

Tribal Incidental Take of Pinnipeds

External Talking Points and Q&A¹

BACKGROUND

When Western Washington tribes exercise their treaty right to fish, this includes the practice of deterring California and Steller sea lions and harbor seals from interfering with treaty fishing, gear, and catch. In 2013, the Northwest Indian Fisheries Commission (Commission) and several of its member tribes completed development of a model regulation addressing the interaction of treaty fishing operations with marine mammals in the Salish Sea and along the Washington Coast. The regulation allows non-lethal deterrence of California and Steller sea lions and harbor seals and, in some instances, lethal take. Numerous tribes have adopted versions of the model regulation. The Commission and several tribes communicated with NOAA Fisheries during development of the model regulation, and included provisions for government-to-government information sharing and coordination between tribal and NOAA Fisheries officials. NOAA Fisheries appreciates their coordination and is currently working with the tribes and Commission on annual reporting for interactions between tribal fishers and marine mammals, as the model regulation calls for.

TALKING POINTS/KEY MESSAGES

- Fish are a main part of Western Washington tribal culture and diet. Since time immemorial, tribal fishers have harvested salmon in the waters of western Washington and protected their catch and gear from seals and sea lions.

¹ For internal use by NOAA Fisheries West Coast Region, Office of Law Enforcement, and General Counsel staff in responding to external inquiries regarding tribal lethal take of pinnipeds in fisheries. This document was developed in cooperation with the Puget Sound, Strait of Juan de Fuca, and Washington Coast Treaty Tribes and the Northwest Indian Fisheries Commission on July 24, 2018.

- As sovereign governments and responsible natural resource co-managers, the treaty tribes are working with NOAA Fisheries to effectively manage interactions of their tribal fishers with marine mammals.
- Between 1854 and 1856, 21 Indian Tribes in western Washington signed treaties with the U.S. government to reserve their right to fish in traditional areas.
 - In the landmark ruling under *U.S. v. Washington*, Judge George Boldt re-affirmed the tribes' right to take half of the harvestable salmon returning to western Washington waters
- Western Washington tribes interpret their treaty right to fish to protect traditional fisheries, including the practice of deterring marine mammals from interfering with treaty fishing, gear, and catch.
 - Historical tribal fishing activities likely included deterring marine mammals interfering with fishing and gear
 - This includes using lethal force, if non-lethal deterrence is not effective, to protect themselves, their catch, and their gear from California and Steller sea lions and harbor seals
 - In case of an imminent necessity in self-defense or a life-threatening situation, tribal fishers (like non-tribal members) can defend themselves, including through the use of lethal force
- When Congress adopted the 1994 Amendments to the Marine Mammal Protection Act (MMPA), which included the current provisions governing take of marine mammals in commercial fisheries, it expressly included a tribal treaty savings clause.
 - The MMPA's protections have contributed to the recovery of sea lion and harbor seal populations in the Salish Sea and Washington coast, which are at or approaching carrying capacity
 - NMFS published a final rule to delist the eastern population of Steller sea lion under the Endangered Species Act in November 2013. The

western population (west of 144°W longitude in the Aleutian Islands, Alaska) is still listed as endangered

- California and the eastern Steller sea lion and harbor seal populations are healthy and flourishing on the West Coast
- The model regulation authorizes, while seeking to minimize, the lethal incidental take of three marine mammal stocks not listed under the Endangered Species Act or determined to be depleted under the MMPA – California and eastern Steller sea lions and harbor seals.
 - The regulation calls for non-lethal deterrence before lethal action is taken
 - Only California sea lions, Steller sea lions (eastern stock), and harbor seals are subject to lethal take
 - The tribes report through the Northwest Indian Fisheries Commission to NOAA Fisheries on incidental takes of marine mammals resulting in mortality or serious injury, which is intended to provide us with a more accurate understanding of impacts on marine mammal stocks
- NOAA Fisheries will prioritize its limited enforcement resources and our response to incidents involving marine mammal interactions accordingly and will continue to work with state enforcement officers to respond to these incidents.
- NOAA Fisheries Office of Law Enforcement (OLE) has a longstanding policy in the Pacific Northwest of referring enforcement matters involving tribal members back to their respective tribes for disposition, provided the tribe has applicable law in place, and provided the tribe pursues enforcement action in a diligent manner.
 - NOAA Fisheries appreciates the coordination and cooperation with our partner tribal enforcement agencies
 - In some cases a cooperative investigation between NOAA Fisheries OLE and a tribe may be pursued

QUESTIONS AND ANSWERS

Does the MMPA prohibit lethal take of California and Steller sea lions and harbor seals by tribal treaty fishers?

As reflected in the model regulation, Western Washington tribes take the position that the MMPA does not prohibit tribal treaty fishers from defending their gear or catch through lethal take of California and Steller sea lions and harbor seals. NOAA Fisheries recognizes that in the same statute that Congress enacted to regulate the take of marine mammals in commercial fisheries, Congress stated that those statutory prohibitions did not alter any Indian treaties, including those reserving treaty Indian fishing rights (Section 14 of the 1994 Amendments to the MMPA; Public Law No. 103-238; see also Section 2(b)). NOAA Fisheries acknowledges the Tribes' interpretation of the MMPA's provisions. NOAA also values our partnerships with the Western Washington tribes. When an incident involving a tribal treaty fisher is reported, NOAA Fisheries OLE evaluates each incident based on the unique circumstances involved. In most instances, NOAA Fisheries OLE anticipates referring such incidents to the relevant tribal authorities. NOAA Fisheries appreciates the Tribes' coordination with this approach as reflected in the model regulation.

What is NOAA Fisheries' role under the model regulation?

In prioritizing its enforcement efforts, NOAA Fisheries is unlikely to expend its limited enforcement resources to investigate the potential take of marine mammals in tribal treaty fisheries where the Tribe has adopted and is implementing the model regulation. NOAA Fisheries evaluates each incident based on the unique circumstances involved. If NOAA Fisheries OLE receives a report of an incident falling within the model regulation, NOAA Fisheries generally anticipates it would refer the matter to the appropriate tribal enforcement officials.

What is the Western Washington Tribes' role under the model regulation?

Restrictions on the taking of marine mammals under the MMPA are primarily enforced by NOAA Fisheries. Upon referring a matter involving the interaction of tribal treaty fisheries and marine mammals to the appropriate tribal enforcement officials, NOAA Fisheries anticipates the tribal enforcement officials will investigate the report to determine whether the incident is lawful under tribal regulations. NOAA Fisheries also anticipates continued cooperation with tribal resource managers to maintain healthy marine mammal stocks and for the exchange of important data and information, as contemplated in the model regulation.

Wouldn't this action deplete important California and Steller sea lions and harbor seal populations?

Sea lion and harbor seal populations have been healthy and flourishing on the West Coast. While sea lion and seal populations have been increasing, salmon populations have declined steadily because their habitat is being lost faster than it can be restored since the 1980s. Treaty tribal and non-Indian salmon harvests have been reduced by more than 80% over past few decades (NWIFC 2018). From 1975 to 2015, recent research shows that three species of pinnipeds and killer whales are currently eating more salmon than Indian and non-Indian harvest combined (Chasco et al. 2017a; Chasco et al. 2017b). NOAA Fisheries has determined that California sea lions and harbor seals in Washington are at abundant population levels relative to the capacity of their habitat. Abundance of other pinniped species, such as the eastern stock of Steller sea lions, has steadily increased since the 1970s such that it was delisted under the Endangered Species Act in 2013.

Is NOAA Fisheries authorizing or permitting the lethal take of marine mammals?

No, the model regulation developed by the Western Washington tribes will be considered for adoption by tribal governments, not NOAA Fisheries. The model regulation reflects the interest of tribal treaty fishers in defending their gear and catch and responsibly managing and improving science-based management of fisheries and marine mammals. The regulation also calls for Tribes, working through the Northwest Indian Fisheries Commission, to share information with NOAA Fisheries relevant to implementation, which will support our referral of marine mammal incidents to tribal enforcement where appropriate, and will help us understand impacts of the exercise of tribal treaty rights on marine mammal stocks. This is a responsible approach that maintains tribal treaty rights, fulfills our trust responsibility to the Tribes, and provides NOAA Fisheries with information we need to implement the MMPA and fulfill our responsibility of sound scientific management of West Coast marine mammal populations.

If I see an incident, who should I call?

NOAA Enforcement may be reached during business hours at 206-526-6133 or after hours at 1-800-853-1964.

If I have questions about an incident, who should I call?

Please contact Michael Milstein, NOAA Fisheries Communications and External Affairs Branch, at 503-231-6268.

REFERENCES

- Chasco, Brandon E., Isaac C. Kaplan, Austen C. Thomas, Alejandro Acevedo-Gutiérrez, Dawn P. Noren, Michael J. Ford, M. Bradley Hanson, Jonathan J. Scordino, Steven J. Jeffries, Kristin N. Marshall, Andrew O. Shelton, Craig Matkin, Brian J. Burke, and Eric J. Ward. 2017a. Competing Tradeoffs between Increasing Marine Mammal Predation and Fisheries Harvest of Chinook Salmon. Scientific Reports. DOI: 10.1038/s41598-017-14984-8. October 16, 2017.
- Northwest Indian Fisheries Commission. 2018. Tribal Fishing Rights and Interactions with Marine Mammals in Western Washington. Northwest Indian Fisheries Commission. Unpublished document. Lacey, Washington. March 2018.