

TRIBAL TESTIMONY ON SOUTHERN RESIDENT KILLER WHALE ENDANGERED SPECIES ACT CONSULTATION RE-INITIATION

Tribes in Western Washington have fished since time immemorial. The right to fish was secured in perpetuity in treaties with the United States in 1855. Salmon fishing is not the cause of the decline of salmon, nor of the Southern Resident Killer Whales that depend on them. As a reserved right, treaty tribal fisheries should be included in the environmental baseline of any Endangered Species Act (ESA) consultation. Fishing should not be held to a higher standard under ESA than habitat alteration, destruction, or other actions undertaken by federal, state, and local governments that degrade the environment necessary for fish production. SRKW are a trust resource and so, as with salmon, regulation of tribal fisheries must be held to the conservation necessity principle¹. Affected tribes also have the right to individual government-to-government consultation prior to any action that may affect our rights.

Orcas Are a Treaty Trust Resource

SRKWs are revered by the treaty tribes and, like salmon, share a special cultural and spiritual connection with the Tribes. It is our belief that if we protect the whales, they will protect us. treaty tribes are committed to the interconnected recovery of both salmon and SRKWs. Like salmon and other fishery resources, SRKWs are a trust resource of the treaty tribes. As with salmon, the treaty tribes are co-managers of the SRKWs that pass through our treaty-protected usual and accustomed (U&A) areas. In managing for the protection of SRKWs, there must be consistent and correct application of the conservation necessity doctrine in any limitation on salmon harvest under the Treaty right and full compliance with the government's trust obligation to uphold the tribes' treaty rights.

As individual sovereigns and co-managers of this trust resource, each tribe is entitled to government-to-government consultation on any federal plans that may impact our treaty rights. Each affected tribe has a right to meaningful consultation in order to determine whether proposed federal actions may affect the treaty right and whether it may impair the right to a moderate living² guaranteed under the treaties. We look forward to consulting with NOAA on a government-to-government basis.

Treaty Tribal Fisheries in the Environmental Baseline

The federal government has vigorously supported inclusion of the treaty right to take fish in the environmental baseline in litigation before the Ninth Circuit. In litigation defending inclusion of

¹ United States v. Washington, 384 F. Supp. 312, 342 (WD WA 1974), aff'd 520 F.2d 676 (CA9 1975), cert. Denied, 423 U.S. 1086 (1976).

² Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979)

the Columbia River treaty tribes' future harvest in the environmental baseline for the 2004 Federal Columbia River System Biological Opinion,³ the Department of Justice explained:

Because the tribal treaty right perpetually provides for a Tribal opportunity to harvest 50% of the harvestable surplus, the future harvest is necessarily part of the background picture for the period of the 2004 [FCRPS] BiOp....[As explained in the 2004 BiOp], the annual calculations for each harvest vary, but this does not mean that the harvest will not occur or can be discounted from the baseline. If NMFS did not factor tribal fishing rights into the environmental baseline, the effects of the proposed action would be measured against a false picture of the species' status. It is the exclusion of such an ongoing certainty that would be arbitrary and capricious, not the inclusion.

It is also longstanding NOAA policy that treaty fishing must be included in the environmental baseline for Section 7 ESA consultations. NMFS has repeatedly stated that the tribes' treaty rights must be included in the environmental baseline in ESA Section 7 consultations affecting the exercise of the tribes' treaty-reserved rights to take fish. As recently stated in its biological opinion regarding 2018 Puget Sound fisheries:

NMFS recognizes the unique status of treaty Indian fisheries and their relation to the environmental baseline. Implementation of treaty Indian fishing rights involves, among other things, application of the sharing principles of *United States v. Washington*, annual calculation of allowable harvest levels and exploitation rates, the application of the "conservation necessity principle" articulated in *United States v. Washington* to the regulation of treaty Indian fisheries, and an understanding of the interaction between treaty rights and the ESA on non-treaty allocations. Exploitation rate calculations and harvest levels to which the sharing principles apply, in turn, are dependent upon various biological parameters, including the estimated run sizes for the particular year, the mix of stocks present, the allowable fisheries and the anticipated fishing effort. The treaty fishing right itself exists and must be accounted for in the environmental baseline, although the precise quantification of treaty Indian fishing rights during a particular fishing season cannot be established by a rigid formula.⁴

Disparate Treatment of Treaty Tribal Harvest

³ The 2004 FCRPS Biological Opinion has a description of the treaty rights environmental baseline that is substantially similar to that contained within the 2008 Pacific Salmon Treaty Biological Opinion and the biological opinions that have been written for Puget Sound fisheries.

⁴ See NMFS, Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response: Impacts of the Role of the BIA Under its Authority to Assist with the Development of the 2017-2018 Puget Sound Chinook Harvest Plan, Salmon Fishing Activities Authorized by the U.S. Fish and Wildlife Service, and Fisheries Authorized by the U.S. Fraser Panel in 2017, NMFS Consultation Number: F/WCR-2018-9134 (May 9, 2018) at 70 (emphasis added). The biological opinion analyzing the 2010-2014 Puget Sound Chinook RMP also contains identical language. See NMFS, Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response: Evaluation of the 2010-2014 Puget Sound Chinook Harvest Resource Management Plan under Limit 6 of the 4(d) Rule: Impacts of Programs Administered by the Bureau of Indian Affairs that Support Puget Sound Tribal Salmon Fisheries; Salmon Fishing Activities Authorized by the U.S. Fish and Wildlife Service in Puget Sound; and NMFS' Issuance of Regulations to Give Effect to In-season Orders of the Fraser River Panel, NMFS Consultation Number: FINWRI2010/06051 (May 27, 2011) at 69. Identical language is also found in the December 2008 biological opinion for the Pacific Salmon Treaty (at pages 6-1 to 6-2).

Tribes have noted the disparate treatment of habitat, hatcheries, and harvest under the ESA⁵ and other laws. Numerous actions are currently under way, or recently consulted on that will affect SRKW prey availability. Below are a hatchery funding action, two significant habitat actions that are held to a different standard than harvest actions (i.e. where harvest is expected to take specified reductions in times and areas that are found to overlap with stocks considered to be important SRKW prey), NOAA's implementation of two competing Acts, and a pending federal action that could affect a number of salmon runs negatively up and down the coast. The first can reasonably be expected to reduce production of available prey for a considerable time. The second two habitat actions will reduce production of prey permanently. The other considerations are likewise negative changes in the production of salmon that may be long term or permanent if solutions are not developed. This is in contrast to fisheries that take a portion of the surplus production in a single year:

1) NOAA is reducing Mitchell Act hatchery production of Chinook as part of a Court-ordered settlement at a time when more hatchery production is needed to provide food for SRKW. In the 2017 Biological Opinion on Mitchell Act Funding NOAA found that:

Therefore, a 24% reduction in tule Chinook salmon (or approximately 25,000 adults) would be a small portion (or approximately 1%) of the total estimated ocean escapement that may be available to SRKW. While the average total Chinook salmon escapement estimate does reflect many of the significant populations of Chinook salmon along the U.S. coast, this does not include any totals from significant Canadian Chinook populations that are likely encountered by SRKW to some degree, in particular Fraser River and West Coast Vancouver Island stocks. Therefore, the reduction in Columbia River tule Chinook would likely be less than 1% of the available Chinook salmon across the SRKW range.

These estimates of prey reduction are also considered maximum reductions for several other reasons. As hatchery production is reduced, overall salmon abundance is reduced which may result in some reductions in fisheries. Continued but reduced abundance of harvestable Chinook salmon may be associated with lower catches and possibly lower annual fishing quotas.⁶

In other words, it appears that NOAA is saying that a 24% reduction in tule Chinook salmon production is not a significant impact and they expect harvest reductions may make up for the lost production.

2) The California WaterFix project impacts endangered salmon and SRKW in areas that are traditionally part of their winter range (i.e. during a time when food seems to be most limiting, particularly for the far-ranging L Pod that has seen the steepest declines). In the 2017 Biological Opinion on the California WaterFix NOAA found that:

While Chinook salmon are expected to be the preferred prey with high nutritional value,

⁵ Treaty Rights at Risk: Ongoing Habitat Loss, the Decline of the Salmon Resource, and Recommendations for Change. July 14, 2011.

⁶ NOAA's National Marine Fisheries Service's implementation of the Mitchell Act Final Environmental Impact Statement preferred alternative and administration of Mitchell Act hatchery funding. NMFS Consultation Number: NWR-2014-697 at 360

Southern Residents are capable of taking advantage of other prey sources to supplement their nutritional needs and are assumed to do so in the immediate absence of sufficient Chinook salmon resources.⁷

That Biological Opinion goes on to state:

Ford and Ellis (2006) report that Southern Residents engage in prey sharing about 76% of the time during foraging activities. Prey sharing presumably would distribute more evenly any effects of prey limitation across individuals of the population than would otherwise be the case (i.e., if the most successful foragers did not share with other individuals). Considering this, along with their ability to take advantage of other prey sources to supplement their nutritional needs in the immediate absence of sufficient Chinook salmon resources, we conclude that relatively small reductions in Central Valley Chinook salmon prey compared to the several millions of Chinook that are expected to be available to Southern Residents in the ocean each year over the duration of the PA would likely not alter the fitness of individuals enough to further reduce survival and reproduction rates, assuming Southern Residents only spend part of their time foraging in the southern portion of their range in the ocean where Central Valley Chinook salmon would occur in relative abundance during that time period. However, larger reductions in prey likely could alter the fitness of individuals enough to compromise survival and reproduction rates at any time over the duration of the PA.⁸

From 2009-2015, Central Valley Chinook salmon accounted for five of the 17 SRKW coastal winter prey sample collections identified to Chinook stock⁹. It appears that NOAA is looking for reductions in fisheries that may impact stocks that they consider important to SRKW after they have already found that permanently reducing production and availability of those same stocks is not that big a deal.

3) The National Flood Insurance Program in Puget Sound allows for continuing the same degradation that led to listing of Puget Sound Chinook under the ESA as long as there is mitigation for any habitat destroyed. The following excerpts from Treaty Rights at Risk: Ongoing Habitat Loss, the Decline of the Salmon Resource, and Recommendations for Change. July 14, 2011 sum up the situation:

NOAA's review of the Federal Emergency Management Agency (FEMA) floodplain insurance program does not address Puget Sound salmon recovery. Instead NOAA applies a no net loss standard that attempts, at best, to maintain existing degraded habitat conditions. In September 2008, NOAA determined that the continued implementation of the National Flood Insurance Program in Puget Sound (and the land use practices that go along with it) jeopardizes the continued existence of chinook, steelhead, summer chum, and SRKW. FEMA's flood insurance program subsidizes the alteration and destruction of salmon habitat by providing inexpensive insurance coverage for property and structures

⁷ CA WaterFix Biological Opinion at 833 (no citation to technical literature).

⁸ Ibid.

⁹ B. Hanson. 2015. Distribution and Diet of Southern Resident Killer Whales: Program Review presentation. NWFSC unpublished data. July 28, 2015.

that are built in the floodplain¹⁰. As required by the ESA when it finds jeopardy, NMFS designed a “reasonable and prudent alternative” (RPA) as part of its biological opinion (BiOp), to allow the flood insurance program to go forward. NMFS’ RPA is intended explicitly to result in no net loss of floodplain habitat and no adverse impact to “protected areas” (riparian areas, floodways, and channel migration zones)¹¹. In other words, NMFS’ RPA is intended to maintain current degraded habitat conditions.

The problem gets worse. Whereas the RPA calls for no adverse impacts in floodways, channel migration zones, and riparian areas, FEMA’s response promises more habitat degradation and allows for local governments to permit development in these areas, with mitigation. NMFS is supporting this response¹². However, the initial failure of mitigation to alleviate the impacts of development in these areas is one of the reasons why treaty rights aren’t being met and salmon became subject to the ESA¹³. Moreover, this is bad flood policy because this development impairs watershed flood capacity and exacerbates flood damages.

Along with allowing more habitat degradation, FEMA and NMFS are delegating to local governments the responsibility for deciding what riparian/floodplain salmon habitat still retains value and what habitat can be written off as undeserving of protection¹⁴. The federal agencies provide no watershed and salmon population context for how these decisions ought to be made. Nor do NMFS and FEMA explain how writing off salmon habitat is consistent with their obligations to support salmon (and orca) recovery and comply with treaty rights. Moreover, local governments have neither the expertise nor the interest in meeting these obligations.

4) The Marine Mammal Protection Act of 1972 (MMPA) and the ESA have had remarkable success leading to recovery of robust populations of almost all marine mammal populations in North America. Now that most marine mammal populations are recovered, we need to examine how marine mammals can exist in a balanced ecosystem, without the detrimental impacts on other important species, like Puget Sound Chinook and SRKW, both of which are listed under

¹⁰ See NMFS, ESA Section 7 Consultation Final Biological Opinion: Implementation of the National Flood Insurance Program in the State of Washington, Phase One Document – Puget Sound Region, NMFS Tracking No. 2006-00472) (September 22, 2008) at 3. See also *National Wildlife Federation v. FEMA*, 345 F. Supp. 2d 1151, 1163-65 (W.D. Wash. 2004).

¹¹ See NMFS, ESA Section 7 Consultation Final Biological Opinion: Implementation of the National Flood Insurance Program in the State of Washington, Phase One Document – Puget Sound Region, NMFS Tracking No. 2006-00472) (September 22, 2008) Appendix 4 at 222-223.

¹² Public statements by NMFS staff at May 2, 2011 workshop instructing local governments how to comply with the RPA and flood insurance requirements. See also Letter from Dan Siemann, National Wildlife Federation, to Will Stelle, NMFS, and Ken Murphy, FEMA (May 17, 2011).

¹³ As recently conceded by the Washington Department of Ecology: “Estimates of mitigation success vary, but local, regional, and national studies show that most mitigation projects fail to fully achieve their intended goals and are not effectively replacing lost or damaged resources, habitats, and functions. We are not even close to achieving the goal of no net loss for wetlands and other aquatic habitats.” See WDOE, Making Mitigation Work: Report of the Mitigation that Works Forum (December 2008) at 1.

¹⁴ FEMA’s Model Ordinance, and apparently NMFS’ interpretation of its RPA, allows local governments to decide (regardless of expertise): (a) whether a given piece of floodplain or riparian habitat retains any fish habitat functions (See FEMA Revised Model Ordinance at 46 (commentary)); (b) whether a proposed action may affect any of these habitat functions (*Id.* at 52, §7.7(d)); and (c) how those impacts should be mitigated (*Id.* at 52-53, §7.8).

the ESA. Predation of Chinook by pinnipeds is estimated to be 190,000 to 260,000 adults annually.¹⁵ In 2015, pinnipeds consumed twice as much Chinook as resident killer whales and six times that of commercial and recreational fisheries.¹⁶ Harbor seals and California sea lions have been determined to be at their Optimum Sustainable Population (OSP), an abundance level which results in the maximum productivity of the population or the species, *keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element*. Achieving OSP is one of the primary objectives of the MMPA. Avian predation is one of the primary drivers in smolt mortality of ESA-listed salmon in the Columbia River.¹⁷ In 2011, avian predators consumed approximately 23 million smolts.

As it reinitiates consultation, NOAA should consider the significant impact of pinniped and avian predation on Chinook abundance and SRKW health and ensure that any new management measures do not fall on fisheries. Instead, NOAA should seek to rectify conflicts in the implementation of the MMPA and ESA, when abundant, non-listed pinnipeds are having detrimental effects on several ESA-listed species and, consequently, the health of the ecosystem.

5) The Environmental Protection Agency and Army Corps of Engineers are currently proposing¹⁸ to roll back regulations that extended the designation of Waters of the United States so that Clean Water Act regulations extend to headwaters, wetlands, and other important salmon habitat that flows into Puget Sound and the Pacific Ocean. This rule change will have a significant impact on treaty resources, particularly salmon. We have not heard whether NOAA intends to undertake a Section 7 consultation on this action given its potential to impact threatened Chinook and endangered SRKW.

Impacts of Treaty Tribal Actions on SRKW

Tribal fisheries have very little overlap with SRKW foraging. Most fisheries take place in terminal areas after the fish have already escaped all other fisheries as well as orcas and other predators. Treaty tribal preterminal fisheries have very little overlap in time and space with SRKW foraging or on stocks that comprise the bulk of SRKW diets. The primary preterminal treaty tribal ocean fishery for salmon is the treaty troll fishery. It takes place from May to September and does not overlap with aggregations of Chinook at the mouths of rivers where SRKW seem to forage most often. K and L pods have been observed feeding in the spring off the Columbia River on returning spring Chinook before the treaty troll fishery occurs. Furthermore, treaty tribal fisheries have reduced significantly since the 80s in response to declining availability (particularly from ongoing habitat loss¹⁹), Endangered Species Act listing of some stocks and the associated conservation actions that come with that, and other restrictions in the face of conservation concerns.

¹⁵ Chasco, B., I. Kaplan, A. Thomas, A. Acevedo-Gutiérrez, D. Noren, M. Ford, M. Hanson, J. Scordino, S. Jeffries, K. Marshall, A. Shelton, C. Matkin, B. Burke, and E. Ward. 2017. *Competing tradeoffs between increasing marine mammal predation and fisheries harvest of Chinook salmon*. Scientific Reports. 7: 15439.

¹⁶ Ibid.

¹⁷ Hostetter, N. J., Evans, A. F., Cramer, B. M., Collis, K., Lyons, D. E. and Roby, D. D. (2015), Quantifying Avian Predation on Fish Populations: Integrating Predator-Specific Deposition Probabilities in Tag Recovery Studies. Transactions of the American Fisheries Society, 144: 410-422. doi:10.1080/00028487.2014.988882

¹⁸ 82 FR 34899

¹⁹ 2016 State of Our Watersheds, A Report of the Western Washington Treaty Tribes.

The tribes are undertaking the hard work of salmon recovery, and that will improve the prospects for SRKW as well. Examples include, but are not limited to, the following. The Skokomish Tribe is establishing a spring Chinook run, which will provide more food during times when prey is otherwise less available. The Elwha Tribe spent years getting the dams removed from the Elwha River—we are just starting to see the benefits in terms of returning spawners. Our member tribes litigated the “Culvert Case”²⁰ and are in the process of working with the state to meet the Injunction to improve fish passage. We have also worked diligently over the last several years to renegotiate the Pacific Salmon Treaty²¹ which includes reduced interceptions of natural Chinook stocks to increase escapement as well as habitat restoration and hatchery supplementation for critical stocks (i.e. as part of the implementation).

Conclusion

The treaty tribes have provided analyses to NOAA showing the lack of overlap between our fisheries and identified SRKW foraging hotspots during the summer and fall; however, there seems to be a reluctance on the part of the federal government to distinguish treaty tribal fisheries from other fishery impacts in their effects on SRKW. NOAA also continues to be vague as to what Chinook stocks and forage areas are important to SRKWs during the winter and spring months. To date the harvest framework approach, as it has been presented to the tribes, lumps all fisheries together, leaving allocation of the sharing of those impacts to either the state and tribal co-managers or the Pacific Fishery Management Council. This is not consistent with NOAA’s trust responsibility, treaty rights, or the conservation necessity principle.

NOAA may decide that they need to take action in regards to harvest; however, they have not met the conservation necessity standard to curtail treaty tribal fisheries (i.e. after all other means have been exhausted). To the extent that changes to harvest are required, the tribes expect treaty rights to be honored as the supreme law of the land under the United States Constitution²². We expect NOAA to uphold its trust responsibility to protect treaty resources and the exercise of those rights. We are calling on NOAA as our federal trustee to engage each affected tribe in government to government consultation prior to proposing any action that may directly or indirectly impact exercise of the treaty right or any treaty trust resource.

Finally, with regard to the proposed technical working group and advisory panel that NOAA is asking PFMC to set up, the tribes expect to have the proper representation and expertise on any workgroups exploring interactions between fisheries and SRKW foraging. We also expect that the expertise that fisheries managers are providing either through the Salmon Technical Team or this Ad Hoc Workgroup will provide the data on salmon aggregations; however, it is incumbent on NOAA to provide contemporary, up-to-date data along the lines of the presentation²³ that we received when we requested information on feeding aggregations along the outer coast. We note that the Hanson 2015 presentation that we have seen represents a distribution that is different

²⁰ *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017).

²¹ Treaty Between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon (*including amendments provisionally applied as of January 1, 2019*).

²² United States Constitution, Article VI, Clause 2.

²³ B. Hanson. 2015. Distribution and Diet of Southern Resident Killer Whales: Program Review presentation. NWFSC unpublished data. July 28, 2015.

from the seasonal distribution of run timing for stocks of concern identified by NOAA and WDFW²⁴.

²⁴ NOAA/WDFW 2018. Southern Resident Killer Whale Priority Chinook Stocks. June 22, 2018.