

Tulalip Tribes Briefing Document

Joint Conference Pilot for Regulatory Harmonization in Snohomish Basin, Washington

March 24, 2016

Need

The Tulalip Tribes (Tulalip) has long been working to protect and restore the healthy ecosystems that support salmon. Even after 30 years and more than \$50,000,000 of investment in planning and habitat restoration in the Snohomish Basin, salmon stocks continue to decline, such that some runs are nearly extinct. Restoration cannot keep up with habitat loss and water quality degradation due to development. Progress has been made in the updated stormwater regulations and critical areas ordinances, but is often hampered by development that is vested in the old regulations. There is a pressing need for alignment across agencies and all levels of government to close regulatory gaps and inconsistencies, set measurable standards for performance and accountability and to bundle and streamline regulatory requirements. To date, no processes for accomplishing this regulatory harmonization have been developed, nor have mechanisms been created for increasing the effectiveness and accountability of land use rules and regulations.

The Joint Conference Pilot for Regulatory Harmonization recommended here provides an opportunity for agreement on sideboards, direction, and common goals that address priority tribal trust resources, local government needs, climate adaptation, new information, and more agile decision-making in response to emerging issues and understandings. In addition, the Joint Conference model invites state and federal agency participation and sets the table for achieving regulatory alignment across all levels of government with agreement on program and policy changes that remove barriers, set common standards, and identify measurable outcomes to show progress in ecosystem recovery and economic, cultural and environmental gains that meet both local government and Tulalip objectives.

The Time is Right

Currently there are several national and local drivers for a Joint Conference Pilot for Regulatory Harmonization in the Snohomish Basin, Washington. These include:

1. Climate change affecting sea level rise, ocean acidification, hydrologic shifts, ecosystem shifts and increasing hazard (flooding, landslide, and fire) and impacts to both the built environment and the natural world that our cultures and economies depend on.
2. Rapid population growth in Puget Sound and Snohomish basin puts increasing development pressure on working lands, infrastructure needs, and environmental conditions, especially water quality and habitat and requires review and revision of existing regulations.
3. Federal agency response to Treaty Rights at Risk (TRAR):
 - a. Gina McCarthy, EPA Administrator, commitment to uphold treaty rights and consult with all tribes on the protection and recovery of treaty trust resources (Policy Statement, December 9, 2014) and

- b. Karen Divers, special assistant to the President for Native American Affairs, requires federal agency response to TRAR by January 31, 2016 (tribal - white house meeting in Washington, DC on December 4, 2015). Agency support for regulatory harmonization and the Joint Conference model will demonstrate responsiveness to TRAR as well as provide incentives and funding to tribes, state and local governments to undertake regulatory harmonization to meet tribes' stated goals.
- 4. A measurable standard for performance and accountability:
 - a. The Ecosystem Diagnosis and Treatment (EDT) model (Lars Mobrand, 1997) used by Tulalip and other Snohomish Basin salmon recovery partners (Including local, state, and federal governments) to develop Chinook salmon recovery goals. EDT also provides a framework for assessing which habitat protection measures will be most effective in supporting salmon recovery in concert with ongoing restoration work. This framework can be used as a way of determining which land use rules and regulations will best support salmon recovery and priority trust resources. With agreement, EDT can be used as the technical basis for setting goals and measuring habitat gains and losses, as well as progress in ecosystem recovery for the Snohomish Basin Joint Conference Pilot Regulatory Harmonization Initiative.
- 5. Intergovernmental coordination:
 - a. The Joint Conference Pilot for Regulatory Harmonization in the Snohomish Basin provides the pilot setting for Washington Dept. of Ecology, Washington Dept. of Commerce, NOAA, EPA and other agencies to work through needed program changes.
 - b. Tulalip is proposing the Snohomish-Stillaguamish LIO host the Joint Conference Pilot for Regulatory Harmonization.
- 6. The Snohomish Basin, one of four watersheds nationwide recognized by CEQ as a Resilience Showcase, received this designation in part due to the Sustainable Land Strategy where farmers and the Tulalip Tribes have agreed to support each other's cultures and economies using a Net Gain approach to agricultural and ecosystem productivity. Partnering local governments and Tulalip are currently identifying projects and developing plans for the Snohomish Basin that meet trust resource obligations and the goals of the Puget Sound Estuary Program and will become part of the President's Climate Plan. As such, this pilot project will be recognized as a national initiative.

Current Status of the Joint Conference Pilot as of March 2016 and Schedule of Next Steps

Building relationships, conducting assessments and inventories, and growing the vision regarding the need for regulatory harmonization has been years in the making. Currently there is wide spread interest from local governments and state and federal agencies. This section provides an update of where things stand currently and briefly describes next steps and a timeline to a Joint Conference in September 2016.

- 1. Intergovernmental Coordination: Conversations with local government partners, Snohomish County, City of Everett, and King County are ongoing. In addition, the Puget Sound Partnership

(PSP), EPA, NOAA, NRCS, and Washington Dept. of Ecology and Dept. of Commerce have all been notified of the intent and interest of Tulalip Tribes to pursue the Joint Conference Pilot for Regulatory Harmonization in the Snohomish Basin. Interest is strong from all parties and further conversations to understand this initiative are being proposed by PSP and Snohomish County.

Commitment from federal agencies by April 2016, participating local government commitments by May 2016.

2. LIO/Local Government Next Steps (Steps 2a-c in Joint Conference Diagram): Much of the information regarding hazard liabilities and climate impacts already exists and/or is in the process of being updated by various local governments. ***Identify where revision to codes and regulations would be needed to reduce risks and hazard liabilities. June-July 2016.***
3. Tulalip Tribes Next Steps (Steps 1a-c in Joint Conference Diagram): Tulalip has already completed much of the work identified in Steps 1a, 1b and 1c. ***Identify key regulatory changes needed to better protect and restore priority trust resources. Identify information needs for monitoring climate, habitat changes, and effectiveness of regulatory changes in protecting priority trust resources. To be completed by July 2016.***
4. Joint Conference: At the discretion of Tulalip Tribes and the Snohomish LIO, separate pre-conferences can be held with invited state and federal agency representatives to identify goals, issues and potential solution in advance of the Joint Conference. ***The Joint Conference to be convened in September 2016.***

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Appendix A: Joint Conference Model Explained

The Joint Conference model provides parallel pathways for the identification of key regulatory changes needed for 1) tribes (in this case, Tulalip) to address protection and enhancement of priority treaty trust resources including fish, wildlife, plants and water and tribal needs for climate adaptation; and 2) local government partners including Snohomish County, King County, the City of Everett, and other agencies with land use authority to identify program revisions (e.g. Critical Areas Ordinances and Shoreline Master Programs) needed to better address public safety, reduce risks and liabilities associated with climate change, and meet Puget Sound recovery goals.

By invitation, state and federal agencies can participate in pre-conference meetings to better understand the needs, intent opportunities, and barriers to regulatory alignment. At the Joint Conference for Regulatory Harmonization issues and solutions will be discussed with all parties present (state and federal agencies will be active participants) to agree on direction, goals and key program revisions that address stated tribal and local government needs.

Steps in the Joint Conference Model

This section describes the steps shown in the Joint Conference Diagram below.

Steps 1 and 2 can take place concurrently, Step 3 follows. Steps 1c, 2c and Step 3 should occur on a regular and ongoing basis to monitor progress and accommodate new information and needs.

Steps 1a-c: Tulalip Tribes Pathway

- 1a) Tulalip identifies priority trust resources (Tulalip Chapter of NWIFC State of Watersheds Report, local/traditional knowledge);
- 1b) Tulalip identifies barriers to priority trust resources, potential solutions and information or other critical needs including key changes to policy/regulation as well as identifying opportunities for net gain increases in productivity or ecosystem function;
- 1c) Tulalip Board of Directors in conjunction with Tulalip Office of Treaty Rights develop treaty sideboards, review progress, incorporate new information, update needs and identify draft goals in regular tribal pre-conference meetings.

Steps 2a-c: Local governments/Snohomish LIO pathway

- 2a) Local government partners and the Snohomish Local Integrating Organization, as entities with land use authority, identify hazard liabilities, climate and other needs;
- 2b) Local governments review current rules and regulations, identify needed changes to respond to climate guidance, treaty rights and other needs, identify barriers and opportunities to rule changes;

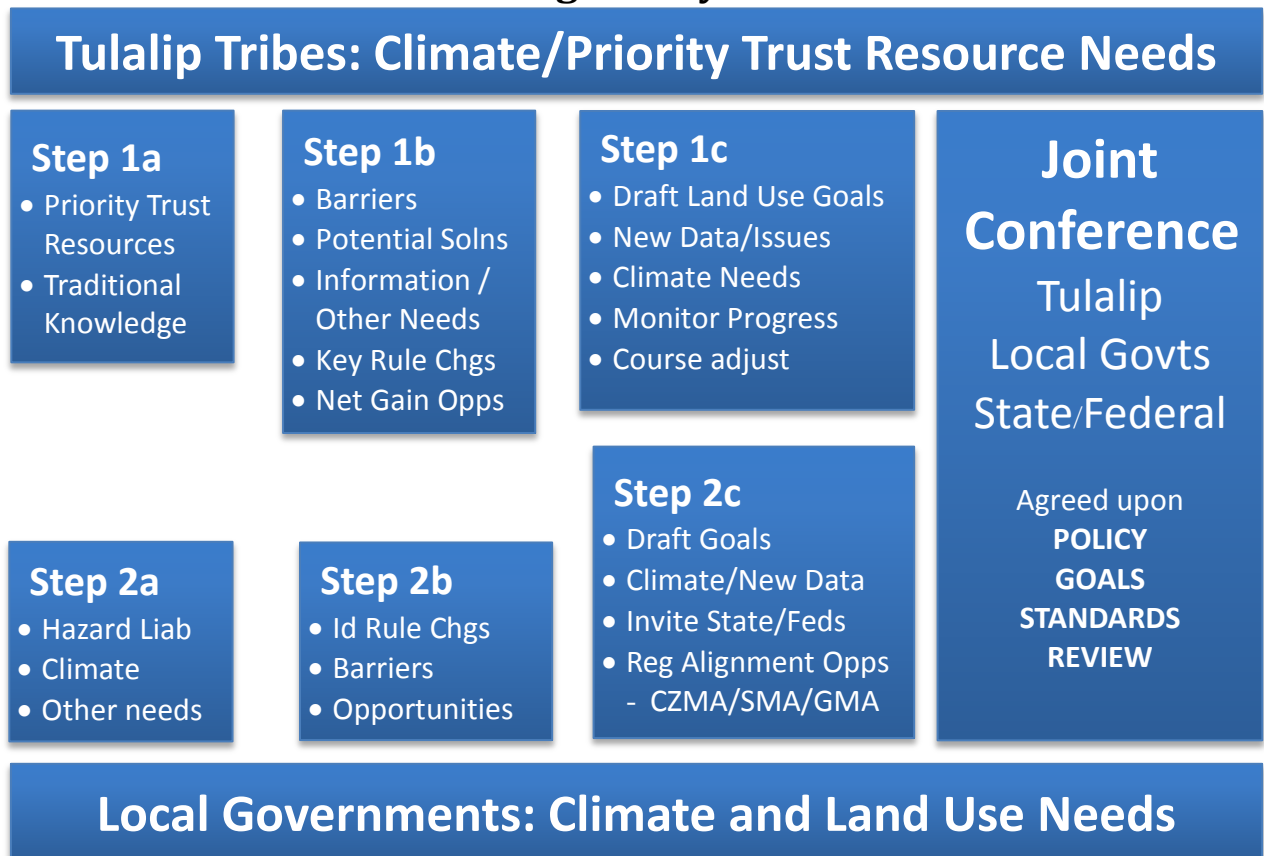
2c) Under the auspices of Snohomish LIO, Local governments receive new information, update needs, and identify draft goals in regular pre-conference meetings. Invite state and federal agencies as needed and identify regulatory alignment needs and opportunities.

Step 3. Joint Conference

Convene Joint Conference with representatives from the Tulalip Tribes and local governments/Snohomish LIO to share needs and recommended solutions, and to negotiate land use policy direction. Invite state and federal agencies to help resolve gaps and barriers to regulatory alignment, bundle and streamline regulations, share resources and leverage opportunities.

Note: Implementation of this model is not intended to displace mandated processes for amending and updating rules and regulations nor to displace SEPA and other public process requirements.

**Joint Conference Diagram:
Land Use and Regulatory Harmonization**



**Appendix B: The use of EDT for assessing progress (or lack thereof) in
restoring and protecting habitats that support Snohomish basin Chinook salmon**

Tulalip Tribes, January 29, 2016

The Ecosystem Diagnosis and Treatment (EDT) approach (Mobrand et al. 1997, Lestelle et al. 1996) has been the principal way of relating habitat condition (quantity and quality) to the abundance, productivity, and diversity of Pacific northwest salmon populations, especially Chinook and Coho salmon. The Puget Sound Technical Recovery Team used EDT, in combination with population viability analysis, to develop recommended recovery goals for the 22 populations that comprise the threatened Puget Sound Chinook Evolutionarily Significant Unit (Rawson et al. 2009).

When recovery goals were under development, the Tulalip Tribes contracted with Mobrand Biometrics to develop a detailed EDT model for the entire basin, including both component Chinook populations: Skykomish and Snoqualmie. Mobrand Biometrics worked with technical experts from Tulalip, Washington Department of Fish and Wildlife, Snohomish County, King County, and others familiar with the relationships of Chinook salmon production to habitat conditions throughout the basin. This work provided the basis for the quantitative recovery goals for these two populations. In combination with Shiraz (Scheuerell et al. 2006), another model that quantitatively relates habitat condition and salmon population performance, it also provided the basis for the basin's recovery plan (Snohomish Basin Salmonid Technical Recovery Committee 2004), including the geographic structure of subbasin strategy groups and the priority recovery strategies, especially habitat restoration strategies, to be followed within these subbasin strategy groups. The Snohomish Basin Technical Committee also used the EDT results to evaluate the interaction of different levels of habitat restoration and protection with different hatchery and harvest management strategies (Kaje et al. 2009).

EDT computes a production curve for a salmon population based on habitat conditions throughout a watershed. The habitat conditions are determined for a number of habitat factors in a large number of reaches delineated throughout the system in the areas used by Chinook salmon. Habitat conditions are expressed as discrete levels, which can be called very good, good, fair, and poor. Typically, good conditions are the same as properly functioning conditions as defined by NMFS (1996), and very good conditions are historical, or pre-contact conditions. Fair conditions represent habitat conditions that can support salmon at some level below viable abundance and productivity. Poor conditions represent nearly fully degraded habitat that is not suitable for supporting even hatchery produced salmon.

The original EDT analysis for the Snohomish, completed approximately 15 years ago, included an assessment of production under then current habitat conditions. This required a comprehensive review of conditions then prevailing throughout the basin, which was part of the work done by the local technical experts. That set of current conditions from 2000 could be used as a baseline against which to compare population performance today based on now current habitat conditions.

It would be necessary to convene a group of local experts again to develop the set of habitat conditions that are current today. This would be a worthwhile exercise because it would enable us to compare the tradeoff between the effects of the restoration work that has happened to date (presumably beneficial) and the losses due to the lack of adequate habitat protection (presumably detrimental). Figure 1 shows how different habitat scenarios are output from EDT in terms of population performance curves. In those graphs, Scenario 1 is the “current path,” which was close to the current conditions scenario. The “Goal” scenario is the recovery goal, which was based on inputting NMFS’s properly functioning conditions as the habitat conditions. The other scenarios were intermediate steps towards recovery, representing different levels of recovery effort and of habitat protection. A current, “2016” scenario could be shown on these graphs as well to give us an idea of whether we have gotten closer to, or farther away from, the recovery goal in the past 15 years.

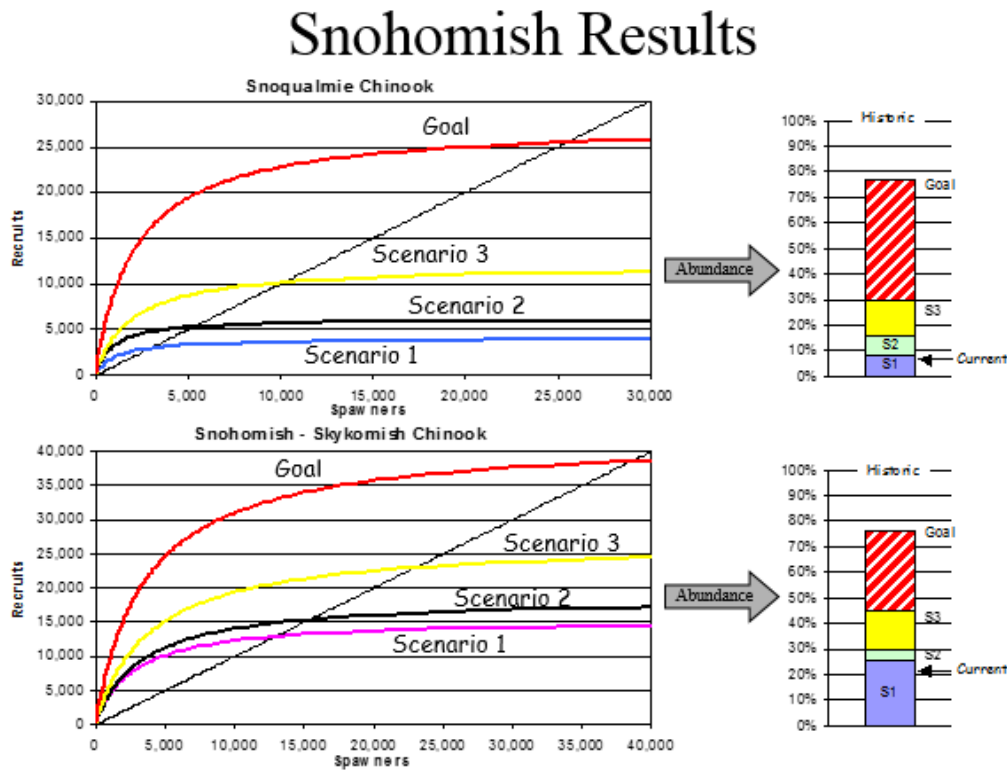


Figure 1. Example of population performance resulting from scenarios modeled in EDT during Snohomish recovery planning.

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Appendix C: A Brief History of Tribes and Environmental Regulation, Planning and Assessment in Puget Sound, Washington

February 4, 2016

Indigenous peoples from around the world are here today because their cultures and lifeways are resilient and adaptable. The native peoples of the Salish Sea are no exception with a 10,000 year history in one of the most dynamic landscapes in the world. The ancestors of today's tribes experienced glaciation, floods, fires and landslides and like salmon adapted and thrived in a landscape built on disturbance. In the nearly 200 years since first contact, disease, starvation, termination, and assimilation have tested the resilience and adaptability of tribes.

Recent tribal history, dating back to the 1960s, shows northwest treaty tribes exercised their sovereignty through direct action, the courts, and formal engagement with all levels of governments to defend, protect and restore treaty trust resources. However current conditions today and future projections for the health of salmon and Puget Sound ecosystems show that landmark agreements notwithstanding, federal, state and local government regulatory, planning and assessment processes have failed to show progress. Basic assumptions about monitoring, accountability, adaptive management, ecosystem stability, and the efficacy of regulatory systems of delegated authorities, have shown themselves to be unachievable, unreliable, or wrong with little political will or institutional ability to course correct as needed. The following briefly describes this history.

I. National Environmental Law and Policy (1970s) and the Boldt Decision

Longstanding public concern over human health and safety from pollution led to the enactment of national environmental laws and policy throughout the 1970s including the National Environmental Policy Act, the Clean Water Act, the Clean Air Act, the Coastal Zone Management Act and the Endangered Species Act. These laws provide a federal backstop to all state, local and tribal environmental regulations and led to a 40 year era of science based regulation, watershed planning and environmental assessment in processes that invited participation from tribes, all levels of government, and often included landowners and other stakeholders.

In this same decade, the Boldt decision in *US v Washington* (1974, 1979) affirmed treaty tribes as sovereign nations with a treaty right to salmon. Tribes have increased their standing through self-determination and self-governance as well as expanding the definition of trust resources to include fish, wildlife, plants and water and including the protection and governance of traditional knowledge as a further exercise of tribal sovereignty.

II. The Timber Wars (1975-1985)

An early exercise of tribal sovereignty was the defense of habitat critical to salmon through the courts.

- a. Timber Fish and Wildlife (1986-1994) ended a decade of litigation. Tribes negotiated with the Washington governor, lands commissioner, and state legislature to set up a landmark process between tribes, state, local governments and private landowners (timber companies).

III. State Environmental Regulation and Water Quality Management (1985 -1996)

Federal law is delegated to states. Water quality drives state environmental regulations and watershed water management plans.

- a. Puget Sound Water Quality Authority developed Puget Sound Water Quality Management Plans (1987, 1989, 1991) for marine and freshwaters. Local governments, tribes and landowners participate in joint planning processes.
- b. Tulalip fish consumption surveys with invitation to Swinomish and Squaxin tribes resulted in agreement on a process for setting fish consumption standards.
- c. Snohomish Watershed Plans (1988) Tulalip staff (Dave Somers) established policy and technical structure for federal, state, and local governments to follow.
- d. Local and tribal watershed plans provided a legal framework and resulted in statewide support for Watershed Analysis allowing for science driven, measurable watershed goals.
- e. Northwest Straits Commission (1992) and Puget Sound Action Team (1996) implement PSWQA Water Quality Management Plans using coordinated state, local, tribal and citizen efforts

IV. Endangered Salmon (ESA) and Puget Sound Recovery (1997 to present)

- a. Throughout the 1990s tribes reduced harvest quotas to mitigate declining salmon runs.
- b. NOAA Shared Strategy (2001-present) response to Chinook listing led to collaborative multi-agency/stakeholder forums for the development of local Salmon Recovery Plans.
- c. Puget Sound Partnership (PSP) formed in 2007, coordinates state agencies, local governments and tribes to develop biennial Action Agendas for salmon and Puget Sound recovery.
- d. PSP-Local Integrating Organizations (2011) create tribal-local government partnerships to develop and implement local plans for salmon and ecosystem recovery on a watershed basis.

V. Treaty Rights at Risk (2011 to present) and a new Resilience

- a. Northwest Treaty Tribes issue "Treaty Rights at Risk" (TRAR)(2011) describing insufficient federal response in meeting treaty obligations.
- b. Tribes and Tulalip staff response to federal inaction builds on the rule of law, watershed planning, and watershed analysis. Now with EDT and other ecosystem models, impacts can be measured, and making the federal agencies liable for ensuring tribal rights and property under TRAR can be achieved and ensuring the treaty obligations to trust resources are met.
- c. The major issues from climate change are the loss of glaciers and hydrologic change resulting in flooding and drought, sea level rise impacting shoreline aquifers, and increased erosion and damage from winter storms. Currently under No Net Loss policies, federal, state, and local governments are not meeting the standards that would cause recovery under current conditions. Now with climate change, predictive science and Net Gain policy is needed to offset climate impacts and to meet recovery goals. The focus on individual habitats and ecosystems needs to scale up to recovery of whole landscapes with healthy working lands.
- d. Finally, we need **traditional knowledge and better science** to provide the information needed to better assess where we're headed, how we're doing, what is coming (forecasting), and where we need to make course corrections.

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