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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. <u>Take Caused by Ecological Interactions</u>.

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. <u>Take Caused by Broodstock Collection Activities</u>.

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