

# SCHEFTER & FRAWLEY

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January 29, 2021

## **Via Certified Mail – Return Receipt Requested**

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Re: Sixty-day Notice of Intent to Sue For Violations of the Endangered Species Act

Dear Honorable Civil Servants:

Pursuant to 16 U.S.C. § 1540(g), this letter serves as the Fish Northwest's 60-day notice of intent to sue the U.S. Department of Commerce, the Secretary of Commerce, the National Marine Fisheries Service (also known as NOAA Fisheries), and the Northwest Regional Administrator for the National Marine Fisheries Service (collectively "NMFS"), as well as the Bureau of Indian Affairs, the U.S. Fish and Wildlife Service, and the Washington Department of Fish and Wildlife.

There are a number of salmon and steelhead runs in Washington that are listed as either threatened or endangered under the Endangered Species Act (ESA). Those species are caught in fisheries conducted by both treaty and non-treaty fishers in Washington waters. Because listed species are caught, and those fisheries impact other listed species, NMFS is responsible for analyzing proposed salmon and steelhead fisheries, along with other actions detailed below, to ensure compliance with the ESA.

For the past few years (since 2014), NMFS has granted single year approval for tribal fisheries, and fisheries proposed by the Washington Department of Fish and Wildlife ("WDFW") so long as WDFW complies with the Treaty Tribes' demands, under Section 7 of the ESA. Section 7 provides for consultation among federal agencies based on a proposed "federal action." Relevant to this case, the alleged "federal action" is the Bureau of Indian Affairs (BIA) "authority to assist with the development and implementation of the co-managers" salmon seasons. While identifying BIA activities as federal actions relevant to the management of Puget Sound salmon seasons is dubious<sup>1</sup>, NMFS has intentionally ignored federal actions related to non-treaty fisheries. In addition, despite the admission that BIA's alleged action is development and implementation of the "comanagers" fishing season (meaning both state and Treaty Tribes), the Section 7 consultation is somehow not conducted for the state fisheries. Some examples of federal actions by NMFS and USFWS, but certainly not all, are given in this letter.

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<sup>1</sup> Individuals that have decades of experience in North of Falcon negotiations and salmon season management will testify that they have never seen any employee of BIA being involved in salmon management.

The effect, which appears intentional, is to leverage the annual negotiations in favor of the Treaty Tribes and to the detriment of the non-treaty fishers of Washington. The process has devolved into what more or less amounts to extortion. Treaty Tribes withhold agreement based solely on their desired outcomes for state managed fisheries. The treaty tribes harvest hundreds of thousands more salmon than do non-treaty fishers, and the constraints placed on state fisheries prevent the state from obtaining the state's share of the harvest. Importantly, the Treaty Tribes harvest far more natural origin chinook and coho salmon than do non-treaty fishers. As discussed below, the result is a consistent overharvest of ESA listed stocks and substantive violations of the ESA.

Realizing the leverage they have been given, and the complete lack of public oversight, Treaty Tribes are withholding agreement in the annual season setting process to settle non-fishing related disputes, such as the territorial dispute between the State of Washington and the Skokomish Tribe.<sup>2</sup>

The result is the parties are now in violation of the various orders of the court in *U.S. v. Washington*. Management does not occur in a manner consistent with the Puget Sound Salmon Management Plan. Conservation concerns regarding salmon and steelhead in Washington are getting worse, not better, and the citizens of Washington are excluded from the management process. A veil of secrecy has been placed over fisheries management that is not only unlawful but also detrimental to the management and recovery of listed species. As detailed below, the unlawful process has resulted in a number of substantive violations of the ESA.

NMFS and BIA are complicit in this management scheme (although BIA's role appears to be limited to requesting consultation) and have, on a number of occasions, explicitly instructed that WDFW must not push back against the existing process. Letters, discussed below and attached hereto as Exhibit 2 and Exhibit 3, from NMFS confirm that NMFS and BIA will continue to violate the ESA unless legal action is taken. It is Fish NW's intent to file suit following sixty days from the date of this letter if a resolution is not reached.

## **I. ENDANGERED SPECIES ACT BACKGROUND**

The purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend.<sup>3</sup> Section 9 of the ESA prohibits any person, including any federal agency, from "taking" an endangered species without proper authorization. The term "take" is statutorily defined broadly as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The definition of "harm" has been defined broadly by regulation as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."

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<sup>2</sup> Attached hereto as Exhibit 1 is a resolution of the Skokomish Tribal Council requiring the tribe to withhold agreement at North of Falcon unless the state acquiesces its position in a territorial dispute concerning the reservation boundary.

<sup>3</sup> 16 U.S.C. § 1531(b).

Under Section 7(a)(2) of the ESA, NMFS must insure that any action it authorizes, funds or carries out is “not likely to jeopardize the continued existence of any endangered species.” When an agency determines that its proposed action “may affect listed species” it must engage in formal consultation with the expert federal wildlife agency responsible for the species at issue using “the best scientific and commercial data available.” Where, as here, NMFS is both the action agency and the expert agency, it must undertake internal consultation before taking any action that may result in a “take” of listed salmon and steelhead. As detailed below, that has not happened.

## II. FACTUAL BACKGROUND

### A. NMFS Takes Dozens of “Federal Actions” Annually That Require Consultation Under Section 7.

Consultation under Section 7 of the ESA is required to “insure that any action authorized, funded, or carried out by such agency” is not likely to jeopardize the continuance of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species...” As discussed above and below, NMFS has in recent years relied on alleged actions taken by BIA to find a “federal action” to trigger expedited review under Section 7. It also repeatedly, and consistently, taken the position that no federal action by NMFS or USFWS exists to provide the same expedited review to WDFW proposed fisheries.<sup>4</sup> This is patently false and will be discussed below. NMFS and USFWS take many actions annually that require it conduct a Section 7 consultation for the fisheries they authorize, fund and carry out.

First, NMFS approves the state fisheries proposed by WDFW that take listed species of salmon and steelhead. NMFS issues directives concerning harvest each year, provides continuous input to both WDFW and the treaty tribes before, during and after the season setting process, and monitors catch (such as ocean catch under both state and federal regulations) to manage and, if necessary, open or close seasons as the year progresses. NMFS authorizes Washington State fisheries, just as it does treaty fisheries, that annually take listed species. This authorization alone requires NMFS to conduct a Section 7 consultation, as does the conducting of seasons off the Washington coast that must be administered in lock-step with state fisheries.

Second, NMFS funds the Washington state fisheries in many ways. NMFS and USFWS fund hatcheries that are intended to, and do, provide fish for Washington State fisheries. NMFS annually contributes roughly \$1 million to WDFW to implement the Pacific Salmon Treaty. Those funds are expended to implement fisheries in Washington that result in the take of listed species, including the development of fisheries plans, in-season management of fisheries, and the collection of biological data to ensure fisheries are compliant with the Pacific Salmon Treaty.

NMFS annually contributes roughly \$2 million through a Pacific Coastal Salmon Recovery Fund grant. Hundreds of thousands of those dollars are spent annually to implement

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<sup>4</sup> Attached hereto as Exhibit 2 is a letter dated January 19, 2016 from NMFS Assistant Regional Administrator Robert Turner to then WDFW Director Jim Unsworth and Northwest Indian Fisheries Commission Lorraine Loomis. Attached hereto as Exhibit 3 is a letter dated February 10, 2017 from NMFS Regional Administrator Barry Thom to then WDFW Director Jim Unsworth and Northwest Indian Fisheries Commission Chair Lorraine Loomis.

fisheries that take listed species, including creation of fishery plans, in season management, and the collection of biological data to ensure fisheries are compliant with the Pacific Salmon Treaty.

USFWS annual contributes nearly \$1 million to WDFW from a Dingell-Johnson Act grant. These funds are used to implement fisheries that take listed species, including creation of fishery plans, in season management, and the collection of biological data to ensure fisheries are compliant with the Pacific Salmon Treaty.

Third, NMFS approves and implements fisheries outside of three miles in the Pacific Ocean off of Washington's coast. Washington approves and implements fisheries inside of three miles. NMFS requires that Washington's ocean fisheries inside of three miles be identical to those implemented by NMFS outside of three miles. WDFW fisheries managers have acknowledged in deposition testimony that it is understood that NMFS will only approve identical fisheries, and it would be impossible to manage for different fisheries more than and less than three miles from the coast. NMFS monitors these fisheries and modifies them, by opening, closing, or transferring quotas, as the seasons progress. Again, state fisheries, including in season adjustments, are dictated by the fisheries approved, funded and managed by NMFS.

Fourth, USFWS is a signatory to the Hood Canal Salmon Management Plan. The plan states that it is "to serve as the basic guideline for implementation of the annual pre- and in-season management plans by the parties." The plans developed and implemented by the parties result in the take of listed species.

Fish NW can readily prove that NMFS and USFWS take many actions annually that require Section 7 consultation. As discussed below, Fish NW will seek injunctive relief enjoining the procedurally defective season setting process from continuing.

#### **B. BIA's Federal Action is Dubious At Best.**

Section 7 consultation is required when a federal agency takes an action that harms a listed species. Importantly, not every federal action can trigger Section 7 consultation. "Section 7 and the requirements of this part apply to all actions in which there is discretionary federal involvement or control." 50 CFR § 402.03. "Where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect, and the agency action therefore should not be considered "discretionary" actions subject to Section 7. *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946, 963 (quoting *Dep't. of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004)) (overruled on other grounds).

BIA does not exercise discretionary control of the fisheries, is not the "cause" of the taking of listed species during treaty fisheries, and is nothing more than a convenient vehicle for the parties to attempt to trigger Section 7 of the ESA. A federal "action" was created in 2014 to allow fishing to go forward based on the Treaty Tribes' fisheries when the parties failed to timely complete a multi-year fisheries plan.

#### **C. The Existing Process Is Weaponized Against Non-Treaty Citizens of Washington and the Salmon and Steelhead Resources of Washington State.**

The current system of using single year fisheries plans, using a Section 7 consultation based on BIA's alleged federal action, began in 2014 when WDFW and the treaty tribes did not timely submit a multi-year fisheries plan. The process has continued annually since that time. Each year, the process grows more dysfunctional. The parties to the annual fisheries negotiations, and in particular the Treaty Tribes and USA, have now weaponized the Section 7 consultation process. The 2016 season setting process is an illustrative example.

During the 2016 North of Falcon process, WDFW proposed a two week catch and release salmon fishery in a portion of Puget Sound. The proposed fishery did not create any conservation concerns. The Treaty Tribes rejected the fishery (in violation of the court's order in *U.S. v. Washington* to work cooperatively and exercise management flexibility), and the negotiations reached an impasse. NMFS, through the alleged BIA action, approved the Treaty Tribes' seasons and WDFW was not granted authorization for its seasons. The result was the Treaty Tribes went fishing (some prior to ESA consultation in blatant, but unaddressed by NMFS or BIA, violation of the ESA) and the non-treaty citizens of Washington did not.

To further clarify that WDFW would be forced to capitulate if it wanted authorization from NMFS in 2017, Barry Thom, the Regional Administrator for the Department of Commerce, sent a letter to WDFW explicitly stating that no fishing would occur absent agreement. Mr. Thom acknowledges that "NOAA Fisheries was able to address the 2016 Treaty Indian fisheries through ESA section 7 consultation in the absence of an agreement because of the connection with the BIA's action." To make it clear that WDFW must capitulate, Mr. Thom writes that "[w]ithout 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."

#### **D. The Unlawful Process Has Resulted in Substantive Violations of the ESA.**

The procedural violations of the ESA, described above and below, have resulted in substantive violations of the ESA. These violations are documented, in part, in the biological opinion produced by NMFS in 2020.

Perhaps the most obvious substantive violation involves Skokomish River wild Chinook salmon. The natural origin escapement of Skokomish River Chinook is an ESA-listed Puget Sound Chinook population that has routinely experienced escapement below the NMFS critical escapement threshold.

Incredibly, the fishery exploitation rate on Skokomish River wild Chinook is the highest of all ESA-listed Puget Sound Chinook populations. According to NMFS, the estimate of the maximum population specific exploitation rate (Rebuilding Exploitation Rates or RERs) for this population is 35%. Despite knowing that the maximum defensible exploitation rate is 35%, NMFS, the Treaty Tribes, and WDFW annually agree to a target exploitation rate of 50%. Worse, as detailed in NMFS 2020 biological opinion, "[a]vailable information indicates that observed exploitation rates have exceeded the management objective of 50 percent in all but two years since its adoption in 2010, likely resulting in an even greater risk to rebuilding a sustainable population (Table 22). The ceiling was exceeded by 3 percent to 13 percentage points (average 8%) with virtually all of the overage attributable to Hood Canal terminal net fisheries."

In 2020, the agreed to fisheries, approved by NMFS after Section 7 consultation, were expected to have an exploitation rate of 48.3% on Skokomish River natural origin Chinook. Given the performance of past fisheries, the exploitation rate will be higher still. The result of the fisheries is an expected natural origin escapement of 335, well below NMFS' critical escapement threshold of 452. Eighty three percent (83%) of the southern U.S. fishery impacts occurred in tribal fisheries and, incredibly, only six and half percent (6.5%) of all impacts occurred in non-treaty southern U.S. fisheries.

This rampant overharvest is widespread. According to NMFS's 2020 biological opinion, "[i]n summary, under the proposed action, the combined ocean and Puget Sound exploitation rates for the 2020 fishing year for one of the 14 management units (Skagit early) and 6 of 22 total populations (Lower Sauk, Upper Sauk, Upper Cascade, Suiattle, NF Stillaguamish, and White) are expected to be under their RER or RER surrogates (Table 34)." It simply is not permissible under the ESA for the NMFS to annually approve, and the parties to prosecute, fisheries that knowingly overharvest 13 of the 14 management units in Puget Sound.

The bottom line is that the actions of NMFS, the Treaty Tribes, and WDFW clearly exceed the maximum exploitation rates and do not meet the minimum escapement goals for Skokomish River natural origin Chinook and many other Puget Sound Chinook populations. The parties have knowingly agreed to these violations of the ESA for years and continue to annually conduct fisheries that violate the substantive provisions of the ESA.

### III. LEGAL VIOLATIONS

Section 7 has a number of procedural requirements with which federal agencies must comply. These procedural requirements are intended to prevent substantive violations of Section 7(a)(2). The requirements include an inquiry, a biological assessment, consultation and biological opinion. These requirements are triggered by "federal action," as discussed above. Both the procedural and substantive requirements of Section 7 are triggered by "any action authorized, funded or carried out by such agency," and both apply if such an "action" is under consideration. *Defenders of Wildlife II*, 420 F.3d 946, 961 (9<sup>th</sup> Cir. 2005).

A federal agency proposing to take an "action" is first required to determine if a listed species "may be present" in the area of the proposed action. If so, a biological assessment is required. Once it is determined that the proposed "action" may affect a listed species or critical habitat, the agency must formally consult with FWS or NMFS. Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement. *Nat. Wildlife Fed'n v. FEMA*, 345 F.Supp.2d 1151, 1174 (W.D. Wash. 2004).

Section 7(d) prohibits federal agencies from making any "irreversible or irretrievable commitment of resources" which would foreclose the formulation or implementation of any reasonable and prudent alternative measures which would not violate Section 7(a)(2). The purpose is to maintain the status quo during the consultation process.

Procedural violations of Section 7 are not mooted by a finding that a substantive violation has not occurred. A court, in absence of "unusual circumstances," will issue an injunction to halt

an agency action where there is a substantial procedural violation. *Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9<sup>th</sup> Cir. 1987) (failure to consult).

As described above, it is clear that Section 7 consultation is required for the nontreaty fisheries of the state of Washington. NMFS takes literally dozens of actions that are the “cause” of the taking of listed salmon and steelhead. NMFS funds hatcheries and fisheries intended to create fish for harvest, monitors treaty and nontreaty fisheries, authorizes commercial and non-commercial state and treaty fisheries, authorizes ocean fisheries concurrently with state and tribal fisheries inside and outside three miles in the Pacific Ocean, and provides millions of dollars annually to implement state fisheries. Simply put, Fish Northwest will easily be able to demonstrate a number of federal “actions” related to non-treaty fisheries that require Section 7 consultation.

It is also clear that BIA is not taking any action that is the “cause” of the taking of listed species, and it is therefore not appropriate for a Section 7 consultation to be triggered by BIA’s alleged action. Unless NMFS conducts the required Section 7 consultations for its actions, including Section 7 consultations for state fisheries, Fish Northwest intends to seek preliminary and permanent injunctive relief including enjoining the procedural and substantive ESA violations that occur annually as a result of North of Falcon and the processes utilized and fisheries conducted by NMFS, USFS, BIA, WDFW and the Treaty Tribes. Fish Northwest will also seek an injunction stopping the process of using BIA’s alleged action as the event triggering Section 7 consultation.

I appreciate your attention to this matter, and look forward to discussing a potential resolution with you prior to the expiration of 60 days from the date of this letter.

Sincerely,  
SCHEFTER & FRAWLEY

A handwritten signature in blue ink, appearing to read 'Joe D. Frawley', is written over the printed name.

Joe D. Frawley

JDF/ah  
*Enclosure*



# EXHIBIT 1



# Skokomish Indian Tribe

Tribal Center (360) 426-4232

N. 80 Tribal Center Road

FAX (360) 877-5943

Skokomish Nation, WA 98584

## SKOKOMISH TRIBAL COUNCIL RESOLUTION NO. 2020-144

### *A RESOLUTION ADOPTING OFFICIAL POLICIES TO DEFEND SKOKOMISH'S RIVER FROM FALSE CLAIMS OF STATE OWNERSHIP.*

WHEREAS, the Skokomish Indian Tribe is a federally recognized Indian tribe organized under its Constitution and by-laws first adopted on April 2, 1938, and approved by the Secretary of the Interior May 3, 1938, amended January 15, 1980, as approved by the Secretary of the Interior March 17, 1980; and

WHEREAS, the Skokomish Tribal Council is the governing body of the Skokomish Indian Tribe, pursuant to Article IV, Section 1 of the Constitution of the Skokomish Indian Tribe; and

WHEREAS, the Skokomish Tribal Council, pursuant to the Constitution of the Skokomish Indian Tribe, has the authority under Article V, Sections 1(b), (h), (j), (m), (q) to set aside and to spend tribal funds for tribal purposes; to manage, develop, protect, and regulate the use of water, fish and wildlife, minerals, timber, and all other natural resources within the Skokomish Indian Tribe's jurisdiction, and to regulate land use and development in areas within the Skokomish Indian Tribe's jurisdiction; to enact laws and ordinances governing the conduct of individuals and defining offenses against the Skokomish Indian Tribe, to maintain order and to protect the safety and welfare of all persons within the Skokomish Indian Tribe's jurisdiction, and to provide for the enforcement of laws and ordinances of the Skokomish Indian Tribe; on behalf of the tribe to consult, negotiate, and contract with agencies and officers of Federal, state, local, and tribal governments and with private persons and organizations; to provide services for the health, education, and welfare of all persons within the Skokomish Indian Tribe's jurisdiction; and

WHEREAS, the Skokomish Tribal Council finds that the State of Washington must immediately withdraw any and all claims of ownership of the Skokomish River, including its beds and banks, lying between the Skokomish Reservation's western boundary and the mouth of the Skokomish River (hereinafter, "Skokomish's River"), all of which are held in reservation trust status; and

WHEREAS, the State of Washington's false claims of ownership of Skokomish's River are an affront to our ancestors and are tantamount to an invasion of our territory; and

NOW, THEREFORE, BE IT RESOLVED that the Skokomish Tribal Council hereby directs the Skokomish Indian Tribe (including its officials, directors, staff, and departments) to oppose the submission of a joint Tribal-State List of Agreed Fisheries until such time as the State of Washington withdraws its false claims of ownership of Skokomish's River; and

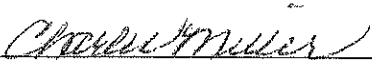
BE IT FURTHER RESOLVED that the Skokomish Tribal Council hereby directs that no non-Treaty fishery shall be opened within Skokomish's River until such time as the State of Washington withdraws its false claims of ownership; and

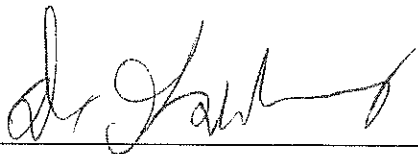
BE IT FURTHER RESOLVED that the Skokomish Police Department shall enforce the closure of Skokomish's River to non-Treaty fishers, citing those that violate tribal or federal law; and

BE IT FINALLY RESOLVED that the Skokomish Legal Department is authorized to take all reasonable and necessary steps to enforce the Skokomish Indian Tribe's ownership of Skokomish's River.

\*\*\*CERTIFICATION\*\*\*

I, Charles Miller, Chairperson of the Skokomish Tribal Council, do hereby certify that the foregoing Resolution No. 2020-144, was adopted at a regular meeting held on October 21, 2020, at which time a quorum was present with a vote of 4 FOR, 0 AGAINST, 0 ABSTAINING.

  
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Charles Miller, Chairperson  
Skokomish Tribal Council

  
\_\_\_\_\_  
Alex Gouley, Secretary  
Skokomish Tribal Council

# EXHIBIT 2

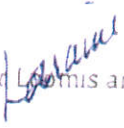
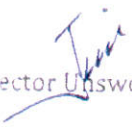


**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
West Coast Region  
Sustainable Fisheries Division  
510 Desmond Drive SE, Suite 103  
Lacey WA, 98503

January 19, 2016

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

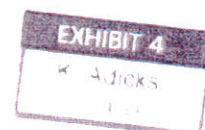
Mr. Jim Unsworth, Director  
Washington Department of Fish and Wildlife  
600 Capitol Way North  
Olympia Washington 98501

Dear Chair  and Director .

In 2015 and even as we now enter the North of Falcon process for 2016, considerable discussion has focused on consequences that could occur 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 to be made by NOAA Fisheries under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) regarding the ocean salmon fisheries (Pacific Fishery Management Council or PFMC fisheries), and NOAA's ability to make timely determinations under the Endangered Species Act (ESA) regarding Puget Sound fisheries.<sup>1</sup> I would like to take this opportunity to examine the related decisions and determinations NOAA Fisheries must make in 2016 and be as forthcoming as possible about the process so that co-managers and others have the same level of information about our thinking as negotiations move forward. We do not address - nor have we anticipated - all possible scenarios for the coming North of Falcon process, and do not suggest that the information below is inclusive of all considerations that may arise over time. Please feel free to share this information with others.

At the outset, 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. Nor do we believe that co-manager agreements related to fisheries within the Columbia River would be directly affected. Therefore, in this letter I would like to consider the context surrounding approval of PFMC fisheries north of Cape Falcon and federal determinations related to state and tribal fisheries in Puget Sound. As you know well, acknowledging and accounting in each instance for the interrelationship between the 'outside' fisheries and the 'inside' fisheries is unavoidable.

<sup>1</sup> Similar concerns conceivably could, but thus far have not, arisen in the context of Columbia River fisheries and implementation of treaty Indian fishing rights under *U.S. v. Oregon*.



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 so fundamental to conservation. Ocean salmon fisheries occur in the Exclusive Economic Zone off the U.S. West Coast and are managed by the Pacific Fishery Management Council and NOAA Fisheries under the MSA. 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 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. In that regard, it is important that you have confidence that NOAA Fisheries will always "stay in its lane." Please let me know at any time if you have concerns that our actions may be extending beyond our appropriate authorities.

#### *Requirements for federal determinations*

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

To approve the Council'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, but 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)
- Allow for full exercise of treaty rights by affected treaty fishing tribes, consistent with court orders in *U.S. v. Washington*, *U.S. v. Oregon*, *Hon. v. Baldrige* and other cases.

NOAA Fisheries' determination of compliance with the MSA, the ESA, and the PST is informed by the technical analysis and information developed through the Council process. The Council's scientific advisors (Salmon Technical Team or STT) provide analysis periodically through the season-setting process of whether the alternative sets of management measures under consideration meet quantitative standards or limits described in the FMP, or identified through ESA or PST processes<sup>1</sup>. The Council considers these analyses as it considers potential modifications to the alternatives, moving to final recommendations that the STT confirms meet all quantitative requirements. As to the fourth requirement, treaty right implementation, the PFMC and NOAA Fisheries normally rely on the state and tribes through the North of Falcon process to arrive at a

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<sup>1</sup> These requirements are discussed below.

determination that they have agreed that the PFMC's final recommendations on, as well as a complementary set of Puget Sound fisheries 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. A good deal of confidence is established about the legal defensibility of the agreed-to regime under all the applicable laws. Obviously, should there be something short of consensus within North of Falcon, confidence about the defensibility of related decisions is eroded and NOAA Fisheries expects its decisions and the nature of any dispute to be scrutinized intensely by interested parties.

#### *The Magnuson-Stevens Act*

Of the four major bodies of law that apply to the fishery, the MSA is unique in its requirement that the fishery also comply with the three "other applicable law(s)." But in addition, the MSA requires that Councils set biological standards to guide management of the fishery for which they have an FMP. The Salmon FMP describes management reference points (conservation objectives and Annual Catch Limits (ACLs), for example) for each Chinook and coho stock. The annual management measures must be consistent with these standards in order for NOAA Fisheries to approve PFMC fishery management measures.

For ESA listed species including Puget Sound Chinook, ESA "consultation standards" serve as the applicable reference points. Historically the consultation standards for Puget Sound Chinook 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. In arriving at ESA consultation standards on an annual basis, 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. Ultimately NOAA Fisheries captures the conservation objectives in the annual "ESA Guidance Letter" sent to the Council prior to the March meeting, and the co-managers present them to the Council as their management objectives for Puget Sound and coastal populations.

For coho salmon, the standards applied by the PFMC reflect agreement among the co-managers found in the Puget Sound Comprehensive Coho Management Plan. The FMP describes allowable exploitation rates for each stock, but notes that "annual natural escapement targets can vary from FMP conservation objectives if agreed to" by the co-managers. The five Puget Sound coho stocks are managed for stepped exploitation rates based on three predefined stock-status categories. PFMC impacts on Puget Sound coho stocks are relatively small and the stepped rates rarely constrain PFMC fisheries.

All of the requirements of the FMP for Puget Sound 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 - and some find it counter-intuitive - that

even though PFMC fisheries have a relatively small impact on Puget Sound populations, Puget Sound fisheries have a significant impact on the ability to approve PFMC fisheries.

#### *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 threatened Puget Sound Chinook has most recently been addressed in a 2004 biological opinion. The analysis in the opinion, which concludes 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 remain low. In determining if the PFMC fisheries comply with the ESA, NOAA Fisheries would need to assess whether the proposed PFMC fisheries have similarly low impacts on Puget Sound Chinook stocks. It could do this without agreement on the Puget Sound fisheries.<sup>1</sup> However, this does not by itself ensure that NOAA Fisheries could approve PFMC management measures without some form of assurance regarding Puget Sound fisheries. As noted above, the FMP describes standards that account for combined fishery impacts. In addition, NOAA Fisheries would need to ensure that the effects of the PFMC fisheries are consistent with the biological opinion addressing those effects on Southern Resident Killer Whales.

As discussed above, ESA authorization for the fisheries in Puget Sound also is necessary. In recent years, NOAA Fisheries has addressed the effects of the fisheries through Section 7 of the ESA whereby a "consultation" on a federal action can receive a determination. In this instance, the federal action upon which NOAA Fisheries has consulted is the funding by the Bureau of Indian Affairs (BIA) 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 likely would lose its "interrelated and interdependent" relationship with the tribal fishery and may no longer be associated with a "federal action" and if so, would not be eligible for a section 7 consultation. In that case, a proposed non-Indian fishery could only be determined to comply through sections of the ESA that take much longer to put in place - longer than the fishery itself. The section 7 consultation provides a more timely mechanism for the ESA determination on a North of Falcon agreement because it has fewer procedural requirements and can be completed more quickly than alternative ESA review processes.

Tribal Indian fisheries, on the other hand, would be addressed through section 7 consultation in the absence of an agreement and regardless of whether non-Indian fisheries were proposed because of

<sup>1</sup> Puget Sound bonds are not ESA-listed and NOAA Fisheries has no ESA-related decisions related to fisheries harvesting them.

<sup>2</sup> Specifically, application for approvals under the applicable ESA section 4(d) rule on any incidental Take Permit under ESA section 12.



cooperate with the federal action or BIA funding. However, these circumstances would be unprecedented and require development of completely new documents and analyses. NOAA Fisheries' ability to proceed with a biological opinion would depend first on the tribes providing a clear and comprehensive plan in a timely manner, second, a biological opinion on tribal fisheries that would differ significantly from prior opinions on Puget Sound fisheries, and third, a new biological opinion that would likely be subject to the usual, but in this case heightened, legal and policy review sensitized to the unique circumstances. In addition, a separate tribal plan could require a new NEPA assessment by the BIA. While NOAA Fisheries believes proposals for tribal-only fisheries could receive ESA approval so long as conservation objectives were being met, it is likely that the analysis and review of the newly-structured proposals would be time-consuming, and might not be completed before the proposed fisheries would be over.

In summary, a biological opinion currently covers PFMC fisheries when their impact on Puget Sound chinook populations remains low, but no ESA coverage will exist for Puget Sound fisheries after May of 2016. Based upon what NOAA Fisheries knows now, the only potentially timely mechanism for ESA coverage of Puget Sound fisheries, at least non-Indian fisheries, requires agreement under North of Falcon. Section 7 is available to tribal fisheries, even without an agreement. However, given the unprecedented nature of a consultation under these circumstances, it is not clear that coverage could be provided in time for fisheries.

#### *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 and the west coast of Vancouver Island are managed on overall Chinook abundance (aggregate abundance based management or AABM), as opposed to individual Chinook stock abundance (individual stock based management or ISBM) that occurs in southern BC and Washington. The treaty 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 Treaty obligations - in fact, the Treaty's ISBM limits for Puget Sound Chinook and Puget Sound coho have never limited southern U.S. fisheries.

However, the PST limits southern U.S. impacts on Interior Fraser River (Thompson River) coho to 10% when the stock's status is designated as "low" as it has been since 2009. Because these fish 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 is often the subject of sensitive 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 a position of not fulfilling its international obligations under the Treaty.

Co-managers are well aware that Thompson 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. This would be necessary to comply with the MSA's 'other applicable law' provision and to ensure that the enforcement provision of the PSTA not become an issue.

### *Tribal Treaty Fishing Rights*

Treaty fishing rights in northwestern Washington are addressed in the long-running *U.S. v. Washington* litigation which guarantee 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 myriad court 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 describe 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. Data and science have improved. In general, the conservation objectives that the co-managers present at the March Council 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.

Process, like the development of the LOAF, too has evolved. The 1985 Plan includes a schedule for pre-season agreement and information exchange which is not current practice. Its dispute resolution processes are time-consuming, and would not likely lead to resolution of issues in time for today's decision process.

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 co-managers nor NOAA Fisheries has modern judicial guidance on how to proceed in today's environment when there is not 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

to estimate the original allocation units that occurred 30 years ago? It may be difficult in today's environment to determine without co-manager consensus what the "harvestable surplus" is, and what the treaty share is and conversely, whether a proposed non-Indian fishery would impair the treaty share. Under any circumstance, it is difficult to imagine a judicial review of a manager's unilateral decision about such matters being resolved in a satisfactory manner if the co-managers are disputing the underlying science and legal standards.

Candidly, NOAA Fisheries believes that a dispute among co-managers about conservation objectives in Puget Sound is possible, but unlikely. Far more likely is a dispute about the allocation of impacts among the fisheries required to meet those objectives. 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," particularly treaty rights. PPMC 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 - a more significant issue for PPMC fisheries for Washington north coastal populations than Puget Sound. However, such a determination would be difficult even with agreed conservation objectives, given the lack of precedent and the short time between the Council's April meeting and the start of the fisheries. Such a determination would likely be impossible without agreed conservation objectives.

More significant would be questions surrounding a proposal for a pre-terminal 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 long has been deferred, giving way to the Pacific Salmon Treaty and the North of Falcon process. Assuming such questions do not again surface, it is conceivable that NOAA Fisheries could infer the harvestable surplus for each population affected from the agree-to conservation objectives - and factor in any PPMC fishery's impacts - to determine if a harvestable share would be exceeded from the proposal. Yet issues about compliance with the other requirements immediately surface - ESA approval of non-Indian fisheries in Puget Sound in the absence of an agreement, in particular.

NOAA Fisheries is aware that a level of controversy surrounded the 2015 non-Indian fisheries in Puget Sound. Assuming allocation of impacts was a factor in that controversy, NOAA Fisheries notes its belief that in the most recent five years, the negotiated non-Indian catch in Washington has exceeded 50% on average for at least two Puget Sound Chinook allocation units - specifically in 2015. It appears to NOAA Fisheries that non-Indians fisheries in Washington exceeded 50% in three allocation units. It is unclear what a non-Indian fishery would look like if it was proposed without agreement and complied strictly with allocation requirements - assuming those requirements themselves did not again become the focus of the dispute.

I reiterate NOAA Fisheries' belief that a North of Falcon agreement will emerge in 2016. In that regard, please let me know if there is anything I can do to advance your deliberations. At a minimum, I want to ensure all interested parties have the same level of understanding of the thinking of NOAA Fisheries about the benefit of an agreement as we move into the 2016 season.

setting process. I hope the information I have provided is of interest and I will do what I can 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 Payson process.

Sincerely,

A handwritten signature in blue ink that reads "Bob" with a stylized flourish extending to the left.

Robert Turner  
Assistant Regional Administrator  
Sustainable Fisheries Division

Cc: Curt Melcher ODFW  
Dorothy Lowman PPMC  
Jeremy Wolf CR.TFC

# EXHIBIT 3



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

To approve the PFMC'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 fishery<sup>1</sup>. 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.

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<sup>1</sup> 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 year<sup>2</sup>. 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.

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<sup>2</sup>Specifically 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%
<b>Total</b>	<b>27,808</b>	<b>17,482</b>	<b>45,289</b>		<b>10,069</b>	<b>58,713</b>	<b>68,783</b>	

**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.Fic. Ocean Troll:	Nontreaty	0%	1%	0%	1%	3%	1%
	Treaty	2%	2%	2%	4%	5%	3%
N.Fic. Ocean & Buoy10 Spt	Nontreaty	0%	1%	1%	0%	2%	1%
	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%
	Treaty	1%	4%	50%	1%	22%	58%
<b>Total</b>		<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

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,

A handwritten signature in blue ink that reads "Barry A. Thom". The signature is fluid and cursive, with the first name being the most prominent.

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