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12 UNITED STATES DISTRICT COURT
 13 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 14

15 HOOPA VALLEY TRIBE,)	Civ. No.
)	
16 Plaintiff,)	
)	
17 v.)	COMPLAINT FOR
)	DECLARATORY AND
18)	INJUNCTIVE RELIEF
19 WILBUR ROSS, in his official capacity as U.S.)	
Secretary of Commerce; NATIONAL MARINE)	Endangered Species Act and
20 FISHERIES SERVICE; and PACIFIC FISHERY)	Administrative Procedure Act Case
MANAGEMENT COUNCIL)	
21)	
22 Defendants.)	
)	
23)	

INTRODUCTION

1
2 1. In this action for declaratory and injunctive relief, Plaintiff Hoopa Valley Tribe
3 (“Tribe”) challenges the failure of the Secretary of Commerce (“Secretary”), National Marine
4 Fisheries Service (“NMFS”), and the Pacific Fishery Management Council (“PFMC”)
5 (collectively, “Defendants”) to reinstate formal consultation with NMFS (who serves here as
6 both the action agency and the consulting agency) pursuant to Section 7 of the Endangered
7 Species Act (“ESA”), 16 U.S.C. § 1536 and 50 C.F.R. § 402.16, regarding the impacts of ocean
8 salmon fisheries on Southern Oregon/Northern California Coastal (SONCC) Coho, which are
9 listed as threatened under the ESA. The Tribe seeks an order declaring that Defendants have
10 unlawfully failed to reinstate formal consultation under ESA Section 7 and an order enjoining
11 them to do so. The Tribe further seeks injunctive relief to prevent irreparable harm to SONCC
12 Coho pending completion of the reinstated consultation.

JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

13
14 2. Jurisdiction. This action is brought pursuant to the ESA, 16 U.S.C. § 1540(g)(1)
15 and alternatively the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 704, 706. This Court
16 has jurisdiction pursuant to 16 U.S.C. § 1540(g)(1), 28 U.S.C. § 1331, 28 U.S.C. § 1362, and 5
17 U.S.C. §§ 704, 706.

18 3. The Tribe provided the Defendants with notice of intent to sue for violations of
19 the ESA, pursuant to 16 U.S.C. § 1540(g) on July 18, 2018. See Exhibit A. Defendants have
20 failed to correct or remedy their violations of the ESA.

21 4. Venue. Venue is appropriate in the Northern District of California under 28
22 U.S.C. § 1391(e)(1) because this action is against federal agencies and officers, the Plaintiff
23 resides in this District, and no real property is involved in this action.

24 5. Intradistrict Assignment. Though Plaintiff resides in Humboldt County, where
25 the Klamath River and SONCC Coho are also located, Plaintiff does not consent to a magistrate
26 judge and thus assignment to a Bay Area Division is appropriate per Local Rule 3-2(g).

PARTIES

6. Plaintiff Hoopa Valley Tribe is a federally-recognized Indian tribe. Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Tribe. The fishery was “not much less necessary to the existence of the Indians than the atmosphere they breathed.” *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). The salmon fishery also holds significant commercial and economic value in the Hoopa culture and economies, and the Tribe holds property rights in the Klamath River Basin fishery. The lower twelve miles of the Trinity River and a stretch of the Klamath River near the confluence with the Trinity River flow through the Hoopa Valley Reservation. See Memorandum from John D. Leschy, Solicitor of the Department of the Interior to the Secretary of the Interior 3-4 (Oct. 4, 1993) (hereinafter 1993 Solicitor Opinion).

7. The principal purpose of the Tribe’s Reservation was to set aside sufficient resources of these rivers for the Indians to be self-sufficient and achieve a moderate living based on fish. See 1993 Solicitor Opinion 3, 15, 18-21, *cited with approval*, *Parravano v. Babbitt*, 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996). The Tribe’s federal reserved fishing right entitles the Tribe to sufficient fish to support its ceremonial, subsistence, and commercial needs though not more than 50% of the total harvestable quantity. *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986); Solicitor’s Opinion, at 27. Due to the depressed condition of the Klamath fishery, federal regulations must allocate 50% of the available fishery harvest to the tribal fishery (which is shared between the Hoopa Valley and Yurok tribes) with the remaining 50% allocated to the non-Indian recreational and commercial fishery, much of which occurs in the Pacific Ocean.

8. Salmon reside in the Pacific Ocean prior to returning to the Klamath and Trinity Rivers to spawn. The Tribe’s members’ past, present, and future enjoyment of the benefits provided by the Klamath-Trinity River system has been, is being, and will continue to be injured

1 by Defendants' on-going disregard of their statutory duties and by the injuries caused by their
2 permitting of excessive take of salmon, including SONCC Coho, in the ocean harvest.

3 9. Defendants in this action are:

4 A. Wilbur Ross, in his official capacity as Secretary of Commerce. Secretary
5 Ross is responsible for approving ocean fishery management measures pursuant to the
6 Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16
7 U.S.C. § 1801 et seq. The Secretary's actions are subject to compliance with the ESA.

8 B. National Marine Fisheries Service ("NMFS") is an agency of the United
9 States Department of Commerce responsible for promulgating ocean fishery management
10 measures pursuant to the Magnuson-Stevens Act and for administering the provisions of the ESA
11 with regard to threatened and endangered marine and anadromous species, including the species
12 of threatened Coho salmon that migrate and reside in the Klamath River basin and Pacific Ocean.
13 As relating to the fishery management measures adopted pursuant to the Magnuson-Stevens Act,
14 NMFS is both the regulated action agency and the administering consulting agency with regard
15 to its compliance and obligations under the ESA.

16 C. Pacific Fishery Management Council ("PFMC") is a regional council
17 created pursuant to the Magnuson-Stevens Act, which is responsible for making
18 recommendations to the Secretary of Commerce, acting through NMFS, regarding ocean fishery
19 management measures. PFMC's actions are subject to compliance with the ESA.

20 **NATURE AND BACKGROUND OF CASE**

21 A. The Imperiled Klamath Fishery.

22 10. For more than 100 years the Hoopa Valley Reservation has encompassed much of
23 the Klamath and Trinity Rivers. In 1988, Congress partitioned the Hoopa Valley Reservation,
24 reserving to the Hoopa Valley Tribe the portion of the reservation extending six miles to either
25 side of the Trinity River and part of the Klamath River, near the confluence with the Trinity
26 River. Several species of anadromous fish inhabit the Klamath-Trinity River system and its

1 tributaries, including Chinook, Coho, steelhead, green sturgeon, Pacific lamprey, and coastal
2 cutthroat trout. Klamath River runs of salmon and steelhead at one time were among the
3 region's mightiest. SONCC Coho salmon, a population that includes Klamath and Trinity River
4 Coho, was estimated in 1940 to range between 150,000 and 400,000 naturally spawning fish
5 annually. *See* Threatened Status for SONCC ESU of Coho Salmon, 62 Fed. Reg. 24588, 24588
6 (May 6, 1997).

7 11. A multitude of factors, including habitat destruction, and hydropower
8 development contributed to drastic declines of all stocks of salmonids in recent decades. In
9 1997, NMFS concluded that "Coho populations in this ESU are very depressed, currently
10 numbering approximately 10,000 naturally produced adults." *Id.* at 24588. Ocean conditions
11 have a major influence on coho salmon survival. Coho that are taken in the ocean fishery may
12 not return to the Klamath River Basin to spawn.

13 B. Ocean Harvest Regulation

14 12. Ocean salmon fisheries in the exclusive economic zone (EEZ) off Washington,
15 Oregon, and California are managed under authority of the Magnuson-Stevens Act. Pursuant to
16 the Magnuson-Stevens Act, the PFMC annually provides management recommendations to the
17 Secretary of Commerce via NMFS. The Secretary of Commerce, acting through NMFS as the
18 action agency, determines whether the recommended measures are consistent with law and
19 whether to implement them.

20 13. Since 1994, the retention of coho has been prohibited in PFMC regulated fisheries
21 south of Cape Falcon, Oregon, which includes PFMC regulated fisheries within the Klamath
22 Management Zone. Coho are still impacted, however, as a result of hook-and-release mortality
23 in chinook-directed fisheries in those ocean areas.

24 14. On April 28, 1999, NMFS published a Supplemental Biological Opinion and
25 Incidental Take Statement regarding proposed ocean salmon fishing regulations proposed for
26 adoption by NMFS. ("1999 Supplemental BiOp").

1 15. The 1999 Supplemental BiOp described a model known as the Fishery Regulation
2 Assessment Model (FRAM) that is used by PFMC to evaluate proposed fishing plans relative to
3 the PFMC's management objectives. As described in the 1999 Supplemental BiOp, the
4 "FRAM uses the magnitude of chinook catch during the recent years of non-retention to provide
5 an estimate of the exploitation rate on coho resulting from hooking mortality." 1999
6 Supplemental BiOp, at p. 13.

7 16. In the 1999 Supplemental BiOp, NMFS determined that the proposed fishing
8 regulations at issue were likely to jeopardize the continued existence of SONCC coho salmon.
9 1999 Supplemental BiOp, at p. 31.

10 17. In the 1999 Supplemental BiOp, NMFS developed a Reasonable and Prudent
11 Alternative to the proposed action pursuant to the ESA, which required that PFMC fisheries be
12 crafted to achieve an ocean exploitation rate on SONCC coho of no greater than 13%, which
13 includes all harvest related mortality.

14 18. In the 1999 Supplemental BiOp, NMFS prescribed an Incidental Take Statement,
15 that stated as follows:

16 NMFS projects a level of take consistent with the terms specified in the RPA. NMFS
17 anticipates that most incidental take of SONCC coho will be difficult to detect because
18 the incidental take results from the mortality associated with hook and release in chinook-
19 directed fisheries, and the finding of a dead specimen is unlikely. Incidental take is
20 estimated by applying hooking mortality rates to projected encounter rates based on
21 historical catch effort data. Projected ocean exploitation rates on SONCC coho as
22 indicated by Rogue/Klamath hatchery stocks will not exceed 13%. Additional harvest on
23 of [sic] the southern Oregon component of the SONCC coho may occur in terminal or
24 freshwater areas consistent with Amendment 13.

25 1999 Supplemental BiOp, at p. 34.
26

1 19. One of the inputs in the coho FRAM is a forecast of mixed-stock coho mortalities
2 resulting from incidental catch and release ("CNR mortality"). Following issuance of the
3 Incidental Take Statement in 1999 and until April 2018, PFMC and NMFS used the same
4 methodology to annually calculate CNR mortality forecasts and ocean exploitation rates. In
5 general, this methodology uses projected effort measured in vessel days (troll) and angler trips
6 (recreational) applied to an average catch per unit effort (CPUE) for each time, area, and fishery
7 stratum in FRAM. Once determined, CNR mortality forecasts are used in the coho FRAM to
8 compute stock-specific exploitation rates that are used to determine compliance with the
9 Incidental Take Statement's limit of a 13% ocean exploitation rate for SONCC coho. This
10 methodology was consistently used by PFMC and NMFS to determine the annual ocean
11 exploitation rate under the 1999 Supplemental BiOp and the Incidental Take Statement each year
12 until April 2018.

13 20. Applications of this same methodology were used to determine the non-jeopardy
14 threshold in NMFS' Incidental Take Statement of 13 % as well. For example, see 1999
15 Supplemental BiOp, at p. 24: "Ocean exploitation rates for SONCC coho are based on the
16 exploitation rate on Rogue/Klamath hatchery stocks and have only recently become available.
17 The estimated ocean exploitation rates were 5% in 1996 and 1997, 12% in 1998, and are
18 projected to be 5% in 1999..."

19 C. The 2018 Management Measures

20 21. In March 2018, the PFMC released its Preseason Report II, Proposed Alternatives
21 and Environmental Assessment Part 2 for 2018 Ocean Salmon Fishery Regulations. Using the
22 methodology that PFMC and NMFS had consistently utilized since the 1999 Supplemental BiOp
23 to calculate CNR mortality and ocean exploitation rates for purposes of compliance with the
24 Incidental Take Statement, the Preseason Report II determined that Chinook ocean harvest rates
25 would need to be set at a range of 7.9% - 9.0% (depending on the alternative selected) in order to
26

1 limit ocean exploitation of SONCC coho to less than 13%, as required by the Incidental Take
2 Statement.

3 22. During development of the three ocean salmon fishing alternatives at the March
4 2018 Council meeting, exploitation rates were modeled as exceeding 13%, and thus the PFMC at
5 that time proposed to limit the permissible Chinook ocean harvest in order to reduce incidental
6 take of SONCC coho below the 13% exploitation limit prescribed by the Incidental Take
7 Statement.

8 23. At a March 2018 PFMC meeting, the PFMC Vice-Chair requested that the
9 PFMC's Salmon Technical Team (STT) further investigate the high exploitation rates forecasted
10 for Rogue/Klamath coho salmon in fisheries south of Cape Falcon.

11 24. Approximately one month later, the STT submitted a three-page report entitled
12 Investigation of Exploitation Rates on Rogue/Klamath Coho in Fisheries South of Cape Falcon.
13 The STT recommended abandoning and replacing the methodology that had been consistently
14 used for over fifteen years to calculate CNR mortality and thus ocean exploitation rates of
15 SONCC Coho under the Incidental Take Statement.

16 25. The change in methodology recommended by STT and ultimately adopted by
17 PFMC and NMFS adjusted the CNR mortality estimates based on current year coho stock
18 abundance. The STT Report acknowledged that this kind of adjustment had never been done in
19 the past. The STT Report also acknowledged that such adjustments had been considered in the
20 past but not adopted because "a coherent relationship between CPUE [average catch per unit
21 effort] and OPI [Oregon Production Index] abundance was not found." The STT Report
22 speculated, but did not determine, why such a coherent relationship was not found. The STT
23 Report also acknowledged previous determinations that adjusting for OPI abundance "was not
24 deemed appropriate." Nevertheless, despite the prior determinations and despite a lack of
25 supporting analysis, STT proceeded to recommend abandonment of the long-standing
26 methodology and replacement with a methodology previously deemed not appropriate.

1 26. At its April 2018 meeting, PFMC adopted the STT's new process for forecasting
2 mortalities of SONCC coho without further analysis and declined to conduct a formal
3 methodology review prior to implementing this change in methodology.

4 27. Relying on this changed methodology for the first time ever since publication of
5 the 1999 Supplemental BiOp and Incidental Take Statement, PFMC proceeded to increase the
6 permissible 2018 ocean exploitation rate for Klamath River Fall Chinook to 11.5% (from the 7.9
7 – 9.0% range set one month earlier). Relying on this new information, even though the
8 exploitation rate for Chinook was increased significantly, PFMC determined that the ocean
9 exploitation rate for SONCC coho decreased to 5.5%.

10 28. Under the methodology that had been previously and consistently used by PFMC
11 and NMFS prior to April 2018, the 11.5% ocean exploitation rate that Defendants set for
12 Klamath River Fall Chinook would result in exceedance and violation of the 13% ocean
13 exploitation limit for SONCC Coho prescribed by the Incidental Take Statement. This is
14 because the March 2018 Preseason Report set 9.0% as the highest level of ocean exploitation for
15 Klamath River Fall Chinook that could still comply with the 13.0% ocean exploitation rate for
16 SONCC Coho. Allowing more take of Chinook (above 9.0%) correspondingly increases the
17 amount of incidental take of SONCC Coho above the 13.0% limit. The new methodology
18 changed the way that the ocean chinook fishery affects SONCC Coho.

19 29. On April 27, 2018, the Hoopa Valley Tribe sent a letter to Defendant Wilbur
20 Ross, Secretary of Commerce advising of Defendants' obligation to reinstate formal ESA
21 Section 7 consultation due to this new information and likely exceedance of the applicable
22 incidental take limits (if calculated consistent with prior long-standing methodology).

23 30. NMFS approved the PFMC recommended management measures on May 1, 2018
24 without any discussion or analysis of the new information or change in methodology. 83 Fed.
25 Reg. 19005 (May 1, 2018).

1 31. Neither PFMC nor the Secretary of Commerce/NMFS re-initiated formal
2 consultation with NMFS pursuant to the ESA to evaluate this new information or methodology,
3 the excessive incidental take, or the effects of the authorized ocean fishery on SONCC coho.

4 32. On July 18, 2018, the Tribe sent notice pursuant to Section 11 (g) of the ESA that
5 the Defendants were acting in violation of the ESA by failing to reinitiate formal ESA Section 7
6 consultation.

7 33. Following additional correspondence, representatives of the Tribe met with
8 NMFS on September 18, 2018 to discuss the Tribe's 60-day notice letter.

9 34. To date, Defendants have not reinitiated formal ESA Section 7 consultation
10 regarding the effect of authorized ocean salmon fishing on SONCC Coho.

11 C. Endangered Species Act Consultation

12 35. The ESA grants the right to any person to bring suit "to enjoin any person,
13 including the United States and any other governmental instrumentality or agency . . . who is
14 alleged to be in violation of any provision of [the ESA] or regulation issued under the authority
15 thereof." 16 U.S.C. § 1540(g)(1)(A). The District Courts have jurisdiction "to enforce any such
16 provision or regulation, or to order the Secretary to perform such act or duty, as the case may
17 be." 16 U.S.C. § 1540(g).

18 36. Alternatively, the APA authorizes courts reviewing agency action to hold
19 unlawful and set aside final agency action, findings, and conclusions that are arbitrary and
20 capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.
21 § 706(2)(A).

22 37. Section 7 of the ESA prohibits agency actions that may jeopardize the survival
23 and recovery of a listed species or adversely modify its critical habitat:

24 [e]ach federal agency shall, in consultation with and with the
25 assistance of the Secretary, insure that any action authorized,
26 funded, or carried out by such agency (hereinafter in this section
referred to as an "agency action") is not likely to jeopardize the
continued existence of any endangered species or threatened

1 species or result in the destruction or adverse modification of
2 habitat of such species which is determined by the Secretary . . .
3 to be critical. . . .

3 16 U.S.C. § 1536(a)(2).

4 38. Section 9 of the ESA prohibits “take” of listed species by anyone, including
5 federal agencies. 16 U.S.C. § 1538. “Take” means to “harass, harm, pursue, hunt, shoot, wound,
6 kill, trap, capture, or collect.” 16 U.S.C. § 1532(19). NMFS has defined “harm” to include
7 “significant habitat modification or degradation which actually kills or injures fish or wildlife by
8 significantly impairing essential behavioral patterns, including breeding, spawning, rearing,
9 migrating, feeding or sheltering.” 50 C.F.R. § 222.102. “Take” by federal agencies is permitted
10 only if the agency receives an Incidental Take Statement (“ITS”) pursuant to Section 7(b)(4),
11 upon completion of formal consultation. 16 U.S.C. § 1536(b)(4). If an ITS is issued, any take
12 that occurs must be within the limits set in the ITS.

13 39. As part of any ITS, NMFS must specify “the impact of such incidental taking
14 on the species” - quantifying by amount or extent the allowed incidental take. 16 U.S.C.
15 § 1536(b)(4)(C)(i). Such a statement of impact makes explicit the basis for NMFS’ required
16 finding that an incidental take will not jeopardize the species, 16 U.S.C. § 1536(b)(4), and it
17 provides a check on the adequacy of NMFS’ “reasonable and prudent measures . . . necessary or
18 appropriate to minimize such impact.” 16 U.S.C. § 1536(b)(4)(C)(ii).

19 40. Section 7 of the Act also establishes an interagency consultation process to assist
20 federal agencies in complying with their duty to avoid jeopardy to listed species, or destruction
21 or adverse modification of critical habitat. Under this process, a federal agency proposing an
22 action that “may affect” a listed species, including salmon and steelhead, must prepare and
23 provide to the appropriate expert agency, here NMFS, a “biological assessment” of the effects of
24 the proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

25 41. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency
26 initiates consultation on an action under ESA § 7(a)(2), it “shall not make any irreversible or

1 irretrievable commitment of resources with respect to the agency action which has the effect of
2 foreclosing the formulation or implementation of any reasonable and prudent alternative
3 measures which would not violate subsection (a)(2) of this section.” The purpose of ESA § 7(d)
4 is to maintain the status quo pending the completion of interagency consultation.

5 42. For those actions that may adversely affect a species, NMFS must review all
6 information provided by the action agency in the biological assessment, as well as any other
7 relevant information, to determine whether the proposed action is likely to jeopardize a listed
8 species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3).
9 This determination is set forth in a biological opinion from NMFS. *Id.*; 16 U.S.C.
10 § 1536(b)(3)(A).

11 43. In formulating its biological opinion, NMFS must evaluate the “effects of the
12 action” together with “cumulative effects” on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4).
13 This multi-step analysis requires NMFS to consider:

14 a. the direct, indirect, interrelated, and interdependent effects of the proposed
15 action, 50 C.F.R. § 402.02;

16 b. the “environmental baseline” to which the proposed action will be added.
17 This baseline includes “all past and present impacts of all Federal, State, or private actions and
18 other human activities in the action area; the anticipated impacts of all proposed Federal projects
19 in the action area that have already undergone formal or early section 7 consultation; and the
20 impact of State or private actions which are contemporaneous with the consultation in progress,”
21 50 C.F.R. § 402.02; and,

22 c. any “future State or private activities, not involving Federal activities, that
23 are reasonably certain to occur within the action area of the Federal action subject to
24 consultation,” 50 C.F.R. § 402.02.

25 44. After issuance of a Biological Opinion, both the consulting agency and/or the
26 agency with discretionary federal involvement or control over the action must reinitiate formal

1 consultation in certain circumstances. 50 CFR § 402.16. For example, reinitiation must be
2 requested if: (a) the amount or extent of taking specified in the ITS is exceeded; (b) new
3 information reveals effects of the action that may affect listed species or critical habitat in a
4 manner or to an extent not previously considered; or (c) if the identified action is subsequently
5 modified in a manner that causes an effect to the listed species or critical habitat that was not
6 considered in the biological opinion. In this case, NMFS is both the consulting agency and
7 action agency for purposes of ESA formal consultation.

8 D. SONCC Coho Face Imminent and Irreparable Harm From Excessive Ocean Take.

9 45. Coho salmon, including ESA-listed SONCC Coho, generally exhibit a three-year
10 life cycle. Coho eggs typically hatch in March, emerge two weeks after hatching as “fry”, and
11 generally spend up to 15 months in freshwater using the mainstem Klamath to rear and
12 redistribute. Fry generally become smolts after 15 months and migrate to the Pacific Ocean
13 primarily between March and June.

14 46. Coho that are incidentally caught and released in the ocean harvest may suffer
15 death, or injuries that lead to premature death. The incidental catch and release of Coho
16 constitutes a “take” of protected Coho under the ESA. Coho that die from incidental catch and
17 release in the Pacific Ocean cannot return to spawn in the Klamath-Trinity river system. Coho
18 that suffer injury from incidental catch and release also may not return to spawn in the Klamath-
19 Trinity river system. The reduction in spawners facilitates low production of Coho in the
20 Klamath-Trinity river system and perpetuates the imperiled status of Coho.

21 47. The continuing imperiled status of the SONCC Coho results in the continued
22 listing of the species under the ESA and limits tribal harvest opportunities that are reserved to the
23 Tribe pursuant to its federally reserved fishing rights.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Failure to Re-Initiate Formal Consultation Under Section 7 of the ESA, 50 CFR § 402.14(i)(4), 50 CFR § 402.16, and Alternatively Violation of the APA.

48. Plaintiff re-alleges, as if fully set forth herein, each and every allegation set forth in this Complaint.

49. Defendants violated § 7 of the ESA, 16 U.S.C. § 1536, 50 C.F.R. § 402.14(i)(4); 50 C.F.R. § 402.16, and alternatively the APA, 5 U.S.C. § 706 by failing to reinitiate formal ESA Section 7 consultation despite the presence of one or more factors in 50 C.F.R. § 402.16 that require reinitiation.

50. Defendants have a duty to re-initiate formal ESA Section 7 consultation due to the use of and reliance upon new information and methodologies, and effects on the species, that were not considered in the 1999 Supplemental BiOp and which constitute new information pursuant to 50 CFR § 402.16.

51. Defendants have a duty to re-initiate formal ESA Section 7 consultation because the currently authorized incidental take of SONCC Coho in the ocean salmon fishery would exceed the 13% limit set forth in the Incidental Take Statement if such incidental take were calculated under the long-standing methodology that had been used by NMFS and PFMC pursuant to the 1999 Supplemental BiOp until April 2018.

52. Defendants' failure to comply with the ESA and its implementing regulations is directly reviewable in this Court pursuant to 16 U.S.C. § 1540(g).

53. Alternatively, Defendants' actions and omissions, specifically including their failure to reinitiate formal consultation described herein, are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law and are reviewable in this Court under the APA, 5 U.S.C. §§ 704, 706.

WHEREFORE, plaintiff Tribe respectfully requests that this Court:

- COMPLAINT - 15

1 F. Grant the Tribe such further and additional relief as the Court may deem just and
2 proper.

3 DATED this 10th day of October, 2018.

4 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

5 /s/ Thomas P. Schlosser

6 Thomas P. Schlosser WSBA #06276

7 Thane D. Somerville WSBA #31468

8 Attorneys for Plaintiff Hoopa Valley Tribe

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EXHIBIT A

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July 18, 2018

The Honorable Wilbur Ross
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National Marine Fisheries Service
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Barry Thom, Regional Administrator
NOAA Fisheries, West Coast Fisheries Region
1201 NE Lloyd Blvd., Suite 1100
Portland, OR 97231

Re: Notice of Violations of the Endangered Species Act

Dear Secretary Ross, Executive Director Tracy, Assistant Administrator Oliver, Regional Administrator Thom, and Deputy Assistant Administrator Rauch:

This letter provides notice that the Department of Commerce, National Marine Fisheries Service ("NMFS"), and the Pacific Fishery Management Council ("PFMC") are acting in violation of the Endangered Species Act ("ESA"). The violations arise from NMFS' approval and implementation of 2018 management measures for ocean salmon fishery regulations (83 Fed. Reg. 19005, May 1, 2018) that were previously adopted and recommended by the PFMC at its April 5 to 11, 2018, meeting (the "2018 Management Measures"). Specifically, NMFS has violated the ESA by failing to reinitiate formal consultation as required under 50 C.F.R. § 402.16(a), (b), and (c). Implementation of the 2018 Management Measures will result in unlawful taking of ESA-listed SONCC Coho salmon in excess of the limits set in the applicable Supplemental Biological Opinion and Incidental Take Statement issued April 28, 1999. This excessive incidental take of SONCC Coho may unlawfully jeopardize the continued existence of SONCC Coho. This notice is submitted pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g). This notice provides the Department of Commerce, NMFS, and the PFMC "an opportunity to review their actions and take corrective measures" *SW Ctr. for Biological*

Secretary Ross, Executive Director Tracy, Assistant Administrator Oliver, Regional Administrator Thom, and Deputy Asst. Administrator Rauch
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Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 520 (9th Cir. 1998). Specifically, NMFS should rescind the 2018 Management Measures as related to incidental take of SONCC Coho and reinstate formal consultation related to impacts of the proposed 2018 Management Measures on SONCC Coho.

This notice is sent on behalf of the Hoopa Valley Tribe. The Hoopa Valley Tribe, a sovereign federally-recognized Indian tribe, is located on the Hoopa Valley Reservation, which was set aside and reserved as a permanent homeland for the Tribe by the United States in 1864. The lower twelve miles of the Trinity River, as well as a stretch of the Klamath River near the confluence with the Trinity River flow through the Hoopa Valley Reservation. Since time immemorial, the fishery resources of the Klamath and Trinity Rivers have been the mainstay of the life and culture of the Hoopa Valley Tribe and other Klamath Basin tribes. When the Hoopa Valley Reservation was created, the fishery was “not much less necessary to the existence of the Indians than the atmosphere they breathed.” *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381 (1905)). Today, the salmon fishery holds significant cultural, commercial, and economic value for the Tribe. The Tribe holds federally reserved fishing rights in the Klamath and Trinity Rivers, and a federal reserved water right to support the fishery. *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995); *United States v. Adair*, 723 F.2d 1394, 1411 (9th Cir. 1984). Adverse impacts to the ESA-listed Coho that result from excessive incidental take of Coho in ocean fishing directly impair and injure the Tribe and its sovereign, legal, economic, and cultural interests.

I. LEGAL BACKGROUND

Under Section 7 of the ESA, federal agencies must ensure that their actions are not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of the species critical habitat. 16 U.S.C. § 1536(a)(2). Federal action agencies must discharge this obligation in consultation with, and with the assistance of the expert fish and wildlife agency, NMFS in the case of salmon. *Id.* In some cases, NMFS may be both the action agency and the consulting agency.

“Action” is defined broadly to encompass “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies.” 50 C.F.R. § 402.02. Both the consultation and no-jeopardy obligations extend to ongoing actions over which the agency retains discretionary control. See *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054-55 (9th Cir. 1994).

For actions that may adversely affect a listed species or critical habitat, a formal consultation with the fish and wildlife agency is required. 50 C.F.R. § 402.14. At the conclusion of a formal consultation, the expert fish and wildlife agency issues a biological opinion assessing the effects of the action on the species and its critical habitat, determining whether the action is likely to jeopardize the continued existence of the species or adversely modify its critical habitat, and if so, offering a reasonable and prudent alternative that will avoid jeopardy or adverse modification. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h).

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The ESA prohibits the unauthorized “take” of endangered species, 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 17.3; *see Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt*, 515 U.S. 687 (1995). NMFS has extended the take prohibition to threatened species and to salmon in particular. 50 C.F.R. §§ 227.11(a), 227.71; 65 Fed. Reg. 42,422 (2000). If a federal action undergoing consultation will take a listed species, the biological opinion must include an “incidental take statement” that specifies the amount and extent of incidental take of listed species that may occur and “terms and conditions.” 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

An incidental take statement serves as a check on the biological opinion’s assumptions and conclusions. It sets out a “trigger” that specifies an unacceptable level of take that invalidates the safe harbor and requires the agencies to reinitiate consultation. *Arizona Cattle Growers Ass’n v. U.S. Fish and Wildlife Service*, 273 F.3d 1229, 1249 (9th Cir. 2001). The limit is often numerical, but can be stated in terms of ecological conditions, as long as they are linked to the take of the listed species. *Id.* at 1249-50.

The ESA implementing regulations provide:

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; [or]

(c) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion

50 C.F.R. § 402.16. If any of these triggers occur, both the action agency and the expert fish and wildlife agency have a duty to reinitiate consultation. *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008).

II. The 1999 Supplemental Biological Opinion and Incidental Take Statement

On April 28, 1999, NMFS issued a Supplemental Biological Opinion and Incidental Take Statement (“Supp. BiOp”) regarding the Pacific Coast Salmon Plan and Amendment 13 to the Plan. The Supplemental Biological Opinion considered “the effects of west coast salmon fisheries on listed populations of Coho salmon.” Supp. BiOp, p. 1. The Supplemental Biological Opinion explained:

The ocean salmon fisheries in the exclusive economic zone (EEZ) off Washington, Oregon, and California are managed under authority of the Magnuson-Stevens Act.

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Annual management recommendations are developed according to the “Pacific Coast Salmon Plan” of the Pacific Fishery Management Council (PFMC). The PFMC provides its management recommendations to the Secretary of Commerce, who implements the measures in the EEZ if they are found to be consistent with the Magnuson-Stevens Act and other applicable law. Because the Secretary acting through NMFS, has the ultimate authority for the Pacific Coast Salmon Plan and its implementation, NMFS is both the action agency and the consulting agency in this consultation.

Supp. BiOp, p. 1.

The Supplemental Biological Opinion identified impacts to ESA-listed Coho in PFMC fisheries south of Cape Falcon, Oregon resulting from hook-and-release mortality in chinook directed fisheries. Supp. BiOp., p. 13. The Supplemental Biological Opinion explains:

Harvest impacts on Coho stocks can be assessed with models based on recoveries of CWTs (coded-wire tags) from ocean fisheries and hatchery returns. The Fishery Regulation Assessment Model (FRAM) estimates stock specific exploitation rates and is used by PFMC’s Salmon Technical Team (STT) to evaluate proposed fishing plans relative to the PFMC’s management objectives. The FRAM uses the magnitude of the chinook catch during the recent years of non-retention to provide an estimate of the exploitation rate on Coho resulting from hooking mortality.

Supp. BiOp., p. 13.

In the Supplemental Biological Opinion, NMFS determined that implementation of the FMP and Amendment 13 was likely to appreciably reduce the likelihood of both the survival and recovery of SONCC Coho. Supp. BiOp., p. 30. Thus, NMFS developed a reasonable and prudent alternative that required PFMC fisheries be crafted to achieve an ocean exploitation rate on SONCC Coho of no greater than 13%, which includes all harvest related mortality. Supp. BiOp, pp. 31-32. “Management measures developed under the FMP must be designed to achieve an ocean exploitation rate on Rogue/Klamath hatchery stocks of no greater than 13 % . . .” Supp. BiOp, p. 32.

NMFS also developed an Incidental Take Statement (“ITS”). Supp. BiOp., p. 34. “The measures described [in the ITS] are non-discretionary, and must be undertaken by NMFS. NMFS has a continuing duty to regulate the activity covered by this incidental take statement.” *Id.* The Incidental Take Statement provides:

NMFS projects a level of take consistent with the terms specified in the RPA. NMFS anticipates that most incidental take of SONCC Coho will be difficult to detect because the incidental take results from the mortality associated with hook and release in chinook-directed fisheries, and the finding of a dead specimen is

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unlikely. Incidental take is estimated by applying hooking mortality rates to projected encounter rates based on historical catch effort data. Projected ocean exploitation rates on SONCC Coho as indicated by Rogue/Klamath hatchery stocks will not exceed 13%.

Supp. BiOp., p. 34. Finally, the Supplemental Biological Opinion advised that reinitiation of formal consultation would be required if any of the conditions established in 50 C.F.R. § 402.16 were met.

III. The 2018 Management Measures

In March 2018, the PPMC released *Preseason Report II – Proposed Alternatives and Environmental Assessment Part 2 for 2018 Ocean Salmon Fishery Regulations*. In the Preseason Report II, the PPMC projected an ocean harvest rate of Klamath River Fall Chinook (KRFC) of 7.9% - 9.0% depending on which of three alternatives proposed by PPMC were adopted. See Preseason Report II, Table 5. Under that level of KRFC harvest, the marine fishery exploitation rate (incidental take) of SONCC Coho was projected to be 12.7% - 12.9% or just under the 13% maximum rate established in the Incidental Take Statement. *Id.*

In April 2018, the PPMC released *Preseason Report III – Council Adopted Management Measures and Environmental Assessment Part 3 for 2018 Ocean Salmon Fishery Regulations*. In Preseason Report III, the PPMC projected an increased ocean harvest rate for KRFC of 11.5%, yet the projected marine fishery exploitation rate (incidental take) of SONCC Coho decreased to 5.5%. Preseason Report III, Table 5.

The drop in projected incidental take of SONCC Coho (despite the increase in projected/allowable harvest of KRFC) was due to a sudden change by the PPMC Salmon Technical Team (STT) in the inputs and assumptions that are used and have historically been used to calculate incidental take in the FRAM. See *Salmon Technical Team Report on Tentative Adoption of 2018 Management Measures for Analysis: Investigation of Exploitation Rates on Rogue/Klamath Coho in Fisheries South of Cape Falcon* (April 2018) (“STT Report”). The STT explained that:

A key difference in methods exists in this model for fisheries between Cape Falcon and Humbug Mountain and fisheries south of Humbug Mountain. For the area between Cape Falcon and Humbug Mountain, CPUE [catch per unit effort] is adjusted for the current year Oregon Production Index (OPI) Coho stock abundance as compared to the base period OPI Coho stock abundance, which is the average OPI abundance for the years used to estimate CPUE. Estimates of CNR mortality for fisheries south of Humbug Mountain are not adjusted for current year OPI Coho stock abundance. Scaling CPUE for OPI stock abundance south of Humbug Mountain was considered in the past, but a coherent relationship between CPUE and OPI abundance was not found. This may have been because OPI abundance is driven by Columbia River Coho, and the

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contribution of Columbia River Coho in these southern fisheries is minimal, thus adjusting for OPI abundance was not deemed appropriate. The OPI Coho abundance is an aggregate of stocks and may not adequately represent the Coho stocks that are in these southern fisheries.

STT Report, pp. 1-2. STT reported that the high exploitation rate forecasts for 2018 were caused in part by extremely low Coho abundance forecasts. Despite acknowledging the extremely depressed state of ESA-listed Coho and the fact that scaling for abundance in the southern fisheries had never been done in the past years of fishery management under the applicable Supplemental Biological Opinion and Incidental Take Statement, STT developed new inputs and assumptions for use in the FRAM which had the purpose and effect of artificially and arbitrarily driving down anticipated incidental take of Coho – and allowing for greater ocean harvest of KRFC in 2018. This analysis was adopted by PFMC and by NMFS in its approval of the 2018 Management Measures.

This abrupt and unprecedented change in methodology for determining incidental take represents an unlawful modification of the proposed action and assessment of impacts of the proposed action that is unlawful absent reinitiation of formal consultation under Section 7 of the ESA. At minimum, the changed methodology constitutes new information that must be considered in the context of a reinitiated formal consultation prior to implementation. If incidental take were calculated in the same manner as it was in the Preseason Report II (and as it has been since issuance of the Supplemental Biological Opinion and Incidental Take Statement in 1999), an allowed KRFC ocean harvest rate of 11.5% would result in incidental take of SONCC Coho in excess of 13%. (Note: Preseason Report II assumed that KRFC harvest rates of 7.9% to 9% would result in incidental Coho take of 12.7 – 12.9%). Thus, implementation of the 2018 Management Measures with its projected ocean harvest rate of 11.5% for KRFC will result in excessive incidental take of SONCC Coho in violation of the Incidental Take Statement.

Allowing excessive incidental take of SONCC Coho in violation of the ESA will have a direct and negative impact on the Tribe. NMFS already applies different and conflicting Coho take standards to the Klamath ocean take, in-river non-fishery allowance permits, fish hatchery operations, diversions of Trinity River flows to the Central Valley, and then a stricter Coho management standard to the Tribe. If they remain in place, the 2018 Management Measures as related to incidental take of SONCC Coho will have the effect of placing the most restrictive Coho take regulations and conservation burdens directly on the Hoopa Valley Tribe. Allowing increased ocean take of Coho is also directly inconsistent with the Tribe's federal-protected senior right to take 50% of the harvest. See *Parravano v. Babbitt*, 70 F.3d 539, 542-43 (9th Cir. 1995) (approving Solicitor's opinion). Despite the Tribe's request for government-to-government consultation pursuant to Secretarial Order 3206, the Department, NMFS, and PFMC approved the 2018 Management Measures without engaging in such consultation with the Tribe.

Maintaining the 2018 Management Measures, as they affect incidental take of SONCC Coho, without reinitiation of Section 7 consultation to analyze the new inputs and assumptions used and adopted by PFMC and NMFS, violates Section 7 of the ESA and 50 C.F.R. 402.16.

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Maintaining the 2018 Management Measures, as they affect SONCC coho, will also result in excessive and unauthorized incidental take in violation of Section 9 of the ESA and may result in jeopardy to SONCC coho in violation of Section 7 of the ESA.

The Tribe urges that you rescind the portions of the 2018 Management Measures that relate to or affect incidental take of SONCC coho, proceed to adopt management measures based on the methodology used in the PFMC's Preseason Report II (that limited KRFC ocean harvest to a range of 7.9 – 9.0%), and immediately reinitiate formal consultation in order to assess the new methodology unlawfully implemented by PFMC and adopted by NMFS in the adopted 2018 Management Measures. The Tribe also again requests consultation pursuant to Secretarial Order 3206 to discuss the specific impacts caused to the Tribe by your actions.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE



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