

## *Tribe, state will confer over herring run rights*

By Nelson Sigelman - April 13, 2006

April showers bring more than May flowers. Spring rain also swells the streams and rivers that flow into the sea and provide a watery path for river herring, also called alewives, intent on returning to the fresh water pools of their birth.

The natural cycle of returning alewives was witnessed and welcomed by the Wampanoag Indians who first inhabited the Island and early European colonists who exploited the many productive runs around the Island where fresh water mixed with the salt.

The arrival of the silvery fish, prized by some for the taste of their roe and others for their value as bait for striped bass, is still anticipated by Islanders. But in recent years, fewer and fewer herring have returned to the long-standing run at the head of Menemsha Pond owned by the Wampanoag Tribe of Gay Head (Aquinnah) and the briefly thriving Richard F. Madeiras Herring Run at the head of Lagoon Pond, which was restored almost a decade ago by a group of volunteers and is managed jointly by the towns of Oak Bluffs and Tisbury.

The diminishing numbers of returning herring, even by modern standards, prompted state fisheries managers in November to prohibit the possession or sale of herring through 2008, effectively closing all herring runs in the state.

Four years ago, alarmed by an already precipitous decline, Connecticut banned the taking of river herring. Earlier this month Rhode Island fisheries officials took similar action.

According to a report in the Providence Journal, at the headwaters of the Narrow River, the state's most popular spot for netting alewives, herring numbers dropped from 280,000 in 2000 to 8,000 last spring.

In the past, the tribal council leased the Gay Head run to tribal members who ran it as a commercial operation, selling herring to fishermen primarily for bait. Tribal members were also free to take herring for personal use.

The prohibition ran up against the aboriginal rights and control generally accorded Native American tribes over fishing and hunting on tribal lands and claimed by the Wampanoag Tribe, which claimed the state regulations do not apply.

Although the tribal council voted not to allow the commercial harvesting of herring, it has not prohibited the taking of herring for personal use, an activity that tribal leaders said has great cultural significance.

But attorneys for the state maintain that the settlement act that was at the heart of a decision by the Supreme Judicial Court that the tribe is subject to local zoning regulations also applies to fisheries regulations and state law applies.

At the same time, state fisheries officials may allow members of the Mashpee Wampanoag Tribe, which is seeking federal recognition, to exercise their aboriginal rights and take herring for personal use, the difference being the settlement act.

A meeting scheduled yesterday between tribal officials and attorneys for the state was postponed but both sides are expected to get together soon.

Dan McKiernan, assistant director of the Division of Marine Fisheries, said that it is the legal view of lawyers representing the Department of Fisheries and Wildlife that the tribe does not have an aboriginal right to harvest herring.

He said the state's position is based on the legal issues involved, and not a view that conservation concerns would prevent the tribe from taking some fish for cultural and personal use. "This is a really sensitive issue," said Mr. McKiernan.

The Tribe's lawyer, Douglas Luckerman of Lexington, said the state is not looking at the issue through the prism of Indian rights. "You have to look not whether state law applies but what rights does the tribe retain," he said. "And do those rights, when there is a place where the state's authority and the tribe's authority connects, what happens there. That is the question."

Brett Stearns, director of natural resources for the tribe, said the tribe voluntarily gave up the commercial harvesting of herring with the understanding that there is a need to reduce the take, and that they would continue to protect the resource.

Two species of fish in coastal Massachusetts are collectively referred to as river herring. They are the alewife, which spawns from late March to mid-May when water temperature reaches about 51 degrees, and the blueback herring, which spawns from late April to June when the water temperature is about 57 degrees, according to state biologists.

Herring do not return to spawn for three to four years after leaving their birth waters for the open ocean. Taking too many herring before they have had a chance to spawn can have a precipitous affect.

The exact cause of the herring decline remains a mystery. Rainfall levels, water quality, the taking of river herring by large offshore pair trawlers targeting sea herring, and a resurgence of striped bass have all been mentioned as possible causes. Whatever the cause for the decline in fish numbers, fisheries officials across the region have decided it is best to be conservative.

Mr. McKiernan said that while runs tend to function independently of each other and some fare better than others, overall there has been a steep decline. Leaving some runs open would have attracted poachers seeking bait. "We thought to get a handle on this it would be best to ban the harvest of this fish for essentially a generation, three years," he said.

Mr. McKiernan said there is no hard and fast evidence that links the fishery for sea herring, which spawn in the open ocean, with a decline in river herring. That fishery has grown in recent years with the addition of plants in New Bedford and Gloucester that are supplied by pair trawlers that can scoop up a million pounds of fish in one trip. Considered abundant, sea herring are used for lobster bait, aquarium food, and shipped to overseas markets in Asia and Africa.

The tough state measures have the support of one group that has enjoyed the strong attraction striped bass and bluefish have for herring. Prior to the state's decision to ban the taking of herring, members of the Mass Striped Bass Association fishing club endorsed the proposal in a letter stating: "Our membership will be greatly impacted by this closure, however we recognize that the time has come to take drastic measures that will hopefully rebuild the Mass. river herring

populations to a sustainable level."

The prohibition on herring has spawned numerous questions relating to enforcement. Environmental Police Sergeant Patrick Grady said he recently received a call from one fisherman who asked if he could use herring he had kept in his freezer from last year. The man was told the law prohibits possession, therefore he could not use it.

Sergeant Grady recommended a use for the frozen herring in keeping with tradition - chop it up and put it in the garden.

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