(1) The design pressure of the weakest element in the segment, determined in accordance with subparts C and D of this part. However, for steel pipe in pipelines being converted under § 192.14 or uprated under subpart K of this part, if any variable necessary to determine the design pressure under the design formula (§ 192.105) is unknown, one of the following pressures is to be used as design pressure:

(i) Eighty percent of the first test pressure that produces yield under section N5.0 of Appendix N of ASME B31.8, reduced by the appropriate factor in paragraph (a)(2)(ii) of this section; or

(ii) If the pipe is 324 mm (12¾ in) or less in outside diameter and is not tested to yield under this paragraph, 1379 kPa (200 psig).

* * * * *

32. Section 192.625 (f) is revised to read as follows:

§ 192.625 Odorization of gas.

* * * * *

(f) Each operator shall conduct periodic sampling of combustible gases to assure the proper concentration of odorant in accordance with this section. Operators of master meter systems may comply with this requirement by—

(1) Receiving written verification from their gas source that the gas has the proper concentration of odorant; and

(2) Conducting periodic ''sniff'' tests at the extremities of the system to confirm that the gas contains odorant.

33. Section 192.705(c) is added to read as follows:

§ 192.705 Transmission lines: Patrolling.

* * * * *

(c) Methods of patrolling include walking, driving, flying or other appropriate means of traversing the right-of-way.

34. Section 192.709 is revised to read as follows:

§ 192.709 Transmission lines: Record keeping.

Each operator shall maintain the following records for transmission lines for the periods specified:

(a) The date, location, and description of each repair made to pipe (including pipe-to-pipe connections) must be retained for as long as the pipe remains in service.

(b) The date, location, and description of each repair made to parts of the pipeline system other than pipe must be retained for at least 5 years. However, repairs generated by patrols, surveys, inspections, or tests required by subparts L and M of this part must be retained in accordance with paragraph (c) of this section.

(c) A record of each patrol, survey, inspection, and test required by subparts L and M of this part must be retained for at least 5 years or until the next patrol, survey, inspection, or test is completed, whichever is longer.

35. Section 192.721(b) is revised to read as follows:

§ 192.721 Distribution systems: Patrolling.

* * * * *

(b) Mains in places or on structures where anticipated physical movement or external loading could cause failure or leakage must be patrolled—

(1) In business districts, at intervals not exceeding 4½ months, but at least four times each calendar year; and

(2) Outside business districts, at intervals not exceeding 7½ months, but at least twice each calendar year.

36. In Appendix A, section I. is amended by redesignating subsections A. through F. as subsections B. through G., respectively, and by adding a new subsection A.; and section II. is amended by redesignating subsections A. through E. as subsections B. through F., respectively, by adding a new subsection A. and a new subsection 12. to newly designated C., by redesignating newly designated subsections D.3. through D.5. as subsections D.5. through D.7., respectively, and by adding new subsections D.3. and D.4. as follows:

Appendix A—Incorporated by Reference

I. * * *

A. American Gas Association (AGA), 1515 Wilson Boulevard, Arlington, VA 22209.

* * * * *

II. * * *

A. American Gas Association (AGA):

1. AGA Pipeline Research Committee, Project PR–3–805, ''A Modified Criterion for Evaluating the Remaining Strength of Corroded Pipe'' (December 22, 1989).

* * * * *

C. * * *

12. ASTM Designation: F1055 ''Standard Specification for Electrofusion Type Polyethylene Fittings for Outside Diameter Controlled Polyethylene Pipe and Tubing'' (F1055–95).

D. * * *

3. ASME/ANSI B31G ''Manual for Determining the Remaining Strength of Corroded Pipelines'' (1991).

4. ASME/ANSI B31.8 ''Gas Transmission and Distribution Piping Systems'' (1995).

* * * * *

Issued in Washington, DC, on May 28, 1996.

D.K. Sharma,

Administrator.

[FR Doc. 96–13787 Filed 6–5–96; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 663

[Docket No. 960304057–6151–02; I.D. 020596A]

RIN 0648–AH84

Pacific Coast Groundfish Fishery; Framework for Treaty Tribe Harvest of Pacific Groundfish and 1996 Makah Whiting Allocation

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

ACTION: Final rule.

SUMMARY: NMFS is establishing a framework to implement the Washington coastal treaty Indian tribes' rights to harvest Pacific groundfish. NMFS also announces the allocation of 15,000 metric tons (mt) of Pacific whiting to the Makah Indian Tribe (Makah) for 1996 only, under the provisions of the regulatory framework.

EFFECTIVE DATE: May 31, 1996.

ADDRESSES: Copies of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) may be obtained from the Director, Northwest Region, NMFS, 7600 Sand Point Way NE., BIN C15700, Seattle, WA 98115.

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

SUPPLEMENTARY INFORMATION: NMFS is issuing this rule under the authority of the Pacific Coast Groundfish Fishery Management Plan (FMP) and the Magnuson Fishery Conservation and Management Act (Magnuson Act). It amends the FMP's implementing regulations to establish a clear procedure to accommodate the Washington coastal treaty Indian tribes' rights to harvest Pacific groundfish. At the same time, NMFS is modifying the groundfish regulations to consolidate regulations on treaty Indian fishing into one section and to provide for the treaty trawl harvest of midwater groundfish species. Under the provisions of this rule, NMFS announces the allocation of 15,000 mt of Pacific whiting to the Makah for 1996. For purposes of this rule, Washington coastal treaty Indian tribes means the Hoh, Makah, and Quileute Indian Tribes and the Quinault Indian Nation.

This rule is implemented under authority of section 305(d) of the Magnuson Act, which gives NMFS,

acting on behalf of the Secretary of Commerce (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 rule, NMFS will ensure that the Pacific coast groundfish FMP is implemented in a manner consistent with treaty rights of the four Washington coastal treaty tribes to fish in their ''usual and accustomed grounds and stations'' in common with non-tribal citizens. *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash., 1974).

NMFS published a proposed rule at (61 FR 10303, March 13, 1996), requesting comments through April 12, 1996. NMFS received 17 comments on the proposed rule, which are responded to below. The background and rationale for this rule appear in the proposed rule and the EA/RIR/IRFA prepared for this action (see **ADDRESSES**).

Description of the Rule

Under the framework established by this rule, NMFS will be able to accommodate the rights of the treaty tribes to fish for groundfish in their ocean fishing grounds by setting aside appropriate amounts of fish through the FMP's framework process for setting annual harvest specifications or by means of specific regulations. The framework process will be initiated by a request to NMFS from one or more Washington coastal treaty Indian tribes prior to the first of the two annual groundfish meetings of the Pacific Fishery Management Council (Council). NMFS will consider the tribal requests, recommendations from the Council, and comments of the public, and will determine the amount of the set-aside for each species and/or appropriate regulatory language. NMFS will generally 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 will be managed by the tribes under their regulations.

This rule also describes the physical boundaries of the usual and accustomed fishing grounds (U&A) for the Washington Coastal treaty Indian tribes. These areas are the same as those set out in NMFS regulations for salmon since 1987 and for Pacific halibut since 1986. The boundaries may be changed by future decisions of a Federal court.

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

Harvests from tribal fisheries under this regulation will 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 modified to clarify this. This rule also allows release to the non-treaty fishery of whiting set aside for the tribes that the tribes will not use.

This rule also re-codifies regulations governing tribal harvest of black rockfish into § 663.23 in order to consolidate all tribal regulations into one section. In addition, the harvest guideline is changed from a harvest guideline for all rockfish to one for black rockfish for the reason explained in the proposed rule. When the current tribal rockfish regulation was adopted, the only tribal fishery that harvested rockfish was the hook-and-line fishery. This rule modifies the current regulation to clarify that the harvest guideline only applies to the hook-and-line fishery. 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.

Allocation of Pacific Whiting to the Makah

In June of 1995, the Makah informed NMFS and the Council that the Tribe intends to exercise its treaty rights to harvest Pacific whiting, *Merluccius productus.* At the August 1995 Council meeting, the Makah requested that 25,000 mt of whiting be set aside from the 1996 U.S. harvest guideline for exclusive harvest by the Makah. The Council voted 7–4 to recommend that NMFS not recognize that the Washington coastal treaty tribes have treaty rights to Pacific whiting, and not set aside any whiting for harvest by the Makah in 1996.

NMFS cannot accept the Council's recommendation because it is contrary to treaty fishing rights law as construed by the Federal courts. Consequently, NMFS published a proposed rule to accommodate the tribal right to harvest groundfish, and sought public comment on the amount of whiting that should be set aside for exclusive harvest by the Makah in 1996.

NMFS and the Makah continue to disagree on the appropriate quantification of the Makah treaty right to Pacific whiting. The basis for this disagreement is explained in the proposed rule at 61 FR 10305 (March 13, 1996).

At the October 1995 Council meeting, the Makah proposed a quantification of their treaty entitlement that would have given the Makah 25 percent of the U.S. harvest guideline. Based on a 1996 U.S. harvest guideline of 212,000 mt, the Makah proposal would have resulted in an allocation to the Makah of 53,000 mt in 1996. NMFS has proposed a biomass-based quantification of the Makah treaty entitlement that is linked to the Makah U&A and adjusted according to the conservation necessity principle. The NMFS proposal would have allocated 6.5 percent of the U.S. harvest guideline to the Makah in 1996, or 13,800 mt. During discussions between NMFS and the Makah, the Makah advanced a compromise 1-year interim allocation of 15,000 mt. The proposed 15,000-mt allocation did not reflect either the NMFS or the Makah view of the amount of whiting to which the Makah are entitled under the Treaty. It represented a compromise proposal by the Makah that reflected the minimum amount of whiting necessary to initiate a fishery in 1996 by the Tribe.

In view of continuing differences between the Makah and NMFS regarding the appropriate quantification of the Makah treaty entitlement, and in recognition of the unresolved legal and technical difficulties in quantifying the treaty right to Pacific whiting, NMFS has decided to implement the proposed compromise and allocate 15,000 mt to the Makah for 1996 only. Based on the U.S. harvest guideline of 212,000 mt, the allocation of 15,000 mt to the Makah is slightly greater than the 13,800 mt that would have been allocated under the NMFS proposal and much less than the amount originally proposed by the Makah. NMFS believes that the 1-year compromise proposal gives NMFS and the Makah additional time to determine an appropriate quantification of the Makah treaty entitlement. To that end, the Makah have initiated a subproceeding in *United States* v. *Washington* (*subproceeding 96–2*) intended to resolve whether the Makah have a treaty right to whiting and the quantification of that right. The 15,000-mt compromise applies to the 1996 fishing year only and is not intended to set a precedent regarding either quantification of the Makah's treaty entitlement or future allocations.

The Makah also plan to harvest midwater species other than whiting, using trawl gear. Rather than attempt to quantify its treaty entitlement to these species at this early point in the process,

the Tribe has agreed that its vessels will trawl for these other midwater species in conformance with trip limits established for the limited entry fishery. NMFS agrees that this is a reasonable accommodation of the treaty right, particularly in view of the data limitations and the uncertainty in quantifying treaty rights.

Response to Comments

NMFS received 17 comments on the proposed rule from: The States of Washington and Oregon; three Washington coastal treaty tribes; and members of the non-Indian fishing and processing community who currently fully utilize the U.S. harvest guideline. Many comments addressed two major issues: (1) Whether the Washington coastal treaty tribes have a treaty entitlement to Pacific groundfish, particularly Pacific whiting; and (2) the appropriate quantification of the treaty right. NMFS received other comments regarding the impacts on non-Indian fishers, processors, coastal communities, the whiting resource, and bycatch, particularly chinook salmon listed under the Endangered Species Act (ESA); NMFS' description of tribal U&A; the implementation process; and the framework.

Treaty Entitlement

Many commenters asserted that the tribes do not have a treaty right to whiting, because they did not harvest whiting at the time the Stevens treaties were signed. NMFS disagrees with this statement. The treaties themselves refer to the right of taking fish, without any species limitation. As explained in the proposed rule, in the shellfish subproceeding (89–3) in *United States* v. *Washington*, 873 F. Supp. 1422 (W.D. Wash., 1994) (appeals pending), the court found that the right to take fish that was reserved in the treaties must be read to cover 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 * * * 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] *Id.* at 1430

Commenters argue that this case is on appeal and dealt with shellfish, not groundfish; therefore it is inappropriate for this ruling to be applied to whiting. The decision has not been stayed pending appeal. As such, NMFS has no choice but to apply the law consistent with interpretations by the District Court.

In addition, the Makah have submitted evidence supporting the conclusion that the Makah did harvest whiting at treaty time. Dr. Barbara Lane, an anthropologist and expert witness in *United States* v. *Washington*, states that ''a lack of documentation in the published literature is of no help in assessing whether or not the Makah fished *M. productus* at treaty times.'' She goes on to say:

> The best that can be done is to interpolate from archeological evidence, the available ethnographic record, linguistic knowledge, oral history, and ethnology. Based upon these sources, which comprise the best available evidence, it is my opinion that if *M. productus* was accessible to Makah fishermen at treaty time, this species would have been utilized.
>
> Letter from Barbara Lane to Marc D. Slonim (legal counsel for the Makah tribe), February 29, 1996.

Dr. Gary Wessen (Wessen & Associates, Archeological Services), in comments submitted by the Makah, reviewed some of the available archeological evidence and concluded:

> Use of this fish [*M. productus*] probably extends over much of the region and has been occurring for a considerable period of time. Within the context of this regional pattern, the case for Makah use of hake/whiting is quite good. At least one site in Makah territory contains the bones of this fish, as do other sites which represent close relatives of the Makah.
>
> Letter from Gary C. Wessen, Ph.D. to Marc D. Slonim, November 24, 1995.

Several commenters argued that the Makah must follow the procedure set out by Judge Boldt in one of his early decisions at 459 F. Supp. 1020, 1037–38, where the court said prior to exercising off-reservation fishing rights to non-anadromous fish and shellfish, a tribe shall present *prima facie* evidence of such right, ''pending final determination of tribal treaty-right entitlement to non-anadromous fish and shellfish.'' NMFS believes that this does not apply to the whiting fishery. First, as explained above, the *United States* v. *Washington* court has already ruled that tribes have treaty rights to all fish available in their U&A; thus the treaty-right entitlement has been determined. Second, in the halibut subproceeding in *United States* v. *Washington*, when Judge Rothstein determined that the tribes have treaty rights to halibut, she did not order NMFS to start accommodating the treaty right because she had previously judicially determined they had a right. Rather, she found that the Makah treaty right had been violated in past regulatory schemes. The necessary implication of this finding is that the treaty right should have been accommodated prior to her judicial determination. *Makah Indian Tribe* v. *Brown*, No. C85–1606R, 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, Dec. 29, 1993). Third, the judicial procedure was set up in the early days of the treaty fishing rights litigation, in relation to fishing within the jurisdiction of the State of Washington (which did not recognize the fishing rights in question) in order to ensure an orderly implementation of new fisheries. The whiting fishery is primarily under the jurisdiction of NMFS, which recognizes the treaty right and which is working with the tribe to implement an orderly fishery. Thus, the *United States* v. *Washington* procedure is not required for Federally regulated fisheries to the extent that there is no disagreement between the tribes and the Federal government. The administrative procedures set up by this rule should ensure the orderly implementation of new treaty fisheries without the need to resort to the courts except in unusual circumstances.

Four commenters agreed with NMFS that the Makah have a treaty right to harvest whiting.

Moderate Living

One commenter argued that the total treaty right to a ''moderate living'' has been satisfied; therefore no extension of the tribal fishery is authorized. The commenter is referring to what has become known as the ''Moderate Living Standard'', which was set out by the Supreme Court as follows:

> It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation. As in *Arizona* v. *California* and its predecessor cases, the central principle here must be that the Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living. Accordingly, while the maximum possible allocation to the Indians is fixed at 50 percent [footnote omitted], the minimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances. If, for example, a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries, a 45 percent or 50 percent allocation of an entire run that passes through its customary fishing grounds would be manifestly inappropriate because the livelihood of the tribe under those

circumstances could not reasonably require an allotment of a large number of fish.

State of Washington et al. v. *Washington State Commercial Passenger Fishing Vessel Association, et al.* 443 U.S. 658 at 686–687.

The commenter refers to an affidavit of Professor Robert Thomas, Associate Professor of Economics, University of Washington, that compares the income of the Makah Tribe and its households with three definitions of the poverty level. Professor Thomas concludes that the average Makah household lives above the poverty level, and, therefore, the Makah Tribe enjoys a livelihood, or a moderate living. A similar analysis, also prepared by Dr. Thomas, was submitted to, and rejected by, the court in the shellfish subproceeding.

The Court finds that no persuasive evidence has been presented to the Court by the State and the intervenors showing that a substantial change in circumstances has occurred, [fn omitted] so that the Tribes could maintain a moderate living without the exercise of their fishing rights, or that the Tribes have voluntarily abandoned their fisheries. Therefore, the Court declines to apply the Moderate Living Doctrine to these facts.

873 F.Supp at 1445.

In the shellfish case, the tribes submitted a report by Dr. Phil Meyer, entitled, ''Analysis of the Material Circumstances of 17 Washington Tribes'', which included information on the Makah tribe. The court accepted Dr. Meyer's analysis as more appropriate than Dr. Thomas's, and declined to apply the Moderate Living Doctrine to reduce the tribes share of fish. *Id.* at 1446.

The Makah, in their comments, submitted information showing that the Makah are a geographically isolated community, which lacks alternative economic opportunities. Unemployment is nearly twice that of Clallam County (where the Makah reservation is located) and a 1988 survey of 102 Makah households showed that 63 percent considered fishing to be the main occupation of their household. The Makah commercial salmon catch has declined by approximately 87 percent for chinook and coho salmon and 20 percent for chum salmon over the last 5 years. The Makah's gross revenues from all salmon fisheries have declined by approximately 72 percent over the last 5 years. The Makah also referred to the ruling in the shellfish subproceeding explained above.

In conclusion, NMFS does not believe there is sufficient evidence that the Moderate Living Doctrine requires reduction of the tribal share of the resource. In any event, that issue must be presented to the court in *United States* v. *Washington*, subproceeding 96–2 for determination before the treaty share is reduced by application of the Moderate Living Doctrine.

Equitable Considerations

One commenter argued that Judge Rafeedie's consideration of equitable factors in the shellfish subproceeding should be taken into account here. The Stevens treaties guaranteed the tribes the right to take shellfish, except from beds that have been ''staked or cultivated.'' In the shellfish subproceeding Judge Rafeedie adopted a broad definition of ''cultivated'' bed with regard to beds found on private property. His ruling only applies to the activities of a private property owner in making his tidelands more productive of shellfish; in that case the Judge ruled that the tribes cannot reap the fruits of the grower's labors in farming a particular piece of private property. In the case of whiting, there are no private property rights involved. Whiting is a common property resource, just like salmon and halibut. While the tribes have not harvested whiting in recent years, that does not defeat their treaty right. Judge Rafeedie in the shellfish decision explained

The Supreme Court and the Ninth Circuit have consistently held that time-related defenses such as latches, waiver, estoppel, and adverse possession are not available to defeat Indian treaty rights. [citations omitted]

873 F. Supp. 1422 at 1446.

Definition of Tribal U&A

NMFS received comments on the tribes' U&A from the States of Washington and Oregon, from three coastal tribes, and from two individuals.

One commenter argued the Makah U&A could not extend beyond 3 miles (4.83 km), the limit of the territorial sea at the time of the treaties. The Federal Court, however, specifically found the Makah U&A extended 40 miles (64.37 km) offshore to the limits of United States maritime jurisdiction. See *United States v. Washington,* 626 F. Supp. 1466, 1467 (W.D. Wash., 1982), aff'd 730 F.2d 1314 (9th Cir. 1984).

Under this rule, NMFS recognizes the same U&A areas that have been implemented in Federal salmon and halibut regulations for a number of years. The States and the Quileute tribe point out that the western boundary has only been adjudicated for the Makah tribe. NMFS agrees. NMFS, however, in establishing ocean management areas, has taken the adjudicated western boundary for the Makah tribe, and extended it south as the western boundary for the other three ocean treaty tribes. NMFS believes this is a reasonable accommodation of the tribal fishing rights, absent more specific guidance from a court. NMFS regulations, including this regulation, contain the notation that the boundaries of the U&A may be revised by order of the court.

The State of Oregon points out that the western boundaries for the Hoh, Quileute, and Quinault have not been specifically adjudicated. The State goes on to argue that because Judge Boldt, in another portion of his opinion, states that the case is limited to adjacent offshore waters that are within the jurisdiction of the State of Washington, the U&A cannot extend more than 3 miles (4.83 km) from shore. NMFS disagrees with this interpretation because, as explained above, the court has specifically found the Makah U&A extends offshore 40 miles. Thus, the State's reading of Judge Boldt's language is too constraining.

The Quinault Nation points out the northern and southern boundaries of the Quileute Tribe's U&A described in the proposed rule (and finalized in this rule) are currently at issue in subproceeding No. 96–1 in *United States* v. *Washington*. The tribe does not object to the description of the U&A contained in this regulation as long as it is without prejudice to proceedings in *United States* v. *Washington*. NMFS agrees that this rule is without prejudice to the court proceedings. As stated above, NMFS will modify the boundaries in the regulation consistent with orders of the Federal Court. NMFS has not taken a position on the Quileute U&A boundaries in the pending subproceeding.

The Makah Tribe supports the rule, and does not object to the description of its U&A.

Another commenter argued that the boundaries of the U&A for salmon and halibut are not necessarily relevant to the Pacific whiting resource. NMFS disagrees. Judge Rafeedie, in the shellfish subproceeding (83–6) in *United States* v. *Washington* found ''that, as a matter of treaty interpretation, the Tribes' usual and accustomed grounds and stations cannot vary with the species of fish.'' 873 F. Supp. 1422 at 1431 (W.D. Wash., 1994)(appeals pending). The commenter also doubted whether the tribes usually and customarily utilized their canoes in fishing operations 20 miles (32.19 km) and beyond the shorelines. The explanation of the western boundaries is set out above.

Magnuson Act

Two commenters argued that NMFS does not have authority under section

305(d) of the Magnuson Act to promulgate this rule. NMFS disagrees. The Magnuson Act at section 305(d) gives the Secretary general authority to carry out any fishery management plan in accordance with the provisions of the Magnuson Act. Section 303(d) requires that any management measure be consistent with other applicable law. One of the laws applicable to the groundfish FMP is the treaty right to groundfish. Fishery management plans and implementing regulations must be consistent with Indian treaty rights. *Washington State Charterboat Ass'n v. Baldrige,* 702 F.2d 820 at 823 (9th Cir. 1983); *Hoh Indian Tribe* v. *Baldrige,* 522 F.Supp. 683 at 685 (W.D. Wash., 1981); *Washington Crab Producers, Inc.* v. *Mosbacher,* 924 F.2d 1438, 1439 (9th Cir. 1990). The FMP itself acknowledges treaty rights, and accommodations for treaty rights to sablefish and black rockfish have been made under existing regulations. However, the FMP's implementing regulations (codified at 50 CFR part 663) currently lack an explicit provision requiring accommodation of treaty rights and a specific process for doing so. NMFS is remedying that deficiency through this regulation.

Two commenters stated that if there were a treaty right, the appropriate procedure for implementing the tribal allocation would be a Secretarial amendment to the FMP. This procedure is available to the Secretary; however, implementing the tribal groundfish rights does not require NMFS to amend the FMP. As explained above, the framework established by the regulation is consistent with the plan, and NMFS has adequate implementing authority under the Magnuson Act.

One commenter argued that the plan amendment process should have been utilized, because numerous applicable laws that govern the process were not complied with here. NMFS disagrees. The other procedural laws to which NMFS assumes the commenter was referring have been complied with, as explained below. The same suite of laws applies to a regulation whether it initially implements a plan or amendment, or whether it is a regulatory amendment to regulations implementing an already approved plan; the scope and substance of the rule controls what laws apply.

One commenter argued that to make an Indian treaty allocation, Indian treaty fishing rights had to be included in the FMP. The commenter noted that the FMP does not include provision to allocate whiting under Indian Treaties, and yet the FMP was adopted and approved as consistent with the Magnuson Act years ago. In fact, the FMP addresses treaty fishing rights, although not as concretely and explicitly as this rule. Section 11.7.6 of the FMP states that some tribes have a treaty right to fish in areas covered by the FMP, that at the time the FMP was prepared, the Makah sablefish fishery was the only active tribal groundfish fishery known by the Council, and that the FMP may need to be amended in the future to address other fisheries that may develop. In section 14.1.5 the FMP acknowledges that the treaty Indian fisheries are not covered by the limited entry program. The FMP acknowledges treaty fishing rights. The FMP also indicates that it may need to be amended in the future, but does not require such an amendment. The rights to both sablefish and black rockfish have been accommodated under this FMP. As the law has developed in recent years (see above), it is appropriate to further implement this FMP consistent with the developing law regarding treaty rights.

Many commenters argued that this rule is inconsistent with National Standard 4, which requires that conservation and management measures be fair and equitable, reasonably calculated to promote conservation; and carried out in such manner that no particular individual, corporation or other entity acquires an excessive share of such privileges. This framework and allocation implements a treaty fishing right, which is not the same as other discretionary allocations the Council and NMFS might adopt. NMFS has determined this rule is consistent with National Standard 4, and is required by the treaties with the Northwest tribes, which are ''other applicable law'' with which management measures must be consistent.

Other commenters argued that this rule violates other national standards, because it is not based on the best scientific evidence available, however, they did not submit information NMFS had not considered. NMFS has gathered the best scientific information known to the agency.

This allocation does not discriminate between residents of different states. While the affected treaty tribes are located in the State of Washington, the criteria of the allocation is not state residence, it is treaty tribe status. This is no different than the longstanding allocation of salmon to the treaty tribes.

One commenter claimed that allocating Pacific groundfish to the treaty tribes contravenes the Council and the fishing industry's attempts to reduce overcapitalization in the groundfish industry. NMFS agrees that the new tribal fishers will increase the groundfish fleet, especially for whiting. However, as described above, this framework and allocation implements a treaty fishing right, which is not the same as other discretionary allocations the Council and NMFS might adopt. NMFS has determined that this rule is required by the treaties with the Northwest tribes, which are ''other applicable law'' with which other management measures must be consistent.

Commenters argued allocating groundfish to treaty tribes in their U&A is not managing groundfish as a unit throughout its range, and is in violation of National Standard 3. It does manage throughout its range because it takes all groundfish into account. Mere allocation in relationship to a specific area does not violate National Standard 3. In addition, National Standard 3 says a stock of fish should be managed throughout its range ''to the extent practicable.'' Since this rule implements a treaty right, which must be accommodated, that right would have to be considered in determining whether a management measure is practicable.

One commenter argued that this rule has economic allocation as its purpose, in violation of National Standard 5. National Standard 5 only prohibits management measures that have economic allocation as their sole purpose. The purpose of this regulation, however, is implementation of treaty fishing rights.

One commenter argued that the Makah petition for whiting did not comply with requirements to formally commence Administrative Procedure Act (APA) rulemaking. While this rule is not in response to a formal APA petition, it meets the requirements for rulemaking set forth in 5 U.S.C. 553.

Some commenters argued that because the Council voted to deny the Makah a treaty allocation, NMFS has no authority to overrule the Council vote. NMFS disagrees with this statement.

The determination of whether the tribes have a treaty right is a legal determination. NMFS, not the Council, is charged with determining whether FMPs and management measures comply with other applicable law. See 16 U.S.C. 1854(a)(1)(B). Indian treaty rights are constitutionally recognized as the ''supreme law of the land'' and thus are ''other applicable law.'' NMFS, like all Federal agencies, has an obligation to ensure that Indian treaty rights are not abrogated or infringed absent a specific Act of Congress.

One commenter asserted that NMFS had not complied with the requirements of E.O. 12866 once the Office of

Management and Budget (OMB) had determined that the proposed regulation was ''significant'' under that executive order. NMFS disagrees. NMFS complied with the submission requirements of section 6(a)(3)(B) of E.O 12866 by providing OMB the appropriate documentation for review after being informed that OMB determined the proposed regulation to be ''significant.''

Tribal Authority

The Quileute Tribe commented:

The proposed rule, while recognizing treaty rights to groundfish, fails to recognize the sovereign status and co-manager role of Tribes over shared federal and Tribal resources. Paragraph (d) gives complete process control to NMFS. The paragraph should be rephrased to implement a Federal-Tribal consensus process in the implementation of all treaty allocations or regulations.

NMFS has revised paragraph (d) of § 663.24 by adding two final sentences as follows:

The Secretary recognizes the sovereign status and co-manager role of Indian tribes over shared federal and tribal fishery resources. Accordingly, the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.

The Quinault Nation commented:

§ 663.24(i) of the proposed rule provides that fishing by members of Washington Coastal Tribes for species not covered by an allocation or special tribal regulation is subject to the same regulations as fishing by non-treaty fishers. This provision ignores the well-established conservation limitation on both federal and state regulation of treaty hunting and fishing activities. The government bears the burden of demonstrating that regulations which it seeks to apply to Indians exercising treaty hunting and fishing rights are reasonable and necessary for conservation. See, *United States* v. *Williams*, 898 F.2d 727, 729–30 (9th Cir. 1990); *United States* v. *Sohappy*, 770 F.2d 816, 824 (9th Cir. 1985).

NMFS should identify, in consultation with affected tribal governments, those general regulations applicable to species for which there is no allocation or special regulation accommodating tribal rights, whose application to treaty Indians NMFS believes to be reasonable and necessary for conservation. Blanket application of general regulations whose application to treaty Indians has not been demonstrated to be reasonable and necessary for conservation is an impermissible effort to avoid the limitation on NMFS authority to regulate treaty Indian fishing and violates the due process rights of treaty fishers to proper notice of those regulations which NMFS may lawfully enforce.''

In the situation addressed by the comment (where groundfish species within a tribe's U&A are not covered by an allocation or regulation under § 663.24), NMFS believes that application of the Federal groundfish regulations in 50 CFR part 663 to fishing by tribal members is reasonable and necessary for conservation.

Under this rule, the four affected Indian tribes may request an allocation for a new species; then, an appropriate allocation would be determined and announced in NMFS's annual specifications. Treaty fisheries for that species are then managed pursuant to tribal regulations and any additional regulations promulgated by NMFS under § 663.24. Until a tribe applies for an allocation and implements tribal regulations, fishing by tribal members would be unregulated unless it were controlled by the Federal groundfish regulations. In the absence of applicable tribal or state regulations, the Federal regulations, which include management measures necessary to keep the fishery within the harvest guidelines established for the numerous groundfish species, are reasonable and necessary for conservation. This rule ensures orderly implementation of new fisheries for which the exact quantification of the treaty right has not been determined.

Quantification of the Treaty Right

Three commenters agreed with NMFS that the proportion of the coastwide Pacific whiting biomass found in the Makah U&A is the appropriate basis for determining the amount of Pacific whiting to allocate to the Makah. However, several of the same commenters took issue with NMFS' application of a 1.375 exploitation rate multiplier in recognition of the conservation necessity principle. Noting that the 1.375 multiplier was based on the observed exploitation rate in the Eureka International North Pacific Fisheries Commission (INPFC) area in 1989, one commenter argued that the multiplier was incorrect for two reasons. First, the Eureka area provides only 2 percent of the catch at a measured 33 percent exploitation rate, whereas the remaining areas provide 98 percent of the catch at a 24 percent exploitation rate. Second, the biomass estimates are made in the summer but the Eureka area fishery occurs in the spring. The biomass estimates show a relatively low biomass in the Eureka area because whiting have migrated north after the spring fishery. The commenters assume that the Eureka area had a higher biomass at the time of the fishery, and, therefore, the multiplier is overestimated. Another commenter noted that the 1992 and 1995 hydroacoustic biomass surveys have shown that the 1989 and earlier surveys and biomass estimates missed a substantial offshore biomass. If earlier surveys are corrected for the missing offshore biomass, the exploitation rate in the affected areas would be reduced from what was estimated in 1989.

NMFS agrees that the ''calculation of the exploitation rate by area in the 1989 and 1992 survey years is less precise because the timing of the U.S. fishery changed. In 1989, the at-sea fishery was completed in June, prior to the start of the hydroacoustic survey. The 1989 data indicate a higher exploitation rate in the Eureka area; however, this exploitation rate would overestimate the true rate if there were further northward movement of fish before the survey occurred'' (September 27, 1995, memorandum from Richard Methot to Bill Robinson). NMFS also agrees that hydroacoustic surveys prior to the 1992 survey likely missed a substantial biomass offshore of the survey area. The United States and Canada, pursuant to the negotiation of a U.S.-Canadian bilateral whiting allocation, have tasked a joint technical team to develop an offshore expansion factor that can be applied to survey results between 1977 and 1989 to correct the survey results for the unsurveyed biomass. Thus, NMFS agrees that the 1.375 multiplier used by NMFS in its proposed quantification of the Makah whiting entitlement might later be shown to be too high. NMFS notes, however, that in 1989, 51 percent of the catch came from the Eureka area, not the 2 percent claimed by the commenter.

The Makah comments claim that recent ''allocations to shore-based processing facilities have had the effect of concentrating the harvest in the vicinity of those facilities,'' presumably resulting in higher exploitation rates in areas smaller than the Eureka INPFC area. The Makah comments go on to say that ''NMFS has made no effort to evaluate the extent to which exploitation rates in areas the size of the Makah fishing grounds have deviated from the average'' and that this type of calculation could be used as a basis for a larger expansion factor. NMFS agrees that it has not developed exploitation rate data for any specific small areas of the coast, including the Makah U&A. The 1.375 multiplier used by NMFS was calculated using the larger INPFC catch reporting and stock assessment areas. NMFS agrees that calculations using smaller areas, if possible, could result in an expansion factor larger than 1.375. As stated earlier, a major reason that NMFS is implementing the 15,000-mt compromise for 1996 is to provide additional time to deal with the extremely complex task of relating the

biology, migration, and conservation of Pacific whiting to the legal principles necessary to establish a treaty-based allocation that is consistent with the ''conservation necessity principle.''

One commenter argued that since the average whiting catch taken from the Makah U&A is 9.9 percent of the U.S. harvest guideline, the Makah should be allocated no more than 4.95 percent of the U.S. harvest guideline (50 percent of 9.9). This is the allocation method (based on historical harvest) used for halibut in *Makah* v. *Brown*. Since the historical halibut harvest in the Tribe's U&A was allowed to greatly exceed the biomass, the court assumed that it reflected a safe level of harvest. For whiting, the historical harvest and biomass in the U&A are roughly equivalent. However, NMFS has no evidence that a somewhat higher level of harvest from the U&A cannot be accommodated without triggering conservation concerns. Thus, basing the allocation on historical harvest in the U&A does not properly take into account the ''conservation necessity principle''.

Another commenter argued that the Makah allocation should be based only on the proportion of the biomass found in the Tribe's U&A. This argument was rejected in *Makah* v. *Brown*, specifically because it did not take into account the ''conservation necessity principle.'' In making the allocation to the Makah, NMFS must, by law, take into account the ''conservation necessity principle.'' How to apply the ''conservation necessity principle'' to the biology of whiting is a complex and difficult issue over which NMFS and the Makah do not agree. NMFS is implementing the 15,000-mt compromise proposal to afford more time for NMFS to consult with other Federal agencies, the Tribes, and the States to resolve this issue.

One commenter argued that due to the migratory behavior of whiting, they are available in the Makah U&A only 7 months of the year. As a result, the commenter proposed that the Makah treaty entitlement be 50 percent of 7/12 of the biomass in the Makah U&A. NMFS disagrees. There are no precedents in treaty law pertaining to either Pacific halibut or salmon that use seasonality as a discounting factor in determining the treaty entitlement. Pacific salmon, for example, may be available in a tribe's U&A for only a portion of the year, but that has never reduced the tribal share. The best available information regarding the amount of whiting in the tribal U&A are the triennial hydroacoustic surveys, which likely measure the maximum biomass in the area since the survey occurs at the peak of the northward summer migration.

The Makah in their comments also raise the issue of migration in the context of asserting that dense concentrations of whiting occur both south and north of the Makah U&A and may either move in and out or pass through the Tribe's area during the course of their northerly migration. As mentioned above, other than the triennial survey, there is little or no data regarding the proportion of whiting that pass either through or offshore of the Makah U&A during other times of the year or during the northerly migration. Based on recent surveys that have identified substantial biomass offshore of what was once thought to be the range of whiting biomass, it is reasonable to conclude that a significant proportion migrates seaward of (outside) the tribal area. However, the triennial survey remains the only quantitative estimate to date, and should be considered the best available information.

NMFS continues to believe that the appropriate method to quantify the Makah whiting treaty entitlement is to rely on biomass and harvest estimates for Pacific whiting, which are the only data available, and to base the Makah treaty entitlement on the whiting biomass in the Makah U&A, taking into account the conservation necessity principle. *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.

Makah Indian Tribe v. *Brown*, No. C85–160R, and *United States* v. *Washington*, Civil No. 923—Phase I, Subproceeding No. 92–1 (W.D. Wash., Order on Five Motions Relating to treaty Halibut Fishing, Dec. 29, 1993).

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.

The Makah Tribe has not stated what it believes is the appropriate method to use in quantifying the treaty right. The Makah initially proposed an allocation that would result in their harvesting up to approximately 25 percent of the total U.S. harvest guideline in the Makah U&A. After further discussions with NMFS, the Makah made a compromise proposal for an allocation of 15,000 mt for 1996.

The Makah comments on the proposed rule do not offer a definitive method of quantifying the tribal treaty right, but instead focus on criticizing the basis for the NMFS proposed method. The Makah agree that their treaty right affords the tribe the opportunity to take 50 percent of the harvestable surplus in their U&A grounds and that the harvestable surplus must be determined in accordance with the conservation necessity principle. The Makah argue that, before NMFS can limit the Tribe's harvest, NMFS must demonstrate that its determination of the harvestable surplus ''is required to prevent demonstrable harm to the actual conservation of fish.'' See, *United States* v. *Washington*, 384 F. Supp. 312, 415 (W.D. Wash., 1974). The Makah claim that NMFS has not demonstrated that it is necessary for conservation to limit the harvest in the Makah area to the amount set by the NMFS' formula. The Makah also claim that NMFS has not applied the same management principle it invokes for the Tribe's fishery to non-treaty fisheries.

NMFS' proposal, described in detail in the proposed rule, is to quantify the Tribe's treaty right by a method that is linked to the biomass within the Tribe's U&A grounds (9.4 percent of the U.S. portion of the biomass), enlarged by a multiplier, currently estimated as 1.375, which represents an estimate of the highest harvest level that can be sustained over the long term without raising conservation concerns. 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. NMFS believes that 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.

If the quantification of the treaty right were based solely on the Makah arguments that NMFS must show demonstrable harm to resource before limiting the Makah harvest, given the biology and biomass distribution of whiting, the Makah could logically argue that the treaty right entitled the tribe to 50 percent of the entire coastwide harvest (between Central California and the U.S.-Canadian border) despite the fact that only about 10 percent of both the biomass and the historical harvest occur within the Makah U&A. NMFS does not believe

that this is an appropriate application of the conservation necessity principle for the purpose of determining a treaty entitlement, because it does not take into account the amount of fish available in the U&A and would shift the distribution of a large proportion of the coastal harvest into the Makah U&A, which is a small geographical area (approximately 8.4 percent of the Columbia/Vancouver INPFC areas where most of the whiting harvest occurs).

As stated in the proposed rule, NMFS believes that a high degree of harvest concentration creates a conservation concern if (1) it involves a large fraction of the total harvest, (2) it is a large deviation from the average harvest rate for the fishing area, and/or (3) it will occur indefinitely. Although data are not presently available that would allow NMFS to evaluate exactly the biological effects of the Makah proposal, it raises all three of these concerns.

NMFS acknowledges that many difficult questions have been raised, and that there is much uncertainty regarding what is a complex and difficult technical and legal issue. NMFS believes that allocating 15,000 mt of whiting to the Makah for 1996, although a compromise, provides both a reasonable accommodation of the treaty right and additional time for NMFS to work with other Federal agencies, the States, and the tribes to resolve these issues. Because the 15,000 mt allocated to the Makah for 1996 is not significantly greater than the quantity of fish NMFS would have allocated in 1996 under its own proposal (13,800 mt), NMFS believes that the compromise is within the range of the treaty right. NMFS intends to seek resolution of the treaty right quantification issue either through continued discussions with the tribes or in the context of the recent subproceeding 96–2 in *United States* v. *Washington*.

Three commenters supported the 15,000-mt compromise allocation for 1996.

Economic Impacts on Non-Indian Fishers, Processors and Coastal Communities

Four commenters claimed that the framework for allocating groundfish to the tribes and the proposed allocation of Pacific whiting to the Makah would have a significant economic impact on a substantial number of small entities. The commenters estimated that an allocation of between 13,800 and 25,000 mt would reduce the shoreside processing season by 6 to 13 days, which would reduce revenues and employment at shoreside processing plants. One commenter claimed that decreasing the whiting available to the non-Makah fishing industry will adversely impact other groundfish fisheries as a result of transfer of effort to other groundfish species.

NMFS agrees that any allocation of groundfish to the treaty tribes comes at the expense of the fully-utilized non-Indian groundfish industry. The framework procedures implemented by this rule, however, do nothing more than establish the steps by which NMFS implements treaty rights. It determines neither which species will be allocated to the tribes, nor the specific amounts of groundfish to be allocated. As such, the framework procedures have little or no economic impact. At the time that NMFS determines the specific treaty entitlement for each groundfish species, it will assess the economic impacts of the allocation. However, treaty Indian rights are ''other applicable law'' with which Magnuson Act regulatory actions must be consistent.

Allocating 15,000 mt of Pacific whiting to the Makah reduces the non-Indian harvest guideline by about 7 percent. That economic impact, which is divided among the at-sea and shoreside catching and processing sectors and must be considered in the context of fisheries income from non-whiting species during the remainder of the year, is not likely to be significant relative to any single fishing business in 1996. As discussed in the EA/RIR/IRFA, due to a substantial increase in harvestable biomass, all industry sectors will catch and process more whiting in 1996 than during 1995, and this is expected to extend several years into the future. To the extent that other coastal treaty tribes develop a whiting fishery in the future, and depending on how the treaty right to whiting is ultimately quantified, future allocations to the treaty tribes may have a significant economic impact on the non-Indian whiting industry.

Other Species

Six commenters argued that NMFS must conduct a formal consultation under Section 7 of the ESA to take into account a localized fishery of a significant nature that could incidentally harvest endangered species of salmon. NMFS conducted a formal Section 7 consultation for the Pacific Groundfish FMP and issued a biological opinion dated August 28, 1992, that 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. Subsequent reinitiations of the consultation on September 27, 1993, and May 15, 1996, reached the same conclusion. Allocating 15,000 mt of whiting to the Makah for 1996 only does not increase the total U.S. whiting harvest, nor will it result in a whiting catch in the Makah U&A any greater than has occurred periodically in the past. Thus, the impacts on listed salmon species are not likely to be different from those assessed in the current biological opinion.

One commenter expressed concern about stocks of salmon that are subject to management under the Pacific Salmon Treaty, particularly Fraser River salmon stocks. The most abundant Fraser River salmon stocks are sockeye and pink salmon. The salmon bycatch in the whiting fishery is predominantly chinook salmon with some pink salmon during odd-numbered years. Fraser River chinook salmon are far-north migrating stocks which are not abundant in areas where the U.S. whiting fishery occurs, including the Makah U&A. Some Fraser River pink salmon may be taken incidentally during odd-numbered years, but the numbers are not significant. The tribal fishery approved for 1996 should not have impacts greater than what has occurred in the past.

One commenter claimed that the NMFS proposal to manage rockfish under the limited entry trip limit regime (until such time a treaty entitlement and allocation is determined) does not limit the tribal rockfish catch to the amount that can be safely landed from the tribal U&A. The Makah will begin to fish whiting for the first time in 1996. Based on the allocation of 15,000 mt of whiting to the Makah, it is not likely that Makah fishermen will utilize more than two or three trawl vessels to harvest their allocation. Those tribal vessels may also land rockfish when the Makah whiting fishery is closed. NMFS does not believe that three additional fishing vessels landing rockfish under the relatively restrictive limited entry trip limit regime will result in rockfish catches in excess of what can be safely allowed to occur. The fishery is managed under an overall harvest guideline that is designed to protect the stocks. This fishery will operate within that harvest guideline.

Finally, one commenter asserted that there was ''no assurance of the assumption the tribal fisheries will abide by limited entry fishery-trip limit regime(s) for other species.'' NMFS has received assurances from the tribes that tribal fisheries for non-whiting groundfish species with harvest

guidelines and/or trip limits under the limited entry fishery trip limits will abide by those trip limits. NMFS knows of no evidence that the coastal treaty tribes have condoned fishing in violation of either tribal or Federal regulations at any time or for any species.

Secretarial Action

NMFS, acting on behalf of the Secretary, allocates 15,000 mt of Pacific whiting to the Makah Tribe in 1996.

Classification

The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), has determined that this final 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) 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 which the Makah have agreed to manage under the current limited entry trawl-trip limits, and for the allocation of 15,000 mt of whiting to the Makah for 1996. On the basis of the EA, the Assistant Administrator concluded that there would be no significant impact on the environment.

NMFS prepared an initial regulatory flexibility analysis as part of the regulatory impact review, which describes the impact of this rule on small entities. That analysis concluded that the allocation of 15,000 mt of Pacific whiting to the Makah in 1996 would result in a decline in whiting revenue to the non-Indian participants in the whiting fishery that would represent between 1 and 3 percent of total gross fishing revenues from all fishing activities. Based on that analysis, the Assistant Administrator determined that neither the framework nor the 15,000-mt whiting allocation to the Makah would have a significant economic impact on a substantial number of small businesses. The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities. Therefore a final regulatory flexibility analysis was not required.

This final rule has been determined to be not significant under E.O. 12866. The proposed rule on this matter was determined to be significant under E.O. 12866. However, after OMB review of the proposed rule and discussions with the Department of Commerce and the Department of the Interior, it was determined that this final rule is not significant under E.O. 12866.

The Director, Northwest Region, NMFS, initially determined that the proposed rule was consistent with applicable state coastal zone management programs, as required. The initial determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. The State of Oregon concurred with the determination, the State of Washington had no comments, and the State of California did not respond so its concurrence is inferred.

A formal section 7 consultation under the ESA was concluded for the Pacific Coast Groundfish FMP. In a biological opinion dated August 28, 1993, and subsequent reinitiations of consultation dated September 27, 1993, and May 15, 1996, the Assistant Administrator 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 rule is within the scope of those consultations.

The 15,000-mt whiting allocation to the Makah in 1996 must be implemented by June 1, 1996, to assure there is enough whiting available to accommodate the tribal allocation without exceeding the U.S. annual harvest guideline. The U.S. whiting harvest guideline currently is divided 60 percent for all fishing vessels and 40 percent for vessels that deliver whiting to shore-based processing plants. The Makah whiting allocation must be deducted from the overall harvest guideline to determine the appropriate allocation for the all-vessel and the shore-based fishery. The fishery for all vessels began May 15 and it is expected that the 60 percent allocation will be reached by June 1. This rule must be effective by June 1 so that the fishery for all vessels can be closed before it exceeds its revised allocation. Therefore, NMFS finds good cause pursuant to 5 U.S.C. 553(d)(3) to implement this rule by June 1, 1996, rather than delaying effectiveness for 30 days after publication in the Federal Register.

List of Subjects in 50 CFR Part 663

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: May 31, 1996.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

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

PART 663—PACIFIC COAST GROUNDFISH FISHERY

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

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

2. In § 663.2 the definition for ''commercial harvest guideline or commercial quota'' is added, 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; when taking and retention is prohibited under § 663.23(b)(4)(iv), fail to keep the trawl doors on board the vessel and attached to the trawls on a vessel used to fish for whiting.

* * * * *

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.-

Canadian 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 lb (45.36 kg) 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 in paragraphs (c)(1) through (c)(4) of this section. Boundaries of a tribe's fishing area may be revised as ordered by a Federal court.

(1) *Makah*—That portion of the FMA north of 48°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. The Secretary recognizes the sovereign status and co-manager role of Indian tribes over shared Federal and tribal fishery resources. Accordingly, the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.

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

(f) A limited entry permit under subpart C 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.-Canadian 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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50 CFR Part 663

[Docket No. 951227306–6117–02; I.D. 053096A]

Pacific Coast Groundfish Fishery; Whiting At-Sea Processing

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

ACTION: Fishing restrictions.

SUMMARY: NMFS announces the prohibition of further processing at sea of Pacific whiting at 1200 hours (local time) on June 1, 1996, based on its projection that 60 percent (118,200 metric tons (mt)) of the 1996 commercial harvest guideline for Pacific whiting will have been harvested by that time. This action is authorized by the Pacific Coast Groundfish Fishery Management Plan and is necessary to provide adequate amounts of whiting for shoreside processors and to achieve the allocations adopted for 1996.

EFFECTIVE DATE: May 31, 1996, through 2400 hours (local time) May 14, 1997.

ADDRESSES: Submit comments to William Stelle, Jr., Director, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way NE., BIN-C15700, Seattle, WA 98115–0070.

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

SUPPLEMENTARY INFORMATION: On April 13, 1994, NMFS issued regulations (59 FR 17491) to allocate annually the U.S. Pacific whiting harvest guideline in the years 1994 through 1996 between fishing vessels that either catch and process at sea or catch and deliver to at-sea processors (the at-sea sector) and fishing vessels that catch and deliver to processors located on shore (the shore-based sector). In each year, after 60 percent of the annual harvest guideline (or quota) for Pacific whiting has been or is projected to be taken, further at-sea processing of Pacific whiting in the exclusive economic zone is prohibited. This provision was modified in 1996 by a rule that established a framework to implement the Washington coastal Indian tribes' treaty rights to harvest Pacific groundfish. That rule also allocated 15,000 mt of whiting to the Makah Indian Tribe for 1996. The tribal allocation is subtracted from the harvest guideline to derive the ''commercial harvest guideline.'' When 60 percent of the commercial harvest guideline is projected to be taken (by both at-sea and shore-based sectors), at-sea processing of whiting is prohibited. The remaining 40 percent of the commercial harvest guideline is reserved initially for harvest by vessels delivering to shore-based processors. The regulations require that the Assistant Administrator for Fisheries, NOAA, announce in the Federal Register when 60 percent of the commercial harvest guideline 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 most recent catch data available on May 31, 1996, indicate that approximately 96,000 mt of Pacific whiting have been harvested through May 28, 1996, and 60 percent (118,200 mt) of the 197,000–mt commercial harvest guideline for Pacific whiting is projected to be reached by 1200 hours (local time) on June 1, 1996.

Secretarial Action

For the reasons given above, and in accordance with 50 CFR 663.23(b)(4)(i) and (iv), after 1200 hours (local time) on June 1, 1996, at-sea processing of Pacific whiting is prohibited (except for Pacific whiting that was on board the processing vessel prior to that time), and the taking and retaining, or receiving (except as cargo) of Pacific whiting by a vessel in the fishery management area with processed whiting on board is prohibited. Any vessel used to fish for whiting for processing at sea must have its trawl doors on board and attached to the trawl (50 CFR 663.7(o)).

Classification

The determination that 60 percent of the commercial harvest guideline is about to be harvested is based on the most recent data available. The aggregate data upon which the determination is based are available for public inspection at the Office of the Director, Northwest Region (see **ADDRESSES**) during business hours. This action is taken under the authority of 50 CFR 663.23 (b)(4)(i), and is exempt from review under E.O. 12866.

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

Dated: May 31, 1996.

Richard W. Surdi,

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

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