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## Western Environmental Law Center

VIA CERTIFIED MAIL, RETURN  
RECEIPT REQUESTED

November 6, 2012

Roy Elicker, Director  
Oregon Department of Fish and Wildlife  
3406 Cherry Avenue N.E.  
Salem, Oregon 97303

Edward Bowles  
Fish Division Administrator  
Oregon Department of Fish and Wildlife  
3406 Cherry Avenue, N.E.  
Salem, Oregon 97303

Scott Patterson  
Fish Propagation Program Manager  
Oregon Department of Fish and Wildlife  
3406 Cherry Avenue N.E.  
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Jeffrey S. Ziller, District Fish Biologist  
Oregon Department of Fish and Wildlife  
3150 East Main Street  
Springfield, Oregon 97478

Tim Wright, Hatchery Manager  
Leaburg Hatchery  
Oregon Department of Fish and Wildlife  
90700 Fish Hatchery Road  
Leaburg, Oregon 97489

Kurt Kremers, Hatchery Manager  
McKenzie River Hatchery  
Oregon Department of Fish and Wildlife  
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Leaburg, Oregon 97489

John McHugh, Secretary  
U.S. Department of the Army  
1400 Defense, Pentagon  
Washington, D.C. 20301

Lieutenant General Thomas P. Bostick  
Commanding General and Chief of Engineers  
U.S. Army Corps of Engineers  
441 G Street, N.W.  
Washington, D.C. 20314

Colonel John W. Eisenhower, Commander  
U.S. Army Corps of Engineers  
P.O. Box 2946  
333 S.W. First Ave.  
Portland, Oregon 97208-2946

Kenneth Salazar, Secretary  
U.S. Department of the Interior  
1849 C Street N.W.  
Washington, D.C. 20240

Rebecca Blank, Acting Secretary  
U.S. Department of Commerce  
1401 Constitution Ave., N.W.  
Washington, D.C. 20230

Re: Notice of Intent to Sue for Violations of Endangered Species Act

Dear Sirs and Madam:

I write on behalf of the McKenzie Flyfishers to respectfully request that you remedy ongoing violations of the federal Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. As McKenzie Flyfishers establishes below, the Oregon Department of Fish and Wildlife (“ODFW”) and its officials have authorized, approved, or otherwise undertaken, and continue to authorize, approve, or undertake, the illegal take of wild spring Chinook salmon in the McKenzie River in Oregon through the operations of the McKenzie River Hatchery and the Leaburg Hatchery. Further, the U.S. Army Corps of Engineers (“Corps of Engineers”) has violated the ESA by failing to consult with the National Marine Fisheries Service (“NMFS”) as to its funding of the hatcheries.

Notifiers:

McKenzie Flyfishers is a group comprised of roughly 120 Oregonians who share a common interest in flyfishing, and invest their time and energies to ensure that Oregon’s native fish and water quality are preserved and protected. McKenzie Flyfishers was incorporated in 1964 under Oregon law and is located in western Oregon. It has a three-fold purpose: to enjoy social contact with other flyfishers, to encourage flyfishing as a method of angling, and to protect and increase fishery resources. To further these goals, McKenzie Flyfishers’ members and their families live near, frequently visit, and enjoy the McKenzie River, to fish and to otherwise appreciate the varied and unique recreational and aesthetic opportunities, and to educate others in how best to share and preserve Oregon’s natural resources.

Background:

The McKenzie River originates from Clear Lake in the Cascade Mountains in Oregon and flows roughly 90 miles to its confluence with the Willamette River. Approximately sixty percent of the McKenzie River watershed is designated as wilderness. The McKenzie River provides habitat for wild Chinook salmon (*Oncorhynchus tshawytscha*) that migrate upstream in the spring (“wild spring Chinook salmon”).

On March 24, 1999, NMFS listed wild spring Chinook salmon in the upper Willamette River evolutionarily significant unit (“ESU”) as threatened with extinction under the ESA. 64 Fed. Reg. 14308 (March 24, 1999). This ESU includes wild spring Chinook salmon in the McKenzie River. 50 C.F.R. § 223.102(c)(6). The only significant natural production of wild spring Chinook salmon in the upper Willamette River ESU occurs in the McKenzie River basin.<sup>1</sup>

On February 16, 2000, NMFS designated critical habitat for wild spring Chinook salmon in the upper Willamette River ESU. 65 Fed. Reg. 7764, 7778 (Feb. 16, 2000); 50 C.F.R. §

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<sup>1</sup> See Oregon Department of Fish and Wildlife and National Marine Fisheries Northwest Region, 2011, Upper Willamette River Conservation and Recovery Plan for Chinook Salmon and Steelhead, pp. 3-3 to 3-5 (hereinafter “ODFW and NMFS”).

226.212. Critical habitat for wild spring Chinook salmon in the upper Willamette River ESU includes the McKenzie River basin below impassable natural barriers. 65 Fed. Reg. at 7778; 50 C.F.R. § 226.212.

In 2000 and 2005, NMFS promulgated regulations under section 4 of the ESA that extend the “take” prohibition in 16 U.S.C § 1538 to wild spring Chinook salmon in the McKenzie River as a threatened species. 50 C.F.R. § 223.203(a); 50 C.F.R § 223.102(c)(6). These protections do not apply to hatchery fish that have had their adipose fin removed before release. 50 C.F.R § 223.203(a).

#### Illegal Take of Wild Spring Chinook Salmon:

##### Collection of Wild Spring Chinook Salmon:

ODFW collects, captures, or traps wild spring Chinook salmon in the McKenzie River to use as broodstock in the McKenzie River Hatchery. The collection, trapping and capture of wild spring Chinook salmon harm them. ODFW does not have a “take” permit under 16 U.S.C. § 1536(b)(4) to authorize collecting, trapping, or capturing wild spring Chinook salmon in the McKenzie River, nor is the take otherwise authorized under the ESA, such as through a Hatchery and Genetic Management Plan (“HGMP”).

##### Release of Hatchery-Bred Chinook Salmon:

ODFW uses wild spring Chinook salmon that it collects, captures, or traps in the McKenzie River as broodstock to spawn spring Chinook salmon at the McKenzie River Hatchery. ODFW releases hatchery-raised spring Chinook salmon smolts from the hatchery into the McKenzie River. Hatchery-raised spring Chinook salmon released from the McKenzie River Hatchery harm wild spring Chinook and their critical habitat. Hatchery-released spring Chinook salmon prey on wild spring Chinook salmon. Hatchery-released spring Chinook salmon dilute the fitness of wild spring Chinook salmon, when adult hatchery fish stray and spawn with wild spring Chinook salmon. Hatchery-released spring Chinook salmon spread disease to wild spring Chinook salmon.

Releases of Chinook salmon from the McKenzie River Hatchery reduce the likelihood of recovery of wild spring Chinook salmon. Among the threats and limiting factors to recovery of wild spring Chinook salmon in the McKenzie is hatchery-raised and released spring Chinook salmon interbreeding with wild spring Chinook salmon resulting in genetic introgression.<sup>2</sup> Hatchery-released Chinook salmon have a lower rate of return than naturally-spawning wild spring Chinook salmon, and a lower rate of reproductivity, so interbreeding between hatchery-raised spring Chinook salmon and wild spring Chinook salmon harms the latter.<sup>3</sup> Further,

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<sup>2</sup> See ODFW and NMFS, pp. 5-72 and Appendix E, p. 122.

<sup>3</sup> See, e.g., Chilcote, M.W., K.W. Goodson, and M.R. Falcy. 2011. Reduced recruitment performance in natural populations of anadromous salmonids associated with hatchery-reared fish. *Canadian Journal of Fisheries and Aquatic Sciences* 68:511-522; see also Araki, H., B.

facilities designed to prevent passage of hatchery-raised spring Chinook salmon to areas upstream of the Leaburg dam do not prevent passage. Hatchery-raised spring Chinook salmon enter the river above the Leaburg dam, which includes native spawning areas for wild spring Chinook salmon.

ODFW has violated the ESA by releasing hatchery-bred spring Chinook from the McKenzie River Hatchery without an approved HGMP or other authorization covering its actions. 50 C.F.R. § 223.203(b)(5); *see Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 518-19 (9th Cir. 2010).

#### Release of Trout:

ODFW operates the Leaburg Hatchery. ODFW releases rainbow trout and steelhead trout from the Leaburg Hatchery into the McKenzie River. Releases of rainbow and steelhead trout into the McKenzie River have significant negative effects on the productivity and recovery of wild spring Chinook salmon, because, among other things, both trout species prey on wild spring Chinook salmon. Recent data indicate that hatchery trout in the McKenzie River consume a significant number of wild spring Chinook salmon smolts. ODFW has violated the ESA by releasing trout from the Leaburg Hatchery without an approved HGMP or other authorization covering its actions. 50 C.F.R. § 223.203(b)(5); *Wild Fish Conservancy*, 628 F.3d at 518-19.

#### Funding of the Hatcheries:

The Corps of Engineers funds operations at the McKenzie River Hatchery and at the Leaburg Hatchery. Section 7 of the ESA provides that “each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species. . . .” 16 U.S.C. § 1536(a)(2). As established above, the operations of the hatcheries, funded in part by the Corps of Engineers, jeopardizes the continued existence of wild spring Chinook salmon in the McKenzie River. The operations of the hatcheries, funded in part by the Corps of Engineers, also results in the destruction or adverse modification of critical habitat for wild spring Chinook salmon. The Corps of Engineers has illegally failed to consult with NMFS under section 7 of the ESA and obtain its opinion whether its funding of the hatcheries jeopardizes the continued existence of wild spring Chinook salmon or results in destruction or adverse modification of its critical habitat.

This letter serves as McKenzie Flyfishers notice of intent to sue ODFW and its officials, and the Corps of Engineers, under the ESA for these violations. 16 U.S.C. § 1540(g)(2).

McKenzie Flyfishers anticipates that during the 60-day period when the ODFW and the Corps of Engineers consider this notice, and before McKenzie Flyfishers files any lawsuit, ODFW and the Corps of Engineers may wish to meet and confer as to its position as to these

matters. McKenzie Flyfishers welcomes such an engagement. McKenzie Flyfishers is represented by counsel in this matter:

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Please contact me if ODFW or the Corps of Engineers is interested in meeting, or if you have questions or concerns about this notice of intent to sue.

Thank you for your time and consideration.

Sincerely,

Peter M.K. Frost  
Attorney for McKenzie Flyfishers