

## **WRITTEN TRIBAL TESTIMONY ON SOUTHERN RESIDENT KILLER WHALE ENDANGERED SPECIES ACT CONSULTATIONS**

The Western Washington treaty tribes wish to supplement and underscore key points from our April 2019 testimony ([Agenda Item F.3.a, Supplemental Tribal Report 1, April 2019](#)) regarding this issue, as action is pending on this topic for the ocean as well as Puget Sound. Our primary concern remains the lack of substantive engagement of the tribes and lack of a comprehensive recovery plan which addresses equally all identified factors for decline.

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 the Southern Resident Killer Whale (SRKW) 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 principle<sup>1</sup>. Affected tribes also have the right to individual government-to-government consultation prior to any action that may affect our rights.

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 SRKWs. 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 for Puget Sound, as it has been presented to the tribes, lumps all fisheries together, leaving allocation of the sharing of allowable impacts to SRKW to state and tribal co-managers after the initial apportionment is determined by the issuance of a Biological Opinion on a federal action. 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 Constitution<sup>2</sup>. 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 affected tribes in individual government-to-government consultations prior to proposing any action that may directly or indirectly impact the exercise of the treaty right or any treaty trust resource.

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<sup>1</sup> 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).

<sup>2</sup> United States Constitution, Article VI, Clause 2.