

**Written Testimony of
Micah McCarty, Chairman
Makah Tribal Council**

**Oversight Hearing on the
National Marine Sanctuary Act Reauthorization**

**Before the
Committee on Natural Resources
Subcommittee on Fisheries, Wildlife, and Oceans
United States House of Representatives**

June 18, 2008

Introduction

WIKEE DAHK KAY TWO PUHTHLIK THLUHKOH WIS

(WITHOUT THE SEA I AM A POOR MAN, KALCHOTE)

Good afternoon, Madam Chair and members of the Subcommittee. On behalf of the Makah Tribe I appreciate the opportunity to speak with you today about the reauthorization of the National Marine Sanctuary Act.

I am Micah McCarty, chairman of the Makah Tribe. Our people have always lived near the tip of the Olympic Peninsula in Washington State, the furthest point northwest in the lower 48 states. In our remote and beautiful home we thrive in balance with nature. Whales, fish, shellfish, wildlife and the bounty of the area's forests form the basis of our tribal culture, both spiritually and economically.

In 1855, our ancestors entered into a treaty with the United States government. Through the Treaty of Neah Bay, ratified by Congress in 1859, we ceded hundreds of thousands of acres of its traditional lands and agreed to live on a small reservation at the present day village of Neah Bay. In exchange for this land, we made certain our ocean-based culture and economy would survive by reserving the rights to utilize marine resources at our usual and accustomed grounds. At the very heart of the Treaty is the promise of guaranteed continued access to the variety of natural resources essential to our way of life and livelihood.

Today, our Makah thrive in Neah Bay on these same resources preserved for us by our ancestors. We work side-by-side with the Federal Government and the State of Washington and others to restore, protect, enhance and carefully utilize the natural

resources of the region and we thank them both for these efforts. In the past, we reduced our salmon harvest to protect migratory fish. We adopted management plans to protect our forest ecosystems and all that they contain. Today, we are engaged in the fishery management and sanctuary processes and we actively work with Congress to protect our coastline from threat of oil spill.

We are here today for one very unique and important reason – the Olympic Coast National Marine Sanctuary (OCNMS) is located entirely within the combined Usual & Accustomed Areas of four Northwest Treaty Tribes, including ours. Our “U&A” as we call it -- is the very same U&A reserved for us by our ancestors in 1855. The OCNMS is the only sanctuary in our nation located within the combined U&A Areas of treaty tribes. This situation presents both opportunity and challenge for the State of Washington, the Federal Government, and us.

In my testimony today I will address three key issues: (1) the Olympic Coast Sanctuary is a special case requiring thorough co-management, federal trust responsibility, and government to government consultation; (2) management responsibility for fishery resources within national marine sanctuaries; and (3) the designation of additional sanctuaries. In closing, I will offer several reauthorization recommendations for your consideration.

The Makah Tribe and the Olympic Coast National Marine Sanctuary: Opportunities and Challenges

While initially not the easiest of choices for our people, the Makah Tribe supported the placement of the sanctuary so close to our home because we viewed it as an opportunity to work with the federal government and the State to protect our cultural and natural resources and to continue developing our economic and employment opportunities within our U&A.

To ease the concerns expressed by many of our people regarding future use of our U&A resources within the boundaries of a marine sanctuary we secured a consultation provision in the implementing/designation regulations of the Olympic Coast National Marine Sanctuary. See 15 CFR 922.154. We believed this provision would provide additional opportunities for co-management and adequate federal treaty trust responsibility.

Additionally, the Tribe pressed the National Ocean Service (NOS) to develop the Olympic Coast Inter-Governmental Policy Council (“IPC”) made up of representatives of the four regional Northwest Treaty Tribes, the State of Washington, and the superintendent of the OCNMS. The primary objective of the IPC is to clarify the Tribes’ standing as a resource trustee in sanctuary processes beyond that afforded standard sanctuary advisory boards in other marine sanctuaries lacking tribal presence. The NOS finalized formation of the IPC in January 2007.

There was, and still remains a belief that is shared by the Makah and other Northwest Treaty Tribes that the IPC will provide ample opportunity for equal co-management,

clear federal trust responsibility, and true government-to-government consultation on all facets of sanctuary management that impact tribal interests. This includes but is not limited to programmatic reviews, research & research strategies, peer review, budgetary concerns, public outreach & education, and general program development.

Faith in the strength of the IPC is evident in the Tribal/State Ocean Ecosystem Initiative developed by the State of Washington and the Makah, Hoh, Quileute tribes and Quinault Indian Nation released in June, 2008. This proactive regional collaboration is designed to utilize the IPC and ocean ecosystem research and monitoring to protect and manage ocean/coastal resources and sustainable economical development.

Unfortunately, the relationship thus far between the Sanctuary and the IPC and the Northwest Treaty Tribes with respect to co-management and treaty trust responsibility is not what the Tribes envisioned when they agreed to support the designation of OCNMS in their U&A areas. This is precisely where we need Congress to provide oversight and work with us to make improvements during the reauthorization of the Act.

I offer as proof of this unmet need -- Resolution #07-55 that was adopted at the 2007 Annual Conference of Affiliated Tribes of Northwest Indians. *See* Resolution #7-55, attached. The members of this conference represent 57 tribes from Washington, Idaho, Oregon, Montana, Nevada, Northern California and Alaska. The resolution contains the following statement "Whereas, The current language in the National Marine Sanctuaries Act, and the Designation Documents for the Olympic Coast National Marine Sanctuary, do not properly address the Trust responsibility for co-management for the OCNMS."

In 2007, the National Congress of American Indians adopted resolution DEN-07-017. *See* attached. The NCAI resolution states that the Sanctuary act fails to acknowledge the existence Tribal Sovereignty and Treaty rights.

Clearly, the co-management approach and government-to-government consultation the affected Tribes thought they were preserving pursuant to the OCNMS regulations and Executive Orders 13158 and 13175 are not sufficient to protect the interests of our people.

By example, today we Makah are experiencing major obstacles from NOS and OCNMS staff regarding a pilot project for developing alternative wave energy in our U&A. In this particular case, agency staff provided little advance consultation to our Tribe and all of two days warning that NOS was exercising their Section 4(e) authority under the Federal Power Act to impose mandatory, additional conditions on our project. The Federal Energy Regulatory Commission (FERC) subsequently held that NOS lacked the authority under the law to even assert Section 4(e) authority.

The permit for this renewable energy project continues to languish while our reservation remains subject to intermittent power outages. Based on our personal experience regarding the issuance of the FERC license for this project we see little evidence of

federal treaty trust responsibility and must therefore seek to strengthen our position in the current reauthorization.

In addition, development of the OCNMS "Observations of Deep Coral and Sponge Assemblages in Olympic Coast National Marine Sanctuary" (See MSCS NMSP-07-04, July 2007) and the ongoing 5-year sanctuary programmatic review documentation were developed to a large extent in the absence of what we consider to be the true spirit of co-managers.

Based on these experiences we will look to this Subcommittee in the reauthorization process to provide specific statutory authorization for the existing IPC. This would give us the opportunity to work with Congress and our Federal Partners to address the Federal Trust Responsibility to co-management and Government to government consultation consistent with applicable Executive Orders.

Managing Marine Fish Resources in National Marine Sanctuaries

The commercial and sport fishing industries are extremely important to our culture and our economy. The Makah commercial fishermen depend on salmon, halibut, whiting, and West Coast groundfish while sport fishermen regularly visit Neah Bay to pursue salmon and other popular species. It is imperative that these marine fish resources and the ecosystem they are in be managed with tribal input and throughout the range, not as a patchwork of resource management.

The United States has a trust responsibility that our nation's fisheries management infrastructure be maintained intact and not broken into competing or duplicative jurisdictions. The "Boldt" decision (See *United States v. Washington* (1974)) and subsequent Supreme Court affirmation underscore and secure the Tribe's ability to exercise its fishing rights for harvestable fish passing through our U&A areas. To protect our ability to harvest these fishery resources we must rely on an intact, orderly fishery management process.

There should not be competing management jurisdictions between the National Marine Sanctuary Act (See 16 U.S.C. 1434) and the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA, See 16 U.S.C. 1852) when it comes to fishing regulations. The specific problem appears in Section 304(a)(5) of 16 U.S.C. 1434 whereby the Councils are afforded the opportunity to prepare draft regulations using the MSFCMA as guidance only "to the extent that the standards are consistent and compatible with the goals and objectives" of the Sanctuary designation. In our minds, this is a serious inconsistency at best and a full-blown statutory conflict in the worse case.

We are not alone in our opinion. In 2005 and again in 2008 the Regional Fishery Management Council Chairmen adopted unanimous positions to amend the National Marine Sanctuary Act to specifically exclude fishery resources as sanctuary resources and to achieve jurisdictional clarity by vesting federal fisheries management within the MSFCMA. The House Natural Resources Committee attempted to address this very issue

during the 2006 MSFCMA reauthorization but Members deferred the debate to the National Marine Sanctuary Act reauthorization. That time is now.

We agree conceptually with the position of the Regional Council Chairman for a number of reasons. First, this approach ensures that fishery resources are managed consistently throughout the range and with the best scientific information available. Second, the MSFCMA has very specific National Standards, guidelines, scientific & economic considerations, and clear requirements for public input that include but extend beyond National Environmental Policy Act (NEPA) considerations. In the Northwest, the tribes and the full breath of federal trust responsibility are already recognized as an integral part of the management process.

Finally, we believe that the National Marine Fisheries Service (NMFS) and the Regional Council system are designed and well equipped to manage fishery resources while the NOS is not, nor was it ever intended to handle the task. Our position is not by any means meant to demean the NOS or its staff. It is simply based on the fact that fishery management is standard operating procedure for NMFS and the Councils using their resources of fishery scientists and support staff, economists, periodic fishery surveys, cooperative research programs, a fleet of federal research vessels, specific data reporting requirements, vessel trip and dealer reporting, permits and licensing activities, very specific limited access and allocation methodologies, constituent services and outreach, and other pending programmatic changes to overfishing and rebuilding requirements resulting from the most recent reauthorization.

Designation of Additional National Marine Sanctuaries

We recognize that there are many special places along the coastlines of this nation that need our attention. We also understand that by adding more sanctuary designations during these lean fiscal years we will be asking our State and Federal partners to do more with less. This situation concerns the Makah very much.

In the case of the OCNMS, we are barely scratching the surface of a premier, dynamic marine ecosystem. We have a long list of research needs that form the basis of our Tribal/State Ocean Ecosystem Initiative – including but not limited to habitat, coral and seafloor mapping, otolith micro-chemistry, and improving West Coast rockfish assessments. Considering that this important work directly involves our U&A resources and our position as sanctuary co-managers – we ask whether it makes good sense to stretch the existing national program with new designations that draw from the same line items? We do not believe the existing sanctuaries and the program's overall mission are being well served by the current fiscal situation and the addition of new designations.

Recommendations for the Reauthorization of the National Marine Sanctuary Act

In closing, I offer the following recommendations for consideration by the Subcommittee.

- ◆ Recognize that the Olympic Coast National Marine Sanctuary is a special case due to the fact that it is the only sanctuary within the combined U&A Areas of four Treaty Tribes and pledge to work with us to address our concerns.
- ◆ Work with the Makah Tribe and other Northwest Treaty Tribes during the reauthorization to provide specific statutory authorization for the existing IPC, moving from an MOA to a binding legal arrangement, which specifies co-management opportunities, ensures federal treaty trust responsibility, and clarifies a government-to-government consultation process.
- ◆ Remedy the competing statutes issue by amending the "Fishery Regulations" section of the Act to ensure that the NMFS and the Regional Councils have responsibility for managing federal fishery resources consistently throughout the range.
- ◆ Provide opportunity for cooperative work with co-managers in the existing sanctuaries to adequately address outstanding research needs and until such time that the NOS fiscal situation improves significantly we recommend not adding additional sanctuary designations.

Madam Chair, I thank you and the Subcommittee members for allowing me to speak with you today on behalf of the Makah Tribe regarding the reauthorization of the National Marine Sanctuary Act. We believe the OCNMS can be a successful example of co-management and research productivity and we hope to continue our work with you and your staff to address these issues.

