

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 223**

[Docket No. 991207318-9318-01; I.D. 092799G]

RIN 0648-AG15

Limitation on Section 9 Protections Applicable to Salmon Listed as Threatened under the Endangered Species Act (ESA), for Actions Under Tribal Resource Management Plans (Tribal Plans)

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

ACTION: Proposed rule; request for comments and notice of public hearings.

SUMMARY: The National Marine Fisheries Service (NMFS) proposes to modify the ESA section 9 take prohibitions applied to threatened salmonids by creating a new limitation on those prohibitions. NMFS does not find it necessary and advisable to impose prohibitions on take when impacts on listed salmonids results from implementation of a tribal resource management plan (Tribal Plan), where the Secretary of Commerce (Secretary) has determined that implementing that Tribal Plan will not appreciably reduce the likelihood of survival and recovery for the listed species. Threatened salmonids that are currently subject to ESA section 9(a) take prohibitions which would be modified by the proposal include Snake River spring/summer chinook salmon; Snake River fall chinook salmon; Central California Coast (CCC) coho salmon; and Southern Oregon/Northern California Coast (SONCC) coho salmon. This proposed limitation on take prohibitions would also be available to all other threatened salmonid Evolutionarily Significant Units (ESUs) whenever final protective regulations make the take prohibitions of ESA section 9(a) applicable to that ESU. This rule intends to harmonize statutory conservation requirements with tribal rights and the Federal trust responsibility to tribes.

DATES: Comments on this rule must be received at the appropriate address (see **ADDRESSES**), no later than 5:00 p.m., eastern standard time, on March 3, 2000. Public hearings on this proposed action have been scheduled. See **SUPPLEMENTARY INFORMATION** for dates and times of public hearings.

ADDRESSES: Comments on this proposed rule or requests for information should

be sent to Branch Chief, Protected Resources Division, NMFS, Northwest Region, 525 NE Oregon Street, Suite 500, Portland, OR 97232-2737.

Comments will not be accepted if submitted via e-mail or Internet. See **SUPPLEMENTARY INFORMATION** for locations of public hearings.

FOR FURTHER INFORMATION CONTACT:

Chris Mobley at (301) 713-1401; Garth Griffin at (206) 526-5006; or Craig Wingert at (562) 980-4021.

SUPPLEMENTARY INFORMATION:

Definitions

Indian Tribe - Any Indian tribe, band, nation, pueblo, community or other organized group within the United States which the Secretary of the Interior has identified on the most current list of federally recognized tribes maintained by the Bureau of Indian Affairs.

Tribal rights - Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies.

Tribal trust resources - Those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by fiduciary obligation on the part of the United States.

Purpose

The purpose of this proposed regulation is to provide a mechanism, consistent with both NMFS' obligation to conserve listed species, and with the Government's trust obligations to Indian tribes (tribes), through which NMFS may enable a tribe to conduct tribal trust resource management actions that may take threatened salmonids, without the risk of enforcement challenges that might be brought pursuant to take prohibitions adopted under ESA section 4(d). Existing and proposed section 4(d) regulations apply section 9 "take" prohibitions to all species listed by NMFS and U.S. Fish and Wildlife Service. The limit on take prohibitions would encompass a variety of types of Tribal Plans, including but not limited to, plans that address fishery harvest, artificial propagation, research, habitat or land management. Tribal Plans could be developed by one tribe or jointly with other tribes. Where there exists a Federal court proceeding with continuing jurisdiction over the subject matter of a Tribal Plan, the plan may be developed and implemented within the ongoing Federal court proceeding. In a

Federal Register document proposing ESA section 4(d) regulations for Puget Sound Chinook and certain other threatened ESUs published today in a separate section of this **Federal Register** issue, NMFS describes the review process for plans developed jointly by tribes and states within the context of ongoing Federal Court proceedings.

Background

Pursuant to its obligations under section 4(d) of the ESA to issue regulations that are necessary and advisable for the conservation of threatened species, NMFS issued a final rule on April 22, 1992, that extended section 9(a) take prohibitions to threatened Snake River spring/summer chinook salmon and Snake River fall chinook salmon (57 FR 14653). Take prohibitions for CCC coho salmon were issued in a final rule on October 31, 1996 (61 FR 56138), and for SONCC coho salmon in an interim final rule on July 18, 1997 (62 FR 38479). NMFS extended generic ESA section 9 prohibitions, with limitations provided only for activities covered under section 10 of the ESA, to the Snake River chinook salmon and CCC coho salmon ESUs. The interim final rule for SONCC coho salmon applied the section 9(a) prohibitions against take to conserve SONCC coho salmon, with limitations for a small number of actions in Oregon and California (state research and monitoring activities, and certain habitat restoration, harvest, and artificial propagation activities) that were deemed sufficiently protective of SONCC coho that additional conservation through take prohibitions were not necessary.

This proposed rule would modify the existing take prohibitions by adding a limitation on take prohibitions for activities conducted in accord with a Tribal Plan that the Secretary determines, based on analysis of the impacts of the Tribal Plan on the biological requirements of the species, that the Tribal Plan and actions conducted pursuant to it will not appreciably reduce the likelihood of survival and recovery for the listed species.

Tribal activities have not been identified as major factors contributing to the decline of threatened species. NMFS believes that a Secretarial determination that implementation of a tribal resource plan will not appreciably reduce the likelihood of survival and recovery of an ESU is sufficient that additional Federal protections are not necessary and advisable for activities carried out under those plans. Thus, the existing 4(d) protections for threatened

ESUs will continue to constitute those necessary and advisable to provide for the conservation of the ESUs even with limits on take prohibitions as proposed in this rule. Likewise, the proposed steelhead and chinook 4(d) rules, as modified by this additional limit on take prohibitions, contain those protections that NMFS deems necessary and advisable for the conservation of the threatened ESUs.

Tribal Rights

The United States has a unique legal relationship with Indian tribes as set forth in the Constitution of the United States, treaties, statutes, executive orders, and court decisions. While Congress has plenary authority over tribes, the tribes remain sovereigns, possessing the authority to govern their lands and members within the boundaries of reservation lands. *Worcester v. Georgia*, 31 U.S. 515 (1832); see also *McClanahan v. Arizona State Tax Commission* 411 U.S. 164 (1973); *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1978). Indian tribes are regarded as "domestic dependent nations" and are owed a fiduciary duty of trust by the United States "with moral obligations of the highest responsibility and trust." *Seminole Nation v. U.S.*, 316 U.S. 286, (1942); *U.S. v. Mitchell*, 463 U.S. 206 (1983). The trust responsibility requires the United States to employ a standard of "due care" in its oversight of tribal resources. *U.S. v. Creek Nation*, 295 U.S. 103 (1935). See also *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252 (D.D.C. 1972). The trust responsibility has both procedural and substantive components as articulated in the President's Memorandum on Government to Government Relations with Native American Tribal Governments, (59 FR 22951, April 29, 1994) and Executive Order 13084 of May 14, 1998, on Consultation and Coordination with Indian Tribal Governments, (63 FR 27655, May 19, 1998).

Native people all along the Pacific coast and throughout the Columbia and Snake River basins and the central valley of California have depended upon fish as their primary source of food and economy. For most of these indigenous cultures, the "first salmon" ceremony was an important religious festival and the many tribes engaged in religious rituals to ensure that the life cycle of the salmon, its migration from natal mountain streams to the sea and its return to spawn and die, would remain unbroken. The cultural importance of salmon to most tribes in the Pacific Northwest cannot be

overstated. In signing treaties with the United States, most Indian tribes in the Pacific Northwest reserved their "right of taking fish, at all usual and accustomed places and stations...in common with all citizens..." The Supreme Court once stated that to these tribes the right to fish was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *U.S. v. Winans*, 198 U.S. 371, 381 (1905). The right to fish is reserved to many tribes by treaty, statute, and executive order.

The appropriate exercise of its trust obligation commits the United States to harmonize its many statutory responsibilities with the exercise of tribal sovereignty, tribal rights, and tribal self-determination. In fulfillment of the President's commitment, the Secretary of Commerce instructed all agencies of the Department of Commerce to commit to government-to-government relations with tribal governments (Memorandum of the Secretary, March 30, 1995). NMFS proposes this rule in recognition of the unique legal and political relationships between tribes and the United States, and in keeping with the trust responsibility to Indian tribes, treaty and Executive Order rights, and the President's Memorandum and Executive Order.

NMFS Obligations Under the ESA

Section 4(d) of the ESA provides that the Secretary shall issue such regulations as deemed necessary and advisable to provide for the conservation of threatened species. Whether a protective regulation is necessary or advisable is, in large part, dependent upon the biological status of the species and potential impacts of various activities on the species.

For each of the threatened species that would be immediately affected by this proposed regulation, the Secretary has already adopted the "take" prohibitions of section 9 of the ESA throughout the species' range. The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect (or attempt the above) any listed species. Land management activities could result in injury, harm or death of a listed salmonid. A fishery designed to harvest non-listed fish, no matter how carefully structured through season, gear, and other provisions, could, on occasion, result in injury, harm or death of a listed fish. A research plan may have as its objective the taking of listed fish. Some tribal fisheries are located or timed such that any fishery would take listed fish.

The Secretary administers the ESA within the context of the Federal trust

responsibility, reserved tribal rights, and government-to-government relationships. Therefore, the purpose of this proposed rule is to establish a process that will enable the Secretary to meet the conservation needs of listed species while respecting tribal rights, values and needs.

Procedures

The proposed regulation recognizes and implements the commitment to government-to-government relations made by the President and the Secretary of Commerce. A tribe intending to exercise a tribal right to fish or undertake other resource management actions that may impact threatened salmonids could create a Tribal Plan that would assure that those actions would not appreciably reduce the likelihood of survival and recovery of the species.

The Secretary stands ready to provide technical assistance in examining impacts on listed salmonids and other salmonids to any tribe that so requests, as tribes develop Tribal Plans that meet tribal management responsibilities and needs. In making a determination whether a Tribal Plan will appreciably reduce the likelihood of survival and recovery of threatened salmonids, the Secretary, in consultation with the tribe, will use the best available biological data (including careful consideration of any tribal data and analysis) to determine the Tribal Plan's impact on the biological requirements of the species, and will assess the effect of the Tribal Plan on survival and recovery, consistent with the trust responsibilities and tribal rights described here.

Before making a determination, the Secretary will provide an opportunity for public comment on the question whether the Tribal Plan will affect the biological status of the species in a way that would appreciably reduce the likelihood of its survival and recovery. The Secretary shall publish notification of any determination regarding a Tribal Plan, with a discussion of the biological analysis underlying that determination, in the **Federal Register**.

Public Hearings

NMFS is soliciting comments, information, and/or recommendations on any aspect of this proposed rule from all concerned parties. (see DATES and ADDRESSES). Public hearings provide an additional opportunity for the public to give comments and to permit an exchange of information and opinion among interested parties. NMFS Northwest Region has, therefore, scheduled 15 public hearings throughout the Northwest to receive

public comment on this rule and other 4(d) rules proposed concurrently. Similarly, NMFS' Southwest Region will hold 7 hearings in California. The agency will consider all information, comments, and recommendations received before reaching a final decision on 4(d) protections for these ESUs.

Public Hearings in Washington, Idaho, and Oregon

(1) January 10, 2000, 6:00 - 9:00 p.m., Metro Regional Center, Council Chamber, 600 NE Grand Ave, Portland, Oregon;

(2) January 11, 2000, 6:00 - 9:00 p.m., Quality Inn, 3301 Market St NE, Salem, Oregon;

(3) January 12, 2000, 6:00 - 9:00 p.m., Lewiston Community Center, 1424 Main Street, Lewiston, Idaho;

(4) January 13, 2000, 6:00 - 9:00 p.m., Natural Resource Center, Bureau of Land Management, 1387 South Vinnell Way, Boise, Idaho;

(5) January 18, 2000, 6:00 - 9:00 p.m., City Library, 525 Anderson Ave., Coos Bay, Oregon;

(6) January 19, 2000, 6:00 - 9:00 p.m., Hatfield Science Center, 2030 SE Marine Science Drive, Newport, Oregon;

(7) January 20, 2000, 6:00 - 9:00 p.m., Columbia River Maritime Museum, 1792 Marine Drive, Astoria, Oregon;

(8) January 24, 2000, 6:00 - 9:00 p.m., Eugene Water & Electric Board Training Room, 500 East 4TH Ave. Eugene, Oregon;

(9) January 25, 2000, 6:00 - 9:00 p.m., City Hall, 2nd Floor Council Chamber, 500 SW Dorian Ave., Pendleton, Oregon;

(10) January 26, 2000, 6:00 - 9:00 p.m., Yakima County Courthouse, Room 420, 128 North 2nd St., Yakima, Washington

(11) January 27, 2000, 6:00 - 9:00 p.m., Mid Columbia Senior Center, John Day Room, 1112 West 9th, The Dalles, Oregon;

(12) January 31, 2000, 6:00 - 9:00 p.m., City Hall, Dining Room (Basement), 904 6th St., Anacortes, Washington;

(13) February 1, 2000, 6:00 - 9:00 p.m., Northwest Fisheries Science Center Auditorium, 2725 Montlake Blvd. East, Seattle, Washington;

(14) February 2, 2000, 6:00 - 9:00 p.m., City Hall, Council Chamber, 321 E. 5th, Port Angeles Washington;

(15) February 3, 2000, 6:00 - 9:00 p.m., Sawyer Hall, 510 Desmond Drive, Lacey, Washington;

Public Hearings in California

(1) January 25, 2000, 6:30 - 9:00 p.m., Double Tree (now Red Lion), 1830 Hilltop Drive, Redding, California;

(2) January 26, 2000, 6:30 - 9:00 p.m., Heritage Hotel, 1780 Tribute Rd., Sacramento, California

(3) January 27, 2000, 6:30 - 9:00 p.m., Modesto Irrigation District, 1231 11th St., Modesto, California;

(4) January 31, 2000, 6:30 - 9:00 p.m., Eureka Inn, 518 Seventh St., Eureka, California;

(5) February 1, 2000, 6:30 - 9:00 p.m., Double Tree, One Double Tree Drive, Rohnert Park, California;

(6) February 2, 2000, 6:30 - 9:00 p.m., Best Western, 2600 Sand Dunes Drive, Monterey, California;

(7) February 3, 2000, 7:00 - 9:30 p.m., Embassy Suites, 333 Madonna Rd., San Luis Obispo, California. 7:00-9:30P

Special Accommodations

These hearings are physically accessible to people with disabilities. Requests for sign language interpretation or other aids should be directed to Garth Griffin or Craig Wingert (see **ADDRESSES**) 7 days prior to each meeting date.

Classification

The Chief Counsel for Regulation of the Department of Commerce has certified that this proposed rule would not have a significant economic impact on a substantial number of small entities as described in the Regulatory Flexibility Act. Therefore, a regulatory flexibility analysis is not required.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

Executive Order 13084 - Consultation with Indian Tribal Governments

The United States has a unique relationship with tribal governments as set forth in the Constitution, treaties, statutes, and Executive Orders. In keeping with this unique relationship, with the mandates of the Presidential Memorandum on Government to Government Relations With Native American Tribal Governments (59 FR 22951), and with Executive Order 13084, NMFS has developed this proposed rule in close coordination with tribal governments and organizations. This proposal reflects many of the suggestions brought forth by tribal representatives during that process.

NMFS' coordination during development of this tribal rule has included meetings with tribes and tribal organizations, and individual staff-to-staff conversations. NMFS will schedule more formal consultation opportunities with each potentially affected tribe, to be completed during the first 2 months after publication of this document. Moreover, NMFS will continue to give careful consideration to all written or oral comments received and will

continue its contacts and discussions with interested tribes as we move toward a final rule.

Paperwork Reduction Act

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number.

This proposed rule contains a collection-of-information requirement subject to review and approval by OMB under the PRA. This requirement has been submitted to OMB for approval. Public reporting burden for this collection of information is estimated to average 20 hours per response for tribes that elect to provide a tribal resource management plan that the Secretary may determine will not appreciably reduce the likelihood of survival and recovery of the species. This estimate includes any time required for reproducing, transmitting, and describing the content of the resource management plan.

Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS (see **ADDRESSES**), and to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC. 20503 (Attention: NOAA Desk Officer). Comments must be received by March 3, 2000.

NMFS will comply with the National Environmental Policy Act (NEPA) of 1969. NMFS is currently working on the necessary NEPA documentation and will publish notification of its decision under NEPA prior to issuance of the final rule.

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Fish, Fisheries, Imports, Indians, Intergovernmental relations, Marine mammals, Treaties

Dated: December 22, 1999.

Penelope D. Dalton,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 223 is revised to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.12 also issued under 16 U.S.C. 1361 *et seq.*

2. Section 223.209 is added to read as follows:

§ 223.209 Tribal plans.

(a) *Prohibitions.* The prohibitions of section 9 of the ESA (16 U.S.C. 1538) relating to endangered species apply to the threatened species of salmon listed in § 223.102(a), except as provided in paragraph (b) of this section.

(b) *Limits on the take prohibitions.*

(1) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 do not apply to any activity undertaken by a tribe, tribal member, tribal permittee, or tribal agent in compliance with a Tribal resource management plan (Tribal Plan), provided that:

(i) The Secretary determines that implementation of such Tribal Plan will not appreciably reduce the likelihood of survival and recovery of the listed salmonids. In making that determination the Secretary shall use the best available biological data to determine the Tribal Plan's impact on the biological requirements of the species, and will assess the effect of the Tribal Plan on survival and recovery, consistent with legally enforceable tribal rights and with the Secretary's trust responsibilities to tribes;

(ii) A Tribal Plan may include but is not limited to plans that address fishery harvest, artificial production, research, habitat, or land management, and may be developed by one tribe or jointly

with other tribes. The Secretary will consult on a government-to-government basis with any tribe that so requests, to provide technical assistance in examining impacts on listed salmonids and other salmonids as tribes develop Tribal resource management plans that meet the management responsibilities and needs of the tribes. A Tribal Plan must specify the procedures by which the tribe will enforce its provisions;

(iii) Where there exists a Federal court proceeding with continuing jurisdiction over the subject matter of a Tribal Plan, the plan may be developed and implemented within the ongoing Federal Court proceeding. In such circumstances, compliance with the Tribal Plan's terms shall be determined within that Federal Court proceeding;

(iv) The Secretary shall seek comment from the public on the Secretary's pending determination whether or not implementation of a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the listed salmonids; and

(v) The Secretary shall publish notification in the *Federal Register* of any determination regarding a Tribal Plan and the basis for that determination.

(2) [Reserved]

[FR Doc. 99–33857 Filed 12–30–99; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[I.D. 110599D]

RIN 0648–AL82

**Designated Critical Habitat:
Reproposed Critical Habitat for
Johnson's Seagrass; Extension of
Public Comment Period**

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; extension of public comment period.

SUMMARY: NMFS is extending the public comment period on the reproposed rule to designate critical habitat for Johnson's seagrass (*Halophila johnsonii*).

DATES: The public comment period, which would otherwise close on January 3, 2000, has been extended and now closes on February 2, 2000.

ADDRESSES: Written comments and materials regarding the proposed rule should be directed to Mr. Charles Oravetz, Assistant Regional Administrator, Protected Resources Division, NMFS, Southeast Regional Office, 9721 Executive Center Drive North, St. Petersburg, Florida 33702–2432. Comments will not be accepted if submitted via e-mail or Internet.

FOR FURTHER INFORMATION CONTACT: Layne Bolen, Panama City Laboratory, Protected Resources Division, NMFS, 850–234–6541 ext. 237, layne.bolen@noaa.gov or Marta Nammack, Office of Protected Resources, NMFS, 301–713–1401, marta.nammack@noaa.gov.

SUPPLEMENTARY INFORMATION: On December 2, 1999, NMFS published a reproposed rule to designate critical habitat for Johnson's seagrass under the Endangered Species Act (64 FR 67536). Public comments were solicited, a public hearing was announced, and the comment period was set to expire on January 3, 2000. NMFS is extending the public comment period to end on February 2, 2000, in order to provide at least 60 days for public comment following publication in the **Federal Register**.

Dated: December 23, 1999.

Ann Terbush,

*Acting Director, Office of Protected Resources,
National Marine Fisheries Service.*

[FR Doc. 99–34064 Filed 12–30–99; 8:45 am]

BILLING CODE 3510–22–F