

**WRITTEN REPLY SUBMISSIONS OF
WESTERN CENTRAL COAST SALISH FIRST NATIONS
COMMISSION OF INQUIRY INTO THE DECLINE OF
SOCKEYE SALMON IN THE FRASER RIVER
November 3, 2011**

The following are the Western Central Coast Salish First Nations (the “WCCSFN”) written reply submissions addressing certain distinct issues raised in the main submissions of various participants in the Cohen Inquiry.

Causes of the Sockeye Decline and the Evidence of Mr. Marmorek

1. The Province adopts David Marmorek’s evidence presented in Technical Report 6,¹ but then proceeds to characterize that evidence in an overly broad manner. The Province states that the evidence points conclusively to oceanic factors and climate change;² freshwater issues, aquaculture, disease, and those areas over which British Columbia has legislative jurisdiction (e.g. logging, urbanization, wastewater, gravel removal, mining, etc.) have not contributed to the decline.³
2. This is not representative of the evidence provided by Mr. Marmorek, who instead presented climate change as a driver that exacerbated other factors such as driving down food abundance, encouraging new predator recruitment, potential colonization of invasive species, harmful algae blooms, and the development of pathogens.⁴ WCCSFN’s submissions comprehensively canvas the individual Technical Reports that suggest that increasing freshwater and ocean temperature is the underlying condition contributing to other factors that stand to impact sockeye salmon mortality.⁵ Dismissing other factors is a simplification of the evidence. All of the factors mentioned above in paragraph 1 may play a significant role in the cumulative impacts that sockeye salmon encounter during their life cycle. The fact is that the Fraser River watershed is far from the pristine watershed that British Columbia’s submissions paint it to be.
3. Moreover, while noting the uncertainties in the science, the Province fails to emphasize the need for further research.⁶ As noted in WCCSFN’s submissions, Mr. Marmorek’s report establishes that there are significant data or research gaps.⁷

¹ Written Submission of the Province of British Columbia, p. 27.

² Written Submission of the Province of British Columbia, p. 71.

³ Written Submission of the Province of British Columbia, p. 71.

⁴ Written Submissions of the WCCSFN, p. 47, para 225.

⁵ Written Submissions of the WCCSFN, p. 47, para 227 – p. 51, para 238.

⁶ Written Submission of the Province of British Columbia, p. 71.

⁷ Written Submissions of the WCCSFN, p. 51, para 239.

4. The freshwater habitat remains a critical component for sockeye salmon both for spawning and rearing phases of their lifecycle.⁸ British Columbia has recognized that it has a duty to sustain wild salmon.⁹

Matters Relating to Aboriginal Rights and Title are Properly Considered

5. British Columbia states that as the Terms of Reference make no reference to Aboriginal rights and title that the Commissioner should make no findings in that regard.
6. While the WCCSFN agrees that the Commissioner should not make findings of fact as to which First Nations may have Aboriginal rights and title, the Commissioner must, as set out in our initial submissions, make recommendations that accord with the *Constitution* and the common law. Moreover, the Commissioner may make recommendations regarding *inter alia*, “changes to the policies, practices and procedures of the Department in relation to the management of the Fraser River sockeye salmon fishery.” The WCCSFN submits that given the evidence heard in the course of the hearing, development of these recommendations will require the Commissioner to consider matters of Aboriginal rights and title and the accommodation of same.

First Nations are not Mere Stakeholders

7. The Province and Canada both characterize First Nations as mere stakeholders or “interested parties” that are lumped in the same group as commercial and recreational fishers and NGOs.^{10,11} The WCCSFN emphasizes that this is not accurate and degrades the nature of the Crown’s relationships with Aboriginal peoples. Present-day First Nations, as descendants of historical Aboriginal peoples, are holders of constitutionally protected Aboriginal rights and title and are not mere stakeholders. These Aboriginal rights and titles reflect the prior use and occupation of Canada by Aboriginal peoples, and govern the relationship today between First Nations and the Crown as resulting from the Crown’s conclusive assertion of sovereignty (in British Columbia as of 1846). As such, Aboriginal rights and title pre-date and are „upstream“ from any Crown granted stake in the sockeye fishery; Aboriginal rights do not depend on any Crown disposition and take priority over interests that do. First Nation participation in all aspects of the fishery must reflect that priority.

⁸ Exhibit 562, Technical Report No. 3, Evaluating the Status of Fraser River Sockeye Salmon and the Role of Freshwater Ecology in Their Decline, p. 59-60.

⁹ Exhibit 1862, *Salmon Forever: An Assessment of the Provincial Role in Sustaining Wild Salmon*, Office of the Auditor General, 2004/2005 Report, p. 9-10.

¹⁰ Written Submission of the Province of British Columbia, pp. 19, 25.

¹¹ Final Submissions of the Government of Canada, p. 7, para 25; p. 65, para 245.

Evidence Provided by Dr. Harris is of Value

8. The Province makes reference to the view taken by the Supreme Court of Canada in *R. v. Nikal*¹² and *R. v. Lewis*¹³ and the view taken by Dr. Harris in his paper, “The Recognition and Regulation of the Aboriginal Fraser River Sockeye Salmon Fisheries.” In particular, the Province takes issue with in the paper’s section entitled “Indian Reserves and Fisheries”¹⁴ and his related testimony during the hearing dated June 27, 2011.¹⁵ Dr. Harris’ evidence was that the Supreme Court of Canada’s conclusion in the noted cases, that it was not within the mandate of the Indian Reserve Commissioners to grant exclusive rights in the fishery, did not in fact reflect Crown policy.¹⁶ The Province suggests that Dr. Harris’ evidence in the noted section should be disregarded because Dr. Harris makes findings that differ from those findings of the court in *Nikal* and *Lewis*.
9. While taking no position on this issue, the WCCSFN emphasizes that nothing in the Province’s submission undermines Dr. Harris’ other evidence – e.g. regarding the Douglas Treaties, DFO’s exclusions of the Cowichan from its first limited licensing regime, or the Cowichan people as the quintessential example of traditional, sustainable aboriginal managers of salmon.

Cowichan Historic Use and Occupation on the South Arm of the Fraser River not Undermined

10. The Musqueam Indian Band relies on the *Sparrow* decision to point to a Musqueam “Aboriginal right to fish in the Fraser River for food and social and ceremonial purposes”.¹⁷ The Musqueam also submitted evidence they had an ancient village on the north arm of the Fraser River near its mouth and, as set out in the Musqueam submissions, that fishing sockeye was of fundamental cultural importance to the Musqueam.¹⁸ The Musqueam submission further references the Musqueam seeking “to avoid disputes over the extent of the Aboriginal right to fish.”¹⁹
11. The WCCSFN submit that the Commissioner should be careful to appreciate the geographic limits of this Musqueam submission and evidence. Nothing in the submission or evidence establishes a Musqueam right or presence through the south arm of the Fraser River, where the evidence before the Commission establishes the historic Cowichan people had a village and fished at legally relevant times for aboriginal rights and title.²⁰
12. The Tsawwassen First Nation in turn submits that” “[t]he Tsawwassen people are a Coast Salish fishing people, whose land base is located on the Strait of Georgia, on the Lower

¹² [1996] 1 S.C.R. 1013.

¹³ [1996] 1 S.C.R. 921.

¹⁴ Exhibit 1135, Recognition and Regulation of the Aboriginal Fraser River Sockeye Salmon Fisheries, pp. 25-31.

¹⁵ Harris, June 27, 2011, pp. 23-33.

¹⁶ Harris, June 27, 2011, pp. 25, ll. 12-17.

¹⁷ Closing Submissions of the Musqueam Indian Band, p. 3.

¹⁸ Becker, December 13, 2010, p. 8, ll. 22-36; *ibid.*

¹⁹ Closing Submissions of the Musqueam Indian Band, p. 4.

²⁰ Written Submissions of the WCCSFN, p. 7, para 35(Harris, June 27, 2011, p. 70, l. 28 – p. 71, l. 47).

Mainland”; “[a]s defined in the [Tsawwassen First Nation] Final Agreement, the constitutionally-protected Tsawwassen Fishing Right (“TFR”) includes „the right to harvest Fish and Aquatic Plants in the Tsawwassen Fishing Area”; “[t]he Tsawwassen Fishing Area is outlined in Appendix J-1 of the Final Agreement [and] includes a large portion of the Strait of Georgia and the lower Fraser River”; “Chief Baird gave evidence about the importance of the fisheries to the Tsawwassen people... blending comments respecting the pre and post Treaty fishery”; and, “salmon is only resources left in TFN’s traditional territory [as “Tsawwassen Territory” is defined in the Final Agreement].”²¹

13. The WCCSFN emphasizes that the Commissioner should take care to understand that nothing in the submissions establishes a Tsawwassen First Nation presence or territory on the south arm of the Fraser River or in the Strait of Georgia at times legally relevant for assessing Aboriginal rights or title (i.e. European contact and Crown assertion of sovereignty). The BC treaty process in which the Tsawwassen First Nation Final Agreement was negotiated, including the “Tsawwassen Fishing Area” and “Tsawwassen Territory”, is a political process that does not require substantiating evidence of historical use and occupation. Rather, the negotiated areas are, by definition in the Final Agreement, based on Tsawwassen First Nation assertion of same in the modern era for negotiation purposes. The BC Treaty Process does not involve a Crown inquiry into the geographic validity of the assertions at historical times legally relevant to Aboriginal rights and title.²²

Not Supportive of a Transition to Terminal Fishery

14. The Conservation Coalition presents evidence that terminal fisheries will assist in ensuring a more robust fishery from the conservation perspective,²³ and recommends a move to more terminal fisheries.²⁴ The Conservation Coalition calls for a transfer of licences from the least selective (marine) to the most selective (river tributaries) First Nations fisheries and providing processing capacity for terminal selective First Nations fisheries.²⁵
15. The WCCSFN is not supportive of a movement to a terminal fishery that excludes, or even limits, exercise of their constitutionally protected Aboriginal rights to fish sockeye specifically in the places where this was traditionally done at legally relevant times. As outlined in its final submissions, WCCSFN Aboriginal rights include the right to fish their interception fisheries, meaning a move to a terminal-only fishery could well be seen as unjustifiable infringement under the *Sparrow* test, and further not honourable for the Crown to tell the group to fish elsewhere (i.e. at the distant terminal when less intrusive conservation measures are available).²⁶

²¹ Closing Submissions of the Tsawwassen First Nation, pp. 12-14.

²² McGivney, September 2, 2011, p. 24, ll. 14-33.

²³ Final Submissions on Behalf of the Conservation Coalition, p. 12.

²⁴ Final Submissions on Behalf of the Conservation Coalition, p. 13.

²⁵ Final Submissions on Behalf of the Conservation Coalition, p. 14.

²⁶ Written Submissions of the WCCSFN, p. 31 paras 135 and 136; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2010 BCSC 359 at para. 62.

16. The WCCSFN submit both traditional interception and terminal fisheries can coexist (this was clearly the case prior to commencement of Crown regulation historically). Conservation of the sockeye does not require a choice between an „interception fishery“ and a „terminal fishery“. A combination of better science and understanding of conservation units („CUs“) pursuant to the Wild Salmon Policy, targeted openings that have minimal impact on weaker stocks, and specific fishing gear and techniques is a less intrusive solution than a transition to a terminal fishery only. The mixed stock fishery has not been put forward as a „cause“ of the decline of the sockeye salmon. Moreover, a move to a purely terminal fishery would potentially be fatal to the commercial fishery and contrary to the constitutional rights of First Nations generally and the WCCSFN in particular.

Not Supportive of Share-Based or Individual Transferrable Quota Fishery

17. The Participants, Seafood Producers Association and Area D Salmon Gillnet Association and Area B Harvest Committee have recommended a move to a share-based or individual transferable quota fishery for sockeye salmon.

18. The WCCSFN do not support a move to a share-based or individual transferable quota fishery for sockeye salmon. In support of this position, the WCCSFN agrees with and adopts the submissions of the Sto‘lo Tribal Council and Cheam Indian Band at paragraphs 149-150 of their submissions. DFO has not consulted with First Nations regarding the introduction of individual transferable quotas in the fishery, nor has it done so in the past.²⁷ Individual fishing quotas should not be introduced until such time as First Nations“ section 35 rights are accommodated in the fishery.²⁸ Moreover, any change to the manner in which the Fraser River sockeye fishery is managed would require deep consultation with First Nations.

19. In addition there are significant socio-economic factors that mitigate against a move to a share-based fishery. In this regard, the WCCSFN agrees with the submissions of the West Coast Trollers (Area G) Association and United Fishermen and Allied Workers“ Union found at paragraphs 139 and 140 regarding the potential impacts of a share-based fishery.

Illegitimate FSC Allocation Considerations

20. Canada“s submissions note that it assesses certain factors pursuant to policy for FSC fisheries allocations, such as looking at a First Nation“s most recent FSC fishery harvest and the consideration of alternatives including game as an alternative protein source.²⁹ It is WCCSFN“s submission that neither of these criteria should have a place in DFOs allocation criteria.

²⁷ See for example, Exhibit 492F, Letter from Bellis to Regan, April 12, 2005.

²⁸ Exhibit 493, Our Place at the Table, 2004 at p. 78.

²⁹ Final Submissions of the Government of Canada, p. 144.

21. As outlined in the WCCSFN man submissions, FSC allocation criteria must be needs-based and capable of being altered in the face of population change and capacity.³⁰ The mere fact that a First Nation's previous year's FSC allocation is a certain number should not serve a purpose other than as a reference number from which a First Nation can seek an increased allocation based on evidence of increased need.
22. Moreover, the consideration of alternative protein sources, such as game, to fulfill a First Nation's FSC fishing needs is completely unacceptable as it is not an accommodation of the right and dismisses the cultural significance of sockeye to the First Nation that historically depended upon it.³¹ The proposal to consider alternate protein supply in making fishing allocations rings hollow for two further reasons. First, in lower Vancouver Island (and in the Fraser Valley) the ability to engage in traditional hunting is obviously going to be significantly constrained by the urbanization of these areas. Second, Canada has adduced no evidence to suggest that it attempts to coordinate its FSC fishery approach with Provincial wildlife regulation and habitat conservation. If Canada sincerely understood that a coordinated approach to traditional harvesting could address aboriginal concerns one would expect to see processes, mechanisms and policies in place to implement this. Instead what is just as likely is that the fisheries managers will look to the land to satisfy traditional needs while the wildlife managers will look to the sea – leaving the First Nations lost between these two positions.

All of which is respectfully submitted.



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³⁰ Written Submissions of the WCCSFN, p. 26, para 133.

³¹ Written Submissions of the WCCSFN, p. 24, para 125.