



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
Sustainable Fisheries Division
510 Desmond Drive SE, Suite 103
Lacey WA, 98503

February 19, 2016

Mr. Charles O. Swanton
Deputy Commissioner
Alaska Department of Fish and Game
P.O. Box 115526
Juneau, AK 99811-5526

Dear Mr. Swanton:

Yesterday, the National Marine Fisheries Service (NOAA Fisheries) wrote you and other U.S. salmon managers along the west coast requesting information you and they may have about the anticipated management regime to be applied to Chinook fisheries this year in southeast Alaska (SEAK). As that letter explains in detail, the NOAA Fisheries and the Department of State desire that the Pacific Fisheries Management Council (PFMC) and other managers, particularly managers of treaty Indian fisheries, have the best available information with which to model anticipated impacts that occur in SEAK and other northern fisheries so that they can proceed with their own pre-season planning process. Because you manage the SEAK fishery, I am writing to provide NOAA Fisheries' and the Department of State's view of important guiding legal parameters for the management regime that we believe will be helpful in your response to the request regarding 2016 management. This letter is written having given full respect to discussions and actions related to management in SEAK that have occurred over the past year and particularly in recent months. We also have reviewed your February 12 correspondence with Pacific Salmon Commission (PSC) Chair Phil Anderson.

Broadly, the fishing regime in SEAK is guided by at least four authorities of federal interest.¹ The first is the Pacific Salmon Treaty (PST) and the Pacific Salmon Treaty Act. The second is the fishing right of treaty Indians in the Northwest and, related to it, the stipulation to which Alaska is signatory in settlement of *Confederated Bands and Tribes of the Yakama Indian Nation v. Baldrige*. The third is the Endangered Species Act (ESA) and the biological opinion and incidental take statement that is applicable to the SEAK Chinook fishery. The fourth is the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the delegation under the MSA of federal management authority of the salmon fishery in the exclusive economic zone (EEZ) of SEAK to the Alaska Board of Fisheries.

From a foreign policy perspective, the PST and the fisheries it sanctions are dependent on the ability of the United States and Canada, as Parties, to share scientific information in a timely manner, follow established processes and protocols, and act as good stewards of the resource. It

¹ We note that while this correspondence (as well as the letter referenced in the opening sentence) relate to the fishing regime to be applied in SEAK, the discussion is also generally applicable to the determination of the abundance index to be used for the fishery in 2016.



is the policy of the United States, particularly as we move into pre-season planning for 2016, to follow established methods for information sharing necessary for shared stocks. Moreover, it is in the best interests of the United States to maintain our strong bilateral relationship with Canada. To do otherwise could have significant negative implications on Treaty renegotiation.

Focusing first on the PST, NOAA Fisheries and the Department of State believe that the PSC has broad latitude within the agreement to reach consensus on management regimes, even during the terms of the applicable Annexes. However, without bilateral agreement to a change, the Commission-agreed Chapter 3 of Annex IV supports the historic practice of managing the fishery in SEAK to not exceed a ceiling determined pre-season under the aggregate abundance based management (AABM) regime. We arrive at this conclusion by reading Annex IV, Chapter 3, Paragraph 6(a) which defines an AABM fishery as “an abundance-based regime that constrains catch or total mortality to a numeric limit computed from either a pre-season forecast or an in-season estimate of abundance, from which a harvest rate index can be calculated.” This is supported by Paragraph 9(d) of this Chapter, which constrains the SEAK fishery “so as not to exceed the catch limits...designated for the applicable abundance index value for [the fishery],” and paragraph 9(e) which states that the annual catch limit “shall be based upon the best available pre-season predictions of abundance as determined by the CTC [Chinook Technical Committee].”

We acknowledge that in 2015 the CTC did not reach a determination about the predicted abundance as envisioned in Paragraph 9(e). In 2015, NOAA Fisheries stated its belief that the PST and other applicable law required that the circumstance be resolved through use of the best available science to determine the predicted abundance. In January 21, 2016 correspondence to the executive director of the Pacific Fisheries Management Council, NOAA Fisheries addressed the potential that again in 2016 there may be no CTC-determined abundance prediction, urging use of best available science to resolve the situation.

To be clear, we do not believe that lack of a CTC-agreed abundance forecast, if that proves to be the case in 2016, affects the requirement to manage the SEAK fishery under the Annex to a ceiling determined by use of the best available science pre-season².

Pre-season planning is central to the second major federal interest – the implementation of treaty Indian fishing rights. Anticipated harvest in northern fisheries must be modeled pre-season and with confidence in order for treaty Indian tribes to establish expectations for north/south sharing and impacts on stocks of concern when cooperatively planning and agreeing to fisheries. Since 1999, this modeling has assumed that SEAK would be managed consistent with our reading of Annex requirements and to not exceed a ceiling derived from an abundance index determined pre-season. For most of those years, in-season management was aligned with pre-season modeling.

Because we read paragraphs 6(a), 9(d) and 9(e) of Annex IV to call for SEAK to be managed to a ceiling unless there is agreement to the contrary, we view compliance with those provisions critical to the process by which implementation of treaty Indian fishing rights are properly implemented. We believe that understanding to be broadly-shared and at the root of the Stipulation and Order in *Confederated Bands and Tribes of the Yakama Indian Nation v. Baldrige* (Baldrige Stipulation), to which Alaska is signatory. Among other things, the Baldrige

² We acknowledge the potential for in-season adjustment of the abundance index under paragraph 9(f) of Annex 3.

Stipulation is intended to resolve a dispute between Alaska and other parties as to Alaska's role, if any, in the satisfaction of the United States' obligations to protected reserved fishing rights for northwest tribes. The Baldrige Stipulation requires the parties to work in good faith and that the north/south allocations of Chinook salmon are in accordance with decisions of the PSC under the Treaty. Because we believe the Treaty and Annex IV currently require SEAK harvest to be constrained by a catch ceiling, management without agreement under an alternative regime would, in our view, give rise to remedies under the Baldrige Stipulation.

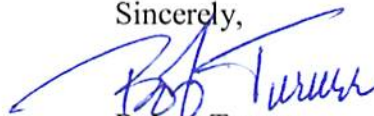
The third federal interest is compliance with the ESA. In this regard there are two areas of concern. The first relates to compliance with the applicable biological opinion for SEAK fisheries. The opinion exempts the incidental take of listed Chinook in SEAK fisheries "limited on an annual basis by the provisions of Chapter 3, Annex IV of the PST Agreement that define the limits of catch or total mortality for each fishery." (Biological Opinion section 10.1.1.) A management regime applied to SEAK that is not based in "limits of catch" under Chapter 3 would be contrary to the existing biological opinion, would not receive an exemption from prohibited "take" under section 9 of the ESA and would require re-initiation of consultation under section 7 of the ESA.

In addition, NOAA Fisheries would be concerned about harvest impacts if the management regime in SEAK resulted directly or indirectly in increased harvest coast-wide of ESA-listed populations over the impacts anticipated in pre-season planning.

The fourth area of federal interest relates to the current delegation of management authority over SEAK fisheries in the EEZ to Alaska under the Magnuson-Stevens Fishery Conservation and Management Act. Just as does the biological opinion above, the MSA requires the delegation to be consistent with "other applicable law," in this case including the PST and the ESA.

Both NOAA Fisheries and the Department of State appreciate your consideration of the information in this letter as you develop your response to NOAA Fisheries' letter of February 17. We remain hopeful of consensus-driven resolution of the issues facing managers as they develop the 2016 salmon fishing season.

Sincerely,



Robert Turner
U.S. Commissioner
Pacific Salmon Commission
Assistant Regional Administrator
Sustainable Fisheries Division

Cc: McCoy Oatman, Tribal Commissioner, PSC
Ron Allen, Tribal Alternate Commissioner, PSC