

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,

**DECLARATON OF PATRICK
PATTILLO**

v.

STATE OF WASHINGTON, et al.,

Noted for: October 30, 2020

Defendants.

PATRICK PATTILLO 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. The North of Falcon process used by the state and tribal governments to set annual Puget Sound salmon fishing seasons and other regulations began in 1984, approximately the same time as the federal court adopted the Puget Sound Salmon Management Plan (1985) developed by the co-managing State of Washington and Puget Sound Treaty Tribal authorities. Without compromising their clear authority to make decisions for their respective tribal and state fisheries or the clear government-to-government relationship of the co-managers, the North of Falcon process was designed to provide access to discussions, information, and negotiations of the co-

1 to supplant the annual season-setting procedures and requirements of the PSSMP, but served to
2 complement and augment that Plan's implementation. As an example of that complementary
3 service, tribal and non-tribal participants in the North of Falcon process were invited to respectfully
4 provide views on "needs" related to their fisheries to be considered along with biological or
5 technical information required to be used by the Plan. Harvestable shares were calculated and
6 openly exchanged and discussed. Use of such qualitative input by the co-managers was consistent
7 with the Plan in providing "management flexibility to achieve fair sharing of fish in ways that will
8 minimize or eliminate the need for equitable adjustments." (PSSMP Section 10.3). The North of
9 Falcon process was an innovative and successful component of the co-managers' annual decision-
10 making obligation.
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12 3. Since implementation of the North of Falcon process, the abundance and status of
13 Puget Sound salmon populations has changed. A prime example of that change is the decline in
14 survival and numbers of wild Puget Sound Chinook salmon populations. That decline culminated
15 in 2001 with the development of the first of several co-manager resource management plans
16 (RMPs) that provided agreed conservation objectives or fishery impact limitations as a framework
17 for annual decisions about fisheries affecting Puget Sound Chinook salmon. An important feature
18 of the original and subsequent co-manager Chinook RMPs was the clearly stated agreement to
19 manage state and tribal fisheries consistent with the federal court adopted PSSMP. Despite major
20 changes and greater complexity added to conservation objectives for Puget Sound Chinook
21 populations, the co-managers made no modifications to the now thirty-five-year-old PSSMP,
22 including procedures for ensuring fair sharing of harvest.
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24 4. The most recent RMP written by the co-managers was completed in 2010 and
25 submitted to the National Marine Fisheries Service (NMFS) as the basis for exemption to take
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1 prohibitions of the Endangered Species Act. NMFS approved that RMP for a period extending
2 through April, 2014. Approval of the jointly agreed, co-manager RMP directly provided an
3 exemption to the ESA take prohibition for fisheries managed by both the Treaty Tribes and
4 WDFW.

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6 5. The co-managers failed to complete a revised, jointly agreed RMP following
7 expiration of the 2010 RMP, jeopardizing implementation of the co-manager agreement on
8 fisheries for the 2014-2015 annual fishery cycle produced by the 2014 North of Falcon process.
9 Without NMFS approval of a revised RMP, neither tribal nor nontreaty fisheries would be
10 exempted from taking prohibitions of the ESA on listed species. With this dilemma in hand, the
11 federal government recommended an alternative exemption process to the co-managers that
12 involved applying for one year only. NMFS completed a one-year consultation under section 7 of
13 the ESA on the effects of the 2014-2015 annual fishery cycle, with a biological opinion completed
14 based on the 2010-2014 RMP. The process in 2014 went relatively smoothly, and it was not until
15 later years that the process broke down. Because the co-managers still have not completed a
16 revised RMP that met requirements for approval by NMFS since the expiration of the 2010-2014
17 RMP, NMFS has approved annual fisheries proposed by the co-managers using the section 7
18 alternative ESA exemption process for each of the annual fishery cycles since 2014-2015.
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21 6. With ESA exemption of co-manager fisheries depending on the one-year section 7
22 alternative process, the co-management North of Falcon process has been fundamentally altered.
23 The section 7 process chosen by NMFS originally in 2014 has relied on a requesting federal agency
24 to consult with NMFS on an "action" related to the management of fisheries affecting Puget Sound
25 Chinook salmon. Since the federal agency chosen to provide this "nexus" for a related action - the
26 Bureau of Indian Affairs (BIA) – allegedly has no connection in its action to the Washington

1 Department of Fish and Wildlife (WDFW), WDFW-managed fisheries are not directly exempted
2 from this section 7 alternative process. NMFS has however provided exemption to WDFW's
3 managed fisheries on the condition that co-manager consensus is reached. This NMFS conditional
4 ESA exemption fundamentally changed the co-management negotiation process of the annual
5 North of Falcon process, because tribal fisheries are likely to be, and have been, approved by
6 NMFS without co-manager consensus. Without consensus, even disagreements over issues having
7 no impact on conservation or allocation outcomes, it is unlikely that NMFS would provide
8 exemption to any WDFW-managed fisheries affecting ESA listed species. One example of this
9 dilemma is the 2016 North of Falcon process in which co-manager agreement was not reached
10 within the normal period of the negotiation process. The treaty tribes obtained approval for their
11 fisheries from NMFS and the State did not.
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13 DATED this 30th day of October, 2020.
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17 PATRICK PATTILLO
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