Incorporating Tribal Interests in Marine Protected Areas:

Case Studies of Treaty Tribes on the Washington Coast

by

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ABSTRACT

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Although Tribal natural resource managers and other Tribal leaders are strong advocates of conservation for marine areas and natural resources, they generally do not favor Marine Protected Areas (MPAs) as a means to those ends. Conservation and Tribal goals overlap to a great extent, but the present design of MPAs often fail to adequately incorporate Tribal interests. Tribes have an interest in how future MPAs could be better designed, and how current MPAs might be altered, to strengthen Tribal powers and perspectives in the process. Through an assessment of the responses to a set of open-ended questions from interviews conducted with Tribal natural resource department representatives and Tribal policy authorities on the Washington coast, as well as with authorities on National Marine Protected Areas, this study considers two main research questions:

- How have Marine Protected Areas in western Washington affected the rights and interests of the Tribes?
- Can protections for marine environments be designed, established and implemented in a way that they achieve conservation goals and recognize Tribal rights and interests?

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ACRONYMS AND ABBREVIATED TERMS

ARPA: (National) Archaeological Resource Protection Act
BCCA: Bottom Contact Closed Area
BIA: Bureau of Indian Affairs
BTCA: Bottom Trawl Closed Area
EEZ: Exclusive Economic Zone
EFH: Essential Fish Habitat
EIS: Environmental Impact Statement
EK: Ecological Knowledge
ESA: Endangered Species Act
FMP: Fisheries Management Plan
IPC: Intergovernmental Policy Council
IUCN: International Union for Conservation of Nature
MMPA: Marine Mammal Protection Act
MOU: Memorandum of Understanding
MPA: Marine Protected Area
MPA FAC: Marine Protected Area Federal Advisory Committee
MSA: Magnuson-Stevens Act (Magnuson-Stevens Fishery Conservation and Management Act)
NAGPRA: Native American Graves Protection and Repatriation Act
NEPA: National Environmental Policy Act
NGO: Non-Governmental Organization
NMFS: National Marine Fisheries Service
NMS: National Marine Sanctuary
NMSA: National Marine Sanctuaries Act
NOAA: National Oceanic and Atmospheric Administration
NWIFC: Northwest Indian Fisheries Commission
OCNMS: Olympic Coast National Marine Sanctuary
ONMS: Office of National Marine Sanctuaries
ONP: Olympic National Park
PA: Protected Area
PCGFMP: Pacific Coast Groundfish Fishery Management Plan
PFMC: Pacific Fishery Management Council
PSMFC: Pacific States Marine Fisheries Commission
U&A (U and A): Usual and Accustomed fishing grounds and stations

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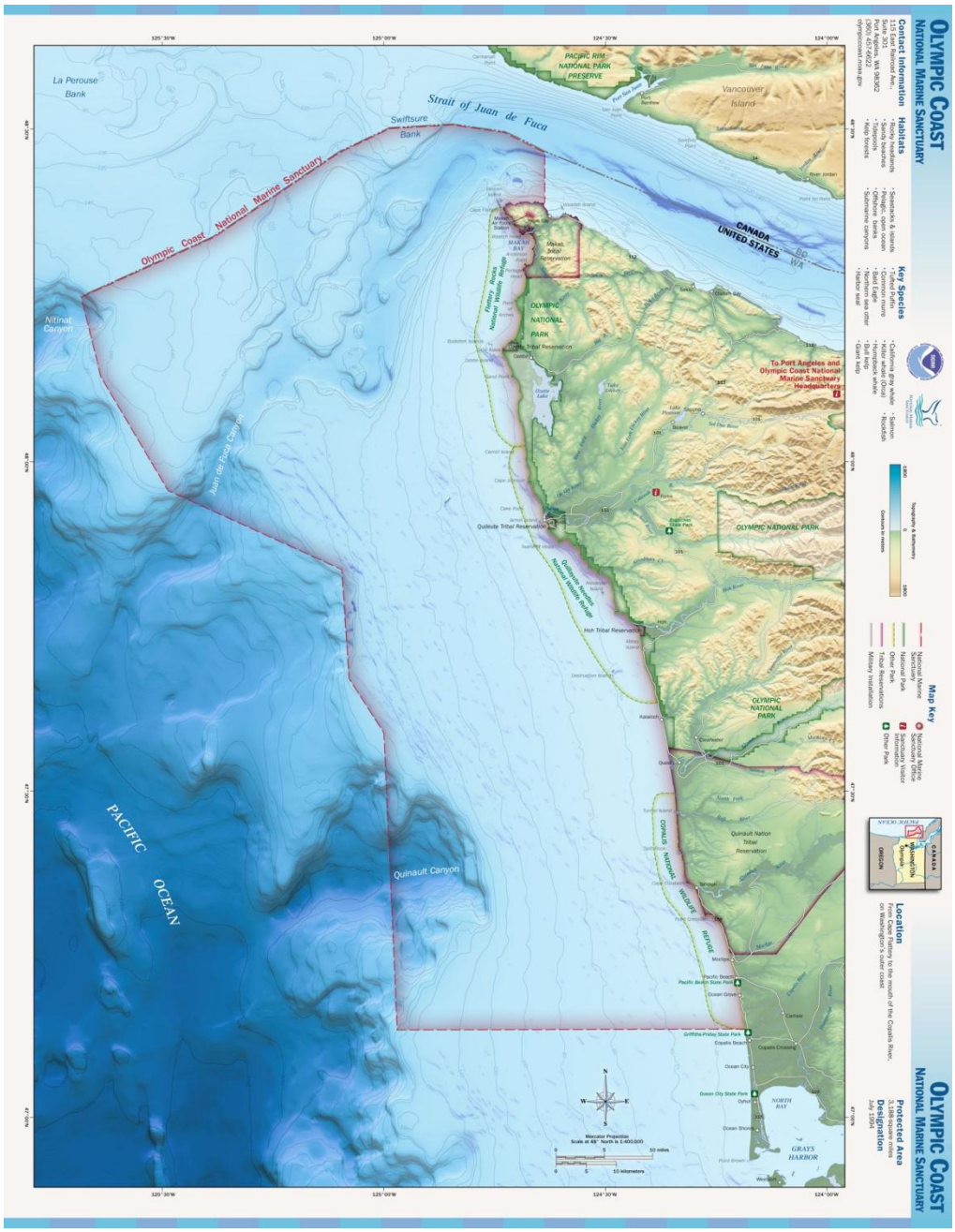

NOAA map of the Olympic Coast National Marine Sanctuary (OCNMS). From north to south, the map locates the reservations of the Makah, Quileute, Hoh, and Quinault. (Downloaded from http://sanctuaries.noaa.gov/pgallery/atlasmaps/images/oc_2000.jpg)

CHAPTER 1: INTRODUCTION

I first became interested in researching about the relationship between Tribes and Marine Protected Areas (MPAs) after coming across a paper entitled "Protecting Washington's Marine Environments: Tribal Perspectives" while doing some background research for one of my classes during my second year in the Master of Environmental Studies program at The Evergreen State College. This 2007 paper, written by Ted Whitesell (one of my Evergreen graduate professors), Fran Wilshusen Schroeder of the Northwest Indian Fisheries Commission (NWIFC), and Preston Hardison of the Tulalip Tribes, piqued my interest in a topic I knew very little about. Their research, using semi-structured interviews with prominent tribal leaders and marine natural resource managers in western Washington, found that though the tribes are deeply concerned about declining marine environments and that they have supported some MPAs in the region, they were concerned about the push for more MPAs. In reading the results of their research, I found a model of research which I found intriguing and a topic that I felt could be expanded upon through my own personal research six years later in 2013.

Marine Protected Areas have already been shown to be of concern to the tribes of Washington State (Whitesell et al. 2007). However, both the recent experiences of Tribes with MPAs and other types of Protected Areas (PAs), and the continuing push for the creation of more MPAs, call for an examination of the effects that existing MPAs have had in relation to Indigenous Peoples and their rights and interests. My goal in documenting Tribal experiences with MPAs was

to determine whether MPAs could be better designed so that they incorporated Indigenous rights and interests and if so, how this goal might be best accomplished.

Through a process of conducting regional and historical case studies, my study focuses largely on the experiences of the Tribes of western Washington State while bringing a more particular focus to the Olympic Peninsula's coastal Treaty Tribes (the Makah, Quileute and Hoh Tribes and the Quinault Indian Nation) and their relationship with the Olympic Coast National Marine Sanctuary (OCNMS) and other protected areas of the Olympic Peninsula. I chose to focus my research on the Olympic Peninsula coastal Tribes because I had done some previous research on the Quileute and Hoh tribes and I had some personal contacts within these Tribes who were able to get me started in the right direction.

My decision to conduct case studies focusing on Washington State's four Pacific coastal Treaty Tribes' relationships with OCNMS was made in part because these four Tribes have relationships with only this one, relatively longstanding federal MPA established in 1994 as opposed to Washington State's Salish Sea tribes, who are affected by multiple but smaller state and local MPAs. This enabled my research to focus on the examination of the MPA/Tribal relationships of four different tribes with one specific MPA, while at the same time providing an opportunity for a more contained study and somewhat limiting the number of interrelationships.

There were two other recent papers documenting studies similar to my own. One was the 2011 thesis of the University of Washington's Amanda Murphy; *A Collaborative Approach to Intergovernmental Coordination: A Case Study of the Olympic Coast Intergovernmental Policy Council*, and the other was a 2012 paper by University of Michigan's Geiger et al.; *An Assessment of Institutional Relationships at the Olympic Coast National Marine Sanctuary*. Murphy's paper focused on intergovernmental and interagency collaborative efforts and approaches in the management of OCNMS, and Geiger et al. focused on the role that institutional relationships play in the management of OCNMS and its marine resources. While the focus of these papers is different than mine the information provided in these two papers is a good supplement to my thesis as they cover in detail other aspects surrounding and related to the OCNMS/Tribal relationship.

In conducting this study, the focus of my research broadened to include varied topics such as the relationship between Indigenous Peoples and Protected Areas (PAs), treaties, law and legal cases, fisheries management, boundary issues, human rights and environmental justice. When I started my thesis research, I originally thought that the OCNMS was merely a no-fishing zone where the Tribes fishing rights were being drastically restricted. After subsequent research I found that Tribal fishing rights were not subject to the kinds of restrictions that I had thought. Learning that the OCNMS fell under the internationally recognized IUCN (International Union for Conservation of Nature) Protected Areas Management Category IV (habitat/species management area) instead of the highest level of protection (Category I: Strict nature reserve or Wilderness area)

helped me to realize that the source of conflict between the Tribes and the OCNMS was more institutional in character (Ostrom 1990).

For background, I felt that it would be helpful to research the effects of some the longstanding Protected Areas on and off of the Olympic Peninsula, in order to understand how these types of area designations have come to affect the Olympic Peninsula coastal Tribes. Federal and state land management confronts many of the same issues that federal and State management of marine areas deals with, so they are relevant to the larger area of research of Tribal/Protected Area relationships. In addition, when looking at these issues from a more holistic point of view, it becomes difficult to separate issues that affect the protections placed on land and marine areas and resources. Migratory fish, mammals and birds and the habitat and resources that support them are often both marine and terrestrial. Additionally, the experiences that Tribes and other Indigenous peoples have had with land designations and Protected Areas flavors their perceptions of how they may be affected by marine area designations and protections for marine environments.

Researching the topics of Tribal/Protected Area relationships and environmental justice helped me to realize that the root of the issue for the coastal tribes of western Washington is not just the varying levels of environmental protection of the many Protected Areas on and around the Olympic Peninsula, but also the transference of the control of traditional tribal territories and resource areas to the U.S. government and its agencies (Spence 1999). The fact that some of these traditional areas have been declared to be Protected Areas perhaps will

prove to be less adverse to tribal interests in the long run than if they had been transferred into the private ownership of citizens and corporations. Federal protection will protect habitats and resources from some sources of degradation, and stop one of the last remaining undeveloped areas in western Washington from being degraded by competing fisheries and fractured into small private landholdings (Perfecto 2009). In the meantime, the many and varied marine and land designations (with their various boundaries) on the Olympic Peninsula, and the various U.S. and State institutional agencies and departments that control them, are often a source of conflict with Tribes and tribal interests.

Dealing with all these separate entities can be a distraction from the larger picture. While the fundamental issues underlying the Tribal/Protected Area relationship really concern the inherent rights of Indigenous people to their traditional lands and resources and the injustices done to the Native cultures of the area, this thesis largely focuses on the U.S. treaty obligations to the Olympic Peninsula coastal Tribes and the overlap of these obligations with protections of the environment. Two recent reports by the Northwest Indian Fisheries Commission (NWIFC): *Treaty Rights at Risk: Ongoing Habitat Loss, the Decline of the Salmon Resource and Recommendations for Change* (NWIFC 2011), and the 2012 *State of Our Watersheds report* (NWIFC 2012) discuss the status of the environment within western Washington's Tribal Usual & Accustomed areas (U&As) as well as the unfulfilled obligations to provide for the welfare of Tribes stated in treaty agreements. While these reports focus particularly on river drainages and shoreline development (and other causes of

salmon habitat degradation) and not Protected Areas, they are especially relevant to the discussion behind this research. The reports combine basic assessments of the health of the watersheds in the region with Tribal perspectives concerning environmental degradation and how it threatens Tribal cultures and treaty-reserved fishing rights. At their roots these reports are a "call to action for the federal government to fulfill its trust responsibilities" established by its treaties with the Tribes of western Washington (NWIFC 2012).

Overall, the part of my thesis research which I found the most difficult (but also the most rewarding) was in the identification of interviewees and in the conducting of the interviews. The process of building relationships with people to the point that they were willing to participate in interviews (or to provide references for other potential interviewees) was an extended process. In the end, I found that these efforts were well worthwhile, as the interviewees' responses about many important topics provided what I believe to be the most interesting and important parts of this thesis's contribution to existing data and literature.

PART I: RESEARCH

This thesis is separated into two parts. Part I gives background information detailing the research behind this thesis. Part II presents the interviewee responses to questions posed by the researcher.

Part I is comprised of two chapters: Chapter 2: Methodologies and Research Design, and Chapter 3: Background. The Methodologies and Research Design chapter describes the methods used by the researcher for this research project. The Background chapter is divided into sections that provide a context for understanding the Tribal/Protected Area relationship on the Washington coast. It begins with a brief history of Northwest Tribes and treaties, then discusses the Tribal/Protected Area relationship, the relationship between of Washington State's coastal Treaty Tribes and Protected Areas and concludes with background on the Tribal relationship with MPAs and the coastal Treaty Tribes' relationship with Olympic Coast National Marine Sanctuary.

CHAPTER 2: METHODOLOGIES AND RESEARCH DESIGN

This study relies on qualitative methodologies that include personal observations and discussions, a review of literature of published and unpublished materials, building relationships and references, conducting interviews (either in person and on-site, by phone, or by email), and transcribing and analyzing these interviews for common themes of interest. The study uses the responses of 10 interviewees to 10 open-ended questions and an examination of case studies of the coastal Treaty Tribes in western Washington to answer two main research questions: *How have Marine Protected Areas in western Washington affected the rights and interests of the Tribes? Can protections for marine environments be designed, established and implemented in a way that they achieve conservation goals and recognize Tribal rights and interests?*

This study is meant to be exploratory and descriptive. It uses an examination of multiple case studies to discover common themes for further analysis. It is not intended to prove a theory or hypothesis; rather it is meant to provide new information. The main objectives of the project were to compile responses and examine information that might be useful to Native and non-Native governments, Protected Area managers, and other interested parties regarding the relationship between Native Peoples and protections for marine environments.
Welcome assistance was provided by TESC Foundation Activity Grants from The Evergreen State College.

To answer the two main research questions behind this study, additional and more specific exploratory and explanatory open-ended research questions[1] were developed to be used in semi-structured interviews. The interview questions and interview process used in this study were approved by The Evergreen State College Human Subjects Review Committee. The open-ended questions that were used in the semi-structured interviews were developed after a review of literature and through initial discussions with individuals who were approached because of their knowledge of Tribal/MPA relationships. The review of literature and the initial discussions provided background information regarding the four coastal Treaty Tribes, the history of federal and state relationships with Washington State's Treaty Tribes, and the interplay of federal, state and Tribal laws, policies and experiences in regards to MPAs. The review of literature and the initial discussions also helped to identify potential interviewees.

Ten interviews were conducted in Olympia and Sequim, Washington from March to November 2013. Three interviewees sent email responses and seven interviews were recorded, either in person or by telephone, all depending on the preference of the interviewee. The interview questions were used to guide the interview; however, interviewees were encouraged to freely express their own ideas and provide information they felt was important. Because of the varying experiences, backgrounds and expertise of the interviewees, they were allowed to choose which questions they wished to answer and also to omit any questions they chose to. The email responses ranged from one page to six pages in length.

[1] List of interview questions can be located in index on pg. 188.

Recorded interviews ranged in length from 35 minutes to one hour and 30 minutes. Interview recordings were made with the participant's knowledge and consent, and later transcribed.

Participants were not randomly selected; instead interviewees were identified through a literature review of key documents and policies or identified by tribal community members and tribal natural resource departments as key information holders because of their knowledge and experiences regarding the relationship between tribes and MPAs. Additionally, each interviewee was asked for recommendations for other potential interviewees. The interviewee selection process was completed when all suggested participants were either interviewed, declined interviews or failed to respond to repeated efforts to establish communication with them. If suggested participants declined an interview they were not asked repeatedly, so that no person felt pressured to participate if they did not feel inclined to do so. At the completion of the interviewee selection process, ten individuals from tribal natural resource departments, past and present federal representatives (from NOAA) and tribal policy experts had been identified and interviewed.

Interviewees

Tribal representatives:

Joe Schumacker
MPA Federal Advisory Committee,
Marine Resources Scientist,
Quinault Indian Nation Department of Fisheries

Micah McCarty
MAFAC Member, appointed by the Secretary of Commerce,

Special Assistant to the President for Tribal Government Relations, The Evergreen State College,
Former Vice-Chair, National Ocean Council's Governance Coordination Committee,
Former Chairman, Makah Tribal Council

Joe Gilbertson
Fisheries Management Biologist,
Fisheries Manager,
Hoh Tribal Fisheries

Katie Krueger, J.D.
Staff attorney and policy analyst,
Quileute Natural Resources,
Quileute Indian Tribe

Daryl Williams
Environmental Liaison,
Tulalip Tribes Fisheries Department

Federal representatives:

Joe Uravitch
Founding Director, National Marine Protected Areas Center at NOAA,
Formerly:
Chief, Coastal Programs Division at NOAA,
Associate Director, Office of Ocean & Coastal Resource Management at NOAA,
Chief, Sanctuaries and Reserves Division at NOAA

Valerie Grussing, Ph.D.
Cultural Resources Coordinator,
National Marine Protected Areas Center at NOAA

Tribal policy experts:

Craig Bowhay
Fisheries Policy Analyst,
Northwest Indian Fisheries Commission

Rob Jones
Coastal Program Coordinator,
Northwest Indian Fisheries Commission

John D. Gates, J.D.
Master in Public Administration faculty, The Evergreen State College,
J. William Fulbright Senior Scholar

Once the data collection period was concluded, interview transcripts were coded according to recurring themes that emerged. As themes emerged, the data from those themes were compared to other themes, and were refined and modified. From this process, core themes emerged for analysis. In order to maintain a level of anonymity and to put the focus on the emergent themes rather than on the interviewees themselves, the grouped responses of the individual interviewees were sometimes summarized and were not attached by name to the interviewees in the final written product. In cases where specific and direct quotations that exemplified or illustrated emergent themes were used, the originator of the quotation was identified in order to help provide context.

Although this research project aims to facilitate understanding of tribal perspectives about Marine Protected Areas, this report can in no way speak for the Tribes. It was prepared by a non-tribal researcher who has neither the authority nor the presumption to speak for the Tribes. And although the research findings consist predominately of the statements (and this researcher's interpretation of the statements) of tribal members, tribal natural resource managers, and tribal policy experts and past and present NOAA representatives, it should not be assumed that they or the Tribes or departments that they represent approve of the ways in which their words have been presented. In addition, no attempts were made to prove or disprove the comments and observations of the interviewees, but rather these comments and observations were presented and analyzed in an attempt to document experiences and perceptions. The author assumes full responsibility for any errors that may be found within this report.

CHAPTER 3: BACKGROUND

Northwest Tribes and Treaties

People have lived in the northwestern corner of Washington State for at least 10,000 years prior to the arrival of European-Americans (Wray 1997). A series of treaties and agreements by European powers and the U.S. would prove to have a profound effect on the lives of the Indigenous populations of this area. An agreement between England and the U.S. and a subsequent Act (Act of August 14, 1848, 9 Stat. 323) passed by the U.S. Congress in 1848 placed the area under U.S. control as part of the "Oregon Territory" (Wray 1997). The Act states that its enactment was not meant to affect "the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the U.S. and such Indians (Wray 1997)." At this time, the Native Peoples of Oregon Territory had had very little contact with Europeans or European-Americans. The wording of the Act indicates both that "the Indians in said Territory" were not considered U.S. citizens and that they were entitled to personal rights as well as property rights in the Oregon Territory.

1853 proved to be a pivotal year for the Native peoples of the Pacific Northwest. It was the year that Washington Territory split off from Oregon Territory and the year that the U.S. government enacted legislation that was indicative of a critical shift in policy. This new legislation was reflective of new motivations and tied to the continuing westward expansion of U.S. settlements in North America.

The Appropriation Act of 1853 authorized the President of the U.S. to negotiate with Indian Tribes to extinguish their title to their land (Wray 1997). The purpose of the Act was to open up Native American land for settlement by U.S. citizens and to confine Native peoples to smaller reserved territories. At the point in time that this act was signed, Native land title was still intact in the Northwest. In 1823, Chief Justice John Marshall had stated that the Tribes were then "the rightful occupants of the soil, with a legal as well as just title to retain possession of it… It has never been contended, that the Indian title amounted to nothing. Their right of possession has never been questioned" (*Johnson's Lessee v. McIntosh* 1823). In other words, the U.S. government needed to acquire the land title from the tribes to try to legitimatize the acquisition of tribal lands for settlement and exploitation.

In 1854, Isaac Stevens, Governor and Superintendent of Indian Affairs in Washington Territory, began negotiating treaties with the Native nations of Washington Territory. He had been directed by the U.S. federal government to unite the "various bands and fragments of tribes into tribes" (*U.S. v. State of Washington* 1974). Stevens noted in his first address to the Territorial legislature on February 28, 1854:

> "The Indian title has not been extinguished, nor even a law passed to provide for its extinguishment east of the Cascade Mountains. Under the land law of Congress it is impossible to secure titles to the land, and thus the growth of towns and villages is obstructed, as well as the development of the resources of the Territory" (found in Wray 1997).

From 1854 to 1856, seven treaties were made by Stevens with Washington tribal nations on the behalf of the U. S. In signing these treaties, and through other

agreements with the United States government, the tribal nations of the Pacific Northwest ceded most of their traditional lands and were largely confined to assigned reservation lands. The assignment to reservation lands restricted the traditional mobility and movement of the people of the area which had been tied to weather, seasonal changes, resource availability and social and cultural activities. As stated in a later interpretation of these treaties in *U.S. v. Washington* by Judge George Boldt in 1974, "the treaties were not a grant of rights to the Indians, but a grant of rights from them, and a reservation of those not granted" (*U.S. v. State of Washington*, 1974).

Coastal Treaty Tribes of the Olympic Peninsula

As this paper focuses on the relationship between the coastal Tribes and the Protected Areas of the Olympic Peninsula; for the purposes of this paper the treaties of note are the Treaty of Neah Bay with the Makah Tribe in January 1855 (for the Northwest tip of the Olympic Peninsula) and the Treaty of Olympia in July of 1855 with the Quinault, Hoh, and Quileute Tribes among others.

Makah Tribe

The Makah Reservation consists of more than 27,000 acres located in the northwestern most corner of the contiguous U.S. It is bounded by the Pacific Ocean and the Strait of Juan de Fuca. The Makah Tribe is the only tribe in the U.S. that is part of the Nootkan culture group, which includes two other First Nations in British Columbia, Canada (Wray 1997).

The Makah Reservation on Cape Flattery was created in 1855 with the Treaty of Neah Bay and it was enlarged in 1873 to include four Makah villages outside of the Cape (Wray 1997). In 1893 the Ozette Reservation was established to protect Ozette village, the southernmost of Makah villages (Wray 1997). The population at Ozette was severely reduced when families were forced by the U.S. government to move to Neah Bay so that their children could attend school. By 1932, there were only two residents at Ozette Village. In 1970, Ozette Reservation was put into trust for the Makah Tribe (Wray 1997). The town of Neah Bay is now the main residential area on the Makah Reservation.

Traditionally, Makah subsistence was acquired almost entirely from the ocean; with whale and halibut being their most important food products, followed by seals, salmon, cod, perch, shellfish, crab, octopi and squid. Because of the importance of fish and mammals to the Makah culture, Makah treaty negotiators made sure that marine resource acquisition guarantees were included in the Treaty of Neah Bay. Their treaty is the only Washington treaty that specifies the right to take whales. The major tribal economy of the Makah continues to be fishing.

Quinault Indian Nation

The Quinault Indian Nation (QIN), whose reservation was created by the Treaty of Olympia, consists of the Quinault and Queets tribes and descendants of five other coastal tribes (Quileute, Hoh, Chehalis, Cowlitz, and Chinook). The Quinault language, spoken by the Quinault, Queets and Copalis Peoples, is a branch of the Salishan language family (in common with Salish Sea and Olympic

Peninsula Tribes as well as British Columbia First Nations) (Wray 1997). The Quinault Indian Reservation, established in 1861 (and later enlarged in 1873), is located in the southwestern corner of the Olympic Peninsula and includes 23 miles of Pacific coastline, many streams and rivers (the largest of which are Quinault and Queets Rivers), and 208,150 acres of forested land (Murphy 2011).

Traditionally, the peoples of this area relied on salmon as a food staple and as such, many of the Quinault and Queets villages were alongside rivers (Wray 1997). Additionally, marine resources such as halibut, rock cod, sea bass, sole, herring, clams, oysters and mussels were regularly harvested. When the Treaty of Olympia was negotiated in 1855, the intention of U.S. negotiators was to concentrate all of the "fish-eating Indians" along the Washington coast onto one reservation (Wray 1997).

The QIN now has a large resource management staff which provides scientific data in order to make fisheries management and policy decisions. In part this helps to maintain the tribes' self-regulation status regarding tribal fishery policies that were recognized under *U.S. v. Washington* (Wray 1997). The QIN reservation now has its own seafood processing plant and fishing remains a large contributor to its economy.

Quileute and Hoh Tribes

For thousands of years, the predecessors of the Quileute and Hoh Tribes had permanent and seasonal settlements on the Pacific Coast as well as along and at the mouths of the Quillayute and Hoh Rivers and their tributaries. Historically,

they practiced seal and whale hunting and they harvested many other marine resources such as halibut, salmon, cod, bass, and shellfish.

The Quileute and Hoh are now recognized as separate Tribes although historically the Hoh River Indians are considered to be a band of the Quileute. Their Chimakuan language family is now represented only by the Quileute and the Hoh Tribes (and formerly by the Chemakum Tribe). This language family distinguishes them from other tribes on the Olympic Peninsula and is one indication of their distinct cultural history. Quileute tradition relates that the Quileute-Chemakum controlled a larger area of the Olympic Peninsula before the arrival of the Makah and the Klallam (from Vancouver Island) pushed them southward (Wray 1997). The Chemakum population was decimated around 1850 after a raid by a Salish Sea Tribe on their settlement in the Port Townsend area, and their remnants were absorbed by Klallam, Skokomish, and other Tribes (Wray 1997).

In 1889, President Grover Cleveland signed an Executive Order creating the 595 acre Quileute Indian Reservation. The location and boundaries of the reservation indicated in the Executive Order were based on an 1881 survey, which was the first official U.S. Land Office survey of the area (Wray 1997). The Quileute Reservation land base was indicated as a roughly one square mile of territory at the mouth of the Quillayute River, what is now called LaPush, Washington State. A 443-acre Hoh Reservation was created at the mouth of the Hoh River four years later by an 1893 Executive Order (Wray 1997).

Interpreting and Implementing Treaties: Boldt Decision, Co-management and Habitat Protection of Tribal Resources

Two landmark court cases for Washington State Treaty Tribes occurred in the Northwest as the result of a turbulent period in the region during the 1950s-1970s known as the "fish wars" (Cronin et al. 2007). In addressing tribal treaty rights in the 1969 *United States v. the State of Oregon* decision, the State of Oregon was mandated to adopt practices that would not impinge on tribal fishing rights (Cronin et al. 2007). A stronger legal pronouncement for the tribes of Washington was made in the 1974 case, *United States v. Washington* (also known as the Boldt Decision); where Judge George Boldt reaffirmed and mandated the recognition of the treaty fishing rights of the Tribes of Washington State which had been guaranteed by treaties.

This judicial process was initiated at least in part by the actions of some members of the Nisqually tribe, notably Billy Frank Jr., who stated that they had fishing rights which were guaranteed by the U.S. government. It was further claimed that these rights could not be regulated by the State of Washington. When the intent of the treaties at the time of their signings was interpreted in the 1974 Boldt Decision, there were clauses in the treaties that were of particular significance that would prove to be of benefit to the Washington State Treaty Tribes. Gov. Isaac Stevens had included clauses in the treaties securing to the tribes the right to take fish "at all usual and accustomed grounds and stations" and of fishing rights "in common" between Indian and non-Indian fishermen.

In 1974, Judge George Boldt interpreted the intent of the "at all usual and accustomed grounds and stations" (now commonly referred to as a Tribal U&A) clause as meaning that in addition to exclusive rights to fishing on reservation, Native fishermen had reserved rights to harvest fish outside of their assigned reservations because they had historically fished in a wide variety of areas depending on the season and the abundance of fish at different areas at different times of year. In addition, Judge Boldt interpreted the "in common" clause as meaning that there would be a 50 – 50 division of salmon and steelhead between Native and non-Native fishers (Cronin et al. 2007). Judge Boldt's aim in making his court decision was to interpret the intent of the treaties. In doing so, he chose not to just break the treaties down to the literal meaning of the words and phrases contained in the treaties, but instead he chose to try to ascertain how the Tribes themselves might have understood the agreements they were signing.

For Native Americans in the Northwest, the Boldt Decision and *U.S. v. Oregon* have helped bring about many positive effects over the past forty years. Judge Boldt had further interpreted the intent of the "in common" clause of the treaties to articulate Washington's relationship with the Treaty Tribes by mandating a co-management relationship between the Tribes and the State of Washington. Co-management is the government-to-government process by which the treaty Indian tribes in western Washington and the Washington State jointly manage the shared salmon resource (NWIFC 2010). An important byproduct of mandating this co-management relationship was the resulting increase in active management of ancestral lands and waters by the Tribes.

Through the co-management process, Tribes and the State of Washington maintain individual sovereignty while jointly managing shared resources. Co-management minimizes the duplication of management activities and enhances the management efforts of the Tribes and the State through incorporating data sharing and review, and through the development of joint management objectives and monitoring, and a dispute resolution system (NWIFC 2010).

After the Boldt decision, the Tribes began to take steps to ensure the decision was implemented through hiring biologists, training enforcement officials, and forming fisheries committees (Murphy 2011). In 1975, 19 Treaty Tribes created the Northwest Indian Fisheries Commission (NWIFC) as an administrative agency to provide staff and support to implement the process of management of the salmon resource (Brown and Footen 2010). The Commission, now composed of Commissioners from 20 member tribes, provides a forum to jointly address natural resource management issues and enables them to speak with a unified voice on issues of mutual concern (Murphy 2011). The NWIFC assists member tribes in their role as natural resource co-managers by providing direct services to member tribes in areas such as biometrics, fish health and salmon management (NWIFC 2010)(Brown and Footen 2010).

From the beginning, the Boldt Decision generated a great deal of backlash from certain parts of the public. However, in part because the Tribes have demonstrated an ability to manage the resource effectively in cooperation with local and regional partners, there has been a gradual shift of public opinion (Cronin et al. 2007). In addition, given that natural resources rarely follow

political boundaries, collaboration has become recognized to be necessary for both Tribal and non-tribal resource managers in order to achieve management objectives (Cronin et al. 2007). Tribal successes in managing the resource in the Pacific Northwest region can be attributed to an ability to draw upon their cultural ties to salmon (and other resources) and to their ability to incorporate Indigenous science with Western science in the co-management process (Cronin et al. 2007).

There is also an increasing set of literature, court rulings and Tribal/state agreements related to the continuation and furthering of Boldt's ruling (Bernholz et al. 2008). The 1980 ruling by Judge Orrick, commonly called Phase II of the Boldt Decision (United States of America et al., Plaintiffs, v. State of Washington et al., Defendants Civ. No. 9213 – Phase II), expanded on the interpretation of tribal treaty harvest rights by applying them to habitat protection of the tribal resource. The *U.S. v. Washington* (1980) decision was concerned in part with treaty obligations to protect the environment, while specifically focusing on habitat issues. This case and decision is particularly relevant to the discussion in this thesis as it involves the idea that the interpretation of tribal treaty rights could be expanded to involve more than just the right to fish (Belsky 1996). Judge Orrick stated in his ruling "habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless."

In 1989, the federally recognized Indian tribes signed the Centennial Accord with the State of Washington. This agreement formally recognized the tribal/state government-to-government relationship as the foundation of natural

resource co-management in Washington and provided a framework to translate the tribal/state government-to-government relationship into more efficient, improved, and beneficial services to Indian and non-Indian people (Washington Governor's Office of Indian Affairs 1989).

The Tribes, which have far fewer staff than the government entities, have had to work with a multitude of state agencies, as well as regional authorities, and county and local government entities to protect and restore fish habitat (Brown and Footen 2010). By acknowledging the Tribes as an equal government in the Centennial Accord, the state introduced a new era of partnership and created a renewed opportunity for state/tribal communication, cooperation and coordination (Reynolds 1997). This agreement was renewed in 1999 as the New Millennium Agreement (Washington Governor's Office of Indian Affairs 1999).

In 2001, the Tribes again sued the State of Washington stating that their "treaty-based right of taking fish had been impermissibly infringed" by the state's construction and operation of culverts that hindered free passage of fish and thus "reduced the quantity and quality of salmon habitat, prevented access to spawning grounds, reduced salmon production in streams, and diminished the number of salmon available for harvest by treaty fishermen" (*United States v. Washington*, C70-9213, 2007).

Culverts are structures used to pass roads over streams and streams under roads. As defined in the text of the litigation: "One cause of the degradation of salmon habitat is blocked culverts, meaning culverts which do not allow the free

passage of both adult and juvenile salmon upstream and downstream" (*United States v. Washington*, C70-9213, 2007). The Tribes asked the Court to find that the State of Washington had an unfulfilled "treaty-based duty to preserve fish runs, and sought to compel the state to repair or replace state culverts that impede salmon migration to or from spawning grounds" (*United States v. Washington*, C70-9213, 2007).

In a 2007 court decision (commonly called the Culvert Case), U.S. District Judge Ricardo Martinez found in favor of the Tribes and declared that "…the right of taking fish, secured to the Tribes in the Stevens Treaties, imposes a duty upon the state to refrain from building or operating culverts under state-maintained roads that hinder fish passage and thereby diminish the number of fish that would otherwise be available for Tribal harvest. The Court further declares that the State of Washington currently owns and operates culverts that violate this duty" (*United States v. Washington*, C70-9213, 2007). In 2013, after the state showed insufficient progress on correcting their fish-blocking culverts, Judge Martinez granted a 2009 motion by the Tribes for a Permanent Injunction by ruling, "Under state and federal law, barrier culverts must be corrected" (*United States v. State of Washington* Case no. CV 70-9213, Subproceeding 01-1 (Culverts), 2013).

The end result of these judicial process showed that the intent of treaties could be used for the purpose of decolonization even though the original intent behind the creation of these treaties was largely meant to facilitate the colonization of Native American lands by the U.S. government. The treaties

provide a key context for any Protected Areas in western Washington, which have to take their legal and political framework into account.

Fisheries Management

Fisheries management is also crucially important to the Tribal/non-tribal relationship in Washington State. For more than 100 years, state regulations have been in effect on domestic fisheries alongside the coasts of Washington, Oregon, and California. While many fisheries overlapped state boundaries and participants in these fisheries operated in more than one state; during that time, management of coastal fisheries fell under the jurisdiction of the states and each state acted independently in both management and enforcement (PFMC 2008). The lack of uniformity of management and regulations led to the formation of the Pacific States Marine Fisheries Commission in 1947 (PFMC 2008). The Pacific States Marine Fisheries Commission had no regulatory power but acted as a coordinating entity that submitted recommendations to states (PFMC 2008).

During the period of 1950–1980 economic growth and modern technologies expanded the scope of world fisheries and free and unregulated fisheries depleted ocean fish stocks (Huppert 2005). In order to reverse this trend, coastal nations responded by developing a variety of institutional regimes aimed at conserving fish stocks and limiting harvests to levels that are biologically sustainable (Huppert 2005).

Management of foreign fishing operations on the U.S. Pacific Coast first began in 1967, when the U.S. and U.S.S.R. signed a bilateral fishery agreement (The U.S. later signed bilateral agreements with Japan and Poland) affecting trawl fisheries off Washington, Oregon, and California (PFMC 2008). When the U.S. implemented its Exclusive Economic Zone (EEZ), extending its jurisdiction to 200 nautical miles from shore (after signing the Fishery Conservation and Management Act of 1976), state jurisdiction of waters were articulated as extending three miles from shore, the National Marine Fisheries Service (NMFS) was developed as an agency to manage U.S. fisheries and a management plan for the foreign trawl fishery off the Pacific Coast was implemented (PFMC 2008).

In 1977, as directed by the Fishery Conservation and Management Act (later amended and renamed the Magnuson-Stevens Fishery Conservation and Management Act or Magnuson-Stevens Act), eight regional fishery management Councils, including the Pacific Fisheries Management Council for the west coast of the contiguous U.S. were established (PFMC 2008).

In the case of the State of Washington, the coastal Treaty Tribes had already been declared as co-managers of the coastal fisheries resource within the state's jurisdiction since the time of the 1974 Boldt Decision. Through the implementation of the Magnuson-Stevens Act (MSA), Washington State's Coastal Treaty Tribes now became fisheries co-managers of the federal waters within their Tribal U&As that extended well beyond the state's three-mile offshore jurisdiction (Magnuson Stevens Act; 16 U.S. 1801 et seq.). The implementation of the MSA and the creation of the Pacific Fisheries Management

Council (PFMC) have created a unique tribal/federal/state co-management framework and forum for managing fishery resources and for the coordination of fishery management efforts (OCNMS 2011).

The Pacific Fishery Management Council (PFMC) is part of NOAA's National Marine Fisheries Service (NMFS) and it is made up of representatives from the Tribes and the states of Washington, Oregon, California, and Idaho (Geiger et al. 2012). The PFMC has developed Fisheries Management Plans (FMPs) for the fisheries that it manages to identify thresholds for both the fishing mortality rate constituting overfishing and the stock size below which a stock is considered overfished. The PFMC manages 119 fishery species along the Pacific Coast by issuing permits and setting catch limits (Geiger et al. 2012).

Though the motives behind them were largely economic, it could be said that the implementation of the EEZ and the creation of the PFMC created what was in effect the first federal Protected Area off of the coast of the State of Washington.

Protected Areas

Different definitions of Protected Areas exist. The globally recognized International Union for Conservation of Nature (IUCN) uses this definition: "A Protected Area is a clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values" (Bertzky et al. 2012). The IUCN has also developed a system of Protected Area

management categories which help to classify Protected Areas based on their primary management objectives. These categories are often used by the United Nations and others for Protected Area planning and reporting (Bertzky et al. 2012). The Protected Areas with the strictest protections are classified as Category I and the Protected Areas with the lowest level of protection are classified Category VI, with other varied levels of land use and protection in between them. The IUCN Protected Area management categories are: **Ia.** Strict nature reserve, **Ib.** Wilderness area, **II.** National park, **III.** Natural monument, **IV.** Habitat/species management area, **V.** Protected landscape/seascape and **VI.** Protected Area with sustainable use of natural resources (Bertzky et al. 2012)

Indigenous/Protected Area Relationship

There is an increased trend for collaborative, multi-stakeholder processes in the governance of biodiversity and protected areas (Bertzky et al. 2012). The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) supports moral and practical claims of indigenous peoples to govern areas and territories where they possess customary rights, traditional ownership or occupation (Bertzky et al. 2012).

While in practice there are still significant challenges in empowering more of a diversity of actors in conservation, recent decades have lead to increased engagement of local communities, Indigenous Peoples, private groups, and shared management models in the governance of Protected Areas (Bertzky et al. 2012).

This trend is seen in the World Database on Protected Areas (WDPA), which currently has governance information for half of the world's total protected area (Bertzky et al. 2012). By 2010, the WDPA recorded some 700 Protected Areas known to be governed by Indigenous Peoples and/or local communities, covering over 9.3% of the total protected area with a known governance type (Bertzky et al. 2012).

Indigenous PAs

Some countries have national legislation which recognizes a broader range of governance types. For example, Australia has developed a category of Indigenous Protected Areas (IPAs) within its national reserve system (Bertzky et al. 2012). Communities are able to decide whether or not they will become officially declared IPAs following a consultation period (Bertzky et al. 2012). At present, nearly 25% of Australia's national reserve system is governed by Indigenous Australians, including through co-management arrangements with government agencies (Bertzky et al. 2012).

In a 2012 review of 21 case studies of natural resources management by Hill et al. (in which they classify resource management initiatives as indigenous governed collaborations, indigenous-driven co-governance, agency-driven co-governance and agency governance) they conclude that "indigenous-driven co-governance provides better prospects for integration of Indigenous ecological knowledge and western science for sustainability of social-ecological systems"

than agency-driven co-governance and agency governance (Hill et al. 2012). They stress the importance of supporting indigenous governance and distributing decision making into "wider networks of families and communities" (Hill et al. 2012).

Globally, there are also other examples of areas that have recently been declared as Protected Areas by Indigenous Peoples. The Ngati Konohi, Native People from Whangara, near Gisborne in Aotearoa (New Zealand), are the first tribe in the country to establish a marine reserve. Their reserve has been running for 10 years and now feeds an adjoining mataitai (traditional Maori MPA), where no commercial fishing is allowed, out in front of their marae (tribal gathering place). In 2013, the aboriginal Dhimurru people of northern Australia made additions to their terrestrial IPA (designated in 2000) when they and the Australian Government formally announced the designation of the first "sea-country" Indigenous Protected Area (IPA) in Australia (Schumacker *MPA Connections* 2013). Also in 2014, the Tla-o-qui-aht First Nation on Vancouver Island created its third Tribal National Park by making a unilateral tribal park declaration to control mining developments on their traditional territories (Hoekstra 2014).

Indigenous/Tribal View of the Environment and Resource Management

The need for Protected Areas in and around western Washington can be directly attributed to the value system of European-American newcomers to the

Pacific Northwest. At first they only saw an opportunity to exploit natural resources; for instance, they saw the trees in terms of their value in board feet and old-growth trees as non-productive (Russo 2011). This perspective is very much in opposition to the value system of a Native culture that had a long-standing relationship to the environment and saw the same trees in terms of their spiritual power; as one piece of the interconnected and interrelated system that they and their ancestors were tied to by tradition and for personal and cultural survival (Russo 2011).

> "It is very hard to value what you do not understand. For example, board-feet is a unit of production that foresters use to measure the volume of harvestable timber. In the case of old-growth trees, as the trees age they add less volume and, therefore, less value. At a certain point, they are considered non-productive (or 'decadent' in the terminology of forestry). (In the Coastal Salish language), sk^{w}adi'lic signifies a spiritual power of the cedar tree. As the tree ages, and the growth rings grow closer together, the spiritual power it possesses increases. This is not to say that the Lummi Indians are not loggers or that foresters are not religious people, but that in certain situations these values can, and do, collide" (Russo 2011).

The differing value orientations and predispositions of people and the pre-judgments that people make filter their perceptions and help to form their responses in regards to what is believed to be "real" or "true" (Russo 2011). An offshoot of this orientation is that the people in positions of power often try to control what is to be considered the "truth," and that "truths" seem to change over time. Because of this tendency, it is important to recognize that there are other viewpoints on what is truth. Dr. Kurt W. Russo, who worked with the Lummi Tribe for many years, said "At the present time, the western scientific frame of reference, ostensibly impartial and objective, is the final arbitrator of what is real and true knowledge" and also; in the dominant culture "science is positioned as a

'neutral' arbiter (Russo 2011)." But the scientific frame of reference cannot provide the whole truth.

> "I don't know why it is, but it seems like non-Indians think they can plan as well as nature when it's the Creator's plan. Our old people knew this: real knowledge of nature comes to you spiritually, humbly. We know you can set the (fishing) net, but you can never control the tides. If you think you can control nature, you abuse it. And if you abuse it, you lose it" (unidentified Lummi Tribal member, Russo 1989).

I would suggest that attempts to separate the Native Peoples surrounding Protected Areas from conservation policies that affect them will fail in the long run. Part of the learning process for conservation strategists is find out how to engage and incorporate the populations surrounding Protected Areas in the planning and implementation of conservation practices within the Protected Areas. The level of success of conservation within the Protected Areas is tied to the actions of people in the areas surrounding them, not just people's action inside the conservation areas. This is, in part, because natural systems and animal species also rely on inputs from areas outside of the areas that are protected, and even if people are excluded from Protected Areas, nature cannot be contained in Protected Areas. In this way, it becomes impossible to separate people from attempts at conservation in their geographical area.

While some progress has been made in the direction of better management and protection of Native American cultural resources, an underlying issue beneath the surface remains; the marginalization of Native American traditional knowledge and tribal cultural values (Russo 2011, Williams 2013). In addition, there is an issue of how land managers can address the sacred and the secular, the private and the public, when addressing Native American cultural use of public

lands (Russo 2011). There seems to be a dominant view among Protected Area advocates and natural science-focused academics that human beings are to be considered the enemy of the environment, and as such they need to separate people from nature and natural processes or their attempts at conservation of species will fail. To me, this is not only an elitist but a defeatist attitude. This type of viewpoint presents the idea that only natural scientists and wilderness advocates can save the species of the natural world because other people are either ignorant, do not care about anything but themselves, or simply cannot be trusted.

Another current point of discussion is about the seemingly opposed preservationist and utilitarian conservation goals and of the merits of "fortress conservation" versus community-based conservation and the sustainable use of natural resources (Adams 2004). Utilitarian and sustainable use of resources is more in line with traditional cultural ecosystem management of the tribes in the Pacific Northwest (and other Native/Indigenous communities that have longstanding ties to their environment, which included the use and management of natural resources around them). Anthropologist Darrell Posey of Oxford University characterized the indigenous cultural practice of sustainability in this way:

> "Traditional livelihood systems embrace principles of sustainability that, across cultures and regions, generally emphasize the following values: cooperation; family bonding and cross-generational communication, including links with ancestors; concern for the well-being of future generations; self-sufficiency and reliance on locally available resources; rights to lands, territories and collective and inalienable (as opposed to individual and alienable) resources; restraint in resource exploitation; and respect for nature, particularly sacred sites"(Mander et al. 2006).

There is much to be learned about conservation of resources from people with long-standing connections with particular environments. Incorporating the sustainability practices of indigenous communities in conservation strategies for areas where they were traditionally successful contributes to the likelihood that these strategies will succeed. Incorporating these practices is especially important if there is a desire to engage or maintain the engagement of local people with conservation of local resources. By maintaining their cultural practices, Indigenous people's cultural connections to local environments are reinforced. However, Indigenous peoples are in many cases, increasingly surrounded by non-Indigenous people and influences and cultural conflicts can and do occur when traditional local knowledge and cultural environmental values are not consistent with the values of a wider public (Gupta 1991). Larry Merculieff, Aleut elder from the Bering Sea's Pribilof Islands, said this regarding what he called "Animal First" activists and their attempts to prohibit his culture from continuing its traditional sustainable cultural practices:

> "They do not understand that in their desire to protect animals, they are destroying culture, economic and spiritual systems which have allowed humans and wild life to be sustained over thousands of years... Theirs is based upon a belief that animals and humans are separate and they project human values into animals. Ours is based on the knowledge from hundreds of generations which allows us to understand that humans are part of all living things – and all living things are part of us. As such it is spiritually possible to touch the animal spirit in order to understand them. Our relationship with animals is incorporated into our cultural systems, language and daily lifestyles. Theirs is based upon laws and human compassion. …Because we are intricately tied to all living things, when our relationship with any part of such life is severed by force, our spiritual, economic, and cultural systems are destroyed, deep knowledge about wildlife is destroyed, knowledge which western science will never replace... I leave you with this last thought – we have an obligation to

> teach the world what we know about proper relationships between humans and other living things" (Merculieff 1990, found in Gupta 1999).

Many natural scientists involved in conservation lack a background in social science and so seem to have trouble coming to grips with the connection between the welfare (including economic development) of local people and conservation issues, but when looking at the larger picture, the two issues are inseparable (Fraser 2009). Instead of deciding that conservation aims are fundamentally at odds with Indigenous cultures that have traditionally lived sustainably, it is a better idea to find ways to invest in Indigenous communities, while reinforcing the common interests within the larger framework of conserving, restoring and protecting the environment and the living things in it (Fraser 2009). However, each situation is unique due to the differing environments and their plant and animal communities and differing histories and present realities of the people nearby (Fraser 2009). Economic pressures and other outside influences have much to do with the existing states of different environments, but local people will inevitably play a leading role in the success or failure of local conservation issues in the long term (Fraser 2009).

> **"**Biodiversity cannot be conserved by keeping people poor even if, historically biodiversity survived largely under such conditions. Our studies have shown that many of the communities which conserve diversity have remained poor because of their superior ethical values… When they decide not to pluck more plants than are necessary for immediate use, they forego an opportunity of accumulating wealth by processing the herbal diversity in larger quantities and sell or dispense it to others for consideration. There are others at the same time (including local people as well as large corporations-national as well as international) who have no hesitation in extracting biodiversity without taking care of regenerating the same. The challenge is to modify ethical positions that threaten biodiversity and, at the same time, to ensure improvements in livelihood prospects for indigenous peoples... These communities will

> then continue to conserve biodiversity along with their associated ethical and cultural values" (Gupta 1999).

Incorporating functioning natural systems in food production systems can be beneficial to human and non-human species as well as to the food production systems themselves (Perfecto et al. 2009). In *Nature's Matrix*, Perfecto et al. present the idea that social injustice, not the need for increased productive capacity that is incorporated within the capitalist mass-production based economic system, is the cause of hunger of many people in the world. Development and increased production has problems of its own. The creation of large corporations to mass produce agricultural products disenfranchises local populations, destroys traditional communities, small-scale farmers and local markets and separates people from their connection to their traditional lands (Perfecto et al. 2009).

While I tend to agree that development has been and continues to be one of the main causes of environmental degradation, it also seems obvious that the welfare of the environment is tied to the welfare of people (Fraser 2009). The relationship between people and the environment can be a mutually beneficial relationship. Our ability to establish and reinforce this type of relationship between people and the environment is the issue that will decide whether conservation of the environment will work in the long run. I would like to think that by recognizing and reinforcing Indigenous Peoples' connections to their traditional areas, and by analyzing their traditions of sustainability; it could be possible to develop new traditions of sustainability that incorporate the well-being of the environment and the species within it, including human beings.

"The environmental movement must involve itself in the human rights movement of indigenous people and other such disenfranchised people to build trust and develop a radical new environmentalism. The idea that preservation equals the absence of human occupation and/or use is no longer consistent with either evolving principles of ecology or international norms of indigenous rights. Joint management models may provide an ideal mechanism for supporting the ideals and goals of both the environmental movement and indigenous sovereignty over lands and resources" (Kellermann 2007).

Establishing and applying new traditions of sustainability (that incorporate traditionally proven managers and methods) into the management of Protected Areas would be a logical step. Collaborative management and Indigenous engagement or ownership of Protected Areas coupled with scientific land management techniques could provide a highly sustainable system of use and protection (Stevens 1997, Birkes 1999). However, this would entail a paradigmatic change in the way Protected Areas are envisioned, especially because the dominant vision of nature preservation, ever since the creation of America's first National Park, Yellowstone National Park, has viewed human use and inhabitation as in opposition to environmental protection (Kellermann 2007).

America's First National Parks

> "The National Park Service is not the first landlord of the 'pristine' and 'untouched' landscapes we now call national parks. In fact, in large part due to the profound influence American Indians have had on all levels of biological organization within ecosystems, the very concepts of 'pristine

> area' and 'wilderness area' are now being dismantled. By setting aside protected areas, it is recognized that the Park Service has succeeded in halting disturbances by hordes of arriving immigrants—but it is also recognized that this very same setting aside has put an end to much of the traditional environmental management of lands and plant communities by indigenous populations" (Ruppert 2001).

An early and strong basis for Native American mistrust of the motives and intentions of non-Natives behind the creation of Protected Areas stems from negative experiences with U.S. National Parks. From the very beginning of the creation of America's first National Parks there has been a history of land dispossession and physical removal of Native Americans from Protected Areas (Spence 1999). America's shifting priorities regarding land use and land protections have been reflective of U.S. policy. They have also been reflective of the shifting understandings of the American people when looking at land and Native peoples. The whole idea of the existence of an "uninhabited wilderness" was a construct seemingly created to excuse the dispossession and exclusion of the Native inhabitants from the land they inhabited or seasonally utilized for thousands of years (Spence 1999). The creation of National Parks in lands said to be "unspoiled by humans" was representative of the times and very much in line with the goal of westward expansion by Americans and its policies aimed toward the cultural destruction and relocation of North America's Native inhabitants (Spence 1999).

Treaties and systematic Native American removal were used to manufacture a "wilderness" that was exclusive of human habitation in National Parks (Spence 1999). The idea of reserves for animals and reservations for human beings helped to bring about an environment that was not reflective of

historical realities. Protected Area lands that had been deemed to be "unspoiled by humans" had actually been shaped by the cultural practices and natural resource use practices of the original inhabitants. The removal and exclusion of the Native Peoples from parklands had very real impacts on these historically human-influenced ecosystems. Overgrazing on particular plant species by ungulates (previously held in check by Indigenous hunting) resulted in the alteration of the make-up of plant communities, and the cessation of anthropogenic burning resulted in the forestation of land that had been previously been maintained as prairies or other open habitat types (Spence 1999). These factors and others affected many plant and animal species that had come to rely on these human-maintained ecosystems.

The idea of Native Americans as being a "vanishing race" was partially brought about by reductions of the Native population due to diseases, but it was also helped along by U.S. policy through the use of the U.S. military which enforced land dispossession (Spence 1999). Changing land-use priorities were also reflected in U.S. policy in regards to Native populations and National Parks. Government priorities were at first geared towards settlement, agriculture, land exploitation and Indian removal. Priorities then shifted towards the preservation from exploitation of certain lands and the creation of National Parks, with an eye on tourism, recreation and preservation of beautiful or scenic sites.

The National Parks were also a manifestation of American nationalism and its ideal of democracy (Spence 1999). Scenic areas were seen to be illustrative of the idea that North America had open places Europe could not match, while at the

same time they were areas to be set aside for the public; the lands would be protected from private exploitation for the good of public enjoyment (Spence 1999). Historically, there were varied and shifting rights and privileges allowed by the government or mandated by treaties (which were usually disregarded) with the Native peoples who traditionally inhabited or seasonally utilized the areas that would become the first National Parks; Yellowstone, Glacier and Yosemite. However, in all three of these instances of National Park creation, Native residence came to an end in the traditional areas that became National Parks.

Yellowstone, Glacier and Yosemite National Parks

America's first National Park was created by the Yellowstone Act in 1872. Yellowstone Park's rules and regulations (with the backing of plenary power) were used to override the usufructuary treaty rights of the Bannock and Shoshone Indians to hunt off-reservation through the 1896 *Ward v. Race Horse* court decision (Spence 1999). In creating America's first National Park, the historical connection between Protected Area creation and Native American dispossession was firmly established at the very beginning, when the Congressional Act creating Yellowstone was used to facilitate the abrogation of a treaty with Native American nations.

Though the impetus for the *Ward v. Race Horse* court decision was largely created by the citizens and game laws of the State of Wyoming (incorporated as a state in 1890 but part of Wyoming Territory at the time of Yellowstone's

creation) the precedents cited for the decision were the Yellowstone Act and the Lacey Act (Spence 1999). The 1894 Lacey Act, which was enacted by Congress with the intention to restrict non-Native hunting in Yellowstone (and did not mention altering treaty rights), gave "the rules and regulations made by the Secretary of the Interior for the government of the park, and for the protection of the animals, birds, and fish and objects of interest within," the power of federal law (Spence 1999).

The justices' ruling on the *Ward v. Race Horse* decision stated that the 1868 Fort Bridger Treaty with the Bannock and Shoshone Indians should be viewed as only a temporary expedient (Spence 1999). Their decision was made even though under Article VI of U.S. Constitution, treaties are recognized as being the "supreme law of the land." Congress's plenary power (absolute authority over Indian affairs) it was said, had unilaterally (even if unintentionally) terminated certain provisions of the Fort Bridger Treaty thus nullifying Shoshone and Bannock off-reservation hunting rights in the State of Wyoming as well as in public lands such as Yellowstone.

The termination of the Bannock and Shoshone off-reservation usufructuary rights was stated as having been previously being demonstrated as the will of Congress, because Congress had already neglected to recognize the U.S. treaty with the Bannock and Shoshone by enacting the Yellowstone Act and the Lacey Act (Spence 1999). These two congressional acts were interpreted by Justice Edward Douglas White, who wrote the majority opinion of the court in the *Ward v. Race Horse* court decision, to be evidence of the government's desire to

abrogate its treaty (Spence 1999). As a result, state and federal agencies, including the Bureau of Indian Affairs (BIA) were now obligated to keep Native hunters out of Yellowstone and to confine Bannock and Shoshone hunters to their reservation (Spence 1999). The *Ward v. Race Horse* court decision has yet to be overturned and remains the basis for restricting Native off-reservation hunting in the State of Wyoming (Spence 1999).

In the case of the Yosemite people, who inhabited the lands of Yosemite Park (established in 1890) in California, they were not a federally recognized tribe and had no treaty rights and thus lacked BIA jurisdictional protection. As a result, they fell under the power and discretion of Yosemite National Park representatives; who stated and enforced their idea that Native residence was a privilege not a right and subsequently (though protractedly), their residence was ended (Spence 1999).

A situation similar to the one experienced by the Bannock and Shoshone in Yellowstone National Park also occurred in Montana, where what is now Glacier National Park land (created in 1910 by the Glacier National Park Act) is the traditional land of the Blackfeet and other Tribes. The eastern half of Glacier National Park was once a part of the Blackfeet Reservation. The Blackfeet tribe has maintained that an 1895 agreement with the U.S. ceded some of these lands (although oral history of the Blackfeet maintains they ceded some mineral rights but nothing else associated with the lands) but permanently reserved usufructuary rights within that eastern part of the park. The 1895 agreement has a clause qualifying Blackfeet rights by making them subject to the Game and Fish laws of

the State of Montana, but there is some question as to whether this provision of the agreement was actually understood by the Blackfeet as being part of the agreement (Spence 1999). There is no question that the agreement specifically reserved the Blackfeet's right to access lands, to cut and remove timber and to hunt and fish in traditional lands as long as they remained U. S. "public lands." However, even these rights soon came into conflict with the Department of Interior's vision of Glacier National Park after its creation fifteen years later.

Cooperative efforts between park rangers, state game wardens and Blackfeet Reservation officials to exclude Native Americans from the park and to restrict Native hunting inside and outside the Park began soon after the Park came into existence (Spence 1999). The right of Blackfeet to hunt the animals that moved back and forth across the park boundary with the Blackfeet Reservation bordering Glacier National Park was also questioned at that time (Spence 1999). In attempts to end Native hunting, the Department of Interior, spurred by Glacier National Park administrators, would cite the precedence of the *Ward v. Race Horse* decision and concluded that Blackfeet privileges had been terminated when Congress enacted the Glacier National Park Act (Spence 1999).

A 1932 court case involving four men arrested and convicted for hunting in the park and who had based their right to do on the 1895 agreement between the Blackfeet and the U. S. brought the issue into a judicial focus (Spence 1999). The convictions were eventually upheld by the U. S. District Court in Helena, Montana. In the case of the Blackfeet, court decisions and the actions of Glacier National Park administrators over the years have caused a great deal of mistrust

and hostility within the Tribe which hamper their desire to cooperate with the park on joint conservation measures to this day (Spence 1999).

Protected Areas of the Washington Coast

The Washington coast, and specifically the Olympic Peninsula region, is among the most protected regions in the State of Washington, as it has many state and federal PAs. The IUCN Protected Area management categories (and the management agencies) of the federal Protected Areas on the Washington coast are: **Category II** (National park): all of Olympic National Park (National Park Service); 95% of ONP is **Category Ib** (Wilderness area): Olympic National Park Wilderness (National Park Service), **Category IV** (Habitat/species management area): Olympic Coast National Marine Sanctuary (NOAA), Flattery Rocks National Wildlife Refuge (U.S. Fish and Wildlife), Quillayute Needles National Wildlife Refuge (U.S. Fish and Wildlife) and Copalis National Wildlife Refuge (U.S. Fish and Wildlife) and **Category VI** (Protected Area with sustainable use of natural resources)**:** Olympic National Forest (Forest Service).

Olympic National Park

Olympic National Park (ONP) has gone through several changes in name and designation since its creation. The area that is now Olympic National Park first came under federal protection when President Grover Cleveland designated

most of the Olympic Peninsula's forested land as the Olympic Forest Reserve in 1897 (Wray 2013). President Theodore Roosevelt enhanced its protection in 1909 by designating part of the reserve as Mount Olympus National Monument, in part to protect the native herds of Roosevelt elk (Roloff 2010). In 1939, President Franklin D. Roosevelt signed legislation establishing Olympic National Park on the lands that had been Mount Olympus National Monument (Wray 2013). The main result of this legislation was to further cement the park's status as a Protected Area.

A 1953 proclamation by President Harry S. Truman made additions to Olympic National Park which included an ocean coastal strip of 41,969 acres that had been acquired as part of the 1939 Public Works program (Richardson 1968). This portion of land is situated along 50 miles of Pacific Ocean front starting in the north at Cape Alava above Lake Ozette (separated only by state-owned Shi-Shi Beach which was later to the park's coastal strip), extending south (while surrounding the Ozette Reservation and largely surrounding the Quileute Reservation) to the Quinault Reservation and connected with the Olympic Mountains by a narrow corridor of forest along the Queets River.

Olympic National Park and the Tribes of the Washington Coast

The ONP/tribal relationship is among the most complicated Park/Tribal relationship within the National Park system because there are numerous tribal reservations and land bases near its borders (Makah, Ozette, Lower Elwha,

Skokomish, Jamestown S'Klallam, Quileute, Quinault, Hoh, Port Gamble, and Squaxin Island). Although treaty rights were explicitly protected in ONP's enabling legislation, tribes were not consulted during discussions about the Park's creation (Keller and Turek 1999). Each of these separate Tribes has had its own history of relations with the Park, but for the purposes of this paper only the coastal Tribes' (Makah, Quinault, Hoh and Quileute) experiences are touched on in this section.

The Makah had no common border with National Park Service land until a 50-mile coastal strip was acquired by the Park Service in 1940. Much of the Makah's early interaction with the Park Service centered around the depopulated Ozette reservation, which both the Makah and the Park Service sought to acquire (Keller and Turek 1999). The Makah ultimately acquired the Ozette Reservation in 1970 by defeating the efforts of the National Park Service (NPS) and its environmentalist allies (in particular the Olympic Park Associates) (Keller and Turek 1999). The Makah and the NPS later cooperated extensively and positively on an Ozette archaeological excavation in the 1970s as well as on combating a major oil spill on the coast in 1990 (Keller and Turek 1999).

The relationship between the Quinault Tribe and ONP has been complicated since the creation of the Park because of disputes about the location of the Quinault reservation's northern boundary. Additionally, in 1982, Quinault Tribal members, Gregory Hicks and Steven Shale were arrested for killing three elk (despite a Quinault Tribe's ban on taking park game) in the Queets River valley inside of Olympic National Park (Keller and Turek 1999). They argued in

court that they had a treaty-guaranteed right to hunt on any traditional land that was "open and unclaimed" (Keller and Turek 1999). A lower court agreed, but an appeals court reversed the decision and upheld National Park Service regulations banning hunting within ONP and ultimately convicted the two Quinault Tribal members (Keller and Turek 1999). After the ruling, Tribes continued to assert their right to hunt in the Park although most officially opposed tribal hunting in the Park at the time (Keller and Turek 1999). The Quinault elk hunting event more than any other earlier events seemed to awaken ONP officials to the fact that they were adjacent to Indian Tribes which could no longer be ignored (Keller and Turek 1999).

The Hoh Tribe and ONP have had jurisdictional clashes over Hoh traditional land claims within the Park as well as over the harvesting of fish and clams (Keller and Turek 1999). Hoh tribal members recall hearing other tribal members' complaints about loss of land to the Park in 1953 after tribal members on the north side of the Hoh River were assigned new homes new homes on the south side and told to move (Keller and Turek 1999).

Like the Makah, Quinault and Hoh, the Quileute Tribe has had a sometimes contentious relationship with ONP. Some Quileute Tribal leaders worked to oppose the creation of a national park the 1930s (Keller and Turek 1999). The Tribe has had disputes with the National Park Service over hunting (like the Quinault and other Tribes, the Quileute also contend they retain treaty hunting rights within the park), law enforcement, firearms, power transmission lines, net fishing in the Quillayute River, tribal closure of the Quillayute River to

sportsmen, and vandalism (Keller and Turek 1999). After the Park expanded after 1938, most of the Quileute Tribe's traditional homeland had been enveloped inside Park boundaries, enclosing the Quileute Tribe on the coast in LaPush.

Quileute and Hoh Tribe Boundary Issues

Most of the Quileute Reservation village of La Push is located within a coastal flood plain on the Olympic Peninsula, with the Tribe's administrative buildings, school, elder center, and housing all located in a tsunami zone. For many decades, the Quileute Tribe and Olympic National Park have had disputes over the Tribe's Reservation boundaries (Bill Text 112th Congress (2011-2012) H.R.1162.RDS), but these boundary issues predate the creation of the Park. In more recent years, boundary disputes intensified as the Tribe pointed to an urgent need for lands outside the tsunami and Quillayute River flood zones for housing, schools, and other infrastructure, particularly with forecasted climate change-generated sea-level rise (Bill Text 112th Congress (2011-2012) H.R.1162.RDS). After a lengthy process with many twists and turns and disagreements over details, "An Act to provide the Quileute Tribe Tsunami and Flood Protection and for other purposes" was signed into law by President Obama on February 27th (Bill Text 112th Congress (2011-2012) H.R.1162.RDS). One key to this transfer is that 275 acres of the land are on higher ground outside of the tsunami and flood hazard zones. These lands have been identified as areas where housing, the Tribal

headquarters, the school day-care center, elder center, and other facilities can safely move (H.R.1162 2012).

This legislation attempts to resolve several issues involving the Quileute Tribe's Reservation lands and is a culmination of a long policy and legal journey for the Tribe to obtain a secure land base from the U.S. federal government. The Quileute experience may prove to be important for other Native communities along the Pacific Northwest Coast and elsewhere because other Native communities now face similar issues or may face similar issues in the future. The land bases of many of these communities are experiencing physical changes or are threatened due to the unpredictable nature of natural systems and natural events. Although the legislative process to enlarge the Quileute Reservation was in the end spurred by concerns about flooding and tsunamis, their experience could prove to be an important precedent in this time of global climate change as more Native communities will be faced with new or compounded environmental threats to their land bases. The Quileute Tribe's experience might be indicative of a trend which is soon to be a sign of the times for Native communities that reside inside U.S. borders.

Tied to this issue for the Quileute Tribe was the importance of land designations such as reservation, private, National Park, National Forest, State Forest, public easements and Wilderness. Each designation has different implications for the land that is designated (Turner 2012). Changing from one land designation to another involves various processes, some more complicated than others.

In 1975, the U.S. Department of the Interior issued an opinion determining that there were errors specifying the Quileute Reservation boundary due to the 1953 Truman proclamation and in the survey that was approved in 1916. They concluded that parcels of land that were part of the original land grant to the Quileute Tribe should be reaffirmed as being part of the Quileute Reservation (Ralston 2008). In 1976, the U.S. Congress revised the reservation boundary and 220 acres of land were administratively returned to the Quileute (Wray 1997). The 1976 legislation however did not address all the disputed lands and set the stage for continuing boundary disagreements between the Tribe and the Park. Throughout the 1980s and 1990s, the Quileute Tribe continued to press the Park for resolution of the boundary agreements.

In 2005, the disagreement about Quileute Reservation boundaries came to a head when Quileute Tribal Council Chairman Russell Woodruff announced a decision to close a trail to a popular tourist location in ONP called "Second Beach" on the grounds that it crossed reservation lands (Ralston 2008). This announcement was in response to an incident where a Tribal member was cited for collecting firewood near a disputed Park boundary (LaCorte 2006). Although these charges were dropped, the Tribe decided further actions were warranted.

Second Beach is public, but the parking lot and access to the trail to Second Beach are on Quileute Reservation ground. The Tribe had allowed the public access to the popular beach even though its access trail crossed Reservation land (LaCorte 2006). When they closed access to the trail, the Tribe offered a land swap with the federal government: It would hand over eight acres of disputed

land at Rialto Beach and reopen access to Second Beach if the National Park would cede or buy other lands for the tribe (LaCorte 2006). "We don't have anything against the public… It was the only way to get the federal government's attention," said James Jaime, the Quileute Tribe's Executive Director at the time (LaCorte 2006).

The Park Service soon proposed a land exchange to address the Quileute Tribe's concerns. In May of 2006, the Olympic National Park (ONP) published its *Draft General Management Plan/Environmental Impact Statement* that included a plan to adjust the boundaries of the Olympic National Park (ONP 2006). The next year, the Tribe offered to reopen the beach and settle the boundary dispute if the National Park Service agreed to a land exchange that gave the Tribe higher ground.

Around this time, the Hoh Tribe also began discussions with the Park, Washington State, and private businesses about the possibility of adding some surrounding lands to their reservation land base (LaCorte 2006). The Hoh Tribe stated a desire to move its members, who live in a flood and tsunami danger zone, to higher ground (LaCorte 2006).

A precedent for the introduction of legislation to provide the Quileute Tribe protection from flooding and tsunamis was introduced by Rep. Norm Dicks on February 13, 2009 (H. R. 1061, 2009). Because of its location along the river and ocean, the Hoh Reservation has repeatedly suffered flood damage to homes and infrastructure and its habitable land had been reduced over time due to storm

surges, flooding and erosion (H. R. 1061, 2009). At the time the bill was introduced, about 90 percent of the Reservation was located within a flood zone and 100 percent of the Reservation was within a tsunami danger zone (H. R. 1061, 2009). Because of these circumstances, the Hoh Tribe purchased approximately 260 acres of land from private owners near the Reservation in order to move key infrastructure out of the flood zone.

In 2010, "The Hoh Indian Tribe Safe Homelands Act" was signed into law by President Obama. This act transferred ownership of land from the National Park Service and the State of Washington's Department of Natural Resources to the Tribe (H.R.1061, 2009). These lands, along with lands that the Hoh tribe had purchased were put in trust as reservation lands and became part of the Hoh Reservation (H.R.1061, 2009). This act was of significance as a precedence of land switching designation from National Park to a Tribal reservation.

Both the Hoh Tribe legislation and the Quileute Tribe legislation are precedent setting as they are the first instances of National Park land and National Park Wilderness land switching their land designation to Tribal Reservation land designations. The legislation may also prove to be an indication of a coming trend as more Tribes are faced with environmental threats due to the effects of global climate change. Coastal Tribes with small land bases face flooding and tsunami threats now, but these should not be the only factors considered when looking at environmental dangers faced by Tribes that warrant securing safer land bases.

Many reservations and other tribal lands of Pacific Northwest tribes are located near coasts, river systems or other bodies of water. Traditional practices tied to resource availability have historically connected tribes to these kinds of geographical areas. Due to global climate change, rising sea levels and changing climate patterns now increasingly threaten the people and infrastructure on tribal land bases as well as wildlife habitat and resource abundance in traditional resource areas. As a result, Pacific Northwest tribes will be particularly impacted by the effects of global climate change or other changes to water systems or bodies of water in the Pacific Northwest.

> "In Washington State, the Shoalwater Bay, Quinault, Hoh, Quileute, Makah, Skokomish, Lower Elwha Klallam, Jamestown S'Klallam, Port Gamble S'Klallam, Squaxin Island, Suquamish, Tulalip, Swinomish, and Lummi are all coastal dwelling people that will have to respond to storm surges, warming seas, and sea-level rise. Many other tribes in Washington are located on rivers only a short distance from the coast" (Papiez 2009).

The Quileute and Hoh Tribes may have benefitted from their unique set of circumstances; because their Reservation lands are surrounded by parklands or less populated and less developed areas when many other Tribes are faced with different situations. In both the Quileute and Hoh cases there may have been fewer land stakeholders and other interests surrounding them and thus there was less to lose, so there was less outcry here than other Tribes may face. However, environmental threats are a reality for many Tribal communities and this is only likely to get worse as global climate change comes into play.

Marine Protected Areas

"Marine Protected Area" is an umbrella term that encompasses a wide variety of approaches to U.S. place-based conservation and management (Whitesell et al. 2007). The National Marine Protected Areas Center in 2006 described Marine Protected Areas (MPAs) in this way: "In practical terms, marine protected areas are delineated areas in the oceans, estuaries, and coasts with a higher level of protection than prevails in the surrounding waters" (found in Whitesell et al. 2007). Around 1.6% of the global ocean area is protected, but marine protection is concentrated in the near-coastal areas (0–12 nautical miles from land), where 7.2% of the total area is protected (Bertzky et al. 2012). If considering the total marine area under national jurisdictions, which extend from the national shorelines to the outer limit of the EEZ at 200 nautical miles, this figure decreases to 4% (Bertzky et al. 2012).

MPAs reflect human values and goals; they are created and function in the context of societal and/or community objectives (Charles et al. 2009). The goals of MPAs often begin with biological and ecological goals; such as improving the fish stock by protecting spawning fish, biodiversity conservation, and insurance against stock collapse, but most MPAs must balance multiple objectives and combine biological goals (biodiversity) and resource management goals (increased fish catches) with human-oriented ones, such as tourism development and conflict resolution (Charles et al. 2009). MPAs, by necessity, must incorporate human-orientated objectives, such as; acknowledging the rights and interests of those affected by the MPA and developing participation and buy-in

into the MPA creation process in order to incorporate the interests of other participants and stakeholders in the MPA (Charles et al. 2009).

Marine Protected Areas of the U.S.

According to the National MPA Center's *Analysis of United States MPAs*, there were 1,729 MPAs in the U.S. as of March 2012, with 71 of them in Washington State (National MPA Center 2012). In 2009, the United States established the National System of Marine Protected Areas in order to conserve the nation's marine resources by facilitating more effective MPA management (National MPA Center 2012). Authorized by President Clinton's Executive Order 13158 in 2000, the national system brings together federal, state and territorial MPAs managed by diverse agencies that are working toward national conservation objectives (National MPA Center 2012).

Executive Order 13158 defines an MPA as "any area of the marine environment that has been reserved by federal, state, territorial, tribal, or local laws or regulations to provide lasting protection for part or all of the natural and cultural resources therein." The U.S. National Marine Protected Areas Center's (National Oceanic and Atmospheric Administration, Department of Commerce) *MPA Inventory* 2012 states that as of March 2012 there were 355 MPA member sites in the national system and that an additional 741 sites were eligible for national system membership.

U.S. MPAs, regardless of whether or not they are members of the national system, vary widely in purpose, legal authorities, managing agencies, management approaches, level of protection, and restrictions on human uses (National MPA Center 2012). About 41% of all U.S. waters are in some form of MPA; nearly all (86%) are multiple-use sites (meaning they combine conservation, sustainable production, recreation, etc.) that allow a variety of human activities, including fishing and other extractive uses (National MPA Center 2012).

Most MPAs have legally established goals, conservation objectives, and intended purpose(s) which influence design, location, size, scale, management strategies and potential contribution to surrounding ecosystems (National MPA Center 2012). The National MPA Center uses the following three main descriptors for the conservation focus of MPAs:

1. Natural Heritage: MPAs or zones established and managed wholly or in part to sustain, conserve, restore, and understand the protected area's natural biodiversity, populations, communities, habitats, and ecosystems; the ecological and physical processes upon which they depend; and, the ecological services, human uses and values they provide to this and future generations.

2. Sustainable Production: MPAs or zones established and managed wholly or in part with the explicit purpose of supporting the continued extraction of renewable living resources (such as fish, shellfish, plants, birds, or mammals) that live within the MPA, or that are exploited elsewhere but depend upon the Protected Area's habitat for essential aspects of their ecology or life history.

3. Cultural Heritage: MPAs or zones established and managed wholly or in part to protect and understand submerged cultural resources that reflect the nation's maritime history and traditional cultural connections to the sea.

The goal for cultural heritage MPAs is to advance the comprehensive conservation and management of marine cultural resources; defined as the broad array of stories, knowledge, people, places, structures, objects, and the associated environment that contribute to the maintenance of cultural identity and/or reveal the historic and contemporary human interactions with an ecosystem (OCNMS 2011).

At present, about half of the MPA area in the U.S. is focused on natural heritage, and half on sustainable production, with less than 1% focused primarily on cultural heritage protection (National MPA Center 2012). About 8 percent of all U.S. waters are in an MPA focused on conserving natural or cultural resources (excludes fishery MPAs which often have specific gear restrictions over large ocean areas) and about 3 percent of all U.S. waters (14% of the area within U.S. MPAs) are no-take areas, established to prohibit the extraction or significant destruction of natural or cultural resources (National MPA Center 2012).

In terms of the numbers of MPA sites, state (72%) and territorial governments (3%) manage approximately 75% of the nation's MPAs and 22% of the nation's MPAs are under federal jurisdiction (with the remaining 3% managed by a local agency or a partnership) (National MPA Center 2012). While state and territorially managed areas are typically quite small, federally managed areas such as federal fishery closures and National Monuments are often very large. In addition, areas under state, territorial, local and partnership management can also overlap with and fall under federal management jurisdiction. For these reasons,

approximately 98% of the total MPA area is managed by federal agencies (National MPA Center 2012).

Although it is at this point in time largely economics-based; in terms of size, the most prominent of the America's federally managed marine areas is the EEZ. In terms of the level of protections, National Marine Sanctuaries were designed to provide the highest level of federal marine resource protections available in the larger MPA system.

National Marine Sanctuaries

Congress created the U.S. National Marine Sanctuary Program in 1972 through the Marine Protection Research and Sanctuaries Act (also known as National Marine Sanctuaries Act (NMSA) (Murphy 2011). Among other purposes the Act was designed to identify and designate special nationally significant areas and to provide authority for comprehensive and coordinated conservation (Murphy 2011).

The Office of National Marine Sanctuaries (ONMS), also created by NMSA, is an office within the National Ocean Service of NOAA whose stated purpose is to "work with other governments, agencies, resource users and the public to protect the living, non-living, and cultural marine resources of sanctuaries while allowing recreational and commercial activities that are compatible with the NMSA's primary goal of "resource protection." (OCNMS 2011) The NMSA serves as a trustee for a system of 14 marine protected areas

(13 national marine sanctuaries and Papahanāumokuākea Marine National Monument) which encompass more than 290,000 square miles of marine and Great Lakes waters from Washington State to the Florida Keys and from New England to American Samoa (OCNMS 2011).

Olympic Coast National Marine Sanctuary

The Olympic Coast National Marine Sanctuary (OCNMS) was established in 1994 under the NMSA "for the purposes of protecting and managing the conservation, ecological, recreational, research, educational, historical, and aesthetic resources and qualities of Washington's coast" (OCNMS 2011). The OCNMS is located off of Washington State's Olympic Peninsula coast. Spanning 2,408 square nautical miles of marine waters which extend seaward 25 to 45 miles and to depths of over 4,500 feet, the sanctuary covers much of the Continental Shelf as well as the heads of three major submarine canyons (OCNMS 2011). Approximately 17% of the sanctuary is located within State of Washington waters (OCNMS 2011).

> "The sanctuary borders one of the few undeveloped coastlines remaining in North America, enhancing the protection provided by both Olympic National Park, which includes 52 miles of wilderness shoreline adjacent to the sanctuary and the Washington Maritime National Wildlife Refuge Complex, which includes more than 600 offshore islands and emergent rocks within the sanctuary… Located in a nutrient-rich upwelling zone, the sanctuary supports high primary productivity and is home to a diversity of organisms and habitats. Commercially important fish species in the sanctuary include groundfish, shellfish and five species of salmon" (OCNMS 2011).

Washington State resource management involves a complex system incorporating federal court decisions, treaties, executive orders and statutes (Geiger et al. 2012). Management of Washington's coastal resources involves state, treaty tribes as well as federal agencies and organizations, including:

Tribal Governments: Hoh, Makah, Quileute, and Quinault Nation.

Federal Agencies: Navy, Coast Guard, Olympic National Park, Fish and Wildlife Service, U.S. Geological Survey and the Pacific Fishery Management Council.

Washington State: Department of Ecology, Department of Natural Resources, and the Department of Fish and Wildlife.

Local Governments: Chambers of Commerce, Marine Resources Committees, and city and county governments.

Non-Governmental Organizations: Academic institutions, non-profit groups, fishing industry and tourism representatives. (OCNMS 2011)

In addition, there are differing interpretations of jurisdiction in the ocean. *When tribes ceded lands in treaties, they never ceded marine areas*. Tribal interest and management authority extends beyond reservation boundaries to include the Usual and Accustomed fishing areas (U&As), as defined for each tribe in United States v. State of Washington, 384 F. Supp. 312 (W. Dist Wash. 1974). In the case of the OCNMS, the management and regulatory authorities of the coastal Treaty Tribes is noteworthy because the OCNMS is located within the U&As of the four coastal Treaty Tribes. This situation is unique among the National Marine Sanctuary system as tribal Treaty rights to resources becomes a crucial factor in management of the OCNMS.

Tribes and the OCNMS

The Makah, Quileute, Hoh and Quinault Peoples historically lived along the Olympic coast and sustainably utilized the fish, shellfish, seabirds and marine mammals that the ocean provided there. This area of the ocean also linked the Native Peoples along the coast; as travel was often easier by canoe because of the dense forests bordering much of the coast. Archaeological remains as well as Native stories, dances, traditional knowledge and practices, traditional place names and language demonstrate the strong cultural ties of Makah, Quileute, Hoh and Quinault to specific areas on the Olympic Peninsula. They also show the strong relationship of these cultures with the sea and resources of the marine environment along and off the coast of the Olympic Peninsula (OCNMS 2011).

> "Beyond its ecological significance, the sanctuary has extraordinary cultural significance. For time immemorial, American Indians have inhabited and cared for the coastal and marine ecosystems that are now part of the sanctuary. The Hoh, Makah and Quileute tribes, and the Quinault Indian Nation continue to make their home on the Olympic Peninsula's outer coast maintaining the continuity of cultures that remain intimately connected with the ocean and its resources" (OCNMS 2011).

The Treaty of Neah Bay and the Treaty of Olympia reserved, in perpetuity, for the coastal Treaty Tribes their hunting, fishing, and gathering rights to access and utilize the plants, mammals, fish and other resources in their respective treaty areas on the Olympic Peninsula and its adjacent waters. To this day, the marine ecosystem and its associated natural resources are the foundation for economies and cultures of these Tribes (OCNMS 2011). In addition, their continued ability to harvest and utilize this region's resources is critical to the protection of their

treaty rights and the continuity of the distinct cultures of the Tribes (OCNMS 2011).

Prior to OCNMS' designation, two oil spills (in 1988 and 1991) near the Makah Reservation spilled hundreds of thousands of fuel oil and diesel fuel (Cooke and Galasso 2002). This led the Makah Tribe to support the designation of OCNMS within the Makah tribal U&A as a means to protect their resources from oil spills and the possibility of offshore oil drilling (Cooke and Galasso 2002).

In 2000, a working group of the OCNMS advisory council that was formed to evaluate marine zoning as a management tool within OCNMS became a cause of concern for the coastal Tribes (Cooke and Galasso 2002). A technical advisory panel (consisting of coastal ecologists and no tribal members or staff) soon identified and recommended sections of the coast (both on and off Tribal reservations) that they felt warranted increased protections because they had ecological significance (Cooke and Galasso 2002). Tribal members were concerned when the recommendations for increased protection did not acknowledge that some of the areas identified fell under Tribal land ownership and jurisdiction (Cooke and Galasso 2002). Tribal members further stated that the sections of shoreline which had been identified as being ecologically significant were ecologically significant as a result of the thousands of years that they were protected under tribal management practices (Cooke and Galasso 2002). This OCNMS action became a cause for much mistrust between the coastal Tribes and the OCNMS for several years.

Intergovernmental Policy Council

Management of the area in and around OCNMS is multinational and multicultural in nature; it is within the U.S. EEZ, it is adjacent to Canada and its EEZ, and it is encompassed by the U&As of the coastal Treaty Tribes (OCNM 2011). Because the coastal Treaty Tribes have treaty-protected fishing rights and share co-management responsibilities for fishing activities within the sanctuary with the State of Washington and the federal government; there are overlapping jurisdictions as well as joint authorities. These complexities (and Tribal experiences with OCNMS) helped lead to the creation of the Olympic Coast Intergovernmental Policy Council (IPC), the first of its kind in the nation.

A 2007 Memorandum of Agreement (MOU) signed by the coastal Treaty Tribes, the State of Washington, and NOAA formed the IPC as a council comprised of representatives of the coastal Treaty Tribes, the State of Washington and Office of National Marine Sanctuaries (Murphy 2007). The IPC was created to provide a regional forum where sovereigns with regulatory jurisdiction over marine resources and activities within the boundaries of the Sanctuary could exchange information, coordinate policies, and develop recommendations for resource management (OCNMS 2011). The Council meets six times per year in rotating locations within the region for non-public meetings where the OCNMS participates as invited but does not set the agenda (Geiger et al. 2012).

The IPC provides an opportunity for regularly scheduled and structured government to government level discussions by providing more regular opportunities for face-to-face communication (Murphy 2011). The IPC also presents an opportunity for participants to establish personal connections that could aid in producing more informed and cohesive working relationships between the parties (Murphy 2011).

The importance of continuing to listen for and documenting the Native voice is the foundation behind the research in this thesis. The ability by Protected Area managers and others to hear the Native voice will help to determine whether OCNMS will be successful. The upcoming Interviewee response chapters present an opportunity to hear some voices that speak to the Protected Area/Tribal relationship.

Part II: INTERVIEWEE RESPONSE CHAPTERS

The upcoming chapters (Chapters 2-6) are a compilation of the responses of ten interviewees to 10 open-ended questions in interviews conducted from March to November 2013. The ten interviewees are staff and/or Tribal members from Tribal natural resource departments, past and present federal representatives (from NOAA) and/or tribal policy experts.[2] The responses of the interviewees were intended to answer two main research questions posed in this thesis: *How have Marine Protected Areas in western Washington affected the rights and interests of the Tribes? Can protections for marine environments be designed, established and implemented in a way that they achieve conservation goals and recognize Tribal rights and interests?*

The responses of the interviewees were grouped in accordance to recurring themes that emerged. Some of the responses do not speak directly to the two main research questions but were included in the response section because they were deemed important and relevant by this researcher and/or the interviewees. While some of the topics raised do not speak directly to the Tribal/MPA relationship these responses are important in and of themselves and they add background to the overall research.

Many of the topics and themes that are included in the Interviewee response chapters were touched on in the Background chapter, and so there is some overlap and repetition between the two. While there is some overlap between chapters,

[2] Interviewee list is located in Methodologies and Research Design chapter.

this format provides an opportunity to present background and context before getting into interviewee responses while at the same time keeping separate the responses chapters in order to highlight the new data that this thesis provides to existing literature. Readers are encouraged to consult the Background chapter for additional context on issues covered by interviewee responses.

CHAPTER 4: TRIBAL VALUES AND TREATY RIGHTS

This chapter will give the reader some background on traditional resource management as well as Tribal treaty rights before dealing with interviewee responses related to this study's two main research questions (which will be covered in subsequent chapters). The responses of interviewees in this chapter show that the Tribes have both a cultural tradition as well as a continuing history of sustainable resource conservation tied to resource utilization within the Tribes' traditional areas.

Background on Traditional Resource Management: Traditional Culture, Values and Knowledge

In examining the responses of interviewees, one of the first points that interviewees stress is that natural resource management is part of the traditional culture of Native peoples. Tribes are not against the concept of protections for resources and the environment; they simply go about it in a different way. As Native cultures and identities are tied to their history within particular areas, sustainable use and management of their area's natural resource has historically been and continues to be a vital to characteristic of Native peoples. Tribes and other Indigenous peoples have a long history of resource management geared towards resource utilization.

In Washington State and elsewhere, Tribes were and continue to be part of the local ecology of their areas. Indigenous cultures view human beings as being an integral component of the environment, rather than solely as stewards of

natural resources (MPA FAC 2011). Their experiences and observations within their areas over time have contributed towards the historic management of the resources of the local environment (MPA FAC 2011). Resource management has been integral to maintaining the cultural survival of Native peoples. Native cultures still depend on the natural resources of their areas spiritually, as well as for nutritional subsistence and economic livelihood (MPA FAC 2011).

One main difference between Native and non-Native people is in Native peoples' long-term relationships to places and the resources within these places. Because Tribal cultures are tied to the access and use of resources in particular places, ensuring that these resources are available to future generations of tribal members is essential for the survival of tribal cultures (MPA FAC 2011).

Tribes have a long-term viewpoint and approach that is ingrained in their goals and objectives for natural resource management (Bowhay). Through the knowledge that sustainable use of resources has been and is now integral to supporting the people; tribes have by necessity become the custodians of their environment. Tribes and Tribal members have taken on a responsibility to maintain resources for future generations. This responsibility is ingrained in their traditional cultural practices and their traditional management structure and philosophy and it is a part of their current cultural practices and management practices and goals (Bowhay).

> "There's a clear mandate to consider the impacts for seven generations into the future. So decisions made now are supposed to consider the impacts for seven generations. You'll hear that ubiquitously up and down the coast. I'm not sure the origin of that, but everyone seems to know it. So, I think that it is the same today as it was, traditionally. …Decisions

> made now are supposed to consider the impacts for seven generations into the future. So from our perspective, the fish that we catch in the lower river fishery are there for us to use and the fish that make it upriver are for the future's use. They are considering the seven generations. Tribes want to make sure [that] seven generations from now, Hoh River fishermen can go out there and get wild steelhead, as a way to make a living… not just as a museum style activity" (Gilbertson).

Tribes have developed and benefited from an intergenerational knowledge of what an area produced and how it can be managed sustainably. Tribal knowledge provides guidance on how to maintain that productivity and health for future generations. Traditional knowledge of traditional areas that has been passed to current generations can provide information that will help to maintain the kind of environment that provides the resources that will ensure the continuity of their cultures (MPA FAC 2011). As two of the interviewees note,

> "This intergenerational and local focus on ensuring that what makes the people who they are is always available is obviously at the root of the health of the marine environment here" (Jones).

> "Traditions have been a strong guiding point to maintaining that relationship with the environment and the access to our traditional resources, traditional foods and culture. It's an interdependency... the natural environment surrounding us is the habitat of our culture. …[Through] the long-term perspective and long-term observation of our people and the oral history of a people that have been in one area for so long, I think we have a better understanding of what has happened to our environment. I think we've gained a collective and longer-term consciousness of what our environments have as far as a community of organisms and life...and then also of [consciously] maintaining an equal reliance on the multitude of species in the form of integrated resource management. I think traditionally, it's already ingrained as an ecosystem-based management system" (McCarty).

Tribal Resource Management

In Washington State, Tribes are heavily involved in fisheries management in their treaty areas. Treaty Tribes are now restricted to the fishing areas (commonly referred to as Usual or Accustomed areas or simply U&As) that were described for them under *United States vs. Washington* (Boldt Decision). For Tribes, fisheries management focuses on both marine and non-marine areas. Tribal fisheries management focuses on maintaining fish populations so that tribal fishermen can continue to harvest; in part through protecting the habitat needed to maintain those harvest levels (Williams). Traditionally, resource management relied less on modern scientific techniques than on familial ownership and stewardship of areas and resources. As Quinault and Tulalip fisheries leaders observe,

> "Tribes would have been able to manage relatively more simply compared to their current situation. They would have a home area that would be tribally controlled. Tribal councils or committees of elders would determine who could fish, as well as when and where and in their traditional areas. Disputes and jurisdictional issues between tribes would be handled through meetings that would be held on a semi-regular basis" (Schumacker).

> "We [Tulalip Tribes] try to manage the harvest in a way that allows for proper escapement into the river systems. For the salmon fisheries, we've established escapement goals for each species to head up river. We manage our fisheries to allow those fish to head up river and spawn. We're a marine fishing tribe, so we don't have commercial fishing in the rivers themselves. We have rights to fish in the river, but we prefer to keep the fishing in Puget Sound...then we're catching the fish when they're at their highest value" (Williams).

Tribes are also involved in restoration projects and reopening habitat in their areas. In many ways, Washington State is a beneficiary of tribal involvement in resource management (Williams). The state benefits from Tribal

access to funding, in part because in some instances Tribes have access to more funding at the federal level than the state agencies have (Williams). In addition, some of larger Tribes (such as the Tulalip) are able to subsidize their fisheries programs and are not solely operating off of state or federal funds (Williams). The Tulalip Tribes, for example, also benefit from living in a high population zone because they derive some income from surrounding population, but the high density developments have affected the rivers and they do not support the fish populations that they used to (Williams).

> "We need to protect the habitat along our shorelines if we are going to restore our fisheries. And you know… every year we're causing more damage to our habitat and the marine areas. And it's getting harder and harder to actually keep our salmon alive just getting in and out of Puget Sound. Because it's not only the habitat where the salmon go to feed but it's the habitat needed to produce the feed-fish and for the plankton…which we're (Tulalip Tribes) starting a big study now, on what's going on with the plankton populations within Puget Sound, because our whole food-web in Puget Sound is falling apart. We need to figure out what it takes to rebuild it" (Williams).

Treaty Rights: Uniqueness of Washington State Treaty Tribes

The long and storied history of legal conflict in Washington State between the state and the Treaty Tribes has created a state/tribal relationship that is unique in many ways. There has been over 100 years of history of legal conflict regarding recognizing tribal rights and in regards to the exercising of treaty rights in the state. Protests from state agencies, governors and citizens about tribes exercising their treaty rights and about having management authority, as well as the attempts to prohibit that expression or activity through the years, date back to

the early 1900s (Bowhay). *U.S. v. Washington* (1974 Boldt Decision) is the seminal case that characterizes that conflict with the Treaty tribes in Washington and its unique outcome.

> "When you look at treaty rights nationally, this is a unique status. There's over 650, I believe, federally recognized tribes and tribal entities in the U.S. and about 31 have federally recognized rights, which also include off-reservation, and 24 of those are here in Washington State or the Columbia River. Once you get out of the Northwest the only other area where you are going to have the same kind of situation is in the Great Lakes. …And when you talk about tribal rights and management authority, people in the Northwest and agencies in the Northwest at the state level understand that …varying degrees of the substance of it, but they understand what they need to do at a minimum, and they have been trying to incorporate it more and more from what it was in the 1980's vs. what it is now. At the federal level you still to push to have that recognition… but it's a constant educational process to get people to understand" (Bowhay).

> "Tribes without that [treaty] right should be engaged… no matter what. So, treaty rights are strong, but tribes that live on the coast of this country have all fished. They don't live on the beach for nothing… you live on the beach because you harvest things in that area, you use the ocean as your waterway, and it has been your breadbasket for your community" (Schumacker).

Treaty rights have also been a source of conflict between Tribes and the U.S. public. Interviewees point to the fact that some in the public resent the idea that certain people could have rights that other do not. Treaty rights have been a source of resentment because they are construed as "special rights" of a racial minority, even though they deal with nations rather than a race. Treaty rights may also seen by some as a temporary expedient; a part of history that is no longer relevant in contemporary American society. The basic lack of understanding of what treaty rights are or what a treaty represents can also be a source of conflict or misunderstanding between tribes and the general public (Bowhay).

> "America is a country that is founded on the rights of individuals. And historically, when issues of tribal sovereignty come up... the notion that there are collective rights of people that are recognized by the federal government and guaranteed through treaties has been a source of conflict since this country was founded" (Gates).
>
> **"**One is just basic ignorance of what the rights of the tribes are. And then you have the possibility of people not particularly caring what the rights are. I've seen this in parts of the Great Lakes where people think that yeah, those rights are there, but that's in the past. You know, it's a non-understanding of what these things mean…a treaty as being a legal and binding document" (Uravitch).

Boldt Phase II: Co-management

When the Treaty Tribes of Washington State signed treaties with the U.S. government in the 1850's, they insisted that their people must be allowed to continue to fish in and beyond the reservation boundaries (*U.S. v. WA* 1974). In *U.S. v. WA* in 1974, Judge Boldt's court found and held that, "every fishing location where members of a tribe customarily fished from time to time at and before treaty times, however distant from the then usual habitat of the tribe, and whether or not other tribes then also fished in the same waters, is a 'usual and accustomed ground or station' at which the treaty tribe reserved, and its members presently have, the right to take fish" (*U.S. v. WA* 1974). These "usual and accustomed grounds and stations" are now more commonly referred to as Tribal U&As.

As established by the Boldt Decision in 1974, and further determined in the 1980 Orrick Decision (commonly called Phase II of the Boldt Decision), Tribes have the legal authority as well as the responsibility to protect their natural and

cultural resources. The federal court-ordered authority and responsibility manifested the current co-management relationship between Washington's treaty Tribes and the State of Washington in which they jointly manage the region's resources, as described by tribal resource managers.

> "Anything that impinges upon treaty rights or has direct or indirect effects on those treaty rights, anything of that nature is covered under those treaties" (Schumacker).

> "It's also a constant that is evolving. If you asked tribes right now what co-management means... in our membership of the 20 tribes, you're gonna get 20 different answers. And that answer that you get today; a year from now or two years from now [it] is going to be different, because it's constantly going to have to evolve. Fishery management when I first started was all about managing harvest. You managed harvest, you provided then for what was necessary for spawning… and almost for every species. But when you talk about what we have to do for fishery management now...it's less about harvest, and it's more about habitat protection and all these other land-use issues that affect habitat or other activities that affect the marine near-shore or whatever you have: the dam operations... everything. So it's become much more complicated. The Tribes' management has gone from being typically just a fishery management issue to now being more land-use oriented, in terms of what we are looking at, because we are involved in restoration and those types of things" (Bowhay).

> "We've been doing a pretty darn good job enhancing [the] fisheries management environment. Certainly with the co-management relationship with the state, who are down-stream beneficiaries of this federal trust responsibility relationship ...I think all concerned parties …should see a champion in what we can do" (McCarty).

Through the co-management relationship Tribes and non-tribal entities, agencies and other groups are potential allies in combating the degradation of the environment, natural resources and cultural sites. There are some obvious commonalities in interests. The Nisqually River and the Qwuloolt (Snohomish River) estuary restoration projects are the largest estuary projects that have been conducted on the West Coast. Both have had strong tribal leadership by the

respective tribes of those watersheds (Nisqually and Tulalip). In spite of this, particularly in watersheds around the Salish Sea, new developments are damaging habitat faster than it is being restored (Williams).

The Elwha River dam removals, the largest dam removals in the U.S. to date, were largely initiated by the Lower Elwha Tribe.

> "For instance the Elwha dam removals… those structures created a huge obstruction to the free migration of fish over time. The government realized that that was having a detrimental effect on the population; not just the tribal citizens but for non-tribal… beyond just the whole ecological integrity of it. And now they are coming down and that's going to be a benefit to citizens and non-Indian citizens alike" (Gates).

> "The Lower Elwha Klallam Tribe, even though being one of the smallest Tribes in western Washington, has some of the biggest projects going on. And they've been pushing for that [Elwha River dam removals] for a long time. They had good tenacity and kept going at it and managed to get the work done. So yeah, the Tribes are doing some good things all around the Sound and out on the Coast. We're doing *our* part to try to restore fish anyway" (Williams).

Tribes have also taken the lead in the development of MPAs or other types of protections of the environment (both marine and terrestrial).

> "And yeah, I do think Tribes can take the lead in developing some MPAs... our Port Susan management area, it actually started out as a Tribal project and then it expanded to include more people. …We worked with the state, the county and some non-profit groups to establish the Marine Management Area in Port Susan, so that was really one where Tulalip took the lead on to start with" (Williams).

> "So we are looking at that [tribal MPAs], it's not that this is a new concept…we have been doing it in some form or fashion in earnest, for the last 20 plus years. Arguably, you could look at certain ways that the tribes have done business… from the fisheries standpoint or a hunting standpoint, and say they have been utilizing this conceptually, all along. So, I guess the take-home message is that…you know, the Tribes are out there and dealing in all of these management forms. They do have a recognition… they often are included in the various policy level boards that guide management… whether it is forest practices, whether it's Puget Sound Partnership, they sit on various councils and it's in recognition of their right and their standing as resource managers and their interests in

> protecting the environment and doing management of natural resources. So I think it's evolving... and it's gotten better, but we are always looking to improve" (Bowhay).

Boldt Phase II and the Culvert Case: Habitat Standing and Stewardship

Tribes are engaged in restoring habitat and reopening habitat and have been engaging the State of Washington through legal avenues to do the same. The Culvert Case decision was a reinforcement of Phase II of the Boldt Decision, including Judge Orrick's 1980 decision that told the state that it has to provide for fish habitat to meet the tribes' treaty rights to resources. Judge Orrick stated in his ruling "habitat is essential to the survival of the fish, without which the expressly-reserved right to take fish would be meaningless and valueless." The 2007 Culvert Case decision (*United States v. Washington*, C70-9213, 2007) specifically stated that fish-blocking culverts prevent fish from accessing a large portion of their traditional habitat and so the state would have to reopen existing fish-blocking culverts and also refrain from building more fish-blocking culverts (Bowhay). Tribes are also engaging local governments on habitat issues and development in habitat areas.

> "Treaties are the most proactive and most practical example of environmental law, because without a natural environment healthy enough to support the traditional resources… the Treaty can be deemed to be broken by the irresponsible parties who destroyed the environment. And that's a natural resource damage assessment that can be applied to the dependence of traditional peoples on the natural environment. And if [the] U.S. jurisdictions fail to protect the health of the natural environment that supports the traditional resources then the federal government and all of its beneficiaries have failed in the trust responsibility to the Tribes" (McCarty).

> "So really, besides opening up these culverts… we need to get local governments to do a better job of protecting the habitat that's still there. And that's something that we have been continually working on over the last three decades now. But we're finally starting to make some headway and getting agencies to do a better job. We still have a long way to go… but at least we think we're on a good direction to get there" (Williams).

> "The Culvert Case is an example. Fish-blocking culverts are a reduction in treaty rights. The Tribes sued the state and said all of these culverts on state roadways that block fish passage and constrain or reduce habitat productivity… [they] are takes and they reduce the Treaty right and they need to be fixed. And the state objected in court and the Tribes won. The state is on the hook to fix their culverts on their lands" (Gilbertson).

In practice, the actual implementation by the state of Phase II of the Boldt Decision and the Culvert Case decision has been varied (Bowhay). Although Tribes are encouraged by the Culvert decision and signs of progress on habitat issues, in many instances the state has been slow to rectify its fish-blocking culverts, in part by citing inadequate funding for culvert replacement.

> "You think that they would have [learned]… with the history that goes in there. But they are saying well... that's a lot of money and you know, we just don't want to do it. Yet the federal government and the other sister agencies won't take them to task because there isn't the political will or leadership at the higher levels in D.C. to say, yeah we have to do what's right and what's legally required of us. They won't take that step. So it forces us to look to go back to the federal courts and say ok… once again, will you rule that we have this right and that needs to be protected... you know, from a habitat standpoint. And that's where we sit today" (Bowhay).

> "I mean honestly, like we've seen… you can prove the point in court, [but] do you actually get some action out of it? Sometimes yes…sometimes no. Culvert Case we're still waiting…and we've waited a long time… years… for the judge [to make a decision]… and then, now the state saying we still won't address the issue. And so, the fact is that there are probably more state blocking culverts now than there was when we filed the court case. So you tell us if we really won" (Bowhay).

> "Just because you win in court doesn't mean anything… that's the take-home message of the Culvert Case. The judge said yeah, you won. Well, we're still waiting for both the judge and the State of Washington and the federal government to make good on that…when are you going to change your ways? When are you going to fix these wrongs that we've identified

> and you've acknowledged? We're still waiting. And you know, we still have other examples of that… the Corps of Engineers is gonna replace the dams on the White River and the Green [River] but they are not going to put in a fish bypass or a passage" (Bowhay).

The question also remains whether federal court decisions about Tribal treaty rights to resources in Washington State apply to culverts on federal lands in the State of Washington. However, respondents recognize that as the case was brought against the state, at this time it has no legal effect on federal culvert management.

> "Are they [state and federal agencies] actually providing for fish passage as they should? Are they taking remedial action to fix those that have been identified as blockages in a timely manner? …and that's the question. And depending on who you talk to you might get a different set of answers. Certainly, when I look at blockages I can see that there's some that occur on state land, there's some that occur on private land and there's some that occur on federal land. How many are being fixed? Well, a few here, a few there… but are we making a positive of negative gain? I would argue we're losing ground. So, everybody has a role here and some fault. But the Culvert Case was, as all your legal actions, specific to an individual and an action. So, we have focused on the state" (Bowhay).

> "Yeah, the National Park [ONP] is on some federal lands…and they have some pretty bad culverts too, where they should put in some bridges, frankly. …Taft Creek could use a bridge and it's a culvert. Taft Creek is a shame… it's got to be probably the most dense [Coho salmon] spawning area in the state; and there's this awesome spring-fed pond, but that little gem of a piece of water has a plugged culvert. It's right at the National Park's visitor's center and they have to dig it out with an excavator most years because the culvert plugs up with this avulsion from just above it from a constructed roadway. So that risks blocking this pristine Shangri-La, year-in and year-out, by plugging up the culvert… right on the National Park. So yeah, they could use a bridge there" (Gilbertson).

Taking Boldt Phase II to the Next Level: Asserting Treaty Rights to Mandate the Conservation and Restoration of Treaty Resources

When interviewee respondents were asked whether Tribal treaty rights to resources legally mandate the conservation and restoration of treaty resources the response was uniformly affirmative. Several respondents pointed to recent reports by the Northwest Indian Fisheries Commission (NWIFC).

As stated in the Introduction of this thesis, the two NWIFC papers; *Treaty Rights at Risk: Ongoing Habitat Loss, the Decline of the Salmon Resource and Recommendations for Change* (NWIFC 2011) and the 2012 *State of Our Watersheds report* (NWIFC 2012) discuss the status of the environment in western Washington's Tribal U&As as well as the unfulfilled obligations to provide for the welfare of Tribes stated in treaty agreements. These reports focus to a large degree on river drainages and shoreline development and other causes of salmon habitat degradation. They combine basic assessments of the health of the watersheds in the region with tribal perspectives concerning environmental degradation and how it threatens tribal cultures and treaty-reserved fishing rights. At their roots these reports are a "call to action for the federal government to fulfill its trust responsibilities" established by its treaties with the Tribes of western Washington (NWIFC 2012).

> "The *Treaty Rights at Risk* document… that's what this is really all about... Which I think is an attempt to say, we have a right to these resources…and if you are not taking the actions to protect and restore these resources, then that's something that needs to be done" (Uravitch).

In response to a question about whether U.S. trust responsibilities to protect the Tribal Treaty right to resources might be used as leverage to reduce or

eliminate potentially detrimental effects of development (particularly those resulting from new or expanded coal or oil terminals in Washington State) one respondent was cautious but optimistic in replying affirmatively that it was possible.

> "You have to prove harm… and the potential of harm is also harm. So boy, that's tough… that's a heavy stone to roll…uphill. But I think that's what you do, right? And so yeah, I believe the Treaties are going to provide... because treaties are the law of the land, right? And for the trustees… the federal government as our trustees, that's supposed to come first. One thing we are going to have to do to be able to yank on that lever is we're going to have to be able to demonstrate what is at risk. So we need to do a better job of characterizing, mapping and capturing for posterity and for science, the status of our near-shore environment. …We need to demonstrate the near-shore population and the different major habitat types and the population assemblages in there and demonstrate how those resources provide for the Tribe. We need to do a better job of clearly painting the picture to clearly illustrate the risk. If we don't clearly illustrate what is at risk, what might be lost, what could be harmed and how important it is to us… If we are not clear, it won't be very compelling. We'll just look like we're obstructionists, standing in the way of development" (Gilbertson).

Increasing and Incorporating Tribal Role in Local Management

Strengthening and enhancing the Tribal status and position relative to the co-management of local resources and local habitat management issues was also seen to be an important next step in the protection of tribal right to resources. Tribes would like to see their role in local permitting to be enhanced so that they would have more say in development issues within their traditional Tribal areas (terrestrial as well as marine and near-shore). Up to this point in time Tribes have not had as much input as they would like into local government decisions that

potentially affect the welfare of tribal resources and the habitats that those resources rely on.

> "Well, we have the authority over our own, but we don't have the authority over the non-tribal user-groups. I think that's a huge problem, is that we don't have that authority. A huge issue is the permitting that goes on by the local and county governments…for permitting this parking lot, that development, that culvert, that little municipal road. With the failure of the ability to [of fish] pass impassible culverts, and impermeable surfaces that drain all these toxins in the first rains of the year, there's so much toxic run-off that all the fish in the creek die… and these are a product of local permitting. So, I believe that the local permitting needs to change, and that's a big issue. It needs to be addressed that local and county governments are totally disrespectful of the Tribes in their area… and totally unaware. I can think of the Dungeness as an example, where there is a battle between developers and in-stream flow rules. And if the Tribes had a direct connection to permitting on the more local level, that would help" (Gilbertson).

The Culvert Case was cited as an example of how Tribes might be able to use their legal leverage of tribal treaty rights to resources to assert more control over local permitting and development in their tribal areas.

> "The only way the tribes are gonna get there is to sue their way to get there. **…**These local and county governments aren't facing that cost [of their development's effecting resources and habitats]. Tribes are supposed to be equal with State of Washington, but they aren't given equal jurisdiction. …We're supposed to have equal jurisdiction on setting our fishing and we do, but we don't have equal jurisdiction on the other sources of impact. So that's part of the issue with the Culvert Case, is kind of equating those. So yes, the Tribes do have a right call the state on the carpet on these issues and yes they are correct …those non-tribal developments are a take. They need to be taken off of the non-tribal side of the ledger, when we are doing our catch sharing… and their impacts need to be characterized and that take needs to go away from one side of the equation and not the tribal side. …We need to hold these non-tribal user groups accountable for their impacts. So to answer your question…yeah, I could 'foresee the Tribes having policy authority in the design and implementation of PAs,' on a local, highly localized level. Like tribes by tribes, aware of what watersheds and areas are important, and with some control over the permitting and development within their U&A. It's gotta happen" (Gilbertson).

Interviewees also viewed Tribal treaty rights to resources as a position of strength that may attract non-Native individuals or groups to ally themselves with tribes. In this way, treaty rights could be invoked by non-tribal people with tribal backing when there are concerns about development or other actions could have effects on resources and habitats.

> "And maybe we do have a pretty strong handle to yank on, you know. The Treaty rights, especially out here, they can really carry a lot of weight, right? You want to make a developer nervous tell them that the Tribe is looking into their project; they would be like 'oh great.' So I guess, having the Tribes and the Treaty rights be able to be evoked more, maybe by others, if there is a development issue that maybe the Tribes aren't totally aware of. If other people in the population were more aware of the clout and the strength behind the Treaty rights, they might pursue further collaboration with tribes in their conservation efforts. So like, if someone wants to do a habitat project on their own, good luck, but line up with us and if we think it's a good idea…boom. We got a lot better access to money, we got a lot better access to permitting, we'll cut through the red tape" (Gilbertson).

The responses of interviewees in this chapter establish that the Tribes have both a cultural tradition as well as a continuing history of sustainable resource conservation tied to resource utilization within their traditional areas. They furthermore show that treaty rights have become an important tool for habitat restoration by tribal governments, and for pressuring other governments to protect habitat. These responses provide a larger context for the interviewees' discussion of MPAs.

CHAPTER 5: RESEARCH QUESTION 1: How have Marine Protected Areas in Western Washington Affected the Rights and Interests of the Tribes?

The previous chapters show that the Tribes have both a cultural tradition as well a continuing history of sustainable resource conservation tied to resource utilization. The responses of interviewees in this chapter point to a history of conflicts with non-tribal management of resources and with non-tribal development in the Tribes' traditional areas. This chapter deals with interviewee responses related to Research Question 1: How have Marine Protected Areas in western Washington affected the rights and interests of the Tribes?

Tribal Experience with PAs

Situations that have occurred and circumstances that arise at an established PA could also happen in MPAs and so are relevant to the discussion of the management of MPAs. There are some similarities in the management of PAs and MPAs, and in addition, it is difficult to separate the marine and terrestrial environments, especially when examining the ecosystem holistically. When speaking to Olympic Coast Tribal representatives about PAs, their experiences with Olympic National Park (ONP) inevitably arise. These experiences flavor their perception of PAs in general, including MPAs.

> "ONP is a federal entity that affects Tribal treaty rights, Tribal fisheries, the habitat of Tribal fisheries and also the Tribes' own PAs. Additionally, because ONP jurisdiction overlaps with the coastal marine environment and it contains and/or affects the habitat of some marine resources it can be looked at as a MPA as well as a PA. As one Hoh Tribal representative observed, "ONP reduces a treaty right. For a Tribal member to go hunting

> in ONP, they are going to encounter a lot of difficulties with enforcement and cops and regulations… and a lot of things… to exercise their Treaty right in that traditional area" (Gilbertson).
>
> "We had a Tribal [Hoh] group of clam diggers accosted [late August 2013] on an ONP beach by a Park Enforcement Officer, who came down to see what was going on. At that point it wasn't a problem to our guys. …Our diggers provided their BIA [Bureau of Indian Affairs] I.D.s and Olympic National Park's cop said 'we don't accept those.' Department of Interior said, 'We don't accept those… and we're closed.' …So all this with the National Park, the MOU, these annual meetings, this feel good, scratching each other's back, that we have been doing with them. So [this is] a blatant conflict, a total crash between the non-tribal jurisdiction and the tribal jurisdiction. And their complete failure to acknowledge… this was a cop. His failure, like our [Hoh Tribal member] said, 'We have our own cops, we have our own seasons… we're not closed.' And this guy's complete lack of awareness, having been here for three years (was) kind of flabbergasting. And so I have to wonder; is he truly unaware? Is he going to over-ride his education about treaty rights" (Gilbertson).

In Washington State and California, as well as other places, tribes are involved with the National Park Service and the National Marine Sanctuary program. Even some of the tribes that lack treaties and/or are not federally recognized, such as the Chumash in California, are heavily involved and coordinate with the Park Service and the Marine Sanctuary program, and the State of California (Uravitch).

In Washington State, Tribes are active natural resource co-managers with federal, state and fellow Tribal agencies. Olympic Peninsula Tribes have an MOU with Olympic National Park which both recognizes Tribal rights within the park as well as helps to formalize the Park/Tribal relationship. The coastal Tribes had a hand in the development of the OCNMS and helped shape it from the start (Bowhay). As discussed in the Background chapters, the coastal Tribes also take

part in the Intergovernmental Policy Council (IPC), the council that helps to provide local tribal input to the OCNMS.

Tribal PAs on the Olympic Peninsula Coast

Tribes and other Indigenous Peoples have traditionally had areas or resources that they that they set aside from utilization, both seasonally and long term in nature. As opposed to the more protectionist federal PA management such as that of ONP, Tribal management is focused on maintaining the productivity and services of a given area, ecosystem or fishery in perpetuity (Jones). This is in part because natural resources are the foundation and basis of the economy, culture, and health in many Tribal communities and are not just one of many missions within the broader federal family (Jones). Because of this, according to Tribal resource managers, Tribes often do a better job in remaining consistent and maintaining their traditionally established roles as stewards of the environment (Jones).

> "Tribes had been doing just fine [with resource management] until thrust into the Western co-management situation we face today. In other words, the Treaty right to resources, on or off reservation, for the Tribe includes many fisheries... and the management of those fisheries includes management and maintenance of their habitat, harvest, monitoring, regulation of the fisheries, [and] projections and monitoring to forecast species numbers returning. Management has become much more complex. Tribal management involves many venues and many types of personnel. We work from a technical level, from the boots on the ground all the way to a policy level where we negotiate agreements with our co-managers in order to secure our seasonal harvests of whatever species we are working on. This can be fishing, hunting and harvesting and other things of that nature" (Schumacker).

> "You know, the Quinaults have a special area ordinance for a particular stretch of coastline on their reservation which they manage for a kind of a wilderness area. You have the Tribes not allowing certain types of take or activity on the beach for protection of natural resources such as clams, and razor clams in particular. You have in front of all the mouths [of the rivers] and on the coastal area; an exclusion zone for harvest. So they are protecting salmon and steelhead as they return, so that there's no fishing in areas that they school up before they enter the river. So they have these type of MPAs that they have had on the books forever and so they are utilizing this type of practice, it's just it's not maybe as some people want to define as a sanctuary... you know, a permanent no-take area" (Bowhay).

> "So in some ways, we [Hoh] have one [Tribal PA]... like our spawning grounds, right? [And] like the Quileute Tribe, they don't fish above the Sol Duc confluence... another example. That's a huge Protected Area… all of those traditional fishing villages and fishing camps, all of that opportunity being forgone" (Gilbertson)**.**

Hoh Tribe Spawning Grounds PA Case Study

The Hoh Tribes' spawning grounds PAs provide a good case study regarding the difficulties that Tribes have had in getting non-tribal recognition of Tribal PAs from the public, the state and the federal government. Although this case study points to a Hoh Tribal success in getting recognition (though begrudgingly) from the federal government of their spawning grounds PA, there is a long history of non-tribal people and agencies disrespecting Tribal PAs and Tribal fisheries management.

> **"**We [Hoh Tribe] have our fishery from river mile 0 to 15… and [from] river mile 15 to 75; we don't conduct our fisheries up there. There are some traditional fishing grounds up there and we don't presently fish in those areas. Our Tribal knowledge is active and that's where the spawning occurs. We update that knowledge annually with on the ground surveys and we operate with the state, our co-managers, to determine where the spawning occurs... and it's mostly upriver and so we don't fish in that area and we provide a sanctuary from the whole upper area, once fish reach that area they are not going to encounter a Hoh Tribal commercial fishery. So from our perspective, the fish that we catch in the

> lower river fishery are there for us to use and the fish that make it upriver are for the future's use" (Gilbertson).

An interviewee points to this example of existing Tribal PA for spawning that has gotten begrudging federal recognition due to Tribal pressure:

> "This is the first year [2013] though, that the Park [ONP] was closed on the spawn. The Park didn't open this summer, they were closed for fishing because of Spring/Summer Chinook spawning… up there. So that was good, this was like the first year where we've had our Treaty Protected Area respected by the non-treaty …the one that matters most for the Hoh, right now. … and that was Olympic National Park that did that. And it was it only at our coercion… basically our complaining in a MOU meeting in front of a bunch of other tribal leaders. That's the only way we got it. And we totally had to yank teeth… and we had to shame the policy leaders in front of all the other Tribal policy leaders" (Gilbertson).

> "And their [ONP] biologists were kicking and screaming because they didn't want to field the grumpy phone calls. And imagine the phone calls I get [from Hoh Tribal fishermen] when we're closed in July and August and there's [non-tribal] sport fishermen up on the spawning grounds seven days a week. These guys have no treaty rights… and they're up there… you know? We're not fishing because the abundance is below the escapement floor and those guys are up there… merrily going about their business" (Gilbertson).

While the Hoh Tribe regulate their own tribal members in regards to fishing practices in the Hoh River, in part through the establishment of their spawning grounds PA, their PA cannot be effective when it is disregarded by non-tribal members.

> "When, because of diminished abundance, the Tribes aren't comfortable moving up into these up-river areas, because we don't want to molest the fish that happen to finally get to those spots… it's really frustrating to see those places disrespected, in some ways, by guides and outfitters. A sport fishery on spawning grounds is a reduction of the Treaty right … And there's a recreation fishery occurring on top of those fish on their spawning grounds…seven days a week. And so there's a lot of molesting and interference in addition to the outright hooking impact" (Gilbertson).

"You Respect Our PAs and We'll Respect Yours"

When Tribes create PAs, jurisdictional and resource allocation issues arise between the Tribes and the federal and state governments and the public.

> "The Tribal right is to 50 percent of the resource... and it needs to be harmonized with the non-treaty and how they want to take and utilize that resource. And so now, because of downturns in abundance for some of these species in the marine environment, what we're seeing is the non-treaty is allocating their take less from a consumption standpoint but more for a recreational standpoint. …Where the Tribes are saying we still want to maintain ours… which is for subsistence, ceremonial or commercial take... and so that's a conflict" (Bowhay).

> "The state's insistence that they can't take away those [recreational fishing on spawning grounds] opportunities... it creates problems for us. …And that's what the state asks us to do… to reduce our fishery, essentially putting more fish up-river on the spawning grounds so those guides and out-fitters can have a better time with them" (Gilbertson).

When Tribal PAs are not respected by non-tribal natural resource managers and the public it creates a situation where there is little incentive for Tribes to regulate the fishing of Tribal members because others are benefitting from Tribal restraint. The resources that the Tribes are trying to protect are still being impacted whether or not members fish.

> "If the non-tribal guys would consistently respect the spawning grounds and our closure areas I don't think they would feel a sense of being slighted. If the state; whether it's in the National Park or in state waters above the bridge… if they had more historically protected the spawning grounds when abundance was low, I don't think it would be such a huge deal to their constituents when it came up from time to time, had they been in the practice of doing that" (Gilbertson).

> "They tell us that 80 percent of the impacts happen by guides and outfitters. And so, we maintain that you could eliminate or reduce the guides and outfitters and conserve and improve that opportunity for all the citizens. We feel that commercial fishing should only occur from river mile 15 down… and that we can't have guides and outfitters making money by molesting the spawners" (Gilbertson).

In addition, Tribes feel less compelled to respect non-tribal PAs because they are not given the same level of respect. The lack of reciprocation and coordination between the Tribal and the non-tribal becomes a disincentive for resource protection and a cause of conflict which negatively impacts the resource and Tribal/non-tribal relations.

> "It really creates a problem when the Hoh Tribe is closed in July and August for Chinook, which used to be the peak for our Summer Chinook fishery, and we see the state open seven days a week upriver. If we had coordinated on some of these PAs then it wouldn't create this strain. But when the state disrespects the Tribe's PAs and goes with their seven day a week sport fishery on top… it really creates a strain. And it makes our Tribal members less inclined to make any further concessions. Why would we put more fish up on the spawning grounds if it [just] means a better angling experience for guides and outfitters up there? Our goal isn't to catch and release a fish" (Gilbertson).

One interviewee points out that there is potential for tribal backlash if the federal government and state do not respect Tribal PAs.

> "Because we can change our regulation tomorrow…to fish up there and join them. And believe me, there's a lot of people… voices in the Tribe that want us to fish all the way up to the glacier, because the state fails to work with us on these areas… people say 'well screw them, we'll just go up there with them,' and it's totally understandable. …Maybe we do need to just go up there for a year and totally blow it out of the water and then get back to the table, and that may be what it takes. But I think the Park realized that we were at that point. And so, well…at least the Park did something. But if the state doesn't make a change here pretty soon to respect our goals to protect some spawning grounds, we're gonna fish right up there with them. And it's gonna suck… abundance is gonna go down for a few years, but if that's what it takes…I think, then we're gonna be alright" (Gilbertson).

Marine Policy Initiatives

Some interviewees point to tribal perspective that there are some increasingly positive Tribal experiences with some of the more recent initiatives

geared towards environmental protection. This is in part because of recognition between the Tribal and the non-tribal policy-makers that decisions that are made need to consider both the Tribal and the non-tribal perspectives before initiatives are implemented. Perhaps more importantly, there is a more recently developing non-tribal recognition that they need to address Tribal rights and desires when they propose initiatives that might affect the Tribes.

> "In general, current initiatives are making more of an attempt to harmonize with the rights and needs of tribes. On the ground (or water) in the U.S., there isn't a yes/no answer to this, categorically. How well they are succeeding at this depends on the particular initiative. A number of current initiatives are making a concerted effort to harmonize with rights, needs, and desires of tribes. It is a delicate process that depends on the lead agency or organization's ability to seek tribal input at the very beginning of the process, and to take the time required to build relationships and respect tribal protocols" (Grussing).

> "I think with the initiatives that have come up in the last decades… the Tribes have been involved in the processes of whether to adopt them or not, so I think that the Tribes have been able to kind of get the ones that have been adopted to fit within their needs. And the one's that haven't been able to fit their needs just haven't been adopted. So, I don't that's really been a problem in recent years" (Williams).

Tribal Relationship with National Marine Sanctuaries

The only Tribes that have rights within the National Marine Sanctuary (NMS) system that are comparable to Pacific Northwest coastal Treaty Tribes are the Great Lakes Treaty Tribes, who have rights in Lake Superior and Lake Michigan (Uravitch). In the marine waters of Washington State and in the Great Lakes, Tribes have treaty rights that extend well into the ocean and the lakes. Because these two groups of tribes have treaty rights in marine and Great Lakes areas they have a position of strength from which to negotiate with the NMS.

This has had the effect of increased interest and participation by these particular groups when it comes to issues that arise that might affect their treaty rights within sanctuaries in their areas.

> "There's over a hundred coastal tribes… not all of them are heavily involved. I know in the national MPA system, we've had the most participation from Northwest tribes, the Great Lakes tribes, New England tribes and then some Alaska natives and folks out in the Pacific islands" (Uravitch).

The primary MPA that Tribes on the Washington coast deal with is the Olympic Coast National Marine Sanctuary (OCNMS). The four coastal Treaty Tribes (Makah, Quileute, Hoh and Quinault) were involved with the process of designating the area as a PA (Bowhay). One main factor; mentioned by several Tribal representatives, in the tribal support for the designation of the OCNMS area as a MPA was the desire for greater protection for the area and its resources from oil spills and oil exploration. In many ways there are compatible interests between the tribes and OCNMS, but it is the differences in interests that seem to be stressed in many of the responses. In many of the responses, the positive aspects that were pointed to in regards to OCNMS, MPAs and environmental agendas were attached with what they could be doing better in order that they fit with tribal needs and desires.

> "The Tribes had a hand in the development of the OCNMS. And so, they helped shape that program from the start… and they did that as way of helping them address issues they had a problem with" (Bowhay).

> "We [Quinault] allowed the designation of that Sanctuary [OCNMS] in order to eliminate any opportunity for off-shore oil drilling to be established in that area. This was during the post 70s oil embargo times…where off-shore oil was expanding rapidly, because we [U.S.] were trying to expand domestic production …and there was the potential for somebody to go out and start prospecting and to even maybe drilling off-shore Washington State" (Schumacker).

The Tribal desire for enhancing the protection of the area and its resources was tempered by a requirement that Tribal fisheries in the area would not be affected by the designation of the area as a MPA. Interviewees point out that the Tribes that supported the creation of OCNMS did so because they received assurances that their ability to manage the Tribal coastal fisheries would not be effected.

> "Initially, in deciding whether to support establishment of the Sanctuary, the Tribes relied on a couple of primary factors: they saw the OCNMS as a means to prevent or minimize future oil spills and they received assurances from the federal government that the Sanctuary would never regulate fishing" (Jones).

> "So, this PA out there was established in order to help the tribal resource at that time. They felt there was real threat of oil development off of the coast. One of the parts of the [OCNMS] charter that was critical to the Tribes was that we maintain our management of fisheries… that the Sanctuary does not enter into managing fisheries in any way shape or form…that we would we would continue to manage them with our co-managers and the federal fisheries management system for the ocean waters and with the State of Washington with things like crab and so forth" (Schumacker).

> "We can benefit from the PAs, especially in terms of habitat protection and protection from devastating events and that sort of thing… or increased shipping traffic or other issues that might diminish our fishery. We benefit from the National Marine Sanctuary if they reduce the likelihood of… let's say… an oil spill or a poorly navigated tanker running aground in hazardous waters. We don't want that of course...so if the NMS helps reduce likelihood of some devastating event, why then, of course we benefit. You know, we are going to stand to benefit from some of those components of those PAs for certain. But when they start to get into the arena of fisheries management… our benefits start to turn into a reduction in Treaty rights" (Gilbertson).

Since the time of the establishment of OCNMS, Tribes continue to be wary of attempts by the sanctuary to exert influence that might affect tribal rights to resources. Tribes are particularly concerned when OCNMS makes decisions that affect Tribes without tribal input and perspective in the decisions that are made.

> "They consistently try to keep the Tribes at their arms length and that was not what was originally envisioned. There have been some steps made to correct that with the establishment of the IPC [Intergovernmental Policy Council], but even then there has been reluctance by the National program to fully incorporate and involve the co-managers…both the state and the Tribes, that sit on that council and take the advice that body provides the sanctuary program on management. And they are saying we're not really going to incorporate you in a formal sense…they move really slow on that" (Bowhay).

Interviewees also point feel that the OCNMS often does not fully incorporate the interests of the Tribes or allow them to fully participate at the management level. Interviewees state that OCNMS is sometimes putting on a public front that it is interested in the concerns of the Tribes and including Tribes at the table while actually pushing an agenda against Tribal interests.

> "The problem that we have is; while they [OCNMS] are good at talking about tribal rights and respecting tribal rights, they are very slow about incorporating that recognition and understanding within their core document in terms of the mission statement at the national legislative level, or even at the management level within the Sanctuary and its management document in terms of really fully acknowledging the tribes and bringing them to the table as a co-manager to the resource" (Bowhay).

> "The Conditions Report that the Sanctuary did after its 10 year anniversary is still one that rubs me wrong, that they had the audacity and the condescending, supremacist attitude that they can write the Conditions Report without integrating the Tribes' perspectives… They spin-doctored the Conditions Report to prime the imagination [that there were] public participants in the issue of prioritization part of the Management Plan Review of the Sanctuary. So to me, they clearly wanted exclusive editorial rights to plant seeds in the minds of the public before they engaged the public. It's a classic [case of] we don't want your opinion until we've given it to you. …If they are trying to sway the public opinion before they engage the public and they don't want the Tribes to be engaged... they clearly were pushing an agenda against our interests. You know…the Tribes play ball with them and play nice and they still act like this? ...the arrogance is disgusting" (McCarty).

When asked for examples of how Tribes had been affected by OCNMS, one interviewee brought up sanctuary attempts to override the right of self-

determination of the Makah Tribe by trying to limit their ability to pursue energy resources in developing wave energy technology within the Makah U&A.

> "One specific one is; the Sanctuary lost three or four hearings under the FERC (Federal Energy Regulatory Commission), where, eventually a FERC license was granted for wave energy in the Makah U&A. …The notion that the NMS looks at itself as a MPA against ocean energy, I think that has affected the self-determination of the Makah Tribe and its right to enjoy the natural resource within our U&A area… where it's an adjudicated marine space where Treaty rights lie within …and the way we define our Treaty rights with our relationship with the environment as co-managers of the environment and resource trustees of the environment… I think the notion that the OCNMS is a MPA against ocean energy is a terrible lack of trust responsibility and recognition as government-to-government. That behavior was extremely paternalistic, condescending and I think downright disrespectful…worthy of a lawsuit. So, I think that certain brands of MPAs have negatively affected" (McCarty).

The interviewee responses in this chapter illustrate that Tribes have a long history of sustainable resource management and that Tribal culture is tied to continuing the availability of resources with which their traditions are tied. Additionally, the responses point to the fact that the Tribal rights to resources and Tribal prominence as managers of resources have been reinforced through Judge Boldt's interpretation of treaty rights and through the co-management system. The chapter also illustrates that Tribes are very much interested in maintaining the health of the environment and in the conservation of resources although they have had conflicts with PAs and MPAs. An important take away from the chapter is that although Tribes have had conflicts with Protected Areas, both marine and terrestrial, they are strong allies of the environment and natural resources.

CHAPTER 6: PRESENT NEGATIVES OF TRIBAL/MPA RELATIONSHIP: What has Gone Wrong

The interviewee responses in the previous chapters show that the Tribes have both a cultural tradition as well as a continuing history of sustainable resource conservation tied to resource utilization. The responses of interviewees in the last chapter point to a more recent history of conflicts with non-tribal management of resources and PAs, and with non-tribal development in the Tribes' traditional areas.

This chapter continues with interviewee responses related to this thesis' Research Question 1: How have Marine Protected Areas in western Washington affected the rights and interests of the Tribes? This chapter presents interviewee responses that speak to what has gone wrong in the present Tribal-MPA relationship. The beginning of this chapter discusses the basic conflict between Tribal and non-tribal resource managers (sustainable resource conservation vs. resource protection) and the remainder discusses other problems inherent in federal management of Protected Areas in Tribal territories.

Sustainable Resource Conservation vs. Resource Protection

The core of the problem between Tribes and MPAs is a potential conflict of interests between the Tribal right to resources in their Treaty areas and the creation of protections of the environment that would affect these Tribal rights. This conflict of interests is enhanced by the fact that each separate Tribe has Treaty rights that are tied to specific areas.

As stated in previous chapters; in the case of the Treaty Tribes of Washington State, when they signed treaties with the U.S. government in the 1850s, they insisted that their Peoples must be allowed to continue to fish as they had in their "usual and accustomed grounds and stations" in and beyond the reservation boundaries. These "usual and accustomed grounds and stations" are now more commonly referred to as Tribal U&As.

The legal establishment of U&As where specific Tribes have specific treaty-reserved rights has created what amounts to treaty "boxes" where Tribal rights are contained. While the sum of all Tribal U&As when combined encompasses all of Washington State's waters, each separate Tribe has treaty rights circumscribed only to delimited boxes (oftentimes overlapping with nearby Tribes' boxes) within these waters. This brings about the situation where Tribes are particularly concerned with anything that would affect their treaty rights within their specific treaty-reserved boxes.

> "Treaty Tribes are restricted to the fishing areas that were described for them under *United States vs. Washington*. So if an MPA is set up, tribes can't just fish somewhere else. Their livelihood and treaty rights are curtailed. A state fisher can go anywhere. The impact is very different" (Krueger).

> "Tribes are place-based and so they each have their own specific U&A where they can exercise a Treaty right. …Any activity or development within that area [Tribal U&A] has the ability to affect in a negative way their right of exercise or access or resource abundance in their area so it's of concern to the Tribes" (Bowhay).

Creating MPAs in Tribal U&As

Tribal fishing has always been a central part of Tribal culture in the Pacific Northwest. The right to continue fishing as guaranteed in their treaties with the U.S. is something the Tribes will not hesitate to fight for and as such has sometimes become a source of conflict with non-tribal citizens, organizations and agencies. As stated in the Boldt Decision, "The right to fish for all species available in the waters from which, for so many ages, their ancestors derived most of their subsistence is the single most highly cherished interest and concern of the present members of plaintiff tribes… The right to fish, as reserved in the treaties of plaintiff tribes, certainly is the treaty provision most frequently in controversy and litigation involving all of the tribes and numerous of their individual members for many years past" (*U.S. v. WA* 1974).

Without the backing of Tribes, the creation of MPAs in Tribal U&As, whether for resource protection or for other purposes is a source of conflict between Tribes and MPA creators and supporters. This is not because Tribes do not support protections for resources, but because the reasons for the protections can conflict with Tribal rights and interests in regards to access and utilization of resources in their U&As.

> "There's been conflict in the past about people wanting to look at the diversity that is occurring out on the coast. The National Park and some academics have looked at a survey of the coastline and saw that in particular areas there's this wealth of species and diversity and they want to protect it into a no-take zone. Well, most of the areas that were being circled on the map were [near the] Tribal reservations… and that diversity is there because they [Tribes] manage for that, but they manage it as a take, for utilization, for their subsistence, ceremonial or commercial purposes…and so there's your clash and conflict that occurs" (Bowhay).

> "Really, between the shipping lanes and the shoreline developments, our Tribe [Tulalip] has lost about half of their fishing area just because they can't do a drift gill-net where there's an object in the way or vessels travelling regularly. …It's been probably 20 years since we've really had any fishermen actually fishing in the shipping lanes …Those shipping lanes basically created a default MPA because those are areas our fishermen can't really fish, so establishing new MPAs in the areas that we do typically fish would reduce the area our fishermen can fish in even more than what it's already been reduced by" (Williams).

> "Other places it [MPA creation in Tribal U&As] occurred, like at Sund Rock in Hood Canal…an area where the divers wanted to have a no-fishing zone so that they wouldn't have to worry about gear conflict. And that was an area where again... the Tribes were fishing in… so that's a conflict. A lot of conflict stems from people proposing MPAs as a way of excluding certain activities, primarily fishing… and it's not really tied to conservation, in any means, it's just a way of giving themselves some exclusive access. And so, that's been a problem that the Tribes have faced throughout Puget Sound and the coast, because again, they are place-based they have a certain area where they can exercise a Treaty right and if people want to exclude them from doing that…that's a problem" (Bowhay).

Fisheries Management in and Around OCNMS

The relationship between the Olympic Coast National Marine Sanctuary and the four coastal Treaty Tribes (Makah, Hoh, Quileute and Quinault) who have treaty rights to resources in and around the area that the sanctuary occupies is a unique relationship within the National Marine Sanctuary system. The relationship between the four coastal Tribes and the OCNMS is also a unique among the Treaty Tribes of Washington State as these four Tribes are the Tribes which are recognized as having U&As that overlap with the Sanctuary.

In the case of the State of Washington, the coastal Treaty Tribes had already been recognized as co-managers of the coastal fisheries resource within

the state's jurisdiction since the time of the 1974 Boldt Decision. The Boldt Decision also established that the tribal right to resource access and utilization can only be restricted if there is a demonstrated conservation concern. It states: "The state has police power to regulate off reservation fishing only to the extent reasonable and necessary for conservation of the resource. …conservation is defined to mean perpetuation of the fisheries species" (*U.S. v. WA* 1974). *U.S. v. Washington* further states: "If alternative means and methods of reasonable and necessary conservation regulation are available, the state cannot lawfully restrict the exercise of off reservation treaty right fishing, even if the only alternatives are restriction of fishing by non-treaty fishermen, either commercially or otherwise, to the full extent necessary for conservation of fish" (*U.S. v. WA* 1974).

As previously stated in the Fisheries management section of the Background chapter; through the implementation of the Magnuson-Stevens Act (MSA), the National Marine Fisheries Service (NMFS) was developed as the agency to manage U.S. fisheries and Washington State's coastal Treaty Tribes became fisheries co-managers of the federal waters within their Tribal U&As (Magnuson-Stevens Act). This jurisdiction extends well beyond that with their state co-managers three-mile offshore jurisdiction. The implementation of the MSA and the ensuing creation of the Pacific Fisheries Management Council (one of eight regional fishery management Councils) have created a unique tribal/federal/state co-management framework and forum for managing fishery resources and for the coordination of fishery management efforts (OCNMS 2011).

Attempts towards Fisheries Management by the NMS Program

There is a basic conflict of interests between Tribes and the mission of the National Marine Sanctuary system. Resource protection, the "primary objective" of the National Marine Sanctuaries Act (which established the NMS system) can be in conflict with the Tribes' focus on resource conservation (Jones). The NWIFC's Coastal Program Coordinator contrasted resource protection with conservation in this way: "Conservation is ongoing sustainable use while protection is reducing or eliminating all potential threats including extraction/use" (Jones).

> "Their [NMS] prime mandate under the National Marine Sanctuaries Act is to 'protect the resources' within Sanctuaries. Tribes are concerned with being able to fish, gather, and sustain their way of life in perpetuity. That means conserving, adapting, watching. Sanctuaries are established to set-aside areas, prohibit certain activities, and so forth to protect resources. They are similar in their desire to keep the resources around (forever if possible), but the mechanisms they employ and philosophy for doing so are quite different…that, of course can cause conflict" (Jones).

One interviewee points out that NMS regulation of fisheries in California sanctuaries puts Tribes on the Washington coast on edge, in case there are attempts by NMS to impose regulations of fisheries in other sanctuaries. He does point out that Treaty Tribes in Washington State have additional leverage to oppose the imposition of fisheries regulations in Tribal U&As because of their Treaties with the U.S. government.

> "There has been a recent push by sanctuaries from the national office, the National Marine Sanctuary program, to regulate fishing within their boundaries. This has upset more than one group of public around Sanctuaries, because most of them were under the impression that sanctuaries would stay out of fisheries management. They [NMS program] decided that they wanted to get into it. We have pushed back much harder here, with a lot more leverage than other areas have...as

> Treaty tribes… and have been able to say to this sanctuary, stay out of it. That has not stopped the Sanctuaries further south in California from limiting fisheries, including bottom contact and in some cases, water column fisheries… where you don't even touch the bottom… from occurring within their boundaries. So, that PA in particular certainly has affected the rights and interests of the tribes and tribal members, because it just keeps us constantly working to remind people of the rights of the Tribes and their ability to manage… and [that] you can't do anything that interferes with that" (Schumacker).

Attempts towards Fisheries Management by the OCNMS

When OCNMS was designated in 1994, the National Oceanic and Atmospheric Administration (NOAA) determined that existing fishery management authorities were adequate to address fishery resource issues (OCNMS *Mgmt. Plan* 2011). As a result, the OCNMS designation document does not authorize the regulation of fishing. However, in part because of the basic conflict of interests between Tribes and the National Marine Sanctuary system (sustainable resource use vs. resource protection), NMS staff can be predisposed to environmental agendas that affect Tribal rights to resources within and around its sanctuaries.

> "The Marine Sanctuary [OCNMS] designation document, under the heading of fisheries management, it says existing management and jurisdictional authorities exist and are sufficient and the Marine Sanctuary will have no role in fisheries management. …But in re-designation documents and drafts, the intention of many is for the Sanctuary to be able to assert some authority over fishing and fisheries management in their areas" (Gilbertson).

> "The National System [is] trying to impose its will on a sanctuary that is the most unique in the whole system... with respect to the only sanctuary that has significant Treaty policy rights out in the ocean" (McCarty).

While OCNMS is not authorized to regulate fishing, and the overriding intention of NMS may not be to curtail Tribal treaty rights, their predispositions towards resource protection objectives for resources in and around the Sanctuary directs them to protect these resources through whatever avenues are available to them. In this way, Tribal treaty rights can be affected by NMS policymakers and staff (sometimes through their backing of people or entities outside of NMS whose objectives they support) through processes of the PFMC/NMFS or Congressional acts such as the ESA (Endangered Species Act), or the MMPA (Marine Mammal Protection Act).

From the point of view of Tribes, NMS is seen by interviewees to be disregarding tribal sovereignty and the U.S. government's federal trust responsibility to Tribes by prioritizing NMS's (as well as non-governmental organizations') conservation goals over Tribal treaty rights to resources and the ability for self-determination by Tribal governments.

> "I think that, for the most part, (OCNMS) has been problematic. Their ill-fated attempts to act as a conservation insurgent into the Pacific Fisheries Management Council and attempting to impose their perspectives on fisheries management, I think has caused some hysteria and also a distrust in certain schools of thought with the scientific community, and more specifically, friends or associations that seem to be like-minded with leadership within the OCNMS" (McCarty).

Interviewee responses stress in particular that the regulation of Tribal fishing and harvesting by the Olympic Coast National Marine Sanctuary (or any other PA) is not something that the tribes will agree to. However, Tribal representatives are aware that this can lead to non-tribal public resentment from people or entities focused on resource protection goals or who take exception to

the idea that Tribes could continue to fish when they cannot. As far as responses of interviewees representing Tribes, attempts at fisheries regulation by OCNMS is the biggest potential problem they have with it (and MPAs in general).

> "The ability of the Tribes' right for Treaty fishing cannot be usurped by Sanctuary regulations, no matter what. So if this sanctuary were to ban all fishing within it… commercial, recreational, etc., that would not stop Treaty fishing, unless there was a demonstrated conservation issue. And you would have to go specie by specie on that, it wouldn't be the whole area. So, in other words, treaty law is higher law than any other. It's the highest law of the land. …It's surpassed by the U.S. Congress, so they usurp these other regulations... But that puts us in the position of being the last people fishing and it adds a public resentment of the Treaty right to the equation. That public resentment becomes a public relations or public image factor… and causes us to have to continually defend and explain to people what a treaty right is. So that is one thing that I can point to for the OCNMS" (Schumacker).

NMFS/PFMC: Existing Management and Jurisdictional Authorities

As previously stated in the Fisheries management section of the Background chapter; the Pacific Fishery Management Council (PFMC) was created through the implementation of the Magnuson-Stevens Act (MSA) and it is part of the NOAA National Marine Fisheries Service (NMFS). The PFMC is made up of representatives from the Tribes and the States of Washington, Oregon, California, and Idaho (Geiger et al. 2012). It manages 119 fishery species along the Pacific Coast by issuing permits and setting catch limits (Geiger et al. 2012). The PFMC has developed Fisheries Management Plans (FMPs) for the fisheries that it manages in order to identify thresholds for both the fishing mortality rate constituting overfishing and the stock size below which a stock is considered overfished (PFMC 2008).

Among these FMPs (and most relevant to the discussion presented by interviewees in this thesis) is the Pacific Coast Groundfish Fishery Management Plan (PCGFMP) which was implemented in 1982. The groundfish covered by the PFMC's groundfish Fishery Management Plan (FMP) include over 90 different species of rockfish, flatfish, roundfish, sharks, skates and others that, with a few exceptions, live on or near the bottom of the ocean (PFMC 2008). Since there is such a wide variety of groundfish, many different gear types are used to target them. These different gear types can have varying impacts on fish habitat.

Essential Fish Habitat (EFH)

The Magnuson-Stevens Act requires Fishery Management Plans to "describe and identify essential fish habitat…, minimize to the extent practicable adverse effects on such habitat caused by fishing, and identify other actions to encourage the conservation and enhancement of such habitat" (PFMC 2008). The MSA defines essential fish habitat (EFH) as "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity" (PFMC 2008). In order to mitigate the adverse impacts of fishing on groundfish EFH, the PFMC can close areas to certain kinds of fishing practices by putting area restrictions on fishing gear designed or modified to make contact with the sea floor.

When the NMFS determines a stock is overfished in a region, the Fisheries Management Council for that region must develop and implement a plan to rebuild it to a healthy level (PFMC 2008). EFH closed areas can be categorized

as Bottom Trawl Closed Areas (BTCAs) and Bottom Contact Closed Areas (BCCAs). A large portion of the EEZ adjacent to Washington, Oregon and California is under a Bottom Trawl Footprint Closure (PFMC 2008). There are bottom contact closed areas in Oregon and California, but only bottom trawl closed areas off of Washington State (PFMC 2008). The PCGFMP states that there are 50 EFH closed areas identified within the PFMC management area, five of them are off the coast of Washington State: Olympic 2, Biogenic 1, Biogenic 2, Biogenic 3, and Grays Canyon (PFMC 2008).

The increasing trend for the creation of more or larger EFH closed areas in Tribal U&As are a cause of concern for Tribes. Tribal concern about this trend was pointed to both interviewees from NWIFC and all of the interviewees that were representatives of the coastal Treaty Tribes. Specifically they point to current conservation concerns connected to rockfish and rockfish EFH. Rockfish are a slow-growing, late-maturing and long-living species; which potentially makes them more vulnerable to being overfished.

> "Another example of a MPA would be the groundfish closure zones… like Olympic 2. There's gonna be some new proposed MPAs off of the Quinault Canyon that are being discussed and deliberated, currently. Those no-fishing zones are intended to address some bottom fish concerns with Yellow-eye and Canary rockfish. Those also represent a reduction in the Treaty right, because tribal members can't go somewhere else" (Gilbertson).

Demonstrating the Conservation Concern

Marine areas off of the Washington coast encompass a variety of habitats important to groundfish, such as rocky reef habitat supporting juvenile rockfish

(primarily north of Grays Harbor), estuary areas supporting numerous economically and ecologically important species and sandy substrates (primarily south of Grays Harbor) important for juvenile flatfish (PFMC 2008). A large proportion of this area is also contained within the Olympic Coast National Marine Sanctuary.

To a large extent the current condition of seafloor habitats must be inferred because detailed information on historic and current conditions in the Sanctuary's seafloor habitats is limited due to technological challenges and expense (PFMC 2008). Thirteen species of rockfish are identified as state species of concern, and three of these are also federal species of concern (OCNMS 2011). Four species of rockfish found in OCNMS have been classified as overfished by the NMFS (OCNMS 2011).

> "There are bottom trawl contact closed areas and bottom contact closed areas identified in the Pacific Groundfish Fishery Management Plan to minimize the impacts of fishing on EFH. The Tribes have always been concerned that the justification for some of these areas is that coral and/or sponge *may be* important EFH (and that) it is vulnerable to fishing impacts and therefore should be protected. However, no one is measuring how much coral/sponge is out there, there is little information on their role as groundfish habitat (except they like hard bottom areas as do rockfish, so there is some co-occurrence), and there are no defined thresholds or targets for how much is an acceptable impact. In the eyes of many environmental NGOs as well as some Sanctuary staff they are considered sacred… all need to be protected. The (coastal Treaty Tribes') U&As have some of the richest concentrations of hard bottom and coral/sponge. The Sanctuary is also seeking to further protections for them" (Jones).

The coastal Treaty Tribes are particularly concerned that areas are being closed to fishing when conservation concerns about species are not backed up by concrete data that demonstrates a need for fishing closures. The OCNMS 2011 Management Plan states, "Analysis of seafloor habitat data used for groundfish

Essential Fish Habitat (EFH) designation indicates that approximately six percent of the sanctuary is hard substrate with potential to host biologically structured habitat. Of this, 29 percent lies within the Olympic 2 EFH conservation area. Recent surveys by OCNMS researchers have documented corals and other biologically-structured habitat in other areas (Brancato et al. 2007), which indicates this analysis may underestimate the historic or current distribution of biologically-structured habitat" (OCNMS 2011).

> "That leads to conflicts like the proposal by OCNMS and WDFW to expand Olympic 2 (one of the closures). This is just one example, but it impacts tribes when you close off a lot of fishing ground and have species that cannot be surveyed in rugose habitats (groundfish abundance is measured with a trawl survey with smaller footrope gear) and then cut off commercial fishing (or the possibility of future fishing). There is no information to determine how much 50% of the harvestable surplus in that area is any more. Also, fishing is now closed to everyone else to protect something that is 'beautiful, rare, and threatened' in the minds of some (without measurement on the extent of the latter two), and the Tribes are left looking like the bad guys who won't protect this resource along with everyone else. This is similar to the situation [public pressure and MMPA affecting Makah Treaty right to whaling] the Makah find themselves in now with whaling, so it's not just an abstract concern" (Jones).

> "Initially, the MPAs [EFHs] off our coast were for deep-sea sponge and coral. But then we said well, 'if we save everything in your box…what does it mean for the population as a whole on the West Coast?' No answer… all the Marine Sanctuary said was 'well, we have an obligation to protect the resources in the Sanctuary.' So they would eliminate all the Treaty fishing if they could to make sure their resources were protected. Even if there is or isn't a conservation concern. …Pacific Fisheries Management Council asked the Sanctuary for some context: 'What percent of the corals and sponges are in the box? If we save every last one, are we gonna save 90% of the species?... 1% of the species?... Is it gonna make a difference?, because you are going to take these Tribes' fishing away from them.' And they couldn't answer the question in terms of coral or sponge conservation, so then they changed the goal and now the goal became coral and sponge are essential juvenile rockfish habitat…and that's why we have to protect them" (Gilbertson).

Non-Governmental Organization (NGO) Attempts to Regulate Fishing

In recognition that new scientific information could reveal other important habitat areas or call into question the importance of the habitat of existing areas, the PFMC can designate new areas or eliminate existing areas (PFMC 2008). Additionally, organizations and individuals are allowed to petition the PFMC to consider a new designation, or to modify or eliminate an existing designation (PFMC 2008). Non-Governmental organizations (NGOs) have begun to use this venue to propose new or expanded EFHs that would limit or close fishing in areas off of the Washington coast. However, Tribes have made sure that their voices will be heard and recognized whenever EFHs are proposed that might affect them.

> "Recently, Non-Governmental organizations have been coming to the Pacific Fisheries Management Council with proposals for groundfish Essential Fish Habitat…in the ocean waters off of Washington State. …We never had seen them before and they surprised us with this… They were right smack in our areas and they were talking about bottom contact prohibitions and things of that nature. And we just said, 'No, not only do we not support you…,' but we wrote a scathing letter about the fact that these guys were going forward with these types of actions without consulting… and put that on the table there at the Pacific Council and just shut the whole process down" (Schumacker).

Oceana, an NGO founded in 2001, was named specifically by several interviewees as an organization that had been pushing for EFH creation in Tribal U&As without Tribal support. Oceana's website gives this descriptor of their organization: "the largest international organization focused solely on ocean conservation. Our offices in North America, South America and Europe work together on a limited number of strategic, directed campaigns to achieve measurable outcomes that will help return our oceans to former levels of abundance. We believe in the importance of science in identifying problems and

solutions. Our scientists work closely with our teams of economists, lawyers and advocates to achieve tangible results for the oceans."

Interviewees point out that Oceana has disregarded the standards of sound science while using their influence to attempt to impose their protectionist agenda in Tribal U&As.

> "And so it just flies off the lips of Oceana, 'Oh, we should close these MPAs… closure off Quinault Canyon, Gray's Harbor sponge reef, glass sponge protected reefs out on Destruction Island, …expand Olympic 2, move Olympic 2 and expand it, expand Olympic 1' …all future MPAs, by Oceana. …So these (proposed closures) are all on the horizon, and they are all gonna reduce the Treaty right because we aren't gonna be able to go anywhere else" (Gilbertson).

> "I believe Oceana filed a lawsuit against the National Marine Fisheries Service to get them to change the recovery plan on certain rockfish species…and ignored additional evidence that indicated a much larger and stronger population of breeding biomass of the species. And the judge coming from that same philosophy ignored the new evidence when it was to be introduced. And so, the end justifies the means… which I think is a nasty, slippery slope away from sound ethics" (McCarty).

> "Oceana is using the presence of deep-sea coral and sponge... but they haven't demonstrated any conservation concern associated with those species. They haven't demonstrated how any of their MPAs are going to help those species' populations" (Gilbertson).

"Don't Punish the Tribes for Something they didn't Do"

Interviewees assert that restrictions to the Tribal right to resources can be seen to be punishing Tribes for something they did not do. The Boldt Decision acknowledged that Tribes are not responsible for the overfishing practices that affect both the Tribal and non-tribal fisheries "For several decades following negotiation and ratification of the treaties all of the tribes extensively exercised

their treaty rights by fishing as freely in time, place and manner as they had at treaty time, totally without regulation or any restraint whatever, excepting only by the tribes themselves in strictly enforcing tribal customs and practices which, during that period and for innumerable prior generations, had so successfully assured perpetuation of all fish species in copious volume. The first other than naturally caused threat to volume or species came from non-Indian population growth and non-Indian industrial development in the rapid westward advance of civilization" (*U.S. v. WA* 1974).

When MPAs that affect Tribal treaty rights to resources are created in Tribal U&As, Tribes are in effect being punished for something they did not do. One Tribal representative pointed out that unless new restrictions on fishing are designed to affect non-tribal fishing, Tribes on the Washington Coast are being forced to compensate for the overfishing practices of others. Specifically, he points out that Tribes may be forced to compensate for the overfishing practices of others that depleted fishing stocks in areas to the south, outside of the Tribal U&As, even though Tribes had no part in these actions and the fishing stocks are not depleted within the Tribal U&A.

> "An MPA is gonna reduce the Treaty right, unless they expressly exempt the Tribes, that's one way, or they have to have some sound science as to why they are necessary for our use. Right now a lot of our MPAs [those within coastal Tribal U&As] goals are to keep our abundances at a higher level because abundances to the south have just been decimated. And that really sucks. I mean those populations to the south should be recovered and they should feel the pain down there. And if our stocks up here are healthier, then we shouldn't be held down. That's an ongoing issue, with the Canary and Yellow-Eye [rockfish]" (Gilbertson).

One interviewee points out that Tribes are being put in the position of maintaining higher levels of fish populations than needed for addressing conservation concerns in their U&As in hopes it will compensate for overfished areas outside of Tribal U&As. In effect, this creates the situation whereby Tribes on the Washington coast will be punished because of the fact that they traditionally maintained their area as a healthy and productive environment through their sustainable resource utilization practices and because the co-managers (Tribes and Washington State) have been better managers of their own fishing stocks.

> "They [NMFS] aggregate the population across the whole Pacific on some of these stocks in order to justify those southern fisheries. So that's kind of annoying, that the Treaty areas have to be reduced and no-fishing zones imposed up here in OCNMS, because in California and Oregon, their abundance is so low. So, it's like they're shopping around and we have to keep our bank account up and charged up…. essentially they are fishing on our biomass" (Gilbertson).

> "And these MPAs, like for example the MPAs that are intended to ensure that abundance of Canary and Yellow-eye rockfish stay high... Well, our abundance up here is pretty high. …California and Oregon have depleted their reserves and so we have to make sure our reserves stay high, because they have blown through their stocks. So rather than force the southern fisheries to close and recover their stocks, they constrain our fisheries to make sure we don't further reduce the abundance, since they couldn't handle being forced to recover stocks on their own to the south" (Gilbertson).

Another interviewee points out that although MPAs can be created that would not apply to non-tribal people and not to Tribes, this is potentially a cause of resentment from the public. This also effectively punishes Tribes by making them look like the bad guy even though they are not responsible for the overfishing practices that caused the need for an MPA.

> "It's the blowback, and for a lack of a better term, it's the public perception of 'How come they can fish?' And you know, it's not just in the education process on Treaty rights, it's also the process of telling people, 'Hey, we didn't cause the issues;' that the Tribes don't have the fishing power nor the ability to damage these areas or to overfish these fisheries out here that have caused us to be in these positions where MPAs seem to be advised. So, what we are saying is, you can't be punishing the tribes for something they didn't do. Unless it's a conservation concern, a demonstrated conservation concern, that says if the Tribes fish they will be seriously depleting this fishery, something of that nature" (Schumacker).

Tribes do have some commonalities of interests with the objectives of people and entities that advocate protections for resources in Tribal U&As from non-tribal sources of resource degradation. One interviewee points out that fishermen from areas outside of the region, who have already overfished their own areas, are a source of resource degradation within Tribal U&As that needs to be addressed before any discussions of affecting Tribal Treaty rights to resources.

> "Tribes have a longer-term, built-in interest in maintaining a healthy environment to sustain that long term relationship. I think it's a more balanced relationship… where it doesn't resemble a smash and grab, locust type management of non-tribal fisheries who would come in and pillage an area and move on to the next one, leaving whoever was left behind to pick up the pieces for recovery plans. I think a lot of the conservationist's agendas have been built to counterbalance that effect. And there are areas where that effect needs to counter-balanced, so don't waste your time in an area that doesn't need to be fixed go on to somewhere else… or help us do a better job with what we're already trying to do" (McCarty).

Additionally, NGOs that would help to protect the Tribal resource could find potential allies in Tribes as long as Tribes are engaged and consulted and their interests are addressed.

> "We have draggers [fishing boats] from California and Oregon all over in our waters up here in our Treaty area. National Marine Fisheries Service will let those guys come up here. …They have depleted their reserves down to the south so they are up here. And in order that they don't deplete all these reserves up here too, we [could] have to have no-fishing zones… which constitute a reduction in Treaty rights" (Gilbertson).

> "Like Oceana, the group that is sponsoring these MPA proposals; I don't think they really want to take it out on the Tribes, but we are just collateral damage. They really want to keep these California and Oregon and Washington interests from dragging every last square inch. **…**And I could sort of understand, I kind of have a problem with California and Oregon draggers being up here in the first place. And that because California and Oregon draggers have come up here and had this impact, presumably, and caused the need for this MPA" (Gilbertson).

Tribal Conflicts with Environmental NGO Agendas

While Tribes have some commonalities of interests with the objectives of people and entities that advocate protections for resources in Tribal U&As from resource degradation, interviewees point out that when groups with conservation agendas try to impose their will in Tribal U&As with little or no consideration of the Tribes, their efforts can conflict with Tribal rights and interests. Tribes want to be involved in discussions for anything that might affect their Tribal U&A in order to ensure that Tribal rights and interests are acknowledged and incorporated in conservation plans.

> "It's just… environmental conservation; we've seen it used sort of against us. And when they don't really articulate what their goals are and they don't really define what a healthy environment is, or what constitutes success or successful recovery, then we gotta shy away from that, because it just seems like there's a lot of interests that want to push all users out of the way. I can understand why, but it doesn't work out to push the tribes away. I mean, that's been the American Way right? Kick the Indians off their land… and take it. So, that's just what's going on out here" (Gilbertson).

Interviewees point out that groups with protectionist agendas often sensationalize issues and concerns in order to gain more funding and support from the public and more attention from the government in order to push their agendas. One interviewee also points out that organizations and employees of groups with

protectionist agendas have jobs and careers which are tied to their ability to get support and funding from the public. This creates the situation that they are incentivized to sensationalize situations in order to support the agendas that provide for their livelihood regardless of whether there are genuine conservation concerns.

> "I think for the most part some of these are pre-existing agendas that were spawned out of emotionally charged public relations campaigns by 'Conservation Incorporated,' where it's their job and their business model and it's their career path to cause people to have an emotionally-charged incentive to make private contributions to these 501C3 organizations… who then in turn, pressure the government to do certain things based on exaggerations. I think they need to be more methodical and forthright in their perspective and not to sensationalize the data and not to ignore new data in the situation. It seems as if they are more interested in advancing and fast tracking their special interests agenda that they have little ground-truth on what is going on in the ocean" (McCarty).

Interviewees condemn the situation where groups and individuals with specialized conservation agendas (such as protecting whales) actually disregard some conservation goals that concern the Tribes (such as ocean acidification) and sensationalize issues in order to continue to push a specific agenda which is tied to receiving funding for their own personal livelihood.

> "No it is [conservation is a loaded term]. We used to be the poster-child of conservation and now people want to take it to the next extreme. …And so, what happens when the cash-cow is gone? I mean the threat is gone, is the cash-cow gone? No, they just keep conjuring up more threats. …And so, when so many whale species have been saved they still have to conjure up more threats about whales so that they can keep themselves in the job they love and the careers they made off of saving whales. They have to learn how to adapt to the reality. How many of these bozos actually want to do something about one of the worst threats to the world's oceans... ocean acidification? But if they are protecting whales and their contracts are paid for by big-oil... they aren't going to touch ocean acidification. So, if they really care about the environment… they have painted themselves into a corner, where they can't do the right thing" (McCarty).

Interviewees also point out that Tribes would be much more likely to support the efforts of conservation groups if they utilized the standards of sound science to demonstrate conservation concerns. Tribes are particularly concerned when groups or individuals appear to be single-mindedly fixated on pursuing their own personal pre-existing protectionist goals in Tribal U&As when these goals are not demonstrated by sound science to be warranted.

> "And it's their fault, not ours. So I know there's a lot of people that have tried to ramshackle their own agenda in an area that wasn't gonna accept it. And it's their waste of money and it's a waste of our time" (McCarty).

> "I think there's an aversion for real science. …I think the interest of the non-tribal fishermen and fishing industry also suffered from some of these agendas that use MPAs as the cure-all to establish them everywhere" (McCarty).

Interviewees point out that both the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA) as having been used by groups with protectionist agendas which are in conflict with Tribal rights and interests. Both the MMPA and the ESA can affect Tribal treaty rights if there are demonstrated conservation concerns associated with them. Interviewees have expressed that Tribes are concerned about MMPA restrictions placed on about the status of taking marine mammals (such as whales) as a resource or (such as sea lions) if their catch or safety is threatened (Krueger). This concern has been under negotiation with NOAA (Krueger).

> "*Anderson v. Evans* … is the big case that told Washington Treaty Tribes they can't target marine mammals. That is not an MPA issue. Nor is it ESA. It applies everywhere and is premised on the Marine Mammal Protection Act, which only Congress can change" (Krueger).

> "So, I think the ESA for one, has become this rigid, inflexible, dogmatic fight that's become very politicized… It seems like this hallowed ground of no man's land and that can't be touched by either Republicans or

> Democrats, when in reality it's becoming one of the worst environmental disasters under the U.S. jurisdiction with respect to the Marine Mammal Protection Act and the species that have shown some great recovery. And now you have MMPA species… that we can't manage their predation on endangered species" (McCarty).

The Center for Biological Diversity, an NGO founded in 1989, was pointed to specifically as a group with an environmental agenda that potentially affects Tribal rights and interests. The Center for Biological Diversity website states that it "is a nonprofit membership organization with approximately 625,000 members and online activists, known for its work protecting endangered species through legal action, scientific petitions, creative media and grassroots activism."

> "[An example is] Center for Biological Diversity's attempt to ramshackle the federal family with 80 species of coral to be listed under the Endangered Species Act. I think the Endangered Species Act is flawed…there's no standard matrix in the way in which recovery plans and stock assessments of different species are really assessed" (McCarty).

Beyond the basic clash of interests between the Tribal right to resources in their traditional areas and the creation of protections of the environment that would affect these Tribal rights, cited by Tribes as the main potential cause of conflict between Tribes and protections for the marine environment, there are other problems inherent in federal and state PA management of resource and habitat protections that were discussed by interviewees. These problems and concerns are presented in the remainder of this chapter.

Implementing Federal Policy at Local Level

One basic problem inherent in federal management is the difficulty of implementing federal policy at local level. It is difficult to design broad policies

and procedures that will be successful in all instances in all regions. While this is an understandable problem, eventually federally implemented management will necessarily have to face the fact that each region has local issues that are unique. There is no one-size-fits-all management template that will be effective in all regions. In the case of the coast of Washington State, the uniqueness of the coastal Treaty Tribe/PA relationship creates issues that can be particularly problematic for federal managers.

> "They [Treaty Tribes] probably weren't thought of when they were putting together the Marine Sanctuary Act or any of the Park Service legislation or anything like that at the federal level" (Uravitch).

> "Tribal management …is focused on maintaining the productivity and services of a given area/ecosystem/fishery in perpetuity. These resources are the basis of the economy, culture, and health of the community. They are the very foundation. They are not one of a million other things as with the broader federal family" (Jones).

Bureaucracy

Interviewees pointed to bureaucracy as a problem inherent in federal management. Federal managers from outside of a region who do not have knowledge of local issues are often more empowered to make decisions than regional managers who do have knowledge of local issues.

> "The goals of the federal government are varied even within NOAA. They try to balance multiple uses across the nation with a centralized hierarchical bureaucracy. An example: The lady at HQ has no idea what is happening at the mouth of the Juan de Fuca Canyon, yet she can override decisions made by subordinates in the region" (Jones).

> "There are numerous agencies with specific missions based on their enacting legislation. Those agencies can have numerous programs, numerous regulatory responsibilities. Eventually, you are left with individual bureaucrats or departments writing rules and regulations that

> will make a call and check a box as to whether the rule affects tribal rights and sovereignty" (Jones).

It can be especially problematic when, because of the hierarchical nature of federal management, local regional managers who are subordinates to others outside of the region are more concerned with what their superiors would like or might think of their decisions than how these decisions will affect the local region they are supposed to be focused on managing.

> "Basically, it is rare in any bureaucracy to have folks that are looking to stand up to their superiors. All bureaucracies operate in a hierarchical manner, with a lot of the most important decisions coming from headquarters (DC) where there is much less understanding of treaty rights or the importance of those rights and resources to the tribes. So, even as you work to educate folks on the ground here, build relationships, and even start to get common understandings and agreements, all of that can be overruled directly by headquarters. Or more insidiously, there are occasions where agency personnel will say all the right things to Tribes while basing decisions on the mandates of their agency's implementing legislation and the directions coming out of headquarters" (Jones).

Consistency: Employee Turnover and the Need for Education of New Staff

The lack of consistency due to employee turnover and the ensuing need for the education of new staff was also highlighted by interviewees as a source of difficulty in the Tribal/MPA relationship. This is in part due to the uniqueness within the NMS of the coastal Treaty tribe/NMS relationship. This again comes back to the basic clash of interests between the Tribal Treaty right to resources in their traditional areas and the "primary objective" for NMS and its staff of "resource protection." It is almost inevitable that new OCNMS staff will have

more knowledge of their NMS objectives than of Tribal treaty rights to resources within the OCNMS management region.

> "Since the establishment of OCNMS, MPAs that focus on no-take or otherwise minimizing fishing impacts have come into broader use. Likewise as with all government agencies, there has been turnover in personnel who do not necessarily feel beholden to past promises. Most Sanctuary personnel (nationally, not just locally) are focused on the 'primary objective' within the Sanctuaries Act of 'resource protection.' This can be in conflict with the Tribes' focus on resource conservation" (Jones)

> "In contrast to the previously mentioned intergenerational nature of tribal management, each new generation of bureaucrat has their own education history and personal interests. Frequently their understanding of their mission is limited to, or at least weighted toward, the broad national mission of the agency and does not recognize the treaties as the supreme law of the land and superseding their founding legislation" (Jones).

Interviewees also point to the fact that they build relationships with federal staff over time and by the time that they have a comfortable working relationship because the federal staff has knowledge of regional issues such as Tribal treaty rights, that staff member is rotated elsewhere or retires and they have build relationships with and educate the new incoming staff on the regional issues. Federal staff education becomes particularly important if the new staff member is in a leadership position.

> "An example of that is the Park's superintendent for ONP… you build a relationship with one and then that person transfers to somewhere else, or up and then somebody new comes in who is from the Everglades …or from out in the Midwest. And [they might say] 'I got no idea what you are talking about,' and they view the Tribes as a constituency and not as a co-manager…co-owner of the resource. And so it takes a little education there and if you can't embody it in an agreement…you can always push for an agreement, so that you have something of record. Otherwise, it can come and go with superintendents" (Bowhay).

> "There's… I don't know how many different sets of federal representatives that we went through in talking about the establishment of the National Sanctuary off the Olympic coast before we finally got it done.

> I think I dealt with three different, complete sets of federal staff that worked on it. And it's no different than…look at how long we talked about taking out the dams on the Elwha before it actually happened. And you know …the Tribes went through four different coordinators at Elwha, working on that issue. When you talk about moving issues like that, it takes forever when you go through the process" (Bowhay).

Besides turnover in NMS staff there is also turnover at the policy-making and implementing level due to elections.

> "The decisions and actions of the feds. and the state depends on who is in office at the time" (Gates).

> "The federal government flip-flops every 4 to 8 years depending on who is in the White House, the Congress or the Senate. Tribes need to become more engaged as resource trustees as opposed to relying on that relationship with the government; which often changes …depending on the year, depending on the election" (McCarty).

Small Staffs and Large Number of Tribes

Another difficulty that PA managers and non-tribal resource management staff face is that often there are a large number of tribes that they deal with, each with their own areas and their own specific rights, needs and desires. Interviewees point out that this difficulty occurs at both the federal and state level. This difficulty can be magnified by budget issues or by a sometimes inadequate or decreasing number of staff that is charged with dealing a large number of Tribes.

> **"**There's over a hundred coastal tribes… each with its own priorities, legal rights or lack of legal rights, semi-formal agreements… and state [but not federally] recognized tribes" (Uravitch).

> "Yeah, budget cuts in recent years… the agencies have really cut back on their staff and the ones that are left are just overloaded and just can't do everything, so we're having to pick up more of the load to make up for what they are unable to do. And then you know, when people get overloaded they don't communicate as well as they should with other

> people. And we're just not getting the good communications back and forth that we used to have. So somehow we have figure out how to function with the current economy and the current budgets that we all have" (Williams).

The interviewee responses in this chapter point out that Tribes potentially have some commonality of interests with protections for the marine environment but mostly they speak to what has gone wrong in the present Tribal-MPA relationship. Additionally, and most importantly, they point to the basic conflict of interests between Tribal and non-tribal resource managers (sustainable resource conservation vs. resource protection) before discussing other problems inherent in federal management of Protected Areas in Tribal areas.

CHAPTER 7: FUTURE REFORMS: Proposals for Fixes to NMS System to Better Incorporate Tribal Concerns

This chapter and the chapter following it speak to the second research question posed by this thesis: Can protections for marine environments be designed, established and implemented in a way that they achieve conservation goals and recognize Tribal rights and interests? Specifically, this chapter incorporates the interviewee responses that speak to potential future reforms to the existing NMS system. It includes short-term proposals for fixes to the NMS system that would help it to better incorporate tribal concerns and interests in PAs and resource management.

Incorporating Tribal Rights and Interests in MPAs

Tribes and Tribal members have already shared their opinion on MPAs in Tribal U&As in Tribal policy statements (such as both the NWIFC's and the Makah Tribe's separate but similar 2003 statements). Incorporating Tribal rights and interests in MPAs can be accomplished, in part, because Tribes have remained consistent in their views on MPAs.

All of the findings from the 2007 Whitesell et al. paper: "Protecting Washington's Marine Environments: Tribal Perspectives" were brought up (though worded in a different fashion) by the interviewees who responded to my research questions six years later. Although the findings reoccur in the responses of the interviews I conducted, I feel it is important to repeat separately and fully the findings of their research in this thesis. Below is the findings section from their research project:

"Tribal leaders deem MPAs to be appropriate under certain circumstances. [It is] important to focus on those circumstances, in order to avoid negative outcomes in the future development and management of MPA systems. The findings of this research project suggest that the following conditions are good predictors of positive or, at least neutral, outcomes for place-based marine conservation policies" (Whitesell et al. 2007).

• "The tribes must be given the opportunity to be meaningfully involved in all phases of MPA discussions, planning and implementation, through government-to-government relations.

• Treaty rights to Usual and Accustomed Areas must never be threatened.

• Tribal self-determination must be respected at all times.

• To receive tribal support, MPAs must have clear, site-specific, scientific justifications for resource protection.

• Bureaucracy and regulation must be made less burdensome in MPA design and management.

• Tribes should be systematically supported financially for carrying out co-management responsibilities.

• Non-Native organizations and agencies can form successful partnerships with the tribes over time by proving themselves to be well informed about the tribes and trustworthy, based upon a proven, long-term track record. A positive indicator of MPA success would, therefore, be the leadership of such organizations and agencies in a given MPA initiative.

• MPAs must be accompanied by sustained education of government officials and the public for the tribes to feel comfortable with them.

• High-level, comprehensive and coordinated data gathering and sharing should be built into the process" (Whitesell et al. 2007).

The fact that the similar responses that had been mentioned in the previous Whitesell et al. findings came up again during my interviews is important because it shows that the Tribes are remaining consistent in their position regarding protections for marine environments. Additionally, the fact that Tribes have desired and continue to desire reforms to existing MPAs and to proposed new MPAs highlight that Tribes' rights and interests were not and are still not being consistently incorporated in protections for marine environments.

The remainder of the chapter is based on the responses from interviewees who participated in interviews for this study.

"Do it Right the First Time"

It is important for policy makers and resource managers to realize that it is much more difficult to fix an unequal, existing management system than to start from scratch with a management system that incorporates both Tribal and non-tribal rights and interests from the very beginning. Interviewees point out that when MPAs are being created it is very important to make sure that things are done right the first time. This will help to minimize conflicts in the future and establish a more conducive framework for maintaining working relationship between resource managers who are genuinely interested in habitat and resource management and conservation. Of course, there will always be room for the improvement of existing management systems.

> "Do it right the first time…and constantly seek improvement. I think what people have to understand is that it is a continuing relationship. You know, the tribes obviously have a continuing relationship with their lands and waters… and if what you are doing potentially effects their lands and waters… and that which say, you also have a co-management responsibility for… you'd have to keep that relationship alive and well and current" (Uravitch).

> "For staff who haven't previously worked with tribes, or who may not be familiar with issues, concerns, and protocols involved in working with tribes, they may not attempt to harmonize their efforts with tribes' rights and needs, or do so early enough in the initiative. Frequently, this is unintentional, but can have far-reaching ramifications…on the success of the initiative, involvement of tribes, and relationships" (Grussing).

Find Common Goals in Habitat and Resource Conservation and Management

There is great potential for finding common goals between Tribes and non-tribal managers in habitat and resource management and conservation. The first

step in finding these common goals is to identify what is important to the parties involved. The next step is to identify the habitat and resource management and conservation parameters that will address the common goals while at the same time addressing the rights and interests of these parties. Finding a venue to discuss and address the interests is also important.

> "If the parties agree on the problem, they can come to mutually agreeable ways to address it" (Jones).

> "I think a good example in the Puget Sound is the Puget Sound Partnership. …There's a good example of people from different sectors coming together and agreeing upon common interests, but based upon recognition of the rights and responsibilities and interests of all the parties. And any MPA design and implementation needs to have that. Again, it comes back to clarity… What do you mean by what you are going to do? What are your goals? Are those compatible? Or, if not, can you come up with some that are compatible and still… in the case of the MPA... meeting the legal authority under which you are established" (Uravitch).

If MPA managers want to incorporate the rights and interests of Tribes they can work with the Tribes on how to design them. Interviewees representing Tribes point out that they have already developed a MPA policy that lays out the parameters that MPAs (or other types of protections for the marine environment) should operate under in order that they do not conflict with Tribal rights and interests.

> "The big thing is just work with Tribes on how to design them [MPAs] and then follow the policies that the tribes set out" (Williams).

> "Back in the late 80s early 90s the Tribes developed a MPA policy which set out the parameters and the types of questions that we would like to have answered if you are going to propose a MPA; so we understand what the nature of it is, what it is trying to do, how it fits into the overall management of the particular habitat type or resource. And so we operate under that here within the Commission [NWIFC]. ...We have evolved our thinking in that regard of what we think a MPA should be utilized for; and that is in conjunction with management of resource. And it's not that the Tribes are opposed to it, they are just saying that it has to be one of the

> tools and tool boxes being utilized, cognizantly and thought through for the management of particular habitat type or resource" (Bowhay).
>
> "I think it's when you have dogmatic agendas that have their pre-existing goals set out for them without really an understanding of the ground –truth of the reality of where they are trying to import and impose this agenda...that's where they get a huge waste of time and waste of money" (McCarty).

In the case of both the Tribes and the National MPA program; they have already established parameters for protections for the marine environment which are tied to Treaties or legal authorities.

> "Part of it is, if you think of it this way, the Tribe goes back to their Treaty and their treaty rights and any MPA program is going to go back to its legal authority. What was it established to do? And you have to basically look for: What you are setting up an MPA for? ...Can it work with what the rights of the tribe are? ...and obviously if you see an inherent conflict between those two ultimate purposes then you have got a problem" (Uravitch).
>
> "They [MPAs] should be developed in conjunction with existing management plans and approaches for specific habitats and resources. And so, they would be reflective and add to the objectives and goals and criteria's that the tribes or the co-managers, the tribes and the state, have already established …and so that they would be constructed in a way that would be adding to the general effort, not done in abstract, without any thought. So that's really kind of how we see them being beneficial… is if they are incorporated in the set or suite of management activities that we are already undertaking" (Bowhay).

There are some inherent problems that will inevitably arise at the local level when implementing federal level policies or programs. It is very difficult to create a single policy or program that will be effective in all situations. There really is no one-size-fits-all when it comes to federal policy implementation at the local level. Because of this, federal policies (such as the National Marine Sanctuaries Act) need to be ingrained with enough flexibility to be shaped according to each separate local situation. Federal MPA managers also need to

have the ability to adapt their MPA (or sanctuary) and themselves to fit local conditions.

> "Need to look at it both from the local and from the federal policy perspective …what is in the Act itself, like the Marine Sanctuaries Act. But when you get down to local implementation and designation and management of the Sanctuary or Park or any other kind of MPA, it's like local government; all things are local. And Washington State is a good example of that; with the individual Tribes and what is their relationship, each with say the Sanctuary, or the Park on the Olympic Coast" (Uravitch).

> "If you have a program that has some flexibility built into it, you know, the site manager is going to have enough sense, one would hope, to adapt to what the local conditions are. In this case, to the rights of the tribes themselves that are in that locality. And so you have to look at it from a national and a local perspective" (Uravitch).

NMS Staff can be Predisposed to NMS Goals and Environmental Agenda

The basic conflict between Tribes and MPA managers is one of sustainable resource management geared towards human utilization vs. management geared toward protecting natural resources from degradation by humans. MPAs would gain more tribal support if they would commit and stay committed to the environmental protections that are compatible with Tribal interests instead of supporting environmental protections or agendas which are not compatible with tribal interests. Some protections of the environment and treaty resources, particularly protections that would exclude certain types of activities are seen by the Tribes to be incompatible with Tribal interests.

> "There is a whole difference in perception of who the tribes are and what their future is and that tying of the tribes to a specific place which they identify with… and which is theirs. And I think that your average person from an agency at any level of government is not likely to understand that very well …that there's a strong historical, cultural, emotional tie to a

> place, which the larger culture in the country does not really appreciate" (Uravitch).

No-fishing Zones in Treaty Areas are a Source of Conflict

One overriding concern of Tribes is the imposition of no-fishing zones in Tribal areas. From the Tribal point of view, MPAs (particularly no-fishing zones) should only be established in tribal areas with Tribal support; unless they are made to apply to non-tribal members only. No-fishing zones in Tribal areas a cause of concern for the Tribes because they potentially conflict with Tribal rights and interests. Because Tribal treaty rights protect the Tribal right to fish in their U&As, MPAs will not apply to Tribes unless they are for the purpose of demonstrated conservation issues. Interviewees point out that attempts to establish no-fishing zones (also referred to as no-takes) in Tribal U&As are a potential source of conflict between MPAs and Tribes.

> "I think the conflict would come, in the situation where someone might want to establish a no-take MPA in areas where, obviously, the tribes have their rights to harvest" (Uravitch).

> "The Tribes will fight that [no-fishing zones] because it's the only place they can fish out there. …Establishing new MPAs in the areas that we do typically fish would reduce the area our fishermen can fish in even more than what it's already been reduced by" (Williams).

Interviewees point out that although no-fishing zones that do not have the support of Tribes can potentially be a source of conflict between the Tribal and the non-tribal fishermen, Tribes have traditionally had (and continue to have) PAs of their own, and they would be more likely to support MPAs if there are

demonstrated conservation concerns backed by sound scientific methods that warrant them.

> "We told them that we could understand MPAs if there was solid science demonstrating those [EFHs] are especially important for reproduction and rearing. If we got that solid science then we're all over that, because we want to protect reproduction and rearing zones. That's a fundamental [part of fisheries] management, right? ...protect your nursery areas. But Oceana didn't want to work with us; maybe because we weren't comfortable with the extent to which they were using the precautionary principle. I think we all have to consider the precaution, but if you're looking to give up your Treaty right, that precautionary principle is coming at a huge cost" (Gilbertson)**.**

> "And we're familiar with PA's, but we can also point to our PAs with specific data to demonstrate why those areas are important, in particular for reproduction. A lot of the MPA we've seen, in particular Olympic 1 and Olympic 2, aren't associated with data demonstrating their critical importance to juvenile Yellow-eye and Canary rockfish reproduction and rearing. There is speculation that they may be important …and that seems to be sufficient and adequate for some people to reduce a treaty right. And so it's a double edged sword" (Gilbertson).

Include Tribes at the Table

Interviewees point out that they should be involved in any discussions about PA creation in their areas. Tribes not only want to have a place at the table when discussion are made that effect their rights and interests, but they have legal right to be there that is tied to their treaties with the U.S. government and property rights tied to the U.S. Constitution.

> "If an MPA is recommended (and we are not saying one should never be created no matter what), tribes want to be in at the beginning of discussions and throughout the analysis and development of an area and the rules for its operation. This is not just because they have a treaty, although that is a huge reason. It is also due process under the Fifth Amendment of the U.S. Constitution. If one's life, liberty or property is to be taken, that entity is entitled to due process: notice and opportunity for hearing. Between the 5th Amendment and the fact that under Article VI,

> Treaties are the highest law of the land, we have two big constitutional grounds for being involved in the decision" (Krueger).

The Tribal right to be included in discussions and decisions that affect their areas is increasingly, although sometimes begrudgingly, being recognized as necessary by the public and by NGOs.

> "Non-profit groups and citizens involved in the process are getting a better idea of what Tribal treaty rights are and of the fact that the Tribes really do need to agree to something before it is adopted. And there's definitely been some conflict, besides those on the outer coast. We got a lot of people that don't really understand why MPAs can't just be created everywhere like they have proposed in the last few years" (Williams).

> "There's a lot of people with money, and there's a lot of foundations that have been actually looking at some of the best examples of initiatives that integrated traditional ecological knowledge, and they found a lot of success in implementing these projects by having the Tribal leaders early on engage in the design of the project. And so I think… to recognize that it is in fact much more cost effective… it's a much more responsible use of resources, to engage tribes early on in the initial phase of the design. And if the Tribes have already designed one, then half of the work has already been done" (McCarty).

> "So they [Oceana] have learned since then… let's put it this way. And now there's another round of these proposals coming up this year and they're coming to us first. And I told them 'that's great.' You know, we see them…and then we ask them also to work with us on explaining to the public that this is a Treaty area and these prohibitions (EFHs) wouldn't apply to us, unless we chose for them to… that kind of thing" (Schumacker).

Interviewees point out that Tribes would be much more likely to support MPAs or other conservation measures if they were included in a timely manner, not as an afterthought. Tribes want to be involved in discussions about anything that might affect their Tribal U&A in order to ensure that their rights and interests are acknowledged and incorporated.

Interviewees point out that Tribes should be a leading entity involved in any MPA creation in their area, or at minimum, be the first consulted rather than being

consulted as an afterthought by others who would designate MPAs in Tribal U&As.

> "Oceana isn't convinced that we're gonna just slip into their pocket, so they don't want to really work with us. That's what I think. We're harvesters. And when we didn't just jump into their pocket then they really didn't want to work with us anymore, because we weren't a sure thing. And I have problem with that, because then they weren't genuinely listening to us. They only wanted to meet with us, you know, just to get our buy-in, but they didn't really want to talk with us about this stuff" (Gilbertson).

> "They [Oceana] wanted to get our buy-in but they kind of came to us in the eleventh hour and they really weren't including us in their considerations they just wanted to check us off the list. So, that was unsavory. …Proposals to designate MPAs within Tribal areas should come from Tribes. Oceana is preparing more MPA proposals that aren't coming from tribes. …If Oceana would just spend a little more time with us and try to align with us we might totally support their MPA proposals out there…and we'd put them forward as our own. And that would be an assertion of our Treaty right" (Gilbertson).

One interviewee gives this advice to groups or government entities that would like Tribal collaboration in the design and implementation of MPAs or other types of protections for the marine environment:

> "So a key to all of this is, whenever any type of action is being proposed, that as soon as it hits the table, the first thing you do is go to the Tribes. And if you're Tribal, fine, but if you're non- tribal and you'd like to propose some kind of action, you don't even go much further than shaping it in your mind, before you go and knock on the Tribes' door and say, you know, we're heading in this direction. And that way, you keep them informed from the very beginning and you minimize or eliminate surprises, the last things tribes like are surprises. So when you suddenly pop something out, that's been worked on by a number people or groups, for months and years, and which show some detailed work in an area, that is actually part of your Treaty area, then you get kind of upset. And that's happened" (Schumacker).

Consultation

Due to their status as sovereign nations with rights to self-determination, Tribes have a right to be consulted when decisions are made that affect them. Because the tribes in western Washington have established treaty rights through the Treaties they signed with the U.S. government, the federal government has a trust responsibility to protect these rights (Murphy2011). The tribal right to government-to-government level consultation has been strengthened by Presidential Executive Orders 12875 and 13175. These Executive Orders "direct federal agencies to consult with Native American tribes on a "government-to-government" basis when proposing to take an action affecting tribal sovereignty or tribal trust resources or tribal treaty rights" (OCNMS 2011). Additionally, Executive Order 13175 "requires federal agencies to encourage American Indian tribes to develop their own policies to achieve program objectives, defer to tribally established standards, and preserve the prerogatives and authority of Indian tribes to the extent permitted by federal law" (OCNMS 2011).

One interviewee, when asked how PAs could be improved so that they lessen conflict, and better incorporate the interests of Tribes and Tribal members, pointed to "government-to-government consultation that results in mutually agreed-upon protections, and just as importantly the reasons/needs for those protections" (Jones). Interviewees stress the importance of government-to-government consultation when agencies or individuals tied to the U.S. government are considering any action that could potentially affect Tribal rights and interests.

> "It [consultation] should always be... I won't even say the back of your mind... it should be in the fore-front of your mind, because that's obviously a critical issue when you think of ownership" (Uravitch).

> "Early and often consultation, first and foremost… and keep that going all the way through. Best is to have the tribes, whose area(s) you are discussing, be with you at the table throughout the entire process, working with you… No surprises, no surprises… And then find out if there are common areas, work with tribes to see if they have areas already in mind that are important to them… both natural resource and cultural areas. And that's really the key, from that point…you know, that's the only way you're really gonna get the design and implementation in a manner that will be fully… I'd say, successful, as a tribal collaboration" (Schumacker).

However, even though Tribal Consultation is mandated by the U.S. government, Tribes point out that in many cases they are not being truly consulted to the extent legally required and intended by agencies or individuals tied to the U.S. government.

> "Consultation often seems more of a box to check within their administrative process rather than truly trying to manage common trust resources with those who have a property right in them. …Real consultation takes longer and requires constant engagement and a level of trust. It is exceedingly rare" (Jones).

Tribes have made a concerted efforts to be part of the discussion when decisions are made that could affect their rights and interests.

> "You are seeing out on the coast them being involved with the Sanctuary; in terms of sitting on an advisory body [IPC] to them and saying ok, here's what we are doing as managers, state and Tribes, this is how you can better integrate with our activity if you choose to" (Bowhay).

Tribes Need Funding Parity

Several interviewees point out that the government needs to provide funding so that Tribes can live with the administrative burdens that the U.S. puts

on Tribes and so that Tribes can participate in all the venues where decisions are being made that affect them.

> "Funding parity is key. Tribes are also saddled with a comparative lack of tax revenue. The federal response is typically to provide access to competitive grants which does not respect the responsibilities of the U.S. nor does it recognize the additional administrative burden on Tribes (i.e. another unfunded mandate)" (Jones).

> "The federal government has to step up and support tribes, many times, with the amount of money needed now to participate in the many venues that we are forced to… traditionally, tribes would have been able to manage relatively more simply compared to this.. the current situation, because of the issues… the scale of what we currently face… you know negotiations and dealings with tribal, state and federal partners as well as numerous other venues that are associated with habitats, areas, etc." (Schumacker).

MPAs should be Temporary, Changeable

Interviewees point to a desire that MPAs and other protections for the marine environment be temporary and changeable. Tribes are more likely to oppose permanent protections than temporary protections with very specific goals.

> "There need to be standards not just for the creation and operation, but also for off-ramp. When the goal is met, how do you gage that? When the goal is met, how do you restore a fishery or an area? But so often the EFH or MPA is set up without such processes" (Krueger).

> "We just kind of look for the policy to have some clearly defined goals... and also showing that once the goals are achieved the MPA could be disbanded or removed…you know, those are kind the main things we are looking for in these policy statements" (Williams).

Tribes are also concerned about the potential for "mission creep" in MPAs or other protections for the marine environment.

> "When they [PAs] start to get into the arena of fisheries management, our benefits start to turn into a reduction in Treaty rights. And that seems to be the inevitable pattern of a lot of these PAs. …in re-designation

> documents and drafts, the intention of many is for the Sanctuary to be able to assert some authority over fishing and fisheries management in their areas. And so, it's an inevitable power grab" (Gilbertson).

Educating PA Managers and Staff on Tribal Rights and Interests

Educating PA managers and staff on Tribal rights and interests in regards to the protection and management resource was cited as being a key to a successful Tribal/PA relationship. PA managers need to educate themselves and make sure that their staff is also educated on Tribal rights and interests before making any decisions that might affect the Tribes.

> "One of the first things that a person working on a new MPA or even moving in to manage one that is already in place should do, is to really educate themselves …on all the groups in the area, but particularly to Indigenous people and their rights and roles and responsibilities. …And then you gotta make sure your staff knows what is going on. And then you basically have to work out from there. … But it needs to be an active process, you need to carve that out and make it part of your fundamental operations. You have to look at the rights and responsibilities of all of your co-managers and be clear that you understand what those are and make sure that those are constantly in front of you and your staff. And so, that helps to avoid conflict" (Uravitch).

> "Currently, agency staffs whose duties include working with tribes, and/or who are interested, have the option of completing training on working with tribes. All staff at all levels of all resource management agencies should have a basic familiarity with tribal rights and jurisdiction, pertaining to areas of common concern. All resource management agency staff should be required to complete a fundamental training course, regardless of whether their particular duties involve tribal consultation. Although it continually falls on tribes to educate agencies and the public about their rights and jurisdiction, it is ultimately agencies' duty to uphold their own trust responsibility" (Grussing).

Take Responsibility for Education about Tribal Rights and Interests

Because education on Tribal rights and interests is a key to creating a successful Tribal/PA relationship, having someone taking responsibility for education also becomes crucial. Interviewees point out that the responsibility for educating others on Tribal rights and interests often falls on the Tribes. Often, Tribes have to take on a leading role in educating others because even though federal government and state co-managers are responsible, they don't always follow through with this responsibility.

An interviewee points to informative literature, public relations staff and the NWIFC website as tools Tribes have used to educate and explain Tribal rights and interest to others.

> "We feel that it falls on both Tribal and non-tribal shoulders as a responsibility, often you just really have to get it out there. I think that the succinct, one pagers [informational brochures] are very helpful…they can get out there and you can put those in front of people's noses in various venues. And then, just making sure that whenever there's public news items and things of that nature, that Treaty rights are explained as best as possible in there. So it's kind of important to have a P.R. [public relations] person on your staff" (Schumacker).

> "Tribes have some responsibility [for communicating Treaty rights], our NWIFC website at NWIFC.org, you find a lot of resources that communicate that Treaty right, what it means and what the responsibilities are that we have with it. …We take the responsibility to get some of that information out there… but then we ask that others, who are proposing actions or implementing actions within areas that Treaty rights exist in that they explain them as well. We think that that's only fair… and oftentimes people like to have Tribal support for these things. If they want that support, then we're gonna ask you to do that" (Schumacker).

Embed Tribal Interests in Core Documents and Mission Statements

Several Interviewees stressed the importance of embedding tribal interests in agreements or in core documents and mission statements at the national level. Because government entities and programs (like the NMS) look to their governing documents to identify their legal authorities; it is important for Tribes to embed Tribal rights and interests within these documents. Tribes can then point to these core documents when their rights or interests are being affected.

> "Often what you get when you have someone new, such as a new director or deputy director that's in charge of a region; they will go back to their mission statements and say, 'what are our basic obligations here?' And they read through it, and if it doesn't say recognition of Tribes and Tribal rights; then as a manager they are reluctant to do it. So that's why we push to have that. Every time there is an opportunity to modify and change those types of mission statements and implementation arrangements or enacting legislation for federal agencies then we try to get that acknowledgement" (Bowhay).

Interviewees point out that when tribal rights and interests are embedded in core documents at the national level it helps reduce the efforts Tribes need to make to defend their rights and interests. If tribal rights and interests are identified in governing documents it helps to reduce conflicts that could arise because of misunderstandings by the general public.

> "We're constantly [involved] in the process of trying to educate people; the general public, as well as professionals that are in resource management and land-use. What we try to do in order to make it better, in terms of implementing, is to get into the mission documents and the core documents at the national level, or what we call the organic documents, that provide the mission statements for the various agencies and embed that recognition of tribal rights and treaty responsibility in there and what government-to-government consultation is and means" (Bowhay).

Additionally, interviewees point out that when tribal rights and interests are embedded in core documents it can reduce any confusion caused by lack of

knowledge or misunderstandings about Treaty rights or about obligations of PA managers and staff. This embedment becomes especially important both during the creation of new PAs or when employee turnover occurs in PAs, because it can easily be pointed to by Tribes.

> "An example of that is the Park's superintendent for ONP. You build a relationship with one and then that person transfers to somewhere else or up and then somebody new comes in. ….And you can always push for an agreement, so that you have something of record, otherwise, it can come and go with superintendents" (Bowhay).

Tribes are also working to make sure that Tribal rights are embedded in policy initiatives and Executive Orders such as Executive Order 13158, through which President Clinton established a national system of MPAs. Tribes would like to make sure that the recognition of inherent and/or treaty rights of tribes and the Presidential mandate (Executive Order 13175) for Tribal consultation are embedded in new governmental programs and policy initiatives as well as in older programs and initiatives that were previously generalized or incomplete.

In the context of MPAs, Tribes are working to ensure that the National MPA framework includes guidelines that order compliance with the Consultation Order (Executive Order 13175) of the federal government in instances when MPAs are being discussed or implemented in a Tribal area.

> "Past policy initiatives were lacking a lot of information; it was too generalized, and didn't comply with the Consultation orders from the federal government as well as they should. And either newer policies or newer rewrites of older policies are beginning to take those things into effect much better, so I'm finding that things are improving in that regard" (Schumacker).

> "That's something that the past three Presidential administrations have tried to mandate through Executive Order... for all the agencies to develop that policy. We're finally seeing those now be developed and codified, if

> you will …or adopted by the various agencies in the federal government or federal family. Some are good some are bad, but at least it's a step forward. And we'd still like to see within their mandates and legislative language… that recognition" (Bowhay).
>
> "[Past and current marine policy] was done with a lack of recognition of inherent and/or treaty rights of tribes where areas [MPAs] are being declared by other non-tribal entities. So, I think that a lot of the current and past policy initiatives needed a lot of brushing up. …There is a lot of work going on to make sure that the Executive Order 13175, President Clinton's Executive Order on tribal consultation, is being observed whenever MPAs are being discussed in a Tribal area. …Also the Executive Order that declared a national system of MPAs around the nation; …that Executive Order is being strengthened. …The gaps in that, regarding relations with tribes, in respect of tribal consultation and in respect to tribes period; …all of those things are being clarified and re-entered into the framework for how these MPAs can be devised" (Schumacker).

Be Aware that the Definitions of Terms can be a Source of Conflict and Misunderstanding

It is very important to clarify goals and define the meanings of terms at the very beginning of discussions so that the parties involved in discussions are on the same page in regards to the intentions and definitions of others. When intentions are transparent and definitions of words and terms are clear it helps to reduce conflicts due to both misunderstandings and potentially unwarranted fear that can be associated with certain words.

One interviewee points out that even the definition of MPAs can be a source of misunderstanding and conflict:

> "I think part of the problem we've always had with MPAs is that a lot of people believe that all MPAs are no-take, in some cases not even entry, as opposed to a management tool. And so, first you gotta just define what your terms are. That was one of the first things that we starting doing when we began developing the MPA Center and the national system of MPAs, was to define what we meant by an MPA. And that's always a

> problem. …Some people just get all jumpy when you say MPA and they think they will never fish again, they will never swim again, you know, you will shoot them in their boat or whatever… even if it's not true. There is a fear that can become associated with words and so, you look for words that are less fearful for people. ….You can call them reserves, fishery management areas, national parks, state parks, ocean sanctuaries, whatever… but those are just words, you have to look at the function itself; what is that area doing?, what are the regulations doing? And so, the first thing to do is to bring people around to some consensus on what terms mean" (Uravitch).

One interviewee points to differing intentions behind the protection and management of resources as being a cause of conflict between the Tribal and the non-tribal:

> "This gets back to the level of what you are trying to do. Are you trying to protect it so you that have a museum piece, so you have something that people can say, you know, this is what old-growth timber looks like. Or is it something where you're protecting, you're managing so that you that you continually have that type of ecosystem developed where you have mature old-growth timber stands… although at some point they could get cut down or utilized, but it's a rotational process" (Bowhay).

> "When you talk about protecting an area, are you protecting it just so that you have something that's a remnant in the future that you can say that's what it used to be? Or do you have something that saying you know, 'this is what we remember, you know, as something that's properly functioning.' ….So for salmon, are we gonna protect that salmon run so it's always around sustainably, in terms of it can thrive on its own and be viable in a particular river… or are we going protect it and recover it to where it provides for a sustainable and viable fishery? See, it's two different levels. One is from a genetic standpoint… a theoretical value that has been proven on a chalkboard or a computer screen …versus a population based on the capacity of the system saying that it was in a viable or a properly functioning condition based on its current potential" (Bowhay).

The words "conservation" and "restoration" were also pointed to as potential causes of conflict by another interviewee:

> "Conservation and restoration… man, we've struggled with those two words. ….That's kind of what was used against us when those terms didn't have some specific, quantifiable, objective metrics. …We need to be careful about how we characterize those terms so that it's clear and

> understandable what we mean. Because it will be used against us by like, NGOs. So conservation, what does that mean? To one person it means one thing and to someone else it means something else" (Gilbertson).
>
> "Conservation to one person might mean, 'oh, lock it up for eternity.' Conservation to someone else means, 'oh, make sure there's enough for me to eat some.' Make sure we use some metrics… conservation metrics defining where there is a problem or where there's not a problem. Another way of looking at it: What is success? ...that's another way. You know, if your goal is conservation or restoration…then define success. When are you there? You know, that's important to consider too. Or else you are just, sort of taking opportunity away from someone. Those words: conservation and restoration, in and of themselves are problematic, because I've seen them used against us. I see the point, but if our goal is to protect abundance for seven generation into the future, then we are going to have to be clear" (Gilbertson).

The interviewee discussions in this chapter establish that much has gone wrong in the present Tribal-MPA relationship but that there is great potential for reforming the NMS system. The most important take away from this chapter is that tribal desires for reforms need to be addressed if MPA managers wish to incorporate Tribal rights and interests in MPAs. This chapter also addressed some potential reforms for problems that are inherent in federal management of Protected Areas in Tribal territories.

CHAPTER 8: FUTURE VISIONS: Incorporating Tribes in MPAs

The interviewee responses in this chapter continue to speak to the second research question posed by this thesis: "Can protections for marine environments be designed, established and implemented in a way that they achieve conservation goals and recognize Tribal rights and interests?" While the previous chapter was largely aimed at reforms for the NMS system, this chapter is intended to

encourage more Tribal leadership in PAs, MPAs and other protections for the marine and terrestrial environment. This chapter will speak to some potentially deeper and longer-term changes that would increase the tribal role in PAs and resource management. Most particularly, it discusses how to transfer some of the actual power in controlling PAs and resource management to Tribes.

Incorporating Tribal Interests in Environmental Protections

The overall goals of tribes, PA managers and environmental advocacy groups are in many ways similar, but their approaches to these goals can sometimes create a clash. Tribes have made many contributions towards environmental goals and they have shown great potential for making further contributions. They are more likely to contribute their efforts towards overall goals if their rights and interests are taken into account during and throughout the processes of establishing and implementing environmental plans and goals, and they have some real power in the process.

> "If you think about it, and what the Tribes are looking for; the protection, conservation, restoration of the resources and the broader environment that is potentially affecting those resources and their quality and quantity …that's really what ought to be in the front of the mind of the MPA manager as well. Because they have that same responsibility; to conserve, protect and manage the resources within their MPA. ….Theoretically, the Tribes and the Sanctuary people, or any MPA person or people, should have ultimately very similar goals in terms of the quality and quantity of their resource. I think the Tribes and the MPA managers and their staff ought to have more in common than they differ" (Uravitch).

One way to ensure that Tribal rights and interests are taken into account during and throughout the processes of establishing and implementing

environmental plans and goals is to expand the Tribal role as managers. Expanding the Tribal role in management could prove to be of benefit to Tribes and the general public because of the commonalities of interests between Tribal members and members of the general public.

> "Our role [as managers of resources] could be expanded. I think the Tribal interests are not always the same as corporate interests, and I believe corporate interests aren't always in the public interests. And I also think that the Tribal interests and the public interests are closer generally than corporate interests and public interests. For me, public interests are, you know; clean air, clean water, the opportunity to eat healthy food and live a healthy life. To me that's what the Tribes want too. Seven generations, Tribes want to make sure seven generations from now, Hoh River fishermen can go out there and get wild steelhead, as a way to make a living, not just as a museum style activity" (Gilbertson).

Tribes have already engaged themselves in making decisions that have had an impact on the environment and the resource. The desire by Tribes for increased engagement in resource management and results of present Tribal engagement are probably among the best arguments for encouraging greater Tribal participation.

> "You are seeing them [Tribes] get involved in deciding issues; whether it's for natural gas, port development, coal export, and the off-shore natural gas lease sales back in the 80s. They have been engaged in the major activities that have come across the horizon that have an impact on the environment and the resource, consistently since probably the 1950s, from a governmental standpoint. So, I think that you are seeing that engagement ramp up and up and that it's occurring not just at the local level or regional level, but at the national level that the Tribes are engaged. And they are very politically astute on working issues at all three levels in order to be successful. And so, it's not a question of what they can do more…it's kind of how can they do it better" (Bowhay].

> "We [Quinault) do a good job. In our case, we force everybody to engage us as co-managers, properly. We're players at all the different tables. We co-manage with the state, the Tribes, and the feds. And we attend all the proper meetings to make sure that our voices are heard, and we follow all the guidelines, and work within those systems. And we choose to do it that way. We don't have to. As a self-regulating Tribe here, we can

> almost do as we wish… just show people the information, making sure that we only maintain a harvest that was 50 percent or less of the surplus. But we do this, because we want to manage these resources well and also keep up a working relationship with our co-managers. So we do this by choice, in most cases, not all, but most cases. So we engage ourselves as strong as we can. And I don't know that we could do better, you know, Quinault and the other coastal Tribes, and the Puget Sound Tribes for that matter" (Schumacker).

Tribes Need to be Clear on What They Want from MPAs

In order for Tribes to increase their engagement in MPA management they need to be clear on what they would like get from MPAs. Tribes will oftentimes need to point out and explain their rights and interests and describe what objectives and benefits they would like to see come from the implementation of MPAs to others who could be potential allies in MPA creation. This will help Tribes to be a greater part of the process when MPAs are designed.

> "I think there is more in common than in difference between the MPA people and the tribes. And I think during the development and the continual operation process they basically need to be clear on what it is they want to get out of that. And the tribes need to be able to be clear; to state what their rights and their interests are. And it's only by being clear about these things that you can hopefully reach some common objectives and move forward" (Uravitch).

> "Tribes can take a proactive approach to collaborating with resource management agencies and protected area staff. Although it is the responsibility of agencies to consult with tribes, tribes also have the prerogative to engage with agencies regarding natural and cultural resource management. Many agency staff would eagerly welcome increased tribal input and participation. There are common hurdles among tribes and agencies that could be increasingly overcome with more communication: in both cases, cultural and natural resources are managed by different departments whose staff typically do not work directly together; and staff at all levels are spread increasingly thin. Tribes and agencies should assume that the other has good intentions, and redouble efforts to communicate and work together productively" (Grussing).

One Tribal interviewee points out that MPAs can be created that incorporate Tribal interests if they are geared towards specific goals that Tribes can agree with and support. Specifically, he points to the idea of establishing MPAs that would help provide protections for the habitat that supports fish.

> "For salmon and other migratory fish I think the big thing is that we need some habitat MPAs rather than non-fishing MPAs. We need to protect the habitat along our shorelines if we are going to restore our fisheries. And you know, every year we're causing more damage to the habitat and the marine areas and it's getting harder and harder to actually keep our salmon alive just getting in and out of Puget Sound. Because it's not only the habitat where the salmon go to feed but it's the habitat needed to produce the feed-fish and for the plankton… which, you know, we're starting a big study now on what's going on with the plankton populations within Puget Sound; because our whole food-we in Puget Sound is falling apart. We need to figure out what it takes to rebuild it" (Williams).

Power Sharing: MPAs Inclusionary of Tribes

There are at least two obvious ways to increase the Tribal role in PAs (including MPAs). One way is to increase the Tribal role in existing PAs and the other is to design new PAs that incorporate Tribal interests. Increasing the role in existing PAs and designing new PAs that incorporate Tribal interests can be done in through many forms. Most PAs will need broad support in order to be effective. PAs outside of Tribal reservations will require involvement of both Tribal and non-tribal interests. MPAs that are genuinely inclusionary of Tribes will require power sharing with Tribes.

> "I really think that for a MPA to be established now, it needs broad support and needs a lot of organizations working together to make it happen… it's not really something that any one agency is going to do on their own. But, whether it's the state, the Tribes, the county or even a non-profit initiating it; they have to involve everyone else" (Williams).

One interviewee points out that Tribal co-management of MPAs with states or the federal government is one way to incorporate power sharing in MPAs. He uses the example of existing co-management and cross-deputized staff arrangements between federal agencies and the State of Florida to demonstrate this type of power sharing arrangement.

> "You see this kind of shared responsibility between federal agencies and states all the time. In Florida you've got the Florida Keys NMS, a number of Fish and Wildlife Refuges and National Parks, and also a number of state parks and state preserves and reserves down in the Florida Keys. So you have a state/federal sharing relationship there, in which, for example staff are cross-deputized, so that the feds. can implement state law and state people can implement federal law. You could certainly do the same kind of power sharing relationship with a tribe and a state or federal agency" (Uravitch).

Incorporating Tribal Liaisons in MPAs

One avenue for helping to incorporate Tribal rights and interests in PAs is to have a Tribal liaison. Protected Area agencies should have a tribal liaison in order to ensure that Tribal rights, knowledge and perspectives will be incorporated into PA management plans and conservation goals (Grussing). Tribal liaisons would be a conduit for providing information to policy-makers and PA managers that could help Tribes and the state or federal government to work collaboratively (Gates)**.** Although interviewees point out that it may not be an enviable position for tribal members or tribal representatives; as tribal liaisons could be looked at as harbingers of bad news (Gates), tribal liaisons can help to ensure that Tribal rights and interests are considered and that Tribes are consulted before decisions are made.

> "The other form [for communicating Tribal interests] would be, in terms of agencies, with individuals that occupy tribal liaison roles. It's a very important position, and it could be very effective. However, if you are mainly, as that tribal liaison, just recognized to be… or what the state policy has determined to be… the messenger of bad news, even before they consult with tribes, that's not a very enviable position. However, if the state would take the position that the liaison would work with the policy makers in Olympia and in Indian Country to devise a policy that's truly one that benefits the Tribes and the state collectively, then a liaison could really be a great conduit for that type of information to state policy-makers generally. So that's a very interesting occupation… and it's probably fraught with conflict" (Gates).

Incorporating Tribes and Tribal Members in MPAs

Incorporating Tribes and Tribal members in MPAs is one way of combining forces between Tribes and protections for the marine environment. Interviewees point out that there can also be tribally run MPAs.

One interviewee points out that there currently are PAs that are in some ways essentially tribally run. He cites the example of Canyon de Chelly National Park inside of the Navajo Reservation in Arizona:

> "Theoretically, there's no reason why the Tribe couldn't be the manager of the MPA or have a significant role in it. I mean a good case in point would be, this is a terrestrial example, but if you think of Canyon de Chelly National Park in northeast Arizona, it's in the middle of Navajo land and basically it's managed by the Navajo, and I think a lot of the Park people there are Navajo. So there's no reason why you couldn't do something similar in other parts of the country" (Uravitch).

Incorporating Tribal members as staff at PAs was cited as an example of a way to combine forces with Tribes as well as get more Tribal leadership and input. However, he also points out that Tribal members may not want to work for the U.S. government.

> "One way is to get more Tribal leadership and input… and that's why one of the solutions, if you can do it is; can you hire tribal members to be part of the staff for a PA? Tribal members know their area best and combining forces a good idea. I think one of the conflicts there, you know, on individual level is, I could see some schizophrenia, 'who am I working for?' On the other hand, if you can set up the MPA and implement it with a common agreement on goals and policies, then that should be less of a problem. As long as it's clear what you're trying to accomplish and how you are trying to accomplish it…it should at least reduce if not minimize those things" (Uravitch).

One interviewee, when asked how MPAs could be better designed, established and implemented so that they would both recognize Tribal rights and interests and achieve environmental conservation goals, made this statement:

> "Let the Tribes design it, pay the Tribes to do it, and watch out for world class examples how to responsibly manage the ecosystem. ….I think having the research and the management responsibility carried out by the Tribes under U.S. federal government contracts with Tribes, where the Tribes administer these programs, I think that's the best model. I think Tribes are best positioned with the Ecological Knowledge and the traditional memory of the space. Tribes have a longer-term, built-in interest in maintaining a healthy environment to sustain that long-term relationship. I think it's a more balanced relationship where it doesn't resemble a smash and grab, locust type management" (McCarty).

In response to a later question about whether he could foresee Tribes holding direct policy authority in the design and implementation of Protected Areas the same interviewee points out that it would be not only logical from the point of view of looking at who has the most local knowledge and the most to gain or lose from the success or failure of an area's environmental management, but it would be more cost effective to support Tribal efforts to protect the environment within a Tribe's traditional areas.

> "Yes, I think we're the best positioned to do so. I think it's also a much more constructive and a much more pragmatic relationship, that's already been defined. I think we do a better job remaining consistent in our role as the first stewards of the environment. I think money spent through our efforts would be much more cost-effective. The local knowledge of how

> we've lived with the environment; no scientist can come into our area and think they know better, just because they have a title behind their name" (McCarty).

One interviewee discusses the possibility of institutionalizing intertribal protections for the environment into what would in effect become an intertribal PA. Developing (or institutionalizing already existing) intertribal protections for the environment would be a way to empower Tribal governments and ingrain their traditional holistic management into MPAs or other protections for the marine environment. Combining the strength of separate Tribes into a unified institution would potentially give them a stronger position to create or affect MPAs or other types of protections. The same is true for existing Tribal PAs. If Tribes recognize one another's PAs that gives the PA more strength.

> "I think empowering a Tribal government in a consortium of intertribal mangers and environmental protectors… is more of a creation of an institution to institutionalize this [existing] relationship" (McCarty).

Of course, as each Tribe is a separate sovereign entity, each Tribe has its own interests which may or not coincide with another Tribe. Even the Tribes on the Washington coast, though they have many similar interests, can have conflicts of interests. However, when Tribes maintain a unified voice it also strengthens each separate Tribe's voice. Additionally, if the coastal Treaty Tribes are unified on the types of protections of the environment they would like to see (or not see) implemented on the Washington coast; they can form a stronger position when outside entities like NGOs try to impose their agendas in the area.

> "You have Makah which is one Tribe, one Treaty… and then you have the Treaty of Olympia that has Quileute, Hoh and Quinault. And the Tribes (have) had to deal with some conflicts…and they all happened to be the IPC Tribes. My hope is that the overarching dilemma with these conservation supremacists… If they [coastal Tribes] don't get it

> together...I think all of the Tribes stand to lose. They can't separate the issues...you know, they need to evolve past this little dogfight over fisheries management related issues...even though it's a hugely invested subject matter for the Tribes. But at the end of the day, the Tribes have way more in common than [they have in common with] ...I'd say the 'Conservationists Incorporated's' agenda" (McCarty).

Establishing Tribal Protected Areas

One way to help ensure that Tribal interests are incorporated in PAs is to encourage and support the inclusion of Tribal PAs in local, state and federal PA systems. There is an emerging interest in the application of Indigenous cultural and traditional area PAs and MPAs.

Tribes in Washington State have already declared areas as protected on reservation and within their Tribal U&As through establishing seasonal spawning protections or other types of restrictions on certain types of activities within certain areas.

> "The Quinaults have a special area ordinance for a particular stretch of coastline on their reservation which they manage for a kind of a Wilderness area. You have Tribes not allowing certain types of take or activity on the beach for protection of natural resources such as clams… and razor clams in particular. You have in front of all the mouths [of the rivers] and on the coastal area... an exclusion zone for harvest..so they are protecting salmon and steelhead as they return… so that there's no fishing in areas that they school up before they enter the river. They have these types of MPAs that they have had on the books for… ever. And so, they are utilizing this type of practice… It's just, it's not maybe as some people want to define as a sanctuary, you know… a permanent no-take area" (Bowhay).

Tribal protections and restrictions established on reservation lands apply to both Tribal and non-tribal citizens. At this time, without state or federal backing, Tribally created off-reservation protections and restrictions are not binding to

non-tribal members and apply only to the members of the tribes that created the protections or restrictions. However, there are avenues that tribes can take to ensure that tribal protections are respected by non-tribal members.

Most of the interviewees had positive responses when addressing the topic of the establishment of Tribal PAs and/or MPAs.

Jurisdictions and Jurisdictional Issues in Tribal MPA Creation

When contemplating avenues that tribes can take to ensure that Tribal environmental and natural resource protections are respected by both Tribal and non-tribal members, jurisdictional issues are among the first issues to arise. When it comes to jurisdictional authority on matters that affect Tribal marine U&A areas and tribal fisheries and other resources, the Tribes operate on a co-management level with the State of Washington and operate under a government-to-government relationship with the federal government.

As discussed in previous chapters, post-Boldt Decision, it has been legally established that Washington State (on its own) does not have the authority to declare PAs or create other types of restrictions that affect Tribal fisheries or the Tribal ability to fish. Additionally, although Tribes are co-managers to the resource with the state, the state can declare PAs that Tribes don't have to recognize and Tribes can declare PAs that state does not have to recognize. However, the federal government can require that Tribes recognize protections for

resources or the environment if it can demonstrate that there is a need for them because Congress ultimately has the ability to affect treaties.

> "The state can create a MPA that the Tribes don't have to follow and the Tribes could create an MPA that the state doesn't necessarily have to follow either. So really, it would have to be adopted by both the Tribes and the state" (Williams).

There is an important distinction between the Tribes and the state. Unlike the state, the Tribes are sovereign nations with treaty rights guaranteed by the federal government. Because Tribal treaties are with the U.S. government, the U.S. has obligations to ensure that state and federal MPAs also comply with Tribal treaty rights to resources. Additionally, the federal government can require that states recognize Tribal PAs.

> "Direct policy authority in the design and implementation of PAs? Well, we have the authority over our own, but we don't have the authority over the non-tribal user-groups. …I think we should have" (Gilbertson).

Tribal authorities have the ability to designate terrestrial PAs that affect their own Tribal members and they have the jurisdiction to designate terrestrial PAs on their Reservation lands that affect Tribal and non-tribal members. Tribal authorities also have the ability to designate MPAs that affect their own Tribal members. However, the Tribal ability to designate MPAs that would affect anyone other than their own Tribal members is complicated by overlapping jurisdictions. Tribal U&A marine areas overlap with state and federal jurisdictions as well as neighboring Tribes' U&A areas. In some ways the relationships between these overlapping jurisdictions are still being defined because most Tribal U&As have not been fully delineated.

> "And these states only have jurisdiction to 3 miles... The Makah's is out to 40 miles and right now we [Hoh Tribe] don't have the western

> boundary adjudicated... so presumably it's out through the EEZ. And so, our jurisdiction extends well beyond the state's" (Gilbertson).

Tribal/Indigenous Ability: How to Declare MPA Specifics

The federal government's relationship with Tribes is in part defined by the Treaty reserved rights to Tribal resources. Federal agencies are obligated to fulfill federal obligations to Tribes. State agencies and U.S. citizens have in some cases have been held to these obligations by the federal judicial system. It is difficult for Tribes to get past the jurisdictional issue of Tribal MPAs extending only to their own Tribal members, but by same accord non-tribal MPAs don't have to be observed by Tribes. And while it is true that the State of Washington does not have to support Tribally designated PAs, MPAs or other Tribal protections for the environment, they could be mandated to do so with the backing of the federal government.

> "Tribal jurisdiction; that's an interesting part of Tribally declared MPAs, which we [Quinault] are working hard on. I don't believe we're going to be able to get past the fact that Tribes will designate these areas and …the jurisdiction will only extend to their own Tribal members. But that's similar to what I just described, in that non- treaty MPAs in a Treaty area would not necessarily have to be observed by Tribes. Well, a Tribally declared MPA would not necessarily have to be observed by non-tribal peoples, unless there was federal back-up on that" (Schumacker).

> "So, it's kind of a balancing act, as I see it… If Tribes begin to assert their authority to do these types of protections out here and show the feds. that… you know, 'hey look, if you want us to respect those [National MPAs]… well, how about you respect these[Tribal MPAs]'… that type of arrangement" (Schumacker).

Federal Processes for Tribal MPA Creation

Federal agencies are held to agency guidelines and guidelines are subject to Executive Orders and other mandates of the federal government. As demonstrated by the Boldt Decision and the Culvert Case; the strength of the treaty-reserved rights of Tribes in Washington State may give them more leverage with federal agencies as far as getting federal government to order that state comply with treaty rights to resources and habitat protections for these resources. Up to this point, the federal government has held Washington State to a higher standard than other states (and the federal government itself) in instances such as the Culvert Case.

> "The Culvert Case was brought against the State of Washington specifically. And [the Tribes] said here are the issues that they have a problem with, and how the management by the state agencies was in direct conflict with their requirements under their own laws and regulations. And so, that specifically was what the court case was. The ruling would have a wider effect in saying if that is indeed the principle that is being established here or recognized or affirmed, then it would also then extend to what is the federal government doing relative to the management of their lands and culverts, in particular" (Bowhay).

Interviewees point out that Tribes do have the authority to implement PAs under the National MPA Act program.

> "The Executive Order that declared a national system of MPAs around the nation... ….That Executive Order is being strengthened. …The gaps in that, regarding relations with tribes, in respect to tribal consultation and in respect to tribes period, and the rights of the tribes to declare PAs of their own; all of those things are being clarified and reentered into the framework for how these MPAs can be devised" (Schumacker).

Additionally, interviewees point out that Tribes could potentially use some more general statutes of the U.S. government to help to provide for some protections of the environment and of Tribal resources.

> "They do have that authority now [to implement PAs]. Under the National MPA Act program, there's the ability for tribes to establish MPAs for cultural purposes and protect historical sites. So there's two things; there's cultural purposes and historical sites. And so, that program itself allows a tribes ability to do that... and in Antiquities [Act] they also have that authority. So it's not that they don't have it, it's whether or not they are exercising it at this point" (Bowhay).

> "Some statutes that were written without an Indian Tribe even being in mind would be really useful: APRA, the Archaeological Resource Protection Act, for instance, and NEPA. Those types of general federal statutes that have general applicability, tribes need to definitely be on the ball about" (Gates).

As previously discussed in the Reforms chapter; since tribal rights (including the Tribal ability to declare MPAs) have already been established by the federal government it should be a priority of Tribes to get tribal rights into governing documents, mission statements and other types of agreements.

> "It is important for tribes to have within their organic governing documents; sections that relate to their authority to regulate in matters concerning the environment within their Reservations. The Navajo Nation is very expressive that they have jurisdiction over all water, for instance, that is within the exterior boundaries both surface and subsurface water. They claim they have the authority to regulate that quality" (Gates).

> "The creation of Tribal PAs that could better protect traditional territories and resources? Yeah, we need to push on that. And we need some way; probably a MOU, such that the state will cooperate in respecting these PAs in development and protection. If the state is gonna respect those areas, they are going to need to be involved… it seems to me, they are going to insist upon being involved in some sort of consideration. But yeah, the state should demonstrate a willingness to come to the table to discuss areas that we feel should be protected. They should be willing to have that conversation and, you know, consider the content of our ask. And I think really, they should be willing to craft an MOU to create these PAs" (Gilbertson).

At this point there are no Tribal MPAs in the federal system, but the Tribal ability to declare MPAs is in embedded in the federal MPA framework that was enacted through Executive Order 13178. "Tribally-designated sites would be eligible to join the National System of MPAs, and would contribute to its design,

planning, and implementation principles, as well as its cultural and natural heritage conservation goals"(MPA FAC 2011).

> "Tribal MPAs? Well, that's a loaded question for me because I'm pushing it. That's exactly what I push. And I've been working on this a long time [through] the MPA Federal Advisory Committee that I hold the Tribal seat on. I've been making sure that this [Executive] Order for MPAs was clarified. It was generalized previously. They said that Tribes could declare, that Indigenous peoples could declare their own areas, but it was just so general… so we've been trying to make it fill in the gaps on that and make it much plainer on what those areas could be, what would be the requirements for getting them recognized and becoming a part of the National system of MPAs. So, you know, you're preaching to the choir on that kind of a question" (Schumacker).

Human Rights, Inherent Rights, and the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP)

A basis for Tribal MPAs (and other rights of Indigenous Peoples) that goes beyond federal acquiescence to its own treaties with Tribes or other Indigenous Peoples is that of inherent rights and human rights. Whether or not Tribes or other Indigenous peoples are recognized as sovereign entities with by the U.S., or whether they have treaties with the U.S. government, they still have inherent rights as Indigenous People and as human beings.

> "The same thing goes for our right to self-governance, whether you consider it to be more of a right of sovereignty or as a human right of self-governance and self-determination… if you don't recognize that that essence comes from within… it's not given to you by anyone else, that you have it as an Indigenous person, that your governments have it... And if you don't choose to exercise it, it's going to be lost. You know?" (Gates).

> "The Tribal role in PA and resource management could be expanded obviously. To me, even a tribe without a treaty right… and recognized [by the federal government]… you know, hopefully they are recognized also by the federal government, that's another big part of this… Without that federal recognition, it's easy to step right across them… even though

> they might have villages and history and government and everything and those tribes had historically fished in those areas and there's all kinds of backing on that…and yet they didn't get a treaty in place that said they could continue to fish. Well federal government, don't use that as a convenient way to keep tribes out of those discussions" (Schumacker).
>
> "Tribes without that right [treaty rights]… should be engaged, no matter what. So, treaty rights are strong, but tribes that live on the coast of this country have *all* fished, they don't live on the beach for nothing… You live on the beach because you harvest things in that area. You use the ocean as your waterway and it has been your breadbasket for your community" (Schumacker).

Several interviewees point to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (under the auspices of the United Nations Human Rights Commissions and the Sub-Commission on Prevention of Discrimination and Protection of Minorities) as an internationally supported recognition that Indigenous Peoples have inherent rights that would include the creation of Indigenous PAs.

UNDRIP was adopted by the U.N. in 2008, and two years later, President Obama stated that the United States would support the UNDRIP. It is a non-binding, but historic document that recognizes the responsibility of governments to fully engage with all Tribal and Indigenous Peoples, whether they are "recognized" or "non-recognized" (MPA FAC 2011). UNDRIP has provisions which recognize the importance of the spiritual and cultural ties that Indigenous Peoples have to their homelands (MPA FAC 2011). UNDRIP states that Indigenous Peoples "have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas" and that they must give "free, prior, and informed consent" for any government actions that may affect them (MPA FAC 2011).

> "I do perceive tribes holding direct policy authority in the design and implementation of PAs, and based on not just tribal consultation policies of the U.S. government, but most recently, the Obama Administration deciding to support the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP). That document says that you will do just that… the U.S. government would allow Tribal Protected Areas in traditional territories and resources based on inherent tribal sovereignty. And it says that on top of much more, the UNDRIP is an extraordinarily powerful and dense document…a lot of stuff in there. You can tell that a lot Indigenous peoples went to work on that thing, it's very comprehensive" (Schumacker).

> "There are lots of examples within the document [UNDRIP] that speak to environmental integrity… Some of the key phrases and key points in the document revolve around… that Indigenous peoples are entitled to prior and informed consent before any agency actions are made. They also have a right to meaningful and ongoing consultation …[and to] discussions with the nation state representatives on matters that concern their sovereignty, their right to self-governance. So, I think that that would really elevate the discussion of environmental protection… you know…it would put it in an international focus on supporting existing laws of the State of Washington and the U.S… and the Tribes" (Gates).

One interviewee points out that because the UNDRIP is a new source of law it is necessary to educate Tribal leaders as well as people that work in federal agencies on the UNDRIP in order to enable Tribes to implement it and use it effectively.

> "It's such a new source of law that one of the primary and initial focuses has to be to better understand the Declaration to get our Tribal leaders and Tribal managers, as well as people that work in these federal agencies to understand the Declaration. The principles contained in there are universal human rights and principles, but many of them are very consistent with the stated policies of the federal government… and as the trustee of our resources and over our self-determination. So, the trick is going to be; how do we educate Tribal leaders and non-tribal leaders, future policy-makers, future managers of the importance of this document…to begin to understand it better, to learn the commonalities that it has with domestic law, and how it can be used to complement…and not be a source of conflict to the domestic laws of the particular nation state. …Our challenge is to implement it and find ways to educate people, and to use it in a really effective way. Otherwise it's gonna all be for naught" (Gates).

Asserting Tribal Authority

Maori author and educator, Linda Tuhiwai Smith speaks to the idea of "claiming" as part of a decolonization process, in her book *Decolonization Methodologies: Research and Indigenous Peoples*. When discussing the topic of claiming for Indigenous Peoples she states: "In a sense colonialism has reduced indigenous peoples to making claims and assertions about rights and dues. It is an approach that has a certain noisiness to it. Indigenous people, however, have transformed claiming into an interesting and dynamic process (Smith 1999).

Although at this point there are no Tribal MPAs in the federal system, interviewees stress the importance of asserting their Tribal authority to do so.

> "The big one for me is… Tribes need to assert their authority. They need to assert their authority, and stop reacting and start managing. So, we do a lot of management within the realms of fisheries... We work with co-managers on harvest and on forecasting and analysis of fisheries populations and things of that nature. But no Tribe here recently in this area, has stepped up and said 'You know what? …this area out here in Puget Sound, this area of the mouth of this river, this area off the coast of Washington, this area within Gray's Harbor…is critical to us because of these reasons... and we're designating it as a PA with a concurrent management plan in place.' By doing this we [would] not only begin to illustrate... not only do we start to balance the equation with other non-tribal designations of this sort, but it just shows that you're actively managing …that you know your area as well or better than others …that you know that there's reasons... that there's something very important in this area …to you, that maybe others didn't recognize… and you gotta make sure that they do. So for me, it's getting Tribes... I really would like to see Tribes assert that ability and the sooner the better" (Schumacker).

The difficulties for Tribal governments in asserting authority was another topic of discussion of interviewees. This difficulty is compounded by the myriad of issues that Tribal governments are also dealing with on a daily basis.

> "It probably takes a lot of different forms, but we also have to be articulate and we have to be considerate of the bigger picture. You know, we can't live in a bubble, no matter how much we would like to. We have to be aware of the competing interests. Our role could be expanded …If you take an ambivalent attitude you're not gonna change your status or your level of engagement or whatever. …It's tough for Tribal leadership to be aware of all the different issues that are going on in the non-tribal natural resources arena, there's so many other issues in their own Tribal politics; nation building, community building... trying to enhance and preserve and salvage their cultures. Sometimes that's enough to worry about. And all the other engines that are rolling out there, it's tough sometimes for the Tribal Councils" (Gilbertson).

> "When you talk about moving issues like that, it takes forever when you go through the process. Now, you can short-circuit that process and maybe get some designations as a result of Presidential action, but those are getting fewer and farther between. And so, if you are going to work these processes where there's a MPA or wilderness designations and things like that, it's along drawn out process…a lot of review, a lot of comment period, preliminary draft and then final draft. It just takes time. The Elwha (dam removals), they talk about how they worked to get that through… you know, a hundred years. It just takes time, things don't always happen overnight… nor do they always happen within one's career" (Bowhay).

However, interviewees point out that there is recognition by Tribes that there can potentially be benefits from MPAs for Tribes and they are actively considering the designs of Tribal MPAs or other types of MPAs or protections for the marine environment and its resources that would be most beneficial for Tribes.

> "We have been looking very intently at MPAs and saying, 'what's the benefit here for us?'...in terms of how can we fold that into our tool box of management approach and activity, to make it beneficial for what we are trying do in the long run with these [fisheries] stocks, whether it is to manage them or recover them. …These are tools that the Tribes will afford themselves of or have access to… and will take the opportunity to implement. It's just, for some people… you just don't see it, because you are not aware of the conversations that are going on or the processes that are going on…or that these conversations play out over many years before action comes to be" (Bowhay).

> "There's [Tribal]consideration being actively ongoing right now both out on the coast and the Puget Sound to look at MPAs from a tribal standpoint …of how they could be constructed to help further what they are try to do for protecting a certain habitat and resources. So, it's not whether or not there is a benefit … there is a benefit… [and] they know how to implement it… It's just a question of how to structure...what do they need the structure to be? But they control their own activity and so it's a question of how do they use it" (Bowhay).

Creating Tribal MPAs: How to Assert Specifics

Another subject topic brought up for discussion by the interviewees is the methods by which Tribes could use to assert their authority and create Tribal MPAs. Interviewees point out that there are a variety of methods which Tribes to utilize in MPA assertion. There are also a variety of MPAs or other protections for the marine environment and its resources which Tribes could utilize. Interviewees also point out that MPAs do not have to be exclusively environmental in nature. Within the federal framework for MPAs, MPAs can also have fisheries related protections or culturally related protections. MPAs can also be designed for a combination of area protection purposes.

> "I think the key there goes back to the definition of what you mean by a PA. You could call it… if you wanted to a 'marine managed area,' in which you are managing the extraction that takes place …which is obviously important to the Tribes. But they could also set up MPAs for the purposes of protecting cultural resources and artifacts. So, there is the different variety of things you could look at for managing through MPAs… The way we had organized it at the national level was to look at what you think of as your traditional MPA, which was a sort of a general protection…but then there's areas that were set up specifically for fisheries management and other areas that were set up specifically for protection of cultural or archaeological resources… and then, you can have a mix of any two of those or all three at once. So the Tribes could use that as yet another overlay of protection of their cultural history and potentially…if you set it up that way… then it might allow them to

> compete for various kinds of grants…which could be used to… you know... advance the knowledge of the resource or for some other purpose" (Uravitch).

Expanding Tribal Reservation PAs into Tribal U&A MPAs

Tribal ownership of reservation tidelands could also become the basis for Tribal MPAs. Because many Tribal reservations in Washington State are on the Washington coast or along the coast of the Salish Sea; many Tribes have ownership over tidelands as part of their Tribal reservation land bases.

> "Well, on reservation, the Tribe [Tulalip] never gave up or sold off the tidelands. And there were a few [non-tribal] people who had mistakes made on their titles when they acquired their property that showed ownership… when earlier versions of the title didn't… So someone did a clerical error in the process, where people [outside of the Reservation] thought they actually owned the tidelands when they really don't. So there's still some small skirmishes going on there, but most of the landowners adjacent to the tidelands have conceded that they don't really own the tidelands. So yeah, the tidelands were just, you know, part of the Reservation when the Tribe was established… and they never sold that portion" (Williams).

One interviewee made the observation that Tribal ownership of reservation tideland areas could be used as the foundation for expanding Tribal PAs into adjacent Tribal U&As.

> "Oh yeah, you could definitely do that. As long as you have the legal authority over the bottom-land and the water-column, then there's no reason why you can't. Any Tribe could do that as long as they have got that authority. …To me that would be the easiest kind of MPA for Tribes to establish. Since they have the ownership, essentially, of the submerged land as well as the water-column; they already have complete control. So all you would be doing, in effect, is sort of organizing and codifying it specifically… and designating it" (Uravitch).

Funding Tribal PAs

When and if Tribes establish Tribal PAs or Tribal MPAs the fundamental question of "How do you pay for it?" inevitably arises. Efforts need to be devoted to finding ways to make Tribal PAs financially self-sustaining, in part, because as the IUCN states, "unfunded PAs cannot be effectively managed and are at risk of becoming 'paper parks'"(Bertzky et al. 2012). There are many potential sources for PA funding that Tribes could use to help make PAs more financially self-sustaining. The IUCN lists these major sources: "national government budgets, international assistance from NGOs, bilateral and multilateral agencies, private institutions, and tourism revenue generated at protected areas" (Bertzky et al. 2012). The IUCN also lists potential public sector funding mechanisms, including "tourist fees, taxes and surcharges, trust funds, private sector funding, biodiversity offsets, and payments for ecosystem services" (Bertzky et al. 2012).

Interviewees point to several potential sources for funding of Tribal management. One interviewee points out that funding Tribal management would be more fiscally responsible than the current method of funding politically motivated management programs.

> "Traditional [Tribal] perspectives and the traditional ecological knowledge is really sort of the common sense that should be a rallying point for people that are into responsible management of tax dollars with respect to ecosystem-based management under a different perspective and not the specialized, brand-name ...of whichever organization raised the most money to influence national politics" (McCarty).

One interviewee points to grants that would be available if Tribes incorporate their MPAs into the National MPA system.

> "If you set it up that way then it might allow them to compete for various kinds of grants. Which could be used to… advance the knowledge of the resource or for some other purpose" (Uravitch).

He also points to the example of Village PAs in American Samoa (that are within the U.S. National MPA system) using support from the federal level and NGOS.

> "In American Samoa, [there are] two or three village Protected Areas that were established that are part of the larger Protected Area, but they are basically implemented by the villagers who assert traditional ownership over those reefs. And so, what you have essentially is a form of local management…and you can find a lot of that going on in the Philippines and Indonesia and a number of the other Pacific Islands. Looking at local management of local resources, with some support from the national level or NGOs in some cases" (Uravitch).

One interviewee, who was speaking in relation to current Tribal funding of restoration projects and fisheries related habitat projects of the Tulalip Tribes and the Nisqually Tribe, points out that Tribes have access to funding from the federal level as well as from revenue Tribes earn on their own.

> "One the benefits of living in the high population zone, is that we can make a lot more money off of the people around us. The bad part is the high density developments have really hammered our rivers and we don't have the fish populations we used to. …Some of the bigger tribes, like Tulalip here…are able to subsidize our fisheries program so we're not just operating off of federal funds like we use to. And we've been taking some budget reductions too, but we've been able to maintain our programs anyway. And we do have access to a lot more funding at the federal level than the state agencies have" (Williams).

This chapter demonstrates some potential methods by which protections for marine environments can be designed, established and implemented so that they achieve conservation goals and recognize Tribal rights and interests. It shows that there is great potential (as well as some recent momentum) for incorporating more Tribal leadership in PAs, MPAs and other protections for the marine and

terrestrial environment. The chapter also discussed some potentially deeper and longer-term changes that would increase the tribal role in PAs and resource management. Most particularly, it discussed how to transfer some of the actual power in controlling PAs and resource management to Tribes.

CHAPTER 9: OBSERVATIONS AND RECOMMENDATIONS

While Tribal natural resource managers and other Tribal leaders are strong advocates of conservation for marine areas and natural resources, they generally do not favor Marine Protected Areas (MPAs) as a means to those ends. This is in part due to the fact that, historically, Tribal experiences with PAs have been mostly negative. Past experiences with PAs (MPAs included) flavor the Tribal opinion about existing and future PAs and, in particular, make Tribes especially wary about any potential creation of PAs or MPAs within their traditional areas.

The research behind this paper demonstrates that Tribes have had a traditional history of sustainable resource management geared toward natural resource utilization. Because Native cultures and identities are tied to their history within particular areas, sustainable use and management of their natural resources has historically been and continues to be a vital to characteristic of Native peoples. In Washington State and elsewhere, Tribes were and continue to be part of the local ecology of their areas.

When it comes to resource management, Tribes in Washington State have developed relationships with the State of Washington and the federal government

that make their situation unique in the U.S. The unique relationships between Washington State Tribes, the state and the federal government are in a large part due to the strength of Tribal treaties with the U.S. government, which are in a large part tied to U.S. guarantees of continued Tribal access to their traditional resources.

However, Tribal treaty rights have also been a source of conflict between Tribes, the American public and PA managers. Interviewees point to the fact that treaty rights have been a source of non-tribal resentment because they are construed as "special rights" of a "minority."

"How have Marine Protected Areas in western Washington affected the rights and interests of the Tribes?"

Interviewees responding to questions related to this first research question stress that protections for the environment are not only a non-Native concept, but that Tribes and other Indigenous peoples have traditionally had areas or resources that they that they set aside from utilization, both seasonally and long-term. As opposed to the more protectionist federal PA management represented by ONP and OCNMS, Tribal management is focused on maintaining the natural productivity and services of a given area, ecosystem or fishery for the continuing benefit of present and future generations.

While Tribes in Washington State have had a history of mostly negative experiences with PAs, they are concerned with the continuing degradation of the environment and the continuing push for more development in the region.

Because of the commonalities in interests between Tribal and non-tribal citizens, Tribes and non-tribal governments and non-governmental organizations are potential allies in combating the degradation of the environment, natural resources, and cultural sites.

From the perspective of some interviewees, there are a number of increasingly positive Tribal experiences with some of the more recent initiatives geared towards environmental protection in Washington State. This is in part because of a growing recognition between the Tribal and the non-tribal policy-makers that decisions need to take into account both the Tribal and the non-tribal perspective before initiatives are implemented. Perhaps more important is the recently developing non-tribal recognition that they need to address Tribal rights and desires before they propose initiatives that might affect the Tribes.

In the State of Washington, Tribes have both a cultural tradition as well a continuing history of sustainable resource conservation tied to resource utilization. Tribes play an important role in natural resource management in Washington State. Interviewee responses show that Tribes are not against the concept of protections for resources and the environment. Tribes simply go about resource management in a different way. This is in part because Tribal goals behind protections for resources and the environment are at times different than some sectors of the government and/or the general public.

The responses of interviewees point to a history of conflicts with non-tribal management of resources and with non-tribal development in the Tribes'

traditional areas. Although Tribes are deeply concerned about declining marine environments and they have supported some MPAs in the region, they are concerned about the recent push for more MPAs.

The core of the problem between Tribes and MPAs is a potential conflict of interests between the Tribal right to resources in their traditional areas and the protections of the environment that may affect these Tribal rights. This conflict of interests is in some ways enhanced by the legal establishment of Tribal U&As, where specific tribes have specific treaty-reserved rights. The establishment of Tribal U&As has created what amounts to treaty "boxes" where Tribal rights are contained. While the sum of all Tribal U&As, when combined, encompasses all of Washington State's waters, each separate Tribe has treaty rights circumscribed only to delimited boxes (oftentimes overlapping with nearby Tribes' boxes) within these coastal waters. This brings about the situation where Tribes are particularly concerned with anything that would affect their treaty rights within their specific treaty-reserved boxes.

There is a basic conflict of interests between Tribes and the mission of the National Marine Sanctuary system. Resource protection, the "primary objective" of the Sanctuaries Act (which established the NMS system) can be in conflict with the Tribes' sustainable resource conservation objectives aimed at continued utilization. Interviewees point out that because of this basic conflict of interests between Tribes and the mission of the National Marine Sanctuary system (sustainable resource use vs. resource protection), NMS staffs are often

predisposed to supporting environmental agendas that could affect Tribal rights to resources within and around sanctuaries.

While OCNMS (specifically) is not authorized to regulate fishing, and the overriding intention of the NMS system may not be to curtail Tribal treaty rights, the predisposition of the OCNMS and the NMS system towards supporting resource protection objectives in and around the Sanctuary directs their staffs to protect these resources through whatever avenues are available to them. Because of these ingrained NMS staff predispositions tied to NMS objectives, Tribal treaty rights can be affected by NMS policymakers and staff (sometimes through their backing or support of people or NGOs outside of NMS whose objectives they support).

On the coast of Washington State, the Tribal desire for enhancing the protection of the area and its resources was tempered by a requirement that Tribal fisheries in the area would not be affected by the designation of the area as a MPA. The Tribes that supported the creation of OCNMS did so because they received assurances that their ability to manage the Tribal coastal fisheries would not be effected by OCNMS. Since the time of the establishment of OCNMS, Tribes continue to be wary of attempts by the Sanctuary to exert influence that might affect Tribal rights to resources. Interviewees point out that they feel that often the OCNMS does not fully incorporate the interests of the Tribes, or allow Tribes to fully participate at the management level.

The coastal Treaty Tribes are particularly concerned that areas in and around OCNMS are being closed to fishing when conservation concerns about species in these areas are not backed up by concrete data that demonstrates a need for fishing closures. Restrictions to the Tribal right to marine resources are also seen to be punishing Tribes for something they did not do. Interviewees point out that Tribes are not responsible for the overfishing practices that are now affecting the abundances of resources. One Tribal representative pointed out that unless new restrictions on fishing are designed to affect only non-tribal fishing, Tribes on the Washington Coast are essentially being forced to compensate for the overfishing practices of others. Although MPAs can be created that would apply to non-tribal people and not to Tribes, this is potentially a cause of resentment from the public. This scenario also effectively punishes Tribes by making them look like the bad guy who continues to fish, while others are not allowed (even though Tribes are not responsible for the overfishing practices that caused the need for an MPA).

Interviewees assert that environmental groups with protectionist agendas often sensationalize particular issues and concerns in order to gain more funding and support from the public, and more attention from the government in order to push their agendas. One interviewee also points out that organizations and employees of groups with protectionist agendas have jobs and careers which are tied to their ability to stimulate the kind of public attention which will generate support and funding from the public. This creates the situation where organizations and individuals have an incentive to sensationalize situations in

order to support the environmental agendas that provide for their livelihood, regardless of whether there are genuine conservation concerns.

Interviewees point out that Tribes would be much more likely to support the efforts of environmental groups if they utilized standards of sound science to demonstrate a need for their conservation concerns. Additionally, interviewees point to the idea that NGOs that would help to protect natural resources could find potential allies in Tribes if Tribes were engaged and consulted in advance and their interests were addressed.

Beyond the basic clash of interests between the Tribal right to resources in their traditional areas and the creation of protections of the environment that would affect these Tribal rights, there are other problems inherent in federal and state PA management of resource and habitat protections that were discussed by interviewees. Specifically, interviewees point to problems that arise due to implementing federal policy at the local level. Bureaucracy, inconsistency, employee turnover and the need for the education of new staff, as well as insufficient federal staffs and funds, were identified by interviewees as problematic.

"Can protections for marine environments be designed, established and implemented in a way that they achieve conservation goals and recognize Tribal rights and interests?"

When interviewees speak to this second research question posed by this thesis, they recommend potential future reforms to the existing NMS system--

both short-term proposals for fixes to the NMS system that would help it to better incorporate tribal concerns and interests in PAs and resource management, as well as some potentially deeper and longer-term changes that would increase the tribal role and decision-making authority in PAs and resource management.

The interviewee responses in this thesis reinforce the findings from the 2007 Whitesell et al. paper: "Protecting Washington's Marine Environments: Tribal Perspectives." All of the findings from that paper were brought up (though worded in a different fashion) by the interviewees who responded to my research questions six years later. The fact that similar responses, mentioned in the previous Whitesell et al. findings, came up again during my interviews is important to note because it shows that the Tribes are remaining consistent in their position regarding protections for marine environments. Additionally, the fact that Tribes have desired and continue to desire reforms to existing MPAs (and to proposed new MPAs) highlight that Tribes' rights and interests were not then and are not now being consistently incorporated in protections for marine environments.

It is important for policy-makers and resource managers to realize that it is much more difficult to fix an unequal, existing management system than to start from scratch with a management system that adequately incorporates both Tribal and non-tribal rights and interests from the very beginning. Interviewees point out that when MPAs are being created it is very important to make sure that things are done right the first time. This will help to minimize conflicts in the future and establish a more conducive framework for maintaining working

relationships between Tribal and non-tribal resource managers who are genuinely interested in habitat and resource management and conservation. Of course, there will always be room for the improvement of existing management systems.

There is great potential for finding common goals between Tribes and non-tribal managers in habitat and resource management and conservation. The first step in finding these common goals is to identify what is important to all the parties involved. The next step is to identify the habitat and resource management and conservation parameters that will address the common goals while at the same time addressing the rights and interests of the involved parties. If MPA managers want to incorporate the rights and interests of Tribes in MPAs, they can work with the Tribes on how to design them from the start of the process.

There are some inherent problems that will inevitably arise at the local level when implementing federal level policies or programs. It is very difficult to create a single policy or program that will be effective in all situations. There really is no one-size-fits-all when it comes to federal policy implementation at the local level. Because of this, federal policies (like the National Marine Sanctuaries Act) need to be ingrained with enough flexibility to be shaped according to each separate local situation. Federal MPA managers also need to have the ability to adapt their MPA (or sanctuary), their staffs and themselves to fit local conditions.

Tribes not only want to have a place at the table when discussions are made that effect their rights and interests, but they have a legal right to be there. Tribes are not just another group of stakeholders; they are rather a group of "rights-

holders." The Tribes' legal rights, entitling them to consultation, are tied to their Treaties with the U.S. government as well as to Tribal property rights (which are tied to Article VI the U.S. Constitution). Interviewees point out that Tribes should be a leading entity involved in any MPA creation in their area, or at minimum, be the first consulted, rather than being consulted as an afterthought by others who would designate MPAs in Tribal U&As. Some interviewees point out that the Tribal right to be included in discussions and decisions that affect their areas is in some cases being increasingly, although sometimes begrudgingly, recognized as necessary by PA managers, the public and NGOs.

The Tribal right to government-to-government level consultation has been strengthened by Presidential Executive Orders 12875 and 13175. These Executive Orders direct federal agencies to consult with Native American tribes on a "government-to-government" basis. However, even though Tribal consultation is mandated by the U.S. government, Tribes point out that in many cases they are not being truly consulted to the extent legally required and intended by agencies or individuals tied to the U.S. government. Interviewees also point out that the U.S. government needs to provide funding so that Tribes can live with the administrative burdens that the U.S. puts on Tribes, so that Tribes can participate in all the venues where decisions are being made that affect them.

Interviewees state that is very important to clarify goals and define the meanings of terms at the very beginning of discussions so that the parties involved are on the same page in regards to the intentions and definitions of other parties. When intentions are made to be transparent and definitions of words and

terms are made clear, it will help to reduce conflicts due to both misunderstandings and to a potentially unwarranted apprehension that can be associated with certain words.

Interviewees also state a desire that MPAs and other protections for the marine environment be temporary and changeable. Tribes are more likely to oppose permanent protections than temporary protections with very specific goals. This desire arises in part because Tribes are also concerned about the potential for "mission creep" of MPAs or other protections for the marine environment.

Educating PA managers and staff on Tribal rights and interests in regards to the protection and management of resources was cited as being a crucial key to a successful Tribal/PA relationship. PA managers need to educate themselves and make sure that their staff is also educated on tribal rights and interests before making any decisions that might potentially affect the Tribes. Often, Tribes have had to take on a leading role in educating others because even though federal government and state co-managers are responsible for educating themselves and the public about Tribal rights and interests, they do not always follow through with this responsibility.

Several Interviewees stressed the importance of embedding tribal interests in formal agreements or in core documents and mission statements at the national level. Because government entities and programs (such as the NMS) look to their governing documents to identify their legal authorities, it is important for Tribes

to embed Tribal rights and interests within these documents. Tribes can then point to these core documents when their rights or interests are being affected. Interviewees point out that when tribal rights and interests are embedded in core documents at the national level, it helps reduce the efforts that Tribes need to make to defend their rights and interests. When tribal rights and interests are stated in governing documents it helps to reduce conflicts that could arise due to misunderstandings by the general public or PA managers and staff. This embedding becomes especially important during the creation of new PAs or when employee turnover occurs in PAs, because it can easily be referred to by Tribes.

For the purpose of identifying some potentially deeper and longer-term changes that would increase the tribal role in PAs and resource management, interviewees were asked to discuss methods for encouraging more Tribal engagement in PAs, MPAs and other protection regimes for the marine and terrestrial environment. While the overall goals of Tribes, PA managers and environmental advocacy groups are in some ways similar, their approaches to these goals can sometimes create a clash. Tribes have made many contributions towards environmental goals and they have shown great potential for making further contributions. They are more likely to contribute their efforts towards overall goals if their rights and interests are taken into account during (and throughout) the processes of establishing and implementing environmental plans and goals.

One way to ensure that Tribal rights and interests are taken into account during and throughout the processes of establishing and implementing

environmental plans and goals is to expand the Tribal role in management. There are at least two obvious ways to increase the Tribal role in PAs (including MPAs). One way is to increase the Tribal role in existing PAs and the other is to design new PAs that incorporate Tribal interests. Increasing the Tribal role in existing PAs and designing new PAs that incorporate Tribal interests can be done in through many forms. Most PAs will need broad support in order to be effective. Any new PA establishment in Washington State requires the involvement of both Tribal and non-tribal interests. MPAs that aim to be genuinely inclusionary of Tribes will require genuine power-sharing with Tribes.

One avenue for helping to incorporate Tribal rights and interests in PAs is to have a tribal liaison. Although interviewees point out that it may not be an enviable position for Tribal members or Tribal representatives, tribal liaisons can potentially help to ensure that Tribal rights and interests are considered and that Tribes are consulted before decisions are made.

Incorporating Tribes in MPA management and operation is another way of combining forces between Tribes and protections for the marine environment. Interviewees point out that incorporating Tribes would be not only logical from the point of view of looking at who has the most local knowledge and the most to gain or lose from the success or failure of an area's environmental management, but it would also be more cost effective to support Tribal efforts to protect the environment within a Tribe's traditional areas. Interviewees also point out that there can be tribally run MPAs with non-tribal support and/or funding.

One way to help ensure that Tribal interests are incorporated in PAs is to encourage and support the inclusion of Tribal PAs in local, state and federal PA systems. Worldwide, there is an emerging interest in the application of indigenous cultural and traditional area PAs and MPAs. Tribes in Washington State have traditionally declared areas as protected (and they continue to employ protections on reservation and within their Tribal U&As) through establishing seasonal spawning protections or other types of restrictions on certain types of activities within certain areas. Most of the interviewees had positive responses when addressing the topic of the establishment of Tribal PAs and/or Tribal MPAs.

Although at this point there are no Tribal MPAs in the federal system, interviewees stress the importance of Tribes asserting their authority to implement their own MPAs. The difficulties for Tribal governments in asserting authority was another topic of discussion of interviewees. This difficulty is compounded by the myriad of other issues that Tribal governments are also dealing with on a daily basis. However, interviewees point out that there is recognition by Tribes that there can potentially be benefits from MPAs for Tribes, and they are actively considering the designs of Tribal MPAs or other types of MPAs or protections for the marine environment and its resources that would be most beneficial for Tribes.

The federal government's relationship with Tribes in Washington State is in part defined by treaty obligations to protect treaty-reserved rights to Tribal resources. As an extension, federal agencies are obligated to fulfill federal obligations to Tribes. Additionally, state agencies and U.S. citizens have in some

cases been held to these obligations by the federal judicial system. It has up to this point in time been difficult for Tribes to get past the jurisdictional issue of Tribal MPAs extending only to their own Tribal members, but by same accord non-tribal MPAs do not have to be observed by Tribes. And while it is true that the State of Washington does not have to support Tribally designated PAs, MPAs or other Tribal protections for the environment, they could be mandated to do so by federal courts or agencies.

Interviewees point out that Tribes do have the authority to implement Tribal PAs under the National MPA Act program. The tribal ability to declare MPAs is in embedded within the federal MPA framework that was enacted through Executive Order 13178. Additionally, interviewees point out that Tribes could potentially use some more general statutes to help to provide for some protections of the environment and of Tribal resources.

A basis for Tribal MPAs (and other rights of Indigenous peoples) that goes beyond federal acquiescence to its own treaties with Tribes is that of inherent rights and human rights. Whether or not Tribes or other Indigenous peoples are recognized as sovereign entities with by the U.S., or whether or not they have treaties with the U.S. government, they still have inherent rights as Indigenous peoples and as human beings. Several interviewees point to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (under the auspices of the United Nations (UN) Human Rights Commissions and the Sub-Commission on Prevention of Discrimination and Protection of Minorities) as an

internationally supported recognition that Indigenous Peoples have inherent rights (including the right to create Indigenous PAs).

Another subject topic brought up for discussion by the interviewees was the potential methods that Tribes could use to assert their authority and to create Tribal MPAs. Interviewees point out that there are varieties of methods for assertion as well as a variety of MPAs (or other protection types for the marine environment and its resources) which Tribes could utilize to protect their interests. Interviewees point out that MPAs do not have to be exclusively environmental in nature. Within the federal framework for MPAs; MPAs can have fisheries-related protections or culturally-related protections, or they can be designed for a combination of area protection purposes.

Tribal ownership of reservation tidelands could also become the basis for Tribal MPAs. Because many Tribal reservations in Washington State are on the Washington coast or along the coast of the Salish Sea many Tribes have ownership over tidelands as part of their Tribal reservation land bases. Protections for these tidelands could be expanded and extended into protections for the adjacent Tribal U&As.

In conclusion, among the main takeaways from the research behind this thesis is that conservation and Tribal goals overlap to a great extent, but the present designs of MPAs often fail to adequately incorporate Tribal interests. Marine Protected Areas in western Washington have affected and will continue to affect the rights and interests of the Tribes. Because of this, Tribes have an

interest in both how current MPAs might be altered, as well as how future MPAs and other protections for the marine environment and its resources could be better designed, established and implemented so that marine protections can achieve conservation goals, recognize Tribal rights and interests, and strengthen Tribal powers and perspectives in the process.

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Interview Questions

What does Tribal management/guardianship of the environment look like/entail? What about traditionally? Could you share any examples of how tribal knowledge of traditional practices and history within an area has contributed (or could contribute) to the protection or guardianship of traditional lands, territories, and resources?

How has the creation of Protected Areas in western Washington affected the rights and interests of the Tribes and Tribal members? More specifically, how has the OCNMS (or other marine protected areas (MPAs)) affected the rights and interests of the Tribes and Tribal members?

Do past and current policy initiatives for marine conservation harmonize with legal rights, needs and desires of the tribes? Why? Why not?

Have treaty rights or tribal jurisdiction been a source of conflict with non-tribal citizens or agencies in regards to MPAs? If so, in what way?

How could protected areas be improved so that they lessen conflict, and better incorporate the interests of Tribes and Tribal members?

Can the treaties' guarantees of tribal access to natural resources be applied to environmental concerns, and mandate the conservation or restoration of traditional resources in marine environments?

How can MPAs be better designed, established and implemented in a way that they both recognize Tribal rights and interests and achieve environmental conservation goals?

How can treaty rights and tribal jurisdiction be better communicated to resource managers, protected area managers, and the general public? Whose responsibility is it?

How can tribal governments be better engaged as co-managers of natural resources (marine and terrestrial)? Could the tribal role be expanded or improved?

Could you foresee tribes holding direct policy authority in the design and implementation of protected areas, based on their inherent tribal sovereignty? How would you feel about the creation of Tribal Protected Areas that could better protect traditional territories and resources?