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Re: Sixty Day Notice of Intent to Sue For Violations of the Endangered Species Act Regarding Operation of the Trinity River Hatchery

Dear Recipients**:**

On behalf of the Hoopa Valley Tribe (Hoopa) this letter provides notice that the United States Bureau of Reclamation ("Reclamation") and California Department of Fish and Wildlife ("CDFW") are acting in violation of the Endangered Species Act ("ESA") in regards to operation of the Trinity River Hatchery (TRH). Specifically, Reclamation has failed and is failing to comply with some mandatory terms and conditions of two Biological Opinions applicable to TRH operations.[1] Both Reclamation and CDFW are unlawfully taking Southern

[1] The applicable Biological Opinions are: (1) June 11, 2020 Biological Opinion re 4d Limit for the Trinity River Coho Salmon Hatchery and Genetic Management Plan (the "HGMP BiOp"); and (2) August 20, 2018 Biological Opinion for the Artificial Propagation of Steelhead and Chinook Salmon at Trinity River Hatchery (the "Steelhead/Chinook BiOp").

Oregon/Northern California Coast (SONCC) Coho Salmon in violation of the ESA through their current operations of the TRH. Absent compliance with the mandatory terms and conditions set forth in the applicable Biological Opinions, Reclamation and CDFW lack any safe harbor from liability under the ESA for taking SONCC Coho.

This notice is submitted pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g). This notice provides Reclamation and CDFW "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). Hoopa demands that Reclamation and CDFW promptly comply with the mandatory terms and conditions of the applicable Biological Opinions (BiOPs)and other applicable obligations under the ESA. If corrective action is not taken to comply with the mandatory terms and conditions in the applicable BiOps, the Tribe may file suit against Reclamation and CDFW pursuant to the ESA.

Background

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 own 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).

The Trinity River Division (TRD) of the Central Valley Project devastated anadromous salmon runs in the Trinity River Basin. Construction of Lewiston Dam blocked access to 109 miles of salmon and trout spawning and rearing habitat. Pursuant to federal law, TRH was constructed and is operated to mitigate for damage to the fishery caused by this significant loss in upstream habitat. Reclamation funds operation and maintenance of TRH, which is operated and managed by CDFW.

In 1997, NMFS listed SONCC Coho salmon as threatened under the ESA. 62 Fed. Reg. 24,588 (May 6, 1997). In 1940, SONCC Coho salmon, a population that includes Trinity and Klamath river coho stocks, were estimated to range between 150,000 and 400,000 naturally spawned fish annually. By the 1970's, this Coho population had become very depressed with naturally producing adults declining to approximately 10,000. The California portion of the population had by then declined to six percent or less of its abundance during the 1940's. NMFS identified agricultural development and water withdrawals for irrigation as major activities responsible for the decline of SONCC coho salmon.

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). "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. This obligation extends to ongoing actions over which the agency retains discretionary control. *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 (i.e., NMFS) 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. 16 U.S.C. § 1536(b)(3)(A); 50 CFR § 402.14(g)-(h).

The ESA further prohibits unauthorized "take" of endangered species, 16 U.S.C. § 1538(a)(1); *see Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt*, 515 U.S. 687 (1995). Congress intended the term "take" to be applied in the "broadest possible manner to include every conceivable way" in which a person could harm or kill fish or wildlife. S. Rep. No. 307, 93rd Cong., 1st Sess. 1, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2989, 2995. The take prohibition has been extended to threatened species, and salmon in particular. 65 Fed. Reg. 42,422 (2000). The ESA take prohibition applies to all "persons." Under the ESA, "person" is defined to include any "officer, employee, agent, department, or instrumentality of the Federal Government, of any State," or of local governments. 16 U.S.C. § 1532(13).

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 that may occur as well as mandatory "terms and conditions" that must be complied with in order to retain coverage under the incidental take statement. 16 U.S.C. § 1536(b)(4); 50 CFR § 402.14(i).

History of Consultation re TRH operations

Prior to 2015, Reclamation and CDFW funded and operated the TRH to release approximately 800,000 hatchery steelhead trout and approximately 500,000 hatchery coho salmon into the Trinity River and its tributaries.

On April 28, 2014, following a lawsuit filed by the Environmental Protection Information Center ("EPIC"), the U.S. District Court for the Northern District of California entered a consent decree that directed Reclamation and CDFW to release in calendar year 2015 no more than 448,000 hatchery steelhead trout and no more than 300,000 hatchery coho salmon from TRH into the Trinity River. The consent decree further directed preparation of a Hatchery Genetics Management Plan (HGMP) for the coho salmon program at TRH. The consent decree imposed no obligations on TRH following formal approval by NMFS of the HGMP for the TRH; rather, following completion of the HGMP, the terms of the HGMP and related BiOp would govern.

The HGMP was completed in December 2017 and submitted to NMFS for approval under the ESA. The HGMP stated that the goal of the TRH coho program was to "provide fish for harvest in a manner consistent with the conservation of the Trinity River Coho population while meeting TRH mitigation requirements." HGMP, p. ix. The HGMP stated that the "program is expected to produce on average approximately 10,000 adult Coho." *Id.*

The HGMP established certain performance metrics to evaluate the program going forward, which included pHOS (proportion of hatchery origin spawners) under 30 percent (Upper Trinity River Coho population), minimum PNI (proportionate natural influence) of 0.5, average PNI greater than 0.67 and proportion natural origin brood stock (pNOB) of 100 percent. HGMP, p. xi, p. 14. Regarding the "expected size of the program," the HGMP further stated that the "number of yearling Coho salmon released each year will depend on the ability of managers to achieve pHOS, PNI, PNOB, and natural spawning escapement criteria established for each of the four program phases. Hatchery production will not exceed 300,000 yearling smolts from 2015-2020. At the end of this period, the hatchery program will be reviewed by a technical team and a decision-making body and a recommendation made to NMFS for continued program operation." HGMP, p. 29. To date, the referenced decision-making body has not been convened and as described further herein, the required hatchery program review has not occurred.

In 2020, NMFS determined in its HGMP BiOp that implementation of the HGMP at TRH is not likely to jeopardize the continued existence of the SONCC coho salmon ESU or destroy or adversely modify its designated critical habitat. HGMP BiOP, p. 80. NMFS determined that HGMP implementation was reasonably certain to result in take of SONCC coho. *Id.* The HGMP BiOp set a number of surrogate measures to determine whether the permissible amount or extent of incidental take was exceeded. HGMP BiOp, p. 81-82.

The HGMP BiOp set forth certain nondiscretionary "reasonable and prudent measures" designed to "minimize the amount or extent of incidental take." *Id.* at p. 83. The HGMP BiOp also set forth certain nondiscretionary "terms and conditions." *Id.* at pp. 83 – 86. "If the entity to whom a term and condition is directed does not comply with the following terms and conditions, protective coverage for the proposed action would likely lapse." *Id.* at p. 83. To date, the mandatory terms and conditions have not been and are not being complied with.

Separately, on August 20, 2018, NMFS issued the Steelhead/Chinook BiOp. The Steelhead/Chinook BiOp analyzed only the effects of steelhead and Chinook propagation and release into the Trinity River at TRH. Consistent with the 2014 Consent Decree, the proposed federal action analyzed in the Steelhead/Chinook BiOp was the annual release of 4.3 million Chinook salmon juveniles and 448,000 steelhead juveniles into the Trinity River at TRH. Like the HGMP BiOp, the Steelhead/Chinook BiOp authorized take of SONCC coho subject to compliance with the incidental take statement, reasonable and prudent measures, and mandatory terms and conditions. Also, like those in the HGMP BiOp, the mandatory measures, terms and conditions have not been and are not being complied with.

Ongoing Violations of ESA

Reclamation and CDFW's funding and operations of the TRH are in violation of the ESA due to untimely compliance issues with the incidental take statements, reasonable and prudent

measures, and mandatory terms and conditions in both the HGMP BiOp and the Steelhead/Chinook BiOp. As discussed below, numerous required actions have not been completed and required deadlines have been missed, which make the anticipated re-evaluation of production levels impossible.

A. HGMP BiOp

The following list of non-compliant actions is not exclusive but is illustrative of the numerous areas of non-compliance. In summary, the failure of adequate monitoring (e.g. failure to provide NMFS with a "monitoring plan" by December 31, 2021) and lack of timely reporting, as required by the HGMP BiOp, makes it largely impossible to assess take and other impacts of TRH operations on SONCC coho, or to assess whether production numbers at TRH should be modified up or down.

Reclamation has failed to "develop a monitoring plan detailing how it will implement [Term and Condition #1a], and provide it to NMFS by December 31, 2021." HGMP BiOp, Term and Condition #1a. To the best of the Tribe's knowledge, the required monitoring plan has not yet been developed or submitted.

Reclamation has failed to "develop and collect all information sufficient to annually calculate the proportionate natural influence (PNI), including the proportion of natural origin brood stock (pNOB), and the proportion of hatchery origin spawners in the Trinity River basin upstream of the North Fork Trinity River" as required by HGMP BiOp Term and Condition 1b. Reclamation does not obtain or provide discrete estimates of natural and hatchery origin components of the three Trinity River populations. Without such discrete estimates of natural and hatchery origin fish in natural areas of Upper Trinity population, PNI cannot be precisely estimated.

Reclamation has failed to "annually review the status of the Trinity River coho salmon relative to population viability parameter triggers identified for each restoration phase to guide decisions regarding transition between the preservation, recolonization, and local adaptation phases" as required by HGMP BiOp Term and Condition 1c. Key metrics identified in the HGMP and associated BiOp for the Upper Trinity population are: pHOS < 30%; pNOB = 100%; NOR brood stock take $\leq$ 400; NOR spawners $\geq$ 1,460; HOR + NOR escapement $\geq$ 1,460. The approved HGMP called for revisiting production levels as early as 2021 and that this review would be informed by the aforementioned metrics. Today, while rough approximations for pHOS and escapement to Upper Trinity have been made available for 2021-2023 no formal process to revisit production levels has occurred.

Reclamation has failed to "ensure that all monitoring and research activities required to assess hatchery operations objectives outlined in the proposed action (Reclamation and CDFW 2017) and other studies to better understand the effects of the hatchery program on SONCC coho salmon are funded and implemented" as required by Reasonable and Prudent Measure 5 of the HGMP BiOp. Nor is all of the data collection required by Term and Condition (T&C) 5 occurring. And some of the data collection that is occurring is incomplete. For example, the Junction City Weir (JCW) is used as a proxy for the Upper Trinity Population (UTP), however,

estimates from this location fail to represent the North Fork Trinity to JCW inclusively. Hence, a considerable reach of the UTP habitat is not evaluated. Research necessary to quantify migration delays associated with the adult fish collection weirs, as required by T&C 5(c) is also not completed. Nor is the calculation of cumulative juvenile migration of hatchery coho salmon to the North Fork of the Trinity River completed, as required by T&C 5(d).

Reclamation has failed to "provide reports to NMFS annually for all funded hatchery operations, and for all M&E activities associated with the Proposed Action" as required by Reasonable and Prudent Measure 6.

The failure to comply with these terms and conditions makes it largely impossible to know whether the performance metrics identified in the HGMP BiOp and its incidental take statement are being achieved. In addition, the HGMP stated that hatchery production would be limited to 300,000 yearling coho smolts from 2015-2020 and that at the end of that five year period, "the hatchery program will be reviewed by a technical team and a decision making body and a recommendation made to NMFS for continued program operation." The failure of Reclamation to adequately fund, monitor, and report as required by the mandatory terms and conditions of the HGMP BiOP, and to establish the required "decision making body" has effectively precluded this reassessment.

Numerous of the other terms and conditions identified in the HGMP BiOp are either not being implemented or are being not fully implemented, resulting in further noncompliance with the HGMP BiOp and associated incidental take statement.

Due to the non-compliance with the requirements of the HGMP BiOp, there is not currently ESA coverage for take of SONCC coho associated with TRH operations. Reclamation and CDFW must immediately bring TRH operations into compliance with the requirements of the HGMP BiOp.

B. Steelhead/Chinook BiOp

Terms and conditions of the Steelhead/Chinook BiOp are also not being complied with. By way of example, Reclamation has failed to "fund a study with the purpose of quantifying [the ecological effects of TRH releases on Coho salmon, including near-shore ocean effects], and recommending ways to reduce those effects" as required by Steelhead/Chinook BiOp Term and Condition #3. The failure to fund and develop this study has precluded re-evaluation of the effects of predation by steelhead on SONCC coho and has precluded a reassessment of the appropriate number of steelhead releases from TRH. The long-term monitoring study of ocean productivity required by RPM 3 is also not implemented. Additionally, RPM 2, T&C (b), addressing the modification of yearling/sub-yearling Chinook production levels has not been implemented.

C. Hatchery Management and Disease Issues

Unpermitted take of SONCC coho is also occurring at TRH as a result of ineffective and sub-optimal operations practices, which have led to increased and significant rates of death of

SONCC coho reared at the hatchery. For example, in the year 2023 (Brood Year 2022), despite collecting approximately 850,000 eggs, only approximately 150,000 SONCC coho releases were made due to substantial disease related deaths. This not only results in significant take pursuant to the ESA but limits the amount of fish available for harvest by Hoopa, including at its selective weir operation.

Conclusion

The Hoopa Valley Tribe demands that Reclamation and CDFW proceed to immediately comply with the mandatory reasonable and prudent measures and terms and conditions of both the HGMP BiOp and the Steelhead/Chinook BiOp. Absent Reclamation and CDFW bringing their actions into compliance with the ESA within 60 days, Hoopa may seek redress in court pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g), and other applicable laws.

Sincerely,

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