



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington Fish and Wildlife Office
500 Desmond Dr. S.E., Suite 102
Lacey, Washington 98503



In Reply Refer to:
FWS/R1/2023-0014641

Trevor Spradlin, Deputy Chief
NOAA National Marine Fisheries Service
Office of Protected Resources
ATTN: E. Keane; J. Heckwolf
1315 East-West Highway
Silver Spring, Maryland 20910

Dear Mr. Spradlin:

Subject: Makah Indian Tribe Waiver Under the Marine Mammal Protection Act

On November 2, 2022, we received from the National Marine Fisheries Service – Office of Protected Resources (NMFS), a Biological Evaluation (BE) and request for informal consultation pursuant to section 7(a)(2) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (ESA). Meetings were held on December 16, 2022, and on January 4 and 25, 2023. And, on February 3, 2023, we received your BE Addendum. All the information needed to complete consultation was received on February 3, 2023.

Specifically, NMFS requested informal consultation for the species identified below:

Bull trout (*Salvelinus confluentus*)

Marbled murrelet (*Brachyramphus marmoratus*)

This letter is in response to your request, for our concurrence with “may affect, not likely to adversely affect” determinations for the bull trout and marbled murrelet. NMFS has determined that the proposed action will have “no effect” on additional listed species and designated critical habitat that are known to occur in Clallam County, Washington, and the Makah Indian Tribe’s usual and accustomed fishing grounds (U&A). The U.S. Fish and Wildlife Service (Service) has no regulatory or statutory authority for concurring with “no effect” determinations, and no consultation with the Service is required. We recommend that the action agency document their analyses on effects to listed species, and maintain that documentation as part of their project file.

PACIFIC REGION 1

IDAHO, OREGON*, WASHINGTON,
AMERICAN SAMOA, GUAM, HAWAII, NORTHERN MARIANA ISLANDS

*PARTIAL

NMFS proposes to waive certain provisions of the Marine Mammal Protection Act (MMPA), to promulgate specific MMPA regulations and/or rules, and proposes to issue a MMPA permit(s) to the Tribe. The proposed action would provide partial relief from the MMPA moratorium on the taking of marine mammals and permit the Tribe to resume limited hunting of Eastern North Pacific (ENP) gray whales (*Eschrichtius robustus*) for ceremonial and subsistence purposes. The 1855 Treaty of Neah Bay secures the Tribe's right to hunt whales. A 2021 Administrative Law Judge hearing, finding(s), and recommendation(s) defines the proposed action. A final decision(s) from NMFS, on the MMPA waiver and regulations, is expected during 2023.

The MMPA waiver, regulations/ rules, and permit(s), would be issued for a 10-year period, and would permit training and hunts throughout coastal portions of the U&A (i.e., continental shelf waters west and south of the Bonilla-Tatoosh Line). Winter/spring hunts and training (December thru May), and summer/fall hunts and training (July thru October), will alternate over the 10-year period.

Hunts and training will employ small vessels (canoes and chase boats). Hunt and training 'days', close approaches (i.e., a vessel or vessels operating within 100 yards), strike attempts, and taking (including successful ENP gray whale strikes and/ or harvests) will be specified and limited. Hunt and training methods will include blunted and un-blunted harpoons and spears, ropes with floats, and (back-up or secondary) high caliber rifles. Harvested ENP gray whales will be secured, towed to landing locations, and landed and butchered on the beach or shoreline. Landings may be located within coastal portions of the U&A (i.e., west and south of the Bonilla-Tatoosh Line), and/ or may be located within those portions of the U&A that extend along the Strait of Juan de Fuca. The Tribe may leave unused portions of whale carcasses to decompose on the beach or shoreline.

Sufficient information has been provided to determine the effects of the proposed action and to conclude whether it would adversely affect federally listed species and/or designated critical habitat. Our concurrence is based on information provided by the action agency, best available science, and complete and successful implementation of the conservation measures included by the action agency.

EXPOSURES AND EFFECTS TO BULL TROUT AND THEIR HABITAT

The Tribe's U&A include and provide nearshore marine foraging, migration, and overwintering (FMO) habitat for anadromous forms of bull trout. Marine and estuarine habitats north of the Columbia River are important for maintaining connectivity, life history diversity, and provide prey base support and foraging opportunities within the Coastal Recovery Unit. Bull trout core areas from the Olympic Peninsula include (from south, to north, and east), the Quinault River, Queets, Hoh, Elwha, and Dungeness River core areas. Low or moderately low numbers of anadromous bull trout use these nearshore marine waters.

Hunts and training will occur across small portions of the action area in any given season or year. Bull trout spawn and rear in upper elevation reaches, and therefore the proposed action will not overlap with or have any effect on bull trout spawning or rearing. And, because bull trout primarily use and migrate in relatively shallow nearshore marine waters, much of the foreseeable

hunt and training activity would be far removed from locations where bull trout might be encountered. The action area does not overlap with designated bull trout critical habitat. The action area includes marine waters that are routinely and heavily trafficked by commercial and recreational vessels.

Hunts and training will be localized and intermittent. The number of ‘days’ will be specified and limited. Small vessel operations in support of hunts and training will have a negligible effect on current baseline conditions across the U&A. In the unlikely event that individual bull trout are encountered, or close to hunt or training activities, we do not expect that these activities will prevent or significantly disrupt normal feeding, moving, or sheltering. New or additional sources of human activity, and sound and visual disturbance, will be limited. Outboard motor operations and (back-up or secondary) high caliber rifle shots will produce transient, non-impulsive sound, and pose a discountable risk of injury.

Hunts and training will have little or no impact to water quality, benthos/ substrate, submerged aquatic vegetation, or other complex physical habitat. Spills, from vessel collision, equipment failure, or other accidental release, are not reasonably foreseeable or anticipated. When towing and landing harvested whales on the beach or shoreline, we expect that small vessel operations may result in limited and temporary impacts (e.g., mild propeller scour, mild anchor drag, etc.). We expect that any measurable impacts to physical habitat, will be limited in physical extent and duration, and will not significantly disrupt normal feeding, moving, or sheltering.

Harvested and butchered whales (and their carcasses) will release organic material (blood, lymph, etc.), and may (according to NMFS) release bioaccumulated contaminants. Harvested and butchered whales (and their carcasses) may also temporarily attract predators. However, these materials will not measurably affect the environment except on a very limited scale, and we expect that bull trout will not be exposed in a manner causing stress or physical injury.

We expect that few (if any) individual bull trout will be encountered or exposed to the proposed action. We conclude that all of the reasonably foreseeable exposures and effects to bull trout and their habitat are insignificant and/or discountable (“extremely unlikely”).

EXPOSURE AND EFFECTS TO MARBLED MURRELET AND THEIR HABITAT

The Tribe’s U&A include portions of Conservation Zone 2, where marbled murrelets occur in nearshore and continental shelf waters throughout the year. Marbled murrelets forage on species that include Pacific sand lance (*Ammodytes hexapterus*), Pacific herring (*Clupea pallasii*), northern anchovy (*Engraulis mordax*), and smelt (family: Osmeridae). Nearshore waters that support foraging and loafing close to inland, forested, nest sites, are particularly important.

Hunts and training will be localized and intermittent. The number of ‘days’ will be specified and limited. Small vessel operations in support of hunts and training will have a negligible effect on current baseline conditions across the U&A. In the unlikely event that individual marbled murrelets are encountered, or close to hunt or training activities, we do not expect that these activities will prevent or significantly disrupt normal feeding, moving, or sheltering. New or

additional sources of human activity, and sound and visual disturbance, will be limited. Outboard motor operations and (back-up or secondary) high caliber rifle shots will produce transient, non-impulsive sound, and pose a discountable risk of injury.

The Service has previously found and concluded, that transient, elevated underwater and in-air sound resulting from the operation of small vessels and motors, are unlikely to significantly disrupt normal marbled murrelet behaviors (i.e., the ability to successfully feed, move, and/or shelter); these are unlikely to interfere with conspecific vocalizations and social foraging, and unlikely to interfere with predator detection and avoidance (*Biological Opinion – Programmatic Consultation for Shellfish Activities in Washington State Inland Marine Waters*; Ref. No. 01EWF00-2016-F-0121). Marbled murrelets may occasionally flush or dive (including as an immediate response to high caliber rifle shots), but this represents a minor and momentary behavioral disruption, and we expect that marbled murrelets will continue to successfully forage and loaf in the action area.

Hunts and training will have little or no impact to water quality, benthos/ substrate, submerged aquatic vegetation, or other complex physical habitat. Spills, from vessel collision, equipment failure, or other accidental release, are not reasonably foreseeable or anticipated. When towing and landing harvested whales on the beach or shoreline, we expect that small vessel operations may result in limited and temporary impacts (e.g., mild propeller scour, mild anchor drag, etc.). We expect that any measurable impacts to physical habitat, will be limited in physical extent and duration, and will not significantly disrupt normal feeding, moving, or sheltering.

Harvested and butchered whales (and their carcasses) will release organic material (blood, lymph, etc.), and may (according to NMFS) release bioaccumulated contaminants. Harvested and butchered whales (and their carcasses) may also temporarily attract predators. However, these materials will not measurably affect the environment except on a very limited scale, and we expect that marbled murrelets will not be exposed in a manner causing stress or physical injury. No measurable effects to suitable, forested nest sites, and no significant exposures or effects to nesting marbled murrelets, are foreseeable. We conclude it is extremely unlikely, that the landing and butchering of whales will attract predators, with measurable consequences for marbled murrelet nest sites or nesting.

We expect that few (if any) individual marbled murrelets will be encountered or exposed to the proposed action. We conclude that all of the reasonably foreseeable exposures and effects to marbled murrelets and their habitat are insignificant and/or discountable (“extremely unlikely”).

CONCLUSION

This concludes consultation pursuant to the regulations implementing the ESA (50 CFR 402.13). Our review and concurrence with your effect determinations is based on implementation of the action as described. It is the responsibility of the federal action agency to ensure that the actions they authorize or carry out are in compliance with the regulatory permit and ESA. If a permittee or the federal action agency deviates from the measures outlined in a permit or project description, the federal action agency has the obligation to reinitiate consultation and comply with section 7(d).

This action should be re-analyzed and re-initiation may be necessary if 1) new information reveals effects of the action that may affect listed species or critical habitat in a manner, or to an extent, not considered in this consultation, 2) if the action is subsequently modified in a manner that causes an effect to a listed species or critical habitat that was not considered in this consultation, and/or 3) a new species is listed or critical habitat is designated that may be affected by this action.

CONSERVATION RECOMMENDATIONS

Section 7(a)(1) of the ESA directs federal agencies to utilize their authorities, to further the purposes of the ESA by carrying out conservation programs for the benefit of endangered and threatened species. The Fish and Wildlife Coordination Act also provides an opportunity for the Service to offer recommendations, for the purpose of conserving fish and wildlife species and their habitats. Conservation recommendations are discretionary agency activities, to avoid or minimize the adverse effects of a proposed action, to implement recovery plans, and/or develop information.

The Service recommends to NMFS, the following:

1. This consultation addresses specific hunt and training methods; as described by the Tribe in their request for a MMPA waiver; as described by the 2021 Administrative Law Judge finding(s) and recommendation(s); and, as described by NMFS with the submitted BE and BE Addendum.
2. The Service respects and honors the Tribe's treaty-reserved right to hunt whales. And, we endeavor to support the Tribe's ceremonial and subsistence practices.
3. Please advise the Service, if at a later date, new or additional hunt and training methods are proposed or requested by the Tribe.

This letter constitutes a complete response by the Service to your request for informal consultation. A record of this consultation is on file at the Washington Fish and Wildlife Office, in Lacey, Washington. If you have any questions about this letter, or our shared responsibilities under the ESA, please contact the consulting biologist and/or supervisor identified below.

U.S. Fish and Wildlife Service Consultation Biologist(s):

Brie English (brianna_english@fws.gov)

Ryan McReynolds (ryan_mcreynolds@fws.gov)

Sincerely,

THOMAS
MCREYNOLDS

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for Brad Thompson, State Supervisor
Washington Fish and Wildlife Office