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May 17, 2016

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

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

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

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

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

Re: Notice of Violations of the Endangered Species Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely yours,

MORISSET, SCHLOSSER, JOZWIAK & SOMERVILLE



Thomas P. Schlosser

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True, K., Bolick, A., & Foott, J. (2015). Myxosporean Parasite (*Ceratonova shasta* and *Parvicapsula minibicornis*) Annual Prevalence of Infection in Klamath River Basin Juvenile Chinook Salmon, April-August 2014. U.S. Fish & Wildlife Service California – Nevada Fish Health Center, Anderson, CA. <http://www.fws.gov/canvfhc/reports.asp>.

True, K., Voss, A., & Foott, J. Scott (2016). Myxosporean Parasite (*Ceratonova shasta* and *Parvicapsula minibicornis*) Prevalence of Infection in Klamath River Basin Juvenile Chinook Salmon, April - July 2015. U.S. Fish & Wildlife Service California – Nevada Fish Health Center, Anderson, CA. <http://www.fws.gov/canvfhc/reports.asp>.