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

15 HOOPA VALLEY TRIBE,)	Civ. No. 4:18-cv-06191-JSW
)	
16 Plaintiff,)	
)	
17 v.)	FIRST AMENDED 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)	Administrative Procedure Act Case
)	
21 Defendants.)	
)	
22)	
)	
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”) and the National
4 Marine Fisheries Service (“NMFS”)(collectively, “Defendants”) to reinitiate formal consultation
5 with NMFS (who serves here as both the action agency and the consulting agency) pursuant to
6 Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536 and 50 C.F.R. § 402.16,
7 regarding the impacts of ocean salmon fisheries on Southern Oregon/Northern California Coastal
8 (SONCC) Coho, which are listed as threatened under the ESA. The Tribe seeks an order
9 declaring that Defendants have unlawfully failed to reinitiate formal consultation under ESA
10 Section 7 and an order enjoining them to do so. The Tribe further seeks injunctive relief to
11 prevent irreparable harm to SONCC Coho pending completion of the reinitiated consultation.

JURISDICTION, VENUE, AND INTRADISTRICT ASSIGNMENT

12
13 2. Jurisdiction. This action is brought pursuant to the ESA, 16 U.S.C. § 1540(g)(1)
14 and alternatively the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 704, 706. This Court
15 has jurisdiction pursuant to 16 U.S.C. § 1540(g)(1), 28 U.S.C. § 1331, 28 U.S.C. § 1362, and 5
16 U.S.C. §§ 704, 706.

17 3. The Tribe provided the Defendants with notice of intent to sue for violations of
18 the ESA, pursuant to 16 U.S.C. § 1540(g) on July 18, 2018. See Exhibit A. The Tribe provided
19 the Defendants with a subsequent notice of intent to sue for violations of the ESA, pursuant to 16
20 U.S.C. § 1540(g) on February 28, 2019. See Exhibit B. On March 6, 2019, Defendants sent a
21 letter acknowledging receipt of the two 60-day notice letters (of July 18, 2018 and February 28,
22 2019). The Defendants March 6, 2019 letter stated that Defendants disagreed that reinitiation of
23 formal consultation was required. To date, Defendants have failed to correct or remedy their
24 violations of the ESA.
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26

1 available fishery harvest to the tribal fishery (which is shared between the Hoopa Valley and
2 Yurok tribes) with the remaining 50% allocated to the non-Indian recreational and commercial
3 fishery, much of which occurs in the Pacific Ocean.

4 8. Salmon reside in the Pacific Ocean prior to returning to the Klamath and Trinity
5 Rivers to spawn. The Tribe's members' past, present, and future enjoyment of the benefits
6 provided by the Klamath-Trinity River system has been, is being, and will continue to be injured
7 by Defendants' on-going disregard of their statutory duties and by the injuries caused by their
8 permitting of excessive take of salmon, including SONCC Coho, in the ocean harvest.

9 9. Defendants in this action are:

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

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

22 **NATURE AND BACKGROUND OF CASE**

23 A. The Imperiled Klamath Fishery.

24 10. For more than 100 years the Hoopa Valley Reservation has encompassed much of
25 the Klamath and Trinity Rivers. In 1988, Congress partitioned the Hoopa Valley Reservation,
26 reserving to the Hoopa Valley Tribe the portion of the reservation extending six miles to either

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

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

15 B. Ocean Harvest Regulation

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

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

1 14. On April 28, 1999, NMFS published a Supplemental Biological Opinion and
2 Incidental Take Statement regarding proposed ocean salmon fishing regulations proposed for
3 adoption by NMFS. (“1999 Supplemental BiOp”).

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

10 16. In the 1999 Supplemental BiOp, NMFS determined that the proposed fishing
11 regulations at issue were likely to jeopardize the continued existence of SONCC coho salmon.
12 1999 Supplemental BiOp, at p. 31.

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

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

19 NMFS projects a level of take consistent with the terms specified in the RPA. NMFS
20 anticipates that most incidental take of SONCC coho will be difficult to detect because
21 the incidental take results from the mortality associated with hook and release in chinook-
22 directed fisheries, and the finding of a dead specimen is unlikely. Incidental take is
23 estimated by applying hooking mortality rates to projected encounter rates based on
24 historical catch effort data. Projected ocean exploitation rates on SONCC coho as
25 indicated by Rogue/Klamath hatchery stocks will not exceed 13%. Additional harvest on
26

1 of [sic] the southern Oregon component of the SONCC coho may occur in terminal or
2 freshwater areas consistent with Amendment 13.

3 1999 Supplemental BiOp, at p. 34.

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

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

22 C. The 2018 Management Measures

23 21. In March 2018, the PFMC released its Preseason Report II, Proposed Alternatives
24 and Environmental Assessment Part 2 for 2018 Ocean Salmon Fishery Regulations. Using the
25 methodology that PFMC and NMFS had consistently utilized since the 1999 Supplemental BiOp
26 to calculate CNR mortality and ocean exploitation rates for purposes of compliance with the

1 Incidental Take Statement, the Preseason Report II determined that Chinook ocean harvest rates
2 would need to be set at a range of 7.9% - 9.0% (depending on the alternative selected) in order to
3 limit ocean exploitation of SONCC coho to less than 13%, as required by the Incidental Take
4 Statement.

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

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

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

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

1 supporting analysis, STT proceeded to recommend abandonment of the long-standing
2 methodology and replacement with a methodology previously deemed not appropriate.

3 26. The new methodology uses decreasing ocean abundance of coho as a justification;
4 however decreasing ocean abundance of ESA-listed SONCC coho supports more restrictive
5 regulation of the ocean fishery and its associated impacts to SONCC coho, not less restrictive
6 regulation.

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

10 28. Relying on this changed methodology for the first time ever since publication of
11 the 1999 Supplemental BiOp and Incidental Take Statement, PFMC proceeded to increase the
12 permissible 2018 ocean exploitation rate for Klamath River Fall Chinook to 11.5% (from the 7.9
13 – 9.0% range set one month earlier). Relying on this new information, even though the
14 exploitation rate for Chinook was increased significantly, PFMC determined that the ocean
15 exploitation rate for SONCC coho decreased to 5.5%.

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

25 30. On April 27, 2018, the Hoopa Valley Tribe sent a letter to Defendant Wilbur
26 Ross, Secretary of Commerce advising of Defendants' obligation to reinstate formal ESA

1 Section 7 consultation due to this new information and likely exceedance of the applicable
2 incidental take limits (if calculated consistent with prior long-standing methodology).

3 31. NMFS approved the PFMC recommended management measures on May 1, 2018
4 without any discussion or analysis of the new information or change in methodology. 83 Fed.
5 Reg. 19005 (May 1, 2018).

6 32. Neither NMFS nor the Secretary of Commerce re-initiated formal consultation
7 with NMFS pursuant to the ESA to evaluate this new information or methodology, the excessive
8 incidental take, or the effects of the authorized ocean fishery on SONCC coho.

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

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

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

16 D. 2019 Management Measures

17 36. Starting in January 2019, NMFS, acting through the PFMC, commenced the
18 process of formulating management measures for 2019. NMFS and PFMC continued to use the
19 methodology described in the 2018 STT Report for purposes of calculating incidental take of
20 SONCC coho resulting from the ocean Chinook harvest.

21 37. On February 28, 2019, the Hoopa Valley Tribe sent notice of its intent to sue or
22 otherwise modify its existing complaint unless NMFS, PFMC, and the Secretary reinitiated
23 formal consultation with NMFS for purposes of evaluating the new methodology described in
24 the 2018 STT Report. The February 28, 2019 notice also identified other information that
25 warranted reinitiation of consultation regarding the impact of ocean Chinook fisheries on
26

1 SONCC coho. On March 6, 2019, NMFS responded that it was not going to reinstate formal
2 consultation based on the information and concerns provided by the Tribe.

3 38. On May 6, 2019, without reinstitution of formal consultation, the Secretary of
4 Commerce approved management measures providing for harvest of ocean Chinook and the
5 continued incidental take of SONCC coho. 84 Fed. Reg. 19729 (May 6, 2019).

6 39. According to Preseason Report III, the 2019 management measures provide for
7 comparably larger rates of harvest of Chinook as compared to 2018. Abundance of relevant
8 coho stocks is also reported as significantly greater in 2019 than in 2018. Yet, despite the
9 increased authorized rates of Chinook harvest and increased levels of coho stock abundance, the
10 incidental take rate calculated by PFMC and NMFS is only nominally higher than 2018 (5.8% v.
11 5.5%).

12 40. The preseason reports that preceded adoption of the 2019 management measures
13 did not explain or disclose that the methodology used to calculate incidental take of SONCC
14 coho in 2019 is different than the methodology used for the same calculation prior to 2018.

15 41. If NMFS calculated 2019 incidental take of SONCC coho using the same
16 methodology that it had used prior to 2018, the incidental take rate for SONCC coho would
17 likely exceed the 13% incidental take limit prescribed by the 1999 Supplemental BiOp and
18 associated Incidental Take Statement.

19 42. NMFS did not reinstate formal consultation pursuant to Section 7 of the ESA
20 prior to adopting the 2019 Management Measures.

21 E. Endangered Species Act Consultation

22 43. 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 44. Alternatively, the APA authorizes courts reviewing agency action to hold
4 unlawful and set aside final agency action, findings, and conclusions that are arbitrary and
5 capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.
6 § 706(2)(A).

7 45. 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 46. 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.

47. 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 48. 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 49. 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 ir retrievable 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 50. 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 51. 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 52. After issuance of a Biological Opinion, both the consulting agency and/or the
11 agency with discretionary federal involvement or control over the action must reinitiate formal
12 consultation in certain circumstances. 50 CFR § 402.16. For example, reinitiation must be
13 requested if: (a) the amount or extent of taking specified in the ITS is exceeded; (b) new
14 information reveals effects of the action that may affect listed species or critical habitat in a
15 manner or to an extent not previously considered; or (c) if the identified action is subsequently
16 modified in a manner that causes an effect to the listed species or critical habitat that was not
17 considered in the biological opinion. In this case, NMFS is both the consulting agency and
18 action agency for purposes of ESA formal consultation.

19
20 F. New Developments and Information Since the 1999 Supplemental Biological
Opinion Require Reinitiation of Formal Section 7 Consultation.

21 53. NMFS last issued a biological opinion regarding the impacts of ocean fisheries on
22 threatened SONCC Coho twenty years ago, on April 28, 1999.

23 54. Prior to the April 28, 1999 Biological Opinion, NMFS issued biological opinions
24 or supplemental biological opinions relating to impacts of PFMC-regulated ocean fisheries on
25 March 8, 1996, February 18, 1997, April 30, 1997, and April 29, 1998. But NMFS has not
26

1 evaluated the impacts of PFMC-regulated ocean fisheries on ESA-listed species such as the
2 SONCC Coho over the past twenty years.

3 55. Over the past twenty years, SONCC Coho have failed to recover and continue to
4 trend towards extinction.

5 56. According to the most recent five-year status review regarding SONCC coho,
6 which was published by NMFS in 2016, twenty-four of thirty-one independent populations of
7 SONCC coho remain at a high risk of extinction with the others at a moderate risk of extinction.
8 2016 Status Review, at p. 21. None of the populations were considered by NMFS to be at a low
9 risk of extinction as of the last status review in 2016. 2016 Status Review, at p. 48.

10 57. The NMFS 2016 status review states that: “All core populations (those intended
11 to serve as anchors for recovery) are thousands of adults short of the numbers needed for them to
12 play their role in recovery of the entire ESU. Our analysis of the ESA section 4(a)(1) factors
13 indicates there is heightened risk to the SONCC coho salmon ESU’s persistence since our last
14 status review in 2011.” 2016 Status Review, p. 48.

15 58. According to the 2016 status review, populations of SONCC coho in the Shasta
16 River (which has the longest duration of monitoring data) have continued to slightly decline
17 (rather than recover) over the past fourteen years. 2016 Status Review, pp. 16-17.

18 59. In recent years, SONCC coho have suffered significant impacts from disease in
19 the Klamath River. In 2014, 81% of sampled juvenile Chinook (which are used as a surrogate
20 for SONCC coho in analyzing disease impacts) tested positive for *C. shasta*. In 2015, 91% of the
21 sampled fish tested positive for disease. In 2016, 48% of the sampled fish tested positive for
22 disease. *See Hoopa Valley Tribe v. NMFS*, 230 F. Supp. 3d 1106, 1112, 1138 (N.D. Cal. 2017).
23 This disease outbreak had a significant adverse effect on SONCC coho populations and the
24 effects of the disease outbreak were not fully known or accounted for in the 2016 status review.
25 Thus, the current condition of SONCC coho is likely even worse than reflected in the 2016 status
26 review.

1 60. PFMC, when formulating its 2018 Management Measures, noted that there was a
2 relatively low ocean abundance for SONCC Coho, which is likely a result of the disease
3 outbreak and other environmental conditions not fully evaluated in the 1999 Supplemental BiOp.
4 NMFS did not have knowledge of and did not consider the possibility of such a large and long-
5 lasting disease outbreak when it set its 13% exploitation rate for ocean harvest in the 1999
6 Supplemental BiOp. Instead of taking a more protective approach, NMFS and the Secretary
7 utilized a change in methodology that allowed more incidental take of SONCC coho than would
8 have been allowed under the methodology consistently used between 1999 and 2017.

9 61. The effect of disease on SONCC coho populations was not addressed in the 1999
10 Supplemental BiOp. The federal monitoring program for disease prevalence in the Klamath
11 River did not even begin until 2009. That monitoring program has documented a mean annual
12 prevalence of infection of 41% during the 2009-2018 time period.

13 62. The impacts of disease have also had a documented impact on overall Chinook
14 populations that exhibit a relatively similar life history to SONCC coho. For example, NMFS
15 and PFMC are currently in the process of developing a rebuilding plan for Klamath River Fall
16 Chinook (KRFC) due to their current status as “overfished.” In its draft rebuilding plan, PFMC
17 has identified the elevated disease levels in 2014-2016 as one of the significant causes for the
18 decline in Chinook and their falling into overfished status. KRFC Rebuilding Plan, pp. 17-22,
19 45.

20 63. Also, in February 2018, NMFS initiated a status review with respect to a petition
21 to list the Upper Klamath-Trinity River Chinook as a threatened or endangered species. 83 Fed.
22 Reg. 8410 (Feb. 27, 2018). Even though NMFS had previously rejected petitions to list Klamath
23 Chinook on two prior occasions (1998 and 2012), NMFS found that such petition may be
24 warranted at this time due in large part to the disease issues facing Chinook (and which similarly
25 affect SONCC Coho) in the Klamath River. 83 Fed. Reg. 8413. The 1999 Supplemental BiOp
26 did not evaluate or consider the effects of such a large disease outbreak on SONCC coho or how

1 such a disease outbreak and corresponding reductions in SONCC Coho abundance should affect
2 the exploitation rate in the ocean harvest.

3 64. In addition to the adverse river habitat conditions, SONCC coho also suffered
4 from and continue to suffer from the effects of extremely adverse and exceptionally warm ocean
5 conditions in 2014 and 2015. The NMFS 2016 status review reported: “Adult coho salmon
6 returns this fall/winter and in the fall 2016/winter 2017 have likely been negatively impacted by
7 poor stream and ocean conditions. Adult coho salmon returns for this fall (next winter) and for
8 the next 2 to 3 years (depending on ocean residence times, maturing in 2015, 2016, 2017 and
9 2018) have likely been negatively impacted by poor stream and ocean conditions.” 2016 Status
10 Review, at p. 44. The negative impacts to adult SONCC coho returns will have continuing
11 adverse effects on overall populations of SONCC coho for years to come, which will further
12 decrease likelihood for recovery and continue the elevated risk of extinction.

13 65. A recent study by Dan A. Smale et al., published in March 2019 in *Nature*
14 *Climate Change*, reported on the significant warming trend in the oceans and the increased
15 prevalence of “marine heat waves” which are causing significant harm to marine life. The
16 authors recommended that: “marine conservation and management approaches must consider
17 [marine heat waves] and the extreme climatic events if they are to maintain and conserve the
18 integrity of highly valuable marine ecosystems over the coming decades.”

19 66. On March 29, 2019, NMFS published a new Biological Opinion regarding the
20 U.S. Bureau of Reclamation’s operations of the Klamath Irrigation Project. On page 68 of that
21 BiOp, NMFS stated: “New information since this SONCC coho salmon ESU was listed suggests
22 that the earth’s climate is warming, and that this change could significantly impact ocean and
23 freshwater habitat conditions (Intergovernmental Panel on Climate Change 2014), which affects
24 survival of coho salmon. Of all the Pacific salmon stocks, coho salmon are likely one of the
25 most sensitive to climate change due to their extended freshwater rearing. Additionally, the
26 SONCC coho salmon ESU is near the southern end of the species’ distribution and many

1 populations reside in degraded streams that have water temperatures near the upper limits of
2 thermal tolerance for coho salmon.”

3 67. In the Incidental Take Statement provided with the 1999 Supplemental Biop,
4 NMFS set a maximum SONCC coho exploitation rate of 13% as related to the ocean Chinook
5 harvest. But in the twenty years that have passed since 1999, SONCC coho populations have
6 failed to recover, have continued in a downward trajectory, and remain at a high risk of
7 extinction.

8 68. Moreover, over the past five years, SONCC coho juveniles have repeatedly been
9 subjected to extremely high rates of disease and SONCC coho adults have experienced
10 exceptionally warm and adverse ocean conditions. These same adverse habitat conditions have
11 led to a designation of Klamath River Fall Chinook (which NMFS uses as a surrogate for
12 SONCC coho in certain management actions) as overfished due to their low average abundance
13 in recent years.

14 69. With SONCC coho populations suffering from extremely adverse habitat
15 conditions in recent years, and with those conditions likely to persist due to the warming and
16 changing climate, NMFS is legally required to reinitiate formal consultation and re-evaluate
17 whether 13% is an appropriate annual exploitation rate in the ocean harvest for purposes of
18 ensuring the continued survival and recovery of the SONCC coho.

19 G. SONCC Coho Face Imminent and Irreparable Harm From Excessive Ocean Take.

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

25 71. Coho that are incidentally caught and released in the ocean harvest may suffer
26 death, or injuries that lead to premature death. The incidental catch and release of Coho

1 constitutes a “take” of protected Coho under the ESA. Coho that die from incidental catch and
2 release in the Pacific Ocean cannot return to spawn in the Klamath-Trinity river system. Coho
3 that suffer injury from incidental catch and release also may not return to spawn in the Klamath-
4 Trinity river system. The reduction in spawners facilitates low production of Coho in the
5 Klamath-Trinity river system and perpetuates the imperiled status of Coho.

6 72. The continuing imperiled status of the SONCC Coho results in the continued
7 listing of the species under the ESA and limits tribal harvest opportunities that are reserved to the
8 Tribe pursuant to its federally reserved fishing rights.

9 **CLAIMS FOR RELIEF**

10 **FIRST CLAIM FOR RELIEF**

11 **Failure to Re-Initiate Formal Consultation Under Section 7 of the ESA, 50 CFR**
12 **§ 402.14(i)(4), 50 CFR § 402.16, and Alternatively Violation of the APA.**

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

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

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

23 76. Defendants have a duty to re-initiate formal ESA Section 7 consultation because
24 the currently authorized incidental take of SONCC Coho in the ocean salmon fishery would
25 exceed the 13% limit set forth in the Incidental Take Statement if such incidental take were
26

1 calculated under the long-standing methodology that had been used by NMFS and PFMC
2 pursuant to the 1999 Supplemental BiOp until April 2018.

3 77. Defendants have a duty to re-initiate formal ESA Section 7 consultation to
4 evaluate whether a 13% exploitation rate remains appropriate in light of new information
5 regarding effects on the species that was not considered in the 1999 Supplemental BiOp.

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

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

12 80. Failure to re-initiate consultation and the allowance of excessive and unlawful
13 levels of incidental take of SONCC Coho in the ocean harvest has harmed, is irreparably
14 harming, and will continue to irreparably harm Plaintiff.

15 81. Defendants' allowance of continued incidental take of SONCC coho in the ocean
16 harvest without any formal re-evaluation of the appropriate levels of such incidental take over
17 the past twenty years is irreparably harming and will continue to irreparably harm Plaintiff.

18 82. Plaintiff has no adequate remedy at law to address its claim raised herein.

19 **PRAYER FOR RELIEF**

20 WHEREFORE, plaintiff Tribe respectfully requests that this Court:

21 A. Determine and declare that each of the Defendants have violated ESA section 7
22 and its implementing regulations by failing to re-initiate formal ESA section 7
23 consultation regarding the impacts of ocean salmon fisheries on SONCC Coho;

24 B. Determine and declare that each of the Defendants have acted in a manner that is
25 arbitrary, capricious, an abuse of discretion or otherwise not in accordance with
26 law pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 704, 706 by failing

1 to reinitiate formal ESA section 7 consultation regarding the impacts of ocean
2 salmon fisheries on SONCC Coho;

3 C. Order Defendants to reinitiate formal ESA Section 7 consultation regarding the
4 impacts of ocean salmon fisheries on SONCC Coho;

5 D. Grant such restraining orders and/or preliminary and permanent injunctive relief
6 as the Tribe may from time to time request to ensure that SONCC Coho do not
7 continue to suffer irreparable harm pending resolution of the merits of this action
8 or pending completion of any reinitiated formal consultation or to repair any
9 damages already incurred by SONCC Coho as a result of Defendants' unlawful
10 actions;

11 E. Award the Tribe its reasonable fees, expenses, costs, and disbursements, including
12 attorneys' fees associated with this litigation under the citizen suit provision of the
13 ESA, 16 U.S.C. § 1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C.
14 § 2412; and

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

17 DATED this 3rd day of June, 2019.

18 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

19 /s/ Thomas P. Schlosser

20 Thomas P. Schlosser WSBA #06276

21 Thane D. Somerville WSBA #31468

22 Attorneys for Plaintiff Hoopa Valley Tribe