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September 16, 2011

Certified U.S. Mail – Return Receipt Requested

United States Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

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Kenneth L. Salazar, Secretary
United States Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

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National Park Service
1849 C Street N.W.
Washington, D.C. 20240

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Jonathan B. Jarvis, Director
National Park Service
1849 C Street N.W.
Washington, D.C. 20240

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United States Fish and Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

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Daniel M. Ashe, Director
United States Fish and Wildlife Service
1849 C Street N.W.
Washington, D.C. 20240

Certified U.S. Mail – Return Receipt Requested

United States Department of Commerce
1401 Constitution Ave. N.W.
Washington, D.C. 20230

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Rebecca M. Blank, Acting Secretary
United States Department of Commerce
1401 Constitution Ave. N.W.
Washington, D.C. 20230

Certified U.S. Mail – Return Receipt Requested

NOAA Fisheries Service
1315 East West Highway
Silver Spring, MD 20910

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Eric C. Schwaab, Assistant Administrator for Fisheries
NOAA Fisheries Service
1315 East West Highway
Silver Spring, MD 20910

Certified U.S. Mail – Return Receipt Requested

Phil Anderson, Director
Washington Department of Fish and Wildlife
600 Capitol Way N.
Olympia, WA 98501

RE: Notice of Intent to Sue for Violations of Sections 7 and 9 of the Endangered Species Act Regarding the Elwha River Fish Restoration Plan and Other Activities

Dear Honorable Civil Servants:

You are hereby informed that, unless the violations described herein are remedied within sixty days, the organizations listed below intend to sue the National Park Service and its Director Jonathan B. Jarvis (collectively, “NPS”), the United States Department of the Interior and its Secretary Kenneth L. Salazar (collectively, “DOI”), the United States Fish and Wildlife Service and its Director Daniel M. Ashe (collectively, “USFWS”), the United States Department of Commerce and its Acting Secretary Rebecca M. Blank (collectively, “DOC”), NOAA Fisheries Service and its Assistant Administrator for Fisheries Eric C. Schwaab (collectively, “NOAA Fisheries”), and the Director of the Washington Department of Fish and Wildlife Phil Anderson (“WDFW”) for violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531, *et al.*, associated with approving, funding, and/or implementing the Elwha River Fish Restoration Plan and associated hatchery operations. This letter is provided pursuant to section 11(g) of the ESA, 16 U.S.C. § 1540(g), on behalf of the Wild Fish Conservancy, the Wild Steelhead Coalition, the Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d/b/a the Conservation Angler. Contact information for these organizations is provided below:

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

The Wild Steelhead Coalition
218 Main Street, Box No. 264, Kirkland, WA 98033
Tel: (425) 941-7041

The Federation of Fly Fishers Steelhead Committee
5237 US Hwy 89 South, Suite 11, Livingston, MT 59047
Tel: (406) 222-9369

Wild Salmon Rivers d/b/a the Conservation Angler
16430 72nd Ave. W., Edmonds, WA 98026
Tel: (425) 742-4651

I. Legal Framework.

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and implementing regulations, require that federal agencies insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat designated for such species. An action is considered to result in such jeopardy where it would reasonably 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.

Federal agencies are required to consult with NOAA Fisheries and/or USFWS for any action that “may affect” protected species or critical habitat to assess whether the action will jeopardize the species or adversely modify the habitat. 50 C.F.R. § 402.14(a). Until the consulting agency issues a comprehensive biological opinion, the action agency may not commence the action. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *and see* 16 U.S.C. § 1536(d). In fulfilling section 7 consultation duties, agencies are required to use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2); *Heartwood, Inc. v. United States Forest Serv.*, 380 F.3d 428, 434 (8th Cir. 2004).

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 “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(b)-(d).

Federal agencies have an independent and substantive obligation to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or adversely modify critical habitat. *See Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990). Indeed, a “no jeopardy” biological opinion from NOAA Fisheries or USFWS does not absolve the action agency of its duty to insure that its actions comply with the ESA. *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994).

Section 9(a) of the ESA, 16 U.S.C. § 1538(a), prohibits the “take” of an endangered species by any person. This prohibition has generally been applied to species listed as “threatened” through the issuance of regulations under section 4(d) of the ESA, 16 U.S.C. § 1533(d). “Take” includes actions that kill, harass or harm a protected species. 16 U.S.C. § 1532(19). “Harass” is defined 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. 50 C.F.R. § 17.3. “Harm” includes significant habitat modification or degradation that actually kills or injures wildlife by significantly impairing essential behavioral patterns. *Id.*; 50 C.F.R. § 222.102.

II. Factual Background.

A. Affected Species and Critical Habitat.

The Puget Sound Chinook salmon (evolutionary significant unit) is listed as a threatened species under the ESA. 64 Fed. Reg. 14,308 (March 24, 1999); 70 Fed. Reg. 37,160 (June 28, 2005). Critical habitat has been designated for this species. 70 Fed. Reg. 52,630 (Sept. 2, 2005). The Puget Sound steelhead (distinct population segment) is listed as threatened under the ESA. 72 Fed. Reg. 26,722 (May 11, 2007). The Southern Resident Killer Whale (distinct population segment) is listed as an endangered species under the ESA. 70 Fed. Reg. 69,903 (Nov. 18, 2005). The coterminous United States population of bull trout is listed as a threatened species under the ESA. 64 Fed. Reg. 58,910 (Nov. 1, 1999). Critical habitat has been designated for threatened bull trout. 75 Fed. Reg. 63,898 (Oct. 18, 2010).

B. Development of the Elwha River Fish Restoration Plan.

Pursuant to Congressional directive in the Elwha River Ecosystem and Fisheries Restoration Act of 1992, the DOI determined in 1994 that removal of the Elwha and Glines Canyon dams in the Olympic National Park is necessary to fully restore the Elwha River ecosystem and fisheries. Since then, NPS, NOAA Fisheries, USFWS, and WDFW, along with other stakeholders, have worked to create a fish restoration plan to coincide with the removal of the Elwha and Glines Canyon Dams that will restore various fish populations in the Elwha River.

The fish restoration plan has apparently been developed and evolved through a variety of agency documents. NPS released a final environmental impact statement

(“EIS”) in 1996 that analyzed the environmental impacts of the Elwha and Glines Canyon Dams removal process and included an early version of the “Elwha River Fish Restoration Plan” that discussed various options for restoring fish species.

The final Elwha River Fish Restoration Plan was published as a NOAA Technical Memorandum dated April 2008 (“2008 Fish Restoration Plan”). The authors of the Fish Restoration Plan include representatives of NPS, NOAA Fisheries, USFWS, and WDFW. The 2008 Fish Restoration Plan purports to describe the finalized plans for fish restoration before, during, and after the dam removal process. The 2008 Fish Restoration Plan includes modifications from earlier iterations of the plan expected to impact threatened and endangered species and their critical habitat.

The 2008 Fish Restoration Plan describes a significant role for hatcheries and hatchery fish to supplement or “restore” fish runs during and after the dam removal process without a clearly articulated adaptive management strategy to monitor and phase out such hatchery practices. The 2008 Fish Restoration Plan’s discussion of hatchery activities includes significant artificial supplementation of fish stocks, outplantings of hatchery fish, and broodstocks. One example of the 2008 Fish Restoration Plan’s hatchery operations is a maintenance program for the continued planting of non-indigenous Chambers Creek hatchery winter steelhead.

Various scientific studies, technical memoranda, and agency documents highlight the serious ecological risks that hatchery fish pose to native salmonids. Artificial supplementation of native Chinook and steelhead can lower reproductive fitness, increase competition for resources, cause interbreeding between native and non-native species, and expose native fish to diseases. Native salmonids will be even more vulnerable to the risks posed by hatchery practices due to the degraded environmental conditions caused by the dam removal process, such as large sediment loads. In 2010 correspondence with the Lower Elwha Klallam Tribe concerning the Chambers Creek steelhead hatchery plans, scientists at NOAA Fisheries, NPS, and WDFW recognized the serious risks that hatchery fish pose to the survival and restoration of native salmonids. Despite the agencies’ serious concerns about the use of hatchery fish in conjunction with the dam removal process and the Elwha River Fish Restoration Project, the 2008 Fish Restoration Plan formally approves these plans.

C. ESA Consultation History.

USFWS issued its Final Biological Opinion for the Elwha River Restoration Project on February 24, 2000. This biological opinion focused on the effects of dam removal on threatened bull trout. The biological opinion included an incidental take statement for bull trout harmed by dam removal, the construction of related flood control, road improvement and water supply measures, and the interim operation of hydroelectric projects. USFWS issued a joint biological opinion with NOAA Fisheries evaluating the effects of the project on bull trout critical habitat dated November 20, 2006. USFWS issued a memorandum dated January 21, 2010 re-initiating ESA consultation to address specific issues not relevant to the effects of the 2008 Fish Restoration Plan on bull trout.

The biological opinions and consultation documents prepared by USFWS do not fully address the adverse effects to bull trout and its critical habitat caused by the activities described in the 2008 Fish Restoration Plan, in particular the effects from hatchery practices. An incidental take statement has not been issued related to the harm caused to bull trout from the activities described in the 2008 Fish Restoration Plan.

NOAA Fisheries issued a biological opinion that assessed the effects of the Elwha River Ecosystem and Fisheries Restoration Project dated November 20, 2006. This document evaluated the effects of the project on threatened Puget Sound Chinook salmon and its designated critical habitat, Puget Sound steelhead (then proposed for listing as a threatened species), and endangered Southern Resident Killer Whale. This document focused on effects resulting from dam removal, while providing a limited discussion of the planned hatchery operations. An incidental take statement was included addressing harm to Puget Sound Chinook salmon associated with increased sediment loads.

The 2006 biological opinion prepared by NOAA Fisheries does not fully address the adverse effects to Puget Sound Chinook salmon and its critical habitat, Puget Sound steelhead, or Southern Resident Killer Whale resulting from the activities described in the 2008 Fish Restoration Plan, in particular those effects from hatchery practices. This biological opinion does not include an incidental take statement for harm caused to Puget Sound Chinook salmon from the activities described in the 2008 Fish Restoration Plan. This biological opinion does not include an incidental take statement for harm caused to Puget Sound steelhead from the 2008 Fish Restoration Plan or from the dam removal process and associated activities.

III. ESA Section 7 Violations.

NPS, NOAA Fisheries, USFWS, DOI, and DOC are required to comply with the procedural and substantive requirements of section 7 of the ESA, 16 U.S.C. § 1536, in carrying out, funding, and/or authorizing the activities described in the 2008 Fish Restoration Plan to insure that these activities will not jeopardize the continued existence of protected species, including Puget Sound Chinook salmon, Puget Sound steelhead, bull trout, and Southern Resident Killer Whale, or result in the adverse modification of designated critical habitat, including such habitat for Puget Sound Chinook salmon and bull trout. These federal agencies have failed to comply with these statutory requirements.

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

NPS, NOAA Fisheries, USFWS, DOI, and DOC are required to consult under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), in authorizing, carrying out, and/or funding the activities described in the 2008 Fish Restoration Plan. The agencies are required to consult regarding the effects of these activities on each protected species that may be affected, which includes Puget Sound Chinook salmon, Puget Sound steelhead, Southern Resident Killer Whale, and bull trout. 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 Puget Sound Chinook salmon and bull trout.

NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), for authorizing, carrying out, and/or funding the activities described in the 2008 Fish Restoration Plan without consulting on their effects to Puget Sound Chinook salmon, Puget Sound steelhead, Southern Resident Killer Whale, and bull trout. NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), for authorizing, carrying out, and/or funding the activities described in the 2008 Fish Restoration Plan without consulting on their effects to critical habitat designated for Puget Sound Chinook salmon and bull trout.

B. Failure to Re-initiate Consultation Under Section 7 of the ESA.

To the extent that the biological opinions discussed *supra* in section II.C constituted consultation under section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), for the activities described in the 2008 Fish Restoration Plan, NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of the ESA for failure to re-initiate consultation regarding the effects of these activities on Puget Sound Chinook salmon and its critical habitat, Puget Sound steelhead, Southern Resident Killer Whale, and bull trout and its critical habitat. These agencies are further in violation of the ESA for failing to re-initiate consultation regarding the effects of the Elwha and Glines Canyon Dam removal and related activities on threatened steelhead and bull trout critical habitat.

The February 24, 2000 biological opinion prepared by USFWS and the November 20, 2006 biological opinion prepared by NOAA Fisheries were issued before completion of the 2008 Fish Restoration Plan. The 2008 Fish Restoration Plan describes expansive hatchery and other fish supplementation activities not evaluated in these or other ESA consultation documents. For example, NOAA Fisheries' 2006 biological opinion did not discuss or assess the effects of the Chambers Creek hatchery operations on the native salmonids. Yet the 2008 Fish Restoration Plan discusses how the Chambers Creek hatchery operations will continue throughout the dam removal process, despite the vulnerable state of the native salmonids and the adverse effects from this hatchery practice. Modifications to the hatchery operations described in the 2008 Fish Restoration Plan such as the Chambers Creek maintenance triggered the re-initiation of consultation.

Significant new information about the listed species and the effects of hatchery practices on native salmonids has arisen since the February 24, 2000 biological opinion prepared by USFWS and the November 20, 2006 biological opinion prepared by NOAA Fisheries were issued. NPS and NOAA Fisheries have recognized the large body of scientific research that discusses the serious risks that hatchery fish pose to native salmonids. For example, on March 23, 2010, the Chief Fisheries Biologists at Olympic National Park sent a letter to the Lower Elwha Klallam Tribe detailing the risks that the Chambers Creek hatchery steelhead pose to native steelhead and other wild salmonids in

the Elwha River. NPS biologists explained that these hatchery fish posed “many genetic and ecological risk factors to wild steelhead and other native fish,” including genetic mixing, competition, predation, and pathogen amplification and transmission. NOAA Fisheries discussed similar scientific information and problems with the Chambers Creek hatchery fish in a white paper on the same subject.

These documents demonstrate that a significant body of scientific literature has established the harmful effects of hatchery practices in general, and from the Chambers Creek stock in particular, on the survival and recovery of native salmonids in the Elwha River. This information was not evaluated when NOAA Fisheries prepared its 2006 biological opinion or when USFWS prepared its 2000 biological opinion.

Puget Sound steelhead was listed as a threatened species in 2007, after NOAA Fisheries completed its November 20, 2006 biological opinion. The agencies have not re-initiated consultation with NOAA Fisheries to evaluate the effects of the 2008 Fish Restoration Plan or the removal of the Elwha and Glines Canyon Dams and related activities on Puget Sound steelhead.

Critical habitat designated for bull trout was expanded in 2010 beyond that evaluated in USFWS and NOAA Fisheries’ joint biological opinion issued in 2006. The additional designated critical habitat includes habitat within the area affected by the activities described in the 2008 Fish Restoration Plan and by the removal of the Elwha and Glines Canyon Dams and related activities. The agencies have not re-initiated consultation with USFWS to evaluate the effects of these activities on the expanded bull trout critical habitat.

NPS, NOAA Fisheries, USFWS, DOI, and DOC are required to re-initiate consultation regarding the activities described in the 2008 Fish Restoration Plan because modifications to the activities cause effects not previously considered, new information reveals effects to protected species and critical habitat not previously considered, and because a new species has been listed as threatened and additional critical habitat has been designated. The agencies are required to re-initiate consultation regarding the effects of Elwha and Glines Canyon Dams removal and related activities on threatened steelhead because this species was listed as threatened after NOAA Fisheries issued its 2006 biological opinion. The agencies are required to re-initiate consultation regarding the effects of Elwha and Glines Canyon Dams removal and related activities on bull trout critical habitat because this habitat was expanded after USFWS and NOAA Fisheries issued their joint 2006 biological opinion. NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of the ESA for failing to re-initiate consultation.

C. Failure to Insure the 2008 Fish Restoration Plan will not Cause Jeopardy.

In addition to the procedural consultation requirements of section 7 of the ESA, NPS, NOAA Fisheries, USFWS, DOI, and DOC are required to insure that any action they authorize, fund, 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). NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of this requirement by authorizing, funding, and/or carrying out the activities described in the 2008 Fish Restoration Plan.

The 2008 Fish Restoration Plan describes significant hatchery operations to be implemented in the Elwha River system. Broodstock collections, outplantings, and artificial supplementation will introduce large quantities of non-native and/or hatchery fish that pose significant ecological risks to native salmonids. The 2008 Fish Restoration Plan does not include a clearly articulated adaptive management strategy to monitor and phase out these hatchery practices. The activities described in the 2008 Fish Restoration Plan are likely to jeopardize the continued existence of Puget Sound Chinook salmon, Puget Sound steelhead, Southern Resident Killer Whale, and bull trout. These activities are further likely to adversely modify critical habitat designated for Puget Sound Chinook salmon and bull trout.

NPS, NOAA Fisheries, and WDFW have recognized the serious risks that these hatchery operations, in particular those related to the Chambers Creek steelhead stocks, will have on the survival of the native salmonids. For example, in a NOAA Fisheries white paper for the Lower Elwha Klallam Tribe, agency scientists concluded that “Chambers Creek hatchery steelhead pose a significant risk to the wild steelhead and rainbow trout in the Elwha” and that “there is a high level of potential for interactions between Chambers Creek hatchery steelhead and wild steelhead, resident rainbow trout, and other salmonid species.” See J. McMillan, et. al. *A review of risks for non-native hatchery salmonids with application to the Chambers Creek hatchery steelhead in the Elwha River Project*, p. 45. Although the NOAA Fisheries white paper highlights the harm that will occur to native salmonids from the Chambers Creek steelhead stocks, the paper reviewed scientific literature that supports general conclusions regarding the harm hatchery fish pose to native salmonids. The paper also discusses how the Chambers Creek steelhead stock poses serious risks to the recovery of native salmonids.

The activities described in the 2008 Fish Restoration Plan are likely to jeopardize the continued existence of Puget Sound Chinook salmon, Puget Sound steelhead, Southern Resident Killer Whale, and bull trout. The activities described in the 2008 Fish Restoration Plan are likely to adversely modify critical habitat designated for Puget Sound Chinook salmon and bull trout. NPS, NOAA Fisheries, USFWS, DOI, and DOC are in violation of section 7 of the ESA by authorizing, funding, and/or carrying out these activities.

IV. ESA Section 9 Violations.

NPS, NOAA Fisheries, USFWS, DOI, DOC and WDFW are in violation of section 9 of the ESA for causing take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout through the activities described in the 2008 Fish Restoration Plan. NPS, NOAA Fisheries, USFWS, DOI, and DOC are further in violation of section 9 of the ESA for causing take of Puget Sound steelhead through the removal of the Elwha and Glines Canyon Dams and associated activities.

The hatchery operations described in the 2008 Fish Restoration Plan will result in take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout in a variety of ways. For example, supplementation of fish can cause take in the event that the returning adults have reproductive fitness that is lower than the original natural-origin (wild) adults. Studies on both spring Chinook and winter and summer-run steelhead show that there is a non-negligible risk of reduced fitness for returning adults. Indeed, recent studies involving winter-run and summer-run steelhead have shown that the reproductive success of naturally spawning progeny of supplementation hatchery fish whose parents were wild is significantly lower than wild fish.

Additionally, the 2008 Fish Restoration Plan includes proposals to transplant adult and/or juvenile hatchery offspring to the upper Elwha basin for release while also releasing hatchery juveniles into the lower river. Releasing hatchery juveniles into the lower river will create severe competition for food and rearing space for the migrants from the upper basin, resulting in take of ESA protected fish. Because the hatchery fish are and will continue to increase competition, reduce fitness, and disrupt the feeding and breeding of the native salmonids, the hatchery operations will cause take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout.

The removal of the Elwha and Glines Canyon Dams and associated activities will result in take of Puget Sound steelhead through increased sediment load and other environmental and ecological impacts.

Despite the harm that will result to ESA protected species from the activities described in the 2008 Fish Restoration Plan, the agencies have not received incidental take statements or other authorizations that shield them from liability under section 9 of the ESA. Further, the agencies have not received an incidental take statement for harm caused to Puget Sound steelhead from the removal of the Elwha and Glines Canyon Dams and associated activities.

The activities described in the 2008 Fish Restoration Plan cause take of Puget Sound Chinook salmon, Puget Sound steelhead, and bull trout. NPS, NOAA Fisheries, USFWS, DOI, DOC and WDFW are in violation of section 9 of the ESA for causing such take. The removal of the Elwha and Glines Canyon Dams and associated activities cause take of Puget Sound steelhead. NPS, NOAA Fisheries, USFWS, DOI, DOC are in violation of section 9 of the ESA for causing such take.

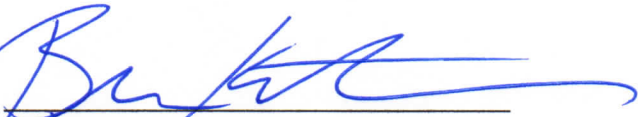
V. Conclusion.

Under section 11(g) of the ESA, 16 U.S.C. § 1540(g), this letter provides NPS, NOAA Fisheries, USFWS, DOI, DOC, and WDFW with sixty days notice of Wild Fish Conservancy, the Wild Steelhead Coalition, the Federation of Fly Fishers Steelhead Committee, and Wild Salmon Rivers d/b/a the Conservation Angler's intent to sue for violations of the ESA discussed herein. Unless the ongoing and/or imminent violations described above are corrected within sixty days, these organizations intend to file suit

against the responsible agencies and officials to enforce the ESA. During the notice period, we will be available to discuss effective remedies and actions that will assure future compliance with the ESA.

Very truly yours,

SMITH & LOWNEY, PLLC

By: 
Brian A. Knutsen