



Skeena Fisheries Commission

Recreational Fisheries, Aboriginal Rights and DFO
Accountabilities

**...should First Nations Seize Control
of the Commercial Sport Fishery?**

Aboriginal Rights in Fisheries

- Aboriginal rights, as guaranteed by s.35.1 of the Canadian Constitution, have priority, after conservation, over *all other users or uses*
- We believe that aboriginal rights include *at least* food, social and ceremonial access to all species
- Does DFO policy recognize this expression of *The Right*?

The aboriginal right to food is not *The Right to a taste*

- S.35.1 rights are *pre-existing or inherent* – these are rights all Nations had at the time of contact
- In our view, the *Aboriginal Right* to take fish for food extends to the ability to be secure in the knowledge that the Nation has access *all the fish needed* for food
- In our view, the ‘priority’ cannot be restricted or squeezed by other interests or users – it can only be limited by the needs of conservation
- *Provision of fish to any other user is not a legitimate conservation objective*

DFO Says:

Paragraph 1.c) of DFO's *Policy for the Management of Aboriginal Fishing (1993)* states:

- “Aboriginal fishing for food, social and ceremonial purposes will have first priority, after conservation, over other user groups. Aboriginal fishing for such purposes will only be restricted to achieve a valid conservation objective, to provide for sufficient food fish for other Aboriginal people, to achieve a valid health and safety objective, or to achieve other substantial and compelling objectives.”

“Allocation Principle 2 – First Nations:

- After conservation needs are met, First Nations’ food, social and ceremonial requirements and treaty obligations to First Nations have first priority in salmon allocation.”

Canada's *Policy for Conservation of Wild Pacific Salmon (2005)* states:

- “As described in more detail in Appendix 1, DFO seeks to manage fisheries in a manner consistent with the decision of the Supreme Court of Canada in *R. v. Sparrow* and subsequent court decisions such as the decision of the BC Court of Appeal in *R. v. Jack, John and John*. Specifically, DFO is committed to managing fisheries such that Aboriginal fishing for food, social and ceremonial purposes has priority over other fisheries.”

And then DFO offers the following examples of restricted access...access restricted clearly to give aboriginal fish to other users...without consultation or accommodation or reference to what the law requires or their own policy

DFO has a broad range of "tools" with which to implement priority for FSC fishing (*e.g.* regulating fishing times, fishing areas, permitted gear, *etc.*). Just as fisheries vary widely, the ways in which DFO gives effect to FSC priority vary widely depending on the fishery and the circumstances - some examples include:

- Closing or restricting certain areas to commercial, and occasionally recreational harvesting, while such areas remain open for FSC harvesting, occurs almost all invertebrate fisheries;
- FSC allocation comes off of the TAC before allocations are given to other sectors (*e.g.* Halibut, herring and Somass Sockeye)
- Under the individual quota programs in red sea urchin, green sea urchin, and sea cucumber fisheries, two percent of the coast-wide TAC is reserved, for planning purposes, for FSC harvesting. Additional allocations can be provided to First Nations to meet FSC requirements;
- FSC fishing is permitted in Rockfish Conservation Areas;
- "Dual fishing" is permitted in several fisheries (such as groundfish) to provide greater opportunities for First Nations to fish for FSC purposes;
- Trimmings from commercial spawn on kelp operations are permitted to be retained for FSC purposes;
- Pursuant to DFO's ESSR policy, the use of ESSR fish for FSC purposes has priority over other uses for such fish;
- Gear is permitted to be used in FSC fisheries for some species that is not permitted in to be used by commercial or recreational fishers;
- FSC fishing is often permitted at times when commercial or recreational fishing is not permitted;
- The retention of by-catch is often permitted in FSC fisheries when it is not permitted to be retained in other fisheries; *etc.*

DFO's Own Policy Statement Affirms This

- Jack, John and John means:
 - Preferred method
 - Preferred species
 - Preferred location
 - Preferred timing
- It says nothing about management or administrative restrictions imposed by DFO for DFO's own purposes

Protecting Your Rights

- How do you fill your food basket?
- Which species do you need?
- Do your people have access to all that they need?
- All of this needs to be clear when dealing with DFO

2009 Rights Violation [Not *Infringement*] on the Skeena System

- The Skeena system under-escaped Sockeye in 2009 [about 200,000 pieces short of minimal escapement]
- All commercial fisheries [ocean and in-river] were curtailed
- Recreational fishery remained open and retained sockeye
- **Question: which fish were they catching?**
- **Answer: aboriginal food fish by definition [there were no other kinds]**
- DFO has permitted the recreation fishery to replace the commercial fishery has the violator of aboriginal rights
- How did this happen?
- **Question: Does DFO protect aboriginal rights or enable the commercial sport fishery?**

DFO has an incoherent policy s.35.1 policy

- When this happened DFO managers on the Skeena tried claiming that the IFMP was superior to aboriginal rights or conservation
- DFO knows this argument will not pass any legal test – yet the manager [the statutory decision maker] promoted an IFMP that violates DFO policy [and infringes upon aboriginal rights]
- Where is the point of accountability?
- Since we have demonstrated that DFO operates an inconsistent policy in regard to s.35.1 rights we ask...
- ***Is it lawful for DFO to operate with an inconsistent policy..?***

The Challenge of Recreational Fisheries

- Unallocated recreational fisheries are a direct challenge to existing and defined aboriginal rights
- Recreational fisheries are wrapped in politics – both federal and provincial
- The recreational fishery in its commercial form is a net extractor from the resource – it does not add value or management revenue nor provide benefits to aboriginal communities
- These fisheries do not collect data – *if they do we do not get the information*
- Recent enforcement actions in the Commercial Sport Fishery demonstrate that data collection and compliance cannot be assumed

Recreational Fisheries Must be Brought Under Control

- Open ended recreational fisheries are over – all must be allocated
- Recreational policy must differentiate between local anglers and tourist/revenue anglers
- All fisheries must generate real data
- These fisheries must be controlled and licensed by area
- Must carry their weight in terms of fees – these fees must be returned to the resource
- Must not violate aboriginal rights
- Aboriginal rights include the right to manage – recreational fisheries need to be brought into aboriginal control for aboriginal benefit

Sue for Compensation

- Aboriginal people have a right to feed themselves from the fisheries resource
- DFO has an obligation to manage the resource to fulfill this right
- It is reported by Nations around BC that access for food purposes for all species is a problem - despite a clearly articulated aboriginal right and fairly clear stated policy [as presented earlier in this slide show]
- The current DFO attitude to aboriginal rights constitutes a prima facie infringement of s.35.1 rights
- Is there a real long term solution without litigation?
- What do we do if salmon disappears altogether?