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11 **THE UNITED STATES DISTRICT COURT**
12 **FOR THE EASTERN DISTRICT OF WASHINGTON**

13 WASHINGTON TROUT, a non-profit
14 organization,

15 Plaintiff,

16 v.

17 GALE NORTON, in her official capacity
18 as Secretary of the Interior; U.S. FISH &
19 WILDLIFE SERVICE; MATTHEW J.
20 HOGAN, in his official capacity as the
21 Acting Director of the U.S. FISH &
22 WILDLIFE SERVICE; JULIE
23 COLLINS, in her official capacity as
24 manager of the Leavenworth National
25 Fish Hatchery Complex,

Defendants.

No.

WASHINGTON TROUT'S
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

1 **INTRODUCTION**

2 1. Washington Trout brings this action for declaratory and injunctive relief to
3 require the United States Fish and Wildlife Service (“USFWS”) to comply with the
4 Endangered Species Act (“ESA”), and to enjoin the Leavenworth National Fish
5 Hatchery (“Leavenworth NFH” or “Hatchery”)—a USFWS facility—from
6 continuing to take native stocks of endangered steelhead trout, endangered spring
7 Chinook salmon, and threatened bull trout in violation of the ESA. 16 U.S.C. §
8 1538(a)(1).
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11 2. Washington Trout also brings this action to require the USFWS to comply
12 with the National Environmental Policy Act (“NEPA”) before undertaking major
13 federal actions at the Leavenworth NFH, including the modification of structures
14 blocking fish passage and the construction of a major water intake and waste-water
15 pump-back project, without an analysis of the direct, indirect, and cumulative
16 impacts of those actions on the environment.
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19 3. For several years, concerned local citizens, including members of
20 Washington Trout, have attempted to work cooperatively with the USFWS in a
21 public-private partnership to restore natural fish passage on Icicle Creek and to
22 ensure that the Leavenworth NFH complies with federal and state laws. That
23 partnership effort led to the preparation of a Final Environmental Impact Statement
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1 and Record of Decision for the Icicle Creek Restoration Project in 2002. At that
2 time, the USFWS selected as its preferred alternative the removal of several
3 abandoned Hatchery structures in the natural channel of Icicle Creek, and the
4 modification of two others to allow for fish passage. The USFWS stated that the
5 purpose and need for the Icicle Creek Restoration Project was to provide long-
6 term, sustainable, year-round passage, and to provide habitat for threatened and
7 endangered species.
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10 4. The Record of Decision for the Icicle Creek Restoration Project indicated
11 that the removal and modifications to the remaining structures to allow for fish
12 passage would be accomplished “within one year.”
13

14 5. Unfortunately, the private-public partnership has faltered. The USFWS soon
15 backed away from its plan, failing to remove abandoned dams, weirs, and rack
16 structures littering the natural channel and blocking fish passage.
17

18 6. Facing agency inaction and increased hostility, the members of the Icicle
19 Creek Watershed Council (“ICWC”) (a watershed council made up of private
20 parties and local land owners) took it upon themselves to pay for the removal of
21 several of these structures, at a cost of more than \$200,000. Since that time, the
22 USFWS has failed to modify the existing structures, and has instead operated them
23 in ways that block fish passage for threatened and endangered species, and in ways
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1 that degrade habitat. As such, the USFWS is failing to comply with the ESA, one
2 of the laws that the USFWS is charged with enforcing.

3
4 7. Further, USFWS is now proceeding with plans to complete a so-called Phase
5 II of the Icicle Creek Restoration Project, and planning to rehabilitate its water
6 supply system and add a waste-water pump-back project to assist fish passage. In
7 each case, USFWS is proceeding without adequate and necessary consultations
8 under the ESA, and without adequate and necessary analysis of environmental
9 impacts under NEPA.
10

11 8. Accordingly, Washington Trout seeks, among other remedies, an order
12 enjoining the Leavenworth NFH from continuing to take threatened and
13 endangered fish species in violation of the ESA. Washington Trout further seeks
14 an order compelling USFWS to reinitiate and complete consultation regarding the
15 effects of Hatchery operations on all federally listed threatened and endangered
16 species, and to undertake necessary analysis of the proposed projects and its
17 operations under NEPA. The requested relief is necessary to prevent continued
18 illegal agency action and forestall irreparable injury to protected species and
19 Plaintiff's interests.
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JURISDICTION AND VENUE

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2 9. This Court has jurisdiction over Washington Trout's ESA and NEPA claims
3 pursuant to 28 U.S.C. § 1331 (federal question), 16 U.S.C. § 1540(g) (ESA citizen
4 suit provision), and 5 U.S.C. §§ 701-706 (Administrative Procedure Act). The
5 requested relief is also proper under 28 U.S.C. § 2201 (declaratory relief) and 28
6 U.S.C. § 2202 (injunctive relief).
7

8
9 10. As required by the ESA, 16 U.S.C § 1540(g), Plaintiff furnished the
10 USFWS, the Secretary of Interior, and the Secretary of Commerce with written
11 notice of intent to sue more than 60 days ago in a letter postmarked March 17,
12 2005. Washington Trout's notice of intent to sue was received by the Hatchery on
13 March 21, 2005, by the Department of Commerce on March 23, 2005, and by the
14 Department of Interior on March 25, 2005. USFWS has not remedied the alleged
15 violations; they are ongoing and reasonably likely to continue. Plaintiff's claims
16 also arise under NEPA. Accordingly, an actual, justiciable controversy exists
17 between Washington Trout and the federal Defendants.
18

19
20 11. Venue is properly vested in this Court pursuant to 16 U.S.C. 1540(g)(3)(A)
21 and 28 U.S.C. § 1391(e) because Defendant Leavenworth NFH is located in this
22 judicial district, a substantial part of the events or omissions giving rise to the
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1 claims occurred in this district, and to the extent that real property is involved in
2 this action, such property is located in this judicial district.

3
4 **PARTIES**

5 12. Plaintiff Washington Trout is a non-profit, 501(c)(3) organization with its
6 principal place of business in Duvall, Washington. Washington Trout is dedicated
7 to the preservation and recovery of Washington's native fish species and the
8 ecosystems upon which those species depend.

9
10 13. Washington Trout brings this action on behalf of itself and its approximately
11 2,400 members.

12 14. As an environmental watchdog, Washington Trout actively informs the
13 public on matters affecting water quality, fish, and fish habitat in the State of
14 Washington through publications, commentary to the press, and sponsorship of
15 educational programs. Washington Trout also conducts field research on wild-fish
16 populations and has designed and implemented habitat restoration projects.
17
18 Washington Trout has lobbied, litigated, and publicly commented on federal and
19 state actions that affect state waters. For example, Washington Trout corrected the
20 misidentification of over 4,500 fish-bearing streams throughout the state, thereby
21 qualifying those waters for additional legal protection. Washington Trout routinely
22 seeks to compel the USFWS, an agency charged with protecting biologically
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1 imperiled species such as bull trout, to follow the laws designed to protect and
2 recover those species.

3
4 15. Washington Trout's staff and members derive scientific, recreational, health,
5 conservation, spiritual, and aesthetic benefits from the preservation and protection
6 of threatened and endangered species under the ESA. More specifically,
7 Washington Trout's staff and members spend time in areas, including Icicle Creek,
8 that are adversely affected by USFWS' lack of compliance with the ESA, and
9 member(s) of Washington Trout reside near and regularly visit these areas of Icicle
10 Creek.
11

12 16. Washington Trout's staff and members use Icicle Creek for recreation and
13 spiritual renewal. Its staff and members derive recreational, scientific and aesthetic
14 benefits from the existence of a healthy ecosystem and from wild salmon and trout
15 in Icicle Creek. Washington Trout's staff and members observe, study,
16 photograph, and appreciate Icicle Creek's native fish populations. In addition,
17 staff and members of Washington Trout have met with, negotiated with, and
18 worked closely with, USFWS personnel concerning native fish passage issues and
19 Hatchery operations.
20
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22 17. Washington Trout staff and members have also suffered procedural and
23 informational harms connected to their substantive, conservation, recreation, and
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1 scientific activities resulting from USFWS' failure to complete and undertake
2 consultations mandated by Section 7 of the ESA. Washington Trout's staff and
3 members rely in part on the Section 7 consultation process to protect threatened
4 and endangered species from injuries inflicted by Defendants' Hatchery activities.
5

6 18. The past, present, and future enjoyment of these benefits, including the
7 recreational, aesthetic, and scientific interests of Washington Trout staff and
8 members, has been, is being, and will continue to be harmed by Defendants'
9 failure to comply with the ESA and NEPA. The consultation process provides
10 agency decision makers, Washington Trout, and the public with essential
11 information regarding the effects of USFWS-approved and NOAA-approved
12 actions with effects on threatened and endangered species.
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15 19. The injuries described above are actual, concrete injuries that the Court may
16 remedy by declaring that Defendants' activities are illegal and enjoining
17 Defendants from taking further illegal actions.
18

19 20. Defendant Gale Norton is the Secretary of the Interior and, as such, is the
20 federal official ultimately responsible for ensuring that the USFWS complies with
21 the ESA and NEPA.
22

23 21. Defendant USFWS is an executive branch department within the
24 Department of the Interior. USFWS is responsible for administering the
25

1 provisions of the Endangered Species Act with regard to threatened and
2 endangered species, including the threatened bull trout that inhabit Icicle Creek.

3
4 22. Defendant Matthew J. Hogan is the Acting Secretary of the USFWS.

5 23. Defendant Julie Collins is the Complex Manager of the Leavenworth NFH
6 Complex and, as such, is responsible for the Hatchery's compliance with the ESA
7 and NEPA.

8 9 **STATUTORY BACKGROUND**

10 **A. The Governing Law**

11 **The Endangered Species Act**

12 24. The ESA is a federal statute whose purpose is to provide a program to
13 conserve threatened and endangered species and a means to protect the ecosystems
14 upon which those species depend. 16 U.S.C. § 1531(b).

15
16 25. To this end, the ESA requires the Secretary of the Interior or the Secretary
17 of Commerce to protect such species by listing them as either threatened or
18 endangered. 16 U.S.C. § 1533.

19
20 26. Section 9 of the ESA and its implementing regulations prohibit any person,
21 including federal agencies, from "taking" a threatened or endangered species. 16
22 U.S.C. § 1538(a)(1); 50 C.F.R. § 227.21. "Taking" is defined broadly under the
23 ESA to include harassing, harming, pursuing, hunting, shooting, wounding, killing,
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1 trapping, capturing, or collecting, or to attempting to engage in any such conduct
2 regarding a protected species either directly or by degrading its habitat sufficiently
3 to impair essential behavior patterns. 16 U.S.C. § 1532(19); 50 C.F.R. § 222.102.

4
5 27. “Take” by federal agencies is permitted if, upon the completion of formal
6 consultation, the agency receives an incidental take statement pursuant to Section
7 7(b)(4). An incidental take statement specifies the impact of any incidental take,
8 provides for reasonable and prudent measures necessary to minimize impacts, and
9 sets forth terms and conditions that must be followed. 16 U.S.C. § 1536(b)(4).

10
11 “Take” by federal agencies of a threatened species may also be permitted if the
12 activity is exempted from the prohibition on “take” through conservation
13 regulations issued pursuant to Section 4(d). 16 U.S.C. § 1533(d)

14
15 28. Section 7(a)(2) of the ESA requires all federal agencies, including
16 USFWS, to “insure that any action authorized, funded or carried out by such
17 agency . . . is not likely to jeopardize the continued existence of any endangered or
18 threatened species.” 16 U.S.C. § 1536(a)(2). To carry out this mandate, the acting
19 agency must consult with NOAA Fisheries, the delegated agency of the Secretary
20 of Commerce, whenever the action agency’s actions “may affect” a listed species
21 under NOAA Fisheries’ jurisdiction. The acting agency must consult with
22 USFWS, as the delegated agency from the Secretary of the Interior, whenever the
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1 action agency's actions "may affect" a listed species under USFWS' jurisdiction.

2 Id.

3
4 29. When an agency's actions "may affect" a listed species, consultation under
5 Section 7(a)(2) results in the preparation of a biological opinion ("BiOp") by either
6 NOAA Fisheries or USFWS that determines whether or not the action is likely to
7 jeopardize a listed species. 16 U.S.C. § 1536(a)(2).

8
9 30. Any taking of threatened or endangered species that is in compliance with
10 the terms and conditions specified in a biological opinion shall not be considered to
11 be a prohibited taking of the species concerned. 16 U.S.C. § 1536(o)(2). Any
12 taking occurring in violation of the terms and conditions of an incidental take
13 statement, or in excess of that permitted under the incidental take statement, is a
14 violation of Section 9 of the ESA. 16 U.S.C. § 1538.

15
16 31. The acting agency's duties under the ESA do not end with the issuance of a
17 biological opinion and incidental take statement. The action agency must reinitiate
18 formal consultation where discretionary Federal involvement or control over the
19 action has been retained or is authorized by law and "the amount or extent of
20 taking specified in the incidental take statement is exceeded" or "new information
21 reveals effects of the action that may affect listed species or critical habitat in a
22 manner or to an extent not previously considered." 50 C.F.R. § 402.16.
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1 32. Section 7(d) of the ESA further provides that once a federal agency
2 initiates consultation on an action under Section 7(a)(2), it “shall not make any
3 irreversible or irretrievable commitment of resources with respect to the agency
4 action which has the effect of foreclosing the formulation or implementation of any
5 reasonable and prudent alternative measures which would not violate” Section
6 7(a)(2). 16 U.S.C. § 1536(d). The purpose of Section 7(d) is to maintain the
7 environmental status quo pending completion of interagency or internal agency
8 consultation.
9
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11 **The National Environmental Policy Act**

12 33. NEPA is our “basic national charter for the protection of the environment.”
13 40 C.F.R. § 1500.1.
14

15 34. The purpose of NEPA, “recognizing the profound impact of man’s activity
16 on the interrelations of all components of the human environment, particularly the
17 profound influences of population growth [and] high-density urbanization,” is “to
18 use all practicable means and measures . . . to create and maintain conditions under
19 which man and nature can exist in productive harmony, and fulfill the social,
20 economic, and other requirements of present and future generations of Americans.”
21 42 U.S.C. § 4331(a).
22
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1 35. To this end, NEPA requires federal agencies to prepare detailed statements
2 for all actions which they approve "significantly affecting the quality of the human
3 environment." 42 U.S.C. § 4332(2)(C). These statements, called environmental
4 impact statements ("EIS"), are detailed reports completed after a thorough analysis
5 and study that report on the environmental effects of the proposed action and
6 describe alternatives to the proposed action.
7

8 36. NEPA and its implementing regulations further require that all related,
9 similar, interconnected, or interdependent actions, including proposed actions that
10 are similar in geographic scope or extent, or will have similar environmental
11 impacts, must be analyzed together in an EIS. See 40 C.F.R. §§ 1501et seq. Such
12 analyses must also include consideration of a reasonable range of alternatives to a
13 proposed action. 42 U.S.C. § 4332(2)(C)(iii); see also 40 C.F.R. § 1502.14.
14

15 37. An agency may not avoid preparation of an EIS by "breaking . . . down [its
16 action] into small component parts." 40 C.F.R. § 1508.27(b)(7).
17

18 38. The Council on Environmental Quality ("CEQ")—an agency within the
19 Executive Office of the President—has promulgated regulations implementing
20 NEPA that are "binding on all federal agencies." 40 C.F.R. § 1500.3.
21

22 39. Even after a NEPA process is completed, where an agency learns of
23 "significant new circumstances" or new "information relevant to environmental
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25

1 concerns and bearing on the proposed action or its impacts,” the agency must
2 undertake further review under NEPA. Id. § 1502.9(c).

3 **The Administrative Procedure Act**

4
5 40. The Administrative Procedure Act (“APA”) authorizes courts reviewing
6 agency action to hold unlawful and set aside final agency action, findings, and
7 conclusions that are arbitrary and capricious, an abuse of discretion, or otherwise
8 not in accordance with law. 5 U.S.C. § 706(2)(A). EISs and environmental
9 assessments (“EAs”) issued pursuant to NEPA are reviewed under this provision of
10 the APA.
11

12 **FACTUAL BACKGROUND**

13 **Icicle Creek**

14
15 41. Icicle Creek originates in the Cascade Mountains of Washington State and
16 is a fourth-order tributary to the Wenatchee River, which is a tributary to the
17 Columbia River.
18

19 42. Icicle Creek contains natural populations of: steelhead trout
20 (*Oncorhynchus mykiss*), spring Chinook salmon (*Oncorhynchus tshawytscha*),
21 and bull trout (*Salvelinus confluentus*). Spring Chinook salmon produced by the
22 Hatchery are not listed under the ESA.
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1 43. In the upper Columbia River, an area that includes Icicle Creek, steelhead
2 trout and spring Chinook salmon are listed as endangered species under the ESA.
3 Both of these species are managed by NOAA Fisheries.
4

5 44. In the upper Columbia River, bull trout are listed as threatened species
6 under the ESA and are managed by the USFWS.

7 45. Icicle Creek is listed on the State of Washington's Clean Water Act 303(d)
8 list for 1998, as violating State water quality standards for temperature, dissolved
9 oxygen and instream flow. The Hatchery is among the entities listed as
10 contributing to this degraded condition.
11

12 46. As explained more fully below, Defendants' actions have degraded, and
13 continue to degrade, the ecosystem in Icicle Creek. Likewise, Defendants' actions
14 block and interfere with fish passage for threatened and endangered species in
15 Icicle Creek.
16

17 **The Leavenworth National Fish Hatchery**

18
19 47. Constructed in 1939 and 1940, the Leavenworth NFH is located
20 approximately three miles south of the city of Leavenworth, Washington, on the
21 banks of Icicle Creek.
22

23 48. Originally designed to maintain salmon stocks blocked by construction of
24 the Grand Coulee Dam on the Columbia River, the Leavenworth NFH initially
25

1 reared fish in holding ponds constructed in a one mile stretch of natural channel of
2 Icicle Creek. Hatchery operations at that time were conducted principally within
3 this stretch of Icicle Creek.
4

5 49. The most upstream of the holding pond structures, the Headgate Dam, was
6 used to control water flow over the fish holding ponds and divert excess water into
7 a 4,000 foot-long manmade canal sending water over a spillway dam where it is
8 returned to Icicle Creek.
9

10 50. Fish migrations to areas above the Hatchery were blocked by the spillway
11 at the base of the canal and by a series of dams and weirs in the natural channel of
12 Icicle Creek. Included among these blocking structures in the natural channel was
13 Dam 5, located just upstream of the confluence of the natural channel and the
14 spillway dam.
15

16 51. Over time, the intermediate structures between the Headgate Dam and
17 Dam 5 were abandoned, and the USFWS no longer used the natural channel of
18 Icicle Creek for Hatchery fish propagation. Unfortunately, these abandoned
19 structures were left in place for decades, where they continued to block native fish
20 passage.
21
22

23 52. Although the Hatchery no longer uses the natural channel of Icicle Creek
24 to raise fish, the Hatchery continues to use the Headgate Dam to divert water from
25

1 Icicle Creek's natural channel into the Hatchery's manmade canal. At most times
2 of the year the Hatchery's diversion of water into its manmade canal significantly
3 dewateres the natural channel of Icicle Creek between the Headgate Dam and Dam
4
5 5.

6 53. When its gates are closed, the Headgate Dam also acts as a barrier to
7 upstream and downstream fish passage, including passage for endangered
8 steelhead, endangered spring Chinook salmon, and threatened bull trout. When the
9 gates are open, the Headgate Dam can still act as a partial barrier to migration
10 depending on water volume through the Dam and the configuration of the gates.
11

12 54. According to USFWS, more than 20 miles of Icicle Creek habitat is
13 located above the Headgate Dam.
14

15 55. Dam 5 also blocks upstream and downstream fish passage, including
16 passage for endangered steelhead trout, endangered spring Chinook salmon, and
17 threatened bull trout. The Hatchery's placement of stop logs in Dam 5 when
18 conducting broodstock trapping activities and at other times of the year blocks fish
19 passage.
20

21 56. The Hatchery's water intake is located approximately 1.5 miles upstream
22 of the Hatchery. The water intake structure consists of a diversion dam, fish
23 ladder, wide bar trash rack, and another narrower trash rack (1 ½ inch spacing)
24
25

1 located in a building. Water is conveyed from this intake to the Hatchery, using
2 gravity, through a buried 31-inch pipe system.

3
4 57. This water enters a sand-settling basin and goes through two screening
5 chambers before use at the Hatchery.

6 58. On March 31, 1999, the USFWS Moses Lake Field Office issued a
7 memorandum (“1999 USFWS Memo”) concluding informal consultation under the
8 ESA for fish propagation operations, including Hatchery operations at the
9 Leavenworth NFH.
10

11 59. The 1999 USFWS Memo identified the potential for migratory bull trout to
12 enter the unscreened Hatchery water intake pipe and stated that “screening of the
13 intake pipe and other protective measures to avoid the take of listed species should
14 be a priority.”
15

16 60. To date, the USFWS has failed to install appropriate screens on its water
17 intake. The existing fish screening devices on the Hatchery’s water intake system
18 are outdated, inefficient, and do not comply with current federal and state
19 regulatory requirements.
20

21 **Initial Efforts to Restore Fish Passage and the Ecosystem in Icicle Creek**

22 61. Beginning in 1998, Washington Trout has worked together with the ICWC
23 and individuals in the Leavenworth area to restore upstream and downstream
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25

1 passage for fish in Icicle Creek, including passage for threatened and endangered
2 species.

3
4 62. After negotiating with members of the ICWC and others, the Hatchery
5 agreed to implement a plan to restore Icicle Creek's natural channel and provide
6 for fish passage into the upper reaches of Icicle Creek.

7
8 63. In January 2002, USFWS published a Final Environmental Impact
9 Statement ("FEIS") for the Icicle Creek Restoration Project. In the FEIS, USFWS
10 stated that its preferred alternative included removal of all structures in the natural
11 channel, with the exception of the Headgate Dam and Dam 5—both of which were
12 to be modified to allow for fish passage.

13
14 64. The FEIS expressly avoids a detailed analysis of the Hatchery's water
15 intake structure, effects of water withdrawals from that structure, or general
16 hatchery operations. Instead, the FEIS focuses on the effects related to the
17 construction and mitigation activities related to the restoration of fish passage in
18 the natural channel of Icicle Creek.

19
20 65. On March 12, 2002, USFWS issued a Biological Opinion addressing the
21 Icicle Creek Restoration Project ("2002 USFWS Restoration BiOp") and
22 concluded that the Restoration Project was not likely to jeopardize the continued
23 existence of bull trout in the impacted segment of Icicle Creek. The Terms and
24

1 Conditions of the accompanying Incidental Take Statement addressed demolition
2 and construction activities in the Icicle Creek channel and not ongoing Hatchery
3 operations.
4

5 66. On April 3, 2002, NOAA Fisheries approved a Biological Opinion
6 addressing the Icicle Creek Restoration Project (“2002 NOAA Restoration BiOp”),
7 and concluded the Restoration Project was not likely to jeopardize the continued
8 existence of steelhead trout and spring Chinook salmon in the impacted portion of
9 Icicle Creek. The 2002 NOAA Restoration BiOp, and the Terms and Conditions
10 for the accompanying Incidental Take Statement for the Restoration Project
11 addressed demolition and construction activities in the Icicle Creek channel and
12 not ongoing Hatchery operations.
13
14

15 **Additional Fragmentation of the Restoration Project**

16 67. After issuance of the FEIS and Record of Decision for the Icicle Creek
17 Restoration Project, the Hatchery announced that it did not have adequate funding
18 to implement the Icicle Creek Restoration Project as proposed, planned, and
19 analyzed.
20

21 68. Frustrated by this turn of events, members of the ICWC used over
22 \$200,000 of their own funds to remove several of the long-abandoned and broken
23 weirs, dams, and other structures littering the natural channel of Icicle Creek,
24
25

1 leaving only the Headgate Dam and Dam 5. Washington Trout provided technical
2 assistance to the ICWC to help it determine the impacts and effects of
3 implementing the Restoration Project.
4

5 69. Since that time, the Hatchery has failed to remove, modify, or operate the
6 two remaining barriers to fish passage in the natural channel of Icicle Creek
7 adjacent to the Hatchery (the Headgate Dam and Dam 5) to allow for fish passage.
8 The Hatchery has also failed to provide sufficient flows to remove accumulated
9 sediments and restore habitat in the natural channel.
10

11 70. Upon information and belief, the Hatchery now plans to move forward
12 with plans for what it calls “Phase II” of the Icicle Creek Restoration Project.
13

14 71. In this so-called Phase II, the Hatchery proposes to, among other things:
15 (1) construct a fish sorter, using Dam 5 as part of the structure; (2) build a vertical
16 slot fish way (fish ladder) at the Headgate Dam; and (3) rehabilitate and modify the
17 Headgate Dam.
18

19 72. On or about July 26, 2003, the U.S. Bureau of Reclamation met with
20 representatives of the U.S. Army Corps of Engineers, Washington Department of
21 Ecology, Washington Department of Fish and Wildlife, Chelan County, USFWS,
22 NOAA Fisheries, and the ICWC concerning Phase II preliminary designs.
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1 73. At that June 2003 meeting, a representative from USFWS reported that
2 new data collected from radio-tagged bull trout demonstrated that bull trout were
3 moving back and forth between the lower Wenatchee River and the main spillway
4 at the Leavenworth NFH all year. USFWS further reported, based on this newly
5 collected data, that it appeared that in addition to upstream spawners and
6 downstream juveniles, resident fish in the Wenatchee and Icicle systems need to be
7 able to pass above the Hatchery facilities at all times of the year. This radio
8 telemetry data was neither known nor taken into account in the FEIS for the
9 Restoration Project or the USFWS Restoration BiOp.
10
11

12 74. In addition to the bull trout radio telemetry data, the following and
13 significant information concerning the Restoration Project is now available: (1)
14 during the USFWS' proposed fish sorter operations (May through December)
15 flows in the historical channel will be limited to no more than 400 cfs, thereby
16 limiting restoration of Icicle Creek's historic channel and potentially leading to
17 further degradation of important habitat; (2) the fish ladder location will be located
18 in the north bay of the Headgate Dam, resulting in lower flows past the Headgate
19 Dam and into the natural Channel of Icicle Creek; (3) because Icicle Creek water is
20 over-appropriated, the Hatchery needed to find a water source other than Icicle
21 Creek itself, to provide water for the fish sorter and for a pipe to return fish to the
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1 pool below the spillway dam; and (4) during value engineering exercises for Phase
2 II, the Hatchery decided that pumped-back Hatchery wastewater from the Water
3 Supply Rehabilitation Project (described more fully in paragraphs 79-90 below)
4 could be used for the proposed fish sorter at Dam 5.
5

6 75. The Hatchery has not supplemented its FEIS for the Icicle Creek
7 Restoration Project in light of these changes, delays, and new information.
8

9 76. The Hatchery has not reinitiated consultation with NOAA Fisheries
10 concerning Phase II of the Restoration Project in light of these changes, delays, and
11 new information.

12 77. The Hatchery has not reinitiated consultation with USFWS concerning
13 Phase II of the Restoration Project in light of these changes, delays and new
14 information.
15

16 78. USFWS had previously indicated that it would begin implementation of
17 Phase II on August 1, 2005.
18

19 79. On June 10, 2005, the U.S. Army Corps of Engineers issued a notice of an
20 application from the Hatchery for a permit under Section 404 of the Clean Water
21 Act to proceed with Phase II.
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1 **The Hatchery Adds a Water Supply and Pump-Back Project**

2 80. Following the issuance of the FEIS for the Icicle Creek Restoration
3 Project, the Hatchery announced that it plans to move forward with a Water Supply
4 Rehabilitation Project.

5
6 81. As part of the Water Supply Rehabilitation Project, the USFWS proposes
7 to replace and upgrade the Hatchery’s gravity intake on Icicle Creek, and replace
8 approximately 1.5 miles of water supply pipeline from the intake to the Hatchery.

9
10 82. In addition, as part of this project, the USFWS proposes to construct a new
11 wastewater pump-back system that would transport up to 42 cfs of Hatchery
12 wastewater back upstream via a buried 7,500 foot, 36 inch diameter pipeline to a
13 discharge point just below the intake structure.

14
15 83. Additionally, the USFWS proposes to connect the pumped-back untreated
16 Hatchery wastewater (9–11) cfs to the proposed fish sorter at Dam 5, proposed to
17 be built as part of “Phase II” of the Icicle Creek Restoration Project. This
18 proposal, or alternative, was not analyzed in the EA for the Water Supply System
19 Rehabilitation Project or in the Icicle Creek Restoration Project FEIS.

20
21 84. The USFWS also proposes to connect the pumped-back Hatchery
22 wastewater to the existing Cascade Orchard Irrigation Company pipeline to allow a
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1 portion of the Hatchery’s pumped-back wastewater (12 cfs) to be routed directly to
2 the irrigation company in lieu of water from Icicle Creek.

3
4 85. Among the USFWS’ stated purposes for the wastewater pump-back project
5 is mitigation for Hatchery water withdrawals and its attendant impacts on water
6 quality and fish passage.

7
8 86. In June 2003, USFWS issued a Biological Assessment (“USFWS Water
9 Supply BA”) for the Water Supply System Rehabilitation Project. In that BA,
10 USFWS found that the Project may affect, but is not likely to adversely affect,
11 UCR steelhead trout, and have no effect on UCR spring Chinook salmon because
12 they are not in the action area. The USFWS also concluded that the Rehabilitation
13 Project may affect, but was not likely to adversely affect, bull trout.

14
15 87. Upon information and belief, USFWS did not formally consult with
16 NOAA Fisheries concerning the Water Supply System Rehabilitation Project and
17 NOAA Fisheries has not issued a biological opinion addressing the Waster Supply
18 System Rehabilitation Project.

19
20 88. In September 2003, the USFWS issued a Final Environmental Assessment
21 (“FEA”) for its proposed Water Supply System Rehabilitation Project.

22
23 89. While the FEA purports to incorporate by reference and build upon the
24 FEIS for the Icicle Creek Restoration Project (FEA at 1-1) the FEA fails to analyze
25

1 the cumulative impacts of Phase II of the Restoration Project and fails to
2 adequately explain the relationship between the two projects, including the
3 Hatchery's continued use of the Headgate Dam to divert water into its manmade
4 canal, and the relationship of the pump-back project to the Hatchery's proposed
5 fish sorter at Dam 5.

7 90. In addition, the FEA fails to adequately address the potential effects on the
8 environment from discharging up to 42 cfs of the Hatchery's waste water into a
9 segment of Icicle Creek that has not previously been subjected to Hatchery waste
10 water discharge, particularly in light of the fact that at certain times of the year this
11 wastewater discharge would constitute a significant portion of Icicle Creek.

13 91. The FEA also fails to examine the potential impact to the environment and
14 economy of using pumped-back waste water on lands currently irrigated by water
15 drawn directly from Icicle Creek.

17 92. The Hatchery has recently announced that it plans to begin construction of
18 the water supply and pump-back project as early as July 2005.

20 **NOAA Fisheries Issues a Second BiOp and Incidental Take Statement**

21 93. On October 23, 2003, a month after USFWS issued its EA for the Water
22 Supply Rehabilitation Project, NOAA Fisheries approved a second Biological
23 Opinion ("2003 BiOp") addressing all federal fish hatchery operations on the upper
24

1 Columbia River. In this 2003 BiOp, NOAA Fisheries concluded that fish hatchery
2 operations would not jeopardize the continued existence of steelhead trout and
3 spring Chinook salmon.
4

5 94. The 2003 BiOp states that “adverse impacts on listed fish due to the
6 operation of hatchery facilities for the propagation of unlisted species may occur
7 because of river water intake placement, or design, or operation including blocked
8 migration, de-watering river reaches or reduced stream flow, and entrainment from
9 unscreened or improperly screened intakes None of the hatchery facilities
10 employed to carry out the proposed artificial propagation programs de-water
11 reaches used by listed fish for migration, spawning, or rearing.” 2003 BiOp at 4-2.
12
13

14 95. The 2003 BiOp contains an incidental take statement that states that “[a]
15 quantifiable take may occur during broodstock collection activities and some
16 investigational activities for the unlisted artificial propagation programs The
17 incidental take of listed adult UCR spring Chinook salmon and UCR steelhead
18 most often will be in the form of capture, handling, and subsequent release of
19 protected species. For activities that pose lethal threats to individuals, the
20 estimated take level is provided.” 2003 BiOp at 6-1.
21
22

23 96. The 2003 BiOp then sets the Leavenworth NFH’s expected annual take of
24 ESA-listed adult UCR spring Chinook salmon at less than ten, and the expected
25

1 take of steelhead trout at twenty adults during USFWS-operated unlisted spring
2 Chinook salmon broodstock trapping activities. 2003 BiOp at 6-1, 6-2.

3
4 97. The 2003 BiOp also contains numerous terms and conditions that the
5 USFWS must undertake in order for the exemption in section 7(o)(2) of the ESA
6 (permitting the agency to take endangered species) to apply. 16 U.S.C. §
7 1536(o)(2). These terms and conditions are non-discretionary and binding.

8
9 98. Among the terms and conditions, applicable to all agencies, including the
10 USFWS' operations at the Leavenworth National Fish Hatchery, set forth in the
11 2003 BiOp are the following:

- 12 • “Activities that encounter steelhead that are not authorized by other permits
13 shall be limited to the levels indicated in Tables 6 through 11 of this
14 Opinion. The action agencies shall report any occurrence in which this level
15 is exceeded to NMFS [now known as NOAA Fisheries] in the monthly and
16 annual report.” 2003 BiOp, p. 6-5.
- 17 • “The Action Agency must ensure that all ESA-listed species are handled
18 carefully. Should NMFS determine that a procedure provided for under this
19 permit is no longer acceptable, the Action Agency must immediately cease
20 such activity until an acceptable substitute procedure is identified and
21 approved by NMFS.” 2003 BiOp, p. 6-6.
22
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- 1 • The Action Agency is responsible for obtaining all other federal, state, and
2 local permits/authorizations needed for the proposed activities. 2003 BiOp,
3 p. 6-6.
4
- 5 • “In trapping operations directed at the collection of broodstock, the Action
6 Agency shall apply measures that minimize the risk of harm to listed salmon
7 and steelhead. These measures include, but are not limited to: limitations on
8 the duration (hourly, daily, weekly) of trapping in mainstem river areas to
9 minimize capture and handling effects on listed fish; limits on trap holding
10 duration of listed fish prior to release; application of procedures to allow
11 safe holding, and careful handling and release of listed fish; and allowance
12 for free passage of listed fish migrating through trapping sites in mainstem
13 and tributary river locations when those sites are not being actively
14 operated.” 2003 BiOp, p. 6-7.
15
- 16 • “The Action Agency shall monitor the incidence of, and minimize capture,
17 holding, and handling effects on, listed salmon and steelhead encountered
18 during trapping. The Action Agency shall carefully handle and immediately
19 release upstream incidentally captured listed UCS spring Chinook salmon
20 and UCR steelhead adults that are not intended for use as broodstock in
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concurrently operated and otherwise authorized listed stock recovery programs.” 2003 BiOp, p. 6-7.

- “The Action Agency shall ensure that water intakes into artificial propagation facilities be properly screened in compliance with 1995 NMFS screening criteria and as per the 1996 addendum to those criteria (NMFS 1996). As an alternative, they shall comply with transitional criteria set forth by NMFS in 1999 for juvenile fish screens constructed prior to the establishment of the 1995 criteria (NMFS 1996), to minimize risks to listed salmon and steelhead. The Action Agency shall inspect and monitor the water intake screen structures at their hatchery facilities to determine if listed salmon and steelhead are being drawn into the facility; the results of this monitoring shall be included in annual reports.” 2003 BiOp, p. 6-7.
- “The USFWS shall develop long-term solutions for fish passage issues associated with Leavenworth NFH facilities and operations through the on-going Icicle Creek Restoration Project EIS process. As an outcome of this process, NMFS expects that the completion of the Icicle Creek Restoration Project process will lead to passage of at least listed steelhead, and potentially salmon adults and juveniles, into that portion of Icicle Creek upstream of the Leavenworth NFH barrier.” 2003 BiOp, p. 6-10.

- 1 • “The USFWS shall immediately provide adult steelhead passage for
2 unspawned steelhead above the hatchery barrier dam on Icicle Creek. To
3 meet this requirement, the USFWS shall pass, by, sanctuary net, listed adult
4 steelhead trapped in the fish ladder at Leavenworth NFH upstream of the
5 hatchery barrier. The requirement shall apply until upstream passage for
6 listed steelhead in Icicle Creek is provided through modifications or methods
7 developed as an outcome of the on-going Upper Icicle Creek Restoration
8 Process.” 2003 BiOp, p. 6-10.
9

10
11 99. In its 2003 BiOp, NOAA Fisheries explained that the effects on listed fish
12 from water withdrawals from Icicle Creek for Leavenworth NFH use, among
13 others, and the operation of the Hatchery’s water intake structure would be
14 addressed by NOAA Fisheries through a separate Section 7 consultation with
15 USFWS.
16

17
18 100. Upon information and belief, to date NOAA Fisheries has not addressed
19 the operation of the Hatchery’s water intake structure and water withdrawal in a
20 separate Section 7 consultation with USFWS.

21
22 101. In its 2003 BiOp, NOAA Fisheries also explained that effects on listed fish
23 from operation of the passage barriers would be addressed by NOAA Fisheries
24 through a separate Section 7 consultation with USFWS. In fact the 2003 BiOp
25

1 explicitly states that “an effects analysis and jeopardy determination for this
2 portion of the Leavenworth NFH operation (passage barriers) will not be rendered
3 in this Opinion.” 2003 BiOp 4-22. While analysis of barriers to fish passage,
4 therefore, was not directly part of the 2003 BiOp, NOAA Fisheries did state that it
5 expected that free upstream passage for listed UCR steelhead juveniles and adults
6 must be provided at the Leavenworth Dam.
7

8
9 102. To date, the Hatchery has failed to provide unobstructed passage for listed
10 UCR steelhead juveniles and adults past the Headgate Dam.

11 **The Hatchery’s Continued Take of Steelhead in the Natural Channel of**
12 **Icicle Creek**

13 103. Upon information and belief, current Hatchery operations are taking
14 steelhead trout in the natural channel of Icicle Creek. Washington Trout has
15 documented this take and has on several occasions notified the Hatchery and
16 NOAA Fisheries of the situation. For example, within the last month Washington
17 Trout video recorded steelhead jumping into the Headgate Dam before the racks
18 and stoplogs were placed in Dam 5. The north gate of the Headgate Dam was
19 closed and the south gate was open approximately 10 inches, thereby making it
20 impassable to fish upstream and downstream.
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1 104. Prior to the video taping, a member of Washington Trout observed
2 steelhead jumping at the Headgate Dam at an occurrence of approximately one
3 every 2½ minutes for forty-five minutes.
4

5 105. Additionally, by impeding natural water flow through the natural section of
6 Icicle Creek between the Headgate Dam and Dam 5, the Hatchery is currently
7 harming or harassing steelhead redds located in the natural channel of Icicle Creek
8 between the Headgate Dam and the natural channel immediately below the
9 spillway dam. Each redd can contain thousands of steelhead eggs.
10

11 106. Section 9(a)(1)(B) of the ESA provides that “with respect to any
12 endangered species of fish or wildlife . . . it is unlawful for any person subject of
13 the jurisdiction of the United States to take any such species within the United
14 States” 16 U.S.C. § 1538(a)(1)(B). Under Section 3 of the ESA , “the term
15 ‘fish and wildlife’ means any member of the animal kingdom, including without
16 limitation any mammal, fish, bird. . . , amphibian, reptile, mollusk, crustacean,
17 arthropod or other invertebrate, and includes any part, product, egg, or offspring
18 thereof, off the dead body or parts thereof.” 16 U.S.C. § 1932(8). The 2003 BiOp
19 does not include an incidental take statement covering the Hatchery’s take of
20 steelhead eggs. Accordingly, these takes are in violation of Section 9 of the ESA.
21
22
23
24 16 U.S.C. § 1938.
25

1 107. Additionally, upon information and belief, the Hatchery has not ensured
2 that all ESA-listed species are handled carefully. Washington Trout recently video
3 recorded several steelhead trout trapped in the natural channel of Icicle Creek after
4 the Hatchery closed the Headgate Dam and Dam 5 to fish passage. The trapped
5 fish species were not allowed passage upstream or downstream. Additionally,
6 members of Washington Trout observed steelhead spawning in the portion of Icicle
7 Creek between Dam 5 and the Headgate. The Hatchery was informed of this
8 situation and upon information and belief the USFWS has neither monitored the
9 number of steelhead taken to determine whether the current fish propagation
10 activities are inflicting a higher level of take on adult steelhead than the number
11 expected in the 2003 BiOp, nor taken actions to ensure that these ESA-listed
12 species are handled carefully.
13

14
15
16 108. The Incidental Take Statement in the 2003 BiOp does not consider or
17 address harm to listed fish and fish eggs isolated in the historic channel through the
18 Hatchery's continued blocking of fish passage and dewatering of the natural
19 channel.
20

21 109. These listed fish are harmed, among other reasons, because they are
22 prevented from reaching better habitat upstream.
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1 110. Likewise, the Hatchery's operation of the Headgate Dam and Dam 5 have
2 excluded fish upstream and downstream of the natural channel from entering the
3 natural channel. For example, by restricting movements of listed fish, the USFWS
4 has harmed juvenile and adult life stages of the listed fish throughout Icicle Creek
5 by disrupting pre-spawning behavior, interfering with the ability of spawners to
6 find one another, and by restricting the ability of rearing juveniles to seek optimal
7 habitats within the segment of Icicle Creek that spans the area immediately
8 upstream and downstream of the historical channel. These actions impair the
9 chances of listed fish to successfully spawn.
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11

12 111. Many salmon and steelhead die after spawning and their carcasses are an
13 important source of nutrients to the aquatic and riparian ecosystem. By restricting
14 fish movements, the USFWS has reduced the number of returning fish and is, in
15 essence, starving the upper Icicle Creek watershed of nutrients, significantly
16 degrading the habitat, and harming listed fish reaching upper Icicle Creek, or listed
17 bull trout that are year-round residents of upper Icicle Creek.
18
19

20 112. Whether listed or not, fish carcasses, fish eggs, and newly hatched fish are
21 all important food sources for listed fish and non-listed fish and aquatic life. By
22 restricting movement of listed and non-listed fish, USFWS has significantly
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24
25

1 degraded the upper Icicle Creek habitat and thus harmed listed fish by limiting this
2 food source.

3
4 113. Sufficient numbers of spawning fish can improve habitat by physical
5 movement of gravel in the stream bed. By preventing fish from reaching the upper
6 Icicle Creek watershed, the USFWS has degraded the habitat above the Hatchery,
7 thus harming listed fish.

8
9 114. Further, as of June 16, 2005, the Hatchery reports on its website that 1971
10 adult spring Chinook salmon had returned to the Hatchery; that 611 of these fish
11 had been “excessed,” and that 1360 adult spring Chinook salmon were “on
12 station.” USFWS, 2005 Adult Spring Chinook Salmon Returns,
13 <http://leavenworth.fws.gov/returns.htm> (last visited June 16, 2005). Despite having
14 collected this number of fish, the Hatchery continues to block fish passage for all
15 other fish, including threatened and endangered species, by keeping the stop logs
16 in Dam 5 and diverting water into the manmade canal via the Headgate Dam.
17

18
19 115. These actions are inconsistent with the Terms and Conditions of the
20 Hatchery’s Incidental Take Statement in the 2003 BiOp which require the
21 Hatchery to apply measures to minimize the risk of harm to listed salmon and
22 steelhead, including: limitations on duration (hourly, daily and weekly) of trapping
23 in the mainstem river areas, and allowance for free passage of listed fish migrating
24
25

1 though trapping sites in mainstem river locations when the site is not being actively
2 operated.

3 4 **CLAIMS FOR RELIEF**

5 **First Claim for Relief (ESA): Failure to Comply with the Terms and** 6 **Conditions of the Incidental Take Statement (Screening)**

7 116. Washington Trout realleges and incorporates by reference each and every
8 allegation set forth in paragraphs 1-115 of this Complaint.

9 117. By failing to bring its water intake screening system into compliance with
10 NOAA Fisheries screening criteria, Defendants have failed to comply with a
11 mandatory term of its Incidental Take Statement in the 2003 BiOp.
12

13 118. Because Defendants have failed to comply with this Term and Condition
14 of its Incidental Take Statement, the Hatchery is taking listed species, including
15 endangered steelhead trout in violation of the ESA.
16

17 **Second Claim for Relief (ESA): Take of Listed Fish in the Natural** 18 **Channel of Icicle Creek Without an Incidental Take Statement**

19 119. Washington Trout realleges and incorporates by reference each and every
20 allegation set forth in paragraphs 1-118 of this Complaint.

21 120. Concurrent with broodstock collection efforts, and at other times of the
22 year when the Hatchery is blocking fish passage at Dam 5, listed fish including
23 endangered steelhead trout and threatened bull trout that are not attracted to the
24
25

1 Hatchery's fish ladder are otherwise blocked from migrating past the fish trapping
2 area.

3
4 121. Concurrent with broodstock collection efforts, and at other times of the
5 year when the Headgate Dam is closed or open only partially, listed fish including
6 endangered steelhead trout and threatened bull trout, are blocked from migrating
7 past the Headgate Dam and are otherwise trapped in the natural channel of Icel
8 Creek between the Headgate Dam and Dam 5.

9
10 122. Concurrent with broodstock collection efforts, and at other times of the
11 year when the Headgate Dam is closed or open only partially, the Hatchery is
12 harming steelhead redds located in the natural channel of Icel Creek between the
13 Headgate Dam and the natural channel immediately below the spillway dam. Each
14 redd can contain thousands of steelhead eggs.

15
16 123. By blocking stream passage and diverting flows into the Hatchery's
17 manmade canal as described, the Hatchery is taking listed fish, including
18 endangered steelhead trout, in violation of the ESA.

19
20 **Third Claim for Relief (ESA): Take of Bull Trout Without an Incidental**
21 **Take Statement**

22 124. Washington Trout realleges and incorporates by reference each and every
23 allegation set forth in paragraphs 1-123 of this Complaint.

1 125. By blocking stream passage and diverting flows into the Hatchery's
2 manmade canal, the Hatchery is taking threatened bull trout in violation of the
3 ESA.
4

5 126. By failing to screen its water intake system the Hatchery is taking
6 threatened bull trout in violation of the ESA.
7

8 127. By handling threatened bull trout without an Incidental Take Statement the
9 Hatchery is taking threatened bull trout in violation of the ESA.
10

11 **Fourth Claim for Relief (ESA): In the Alternative, if Take of Listed**
12 **Fish In the Natural Channel is Covered by the Incidental Take**
13 **Statement, the Hatchery has Failed to Comply with the Terms and**
14 **Conditions of the Incidental Take Statement (Failure to Monitor and**
15 **Report)**

16 128. Washington Trout realleges and incorporates by reference each and every
17 allegation set forth in paragraphs 1-127 of this Complaint.
18

19 129. By failing to adequately monitor and report the number of steelhead trout
20 being taken in the natural channel of Icicle Creek during broodstock collection
21 efforts, the Hatchery has failed to comply with a mandatory term of its Incidental
22 Take Statement.
23

24 130. Because the Hatchery has failed to comply with these Terms and
25 Conditions of its Incidental Take Statement, the Hatchery is taking endangered
species, including steelhead trout in violation of the ESA.

1 **Fifth Claim for Relief (ESA): In the Alternative, if Take of Listed Fish**
2 **in the Natural Channel is Covered by the Incidental Take Statement,**
3 **the Hatchery has Failed to Comply with the Terms and Conditions of**
4 **the Incidental Take Statement (Failure to Minimize the Capture and**
5 **Handling Effects; Failure to Provide Immediate Fish Passage)**

6 131. Washington Trout realleges and incorporates by reference each and every
7 allegation set forth in paragraphs 1-130 of this Complaint.

8 132. In violation of its Incidental Take Statement, the Hatchery has failed to
9 limit the duration of its trapping activities to minimize the capture and handling
10 effects on listed fish.

11 133. In violation of its Incidental Take Statement, the Hatchery has failed to
12 allow for free passage of listed fish migrating past the trapping site when trapping
13 for broodstock is not being actively operated.

14 134. The Hatchery has also failed to provide for immediate passage for
15 unspawned adult steelhead isolated in the main channel and blocked below Dam 5
16 to above the Headgate Dam on Icicle Creek.

17 135. By failing to comply with the Terms and Conditions of the Incidental Take
18 Statement, the Hatchery is taking endangered species in violation of the ESA.

19 **Sixth Claim for Relief (ESA): The Hatchery Must Reinitiate**
20 **Consultation for the Icicle Creek Restoration Project**

21 136. Washington Trout realleges and incorporates by reference each and every
22 allegation set forth in paragraphs 1-135 of this Complaint.
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1 137. Rather than complete the Icicle Creek Restoration Project on the timeline
2 planned, the USFWS left the Headgate Dam and Dam 5 in place, and is currently
3 planning to initiate a second phase of the Restoration Project.
4

5 138. The USFWS is also concurrently planning to construct a related Water
6 Supply System Rehabilitation Project. That Water Supply Rehabilitation project
7 includes elements to facilitate fish passage that are related to the Restoration
8 project.
9

10 139. Neither the 2002 NOAA Fisheries Restoration BiOp nor the 2002 USFWS
11 Restoration BiOp considered the impacts of an additional dewatering of the natural
12 channel of Icicle Creek or the manmade canal for a phased construction or
13 restoration project.
14

15 140. Neither the 2002 NOAA Fisheries Restoration BiOp nor the 2002 USFWS
16 Restoration BiOp considered the impacts of construction, or of modification to, the
17 fish screen on the water intake facility, including the proposed pump-back of
18 Hatchery wastewater to facilitate fish passage.
19

20 141. The USFWS has obtained significant new information concerning bull
21 trout migration in Icicle Creek that it did not consider in the 2002 Restoration
22 BiOp.
23
24
25

1 142. By failing to reinitiate consultation on the Restoration Project, the
2 Hatchery is violating the ESA.

3
4 **Seventh Claim for Relief (ESA): The Hatchery Must Initiate**
5 **Consultation with NOAA Concerning the Water System Rehabilitation**
6 **Project**

7 143. Washington Trout realleges and incorporates by reference each and every
8 allegation set forth in paragraphs 1-142 of this Complaint.

9 144. As part of the Water Supply System Rehabilitation Project, the Hatchery
10 proposes to construct a new fish ladder and screening facility at the Hatchery's
11 water intake on Icicle Creek and construct a wastewater pump-back system to
12 discharge a portion of the water used at the Hatchery to a point just downstream of
13 its intake.

14 145. Concurrently, the Hatchery plans to update the water delivery system that
15 withdraws water from Icicle Creek.

16 146. Pursuant to Section 7(c) of the ESA, the USFWS prepared a Biological
17 Assessment to determine whether identified endangered and threatened species
18 will be adversely affected by this proposed major federal action.

19 147. The USFWS 2003 BA found that the Waste Supply System Rehabilitation
20 Project "may affect but is not likely to adversely affect UCR steelhead in Icicle
21 Creek."
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1 148. NOAA Fisheries must concur with the USFWS' determination.

2 149. By failing to failing to complete consultation with NOAA Fisheries
3 regarding the Water Supply Rehabilitation Project, USFWS is violating the ESA.
4

5 **Eighth Claim for Relief (NEPA): The Hatchery Must Supplement the**
6 **EIS for the Restoration Project**

7 150. Washington Trout realleges and incorporates by reference each and every
8 allegation set forth in paragraphs 1-149 of this Complaint.

9 151. The FEIS for the Restoration Project did not consider, and could not have
10 considered, new information concerning the extent to which the design of the
11 proposed fish sorter, which restricts flows through much of the year, is consistent
12 with the purpose and need for the Restoration Project, and the goals stated in the
13 Record of Decision.
14

15 152. The FEIS for the Restoration Project did not consider, and could not have
16 considered, new information concerning the extent to which the design of the fish
17 ladder at the Headgate Dam, and the placement of the gate in the north gate,
18 reduces flows in the natural channel and is therefore inconsistent with the purpose
19 and need for the Restoration Project and the goals stated in the Record of Decision.
20
21

22 153. The FEIS for the Restoration Project did not consider, and could not have
23 considered, new information concerning bull trout migration and the importance of
24 fish passage to allow bull trout migration all year.
25

1 154. The FEIS for the Restoration Project did not consider, and could not have
2 considered, new information concerning the extent to which the design of the
3 proposed fish sorter and modifications to the Headgate Dam will effect the
4 environment, including the potential to further degrade habitat, and not allow for
5 flows that will provide for natural flushing.
6

7 155. Based on this new information, changes in circumstances including timing,
8 and in order to avoid improper segmentation of closely related projects, the
9 Hatchery must supplement the FEIS for the Restoration Project before proceeding
10 with a second phase of construction.
11

12 **Ninth Claim for Relief (NEPA): The EA for the Water Supply**
13 **Rehabilitation Project is Inadequate (Inadequate Analysis)**

14 156. Washington Trout realleges and incorporates by reference each and every
15 allegation set forth in paragraphs 1-155 of this Complaint.
16

17 157. The FEA for the Water Supply Rehabilitation Project failed to adequately
18 consider the effects on the environment of untreated and undiluted Hatchery
19 wastewater being discharged into Icicle Creek approximately 1.5 miles upstream of
20 the Hatchery.
21

22 158. The FEA for the Water Supply Rehabilitation Project failed to adequately
23 consider the effects on instream resources when untreated and undiluted Hatchery
24
25

1 wastewater being discharged into Icicle Creek approximately 1.5 miles upstream of
2 the Hatchery will make up a significant portion of the flow in Icicle Creek.

3
4 159. The FEA for the Water Supply Rehabilitation Project failed to adequately
5 consider the effects on the environment, including animals and crops, when
6 untreated and undiluted Hatchery wastewater is pumped-back to the Irrigation
7 Company's intake and used in place of Icicle Creek water.

8
9 160. The FEA for the Water Supply Rehabilitation Project failed to adequately
10 consider the effects on the environment when untreated and undiluted Hatchery
11 wastewater is pumped-back to the Irrigation Company's intake and the carry water
12 is subsequently discharged to the Wenatchee River.

13
14 161. For these reasons, the FEA for the Water Supply Rehabilitation project is
15 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance
16 with law.

17
18 **Tenth Claim for Relief (NEPA): The EA for the Water Supply Project**
19 **Violates NEPA (Improper Segmentation)**

20
21 162. Washington Trout realleges and incorporates by reference each and every
22 allegation set forth in paragraphs 1-161 of this Complaint.

23
24 163. While the FEA for the Water Supply Rehabilitation Project purports to
25 incorporate by reference and build upon the FEIS for the Restoration project, the
FEA failed to adequately analyze the cumulative effects of the two projects and

1 improperly segments, indeed fails to recognize and acknowledge the close
2 relationship between, the two projects.

3
4 164. The FEA for the Water Supply Rehabilitation Project failed to adequately
5 consider in one EA or EIS, the USFWS' planned use of pumped-back untreated,
6 undiluted Hatchery wastewater for the fish sorter—planned to be constructed in
7 Phase II of the River Restoration Project.

8
9 165. The FEA for the Water Supply Rehabilitation Project failed to adequately
10 consider in one EA or EIS, the relationship and environmental effects of the
11 USFWS' plan to pump-back untreated, undiluted wastewater to Icicle Creek in
12 connection to flows in the natural channel and the USFWS' operations and
13 activities to divert water from the natural channel into its manmade canal.

14
15 166. The FEA for the Water Supply Rehabilitation Project failed to adequately
16 consider in one EA or EIS, the relationship and environmental effects of the
17 USFWS' plan to pump-back untreated wastewater to Icicle Creek to the Hatchery's
18 diversion of flows from Icicle Creek to the manmade canal to recharge the
19 Hatchery's groundwater supply.

20
21 167. The FEA improperly segmented the USFWS' analysis of environmental
22 impacts relating to the Water Supply Rehabilitation Project from Phase II of the
23 Restoration Project.
24
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1 168. For these reasons, the FEA for the Waster Supply Rehabilitation Project is
2 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance
3 with law.
4

5 **PRAYER FOR RELIEF**

6 **WHEREFORE**, Washington Trout respectfully requests that the Court:

7 A. Declare that USFWS/Leavenworth NFH has not complied with the terms
8 and conditions of the Incidental Take Statement and is in violation of Section 9 of
9 the ESA by failing to bring the Leavenworth NFH's water intake screening system
10 into compliance with NOAA Fisheries' screening criteria;
11

12 B. Declare that USFWS is in violation of Section 9 of the ESA by taking
13 endangered steelhead trout, endangered spring Chinook salmon, and threatened
14 bull trout;
15

16 C. In the alternative, declare that USFWS/Leavenworth NFH is violating
17 Section 9 of the ESA by failing to monitor and report whether it is exceeding the
18 allowed incidental take of endangered steelhead trout and/or spring Chinook
19 salmon established in the 2003 BiOp;
20

21 D. In the alternative, declare that USFWS is in violation of Section 9 of the
22 ESA by failing to comply with the terms and conditions of the 2003 BiOp and
23
24
25

1 taking endangered steelhead trout and/or spring Chinook salmon in violation of the
2 ESA;

3
4 E. Declare that USFWS is in violation of Section 7 of the ESA by failing to re-
5 initiate and complete consultation with NOAA Fisheries and USFWS prior to
6 undertaking Phase II of the Icicle Creek Restoration Project;

7
8 F. Declare that USFWS is in violation of Section 7 of the ESA by failing to
9 initiate and complete consultation with NOAA Fisheries prior to construction of
10 the Water Supply System Rehabilitation Project including the modification of the
11 fish screen on the water intake facility;

12
13 G. Order USFWS to immediately comply with the requirements of the ESA;
14 including, but not limited to:

15 1) providing for upstream and downstream passage for threatened and
16 endangered species at all life stages and at all times of the year;

17
18 2) complying with the applicable terms and conditions of the Incidental
19 Take Statement in the 2003 BiOp, including providing for a legal water intake
20 screen; and

21
22 3) conducting and completing adequate consultations under the ESA
23 regarding the operations and activities of the Hatchery on federally listed
24 threatened and endangered species;

1 H. Enjoin the Hatchery from conducting further operations until compliance
2 with the ESA is achieved;

3
4 I. Grant such restraining orders and/or such preliminary or permanent
5 injunctive relief as Plaintiff may from time to time request during the resolution of
6 this case to ensure that Defendants do not irreparably injure threatened and
7 endangered species during the resolution of the merits of this case;

8
9 J. Declare that USFWS has failed to comply with NEPA by failing to
10 supplement its FEIS for the Icicle Creek Restoration Project and/or improperly
11 segmenting its consideration of the Restoration Project from its analysis of the
12 Water Supply Rehabilitation and pump-back project;

13
14 K. Declare that the USFWS failed to comply with NEPA by preparing an
15 inadequate EA for the Water Supply Rehabilitation and pump-back Project;

16 L. Order USFWS to comply with the requirements of NEPA by preparing a
17 comprehensive analysis of Hatchery impacts, including impacts of Phase II of the
18 Icicle Creek Restoration Project and the Water Supply Restoration Project;

19
20 M. Award Washington Trout its reasonable attorneys' fees, costs of court, and
21 other expenses necessary for the preparation and litigation of this case under the
22 ESA and the Equal Access to Justice Act, 28 U.S.C. § 2412 et seq.; and
23
24
25

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

2 DATED this 16th day of June, 2005.

3 Respectfully submitted,

4
5 s/ Michael J. Robinson-Dorn

6 WSBA # 29856

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