UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
1201 NE Lloyd Boulevard, Suite 1100
PORTLAND, OREGON 97232-1274

March 6, 2019

Mr. Ryan Jackson, Chairman
Hoopa Valley Tribal Council
Post Office Box 1348
Hoopa, CA 95546

Dear Chairman Jackson:

We received your letters dated July 18, 2018, and February 28, 2019, alleging a violation of the Endangered Species Act (ESA) related to the management of the ESA-listed Southern Oregon/Northern California Coast (SONCC) coho Evolutionarily Significant Unit (ESU) by the 2018 Pacific Fishery Management Council (Council). For the reasons provided below, we disagree that reinitiation of ESA consultation has been triggered by changes in how the effect of ocean salmon fisheries on SONCC coho was evaluated at the April 2018 Council meeting and adopted by the National Marine Fisheries Service (NMFS) on May 1, 2018.

As you know, ocean salmon fisheries in the Exclusive Economic Zone (EEZ) off the states of Washington, Oregon, and California (between 3 and 200 miles offshore) are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Pursuant to the MSA, NMFS works with the Council to manage the salmon fisheries in accordance with the Pacific Coast Salmon Fishery Management Plan (Salmon FMP). Ocean fisheries managed under the Salmon FMP include recreational and commercial troll fisheries, and tribal fisheries that target Chinook and coho salmon. The Council annually provides its management recommendations to the Secretary of Commerce, who implements the measures if they are found to be consistent with the MSA and other applicable law, including the ESA. The implementation of the measures through regulation constitutes a federal action requiring consultation under the ESA if listed species are likely to be adversely affected by those measures.

NMFS has consulted on the effects of the Salmon FMP to ESA-listed species, including the SONCC coho salmon ESU, on several occasions. NMFS has done a new consultation or reinitiated consultation when, for example, a new species is listed under the ESA or the Council proposes to revise the Salmon FMP in some way. In the late 1990s, the Council recommended and the Secretary of Commerce approved Amendment 13 to the Salmon FMP which implemented a new framework for managing Oregon coastal natural coho salmon. NMFS consulted on the effects to Oregon Coastal coho, Central California Coastal coho, and SONCC coho salmon from the salmon fisheries implemented consistent with Amendment 13 in the 1999 Supplemental Biological Opinion and Incidental Take Statement, covering the Pacific Coast Salmon Plan and Amendment 13 to the Plan (1999 Opinion). The 1999 Opinion concluded that neither the FMP nor Amendment 13 provided management provisions adequately protective for the SONCC coho salmon ESU; and, therefore, the fisheries were likely to jeopardize the continued existence of the SONCC coho salmon ESU. In order to avoid the likelihood of jeopardizing the continued existence of SONCC coho salmon, NMFS developed a Reasonable

and Prudent Alternative with three components. As relevant here, the first component requires that fisheries management measures developed under the Salmon FMP achieve an ocean exploitation rate on Rogue/Klamath coho salmon (the indicator for the SONCC coho salmon ESU) of no more than 13 percent. The Council has managed the salmon fisheries consistent with these provisions, included the 13 percent incidental take limit, ever since. The provisions of the 1999 Opinion also prohibit both coho-directed fisheries and coho salmon retention in Chinook-directed fisheries off California.

In order to manage the west coast salmon fisheries, the Council and NMFS use several models. These models are essentially accounting tools that are used during the preseason planning process to estimate the number of salmon that will be harvested under a given fishing regime, and importantly, the stock specific impacts anticipated from implementation of that regime. The coho salmon Fishery Regulation and Assessment Model (FRAM) is the model referenced in the 1999 Opinion. There are different models for management of other salmon species, including a Chinook salmon FRAM, as well as separate models for Klamath River fall-run Chinook salmon, Sacramento River fall-run Chinook salmon, and Sacramento River winter-run Chinook salmon. The coho salmon FRAM produces a variety of output reports that are used to examine the impacts of proposed fisheries management measures for compliance with management objectives, allocation arrangements, ESA compliance, and domestic and international legal obligations. One of the outputs provided by the coho salmon FRAM model is an estimate of the exploitation rate from the proposed ocean salmon fisheries that encounter SONCC coho salmon. These estimates from the coho salmon FRAM are used to determine whether the exploitation rate on SONCC coho salmon anticipated from implementation of a proposed fishing regime is less than the 13 percent incidental take limit established in the 1999 Opinion.

The management models are the accounting tools necessary for management of the salmon fisheries. However, the models are not themselves part of the salmon management measures, rather they are used to evaluate the impact of the salmon fisheries. The model inputs are necessary components of the management models that define the structure, interactions, and characteristics of stocks and fisheries in the model. These models can have hundreds of inputs, many of which change every year, including stock-specific abundance forecasts. Other inputs change only when there is new information that indicates the input needs to be updated in order to represent the best science available and provide accurate results. Changes in model inputs are commonly used to address management circumstances that change from year-to-year. However, routine changes in the inputs do not change the overall model and how it is implemented. It is standard for the Council and NMFS to consider these sort of technical changes to the model inputs, as the following examples illustrate.

The Council's Salmon Technical Team (STT) has made several modifications to model inputs for various salmon models. The STT has made similar changes in model inputs for both the Sacramento Harvest Model and the Klamath Ocean Harvest Model. To take just one example, in 2016, the STT discovered that they had been consistently underestimating the ocean harvest rate for Sacramento River fall-run Chinook (SRFC) in the Sacramento Harvest Model. In order to more accurately model the harvest rate, the STT modified the data range used to estimate SRFC

harvest rates per unit effort. This change in model inputs resulted in the estimates of harvest rate being more representative of the recent year observations. More information on this input change can be found in Appendix A of the Council's 2016 Preseason Report II.

In another example, in 2012, the STT observed that in forecasting harvest rates, they were routinely overestimating effort (the number of boats or anglers expected to participate in a fishery), which caused the forecasts to overestimate catch. In order to be more representative of the actual effort expended in the fisheries, the STT adjusted the model inputs used to forecast fishing effort to be more consistent with recent observations. This change is described on page 14 of a recent Technical Memo (Mohr, M.S., and O'Farrell, M.R. 2014. The Sacramento Harvest Model (SHM). U.S. Department of Commerce, NOAA Technical Memorandum. NOAA-TM-NMFS-SWFSC-525).

The changes made to the coho salmon FRAM inputs in 2018 are similar to other routine modifications of inputs to fisheries management models as in the above examples. As described in our July 19, 2018, letter to you, during the March 2018 Council meeting, the Council and STT observed that the FRAM model was providing estimates of Rogue/Klamath coho salmon exploitation rates that were inconsistent with past experience and higher than could reasonably be expected given the level of fishing that was being considered. The level of fishing being considered in 2018 was lower relative to many prior years, yet the preliminary estimates of exploitation rates for 2018 were higher (from 2010 to 2017 the average exploitation rate was 6.9 percent, with a range of 3.3 to 10.0 percent, the preliminary estimate for 2018 was 12.7 to 12.9 percent depending on the alternative being considered (PFMC Preseason Report II 2018)). At the Council's request, the STT reviewed the results and reported at the April 2018 Council meeting that the abundance of coho salmon stocks in the area south of Humbug Mountain was much lower than in previous years and that the STT had not been adjusting the coho salmon FRAM inputs for abundance as is done routinely for other salmon stocks. The STT therefore recommended that coho salmon abundance estimates should be scaled as needed to incorporate the stock specific forecasts that were already available. Scaling for abundance is consistent with the assessment of coho salmon from Cape Falcon to Humbug Mountain as well as other stocks managed by the Council. Thus, the coho salmon FRAM model inputs were updated based on the best available science to include coho salmon abundance in order to more accurately evaluate the effect of ocean salmon fisheries on SONCC coho salmon. The results and recommendations of the STT's analysis were provided in a report to the Council at the April meeting (Agenda Item E.1.a, Supplemental STT Report 2, April 2018). The Council approved the model input changes as part of the management measures for ocean salmon fisheries at the April 2018 Council meeting and NMFS adopted the management measures on May 1, 2018.

Our understanding of the Hoopa Valley Tribe's primary contention is that a model input modification was introduced between the March and April Council meetings in 2018 that had the effect of reducing the estimated impacts of the ocean salmon fisheries on SONCC coho salmon. On that point NMFS agrees. However, NMFS does not agree with the Hoopa Valley Tribe's contention that the revised model input was a modification to the proposed action such that reinitiation under Section 7 of the ESA of the 1999 Opinion is required. NMFS' view is that changes to model inputs like the one used to develop the fishery management measures adopted

at the April 2018 Council meeting are a routine part of the annual fisheries assessment and management process. And further, such changes are necessary and appropriate to ensure we continue to manage the fisheries using the best scientific information available.

It is our perspective that this change in model input to the coho salmon FRAM does not trigger reinitation of the 1999 Opinion. Under the ESA, reinitiation is required if: (1) the amount or extent of incidental take specified in the Incidental Take Statement of the Opinion is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the identified action is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not considered in the biological opinion; (4) a new species is listed or critical habitat designated that may be affected by the identified action. The first three of these criteria are most relevant in this case. The change to the model inputs represent an improvement in the estimation of the exploitation rates and, for the following three reasons, does not trigger reinitiation of consultation:

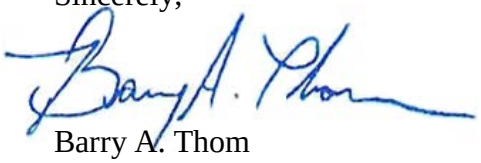
- The ocean exploitation rate averaged 6.9 percent from 2010-2017, well below the take limit of 13 percent. In April 2018, an input to the coho FRAM model was updated in order to more accurately estimate the ocean exploitation rate for SONCC coho. After scaling for abundance, the STT determined the ocean exploitation rate for Rogue/Klamath stock (the indicator for SONCC coho) was 5.5 percent, well below the take threshold in the 1999 Opinion. The 2018 modification to the model input improved the estimate of ocean exploitation rate for SONCC coho over the previous approach, ensuring we are using the best available science to monitor take of SONCC coho salmon in ocean fisheries. The amount or extent of incidental take of SONCC coho specified in the 1999 Opinion has not been exceeded.
- The modification to the model input does not change the overall methodology used to determine the effect of the fisheries on SONCC coho or change the range of exploitation rates that were analyzed in the 1999 Opinion. The updated input results in better estimates of the exploitation rate. Those estimates indicate the ocean exploitation rates on the SONCC coho salmon ESU (as indicated by the Rogue/Klamath hatchery stock) in recent years (the range from 2010 to 2018 was 2.8 to 10 percent) are the same or lower than those considered in the 1999 Opinion (5 to 12 percent observed, up to 35 percent proposed). Therefore, the improved input does not reveal effects of the action not previously considered.
- Finally, the improved input does not represent a modification to the action itself. The PFMC fisheries continue to be managed consistent with the provisions of Amendment 13 for Oregon coastal natural coho salmon and with the provisions of the incidental take limit and Reasonable and Prudent Alternative of the 1999 Opinion.

In summary, in 1999, NMFS consulted on the effects to SONCC coho salmon and other ESA-listed salmon ESUs from implementing the salmon management framework consistent with Amendment 13 of the Salmon FMP. One component of the Reasonable and Prudent Alternative in the 1999 Opinion requires that fisheries management measures developed under the Salmon FMP achieve an ocean exploitation rate on Rogue/Klamath coho salmon no greater than 13 percent. Management models are used to assess impacts of ocean fisheries on salmon stocks,

including SONCC coho, to ensure impacts remain below take limits. Model input parameters are routinely changed to ensure managers continue to manage the fisheries using the best scientific information available. However, routine changes in the inputs do not change the overall model and how it is implemented. Based on the information we have presented, the change in the model input to the coho salmon FRAM adopted in 2018 does not meet any of the reinitiation triggers and therefore does not require reinitation of the 1999 Opinion.

Thank you, again, for working constructively with us on these important issues. If you have questions or would like to discuss this further, please contact me.

Sincerely,



Barry A. Thom
Regional Administrator

SALMON TECHNICAL TEAM REPORT ON TENTATIVE ADOPTION OF 2018 MANAGEMENT MEASURES FOR ANALYSIS

INVESTIGATION OF EXPLOITATION RATES ON ROGUE/KLAMATH COHO IN FISHERIES SOUTH OF CAPE FALCON

Salmon Technical Team, April 2018

Background

At the March 2018 Council meeting, Mr. Marc Gorelnik requested the Salmon Technical Team (STT) investigate the unusually high exploitation rates forecasted for Rogue/Klamath coho salmon in fisheries south of Cape Falcon. Unmarked Rogue/Klamath hatchery coho are used as the indicator of fishery impacts on the Southern Oregon, Northern California Coast Coho (SONCC) Evolutionarily Significant Unit (ESU). The Endangered Species Act (ESA) consultation guidance for SONCC in 2018 is for an ocean exploitation rate of no more than 13%. During development of the three ocean salmon fishing Alternatives at the March Council meeting, exploitation rates exceeded 13%, sometimes substantially, and were much higher than the rates that have occurred in recent years, including several with similar fishing seasons south of Cape Falcon. Between 2010 and 2017, the final ocean salmon seasons adopted by the Council had an average preseason exploitation rate on Rogue/Klamath unmarked coho of 6.9% (range 3.3%-10.0%). Fishing impacts on Rogue/Klamath coho are negligible in fisheries north of Cape Falcon and consequently have little effect on the total exploitation rate.

The current approach to forecasting Rogue/Klamath coho marine exploitation rates relies on two models. The first model forecasts the number of mixed-stock coho mortalities, stratified by time period, area, and fishery. These forecasts are then used as inputs into coho Fishery Regulation Assessment Model (FRAM), where stock-specific exploitation rates are computed. We describe both of these models in more detail below.

Current Method of Estimating Mortality in Fisheries Requiring the Release of Coho (CNR)

The method currently used to estimate the number of mixed-stock "dead coho" resulting from release and drop-off mortality was developed in 2001 by the STT. This method uses projected effort measured in vessel days (troll) and angler-trips (recreational) applied to an average catch per unit effort (CPUE) for each time, area, and fishery stratum in FRAM. The CPUE was calculated from landings and effort data in the late 1980s to early 1990s base period when retention of coho was allowed in these fisheries. Adjustments that reduce the CNR estimates in the troll fisheries are made for targeting Chinook (0.25 reduction) and for a four-spread gear credit (reductions variable by area) in Oregon. Adjustments are not made in the recreational fisheries for Chinook target or gear type.

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

for OPI abundance was not deemed appropriate. The OPI coho abundance is an aggregate of stocks and may not adequately represent the coho stocks that are in these southern fisheries.

How CNR Mortalities are Modeled in FRAM

CNR mortalities are modeled as direct "dead fish" inputs to FRAM by fishery type, time, and area. The coho FRAM base period dataset contains stock abundances and exploitation rates by fishery type, time, and area derived from 1986-92 coded-wire tag data. Estimates of stock-specific mortality can be made using current year stock abundances and applying these base period exploitation rates. Summing up these individual mortality estimates and then comparing the sum to the number of CNR mortality input into the model, provides the adjustment ("effort scalar") that when applied to all coho stocks encountered in the fishery, will produce the target number of dead fish.

Because CNR mortalities are input into FRAM as dead fish, FRAM has to determine the number of dead coho by stock using base exploitation rates and stock abundances that add up to the total dead fish. If coho abundance is low for the stocks that contribute to these fisheries, but a high number of CNR mortalities are input into FRAM due to CPUE not being adjusted, the contact rates may need to be increased significantly to produce the correct number of total dead CNR coho. The forecast abundance of coho stocks that contribute to fisheries south of Humbug Mountain is very low in 2018 relative to past years.

Incorporating Stock Abundance in Estimating CNR Mortalities

As mentioned, the current method adjusts the CNR mortalities in the fisheries from Cape Falcon to Humbug Mountain using a relationship of base period OPI abundance to current year OPI abundance. Fisheries south of Humbug Mountain have no stock abundance adjustment.

The STT investigated three methods that capture the changes in CPUE that would be expected to occur due to variation in coho abundance.

Method One compared changes in CPUE to the changes in stock abundances from year to year. Even though it seems logical that with reduced abundance the CPUE should drop, the regression relationship was weak with similar CPUEs occurring across a wide range of stock abundances. Using CPUE has the additional disadvantage of needing to rely on interview or log book data for recent years where no retention was allowed or very old data where retention occurred. Furthermore, contemporary CPUE data was not available for all fishery sectors. Because of these shortcomings, we did not attempt to predict Rogue/Klamath coho exploitation rates using this method.

Method Two was a variation of the current method used for fisheries north of Humbug Mountain. In this method, instead of using relative abundance of OPI aggregate stocks between base years and current years, the relative abundance of a stock aggregate consisting of Oregon Coast Hatchery, Oregon Coast Natural (OCN), and Rogue/Klamath was used to adjust CNR estimates. These stocks are the main components in the fisheries south of Humbug Mountain and would be a better index of abundance. This system also assumes that this aggregate is distributed in the same way throughout these southern fisheries, just like the assumption for OPI stocks in the northern portion fisheries. Equal distribution north to south is probably not the case for either of these stock aggregate adjustment systems.

Method Three uses FRAM stock abundances as part of the system to scale the CNR estimates. In this method FRAM is run two times. The first run is conducted using the relative proportion of average effort in the base period compared to the projected current effort as a conventional landed catch input scalar to the model. This run produces a "landed catch" for each of the fisheries south of Humbug Mountain, which represents the number of encounters in each of these fisheries. Therefore, the estimate of

encounters are scaled both for the forecast stock abundances that are in the current FRAM run year and the current year fishing effort in vessel days or angler trips. Release mortality rates, drop-off rates, and gear/target adjustments are applied in the same manner as they are in fisheries north of Humbug Mountain to produce the CNR input in the second model run used to estimate stock exploitation rates.

Due to the general lack of high quality recent data on CPUE in non-retention fisheries, Method One was not evaluated further. Method Two was not evaluated further because of the likely violation of the equal distribution assumption for the aggregate in fisheries north and south of Humbug Mountain. As a result, the STT focused on further evaluation of Method Three.

Method Three Using FRAM Stock Abundances for CNR

We ran the March Alternatives using the Method Three two-step system described above. The first pass of FRAM produced the estimated encounters that associate the current stock abundances with the fishing effort projected for each 2018 Alternative. To these encounters we applied the release mortality rates, drop-off mortality, and gear/target reductions as per the current method. Because the 2018 stock abundances for Oregon coast and south stocks are much lower than previous years, and the current system doesn't capture this for fisheries south of Humbug Mountain, the FRAM-based estimates of CNR are much lower and hence the exploitation rates on Rogue/Klamath are greatly reduced (Table 1). The exploitation rates on OCN declined to a lesser extent (Table 2).

As a further test of method, we ran the final preseason FRAM for 2013, a year with similar fisheries south of Cape Falcon but higher coho stock abundances. Rogue/Klamath exploitation rates were lower, as expected, but not to the degree they are in 2018, presumably because the stock abundances weren't as low in 2013. The final 2013 preseason exploitation rate for Rogue/Klamath coho was 7.3% compared to a FRAM-based CNR version of 5.6%.

Summary

The STT's examination of the models used to forecast Rogue/Klamath coho exploitation rates indicated that the unusually high forecasts produced for the March Alternatives resulted from a lack of scaling base period CPUE to current coho stock abundances south of Humbug Mountain. The effect was particularly notable this year because coho stocks distributed south of Humbug Mountain have very low 2018 abundance forecasts. Three methods were proposed to address this issue and to make the modeling framework consistent with the other approaches used by the STT that account for annual variation in abundance when predicting CPUE. Based on our evaluation, the STT recommends the use of Method Three for forecasting coho CNR mortalities south of Humbug Mountain during the April Council meeting and into the future. If this modification were to be implemented in 2018, the predicted marine fishery exploitation rates for Rogue/Klamath coho would be reduced substantially relative to the exploitation rate forecasts presented in Preseason Report II (Table 1). The exploitation rates on OCN coho also declined, but to a lesser extent (Table 2). The STT believes this modification is warranted and is an improvement over the existing method that does not capture annual differences in stock abundances. Finally, Method Three is an application of an existing, approved model (coho FRAM), and the proposed changes are to model inputs and not model structure.

TABLE 1. RK coho exploitation rates from March Alternatives compared to Method Three FRAM based CNR.

	RK Coho --March			RK Coho --FRAM CNR		
Fishery	I	II	III	I	II	III
SOUTH OF CAPE FALCON						
Recreational:						
Cape Falcon to Humbug Mt.	0.5%	0.5%	0.4%	0.5%	0.5%	0.4%
Humbug Mt. to OR/CA border (KMZ)	1.1%	0.6%	0.2%	0.3%	0.2%	0.0%
OR/CA border to Horse Mt. (KMZ)	3.5%	4.5%	4.9%	0.6%	0.6%	0.8%
Fort Bragg	2.0%	2.6%	1.7%	0.3%	0.4%	0.3%
South of Pt. Arena	1.7%	1.1%	0.7%	0.2%	0.2%	0.1%
Troll:						
Cape Falcon to Humbug Mt.	0.1%	0.1%	0.1%	0.1%	0.1%	0.1%
Humbug Mt. to OR/CA border (KMZ)	0.2%	0.2%	0.0%	0.0%	0.0%	0.0%
OR/CA border to Horse Mt. (KMZ)	3.0%	2.5%	4.0%	1.5%	1.3%	2.0%
Fort Bragg	0.5%	0.5%	0.5%	0.0%	0.1%	0.1%
South of Pt. Arena	0.2%	0.1%	0.0%	0.0%	0.0%	0.0%
BUOY 10	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%
ESTUARY/FRESHWATER	NA	NA	NA	NA	NA	NA
TOTAL	12.9%	12.9%	12.7%	4.0%	3.6%	4.0%

TABLE 2. OCN coho exploitation rates from March Alternatives compared to Method Three FRAM based CNR.

	OCN Coho --March			OCN Coho --FRAM CNR		
Fishery	I	II	III	I	II	III
SOUTH OF CAPE FALCON						
Recreational:						
Cape Falcon to Humbug Mt.	6.8%	5.5%	8.2%	6.9%	5.6%	8.3%
Humbug Mt. to OR/CA border (KMZ)	0.5%	0.2%	0.1%	0.1%	0.1%	0.0%
OR/CA border to Horse Mt. (KMZ)	0.7%	0.8%	1.0%	0.1%	0.1%	0.2%
Fort Bragg	0.5%	0.7%	0.3%	0.1%	0.1%	0.0%
South of Pt. Arena	0.6%	0.4%	0.2%	0.1%	0.1%	0.0%
Troll:						
Cape Falcon to Humbug Mt.	0.6%	0.6%	0.5%	0.6%	0.6%	0.5%
Humbug Mt. to OR/CA border (KMZ)	0.1%	0.1%	0.0%	0.0%	0.0%	0.0%
OR/CA border to Horse Mt. (KMZ)	0.9%	0.9%	1.6%	0.4%	0.5%	0.7%
Fort Bragg	0.2%	0.2%	0.3%	0.0%	0.0%	0.0%
South of Pt. Arena	0.4%	0.3%	0.1%	0.1%	0.1%	0.0%
BUOY 10	0.1%	0.1%	0.1%	0.1%	0.1%	0.1%
ESTUARY/FRESHWATER	1.5%	1.6%	1.5%	1.6%	1.6%	1.6%
TOTAL	14.8%	12.7%	14.9%	12.1%	10.1%	12.5%

PFMC
04/06/18

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

MASON D. MORISSET (WA)
THOMAS P. SCHLOSSER (WA)
THANE D. SOMERVILLE (WA, OR, AZ)

OF COUNSEL
FRANK R. JOZWIAK (WA)

811 FIRST AVENUE, SUITE 218
SEATTLE, WA 98104

WWW.MSAJ.COM

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

February 28, 2019

The Honorable Wilbur Ross
Secretary of Commerce
United States Department of Commerce
1401 Constitution Avenue
Washington, DC 20230

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

Chuck Tracy, Executive Director
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, OR 97220-1384

Samuel D. Rauch III, Deputy Assistant
Administrator for Regulatory Programs
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Barry Thom, Regional Administrator
NOAA Fisheries, West Coast Fisheries Region
1201 NE Lloyd Blvd., Suite 1100
Portland, OR 97231

Re: Notice of Violations of the Endangered Species Act

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

This letter provides notice that the Department of Commerce, National Marine Fisheries Service ("NMFS"), and the Pacific Fishery Management Council ("PFMC") are acting in violation of the Endangered Species Act ("ESA"). The violations arise from NMFS' failure to reinitiate formal consultation pursuant to 50 C.F.R. § 402.16 and 16 U.S.C. § 1536 prior to approval and implementation of its 2019 management measures for ocean salmon fishery regulations (the "2019 Management Measures"), which are scheduled to be approved by the Secretary of Commerce on or around May 1, 2019.

This notice is submitted pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g). This notice provides the Department of Commerce, NMFS, and the PFMC "an opportunity to review their actions and take corrective measures . . . ." *SW Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 520 (9th Cir. 1998). Specifically, NMFS should reinitiate formal consultation related to impacts of the ocean Chinook fishery on SONCC coho because one or more of the triggering events identified in 50 C.F.R. § 402.16 have occurred.

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

The Tribe previously sent you a 60-day notice letter providing notice of alleged violations of the ESA on July 18, 2018. That prior 60-day notice letter is attached hereto for your reference. The violations addressed in that prior letter have not been corrected. Following the passage of sixty days without corrective action, the Tribe filed suit in the Northern District of California pursuant to 16 U.S.C. § 1540(g) seeking declaratory and injunctive relief. *Hoopa Valley Tribe v. Ross et al.,* Case No. 18-cv-6191-JSW. Absent corrective measures specifically including re-initiation of formal consultation pursuant to Section 7 of the ESA to re-evaluate the impacts of the ocean Chinook fishery on SONCC coho, the Tribe may seek to amend its complaint in that litigation to incorporate the new violations addressed in this letter or otherwise sue to remedy the continuing violations of the ESA.

I. LEGAL BACKGROUND

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

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

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

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

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The ESA implementing regulations provide:

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

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

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

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

(d) if a new species is listed or critical habitat designated that may be affected by the identified action.

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

the Federal agency . . . shall make no irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid violating section 7(a)(2). This prohibition is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied." 16 U.S.C. § 1536(d).

II. The 1999 Supplemental Biological Opinion and Incidental Take Statement

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

> The ocean salmon fisheries in the exclusive economic zone (EEZ) off Washington, Oregon, and California are managed under authority of the Magnuson-Stevens Act. Annual management recommendations are developed according to the "Pacific Coast Salmon Plan" of the Pacific Fishery Management Council (PFMC). The PFMC provides its management recommendations to the Secretary of Commerce, who implements the measures in the EEZ if they are found to be consistent with the Magnuson-Stevens Act and other applicable law. Because the Secretary acting through NMFS, has the ultimate authority for the Pacific Coast Salmon Plan and its implementation, NMFS is both the action agency and the consulting agency in this consultation.

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

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

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In the Supplemental Biological Opinion, NMFS determined that implementation of the FMP and Amendment 13 was likely to appreciably reduce the likelihood of both the survival and recovery of SONCC coho. Supp. BiOp., p. 30. Thus, NMFS developed a reasonable and

prudent alternative that required PFMC fisheries be crafted to achieve an ocean exploitation rate on SONCC coho of no greater than 13%, which includes all harvest related mortality. Supp. BiOp, pp. 31-32. "Management measures developed under the FMP must be designed to achieve an ocean exploitation rate on Rogue/Klamath hatchery stocks of no greater than 13 % . . . ." Supp. BiOp, p. 32.

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

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

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

III. The 2018 Management Measures

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

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

The drop in projected incidental take of SONCC coho (despite the increase in projected/allowable harvest of KRFC) was due to a sudden change by the PFMC Salmon Technical Team (STT) in the inputs and assumptions that are used and have historically been used to calculate incidental take in the FRAM. *See Salmon Technical Team Report on Tentative*

Adoption of 2018 Management Measures for Analysis: Investigation of Exploitation Rates on Rogue/Klamath Coho in Fisheries South of Cape Falcon (April 2018) ("STT Report"). The STT explained that:

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

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

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

IV. The 2019 Management Measures

The PFMC and NMFS are currently developing the management measures for the 2019 season (the "2019 Management Measures"). Under the current schedule, the 2019 Management Measures will be submitted to the Secretary for approval and implementation will commence on May 1, 2019. It is the Tribe's understanding that PFMC and NMFS intend to continue to use the methodology from the 2018 STT Report that was utilized for the first time in the 2018 Management Measures and without reinitiation of formal consultation under Section 7 of the ESA. As with the 2018 Management Measures, the continued use of the new methodology from the 2018 STT Report in the calculation of incidental take of SONCC coho without first reinitiating formal consultation with NMFS is a violation of 50 C.F.R. § 402.16 and Section 7 of the ESA. Absent reinitiation of formal consultation prior to the use of the April 2018 STT Report methodology in the 2019 Management Measures, the Tribe hereby provides notice that it intends to sue or otherwise modify its existing complaint in the *Hoopa Valley Tribe v. Ross* litigation to incorporate claims relating to the unlawful failure to reinitiate consultation with regard to the 2019 Management Measures that affect incidental take of SONCC Coho.

V. Additional Bases For Reinitiation of Consultation Regarding Impacts of Ocean Chinook Fishery on SONCC Coho.

The Supplemental BiOp relating to the impacts of the ocean fishery on SONCC coho is now twenty years old. Over the past twenty years, SONCC coho have failed to recover. According to the most recent five-year status review, which was published by NMFS in 2016, twenty-four of thirty-one independent populations of SONCC coho remain at a high risk of extinction with the others at a moderate risk of extinction.[1] 2016 Status Review, pp. 21. None of the populations were at a low risk of extinction as of the last status review in 2016. *Id.* at 48. The status review states: "All core populations (those intended to serve as anchors for recovery) are thousands of adults short of the numbers needed for them to play their role in recovery of the entire ESU. Our analysis of the ESA section 4(a)(1) factors indicates there is heightened risk to the SONCC coho salmon ESU's persistence since our last status review in 2011." *Id.* According to the status review, populations in the Shasta River (which has the longest duration of monitoring data) have continued to slightly decline over the past fourteen years. *Id.* at 16-17.

Given that SONCC coho populations have not improved or recovered and generally remain at a high risk of extinction, NMFS must reevaluate whether a 13% ocean exploitation rate of incidental take is appropriate for SONCC coho in the ocean Chinook harvest. In addition to the length of time since the last consultation in 1999 and the failure of SONCC coho to recover in any respect during that time period, there is specific new information that NMFS should evaluate in the context of a new consultation on the ocean fishery impacts on SONCC Coho.

In recent years, SONCC coho have recently suffered significant impacts from disease in the Klamath River. *See Hoopa Valley Tribe v. NMFS*, 230 F. Supp. 3d 1106 (N.D. Cal. 2017).

[1] The 2016 status review is available at:
https://www.westcoast.fisheries.noaa.gov/publications/status_reviews/salmon_steelhead/2016/2016_soncc_coho.pdf

In 2014, 81% of sampled juvenile Chinook (used as a surrogate for SONCC coho) tested positive for C. shasta. *Id.* at 1112. In 2015, 91% of the sampled fish tested positive. *Id.* In 2016, 48% of the sampled fish tested positive. *Id.* at 1138. This disease outbreak had a significant effect on SONCC coho populations and the effects of the disease outbreak were not fully known or accounted for in the 2016 status review. Thus, the current condition of SONCC coho is likely even worse than reflected in the 2015 status review. PFMC, when formulating its 2018 Management Measures, noted that there was a relatively low ocean abundance for SONCC Coho, which is likely a result of the disease outbreak and other environmental conditions not fully evaluated in the 1999 Supplemental BiOp. NMFS did not have and did not consider the possibility of such a large and long-lasting disease outbreak when it set is 13% exploitation rate for ocean harvest in the 1999 Supplemental BiOp.

The impacts of disease have also had a documented impact on overall Chinook populations. For example, NMFS and PFMC are currently in the process of developing a rebuilding plan for Klamath River Fall Chinook (KRFC) due to their current status as "overfished."[2] In its draft rebuilding plan, PFMC has identified the elevated disease levels in 2014-2016 as one of the significant causes for the decline in KRFC and their falling into overfished status. KRFC Rebuilding plan, pp. 17-22, 45. Also, in February 2018, NMFS initiated a status review with respect to a petition to list the Upper Klamath-Trinity River (UTKR) Chinook as a threatened or endangered species. 83 Fed. Reg. 8410 (Feb. 27, 2018). Even though NMFS had previously rejected petitions to list Klamath Chinook on two prior occasions (1998 and 2012), NMFS found that such petition may be warranted at this time due in large part to the disease issues facing Chinook (and which also affect SONCC Coho) in the Klamath River. 83 Fed. Reg. 8413. The State of California has also recently initiated a status review regarding the potential listing of spring-runs of UKTR Chinook under the State of California's Endangered Species Act. The 1999 Supplemental BiOp did not evaluate or consider the effects of such a large disease outbreak or how that should affect the exploitation rate for SONCC Coho in the ocean harvest.

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

In the Incidental Take Statement provided with the 1999 Supplemental BiOP, NMFS set a maximum SONCC coho exploitation rate of 13% as related to the ocean Chinook harvest. But in the twenty years that have passed since 1999, SONCC coho populations have failed to

[2] Available at: https://www.pcouncil.org/wp-content/uploads/2019/01/1_KRFC_Draft_9_010419.pdf

recover, have continued in a downward trajectory, and remain at a high risk of extinction. Moreover, over the past five years, SONCC coho juveniles have repeatedly been subjected to extremely high rates of disease and SONCC coho adults have experienced exceptionally warm and adverse ocean conditions. These same adverse habitat conditions have led to a designation of KRFC (which NMFS uses as a surrogate for SONCC coho in certain management actions) as overfished due to their low average abundance in recent years. With SONCC coho populations suffering from extremely adverse habitat conditions in recent years, and with those conditions likely to persist due to the warming and changing climate, NMFS must re-evaluate whether 13% is an appropriate exploitation rate for incidental take in the ocean harvest or whether some other, likely lower, exploitation rate is required to ensure the continued survival and recovery of SONCC coho.

Based on this new information, the Tribe urges you to reinitiate formal consultation as required by 50 C.F.R. § 402.16 and 16 U.S.C. § 1536 with regard to the appropriate level of impacts on SONCC coho resulting from the ocean Chinook fishery. During such consultation, incidental take of SONCC coho resulting from the ocean Chinook fishery should be calculated in the same manner as it was prior to the 2018 Management Measures and without using the new methodology developed by the STT and used for the first time in 2018. The Tribe also again requests consultation pursuant to Secretarial Order 3206 to discuss the specific impacts caused to the Tribe by your actions.

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

Thomas P. Schlosser
Attorneys for Hoopa Valley Tribe

cc: Sarah Sheffield, U.S. DOJ

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tds:2/28/19

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

MASON D. MORISSET (WA)
THOMAS P. SCHLOSSER (WA)
THANE D. SOMERVILLE (WA, OR, AZ)

OF COUNSEL
FRANK R. JOZWIAK (WA)

811 FIRST AVENUE, SUITE 218
SEATTLE, WA 98104

WWW.MSAJ.COM

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

July 18, 2018

The Honorable Wilbur Ross
Secretary of Commerce
United States Department of Commerce
1401 Constitution Avenue
Washington, DC 20230

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

Chuck Tracy, Executive Director
Pacific Fishery Management Council
7700 NE Ambassador Place, Suite 101
Portland, OR 97220-1384

Samuel D. Rauch III, Deputy Assistant
Administrator for Regulatory Programs
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Barry Thom, Regional Administrator
NOAA Fisheries, West Coast Fisheries Region
1201 NE Lloyd Blvd., Suite 1100
Portland, OR 97231

Re: Notice of Violations of the Endangered Species Act

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

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

Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 520 (9th Cir. 1998). Specifically, NMFS should rescind the 2018 Management Measures as related to incidental take of SONCC Coho and reinitiate formal consultation related to impacts of the proposed 2018 Management Measures on SONCC Coho.

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

I. LEGAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

Thomas P. Schlosser
Attorneys for Hoopa Valley Tribe

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