

THE HONORABLE RICARDO S. MARTINEZ

UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, et al.,

Case No. C70-9213

Plaintiffs,

DECLARATION OF JOE FRAWLEY

v.

STATE OF WASHINGTON, et al.,

Noted For: October 30, 2020

Defendants.

JOE FRAWLEY declares under penalty of perjury under the laws of the State of Washington that the following is true and correct.

1. I am over 18 years of age and competent to testify, and make this declaration based upon my own personal knowledge.

2. Attached hereto as Exhibit A is an excerpt of the Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat (EFH) Response.

3. Attached hereto as Exhibit B is an excerpt of the transcript of Deposition Upon Oral Examination of Ron Warren from proceeding on December 20, 2019 in Thurston County Superior Court under cause number 19-2-01464-34.

1 4. Attached hereto as Exhibit C is a letter from Barry Thom, Regional Administrator for
2 United States Department of Commerce, to Honorable Lorraine Loomis, Chair of Northwest
3 Indian Fisheries Commission; and Dr. Jim Unsworth, Director of Washington Department of
4 Fish and Wildlife, dated February 10, 2017.

5 5. Attached hereto as Exhibit D is an excerpt of the Verbatim Report of Proceedings from
6 proceedings on June 12, 2020 in Thurston County Superior Court under cause number 19-2-
7 02319-34.
8

9
10 DATED this 30th day of October, 2020.

11
12
13
14 
JOE D. FRAWLEY, WSB#41814
Attorney for Fish Northwest
15
16
17
18
19
20
21
22
23
24
25
26

EXHIBIT A

Endangered Species Act (ESA) Section 7(a)(2) Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat (EFH) Response

Impacts of the Role of the BIA Under its Authority to Assist with the Development of the 2020-2021 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 2020

NMFS Consultation Number: WCR-2020-00960

Action Agency: Bureau of Indian Affairs (BIA)
United States Fish and Wildlife Service (USFWS)
National Marine Fisheries Service (NMFS)

Affected Species and NMFS' Determinations:

ESA-Listed Species	Status	Is Action Likely to Adversely Affect Species?	Is Action Likely To Jeopardize the Species?	Is Action Likely to Adversely Affect Critical Habitat?	Is Action Likely To Destroy or Adversely Modify Critical Habitat?
Puget Sound Chinook Salmon (<i>Oncorhynchus tshawytscha</i>)	Threatened	Yes	No	No	No
Puget Sound Steelhead (<i>O. mykiss</i>)	Threatened	Yes	No	No	No
Puget Sound/Georgia Basin (PS/GB) bocaccio (<i>Sebastes paucispinis</i>)	Endangered	Yes	No	Yes	No
PS/GB yelloweye rockfish (<i>S. ruberrimus</i>)	Threatened	Yes	No	Yes	No
Southern Resident killer whales (<i>Orcinus orca</i>)	Threatened	Yes	No	Yes	No
Eulachon (<i>Thaleichthys pacificus</i>)	Threatened	No	No	No	No
Green Sturgeon (<i>Acipenser medirostris</i>)	Threatened	No	No	No	No
Humpback whale (<i>Megaptera novaeangliae</i>) Mexico DPS	Threatened	Yes	No	No Designated Critical Habitat	No Designated Critical Habitat
Humpback whale (<i>Megaptera novaeangliae</i>) Central America DPS	Endangered	Yes	No	¹ No Designated Critical Habitat	¹ No Designated Critical Habitat

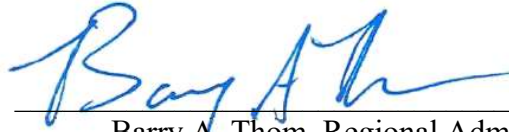
Fishery Management Plan That Identifies EFH in the Project Area	Does Action Have an Adverse Effect on EFH?	Are EFH Conservation Recommendations Provided?
Pacific Coast Salmon	No	No

¹ Critical habitat was proposed for humpback whales along the West Coast of the United States in October 2019. The final rule has not gone into place.

Fishery Management Plan That Identifies EFH in the Project Area	Does Action Have an Adverse Effect on EFH?	Are EFH Conservation Recommendations Provided?
Coastal Pelagic Species	No	No
Pacific Coast Groundfish	Yes	Yes

Consultation Conducted By: National Marine Fisheries Service, West Coast Region

Issued by:



Barry A. Thom, Regional Administrator
West Coast Region
National Marine Fisheries Service

Date: May 8, 2020 (Date expires: April 30, 2021)

TABLE OF CONTENTS

TABLE OF CONTENTS	3
Table of Figures	7
Table of Tables	10
LIST OF ACRONYMS	13
1. INTRODUCTION	18
1.1 Background	18
1.2 Consultation History	19
1.3 Proposed Federal Action	21
2. ENDANGERED SPECIES ACT: BIOLOGICAL OPINION AND INCIDENTAL TAKE STATEMENT	25
2.1 Analytical Approach	26
2.2 Range-wide Status of the Species and Critical Habitat	28
2.2.1 Status of Listed Species	28
2.2.1.1 Status of Puget Sound Chinook	31
2.2.1.2 Status of Puget Sound Steelhead	42
2.2.1.3 Status of Puget Sound/Georgia Basin Rockfish	60
2.2.1.4 Status of Southern Resident Killer Whales	72
<i>May – September</i>	86
<i>October – December</i>	87
<i>January – April</i>	87
2.2.1.5 Status of the Mexico and Central America DPSs of Humpback Whales	95
Geographic Range and Distribution	97
Abundance, Productivity and Trends	98
Limiting Factors and Threats	99
2.2.2 Status of Critical Habitat	103
2.2.2.1 Puget Sound Chinook	103
2.2.2.2 Puget Sound Steelhead	104
2.2.2.3 Puget Sound/Georgia Basin Rockfish	106
2.2.2.4 Southern Resident Killer Whale	107
2.3 Action Area	111
2.4 Environmental Baseline	112
2.4.1 Puget Sound Chinook and Steelhead	113

<i>Climate change and other ecosystem effects</i>	113
2.4.2 Puget Sound/Georgia Basin Rockfish	131
2.4.3 Southern Resident Killer Whales	133
Hatchery programs to support critical Chinook populations and increase SRKW prey base	137
2.4.4 Mexico and Central America DPSs of Humpback Whales	146
2.4.5 Scientific Research	150
2.5 Effects of the Action on Species and Designated Critical Habitat	152
2.5.1 Puget Sound Chinook	152
2.5.1.1 Assessment Approach	152
2.5.1.2 Effects on Puget Sound Chinook	159
2.5.1.3 Effects on Critical Habitat	178
2.5.2 Puget Sound Steelhead	179
2.5.2.1 Assessment Approach	179
2.5.2.2 Effects on Species	181
2.5.2.3 Effects on Critical Habitat	183
2.5.3 Puget Sound/Georgia Basin Rockfish	184
2.5.3.1 Bycatch Estimates and Effects on Abundance	187
2.5.3.1.1 Yelloweye Rockfish	189
2.5.3.1.2 Bocaccio	189
2.5.3.1 Effects on Populations	190
2.5.3.2 Effects on Spatial Structure and Connectivity	190
2.5.3.3 Effects on Diversity and Productivity	191
2.5.3.4 Effects on Critical Habitat	191
2.5.4 Southern Resident Killer Whales	193
2.5.4.1 Effects on the Species	193
Limitations and uncertainties	216
2.5.4.2 Effects on Critical Habitat	218
2.5.5 Central America and Mexico DPSs of Humpback Whales	220
2.5.6 Fishery Related Research Affecting Puget Sound Chinook Salmon and Steelhead	226
2.6 Cumulative Effects	235
2.7 Integration and Synthesis	237
2.7.1 Puget Sound Chinook	238

2.7.2 Puget Sound Steelhead	245
2.7.3 Puget Sound/Georgia Basin Rockfish	247
2.7.4 Southern Resident Killer Whales and Critical Habitat	250
2.7.5 Central America and Mexico DPSs of Humpback whales	257
2.8 Conclusion	258
2.8.1 Puget Sound Chinook	258
2.8.2 Puget Sound Steelhead	258
2.8.3 Puget Sound/Georgia Basin Rockfish	259
2.8.4 Southern Resident Killer Whales	259
2.8.5 Central America and Mexico DPSs of Humpback whales	259
2.9 Incidental Take Statement	259
2.9.1 Amount or Extent of Take	260
2.9.1.1 Puget Sound Chinook	260
2.9.1.2 Puget Sound Steelhead	260
2.9.1.3 Puget Sound/Georgia Basin Rockfish	261
2.9.1.4 Southern Resident Killer Whales	262
2.9.1.5 Central America and Mexico DPSs of Humpback Whales	262
2.9.2 Effect of the Take	263
2.9.2.1 Reasonable and Prudent Measures	263
2.9.2.2 Terms and Conditions	264
2.10 Conservation Recommendations	268
2.11 Reinitiation of Consultation	269
2.12 “Not Likely to Adversely Affect” Determinations	269
3. MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT ESSENTIAL FISH HABITAT CONSULTATION	271
3.1 Essential Fish Habitat Affected by the Project	272
3.2 Adverse Effects on Essential Fish Habitat	272
3.2.1 Salmon	272
3.2.2 Groundfish	275
3.2.3 Coastal Pelagic	275
3.3 Essential Fish Habitat Conservation Recommendations	275
3.4 Statutory Response Requirement	276
3.5 Supplemental Consultation	277

4. DATA QUALITY ACT DOCUMENTATION AND PRE-DISSEMINATION REVIEW	278
4.1 Utility	278
4.2 Integrity	278
4.3 Objectivity	278
5. REFERENCES	279
Appendix A	336
Appendix B	342

Table of Figures

Figure 1. Puget Sound Chinook populations.	35
Figure 2. The Puget Sound Steelhead DPS showing MPGs and DIPs. The steelhead MPGs include the Northern Cascades, Central & Sound Puget Sound, and the Hood Canal & Strait of Juan de Fuca.	44
Figure 3. Scatter plot of the probabilities of viability for each of the 32 steelhead populations in the Puget Sound DPS as a function of VSP parameter estimates of influence of diversity and spatial structure on viability (Puget Sound Steelhead Technical Recovery Team 2011).	49
Figure 4. Trends in estimated total (black line) and natural (red line) population spawning abundance of Puget Sound steelhead. The circles represent annual raw spawning abundance data and the gray bands represent the 95% confidence intervals around the estimates (NWFSC 2015).	52
Figure 5. Trends in population productivity of Puget Sound steelhead (NWFSC 2015).	57
Figure 6. Total harvest rates on natural steelhead in Puget Sound Rivers (WDFW (2010) in NWFSC (2015).	58
Figure 7. Yelloweye rockfish DPS area.	61
Figure 8. Bocaccio DPS area.	62
Figure 9. Yelloweye rockfish length frequency distributions (cm) binned within four decades.	69
Figure 10. Bocaccio length frequency distributions (cm) within four decades. The vertical line depicts the size at which about 30 percent of the population comprised fish larger than the rest of the population in the 1970s, as a reference point for a later decade.	70
Figure 11. Population size and trend of Southern Resident killer whales, 1960-2019. Data from 1960-1973 (open circles, gray line) are number projections from the matrix model of Olesiuk et al. (1990). Data from 1974-2019 (diamonds, black line) were obtained through photo-identification surveys of the three pods (J, K, and L) in this community and were provided by the Center for Whale Research (unpublished data) and NMFS (2008g). Data for these years represent the number of whales present at the end of each calendar year.	74
Figure 12. Southern Resident killer whale population size projections from 2016 to 2066 using 2 scenarios: (1) projections using demographic rates held at 2016 levels, and (2) projections using demographic rates from 2011 to 2016. The pink line represents the projection assuming future rates are similar to those in 2016, whereas the blue represents the scenario with future rates being similar to 2011 to 2016 (NMFS 2016j).	75
Figure 13. Geographic range of Southern Resident killer whales (reprinted from Carretta et al. (2017a)).	77
Figure 14. Duration of occurrence model output for J pod tag deployments (Hanson et al. 2017). “High use areas” are illustrated by the 0 to > 3 standard deviation pixels.	79
Figure 15. Duration of occurrence model for all unique K and L pod tag deployments (Hanson et al. 2017). “High use areas” are illustrated by the 0 to > 3 standard deviation pixels.	80
Figure 16. Deployment locations of acoustic recorders on the U.S. west coast from 2006 to 2011 (Hanson et al. 2013).	82
Figure 17. Locations of passive acoustic recorders deployed beginning in the fall of 2014 (Hanson et al. 2017).	83

Figure 18. Counts of detections at each northern recorder site by month from 2014-2017 (Emmons et al. 2019). Areas include Juan de Fuca (JF); Cape Flattery Inshore (CFI); Cape Flattery Mid Shelf (CFM); Cape Flattery Offshelf (CFO); Cape Flattery Deep(CFD); Sand Point and La Push (SP/LP); and Quinault Deep (QD).	83
Figure 19. Swiftsure Bank study site off the coast of British Columbia, Canada in relation to the 2007 Northern Resident critical habitat (NE Vancouver Island) and 2007 Southern Resident killer whale critical habitat (inshore waters) and the 2017 Northern Resident and Southern Resident expansion of critical habitat (Riera et al. 2019).	84
Figure 20. Number of days with acoustic detections of SRKWs at Swiftsure Bank from August 2009 – July 2011. Red numbers indicate days of effort (Riera et al. 2019).	85
Figure 21. Location and species for scale/tissue samples collected from Southern Resident killer whale predation events in outer coastal waters (NMFS 2019i).	88
Figure 22. Specific areas containing essential habitat features (Figure 9 reproduced from (NMFS 2019i)).	109
Figure 23. Puget Sound Action Area, which includes the Puget Sound Chinook ESU and the western portion of the Strait of Juan de Fuca in the United States.	112
Figure 24. Puget Sound Commercial Salmon Management and Catch Reporting Areas (https://wdfw.wa.gov/sites/default/files/2019-03/wac_220-022-030.pdf).	181
Figure 25. Sidescan sonar images of derelict nets located on Point Roberts Reef of the San Juan basin. Suspended nets have a larger acoustic shadow than nets flush with the bottom. Image used by permission of Natural Resource Consultants (NRC).	192
Figure 26. Number of days of SRKW occurrence in inland waters number in June for each year from 2003 to 2016 (data from The Whale Museum).	196
Figure 27. Foraging events observed in the Salish Sea in September 2017 (Shedd 2019).	197
Figure 28. Foraging events observed in the Salish Sea from May to September 2004 to 2008 (Hanson et al. 2010).	198
Figure 29. Puget Sound Fishing Zone Map and Catch Reporting Areas (reprinted from Cunningham (2020)).	199
Figure 30. Average overlap of tribal fishing vessels (measured by unique fish tickets) and Southern Resident killer whale sightings in the summer months (FRAM timestep 3, July – September) (reprinted from Loomis (2020)).	201
Figure 31. Monthly maximum (top) and average numbers (bottom) of vessels near Southern Resident killer whales by vessel type and activity in 2017 (Figures from Seely (2017)).	203
Figure 32. Incidents in 2019 recorded by vessel type (reprinted from Shedd 2020).	203
Figure 33. An approximation of the Voluntary “No-Go” Whale Protection Zone, from Mitchell Bay to Cattle Point (Shaw 2018).	206
Figure 34. Annual mortality indices for a) Northern Resident and b) Southern Resident killer whales and c) abundance index of Chinook salmon from 1979 to 2003 (reprinted from Ford et al. (2010)).	210
Figure 35. Puget Sound Fishing Zone Map and Catch Reporting Areas (Source: 2006 WDFW commercial salmon regulations, Prepared by Preston Gates & Ellis LLP).	223
Figure 36. Location of proposed sampling site for PSC chum genetic sampling study.	226
Figure 37. Muckleshoot Indian Tribe proposed warm water test fishery zones (1-8) and exclusion areas (cross-hatched) that will not be fished in order to minimize the potential for adult	

steelhead encounters (Mercier 2020). 229

Figure 38. Proposed WDFW study area—Lake Washington Ship Canal (Mercier 2020). 232

Table of Tables

Table 1. NMFS ESA determinations regarding listed species that may be affected by Puget Sound salmon fisheries and the duration of the decision (4(d) Limit or biological opinion (BO)). Only the decisions currently in effect and the listed species represented by those decisions are included.	21
Table 2. Extant PS Chinook salmon populations in each geographic region (Ruckelshaus et al. 2006).	33
Table 3. Estimates of escapement and productivity (recruits/spawner) for Puget Sound Chinook populations. Natural origin escapement information is provided where available. Populations at or below their critical escapement threshold are bolded . For several populations, hatchery contribution to natural spawning data are limited or unavailable.	39
Table 4. Long-term trends in abundance and productivity for Puget Sound Chinook populations. Long-term, reliable data series for natural-origin contribution to escapement are limited in many areas.	41
Table 5. Puget Sound steelhead 5-year mean fraction of natural-origin spawners ¹ for 22 of the 32 DIPs in the DPS for which data are available (NWFSC 2015).	50
Table 6. 5-year geometric mean of raw natural spawner counts for Puget Sound steelhead (total spawner H and W counts). A value only in parentheses means that a total spawner count was available but no, or only one estimate (within the 5-year (yr) period) of natural-origin spawners was available. Values not in parentheses, where available, represent the 5-year geometric mean of natural-origin spawners for each period. Percent change between the most recent two 5-year periods is shown on the far right (NWFSC 2015).	53
Table 7. Current abundance and recovery goals for Puget Sound steelhead in the North Cascades MPG based on recruits/spawner (R/S) in years of high productivity and low productivity. Current abundance is the five-year average terminal run size (escapement + harvest) for return years 2012 – 2016, unless otherwise noted or not available (n/a). We suspect that our methods overestimated the historical steelhead abundance of populations composed of many small independent streams relative to those in larger rivers (NMFS 2019h).	54
Table 8. Current abundance and recovery goals for Puget Sound steelhead in the Central and South Sound and Hood Canal and Strait of Juan de Fuca MPGs based on R/S in years of high productivity and low productivity. Current abundance is the five-year average terminal run size (escapement + harvest) for return years 2012 – 2016, unless otherwise noted or not available (n/a). We suspect that our methods overestimated the historical steelhead abundance of populations composed of many small independent streams relative to those in larger rivers (NMFS 2019h).	55
Table 9. Anticipated Maximum Annual Takes for Bocaccio, Yelloweye Rockfish by the fisheries within the WDFW ITP (2012 – 2017) (WDFW 2012).	72
Table 10. Satellite-linked tags deployed on Southern resident killer whales 2012-2016. (Hanson et al. 2018). This was part of a collaborative effort between NWFSC, Cascadia Research Collective, and the University of Alaska.	78
Table 11. Summary of the priority Chinook salmon stocks (adapted from NOAA and WDFW (2018)).	90
Table 12. Proportional estimates of each DPS that will be applied in waters off of Washington/South British Columbia. E=Endangered, T=Threatened. NL = Not Listed (adapted	

from Wade (2017))	97
Table 13. Average 2009 to 2016 total and SUS ERs for Puget Sound Chinook management units (see Table 3 for correspondence to populations). This encompasses the provisions of the 2009-2018 Pacific Salmon Treaty Chinook Annex.	115
Table 14. Average marine area catch of steelhead from 2001/02 to 2006/07 and 2007/08 to 2018/19 time periods.....	117
Table 15. Steelhead impact levels as proposed by the Skagit River RMP. Impact levels include both treaty harvest and recreational catch and release fisheries and are tiered based on forecasted terminal run levels for natural-origin steelhead (Sauk-Suiattle Indian Tribe et al. 2016).	118
Table 16. Tribal and non-tribal terminal harvest rate (HR) percentages on natural-origin steelhead for a subset of Puget Sound winter steelhead populations for which catch and run size information are available (NMFS 2015c; WDFW and PSTIT 2017a; 2018; 2019; 2020).....	119
Table 17. Puget Sound Hatchery programs that have been addressed in previously completed ESA Section 7 consultations.....	124
Table 18. Beginning Chinook salmon abundances for the Salish Sea during 1992-2016 during the October and April, May and June, and July and September FRAM time steps (refer to (PFMC (2020); Appendix E for starting abundances Oct-April).	139
Table 19. Humpback Whale Entanglements on the West Coast for 2017- August 2019.	147
Table 20. Average annual take allotments for research on listed species in 2014-2019 (Dennis 2020).	150
Table 21. Rebuilding Exploitation Rates by Puget Sound Chinook population. Newly revised RERs (2018) are bolded. Surrogate FRAM-based RERs are italicized.....	153
Table 22. Estimated exploitation rates compared with the applicable management objective for each Puget Sound Chinook Management Unit. Rates exceeding the objective are bolded*.....	157
Table 23. FRAM adult equivalent exploitation rates expected in 2020 ocean and Puget Sound fisheries and escapements expected after these fisheries occur for Puget Sound management units compared with their RERs and escapement thresholds (surrogates in italics). Outcomes expected to exceed at least one population's RER within a management unit (top half of table) or fall below a population's critical escapement thresholds (bottom half of table) are bolded.....	160
Table 24. Mortality estimates (%) by depth bin for canary rockfish and yelloweye rockfish at the surface, from PFMC (2014a).	186
Table 25. Yelloweye rockfish bycatch estimates.	189
Table 26. Bocaccio bycatch estimates.....	189
Table 27. Monthly pod occurrence in inland waters (Olson 2017). J-Pod= yellow, K-Pod= dark blue, J & K-Pod= light blue, J & L-Pod= dark green, and J, K & L-Pods=light green, (p)=partial, and ?=no positive identification on the sightings.	194
Table 28. Average and maximum number of observed days spent by Southern Residents (per pod) in inland waters per month (raw data from The Whale Museum, from 2003-2017).	195
Table 29. Puget Sound Marine Pre-Season Recreational Chinook Seasons in Marine Area 7 (MA7) (2017 – 2020). MSF- Mark Selective Fishing; NS- Non-Selective; NR- Non Retention; Gray shaded cells indicate closed season. Months with split cells change management mid-month (e.g, NR/MSF means non-retention the 1 st -15 th of the month and mark selective fishing the 16 th to the end of the month).	199
Table 30. Estimated starting abundance (beginning of FRAM timestep 1; October) of age 3-5	

Chinook in the “SALISH” Shelton et al. model (Shelton et al. 2019). 2007-2016 represent estimates from post-season FRAM runs (validation round 6.2). The annual abundance reduction and percent reduction are the difference between post-fishing (pre-terminal) September Chinook abundance from the validation runs and Chinook FRAM validation runs with no Puget Sound fishing (Cunningham 2020). Average values indicated in bold font.	213
Table 31. Number of humpback whale sightings and overlap with active fisheries, including test fisheries. Within each month is the number of “unique” whale sightings reported to Orca Network. Cells are shaded if the sightings overlapped with an open gillnet fishery for all or a portion of the month. WCAs open for a short portion of a month were considered open for the full month. WCAs were grouped consistent with the LOAFs. Areas 10, 10A, and 10E along with 13 A-H were grouped to better reflect the movement through these areas. Fraser River Panel Control was assumed to allow gillnet fishing.	223
Table 32. Expected maximum levels of incidental mortality of ESA-listed Lake WA Chinook and steelhead, by life stage, associated with the 2020-2021 MIT Warm water predator-removal studies.	230
Table 33. 5-year geometric mean of raw natural steelhead spawner counts for the Lake Washington/Lake Sammamish watershed, where available (NWFSC 2015).	233
Table 34. Summary of factors considered in assessing risk by population in the Puget Sound Chinook ESU. The colors denote the status of the parameter in each column for each population. Red = higher risk, yellow = medium risk, green = low risk.	244
Table 35. Estimated total annual lethal take for the salmon fisheries and percentages of the listed-rockfish.	248
Table 36. Estimated total takes for the salmon fishery and percentages of the listed-rockfish covered in this Biological Opinion in addition to takes within the environmental baseline.	248

LIST OF ACRONYMS

ACOE	ARMY CORPS OF ENGINEERS
B.C.	BRITISH COLUMBIA
BIA	BUREAU OF INDIAN AFFAIRS
BO	BIOLOGICAL OPINION
BRT	BIOLOGICAL REVIEW TEAM
C&S	CEREMONIAL AND SUBSISTENCE
CA	CALIFORNIA
CFD	CAPE FLATTERY DEEP
CFI	CAPE FLATTERY INDEX
CFM	CAPE FLATTERY MID SHELF
CFO	CAPE FLATTERY OFFSHELF
CFR	CODE OF FEDERAL REGULATIONS
CHART	CRITICAL HABITAT ANALYTICAL REVIEW TEAM
CM	CENTIMETERS
CNP	CENTRAL NORTH PACIFIC
CO ₂	CARBON DIOXIDE
CPUE	CATCH PER UNIT EFFORT
CWT	CODED WIRE TAG
dB	DECIBELS
DDT	DICHLORODIPHENYLTRICHLOROETHANE
DEIS	DRAFT ENVIRONMENTAL IMPACT STATEMENT
DFO	DEPARTMENT OF FISHERIES AND OCEANS
DIP	DEMOGRAPHICALLY INDEPENDENT POPULATION
DNA	DEOXYRIBONUCLEIC ACID
DPER	DAILY ENERGY PREY REQUIREMENT
DPS	DISTINCT POPULATION SEGMENT
DTAGs	DIGITAL ACOUSTIC RECORDING TAGS

E	ENDANGERED
EAR	ECOLOGICAL ACOUSTICAL RECORDER
EFH	ESSENTIAL FISH HABITAT
ER	EXPLOITATION RATES
ESA	ENDANGERED SPECIES ACT
ESCA	ENDANGERED SPECIES CONSERVATION ACT
ESS	EARLY SUMMER-RUN STEELHEAD
ESU	EVOLUTIONARILY SIGNIFICANT UNIT
EWS	EARLY WINTER STEELHEAD
FEIS	FINAL ENVIRONMENTAL IMPACT STATEMENT
FEMA	FEDERAL EMERGENCY MANAGEMENT AGENCY
FR	FEDERAL REGULATION
FRAM	FISHERY REGULATION ASSESSMENT MODEL
GB	GEORGIA BASIN
GSI	GENETIC STOCK IDENTIFICATION
HCSMP	HOOD CANAL SALMON MANAGEMENT PLAN
HGMP	HATCHERY AND GENETIC MANAGEMENT PLAN
HOR	HATCHERY-ORIGIN
HPA	HYDRAULIC PROJECT APPROVAL
HR	HARVEST RATE
HUC5	FIFTH-FIELD HYDROLOGIC UNIT CODE
ITP	INCIDENTAL TAKE PERMIT
ITS	INCIDENTAL TAKE STATEMENT
JF	JUAN DE FUCA
KCAL	KILOCALORIE
KG	KILOGRAM
KHz	KILOHERTZ
KM	KILOMETERS
LOAF	LIST OF AGREED FISHERIES
LOF	LIST OF FISHERIES
LWSC	LAKE WASHINGTON SHIP CANAL

M	METERS
M/SI	MORTALITY AND SERIOUS INJURY
MA	MARINE AREA
MIT	MUCKLESHOOT INDIAN TRIBE
MMAP	MARINE MAMMAL AUTHORIZATION PROGRAM
MMPA	MARINE MAMMAL PROTECTION ACT
MPG	MAJOR POPULATION GROUP
MSA ACT	MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT
MSF	MARK SELECTIVE FISHERY
MSY	MAXIMUM SUSTAINABLE YIELD
MU	MAJOR UNIT
NF	NORTH FORK
NL	NOT LISTED
NMFS	NATIONAL MARINE FISHERIES SERVICE
NMI	NAUTICALMILE
NOAA	NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NOF	NORTH OF FALCON
NOR	NATURAL-ORIGIN
NPFMC	NORTH PACIFIC FISHERIES MANAGEMENT COUNCIL
NPGO	NORTH PACIFIC GYRE OSCILLATION
NR	NON RETENTION
NRC	NATURAL RESOURCE CONSULTANTS
NRCS	NATURAL RESOURCES CONSERVATION SERVICE
NWFSC	NORTHWEST FISHERY SCIENCE CENTER
NWTRC	U.S. NAVY'S NORTHWEST TRAINING RANGE COMPLEX
OA	OCEAN ACIDIFICATION
OR	OREGON
PAH	POLYCYCLIC AROMATIC HYDROCARBON
PAL	PASSIVE AQUATIC LISTENER
PBDEs	POLYBROMINATED DIPHENYL ETHERS

PBFs	PHYSICAL OR BIOLOGICAL FEATURES
PBR	POTENTIAL BIOLOGICAL REMOVAL
PCBs	POLYCHLORINATED BIPHENYLS
PCE	PRIMARY CONSTITUENT ELEMENT
PDO	PACIFIC DECADAL OSCILLATION
PFMC	PACIFIC FISHERY MANAGEMENT COUNCIL
PLAN	PUGET SOUND STEELHEAD RECOVERY PLAN
POP	PERSISTENT ORGANIC POLLUTANT
PPB	PARTS PER BILLION
PRA	POPULATION RECOVERY APPROACH
PS	PUGET SOUND
PSA	PUGET SOUND ANGLERS
PSC	PACIFIC SALMON COMMISSION
PSIT	PUGET SOUND TREATY INDIAN TRIBES
PSSMP	PUGET SOUND SALMON AND STEELHEAD MANAGEMENT PLAN
PSSTRT	PUGET SOUND STEELHEAD TECHNICAL RECOVERY TEAM
PST	PACIFIC SALMON TREATY
PSTRT	PUGET SOUND TECHNICAL RECOVERY TEAM
PVA	POPULATION VIABILITY ANALYSIS
PWWA	PACIFIC WHALE WATCHERS ASSOCIATION
QD	QUINULT DEEP
QET	QUASI-EXTINCTION THRESHOLD
R	INTRINSIC RATE OF NATURAL INCREASE
R/s	RECRUITS/SPAWNER
RAAMF	RISK ASSESSMENT AND ADAPTIVE MANAGEMENT FRAMEWORK
RCA	ROCKFISH CONSERVATION AREA
RCW	REVISED CODE OF WASHINGTON
RERs	REBUILDING EXPLOITATION RATES
RM	RIVER MILE
RMP	RESOURCE MANAGEMENT PLAN
ROV	REMOTELY OPERATED VEHICLE

RPA	REASONABLE AND PRUDENT ALTERNATIVE
SAR	STOCK ASSESSMENT REPORT
SBC	SOUTHERN BRITISH COLUMBIA
SEAK	SOUTHEAST ALASKA
SF	SOUTH FORK
SJF	STRAIT OF JUAN DE FUCA
SP/LP	SAND POINT AND LA PUSH
SRKW	SOUTHERN RESIDENT KILLER WHALE
SSPS	SHARED STRATEGY FOR PUGET SOUND
SUS	SOUTHERN UNITED STATES
SWFSC	SOUTHWEST FISHERY SCIENCE CENTER
SWVCI	SOUTHWEST VANCOUVER ISLAND
T	THREATENED
TRT	TECHNICAL RECOVERY TEAM
TTS	TEMPORARY THRESHOLD SHIFTS
US	UNITED STATES
USFWS	UNITED STATES FISH AND WILDLIFE SERVICE
USGS	UNITED STATES GEOLOGICAL SURVEY
VRAP	VIABLE RISK ASSESSMENT PROCEDURE
VSP	VIABLE SALMONID POPULATIONS
WA	WASHINGTON
WCVI	WEST COAST VANCOUVER ISLAND
WDFW	WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
WNP	WESTERN NORTH PACIFIC
WORKGROUP	AD HOC SOUTHERN RESIDENT KILLER WHALE WORKGROUP
YR	YEAR
μPa	MICROPASCAL

1. INTRODUCTION

This Introduction section provides information relevant to the other sections of this document and is incorporated by reference into Sections 2 and 3 below.

1.1 Background

The National Marine Fisheries Service (NMFS) prepared the biological opinion (opinion) and incidental take statement portions of this document in accordance with section 7(b) of the Endangered Species Act (ESA) of 1973, as amended (16 U.S.C. 1531 et seq.), and implementing regulations at 50 CFR 402.

We also completed an essential fish habitat (EFH) consultation on the proposed actions, in accordance with section 305(b)(2) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1801 et seq.) and implementing regulations at 50 CFR 600.

We completed pre-dissemination review of this document using standards for utility, integrity, and objectivity in compliance with applicable guidelines issued under the Data Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Public Law 106-554). The document will be available through the NOAA Institutional Repository (<https://repository.library.noaa.gov/>), after approximately two weeks. A complete record of this consultation is on file at the Seattle NMFS West Coast Regional office.

This document constitutes the NMFS' biological opinion under section 7 of the ESA and MSA Essential Fish Habitat consultation for federal actions proposed by NMFS, the Bureau of Indian Affairs (BIA), and the United States Fish and Wildlife Service (USFWS). The federal actions include:

- (1) The BIA's authority to assist with the development and implementation of the co-managers 2020-2021 Puget Sound Harvest Plan, as reflected in BIA's April 20, 2020 request (supplemented on April 24, 2020) for consultation to NMFS, inclusive of BIA's Biological Assessment and Environmental Assessment.
- (2) The proposed USFWS authorization of fisheries, as party to the Hood Canal Salmon Management Plan (*U.S. v. Washington*, Civil No. 9213, Ph. I (Proc. 83-8)), from May 1, 2020-April 30, 2021.
- (3) Two actions associated with the management of the 2020 U. S. Fraser Panel sockeye and pink fisheries under the Pacific Salmon Treaty (PST):
 - (a) the U.S. government's relinquishment of regulatory control to the bilateral Fraser Panel within specified time periods and,
 - (b) the issuance of orders by the Secretary of Commerce that establish fishing times and areas consistent with the in-season implementing regulations of the U.S. Fraser River Panel. This regulatory authority has been delegated to the Regional Administrator of NMFS' West Coast Region.

This opinion considers impacts of the proposed actions on the Puget Sound Chinook salmon Evolutionarily Significant Unit (ESU), the Puget Sound Steelhead Distinct Population Segment (DPS), the Southern Resident killer whale DPS, the Mexico DPS of humpback whales (*Megaptera novaeangliae*), the Central America DPS of humpback whales (*M. novaeangliae*), and two listed Puget Sound rockfish DPSs. Other listed species occurring in the action area are either covered under existing, long-term ESA opinions or 4(d) determinations as shown in Table 1, or NMFS has determined that the proposed actions are not likely to adversely affect the species (Section 2.12).

NMFS proposed critical habitat for humpback whales on October 9, 2019 (84 Federal Regulation (FR) 54354). The area proposed stretches across the majority of the west coast of the United States and includes 44,119 nautical miles (nmi)² for the Western North Pacific DPS, 12,966 nmi² for the Central American DPS, and 30,527 nmi² for the Mexico DPS. The proposed nearshore critical habitat boundary in Washington is defined by the 50-m isobath, and the offshore boundary is defined by the 1,200-m isobath relative to MLLW. Critical habitat also includes waters within the U.S. portion of the Strait of Juan de Fuca to an eastern boundary line at Angeles Point at 123°33' W. In November, 2019 the formal comment period deadline was extended until January 31, 2020 (84 FR 65346). Because the proposed humpback whale critical habitat has limited overlap with the action area and the action is not likely to result in meaningful bycatch of humpback whale prey, humpback whale critical habitat is not discussed further in this opinion.

1.2 Consultation History

On July 10, 2000, NMFS issued the ESA 4(d) Rule establishing take prohibitions for 14 threatened salmon ESUs and steelhead DPSs, including the Puget Sound Chinook Salmon ESU (65 Fed. Reg. 42422, July 10, 2000). The ESA 4(d) Rule provides limits on the application of the take prohibitions, i.e., take prohibitions would not apply to the plans and activities set out in the rule if those plans and activities met the rule's criteria. One of those limits (Limit 6, 50 CFR 223.203(b)(6)) applies to joint tribal and state resource management plans. In 2005, as part of the final listing determinations for 16 ESUs of West Coast salmon, NMFS amended and streamlined the previously promulgated 4(d) protective regulations for threatened salmon and steelhead (70 Fed. Reg. 37160, June 28, 2005). Under these regulations, the same set of 14 limits was applied to all threatened Pacific salmon and steelhead ESUs or DPSs. As a result of the Federal listing of the Puget Sound Steelhead DPS in 2007 (72 Fed. Reg. 26722, May 11, 2007), NMFS applied the 4(d) protective regulations adopted for the other Pacific salmonids (70 Fed. Reg. 37160, June 28, 2005) to Puget Sound steelhead (73 Fed. Reg. 55451, September 25, 2008).

Since 2001, NMFS has received, evaluated, and approved a series of jointly developed resource management plans (RMP) from the Puget Sound Treaty Indian Tribes (PSIT) and the Washington Department of Fish and Wildlife (WDFW) (collectively the co-managers) under Limit 6 of the 4(d) Rule. These RMPs provided the framework within which the tribal and state jurisdictions jointly managed all recreational, commercial, ceremonial, subsistence and take-home salmon fisheries, and steelhead gillnet fisheries impacting listed Chinook salmon within

the greater Puget Sound area. The most recent RMP approved in 2011 expired April 30, 2014 (NMFS 2011b). NMFS consulted under ESA section 7 and issued biological opinions on its 4(d) determinations on each of these RMPs, BIA program oversight and USFWS Hood Canal Salmon Plan-related actions. Since the most recent RMP expired in 2014, NMFS has consulted under section 7 of the ESA on single year actions by the BIA, USFWS and NMFS similar to those described above. The consultations considered the effects of Puget Sound salmon fisheries on listed species based on the general management framework described in the 2010-2014 RMP as amended to address year-specific stock management issues. NMFS issued one-year biological opinions for the 2014, 2015, 2016, 2017, 2018 and 2019 fishery cycles (May 1, 2014 through April 30, 2020) that considered BIA's, USFWS', and NMFS' actions related to the planning and authorization of the Puget Sound fisheries based on the 2010-2014 RMP framework (NMFS 2014b; 2015c; 2016c; 2017b; 2018c; 2019c). In each of these biological opinions NMFS concluded that the proposed fisheries were not likely to jeopardize the continued existence of listed Puget Sound Chinook salmon, Southern Resident killer whales, Puget Sound steelhead, Puget Sound/Georgia Basin Boccaccio and Puget Sound/Georgia Basin yelloweye rockfish. NMFS has reviewed and provided comments and guidance on a new draft RMP submitted in December 2017 for consideration under Limit 6 of the ESA 4(d) Rule and has continued to work with the Puget Sound co-managers on further development of the plan. For 2020, NMFS will complete a one-year consultation under section 7 of the ESA on the effects of 2020-2021 Puget Sound salmon fisheries on ESA listed species.

On April 20, 2020, the BIA formally requested consultation, regarding its role in providing assistance to the Treaty Tribes and pursuant to obligations in *United States v. Washington*, on the co-manager jointly-submitted 2020-2021 Puget Sound Chinook Harvest Plan, as described in (Mercier 2020). The original request was supplemented on April 24, 2020 with an updated Environment Assessment. The request included a plan produced by the state of Washington and the Puget Sound Treaty Tribes, as an amendment to the 2010 Puget Sound RMP, for the proposed 2020-2021 Puget Sound salmon and steelhead fisheries, along with several additional management and technical documents supporting the plan (See section 1.3). This plan describes the framework within which the tribal and state jurisdictions jointly manage all recreational, commercial, ceremonial, subsistence and take-home salmon and steelhead fisheries, and considers the total fishery-related impacts on Puget Sound Chinook salmon and steelhead from those fisheries within the greater Puget Sound area.

This opinion is based on information provided in the letter from the BIA requesting consultation to NMFS and associated documents provided with the consultation request (Mercier 2020), the Environmental Assessment on the 2020 Puget Sound Chinook Harvest Plan (Mercier 2020), discussions with Puget Sound tribal, WDFW and Northwest Indian Fisheries Commission staffs, consultations with Puget Sound treaty tribes, published and unpublished scientific information on the biology and ecology of the listed species in the action area, and other sources of information.

As noted above, for a number of species affected by the Puget Sound salmon fisheries we have completed long-term biological opinions or ESA 4(d) Rule evaluation and determination processes. Table 1 identifies those opinions and determinations still in effect that address impacts

to salmonids species that are affected by the Puget Sound salmon fisheries considered in this opinion. In each determination listed in Table 1, NMFS concluded that the proposed actions were not likely to jeopardize the continued existence of any of the listed species. NMFS also concluded that the actions were not likely to destroy or adversely modify designated critical habitat for any of the listed species. The Table 1 determinations take into account the anticipated effects of the Puget Sound salmon fisheries each year through pre-season planning and modeling. Because any impacts to the species listed in Table 1 from the proposed actions under consultation here were accounted for and within the scope of the associated Table 1 determinations, effects of the fisheries on those species are not analyzed in this opinion.

Table 1. NMFS ESA determinations regarding listed species that may be affected by Puget Sound salmon fisheries and the duration of the decision (4(d) Limit or biological opinion (BO)). Only the decisions currently in effect and the listed species represented by those decisions are included.

Date (Coverage)	Duration	Citation	ESU considered
April 1999 (BO) *	until reinitiated	(NMFS 1999)	S. Oregon/N. California Coast coho Central California Coast coho Oregon Coast coho
April 2001 (4(d) Limit)	until withdrawn	(NMFS 2001a)	Hood Canal summer-run Chum
April 2001 (BO) *	until reinitiated	(NMFS 2001b)	Upper Willamette River Chinook Columbia River chum Ozette Lake sockeye Upper Columbia River spring-run Chinook Ten listed steelhead ESUs
June 13, 2005*	until reinitiated	(NMFS 2005e)	California Coastal Chinook
December 2008 (BO) (affirmed March 1996 (BO))*	until reinitiated	(NMFS 2008f)	Snake River spring/summer and fall Chinook and sockeye
April 2012 (BO)*	until reinitiated	(NMFS 2012)	Lower Columbia River Chinook
April 9, 2015 (BO) *	until reinitiated	(NMFS 2015b)	Lower Columbia River coho

* Focus is fisheries under Pacific Fishery Management Council (PFMC) and United States (US) Fraser Panel jurisdiction. For ESUs and DPSs from outside the Puget Sound area, the effects assessment incorporates impacts in Puget Sound, and fisheries are managed for management objectives that include impacts that occur in Puget Sound salmon fisheries.

1.3 Proposed Federal Action

“Action” means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies (50 CFR 402.2). Under the MSA Essential Fish Habitat consultation, Federal Action means any action authorized funded, or undertaken, or proposed to be authorized, funded, or undertaken by a Federal Agency (50 CFR 600.910). The actions that are subject of this opinion require consultation with NMFS because Federal agencies (BIA, USFWS, NMFS) are authorizing, funding, or carrying out actions that may adversely affect listed species (section 7(a)(2) of the ESA). NMFS is grouping these three proposed Federal actions in this consultation pursuant to 50 CFR 402.14 (c) because they are similar actions

occurring within the same geographical area.

BIA The BIA has requested consultation on its authority to assist with the development and implementation of the co-managers 2020-2021 Puget Sound Chinook Harvest Plan occurring from May 1, 2020 through April 30, 2021. This plan describes the framework within which the tribal and state jurisdictions jointly manage all recreational, commercial, ceremonial, subsistence and take-home salmon and steelhead fisheries, and considers the total fishery-related impacts on Puget Sound Chinook salmon and steelhead from those fisheries within the greater Puget Sound area. The 2020-2021 Chinook Harvest Plan is based on the 2010-2014 Puget Sound Chinook harvest RMP, with revisions to the conservation objectives, as has been necessary and appropriate. This 2020-2021 Chinook Harvest Plan details the current conservation and management objectives, including expected levels of impact to ESA-listed Chinook salmon and steelhead, over the one-year term of its implementation, and describes the suite of fisheries planned to meet these objectives. The Chinook Harvest Plan also contains management area-specific details on fishery time periods, gear restrictions, and catch allocation and bag limits, where applicable, anticipated to occur during the period (Mercier 2020). The Chinook Harvest Plan, as submitted by the BIA, encompasses:

- the information and commitments of the 2010-2014 Puget Sound Salmon RMP as amended by the Summary of Modifications to Management Objectives of the 2010 Puget Sound Chinook Harvest Management Plan for the 2020-2021 Season;
- the 2020-2021 List of Agreed Fisheries (LOAF), which provides specific details about individual anticipated fisheries by location, gear, time and management entity;
- an addendum related to on-going management of the late-timed fall Chinook hatchery program in the Skokomish River;
- Stock Management Plan for the Nisqually Fall Chinook Recovery
- Pre-season plan for the Nisqually tribal selective net gear research fishery
- 2020 Green River Management actions,
- 2020 Puyallup River Management actions;
- a description of actions to be taken in the WDFW managed fishery season for 2020-2021 beneficial for Southern Resident Killer Whales;
- a summary assessment of the tribal salmon fishing impacts associated with the proposed 2020-21 Puget Sound Chinook Harvest Plan on Southern Resident killer whales
- the co-managers' anticipated impacts to Puget Sound steelhead,
- Pacific Salmon Commission, Chum Technical Committee genetic stock composition research study;
- Piscivorous predator removal fishery and research study (Muckleshoot Tribe), and;
- Piscivorous predator assessment research study (WDFW).
- Nooksack early Chinook telemetry research study (Lummi Tribe)

The BIA is the lead federal action agency on this consultation.

USFWS:

The USFWS proposes to authorize fisheries that are consistent with the implementation of the Hood Canal Salmon Management Plan (Hood Canal Salmon Management Plan 1986; HCSMP)

from May 1, 2020 through April 30, 2021. The USFWS, along with the State of Washington and the treaty tribes within the Hood Canal, is party to the HCSMP, which is a regional plan and stipulated order related to the Puget Sound Salmon and Steelhead Management Plan (PSSMP). The state, tribal, and federal parties to the Hood Canal Plan establish management objectives for stocks originating in Hood Canal including listed Chinook and summer-run chum stocks. Any change in management objectives under the HCSMP requires authorization by the USFWS, as a party to the plan. Management under the HCSMP affects those fisheries where Hood Canal salmon stocks are caught. This opinion focuses on Puget Sound salmon and steelhead fisheries that may impact listed species under NMFS' jurisdiction from May 1, 2020 through April 30, 2021 (see Mercier (2020) for fisheries proposed to occur during this period).

NMFS:

The Fraser Panel of the Pacific Salmon Commission (PSC) controls sockeye and pink salmon fisheries conducted in the Strait of Juan de Fuca and San Juan Island regions in the U.S., the southern Georgia Strait in the U.S. and Canada, and the Fraser River in Canada, and certain high seas and territorial waters westward from the western coasts of Canada and the U.S. between 48 and 49 degrees N. latitude. The Fraser Panel typically assumes control of commercial and subsistence fisheries in these waters from July 1 through September, although the exact date depends on the fishing schedule in each year. Fisheries in recent years have occurred in late July into late August in non-pink salmon years and into September in pink years. These fisheries are commercial and subsistence net fisheries using gillnet, reef net, and purse seine gear to target Fraser River-origin sockeye and, in odd-numbered years (e.g., 2013, 2015, 2017, 2019), Fraser River pink salmon. Other salmon species are caught incidentally in these fisheries. The U.S. Fraser Panel fisheries are managed in-season to meet the objectives described in Chapter 4 of the PST (the Fraser Annex). The season structure and catches are modified in-season in response to changes in projected salmon abundance, fishing effort or environmental conditions in order to assure achievement of the management objectives, and in consideration of safety concerns. U.S. Fraser Panel area fisheries are also managed together with the suite of other Puget Sound and PFMC fisheries to meet conservation and harvest management objectives for Chinook, coho, and chum salmon.

Two Federal actions will be taken by NMFS during the 2020 fishing season (May 1, 2020 – April 30, 2021) to allow the PSC's Fraser Panel to manage Fraser River sockeye and pink fisheries in U.S. Fraser Panel Waters. One action grants regulatory control of the U.S. Fraser Panel Area Waters to the Panel for in-season management (a reciprocal action in Canada takes place for their Panel waters). The other action is the issuance of in-season orders by NMFS that give effect to Fraser Panel actions in the U.S. portion of the Fraser Panel Area. The Pacific Salmon Treaty Act of 1985 (16 U.S.C. 3631 et seq.) grants to the Secretary of Commerce authority to issue regulations implementing the Pacific Salmon Treaty. Implementing regulations at 50 CFR 300.97 authorize the Secretary to issue orders that establish fishing times and areas consistent with the annual Pacific Salmon Commission regime and in-season orders of the Fraser River Panel. This authority has been delegated to the Regional Administrator of NMFS' West Coast Region.

NMFS is grouping these proposed Federal actions in this consultation pursuant to 50 Code of Federal Regulations (CFR) 402.14(c) because they are similar actions occurring within the same geographical area. We considered whether or not the proposed Federal actions would cause any other activities and determined that it would. Puget Sound treaty Indian salmon fisheries and related enforcement, research, and monitoring projects associated with fisheries, other than those governed by the U.S. Fraser Panel, would occur as a consequence of the proposed action and are reasonably certain to occur. Because the state of Washington and the Puget Sound treaty tribes have submitted a proposal for joint management² of the 2020-2021 Puget Sound salmon fisheries, the non-treaty salmon fisheries and related enforcement, research, and monitoring projects associated with fisheries, other than those governed by the U.S. Fraser Panel, would also occur as a consequence of the proposed action and are reasonably certain to occur. We will be including the effects of these activities in the effects analysis of this opinion.

Many salmon stocks impacted in the Puget Sound salmon fisheries are also taken in other marine fisheries outside of the Puget Sound region. The conservation objectives developed for Puget Sound Chinook described in the 2020-2021 Puget Sound Harvest Plan are a mix of Southern United States (SUS), total (all marine and freshwater) exploitation rate (ER), and escapement abundance-based impact objectives. Therefore, the analysis of fishery impacts to Puget Sound Chinook stocks includes assumptions regarding their harvest in salmon fisheries along the Pacific west coast, including Southeast Alaskan (SEAK) and Canadian fisheries, ocean fisheries off the coasts of Washington and Oregon states, as well as fisheries in the marine, estuarine, and freshwater areas of Puget Sound (Puget Sound salmon fisheries), considered in this opinion, in determining whether conservation objectives are met. The Fraser Panel fisheries are included in the mix of Puget Sound salmon fisheries.

Puget Sound salmon fisheries for Chinook, coho, chum, and Fraser River sockeye and pink salmon are managed consistent with the provisions of the PST, an international agreement between the U.S. and Canada, which also governs fisheries in SEAK, those off the coast of British Columbia, the Washington and Oregon coasts, and the Columbia River. Canadian and SEAK salmon fisheries impact salmon stocks from the states of Washington, Oregon, and Idaho as well as salmon originating in SEAK and Canadian waters. As described above, fisheries off the coast of Washington and Oregon and in inland waters, such as the Puget Sound, harvest salmon originating in U.S. West Coast and Canadian river systems. The PST provides a framework for the management of salmon fisheries in these U.S. and Canada waters that fall within the PST's geographical scope. The overall purpose of the fishing regimens, is to accomplish the conservation, production, and harvest allocation objectives set forth in the PST (<https://www.psc.org/publications/pacific-salmon-treaty/>). The PST provides for the U.S. and Canada to each manage their own fisheries to achieve domestic conservation and allocation priorities, while remaining within the overall limits agreed to under the PST. In 2018, U.S. and Canadian representatives reached agreement to amend versions of five expiring Chapters of Annex IV (Turner and Reid 2018); both countries have since executed this agreement. Because the Puget Sound Chinook salmon are listed under the ESA and are subject to management under

² As provided under the Puget Sound Salmon Management Plan, implementation plan for *U.S. v Washington* (see 384 F. Supp. 312 (W.D. Wash. 1974)).

the PST, objectives for Puget Sound salmon fisheries are designed to be consistent with these laws.

The new PST Agreement includes reductions in harvest impacts in all Chinook fisheries within its scope, including Puget Sound, and refines the management of coho salmon caught in these areas. The new Agreement includes reductions in the allowable annual catch of Chinook salmon in the SEAK and Canadian West Coast of Vancouver Island and Northern British Columbia fisheries by up to 7.5 and 12.5 percent, respectively, compared to the previous agreement. The level of reduction depends on the overall Chinook abundance in a particular year. This comes on top of the reductions of 15 and 30 percent for those same fisheries that occurred as a result of the prior 10-year agreement (2009 through 2018). Harvest rates on Chinook salmon stocks caught in southern British Columbia and U.S. salmon fisheries, including those in Puget Sound waters are reduced by up to 15% from the previous agreement (2009 through 2018). Beginning in January 2020 this will result in an increased proportion of abundances of Chinook salmon migrating to more southerly waters including those in the southern U.S. Although provisions of the updated agreement are complex, they were specifically designed to reduce fishery impacts in all fisheries to respond to conservation concerns for a number of U.S.—particularly Puget Sound Chinook—and Canadian stocks.

In 2019, NMFS consulted on impacts to ESA-listed species from several U.S. domestic actions associated with the new PST agreement (NMFS 2019f) including federal funding of a conservation program for critical Puget Sound salmon stocks and SRKW prey enhancement. The 2019 opinion (NMFS 2019f) included a programmatic consultation on the PST funding initiative, which is an important element of the environmental baseline in this opinion. In Fiscal Year 2020 Congress appropriated \$35.1 million dollars for U.S. domestic activities associated with implementation of the new PST agreement, of which \$5.6 million is being used for increased hatchery production to support prey abundance for SRKW and also includes \$13.5 million in support of Puget Sound Critical Stock Conservation and Habitat Restoration and Protection Program. The beneficial effects of these activities (i.e., increases in the abundance of Chinook salmon available as prey to SRKW, hatchery conservation programs to support critical Puget Sound Chinook populations, and improved habitat conditions for those populations) are expected to begin in the next 3-5 years. Subsequent specific actions (i.e, hatchery production programs, habitat restoration actions) will undergo separate consultations, tiered from the programmatic consultation (NMFS 2019f), to assess effects for site-specific actions. The harvest management provisions of the new Agreement and the appropriations to initiate the conservation activities are in place now and will be taken into account in this biological opinion. The effects of the conservation activities will be important to the analysis of the impacts of Puget Sound salmon fisheries over the long term to Puget Sound Chinook salmon and SRKW. Additional detail on the activities associated with the PST funding initiative are described in the Environmental Baseline (Section 2.4).

2. ENDANGERED SPECIES ACT: BIOLOGICAL OPINION AND INCIDENTAL TAKE STATEMENT

The ESA establishes a national program for conserving threatened and endangered species of

EXHIBIT B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

ARTHUR WEST; and TWIN HARBORS)	
FISH AND WILDLIFE ADVOCACY,)	
)	
Plaintiffs,)	
)	
vs.)	NO. 19-2-01464-34
)	
WASHINGTON DEPARTMENT OF FISH)	
AND WILDLIFE, an agency of the)	
State of Washington,)	
)	
Defendant.)	

DEPOSITION UPON ORAL EXAMINATION OF RON WARREN

December 20, 2019

Lacey, Washington

DIXIE CATTELL & ASSOCIATES
COURT REPORTERS & VIDEOCONFERENCING
(360) 352-2506

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF THURSTON

3)
4 ARTHUR WEST; and TWIN HARBORS)
FISH AND WILDLIFE ADVOCACY,)

5 Plaintiffs,)

6 vs.)

NO. 19-2-01464-34

7 WASHINGTON DEPARTMENT OF FISH)
8 AND WILDLIFE, an agency of the)
State of Washington,)

9 Defendant.)

10 DEPOSITION UPON ORAL EXAMINATION OF RON WARREN
11

12
13
14
15
16 December 20, 2019

17 Lacey, Washington
18
19
20
21
22

23 DIXIE CATTELL & ASSOCIATES
24 COURT REPORTERS & VIDEOCONFERENCING
25 (360) 352-2506

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 APPEARANCES :

2 FOR THE PLAINTIFF
3 TWIN HARBORS:

MR. JOE FRAWLEY
SCHEFTER & FRAWLEY
1415 College Street
Lacey, WA 98503
(360) 491-6666
joedfrawley@gmail.com

6 FOR THE DEFENDANT:

MR. MICHAEL GROSSMANN
ASSISTANT ATTORNEY GENERAL
P.O. Box 40100
Olympia, WA 98504-0100
(360) 586-3550
mikegl@atg.wa.gov

9 MS. NOELLE CHUNG
10 ASSISTANT ATTORNEY GENERAL
11 P.O. Box 40100
12 Olympia, WA 98504-0100
(360) 664-8977
noelle.chung@atg.wa.gov

13 ALSO PRESENT: MR. TIM HAMILTON

14

15

16

17

18

19

20

21

22

23

24

25

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
 Ron Warren, 12/20/2019

1	INDEX		
2			
3	EXAMINATION		PAGE
4	MR. FRAWLEY		4
5	MR. GROSSMANN		51
6	MR. FRAWLEY		55
7			
8			
9	EXHIBITS		
10	EXHIBIT	DESCRIPTION	PAGE
11	1	CR 103E; 4 pgs.	18
12	2	CR 103E dated December 2017; 4 pgs.	19
13	3	Final 2019 PFMC Chinook; 31 pgs.	21
14	4	Letter to Director Unsworth from Mr. Sterud; 4 pgs.	30
15	5	2019 Puget Sound summer/fall preseason forecast; 3 pgs.	37
16	6	Columbia River fall Chinook 2019 forecast; 1 pg.	46
17			
18			
19			
20			
21			
22			
23			
24			
25			

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 BE IT REMEMBERED that on Friday, December 20,
2 2019, at 9:06 a.m., at 1415 College Street, Lacey,
3 Washington, before REBECCA S. LINDAUER, Certified Court
4 Reporter, in and for the State of Washington, appeared RON
5 WARREN, the witness herein:

6 WHEREUPON, the following proceedings were had, to
7 wit:

8
9 (Mr. Grossmann not present.)

10 (Mr. West not present.)

11
12 RON WARREN, having been first duly sworn,
13 testified as follows:

14 EXAMINATION
15 BY MR. FRAWLEY:

16 Q Good morning, Ron. My name is Joe Frawley. I'm the
17 attorney for Twin Harbors Fish and Wildlife.

18 Have you ever had your deposition taken before?

19 A No.

20 Q Okay. Can you please state your name for the record.

21 A Ron Warren.

22 Q I'll go over some brief ground rules. The court reporter's
23 obviously writing everything down; so please wait until I'm
24 done speaking. I'll wait until you're done speaking. It's
25 hard for her to write two conversations down at once. If

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 you want to take a break, let me know at any time.

2 Your attorney's going to object at some point,
3 probably. Let her finish her objection. You do have to
4 answer unless she tells you not to, even if she objects.

5 If I ask a poorly worded question or you otherwise
6 don't understand, just tell me you don't understand. If you
7 don't, the record will reflect that you did understand the
8 question, and it makes for a better record if we're on the
9 same page.

10 What did you do to prepare for today's deposition?

11 **A I read back and forth the court documents, responses to**
12 **interrogatories, as well as the deposition that we got back**
13 **from Kyle Adicks.**

14 Q So did you read Mr. Adicks's deposition?

15 **A I did.**

16 Q Anything in there you disagree with?

17 **A No. There were some wording things, but, no, no**
18 **disagreements.**

19 Q Nothing substantive?

20 **A No.**

21 Q Can you tell me your educational background starting with, I
22 guess, high school. You graduated high school here in
23 Olympia. Correct?

24 **A I graduated high school in 1978 here in Olympia from**
25 **Capital.**

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 Q Okay.

2 A And I've only taken a couple of college courses back in
3 the '80s, DOS. I was one of those.

4 Q What's DOS?

5 A And then some -- obviously some state training along the
6 way. Took a two-year program called Washington State
7 Certified Public Managers, but no other formal education.

8 Q So then what -- can you tell me your work history starting
9 with, I guess, post high school.

10 A Post high school. So I came out of high school and was a
11 hod carrier for a short period of time, and then I went to
12 work in a machine shop. I did that for a short period of
13 time, and then came to work for the Department of Fisheries
14 December 19, 1979; so, yes, that's 40 years yesterday.

15 Q Okay. So what did you do when you started with the
16 fisheries in '79?

17 A I was a temporary fish culturist at what then was the Green
18 River Hatchery, which is now called Soos Creek Hatchery,
19 S-o-o-s.

20 Q What does a temporary fish culturist do?

21 A Whatever they're told to do.

22 Q As needed.

23 What did you do after that?

24 A So from there I just got on permanent. I went up to the
25 Nooksack Hatchery as a fish culturist 1, and then it was a

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 progressive increase in different responsibilities and
2 positions until 1994, 1995 when I became a complex manager
3 and oversaw the Lake Washington facilities: so Issaquah,
4 Cedar River, and then all of the Green River facilities.
5 So...

6 Q How long were you complex manager?

7 A Until 1998.

8 Q Okay. What changed in '98?

9 A 1998 I went in as a -- on a temporary assignment to become
10 the legislative coordinator for the hatcheries program, and
11 then I did go back to the field briefly, but then returned
12 within a month or two and became our agency's labor
13 relations manager in our human resources office, and I did
14 that for almost two years. Returned to hatcheries as a
15 regional operations manager; so I oversaw 18 facilities in
16 our Administrative Region 4.

17 Q What year was that that you took that position?

18 A 2000, I believe.

19 Q How long did you do that?

20 A Just over two years. There were a variety of different
21 responsibilities in that but -- because of some changes and
22 preparation for agency mergers that were going on but -- and
23 then in 2002 I went out to Region 6 as the fish program
24 manager.

25 Q When did the merger happen?

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 **A 1995.**

2 Q So you're not talking about merger of --

3 **A Sorry. Yeah, 19- -- yeah. 1995 merger of Fish and**
4 **Wildlife.**

5 Q Yeah. So what merger are you referring to in the 2000-2002
6 range when you were just describing that?

7 **A I had my years wrong. It was the merger of the agencies**
8 **that I was talking about.**

9 Q Okay.

10 **A Thank you for the clarification.**

11 Q Okay. So when were you the Region 6 manager? When was
12 that?

13 **A So 2002 I started. I believe that I went in to become the**
14 **hatcheries division manager in '07, did that for two years,**
15 **and then returned to the Region 6 fish program manager**
16 **position with additional responsibilities. I went back and**
17 **also became a representative on a committee through the**
18 **Pacific Salmon Commission.**

19 Q That was when?

20 **A In 2009.**

21 Q What was your position on the --

22 **A I was a Southern Panel alternate.**

23 Q What's that mean?

24 **A So the Pacific Salmon commissioners -- commissioners and**
25 **through the treaty have staff amongst the states and**

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 bilateral countries that fulfill obligations of
2 implementation and/or negotiations of the treaty, and I
3 participated on the Southern Panel which oversaw coho and
4 chum for the commission.

5 Q Okay.

6 A And then that was just the work -- of the U.S. section was
7 then Oregon, Washington, and the tribes, affected tribes,
8 and then we would work together to come up with our
9 positions and then meet bilaterally with our Canadian
10 counterparts.

11 Q How long were you a Southern Panel alternate?

12 A I believe I was for six years.

13 Q So until 2015?

14 A Roughly, yes.

15 Q And then were you also a Region 6 manager?

16 A So there was a change in duties in there, and I'm trying to
17 recall what year that was. I became -- it's the exact same
18 position Kyle Adicks has now, but the title was different.
19 I was the deputy assistant director in charge of
20 intergovernmental salmon management.

21 Q What year was that?

22 A I believe that was in 2012.

23 Q And you held that until when?

24 A 2015 when I became the fish program assistant director.

25 Q And then did Mr. Adicks take over that position in '15?

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 **A** He did not. John Long took over for a couple of years until
2 he promoted and then ultimately left the department but --
3 and then Kyle promoted into the position.

4 **Q** Then after 2015 what was your position?

5 **A** I was the assistant director, oversaw the administrative
6 fish program within the agency.

7 **Q** Is that still your position today?

8 **A** No, sir.

9 **Q** What's your position today?

10 **A** Today I'm the fish policy director for the agency and reside
11 in the director's office.

12 **Q** Okay. So what was -- your assistant director of fish
13 program, what were your responsibilities?

14 **A** Kind of like when I was a temporary culturist.

15 **Q** Whatever you were told to do?

16 **A** Yeah. Just to oversee the administrative function of the
17 fish program, which is roughly half of the Department of
18 Fish and Wildlife, about 850 full-time employee equivalents,
19 but then primary responsibilities were that I was the main
20 contact, lead negotiator through North of Falcon and tribal
21 contacts on salmon and shellfish.

22 **Q** Okay.

23 **A** I should say salmon, steelhead, and shellfish.

24 **Q** Did that change -- what year did that change as far as your
25 North of Falcon responsibilities?

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 trying to point as a quick reference to the language that's
2 there instead of spelling it out here.

3 Q So then this final model run, is this included in what's
4 sent to -- as part of the ESA consultation?

5 A So the final model run, whether it's in this great of
6 detail, I assume that they get the entire electronic copies,
7 so this plus more. This may not be the entire model. It
8 may be the model -- I don't know -- but, yes, the final
9 model run is sent to NOAA fisheries for their ESA analysis.

10 Q So the model run and the LOAF are sent to NOAA fisheries.
11 Correct?

12 A Yes, sir.

13 Q And they conduct their ESA consultation, and at this point
14 the agreement is -- I think you've used the word
15 "tentative." Correct?

16 A Yes, sir.

17 Q The tentative agreement, which is the LOAF, and the model
18 run are sent to NOAA fisheries. What does NOAA fisheries do
19 then?

20 A So let me back up just a little bit. The model run would be
21 sent immediately because NOAA has staff that help keep the
22 model functioning throughout the PFMC, North of Falcon
23 process; so they would be transmitted a copy. They can
24 start some of their analysis while the LOAF is completed.
25 From that point, once we finalize the LOAF to full

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 tentative, sign off on it, and then continue through the
2 rulemaking process with CR 102 and to the 103 process for
3 finalization.

4 Q But specific to NOAA --

5 A Yeah.

6 Q -- they receive the LOAF and the model run. I think you
7 said they're conducting -- they are conducting analysis
8 throughout the PFMC process. They then complete their ESA
9 consultation based on the LOAF and the model run. Is that
10 accurate?

11 A There may be other factors that they're looking at:
12 southern resident killer whales, those types of things that
13 complete their ESA consultation, but those are two critical
14 documents that they use, yes.

15 Q And then what does -- what form does the NOAA approval take?
16 Is it a letter that the parties receive? Is it published on
17 the federal register? What evidence is NOAA's approval
18 under ESA?

19 A So my understanding is that NOAA does place their decisions
20 on the federal register in the form of biological opinion to
21 us and then a final decision action after a cooling down
22 period of 30 days after public comment is taken. I believe
23 that's the process that it goes through.

24 Q And then based on that, I think a number of people have
25 testified that the LOAF is then turned into a CR 102 that's

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 put out for public comment?

2 MS. CHUNG: Objection. Mischaracterizes prior
3 testimony.

4 You can answer.

5 **A Can you restate the question? Sorry.**

6 Q (By Mr. Frawley) Maybe. My understanding -- and I think
7 it's consistent with prior testimony -- is that the LOAF
8 that comes out of PFMC is used by the department to create
9 the CR 102 language that's published for public comment. Is
10 that accurate?

11 **A So the portion of the LOAF that represents the state**
12 **recreational fisheries is likely used to create that**
13 **document, absolutely.**

14 Q You said "likely used." Do you know if it's used?

15 **A I'm not positive. That's why I used that word. I make that**
16 **assumption. I've never been involved in that process.**

17 Q Fair enough.

18 The ESA consultation, is it required to conduct our
19 state salmon fisheries? Are you required to get NOAA's
20 approval?

21 **A Yes.**

22 Q As part of that my understanding -- correct me if I'm
23 wrong -- is the state's practice recently has been to submit
24 a permit jointly with the treaty tribes. Is that accurate?
25 Seek consultation jointly with the treaty tribes is perhaps

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 a better way to say it.

2 **A For our individual year, yes, that's true.**

3 Q And are you aware -- that's based on agreement. Correct?

4 **A What do you mean by "agreement"?**

5 Q That only occurs if the state and the treaty tribes reach an
6 agreement on fisheries. Correct?

7 **A Yes.**

8 Q Okay. Are you aware of anytime recently when agreement was
9 not reached?

10 **A Yes.**

11 Q Okay. When was that?

12 **A In 2016.**

13 Q Okay. Were you involved in that process?

14 **A I was.**

15 Q And I believe you testified earlier that you were, at the
16 time, the lead negotiator for the department?

17 **A Yes.**

18 Q What was the basis for disagreement in 2016?

19 **A The basis for disagreement, we had submitted what we called**
20 **a final package to the tribes, and I believed that we had a**
21 **tentative agreement on a full package. And the next morning**
22 **our director requested that I go pull that back, that we**
23 **wanted to make alterations to that, and that caused some**
24 **angst amongst all the parties. We supplied that, and then**
25 **those fisheries that had been modified became the issue that**

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 **caused us not to reach agreement on time that year --**

2 Q Okay.

3 **A -- or tentative agreement on time that year.**

4 Q So I didn't mean to speak over you. The state had submitted
5 what the parties at the time thought was a final, I guess,
6 tentative agreement, fisheries' proposal from the state's
7 perspective?

8 **A Correct. We had not done a final model run, although we had**
9 **every belief it would meet all of the ESA standards and had**
10 **communicated that to the tribes, and then the next morning**
11 **we pulled that back.**

12 Q Okay. What changes did the state attempt to make after
13 the -- when it pulled back the final fisheries plan?

14 **A There were fisheries in Marine Area 10 in, I believe, June**
15 **that we wanted to add back in.**

16 Q So you wanted to add a Chinook fishery in Area 10 for the
17 month of June. Is that accurate?

18 **A I believe it was a nonretention fishery, so a catch-and-**
19 **release fishery. Not Chinook, not coho. They could have --**
20 **anglers could have fished for other species, but they could**
21 **not have retained any salmon at the time.**

22 Q So it was a nonretention catch-and-release season in Area 10
23 for the month of June?

24 **A Two weeks in June.**

25 Q "Two weeks in June"?

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 **A It's my recollection.**

2 Q What would the effect of that fishery have been as far as
3 mortalities go?

4 **A I don't recall.**

5 Q So the tribes then refused to reach an agreement once that
6 fishery was inserted into the final fisheries plan?

7 **A We continued the dispute over fisheries at that time, yes.**

8 Q Would agreement have been reached had that final plan not
9 been pulled back?

10 **A I believe so.**

11 Q So what happened? Was the state able to fish once agreement
12 was not reached?

13 **A No, we were not.**

14 Q Okay. Did the tribes -- were the tribes able to go fishing?

15 **A The tribes were able to receive approval under ESA to**
16 **conduct their fisheries.**

17 Q Why was --

18 **A I do believe they had to delay from the start of when their**
19 **fisheries would have initially begun, but it wasn't a huge**
20 **delay.**

21 Q Was the tribe able to get ESA approval and the state not
22 able to get ESA approval?

23 **A Well, they received approval through consultation with the**
24 **Bureau of Indian Affairs. The details of that, I don't**
25 **recall what those -- what that was called, but received**

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1	approval --
---	-------------

2	Q	Okay.
---	---	-------

3 A -- or authorization is probably a better word to use.

4 (Exhibit No. 4 marked.)

5 Q You've been handed what's been marked as Exhibit 4. Can you
6 review that, and then let me know if you recognize that
7 document.

8 A Yes. I recognize the document.

9	Q	What is it?
---	---	-------------

10 A A letter from the Puyallup Tribal Council to then-Director
11 Unsworth at Department of Fish and Wildlife.

12 Q This letter discuss the disagreement we were just -- you
13 were just testifying about?

14 A I would have to reread the letter to know that for certain.

15 | Q Can you do that real quick.

16 MS. CHUNG: Take your time.

17 A Yeah. I was going to say, "I don't know about real quick."
18 Okay.

19 Q (By Mr. Frawley) Have you read it?

20	A	I have.
----	---	---------

21 Q "It," being Exhibit 4, does that refresh your recollection?

22 | A It does.

23 Q Is this the -- is this letter referencing the dispute that
24 we just discussed?

25	A	No.
----	---	-----

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 Q Okay. What is this letter discussing?

2 A This letter is discussing the post North of Falcon or final
3 PFMC week. Many of the different positions changed, and
4 different negotiations needed to occur to reach final
5 agreement.

6 Q So what positions changed? You said "many different
7 positions changed."

8 A So obviously our change caused the Puyallup tribe to offer
9 us different fishery proposals. Those were the many things
10 that changed that I was talking about.

11 Q What changes did the Puyallup tribe make?

12 A They were just offering us in the letter two different
13 alternatives to consider within the fisheries that they were
14 going to conduct in the Puyallup River.

15 Q Was that -- I guess, do they offer to conduct less fishing
16 or more fishing?

17 A Than?

18 Q For the tribe. Than what had been, I guess, the tentative
19 agreement that was then pulled back?

20 A I don't know. I don't have the document that was the
21 tentative agreement in front of me.

22 Q Do you have a recollection?

23 A I do not.

24 Q If you turn to page 2 --

25 A Yes, sir.

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 Q -- you'll see -- I believe I highlighted a portion for you
2 on the top, the first highlight. It says "A nontreaty
3 fishery now may not be possible this season because of the
4 well-understood deadline for ESA review." Do you see that?

5 A I do.

6 Q What's the tribe referencing there?

7 A Well, I -- the tribe is referencing the fact that because
8 we're still before May but before -- or post PFMC 2, we were
9 still trying to proceed to get joint coverage from ESA, and
10 until we could provide fisheries that they could agree to
11 and vice versa, we weren't able to submit a joint package to
12 NOAA fisheries for consideration.

13 Q Okay. And then there's a second highlighted portion. Can
14 you read that for the record, please.

15 A I can. "As known to all, for many years, the North of
16 Falcon process is driven by deadlines made necessary by the
17 requirements of NOAA review under the ESA. Each year the
18 joint tribal-state list of approved fisheries was submitted
19 to NOAA in time for NOAA review, and NOAA was able to
20 complete its review each year in a timely fashion. This
21 year is different because of WDFW's lack of meaningful
22 engagement with the process. When WDFW abruptly walked away
23 on April 19, it offered no response to our proposal and no
24 explanation whatsoever for its decision. WDFW thereby left
25 the tribes with no alternative other than to submit a

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 **tribal-only list of approved fisheries in time for federal**
2 **interagency consultation under ESA Section 7."**

3 Q All right. So, first of all, do you agree with that
4 characterization of WDFW's actions?

5 A I don't recall the details of the actions to where -- but
6 obviously those are the thoughts of the Puyallup tribe, and
7 I can't begin to put myself in their shoes.

8 Q Do you agree that WDFW lacked meaningful engagement in the
9 North of Falcon process in 2016?

10 A **My opinion or the Puyallup tribe's opinion?**

11 Q Your opinion.

12 A **No. I believe we were actively engaged throughout North of**
13 **Falcon.**

14 Q The tribe here references they are able to get their own ESA
15 consultation under ESA Section 7. Does the State have a
16 similar process to follow to submit its own permit without
17 the tribal agreement?

18 A **So during that year we did explore those avenues but could**
19 **not find a pathway to receive our own approval for ESA to**
20 **allow us to go fishing.**

21 Q So it's fair to say without tribal agreement, at least as it
22 stands now, there's no path to receive ESA consultation for
23 the state?

24 A **Correct.**

25 Q Okay. What are the deadlines? The letter references

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 "well-understood deadline for ESA review in a timely
2 fashion." "North of Falcon is driven by deadlines." Each
3 year what are those deadlines?

4 A So coming out of PFMC 2, if you have the full package of the
5 tentative agreement and are able to provide the final model
6 run to NOAA fisheries, NOAA has a condensed period of time
7 to be able to provide the authorization to fish under ESA.

8 And so you can imagine that if we -- if the dates in
9 here are accurate and that we had walked away on April 19
10 and there are tribal fisheries that could -- are awaiting
11 authorization to begin on May 1st, that's the deadline that
12 they're talking about. That NOAA has a very condensed time
13 frame to analyze everything and finalize the process, notify
14 the parties that they have authorization or don't.

15 Q It sounds like NOAA, if there's an agreement, can conduct
16 the ESA consultation within a few weeks. Is that accurate?

17 A When we are in the midst of an annual single year
18 consultation or have in place a multiyear plan where they
19 just have to do the analysis of the fisheries, yes, I
20 believe that to be true.

21 Q How long would it take for the state to receive ESA
22 consultation without tribal agreement and without a
23 fisheries plan in place?

24 A So we never -- we never got to what the final month count
25 was, but I'm going to guess it's longer than a year to take.

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 It's somewhere between that year and 18 months is my guess,
2 but certainly beyond the point of time where our fisheries
3 would have been gone and we would have been negotiating the
4 next year's fisheries instead of promulgating our fisheries
5 that were going to be in place.

6 Q So going back to the agreement, it sounds as if once this
7 fisheries proposal is submitted to the tribe, the tribe is
8 not very receptive or receptive at all to changes once the
9 final model run has been made or anticipated. Is that
10 accurate?

11 MS. CHUNG: Objection. It's a little confusing.

12 A Can you restate it?

13 Q (By Mr. Frawley) Hopefully better. You testified earlier
14 that the tribe -- tribes became upset when WDFW pulled back
15 their -- what they had proposed as the final model run in
16 2016. Correct?

17 A Correct.

18 Q And you testified that that was a catch-and-release fishery
19 for two weeks in Area 10. Correct?

20 A My recollection, yes.

21 Q So I guess I'm asking is the tribe historically unwilling to
22 make changes once the final model run has been made or
23 proposed?

24 A Depending on what the change is. If you're going to change
25 something that has the effect that -- that affects multiple

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

1 tribes within what their usual and customary is, then I'm
2 going to guess that you're -- the chances to kind of throw
3 the wrench in the spokes is pretty great.

4 Q How great of a change or effect is required before the
5 tribes object?

6 A I don't know.

7 Q Can you recall any changes being made at all post final
8 model run?

9 A Minor, less significant, like, date changes or stack weeks.
10 Those types of changes have been made that we could notify
11 NOAA or know that there are date changes within stack weeks
12 that we know aren't going to change the effect of the
13 fisheries on ESA standards, those types of things have taken
14 place on both sides, both at tribal fishery and ours.

15 Q Okay. If there's any effect on the ESA impact, can the
16 change be made?

17 A I would say it can, but you have to be able to be -- or show
18 that it's a neutral change and have agreement by all
19 parties, including the -- depending on where you are that
20 would include NOAA fisheries and agreeing with that change.

21 Q When you say "neutral change," what is neutral change?

22 A "Neutral" means that if you -- if you increase your impact
23 on whatever critical stock might be there, if you're
24 increasing that impact, everybody's going to say no. You're
25 outside of what could be now the ESA threshold or standard

WEST vs WASHINGTON DEPARTMENT OF FISH AND WILDLIFE
Ron Warren, 12/20/2019

C E R T I F I C A T E

I, REBECCA S. LINDAUER, a Certified Court Reporter in and for the State of Washington, residing at Lacey, do hereby certify:

That the foregoing deposition of RON WARREN was taken before me and completed on the 20th day of December 2019, and thereafter transcribed by me by means of computer-aided transcription; that the deposition is a full, true, and complete transcript of the testimony of said witness;

That the witness, before examination, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth, and that the witness reserved signature;

That I am not a relative, employee, attorney, or counsel of any party to this action or relative or employee of any such attorney or counsel, and I am not financially interested in the said action or the outcome thereof;

That I am herewith securely sealing the deposition of RON WARREN and promptly mailing the same to MR. JOE FRAWLEY.

IN WITNESS HEREOF, I have hereunto set my hand this 4th day of January 2020.

A large, stylized handwritten signature in black ink, appearing to be 'R. Lindauer', is written over a horizontal line.

Rebecca S. Lindauer, CSR#2402
Certified Court Reporter, in and for the
State of Washington, residing at Lacey.

EXHIBIT C



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
1201 NE Lloyd Boulevard, Suite 1100
PORTLAND, OREGON 97232-1274

February 10, 2017

Honorable Lorraine Loomis, Chair
Northwest Indian Fisheries Commission
6730 Martin Way East
Olympia, Washington 98516

Dr. Jim Unsworth, Director
Washington Department of Fish and Wildlife
600 Capitol Way North
Olympia, Washington 98501

Dear Chair Loomis and Director Unsworth:

As you are well aware, the events leading to the co-managers' delayed agreement on Puget Sound fisheries in 2016 involved a significant commitment of time and resources by all of us. We are encouraged by the co-managers' recent efforts and progress to avoid a repeat of these events in 2017. These efforts demonstrate commitment and determination to reach a better outcome this year.

Success this year entails the state and tribes reaching a timely 2017 fisheries management agreement. Reaching that agreement will aid in crafting a new, long-term agreement that the co-managers can rely on for the foreseeable future. We are reassured by the co-managers' commitment to a substantive schedule that, if adhered to, will lead to a conclusion by mid-April. NOAA Fisheries will continue to work closely with the co-managers to avoid surprises and ensure the co-managers' plans are consistent with the requirements of our regulatory review.

Although these efforts give good reason for hope, there continues to be a measure of anxiety and skepticism about the upcoming season. To inform and encourage your efforts, we are taking this opportunity to reiterate and expand upon concerns described in NOAA Fisheries' letter of January 19, 2016, that remain relevant for the 2017 season-setting process.

In that letter, we identified potential consequences should the co-managers fail to reach agreement on fisheries in Puget Sound through the North of Falcon process. Those consequences have broad reach but certainly could affect decisions by NOAA Fisheries under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) regarding the 2017 federal ocean salmon fisheries (i.e., those under the jurisdiction of the Pacific Fishery Management Council (PFMC)), as well as timely determinations under the Endangered Species Act (ESA) regarding Puget Sound fisheries.

This year, we are describing some potential scenarios below. However, we do not suggest that this information is inclusive of all considerations that may arise over time. We encourage you to share this information with others to promote a common understanding of the importance of our collective success. Please alert us to any additional potential outcomes you anticipate.



We also reiterate our offer to assist in any way we can to reach a successful outcome in 2017 and beyond.

Management Structure

NOAA Fisheries and the PFMF have management authority under the MSA for ocean salmon fisheries occurring in the Exclusive Economic Zone off the U.S. West Coast. The State of Washington manages salmon fisheries in state ocean waters, and the coastal treaty tribes manage treaty fisheries in the ocean. "Puget Sound fisheries" occur in the Strait of Juan de Fuca, Puget Sound, and the rivers and tributaries entering Puget Sound and the Strait of Juan de Fuca. These fisheries are managed by the State of Washington and the Indian tribes with treaty fishing rights in these waters. While this letter discusses the decisions of NOAA Fisheries, we respect the management entities responsible for regulating each fishery and the cooperation among them that is fundamental to achieving our sustainable management and shared conservation goals.

Affected Area

NOAA Fisheries believes that fisheries south of Cape Falcon, Oregon, would not be affected by the issues discussed here as those fisheries have negligible impact on Puget Sound salmon, and fisheries north of Cape Falcon have minimal effect on the southern populations. NOAA Fisheries similarly believes that co-management agreements related to fisheries within the Columbia River would not be directly affected by the issues discussed here. Therefore, this letter considers only the context surrounding approval of PFMF fisheries north of Cape Falcon (*i.e.*, the "outside" fisheries) and federal determinations related to state and tribal fisheries in Puget Sound (*i.e.*, the "inside" fisheries), which, as you know, are unavoidably intertwined.

Federal Requirements for Approval

Under the authority of the MSA, the PFMF's Pacific Coast Salmon Fishery Management Plan (FMP) governs the salmon fisheries off Washington, Oregon, and California. Consistent with the FMP, the PFMF develops its annual salmon management measures through a two-meeting process conducted in March and April each year. At its April meeting, the PFMF adopts a final set of management measures, which it then recommends to NOAA Fisheries for approval and implementation.

To approve the PFMF's final management measures, NOAA Fisheries must make a determination that the measures are consistent with the MSA. The MSA has procedural and biological requirements for approval which are captured in the FMP, and also requires that the fishery be consistent with "other applicable law." "Other applicable law" with respect to Puget Sound stocks means that NOAA Fisheries must determine that the management measures:

- are consistent with the ESA;
- are consistent with the Pacific Salmon Treaty (PST); and

- allow for the full exercise of treaty rights by affected treaty fishing tribes, consistent with court orders in *U.S. v. Washington*, *U.S. v. Oregon*, *Hoh v. Baldrige* and other cases.

NOAA Fisheries' determination of compliance with the MSA, ESA, and PST is informed by the technical analyses and information developed through the PFMC's process and scientific advisors (Salmon Technical Team or STT). With respect to treaty rights, the PFMC and NOAA Fisheries normally rely on the state and tribes to affirm through joint agreement that the PFMC's final management measures *combined with* a complementary set of Puget Sound fisheries (determined through the North of Falcon process) assure implementation of the treaty right.

Under usual circumstances, a broad technical and policy consensus develops around the co-managers' recommended fishing regimes emanating from the North of Falcon process. This consensus establishes confidence that the agreed-to regime meets all the applicable laws. Lack of consensus within North of Falcon diminishes this confidence and increases NOAA Fisheries' expectation that any decisions made will be intensely scrutinized.

In addition, NOAA Fisheries' ability to approve the PFMC's recommendations prior to May 1 is always a challenge due to the limited time following PFMC's final action in April. Any ambiguity related to the required assurances would almost certainly delay NOAA Fisheries' approval of the regulations past the traditional May 1 season start date.

Approval Requirement 1: Meet MSA Standards

The MSA requires that Fishery Management Councils set science-based standards to guide management of the fishery for which they have a FMP. The Salmon FMP describes management reference points (*e.g.*, conservation objectives and Annual Catch Limits or ACLs) for each Chinook and coho stock. In order for NOAA Fisheries to approve the PFMC's recommended annual fishery management measures, they must be consistent with these standards.

Puget Sound Chinook salmon are listed under the ESA as threatened, so ESA "consultation standards" serve as the applicable reference points for these populations. Historically, these consultation standards have been linked to the co-managers' "conservation objectives" for Puget Sound Chinook populations and thus address impacts from both Puget Sound and the PFMC fisheries. NOAA Fisheries contributes to discussions among co-managers directed at updating and maintaining conservation objectives to help ensure that, once agreed-upon, they are also likely to meet ESA requirements. NOAA Fisheries summarizes the conservation objectives in its annual "ESA Guidance Letter" sent to the PFMC prior to the annual March PFMC meeting.

For coho salmon, which are not listed under the ESA, the FMP describes allowable exploitation rates for each stock, but it notes that "annual natural escapement targets can vary from FMP conservation objectives if agreed to" by the co-managers. PFMC fisheries impacts on Puget

Sound coho stocks are relatively small and their exploitation rates rarely constrain PFMC fisheries. However, in 2016, both Washington coastal and Puget Sound coho stocks were expected to return in historically low numbers. Thus, these stocks constrained the ocean fisheries North of Cape Falcon such that ocean fisheries were extremely limited compared to prior years.

All of the requirements of the FMP for Puget Sound Chinook and coho stocks are described in terms of total or southern U.S. impacts rather than PFMC-specific impacts, regardless of the relatively small impact of PFMC fisheries on those stocks. It is important to note that even though PFMC fisheries have a relatively small impact on Puget Sound populations, Puget Sound fisheries may have a significant impact on NOAA Fisheries' ability to approve PFMC fisheries. In 2016, because of significant constraints on ocean fisheries to limit impacts on coastal and Puget Sound coho, the impacts of PFMC fisheries on Puget Sound populations were extremely low – much lower than in prior years and described as 'de minimus' in PFMC deliberations. As a result, the additive impacts of PFMC and Puget Sound fisheries were of lesser concern than usual in NOAA Fisheries' consideration of approval of the PFMC's fishery recommendations under the MSA. In a year when stock abundance is at normal levels and the co-managers could not reach agreement, it would be particularly important that the PFMC and co-managers provide the assurance needed for NOAA Fisheries to approve PFMC fisheries impacting Puget Sound populations.

Approval Requirement 2: Consistent with Endangered Species Act

The second legal requirement for approval of the annual fishery management measures is compliance with the ESA. The impact of the PFMC fisheries on ESA-listed Puget Sound Chinook was most recently addressed in a NOAA Fisheries' 2004 biological opinion. The analysis in the opinion, which concluded that the PFMC fisheries are not likely to jeopardize Puget Sound Chinook, relies on the expectation that the impact of PFMC fisheries on Puget Sound Chinook has been, and will continue to be, low. In determining compliance of PFMC fisheries with the ESA, NOAA Fisheries must assess whether the proposed PFMC fisheries indeed have low impacts on ESA-listed Puget Sound Chinook. This assessment could occur without agreement on the Puget Sound fisheries. However, as noted above, this does not ensure that NOAA Fisheries could approve PFMC management measures without some form of assurance regarding the combined effect of PFMC and Puget Sound fisheries.

Separate from NMFS' approval of the ocean fisheries under the MSA, exemption from the ESA's prohibition on take of ESA-listed Puget Sound Chinook for the fisheries inside Puget Sound is also necessary. In recent years, NOAA Fisheries has addressed the effects of the fisheries through section 7 of the ESA, whereby consultation on a federal action can provide authorization for associated take of ESA-listed species. In 2016, the Bureau of Indian Affairs (BIA) was the federal action agency through its support of tribal fisheries management activities. Non-Indian fisheries are included within the consultation because, under a North of Falcon agreement, they are interrelated and interdependent with the tribal fisheries.

If there is no co-manager agreement on Puget Sound fisheries, any non-Indian fishery in Puget Sound would likely lose its "interrelated and interdependent" relationship with the tribal

fishery. Without association with a federal action, the non-Indian Puget Sound fishery would not be eligible for a section 7 consultation and timely authorization under the ESA. This situation is what occurred in 2016 because NOAA Fisheries could not identify a federal nexus for non-treaty fisheries; there was no practical and timely alternative to exempt the take of ESA-listed species resulting from non-treaty fisheries until a co-manager agreement was ultimately reached. In addition, there was not time in 2016 to process an alternative mechanism for exempting take through other sections of the ESA in order to reach a determination before the end of the scheduled fishery¹. We expect this situation would again be the case should the co-managers fail to reach agreement in 2017.

As noted above, NOAA Fisheries was able to address 2016 Treaty Indian fisheries through an ESA section 7 consultation in the absence of an agreement because of their connection with the BIA's action. However, Treaty fisheries were still delayed until the tribal fishing plan was finalized, the supporting analysis was provided, and the opinion was issued. There is greater uncertainty concerning the prospects of a timely authorization for a 2017 Treaty Indian fishery in the absence of an agreement. The supporting analysis for the 2016 Treaty Indian fisheries was less complex due to the constraining low coho returns. However, in 2017 we anticipate that fisheries will not be constrained by coho. As such, if the co-managers fail to reach agreement again in 2017, more complex analyses would be required and could result in more delay and disruption of tribal fisheries than occurred in 2016. Additionally, NEPA compliance would have to be addressed before completing any biological opinion on a joint or tribal-only fishery. Since ESA coverage for Puget Sound fisheries in 2016 was based on agreement on a single year fishing regime, the associated incidental take coverage will expire after April 31, 2017. Based upon current information, the only path that provides a reasonable prospect for completing a timely ESA review of state or tribal fisheries in 2017 is through a North of Falcon agreement.

Approval Requirement 3: Consistent with Pacific Salmon Treaty

The management of fisheries that impact salmon stocks originating in Washington and Oregon (southern U.S.) and migrating north through Canadian or Alaskan waters is governed by the PST. Fisheries in Southeast Alaska, northern British Columbia (BC), and the west coast of Vancouver Island are managed based on overall Chinook abundance ('aggregate abundance based management' or AABM), and fisheries that occur in southern BC and Washington are managed based on individual Chinook stock abundance ('individual stock based management' or ISBM). The PST limits overall impacts in the ISBM fisheries to a set percentage of impacts that occurred during a base period of 1979-1982. For Puget Sound Chinook and coho stocks, domestic conservation objectives are generally more conservative than PST obligations – in fact, the PST's ISBM limits for Puget Sound Chinook and Puget Sound coho have never limited southern U.S. fisheries.

¹ While Sections 10 and 4(d) of the ESA provide mechanisms to review non-federal actions, they have additional procedural requirements, including a cycle of public comment. NOAA Fisheries has previously provided advice to the co-managers that a section 4(d) review of a new long-term state/tribal co-management fishing plan would take 18 months to complete.

However, the PST limits southern U.S. impacts on Interior Fraser River (*i.e.*, Thompson River) coho to 10% when the stock's status is designated as "low"-- as it has been since 2009. Because these coho are found in significant numbers in both ocean and Puget Sound fisheries, the 10% exploitation rate has constrained *both* PFMC and Puget Sound fisheries every year since 2009, and it is often the subject of substantive negotiations in North of Falcon discussions.

Implementation of the PST in the United States is governed by the Pacific Salmon Treaty Act (PSTA). The PSTA governs the makeup and conduct of the U.S. Section of the Pacific Salmon Commission and provides for enforcement of the PST in the U.S. The PSTA authorizes NOAA Fisheries to preempt "any action . . . the results of which place the United States in jeopardy of not fulfilling its international obligations under the Treaty"

All co-managers are well aware that Thompson River coho has been problematic in North of Falcon discussions. In the absence of a North of Falcon agreement, it will be important to develop an alternative mechanism that gives NOAA Fisheries assurance that the 10% limit on Thompson River coho will not be exceeded. In 2016, due to constraints on PFMC fisheries to limit impacts to coho, sharing of Thompson River coho between the PFMC and Puget Sound fisheries was not a significant issue. However, in a typical year, this sharing can be limiting and assurances regarding the combined impacts on Thompson River coho are necessary to support NOAA Fisheries' approval of the PFMC's recommended fisheries.

Approval Requirement 4: Allows Full Exercise of Tribal Treaty Fishing Rights

Treaty fishing rights in northwestern Washington are addressed in the long-running *U.S. v. Washington* litigation which guarantees treaty tribes the continued right to take 50% of the harvestable fish passing through their usual and accustomed fishing grounds. In practice today, the state and tribes co-manage the resource and use the North of Falcon process to annually negotiate the division of harvest, being mindful of the court's decisions but seeking mutually-beneficial flexibility. The formal results of the North of Falcon negotiations are documented in the "final model run" and the "List of Agreed Fisheries" (LOAF), which describes in detail the current-year's fisheries. The co-managers typically provide a fishery plan, which in combination with the final model run and LOAF, reflects their agreement and describes the proposed action and the basis for NOAA Fisheries' ESA review of Puget Sound fisheries.

The North of Falcon process evolved within the court-approved 1985 Puget Sound Salmon Management Plan, negotiated and agreed to among the state and the tribes. While this Plan remains the foundation of co-management, many practices have evolved since 1985. Stock designations have changed, exploitation rates have replaced numeric escapement goals for many stocks, and data and science have improved. In general, the conservation objectives that the co-managers present at the March PFMC meeting are a modern, more sophisticated version of the agreed-to escapement goals envisioned in 1985. Today, co-managers focus intently on an optimum distribution of available impacts to ESA-listed populations as well as traditional Indian/non-Indian allocation requirements.

For decades, the state and tribes have reached agreement on how to share the catch in a manner that has not required major judicial involvement. As a result, neither the co-managers nor NOAA Fisheries has modern judicial guidance on how to proceed in the absence of an agreement. Would the court review exploitation rates or be solely concerned with fixed escapement goals? How would the court treat biological risk to ESA-listed populations? Would the court look at the allocation of the management units analyzed by co-managers today, or would it revert to the original allocation units the court used 30 years ago? It may be difficult to determine the “harvestable surplus”, the treaty share, and whether a proposed non-Indian fishery would impair the treaty share without co-manager consensus. Under any circumstance, it is difficult to imagine a satisfactory judicial resolution if the co-managers are disputing the underlying scientific and legal standards.

In 2016, the co-managers agreed on conservation objectives in Puget Sound. The dispute that delayed co-manager agreement related to the allocation of impacts among the fisheries required to meet those objectives. In NOAA Fisheries’ January 19, 2016, letter, we stated that in a circumstance where the conservation objectives are agreed to but the fisheries are not, NOAA Fisheries could potentially review a proposed fishery submitted unilaterally by one manager or another for its compliance with “other applicable law;” in this circumstance, with treaty rights. We stated that PFMC fisheries, which are predominantly (but not exclusively) non-Indian, could be evaluated to ensure that they are designed to harvest less than 50% of the harvestable share. However, making such a determination even with agreed conservation objectives would be difficult, given the lack of precedent and the short time between the PFMC’s April meeting and the start of the fisheries. Making a determination would likely be impossible without agreed conservation objectives.

More significant questions surround a proposal for a non-Indian fishery in Puget Sound that has not been agreed to by tribal co-managers. NOAA Fisheries notes that during the era of co-management litigation about what harvest counts in the non-Indian share has long been deferred, giving way to the Pacific Salmon Treaty and the North of Falcon process. Assuming such questions do not surface, it is conceivable that the harvestable surplus for each population affected could be inferred from the agreed-to conservation objectives – and factor in any PFMC fishery impacts – to determine if a harvestable share would be exceeded by fishing consistent with the proposal.

In NOAA Fisheries’ analysis of the past five years, the negotiated non-Indian catch impacts in Washington have exceeded 50% for at least two Puget Sound Chinook allocation units – Strait of Juan de Fuca and Nooksack/Samish in every year². Treaty Indian catch impacts have exceeded 50% for at least three allocation units. The following table illustrates the balances across allocation units (the unit of sharing defined by the Puget Sound Salmon Management Plan) for 2016. The table also describes the fisheries with the greatest impacts for those units and where adjustments would most likely have to occur in order to bring impacts down to 50% or less.

²Specifically in 2016, it appears to NOAA Fisheries, based on preseason estimates, that non-Indian fisheries in Washington exceeded 50% in three allocation units.

While unique in some respects, 2016 is representative of the overall pattern of general impact distribution and sharing among allocation units in recent years. Non-Indian impacts occur over broad areas, primarily in pre-terminal sport fisheries, while Treaty Indian impacts are more localized occurring primarily in the rivers or adjacent marine areas. This information helps illustrate the complexity and changes that would be required to achieve 50/50 sharing for each management unit. It also reminds us that one of the key advantages of co-manager agreement is the flexibility for the co-managers to reach accommodation on sharing principles that recognize the needs and interests of the state and tribal parties.

Final 2016 Preseason Fishery Distribution of Adult Mortality for Puget Sound Chinook

Allocation Unit	Nontreaty				Treaty			
	Preterminal	Terminal	Total	% of mortality	Preterminal	Terminal	Total	% of mortality
Str. Juan de Fuca	430	1	431	65%	226	4	230	35%
Nooksack/Samish	5,311	14,904	20,215	57%	2,648	12,341	14,990	43%
Skagit	1,311	338	1,648	37%	542	2,263	2,805	63%
Stilly-Snoh	2,457	599	3,056	66%	564	980	1,544	34%
So. Puget Sound	10,160	1,605	11,765	41%	3,665	12,995	16,661	59%
Hood Canal	8,570	36	8,605	21%	2,649	30,134	32,783	79%
Total	27,808	17,482	45,289		10,069	58,713	68,783	

Distribution of Adult Mortality Described in the Above Table Across Southern U.S. Fisheries for Each Allocation Unit
 Shaded cells = allocation units with Nontreaty mortalities > 50%. Unshaded cells = Treaty mortalities > 50%.
 Highlighted cells = fisheries with the largest impacts for the fleet with the imbalance for that allocation unit.

Fisheries		Str. Juan de Fuca	Nooksack/Samish	Skagit	Stillaguamish-Snohomish	So. Puget Sound	Hood Canal
S. Of Falcon Ocean		0%	0%	0%	0%	0%	0%
N.Flc. Ocean Troll:	Nontreaty	0%	1%	0%	1%	3%	1%
	Treaty	2%	2%	2%	4%	5%	3%
N.Flc. Ocean & Buoy10 Spt	Nontreaty	0%	1%	1%	0%	2%	1%
Pgt Snd Troll	Treaty	10%	2%	0%	3%	4%	1%
Pgt Snd 6 Sport	Nontreaty	15%	2%	1%	4%	5%	1%
Pgt Snd 5 Sport	Nontreaty	28%	3%	1%	5%	7%	2%
Pgt Snd 7 Sport	Nontreaty	6%	4%	13%	11%	4%	6%
Pgt Snd 8-13 Sport	Nontreaty	13%	2%	7%	28%	16%	9%
Preterm. Pgt Snd or Out-of-Region net:	Nontreaty	3%	1%	5%	4%	0%	1%
	Treaty	23%	3%	10%	5%	4%	2%
Terminal Pgt Snd or Local Terminal Net:	Nontreaty	0%	22%	0%	0%	4%	0%
	Treaty	0%	31%	1%	21%	24%	15%
Freshwater Sport:	Nontreaty	0%	20%	8%	13%	2%	0%
Freshwater Net:	Treaty	1%	4%	50%	1%	22%	58%
Total		100%	100%	100%	100%	100%	100%

Source: Data compiled from FRAM Chinook run 2916 - June 2016

Conclusion

I reiterate NOAA Fisheries' confidence that a successful North of Falcon agreement will emerge in 2017 as a direct result of your work over these intervening months. I encourage you to stay focused on the hard work necessary to reach an agreement among the co-managers for the 2017 fishing season and a new long-term agreement that the co-managers could rely on for the foreseeable future. Ultimately, it is up to the state and tribes to find common ground and reach agreement. My staff and I will do all we can to support an outcome that is satisfactory to all.

I hope the information I provided is useful, and I am happy to address any questions you may have. As mentioned above, please feel free to share this information with anyone interested in our upcoming North of Falcon process.

Sincerely,



Barry A. Thom
Regional Administrator

cc: Curt Melcher, Oregon Department of Fish and Wildlife
Herb Pollard, Pacific Fishery Management Council
Jeremy Wolf, Columbia River Inter-tribal Fish Commission

EXHIBIT D

APPEARANCES

For Twin Harbors Fish
And wildlife Advocacy:

Joe D. Frawley
Schefter & Frawley
1415 College Street SE
Lacey, WA 98503

For Mr. West:

Arthur West
Pro Se
120 State Avenue NE
Olympia, WA 98501

For the Department:

Michael Grossmann
Attorney General's Office
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100

Noelle Chung
Attorney General's Office
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100

I N D E X

PAGE REFERENCE

Argument by Mr. Frawley	13
Argument by Mr. West	19
Argument by Mr. Grossmann	19
Rebuttal by Mr. Frawley	31
Questions by the Court	34
Court's Ruling	54

WITNESS

PAGE REFERENCE

E X H I B I T L I S T

NUMBER

PAGE

1 *** June 12, 2020 ***

2
3 THE COURT: Good morning, everyone. This is the
4 Friday civil motions calendar for June 12th. We have one
5 matter on the calendar for oral argument this morning. It
6 is matters one and two on the calendar, Twin Harbors Fish
7 and wildlife Advocacy and Arthur West vs. Washington
8 Department of Fish and Wildlife.

9 This matter was set for telephonic argument by the court
10 earlier this week. In the courtroom we have Mr. Clerk, we
11 have Madam Court Reporter, and we have a member of the
12 public.

13 Before we get started, let me have the identities of
14 those on the telephone. I'll start with the plaintiffs.

15 Mr. West, are you there?

16 MR. WEST: I am, Your Honor. Good morning.

17 THE COURT: Good morning, Mr. West.

18 And Mr. Frawley, are you there?

19 MR. FRAWLEY: I am, Your Honor. Good morning.

20 THE COURT: Good morning to you, Mr. Frawley.

21 And for the defendants, who do we have?

22 MR. GROSSMANN: Good morning, Your Honor. Mike
23 Grossman with the Washington State Attorney General's
24 Office with the Washington Department of Fish and Wildlife
25 and with me is Co-counsel Noelle Chung.

1 specific questions.

2 THE COURT: Thank you, Mr. Frawley.

3 Mr. West, any further words from you?

4 MR. WEST: No, thank you, Your Honor.

5 THE COURT: Mr. Grossmann, let me ask you a couple of
6 questions. I was interested to hear your comments
7 regarding mootness on the process regarding the other
8 rules. Do you see this dispute, at least portions of it
9 that appear to be crystalizing in this briefing anyway,
10 regarding the alleged illegality of the process involving
11 the closed-door meetings with the co-managers, treaty
12 tribes being one of them, do you see that being a decision
13 that the Court needs to make?

14 MR. GROSSMANN: Needs to make today?

15 THE COURT: Whether that process is illegal.

16 MR. GROSSMANN: I think I understand the question,
17 Your Honor.

18 I guess what I would say is, again, we have subject
19 matter and personal jurisdiction over '18 and '19
20 rulemaking. We don't have it for 2020. A rulemaking
21 process is not yet concluded. Certainly the new rules, I
22 think, are going to be in effect, they're planned to be in
23 effect, by June 22nd. I would certainly argue that the way
24 the agency put the rulemaking file together for '18 and '19
25 are then moot.

1 But I would commit to this Court that the issue of
2 whether or not the mechanisms by how the Department works
3 with the federal government and with treaty tribes and the
4 public to -- [unintelligible] 101 through to the issuance
5 of a final rule, I mean, I don't want to deprive the
6 petitioners of their day in court on that one, but we need
7 to get a proper rulemaking record, and I think we could do
8 it for '18, '19, or '20 in front of this Court and I will
9 not make a mootness argument with regard to that particular
10 claim.

11 THE COURT: If that briefing were to occur and that
12 decision were to be requested of the Court, are the tribes
13 indispensable parties?

14 MR. GROSSMANN: They might have a different view on
15 that than I have. They have been very interested in this
16 litigation. I have been feeding them... Probably that's
17 not the right word. I have been sharing with them the
18 pleadings filed with this court. So far they have decided
19 not to join in.

20 You know, I think at the end of the day... Let me do
21 this: Let's say that issue were to come up and let's just
22 say, for sake of discussion, that this Court agreed with
23 Mr. Frawley to not -- you just can't do it that way, I
24 think the remedy at that point would be to invalidate
25 rules. Frankly, that's why I think it would be a better

1 course of action for them to wait for the 2020 rules to get
2 adopted and that's something that you can actually
3 invalidate because 2018 and 2019 are gone.

4 But even let's assume that they don't do that. You
5 know, I'm certainly willing to proceed on 2019. I think
6 there's maybe a question about whether the opinion that
7 comes out for rules that are no longer around becomes
8 advisory. But I think -- you know, I think the Court --
9 and I would be okay with the Court adjudicating that legal
10 question. And with that in hand, you know, I think the
11 agency would have enough information to appeal if it wanted
12 to, but also it would take that information to heart and I
13 think we would have a, you know, discussion, you know, do
14 we enter some more specific form of relief.

15 Again, it would be a little difficult with regard to '18
16 or '19 rules that no longer exist. But, you know, we could
17 talk about how the agency should proceed on that basis.
18 Again, I think it would be a lot cleaner if that -- and
19 that sounds like a pretty -- pretty narrow legal issue.
20 There's probably some disputed facts about the degree of
21 change that's possible and why and under what circumstance.
22 But with just a little bit of discovery work, we could pull
23 all that together for 2020 rules and get it decided while
24 those 2020 rules are still in place.

25 THE COURT: And when you say "that," you mean the

1 description and record built regarding the process through
2 which the Department interacts with the treaty tribes and
3 perhaps others in closed-door settings that then result in
4 the initial rulemaking proposal?

5 MR. GROSSMANN: Correct, Your Honor.

6 THE COURT: Knowing that that specific question is
7 not necessarily in front of the Court with that type of
8 record, what are your thoughts with respect to whether
9 that's a... well, would that be... Let me back up. If
10 the tribes were to be part of that discussion, would that
11 be removable to federal court because of the potential
12 interaction of the federal authorities into whatever it is
13 that Fish and Wildlife is doing pre-rule proposal?

14 MR. GROSSMANN: So I'll put a placeholder on that to
15 say, you know, I always want to hear what the tribes have
16 to say in answer to that. They may have a different answer
17 than me.

18 I don't think the tribes would choose to intervene.
19 They might make some kind of a Rule 19 argument. Frankly,
20 I don't see it because I think the relief that occurs in
21 that particular instance would be to invalidate the 2020 --
22 you know, assuming that we did it based on an amended
23 complaint once the 2020 rules are adopted here at the end
24 of June, I think the remedy would be to invalidate the
25 rules, and that's what gives the agency the kick in the

1 numbers and the what is or isn't in the rulemaking file,
2 but the process has been followed the last few years and is
3 likely to be followed absent some decision from me or
4 somebody else, likely to be followed in subsequent years?
5 You would agree with that, the process?

6 MR. GROSSMANN: Yes, I completely agree. And that's
7 why I would never make a mootness argument with regard to
8 that process claim and that claim that that process is
9 illegal because I do think it is capable of petition
10 evading review if at some point we don't confront the
11 petitioners' claims. I'm fine with doing that.

12 THE COURT: Okay. So Mr. Grossmann, let me ask my
13 other question. You said something in response to a
14 previous question, that you believe that the Department has
15 the ability to -- I can't remember the words you used --
16 foundational work prior to the pre-proposal, the rule
17 proposal, and that you can -- that's not part of the -- the
18 rulemaking file obligation does not start there, that the
19 public participation arguably would not start there during
20 that foundational work for the rule proposal. Is that
21 accurate?

22 MR. GROSSMANN: Well, partly so. I think it really
23 kind of depends on what we talk about. And if I might use
24 some illustrative examples by way of an explanation. So,
25 you know, the fishing season that parties can comment on

1 and the way they got there once a proposal is floated
2 within 102 is built on a huge amount of work. Some of that
3 occurs, you know, between the 101 and the 102, but some of
4 it may have occurred years ago.

5 So, for example, one of the biggest and most tough
6 issues this year is the mid-Hood Canal conservation
7 restraint. I mean, we were arguing over two-tenths of a
8 percent, but it had a huge impact on that fisheries that
9 could be generated and put in the LOAF and that ultimately
10 people would comment on. I mean, those are decisions and
11 technical work that was done with tribes and with NMFS, you
12 know, years ago. And, you know, we have some complaints
13 about how it should be done currently. But that's the kind
14 of example of foundational work that just -- it ends up
15 setting the table, it ends up having huge consequences for
16 the range of options that are available. But there's not a
17 lot that you can really say about public involvement in
18 that because the decisions were made long ago and the
19 table's been set on them.

20 Now, having said that, I will say that if somebody, and
21 this was part of my argument, if somebody comes and says,
22 "hey, you're continuing to rely on 12 percent, everyone
23 knows that, it's disclosed during the rulemaking process,
24 Pat Patillo commented on it this year, I've got a better
25 rate and I've got a technical basis for it," well, then the

1 APA process envisions providing us with that information
2 and with that information in hand we have to react to it
3 and respond to it and make a decision and explain it. So
4 that's one example of how decisions made long ago have a
5 foundation for today.

6 THE COURT: Okay.

7 MR. GROSSMANN: There were also decisions made in
8 negotiations with tribes and as part of the ESA process
9 that occur on an annual basis and most of it occurs in that
10 January to mid April timeframe and they create a similar
11 foundational basis. We do that because we're required to
12 do so under federal law and it's the only way that you can
13 logically have a fishery and be in compliance with federal
14 law and your conservation objectives. But it's done during
15 that period of time.

16 And I would disagree with Mr. Frawley that the public
17 doesn't know about it or it's all secret, and Mr. Baltzell
18 addresses why that's a myth. But still I would agree that
19 some of those things we have to do. Even if we didn't
20 adopt rules, if we were just being fishery managers, we
21 would do this, and it sets the table.

22 And, again, just if I can close really quickly, you
23 know, I agree that, having set the table, it probably
24 pretty -- puts a pretty heavy thumb on what's likely to be
25 proposed and whether any changes can be made. But, again,

1 the basis for change is to comment and be so persuasive in
2 your comment that, if the agency ignores it, it's arbitrary
3 and capricious. So I'm willing to take that argument on.

4 THE COURT: All right. So Mr. Grossman, let me ask
5 you a more limited question, more of a hypothetical. You
6 would agree, would you not, that the APA is a process that
7 is designed to both solicit and to incorporate public
8 comment in the process? Would you agree with that?

9 MR. GROSSMANN: Yes.

10 THE COURT: And would you agree also that the
11 exemption of APA from OPMA cases is because the APA process
12 is one that already inherent in the APA process involves
13 public involvement and some level of transparency with
14 rulemaking files?

15 MR. GROSSMANN: So a two-part answer, if I may. The
16 simple answer is yes. But the manner in which that public
17 involvement occurs and the, quote, unquote, transparency is
18 set forth in statute. It's not set, based on Mr. Frawley's
19 recitation, to legislative intent.

20 THE COURT: Well, I'm not suggesting that it is. I'm
21 just asking the question.

22 That conceptionally, though, would you agree with me, is
23 why APA rulemaking process is exempted from the
24 transparency that's at the heart of OPMA law?

25 MR. GROSSMANN: I mean, I don't know what was in the

1 mind of the legislature. I do know that the legislature
2 said there's a process under the APA, follow that process.
3 It has its own rules on public involvement and, quote,
4 unquote, transparency. The OPMA does not apply. I think
5 that's the most direct answer to your question.

6 THE COURT: You wouldn't agree with me that the
7 reason for that is because the APA is already designed to
8 include the public?

9 MR. GROSSMANN: I think that's a logical inference.
10 I won't deny for a moment that the APA does envision public
11 involvement. But the manner in which the public is
12 involved is set forth in statute, not in Mr. Frawley's
13 recitation to legislative intent.

14 THE COURT: Okay. I understand. I guess my question
15 is this, though: At some point is the foundational work
16 that you're discussing is necessary and, frankly, the
17 agencies are entitled to do it, outside of a rulemaking
18 file, the foundational work that goes into a rule, if that
19 foundational work is also exempted from the OPMA, isn't
20 there some limitation on how much foundational work can be
21 under the umbrella of the APA process so as not to have too
22 large of an exemption from otherwise OPMA considerations?
23 Does that question make sense to you?

24 MR. GROSSMANN: No, it absolutely does because I've
25 actually pondered it quite substantially as we were trying

1 to think about the crossover between the OPMA and APA.
2 And, you know, it's a tough one to ponder, to be quite
3 frank.

4 So let me use my example about the mid-Hood Canal
5 conservation constraint. I mean, it's something that was
6 generated over years of work and, you know, it was done by
7 staff. I would continue to make the argument there
8 probably more so, not so much on rulemaking activity
9 exemption, but on the idea that it's not the agency head, a
10 governing body, that's doing that, that that was also not
11 covered by the OPMA. But that's not the way they pleaded
12 their complaint. And so, you know, we dismissed it on
13 different grounds. They pleaded their OPMA complaint
14 purely based on the North of Falcon process.

15 Now, during the North of Falcon process, that table-
16 setting work has occurred, you know, years before the
17 current year's rulemaking. But it's considered, it's
18 considered during that process, it's a piece of information
19 and we provide that information in the rulemaking file. So
20 it's there, it's part of the rulemaking process, and the
21 APA duty then is if somebody's got a problem with that
22 12-percent rate, they better give us some information, they
23 better give us a comment. We'll take that comment, we'll
24 take that information, we'll confront, we'll decide whether
25 to incorporate it in the rulemaking process and proposals

1 in that 101 to 102 time frame, if that's when they provide
2 the information, and if they provide the information at the
3 rulemaking hearing, we'll confront it and decide whether to
4 change the rule or not. And if they don't like it, they
5 challenge the rule.

6 THE COURT: So, Mr. Grossmann, I would suggest you
7 wouldn't agree that this is the case in this specific
8 incidence. But what would prevent an agency from having
9 many closed-door private meetings with members of the
10 public or trade groups that would otherwise be public under
11 the OPMA but characterize it as foundational work to a rule
12 that may or may not be proposed in a year's time or
13 two years' time?

14 MR. GROSSMANN: Well, so two responses: First of
15 all, I think there's nothing in the law that precludes that
16 under either OPMA or the APA. And if those meetings
17 occurred, as they acknowledged -- or I mean admittedly do,
18 you know, during the North of Falcon process, there's
19 nothing in the APA that precludes that either.

20 THE COURT: All right. Mr. Frawley, I want to give
21 you and Mr. West a final word on some of the topics I've
22 been discussing, if you would like to weigh in on anything
23 you heard either from me or Mr. Grossmann.

24 MR. WEST: Are you speaking to Mr. Frawley or myself,
25 Your Honor?

C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF THURSTON) ss

I, CHERYL HENDRICKS, CCR, Official Reporter of the Superior Court of the State of Washington in and for the County of Thurston do hereby certify:

1. I reported the proceedings stenographically;
2. This transcript is a true and correct record of the proceedings to the best of my ability, except for any changes made by the trial judge reviewing the transcript;
3. I am in no way related to or employed by any party in this matter, nor any counsel in the matter; and
4. I have no financial interest in the litigation.

Dated this 19th day of June, 2020.

Cheryl L. Hendricks,
CCR NO. 2274