
From: Point, Jordan [Jordan.Point@dfo-mpo.gc.ca]
Sent: 2008-Jul-18 2:29 PM
To: Johansen, Jeff
Cc: Trager, Diana (DFO); Cheema, Bilal; Kotyk, Mel; MacAulay, Hugh; McGivney, Kaarina
Subject: RE: Hwiltsum 1st Draft BN

Excellent comments Jeff,

Thanks - so far I have only heard back from you....these points you raise are musings that we all have had over the years....which is why I think we need to incorporate them all into a note toward a decision. (So we can finally determine a start and end point - even if on an annual basis.)

Jordan Point

Litigation Case Manager

Fisheries & Oceans Canada

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-----Original Message-----

From: Johansen, Jeff
Sent: July 18, 2008 2:06 PM
To: Point, Jordan
Cc: Trager, Diana; Cheema, Bilal; Kotyk, Mel; MacAulay, Hugh; McGivney, Kaarina
Subject: FW: Hwiltsum 1st Draft BN

Jordan,

A really good start. I have added some suggested wording in track changes and some comments.

<< File: HFN-ACCESS bn_min_e 2008 DRAFT 1.rtf >>

In the note you suggest that the option of having them designated under another band would be an interim solution. But if they came to an agreement where the other band benefited from the HFN fishing capacity and delivery system then perhaps it could be a longer term solution. The HFN may not be as happy, but they couldn't argue that they didn't have the access to fishing opportunities. Point being is that I don't think we should necessarily describe this as ad hoc or temporary.

A couple of other points/comments for consideration. Note that this is essentially a brain dump of issues that have come to mind so I don't expect you to have the answers.

After the meeting I was thinking about the HFN relationships with some of the other bands they have fished with in the past. Why is it that these relationships break down? The Chief seemed quite concerned that fishing under another's designation could impact their relationship with the group as it has in two other instances. So I wonder what's going on and why these relationships decay and leave bad feelings? Is this an indication of conflict that may occur if we give the HFN their own licence?

The historical information that the HFN use to support their access in the river is the same info that is use by Penelekut. They both claim that they were descendants of the Lamalchi. Does it make sense to accept the claim for fishing access to the same area by two separate groups using the same data/info to make their arguments? Would it not make more sense for the two groups to agree on an arrangement since they appear to be of the

same direct ancestry? Would giving the HFN their own licence set a precedent for any other group of individuals that splinters off from an existing FN to make a claim for their own licence?

Al Grove stated that their Nation is comprised of 140 status individuals, unaffiliated with any other FN. But if INAC does not recognize the HFN, yet these 140 individuals have status, doesn't that mean they must be affiliated with another group? And if so, they could certainly exercise their right to fish within the designation of the group that they have status through. So for the HFN to argue that we are infringing on their right to fish strikes me as a red herring (no pun intended). By not issuing a Communal Licence to the HFN for FSC purposes we may be preventing them from fishing as the HFN, but there is nothing stopping them from fishing within the group through which they have their status. Or maybe I am missing a key piece here.

My suggestion would be to recommend that they be designated under another group, either as a whole or as individuals and that we wait to see what comes out of the BCTC. The BCTC letter states that they will convene a meeting of the parties within 45 days. If at some point Canada and BC agree to negotiate with the HFN then presumably INAC would have to get off the fence about their recognition of the HFN as a band. If Canada and BC do not agree to negotiate then DFO would be stepping out on its own if we issued a licence. Probably not a good idea.

Finally, I have attached a section of a recent BN to the Minister. I didn't include all the background stuff as the situation is a bit different. A New Brunswick FN group wants to fish in another part of the province because the can't meet their FSC needs in their traditional area. However, there are similarities. One of the requirements is that the FN receive written support from the resident FN groups before DFO will consider their request. Thought you might find this helpful.

Note: I am not sure where this note is in the system so we should limit the distribution.

<< File: #804591 v7 - Notification by St. Mary's FN of intent to engage in a FSC fishery for Atlantic Salmon in the Miramichi.doc >>

Jeff Johansen
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Treaty and Aboriginal Policy Directorate
Fisheries and Oceans Canada
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-----Original Message-----

From: Point, Jordan
Sent: July 16, 2008 3:09 PM
To: Trager, Diana; Cheema, Bilal; Kotyk, Mel; Johansen, Jeff
Cc: MacAulay, Hugh
Subject: Hwiltsum 1st Draft BN

All

Just to kick start the process I have developed a VERY ROUGH draft of a note that we can all start to edit comment on....there will of course be appendices attached but I haven't begun to include. (perhaps if you have suggestions on content that should be included please advise.

Feel free to edit under track changes and return to me and we can begin to flesh out a sound document.

I also attach a draft protocol fishing area for stimulating thought /discussion.....I am not particularly attached to any scenario - so take your liberties.

Jordan Point

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CLASSIFICATION

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EKME # XXXXXX

BRIEFING NOTE FOR THE MINISTER

**ACCESS AND ADJACENCY ISSUES FOR SALISH TRIBES,
AND HWILTSUM ASSERTIONS TO FISH IN THE LOWER FRASER**

(Decision sought)

SUMMARY

- The 1993 “*Policy for the Management of Aboriginal Fishing*” advises that FSC fishing should occur within traditional areas. With the evolution of the *BC Treaty Process*, First Nations, particularly the Salish tribes of the Georgia Basin are submitting Statements of Intent (SOI) that set out a traditional area under treaty that are larger than the areas that were identified at the introduction of the AFS. This increasingly includes assertions of “*Continued Use and Occupancy*” fishing camps and villages on the Fraser.
- Complicating this environment is a group called the Hwilitsum, they are status Indians, but not an Indian Act Band. The Hwilitsum assert that they are descendants of a larger Salish Tribe (the Lamalchi) that evidence shows were connected to the Penelekt and Chemainus, which clearly showed historical *Continued Use and Occupancy* on the Fraser, since the time of contact. They number approximately 300 members and have an elected Chief and Council.
- This note will recommend a strategy to attempt to accommodate the assertions and aspirations of these Salish Tribes, while seeking to achieve no increased pressure on stocks. The objective is to recommend a management approach and specific management area for fishing..

Background

- At the time of contact with Europeans, the *Salishan* people inhabited the areas in and

around the Fraser River, the Georgia basin and south eastern Vancouver Island. Many historical recordings were compiled by early explorers, combined with oral transcripts to document this landscape. These documents and historical records are increasingly being used by First Nations to assert a harvesting right on the Fraser River.

- While managing the fishery in the Lower River, departmental staff attempt balance aging departmental policy with evolving case law. . Currently the management regime for aboriginal fishing in the lower Fraser is stable and bears little substantive change from the inception of AFS some 15 years ago in 1993.
- Increasingly, as the west coast Salmon fishery moves toward terminal area opportunities, we are observing an increase in First Nations asserting Historical use of the Fraser. [The Some East Coast Vancouver Island](#) First Nations are advising that they are not meeting their Communal needs in the waters adjacent to their communities on Vancouver Island and smaller adjacent Islands, and thus, should be able to revert back to fishing in the Fraser, as this is where they historically fished seasonally.
- This was not an issue when AFS was rolled out, as salmon abundance allowed for needs to be met with fishing farther away from the adjacent communities. In the late 1990's, Salmon Seine "Protocol fishery's" between the Salish tribes, were utilised at the mouth of the Fraser to meet the needs of some of these communities, however, for many reasons – such as costs, quality of the fish upon delivery, this was not the ideal, nor preferred approach.
- In 2002, departmental C&P staff began to observe Vancouver Island tribes entering the Fraser by Gillnet, seeking to fish without a licence and thus compel a trial and a constitutional "Aboriginal Rights" defence. Charges were laid in the case of the Hwiltsum, but not in the case of the Vancouver Island tribes. The Hwiltsum offenders eventually pled guilty, and thus avoided an aboriginal rights defence.
- Departmental staff anticipate this trend will only continue, and are seeking to develop remedies that will move beyond ad-hoc in season resolutions, to a longer term adjustment of developing a management regime that accommodates assertions of Historical Continued Use and [Occupancy](#), and avoids conflict and possible and potential litigation.

Analysis / DFO Comment

- Increasingly departmental staff are observing assertions of aboriginal fishing rights in the Fraser. This includes Douglas Treaty assertions, to historical use arguments from multiple non-Fraser Salish tribes. Annually, South Coast and LFA staff have worked constructively and cooperatively in season to identify ad-hoc solutions to each incident, however this is inefficient and untenable as we move forward.
- Litigation to prove or disprove the assertions of Aboriginal title is not desired nor [preferred, as preferred, as](#) it proves costly for all parties and can cause uncertainty and instability in programs while the court process is ongoing.

- There is no support from Lower Fraser FNs for providing HFN with their own Communal Licence to fish in the river. Issuance of such a licence without consultation and some level of concurrence could result in conflict.
- INAC has indicated that it is DFO decision, and that they have no concerns (is this accurate?) however, some local FN would take exception to HFN licenced within the Area. (Musqueam , Tsawwassen)

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Comment [FaOC1]: Not sure if this is entirely accurate but I think we need to raise it somehow as a possibility.

.../2

Recommendations / Next Steps

- It is recommended that a longer term, strategic approach be adopted, which maintains manageability of the fishery, while ensuring no increased fishing pressure overall on Fraser bound stocks. Annual FSC Fish mandates will not change, and departmental obligations to *PSC ??? will be maintained.*
- Could say something like: A table outlining various options is attached. The objective preferred option is Option 4; to identify a specific management area within the lower Fraser River to accommodate a Protocol Fishery. Those bands that assert and reasonably demonstrate strength of claim to historical use will be permitted and licenced to fish within a contained and clearly marked area of the lower River.
- See my comment. An alternative to the above bullet could be: A table outlining various options is attached with a recommended approach identified.

Comment [FaOC2]: This is simply one of the options you have identified in the table. Is this being proposed as the recommended option? If so see two approaches for introducing it as the preferred option.

Comment [FaOC3]: Just for the record, I am not sure if I agree with this as a recommended option. I think it could create some serious challenges in the short term and later with treaty implementation.

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Attachment (1) (if applicable)

Description of the attachment(s) (if applicable)

Officers / DGs / ADMs / initials of the admin clerk or typist

200X-XXX-XXXXX

SPEAKING POINTS

- **Speaking points should normally accompany each briefing note.**
- **Speaking points must also be written with size 16 font and with bold typeface.**

- Appendix

OPTIONS CONSIDERED: Re Hwiltsum in particular, but applicable to other SC Salish Tribes;

Comment [FaOC4]: Will probably need to recommend an option here if we haven't done it earlier.

1. Fish supplied by another FN through a protocol agreement under a host FN communal Licence
 - a. Pros = no change to any FN management / existing structures
~~a.b.~~Cons = not preferred by HFN as cultural practise is lost, difficult to find accommodating host First Nation
2. Fish Harvested by HFN members, who are designated to fish by a local FN under a Host FN Communal licence
 - a. Pros= easiest to facilitate, this will be the ad-hoc approach for 2008 (Semiahmoo and New Westminister bands to be approached)
~~a.b.~~Cons = it is ad-hoc and ~~does~~ may not resolve the issue, and may have to search for a new process in 2009.
3. Fish Harvested by HFN members, in a designated area at the mouth of the Fraser but outside of the river.
 - a. Pros = least controversial to Fraser bands
~~a.b.~~Cons = gillnet fishing is difficult for HFN in this area, -hard to meet target allocations, opportunity may be lost.
4. Fish Harvested by HFN, in the river but in a generic , and specific management area for protocol fisheries to be held, while making no concessions concerning rights,
 - a. Pros = Manageabilty, specific area identified without designating as a traditional area, reasonably close to Hwiltsums preferred area.
~~a.b.~~Adjacent FN will voice concern, and be in opposition
5. Issue a communal licence to HFN with Preferred area, and preferred means.
 - a. Pros = preferred by HFN,
~~a.b.~~Cons = may cause open conflict in the river, not applicable to all SC tribes and thus not best for long term strategy.

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Area description. (Attached separately)