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20 UNITED STATES DISTRICT COURT
21 FOR THE NORTHERN DISTRICT OF CALIFORNIA
22 OAKLAND DIVISION

23 HOOPA VALLEY TRIBE,) Civ. No.
24)
25 Plaintiff,)
26)
27 v.)
28) COMPLAINT FOR
29 U.S. BUREAU OF RECLAMATION) DECLARATORY AND
30) INJUNCTIVE RELIEF
31 and)
32) Endangered Species Act and
33 NATIONAL MARINE FISHERIES SERVICE,) Administrative Procedure Act Case
34)
35 Defendants.)
36)

INTRODUCTION

1
2 1. In this action for declaratory and injunctive relief, Plaintiff Hoopa Valley Tribe
3 (“Tribe”) challenges the actions of the United States Bureau of Reclamation (“BOR”) and the
4 National Marine Fisheries Service (“NMFS”) for violating the Endangered Species Act (“ESA”),
5 16 U.S.C. §§ 1531 *et seq.*, in operating the Klamath Irrigation Project (“Klamath Project”).
6 Specifically, the Tribe seeks an order declaring that NMFS and BOR have illegally failed to
7 reinstate consultation pursuant to Section 7 of the ESA, 16 U.S.C. § 1536, regarding the effects
8 of Project operations on Southern Oregon/Northern California Coast (“SONCC”) Coho salmon,
9 which are listed as threatened under the ESA, and an order enjoining them to do so. The Tribe
10 also seeks an order enjoining any prospective operation of the Klamath Project that could further
11 take SONCC Coho salmon pending completion of the re-initiated consultation.

12 2. The Secretary of the Interior, acting through the BOR, manages and operates the
13 Klamath Project, which diverts water from the Klamath River to supply irrigation water to
14 agricultural lands. BOR controls diversion and releases of water from Upper Klamath Lake,
15 which in turn substantially affect flow levels in the Klamath River downstream of Iron Gate dam.
16 BOR identifies timely volumes of water flows at Iron Gate Dam that are available for Chinook,
17 Coho, and other salmon habitat after BOR has estimated the water supply needs throughout the
18 year of the Klamath Project for irrigation purposes.

19 3. BOR’s operation of the Klamath Project is subject to and must comply with the
20 ESA. In addition, BOR owes a fiduciary trust responsibility to the Tribe, which holds federal
21 reserved rights to fish and water in the Klamath River.

22 4. On May 31, 2013, NMFS and the United States Fish and Wildlife Service
23 (“USFWS”) issued “Biological Opinions on the Effects of Proposed Klamath Project Operations
24 from May 31, 2013, through March 31, 2023, on Five Federally Listed Threatened and
25 Endangered Species” (the “2013 BiOp”). The 2013 BiOp addresses effects of proposed Klamath
26 Project operations on SONCC Coho salmon. The 2013 BiOp is accompanied by an Incidental

1 Take Statement (“ITS”) that establishes the permissible amount or extent of “take” of SONCC
2 Coho.

3 5. The 2013 BiOp acknowledges that Klamath Project operations exacerbate the
4 impact and severity of a lethal fish disease known as *Ceratomyxa Shasta* (*C.shasta*) on juvenile
5 salmonids due to the reduction of magnitude, frequency, and duration of flows in the mainstem
6 Klamath River.

7 6. A critical assumption, as well as a limit for the annual incidental take of SONCC
8 Coho in the 2013 BiOp and ITS, is that approximately 50% of the total annual Chinook salmon
9 juveniles in the mainstem Klamath River between the Shasta River and the Trinity River will not
10 be infected with *C.shasta* during the months of May to July. 2013 BiOp at 392. Due to the
11 small population size and limited sampling data for SONCC Coho, NMFS used infection rates
12 for Chinook salmon as a surrogate for infection rates and incidental take of SONCC Coho
13 salmon. The 2013 BiOp states that “[i]f the percent of *C. Shasta* infections for Chinook salmon
14 juveniles in the mainstem Klamath River between Shasta River and Trinity River during May to
15 July exceed these levels (i.e., 54 percent infection via histology or 49 percent infection via
16 QPCR), reinitiation of formal consultation will be necessary.” *Id.* at 391. The 2013 BiOp relies
17 on not violating this required limit for incidental take to conclude that continued operations of
18 the Klamath Project will not jeopardize SONCC Coho or adversely modify its critical habitat.

19 7. In 2014, the average juvenile Chinook salmon *C.shasta* infection rate in the
20 Klamath River upstream of the Trinity River confluence from May through July was estimated at
21 81%. In 2015, the average juvenile Chinook salmon *C.shasta* infection rate in the same part of
22 the river was estimated at 91%. These infection rates greatly exceed the permissible rates in the
23 2013 BiOp and ITS. The rates of infection, and subsequent death of salmon, were caused by
24 factors including low stream flows.

25 8. Despite the significant exceedance of *C. Shasta* infection rates and the occurrence
26 of multi-year drought and hydrologic conditions and resulting operational changes that were not

1 anticipated in the 2013 BiOp, BOR and NMFS have failed to reinitiate consultation as required
2 by the 2013 BiOp, by Section 7 of the ESA, and by 50 CFR § 402.16.

3 9. This action seeks to require NMFS and BOR to reinitiate consultation pursuant to
4 the ESA and to invalidate the 2013 BiOp and its Incidental Take Statement (“ITS”) for two
5 principal reasons. The ESA and its implementing regulations at 50 CFR § 402.16 require re-
6 initiation of formal consultation: (a) if the amount of taking specified in the ITS is exceeded; or
7 (b) if new information reveals effects of the action to an extent not previously considered.
8 Despite fulfillment of these conditions, and despite the express terms of the BiOp requiring re-
9 initiation of consultation under the present circumstances, NMFS and BOR have failed and
10 refused to reinitiate formal consultation.

11 10. This action seeks a declaration that NMFS and BOR have violated the ESA by
12 failing to reinitiate consultation and unlawfully taking SONCC Coho through Klamath Project
13 operations. The 2013 BiOp and ITS have clearly failed to protect SONCC Coho and its habitat
14 from excessive take.

15 11. This action also seeks an injunction directing NMFS to withdraw the 2013 BiOp
16 and ITS, complete a new consultation with BOR on a schedule set by the Court, and for BOR to
17 operate the Klamath Project in a manner which preserves and protects SONCC Coho salmon
18 pending completion of consultation in accordance with the best available science. This relief is
19 necessary to preserve the status quo, to correct illegal final agency action, to prevent future
20 unlawful agency actions that may cause additional irreparable harm to the environment and
21 species listed for protection under the ESA, and to protect tribal trust resources.

22 12. This action also seeks an injunction preventing BOR from relying on the 2013
23 BiOp and ITS to satisfy ESA obligations, and an injunction requiring BOR to limit irrigation
24 water deliveries to the Klamath Project that would cause Klamath River flows below Iron Gate
25 Dam to fall below the levels necessary for survival and recovery of SONCC Coho as determined
26

1 by the best available science in the period before a new legally and biologically valid Biological
2 Opinion is issued.

3 13. Finally, this action seeks an order requiring NMFS to complete consultation on
4 the effects of the Klamath Project on Essential Fish Habitat for Chinook salmon and other
5 species pursuant to the Magnuson-Stevens Fishery Conservation and Management Act
6 (“MSFCMA”), 16 U.S.C. § 1855(b)(4)(B).

7 **JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT**

8 14. This action is brought pursuant to the ESA, 16 U.S.C. § 1540(g)(1) and the APA,
9 5 U.S.C. § 706. This Court has jurisdiction pursuant to 5 U.S.C. § 706, 28 U.S.C. § 1331,
10 28 U.S.C. § 1362, 16 U.S.C. § 1540(g)(1), 16 U.S.C. § 1855 and 16 U.S.C. § 1861.

11 15. The Tribe provided NMFS and BOR with notice of intent to sue for violations of
12 the ESA, pursuant to 16 U.S.C. § 1540(g) on May 17, 2016. NMFS and BOR have failed to
13 correct or remedy their violations of the ESA.

14 16. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) and 16 U.S.C.
15 § 1540(g)(3), as the Tribe resides in this district and many of the events, omissions, and
16 consequences of Defendants’ violations of the law giving rise to the claims occurred or will
17 occur in this district.

18 17. Intradistrict Assignment: this case is properly assigned to the San
19 Francisco/Oakland Division under Civil L.R. 3-2(c) because a substantial part of the events or
20 omissions which give rise to this action occurred in Humboldt and Del Norte counties, counties
21 through which the lower Klamath River flows, because the Tribe and its Reservation are located
22 in Humboldt County, and because the location of the fish disease is in Humboldt and Del Norte
23 Counties.

24 **PARTIES**

25 18. Plaintiff Hoopa Valley Tribe is a federally-recognized Indian tribe. Since time
26 immemorial, the Tribe and its members have used, and continue to use, the Klamath-Trinity

1 River system and its anadromous fishery resource for subsistence, cultural, ceremonial, religious,
2 and commercial purposes. The lower twelve miles of the Trinity River and a stretch of the
3 Klamath River flows through the Hoopa Valley Reservation. All migrating salmon from the
4 Trinity River must use the mainstem of the Klamath River as their corridor to and from the sea.
5 The Tribe's members' past, present, and future enjoyment of the benefits provided by the
6 Klamath-Trinity River system has been, is being, and will continue to be injured by defendants'
7 on-going disregard of their statutory duties and by the injuries caused by the unlawful operation
8 of the Klamath Project.

9 19. Since time immemorial, the fishery resources of the Klamath and Trinity Rivers
10 have been the mainstay of the life and culture of the Hoopa Valley Tribe. The fishery was "not
11 much less necessary to the existence of the Indians than the atmosphere they breathed." *Blake v.*
12 *Arnett*, 663 F.2d 906, 909 (9th Cir. 1981) (quoting *United States v. Winans*, 198 U.S. 371, 381
13 (1905)). The salmon fishery also holds significant commercial and economic value in the Hoopa
14 culture and economies, and the Tribe holds property rights in the Klamath River Basin fishery.
15 The lower twelve miles of the Trinity River and a stretch of the Klamath River near the
16 confluence with the Trinity River flow through the Hoopa Valley Reservation. *See*
17 Memorandum from John D. Leshy, Solicitor of the Department of the Interior to the Secretary of
18 the Interior 3-4 (Oct. 4, 1993) (hereinafter 1993 Solicitor Opinion).

19 20. The principal purpose of the Tribe's Reservation was to set aside sufficient
20 resources of these rivers for the Indians to be self-sufficient and achieve a moderate living based
21 on fish. *See* 1993 Solicitor Opinion 3, 15, 18-21, *cited with approval*, *Parravano v. Babbitt*,
22 70 F.3d 539, 542 (9th Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996). The Tribe's federal
23 reserved fishing right carries with it a corresponding right to Klamath and Trinity River flow
24 levels that are sufficient to support a productive habitat for the Tribe's anadromous fishery,
25 including but not limited to Coho and Chinook salmon.

26 21. Defendants in this action are:

1 A. United States Bureau of Reclamation (“BOR”), an agency of the United
2 States Department of the Interior, constructs and operates federal water projects throughout the
3 United States. BOR has primary management authority over the Klamath Project, the operation
4 of which is at the heart of this action, and has a trust responsibility to ensure a continued fishery
5 for the Tribe.

6 B. National Marine Fisheries Service (“NMFS”) is an agency of the United
7 States Department of Commerce responsible for administering the provisions of the Endangered
8 Species Act with regard to threatened and endangered marine species, including the species of
9 threatened Coho salmon that live in the Klamath River basin. Both BOR and NMFS are
10 obligated by federal law to protect the Tribe’s fishing rights in the Klamath-Trinity River system
11 and each have a trust responsibility to ensure a continued fishery for the Tribe.

12 **NATURE AND BACKGROUND OF CASE**

13 A. The Klamath River’s Imperiled Ecosystem

14 22. Habitat critical for the survival of the Coho salmon is located in the lower-
15 Klamath River and within the Hoopa Valley Reservation on the Tribe’s former ancestral lands in
16 the southern part of the Klamath Basin. For more than 100 years the Hoopa Valley Reservation
17 has encompassed much of the Klamath and Trinity Rivers. In 1988, Congress partitioned the
18 Hoopa Valley Reservation, reserving to the Hoopa Valley Tribe the portion of the reservation
19 extending six miles to either side of the Trinity River and part of the Klamath River, near the
20 confluence with the Trinity River. Several species of anadromous fish inhabit the Klamath-
21 Trinity River system and its tributaries, including Chinook, Coho, steelhead, green sturgeon, and
22 coastal cutthroat trout. Klamath River runs of salmon and steelhead at one time were among the
23 region’s mightiest. SONCC Coho salmon, a population that includes Klamath and Trinity River
24 Coho, was estimated in 1940 to range between 150,000 and 400,000 naturally spawning fish
25 annually. *See* Threatened Status for SONCC ESU of Coho Salmon, 62 Fed. Reg. 24588, 24588
26 (May 6, 1997) (“Listing Notice”).

1 23. A multitude of factors, including habitat destruction, and hydropower
2 development contributed to drastic declines of all stocks of salmonids in recent decades. In
3 1997, NMFS concluded that “Coho populations in this ESU are very depressed, currently
4 numbering approximately 10,000 naturally produced adults.” *Id.*

5 The perilous situation of the SONCC Coho salmon prompted
6 NMFS in 1997 to list the fish under the ESA as threatened. In
7 listing the Coho, NMFS noted that “water diversions” and “water
8 withdrawals” for irrigation were “major activities responsible for
9 the decline of Coho salmon in Oregon and California.” *Id.* at
10 24,592. NMFS further concluded that depletion and storage of
11 natural flows have drastically altered natural hydrological cycles,
12 especially in California and southern Oregon rivers and streams.
13 Alteration of streamflows has increased juvenile salmonid
14 mortality for a variety of reasons: Migration delay resulting from
15 insufficient flows or habitat blockages; loss of usable habitat due to
16 dewatering and blockage; stranding of fish resulting from rapid
17 flow fluctuations; entrainment of juveniles into unscreened or
18 poorly screened diversions; and increased juvenile mortality
19 resulting from increased water temperatures. In addition, reduced
20 flows degrade or diminish fish habitats via increased deposition of
21 fine sediments in spawning gravels, decreased recruitment of new
22 spawning gravels, and encroachment of riparian and non-endemic
23 vegetations into spawning and rearing areas.

17 *Id.* at 24,593. Klamath River basin steelhead, part of the Klamath Mountains Province steelhead
18 ESU, remain a candidate species for listing under the ESA due to high risk factors. 63 Fed. Reg.
19 13347 (Mar. 19, 1998). Klamath River basin Chinook suffer the same ill effects from Klamath
20 Project water withdrawals.

21 24. In originally designating critical habitat for the SONCC Coho salmon, NMFS
22 noted that “essential features” of Coho habitat include water quantity, water velocity, and water
23 temperature. *See* Designated Critical Habitat: Central California Coast and Southern
24 Oregon/Northern California Coast Coho Salmon, 64 Fed. Reg. 24,049, 25,059 (May 5, 1999).
25 NMFS further concluded that irrigation water withdrawals and dam operations were “activities
26 that may require special management considerations” for juvenile Coho salmon. *Id.* at 24,059.

1 Chinook salmon require the same habitat characteristics, and water withdrawals and dam
2 operations also affect Chinook salmon habitat and populations.

3 25. Concerned with continued drastic drops in salmon populations in the Klamath and
4 Trinity Rivers, Congress in 1984 enacted the Trinity River Basin Fish and Wildlife Management
5 Act of 1984, Pub. L. 98-541, noting the decreased flows in the Trinity River caused by BOR's
6 operations and directing the Secretary of the Interior to develop a management program for the
7 river to restore fish levels. Subsequently in 1986, Congress enacted the Klamath Basin Fishery
8 Resources Restoration Act ("Klamath Restoration Act"), 16 U.S.C. § 460ss. Among various
9 causes of the declines in salmon, Congress cited "the construction and operations of dams,
10 diversions, and hydroelectric projects" which have contributed to, among other things, "reduced
11 flows . . . which ha[ve] significantly reduced the anadromous fish habitat in the Klamath-Trinity
12 River system." 16 U.S.C. § 460ss(3).

13 B. BOR's Management of Water in the Klamath Basin

14 26. Congress authorized construction and development of the Klamath Project in
15 1905, pursuant to the Act of February 9, 1905, ch. 567, 33 Stat. 714, which is part of the
16 Reclamation Act of 1902, 43 U.S.C. § 372 *et seq.* Various project facilities were built between
17 1906 and 1966. The Klamath Project consists of several major dams, including Link River Dam,
18 Clear Lake Dam, and Gerber Dam, as well as various canals and pumping stations. BOR's
19 project operations determine the level, timing, and rate of water flow in the Klamath River below
20 Iron Gate Dam.

21 27. The Klamath Project provides irrigation water to approximately 200,000 acres of
22 agricultural land each year. The Klamath Project also supplies water for a system of wildlife
23 refuges operated by the U.S. Fish and Wildlife Service ("FWS"). Four national wildlife refuges
24 – Lower Klamath, Tule Lake, Clear Lake, and Upper Klamath – lie within the boundaries of the
25 project.

1 28. Pursuant to a 1956 contract with BOR, PacifiCorp, a private corporation, operates
2 the Klamath Project's Link River Dam. PacifiCorp also owns and operates several downstream
3 dams on the Klamath River for hydroelectric power generation, including the Iron Gate Dam in
4 Northern California. These projects are operated pursuant to a Federal Energy Regulatory
5 Commission ("FERC") license that sets certain minimum instream flows at Iron Gate Dam.

6 29. Operation of the Klamath Project has a major impact on flows in the Klamath
7 River downstream of Iron Gate Dam and on anadromous fish habitat in both the Klamath and
8 Trinity Rivers.

9 30. BOR maintains ongoing discretionary management authority and control over the
10 Klamath Project. Since 1996, BOR has operated the Klamath Project with annual operating
11 plans that designate or identify minimum flow levels in the Klamath River downstream of Iron
12 Gate Dam. These plans identify flows that are likely to be met – after agricultural diversions are
13 satisfied – during particular times of the year in terms of the cubic feet per second ("cfs") of
14 water as measured flowing past Iron Gate Dam. BOR's 2016 Annual Operations Plan calculates
15 that 388,680 acre-feet of water will be supplied to the Klamath Project, water that would
16 otherwise flow down the Klamath River.

17 31. BOR's diversions of water occur upstream of the portion of the Klamath River in
18 which fish disease is most prevalent. BOR's actions result in hydrologic concentrations of
19 *C.shasta* actinospore that increase the percentage of disease-related mortality to Coho salmon in
20 the mainstem Klamath River in May to mid-June.

21 C. Endangered Species Act Consultation

22 32. The ESA grants the right to any person to bring suit "to enjoin any person,
23 including the United States and any other governmental instrumentality or agency . . . who is
24 alleged to be in violation of any provision of [the ESA] or regulation issued under the authority
25 thereof." 16 U.S.C. § 1540(g)(1)(A). The District Courts have jurisdiction "to enforce any such
26

1 provision or regulation, or to order the Secretary to perform such act or duty, as the case may
2 be.” 16 U.S.C. § 1540(g).

3 33. The Administrative Procedure Act (“APA”) authorizes courts reviewing agency
4 action to hold unlawful and set aside final agency action, findings, and conclusions that are
5 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.
6 5 U.S.C. § 706(2)(A).

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

9 [e]ach federal agency shall, in consultation with and with the
10 assistance of the Secretary, insure that any action authorized,
11 funded, or carried out by such agency (hereinafter in this section
12 referred to as an “agency action”) is not likely to jeopardize the
13 continued existence of any endangered species or threatened
14 species or result in the destruction or adverse modification of
15 habitat of such species which is determined by the Secretary . . .
16 to be critical. . . .

17 16 U.S.C. § 1536(a)(2).

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

36. As part of any ITS, NMFS must specify “the impact of such incidental taking
on the species” - quantifying by amount or extent the allowed incidental take. 16 U.S.C.
§ 1536(b)(4)(C)(i). Such a statement of impact makes explicit the basis for NMFS’ required

1 finding that an incidental take will not jeopardize the species, 16 U.S.C. § 1536(b)(4), and it
2 provides a check on the adequacy of NMFS' "reasonable and prudent measures . . . necessary or
3 appropriate to minimize such impact." 16 U.S.C. § 1536(b)(4)(C)(ii).

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

10 38. Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency
11 initiates consultation on an action under ESA § 7(a)(2), it "shall not make any irreversible or
12 irretrievable commitment of resources with respect to the agency action which has the effect of
13 foreclosing the formulation or implementation of any reasonable and prudent alternative
14 measures which would not violate subsection (a)(2) of this section." The purpose of ESA § 7(d)
15 is to maintain the status quo pending the completion of interagency consultation.

16 39. For those actions that may adversely affect a species, NMFS must review all
17 information provided by the action agency in the biological assessment, as well as any other
18 relevant information, to determine whether the proposed action is likely to jeopardize a listed
19 species or destroy or adversely modify its designated critical habitat. 50 C.F.R. § 402.14(h)(3).
20 This determination is set forth in a biological opinion from NMFS. *Id.*; 16 U.S.C.
21 § 1536(b)(3)(A).

22 40. In formulating its biological opinion, NMFS must evaluate the "effects of the
23 action" together with "cumulative effects" on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4).
24 This multi-step analysis requires NMFS to consider:

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

1 b. the “environmental baseline” to which the proposed action will be added.
2 This baseline includes “all past and present impacts of all Federal, State, or private actions and
3 other human activities in the action area; the anticipated impacts of all proposed Federal projects
4 in the action area that have already undergone formal or early section 7 consultation; and the
5 impact of State or private actions which are contemporaneous with the consultation in progress,”
6 50 C.F.R. § 402.02; and,

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

10 41. The regulations do not, however, permit NMFS to consider the effects of future
11 federal actions when determining whether a proposed federal action will jeopardize a listed
12 species. *Id.*; *see also* 51 Fed. Reg. 19933 (June 3, 1986) (Interagency Cooperation – Endangered
13 Species Act of 1973, as Amended; Final Rule) (“Since all future Federal actions will at some
14 point be subject to the section 7 consultation process pursuant to these regulations, their effects
15 on a particular species will be considered at that time and will not be included in the cumulative
16 effects analysis.”). Such future federal actions also are not properly a part of the environmental
17 baseline, given that they have not yet occurred.

18 42. After issuance of a Biological Opinion, an agency with discretionary federal
19 involvement or control over the action must request reinitiation of formal consultation in certain
20 circumstances. 50 CFR § 402.16. For example, reinitiation must be requested if (a) the amount
21 or extent of taking specified in the ITS is exceeded; or (b) new information reveals effects of the
22 action that may affect listed species or critical habitat in a manner or to an extent not previously
23 considered.

24 D. MSFCMA Consultation

25 43. The MSFCMA requires a three-step consultation process between the acting
26 agency, the BOR, and NMFS regarding effects on Essential Fish Habitat. First, the acting

1 agency “shall consult with the Secretary [NMFS] with respect to any action authorized, funded
2 or undertaken or proposed . . . that may adversely affect any essential fish habitat.” Then, the
3 Secretary shall “recommend to such agency measures that can be taken by such agency to
4 conserve such habitat.” Finally, the action agency “shall provide a detailed response in writing .
5 . . [which] include[s] a description of measures proposed by the agency for avoiding, mitigating,
6 or offsetting the impact of the activity on such habitat.”

7 44. Essential Fish Habitat has been designated. 79 Fed. Reg. 75449 (Dec. 18, 2014).

8 The Klamath River is included in the Essential Fish Habitat of salmon.

9 E. BOR’s Past Consultation Efforts

10 45. In 1999, BOR consulted with NMFS regarding the impacts of the 1999 Klamath
11 Operations Plan on listed Coho salmon under Section 7(a)(2) of the ESA. In 1999, NMFS issued
12 a Biological Opinion (“1999 BiOp”) that found that operation of the Klamath Project, and its
13 associated water diversions, withdrawals, temperature impacts, and pollutant loadings would
14 adversely affect listed Coho salmon. The 1999 BiOp describes how inadequate flows and
15 sudden changes in flow level result in stranding of anadromous fish and the destruction of usable
16 habitat. The 1999 BiOp concludes that higher flows in the Klamath River are associated with
17 increased juvenile salmon survival. Nevertheless, in the 1999 BiOp, NMFS found that the
18 Klamath Project was not likely to jeopardize SONCC Coho.

19 46. In 2000, BOR’s Klamath Operation Plan again specified minimum flow levels
20 that varied on a monthly or bi-weekly basis, but BOR never completed the requisite ESA
21 consultation. BOR’s failure to follow the law led this Court to rule that “[d]espite the weight
22 which the Ninth Circuit repeatedly has placed upon the procedural requirements of the ESA, it is
23 clear that the Bureau of Reclamation failed to comply with these requirements before
24 implementing its 2000 Operations Plan for the Klamath Project.” *Pacific Coast Fed’n of*
25 *Fishermen’s Ass’ns v. United States Bureau of Reclamation*, 138 F. Supp. 2d 1228, 1242-43
26 (N.D. Cal. 2001).

1 47. On May 31, 2002, NMFS issued its Biological Opinion: Klamath Project
2 Operations, June 1, 2002 - March 31, 2012 (“2002 BiOp”). NMFS found the proposed operation
3 of the Klamath Project is likely to jeopardize the continued existence of SONCC Coho and
4 adversely modify its designated critical habitat.

5 48. After finding jeopardy, NMFS identified and described the RPA to the proposed
6 action that it believed would avoid jeopardy and adverse modification. 16 U.S.C.
7 § 1536(b)(3)(B).

8 49. The 2002 BiOp and RPA have five major components, including: specific water
9 management measures over the ten-year period; a water bank and water supply enhancement
10 program for flows in the Klamath River below Iron Gate dam; a long-term flow target; an inter-
11 governmental task force; and an inter-governmental research science panel.

12 50. In its ITS for the 2002 BiOp and RPA, NMFS found that “some level of
13 incidental take [is] to occur due to implementation of some of the actions outlined in the
14 reasonable and prudent alternative.” 2002 BiOp at 71. However, NMFS failed to quantify,
15 either numerically or by extent, the incidental take permitted under the 2002 BiOp. Moreover,
16 NMFS failed to evaluate whether this unspecified level of take, combined with already-permitted
17 levels of take for SONCC Coho, would jeopardize the continued existence of the species.

18 51. Plaintiff Hoopa Valley Tribe, the Pacific Coast Federation of Fishermen’s
19 Associations and others filed suit challenging the 2002 BiOp in related case *PCFFA, et al v.*
20 *U.S. Bureau of Reclamation*, No. C 02-2006 (N.D. Cal.). On July 15, 2003, this Court granted
21 Plaintiffs’ Motion for Summary Judgment, in part, concluding that the RPA and ITS in NMFS’
22 2002 BiOp were arbitrary and capricious.

23 52. The United States Court of Appeals for the Ninth Circuit agreed that the short-
24 term measures in the 2002 BiOp were arbitrary and capricious. *PCFFA v. U.S. Bureau of*
25 *Reclamation*, 426 F.3d 1082 (9th Cir. 2005). The Ninth Circuit also ruled that the 2002 BiOp’s
26 phased increases in water flows meant that five full generations of SONCC Coho would

1 complete their three-year life cycles during years of insufficient water. The Court stated: “If
2 that happens, all the water in the world in 2010 and 2011 will not protect the Coho, for there will
3 be none to protect.” *Id.* at 1094.

4 53. On remand, the District Court directed NMFS and BOR to reinitiate consultation;
5 NMFS to issue a new Biological Opinion; and BOR to limit project irrigation deliveries if they
6 would cause flows in the Klamath River to fall below 100% of the Phase III flow levels
7 identified by NMFS in its 2002 BiOp.

8 54. In 2007, BOR reinitiated consultation but, after NMFS issued a draft jeopardy
9 BiOp, BOR requested that NMFS suspend the completion of the consultation. On March 18,
10 2010, NMFS issued its BiOp for the period 2010 – 2018 concluding that Reclamation’s proposed
11 operations would likely jeopardize the continued existence of SONCC Coho salmon.

12 55. The 2010 BiOp caused BOR to again reinitiate consultation. In 2013, NMFS
13 revised its proposed action to increase the minimum daily flow targets for April, May and June,
14 as well as other changes.

15 56. On May 31, 2013, NMFS (together with FWS) issued the 2013 BiOp. NMFS
16 concluded that the action, as proposed, is not likely to jeopardize the continued existence of the
17 SONCC Coho. However, NMFS stated that it expected incidental take of SONCC Coho and
18 other species.

19 57. Among the anticipated forms of incidental take is BOR’s creation of conditions
20 promoting the spread of fish diseases such as *C.shasta*. The 2013 BiOp states: “If the percent of
21 *C.shasta* infections for Chinook salmon juveniles in the mainstem Klamath River between
22 Shasta River and Trinity River during May to July exceed these levels (i.e., 54% infection via
23 histology or 49% infection via QPCR), re-initiation of formal consultation will be necessary.”
24 2013 BiOp at 391.

25 58. BOR maintains continuing discretionary authority and control of the Klamath
26 Project subject to federal laws including the ESA.

1 59. On July 17, 2015, BOR contacted NMFS concerning the previous two years of
2 implementing the proposed action under the 2013 BiOp. BOR noted that “one of [the]
3 outstanding issues is completion of the Essential Fish Habitat and Orca consultation.” *See*
4 Exhibit 1.

5 60. On March 29, 2016, NMFS responded to BOR and announced a determination
6 that the Chinook salmon infection rates used in the ITS were exceeded in 2014 and 2015. NMFS
7 stated: “We conclude that the effects analysis and conclusions in the 2013 BiOp remain valid.
8 However, based on new information described below, we intend to revise the ITS prior to the
9 2017 operational water year, commencing April 1, 2017.” *See* Exhibit 2.

10 61. On May 17, 2016, counsel for the Hoopa Valley Tribe notified the Secretary of
11 the Interior, the Secretary of Commerce, and officials of the BOR and NMFS of the agencies’
12 violations of the ESA through their failure to reinitiate consultation. *See* Exhibit 3.

13 62. The Hoopa Valley Tribe’s May 17, 2016 letter also noted that the 2014 pre-spawn
14 mortality of adult Coho salmon returning to the Trinity River approached 50%, which is the
15 highest ever observed and approximately four times the average pre-spawn mortality recorded in
16 1997 – 2013. Such unprecedented mortality was not anticipated or analyzed in the 2013 BiOp,
17 and such new information should have required re-initiation of formal consultation.

18 **CLAIMS FOR RELIEF**

19 **FIRST CLAIM FOR RELIEF**

20 **Violation of the ESA and APA by NMFS and BOR For Failure to Re-Initiate Consultation**
21 **Under Section 7 of the ESA and 50 CFR § 402.16**

22 63. Plaintiff re-alleges, as if fully set forth herein, each and every allegation set forth
23 in this Complaint.
24
25
26

1 64. NMFS violated § 7 of the ESA, 16 U.S.C. § 1536, and 50 C.F.R. § 402.16 by
2 issuing an incidental take statement but failing to reinitiate formal consultation when the take
3 permitted by the ITS was greatly exceeded in 2014 and 2015.

4 65. NMFS also had a duty to re-initiate consultation due to the occurrence of
5 unanticipated pre-spawn mortality conditions that were not considered in the 2013 BiOp and
6 which constitute new information pursuant to 50 CFR § 402.16.

7 66. NMFS' failure to re-initiate consultation failed to comply with the express terms
8 of the 2013 BiOp.

9 67. NMFS' failure to re-initiate consultation failed to comply with its regulations
10 regarding re-initiation of consultation at 50 CFR § 402.16.

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

13 69. NMFS' actions and omissions are arbitrary, capricious, an abuse of discretion,
14 and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §706.

15 70. Failure to re-initiate consultation and continued operation of the Klamath Project
16 under the 2013 BiOp and ITS has harmed and is harming Plaintiff and Plaintiff has no adequate
17 remedy at law.

18 **SECOND CLAIM FOR RELIEF**

19 **Violation of Take Prohibitions in Section 9 of the ESA By BOR and NMFS.**

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

22 72. Section 9 of the ESA prohibits federal agencies from unauthorized take of
23 threatened and endangered species and prohibits NMFS from authorizing activities that cause the
24 unauthorized take of threatened and endangered species.

25 73. The terms and conditions of the ITS regarding incidence of disease were exceeded
26 in 2014 and 2015, rendering the 2013 BiOp invalid.

1 74. NMFS is violating the ESA by continuing to allow Klamath Project operations
2 pursuant to the terms of the fundamentally flawed assumptions in the 2013 BiOp and ITS.

3 75. BOR's operations of the Klamath Project have exceeded take authorizations in the
4 ITS, and will continue to exceed take authorizations in the ITS, in violation of the ESA.

5 76. The continued take of juvenile SONCC Coho is likely to occur, particularly in
6 low flow years.

7 77. NMFS' and BOR's failures to comply with the ESA and its implementing
8 regulations are directly reviewable in this Court pursuant to 16 U.S.C. § 1540(g).

9 78. Unauthorized and unlawful take of SONCC Coho causes harm to Plaintiff and
10 Plaintiff has no adequate remedy at law.

11 **THIRD CLAIM FOR RELIEF**

12 **Violation of MSFCMA and APA by NMFS for Failure to Consult on Essential Fish Habitat**

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

15 80. NMFS has violated the MSFCMA, 16 U.S.C. § 1855(b)(4)(B) by failing to
16 consult on effects of the Klamath Project on Essential Fish Habitat.

17 81. NMFS' actions and omissions are arbitrary, capricious, an abuse of discretion,
18 and otherwise not in accordance with the law and are reviewable under the APA, 5 U.S.C. §706.

19 82. NMFS' failure to consult has harmed and is harming Plaintiff due to continuing
20 impacts to Essential Fish Habitat caused by the Klamath Project and Plaintiff has no adequate
21 remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff Tribe respectfully requests that this Court:

- A. Determine and declare that NMFS and BOR have violated ESA section 7 and its implementing regulations by failing and deciding not to re-initiate consultation on the Klamath Project’s impacts on SONCC Coho;
- B. Determine and declare that BOR’s operation of the Klamath Project has violated and will continue to violate ESA section 9 due to unlawful and excessive taking of SONCC Coho;
- C. Declare that the analysis of the BiOp and the accompanying ITS are legally invalid and order Defendants to reinitiate consultation and prepare a legally adequate BiOp for Klamath Project operations and any related actions that complies with the requirements of the ESA, on a schedule to be set by the Court;
- D. Order BOR to limit irrigation water deliveries from the Klamath Project in order to implement an interim flow regime in the Klamath River below Iron Gate Dam that will protect anadromous fish in accordance with the best available science pending BOR’s full compliance with its obligations under the ESA and with its trust obligation to protect the Tribe’s fishing rights;
- E. Grant such restraining orders and/or preliminary and permanent injunctive relief as the Tribe may from time to time request to ensure that the Klamath River anadromous fishery does not continue to suffer irreparable harm pending resolution of the merits of this action;
- G. Determine and declare that NMFS has violated the MSFCMA, 16 U.S.C. § 1855(b)(4)(B), by failing to consult regarding the effects of the Klamath Project on Essential Fish Habitat and ordering NMFS to complete such consultation;
- H. Award the Tribe its reasonable fees, expenses, costs, and disbursements, including attorneys’ fees associated with this litigation under the citizen suit provision of the

1 ESA, 16 U.S.C. § 1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C.
2 § 2412; and

3 I. Grant the Tribe such further and additional relief as the Court may deem just and
4 proper.

5 DATED this 29th day of July, 2016.

6 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE
7

8
9 /s/ Thomas P. Schlosser

10 Thomas P. Schlosser WSBA #06276

11 Thane D. Somerville WSBA #31468

12 Attorneys for Plaintiff Hoopa Valley Tribe
13

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EXHIBIT 1



United States Department of the Interior

BUREAU OF RECLAMATION
Mid-Pacific Region
Klamath Basin Area Office
6600 Washburn Way
Klamath Falls, OR 97603-9365

IN REPLY REFER TO:

KO-300
ENV-7.00

JUL 17 2015

VIA ELECTRONIC MAIL AND U.S. MAIL

Ms. Lisa Van Atta
National Marine Fisheries Service
777 Sonoma Avenue, Room 325
Santa Rosa, CA 95404

Subject: Notification of Modification, Amendment, Clarification and/or Reinitiation of Formal Consultation on Klamath Project Operations

Dear Ms. Lisa Van Atta:

The Bureau of Reclamation received the final integrated (non-jeopardy) Biological Opinion (BiOp), issued jointly by National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS); collectively (Services), on May 31, 2013, regarding the effects of the proposed continued operation of the Klamath Project (Project) from May 31, 2013, through March 31, 2023, on Federally listed threatened and endangered species and their designated critical habitat pursuant to section 7(a)(2) of the *Endangered Species Act of 1973*, as amended (16 U.S.C. 1531 et seq.).

During the time that Reclamation has been implementing the Proposed Action under the BiOp, unprecedented, multi-year drought conditions have persisted which have caused variations in operations and hydrologic conditions that were not anticipated at the time the Proposed Action was analyzed in the BiOp. Reclamation and the two Services have engaged in a series of discussions regarding these unanticipated conditions and have addressed some of them; and further suggested that the agencies engage in more comprehensive discussions to address the remaining issues once the current drought operations were complete. Reclamation would like to begin a comprehensive discussion to clearly establish a path forward to resolve the outstanding issues.

One of these outstanding issues is completion of the Essential Fish Habitat and Orca consultation. To date, additional modeling tools that would aid in this analysis are not complete and the data gap still exists. Therefore, we would also like to engage in discussions regarding options for completing these two actions.

Reclamation appreciates and acknowledges the extensive inter-agency coordination and collaboration during the formal consultation process leading to the 2013 BiOp. Reclamation looks forward to continued collaborative coordination as we develop the strategy and approach to move into this new phase.

I would like to suggest a meeting date of August 4, 2015, for the three agencies to meet to discuss the issues listed above. In the interim, should you have any questions regarding the BiOp or the contract for the modeling tool, please contact Ms. Kristen Hiatt, Natural Resource Specialist at 541-883-6935 or at khiatt@usbr.gov.

Sincerely,

A handwritten signature in blue ink that reads "Therese O'Rourke Bradford". The signature is fluid and cursive, with the first name being the most prominent.

Therese O'Rourke Bradford
Area Manager

cc: United States Fish and Wildlife
Attn: Laurie Sada, Field Supervisor,

Mr. Jim Simondet
National Marine Fisheries Service
1655 Heindon Road
Arcata, CA 95521

EXHIBIT 2



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE

West Coast Region
777 Sonoma Avenue, Room 325
Santa Rosa, California 95404

MAR 29 2016

In response refer to:
151422WCR2013AR00274

Therese O'Rourke Bradford
Bureau of Reclamation
6600 Washburn Way
Klamath Falls, Oregon 97603-9365

Re: Klamath Project Operations Biological Opinion

Dear Ms. O'Rourke Bradford:

Thank you for your July 17, 2015, letter to NOAA's National Marine Fisheries Service (NMFS), regarding "Notification of Modification, Amendment, Clarification and/or Reinitiation of Formal Consultation on Klamath Project Operations" (Project Operations), which relates to the *Biological Opinions on the Effects of Proposed Klamath Project Operations from May 31, 2013 through March 31, 2023, on Five Federally Listed Threatened and Endangered Species* (2013 BiOp), issued May 31, 2013, by NMFS and the U.S. Fish and Wildlife Service. In response to your letter, we determined that Chinook salmon *Ceratanova shasta* (*C. shasta*) infection rates used in the Incidental Take Statement (ITS) of the 2013 BiOp as a surrogate for the extent of incidental take of listed Southern Oregon/Northern California Coast Evolutionarily Significant Unit coho salmon from increased disease risk, were exceeded in 2014 and 2015. We conclude that the effects analysis and conclusions in the 2013 BiOp remain valid. However, based on new information described below, we intend to revise the ITS prior to the 2017 operational water year, commencing April, 1, 2017.

In the 2013 BiOp, NMFS concluded that the proposed action would likely result in lower disease risks from *C. shasta* infection in juvenile coho salmon than observed during the hydrologic analysis period of record (POR), 1981-2011. NMFS came to this conclusion after considering, among other things: 1) our expectation that reductions in spring Klamath River flow due to Klamath Project Operations are likely to increase water temperatures in the spring by up to approximately 0.5 °C, and 2) when water temperature chronically exceeds 16.5 °C coho salmon may become stressed and more susceptible to disease-related mortality. NMFS also noted that during consecutive dry years, the proposed action would likely result in increased fine sediment deposition, increased establishment of aquatic vegetation downstream of Iron Gate Dam, and decreased dilution of *C. shasta* actinospores in the spring; all factors that create favorable conditions for infecting coho salmon with *C. shasta*.



During dry water years, the daily minimum flows in April, May, and June included in the proposed action provide at least 1325 cubic feet per second (cfs), 1175 cfs, and 1025 cfs, respectively for diluting *C. shasta* actinospores. While these minimum flows are not likely sufficient to dilute actinospore concentrations to below 5 genotype II spores/Liter, which will likely result in disease related mortality to coho salmon in the mainstem Klamath River, the 2013 BiOp states that these minimum flows provide a limit to the increased risks posed to coho salmon under the proposed action.

A relative scarcity of juvenile coho salmon infection information existed for NMFS to evaluate Project operations effects in our 2013 BiOp. In contrast, systematic monitoring of juvenile Chinook salmon *C. shasta* infection rates has taken place since 2006. Therefore, in the ITS of our 2013 BiOp, NMFS utilized Chinook salmon infection rate estimates as a surrogate to estimate the extent of incidental take of coho salmon from increased disease risk. In the 2006-2012 disease monitoring POR, the maximum annual average May through July infection rate estimate for the Iron Gate Dam to Trinity River confluence reach of the Klamath River was 49 percent (via quantitative polymerase chain reaction). This highest average annual Chinook salmon *C. shasta* infection rate was used as a surrogate to describe the expected maximum coho salmon infection rate during implementation of the proposed action through 2023. In 2014, the average Chinook infection rate in the Shasta to Trinity River reach from May through July was estimated at 81 percent. In 2015, an estimated 91 percent of juvenile Chinook salmon were infected with *C. shasta*. Therefore, the Chinook salmon *C. shasta* infection rates used in the ITS of the 2013 BiOp as a surrogate for the extent of incidental take of listed coho salmon from increased disease risk were exceeded in 2014 and 2015.

As stated in your letter, multi-year persistent drought conditions contributed to substantial challenges for Project Operations in 2014 and 2015. For example, the lack of snowpack in 2014 and 2015 resulted in near record low inflows to Upper Klamath Lake. Iron Gate Dam releases consistent with the 2013 BiOp, combined with record low spring and summer accretions to the mainstem Klamath River, resulted in deleterious conditions for listed coho salmon in the Klamath River. Although the extent of dry hydrologic and associated environmental conditions in the Klamath River in 2014 and 2015 are rare, the analysis in the 2013 BiOp fully considered the expectation that disease infection rates would generally be higher in dry years, and NMFS expected that environmental conditions during consecutive dry years would be particularly poor and associated disease risks would be higher. Therefore, the effects analysis and conclusions of the 2013 BiOp remain valid.

We now know that the surrogate we used in the ITS of the 2013 BiOp for the extent of incidental take of listed coho salmon from increased disease risk did not fully consider the environmental variability that coho salmon experienced in the Klamath River in 2014 and 2015. In addition, we are aware that the *C. shasta* disease monitoring results for a revised, long-term POR will be reassessed utilizing weekly juvenile Chinook salmon population estimates to better describe the effects of *C. shasta* on the Klamath River Chinook population. Furthermore, the Stream Salmonid Simulator (S3) model will soon allow for evaluation of *C. Shasta* infection rates under various flow management scenarios. We will revise the ITS based on consideration of the environmental variability that coho salmon experienced in the Klamath River in 2014 and 2015 and to account for the likelihood of similar conditions in the future. We expect that the new *C. shasta* monitoring results analysis and the S3 will be completed within the next few months and

then we will need to consider the appropriate description of the extent of incidental take of coho salmon based on that information. Therefore, we will revise the amount and extent of incidental take of listed coho salmon from increased disease risk in the ITS of the 2013 BiOp prior to the 2017 operational water year, commencing April 1, 2017.

In contrast to water years 2014 and 2015, NMFS expects that hydrologic conditions in water year 2016 will be within the bounds of the environmental variability that we considered in developing the surrogate for the ITS of the 2013 BiOp; as of March 28, 2016 the Klamath Basin was at 114 percent of average annual peak snow water equivalent. We conclude that given the extensive snowpack, flows and water temperatures in the Klamath River below Iron Gate Dam in the Spring of 2016 are expected to be sufficient to reduce disease infection rates below the take exceedance criteria described in the ITS. We do not anticipate dry hydrologic conditions, and the resultant level of effects of the Project operations observed during dry year conditions, will occur in 2016 during the time needed to revise the ITS as described above.

Your letter also mentioned the outstanding issues of completing the Essential Fish Habitat and Southern Resident killer whale consultations, and it provided that additional modeling tools that would aid in these analyses were not yet complete. The *C. shasta* monitoring results analysis and the S3 model will soon be complete. Please contact Jim Simondet, whose contact information is provided below, as soon as possible in order to develop a schedule for completing these consultations.

NMFS appreciates the close coordination with your staff during these challenging operational and hydrologic circumstances. If you have any questions regarding the 2013 BiOp or ESA section 7 consultation, please contact our Klamath Branch Chief, Mr. Jim Simondet at 707 825-5171.

Sincerely,

A handwritten signature in blue ink, appearing to read "W. Stelle, Jr.", followed by a flourish.

William W. Stelle, Jr.
Regional Administrator

EXHIBIT 3

LAW OFFICES
MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE
A PROFESSIONAL SERVICE CORPORATION

REBECCA JCH JACKSON (WA)
FRANK R. JOZWIAK (WA)
MASON D. MORISSET (WA)
THOMAS P. SCHLOSSER (WA)
THANE D. SOMERVILLE (WA, OR, AZ)

1115 NORTON BUILDING
801 SECOND AVENUE
SEATTLE, WA 98104-1509

TELEPHONE: (206) 386-5200
FACSIMILE: (206) 386-7322

COMPTROLLER
M. ANN BERNHEISEL

WWW.MSAJ.COM

May 17, 2016

The Honorable Sally Jewell
Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

David Murillo, Regional Director
Mid-Pacific Regional Office
U.S. Bureau of Reclamation
2800 Cottage Way, Mail Code MP-100
Sacramento, CA 95825-1898

Estevan López, Commissioner
U.S. Bureau of Reclamation
1849 C Street, N.W., Mail Code 91-00000
Washington, D.C. 20240

The Honorable Penny Pritzker
Secretary of Commerce
United States Department of Commerce
1401 Constitution Ave., N.W.
Washington, D.C. 20230

Eileen Sobeck, Assistant Administrator
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Re: **Notice of Violations of the Endangered Species Act**

Dear Secretary Jewell, Commissioner López, Regional Director Murillo, Secretary Pritzker, and Assistant Administrator Sobeck:

This letter provides notice that the Bureau of Reclamation (“Reclamation”) and the National Marine Fisheries Service (“NMFS”) are in violation of the Endangered Species Act (“ESA”). The violations arise from Reclamation’s operations in the Trinity and Klamath River jeopardizing the ESA listed Coho salmon and from Reclamation’s and NMFS’ failure to reinitiate formal consultation on the Klamath Biological Opinion (BiOp) as required by ESA Section 7. Meanwhile, reliance upon Trinity River Division water to address fishery habitat in lower Klamath River has led to legal actions brought against DOI by Central Valley irrigators *E.g., San Luis & Delta Mendota Water Authority v. Jewell*, No. 15-cv-1290 (E.D. CA). This notice is pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g). This notice provides Reclamation and NMFS “an opportunity to review their actions and take corrective measures....” *Sw. Ctr. for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998).

Secretary Jewell, Commissioner López, Regional Director Murillo,
 Secretary Pritzker, and Assistant Administrator Sobeck
 May 17, 2016
 Page 2

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 (1984). Adverse impacts to the ESA listed Coho fishery that result from Reclamation’s and NMFS’ actions directly impair and injure the Tribe and its sovereign, legal, economic, and cultural interests.

Section 7 of the ESA imposes an obligation on federal agencies to “insure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined... to be critical....” 16 U.S.C. § 1536(a)(2); see 50 C.F.R. § 402.01(a); *Pyramid Lake Paiute Tribe of Indians v. United States Dept of Navy*, 898 F.2d 1410, 1414-15 (9th Cir. 1990). An action jeopardizes the continued existence of a listed species when it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. Destruction or adverse modification of habit occurs where there is a “direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.” *Id.*

Agencies must consult with either Fish and Wildlife Service or NMFS “under Section 7 of the ESA for any discretionary agency action that ‘may affect’ a listed species or designated critical habitat.” *Karuk Tribe of Cal. v. United States Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012); see 50 C.F.R. § 402.14(a). The Ninth Circuit has found that “‘may affect’ is a ‘relatively low’ threshold for triggering consultation.” *Id.* (quoting *Cal. ex rel. Lockyer v. U.S. Dep’t of Agric.*, 575 F.3d 999, 1018 (9th Cir. 2009)).

After a biological opinion is issued, federal agencies have a continuing duty under Section 7 of the ESA to insure their actions do not jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. An agency must reinitiate consultation under Section 7 when:

- (a) discretionary federal involvement or control has been retained or authorized;
- and (b) *the amount or extent of taking specified is exceeded, new information*

Secretary Jewell, Commissioner López, Regional Director Murillo,
Secretary Pritzker, and Assistant Administrator Sobeck
May 17, 2016
Page 3

reveals effects that may affect listed species or critical habitat in a manner not considered, the action is subsequently modified so as to cause an effect to the listed species or critical habitat not previously considered, or a new species is listed or critical habitat designated.

Salmon Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220, 1229 (9th Cir. 2008) (emphasis added); 50 C.F.R. § 402.16(a)-(d).

The Klamath Project reduces the magnitude, frequency, and duration of mainstem Klamath River flows, contributing to reduced survival and production of ESA listed Coho salmon that evolved under a natural flow regime. A major limiting factor for Coho salmon is the high incidence of disease, which is directly attributed to Klamath Project activities. The densities and infectivity rates of *Ceratomyxa nova* (*C. nova*, formerly *C. shasta*) on juvenile Coho are influenced in large part by spring and winter flows, both of which provide important ecological function in reducing disease prevalence by scouring parasite hosts, diluting spores infectious to salmon, and increasing transport rate of outmigrating juvenile Coho salmon. Reclamation's and NMFS' failure to adequately address disease spore density through providing adequate and sufficiently mitigating spring flows in the Klamath River and their failure to reinitiate consultation as required by Section 7 of the ESA has negatively affected Coho salmon returning to the Klamath and Trinity rivers. These salmon are part of the Southern Oregon/Northern California Coast ("SONCC") evolutionarily significant unit ("ESU"). SONCC Coho are listed as threatened with extinction under the ESA, and critical habitat for the SONCC Coho ESU includes all accessible waters of the Klamath River, the Trinity River, and the tributaries of the Klamath and Trinity rivers.

After completing formal consultation with Reclamation, NMFS issued its Klamath Project BiOp on May 31, 2013. In the BiOp, NMFS outlined the extensive impacts of [sic] *Ceratomyxa shasta* ("*C. Shasta*"), a lethal parasite, on SONCC Coho and developed an Incidental Take Statement (ITS). The ITS allowed up to a 49 percent (via quantitative polymerase chain reaction) infection rate of the total Chinook salmon juveniles in the mainstem Klamath River between the Shasta River and the Trinity River.¹ In 2014 and 2015, the infection rates were 81 percent and 91 percent respectively (True, et al., 2015, 2016). Thus, the disease infection rates plainly exceeded the rates allowed in the ITS. Reclamation and NMFS must ensure that this high infection rate does not jeopardize the continued existence of the SONCC Coho.

On March 29, 2016, NMFS responded to Reclamation's July 17, 2015 letter regarding "Notification of Modification, Amendment, Clarification and/or Re-initiation of Formal Consultation on Klamath Project Operations." In its letter, NMFS explained that the *C. Shasta* disease incidence exceeded the ITS in 2014 and 2015. Yet, NMFS dismissed the need to reinitiate consultation because "the analysis in the 2013 BiOp fully considered the expectation

¹ Given the low numbers of juvenile Coho salmon in the Klamath River, NMFS used Chinook salmon disease incidence as a proxy for Coho in the ITS.

Secretary Jewell, Commissioner López, Regional Director Murillo,
Secretary Pritzker, and Assistant Administrator Sobeck
May 17, 2016
Page 4

that disease infection rates would generally be higher in dry years, and NMFS expected that environmental conditions during consecutive dry years would be particularly poor and associated disease risks would be higher.” NMFS’ attempt to dismiss Reclamation’s obligation to reinitiate consultation when the taking exceeds the ITS violates Section 7 of the ESA and 50 C.F.R. § 402.16(a).

Despite multiple requests by the Hoopa Valley Tribe since 2014 and other tribal and federal participants in the Federal Flow Account Scheduling Environmental Team (FASTA) to increase flows to reduce disease incidence given past, existing, and impending take exceedances during critical spring months, Reclamation has refused to modify flows with NMFS’ tacit or explicit approval. NMFS even proposed increasing the amount of take allowed in the BiOp through an amendment rather than reinitiating consultation and addressing the root of the problem through increased spring flows.

In addition, the 2014 pre-spawn mortality of adult Coho salmon returning to the Trinity River approached 50 percent, which is the highest ever observed and approximately four times the average pre-spawn mortality recorded (1997-2013). This unprecedented pre-spawn mortality rate—likely resulting from poor flow and stressful conditions in the lower Klamath—was not anticipated nor analyzed in the 2013 BiOp. Indeed, the BiOp incorrectly concluded that the Klamath Project was unlikely to impact adult Coho salmon. Thus, new information demonstrates that the Klamath Project may affect adult Coho and/or Coho habitat in a manner not previously considered, which requires re-initiation of consultation.

Reclamation cannot restore the juvenile Coho salmon lost to *C. nova* in 2014 and 2015; nor can Reclamation restore the unprecedented number of Trinity River adult Coho killed before spawning in 2014. However, Reclamation can take action to increase the flows in Klamath River to reduce the incidence of *C. nova* infection among out-migrating juveniles in the spring and early summer, and reduce the mortality rate among pre-spawn adult Coho salmon in the fall. We urge Reclamation and NMFS to stop violating Section 7 of the ESA by simply modifying the existing ITS to accommodate new information and instead reinitiate consultation to provide increased flows in the Klamath River.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE



Thomas P. Schlosser

Secretary Jewell, Commissioner López, Regional Director Murillo,
Secretary Pritzker, and Assistant Administrator Sobeck
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