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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILD FISH CONSERVANCY,

Plaintiff,

v.

DAVE IRVING, in his official capacity as the Manager of the Leavenworth Fisheries Complex; UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE, in his official capacity as the Director of the United States Fish and Wildlife Service; UNITED STATES BUREAU OF RECLAMATION; LOWELL PIMLEY, in his official capacity as the Acting Commissioner of the United States Bureau of Reclamation; and NATIONAL MARINE FISHERIES SERVICE,

No. 2:14-CV-00306-SMJ

SECOND AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Defendants,

and

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION; and CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Defendants-Intervenors.

INTRODUCTION

1. The continued existence of the Upper Columbia River distinct population segment ("DPS") of steelhead and the Upper Columbia River spring-run Chinook salmon evolutionary significant unit ("ESU") in the Wenatchee River basin, including Icicle Creek, is very precarious. The Upper Columbia River spring-run Chinook salmon ESU is listed as an endangered species under the Endangered Species Act ("ESA") and the Upper Columbia River steelhead DPS is listed as threatened species under the ESA. These listed species face extraordinary challenges due to anthropogenic impacts to their habitat, including devastating impacts from the Leavenworth National Fish Hatchery (the "Hatchery").

2. The Hatchery has a long history of disregard for the wild salmonid populations in Icicle Creek and for its legal obligations under federal

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environmental laws. The Hatchery imposes blockages for salmonid migration, diverts necessary water from the creek, contains features that trap salmonids, discharges chemical and nutrient pollutants, and produces fish that harm wild salmonids through ecological and genetic interactions, among other impacts. All this has contributed to a significant decline in the wild salmonid populations, including those protected under the ESA, and is severely inhibiting their ability to recover.

3. Plaintiff Wild Fish Conservancy challenges Defendants' failure to comply with the ESA and the National Environmental Policy Act ("NEPA") in their operation, maintenance, funding, and authorization of the Hatchery. Wild Fish Conservancy seeks declaratory and injunctive relief requiring Defendants to comply with the ESA and NEPA.

JURISDICTION AND VENUE

4. This Court has jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, section 11(g) of the ESA, 16 U.S.C. § 1540(g), and 28 U.S.C. § 1331 (federal question). The requested relief is proper under the APA, 5 U.S.C. § 706, 28 U.S.C. § 2201 (declaratory relief), and 28 U.S.C. § 2202 (injunctive relief). As required by the ESA citizen suit provision, 16 U.S.C. § 1540(g)(2)(A)(i), Wild Fish Conservancy provided sixty days' notice of its intent

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to sue through a letter dated and postmarked July 9, 2014. A copy of that letter is attached as Exhibit 1 to this Second Amended and Supplemental Complaint.

5. The APA, 5 U.S.C. § 702, waives the sovereign immunity of the Federal Defendants for these claims.

6. The Eastern District of Washington is the proper venue under 28 U.S.C. § 1391(e) and 16 U.S.C. § 1540(g)(3)(A) because the violations alleged, and/or substantial parts of the events and omissions giving rise to the claims, occurred and are occurring within such District.

PARTIES

7. Plaintiff Wild Fish Conservancy is a membership-based 501(c)(3) nonprofit organization incorporated in the State of Washington with its principal place of business in Duvall, Washington. Wild Fish Conservancy is dedicated to the preservation and recovery of Washington's native fish species and the ecosystems upon which those species depend. Wild Fish Conservancy brings this action on behalf of itself and its approximately 2,400 members. Wild Fish Conservancy changed its name from "Washington Trout" in 2007. As an environmental watchdog, Wild Fish Conservancy actively informs the public on matters affecting water quality, fish, and fish habitat in the State of Washington through publications, commentary to the press, and sponsorship of educational programs. Wild Fish Conservancy also conducts field research on wild fish

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populations and has designed and implemented habitat restoration projects. Wild Fish Conservancy has lobbied, litigated, and publicly commented on federal and state actions that affect the region's native fish and ecosystems. Wild Fish Conservancy routinely seeks to compel government agencies to follow the laws designed to protect native fish species, particularly threatened and endangered species.

8. Wild Fish Conservancy's members and representatives have met with, negotiated with, and worked closely with United States Fish and Wildlife Service personnel concerning native fish passage issues and Hatchery operations.

9. Wild Fish Conservancy's members regularly spend time in areas in and around Icicle Creek and the Wenatchee River. Wild Fish Conservancy's members intend to continue to visit these areas on a regular basis, including in the coming months and beyond. These members observe, study, photograph, and appreciate wildlife and wildlife habitat in and around these waters. These members also fish, hike, camp, and swim in and around these waters. Wild Fish Conservancy's members would like to fish in these waters for wild steelhead, wild Chinook salmon and wild bull trout if those species were able to recover to a point where such activities would not impede the species' conservation and restoration.

10. Wild Fish Conservancy's members derive scientific, educational, recreational, health, conservation, spiritual, and aesthetic benefits from Icicle

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Creek, the Wenatchee River and its tributaries, the surrounding areas, and from wild native fish species in those waters and from the existence of natural, wild and healthy ecosystems.

11. The past, present, and future enjoyment of Wild Fish Conservancy's interests and those of its members, including the recreational, aesthetic, spiritual, and scientific interests, have been, are being, and will continue to be harmed by Defendants' failures to comply with the ESA, NEPA, and APA as described herein and by Wild Fish Conservancy's members' reasonable concerns related to Defendants' violations. These injuries include reduced enjoyment of time spent in and around the Wenatchee River and its tributaries, including Icicle Creek, fewer visits to those areas than would otherwise occur, and refraining from engaging in certain activities while visiting these areas, such as fishing, than would otherwise occur. These injures also include an inability or unwillingness to fish for wild salmonids due to their depressed status.

12. Wild Fish Conservancy and its members have suffered procedural and informational harms connected to their substantive, conservation, recreational, and scientific activities resulting from Defendants' violations. Wild Fish Conservancy and its members rely, in part, on adequate ESA consultation and NEPA evaluation processes to provide information, protect threatened and endangered species and prevent environmental harms. Defendants' failure to comply with these statutes

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has deprived Wild Fish Conservancy and its members of public comment opportunities and information, thereby harming their efforts to effectively advocate for and protect their interests.

13. Wild Fish Conservancy's injuries and those of its members are actual, concrete and/or imminent, and are fairly traceable to Defendants' violations of the ESA, NEPA, and APA as described herein that the Court may remedy by declaring that Defendants' omissions and actions are illegal and issuing statutory and injunctive relief vacating Defendants' actions and requiring Defendants to comply with their statutory obligations. Wild Fish Conservancy's members will benefit from increased enjoyment of time spent in and around the waters described above and/or will visit the areas more frequently if Defendants are required by the Court to comply with the ESA, NEPA, and APA.

14. Defendant Dave Irving is the Leavenworth Fisheries Complex Manager and is being sued in that official capacity. The Hatchery is one of three hatcheries that comprise the Leavenworth Fisheries Complex, which is owned and operated by the United States Fish and Wildlife Service. Mr. Irving manages the Hatchery's operations and maintenance and is responsible for the Hatchery's compliance with applicable laws.

15. Defendant United States Fish and Wildlife Service ("FWS") is a sub-agency, referred to as a "bureau," within the United States Department of the

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Interior, an agency within the executive branch. FWS owns and operates the Hatchery.

16. Defendant Daniel M. Ashe is the Director of the FWS and is being sued in that official capacity. Mr. Ashe is responsible for ensuring that the FWS complies with applicable laws in its operations and maintenance of the Hatchery.

17. Defendant United States Bureau of Reclamation is a sub-agency, referred to as a "bureau," within the United States Department of the Interior, an agency within the executive branch. The United States Bureau of Reclamation funds the operations and maintenance of the Hatchery.

18. Defendant Lowell Pimley is the Acting Commissioner of the United States Bureau of Reclamation and is being sued in that official capacity. Mr. Pimley is responsible for ensuring that the United States Bureau of Reclamation complies with applicable laws in its funding of the operations and maintenance of the Hatchery.

19. Defendant National Marine Fisheries Service ("NMFS"), also known as NOAA Fisheries, is an office of the National Oceanic and Atmospheric Administration within the United States Department of Commerce, and agency within the executive branch. NMFS is charged with certain implementation responsibilities under the ESA.

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BACKGROUND

I. The Endangered Species Act.

20. The ESA is a federal statute enacted to provide a program to conserve threatened and endangered species and to protect the ecosystems upon which those species depend. 16 U.S.C. § 1531(b). "Conserve," as used is in the ESA, means to use all methods and procedures necessary to bring threatened and endangered species to a point where the protections afforded by the statute are no longer necessary. 16 U.S.C. § 1532(3).

21. The ESA assigns certain implementation responsibilities to the Secretaries of the United States Department of the Interior and the United States Department of Commerce, which have delegated these duties to FWS and NMFS, respectively.

22. Section 4 of the ESA requires FWS and NMFS to determine whether species are threatened or endangered of extinction and to list species as such under the statute. 16 U.S.C. §§ 1533(a)(1) and (c)(1). Such a listing triggers various protective measures intended to conserve the species, including the designation of critical habitat and the preparation of a recovery plan. 16 U.S.C. §§ 1533(a)(3) and (f).

23. Section 9 of the ESA makes it unlawful for any person to "take" species listed under the statute as endangered. 16 U.S.C. § 1538(a)(1). The take

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prohibition has been applied to certain species listed as threatened under the statute though regulations promulgated by NMFS and FWS under section 4(d) of the ESA, 16 U.S.C. § 1533(d). 50 C.F.R. § 223.102(c)(25); 50 C.F.R. § 223.203(a); 50 C.F.R. § 17.21; 50 C.F.R. § 17.31(a). Section 9 of the ESA prohibits a violation of those regulations. 16 U.S.C. § 1538(a)(1)(G). Section 9 of the ESA also makes it unlawful to "solicit another to commit or cause to be committed" a violation of that section of the statute. 16 U.S.C. § 1538(g).

24. "Take" is defined broadly under the ESA to include harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

25. Harass is defined by FWS to include an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. 50 C.F.R. § 17.3. NMFS defines "harass" to include an intentional or negligent action that has the potential to injure an animal or disrupt its normal behaviors to a point where such behaviors are abandoned or significantly altered.

26. Harm is defined to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing

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essential behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 17.3; 50 C.F.R § 222.102.

27. Section 7 of the ESA imposes a substantive 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 or threatened species or result in the destruction or adverse modification of" habitat that has been designated as critical for such species. *See* 16 U.S.C. § 1536(a)(2) (emphasis added); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

28. Such jeopardy results where an action 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.

29. Destruction or adverse modification of critical habitat 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. 50 C.F.R. § 402.02.

30. In fulfilling the substantive mandates of section 7 of the ESA, federal agencies planning to authorize, fund or carry out an action that "may affect" ESA-listed species or their critical habitat (the "action agencies") are required to consult

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with NMFS and/or FWS (the "consulting agencies") regarding the effects of the proposed action. 50 C.F.R. § 402.14(a). Such consultation requires the consulting agencies to review all relevant information, evaluate the current status of the listed species and/or critical habitat, evaluate the effects of the action and cumulative effects on the listed species and/or critical habitat, formulate a biological opinion ("BiOp") as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species and/or result in the destruction or adverse modification of critical habitat, identify reasonable and prudent alternatives if such jeopardy or adverse modification is found, and formulate an incidental take statement ("ITS"). 50 C.F.R. § 402.14(g); *see also* 16 U.S.C. §§ 1536(b)(3)(A) and (4).

31. The BiOp must include a summary of the information upon which the opinion is based, a detailed discussion of the effects of the action, and if jeopardy or adverse modification is found, reasonable and prudent alternatives to the action that will avoid jeopardy and/or adverse modification. 50 C.F.R. § 402.14(h).

32. If the consulting agency concludes that jeopardy and adverse modification are not likely, an ITS is issued with the BiOp specifying conditions under which take of listed species incidental to the proposed action may occur. 16 U.S.C. § 1536(b)(4); *Aluminum Co. of Am. v. Adm'r, Bonneville Power Admin.*, 175 F.3d 1156, 1159 (9th Cir. 1999). The ITS functions as a permit exempting

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from liability take resulting from the action to the extent that those covered thereby fully comply with the terms and conditions of the ITS. *See* 16 U.S.C. § 1536(o)(2); *and* 50 C.F.R. § 402.14(i)(5); *and Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1239 (9th Cir. 2001). The proponent of the exemption has the burden of proof in showing the ITS was applicable and in force at the time of an alleged violation in an action enforcing section 9 of the ESA. 16 U.S.C. § 1539(g).

33. After a BiOp is issued, federal agencies have a continuing duty under section 7 of the ESA to insure that their actions will not jeopardize the continued existence of listed species or adversely modify designated critical habitat. An agency must re-initiate consultation whenever "the amount or extent of taking specified in the incidental take statement is exceeded," "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," where the action question 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 where "a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16(a)-(d).

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II. The National Environmental Policy Act.

34. The purpose of NEPA is, *inter alia*, to declare a national policy that will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, and to enrich the understanding of the ecological systems and natural resources important to the Nation. 42 U.S.C. § 4321.

35. NEPA requires federal agencies to undertake processes to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken" and that are "intended to help public officials make decisions that are based on understanding of environmental consequences." 40 C.F.R. §§ 1500.1(b) and (c).

36. To accomplish these purposes, NEPA requires federal agencies to prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

37. The "detailed statement," commonly known as an environmental impact statement ("EIS"), must describe the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and

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enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

38. If a proposed action is neither one that normally requires an EIS or that normally does not require an EIS, the agency must prepare an environmental assessment ("EA") to determine whether an EIS is required. 40 C.F.R. §§ 1501.4(a) and (b).

39. If the agency determines through the EA process that an EIS is not required for the proposed action, then the agency is required to issue a finding of no significant impact ("FONSI"). 40 C.R.F. § 1501.4(e).

40. Regulations promulgated by the Council on Environmental Quality ("CEQ") direct agencies to consider certain factors when considering whether a particular proposed action requires preparation of an EIS, including, *inter alia*, whether the action may adversely affect an endangered or threatened species listed under the ESA or its critical habitat. 40 C.F.R. § 1508.27.

41. NEPA further provides that agencies "shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E).

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III. Icicle Creek.

42. Icicle Creek originates in the Cascade Mountains in Washington State and is a fifth-order tributary to the Wenatchee River, which is a tributary to the Columbia River. Icicle Creek enters the Wenatchee River in Leavenworth, Washington.

43. Icicle Creek contains natural populations of steelhead trout (*Oncorhynchus mykiss*), spring Chinook salmon (*Oncorhynchus tshawytscha*), bull trout (*Salvelinus confluentus*), and other fish species, and provides important habitat for these species.

44. Icicle Creek is uniquely pristine because the vast majority of its watershed consists of federally protected public lands. The watershed is 214 square miles, 87 percent of which is National Forest land and 74 percent of which is Alpine Lakes Wilderness. Wilderness areas are considered "untrammeled by man" and are afforded the highest protection of federal lands—managed so as to leave them "unimpaired for future use and enjoyment as wilderness." 16 U.S.C. §§ 1131(a) and (c).

45. The Forest Service manages the National Forest portions of the Icicle Creek watershed as a "Tier 1 Key Watershed," designated to provide high quality habitat for at-risk fish species and intended to serve as an "anchor[] for the potential recovery of depressed stocks." The 31.8 mile long creek is the largest

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sub-watershed of the Wenatchee River. Upper Icicle Creek is "unaltered by human activity," and "the majority of the fish habitat in the watershed is 'in pristine state and very capable of producing fish.'"

IV. The Leavenworth National Fish Hatchery.

46. Constructed from 1939 to 1941 on the banks of Icicle Creek, the Hatchery is located approximately three miles from Icicle Creek's confluence with the Wenatchee River.

47. Originally designed to maintain salmon stocks blocked by construction of the Grand Coulee Dam on the Columbia River, the Hatchery initially reared fish in a one-mile segment of Icicle Creek. A series of dams and weirs were installed in Icicle Creek to create "ponds" to hold the Hatchery fish.

48. A 4,000 foot-long manmade canal ("Hatchery Canal") was constructed adjacent to Icicle Creek to control the amount of water flowing through the reach of Icicle Creek where fish were held.

49. A headgate dam, referred to as "Structure 2," or "Dam 2," was constructed to divert water into the Hatchery Canal and block flows into Icicle Creek. Fish passage features originally constructed at Structure 2 are no longer operational.

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50. A downstream dam, "Structure 5" or "Dam 5," is located in Icicle Creek near the terminus of the Hatchery Canal. This structure is operated in a manner that blocks fish passage when closed.

51. A spillway dam at the downstream terminus of the Hatchery Canal prevents all upstream fish passage into the Hatchery Canal from Icicle Creek. This structure is a complete block to fish passage.

52. The practice of holding and spawning Hatchery fish in Icicle Creek was terminated in 1979, and the Hatchery moved its operations to off-channel holding ponds located on the north side of the Hatchery Canal opposite of Icicle Creek. However, the Hatchery did not remove the dams and weirs from Icicle Creek, which continued to obstruct salmonid migrations.

53. After years of cooperation and pressure from various community members, the Icicle Creek Restoration Project Environmental Impact Statement and associated record of decision were prepared determining to remove most of the Hatchery's dams and weirs and to modify the other structures to ensure year-round fish passage. The Hatchery did not fund or move forward on that project. Instead, members of the community came forward and agreed to provide the necessary funding to restore Icicle Creek from the harmful impacts caused by this federal facility. However, the Hatchery bi-furcated the project, allowing some structures to be removed but not allowing Structures 2 or 5 to be removed or modified.

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54. The Hatchery continues to operate Structures 2 and 5 in a manner that obstructs fish passage through Icicle Creek during some or all of the year. The spillway dam prevents upstream fish passage through the Hatchery Canal.

55. The Hatchery diverts water out of Icicle Creek at Structure 2 and into the Hatchery Canal for various beneficial uses, including to recharge the aquifer that supplies the Hatchery's groundwater wells, to attract Hatchery fish for broodstock collection, to flush Hatchery smolts, and for flood control.

56. The Hatchery has a water intake, referred to as "Structure 1" or "Dam 1," located approximately 1.5 miles upstream of the Hatchery and Structure 2. Structure 1 consists of a diversion dam, fish ladder, wide bar trash rack, and another narrower trash rack located in a building. Structure 1 spans the entire width of Icicle Creek except for the several feet on the north bank that is occupied by the fish ladder. Water is diverted from Icicle Creek at Structure 1 and conveyed to the Hatchery through a buried 31-inch pipe system operating under gravity. Diversions are Structure 1 contribute to the dewatering of Icicle Creek.

57. The Hatchery's diversions of water at Structures 1 and 2 significantly dewaters parts of Icicle Creek, particularly the segment between the headgate dam (Structure 2) and Structure 5.

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V. ESA-Listed Salmonids and their Critical Habitat.

58. The Upper Columbia River steelhead DPS was first listed as an endangered species under the ESA in 1997. 63 Fed. Reg. 43,937 (Aug. 18, 1997). The species is currently listed as a threatened species under the ESA. 71 Fed. Reg. 834 (Jan. 5, 2006); 74 Fed. Reg. 42,605 (Aug. 24, 2009); 50 C.F.R. § 223.102(c)(25). NMFS has applied the ESA section 9 take prohibition to this species. 50 C.F.R. §§ 223.102(c)(25), 223.203(a).

59. Critical habitat has been designated for Upper Columbia River steelhead that includes Icicle Creek. 70 Fed. Reg. 52,630 (Sept. 2, 2005); 50 C.F.R. § 226.212.

60. The Upper Columbia River spring-run Chinook salmon ESU was listed as an endangered species under the ESA in 1999. 64 Fed. Reg. 14,308 (March 24, 1999); *and see* 70 Fed. Reg. 37,160 (June 28, 2005); *and* 79 Fed. Reg. 20,802 (April 14, 2014); 50 C.F.R. § 224.101(a).

61. NMFS adopted a recovery plan in 2007 for both Upper Columbia River spring-run Chinook salmon and Upper Columbia River steelhead. The plan provides the following description of the Wenatchee River population of Upper Columbia River spring-run Chinook salmon:

> When considering the factors that determine diversity and spatial structure, the Wenatchee spring Chinook population is currently considered to be at a high risk of extinction because of the loss of

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> naturally produced Chinook spawning in tributaries downstream from Tumwater Canyon. In addition, the Wenatchee spring Chinook population is currently not viable with respect to abundance and productivity and has a greater than 25% chance of extinction in 100 years. In sum, the Wenatchee spring Chinook population is not currently viable and has a high risk of extinction.

62. The recovery plan provides the following description of the Wenatchee River population of the Upper Columbia River steelhead:

> When considering the factors that determine diversity and spatial structure, the Wenatchee steelhead population is currently considered to be at a high risk of extinction. Based only on abundance and productivity, the naturally produced Wenatchee steelhead population is not viable and has a greater than 25% chance of extinction in 100 years. In sum, the Wenatchee steelhead population is not currently viable and has a moderate to high risk of extinction.

VI. Hatchery Operations Significantly Harm ESA-Listed Salmonids.

63. Operations and maintenance of the Hatchery significantly harm ESA-listed Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon and impede the recovery of these species. Such harm occurs through a variety of mechanisms, including facility effects, genetic introgression, ecological interactions, and broodstock collection activities.

64. The Hatchery harms and kills Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon through facility effects—those effects resulting from the physical structures and devices at the Hatchery.

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65. Upper Columbia River steelhead and/or Upper Columbia River spring-run Chinook salmon are harmed and killed when the fish enter Hatchery facilities/structures and are thereby captured, trapped, and/or collected by the Hatchery.

66. For example, ESA-listed fish become entrained by the Hatchery's water intake structures and facilities. The Hatchery has not installed fish screens at Structure 1 that comply with NMFS' criteria. Fish entrained in the Hatchery's water intake travel through approximately 1.5 miles of piping before encountering a manifold, and then enter a sediment retention pond at a high velocity where they encounter a steel plate. Fish are wounded and killed at each stage of this journey.

67. Similarly, ESA-listed fish enter the Hatchery's fish ladder and are then captured, trapped, and/or collected by Hatchery structures and facilities.

68. ESA-listed fish that are trapped in the Hatchery can be injured and/or killed in the Hatchery environment and/or during attempts to return the fish back to the wild.

69. ESA-listed fish captured in the Hatchery have their migration delayed or prevented, including spawning and/or foraging migration. For example, fish entrained by the water intake may remain in a sediment retention pond for prolonged periods where they are delayed at best and wounded or killed at worst.

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70. Structure 1, Structure 2, and Structure 5 impede or block migration of Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon, including spawning and foraging migration. Delays in spawning migration prevent successful spawning and cause spawning in less desirable habitat.

71. ESA-listed fish are injured and/or killed attempting to migrate past Structure 1, Structure 2, and/or Structure 5.

72. Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon are significantly harmed by the Hatchery's use of water. For example, the Hatchery's diversions of water at Structure 1 and/or Structure 2 significantly and sometimes entirely dewater a segment of Icicle Creek. This causes a variety of forms of take, including when redds are present in the dewatered segment and are thereby adversely affected, when fish are stranded in the dewatered segment, and when stranded fish are captured, collected, trapped, injured, and/or killed in an effort to transfer them out of the dewatered segment.

73. ESA-listed fish are also harmed and killed when the Hatchery's use of water—diversions at Structure 1 and/or Structure 2—reduces flows in Icicle Creek to such an extent that the river does not provide suitable habitat for migration, spawning, rearing, sheltering, and/or foraging.

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74. Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon are harmed when the Hatchery's effluent discharges and/or use of water adversely affect the water quality of Icicle Creek and the Wenatchee River, including the water temperature. Currently, the Hatchery does not have a valid National Pollutant Discharge Elimination System permit as required under the Clean Water Act for the Hatchery's discharges of pollutants to Icicle Creek. Take occurs when the Hatchery causes or contributes to the water quality of Icicle Creek and/or the Wenatchee River becoming unsuitable habitat for migration, spawning, rearing, sheltering, and/or foraging and thereby harms, harasses, wounds, and/or kills ESA-listed fish.

75. The Hatchery's blockage of salmonid migrations severely harms ESA-listed salmonids and greatly inhibits their ability to recover. As noted, there is abundant pristine spawning habitat in Icicle Creek above the Hatchery. The Hatchery is at river mile 2.7 of Icicle Creek—2.7 miles above the confluence of Icicle Creek and the Wenatchee River. There are 29 miles of Icicle Creek upstream of rive mile 2.7, not including several tributaries with rearing and spawning habitat for ESA-listed salmonids. Icicle Creek would be able to contribute significantly more to the recovery of Upper Columbia River spring-run Chinook salmon and Upper Columbia River steelhead if it were not for the activities of the Hatchery.

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76. The Hatchery harms Upper Columbia River spring-run Chinook salmon through genetic interactions. Such interactions occur when hatchery fish spawn in the wild with ESA-listed Chinook salmon.

77. Fish become domesticated in a hatchery environment and thereby less fit to survive and reproduce in the wild. The Chinook salmon stock used at the Hatchery is originally from the Carson National Fish Hatchery (not from the Upper Columbia River basin) and is highly domesticated due to decades of artificial production.

78. Adverse effects from genetic introgression occurs when these Hatchery fish are allowed to spawn in the wild and thereby pass their maladaptive genes to the wild Upper Columbia River spring-run Chinook salmon. The resultant offspring have markedly reduced fitness, dying at a much higher rate at pre-adult life stages and producing fewer mature adults that return to spawn than would occur with two wild parents. Each release of fish at the Hatchery results in take through these genetic interactions.

79. The "straying" of adult Hatchery fish and resultant spawning with ESA-listed Upper Columbia River spring-run Chinook salmon likely occurs throughout the entire Wenatchee River basin, causing harm beyond Icicle Creek.

80. In addition, residualized hatchery juveniles—those that fail to migrate from freshwater after release from the Hatchery—mature and spawn with wild

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Upper Columbia spring-run Chinook salmon in and outside of Icicle Creek, also causing harm of this kind.

81. The Hatchery harms ESA-listed Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon through ecological interactions. Such harm occurs through a variety of mechanisms.

82. The Hatchery harms Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon through increased competition for food and space, including rearing, foraging, sheltering, and spawning territory.

83. The Hatchery also harms Upper Columbia River spring-run Chinook salmon through increased competition for spawning mates.

84. The Hatchery harms Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon through predation. This occurs when the hatchery fish, including residualized hatchery fish, prey on protected fish.

85. The Hatchery also harms ESA-listed fish when the hatchery fish—less fit for survival in the wild—attract predators that then consume the ESA-listed fish.

86. The Hatchery's broodstock collection activities harm and kill Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon.

87. Broodstock collection activities are those associated with the collection of returning adult fish to supply the Hatchery's broodstock.

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88. While generally aimed at Hatchery fish, these activities take ESA-listed salmonids. For example, ESA-listed fish are trapped, captured and/or collected by the broodstock collection activities. Captured fish can be injured and/or killed while in the Hatchery environment and/or when efforts are made to return them to the wild. Broodstock collection activities delay and/or prevent spawning migration of ESA-listed fish—including those fish captured by the Hatchery structures and those prevented from migrating by Structures 1, 2, and/or 5.

89. Operations and maintenance of the Hatchery do not insure that the continued existence of Upper Columbia River steelhead and Upper Columbia River Chinook salmon are not likely to be jeopardized or that the critical habitat of Upper Columbia River steelhead is not likely to be destroyed or adversely modified.

VII. NMFS' Biological Opinions on the Hatchery Effects.

90. FWS initiated consultation with NMFS on December 16, 1999, under section 7 of the ESA to consult on the Hatchery's effects to ESA-listed salmon and steelhead. That consultation resulted in NMFS' issuance of a BiOp dated October 22, 2003 ("NMFS 2003 BiOp").

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91. The NMFS 2003 BiOp included an ITS providing a qualified exemption to liability under section 9 of the ESA for take resulting from the Hatchery operations.

92. The NMFS 2003 BiOp identified the Hatchery's blockage of steelhead migration as a particular concern. NMFS did not render a jeopardy opinion on the effects of that barrier in the NMFS 2003 BiOp, but indicated its expectation that fish passage be addressed and provided for through the Icicle Creek Restoration Project Environmental Impact Statement process that was ongoing at that time, and the NMFS 2003 BiOp included a requirement therefor. As noted, FWS never completed that project.

93. The NMFS 2003 BiOp further identified the lack of fish screens that comply with NMFS' screening criteria at the Hatchery's water intake structures (Structure 1) as a particular concern and the ITS required compliance with specified fish screening criteria. Over ten years later, the Hatchery has not provided for the fish passage contemplated by the NMFS 2003 BiOp nor has it brought its water intake structures into compliance with NMFS' screening criteria.

94. The NMFS 2003 BiOp and ITS included therein expired ten years after it was issued on October 22, 2003—on October 22, 2012.

95. Wild Fish Conservancy issued a notice of intent to sue under the ESA on July 9, 2014, and filed its original Complaint in this matter on September 16,

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2014, given the Hatchery's failure to fulfill the commitments described in NMFS 2003 BiOp and its continuation of operations without an effective BiOp or ITS.

96. NMFS issued a new BiOp with an ITS for Hatchery operations and maintenance on or about May 29, 2015 ("NMFS 2015 BiOp"). The NMFS 2015 BiOp concludes that Hatchery operations and maintenance are not likely to jeopardize the continued existence of ESA-listed Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon or to destroy or adversely modify critical habitat designated for Upper Columbia River steelhead.

97. This lawsuit, including Plaintiff's First Motion for a Preliminary Injunction, was a motivating factor to completion of the NMFS 2015 BiOp.

98. The NMFS 2015 BiOp does not use the best scientific and commercial data available as required by the ESA, including such data that is available on the effects of the Hatchery, affected salmonids, and the habitat of Icicle Creek.

99. The NMFS 2015 BiOp fails to adequately evaluate the effects of the entire action, the effects of all interrelated and interdependent actions, and the cumulative effects as required by the ESA.

100. NMFS' conclusion that Hatchery operations and maintenance are not likely to jeopardize the continued existence of ESA-listed species or result in the destruction or adverse modification of critical habitat in the NMFS 2015 BiOp

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relies on mitigation measures that are not reasonably certain to occur and that fail to address the threats to ESA-listed salmonids in a manner that satisfies applicable standards.

101. The NMFS 2015 BiOp inappropriately defines the environmental baseline.

102. The NMFS 2015 BiOp does not adequately evaluate whether the Hatchery would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of listed species in the wild by reducing the reproduction, numbers, or distribution of the species. The NMFS 2015 BiOp does not adequately evaluate whether the Hatchery would be expected, directly or indirectly, to appreciably diminish the value of critical habitat for both the survival and recovery of listed species. The NMFS 2015 BiOp does not adequately summarize the information on which the opinion is based or adequately detail the effects of Hatchery on listed species and critical habitat. The determination in the NMFS 2015 BiOp that the Hatchery is not likely to jeopardize the continued existence of threatened or endangered species or result in the destruction or adverse modification of critical habitat is arbitrary, capricious, an abuse of discretion, and not in accordance with law. For example, the NMFS 2015 BiOp acknowledges that one of the primary constituent elements of critical habitat for Upper Columbia River steelhead—flow/hydrology—is not properly

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functioning within Icicle Creek. The Hatchery's diversions, including those at Structure 1 and Structure 2, significantly contribute to these conditions.

103. The ITS included in the NMFS 2015 BiOp does not adequately evaluate or specify the impact or extent of the incidental taking of species and relies on inappropriate surrogates in lieu of numeric take levels. The ITS does not include reasonable and prudent measures necessary or appropriate to minimize such impact and it does not include adequate terms and conditions necessary to ensure compliance with the reasonable and prudent measures. The ITS does not include requirements sufficient to monitor and report the incidental take of ESA-listed species or to trigger the reinitiation of consultation if the anticipated impacts are exceeded.

104. The ITS issued with the NMFS 2015 BiOp is a major federal action significantly affecting the quality of the human environment and involves unresolved conflicts concerning alternative uses of available resources.

105. NMFS did not prepare an EIS, EA, or a FONSI for the ITS included in the NMFS 2015 BiOp.

106. NMFS did not study, develop, or describe appropriate alternatives to the ITS issued with the NMFS 2015 BiOp.

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CAUSES OF ACTION

I. Fifth Claim for Relief: Failure to Insure that Hatchery Operations are not likely to Jeopardize ESA-Listed Salmonids.

107. Wild Fish Conservancy realleges and incorporates by reference each and every allegation set forth above.

108. Defendants Dave Irving, FWS, Daniel M. Ashe, United States Bureau of Reclamation, and Lowell Pimley are in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), for carrying out and/or funding the operations and maintenance of the Hatchery without insuring that such activities are not likely to jeopardize the continued existence of Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon or to result in adverse modification of critical habitat designated for Upper Columbia River steelhead.

109. These violations of the ESA are reviewable under section 11(g) of the ESA, 16 U.S.C. § 1540(g).

II. Sixth Claim for Relief: the NMFS 2015 BiOp is Arbitrary, Capricious, an Abuse of Discretion, and Otherwise Not in Accordance with Law.

110. Wild Fish Conservancy realleges and incorporates by reference each and every allegation set forth above.

111. The NMFS 2015 BiOp, including the "no jeopardy/adverse modification" conclusion and the ITS included therein, does not comply with ESA

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standards, is arbitrary, capricious, an abuse of discretion, and not in accordance with law, and is reviewable under the APA, 5 U.S.C. §§ 701-706.

III. Seventh Claim for Relief: NMFS Violated NEPA by Not Preparing an EIS or an EA and FONSI.

112. Wild Fish Conservancy realleges and incorporates by reference each and every allegation set forth above.

113. NMFS violated NEPA by issuing the ITS included in the NMFS 2015 BiOp without preparing an EIS or an EA and FONSI.

114. NMFS violated NEPA by issuing the ITS included in the NMFS 2015 BiOp without studying, developing, or describing appropriate alternatives.

115. NMFS' issuance of the ITS included in the NMFS 2015 BiOp in violation of NEPA was arbitrary, capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law and is reviewable under the APA, 5 U.S.C. §§ 701-706.

REQUESTS FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

A. Issue a declaratory judgment declaring that Defendants Dave Irving, FWS, Daniel M. Ashe, United States Bureau of Reclamation, and Lowell Pimley are in violation of section 7 of the ESA for carrying out and/or funding the operations and maintenance of the Hatchery without insuring that such activities

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are not likely to jeopardize the continued existence of threatened Upper Columbia River steelhead and endangered Upper Columbia River spring-run Chinook salmon or to result in the destruction or adverse modification of critical habitat designated for Upper Columbia River steelhead;

B. Issue a declaratory judgment declaring that the NMFS 2015 BiOp, including the "no jeopardy/adverse modification" conclusion and the ITS included therein, does not comply with ESA standards and is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;

C. Issue a declaratory judgment declaring that NMFS violated NEPA by issuing the ITS included in the NMFS 2015 BiOp without preparing an EIS or an EA and FONSI and without studying, developing, or describing appropriate alternatives;

D. Issue a mandatory injunction requiring Defendants to comply with the ESA and NEPA;

E. Set aside the NMFS 2015 BiOp, including the ITS issued therewith;

F. Enjoin Defendants from operating, maintaining, funding, and authorizing the Hatchery unless and until compliance with the ESA and NEPA is achieved;

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G. Grant such preliminary and/or permanent injunctive relief as Wild Fish Conservancy may from time to time request during the pendency and resolution of this case;

H. Award Wild Fish Conservancy its reasonable litigation expenses, including attorney fees, expert witness fees, Court costs, and other expenses as necessary for the preparation and litigation of this case under section 11(g)(4) of the ESA, 16 U.S.C. § 1540(g)(4), the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*, and/or as otherwise authorized by law; and

I. Grant such additional relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this 21st day of July, 2015.

KAMPMEIER & KNUTSEN, PLLC

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Attorneys for Plaintiff Wild Fish Conservancy

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the attorneys of record.

s/ Brian A. Knutsen
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EXHIBIT 1

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SEATTLE, WASHINGTON 98112
(206) 860-2883, FAX (206) 860-4187

July 9, 2014

Certified U.S. Mail – Return Receipt Requested
Leavenworth Fisheries Complex Manager Dave Irving
United States Fish and Wildlife Service
12790 Fish Hatchery Road
Leavenworth, WA 98826

Certified U.S. Mail – Return Receipt Requested
United States Fish and Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240-0001

Certified U.S. Mail – Return Receipt Requested
Director Daniel M. Ashe
United States Fish and Wildlife Service
1849 C Street N.W., Room 3331
Washington, D.C. 20240-0001

Certified U.S. Mail – Return Receipt Requested
United States Bureau of Reclamation
1849 C Street N.W.
Washington, D.C. 20240-0001

Certified U.S. Mail – Return Receipt Requested
Acting Commissioner Lowell Pimley
United States Bureau of Reclamation
1849 C Street N.W.
Washington, D.C. 20240-0001

Certified U.S. Mail – Return Receipt Requested
Bonneville Power Administration
905 N.E. 11th Ave.
Portland, OR 97232

Certified U.S. Mail – Return Receipt Requested
Administrator and Chief Executive Officer Elliot Mainzer
Bonneville Power Administration
905 N.E. 11th Ave.
Portland, OR 97232

Certified U.S. Mail – Return Receipt Requested
Secretary Penny Pritzker
United States Department of Commerce
1401 Constitution Ave. N.W.
Washington, D.C. 20230

Certified U.S. Mail – Return Receipt Requested
Assistant Administrator for Fisheries Eileen Sobeck
National Marine Fisheries Service (NOAA Fisheries)
1315 East West Highway
Silver Spring, MD 20910

Certified U.S. Mail – Return Receipt Requested
Secretary Sally Jewell
United States Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

RE: Notice of Intent to Sue U.S. Fish & Wildlife Service, U.S. Bureau of Reclamation and Bonneville Power Administration for Violations of Sections 7 and 9 of the Endangered Species Act Associated with Operations and Maintenance at and Funding of the Leavenworth National Fish Hatchery

Dear Honorable Civil Servants:

This letter provides notice of Wild Fish Conservancy's intent to sue the United States Fish and Wildlife Service, Daniel M. Ashe in his official capacity as the Director of the United States Fish and Wildlife Service and Dave Irving in his official capacity as the Leavenworth Fisheries Complex Manager (collectively, "FWS"), the United States Bureau of Reclamation and Lowell Pimley in his official capacity as the Acting Commissioner of the United States Bureau of Reclamation (collectively, "BOR"), and the Bonneville Power Administration and Elliot Mainzer in his official capacity as the Administrator and Chief Executive Officer of the Bonneville Power Administration (collectively, "BPA") for violations of sections 7 and 9 of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1536, 1538, associated with operations and maintenance at and funding of the Leavenworth National Fish Hatchery (the "Hatchery"). This letter is provided pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g).

The Hatchery has a long history of disregard for the wild salmonid populations in Icicle Creek and for its legal obligations under federal environmental laws. Individuals, organizations, and government entities have expended enormous efforts and resources during the last fifteen years seeking to lessen the unlawful harm caused by this facility and to bring it into compliance with its statutory responsibilities. These efforts have included extensive attempts at cooperation, including private funding for the removal of derelict Hatchery structures that blocked fish passage in the Icicle Creek. Litigation has also been employed to address the Hatchery's unlawful conduct. Unfortunately, these

efforts have been unsuccessful in changing the Hatchery's apparent contempt for its environmental and ecological obligations under the ESA.

The National Marine Fisheries Service ("NMFS") issued a biological opinion ("BiOp") consulting on the effects of the Hatchery in October 2003 ("NMFS 2003 BiOp"). That BiOp identified the Hatchery's blockage of steelhead migration as a particular concern. NMFS 2003 BiOp, p. 4-25. NMFS did not render a jeopardy opinion on the effects of that barrier in the NMFS 2003 BiOp, but indicated its expectation, and included a requirement therefor, that fish passage be addressed and provided for through the Icicle Creek Restoration Project Environmental Impact Statement process that was ongoing at that time. *Id.* at pp. 4-25, 6-10. The NMFS 2003 BiOp further identified the lack of fish screens that comply with NMFS' screening criteria at the Hatchery's water intake structures as a particular concern and the incidental take statement required compliance with specified fish screening criteria. *Id.* at pp. 4-25 – 4-26, 6-7. Remarkably, over ten years later, the Hatchery has not provided for the fish passage contemplated by the NMFS 2003 BiOp nor has it brought its water intake structures into compliance with NMFS' screening criteria. Instead, the Hatchery continues to prioritize production of hatchery fish at the lowest cost possible while threatening the extirpation of native salmonids.

After many years of the Hatchery harming threatened bull trout without any ESA authorization whatsoever, Wild Fish Conservancy sued the Hatchery in 2005. That litigation resulted in FWS' issuance of a BiOp in 2006, consulting on the harm the Hatchery inflicts on bull trout, which FWS voluntarily withdrew after Wild Fish Conservancy's challenged that document. FWS issued a new BiOp in 2008, which the Ninth Circuit Court of Appeals found unlawful in a challenge brought by Wild Fish Conservancy. FWS issued another BiOp in 2011 ("FWS 2011 BiOp"), evaluating the effects of Hatchery operations on threatened bull trout and imposing various protective terms and conditions. FWS has identified Hatchery Structures 2 and 5 as a particular concern, noting the harm caused by the Hatchery's blockage of bull trout migration for spawning and foraging. FWS 2011 BiOp, pp. 37-38, 45-46, 54-55, 67-68, 70-74, 84-85, 115, 128-29, 134. During its ESA consultation with FWS, the Hatchery represented that it would leave these two structures open except under five discrete conditions. *Id.* at pp. 8-11. Unfortunately, the Hatchery has not kept to this commitment but has instead lowered Structure 2 and thereby unlawfully harmed threatened bull trout.

I. Legal Framework.

Section 9 of the ESA prohibits the "take" of an endangered species by any person. 16 U.S.C. § 1538(a). This prohibition has generally been applied to species listed as "threatened" through regulations promulgated under section 4(d) of the ESA, 16 U.S.C. § 1533(d). Section 9 of the ESA prohibits violations of those regulations. 16 U.S.C. § 1538(a)(1)(G). Section 9 of the ESA also makes it unlawful to "solicit another to commit or cause to be committed" a violation of that section of the statute. 16 U.S.C. § 1538(g).

"Take" includes actions that harass, harm, pursue, wound, kill, trap, capture, or collect a protected species. 16 U.S.C. § 1532(19). "Harm" includes significant habitat modification or degradation that kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. 50 C.F.R. § 222.102; 50 C.F.R. § 17.3. NMFS defines "harass" to include an intentional or negligent action that has the potential to injure an animal or disrupt its normal behaviors to a point where such behaviors are abandoned or significantly altered. FWS defines this term to include acts that create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include breeding, feeding, or sheltering. 50 C.F.R. § 17.3.

Section 7 of the ESA imposes a substantive 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 or threatened species or result in the destruction or adverse modification of" habitat that has been designated as critical for such species. *See* 16 U.S.C. § 1536(a)(2) (emphasis added); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). Such jeopardy results where an action 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 critical habitat 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.*

In fulfilling the substantive mandates of section 7 of the ESA, federal agencies planning to fund or undertake an action that "may affect" ESA-listed species or their critical habitat are required to consult with NMFS and/or FWS regarding the effects of the proposed action. 50 C.F.R. § 402.14(a). Such consultation concludes with NMFS' and/or FWS' issuance of a BiOp determining whether the action is likely to jeopardize ESA-protected species or result in adverse modification of critical habitat. 50 C.F.R. § 402.14(h)(3). Agencies are prohibited from making any irreversible or irretrievable commitment of resources with respect to the action that would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures until such consultation is completed. 16 U.S.C. § 1536(d).

After a BiOp is issued, federal agencies have a continuing duty under section 7 of the ESA to insure that their actions will not jeopardize the continued existence of listed species or adversely modify designated critical habitat. An agency must re-initiate consultation whenever "the amount or extent of taking specified in the incidental take statement is exceeded," "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," where the action in question 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 where "a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16(a)-(d).

II. Factual Background.

A. Affected Species and Critical Habitat.

The Upper Columbia River distinct population segment ("DPS") of steelhead was first listed as an endangered species under the ESA in 1997. 63 Fed. Reg. 43,937 (Aug. 18, 1997). The species is currently listed as a threatened species under the ESA. 71 Fed. Reg. 834 (Jan. 5, 2006); 74 Fed. Reg. 42,605 (Aug. 24, 2009); 50 C.F.R. § 223.102(c)(25). NMFS has applied the ESA section 9 take prohibition to this species. 50 C.F.R. §§ 223.102(c)(25), 223.203(a). Critical habitat has been designated for Upper Columbia River steelhead that includes Icicle Creek. 70 Fed. Reg. 52,630 (Sept. 2, 2005); 50 C.F.R. § 226.212.

The Upper Columbia River spring-run Chinook salmon evolutionary significant unit ("ESU") was listed as an endangered species under the ESA in 1999. 64 Fed. Reg. 14,308 (March 24, 1999); *and see* 70 Fed. Reg. 37,160 (June 28, 2005); *and* 79 Fed. Reg. 20,802 (April 14, 2014); 50 C.F.R. § 224.101(a).

The coterminous United States population of bull trout (*Salvelinus confluentus*) was listed as threatened under the ESA in 1999. 64 Fed. Reg. 58,910 (November 1, 1999). The bull trout was initially listed as three separate DPSs, which were later consolidated (along with two other population segments) into one listed taxon. For purposes of the jeopardy analysis under section 7 of the ESA, FWS treats the bull trout DPSs as interim recovery units. The Icicle Creek bull trout population is within the Columbia River interim recovery unit. FWS has applied the ESA section 9 take prohibition to threatened bull trout. 50 C.F.R. §§ 17.21, 17.31(a), 17.44(w). FWS designated critical habitat for the Columbia River interim recovery unit of bull trout in 2005, but that decision was remanded upon findings that the agency inappropriately interjected policy decisions into the final rule. 70 Fed. Reg. 56,212 (Sept. 26, 2005); *and see Alliance for the Wild Rockies, Inc. v. Allen*, No. 04-1813-JO, 2009 U.S. Dist. LEXIS 63122, at *4-5 (D. Or. July 1, 2009). FWS issued a new final rule designating critical habitat for bull trout in 2010, that includes Icicle Creek. 75 Fed. Reg. 63,898 (Nov. 17, 2010).

In 2007, NMFS accepted a recovery plan for both Upper Columbia River spring-run Chinook salmon and Upper Columbia River steelhead. The plan describes Upper Columbia River spring-run Chinook salmon as follows:

> Spring Chinook begin returning from the ocean in the early spring, with the run into the Columbia River peaking in mid-May. Spring Chinook enter the Upper Columbia tributaries from April through July. After migration, they hold in freshwater tributaries until spawning occurs in the late summer, peaking in mid to late August. Juvenile spring Chinook spend a year in freshwater before migrating to salt water in the spring of their second year of life. Most Upper Columbia spring Chinook return as adults after two or three years in the ocean. Some precocious males, or

> jacks, return after one winter at sea. A few other males mature sexually in freshwater without migrating to the sea. The run, however, is dominated by four- and five-year-old fish that have spent two and three years at sea, respectively. Fecundity ranges from 1 4,200 to 5,900 eggs, depending on the age and size of the female.
>
> The risk of extinction over a 100-year period for spring Chinook within the Upper Columbia Basin was determined by following the guidance of the ICBTRT (2004, 2005). Risk of extinction was estimated for abundance/productivity and spatial structure/diversity.
>
> Wenatchee Population
>
> When considering the factors that determine diversity and spatial structure, the Wenatchee spring Chinook population is currently considered to be at a high risk of extinction because of the loss of naturally produced Chinook spawning in tributaries downstream from Tumwater Canyon. In addition, the Wenatchee spring Chinook population is currently not viable with respect to abundance and productivity and has a greater than 25% chance of extinction in 100 years. In sum, the Wenatchee spring Chinook population is not currently viable and has a high risk of extinction.

The recovery plan describes Upper Columbia River steelhead as follows:

> The life-history pattern of steelhead in the Upper Columbia Basin is complex. Adults return to the Columbia River in the late summer and early fall. Unlike spring Chinook, most steelhead do not move upstream quickly to tributary spawning streams. A portion of the returning run overwinters in the mainstem reservoirs, passing over the Upper Columbia River dams in April and May of the following year. Spawning occurs in late spring of the calendar year following entry into the river. Currently, and for the past 20+ years, most steelhead spawning in the wild are hatchery fish. The effectiveness of hatchery fish spawning in the wild compared to naturally produced spawners is unknown at this time and may be a major factor in reducing steelhead productivity.
>
> Juvenile steelhead generally spend one to three years rearing in freshwater 1 before migrating to the ocean, but can spend as many as seven years in freshwater before migrating. Most adult steelhead return to the Upper Columbia after one or two years at sea. Steelhead in the Upper Columbia have a relatively high fecundity, averaging between 5,300 and 6,000 eggs.
>
> Steelhead can residualize (lose the ability to smolt) in tributaries and never migrate to sea, thereby becoming resident rainbow trout. Conversely, progeny of resident rainbow trout can migrate to the sea and thereby

> become steelhead. Despite the apparent reproductive exchange between resident and anadromous *O. mykiss*, the two life forms remain separated physically, physiologically, ecologically, and behaviorally (70 FR 67130). Given this separation, NMFS (70 FR 67130) proposed that the anadromous steelhead populations are discrete from the resident rainbow trout populations. Therefore, this plan only addresses the recovery of anadromous steelhead. Resident rainbow trout are not included in the recovery of steelhead.
>
> The risk of extinction over a 100-year period for steelhead within the Upper Columbia Basin was determined by following the guidance of the ICBTRT (2004b, 2005a). Risk of extinction was estimated for abundance/productivity and spatial structure/diversity.
>
> Wenatchee Population
>
> When considering the factors that determine diversity and spatial structure, the Wenatchee steelhead population is currently considered to be at a high risk of extinction. Based only on abundance and productivity, the naturally produced Wenatchee steelhead population is not viable and has a greater than 25% chance of extinction in 100 years. In sum, the Wenatchee steelhead population is not currently viable and has a moderate to high risk of extinction.

The FWS 2011 BiOp states that, "[t]hroughout its range, the bull trout is threatened by the combined effects of habitat degradation, fragmentation and alterations associated with: dewatering, road construction and maintenance, mining, and grazing; the blockage of migratory corridors by dams or other diversion structures; poor water quality; incidental angler harvest; entrainment (a process by which aquatic organisms are pulled through a diversion or other device) into diversion channels; and introduced non-native species." FWS 2011 BiOp, p. 27. The Columbia River interim recovery unit of the coterminous United States population of the bull trout is considered essential to the survival and recovery of the species. *Id*. at 28. Generally, "bull trout subpopulations in the Columbia River DPS/interim recovery unit are declining," occupying about 45% of their estimated historic range. *Id*. at 30. According to the FWS 2011 BiOp, isolation and habitat fragmentation resulting from migratory barriers have negatively affected bull trout by:

(1) Reducing geographic distribution;
(2) Increasing the probability of losing individual local populations;
(3) Increasing the probability of hybridization with introduced brook trout;
(4) Reducing the potential for movements in response to developmental foraging and seasonal habitat requirements; and,
(5) Reducing reproductive capability by eliminating the larger, more fecund migratory form from many subpopulations.

Id. at 37.

Icicle Creek contains one of seven migratory local bull trout populations known within the Wenatchee core area, a component of the Columbia River interim recovery unit. *Id*. at 44. Due to the Hatchery, the Icicle Creek bull trout population "has been reproductively isolated from the metapopulation for the majority of the time since about 1940… Passage opportunities are assumed to have been limited or non-existent in most years." *Id*. at 45. In short, "Small dams still exist[] within the core area and continue to limit bull trout migratory movements and impact habitat quality due to associated water withdrawals and effects on fluvial processes." *Id*. at 47. "Adequate fish protection devices and structures are lacking at Icicle Creek diversions." *Id*. at 48. FWS issued the FWS 2011 BiOp under the assumption that the Hatchery "has increased the timing and duration for structures 2 and 5 remaining fully open. The current proposal would provide for [structures 2 and 5] to remain open year round." *Id*.

It is clear from the recovery plan accepted by NMFS and the FWS2011 BiOp that each species' existence in the Wenatchee River basin, including Icicle Creek, is very precarious.

Icicle Creek is important habitat for each species. The creek drains the eastern side of the Alpine Lakes Wilderness Area, and is one of the largest (if not the largest) wilderness drainages in the state of Washington. It drains over 200 square miles, mostly protected as designated Wilderness. Above the Hatchery, there are approximately 150 nearly pristine stream miles within designated Wilderness. The Hatchery is at river mile (RM) 2.7 of Icicle Creek (i.e., 2.7 miles above the mouth of the stream), upstream of the confluence of Icicle Creek and the Wenatchee River. Icicle Creek would be able to contribute significantly more to the recovery of Upper Columbia River spring-run Chinook salmon,Upper Columbia River steelhead and coterminous United States bull trout if it were not for the activities of the Hatchery.

B. <u>The Hatchery</u>.

The Hatchery was constructed between 1939 and 1941 near Leavenworth, Washington. The Hatchery is located on the banks of Icicle Creek approximately three miles from the river's confluence with the Wenatchee River. The Hatchery is operated by FWS and funded by BOR and BPA. The Hatchery currently produces spring-run Chinook salmon and targets an annual release of 1.2 million yearling smolts. The fish produced by the Hatchery are not considered part of the ESU that was defined by NMFS in its ESA-listing of Upper Columbia River spring-run Chinook salmon.

The Hatchery was originally built to rear fish in Icicle Creek, which was accomplished by constructing several dams in the river to create in-stream rearing ponds and by digging an artificial canal to carry flows around the ponds. Structure 2 is a headgate dam located at the top of the reach of Icicle Creek that was used to rear fish (river mile 2.8) and is used to divert water into the Hatchery's artificial canal and around the rearing ponds. Structure 5 is located at the bottom of the reach of Icicle Creek that

was used to rear fish (river mile 3.8). The Hatchery's water intake structure is located approximately 1.5 miles upstream, of the Hatchery.

The Hatchery discontinued rearing fish in Icicle Creek in 1979, moving its rearing operations to land. However, the Hatchery did not remove its various dams in Icicle Creek, which continued to obstruct salmonid migrations. After years of cooperation and pressure from various community members, the Icicle Creek Restoration Project Environmental Impact Statement and associated record of decision were prepared determining to remove most of the Hatchery's dams and modify the others to ensure year-round fish passage. However, the Hatchery did not fund or move forward on that project. Instead, members of the community came forward and agreed to provide the necessary funding to restore Icicle Creek from the harmful impacts caused by this federal facility. However, the Hatchery bi-furcated the project, allowing some structures to be removed but not allowing Structures 2 or 5 to be removed or modified.

C. Take Caused by the Hatchery.

Operations and maintenance of the Hatchery cause "take" of ESA-listed Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout through a variety of mechanisms. These mechanisms include facility effects, genetic introgression, ecological interactions, broodstock collection activities, monitoring and evaluation activities, and disease transmission.

1. Take Caused by Facility Effects.

The Hatchery causes take of Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout through facility effects—those effects resulting from the physical structures and devices at the Hatchery. A variety of facility effects cause such take.

Take occurs when Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and/or coterminous United States bull trout enter Hatchery facilities/structures and are thereby captured, trapped, and/or collected by the Hatchery. For example, the Hatchery causes take when ESA-listed fish are entrained by the Hatchery's water intake structures and facilities. The Hatchery has not installed fish screens in its water intake that comply with NMFS' criteria. Fish entrained in the Hatchery's water intake travel through approximately 1.5 miles of piping before encountering a manifold, and then enter a sediment retention pond at a high velocity where they encounter a steel plate. Fish are wounded and killed at each stage of this journey. Similarly, the Hatchery causes take when ESA-listed fish enter the Hatchery's fish ladder and are then captured, trapped, and/or collected by Hatchery structures and facilities. Additional take occurs when the ESA-listed fish that are trapped in the Hatchery are injured and/or killed in the Hatchery environment and/or during attempts to return the fish back to the wild. Take also occurs when ESA-listed fish captured in the Hatchery have their migration delayed or prevented, including spawning and/or foraging

migration. For example, fish entrained by the water intake may remain in a sediment retention pond for prolonged periods where they are delayed at best and wounded or killed at worst.

Take occurs when Structure 2, Structure 5, and/or the water intake dam impede or block migration of Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and/or coterminous United States bull trout, including spawning and foraging migration. Delays in spawning migration prevent successful spawning and cause spawning in less desirable habitat. Take also occurs when the ESA-listed fish are injured and/or killed attempting to migrate past Structure 2, Structure 5, and/or the water intake dam.

Take of Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout occurs from the Hatchery's use of water. For example, the Hatchery's diversions of water at Structure 2 into the Hatchery's artificial canal significantly and sometimes entirely dewater a segment of Icicle Creek. This causes a variety of forms of take, including when redds are present in the dewatered segment and are thereby adversely affected, when fish are stranded in the dewatered segment, and when stranded fish are captured, collected, trapped, injured, and/or killed in an effort to transfer them out of the dewatered segment. Take also occurs when the Hatchery's use of water—diversions at Structure 2 into the Hatchery's canal and/or at the Hatchery's water intake structure—reduces flows in Icicle Creek to such an extent that the river does not provide suitable habitat for migration, spawning, rearing, sheltering, and/or foraging and thereby harms, harasses, injures, and/or kills ESA-listed fish.

Take of Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout occurs when the Hatchery's effluent discharges and/or use of water adversely affect the water quality of Icicle Creek, including the water temperature. Currently, the Hatchery does not have a valid National Pollutant Discharge Elimination System ("NPDES") permit from the United States Environmental Protection Agency. Such a permit is required under the Clean Water Act for the Hatchery's discharges of pollutants to Icicle Creek. Take occurs when the Hatchery causes or contributes to the water quality of Icicle Creek becoming unsuitable habitat for migration, spawning, rearing, sheltering, and/or foraging and thereby harms, harasses, wounds, and/or kills ESA-listed fish.

2. <u>Take Caused by Genetic Interactions</u>.

The Hatchery causes take of Upper Columbia River spring-run Chinook salmon through genetic interactions. Such take occurs when hatchery fish spawn in the wild with ESA-listed Chinook salmon.

Fish become domesticated in a hatchery environment and thereby less fit to survive and reproduce in the wild. The Chinook salmon stock used at the Hatchery is originally from the Carson National Fish Hatchery (not from the Upper Columbia River

basin) and is highly domesticated due to decades of artificial production. Take through genetic introgression occurs when these Hatchery fish are allowed to spawn in the wild and thereby pass their maladaptive genes to the wild Upper Columbia River spring-run Chinook salmon. The resultant offspring have markedly reduced fitness, dying at a much higher rate at pre-adult life stages and producing fewer mature adults that return to spawn than would occur with two wild parents. Each release of fish at the Hatchery results in take through these genetic interactions. The "straying" of adult Hatchery fish and resultant spawning with ESA-listed Upper Columbia River spring-run Chinook salmon likely occurs throughout the entire Wenatchee River basin, causing "take" beyond Icicle Creek. In addition, residualized hatchery juveniles that fail to migrate from freshwater after release from the Hatchery mature and spawn with wild spring Chinook in and outside of Icicle Creek, also causing take of this kind.

3. Take Caused by Ecological Interactions.

The Hatchery causes take of ESA-listed Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout through ecological interactions. Such take occurs through a variety of mechanisms.

The Hatchery causes take of Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout through increased competition for food and space, including rearing, foraging, sheltering, and spawning territory. The Hatchery also causes take of Upper Columbia River spring-run Chinook salmon through increased competition for spawning mates.

The Hatchery causes take of Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout through predation. This occurs when the hatchery fish prey on protected fish. The Hatchery also causes take when hatchery fish—less fit for survival in the wild—attract predators that then consume the ESA-listed fish.

4. Take Caused by Broodstock Collection Activities.

The Hatchery causes take of Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout through the broodstock collection activities. Broodstock collection activities are those associated with the collection of returning adult fish to supply the Hatchery's broodstock.

While generally aimed at Hatchery fish, these activities take ESA-listed salmonids. For example, take occurs when ESA-listed fish are trapped, captured and/or collected by the broodstock collection activities. Additional take occurs when the captured fish are injured and/or killed while in the Hatchery environment and/or when efforts are made to return them to the wild. Take also occurs when the broodstock collection activities delay and/or prevent spawning migration of ESA-listed fish—including those fish captured by the Hatchery structures and those prevented from migrating by Structures 2 and 5 and/or the water intake dam.

5. Take Caused by Monitoring and Evaluation Activities.

The Hatchery causes take of Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout through monitoring and evaluation activities. Monitoring and evaluation activities are those undertaken to evaluate the success of the Hatchery programs and/or its effects on wild fish. Specific activities can include electrofishing and other salmonid sampling efforts that directly affect listed salmonids and ecological research activities that adversely affect the habitats of listed salmonids or disrupt their typical life history functions. The monitoring and evaluation activities cause take of ESA-listed salmonids when they capture, collect, trap, harm, harass, wound, and kill protected fish.

6. Take Caused by Disease Transmission.

The Hatchery causes take of Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout through the transmission of diseases. The unnaturally high densities of fish maintained in the Hatchery lead to increased occurrence of infection of Hatchery fish and the creation of concentrated and effective vectors for the transmission of infection to other fish. Take occurs when the Hatchery transmits disease through water discharges from the Hatchery or directly from fish released by the Hatchery to ESA-listed salmonids.

III. FWS, BOR and BPA Violations of the ESA.

FWS, BOR and BPA are in violation of sections 7 and 9 of the ESA for operating and funding the Hatchery. These violations are ongoing and have a devastating impact on the survival of Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout and the ability of these species to recover to a point where the protections afforded by the ESA are no longer necessary.

A. Violations of Section 9 of the ESA.

FWS, BOR and BPA are in violation of section 9 of the ESA, 16 U.S.C. § 1538, for carrying out and/or funding operations and maintenance of the Hatchery. As described above, the Hatchery causes take of ESA-listed Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout. Accordingly, FWS, BOR, and BPA are in violation of section 9 of the ESA for causing take and/or for soliciting another to commit and/or causing to be committed violations of section 9 of the ESA. *See* 16 U.S.C. § 1538(a), (a)(1)(G), (g).

The descriptions of take provided herein are based upon the information currently available to Wild Fish Conservancy. Wild Fish Conservancy intends to sue for all take of ESA-listed salmonids resulting from operations and maintenance of the Hatchery.

The FWS 2011 BiOp includes an incidental take statement that provides an exemption from liability under section 9 of the ESA for take of threatened bull trout

resulting from the Hatchery operations described in the BiOp and in compliance with the terms and conditions of the incidental take statement. It is not a violation of the ESA to violate a BiOp or incidental take statement, and the ESA citizen suit provision therefore does not require notice of such non-compliance. *See* 16 U.S.C. § 1540(g)(2)(A)(i) (requiring pre-sit notice "of the violation"). Rather, FWS, BOR, and BPA have the burden in any enforcement action of proving that this exemption is applicable and in force at the time of any take. 16 U.S.C. § 1539(g).

FWS, BOR and BPA are not in compliance with the FWS 2011 BiOp and/or the incidental take statement issued therewith and will not be able to prove otherwise. For example, the Hatchery operations evaluated and authorized in the FWS 2011 BiOp provided that Structures 2 and 5 would remain open year-round to provide for fish passage except under five discrete conditions. The Hatchery is not operating in compliance with these approved operations. Notably, Structure 2 has remained in a position that obstructs fish passage outside of the five discrete conditions contemplated in the FWS 2011 BiOp. Accordingly, FWS, BOR, and BPA are not exempted from liability under section 9 of the ESA for take of threatened bull trout caused by the Hatchery.

There is no applicable exemption from liability under section 9 of the ESA for take of Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon resulting from Hatchery operations and maintenance. However, Wild Fish Conservancy's concerns regarding the Hatchery stretch far beyond the mere lack of authorization for take. The Hatchery is severely affecting ESA-listed Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon and their ability to recover to a point where the protections of the ESA would not be necessary.

The Hatchery greatly harms ESA-listed salmonids by blocking migrations, by dewatering a segment of Icicle Creek, and by otherwise capturing, wounding, and killing fish. Any authorization for take of Upper Columbia River steelhead or Upper Columbia River spring-run Chinook salmon issued by NMFS would likely impose important restrictions on the Hatchery's operations and maintenance designed to minimize take. Given the Hatchery's history of unlawful take and disregard for its legal obligations, it is likely that the Hatchery would not comply with those restrictions.

Further, the Hatchery's Chinook salmon program is a "segregated" or "isolated" program as defined by the congressionally-chartered Hatchery Science Review Group ("HSRG"). The HSRG has made clear recommendations regarding the maximum acceptable level of gene flow from segregated hatchery programs to wild conspecific populations. This is measured by pHOS—the proportion of the total number of adult fish present on spawning grounds in the wild that originate from segregated hatchery facilities. The HSRG recommendation is to maintain a pHOS of less than five percent (or a gene flow of no more than two percent). This and/or similar requirements would likely be imposed on the Hatchery through any exemption from liability under section 9 of the ESA for take of Upper Columbia River steelhead or Upper Columbia River spring-run Chinook salmon, along with monitoring and evaluation requirements necessary to ensure compliance with such requirements. It is unlikely that the Hatchery would be able to

fully comply with these requirements and that the Hatchery will continue to contribute to the decline of ESA-listed salmonids.

Accordingly, Wild Fish Conservancy provides notice of its intent to sue FWS, BOR and BPA to bring the Hatchery into compliance with section 9 of the ESA. This includes complete compliance with any exemption from ESA liability for take that may be lawfully issued by NMFS and/or FWS in accordance with the requirements of the ESA, the National Environmental Policy Act, and any other applicable statutes and regulations.

B. Violations of Section 7 of the ESA.

FWS, BOR and BPA are required to comply with the procedural and substantive requirements of section 7 of the ESA, 16 U.S.C. § 1536, in funding and carrying out the operations and maintenance at the Hatchery to insure that these activities will not jeopardize the continued existence of protected species, including Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout, or result in the adverse modification of critical habitat, including that designated for Upper Columbia River steelhead and the coterminous United States bull trout. These federal agencies have failed to comply with these statutory requirements.

1. Failure to Consult Under Section 7(a)(2) of the ESA.

FWS, BOR and BPA are required to consult with NMFS under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), in carrying out and/or funding the operations and maintenance of the Hatchery. The agencies are required to consult regarding the effects of these activities on each protected species that may be affected, which includes Upper Columbia River steelhead and Upper Columbia River spring-run Chinook salmon. The agencies are further required to consult regarding the effects of these activities on any designated critical habitat that may be affected, which includes critical habitat designated for Upper Columbia River steelhead.

FWS, BOR and BPA are in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), for carrying out and/or funding the operations and maintenance of the Hatchery without consulting with NMFS on the effects to Upper Columbia River steelhead and its critical habitat and Upper Columbia River spring-run Chinook salmon.

2. Failure to Reinitiate Consultation Under Section 7(a)(2) of the ESA.

FWS, BOR and BPA are in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 136(a)(2), for carrying out and/or funding the operations and maintenance of the Hatchery without reinitiating consultation with NMFS on the effects to Upper Columbia River steelhead and its critical habitat and Upper Columbia River spring-run Chinook salmon and without reinitiating consultation with FWS on the effects to coterminous United States bull trout and its critical habitat.

With regard to Upper Columbia River steelhead and its critical habitat and Upper Columbia River spring-run Chinook salmon, numerous events and occurrences have triggered the requirement to reinitiate consultation since the last consultation with NMFS concluded in October 2003. Most notably, the NMFS 2003 BiOp consulting on the effects of the Hatchery expired in October 2013, requiring that consultation be reinitiated.

Critical habitat was designated for Upper Columbia River steelhead in 2005. 70 Fed. Reg. 52,630 (Sept. 2, 2005); 50 C.F.R. § 226.212. The designated critical habitat includes Icicle Creek—habitat adversely affected by operations and maintenance of the Hatchery. The agencies have not re-initiated consultation with NMFS to evaluate the effects of these activities on this critical habitat.

Significant new information about the listed species and the effects of hatchery practices on native salmonids has been developed since the NMFS 2003 BiOp was issued. For example, the HSRG completed its review and report for the Columbia River hatchery programs in 2009, in which it described the adverse effects of the hatchery programs and recommended extensive reforms. The agencies have not re-initiated consultation with NMFS to evaluate the effects of the Hatchery in light of this new information.

Further, the action analyzed in the previous consultation has been modified and the amount of take authorized has been exceeded such the reinitiation of consultation is required. For example, the NMFS 2003 BiOp and incidental take statement included a requirement that FWS "develop long-term solutions for fish passage issues…through the on-going Icicle Creek Restoration Project EIS process…[that] will lead to passage of at least listed steelhead, and potentially salmon adults and juveniles, into that portion of Icicle Creek upstream of the [Hatchery]." NMFS 2003 BiOp, p. 6-10. FWS decided not to complete the Icicle Creek Restoration Project or otherwise provide for the required fish passage.

With regard to coterminous United States bull trout and its critical habitat, several occurrences since the FWS 2011 BiOp have triggered the requirement to reinitiate consultation. Most notably, the action analyzed in that previous consultation has been modified and the amount of take authorized has been exceeded such the reinitiation of consultation is required. The FWS 2011 BiOp contemplated that the Hatchery would leave Structures 2 and 5 open year-round to provide for bull trout passage except under five discrete conditions. The Hatchery is not operating in accordance with these approved operations and is thereby causing more take of bull trout than authorized. For example, the incidental take statement estimated that broodstock collection activities would take up to 16 bull trout annually and it established as a surrogate for such take "28 days of passage impairment (i.e., the total number of days where closure of either structure 2 and 5 occurs) during the BSC [broodstock collection] period (May 15-July 7)." FWS 2011 BiOp, p. 155. The Hatchery is not complying with this requirement and has exceeded the surrogate take limit. The incidental take statement in the FWS 2011 BiOp specifies that:

> [A]s long as each Project element [including operation of structure 2 and 5] is implemented as described in the Biological Assessment, the [Hatchery] will not exceed the level of incidental take exempted here. However, if implementation methods are changed in ways that are likely to result in different net effects, resulting incidental take could exceed the level exempted here, and reinitiation of consultation is required.

Id. at 155-56. Structures 2 and 5 and not being operated as described in the Hatchery's biological assessment (and as analyzed in the FWS 2011 BiOp) and are causing more take of bull trout that described in the incidental take statement. Accordingly, FWS, BOR, and BPA are in violation of section 7 of the ESA for failing to reinitiate consultation with FWS.

3. Unlawful Commitment of Irreversible and/or Irretrievable Resources.

FWS, BOR and BPA are in violation of section 7(d) of the ESA, 16 U.S.C. § 1536(d), for making irreversible and/or irretrievable commitments of resources with respect to operations, maintenance, improvements, and/or upgrades at the Hatchery before consultation with NMFS has been completed on the effects to Upper Columbia River steelhead and its critical habitat and Upper Columbia River spring-run Chinook salmon. 16 U.S.C. § 1536(d). All funding and/or commitments to fund operations, maintenance, improvements, and/or upgrades at the Hatchery violate this provision.

4. Failure to Insure that the Hatchery Does not Cause Jeopardy.

In addition to the procedural consultation requirements of section 7 of the ESA, FWS, BOR and BPA are required to insure that any action they fund and/or carry out is not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). The operations and maintenance at the Hatchery jeopardize Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout and cause the destruction and/or adverse modification of critical habitat designated for Upper Columbia River steelhead and coterminous United States bull trout.

FWS, BOR and BPA are in violation of section 7 of the ESA by carrying out and/or funding the operations and maintenance of the Hatchery without insuring that such activities are not likely to jeopardize the continued existence of Upper Columbia River steelhead, Upper Columbia River spring-run Chinook salmon and coterminous United States bull trout or result in the destruction or adverse modification of critical habitat designated for Upper Columbia River steelhead and coterminous United States bull trout. The continued activities of the Hatchery, such as the unscreened intake structure, the annual release of 1.2 million non-ESA-listed Chinook smolts (resulting in straying of returning adults throughout the Wenatchee basin), the continued de-watering of Icicle Creek, the impeding of migrating steelhead, Chinook salmon and bull trout, and the

chemical and thermal pollution of Icicle Creek and the Wenatchee River, all result in "take" of these ESA-listed species to the extent of jeopardy and the destruction and/or adverse modification of critical habitat. Further, FWS, BOR and BPA have failed to insure that such jeopardy and/or adverse modification is not likely to occur by funding and/or carrying out the Hatchery operations and maintenance without first completing consultation and/or reinitiating consultation as required under section 7 of the ESA as described herein.

IV. Party Giving Notice of Intent to Sue.

The full name, address, and telephone number of the party giving notice is:

Wild Fish Conservancy
15629 Main Street N.E.
Duvall, WA 98019
Tel: (425) 788-1167

V. Attorneys Representing Wild Fish Conservancy.

The attorneys representing Wild Fish Conservancy in this matter are:

Brian A. Knutsen and Marc Zemel
Smith & Lowney, PLLC
917 S.W. Oak Street, Suite 300
Portland, OR 97205
(971) 373-8692

Please direct mail to:

Smith & Lowney, PLLC
2317 East John Street
Seattle, WA 98112

VI. Conclusion.

This letter provides notice under section 11(g) of the ESA, 16 U.S.C. § 1540(g), of Wild Fish Conservancy's intent to sue FWS, BOR and BPA for violations of the ESA discussed herein. Unless these ongoing and imminent violations described herein are corrected within sixty days, Wild Fish Conservancy intends to file suit to enforce the ESA. Wild Fish Conservancy is available during the sixty-day notice period to discuss effective remedies and actions that will assure future compliance with the ESA.

Very truly yours,

SMITH & LOWNEY, PLLC

By: _____
Brian A. Knutsen