4.4 Tribal Treaty Rights and Trust Responsibility

This section qualitatively evaluates the Proposed Action and alternatives with respect to their impact on the ability of the Puget Sound tribes to exercise their treaty rights to harvest salmon. Subsection 3.4, Tribal Treaty Rights and Trust Responsibilities – Affected Environment, described how these treaty rights were interpreted and affirmed by federal courts in U.S. v. Washington, and subsequent judicial oversight of the tribes' co-management role and harvest allocation. As explained in Subsection 3.4, the role of the federal government's oversight of Puget Sound fisheries is to assure that treaty rights are protected by federal, state, and local government entities, and to ensure that harvest actions implemented by the co-managers meet the requirements of the Endangered Species Act. The following discussion also evaluates the implications under federal trust responsibility of implementing the Proposed Action or one of the alternatives.

The substantial negative consequences of Alternative 2, 3, or 4 are presented here in a legal context, relative to the scope of conservation measures that are granted to NMFS as it implements the Endangered Species Act, complies with treaty rights, and fulfills its trust responsibility. The reader is referred to Subsections 4.5, Treaty Indian Ceremonial and Subsistence Salmon Uses; 4.6, Economic Activity and Value; and 4.7, Environmental Justice, of this Environmental Impact Statement for more detailed discussion of the economic and cultural consequences to the Puget Sound tribes.

The following comparison of the impacts of the four alternatives is based on Scenario B, which assumes that the abundance of Puget Sound chinook salmon will be similar to that projected in 2003, and that intercepting fisheries in British Columbia (Canada) and Alaska will harvest at the maximum level allowed under the Puget Salmon Treaty (PST) Annex 4 Chapter 3. Though the different abundance and northern fishery scenarios examined elsewhere in this Environmental Impact Statement imply different harvest levels in Puget Sound, the difference among alternatives with respect to qualitative impacts on the exercise of treaty rights would not change.

4.4.1 Alternative 1 – Proposed Action/Status Quo

Implementation of Alternative 1 would have low or no impact on treaty fisheries as they are currently conducted. Provided that the abundance of salmon stocks is sufficient to allow harvestable surpluses of the magnitude modeled under this alternative, the tribes are predicted to be able to continue accessing their usual and accustomed fishing areas, and to harvest substantial numbers of coho, sockeye, pink, chum salmon, and steelhead (see Table 4.7-5 in Subsection 4.7, Environmental Justice). The chinook salmon conservation measures contained in the Resource Management Plan (Appendix A to this

Environmental Impact Statement) imply relatively moderate constraints on access to these species, in order to reduce incidental impact to listed chinook salmon. Under Alternative 1, chinook salmon harvest would be substantially restricted, relative to historical levels, because of conservation requirements necessary to protect weak chinook populations. However, these restrictions would be voluntarily adopted by the tribes, in consultation with the State of Washington (Washington Department of Fish and Wildlife), as co-managers of Puget Sound fisheries.

Alternative 1 meets the requirement of the Secretarial Order that the restriction: 1) does not discriminate against Indian activities, and 2) incorporates voluntary tribal measures to achieve the necessary conservation purpose (Secretarial Order Number 3206, June 5, 1997). Alternative 1 would comport with the legal requirement that restriction on treaty fisheries be implemented in the least restrictive manner necessary in order to continue tribal access to naturally- and hatchery-produced salmon, while conserving natural populations. Therefore, Alternative 1 is predicted to be consistent with the federal trust responsibility to protect and provide tribal fishing opportunities. However, it is important to note that the Puget Sound tribes do not construe the fishing opportunity or harvest that would occur under Alternative 1 as satisfying treaty rights given the reduction in tribal harvest opportunity and catch that has occurred with the decline of Puget Sound salmon populations over the last several decades.

The proposed Resource Management Plan states that, for many populations, fishery exploitation rates would be constrained well below their exploitation rate ceiling- (see discussion in Section 2, Alternatives Including the Proposed Action, Subsection 2.3.1, Alternative 1 – Proposed Action/Status Quo), at the discretion of the co-managers, while units are recovering. This principle implies that tribes will voluntarily forego access to chinook salmon and other species from more productive and abundant units, in the interest of protecting weaker units, and promoting recovery of the Evolutionarily Significant Unit.

4.4.2 Alternative 2 – Escapement Goal Management at the Management Unit Level

Under Alternative 2, salmon fisheries in Puget Sound would be confined to terminal (i.e., freshwater) areas of Puget Sound and the Strait of Juan de Fuca. Terminal areas are defined as locations containing only populations returning to a single river system; such as, the Skagit River. Fisheries under the jurisdiction of the Pacific Fisheries Management Council, including Marine Catch Area 4B from May to September, would continue to operate. Puget Sound fisheries would also be constrained to meet harvest objectives for other species.

Reduction of treaty fishing opportunities to this extent would substantially preclude the exercise of treaty rights confirmed in U.S. v. Washington. Therefore, implementing Alternative 2 would be inconsistent with the federal trust responsibility, and would make the United States subject to litigation for damages. Alternative 2 would not implement measures that tribes have voluntarily proposed to achieve the necessary conservation purpose, whereas the Secretarial Order prescribes deference to these voluntary measures. Managing Puget Sound fisheries to achieve management-unit-specific escapement goals, and precluding marine fisheries as a means of certainty to achieve these goals, would place substantial constraint on tribal fisheries. The magnitude of harvest is predicted to be substantially reduced (78%) under Alternative 2, relative to Alternative 1. Though non-Indian recreational salmon harvest in freshwater is substantial for all management units, the majority of freshwater harvest, under Alternative 2 would be taken by Indian net fisheries.

Alternative 2 is predicted to substantially reduce access to usual and accustomed fishing areas and the exercise of treaty fishing rights compared to Alternative 1. For some tribes, the opportunity to harvest some species of salmon or steelhead is only available in marine areas. In some cases, harvest of those species would be precluded because they are either not produced in streams within their usual and accustomed fishing areas, or are produced at such low abundance that harvest would be precluded. Under Alternative 2, these species would be entirely unavailable to some tribes, effectively eliminating the exercise of treaty rights on those species by those tribes. Closure of pre-terminal marine fisheries due to the presence of commingled listed chinook salmon, would effectively preclude tribal access to harvest of Fraser River sockeye and pink salmon, and chum salmon originating in southern British Columbia. The Fraser River sockeye and pink fisheries, in particular, are of great economic and cultural consequence to tribes that would otherwise access this resource (see Subsections 4.5, Treaty Indian Ceremonial and Subsistence Salmon Uses; 4.6, Economic Activity and Value; and 4.7, Environmental Justice, of this Environmental Impact Statement).

4.4.3 Alternative 3 – Escapement Goal Management at the Population Level with Terminal Fisheries Only

The fishing regime envisioned by Alternative 3 would limit the exercise of treaty-reserved fishing rights to a greater extent than under Alternative 2, and would, therefore, be expected to result in a more substantial impact relative to Alternative 1. Reduction of treaty fishing opportunities to this extent would substantially preclude the exercise of treaty rights confirmed in U.S. v. Washington. Therefore, implementing Alternative 3 would be inconsistent with the federal trust responsibility, and would make the United States subject to litigation for damages. Alternative 3 would not implement measures that tribes have voluntarily proposed to achieve the necessary conservation purpose, whereas the Secretarial

Order (1997) prescribes deference to these voluntary measures. Managing Puget Sound fisheries to achieve management-unit-specific escapement goals, and precluding marine fisheries as a means of certainty to achieve these goals, would place substantial constraint on tribal fisheries.

Total salmon harvest is predicted to be 84 percent lower than under Alternative 1 (see Table 4.7.10). The escapement goals for individual populations prescribed by Alternative 3 infer lower harvestable abundance in the North Sound region, relative to Alternative 2, resulting in further reduction in fishing opportunity in the Stillaguamish River and Tulalip Bay (Marine Catch Area 8D).

Alternative 3 is predicted to substantially reduce access to usual and accustomed fishing areas and the exercise of treaty fishing rights compared to Alternative 1. As under Alternative 2, the closure of marine areas under Alternative 3 would effectively eliminate the exercise of treaty rights on some species by some Puget Sound tribes. Closure of pre-terminal marine fisheries due to the presence of commingled listed chinook salmon, would effectively preclude tribal access to harvest of Fraser River sockeye and pink salmon, and chum salmon originating in southern British Columbia. The Fraser River sockeye and pink salmon fisheries, in particular, are of great economic and cultural consequence to tribes that would otherwise access this resource (see Subsections 4.5, Treaty Indian Ceremonial and Subsistence Salmon Uses; 4.6, Economic Activity and Value; and 4.7, Environmental Justice, of this Environmental Impact Statement).

4.4.4 Alternative 4 – No Action/No Authorized Take

Under Alternative 4, no fishery-related mortality of listed Puget Sound chinook salmon would occur in salmon fisheries within the Puget Sound Action Area. Tribal salmon harvest would be limited to late-season fisheries for chum salmon and steelhead. Fisheries under the jurisdiction of the Pacific Fisheries Management Council, including troll fishing in Marine Catch Area 4B from May to September, would continue to operate. Implementing Alternative 4 would substantially limit the ability of Puget Sound tribes to obtain salmon or steelhead, since listed chinook are present, to a greater or lesser extent, throughout the year in most tribal usual and accustomed fishing areas and fisheries. Total salmon harvest is predicted to be reduced by 98 percent from the level predicted to occur under Alternative 1 (see Table 4.7.12). Implementing Alternative 4 would virtually eliminate access to usual and accustomed fishing areas in the Strait of Juan de Fuca and Puget Sound..

Elimination of treaty fishing opportunities on this broad scale would constitute substantial interference with Indian treaty fishing rights, which are property rights. The conservation standard of U.S. v. Washington and Secretarial Order Number 3206 require that any restriction on treaty fisheries be

implemented in the least restrictive manner necessary to provide self-sustaining natural- and hatchery-produced salmon.. Such a severe limitation on the exercise of treaty rights would be inconsistent with the federal trust responsibility, and would make the United States subject to a damages claim. Alternative 4 would also fail to promote voluntary tribal measures to achieve the necessary conservation purpose as required by the Secretarial Order. The consequences of this alternative would thus have a substantial impact on the ability of Puget Sound tribes to exercise their treaty rights, and on the ability of the federal government to exercise its trust responsibility.

Alternative 4 could, legitimately, be eliminated from detailed examination in the Environmental Impact Statement because it implies violation of the trust responsibility of the federal government, and of the legal implication of Secretarial Order Number 3206 (1997), and thus is inconsistent with the purpose and need of the Proposed Action (see discussion in Section 2.3). However, the Settlement Agreement negotiated by the parties to Washington Trout v. Lohn, required analysis of a "No Take, No Harvest" alternative.

4.4.5 Indirect and Cumulative Effects

There are no predictable indirect effects on the exercise of treaty fishing rights by tribes which would not be directly affected by this action. Other than U.S. v. Washington and its various sub-proceedings, including its mandate for the Puget Sound Salmon and Steelhead Management Plan, there are no other relevant laws or policies that affect the exercise of treaty rights by Puget Sound or other tribes. Therefore, there are no indirect or cumulative effects to analyze for this element of the Environmental Impact Statement.