

## **Tribal 4(d) Rule Proposed Evaluation and Pending Determination**

**Title:** Tribal Resource Management Plan for Fall Chinook and Coho Salmon Fisheries in the Snake River Basin

**Submitted by:** Nez Perce Tribe

**DPS/ESU:** Snake River Steelhead (*Oncorhynchus mykiss*)  
Snake River Fall Chinook Salmon (*O. tshawytscha*)  
Snake River Spring/Summer Chinook Salmon (*O.tshawytscha*)  
Snake River Sockeye (*O. nerka*)

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## Table of Contents

<b>1. Evaluation</b> .....	<b>3</b>
1.1. Criterion 4(i): Clearly defines the scope and area of impact, and sets management objectives and performance indicators for the plan .....	4
1.1.1. Criterion 4(i)(A): The TRMP defines populations within affected listed ESUs, taking into account spatial and temporal distribution, genetic and phenotypic diversity, and other appropriate identifiably unique biological and life history traits.....	5
1.1.2. Criterion: 4(i)(B) Uses the concepts of “viable” and “critical” salmonid population thresholds, consistent with Viable Salmonid Populations (VSP) concepts in “Viable Salmonid Population.” .....	6
1.1.3. Criterion 4(i)(C): Sets escapement objectives or maximum exploitation rates for each management unit or population based on its status, and assures that those rates or objectives are not exceeded. ....	6
1.1.4. Criterion 4(i)(D): Display a biologically based rationale demonstrating that the harvest management strategy will not appreciably reduce the likelihood of survival and recovery of the ESU in the wild, over the entire period of time the proposed harvest management strategy affects the population, including effects reasonably certain to occur after the proposed actions cease.....	7
1.1.5. Criterion: 4(i)(E): Include effective monitoring and evaluation programs to assess compliance, effectiveness, and parameter validation.....	8
1.1.6. Criterion 4 (i)(F): Provide for evaluating monitoring data and making any revisions of assumptions, management strategies, or objectives that data show are needed. ....	9
1.1.7. Criterion 4(i)(G): Provide for effective enforcement, education and coordination among involved jurisdictions.....	9
1.1.8. Criterion 4(i)(H): Include restrictions on resident and anadromous species fisheries that minimize any take of listed species, including time, size, gear, and area restrictions. ....	9
1.1.9. Criterion 4(i)(I): Is consistent with plans and conditions established within any Federal court proceeding with continuing jurisdiction over tribal harvest allocations. ....	10
1.2. Criterion (4)(ii): The Amount Of Take is Monitored and Provided to NMFS On A Regular Basis .....	10
<b>2. Notice of Proposed Evaluation and Pending Determination</b> .....	<b>10</b>
<b>3. Recommended Determination</b> .....	<b>10</b>
<b>4. References</b> .....	<b>11</b>

## 1. Evaluation

NOAA's National Marine Fisheries Service (NMFS) issued a final Endangered Species Act (ESA) 4(d) Rule (Tribal 4(d) Rule) adopting regulations (50 CFR 223.204) to conserve listed salmon and steelhead (NMFS and NOAA 2005). Under the Tribal 4(d) Rule, ESA section 9 take prohibitions for listed species do not apply to activities described in a Tribal Resource Management Plan (TRMP) provided that the following criteria are met:

- The TRMP must specify the procedures by which the tribe will enforce its provisions.
- Where there exists, a Federal court proceeding with continuing jurisdiction over the subject matter of the TRMP, the plan may be developed and implemented within the ongoing Federal Court proceeding. In such circumstances, compliance with the TRMP's terms shall be determined within that Federal Court proceeding.
- The Secretary shall seek comment from the public on the Secretary's pending determination whether or not implementation of the TRMP will appreciably reduce the likelihood of survival and recovery of the listed salmonids.
- The Secretary shall publish notification in the Federal Register of any determination regarding the TRMP and the basis for that determination.

Because the TRMP is a plan for fishery harvest, we will also evaluate the TRMP using criteria used to address fishing plans under limit 4 of the 4(d) Rule (50 CFR 223.203(b)(4), which sets out appropriate considerations and conditions for minimizing the impacts of a fishery to threatened or endangered salmon and steelhead.

The NPT provided a TRMP for fall Chinook and coho salmon fisheries in the Snake River Basin to NMFS for evaluation under the Tribal 4(d) Rule November, 2018 (Nez Perce Tribe 2018). As per the Tribal 4(d) Rule, NMFS consulted with the Nez Perce Tribe (NPT) during the development of the TRMP to provide technical assistance, exchange information, discuss what would be needed to provide for the conservation of the listed species, and be consistent with legally enforceable tribal rights and with the Secretary's trust responsibilities to the tribes<sup>1</sup>.

ESA-listed species potentially affected by the activities described in this TRMP include the Snake River Steelhead Distinct Population Segment (DPS), and the Snake River Fall Chinook Salmon, Snake River Sockeye Salmon, and Snake River Spring/Summer Chinook Salmon Evolutionary Significant Units (ESUs).

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<sup>1</sup> The Tribal 4(d) rule establishes a process for the Secretary of Commerce to meet the conservation needs of listed species while respecting tribal rights, values and needs, and not causing an abridgement of any treaties, rights, executive orders, or statutes. It sets forth that the National Marine Fisheries Service (NMFS) will work with tribes to the maximum extent practicable to craft plans that will meet the needs of listed species and accomplish the goals of the tribes.

The following subsections apply the criteria of Limit 4 of the 4(d) rule to the TRMP submitted to NMFS for the NPT's Snake River fall Chinook and coho salmon fisheries.

**1.1. Criterion 4(i): Clearly defines the scope and area of impact, and sets management objectives and performance indicators for the plan**

The TRMP submitted by the NPT includes written descriptions, figures, and maps that define the scope of the plan and the area of impact considered in the plan (Sections 1 and 2) (Nez Perce Tribe 2018). The NPT's TRMP is designed to provide Tribal members with treaty harvest opportunities consistent with the exercise of treaty fishing rights while allowing for the conservation and recovery of steelhead populations through application of management framework for these fisheries implemented in coordination with other parties and consistent with management for hatchery production and natural spawning escapement.

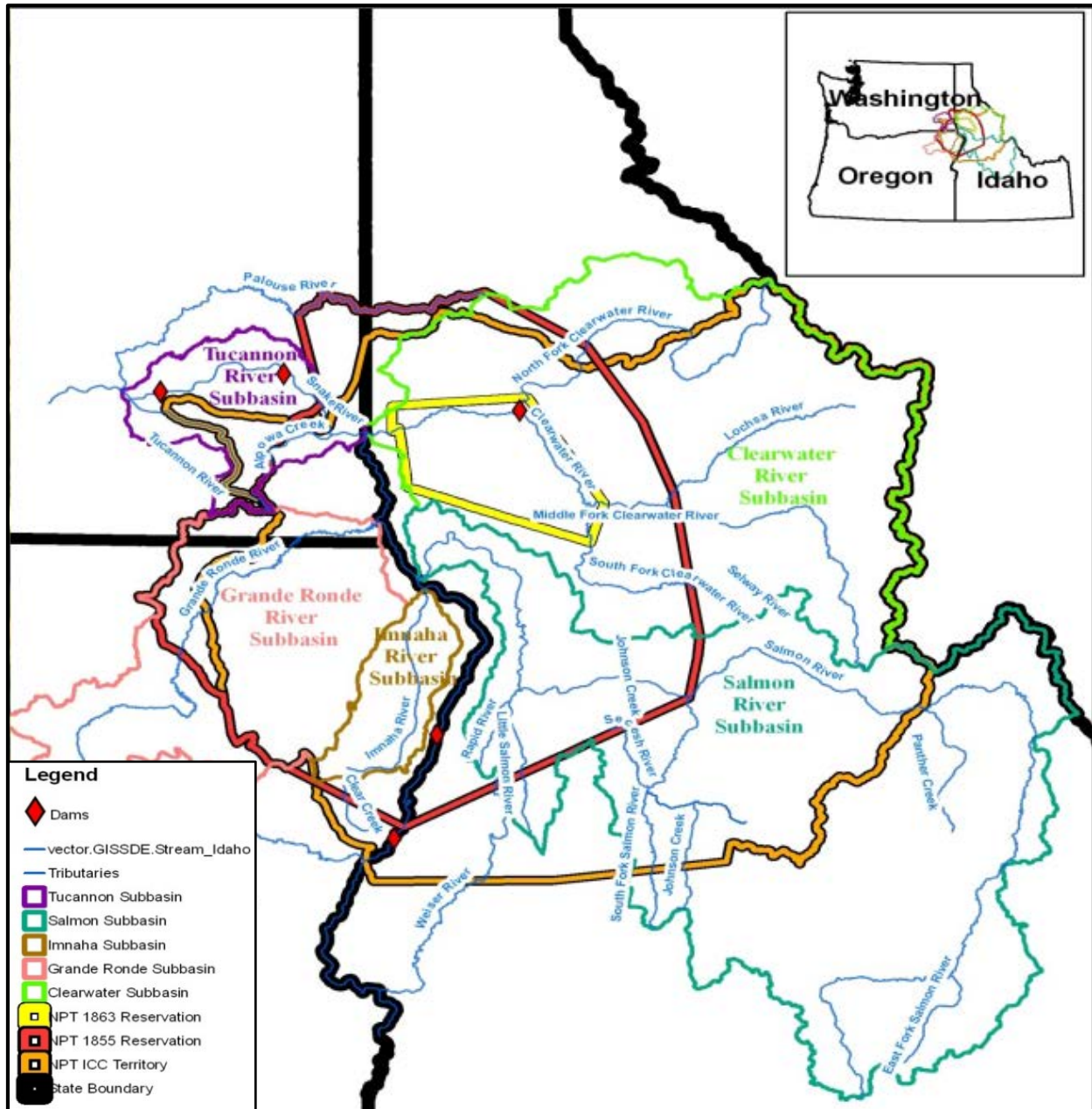
The NPT fall Chinook and coho salmon fisheries in the Snake River Basin (Figure 1) would occur in the fall season. The NPT would issue annual season regulations detailing the timing and season for fisheries consistent with this long-term fall Chinook and coho salmon TRMP (Nez Perce Tribe 2018).

The TRMP submitted by the NPT includes objectives for harvest (Section 1 of the TRMP) as well as performance indicators designed to monitor those objectives. The stated objectives of the TRMP include: (1) Provide for exercise of NPT federally-secured and legally-enforceable treaty reserved fishing rights in the Snake River Basin and its tributaries; (2) Provide for NPT treaty fisheries to meet ceremonial, subsistence, and commercial needs as part of the tribal fishing-based economy; (3) Establish harvest management frameworks to determine the amount of harvestable fish<sup>2</sup> available on an annual basis and to allocate harvest between NPT treaty and non-treaty fisheries; (4) Maintain consistency with conditions and agreements established in the ongoing *U.S. v. Oregon* court proceeding that address treaty fishing rights; and (5) Not appreciably reduce the likelihood of survival and recovery of ESA-listed Snake River spring/summer Chinook, fall Chinook salmon, sockeye salmon, or steelhead populations.

Performance indicators include: (1) number and composition (hatchery and wild) of fall Chinook and coho salmon harvested within the basin by the NPT, described in Table 1, below; (2) level of Tribal fishing effort within the basin; and (3) level of consistency (compliance) with annual harvest goals and fishing regulations. Another key aspect is to improve access for Nez Perce tribal members to fish at their "usual and accustomed" fishing places so that they can increase their harvest and to catch their fair share of the fish runs.

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<sup>2</sup> "Harvestable fish" as defined in the *U.S. v. Oregon* Management Agreement are "[t]hose fish determined pursuant to this Agreement to be available for harvest"; [citation] at page 123.



**Figure 1. The Snake River Basin and its harvest areas as they relate to the Nez Perce Tribe’s 1855 Reservation and Indian Claims Commission (ICC) determinations.**

**1.1.1. Criterion 4(i)(A): The TRMP defines populations within affected listed ESUs, taking into account spatial and temporal distribution, genetic and phenotypic diversity, and other appropriate identifiably unique biological and life history traits.**

The TRMP describes the populations of listed DPSs and ESUs it expects to be affected by fishery management within the plan (Section 5.0 of the TRMP). The TRMP incorporates the

concepts defined in the NMFS Viable Salmonid Population (VSP) document (McElhany et al. 2000). Application of these VSP concepts is needed to adequately assess and limit the take of listed salmonids for the protection of the species (see section 1.1.2, below, and discussion in section 1.1.4). The TRMP also references the NMFS' Northwest Fisheries Science Center most recent status review of ESA-listed salmon and steelhead species in the Snake River Basin (NWFSC 2015). The TRMP analysis considers spatial and temporal distribution of ESA-listed species in defining harvest seasons. The analysis also takes into account the genetic and phenotypic diversity of each species by managing harvest based on natural-origin abundance (fall Chinook salmon) versus total abundance (coho salmon).

The NPT asserts that their treaty rights ensure that the NPT may fish throughout the Snake River Basin. Thus, all listed populations within the four ESUs/DPSs may be affected, with those in the Clearwater and traveling through the mainstem Snake River heavily influenced by tribal treaty fisheries due to proximity to the NPT's reservation. Of the listed ESUs and DPSs, the fall Chinook salmon ESU is likely to be most affected by the proposed fisheries because it is the target of the fall Chinook fishery. However, the effects would be limited by the harvest framework described in section 1.1.3. Effects of the proposed fisheries on other ESA-listed salmon and steelhead are smaller, but are considered in NMFS' NEPA analysis, and will be included in NMFS' biological opinion under section 7 of the ESA, as summarized in section 1.1.4.

**1.1.2. Criterion: 4(i)(B) Uses the concepts of “viable” and “critical” salmonid population thresholds, consistent with Viable Salmonid Populations (VSP) concepts in “Viable Salmonid Population.”**

The NPT uses the concepts of “viable” and “critical” salmonid population thresholds to assist in NMFS' evaluation and determination (TRMP's Section 5.2, Table 8). For the single extant population in the Snake River fall Chinook salmon ESU, minimum abundance threshold (MAT) is synonymous with population viability and equates to 4,200 natural-origin Snake River fall Chinook salmon. The NPT's TRMP also describes a critical abundance threshold (CAT) of 1,260 natural-origin returns, which is equivalent to 30 percent of MAT, and far exceeds the Biological Requirements Workgroup recommendation of 300 for fall Chinook salmon (BRWG 1994). For discussion of the effects of the proposed fisheries in the context of abundance thresholds, see section 1.1.4, below.

**1.1.3. Criterion 4(i)(C): Sets escapement objectives or maximum exploitation rates for each management unit or population based on its status, and assures that those rates or objectives are not exceeded.**

For the purpose of evaluating the proposed fisheries, NMFS considers harvest rates (as described in the TRMP Section 5.2, Table 8) to adequately represent exploitation rates. The NPT's TRMP limits exploitation rates for fall Chinook salmon based on predicted natural-origin abundance (Table 1) at Lower Granite Dam (LGD; after hatchery and natural broodstock has been collected) and escapement into the Tucannon River. The impact rates are maximum rates that include

potential mortalities from caught and released fish in the sport fisheries for steelhead, ad-clipped and adipose-intact fall Chinook, and coho. If escapement levels were to drop below 1,260 natural-origin adults, the NPT would do one of the following: (1) approving fisheries to target natural origin fall Chinook at a number less than what the harvest scale would otherwise allow; (2) approve fisheries to target natural origin fall Chinook using a harvest rate that is less than 4.5%; or (3) implement other measures such as timing and area management to reduce the level of take.<sup>3</sup>

**Table 1. Proposed harvest rates for natural-origin fall Chinook salmon.**

Natural-Origin Adult Run Size	Non-tribal Harvest Rate (%) <sup>2</sup>	Tribal Treaty Harvest Rate (%)	Total Harvest Rate (%)	Treaty Fisheries Impact (%)
< 1,260 <sup>1</sup>	1.5	4.5	6.0	75
1,261 - 2,100	2.0	6.0	8.0	75
2,101 - 3,150	2.0	7.0	9.0	78
3,151 - 5,040	6.0	8.0	14.0	57
>5,040	10 + 22 on Margin	10 + 22 on Margin	20 + 44 on Margin <sup>3</sup>	50

<sup>1</sup> At this tier, there is no directed fishing on ad-intact fall Chinook salmon within the recreational fisheries. The impacts are incidental only to steelhead, coho, and mark-selective fall Chinook fisheries.

<sup>2</sup> If mark-selective fisheries are implemented, the non-treaty fisheries may not harvest more than 50% of the harvestable share.

<sup>3</sup> For example, at an abundance of 5,200 fish, total harvest is determined as follows:  $(5,200 * 0.20) + ((5,200 - 5040) * 0.44) = 1,110$  fish.

Coho fisheries in the Snake River Basin and its tributaries are managed to help meet multiple objectives: treaty and non-treaty harvest, hatchery brood needs, and natural spawning. Preseason and in-season run forecasts are used in planning and implementing treaty and non-treaty fisheries. The general approach is to determine total harvestable fish by subtracting the broodstock needs from run forecast and then implement fisheries using a 50:50 harvest sharing principle to allocate the harvest between treaty and non-treaty fisheries. The fishery managers will need to determine how this will be done. The NPT will review and update the coho salmon run information in-season to more precisely estimate run abundance for informing management of tributary fishery harvest.

**1.1.4. Criterion 4(i)(D): Display a biologically based rationale demonstrating that the harvest management strategy will not appreciably reduce the likelihood of survival and recovery of the ESU in the wild, over the entire period of time the proposed**

<sup>3</sup> These additional harvest conservation measures would occur along with the other non-harvest conservation measures that the Tribe has or may continue to do on an annual basis.

**harvest management strategy affects the population, including effects reasonably certain to occur after the proposed actions cease.**

All fall Chinook salmon fisheries, including non-tribal fisheries, are to be managed according to the same total maximum harvest rates in Table 1. The maximum harvest rates vary annually based on the natural-origin run size determined at Lower Granite Dam, with lower natural-origin abundances resulting in decreased harvest rates. For coho salmon, the harvest framework ensures broodstock collection and natural escapement is consistent with identified escapement goals and viability thresholds, while still providing for tribal fisheries. The NPT's TRMP commits the NPT to work with other parties to developed agreed-upon run forecasts, to report catch and ESA impacts in a timely manner, and to adjust or close fisheries to keep total allowable take of fall Chinook and coho salmon to the prescribed limits. We believe these limits are sufficient to not appreciably reduce the likelihood of survival and recovery of the listed ESUs and DPSs, particularly fall Chinook salmon, because harvest is limited by the natural-origin run size. In addition, some fish from the ESA-listed hatchery component of the fall Chinook salmon population will escape the fisheries to spawn, ensuring the goal of the hatchery programs to supplement the natural population component is met. Thus, total spawner abundance would be greater than what the harvest schedule demonstrates for just the natural-origin component.

This TRMP employs a number of key strategies as recommended by the Federal government (Caucus 2000) as part of their harvest conservation measures, which include: (1) fishery-related redistribution of the conservation burden historically borne by tribal fisheries; (2) use of threshold points to restrict the take of ESA-listed fish; and (3) abundance-based harvest rate to determine appropriate ESA take limits at levels that may not slow recovery.

**1.1.5. Criterion: 4(i)(E): Include effective monitoring and evaluation programs to assess compliance, effectiveness, and parameter validation.**

The NPT's TRMP includes effective monitoring and evaluation programs to assess compliance, effectiveness, and parameter validation (TRMP Section 9). To ensure compliance with ESA requirements, monitoring of NPT fisheries within the TRMP management area will be performed each year as described in the Snake River Basin Sampling Plan (Oatman and Sharma 2009). In summary, harvest monitors are assigned to sample the general Ceremonial and Subsistence (C&S) and commercial fisheries on the North Fork Clearwater River, mainstem Clearwater River, and mainstem Snake River. In addition, there are in-season interviews for the C&S and gillnet commercial fisheries, as well as post-season interviews.

Each year, the Technical Advisory Committee (TAC) provides run forecasts for fall Chinook and coho in the Columbia River. These preseason projections are used primarily for planning and implementing mainstem Columbia River treaty and non-treaty fisheries. These projections are also useful in providing an indication of how many Snake River fall Chinook and coho salmon may be in these aggregate returns. Annual tributary fishery plans will take the TAC run forecasts into consideration. A post-season report would be produced each year and would be provided to NMFS, detailing impacts on natural-origin fish and identifying potential modifications to



improve fisheries planning and fisheries implementation. The post-season report would also outline fisheries' characteristics as they relate to performance indicators.

**1.1.6. Criterion 4 (i)(F): Provide for evaluating monitoring data and making any revisions of assumptions, management strategies, or objectives that data show are needed.**

Through the process of preparing annual pre-season reports, conducting in-season harvest monitoring, and reporting post-season data, the NPT, other parties, and NMFS will consider any needed revision of assumptions regarding fishery impacts and management strategies to ensure allowable ESA impacts are not exceeded, while meeting party objectives (TRMP Sections 9 and 11).

**1.1.7. Criterion 4(i)(G): Provide for effective enforcement, education and coordination among involved jurisdictions.**

The NPT's TRMP provides for effective enforcement and coordination among involved jurisdictions. The NPT will provide appropriate enforcement of respective fisheries implemented according to the TRMP. Conservation enforcement officers will conduct routine patrols of the fishery area to observe the fishery and enforce applicable annual tribal regulations for this treaty fishery (TRMP Sections 9). The NPT intends to distribute information regarding tribal fishing effort and harvest of Snake River fall Chinook and coho salmon to the Oregon Department of Fish and Wildlife (ODFW), Washington Department of Fish and Wildlife (WDFW), Idaho Department of Fish and Game (IDFG), and NMFS at least twice a month for the duration of the season. Regulation, education, and outreach materials can be found at the [NPT's Department of Fisheries Resources Management](#) website. These provisions also satisfy the requirement of the Tribal 4(d) rule at 50 CFR 223.204(b)(1) that the plan specify the procedures by which the Tribe will enforce the plan.

**1.1.8. Criterion 4(i)(H): Include restrictions on resident and anadromous species fisheries that minimize any take of listed species, including time, size, gear, and area restrictions.**

The regulations for the fisheries proposed under the NPT's TRMP are specifically designed to protect listed species and limit harvest to specified limits; because the proposed fisheries would only target fall Chinook and coho salmon, other resident or anadromous species, such species would be expected to be much less vulnerable to the proposed fisheries. NMFS will explicitly consider the effects of these fisheries on ESA-listed species in the action area in the biological opinion. The effects of these fisheries on ESA-listed species under the US Fish and Wildlife Service's jurisdiction were considered previously (USFWS 2019).

**1.1.9. Criterion 4(i)(I): Is consistent with plans and conditions established within any Federal court proceeding with continuing jurisdiction over tribal harvest allocations.**

As described in Section 10 of the NPT’s TRMP, the plan is consistent with plans and conditions established within any Federal court proceeding with continuing jurisdiction over tribal harvest allocations. The parties to *U.S. v. Oregon* are under a court order obligating them to “exercise their sovereign powers in a coordinated and systematic manner in order to protect, rebuild, and enhance upper Columbia River fish runs while providing harvests for both treaty Indian and non-Indian fisheries.” The NPT is a tribal party to this case. As such, the NPT is responsible for cooperatively developing tributary fisheries with other parties, and providing tributary harvest plans to other affected parties to the case for review and comment.

The NPT assert that the implementation of this plan for harvest management is consistent with the legally enforceable treaty-reserved fishing rights held by the NPT, as well as the Department of Commerce’s trust responsibilities to the NPT. The TRMP was developed consistent with the existing and ongoing Federal court proceedings in *U.S. v. Oregon*. This is consistent with the Tribal 4(d) rule provision which allows Tribes to develop plans within an ongoing Federal court proceeding. 50 CFR 223.204(b)(2).

**1.2. Criterion (4)(ii): The Amount Of Take is Monitored and Provided to NMFS On A Regular Basis**

As stated in section 1.1.6 of this evaluation, an annual report will be provided to NMFS. Every five years, starting in 2024, NMFS will meet with the NPT to evaluate the program based on the monitoring data to determine if any changes to the TRMP are necessary.

**2. Notice of Proposed Evaluation and Pending Determination**

As required by the Tribal 4(d) Rule, the Secretary is seeking comment from the public on the pending determination as to whether or not the TRMP evaluated here would appreciably reduce the likelihood of survival and recovery of the listed salmon and steelhead. The Secretary will publish notice of any determination and the basis for that determination in the Federal Register.

**3. Recommended Determination**

Based on this review and evaluation, a recommendation would be made, subject to information provided during public comment, that activities implemented as described in this TRMP would not appreciably reduce the likelihood of survival and recovery of ESA-listed Snake River steelhead, fall Chinook salmon, spring/summer Chinook salmon, and sockeye salmon. If the Regional Administrator concurs with this recommended determination, take prohibitions would not apply to activities implemented in accordance with the TRMP.

#### 4. References

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