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7
8 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

9
10 WILD FISH CONSERVANCY;
11 HARRIET S. BULLITT,

12 Plaintiffs,

13 v.

14 KENNETH L. SALAZAR, in his official
15 capacity as the Secretary of the United
16 States Department of the Interior;
17 UNITED STATES DEPARTMENT OF
18 THE INTERIOR; ROWAN W. GOULD,
19 in his official capacity as the Acting
20 Director of the United States Fish and
21 Wildlife Service; UNITED STATES
22 FISH AND WILDLIFE SERVICE;
JULIE COLLINS, in her official capacity
as the Leavenworth National Fish
Hatchery Complex Manager, MICHAEL
L. CONNOR, in his official capacity as
the Commissioner of the Bureau of
Reclamation; and the UNITED STATES
BUREAU OF RECLAMATION

23 Defendants.
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No.

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

1 INTRODUCTION

2 1. Wild Fish Conservancy and Harriet S. Bullitt bring this action for
3 declaratory and injunctive relief to require the Leavenworth National Fish
4 Hatchery (the “Hatchery”) to comply with the State of Washington’s Water Code
5 and to require the Hatchery to cease all illegal diversions of water from Icicle
6 Creek, as required by federal law.
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9 2. Wild Fish Conservancy and Harriet S. Bullitt further bring this action
10 to require the Hatchery to comply with RCW 77.57.030, as required by federal
11 law, and to require the Hatchery to provide the mandated fishways.
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14 JURISDICTION AND VENUE

15 3. This Court has jurisdiction over these claims under 28 U.S.C. § 1331
16 (federal question), 28 U.S.C. § 1346(a)(2) (United States as Defendant), and the
17 Administrative Procedure Act, 5 U.S.C. §§ 701-706 (“APA”). The APA waives
18 the sovereign immunity of the United States federal Defendants for these claims. 5
19 U.S.C. § 702. The requested relief is also proper under 28 U.S.C. § 2201
20 (declaratory relief) and 28 U.S.C. § 2202 (injunctive relief).
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24 4. Venue is properly vested in this Court under 28 U.S.C. § 1391(e)
25 because the Hatchery is located within this judicial district, and therefore a
26 substantial part of the events and omissions giving rise to the claims occurred in
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1 this district, and, to the extent that real property is involved in this action, such
2 property is located in this district.

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4 PARTIES

5 5. Plaintiff Wild Fish Conservancy is a membership-based 501(c)(3)
6 nonprofit organization incorporated in the State of Washington with its principal
7 place of business in Duvall, Washington. Wild Fish Conservancy is dedicated to
8 the preservation and recovery of Washington's native fish species and the
9 ecosystems upon which those species depend. Wild Fish Conservancy brings this
10 action on behalf of itself and its approximately 2,400 members. Wild Fish
11 Conservancy changed its name from "Washington Trout" in 2007.
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15 6. As an environmental watchdog, Wild Fish Conservancy actively
16 informs the public on matters affecting water quality, fish, and fish habitat in the
17 State of Washington through publications, commentary to the press, and
18 sponsorship of educational programs. Wild Fish Conservancy also conducts field
19 research on wild fish populations and has designed and implemented habitat
20 restoration projects. Wild Fish Conservancy has lobbied, litigated, and publicly
21 commented on federal and state actions that affect state waters. Wild Fish
22 Conservancy routinely seeks to compel governmental agencies to follow the laws
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1 designed to protect native fish species, particularly including threatened and
2 endangered species.

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4 7. Plaintiff Harriet S. Bullitt is fee owner or part owner of approximately
5 350 acres of property adjacent to the Hatchery, containing approximately 2 miles
6 of riverbank, including all of the riverbank on the east side of Icicle Creek and
7 some of the riverbank on the Hatchery's side. Her mother, Dorothy S. Bullitt,
8 purchased substantial acreage along Icicle Creek in the 1930's, a portion of which
9 was transferred to the United States for the development of the Hatchery. Ms.
10 Bullitt spent her summer and winter holidays on this family property near the
11 current site of the Hatchery as a child. Dorothy S. Bullitt retained ownership of
12 over 300 acres, some of which was made subject to an easement for the benefit of
13 the Hatchery, and Ms. Bullitt and her brother became owners of this retained
14 property in the late 1960's. Ms. Bullitt became sole owner in 1977, and in 1979
15 developed a planned unit development known as Copper Notch on approximately
16 290 acres of this parcel, east of the River, with eight (8) home sites, five of which
17 have been retained by Ms. Bullitt and her children, and 280 acres of dedicated open
18 space, in which she and her children have an undivided 5/8ths interest. She
19 retained fee title to 30 acres of the land purchased by her mother, and has made a
20 home on this parcel her principal residence since the 1980's. This parcel is east of
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1 the Hatchery and owns both banks of Icicle Creek, which runs through it; and also
2 owns a portion of east bank of the Hatchery Canal. In 1990's Ms. Bullitt acquired
3 another 67 acres adjacent to the Hatchery: the majority of which is south of the
4 Hatchery and has been developed by her as the Sleeping Lady Mountain Retreat
5 and as the Icicle Creek Music Center; and the remainder of which is to the west of
6 the Hatchery. Ms. Bullitt has operated the Sleeping Lady Mountain Retreat as her
7 principal business since 1992. The amenities provided by Icicle Creek are critical
8 to the success of this business, as well as to the enjoyment of the residential
9 properties owned by her, her children and other owners of parcels in the Copper
10 Notch development.

15 8. Wild Fish Conservancy's members and Harriet S. Bullitt derive
16 scientific, recreational, health, conservation, spiritual, aesthetic, and economic
17 benefits from Icicle Creek and the surrounding area, from the preservation of flows
18 in Icicle Creek, and from the preservation and protection of native fish species in
19 Icicle Creek and other species that depend on Icicle Creek. More specifically,
20 Wild Fish Conservancy's members and Harriet S. Bullitt spend time in areas,
21 including the Icicle Creek area, that are adversely affected by Defendants'
22 violations addressed in this Complaint, and reside near and regularly visit these
23 areas, including the Icicle Creek area, on a continuing and ongoing basis. The
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1 portion of Icicle Creek de-watered by Defendants' violations addressed herein runs
2 through property owned by Harriet S. Bullitt. Ms. Bullitt's property value and
3 resort operated at this property are economically impacted by the violations
4 addressed herein.
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6 9. Wild Fish Conservancy's members and Harriet S. Bullitt use Icicle
7 Creek for recreation and spiritual renewal. Wild Fish Conservancy's members and
8 Harriet S. Bullitt derive recreational, scientific and aesthetic benefits from the
9 existence of a healthy ecosystem and from wildlife in and around Icicle Creek.
10 These members and Harriet S. Bullitt observe, study, photograph, and appreciate
11 wildlife in and around Icicle Creek. Patrons of Ms. Bullitts' resort derive similar
12 benefits from this portion of Icicle Creek, and Ms. Bullitt is therefore economically
13 impacted by the violations at issue. In addition, Wild Fish Conservancy's
14 members and representatives have met with, negotiated with, and worked closely
15 with United States Fish and Wildlife Service personnel concerning native fish
16 passage issues and Hatchery operations. Ms. Bullitt has met with elected officials
17 to negotiate and discuss these same issues, along with Wild Fish Conservancy
18 members and representatives.
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25 10. The past, present, and future enjoyment of these benefits, including
26 the recreational, aesthetic, scientific, and economic interests of Wild Fish
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1 Conservancy's members and Harriet S. Bullitt, have been, are being, and will
2 continue to be harmed by Defendants' failures to comply with applicable laws as
3 described herein. Defendants' illegal diversions of water from Icicle Creek and
4 failure to provide required fishways reduce the aesthetic, scientific and recreational
5 enjoyment Wild Fish Conservancy's members and Harriet S. Bullitt derive from
6 Icicle Creek and the surrounding area.
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9 11. These injuries are actual, concrete injuries fairly traceable to
10 Defendants' violations of applicable laws as described herein that the Court may
11 remedy by declaring that Defendants' omissions and actions illegal and issuing
12 injunctive relief requiring Defendants to comply with their statutory obligations.
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15 12. Defendant Kenneth L. Salazar is the Secretary of the United States
16 Department of the Interior. Mr. Salazar is sued in his official capacity. As the
17 Secretary of the United States Department of the Interior, Mr. Salazar is
18 responsible for ensuring the Hatchery's compliance with applicable laws.
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21 13. Defendant the United States Department of the Interior is an agency
22 within the executive branch. Defendants United States Fish and Wildlife Service
23 and Bureau of Reclamation are sub-agencies, referred to as "bureaus," within the
24 United States Department of the Interior.
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1 20. The Hatchery was constructed as part of the Grand Coulee Dam
2 project. Construction of the Grand Coulee Dam was authorized by the Act of
3 August 30, 1935, 49 Stat. 1028. This project was re-authorized by Congress
4 through the Columbia Basin Project Act, 16 U.S.C. §§ 835-835m, which provides
5 that the project is subject to the Act of August 30, 1935, 49 Stat. 1028, and the
6 Reclamation Project Act of 1939, and further provides that the provisions of each
7 of those two Acts, together with the provisions of the Columbia Basin Project Act,
8 shall govern operation and maintenance of all works constructed as part of the
9 project. 16 U.S.C. § 835. The Columbia Basin Project Act further provides that
10 the “Columbia Basin project shall be governed by the Federal reclamation laws,
11 being the Act of June 17, 1902 (32 State. 388), and all Acts amendatory thereof or
12 supplementary thereto.” 16 U.S.C. § 835-1.
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18 21. The Hatchery was specifically authorized as part of the Grand Coulee
19 Dam project by agreement between Defendant United States Bureau of
20 Reclamation and the State of Washington Department of Fisheries dated April 3,
21 1937, a copy of which is attached hereto as **Exhibit 1**. The agreement provides
22 that is was entered into “pursuant to the Act of Congress approved June 17, 1902,
23 (39 Stat. 388) and acts amendatory thereof or supplementary thereto, all of which
24 acts are commonly known and referred to as the Reclamation Law...”
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1 22. Section 8 of the Reclamation Act of June 17, 1902 provides, in part:

2 “Nothing in this Act shall be construed as affecting or intended to affect or to in
3 any way interfere with the laws of any State or Territory relating to the control,
4 appropriation, use, or distribution of water used in irrigation, or any vested right
5 acquired thereunder, and the Secretary of the Interior, in carrying out the
6 provisions of this Act, shall proceed in conformity with such laws, and nothing
7 herein shall in any way affect any right of any State or of the Federal Government
8 or of any landowner, appropriator, or user of water in, to, or from any interstate
9 stream or the waters thereof.” 43 U.S.C. § 383. This provision further provides
10 ““The right to the use of water acquired under the provisions of this Act shall be
11 appurtenant to the land irrigated, and beneficial use shall be the basis, the measure,
12 and the limit of the right.” 43 U.S.C. § 372.
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18 23. The Reclamation Act of 1939, as amended, similarly provides:

19 “Nothing in sections 485h-1 to 484h-5 of this title shall be construed as affecting
20 or intended to affect or to in any way interfere with the laws of any State relating to
21 the control, appropriation, use, or distribution of water used in irrigation, or any
22 vested right acquired thereunder, and the Secretary [of the Interior] in carrying out
23 the provisions of such sections, shall proceed in conformity with such laws, and
24 nothing herein shall in any way affect any right of any State or of the Federal
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1 Government or of any landowner, appropriator, or user of water in, to, or from any
2 interstate stream or the waters thereof; Provided, That the right to the use of water
3 acquired under the provisions of such sections shall be appurtenant to the land
4 irrigated and beneficial use shall be the basis, the measure, and the limit of the
5 right.” 43 U.S.C. § 485h-4.
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8 24. The federal laws governing the operations of the Hatchery, including
9 those described above, require the Defendants to comply with Washington State
10 water laws and other laws related to the control, appropriation, use or distribution
11 of water, except where such laws are inconsistent with congressional directive.
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14 Washington State Water Code

15 25. Washington State’s Water Code, RCW 90.03, governs the use and
16 diversion of surface waters for beneficial uses in Washington.
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18 26. Subject to existing water rights, all waters within the State of
19 Washington belong to the public, and any right thereto, or to the use thereof, can
20 be acquired only by appropriation for a beneficial use in the manner provided by
21 the Water Code. RCW 90.03.010. Washington enacted the Surface Water Code in
22 1917 and the Ground Water Code in 1945.
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1 27. Washington follows the prior appropriation doctrine, which provides
2 that water rights acquired first in time are entitled to the quantity of water that has
3 been appropriated to the exclusion of subsequent water rights. RCW 90.03.010.
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5 28. Washington’s Water Code provides that any entity “desiring to
6 appropriate water for a beneficial use shall make an application to the [Washington
7 Department of Ecology] for a permit to make such appropriation, and shall not use
8 or divert such waters until he has received a permit from the [Washington
9 Department of Ecology] as in this chapter provided.” RCW 90.03.250.
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12 29. The Washington Department of Ecology is charged with reviewing
13 and investigating applications for water rights. RCW 90.03.290. The Washington
14 Department of Ecology is directed to issue permits authorizing water diversions
15 where it finds that there is water available for appropriation for a beneficial use,
16 and the appropriation thereof as proposed in the application will not impair
17 existing rights or be detrimental to the public welfare. RCW 90.03.290(3). Such
18 permits are to state the amount of the water the applicant is entitled to and the
19 beneficial use or uses to which the water may be applied. *Id.* The Washington
20 Department of Ecology is required to reject a permit application if it determines
21 that there is no unappropriated water in the proposed source of supply, or that the
22 proposed use conflicts with existing rights, or threatens to prove detrimental to the
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1 public interest, having due regard to the highest feasible development of the use of
2 the waters belonging to the public. *Id.*

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4 30. The term “beneficial use” includes diversions of water to recharge
5 aquifers that supply groundwater wells and for fish propagation purposes.

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7 31. Upon a showing satisfactory to the Washington Department of
8 Ecology that any appropriation has been perfected in accordance with the Water
9 Code, it is the duty of the Washington Department of Ecology to issue to the
10 applicant a certificate. RCW 90.03.330. The certificate is to set forth the name
11 and address of the person entitled to the diversion of water, the priority and
12 purpose of the right, the period during which said right may be exercised, the point
13 of diversion and the place of use, the land to which the water right is appurtenant
14 and when applicable the maximum quantity of water allowed. RCW 90.03.240.

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17 32. The Washington Department of Ecology was authorized in 1969 to
18 “establish minimum water flows or levels for streams, lakes or other public waters
19 for the purposes of protecting fish, game, birds or other wildlife resources, or
20 recreational or aesthetic values of said public waters whenever it appears to be in
21 the public interest to establish the same.” RCW 90.22.010. Such flows are
22 established through the adoption of rules. RCW 90.22.020.
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1 33. Washington’s Water Resources Act of 1971 mandates that the
2 Washington Department of Ecology establish base flows by providing that
3 “[p]erennial rivers and streams of the state shall be retained with base flows
4 necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other
5 environmental values, and navigational values... Withdrawals of water which
6 would conflict therewith shall be authorized only in those situations where it is
7 clear that overriding considerations of the public interest will be served.” RCW
8 90.54.020(3)(a).
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11 34. Washington’s Watershed Planning Act, passed in 1998, is designed to
12 develop a more thorough and cooperative method of determining the current water
13 situation in each water resource inventory area of the state and to provide local
14 citizens with the maximum possible input concerning their goals and objectives.
15 RCW 90.82.010.
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18 35. The establishment of instream minimum flows or levels under RCW
19 90.22.010 and 90.54.040 constitute water right appropriations within the meaning
20 of the Water Code with priority dates as of the effective dates of their
21 establishment. RCW 90.03.345.
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1 contributing to the degraded condition of Icicle Creek. Water diversions from
2 Icicle Creek contribute to the failure to meet water quality standards.

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4 45. The Washington Department of Ecology promulgated a rule
5 establishing an instream flow water right for Icicle Creek with a priority date of
6 June 3, 1983. WAC 173-545-050. The reach of Icicle Creek affected by this
7 instream flow right includes the reach where the Hatchery is located. The stated
8 purposes of this instream flow water right include “to protect water quality,
9 wildlife, fish, and other environmental values, as well as aesthetics, recreation
10 [and] navigation.” WAC 173-545-020.

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14 46. The Washington Department of Ecology promulgated a rule
15 establishing a second instream flow water right for Icicle Creek with a priority date
16 of November 2, 2001. WAC 173-545-060. The reach of Icicle Creek affected by
17 this instream flow right includes the reach where the Hatchery is located. The
18 stated purpose of this instream flow water right is to “preserve flow levels that are
19 necessary to protect wildlife, fish, water quality, aesthetic and other environmental
20 values, recreation, and navigational values.” WAC 173-545-060(2).

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24 47. Water in Icicle Creek is over-appropriated, meaning that in some
25 years some of the water rights that divert from Icicle Creek are not fully satisfied.
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The Leavenworth National Fish Hatchery

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2 48. Constructed in 1939 to 1941, the Hatchery is located approximately
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4 three miles south of the city of Leavenworth, Washington, on the banks of Icicle
5 Creek.

6 49. Originally designed to maintain salmon stocks blocked by
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8 construction of the Grand Coulee Dam on the Columbia River, the Hatchery
9 initially reared fish in a one mile segment of Icicle Creek. A series of dams and
10 weirs were installed in Icicle Creek to create “ponds” to hold the Hatchery fish.
11

12 50. A 4,000 foot-long manmade canal (“Hatchery Canal”) was
13
14 constructed adjacent to Icicle Creek to control the amount of water flowing through
15 the reach of Icicle Creek where fish were held.

16 51. A headgate dam, referred to as “dam 2,” was constructed to divert
17
18 water into the Hatchery Canal and block flows into Icicle Creek. Fish passage
19 features originally constructed at dam 2 are no longer operational.
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21 52. A downstream dam, “dam 5,” is located in Icicle Creek near the
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23 terminus of the Hatchery Canal. This structure is operated in a manner that blocks
24 fish passage during certain times of the year.
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1 53. A spillway dam at the downstream terminus of the Hatchery Canal
2 prevents all upstream fish passage into the Hatchery Canal from Icicle Creek. This
3 structure is a complete block to fish passage.
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5 54. The practice of holding and spawning Hatchery fish in Icicle Creek
6 was terminated in 1979, and the Hatchery moved its operations to off-channel
7 holding ponds located on the north side of the Hatchery Canal opposite of Icicle
8 Creek.
9

10 55. The Hatchery continues to operate dams 2 and 5 in a manner that
11 obstructs fish passage through Icicle Creek during some or all of the year. The
12 spillway dam prevents fish passage through the Hatchery Canal.
13

14 56. The Hatchery continued to divert the majority of flow in Icicle Creek
15 through the Hatchery Canal by maintaining the two radial gates at dam 2 closed
16 after the Hatchery discontinued using Icicle Creek for fish rearing purposes in
17 1979. During this time, Icicle Creek between dams 2 and 5 received water only
18 when flows were high enough to cause leakage at dam 2.
19

20 57. The Hatchery began to open dam 2 to allow for some fish passage and
21 increased flows through Icicle Creek during parts of the year in approximately
22 2001. The Hatchery began to experience periods of reduced productivity from its
23 groundwater wells some time thereafter.
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1 58. The Hatchery currently diverts water out of Icicle Creek at dam 2 and
2 into the Hatchery Canal for various beneficial uses, including to recharge the
3 aquifer that supplies the Hatchery's groundwater wells, to attract Hatchery fish for
4 broodstock collection, to flush Hatchery smolts, and for flood control. The
5 Hatchery has not applied for water rights for these diversions.
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8 59. The Hatchery's diversion of water into the Hatchery Canal
9 significantly dewateres the natural channel of Icicle Creek between the headgate
10 dam (dam 2) and dam 5. When the Hatchery is diverting water at dam 2 into the
11 Hatchery Canal, the instream flow water rights for Icicle Creek, established by
12 regulation in 1983 and 2001, are frequently not met between dam 2 and dam 5.
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15 60. The Hatchery has a water intake located approximately 1.5 miles
16 upstream of the Hatchery. The water intake structure consists of a diversion dam,
17 fish ladder, wide bar trash rack, and another narrower trash rack located in a
18 building. The diversion dam spans the entire width of Icicle Creek except for the
19 several feet on the north bank that is occupied by the fish ladder. Water is diverted
20 from Icicle Creek at the water intake and conveyed to the Hatchery through a
21 buried 31-inch pipe system operating under gravity.
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24 61. To date, the Hatchery has failed to install appropriate screens on its
25 water intake. The existing fish screening devices on the Hatchery's water intake
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1 system are outdated, inefficient, and do not comply with current federal and state
2 regulatory requirements.

3
4 62. The Hatchery structures, including dams 2 and 5 and the water intake,
5 do not have durable and efficient fishways. Based on information and belief, these
6 structures do not have fishways that have been approved by the Director of the
7 Washington Department of Fish and Wildlife. Furthermore, these structures do not
8 have fishways that are maintained in an effective condition nor are they
9 continuously supplied with sufficient water to freely pass fish.
10

11
12 63. In addition to the diversions of surface water from Icicle Creek, the
13 Hatchery withdraws groundwater from seven wells for use at the Hatchery. One of
14 these wells withdraws entirely from the deep aquifer and has no influence on the
15 shallow aquifer. A second well is constructed to withdraw groundwater from both
16 the shallow and deep aquifers, and the remaining five wells withdraw entirely from
17 the shallow aquifer.
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21 64. The natural recharge of the shallow aquifer is insufficient to supply
22 the amount of water the Hatchery desires to withdraw from it. The Hatchery
23 therefore diverts water at dam 2 into to Hatchery Canal, which percolates into the
24 ground and recharges the aquifer.
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The Hatchery's Water Rights

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2 65. Defendants hold water rights perfected under Washington law for
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4 both surface and groundwater diversions for use at the Hatchery.

5 66. The Hatchery's water use occurred after the enactment of the Surface
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7 Water Code in 1917 and the Ground Water Code in 1945. Defendants therefore
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9 have no "existing" water rights for the Hatchery that are exempt from the permit
10 requirements of those statutes.

11 67. Defendants held surface water rights for the use of large quantities of
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13 water at the Hatchery at one time. Defendants received two surface water rights in
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15 1942 for fish propagation purposes under Certificates Nos. 1823 and 1824.

16 68. Certificate No. 1823 authorized diversion of 300 cubic feet per second
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18 ("cfs") of water from the Wenatchee River. However, it was subsequently
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20 discovered that water from the Wenatchee River was unsuitable for use at the
21 Hatchery, and the diversion works were abandoned. This water right was
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23 relinquished in 1984.

24 69. Certificate No. 1824 authorized diversion of 200 cfs from Icicle Creek
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26 at the upstream intake structure. In 1983 it was discovered that the Hatchery's
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28 diversion structures had a capacity of approximately 42 cfs. The Washington
29 Department of Ecology then issued Superseding Certificate No. 1824 in 1984,

1 which quantified this water right at 41.7 cfs, and confirmed that Defendants had
2 relinquished the remaining 158.3 cfs of this right.

3
4 70. Superseding Certificate No. 1824 authorizes Defendants to divert
5 water from Icicle Creek at a location described as “200 feet north and 700 feet west
6 of the east corner of Section 27.” This location is 1.5 miles upstream of the
7 Hatchery where its water intake system is located. This water right authorizes
8 water to be used continuously for fish propagation.
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11 71. Defendants have four water rights to withdraw groundwater from the
12 Hatchery’s seven wells. The water rights authorize the Defendants to withdraw a
13 total instantaneous flow of 6,700 gallons per minute, and a total volume of 7,477
14 acre feet per year.
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17 72. The natural recharge of the shallow aquifer that supplies the
18 Hatchery’s wells is insufficient to fulfill the full amount of these groundwater
19 rights or to satisfy the amount of groundwater the Hatchery desires to withdraw.
20 The Hatchery therefore diverts water from Icicle Creek at dam 2 into the Hatchery
21 Canal to recharge the aquifer.
22

23
24 73. Defendants hold an additional water right that authorizes them to dam
25 Snow Creek above the Hatchery to create a reservoir referred to as Snow Lake.
26 This right, authorized by Certificate No. 1825, has a priority date of 1942 and
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1 authorizes the storage of 16,000 acre feet. This right is restricted to the months of
2 July through October inclusive, and its purpose is for “supplementing supply for
3 hatchery and holding ponds.” Water released from Snow Lake under this water
4 right is diverted at the Hatchery’s water intake structure 1.5 miles upstream of the
5 Hatchery.
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8 74. The Hatchery does not hold any water right to divert water from Icicle
9 Creek at dam 2 and into the Hatchery Canal.
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11 75. The Hatchery does not hold any water right to divert water from Icicle
12 Creek for the beneficial use of aquifer recharge.
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14 76. The Hatchery has not filed an application with the Washington
15 Department of Ecology for a permit to divert water from Icicle Creek at dam 2.
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17 77. The Hatchery has not filed an application with the Washington
18 Department of Ecology for a permit to divert water for the beneficial use of aquifer
19 recharge.
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21 CLAIMS FOR RELIEF

22 First Claim for Relief: Failure to Comply with the Washington Water Code

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24 78. Plaintiffs reallege and incorporate by reference each and every
25 allegation set forth in the paragraphs above.
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1 79. Defendants have failed to comply with the Washington Water Code
2 by failing to apply for and receive a permit or other authorization for diversions of
3 water from Icicle Creek at the Hatchery's dam 2.
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5 80. Defendants have failed to comply with the Washington Water Code
6 by failing to apply for and receive a permit or other authorization for diversion of
7 water from Icicle Creek at the Hatchery for the beneficial use of aquifer recharge.
8

9 81. Defendants have failed to comply with the Washington Water Code
10 by diverting water from Icicle Creek at the Hatchery's dam 2 without a water right
11 senior to the instream flow water rights for Icicle Creek at times when those
12 instream flow rights are not being satisfied.
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15 82. Defendants have therefore failed to comply with federal law—
16 including the Reclamation Act of 1902, the Reclamation Act of 1939, and the
17 Columbia Basin Project Act—by failing to comply with Washington State laws
18 relating to the control, appropriation, use, or distribution of water.
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21 83. Defendants' failure to comply with the law as described above is
22 reviewable under the APA. 5 U.S.C. § 706(1).
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24 84. Alternatively, Defendants' adoption of the Hatchery's operations
25 plan—as described in various documents, including the Hatchery's Biological
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1 Assessment for Operation and Maintenance of Leavenworth National Fish
2 Hatchery (July 10, 2006)—is reviewable under the APA. 5 U.S.C. § 706(2).

3
4 Second Claim for Relief: Failure to Comply with Washington’s Fishway Law

5 85. Plaintiffs reallege and incorporate by reference each and every
6 allegation set forth in the paragraphs above.
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8 86. Defendants have failed to comply with Washington’s Fishway Law,
9 RCW 77.57.030(a), by failing to provide durable and efficient fishways on
10 Hatchery structures, including dams 2 and 5 and the Hatchery’s intake system.
11

12 87. Defendants have failed to comply with Washington’s Fishway Law,
13 RCW 77.57.030(a), by failing to submit and have approved by Washington’s
14 Department of Fish and Wildlife plans and specifications for fishways for the
15 Hatchery’s structures, including dams 2 and 5 and the Hatchery’s intake system.
16
17

18 88. Defendants have failed to comply with Washington’s Fishway Law,
19 RCW 77.57.030(a), by failing to maintain fishways on the Hatchery’s structures,
20 including dams 2 and 5 and the water intake system, in an effective condition and
21 by failing to continuously supply such fishways with sufficient water to freely pass
22 fish.
23
24

25 89. The Defendants have therefore failed to comply with federal law—
26 including the Reclamation Act of 1902, the Reclamation Act of 1939, and the
27
28

1 Columbia Basin Project Act—by failing to comply with Washington State laws
2 relating to the control, appropriation, use, or distribution of water.

3
4 90. The Defendants’ failure to comply with the law as described above is
5 reviewable under the APA. 5 U.S.C. § 706(1).

6
7 91. Alternatively, Defendants’ adoption of the Hatchery’s operations
8 plan—as described in various documents, including the Hatchery’s Biological
9 Assessment for Operation and Maintenance of Leavenworth National Fish
10 Hatchery (July 10, 2006)—is reviewable under the APA. 5 U.S.C. § 706(2).

11
12 PRAYER FOR RELIEF

13
14 WHEREFORE, Wild Fish Conservancy and Harriet S. Bullitt respectfully
15 request that the Court:

16
17 A. Declare that Defendants are in violation of federal law by failing to
18 apply for and receive a permit or other authorization to divert water from Icicle
19 Creek at dam 2 as required by the Washington Water Code;

20
21 B. Declare that Defendants are in violation of federal law by failing to
22 apply for and receive a permit or other authorization to divert water from Icicle
23 Creek for the beneficial use of aquifer recharge as required by the Washington
24 Water Code;

1 C. Declare that Defendants are in violation of federal law by failing to
2 provide durable and efficient fishways on Hatchery structures;

3
4 D. Declare that Defendants are in violation of federal law by failing to
5 submit and have approved by Washington's Department of Fish and Wildlife plans
6 and specifications for fishways for the Hatchery's structures;

7
8 E. Declare that Defendants are in violation of federal law by failing to
9 maintain fishways on Hatchery's structures in an effective condition and by failing
10 to continuously supply such fishways with sufficient water to freely pass fish;

11
12 F. Issue a temporary restraining order, preliminary injunction and/or
13 permanent injunction requiring Defendants to comply with the requirements of the
14 Washington Water Code;

15
16 G. Issue a temporary restraining order, preliminary injunction and/or
17 permanent injunction requiring Defendants to comply with the requirements of
18 Washington's Fishway Law, RCW 77.57.030;

19
20 H. Grant such other preliminary or permanent injunctive relief as
21 Plaintiffs may from time to time request during the pendency and resolution of this
22 case;

23
24 I. Award Plaintiffs their reasonable litigation expenses, including
25 attorney fees, expert witness fees, court costs, and other expenses necessary for the
26

1 preparation and litigation of this case as authorized by law, including the Equal
2 Access to Justice Act, 28 U.S.C. §§ 2412 *et seq.*; and

3
4 J. Grant such additional relief as the Court deems just and proper.

5 RESPECTFULLY SUBMITTED this 9th day of July, 2009.

6
7 **SMITH & LOWNEY, PLLC**

8 By: s/ Brian A. Knutsen
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10 Richard A. Smith, WSBA # 21788
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187-7229

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

Contract for contribution to cost of experimental work bearing upon the design of facilities for propagation of fish life, Columbia River, Grand Coulee Dam

THIS CONTRACT, made this 3rd day of April, 1937, pursuant to the Act of Congress approved June 17, 1902 (32 Stat., 383) and acts amendatory thereof or supplementary thereto, all of which acts are commonly known and referred to as the Reclamation Law, between the UNITED STATES OF AMERICA, hereinafter referred to as "United States", acting for this purpose by the contracting officer executing this contract, and the STATE OF WASHINGTON, hereinafter referred to as the "State".

WITNESSETH THAT:

1. WHEREAS, the United States, through its Bureau of Reclamation, is engaged in the construction of the Grand Coulee Dam on the Columbia River for the purpose of flood control, reclamation and irrigation, and the improvement of the navigability of the Columbia river, which dam will, when completed, constitute an obstruction in said stream to the migration and propagation of fish life therein; and
2. WHEREAS, the United States desires to cooperate in making provision, if and when deemed necessary, and if economically practicable, for the migration of fish life in said stream; and

3. WHEREAS, the State, through its Department of Fisheries and of Game, is engaged in studies preliminary to a definite plan for such migration of fish life and has the required scientific personnel for the carrying on of all necessary engineering and biological investigations experimental to such definite plan, and the United States Bureau of Reclamation has in its personnel no such employes trained and experienced in the science of the propagation of fish life; and

4. WHEREAS, the State does not have sufficient funds to carry such experimental investigations to completion, and the United States is willing to cooperate to a reasonable extent therein,

5. NOW THEREFORE, it is agreed as follows:

6. The State will, through its Department of Game and Department of Fisheries, carry on all necessary experiments, investigations and surveys to determine the means of protection of the continued propagation of fish life in the Columbia river against the obstacles thereto by reason of the construction of the Grand Coulee Dam to its ultimate height. The State will furnish its personnel trained in the science of biology and particularly as it pertains to the migration of fish life in the Columbia river and its tributaries and the propagation of such life therein. Such trained personnel of the State shall in such investigations transport adult fish to the Wenatchee, Kootenai, Methow and Okanogan rivers, and will observe and record and report the results of any plantings of fish.

(a) The State will furnish materials for the construction of any racks necessary in the Wenatchee river to determine the direction of fish placed in such river and will purchase all minor equipment required for the trapping of fish at the Rock Island dam, and shall handle any and all spawn taken and shall pay the cost of transporting, collecting and returning any borrowed equipment necessary in conducting any such experimental work.

(b) The State will collect biological data concerning the food supply for fish in the Columbia river and its tributaries, and will make a study of the downstream migrants in connection with by-pass trap screens in the Columbia river or its tributaries.

(c) The State will conduct such experimental work and will make the necessary purchases of equipment therefor in cooperation with the United States and under the supervision of the Chief Engineer of the Bureau of Reclamation.

(d) The State will, upon completion of any of its studies as herein provided or any part thereof which may be incorporated in a separate report, furnish the United States with copies of such report and with any collection of data obtained in pursuance of the provisions of this contract.

(e) The State will, immediately on making any expenditure of money for salaries or materials necessary to carry on the investigations contemplated by this agreement, prepare an itemized and sworn statement thereof and submit the same to the United States Bureau of

Reclamation at Coules Dam, Washington, for the purpose of audit and voucher. The United States will, on receipt of duly executed vouchers for such expenditures as herein provided, pay to the State of Washington the amount of such vouchers in a total and aggregate amount not to exceed \$20,000 during the six-months term beginning with the date of this contract, and in the event of the extension of this contract as herein provided, then not to exceed \$5,000 during such first extended term of six months, nor \$12,500 during each of any successive six-months extensions of the contract.

7. In the performance of this contract no persons shall be employed who are undergoing sentence for imprisonment at hard labor which has been imposed by the courts of the several states or territories or municipalities having criminal jurisdiction.

8. Where the operations of this contract extend beyond the current fiscal year, it is understood that the contract is made contingent upon Congress making the necessary appropriations for expenditures thereunder after such current year has expired. In case such appropriation as may be necessary to carry out this contract is not made, the State hereby releases the United States from all liability due to the failure of Congress to make such appropriation.

9. The State warrants that it has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or in its discretion, to deduct from the contract price or consideration the

amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the State for the purpose of securing business.

10. This contract shall remain in effect for a period of six months from the date thereof unless sooner terminated in the manner above provided, but the United States may, at the option of the Secretary of the Interior, by written notice to the State Department of Fisheries of the State of Washington, extend this contract on the terms and conditions hereof for an additional period of six months and thereafter at the option of the Secretary of the Interior for additional successive terms of six months each up to but not beyond two years from the date hereof.

11. No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation for its general benefit.

IN WITNESS WHEREOF, the parties have caused this contract to be executed as of the date first above written.

UNITED STATES OF AMERICA,

By S. O. Harper
~~Acting Chief Engineer,~~
Bureau of Reclamation.

Attest:

Ernest N. Hutchinson (SEAL)
Secretary of State

Attest:

Charles B. Reed (SEAL)
Asst. Secretary of State

STATE OF WASHINGTON,

By B. M. Brennan, Director
Department of Fisheries

By B. T. McCauley, Director,
Department of Game