(iii) *Cook Inlet* means all waters of Cook Inlet north of 59° North latitude, including, but not limited to, waters of Kachemak Bay, Kamishak Bay, Chinitna Bay, and Tuxedni Bay.

(2) *Marking.* Each whaling captain or vessel operator, upon killing and landing a beluga whale (*Delphinapterus leucas*) from Cook Inlet, Alaska, must remove the lower left jawbone, leaving the teeth intact and in place. When multiple whales are harvested during one hunting trip, the jawbones will be marked for identification in the field to ensure correct reporting of harvest information by placing a label marked with the date, time, and location of harvest within the container in which the jawbone is placed. The jawbone(s) must be retained by the whaling captain or vessel operator and delivered to NMFS at the Anchorage Field Office, 222 West 7th Avenue, Anchorage, Alaska 99513 within 72 hours of returning from the hunt.

(3) *Reporting.* Upon delivery to NMFS of a jawbone, the whaling captain or vessel operator must complete and mail a reporting form, available from NMFS, to the NMFS Anchorage Field Office within 30 days. A separate form is required for each whale harvested.

(i) To be complete, the form must contain the following information: the date and location of kill, the method of harvest, and the coloration of the whale. The respondent will also be invited to report on any other observations concerning the animal or circumstance of the harvest.

(ii) Data collected pursuant to paragraph (e) of this section will be reported on forms obtained from the Anchorage Field Office. These data will be maintained in the NMFS Alaska Regional Office in Juneau, Alaska, where such data will be available for public review.

(4) No person may falsify any information required to be set forth on the reporting form as required by paragraph (e) of this section.

(5) The Anchorage Field Office of NMFS is located in room 517 of the Federal Office Building, 222 West 7th Avenue; its mailing address is: NMFS, Box 43, Anchorage, AK. 99513.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 600 and 660

[Docket No. 981231333–9127–03; I.D. 122898E]

RIN 0648–AM12

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

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

ACTION: Final rule.

SUMMARY: NMFS publishes a final rule to announce the 1999 optimum yield (OY) specification (formerly called ''harvest guideline'') for Pacific whiting (whiting) harvested off Washington, Oregon, and California, and announces allocation of a portion of the OY to Washington coastal tribal fisheries. This rule is intended to accommodate the Washington coastal treaty tribes' rights to Pacific whiting and to provide equitable allocation of the whiting resource, and promoting the goals and objectives of the Pacific Coast Groundfish Fishery Management Plan (FMP).

DATES: Effective May 19, 1999.

ADDRESSES: Copies of the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) for this action is available from NMFS, Northwest Region, Sustainable Fisheries Division, 7600 Sand Point Way NE, Bldg. 1, Seattle, WA 98115–0070.

FOR FURTHER INFORMATION CONTACT: William Robinson, Northwest Region, NMFS, 206–526–6140.

SUPPLEMENTARY INFORMATION: Two actions are announced in this document: The final 1999 acceptable biological catch (ABC) and OY for whiting and allocation of part of that OY to the Washington coastal treaty tribes. Further background on these actions is found in the notice of proposed rulemaking, which was published in the **Federal Register** on January 8, 1999 (64 FR 1341) with a request for comments. Comments were received only on the tribal allocation, and are addressed later in this document. A draft EA/RIR (dated March 1, 1999) and an Initial Regulatory Flexibility Analysis (IRFA) (dated December, 17, 1998) were prepared for the tribal allocation and made available at the March 9–12, 1999, meeting of the Pacific Fishery Management Council (Council). An FRFA has been prepared and is appended in the final EA/RIR/FRFA for the tribal allocation.

1999 ABC/OY

Preliminary ranges for the U.S. ABC and OY were recommended at the Council's November 1998 meeting. The upper end was 232,000 mt, the same as the 1998 ABC and OY for U.S. waters. The lower end was 178,000 mt (the amount projected for the ABC (the proxy for maximum sustainable yield (MSY), also called the MSY proxy) for the U.S. and Canada combined in the then most recent stock assessment for the 1998 fishery), multiplied by 0.8, which is the proportion taken by the United States in recent years.

The final OY for whiting was delayed from the normal January 1 specification cycle so that data from the summer 1998 survey could be analyzed and incorporated into a new stock assessment. The new assessment was considered at the March 9–12, 1999, Council meeting.

A number of issues were discussed such as: (1) the appropriate harvest policy to be used—whether to continue with the hybrid harvest policy used in recent years, or to convert to the 40–10 harvest policy adopted for most other groundfish species (see the annual specifications published at 64 FR 1316 January 8, 1999, and Amendment 11 to the FMP); (2) continuation of the 80-percent U.S. allocation of the U.S.-Canada MSY; and (3) whether the ABC and OY should apply only to 1999, or whether it could be applied to the year 2000 as well, since a new assessment will not be conducted in 1999.

ABC

Under Amendment 11 to the FMP, ABC is set equal to a default proxy for the fishing mortality rate (F) needed to produce the MSY (Fmsy). In recent years, a hybrid F harvest policy, similar to the F35 policy used for other groundfish species, was used as the Fmsy proxy for whiting (''F35'' means the fishing mortality rate that reduces the spawning potential per recruit to 35 percent of the unfished condition). F35 is commonly used in the FMP for faster growing stocks or stocks with quicker recruitment. The new policy, F40 with the 40–10 OY adjustment, results in similar harvest rates to the moderate hybrid F policy used in previous years. Consequently, the Council endorsed the use of the more conservative F40 for whiting, which would result in a U.S.-Canada ABC of 320,000 mt in 1999 (and 297,000 mt in 2000). Applying the 80-

percent U.S. share would result in a U.S. ABC of 256,000 mt in 1999 (and 237,600 in 2000). However, the Council recommended a more conservative U.S. ABC of 232,000 mt for 1999, and signaled its intent to do the same in 2000, as discussed below.

OY

Amendment 11 also adopted a new, precautionary policy for establishing OY. This policy is more completely described in the annual specifications (64 FR 1316, January 8, 1999). Under this policy, if the stock biomass (B) is believed to be equal to or less than the MSY biomass (Bmsy), a precautionary OY threshold is established at the MSY biomass size, which is assumed to be 40 percent of the unfished biomass. A stock whose current biomass is between 25–40 percent of the unfished level is said to be in the ''precautionary zone.'' The farther the stock is below the precautionary threshold (in this case 40 percent of the unfished biomass), the greater the reduction in OY will be relative to the ABC. This default harvest policy is also called the ''40–10'' policy because the OY is set according to a mathematical relationship that reduces the OY at an increasing rate to zero as the stock approaches 10 percent of its unfished biomass (e.g., the farther the stock is below the precautionary threshold, the greater the reduction in OY will be relative to the ABC). In the nearterm, the 40–10 policy results harvest levels similar to those obtained by the hybrid F policy previously used for whiting, but dampens the variability in harvest from year to year.

The new stock assessment indicated that the mature female biomass of whiting in 1998 was at 37 percent of its unfished level, and, thus, is slightly into the precautionary zone. To determine the OY for the U.S. portion of the fishery, the 40–10 harvest policy is applied to the F40 MSY proxy for the U.S.-Canada combined, and then 80-percent (the U.S. share) of the resulting number is used; the resulting OY is 240,800 mt for 1999 and 220,000 mt for 2000. This approach is more conservative than that used in the past in that the 80 percent factor is applied after the 40–10 value is calculated, rather than before. However, the final results over the next few years are similar to what would have been reached using the previous hybrid-F policy.

United States-Canada

The allocation of the whiting resource between the United States and Canada is not resolved. The stock assessment was a collaborative effort between the two nations and there appears to be agreement as to the level of the combined U.S.-Canada MSY. However, the results of the new stock assessment were not available in time to hold formal negotiations with Canada before the March Council meeting. Consequently, the Council assumed continuation of the 80-percent share that the U.S. has harvested in recent years. Although Canada has in the past converted the U.S. catch into a 70-percent share, resulting in exceeding the US-Canada MSY by about 12 percent annually, NMFS hopes that the more conservative F40 and 40–10 harvest policy approach adopted by the United States for 1999 will also result in a more conservative approach by Canada. Meetings with Canada on this issue are expected to be scheduled in 1999.

Final U.S. ABC and OY

Because no new whiting assessment will be conducted in 1999 for 2000, the Council considered whether to use the individual-year recommendations from the assessment for 1999 and 2000, or to implement equal OYs at an intermediate level in both years. The Council preferred the latter approach, which results in equal U.S. OY values for 1999 and 2000 at 230,000 mt. However, because these average levels were very close to the ABC and OY used in 1998, the Council recommended continuation of the 1998 U.S. ABC and OY in 1999, in which the U.S. ABC and OY are the same, 232,000 mt, based on an overall U.S.-Canada ABC of 290,000 mt.

Tribal Allocation

The Council considered tribal whiting allocations at its September meeting, but delayed its final recommendation until its March 1999 meeting when the final ABC and OY recommendations were made. In 1999, the Quileute treaty tribe for the first time joined the Makah tribe in expressing interest in whiting, and the two tribes submitted a proposal for determining annual tribal allocations. This framework proposal that would vary the tribal allocation depending on the level of OY appears in the following table.

U.S. Optimum yield (OY)	Makah	Quileute	Total allocation
Up to 145,000 mt	17.5% of the U.S. OY	2,500 mt	17.5% OY plus 2,500 mt.
145,001 to 175,000 mt	25,000 mt	2,500 mt	27,500 mt.
175,001 to 200,000 mt	27,500 mt	2,500 mt	30,000 mt.
200,001 to 225,000 mt	30,000 mt	2,500 mt	32,500 mt.
225,001 to 250,000 mt	32,500 mt	2,500 mt	35,000 mt.
Over 250,000 mt	35,000 mt	2,500 mt	37,500 mt.

The tribal proposal also states that if the Quileute Tribe is unable to fully utilize its amount, the unused portion would be released to the Makah tribe to enable the Makah tribe to harvest the unused portion by the end of the year. NMFS believes that the intertribal distribution of the overall tribal allocation is an internal tribal issue, and herein issues only a total allocation for the affected tribes.

A proposed rule was published in the **Federal Register** (64 FR 1341, January 8, 1999) requesting comments on two options. The options considered were: (1) 25,000 mt, the tribal allocation in 1997 and 1998, as proposed by the Council for 1999; and (2) the tribal framework proposal that was expected to produce an allocation of 30,000–35,000 mt of whiting in 1999, based on the preliminary OY range of 178,000 to 232,000 mt. NMFS does not believe the no-action alternative, which assumes no explicit tribal allocation, is a viable option, because it is contrary to tribal treaty rights. Consequently, the total tribal allocation of whiting in 1999 was proposed to be in the range of 25,000–35,000 mt, with the lower end representing the Council's proposal and the upper end representing the tribal framework applied to the high end of the OY range (232,000 mt) proposed for 1999.

Because the ABC and OY were uncertain, the IRFA and draft EA/RIR used the maximum tribal allocation of 35,000 mt (associated with an OY of 232,000 mt) to analyze the tribal proposal. At the March 1999 Council meeting, the Quileute indicated that they would not be harvesting whiting in 1999. This reduced the tribal proposal for 1999 by 2,500 mt. This change, plus recommendation of an ABC and OY at the same levels as in 1998, resulted in a revised tribal proposal of 32,500 mt for

1999, 14 percent of the 232,000 mt OY, and 7,500 mt higher than in 1998.

The tribal allocation is subtracted from the species OY before limited entry and open access allocations are derived. The treaty tribal fisheries for sablefish, black rockfish, and whiting are separate fisheries not governed by the limited entry or open access regulations or allocations. The tribes regulate these fisheries so as not to exceed their allocations.

NMFS Decision on the Tribal Allocation

NMFS believes the Makah have a treaty right to harvest half of the harvestable surplus of whiting found in the tribe's usual and accustomed fishing area in accordance with the legal principles elaborated in *U.S.* v. *Washington*. For further background refer to the proposed rule regarding the framework for treaty tribe harvest of Pacific groundfish (61 FR 10303, March 13, 1996). Under the legal principles of that case, the question becomes one of attempting to determine what amount of fish constitutes half the harvestable surplus of Pacific whiting in the Makah's usual and accustomed fishing 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 a case regarding Pacific halibut (*Makah* v. *Brown*, Civil No. C–85–1606R and *U.S.* v. *Washington*, Civil No. 9213–Phase I, Subproceeding No. 92–1 (W.D. Wash.)) most of the legal and technical precedents are based on the biology, harvest, and conservation requirements for Pacific salmon and shellfish, 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 1996 the Makah instituted a subproceeding in *U.S.* v. *Washington*, Civil No. 9213–Phase I, Subproceeding No. 96–2, regarding their treaty right to whiting, including the issue of the appropriate quantification of that right. The quantification issue has not yet been litigated or otherwise resolved. The Makah have made a proposal for 32,500 mt of whiting in 1999 that NMFS accepts as a reasonable accommodation of the treaty right for 1999 in view of the remaining uncertainty surrounding the appropriate quantification. This 1999 amount of 32,500 mt (14 percent of the 232,000-mt OY) is not intended to set a precedent regarding either quantification of the Makah treaty right or future allocations. NMFS will continue to attempt to negotiate a settlement in *U.S.* v. *Washington* regarding the appropriate quantification of the treaty right to whiting. If an appropriate methodology or allocation cannot be developed through negotiations, the allocation will ultimately be resolved in the pending subproceeding in *U.S.* v. *Washington*.

Comments and Responses

Five letters on the proposed rule were received; three were from individuals representing industry associations in the shore-based whiting sector, and all were critical of any tribal allocation. Most of the comments were similar and are grouped together here, followed by NMFS' responses.

Comment 1: Some commenters argued there should be no whiting allocation to the tribes until there are final decisions in a court case challenging treaty rights to Pacific whiting (citing the shellfish subproceeding, 89–3, in *U.S.* v. *Washington* and in a court case challenging the groundfish regulations regarding tribal treaty rights to groundfish (citing *Midwater Trawlers Cooperative* v. *Secretary of Commerce*, No. 97–36008 (9th Cir.)). They also argued there should be no allocation until a ''formal quantification of treaty rights (if any) under the procedures specified by the Supreme Court in *U.S.* v. *Washington* occurs.'' Finally, they argued that Congress expressed its clear intent that ''Federally recognized fishing rights'' under the Magnuson Fishery Conservation and Management Act (Magnuson-Stevens Act) means ''treaty fishing right[s] that [have] been finally approved by the courts under the procedures defined in section 19(g) of the final court order under United States versus Washington, and the approval is not subject to further appeal.'' (September 27, 1996 Congressional Record, page H11437). Commenters noted appeals in the above cases are still pending, and asserted that therefore no right exists. These issues will be addressed separately.

Response: The relevant question in litigation in the shellfish subproceeding cited by commenters is whether tribes have treaty rights to all species of fish found in their usual and accustomed fishing areas, or only have rights to species they harvested at treaty time. In the shellfish subproceeding, the district court concluded:

> 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. [emphasis in original] 873 F. Supp. at 1430.

The Court of Appeals upheld this, and further stated:

> A more restrictive reading of the Treaties would be contrary to the Supreme Court's definitive conclusion that the Treaties are a ''grant of rights from'' the Tribes. Winans, 198 U.S. at 3880, 25 S.Ct. 662. We therefore reject Washington's argument that the Tribes are limited in the species of shellfish they harvest (157 F.3d 630 at 644).

Commenters argue that since a petition for certiorari has been filed with the U.S. Supreme Court in this case, no rights exist and NMFS should not provide any tribal allocation. However, the U.S. Supreme Court recently denied the petition for certiorari; NMFS must apply the law as interpreted by the 9th Circuit Court of Appeals.

In addition, in the whiting subproceeding mentioned here the Judge ruled that Judge Rafeedee's ruling in the shellfish subproceeding ''should remain the binding law of the case until the Ninth Circuit decides the appeal of the decision now pending before it.'' As noted, the 9th Circuit Court of Appeals has made its decision and upheld Judge Rafeedee's ruling.

Plaintiffs also refer to the case of *Midwater Trawlers Cooperative* v. *Secretary of Commerce*. In that case the District Court dismissed the challenge to the existence of the treaty right to whiting because the tribes are necessary and indispensable parties to the litigation and cannot be joined. The 9th Circuit Court of Appeals recently reversed the District Court and found that the tribes are not necessary parties to the litigation because the Federal government can adequately represent the tribes on the issue of the existence of the treaty right. The underlying issue regarding the treaty right to whiting is being remanded to the District Court. However, the 9th Circuit Court of Appeals ruling in the shellfish subproceeding discussed above is that the tribes have treaty rights to all species of fish found in their usual and accustomed fishing area. This would cover the Makah treaty right to whiting. Plaintiffs had also alleged the tribal whiting allocations violated the National Environmental Policy Act, the Endangered Species Act (ESA) and the Regulatory Flexibility Act. The District Court and the 9th Circuit Court of

Appeals upheld the Agency's actions under those statutes.

Commenters also argue no whiting should be allocated until ''formal quantification of treaty rights (if any) under the procedures specified by the Supreme Court in *U.S.* v. *Washington* occurs.'' Commenters did not cite to specific U.S. Supreme Court procedures, but we assume they were referring to procedures set out by Judge Boldt in one of his early decisions regarding exercise of off-reservation fishing rights to non-anadromous fish and shellfish. This argument was addressed in the Response to Comments section on the rule regarding treaty fishing rights to groundfish at 61 FR 28786 (June 6, 1996).

The statement, cited by the commenters, that ''Federally recognized fishing rights'' under the Magnuson-Stevens Act mean ''treaty fishing right[s] that [have] been finally approved by the courts under the procedures defined in section 19(g) of the final court order under United States versus Washington, and the approval is not subject to further appeal,'' suggests a narrower definition of federally recognized fishing right than defined in the plain language of the statute. The quote referred to section 19(g) of the final court order under *U.S.* v. *Washington*. There is no section 19(g), so the quote probably referred to paragraph G of the ''Order for Program to Implement Interim Plan'' in *U.S.* v. *Washington*, found at 459 F. Supp. 1035, 1037 (W.D. Wash. 1978), which sets forth a procedure for parties in that case to establish treaty entitlement to non-anadromous fish. The quote was a statement of one Congressman, not a committee interpretation of a legislative provision, and it referred to an additional seat on the Pacific Council to be filled by a member ''appointed from an Indian tribe with federally recognized fishing rights from California, Oregon, Washington, or Idaho. * * *'' 16 U.S.C. 1852(a)(1)(F). This interpretation does not fit well with the actual language used in the statute for three reasons. First, Paragraph G only applies in *U.S.* v. *Washington* (in which tribes in the State of Washington are the only tribal parties whose fishing rights are adjudicated). Therefore, no tribe located in Oregon, California, or Idaho would be considered a tribe with ''Federally recognized fishing rights'' as defined by the quoted statement. This directly conflicts with the statutory language that specifically includes tribes from these other States. Second, the statute refers to tribes with ''Federally recognized fishing rights.'' It is clear from other applicable law, see *Parravano* v. *Babbitt and Brown* and *U.S.* v. *Oregon*, that there are tribes with federally protected fishing rights that are not covered by Paragraph G in *U.S.* v. *Washington*. These include the treaty tribes that are parties to *U.S.* v. *Oregon*, and the Hoopa and Yurok tribes in California. Finally, if the Judge in *U.S.* v. *Washington* has held that a tribe has a federally protected fishing right, and has not stayed implementation of that right, the law is binding on the United States, even if that issue is on appeal. Therefore, NMFS does not agree that the quoted language provides a basis to deny a whiting allocation to the Makah tribe.

Comment 2: Commenters argued the tribal fishery violates the ESA by exceeding the level of concern set out in the section 7 consultation on the effect of the groundfish fishery on salmon listed under the ESA. They also asserted that NMFS combined the tribal and nontribal salmon take in order to bring the overall numbers below the standard in the biological opinion. They argued that the tribal fishery is distinct in terms of geographical, technical, and economic characteristics and that under section 3(13) of the Magnuson-Stevens Act, it is a separate fishery, and must be ''subject by itself to the ESA biological opinion and level of concern.''

Response: NMFS does not agree with this comment. Under the ESA, NMFS consults on the groundfish fishery as a whole, not the different segments of the fishery. Nothing in the ESA or the Magnuson-Stevens Act requires a different approach. NMFS does not consult separately on the open access fishery, the limited entry longline fishery, the limited entry non-whiting trawl fishery, the at-sea whiting fishery, the shoreside whiting fishery, and the tribal fishery. Similarly, in the salmon fishery, NMFS consults on the Council's salmon fishery as a whole, not on the various segments of the fishery. In the biological opinion for the groundfish fishery, NMFS has set standards for different segments of the fishery for monitoring purposes. If one segment exceeds the rate of 0.05 chinook salmon/mt whiting and the total bycatch in the whiting fishery is expected to exceed 11,000 chinook salmon, reinitiation of consultation under the ESA would be required in order to determine if the new information may affect previous conclusions with respect to the impacts of the fishery on listed species. Reinitiation of consultation does not mean that jeopardy to any listed stock has occurred or is likely to occur. Instead, it reevaluates the status of the fishery relative to listed species to see if a jeopardy problem exists.

The bycatch of chinook salmon in the Makah tribal fishery has been higher than other sectors of the whiting fishery (see Tables 5A, 5B, 5C, and 6 of the EA/RIR/IRFA). However, the level of catch is not in violation of the ESA. Even though the bycatch rate of chinook salmon in the tribal Makah fishery exceeded the other sectors, when combined with the entire mothership fishery, the rate remained below the 0.05 rate in each of the three years (1996–98) that the tribal fishery operated. Also, in each of the three years, fewer than 5,500 chinook salmon were taken in the entire Washington, Oregon, and California whiting fishery. Consequently, reinitiation of consultation under the ESA was not required.

Comment 3: Commenters argued ''NMFS used the proscriptions in the treaty between the United States and the Makah Tribe regarding sale of resources to foreign entities as a means to prevent any prospective sale of treaty-harvested whale meat to a foreign company.'' The commenters argue that NMFS must be consistent and cannot allow the tribe to sell whiting to a company that is substantially foreign owned.

Response: First, the prohibition on sale of whale meat is not aimed at foreign trade, it is an absolute prohibition on sale to anyone. It is not based on a provision in the Treaty with the Makah, but rather on the nature of aboriginal fishing rights under the International Whaling Convention. The Treaty with the Makah states the tribe has agreed not to trade ''out of the dominions of the United States.'' Sale of whiting to a U.S. company, even one with substantial foreign ownership, is not trading ''out of the dominions of the United States.''

Comment 4: Commenters objected to allocation of whiting to the Hoh, Quileute, and Quinault tribes because the courts have not adjudicated the western boundary of their usual and accustomed fishing areas.

Response: The only one of these three tribes that had requested an allocation for 1999 was the Quileute Tribe. However, the Quileute tribe has since advised NMFS it does not plan to harvest whiting in 1999, and is not seeking an allocation in 1999. Therefore, in 1999, the only tribal allocation of whiting is for the Makah Tribe. For further discussion of the tribal usual and accustomed fishing areas see the response to comments on the tribal groundfish rule at 61 FR 28786 (June 6, 1996).

Comment 5: One commenter objected to the language in the proposed rule because it sounded as though the Council recommended the tribal allocation of 35,000 mt.

Response: At its September and November 1998 meetings, the Council proposed a 25,000 mt tribal allocation for 1999, and the tribes proposed a framework formula that would have resulted in a tribal allocation of 35,000 mt in 1999. The Council then recommended that both of these proposals, together ranging from 25,000–35,000 mt, be considered at its March 1999 meeting when its final recommendation to NMFS would be made. The Council did not endorse the tribal proposal, but rather agreed to consider it in March.

Comment 6: Commenters stated that the allocation of whiting to the tribes will have a direct adverse economic impact on individual companies and on the communities of Astoria and Newport, Oregon, and claimed that NMFS paid no attention to the socioeconomic impacts on coastal vessels or communities, and, therefore, violated the standards of the Magnuson-Stevens Act.

Response: NMFS has acknowledged that allocation of whiting to the tribes may have adverse economic impacts on certain companies and communities. NMFS is prohibited by confidentiality laws from revealing the impacts on individual companies even if it had such information. However, in the IRFA, NMFS considered the economic impact on small entities. The draft EA/RIR also examined impacts on the fishing and processing sectors, which have been expanded in the EA/RIR/FRFA. Tables 3A, 3B, 4A, and 4B compare the tonnage and revenue impacts of the 3 options (with the final allocation included in Tables 25A and 25B if the EA/RIR/FRFA), and Table 17 shows the revenue due to whiting in the coastal communities, including Newport and Astoria, Oregon. New Tables 22–24 have been added to the EA/RIR/FRFA which show the ex-vessel revenues for all species in 1991–1998 for the ports in which whiting contributed at least 3 percent of the all-species ex-vessel revenue in any year from 1996–1998.

The whiting resource is also allocated among nontribal sectors. Forty-two percent of the amount available for nontribal harvest is allocated to the shore-based sector. Consequently, the shore-based fishery would lose 14,700 mt of whiting under a 35,000-mt tribal allocation and 10,500 mt under a 25,000-mt tribal allocation, relative to the no-action alternative, as indicated in Table 4A of the EA/RIR/FRFA. The 10,000-mt difference between a 25,000-mt and 35,000-mt tribal allocation represents 4,200 mt of whiting to the shore-based sector (42 percent of 10,000 mt). A tribal allocation of 35,000 mt in 1999 would result in a loss of 4,200 mt to the shore-based sector relative to a 25,000-mt allocation. (The tribal allocation was 25,000 mt in 1998, but both mothership and shore-based sectors exceeded their allocations, so comparing likely harvest levels by these sectors in 1999 to actual harvest levels in 1998 makes the losses appear larger than if those allocations had not been exceeded.) At the March 1999 Council meeting, the tribal proposal was reduced to 32,500 mt for 1999, so the loss to the shore-based sector from a 32,500-mt tribal allocation compared to a 25,000-mt tribal allocation in 1999 would be 3,150 mt (42 percent of 7,500 mt), less than 1.5 percent of the 232,000 mt OY. Diversion of 3,150 mt of whiting from the shore-based whiting fishery in 1999 may result in localized impacts on some coastal communities, particularly the 6 nontribal ports with whiting ex-vessel revenues contributing at least 3 percent or $100,000 of all species revenue in any 1 year between 1996–1998 (Table 17). Because the ports of Newport and Astoria process the most whiting relative to the other nontribal ports, they may suffer the greatest losses in terms of metric tons and ex-vessel revenue. They also may be better able to absorb the loss because they also are the two largest coastal ports with respect to ex-vessel revenue from all species (EA/RIR/FRFA, new Tables 22–24).

Comment 7: At the March Council meeting, one individual testified that the draft EA/RIR was hastily prepared with no new information, no recommendations, and inadequate social and economic impact analyses.

Response 7: NMFS assures the public that the document was not hastily prepared, and was not designed to preselect among the options (a tribal allocation between 25,000–35,000 mt), but, rather was designed to provide information from which individuals could make up their own minds. With the exception of 2 out of more than 20 tables, all information was new or updated to reflect the best available information. The economic analysis was primarily distributional, as data were lacking on which to base a formal cost-benefit analysis. Social impacts are extremely difficult to ascertain, particularly when analyzing the possible social changes that could occur between 1998 and 1999 with a redistribution of 3,150 mt, 1.5 percent of the OY, among coastal communities. Consistent with preliminary guidance from NMFS, the authors appended the draft EA/RIR with the information developed by the coastal communities (and provided on the internet) regarding employment and demographics.

Nontribal Allocations

The nontribal whiting allocations are also announced in this rule. The percentages used to allocate the commercial OY of whiting among the nontribal sectors are found at 50 CFR 660.323(a)(4). The percentages are applied to the commercial OY (the OY minus the tribal allocation) to determine the 1999 whiting allocations for the catcher/processor, mothership, and shore-based sectors.

NMFS Action

For the reasons stated above, NMFS concurs with the Council's recommendations, except for the tribal whiting allocation, and announces the following specifications and allocations for the 1999 whiting fishery, which modify the 1999 annual specifications published at 64 FR 1316, January 8, 1999.

1. In Section I, table 1 (64 FR 1317, January 8, 1999) is amended by removing the number ''178,000–'' in the following three places:

a. In the second column of the table, under the heading, ''Acceptable Biological Catch (ABC),'' and under the subheadings ''Vancouver, Columbia, Eureka, Monterey, and Conception,'' on the same line with the species ''Pacific whiting.''

b. Under the same heading, under the subheading ''Total Catch ABC'', on the same line with the species ''Pacific whiting.''

c. In the third column of the table, under the heading ''OY,'' and under the subheading, ''Total Catch, ''on the same line with the species ''Pacific whiting.''

2. Footnote d/to table 1 (64 FR 1318, January 8, 1999) is revised to read as follows: ''d/Pacific whiting. U.S. ABC is 80 percent of U.S.-Canada MSY.'' No other changes are made to Table 1.

3. In Section IV., under ''B. Limited Entry Fishery'', (64 FR 1337, January 8, 1999) paragraph 7(a) regarding nontribal allocations is revised to read as follows:

* * * * *

(7) * * *

(a) *Allocations.* The nontribal allocations are harvest guidelines, based on percentages that are applied to the commercial OY (see 50 CFR 660.323(a)(4)), as follows:

(i) Catcher/processor sector—67,800 mt (34 percent);

(ii) Mothership sector—47,900 mt (24 percent);

(iii) Shore-based sector—83,800 mt (42 percent). No more than 5 percent (4,200 mt) of the shore-based whiting allocation may be taken before the shore-based fishery begins north of 42'' N. lat.

* * * * *

4. In Section V., paragraph D. regarding the tribal allocation (64 FR 1340 January 8, 1999) is added to read as follows:

D. Whiting

The allocation of whiting is 32,500 mt for the Makah tribe.

Classification

The Administrator, Northwest Region, NMFS determined that this action is necessary for the conservation and management of the Pacific coast groundfish fishery and that it is consistent with the Magnuson-Stevens Act and other applicable law.

These actions are authorized by the regulations implementing the FMP at 50 CFR 660.321(b), 660.323(4) and 660.324. The determination to take these actions is based on the most recent stock assessment; which was not available for consideration by the Council until its March 1999 meeting. Because of the need for immediate action to implement the new ABC and OY near the start of the regular season for the shore-based sector in California on April 1, 1999, NMFS has determined in accordance with section 553(d)(3) of the Administrative Procedure Act that good cause exists for the ABC and OY specifications and allocations to the tribal and nontribal sectors to be implemented without affording a 30-day delayed effectiveness period.

NMFS prepared an EA for the tribal allocation and the AA concluded that there will be no significant impact on the human environment. At issue is the reallocation of whiting from nontribal to tribal fisheries, consistent with treaty rights and other applicable law. The total amount of whiting that may be harvested is not changed by the tribal allocation. A copy of the EA is available from NMFS (see **ADDRESSES**).

This final rule has been determined to be not significant for purposes of E.O. 12866.

NMFS prepared an FRFA on the tribal allocation, a summary of which follows: (1) *A succinct statement of the need for, objectives of, and legal basis for, the proposed rule:* The objective is to accommodate tribal treaty rights, as required by the Stevens treaties and as interpreted in the case of *U.S.* v. *Washington.* See attachment 3 of this FRFA for further citations. (2) *A summary of significant issues raised by the public comments in response to the IRFA, the agency's response to those comments, and a statement of any changes made to the rule as a result of the comments:* Refer to the preamble of this final rule, which includes the public comments and agency responses. (3) *A description of and, where feasible, an estimate of the number of small entities to which the rule will apply, or an explanation of why no such estimate is available:* The Small Business Administration classifies commercial fishing firms as small entities if they have gross receipts of up to $3 million annually. For processors and wholesalers, a small business is a firm that employs less than 500 and 100 employees, respectively. The small entities directly affected by the rule are enumerated in the following table, and include catcher boats (tribal and nontribal) that harvest whiting and deliver either to shore-based processors or to mothership processors at sea; and shore-based processors that process whiting.

Small entities using whiting (directly affected by the rule)				Small entities using groundfish, including whiting, that could be affected (directly or indirectly) by the rule					
Limited entry trawl vessels	Tribal catcher vessels	Shore-based processors	Total [1]	Limited entry trawl vessels [1]	Limited entry fixed gear vessels	Total limited entry vessels [1]	Tribal catcher vessels	Shore-based processors [2]	Total [1]
[1, 3] 56	1–6	12	74	252	240	492	1–6	169	667

[1] Excluding 10 catcher-processors over 125 ft (381 km) in length, which are not considered small businesses.
[2] Includes processors that paid more than $5,000 for groundfish in the first 9 months of 1998 (using the best available information in December 1998).
[3] 39 delivered shoreside, 30 delivered to motherships, and 13 did both (1996 data).

(4) *A description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, (including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record):* There are no additional projected reporting, recordkeeping, or compliance requirements in this rule. (5) *A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected:* Because the tribes have a treaty right to harvest whiting, and have indicated that they plan to exercise that treaty right, there is no way to accomplish the objective of accommodating the treaty right without setting aside an appropriate amount of whiting for the tribes. Three options were under consideration in the proposed rule. The no-action alternative (which provided no tribal allocation of whiting) is not considered viable by NMFS because it is contrary to tribal treaty rights. The other two alternatives would have provided the tribes with either 25,000 mt or 32,500 mt of whiting, the difference between the two being 7,500 mt, which is 3 percent of the 232,000-mt OY for 1999. The direct impact of this rule on small businesses is largely distributional and diverts whiting from nontribal catcher vessels to tribal catcher vessels, all of which are considered small businesses. The direct impact on nontribal coastal communities (the 5 major ports that receive whiting; see Table 24 of the EA/RIR/FRFA) of a 32,500-mt tribal allocation of whiting is a loss of 1–2 percent of the ex-vessel revenue (for all species) relative to no tribal allocation, and a loss of less than 1 percent of the ex-vessel revenue (for all species) relative to a 25,000 mt tribal allocation (which was the amount of the tribal allocation in 1998). However, this loss in ex-vessel revenue is recovered by the tribal coastal community.

The quantification issue has not yet been litigated or otherwise resolved. The Makah have made a proposal for 32,500 mt of whiting in 1999 that NMFS accepts as a reasonable accommodation of the treaty right for 1999 in view of the remaining uncertainty surrounding the appropriate quantification. This 1999 amount of 32,500 mt (14 percent of the

232,000-mt OY) is not intended to set a precedent regarding either quantification of the Makah treaty right or future allocations. NMFS will continue to attempt to negotiate a settlement in *U.S.* v. *Washington* regarding the appropriate quantification of the treaty right to whiting. If an appropriate methodology or allocation cannot be developed through negotiations, the allocation will ultimately be resolved in the pending subproceeding in *U.S.* v. *Washington*. A more complete discussion of the treaty right appears in the response to comment 1 in the preamble to this rule. A copy of this analysis is available from NMFS (see **ADDRESSES**).

NMFS issued Biological Opinions (BOs) under the ESA on August 10, 1990, November 26, 1991, August 28, 1992, September 27, 1993 and May 14, 1996, pertaining to the impacts of the groundfish fishery on Snake River spring/summer chinook, Snake River fall chinook, Sacramento River winter chinook, and on Snake River sockeye. The opinions concluded that implementation of the FMP for the Pacific Coast Groundfish Fishery is not expected to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS, or to result in the destruction or adverse modification of critical habitat. This action is within the scope of these consultations.

The August 28, 1992, BO included a review of the anticipated impacts to listed salmon species in the whiting fishery. The analysis of impacts to listed species in the BO was based on two key assumptions, including: (1) An anticipated long-term average catch of 221,000 mt of whiting per year; and (2) the overall bycatch rate of salmon in the fishery (subsequently clarified in the September 27, 1993, reinitiated consultation to mean chinook salmon) would not exceed 0.05 chinook salmon/mt of whiting. Impacts to listed fish were analyzed assuming that the bycatch of salmon (assumed to be all chinook) would not exceed 11,000 salmon in the entire whiting fishery ($221{,}000 \times 0.05 = 11{,}050$). Allocating a portion of the OY (sometimes called TAC, or total allowable catch) to the Washington Coast treaty tribes would not result in an increased catch of whiting, but may result in more fishing to the north because of the geographical limitation on the tribal fishing area. However, the fishery has been broadly distributed with much of it already occurring in the north in recent years. The BO assumed that most of the whiting fishery would occur in the northern Columbia and Vancouver areas and specifically considered the possibility that all of the fishery would occur to the north. The Incidental Take Statement of the August 28, 1992, BO (as revised in 1993) defined a bycatch rate limit of 0.05 chinook salmon/mt whiting with an expectation that the catch would not exceed 11,000 chinook salmon in the entire whiting fishery. The tribal allocation action does not affect the assumptions of the analysis and is not outside the scope of the action considered in the opinion. Because the impacts of this action fall within the scope of the impacts considered in these BOs, additional consultations on these species are not required for this action.

Since the last BO, additional species have been listed under the ESA, including: Coho salmon as threatened (Oregon coast/southern Oregon-northern California/central California); chinook salmon as threatened (Puget Sound/lower Columbia River/upper Willamette River) and endangered (upper Columbia River); chum salmon as threatened (Hood Canal/Columbia River); sockeye salmon threatened (Ozette Lake); steelhead as threatened (middle and lower Columbia River/Snake River Basin/upper Willamette River/central California/south-central California) and endangered (upper Columbia River/southern California); and Umpqua River cutthroat trout as endangered.

NMFS intends to reinitiate consultation on the Pacific coast groundfish fishery to consider its effect on newly listed species. Review of the available information indicates that these fisheries are not likely to affect listed coho, chum, sockeye, steelhead, or cutthroat trout, as these species are rarely, if ever, encountered in the groundfish fishery. Four chinook salmon evolutionarily significant units (ESUs) have recently been listed as threatened or endangered under the ESA; listings for those ESUs are effective on May 24, 1999. Chinook salmon are caught incidentally to some of the groundfish net fisheries, and those fisheries may take chinook salmon from some of the newly listed runs. However, all four of the newly listed chinook ESUs are north or far-north migrating species, which greatly limits the potential for take in the groundfish fisheries. Therefore, NMFS does not believe that management constraints for the groundfish fisheries are necessary or appropriate at this time. NMFS will provide more detailed accounts of the anticipated take of chinook by ESU in the reinitiated consultation.

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

Dated: May 18, 1999.

Penelope D. Dalton,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

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