

1 JEAN E. WILLIAMS,  
2 Deputy Assistant Attorney General  
3 Environment & Natural Resources Division  
4 SETH M. BARSKY, Chief  
5 MEREDITH L. FLAX, Assistant Chief  
6 SARAH J. SHEFFIELD, Trial Attorney  
7 HI Bar Number 10415  
8 U.S. Department of Justice  
9 Environment & Natural Resources Division  
10 Wildlife & Marine Resources Section  
11 Ben Franklin Station, P.O. Box 7611  
12 Washington, D.C. 20004-7611  
13 Telephone: (202) 305-0211  
14 Facsimile: (202) 305-0275  
15 Email: sarah.sheffield@usdoj.gov

16 Attorneys for Federal Defendants

17 **IN THE UNITED STATES DISTRICT COURT**  
18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

19 HOOPA VALLEY TRIBE, ) CASE NO. 4:18-CV-06191-JSW  
20 ) ORDER GRANTING  
21 Plaintiff, ) **STIPULATED AGREEMENT AND**  
22 ) **MOTION TO STAY CASE**  
23 v. ) AS MODIFIED HEREIN  
24 )  
25 WILBUR ROSS, in his official capacity )  
26 as U.S. Secretary of Commerce, and ; )  
27 NATIONAL MARINE FISHERIES )  
28 SERVICE, )  
29 Defendants. )  
30 )  
31 )  
32 )  
33 )  
34 )

35 Plaintiff Hoopa Valley Tribe and Defendants Wilbur Ross, in his official capacity as  
36 Secretary of the Department of Commerce, and the National Marine Fisheries Service  
37 (“Service”) hereby agree and stipulate as follows:  
38

1           WHEREAS, in 1997, the Service listed the Southern Oregon/Northern California Coastal  
2 (“SONCC”) coho salmon Evolutionary Significant Unit (“ESU”) as a threatened species under  
3 the Endangered Species Act (“ESA”).

4           WHEREAS, in 1999, the Service consulted on the effects to Oregon Coastal coho,  
5 Central California Coastal coho and SONCC coho salmon from the salmon fisheries  
6 implemented consistent with Amendment 13 to the Pacific Coast Salmon Fishery Management  
7 Plan (“Salmon FMP”) and issued the *1999 Supplemental Biological Opinion and Incidental Take*  
8 *Statement, covering the Pacific Coast Salmon Plan and Amendment 13 to the Plan* (“Biological  
9 Opinion”). The Biological Opinion evaluated the effects of the ocean salmon fisheries on  
10 SONCC coho. In order to avoid the likelihood of jeopardizing the continued existence of  
11 SONCC coho, the Biological Opinion requires, as relevant here, that ocean fisheries’  
12 management measures developed under the Salmon FMP achieve an ocean exploitation rate on  
13 Rogue/Klamath coho salmon (the indicator stock representing the SONCC coho salmon ESU) of  
14 no more than 13%. This 13% exploitation rate is also used as the incidental take limit in the  
15 Incidental Take Statement provided with the 1999 Biological Opinion.  
16  
17  
18

19           WHEREAS, since the issuance of the 1999 Biological Opinion, the Service and the  
20 Pacific Fishery Management Council (“Council”) have used the coho salmon Fishery Regulation  
21 and Assessment Model (“FRAM”) to, inter alia, estimate the exploitation rate from the proposed  
22 ocean salmon fisheries that encounter SONCC coho salmon. This estimate is used to determine  
23 whether the exploitation rate on SONCC coho salmon anticipated from implementation of an  
24 annual proposed fishing regime is less than the 13% exploitation rate incidental take limit  
25 established in the 1999 Biological Opinion.  
26

27           WHEREAS, in April 2018, the Council’s Salmon Technical Team (“STT”), upon request  
28

1 of the Council, issued a report entitled “Investigation of Exploitation Rates on Rogue/Klamath  
2 Coho in Fisheries South of Cape Falcon,” (“STT Report”) that made recommendations to the  
3 Council relating to the Council’s annual forecast of Rogue/Klamath coho exploitation rates.

4 WHEREAS, in April 2018, the Council adopted the 2018 ocean salmon management  
5 measures which were developed using an updated FRAM approach that incorporated the  
6 recommendations of the STT Report. The Service promulgated the management measures on  
7 May 1, 2018.  
8

9 WHEREAS, in April 2019, the Council adopted the 2019 ocean salmon management  
10 measures which were developed using the updated FRAM approach and the Service promulgated  
11 the management measures on May 6, 2019.  
12

13 WHEREAS, on October 10, 2018, Plaintiff filed a lawsuit under the ESA or, in the  
14 alternative, the Administrative Procedure Act (“APA”), alleging that the Service failed to  
15 reinstate formal consultation pursuant to Section 7 of the ESA regarding the impacts of ocean  
16 salmon fisheries on SONCC coho salmon. ECF No. 1.  
17

18 WHEREAS, on June 3, 2019, Plaintiff filed a first amended complaint. ECF No. 46. In  
19 addition to the claims raised in its original complaint, Plaintiff alleges that the 2019 management  
20 measures, and other new information on the status of SONCC coho, require reinstitution of  
21 consultation regarding the impacts of the ocean salmon fisheries on SONCC coho salmon.  
22

23 WHEREAS, in June 2018, the Service’s West Coast Region developed a strawman  
24 process and draft Terms of Reference for the purposes of developing a new harvest control rule  
25 for SONCC coho salmon, which was updated in June 2019. Harvest control rules are  
26 management measures used to determine appropriate harvest levels given social, economic and  
27 biological objectives. As proposed, the new SONCC coho control rule would comprehensively  
28

1 address impacts to SONCC coho salmon in both ocean and in-river areas, and could potentially  
2 inform tribal/non-tribal sharing in the Klamath River. The Service has proposed the control rule  
3 be developed through a workgroup of tribal, state and federal participants.

4 WHEREAS, the draft Terms of Reference estimate that the SONCC coho control rule  
5 will take approximately eighteen months to develop, including development, modification and  
6 deliberations through the public Council process. Once adopted through the Council, the harvest  
7 control rule would be transmitted to the Service for action under the Magnuson-Stevens Fishery  
8 Conservation and Management Act (“MSA”) and Section 7 of the ESA.

9  
10 WHEREAS, since June 2019, the Parties have engaged in mediation in an effort to  
11 resolve this dispute absent further litigation. As part of mediation, the Parties have discussed  
12 next steps for the SONCC coho control rule as a means to resolve the litigation.

13  
14 NOW, THEREFORE, IT IS STIPULATED BY AND BETWEEN THE PARTIES AS  
15 FOLLOWS:

16 1. The Parties agree to a stay of this litigation to allow the Service to complete the SONCC  
17 coho harvest control rule and any consultation thereon, as described in the following paragraphs.

18 2. To achieve this stay, the Service agrees to the commitments outlined in paragraphs 3, 5,  
19 and 6. If, however, the Service does not meet any of the commitments outlined in paragraphs 3,  
20 5, and 6, Plaintiff’s sole remedy is to terminate this Stipulated Agreement and petition the Court  
21 to lift the stay and to recommence the litigation. Nothing in this paragraph 2 shall limit  
22 Plaintiff’s rights to pursue claims relating to the Service’s ESA consultation or lack thereof.

23 3. The Service agrees to propose a process to develop the SONCC coho harvest control rule  
24 to the Council for consideration at the Council’s April 2020 meeting. The Service’s proposal  
25 will include a timeline for development of the SONCC coho control rule and its completion.  
26  
27  
28

1 4. If, by May 31, 2020, the Council does not agree to consider a process to develop the  
2 SONCC coho harvest control rule, Plaintiff may terminate this Stipulated Agreement and may  
3 petition the Court to lift the stay and recommence the litigation.

4 5. If, by May 31, 2020, the Council agrees to consider a process to develop the SONCC  
5 coho harvest control rule, the Service agrees to provide public updates on the progress of the  
6 SONCC coho harvest control rule. Such updates shall be provided at the time of each Council  
7 meeting where the SONCC coho harvest control rule is on the Council agenda.

8 6. In the event that a new SONCC coho control rule is approved by the Council, and if the  
9 Service determines pursuant to 50 C.F.R. 402.14(a) that the rule may affect SONCC coho, the  
10 Service shall conduct a formal consultation pursuant to Section 7 of the ESA on the effects of the  
11 SONCC coho control rule on SONCC coho salmon prior to adoption of the rule by the Service  
12 unless formal consultation is excepted pursuant to 50 C.F.R. 402.14(b).

13 7. If, by November 30, 2021, the Council does not approve a new SONCC coho control  
14 rule, Plaintiff may terminate this Stipulated Agreement and may petition the Court to lift the stay  
15 and recommence the litigation.

16 8. If any consultation described in paragraph 6 of this Stipulated Agreement has not been  
17 initiated by December 15, 2021, Plaintiff may terminate this Stipulated Agreement and may  
18 petition the Court to lift the stay and recommence the litigation. In addition, if the consultation  
19 described in paragraph 6 of this Stipulated Agreement does not conclude before the 135<sup>th</sup> day  
20 after the date on which consultation is initiated, Plaintiff may terminate this Stipulated  
21 Agreement and may petition the Court to lift the stay and recommence the litigation.

22 9. The Parties may modify the deadlines in paragraphs 3-8 of this Stipulated Agreement by  
23 mutual agreement.  
24  
25  
26  
27  
28

1 10. If the Service meets the commitments set forth in paragraphs 3, 5, and 6, and completes  
2 consultation within the timeframe identified in paragraph 8, the Parties shall jointly and promptly  
3 stipulate to the dismissal of Plaintiff's claims in this litigation with prejudice. The Parties agree  
4 that, in the event of such dismissal, Plaintiff fully reserves its rights to challenge any aspect of  
5 the Service's ESA consultation or lack thereof and Defendants reserve any and all defenses to  
6 such challenge. Plaintiff may bring any claims, known or unknown, that it may have with  
7 respect to the Service's ESA consultation or the lack thereof, but it may not bring claims that  
8 arise solely from the 1999 Biological Opinion. Other than claims expressly described in  
9 paragraph 10, this Stipulated Agreement does not cover and has no effect on any claims of any  
10 kind, known or unknown, past, present, or future, that the parties may have against each other.  
11  
12

13 In light of the above Stipulated Agreement, the Parties respectfully request that the Court  
14 stay this case and enter their Proposed Order.  
15

16 Dated: March 2, 2020

17 Respectfully submitted,

18 MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE

19 /s/ Thomas P. Schlosser

20 Thomas P. Schlosser WSBA #06276

21 [t.schlosser@msaj.com](mailto:t.schlosser@msaj.com)

22 Thane D. Somerville WSBA #31468

23 [t.somerville@msaj.com](mailto:t.somerville@msaj.com)

24 811 First Avenue, Suite 218

25 Seattle, WA 98104

26 Tel: 206-386-5200

27 Attorneys for Plaintiff Hoopa Valley Tribe

28 JEAN E. WILLIAMS,

Deputy Assistant Attorney General

Environment & Natural Resources Division

SETH M. BARSKY, Chief

MEREDITH L. FLAX, Assistant Chief

*/s/ Sarah J. Sheffield*

SARAH J. SHEFFIELD

Trial Attorney HI Bar Number 10415

U.S. Department of Justice

Environment & Natural Resources Division

Wildlife & Marine Resources Section

Ben Franklin Station

P.O. Box 7611

Washington, DC 20044-7611

Phone: (202) 305-0211

Fax: (202) 305-0275

*Attorneys for Defendants*

**ATTORNEY ATTESTATION OF CONCURRENCE**

I hereby attest that I have obtained concurrence in the filing for the signature of all counsel indicated by a “conformed” signature (“/s/”) within this e-filed document, in accordance with Civil L.R. 5-1(i).

Dated: March 2, 2020

*/s/ Sarah J. Sheffield*

SARAH J. SHEFFIELD

1 PURSUANT TO STIPULATION, IT IS SO ORDERED. The parties shall file a joint status report  
2 on May 31, 2020, and the Court reserves the right to require further status reports during the course  
3 of the stay.  
4

5 Date: March 3, 2020

  
\_\_\_\_\_

Honorable Jeffrey S. White

U.S. District Judge

6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28