

species of salmonids listed in § 223.102 (a)(12), (a)(13), (a)(16), (a)(17), and (a)(19) do not apply to non-Federal forest management activities conducted in the State of Washington provided that:

(i) The action is in compliance with forest practice regulations adopted and implemented by the Washington Forest Practices Board that NMFS has found are at least as protective of habitat functions as are the regulatory elements of the Forests and Fish Report dated April 29, 1999, and submitted to the Forest Practices Board by a consortium of landowners, tribes, and state and Federal agencies.

(ii) All non-regulatory elements of the Forests and Fish Report are being implemented.

(iii) Actions involving use of herbicides, pesticides, or fungicides are not included within this limit.

(iv) Actions taken under alternative plans are included in this limit provided that the Washington Department of Natural Resources (WDNR) finds that the alternate plans protect physical and biological processes at least as well as the state forest practices rules and provided that NMFS, or any resource agency or tribe NMFS designates, has the opportunity to review the plan at every stage of the development and implementation. A plan may be excluded from this limit if, after such review, WDNR determines that the plan is not likely to adequately protect listed salmon.

(v) Prior to determining that regulations adopted by the Forest Practice Board are at least as protective as the elements of the Forests and Fish Report, NMFS will publish notification in the **Federal Register** announcing the availability of the Report and regulations for public review and comment.

(vi) NMFS finds the activities to be consistent with the conservation of listed salmonids' habitat by contributing to the attainment and maintenance of PFC. NMFS defines PFC as the sustained presence of a watershed's natural habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation. Actions that affect salmonid habitat must not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward PFC. Programs must meet this biological standard in order for NMFS to find they qualify for a habitat-related limit. NMFS uses the best available science to make these determinations. NMFS may review and revise previous findings as new scientific information

becomes available. NMFS will evaluate the effectiveness of the program in maintaining and achieving habitat function that provides for conservation of the listed salmonids. If the program is not adequate, NMFS will identify to the jurisdiction ways in which the program needs to be altered or strengthened. Changes may be identified if the program is not protecting desired habitat functions or where even with the habitat characteristics and functions originally targeted, habitat is not supporting population productivity levels needed to conserve the ESU. If Washington does not make changes to respond adequately to the new information, NMFS will publish notification in the **Federal Register** announcing its intention to withdraw the limit on activities associated with the program. Such an announcement will provide for a comment period of no less than 30 days, after which NMFS will make a final determination whether to subject the activities to the ESA section 9(a)(1) take prohibitions.

(vii) NMFS approval of regulations shall be a written approval by NMFS Northwest Regional Administrator.

(c) *Affirmative defense.* In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section with respect to the threatened species of salmonids listed in § 223.102 (a)(5) through (a)(10), and (a)(12) through (a)(19), any person claiming the benefit of any limit listed in paragraph (b) of this section or § 223.209(a) shall have a defense where the person can demonstrate that the limit is applicable and was in force, and that the person fully complied with the limit at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent. If proven, this defense will be an absolute defense to liability under section (a)(1)(G) of the ESA with respect to the alleged violation.

(d) *Severability.* The provisions of this section and the various applications thereof are distinct and severable from one another. If any provision or the application thereof to any person or circumstances is stayed or determined to be invalid, such stay or invalidity shall not affect other provisions, or the application of such provisions to other persons or circumstances, which can be given effect without the stayed or invalid provision or application.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 223

[Docket No. 991207318-0159-02; I.D. No 092799G]

RIN 0648-AG15

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

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

**ACTION:** Final rule.

**SUMMARY:** The National Marine Fisheries Service (NMFS) is issuing a final rule to modify the ESA section 9 take prohibitions applied to threatened salmon and steelhead. The modification will create a section 4(d) limitation on those prohibitions for tribal resource management plans (Tribal Plans), 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. This rule intends to harmonize statutory conservation requirements with tribal rights and the Federal trust responsibility to tribes.

**DATES:** Effective September 8, 2000.

**ADDRESSES:** Branch Chief, NMFS, Northwest Region, Protected Resources Division, 525 NE Oregon St., Suite 500, Portland, OR 97232-2737; Assistant Regional Administrator, Protected Resources Division, NMFS, Southwest Region, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802-4213; Salmon Coordinator, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Garth Griffin at 503-231-2005; Craig Wingert at 562-980-4021.

#### Electronic Access

Reference materials regarding this final rule can also be obtained from the internet at [www.nwr.noaa.gov](http://www.nwr.noaa.gov).

#### 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 tribes maintained by the

Bureau of Indian Affairs (65 FR 13298, March 13, 2000).

**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.

**Indian lands**—Any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

### Background

For the past decade NMFS has been conducting ESA status reviews for salmon and steelhead throughout the Pacific Northwest and California. To date, these reviews have identified 20 population groups, or “evolutionarily significant units” (ESUs), that warrant threatened status under the ESA. Section 4(d) of the ESA provides that whenever a species is listed as threatened, the Secretary shall issue such regulations (i.e., “4(d) rules”) as he deems necessary and advisable for the conservation of the species. Such 4(d) rules may include any or all of the prohibitions that apply automatically to protect endangered species under ESA section 9(a). Those section 9(a) prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect; or to attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any wildlife species listed as endangered, unless with written authorization for incidental take. NMFS has promulgated ESA 4(d) rules that apply the section 9 take prohibitions to nearly all threatened salmon and steelhead ESUs. In a recent ESA 4(d) rule addressing 14 of these ESUs (i.e., the salmon/steelhead 4(d) rules published elsewhere in this **Federal Register** issue), NMFS determined it is not necessary and advisable to apply the section 9 take prohibitions to specified categories of activities that contribute to conserving listed salmonids or are governed by a program that adequately limits impacts on listed salmonids.

NMFS also determined it is not necessary or advisable to prohibit activities associated with Tribal resource management activities when those activities conserve listed salmonids or adequately limit impacts on listed salmonids. NMFS accordingly proposed a parallel ESA 4(d) rule for Tribal Plans (i.e., a tribal plan limit) (65 FR 111, January 3, 2000). In that proposal, NMFS announced a process whereby a tribe could conduct tribal trust resource management actions that may take threatened salmonids, without the risk of violating take prohibitions adopted under ESA section 4(d). Eligibility for such limits on take prohibitions would require a determination by the Secretary that implementing a specific Tribal Plan will not appreciably reduce the likelihood of survival and recovery of the listed species. The purpose of this 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, and not causing an abridgement of any treaties, rights, executive orders, or statutes. 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, or water 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.

This final rule acknowledges that 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. The appropriate exercise of its trust obligation commits the United States to harmonize its many statutory responsibilities with the tribal exercise of tribal sovereignty, tribal rights, and tribal self-determination. NMFS believes that this final rule recognizes the unique legal and political relationships between tribes and the United States, and is in keeping with the trust responsibility to Indian tribes. Furthermore, NMFS believes that additional Federal protections are not needed for activities carried out under those Tribal Plans deemed by the Secretary to not appreciably reduce the likelihood of survival and recovery of an ESU.

### Summary of Comments and Information Received in Response to the Proposed Rule

Between January 10 and February 22, 2000, NMFS held 25 public hearings in Washington, Oregon, Idaho, and California to allow for public testimony and to discuss the proposed tribal plan limit and salmon/steelhead ESA 4(d) rules. The agency also requested comments from all interested parties and conferred with affected tribes throughout the Pacific Northwest and California. The agency received approximately 20 written comments pertaining to the proposed tribal plan limit. New information, comments, and responses are summarized here. Copies of references, reports and related documents are available upon request (see **ADDRESSES**).

**Comment 1:** Numerous tribal commenters addressed the issue of government-to-government consultation. Commenters cited concerns that consultation had not occurred during the development of the tribal plan limit and salmon/steelhead ESA 4(d) rules and underscored the need for NMFS to consult with tribes as these rules are implemented.

**Response:** Throughout the development of the tribal plan limit and salmon/steelhead ESA 4(d) rules NMFS has made a concerted effort to notify and confer with tribal representatives and technical staff throughout the Pacific Northwest and California. Contact regarding these rules began before December 1998, when a draft steelhead ESA 4(d) rule was submitted for review to affected tribes well in advance of the proposed rules. During a 2-year period, NMFS coordinated and attended a number of meetings and working sessions with tribal governments and representatives (including staff from inter-tribal fisheries commissions) to discuss particular aspects of the rules. These meetings allowed NMFS to develop proposed ESA 4(d) rules that the agency believes address a wide range of issues highlighted by the tribes. Since publication of the proposed 4(d) rules NMFS and tribal staffs and tribal council members have met to discuss these rules.

NMFS recognizes the need to work closely with the tribes of the region to develop and improve upon information exchange and consultation opportunities relating to salmon and steelhead conservation. Since beginning work on these ESA 4(d) rules, NMFS' Northwest Region has added a tribal liaison position to its staff to focus on improving communications with the

tribes and developing consultation procedures that will meet both NMFS and tribal needs. It is the agency's intent to continue working with tribal governments to develop regularly scheduled meetings between NMFS and tribal technical staff and policy makers to provide more timely notice regarding NMFS' activities and to discuss how consultation might occur for future fisheries issues and ESA rulemaking.

There remains the opportunity for the tribes and the agency to hold future discussions on application of the ESA 4(d) rules. Such future discussions can include the identification of cultural/economic issues requiring the agency's attention and ideas on how such analyses should be conducted. In response to tribal requests, NMFS will correspond with each commenting tribal government, clarify how its comments were addressed, and identify the need for additional meetings to discuss potential amendments and/or modifications to the rules.

*Comment 2:* Many commenters challenged the basis for a Secretarial review of Tribal Plans. Their comments ranged in scope from questioning the appropriateness of Secretarial review and public notification (e.g., the disclosure of confidential tribal information), to specific comments on Tribal Plan contents, standards and time frames. One commenter suggested that the time period covered by a Tribal Plan be fixed (e.g., a 1-year plan with annual reviews) while another suggested that the period covered by the plan be similar to that for ESA section 10 Habitat Conservation Plans (HCPs), which can extend for a number of years. Another commenter suggested that the scope covered by the tribal plan limit be expanded (e.g., to include all listed species and ESUs versus the four stocks specifically identified in the Tribal 4(d) proposed rule's Summary Section).

Some commenters addressed the Secretarial review process, in particular the need to take into account the impacts of non-tribal activities on the listed species so that any assessment of Tribal Plans would accurately assess impacts that are beyond tribal control. After such review has been completed, and if a Tribal Plan was found to be insufficient, some commenters stated the Secretary should provide specific comments to the affected tribe(s) so that they have an opportunity to respond. These and other commenters noted that NMFS has an obligation to abide by Principle 3(C) (i.e., the "Conservation Necessity Principle") of the June 1997 Secretarial Order No. 3206 entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities,

and the Endangered Species Act" (Secretarial Order). Additionally, some commenters suggested the Secretarial review have specific time constraints (e.g., 60 days) so tribes could plan on implementing approved actions in a timely manner.

*Response:* The nature of some of these comments suggests a general misunderstanding regarding the purpose of Secretarial review. Secretarial review will determine if implementation of the plan will appreciably reduce the likelihood of survival and recovery of the listed species. The Secretary will not review the Tribal Plan to determine adequacy of meeting tribal goals and objectives. A determination that an action may or may not reduce the likelihood of survival or recovery will be made in the context of the operative environmental conditions at the local (site-specific) and ESU levels. There are legitimate concerns about disproportionate conservation requirements being placed on the tribes when surrounding non-Indian lands are in extremely degraded conditions. These concerns are addressed in other comments/responses in this document.

NMFS respectfully disagrees with the suggestion that tribes should have the ultimate responsibility for making a determination that a Tribal Plan will not appreciably reduce the likelihood of survival and recovery of threatened salmon or steelhead. This determination cannot be delegated by the Secretary to a tribal government. However, NMFS agrees that in making the determination it must work closely with the tribes to determine the level of impact, if any, on threatened species. As suggested by one tribal commenter, this means the Secretary shall consider data and analysis provided by the tribe and shall defer, where appropriate, to the tribe's conclusion that a Tribal Plan does not appreciably reduce the likelihood of survival and recovery of the species. If the Secretary determines a Tribal Plan should be modified, the tribe will be informed as soon as possible with a detailed explanation of what changes are recommended and the reason for the changes.

It is NMFS' view that, given the sovereign status of the tribes it is inappropriate to describe in this final rule the specific qualifying criteria for Tribal Plans. The plans will be held to the same fundamental ESA standard as any other activity, and will be evaluated consistent with principles outlined in the Secretarial Order. NMFS will work with tribes to the maximum extent practicable to craft plans that will meet the needs of listed species and accomplish the goals of the tribes.

Furthermore, NMFS recognizes, as stated in the Secretarial Order, that it has a trust obligation to minimize impacts on tribes as much as possible while still meeting agency responsibilities under the ESA.

With respect to reporting requirements, NMFS believes it would be inappropriate to require a specific time period for all Tribal Plans, and instead prefers to allow tribes to suggest schedules that meet their needs. Also, it is not feasible to place mandatory time limits on the Secretary's review since the Tribal Plans themselves will likely vary considerably in size and complexity. Regarding the scope of the tribal plan limit, the proposed rule states this rule would apply to all existing and future listings of threatened salmonids promulgated by NMFS "whenever final protective regulations make the take prohibitions of ESA section 9(a) applicable" to the particular species/ESU.

Finally, regarding the process for public notification, NMFS is obliged to make public the determinations made under section 4 of the ESA. This is in contrast with other statutory provisions (e.g., ESA section 7 consultations) that do not include public review and comment processes. If the tribes elect to develop and submit plans under the tribal plan limit, the pending determination of the Secretary regarding survival and recovery of listed species is subject to public review and comment. However, public notification will focus on those features of a Tribal Plan needed to understand the Secretary's pending determination and NMFS will take all appropriate actions to ensure confidential information is protected to the maximum extent possible under applicable law. Furthermore, the public notification process will focus on the Secretary's pending decision, not on the Tribal Plan. In other words the agency will consider only those comments concerning the adequacy of the Secretary's pending determination that a Tribal Plan will or will not result in an appreciable reduction in the likelihood of survival and recovery.

*Comment 3:* While a number of commenters questioned the applicability of the ESA to tribal actions, other commenters contended that the tribal plan limit fails to meet the standards necessary for compliance with the ESA. Several commenters reminded NMFS of its trust relationship with tribal governments and the need to comply with existing judicially mandated procedures/processes (e.g., harvest issues) concerning trust resource management. One commenter questioned the applicability of the rule

to "all Federally recognized tribes" and expressed concern that the agency would be in the position of expanding "off-reservation rights."

*Response:* The tribal plan limit was developed to be consistent with the agency's obligation to conserve listed species under the ESA and meet trust obligations to Indian tribes. NMFS concludes this final rule responds to both mandates, but it is clearly the prerogative of any tribe to choose whether to submit a Tribal Plan for review under the tribal plan limit. By meeting its responsibility under ESA, in conjunction with obligations under the Secretarial Order, NMFS can meet its trust responsibilities to the tribes while improving the condition of salmon, steelhead, and other trust resources as well. NMFS is fully cognizant of these trust responsibilities and notes that the agency routinely consults with affected tribes on harvest and hatchery actions via section 7 of the ESA. This occurs in court mandated procedures such as *U.S. v. Oregon* and *U.S. v. Washington*, as well as for actions not covered by judicial requirements.

The unique political and constitutional relationship between the United States and Indian tribes as described in this rule involves Federally recognized tribes. It would be inappropriate to base the tribal plan limit's applicability on some other characteristic such as possession of off-reservation fishing rights. The agency's compliance with the ESA, the Secretarial Order, and its trust obligations to the tribes will not expand any rights held by the tribes. Those rights and authorities exist by virtue of the tribe being a sovereign entity; NMFS does not have the ability to limit or expand them.

*Comment 4:* A number of commenters expressed views regarding tribal treaty rights, tribal impacts on listed species, and the conservation burden placed on both tribal and non-tribal entities. While some commenters were concerned the tribal plan limit may give the tribes a "blank check" to conduct activities as they please, others were concerned the rule may infringe upon pre-existing tribal rights (e.g., fishing and water rights). Some commenters agreed that NMFS needs to find a way to harmonize ESA and tribal trust responsibilities, in particular relating to issues concerning terminal fisheries (i.e., fisheries typically occurring near river mouths or hatchery release sites where the targeted species is returning to spawn) and harvest/hatchery management. Other commenters stated they did not agree with NMFS' assertion that tribal actions

have not been major factors contributing to the decline of salmon and steelhead.

*Response:* NMFS believes that by meeting its responsibilities under the ESA, in conjunction with the obligations under the Secretarial Order, it will not only meet its trust responsibilities to the tribes, but improve the status of trust resources. It is the agency's intent to continue working with the tribes to identify how best to meet these responsibilities without infringing upon pre-existing tribal rights. Similarly, NMFS believes this rule will assist the agency in ensuring there is not a disproportionate conservation burden placed on either tribal or non-tribal parties. As noted previously in this document, NMFS expects an equitable balance can be achieved by holding all parties to a standard that supports the concepts of viable salmonid populations and properly functioning habitat conditions.

NMFS disagrees with comments suggesting the tribal plan limit will provide a "blank check" to the tribes to conduct activities that may affect listed species. Although the tribes and Federal government maintain a unique relationship, NMFS has an important role in administering the ESA. This includes reviewing Tribal Plans to assess and determine that proposed actions do not appreciably reduce the likelihood of survival and recovery.

NMFS strongly concurs that tribes in terminal fisheries areas are placed at a significant disadvantage when they attempt to exercise their treaty or trust rights to harvest fish. The majority of salmon or steelhead harvested in these fisheries are likely to be listed under the ESA, offering little or no opportunity to pursue a NMFS authorization for incidental take. It is difficult to characterize such harvest as "incidental" take. This is in contrast to harvest that occurs in fisheries in which listed fish intermingle with unlisted fish ("mixed-stock fisheries"). This issue was an important motivation for NMFS to develop the tribal plan limit. Adoption of this limit will enable NMFS to authorize tribal harvest in terminal fisheries, so long as NMFS concludes that harvest will not impair the survival and recovery of the listed ESU. Tribes exercising their rights to fish will no longer be held to a different standard than others who have opportunities to harvest fish in mixed-stock fisheries, or who take listed fish when conducting other non-harvest activities.

Finally, in stating that "[T]ribal activities have not been identified as major factors contributing to the decline of threatened species," the agency considered the totality of tribal actions

in the context of all historic impacts on the species. Tribes have a long history of promoting sound resource management in a manner that takes into account a wide variety of environmental values, including ESA-listed species.

*Comment 5:* Numerous commenters voiced concerns about the construct of the proposed rule both in general and specific terms. Some stated a separate 4(d) rule for Tribal Plans was unnecessary and undesirable. Others referenced a court decision indicating that, absent direct legislative language, NMFS' trust obligations would be fulfilled by compliance with general regulations and statutes. Others were concerned with the lack of specific standards.

*Response:* The tribal plan limit is an affirmative expression of NMFS' trust relationship with the tribes. The judicial case cited by several commenters involved the Federal Aviation Administration which, unlike NMFS' management authority over imperiled trust resources (e.g., marine mammals and listed salmon and steelhead), is not likely to involve a constant, almost daily interaction with numerous Indian tribes. Therefore, developing a rule that pertains to the daily interaction of the agency and the tribes seems to be most appropriate.

#### Changes to the Proposed Rule

NMFS is modifying the proposed rule based on comments and new information received. The regulatory language has been modified to: (1) include the phrase "tribal employee" in the list of entities subject to the tribal plan limit; and (2) clarify that a Tribal Plan could address "water management" activities.

Procedures for Implementing the ESA 4(d) Limit for Tribal Plans

This final rule 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 the maximum extent practicable to provide technical assistance to any tribe that so requests in examining impacts on listed salmonids and other salmonids and in the development of 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 scientific and commercial data (including careful consideration of any tribal data and analysis) to determine the Tribal Plan's impact on the biological requirements of the species. The Secretary will also assess the effect of the Tribal Plan on survival and recovery in a manner consistent with tribal rights and trust responsibilities. Before making a final determination, the Secretary shall seek comment from the public on his pending determination whether or not implementation of a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the listed salmonids. The Secretary shall publish notification in the **Federal Register** of any determination regarding a Tribal Plan and the basis for that determination.

#### Classification

The Chief Counsel for Regulation of the Department of Commerce has certified that this 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 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 final rule in close coordination with tribal governments and organizations. This final rule 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. Moreover, NMFS will continue to give careful consideration to all tribal comments and will continue its contacts and discussions with interested tribes as this final rule is implemented.

#### 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 PRA, unless that collection of information displays a currently valid OMB Control Number.

This rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) and which have been approved by OMB under control number 0648-0399. Public reporting burden per response for this collection of information is estimated to average 20 hours for a tribal plan. This estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding these burden estimates, or any other aspect of this data collection, including suggestions for reducing the burden, 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).

#### National Environmental Policy Act

This final rule does not require the preparation of Tribal Plans. For most plans on which tribes request a NMFS determination under this limit, the Bureau of Indian Affairs or another agency, will have performed an NEPA analysis at the time they are developed. In the case of any tribal plan for which NEPA analysis has not been performed by another agency, NMFS will prepare an environmental analysis. Hence, NMFS has determined that this rule will not of its own force result in any changes to the human environment. Any plans determined to come within this limit will be evaluated under NEPA either by NMFS or another federal agency, prior to that determination. Therefore, this rule is categorically excluded from the need to prepare an Environmental Assessment, in accord with NOAA Administrative Order 216-6 (3)(d) and (f).

#### References

A list of references cited in this final rule is available upon request (see **ADDRESSES**).

#### List of Subjects in 50 CFR Part 223

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

Dated: June 19, 2000.

**Andrew A. Rosenberg,**

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

For the reasons set out in the preamble, 50 CFR part 223 is 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) *Limits on the prohibitions.* The prohibitions of § 223.203(a) of this subpart relating to threatened species of salmonids listed in § 223.102 do not apply to any activity undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent in compliance with a Tribal resource management plan (Tribal Plan), provided that 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 (including 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 legally enforceable tribal rights and with the Secretary's trust responsibilities to tribes.

(b) *Consideration of a Tribal Plan.* (1) A Tribal Plan may include but is not limited to plans that address fishery harvest, artificial production, research, or water 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 and will provide to the maximum extent practicable 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.

(2) 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.

(3) 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.

(4) The Secretary shall publish notification in the **Federal Register** of any determination regarding a Tribal

Plan and the basis for that determination.

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