

Center for Environmental Law & Policy
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Columbia Riverkeeper
724 Oak St., Hood River, OR 97031

October 27, 2009

Via Certified Mail: Return Receipt Requested

Michael L. Connor
Commissioner
U.S. Bureau of Reclamation
1849 C Street NW
Washington, DC 20240

J. William McDonald
Regional Director
Pacific Northwest Regional Office
1150 North Curtis Rd., Suite 100
Boise, ID 83706-1234

Re: NOTICE OF INTENT TO SUE THE U.S. BUREAU OF RECLAMATION FOR VIOLATIONS OF THE ENDANGERED SPECIES ACT.

The Honorable Michael L. Connor,

On behalf of the Center for Environmental Law & Policy (“CELP”) and Columbia Riverkeeper (“Riverkeeper”), we write to provide the U.S. Bureau of Reclamation (“the Bureau”) with sixty days notice, pursuant to section 11(g) of the Endangered Species Act (“ESA” or “Act”), 16 U.S.C. § 1540(g)(2)(A)(i), of our intent to file a citizen suit against the Bureau for ongoing violations of the ESA, 16 U.S.C. §§ 1531-1544 and its implementing regulations, 50 C.F.R. § 402 *et seq.* The Bureau is violating section 7(a)(2) of the ESA by expanding the Weber Siphon Complex (“Weber Siphon expansion”) in eastern Washington, which “may affect” ESA-listed species. CELP and Riverkeeper are notifying the Bureau of our intent to sue because the Bureau failed to initiate and complete consultation under the ESA section 7(a)(2). 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

In particular, the Bureau failed to consult with the National Marine Fisheries Service (“NMFS”) and the U.S. Fish and Wildlife Service (“FWS”) (collectively “the Services”) concerning the effects of the Weber Siphon expansion on ESA-listed Upper Columbia River Bull Trout (*Salvelinus confluentus*) and 13 species of ESA-listed salmonids including: Steelhead

(*Oncorhynchus mykiss*), Upper Columbia River chinook (*Oncorhynchus tshawytscha*), Mid-Columbia River Steelhead (*Oncorhynchus mykiss*), Snake River steelhead (*Oncorhynchus mykiss*), Snake River sockeye (*Oncorhynchus nerka*), Snake River fall chinook (*Oncorhynchus tshawytscha*), Snake River spring/summer chinook (*Oncorhynchus tshawytscha*), Lower Columbia River chum (*Oncorhynchus keta*), Lower Columbia River chinook (*Oncorhynchus tshawytscha*), Lower Columbia River coho (*Oncorhynchus kisutch*), Lower Columbia River steelhead (*Oncorhynchus mykiss*), Upper Willamette River Chinook (*Oncorhynchus tshawytscha*), Upper Willamette River steelhead (*Oncorhynchus mykiss*).

The Bureau's ESA violations arise from its failure to comply with the substantive and procedural requirements imposed by section 7 of the ESA, 16 U.S.C. § 1536, which requires the Bureau to ensure that any federal action is not likely to jeopardize the continued existence of any endangered species or result in adverse modification to, or destruction of, critical habitat. The Bureau initiated ESA section 7 consultation on the Lake Roosevelt Incremental Storage Releases Project ("Lake Roosevelt Drawdown Project") as part of the Federal Columbia River Power System ("FCRPS") consultation process.¹ However, the Bureau failed to initiate or complete ESA section 7 consultation on the Weber Siphon expansion. Like the components of the Lake Roosevelt Drawdown Project which the Bureau included in the FCRPS Biological Assessment, the Weber Siphon expansion "may affect" ESA-listed species. In turn, the Bureau has a statutory duty to comply with ESA section 7(a)(2) before undertaking the Weber Siphon expansion. The Bureau, however, has failed to satisfy its duties under ESA § 7.

I. PARTIES PROVIDING NOTICE.

The Center for Environmental Law & Policy ("CELP") is a membership-based 501(c)(3) nonprofit organization incorporated in Washington, with its headquarters at 25 West Main, Suite 234 Spokane, Washington 99201. CELP is dedicated to preserving and protecting the water resources of western Washington and the Columbia River Basin. CELP achieves these goals through education, litigation, and advocacy. CELP's interest in the Columbia River and its tributaries dates back to the foundation of the organization in 1993.

Columbia Riverkeeper is a 501(c)(3) non-profit, tax exempt, public interest conservation organization incorporated in Washington with headquarters in 724 Oak St. Hood River, Oregon 97031. Columbia Riverkeeper's mission is to restore and protect the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. Columbia Riverkeeper works to accomplish its mission through diverse activities including monitoring and commenting on the activities of federal, state, and local agencies charged with responsibility over the Columbia basin. Additionally, Columbia Riverkeeper coordinates education research projects and presentations from the Columbia's headwaters to the Pacific Ocean. Columbia

¹The portion of the Columbia River behind the Grand Coulee Dam is known as Lake Roosevelt. Under the Lake Roosevelt Drawdown Project, the Bureau will increase the quantity of water withdrawn from Columbia River. The Bureau included the Weber Siphon expansion in its Environmental Assessment and Final Finding of No Significant Impact ("FONSI") on the Lake Roosevelt Drawdown Project. CELP and Riverkeeper are currently challenging the timing and adequacy of the Bureau's compliance with the National Environmental Policy Act for the Lake Roosevelt Drawdown Project.

Riverkeeper and its members actively participate in governmental decision making processes that impact the Columbia River and species that depend on the river for survival.

Many of CELP and Riverkeeper's members have scientific, aesthetic, commercial, recreational, cultural, and/or spiritual interests in the protection of endangered salmon, steelhead, and bull trout.

II. THE ENDANGERED SPECIES ACT.

The ESA is “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). A review by the U.S. Supreme Court of the ESA's language, history, and structure convinced the Court “beyond doubt” that “Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174. “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184. To accomplish this purpose, the ESA includes both substantive and procedural provisions that are designed to protect imperiled species and aid in their recovery. In order to meet these obligations, the Supreme Court declared that “endangered species [have] priority over the ‘primary missions’ of federal agencies.” *Id.* at 185.

Section 7 of the ESA, the heart of the ESA's requirements for federal actions, imposes strict substantive and procedural duties on federal agencies to ensure that their activities do not cause jeopardy to listed species or adverse modification to their critical habitat. 16 U.S.C. § 1536(a)(2). Not satisfied that federal agencies possessed the requisite expertise, Congress added a strict procedural requirement: that the determination of whether any federal action would be likely to result in jeopardy or adverse modification would be made “in consultation with and with the assistance of [the Services].” *Id.* This mandatory consultation is the key to section 7; in fact, Congress titled Section 7, “Interagency Cooperation.”

Section 7 embodies another safeguard to protect against substantive jeopardy. Section 7 requires federal agencies—action and expert agencies alike—to use the best available scientific information in meeting their section 7 obligations. The agencies are generally the repositories of the best scientific evidence given their role in listing threatened and endangered species, in conducting section 7 consultations, in issuing incidental take permits and statements, and in developing recovery plans.

A. The Consultation Process.

The ESA mandates consultations to ensure that an agency action “is not likely to jeopardize the continued existence of any” listed species or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). Regulations require such consultations whenever an action “may affect” a listed species. *See* 50 C.F.R. § 402.14. Where an action is “likely to adversely effect” a listed species, the agency must conduct formal consultation with NMFS and FWS. The end product of formal consultation is a biological opinion in which the Services determine whether the action will cause jeopardy to the species or adversely modify designated critical habitat. 16 U.S.C. § 1536(b).

In their joint consultation regulations, NMFS and the FWS established a preliminary review that can be used to sidestep formal consultation in limited situations. For all actions that “may affect” a listed species, the action agency must determine whether the action is “likely to adversely affect” or “not likely to adversely affect” the listed species. 50 C.F.R. § 402.14(a)–(b). An action that is “likely to adversely affect” a listed species or its critical habitat must undergo formal consultation that culminates with the services' issuance of a biological opinion that complies with the ESA and regulatory requirements. *Id.* §§ 402.02, 402.14(a).

Under the joint regulations, a “not likely to adversely affect” determination can lead instead to an informal consultation, which consists of all discussions and communications between the agencies and ends with the Services' written concurrence in that determination. *Id.* § 402.13. If the expert agency does not concur, the action is deemed “likely to adversely affect” and the agencies must conduct a formal consultation. *Id.* §§ 402.02, 402.14(a). Use of informal consultation is optional in those instances where it is available.

An agency may avoid “consultation only when it has determined the proposed action is unlikely to adversely affect the protected species or habitat and the [expert agency] concurs with that determination.” *Tinoqui-Chalola Council of Kitanemuk v. U.S. Dept. of Energy*, 232 F.3d 1300, 1306 (9th Cir. 2000) (citing 50 C.F.R. § 402.14(b)).

B. ESA-Listed Species in the Columbia River.

Due to a myriad of human caused adverse effects, salmon, steelhead, and bull trout are listed as threatened or endangered throughout the Columbia River.² “The operation of the Federal Columbia River Power System (FCRPS) affects 13 species of Columbia River Basin salmon and steelhead listed for protection under the Endangered Species Act (ESA).” FCRPS Biological Opinion Executive Summary at 1 (May 2008). The Services listed a total of 13 salmon species between 1991 and 2005. These species are affected by federal agencies, including the Bureau’s operation of the Columbia River hydrosystem for power, irrigation, flood control, navigation and other purposes. *Id.* at 6. “The salmon and steelhead in the Columbia River Basin have been negatively affected for more than a century by many factors, including urbanization, the introduction of exotic species, overfishing, development of floodplains, diversions, dams, mining, farming, ranching, logging, hatcheries, predation, ocean conditions and the loss of habitat.” *Id.* at 10.

²Columbia River ESA-listed anadromous species include: Steelhead (*Oncorhynchus mykiss*), Upper Columbia River chinook (*Oncorhynchus tshawytscha*), Mid-Columbia River Steelhead (*Oncorhynchus mykiss*), Snake River steelhead (*Oncorhynchus mykiss*), Snake River sockeye (*Oncorhynchus nerka*), Snake River fall chinook (*Oncorhynchus tshawytsca*), Snake River River spring/summer chinook (*Oncorhynchus tshawytscha*), Lower Columbia River chum (*Oncorhynchus keta*), Lower Columbia River chinook (*Oncorhynchus tshawytsca*), Lower Columbia River coho (*Oncorhynchus kisutch*), Lower Columbia River steelhead (*Oncorhynchus mykiss*), Upper Willamette River Chinook (*Oncorhynchus tshawytscha*), Upper Willamette River steelhead (*Oncorhynchus mykiss*). The Upper Columbia River Bull trout (*Salvelinus confluentus*), which is not anadromous, is also listed as threatened under the ESA.

ESA-listed salmon and steelhead were historically present in the Upper Columbia River, including the area now known as Lake Roosevelt. Today, anadromous fish passage is blocked downstream of Lake Roosevelt at the Chief Joseph Dam. Thus, none of the ESA-listed species of anadromous salmon occur, and no critical habitat is present, in Lake Roosevelt. Nonetheless, management of Columbia River flows and water quantity upstream of Chief Joseph impacts anadromous species and critical habitat downstream.

Unlike anadromous fish, bull trout are present in Lake Roosevelt. See U.S. Fish and Wildlife Service Draft Bull Trout Recovery Plan, Ch. 23, p. v (USFWS 2002), available online at: <http://www.fws.gov/pacific/bulltrout/Recovery.html>. According to the U.S. Fish and Wildlife Service Draft Bull Trout Recovery Plan, "[t]he Columbia River Distinct Population Segment [of Bull trout] is threatened by habitat degradation and fragmentation, blockage of migratory routes, poor water quality, and past fisheries management practices such as the introduction of nonnative species." *Id.* at Ch. 22, p. iv. Bull trout have more specific habitat requirements than most other salmonids. "Bull trout are found in colder streams and require colder water than most other salmonids for incubation, juvenile rearing, and spawning." *Id.* Ch. 1, p. iv. The Draft Bull Trout Recovery Plan notes that "[s]pecific land and water management activities that continue to depress bull trout populations and degrade habitat include dams and other diversion structures . . . and urban and rural development." *Id.* at Ch. 1, p. v.

III. THE BUREAU'S FAILURE TO COMPLY WITH ESA § 7 FOR THE WEBER SIPHON EXPANSION.

A. Increasing Columbia River Water Withdrawals through the Weber Siphon Expansion.

The Weber Siphon expansion is a federal project to expand the water delivery capacity of the Columbia Basin Project in eastern Washington. According to the Bureau, the Weber Siphon expansion is a component of the Lake Roosevelt Incremental Storage Releases Project ("Lake Roosevelt Drawdown Project"). The Lake Roosevelt Drawdown proposes new diversions of water from behind the Grand Coulee Dam for agricultural, municipal, industrial, and in-stream uses. All water supplied by these projects will come from water stored behind Grand Coulee Dam.

On April 15, 2009, the Department of Interior announced that \$50 million in federal funding under the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115 § 1609, would be made available for the Weber Siphon expansion, a component of the water delivery infrastructure of the Bureau of Reclamation's Columbia Basin Project. The Weber Siphon expansion will construct the second siphon barrels (cast-reinforced pipe) to the Weber Branch and Weber Coulee Siphons. According to the Bureau's fact sheet, the Weber Siphon expansion will eliminate a bottleneck in the East Low Canal where the canal crosses Interstate 90. The East Low Canal carries irrigation water to a portion of the Columbia Basin Project. The Fact Sheet explains that the Weber Siphon expansion will provide 30,000 acre-feet of water to 10,000 acres outside the current service area of the Columbia Basin Project. See U.S. Bureau of Reclamation, Fact Sheet on Weber Siphon Complex- Odessa Subarea, available online at: http://recovery.doi.gov/docs/bor/factsheets/weber_siphon.pdf.

What the Bureau's fact sheet omits is that the Weber Siphon expansion would *double* water capacity of the East Low Canal, making it possible to pump another 202,000 acre-feet of water from the Columbia River to 57,000 acres proposed for irrigation under the Bureau's ongoing "Odessa Subarea Special Study."³ The Weber Siphon expansion will increase the capacity of the East Low Canal well beyond the requirements of the Lake Roosevelt Drawdown Project. The expansion will increase capacity by 1950 cubic feet per second (cfs), resulting in a total capacity of 3650 cfs in the East Low Canal. The Lake Roosevelt Drawdown requires increased flow in the East Low Canal of not more than 180 cfs. The Weber Siphon will therefore facilitate the diversion and delivery of more than ten times the quantity of water addressed in the Bureau's FCRPS ESA consultation for the Lake Roosevelt Drawdown Project.

B. The Weber Siphon Expansion "May Affect" Threatened and Endangered Species.

The Columbia River dams block anadromous fish passage to Lake Roosevelt. Regardless, water withdrawn at Lake Roosevelt and delivered by the Weber Siphon expansion will reduce instream flows downstream of Grand Coulee Dam and "may affect" salmon and steelhead. Endangered Species Act litigation against the Bureau and other federal agencies regarding the impacts of the Columbia River hydropower system has focused, in part, on the inadequacy of instream flows for salmon and steelhead migration. For example, the Grand Coulee Dam is operated to meet downstream target flows for fisheries throughout the year. Therefore, projects like the Weber Siphon expansion that facilitate major water diversions above Chief Joseph dam "may affect" ESA-listed anadromous species.

Additionally, the Bureau currently withdraws 3.1 million acre feet of water from the Columbia River each year to serve the 640,000 acre Columbia Basin Project. This is only one example of the Bureau's water withdrawal projects on the Columbia and Snake Rivers. Given the extent of the Bureau's impacts on Columbia River flows, the Bureau's action to expand the Columbia Basin Project's water delivery infrastructure "may affect" ESA-listed salmon, steelhead, and bull trout. The threshold for a "may affect" determination and required ESA section 7 consultation is low. *See* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) ("Any possible effect, whether beneficial, benign, adverse, or of an undetermined character, triggers the formal consultation requirement."). The ESA, therefore, requires that the Bureau consult on the Weber Siphon expansion.

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³The Bureau is currently planning a second water delivery project that would take advantage of the increased capacity of the Weber Siphon. Pursuant to that project, the Odessa Subarea Special Study, the Bureau is investigating delivery of up to 377,700 acre-feet of water to the Odessa Subarea. Much of the water to be delivered to the Odessa Subarea as a result of the project would flow through the East Low Canal, and as a part of the study, the Bureau has explicitly identified expansion of the Weber Siphon as a precondition for increasing water deliveries from the Columbia River to the Odessa Subarea.

C. The Bureau Failed to Initiate or Complete Consultation on the Weber Siphon Expansion.

The Weber Siphon expansion is beyond the scope of the Bureau's ESA section 7 consultation on the Lake Roosevelt Drawdown Project, which the Bureau conducted as part of the FCRPS consultation. Neither the Bureau's FCRPS Biological Assessment nor the Services' FCRPS Biological Opinion mention the Weber Siphon expansion. While the Bureau initiated ESA section 7 consultation on the Lake Roosevelt Drawdown Project, the Bureau has not initiated and completed ESA section 7 consultation on the Weber Siphon expansion and must do so.

Moreover, the Bureau cannot delay its ESA consultation, which is already past due. To date, the Bureau committed \$50 million of funding to the Weber Siphon expansion, solicited contract bids for the project, and is actively negotiating contracts to complete the project. The Bureau's actions violate the ESA's procedural and substantive requirements to consult with the expert agencies *prior* to taking a federal action that may affect ESA-listed species.

D. The Bureau Fails to Ensure that the Weber Siphon Expansion is Not Likely to Cause Jeopardy.

Any federal action that "may affect" any ESA-listed species requires compliance with ESA § 7. The Bureau undertook a federal action, the Weber Siphon expansion, which may adversely affect ESA-listed salmon, steelhead, and bull trout in the Columbia River. Specifically, the Weber Siphon expansion will significantly increase the water delivery capacity of the Bureau's Columbia Basin Project and facilitate the annual removal of a significant amount of Columbia River water. In turn, the Weber Siphon expansion may affect ESA-listed fish by reducing instream flow, impacting temperature, and degrading water quality. The Bureau failed to insure that this action is not likely to jeopardize the continued existence of any endangered or threatened species. The Bureau, therefore, is in violation of ESA section 7(a)(2).

IV. CONCLUSION.

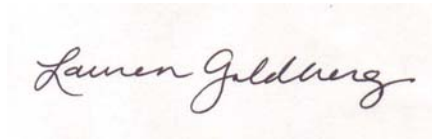
As the Ninth Circuit explained in *Thomas v. Peterson*, the ESA's procedural requirements are critically important to assuring that actions do not cause substantive violations of the Act. 753 F.2d at 763-65 (9th Cir. 1985). The Bureau's failure to consult on the Weber Siphon expansion violates the strict procedural requirements of the ESA. Section 11(g)(4) of the ESA, 16 U.S.C. § 1540(g)(4), permits parties to recover attorney fees and costs, which CELP and Riverkeeper intend to seek.

During the 60-day notice period, CELP and Columbia Riverkeeper are available to discuss effective remedies for the violations in this letter and settlement terms. If you wish to discuss any aspect of this notice or to discuss settlement of this matter prior to commencement of suit, please contact Chris Winter at chris@crag.org or (503) 525-2725. We do not intend to delay the filing of a complaint if discussions are continuing when the notice period ends.

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Yours very truly,

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