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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
EUGENE DIVISION

WILLAMETTE RIVERKEEPER,  
CONSERVATION ANGLER,

Plaintiffs,

vs.

U.S. ARMY CORPS OF ENGINEERS, JOSE  
AGUILAR,

Defendants.

Case No.:

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

(Violation of Endangered Species Act)

1. This is a civil suit for declaratory and injunctive relief. Winter-run steelhead trout, a remarkable fish species that has existed since recorded time in the upper Willamette River in Oregon, is threatened with extinction under the Endangered Species Act (“ESA”), and new data and information reveal it is in further precipitous decline. Plaintiffs Willamette Riverkeeper and Conservation Angler seek to compel Defendants U.S. Army Corps of Engineers et al. (“Corps of Engineers”) to comply with the ESA by reinitiating consultation with the National Marine Fisheries Service (“NMFS”) to address significant new information related to the effects of Corps of Engineers’ authorization, funding, and facilitation of placing non-native summer steelhead trout into habitat for winter steelhead trout in the upper Willamette River basin. Plaintiffs also seek to compel the Corps of Engineers to comply with the ESA by preventing further irreversible and/or irretrievable commitments of resources before it completes reinitiating consultation. Plaintiffs also seek to compel the Corps of Engineers to comply with the ESA by preventing further “take” of winter steelhead trout by introduced hatchery rainbow trout.

#### Jurisdiction.

2. An actual, justiciable controversy exists between the parties. This Court has jurisdiction under 16 U.S.C. § 1540(g)(1). Pursuant to the ESA, more than 60 days ago, Plaintiffs served the Corps of Engineers with written notice of their intent to sue. 16 U.S.C. § 1540(g)(2). The Corps of Engineers has not remedied its violations of the ESA, which are ongoing and likely to continue. The relief Plaintiffs seek is proper under 16 U.S.C. § 1540(g)(1)(A), 28 U.S.C. §§ 2201–02, and 5 U.S.C. §§ 701–06.

3. Venue is proper in this Court under 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391, because the South Santiam Hatchery, the Marion Forks Hatchery, and other facilities or activities owned or financed by the Corps of Engineers are located in Marion County, which is within this judicial district; all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district; and agency records or personnel are located in this district.

#### Parties.

4. Plaintiff Willamette Riverkeeper was founded in 1996, and focuses on protecting and restoring the resources of the Willamette River basin in Oregon. Willamette Riverkeeper works

on programs and projects ranging from Clean Water Act compliance and river education, to Superfund cleanup and restoring habitat. Willamette Riverkeeper filed suit to force the Corps of Engineers and other federal action agencies to consult with NMFS as to the effects of federal projects and facilities on ESA-listed fish in the upper Willamette River basin, including winter steelhead trout. That consultation resulted in a 2008 Biological Opinion related to effects of federal facilities and projects on winter steelhead trout and spring Chinook salmon in the upper Willamette River basin.

5. Plaintiff Conservation Angler Conservation Angler is non-profit conservation group that advocates for wild fish and fisheries, and advocates to protect and conserve wild steelhead, salmon, trout and char throughout their Pacific range. The Conservation Angler is a watch-dog organization - holding public agencies, countries and nations accountable for protecting and conserving wild fish for present and future generations - using education, legal, administrative and political means necessary to prevent the extinction and to foster a long-term recovery of wild steelhead trout, salmon, and char to fishable and ultimately, harvestable abundance.

6. Plaintiffs Willamette Riverkeeper and Conservation Angler have suffered and continue to suffer harm from the Corps of Engineers' violation of the ESA. Plaintiffs' members include anglers who enjoy fishing, and would seek and enjoy catch and release fishing of populations of winter steelhead trout in the North Santiam River and South Santiam River basins, if the populations were recovered. Plaintiffs' members have fewer opportunities to do so because catching and releasing winter steelhead trout will harm the few that remain, and hamper recovery of the populations. Plaintiffs' members also include anglers and others with scientific and professional interests in the genetic integrity of winter steelhead trout. Plaintiffs' members also include anglers who are outfitters or guides who seek to advance commercial interests in what could be a winter steelhead trout fishery in the North Santiam River and South Santiam River basins.

7. Defendant U.S. Army Corps of Engineers is an agency of the Department of the Army. The Corps has built and operates federal dams and other facilities in the North Santiam River and

South Santiam River basins. These dams and facilities harm and impede recovery of native wild winter steelhead in these basins.

8. Defendant Jose Aguilar is the Commander and District Engineer for the U.S. Army Corps of Engineers in Portland, Oregon. Mr. Aguilar is sued in his official capacity. Mr. Aguilar is responsible for ensuring that the Corps of Engineers complies with the ESA in its funding and operation of federal and other facilities in the Upper Willamette River basin.

#### Allegations.

9. The Willamette River originates in the Cascade Mountains in Oregon and flows generally northward to its confluence with the Columbia River. The mainstem Willamette River is 187 miles long. At river mile 27, the Willamette River falls approximately 35 feet. By volume of water, Willamette Falls is the largest in Oregon, and the sixth largest in the United States. Historically, in its natural state, Willamette Falls was a barrier to the upstream migration of anadromous fish, except during relatively high flows in the winter or early spring. Historically, steelhead trout (*Oncorhynchus mykiss*) and Chinook salmon (*Oncorhynchus tshawytscha*) were able to ascend Willamette Falls to reach the Willamette River basin above the falls. The part of the Willamette River basin above Willamette Falls is called the “upper” Willamette River.

10. The North Santiam River originates near Three Fingered Jack in the Cascade Mountains and flows roughly 92 miles to its confluence with the South Santiam River. The Corps of Engineers built Big Cliff Dam and Detroit Dam on the North Santiam River. Big Cliff Dam is downstream of Detroit Dam, and is a barrier to the upstream migration of adult anadromous steelhead trout and Chinook salmon.

11. The South Santiam River originates at the confluence of Sevenmile and Squaw Creeks in the Cascade Mountains and flows roughly 66 miles to its confluence with the North Santiam River. The Corps of Engineers built Foster Dam on the South Santiam River. Foster Dam is a barrier to the upstream migration of adult anadromous steelhead trout and Chinook salmon.

12. After the North Santiam River and South Santiam River join, they form the Santiam River, which flows roughly 10 miles to its confluence with the Willamette River upstream of Willamette Falls.

13. Steelhead trout are usually dark-olive in color, shading to silvery-white on the underside, with a heavily-speckled body and a pink to red stripe running along the sides. Steelhead trout hatch in gravel-bottomed, fast-flowing, well-oxygenated rivers and streams. Individual steelhead trout can develop differently, depending on the environment. Some steelhead trout stay in fresh water all of their lives. These fish are called rainbow trout. Steelhead trout that migrate to the ocean are “anadromous,” and they develop a slimmer profile, become more silvery in color, and typically grow larger than rainbow trout. Unlike other Pacific salmonids, steelhead trout are iteroparous, meaning they do not always die after spawning.

14. On March 25, 1999, the National Marine Fisheries Service (“NMFS”) listed naturally-spawned anadromous steelhead trout in the upper Willamette River evolutionarily significant unit (“ESU”) as threatened with extinction under the ESA. This ESU occupies the upper Willamette River and its tributaries, from Willamette Falls upstream to the Calapooia River, inclusive. Steelhead trout in the upper Willamette River basin are genetically distinct from those in the lower Willamette River basin. Steelhead trout in the upper Willamette River basin are late-migrating (“winter”) steelhead. Winter steelhead in the upper Willamette River basin enter fresh water primarily in March and April. Historically, winter steelhead trout spawning in the upper Willamette River basin was concentrated in the North Santiam River and South Santiam River basins.

15. In 2006, NMFS listed or re-listed ten distinct population segments (“DPSs”) of West Coast steelhead trout as threatened with extinction, or as endangered, under the ESA. The listing includes the upper Willamette River DPS of winter steelhead trout. Winter steelhead trout in the upper Willamette River DPS occupy four subbasins: the Mollala River, the North Santiam River, the South Santiam River, and the Calapooia River. In 2006, NMFS found that the upper Willamette River DPS is spatially well-distributed among the four subbasins. Each of these subbasins has a distinct population of winter steelhead trout. The South Santiam River and the North Santiam River are the two “core” populations of winter steelhead trout in the upper Willamette River DPS.

16. In its 2006 listing, for the upper Willamette River DPS of winter steelhead trout, NMFS found that the recent 5-year mean abundance remains low for an entire DPS (5,819 adults). In its 2006 listing, for the upper Willamette River DPS of winter steelhead trout, NMFS found that individual populations remain at low abundance. In its 2006 listing, for the upper Willamette River DPS of winter steelhead trout, NMFS found that long-term trends in abundance are negative for all populations in the DPS.

17. The Corps of Engineers has a duty to mitigate for fish habitat lost or degraded by its projects in the upper Willamette River basin. The Corps of Engineers has discretionary involvement or control as to how it meets its mitigation duty. The Corps of Engineers has contracted with or otherwise entered into agreements with the Oregon Department of Fish and Wildlife (“ODFW”) to produce and/or release fish from the South Santiam hatchery and the Marion Forks hatchery, and other facilities, in the upper Willamette River basin. The contracts or agreements executed by the Corps of Engineers gave or give ODFW permission to use the South Santiam hatchery and the Marion Forks hatchery, and other facilities, to produce and release certain species of fish. The contracts or agreements gave or give ODFW permission to use the South Santiam hatchery and the Marion Forks hatchery, and other facilities, if there is additional capacity, to produce or release other (non-denominated) fish species.

18. In the past, ODFW operated a winter steelhead trout hatchery program in the upper Willamette River basin. Hatchery winter steelhead trout programs in the upper Willamette River basin were terminated in 1999.

19. In the late 1960s, ODFW introduced “summer” steelhead trout into the upper Willamette River basin. The broodstock for these fish were taken from the Washougal River and Skamania Hatchery in Washington. Summer steelhead trout are not native to the upper Willamette River. Summer steelhead trout are not part of the winter steelhead trout DPS.

20. Since 1973, broodstock to raise summer steelhead trout to release into the upper Willamette River basin has been collected from summer steelhead trout adults that return to the South Santiam River. The Corps of Engineers owns or has ownership interests in the South Santiam hatchery in the South Santiam River basin. The Corps of Engineers provides 70% of the

funding for operations of the South Santiam hatchery. The Corps owns or has ownership interests in the Marion Forks hatchery (including the Minto Facility) in the North Santiam River basin. The Corps of Engineers provides 83.75% of the funding for operations of the Marion Forks hatchery.

21. The sole purpose of releasing summer steelhead trout into the upper Willamette River basin is to create or sustain opportunities for fishing. The purpose of releasing summer steelhead trout into the upper Willamette River basin is not for mitigation, because these fish are not native to the basin. ODFW has released summer steelhead trout into the South Santiam River basin. ODFW has set an annual harvest goal of 5,600 summer steelhead trout in the South Santiam River basin. ODFW has released summer steelhead trout into the North Santiam River basin. ODFW has set an annual harvest goal of 4,500 summer steelhead trout in the North Santiam River basin. ODFW releases summer steelhead trout into the South Santiam River and the North Santiam River basins in April or May.

22. The Corps of Engineers has authorized, paid for, or facilitated production or release of summer steelhead trout into the South Santiam River basin. The Corps of Engineers has authorized, paid for, or facilitated production or release of summer steelhead trout into the North Santiam River basin.

23. Winter steelhead trout and summer steelhead trout spawn naturally in the same areas in the upper Willamette River basin. Winter steelhead trout and summer steelhead trout spawn naturally in the same areas in the North Santiam River basin. Winter steelhead trout and summer steelhead trout spawn naturally in the same areas in the South Santiam River basin.

24. There is overlap in the spawn timing of winter steelhead trout and summer steelhead trout in the North Santiam basin. There is overlap in the spawn timing of winter steelhead trout and summer steelhead trout in the South Santiam River basin.

25. Winter steelhead trout interbreed with summer steelhead trout in the North Santiam River basin. Winter steelhead trout interbreed with summer steelhead trout in the South Santiam River basin. Offspring of these interbred fish are less fit. Offspring of these interbred fish are less likely to reproduce.

26. Summer steelhead trout residualize in the North Santiam River basin. Summer steelhead trout residualize in the South Santiam River basin. Emigration percentages among summer steelhead trout in the upper Willamette River do not differ between volitional release groups from a hatchery, and off-station release groups from a hatchery. Residualized adult summer steelhead trout prey upon winter steelhead trout fry and juveniles. Juvenile summer steelhead trout prey upon age-0 and age-1 juvenile winter steelhead trout.

27. Spawning and rearing habitat for winter steelhead trout in the North Santiam River basin are limited due to the existence of Big Cliff Dam. Winter steelhead trout compete with summer steelhead trout for available habitat in the North Santiam River basin. Spawning and rearing habitat for winter steelhead trout in the South Santiam River basin are limited due to the existence of Foster Dam. Winter steelhead trout compete with summer steelhead trout for available habitat in the South Santiam River basin.

28. In 2007, the Corps of Engineers, the Bonneville Power Administration, and the U.S. Bureau of Reclamation prepared a Supplemental Biological Assessment and consulted with NMFS under Section 7 of the ESA to obtain its opinion as to effects of federal actions and facilities affecting ESA-listed salmonids in the upper Willamette River basin. The actions include authorizing, funding, or facilitating operations of the South Santiam Hatchery. The actions include authorizing, funding, or facilitating operations of the Marion Forks Hatchery (including the Minto Facility). The actions include authorizing, funding, or facilitating release of summer steelhead trout in the South Santiam River basin. The actions include authorizing, funding, or facilitating release of summer steelhead trout in the North Santiam River basin.

29. In 2008, NMFS issued a Biological Opinion (“BiOp”) as to effects of these and other federal facilities and actions. Since the BiOp was issued, new information and data reveal that releases of summer steelhead trout into the South Santiam River basin and the North Santiam River basin are harmful to and impede recovery of winter steelhead trout to an extent not previously considered or evaluated. Recent genetic analyses have identified approximately 10 percent of the juvenile steelhead at Willamette Falls as summer x winter-run hybrids. Recent genetic analyses have identified approximately 11.1 percent of the steelhead trout in the North



Santiam River as summer x winter-run hybrids. Recent genetic analyses have identified approximately 14.8 percent of steelhead trout in the South Santiam River as summer x winter-run hybrids. Hybridization decreases productivity of the winter steelhead trout population.

30. Recent data show high levels of hatchery origin summer steelhead trout spawners in the South Santiam River basin. Recent data show high levels of hatchery origin summer steelhead trout spawners in the North Santiam River basin.

31. From 1990 to 2005, a range of 1,618 to 2,853 winter steelhead trout “natural spawners” returned to the South Santiam River. From 1990 to 2005, an average of 2,149 winter steelhead trout “natural spawners” returned to the South Santiam River. By May 15, 2017, approximately 18 winter steelhead trout “natural spawners” returned to the Foster trap on the South Santiam River. It is unlikely that more winter steelhead trout will return to the Foster fish trap in the remainder of 2017.

32. From 1990 to 2005, a range of 1,485 to 2,994 winter steelhead trout returned to the North Santiam River. From 1990 to 2005, an average of 2,109 winter steelhead trout returned to the North Santiam River. By May 13, 2017, approximately 142 winter steelhead trout passed the fish counting stations at Upper and Lower Bennett Dams on the North Santiam River. By May 15, 2017, approximately 31 winter steelhead trout returned to the Minto fish trap on the North Santiam River. It is unlikely that more winter steelhead trout will return to the North Santiam River in the remainder of 2017.

33. The Corps of Engineers authorizes, funds, or facilitates production of hatchery rainbow trout at the Leaburg Hatchery on the McKenzie River and the Willamette Hatchery in the Middle Fork Willamette River basin. The Corps of Engineers authorizes, funds, or facilitates the release of hatchery rainbow trout in the upper Willamette River basin. The Corps of Engineers authorizes, funds, or facilitates the release of hatchery rainbow trout into Foster Reservoir in the South Santiam River basin. Annual releases of rainbow trout into Foster Reservoir amount to approximately 43,500 fingerling and “legal-size” fish (trout that are eight inches or larger). Adult winter steelhead trout are placed into the South Santiam River above Foster Dam to attempt to conserve the winter steelhead trout run above Foster Dam. In 2008, mortality to out-migrating

juvenile winter steelhead trout from Foster Dam was estimated to be 8% to 10%. Hatchery rainbow trout released into Foster Reservoir prey upon or compete for resources with winter steelhead trout fry, smolts, or juveniles.

#### Claims for Relief: ESA

34. Plaintiffs re-allege the allegations above.

35. To comply with Section 7 of the ESA, the Corps of Engineers is required to reinitiate consultation where it has discretionary involvement or control over facilities or activities that affect winter steelhead trout in the North Santiam River and South Santiam River basins and (a) the amount or extent of taking specified in the incidental take statement is exceeded or (b) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. 16 U.S.C. § 1536(a); 50 C.F.R. § 402.16. Among other sources of new information, the number of adult winter steelhead trout returning to Foster Fish Trap and Minto Fish Trap in 2017 constitutes new information that reveals effects of the action that may affect winter steelhead trout or its critical habitat in a manner or to an extent not previously considered. Among other sources of new information, recent pHOS of summer steelhead trout in the North Santiam and South Santiam River basins constitutes new information that reveals effects of the action that may affect winter steelhead trout or its critical habitat in a manner or to an extent not previously considered. Among other sources of new information, recent studies proving high rates of hybridization constitute new information that reveals effects of the action that may affect winter steelhead trout or its critical habitat in a manner or to an extent not previously considered. The Corps of Engineers has illegally failed to re-initiate consultation with NMFS to obtain its opinion as to how the facilities and activities it authorizes, funds, or facilitates affects winter steelhead trout or its critical habitat, and jeopardize its continued existence.

36. The Corps of Engineers is in violation of Section 7(d) of the ESA, 16 U.S.C. § 1536(d), for making irreversible and/or irretrievable commitments of resources before completing the reinitiation of consultation under Section 7(a)(2) on the effects to winter steelhead trout in the North Santiam River and South Santiam River basins. The Corps of Engineers' authorization,

funding, or facilitation of the production and release of summer steelhead trout into these basins constitute irreversible and/or irretrievable commitments of resources that violate this provision.

37. NMFS has promulgated regulations under Section 4 of the ESA that extend the “take” prohibition in 16 U.S.C § 1538 to winter steelhead in the upper Willamette River basin as a threatened species. 50 C.F.R. § 223.203(a). Section 9 of the ESA prohibits the Corps of Engineers from authorizing, funding, or facilitating take of winter steelhead trout in the South Santiam River basin. 16 U.S.C. § 1538(a)(1)(B). The Corps of Engineers has violated and continues to violate Section 9 of the ESA, by causing take of winter steelhead trout through the release of hatchery rainbow trout into habitat for winter steelhead trout.

#### Relief Requested.

Plaintiffs respectfully request that the Court grant the following relief:

1. Issue a declaratory judgment that the Corps of Engineers has violated Section 7 of the ESA by failing to reinitiate consultation with NMFS as to effects on winter steelhead trout of the release of summer steelhead trout into the North Santiam River and South Santiam River basins;
2. Issue a declaratory judgment that the Corps of Engineers has violated Section 7 of the ESA by making irreversible and/or irretrievable commitments of resources before completing reinitiation of consultation under Section 7 on the effects of summer steelhead trout on winter steelhead trout in the North Santiam and South Santiam River basins;
3. Issue a declaratory judgment that the Corps of Engineers has violated Section 9 of the ESA by causing take of winter steelhead trout through release of hatchery rainbow trout upstream of Foster Dam;
4. Order the Corps of Engineers to cease authorizing, facilitating, or funding production or release of summer steelhead trout into the North Santiam River and South Santiam River basins;
5. Order the Corps of Engineers to cease authorizing, facilitating, or funding the production or release of rainbow trout into the South Santiam River basin upstream of Foster Dam;
6. Award Plaintiffs reasonable costs, expenses, and attorneys’ fees associated with this case pursuant to the ESA and any other applicable authorities;

7. Grant such other further relief as Plaintiffs may pray for or the Court deems just and proper.

Date: May 22, 2017.

Respectfully submitted,

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