.*

Dated: March 6, 1996.

Donald J. Leedy,

Acting Director, Office of Fisheries
Conservation and Management, National
Marine Fisheries Service.

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50 CFR Part 663

[Docket No. 960304057-6057-01; I.D.
020596A]

RIN 0648-AH84

Pacific Coast Groundfish Fishery; Framework for Treaty Tribe Harvest of Pacific Groundfish

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: This rule proposes a framework that allows NMFS, acting on behalf of the Secretary of Commerce (Secretary), to implement the rights of the Washington coastal treaty Indian tribes to fish for groundfish in their usual and accustomed fishing areas (U&A area). The Secretary requests public comments on the proposed framework and on the amount of Pacific whiting to be set aside for the Makah Indian Tribe (Makahs) for 1996 under the provisions of this rule. The intent of this rule is to accommodate treaty fishing rights.

DATES: Comments will be accepted on or before April 12, 1996.

ADDRESSES: Comments may be mailed to William Stelle, Jr., Director, Northwest Region, NMFS, 7600 Sand Point Way NE., BIN C15700, Seattle, WA 98115. Information relevant to this proposed rule is available for public review during business hours at the Office of the Director, Northwest Region, NMFS.

FOR FURTHER INFORMATION CONTACT: William L. Robinson at 206-526-6140.

SUPPLEMENTARY INFORMATION: NMFS is issuing a proposed rule, based on the agency's authority under the Pacific Coast Groundfish Fishery Management Plan (FMP) and the Magnuson Fishery Conservation and Management Act (Magnuson Act) to amend the FMP's implementing regulations to establish a clear procedure for implementing the Washington coastal treaty Indian tribes' rights to harvest Pacific groundfish. At the same time, NMFS is seeking public comment on the amount of Pacific whiting to set aside in 1996 for the

Makahs under the procedures of this rule. For purposes of this rule, Washington coastal treaty Indian tribes means the Hoh, Makah, and Quileute Indian Tribes and the Quinault Indian Nation.

Background

The FMP generally acknowledges that certain treaty Indian tribes have secured rights to harvest fish from their U&A area. However, the FMP's implementing regulations currently do not explicitly provide a process by which NMFS can set aside, from the annual harvest guideline or quota, amounts of Pacific groundfish for exclusive harvest by treaty Indian tribes. Since 1989 NMFS, at the recommendation of the Pacific Fishery Management Council (Council), has set aside, through the annual groundfish management process, a specific amount of sablefish for harvest by the Pacific Coast treaty Indian tribes. In 1992, NMFS first imposed black rockfish trip limits on commercial hook and line vessels fishing in certain areas off the Washington coast. The same regulation created a process for establishing a tribal rockfish harvest guideline during the annual groundfish management process. Tribal fishermen fishing under this harvest guideline are not subject to the black rockfish trip limit.

In June of 1995, the Makahs informed NMFS and the Council that they would seek to exercise their treaty rights to harvest Pacific whiting, *Merluccius productus*. At the August 1995 Council meeting, the Makahs requested that 25,000 metric tons (mt) of whiting be set aside from the 1996 U.S. harvest guideline for exclusive harvest by the Makahs.

At the October 1995 Council meeting, NMFS and NOAA General Counsel advised the Council that the Federal Government recognizes that Washington coastal treaty Indian tribes, by virtue of their treaties with the United States, have harvest rights to Pacific coast groundfish.

NMFS believes the Makahs have a treaty right to harvest one-half of the harvestable surplus of the Pacific whiting stocks found in their U&A area, in accordance with treaty fishing rights elaborated by a U.S. District Court in the case *United States v. Washington*. NMFS believes that the allocation principles applicable to the tribal treaty right to Pacific whiting and all other groundfish found in the treaty tribes' U&A areas are those established in *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 99 S.Ct. 3055, 3074 (1979), and *Makah Indian Tribe v.*

Brown, No. C-85-1606R, 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 dated December 29, 1993). *Passenger Fishing Vessel* establishes the rule that "an equitable measure of the common right would initially divide the harvestable portion of each run that passes through a 'usual and accustomed' place into approximately equal treaty and non-treaty shares." *Makah v. Brown* held that:

In formulating his allocation decisions, the Secretary must accord treaty fishers the opportunity to take 50 percent of the harvestable surplus of halibut in their usual and accustomed fishing grounds, and the harvestable surplus must be determined according to the conservation necessity principle.

In the shellfish subproceeding (89-3) in *United States v. Washington*, the court found that the right to take fish that was reserved in the treaties must be read to apply to all fish, without any species limitation. The court found:

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.

At the October Council meeting, NMFS and NOAA Northwest General Counsel advised the Council that Indian treaty rights were "other applicable law" under the Magnuson Act that required NMFS to set aside an amount of whiting for harvest by the Makahs in 1996 consistent with their treaty rights. NMFS advised the Council that discussions between NMFS and the Makahs to determine the appropriate amount of whiting to be set aside in 1996 had not yet been completed, and that some disagreement between NMFS and the Makahs as to the proper method of determining the amount still existed. Despite the advice by NMFS and NOAA Northwest General Counsel, the Council voted 7-4 against recommending that NOAA/NMFS recognize that the Washington coastal treaty tribes have treaty rights to Pacific whiting and set aside any amount of whiting for harvest by the Makahs in 1996. The Council voted after consideration of testimony from the State of Oregon's Attorney General's Office that a treaty tribe's right to harvest fish from its U&A area only exists for those species to which the tribe can show historical catch or access at the time that the treaty was signed.

NMFS cannot accept the Council's recommendation because it is contrary to treaty fishing rights law. Consequently, NMFS proposes to

amend the FMP's implementing regulations to provide a framework process by which NMFS can accommodate treaty rights by setting aside specific amounts of Pacific groundfish for harvest by the treaty Indian tribes or by implementing regulations to otherwise accommodate treaty rights. At the same time, NMFS proposes to modify the groundfish regulations as described below to consolidate regulations affecting treaty Indian fishing into one section and to accommodate the treaty trawl harvest of midwater groundfish species. In addition, NMFS seeks public comment on the amount of Pacific whiting it will set aside for exclusive harvest by the Makahs in 1996.

When the Council considered the Makahs' request, the combined United States and Canada coastwide acceptable biological catch (ABC) was projected to be 123,000 mt. During the last few years, the U.S. harvest guideline was 80 percent of the combined ABC. Based on the projected U.S. and Canadian combined ABC of 123,000 mt, the U.S. harvest guideline was projected to be 98,400 mt. In late January, during the preparation of this proposed rule, a new whiting stock assessment, based on the 1995 NMFS hydroacoustic survey, was completed which resulted in the projected ABC for both the United States and Canada increasing to at least 250,000 mt and possibly as high as 350,000 mt. At 80 percent of the combined ABC, the U.S. harvest guideline now would increase to at least 200,000 mt and possibly as high as 280,000 mt. At its March 11-15, 1996, meeting in Portland, OR, the Council will recommend the level for a U.S. harvest guideline.

Proposed Rule

The proposed rule would be implemented under authority of Section 305(d) of the Magnuson Act, which gives the Secretary responsibility to "carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this Act." With this proposed rule, NMFS, acting on behalf of the Secretary, would ensure that the FMP is implemented in a manner consistent with treaty rights of four Northwest tribes to fish in their "usual and accustomed grounds and stations" in common with non-tribal citizens. *United States v. Washington*, 384 F. Supp. 313 (W.D. 1974).

Under the framework to be established by this proposed rule, NMFS would be able to accommodate the rights of the treaty tribes to fish for groundfish in their U&A area by setting

aside appropriate amounts of fish through the framework process for setting annual harvest specifications or by means of specific regulations. The framework process would be initiated by a request to NMFS for a set-aside or regulations from one or more Washington coastal treaty Indian tribes prior to the first of the two annual groundfish meetings of the Council. NMFS would consider the tribal requests, recommendations from the Council, and comments of the public, and would determine the amount of the set-aside for each species or the appropriate regulatory language. NMFS would announce the tribal set-asides in the Federal Register when the annual harvest and allocation specifications for the groundfish fishery are announced. Tribal groundfish set-asides would be managed by the tribes.

The proposed rule also describes the physical boundaries of the Washington Coastal treaty Indian tribes' U&A areas, and acknowledges these boundaries may be revised as ordered by a Federal court. These areas are the same as those set out in NMFS regulations for salmon since 1987 and for Pacific halibut since 1986.

A valid treaty Indian identification card issued pursuant to 25 CFR part 249, subpart A, would be *prima facie* evidence that the holder is a member of the Pacific Coast treaty Indian tribe named on the card.

Participation in a tribal fishery for Pacific Coast groundfish authorized under these regulations would not require a Federal limited entry permit. However, fishing by members of a Washington coastal treaty Indian tribe outside the tribe's U&A area or for a species not covered by a set-aside or regulation under this rule would be subject to the same regulations as other, non-treaty persons participating in the fishery.

Harvests from tribal fisheries under this regulation would not be subject to, or alter rules concerning, harvesting or processing apportionments in the non-treaty fisheries; the whiting allocation regulations at 663.23(b)(4) are proposed to be modified to clarify this. The proposed rule also would allow release to the non-treaty fishery of whiting set-aside for the tribes that the tribes will not use.

The regulations governing tribal harvest of black rockfish described above would be moved to this section to consolidate all tribal regulations into one section. In addition, the harvest guideline would be changed from a harvest guideline for all rockfish to one for black rockfish. When the black rockfish provision was added to the

regulations, the harvest guideline was only necessary to exempt tribal members from the black rockfish trip limits (since the open access trip limits on other rockfish were not constraining on the tribal hook and line vessels). However, the data collection system did not distinguish black rockfish from other rockfish, so the harvest guideline was established for all rockfish. The tribes now can and do distinguish black rockfish from other rockfish, so the harvest guideline would be changed to one for black rockfish only, rather than all rockfish. The tribal members fish with hook and line for other rockfish within the open access fishery, and have no need for a special regulation or specific allocation. Also, at the time the regulation was adopted, the only tribal fishery that harvested rockfish was the hook and line fishery, which this rule was adopted to cover. Therefore, this rule is being modified to clarify that the harvest guideline only applies to the hook and line fishery.

The Makahs also plan to harvest midwater species other than whiting, using midwater trawl gear in their U&A area. Rather than attempt to quantify their treaty entitlement to these species at this early point in the process, the Makahs have agreed that their vessels will trawl for these other midwater species in conformance with trip limits established for the limited entry fishery (§ 663.24(k)). NMFS agrees that this is a reasonable accommodation of the treaty right, particularly in view of data limitations and uncertainty in quantifying treaty rights.

As a housekeeping matter, § 663.23(b)(1)(i) is proposed to be deleted because it is unnecessary. This paragraph states that: "The trip limit for a vessel engaged in fishing with a pelagic trawl with mesh size less than 4.5 inches in the Conception or Monterey subareas is 500 pounds or 5 percent by weight of all fish on board, whichever is greater, of the species group composed of bocaccio, chilipepper, splitnose, and yellowtail rockfishes per fishing trip." This paragraph has been in the regulations since 1982 when the FMP first was implemented (47 FR 43980, October 5, 1982). The management of the fishery has evolved so that NMFS and the Council annually set and adjust trip limits for various species, including the *Sebastes* complex that contains those species listed in § 663.23(b)(1)(i). Therefore, the trip limits in this paragraph are no longer necessary, as the species are adequately protected by the current trip limit system.

Makah Tribe Pacific Whiting Set Aside for 1996

Pacific whiting, formerly a "trash" species for which there were few markets, has been fully exploited by U.S. non-treaty fishermen and processors since 1989, and is the object of intense competition between shoreside and at-sea processors and non-treaty fishermen.

In 1994, NMFS recognized the existence of an Indian treaty right to Pacific Coast groundfish (all species including Pacific whiting) for the Washington coastal treaty Indian tribes (exchange of correspondence between the General Counsel, National Oceanic and Atmospheric Administration, dated October 13, 1994, and the Solicitor, Department of the Interior, dated October 21, 1994).

The remaining issue is the quantification of the Makahs' right to Pacific whiting in the Makahs' U&A area. Under the legal principles discussed above, the question becomes one of attempting to determine what amount of fish constitutes half the harvestable surplus of Pacific whiting in the Makahs' U&A area, determined according to the conservation necessity principle. The conservation necessity principle means that the determination of the amount of fish available for harvest must be based solely on resource conservation needs. This determination is difficult because, with the exception of *Makah v. Brown* (the Pacific halibut case), most of the legal and technical precedents are based on the biology, harvest, and conservation requirements for Pacific salmon, which are very different from those for Pacific whiting. Quantifying the tribal right to whiting is also complicated by data limitations and by the uncertainties of Pacific whiting biology and conservation requirements.

In determining the appropriate Makah whiting allocation, NMFS's initial proposal is to rely on biomass and harvest estimates for Pacific whiting, which are the only data available, and to base the Makahs' treaty entitlement on the whiting biomass in the Makahs' U&A area, taking into account the conservation necessity principle.

The Makahs have not stated what they believe is their ultimate treaty right, nor what method they would propose to use in quantifying the right. Rather, the Makahs have advanced two proposals for 1996 only (described below), both of which they believe to be within the parameters of the treaty right. The Makahs initially proposed an allocation that would result in their harvesting up to approximately 25 percent of the total

U.S. ABC in the Makahs' U&A area. After further discussions with NMFS, the Makahs made a compromise proposal for an allocation of 15,000 mt for 1996.

In *Makah v. Brown*, the Pacific halibut case, the court set the amount of the tribal treaty right as half the amount of halibut that was actually harvested in the tribal U&A area, based on historical statistics for harvests by both treaty and non-treaty fisheries that occurred in the tribal U&A area. However, the Pacific whiting fishery differs from the halibut fishery in that there is no established pattern of harvest closely linked to the area of the tribal U&A area. The current Pacific whiting management regime assumes that harvests will be generally proportionate to biomass distribution, but so far NMFS has not imposed management measures to enforce proportional harvest in the various subareas.

The Makahs argue that under the conservation necessity principle, NMFS must show that a restriction on a tribal fishery "is required to prevent demonstrable harm to the actual conservation of fish." *United States v. Washington*, 384 F. Supp. 312, 415 (W.D. Wash. 1974) (emphasis added). They point out that NMFS' proposal to base the tribal entitlement on biomass in the Makahs' U&A area, is not required to prevent demonstrable harm to the resource. The Makahs argue further that "management measures cannot be applied to the treaty fishery that are not applied to other segments of the fishery." They argue that since NMFS has not imposed a specific limit on the amount of whiting that may be harvested in the Makahs' U&A area, NMFS has no right to restrict the treaty Indian fishery separately. Finally, the Makahs argue that basing tribal allocations on the whiting biomass in the Makahs' U&A area does not account for the quantity of whiting that pass through their fishing area.

The Makahs' initial proposal was based on whiting biomass from a larger area than the Makahs' U&A area. Since NMFS had never managed the fishery based on biomass estimates for subdivisions of the coast, the Makahs would not agree to focusing on an area the size of the Makahs' U&A area. The smallest area they would consider using for a biomass estimate is the North Columbia/Vancouver area. This proposal would give the Makahs about 25 percent of the U.S. share of the total U.S. Pacific whiting ABC for the Pacific Coast (equivalent to 25 percent of the harvest guideline). It is based on comparing the biomass between the "South Columbia" and the "North

Columbia/Vancouver" areas, where 98 percent of the U.S. harvest has occurred in recent years. (Note: To protect juvenile whiting and sensitive salmon stocks that exist south of 42° N. lat., the United States prohibits at-sea processors from operating south of 42° N. lat. As a result, Pacific whiting harvest is concentrated north of 42° N. lat.). About half of the northern biomass occurs in the Columbia/Vancouver area, and about half in the South Columbia area. The Makahs conclude from this that the harvest should be split equally (50:50) between the two areas, and proposed that it be allocated half of the harvest in "North Columbia/Vancouver," or 25 percent of the total U.S. harvest guideline.

As described earlier, when the Makahs made this proposal, the projected 1996 U.S. harvest guideline was 98,400 mt. Under this assumption, the Makahs' whiting allocation would have been 24,600 mt. The new whiting stock assessment now results in a projected harvest guideline of at least 200,000 mt and possibly as high as 280,000 mt. Under the revised projected range of possible U.S. harvest guidelines, the Makahs' whiting allocation under the Makahs' proposal would be at least 50,000 mt and as high as 70,000 mt.

The following information places the Makahs' proposal in geographical context. The entire Pacific Coast groundfish fishery management area (from 3–200 miles offshore from Canada to Mexico) is divided into five management subareas. From south to north these are Conception (Mexico to 36° N. lat.), Monterey (36° N. lat. to 40°30' N. lat.), Eureka (40°30' N. lat. to 43° N. lat.), Columbia (43° N. lat. to 47°30' N. lat.), and Vancouver (47°30' N. lat. to Canada). The dividing line between "South Columbia" and "North Columbia/Vancouver" referred to in the Makahs' proposal is at approximately the latitude of Cape Falcon, Oregon (45°46' N. lat.). The Makahs' U&A area is in the area south of the international boundary with Canada, north of 48°02'15" N. lat. (Norwegian Memorial), and east of 125°44'00" W. long. The Makahs' U&A area is approximately 8.4 percent of the Columbia/Vancouver latitudinal range (i.e., from Canada to 43° N. lat.), where most of the whiting harvest occurs.

NMFS' initial proposal is to quantify the Makahs' treaty right by a method that is linked to the biomass within the Makahs' U&A area (9.4 percent of the U.S. portion of the biomass), enlarged by a multiplier described below. The multiplier is NMFS' attempt to accommodate the conservation

necessity principle established in case law. We believe the multiplier, which is based in past experience, represents the highest harvest level that can be accommodated without raising conservation concerns.

Assuming that an exploitation rate with a value of "1" represents harvest directly correlated to the percentage of biomass in the Makahs' U&A area, NMFS proposes to use an exploitation rate multiplier of 1.375 to determine the total allowable harvest in the area. This figure (1.375) is the ratio between the 1989 exploitation rate in the Eureka area (33 percent) and the 1989 average exploitation rate (24 percent) for the Eureka, Columbia, and Vancouver areas (which is where nearly all of the whiting harvest occurs). The 1989 exploitation rate in the Eureka area is the largest upward deviation from the average exploitation rate for any statistical area in either 1989 or 1992, which are the years, after whiting became fully exploited, for which we have data on biomass distribution and harvest rate. (The data on distribution and biomass come from NMFS's triennial trawl surveys).

Multiplying the percentage of exploitable biomass in the Makahs' area (9.4 percent) times the exploitation rate multiplier 1.375 yields 12.9 percent. Based on past experience, this is the percentage of the U.S. ABC (harvest guideline) that NMFS believes can safely be taken from the Makahs' area on an annual basis. Under the equal sharing principle, one-half of that (6.5 percent) should be allocated for harvest by the Makahs in their U&A area. For 1996, under the earlier assumption for a U.S. harvest guideline of 98,400 mt, the Makahs' whiting allocation would be 6,359 mt. Based on the new stock assessment, however, the Makahs' allocation under the NMFS proposal would be at least 13,000 mt, and possibly as much as 18,000 mt depending on the final U.S. harvest guideline adopted. Also, if analysis of the NMFS 1995 hydroacoustic survey information results in a different biomass distribution, or a higher multiplier, NMFS would substitute the new information in determining the actual amount of whiting to set aside for harvest by the Makahs in 1996 under the NMFS proposal.

NMFS believes that a biomass-based approach to quantifying the Makahs' treaty right, linked to the Makahs' U&A area and adjusted according to the conservation necessity principle, is justified by the following considerations:

(1) Whiting stock assessments (which are used to establish the annual ABC

and harvest guideline) assume that whiting are exploited at the same rate throughout the management area. This assumption of uniform exploitation rate is the safest biological assumption until it can be demonstrated that a different geographic pattern of harvest is not harmful.

(2) Although the U.S. and Canada are not in complete agreement on the binational whiting allocation, the distribution of biomass is recognized by both nations as a sound management basis for fisheries allocations.

(3) If the Makahs' proposal became the minimum annual harvest allocation, it would concentrate at least 25 percent of the coastwide annual harvest into the Makahs' U&A area on a continual basis, while the area had only 9.4 percent of the harvestable biomass when last surveyed in 1992. The percentage harvest in the area would actually be greater than 25 percent if a portion of the non-treaty fishery also occurred there. A high degree of harvest concentration creates a conservation concern if it (1) involves a large fraction of the total harvest; (2) deviates greatly from the average harvest rate for the fishing area; and/or (3) will occur indefinitely. Although data are not presently available that allow us to evaluate exactly the biological effects of the Makahs' proposal, it raises all three of these concerns. Other potential biological impacts associated with a high degree of harvest concentration on whiting in the Makahs' area include disturbing the schooling pattern of the whiting, and increased bycatch of other species.

During subsequent discussions between NMFS and the Makahs, in recognition of the unresolved legal and technical difficulties in quantifying the treaty right to Pacific whiting, the Makahs advanced a compromise consisting of a 1-year interim allocation of 15,000 mt for the Makahs in 1996. The proposed 15,000-mt allocation does not reflect either the NMFS or the Makahs' view of the amount of whiting the Makahs are entitled to under their Treaty. It represents a compromise proposal by the Makahs that, according to the Makahs, reflects the minimum amount of whiting necessary to initiate a fishery by the Makahs. If implemented by NMFS for 1996, it would be intended for one year only, and would not be considered to set any precedent regarding either quantification of the Makahs' treaty entitlement or future allocations. At the time it was proposed, adopting the 15,000-mt compromise for 1996 was intended to accommodate the Makahs' treaty right and provide NMFS and the Makahs additional time to

determine a long-term quantification of the right. This Makah proposal is more than twice the amount of whiting that would have been allocated to the Makahs under the NMFS proposal (using the initial assumption of a U.S. harvest guideline of 98,400 mt). However, based on the new stock assessment, under which the NMFS proposal results in potential allocations to the Makahs of 13,000 to 18,000 mt, the NMFS proposal and the Makahs' compromise proposal for an allocation of 15,000 mt are not markedly different.

Therefore, NMFS seeks public comment on each of the three proposals, explained above, on the appropriate amount of whiting to allocate to the Makahs in 1996. The three alternatives include the Makahs' initial proposal of 25 percent of the 1996 U.S. harvest guideline, the NMFS proposal of 6.5 percent, and the Makahs' compromise 1-year allocation of 15,000 mt. This allocation also would include a provision to release to the non-treaty fishery any portion of the Makahs' set aside estimated by the Tribe not to be needed by them in 1996.

Classification

The Assistant Administrator for Fisheries, NOAA (AA), has preliminarily determined that this proposed rule is necessary for management of the Pacific Coast groundfish fishery and that it is consistent with the Magnuson Act and other applicable law.

NMFS prepared an environmental assessment (EA) for this proposed rule that discusses the impact on the environment as a result of this rule. The EA concludes that the biological and physical impacts are most likely indistinguishable from those of the limited entry trawl fleet in general for most groundfish species that the Makahs have agreed to manage under the current limited entry trawl-trip limits. The EA also asserts that the same conclusion is valid for both the NMFS proposal and the Makahs' 15,000-mt proposal to implement a Makah allocation, under the framework proposal, for Pacific whiting. Conservation concerns arise for both Pacific whiting and bycatch species such as Pacific ocean perch if the Makahs' initial proposal for an allocation amounting to 25 percent of the U.S. Pacific whiting harvest guideline were implemented on a longterm basis. On the basis of the EA, the AA concluded that there would be no significant impact on the environment under any of the alternatives. A copy of the EA is available from NMFS (see ADDRESSES).

NMFS prepared an initial regulatory flexibility analysis as part of the regulatory impact review, which describes the impact this proposed rule would have on small entities, if adopted. The proposed framework in itself would not have a significant economic impact on a substantial number of small entities. Of the three allocation options considered under the framework for 1996, all potentially would affect a "substantial number" of small business entities (tribal and non-tribal catcher vessels that do not process, and shore-based whiting processors). However, if either the second Makah option (15,000 mt) or NMFS option (13,000 mt or up to 18,000 mt depending on the harvest guideline adopted) were implemented, it would not cause "significant economic impacts"—these sectors would receive more whiting in 1996 than in 1995, largely due to the expected increase in the harvest guideline. Only the initial Makah option (25 percent of the U.S. harvest guideline) could result in a significant economic impact. A copy of this analysis is available from NMFS (see ADDRESSES).

A formal section 7 consultation under the Endangered Species Act was concluded for the Pacific Coast Groundfish FMP. In a biological opinion dated August 28, 1993, and a subsequent reinitiation dated September 27, 1993, the AA determined that fishing activities conducted under the FMP and its implementing regulations are not likely to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS.

This proposed rule has been determined by the Office of Management and Budget to be significant for purposes of Executive Order 12866.

List of Subjects in 50 CFR Part 663

Administrative practice and procedure, Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 8, 1996.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 663 is proposed to be amended as follows:

PART 663—PACIFIC COAST GROUND FISH FISHERY

1. The authority citation for part 663 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. Section 663.2 is amended by adding the definition for "commercial harvest guideline or commercial quota", in alphabetical order, to read as follows:

§ 663.2 Definitions.

* * * * *

Commercial harvest guideline or commercial quota means the harvest guideline or quota after subtracting any allocation for the Pacific Coast treaty Indian tribes or for recreational fisheries. Limited entry and open access allocations are based on the commercial harvest guideline or quota.

* * * * *

3. In § 663.7, paragraphs (n) and (o) are revised to read as follows:

§ 663.7 Prohibitions.

* * * * *

(n) Process Pacific whiting in the fishery management area during times or in areas where at-sea processing is prohibited, unless the fish were received from a member of a Pacific Coast treaty Indian tribe fishing under § 663.24.

(o) Take and retain or receive, except as cargo, Pacific whiting on a vessel in the fishery management area that already possesses processed Pacific whiting on board, during times or in areas where at-sea processing is prohibited, unless the fish were received from a member of a Pacific Coast treaty Indian tribe fishing under § 663.24.

* * * * *

4. In § 663.23, paragraphs (b)(1) and (b)(4)(i) through (b)(4)(iv) are revised to read as follows:

§ 663.23 Catch restrictions.

* * * * *

(b) * * *

(1) *Black rockfish*. The trip limit for black rockfish (*Sebastes melanops*) for commercial fishing vessels using hook-and-line gear between the U.S.-Canada border and Cape Alava (48°09'30" N. lat.), and between Destruction Island (47°40'00" N. lat.) and Leadbetter Point (46°38'10" N. lat.), is 100 pounds or 30 percent by weight of all fish on board, whichever is greater, per vessel per fishing trip.

* * * * *

(4) * * *

(i) *The shoreside reserve*. When 60 percent of the commercial harvest guideline for Pacific whiting has been or is projected to be taken, further at-sea processing of Pacific whiting will be prohibited pursuant to paragraph (b)(4)(iv) of this section. The remaining 40 percent is reserved for harvest by vessels delivering to shoreside processors.

(ii) *Release of the reserve*. That portion of the commercial harvest guideline that the Regional Director determines will not be used by shoreside processors by the end of that fishing year shall be made available for harvest by all fishing vessels, regardless of where they deliver, on August 15 or as soon as practicable thereafter. NMFS may again release whiting at a later date if it becomes obvious, after August 15, that shore-based needs have been substantially over-estimated, but only after consultation with the Council and only to ensure full utilization of the resource. Pacific whiting not needed in the fishery authorized under § 663.24 also may be made available.

(iii) *Estimates*. Estimates of the amount of Pacific whiting harvested will be based on actual amounts harvested, projections of amounts that will be harvested, or a combination of the two. Estimates of the amount of Pacific whiting that will be used by shoreside processors by the end of the fishing year will be based on the best information available to the Regional Director from state catch and landings data, the survey of domestic processing capacity and intent, testimony received at Council meetings, and/or other relevant information.

(iv) *Announcements*. The Assistant Administrator will announce in the Federal Register when 60 percent of the commercial harvest guideline for whiting has been, or is about to be, harvested, specifying a time after which further at-sea processing of Pacific whiting in the fishery management area is prohibited. The Assistant Administrator will publish a document in the Federal Register to announce any release of the reserve on August 15, or as soon as practicable thereafter. In order to prevent exceeding the limits or underutilizing the resource, adjustments may be made effective immediately by actual notice to fishermen and processors, by phone, fax, Northwest Region computerized bulletin board (contact 206-526-6128), letter, press release, and/or U.S. Coast Guard Notice to Mariners (monitor channel 16 VHF), followed by publication in the Federal Register, in which instance public comment will be sought for a reasonable period of time thereafter. If insufficient time exists to consult with the Council, the Regional Director will inform the Council in writing of actions taken.

* * * * *

5. Section 663.24 is added to read as follows:

§ 663.24 Pacific Coast treaty Indian fisheries.

(a) Pacific Coast treaty Indian tribes have treaty rights to harvest groundfish in their usual and accustomed fishing areas in U.S. waters.

(b) For the purposes of this part, 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 between 48°02'15" N. lat. (Norwegian Memorial) and east of 125°44'00" W. long.

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

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

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

(d) *Procedures.* The rights referred to in paragraph (a) of this section will be implemented by the Secretary, 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 in this section 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 Regional Director, prior to the first of the Council's two annual groundfish meetings. The Secretary generally will announce the annual tribal allocation at the same time as the annual specifications developed under section II.H. of the Appendix to this part.

(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) A limited entry permit under subpart C of this section is not required for participation in a tribal fishery described in paragraph (d) of this section.

(g) Fishing under this section by a member of a Pacific Coast treaty Indian tribe within their usual and accustomed fishing area is not subject to the provisions of other sections of this part.

(h) Any member of a Pacific Coast treaty Indian tribe must comply with this section, and with any applicable tribal law and regulation, when participating in a tribal groundfish fishery described in paragraph (d) of this section.

(i) Fishing by a member of a Pacific Coast treaty Indian tribe outside the applicable Indian tribe's usual and accustomed fishing area, or for a species of groundfish not covered by an allocation or regulation under this section, is subject to the regulations in the other sections of this part.

(j) *Black rockfish.* Harvest guidelines for commercial harvests of black rockfish by members of the Pacific Coast Indian tribes using hook and line gear will be established annually for the areas between the U.S.–Canada border and Cape Alava (48°09'30" N. lat.) and

between Destruction Island (47°40'00" N. lat.) and Leadbetter Point (46°38'10" N. lat.), in accordance with the procedures for implementing annual specifications in section II.H of the Appendix to this part. Pacific Coast treaty Indians fishing for black rockfish in these areas under these harvest guidelines are subject to the provisions in this section, and not to the restrictions in other sections of this part.

(k) *Groundfish without a tribal allocation.* Makah tribal members may use midwater trawl gear to take and retain groundfish for which there is no tribal allocation, and will be subject to the trip landing and frequency and size limits applicable to the limited entry fishery.

6. The Appendix to this part is amended by revising the first paragraph in section II.H. to read as follows:

Appendix to Part 663—Groundfish Management Procedures

* * * * *

II. * * *

H. * * *

Annually, the Council will develop recommendations for specification of ABCs, identification of species or species groups for management by numerical harvest guidelines and quotas, specification of the numerical harvest guidelines and quotas, and apportionments to DAP, JVP, DAH, TALFF, and the reserve over the span of two Council meetings. The Council also will develop recommendations for the specification of allocations for Pacific Coast treaty Indian tribes as described at § 663.24.

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