



State of Washington
DEPARTMENT OF FISH AND WILDLIFE

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April 28, 1998

Mr. Craig S. Harrison
Pacific Seabird Group
4001 North Ninth Street #1801
Arlington, Virginia 22203

Dear Mr. Harrison:

Thank you for your letter regarding seabird bycatch in salmon gill net fisheries. As you have noted, the Washington Department of Fish and Wildlife is active in developing and implementing measures designed to minimize seabird bycatch while maintaining a healthy salmon net fishery.

We are involved in those activities for three reasons. First, the USFWS's *Biological Opinion re: Marbled Murrelets and the Nontreaty Commercial Salmon Net Fisheries in Puget Sound and Hood Canal* (July 24, 1996) requires us to implement specific measures to avoid destroying marbled murrelets in those fisheries; measures that benefit a wide range of seabird species. Second, we have been working with the U.S. Fish and Wildlife Service (USFWS) to reconcile the "no kill" provisions of the Migratory Bird Treaty Act (MBTA) with the realities of incidental take. And finally, but most importantly, the mission of the Washington Department of Fish and Wildlife includes conservation and wise utilization of both fish and wildlife resources, and we have recognized and acted upon the need for an ecosystem-based management approach for activities that have an impact on more than one type of resource.

Unfortunately, as you have pointed out, the actions of the Washington Department of Fish and Wildlife are not enough to ensure conservation of seabirds in the geographical areas of concern (Puget Sound, Strait of Juan de Fuca, Strait of Georgia, Johnstone Strait, etc.). As we see it, at least four barriers lie in the road to success on this issue:

- 1) USFWS has been unsuccessful in working with the Washington treaty Indian tribes to develop shared seabird conservation goals, and the tribes have not adopted seabird-conserving measures in their gill net fisheries.

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- 2) Because of the perceived inequity between gear requirements (and, therefore, salmon harvest opportunity) between treaty and nontreaty fishers, a large group of nontreaty fishers recently sought and obtained a court order enjoining the Washington Department of Fish and Wildlife from enforcing our newly adopted gill net gear modification. The Department has sought an immediate appeal of this preliminary injunction order. Although we are hopeful that the order might be dissolved in time to apply to this season, it is certain that the lack of tribal participation in seabird conservation measures places the State of Washington in a difficult legal position and a compromised policy-making position *vis a vis* implementation of seabird conservation measures in the non-treaty fishery. As you have noted, lack of treaty participation also limits the potential benefits to affected seabird populations.
- 3) Provisions of the Migratory Bird Treaty Act make it nearly impossible for Washington State and treaty Indian tribes to work reasonably with the USFWS on **reducing** seabird bycatch, since **any** such kill is arguably illegal under the Act. Implementing rules for the Act should be amended to allow incidental take in fisheries; only then will USFWS be able to clearly define acceptable levels of impact and work with us to implement measures that minimize seabird bycatch in fisheries.
- 4) Canadian resource managers have not been responsive to our expressed concerns over fishery-related seabird mortalities in shared waters and fisheries.

We agree with your conclusions about what needs to be done, and believe the State of Washington has, in effect, led the efforts towards meeting the objectives. Clearly, working through a combination of avenues will have the best chance of success: the Migratory Bird Treaty Act provides the primary U.S./Canada link on this issue; complementary seabird conservation measures should be a matter for discussion among state, tribal and Canadian fishery managers through the Pacific Salmon Treaty fishery planning process; discussions involving the USFWS, treaty Indian tribes and State of Washington should lead to coordinated seabird conservation priorities and measures in international and domestic fisheries.

However, Washington Department of Fish and Wildlife should not be forced to take the lead in coordinating these activities, and the Department should not be placed in the position of either requiring/negotiating for tribal compliance, or having the only regulations that accomplish real protection of seabirds. Instead, USFWS should articulate a principled interpretation of the MBTA that leads to even-handed and fair restrictions on **all** commercial net fisheries that affect sea birds. There is certainly no absence of federal power to require fair and even-handed restrictions that affect treaty Indian fisheries. If applied to all commercial fisheries, there is no discriminatory impact on either the opportunity or allocation of the treaty catch.

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We raise these issues to you because the Department's restrictions will continue to be attacked and labeled as unfair so long as federal responsibility is not fulfilled. As evidenced by our adoption of regulations and willingness to defend those regulations vigorously, we have shown that we are committed to finding solutions to this problem. We are eager to work with the various regulatory entities to that end. It is only through a coordinated effort that seabird conservation, ecosystem management, and appropriate fisheries can be assured.

Sincerely,



Bern Shanks, Ph.D.
Director

BS:BC:TS:dr

cc: Governor Gary Locke
Jamie Rappaport Clark, U.S. Fish and Wildlife Service
Billy Frank, Northwest Indian Fisheries Commission
Will Stelle, National Marine Fisheries Service
David Anderson, Minister of Fisheries and Oceans
Christine Stewart, Minister of the Environment
Cathy McGregor, British Columbia Minister of Environment
Ian Todd, Pacific Salmon Commission