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October 9, 2018

VIA U.S. FIRST CLASS CERTIFIED MAIL

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U.S. Department of Commerce
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Washington, DC 20230

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Idaho Fish & Game Commission
P.O. Box 8805
Moscow, ID 83843

Barry Thom, Regional Administrator
National Marine Fisheries Service – NW
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Seattle, WA 98115-0070

Blake Fischer, Commissioner
Idaho Fish & Game Commission
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C.L. “Butch” Otter, Governor
Office of the Governor
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Boise, ID 83701

Greg Cameron, Commissioner
Idaho Fish & Game Commission
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Rupert, ID 83350

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Lane Clezie, Commissioner
Idaho Fish & Game Commission
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Jim Fredericks, Fisheries Bureau Chief
Idaho Department of Fish & Game
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Derick Attebury,
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Idaho Fish & Game Commission
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Idaho Falls, ID 83406

Brad Corkill, Commissioner
Idaho Fish & Game Commission
14701 S. Shady Lane
Cataldo, ID 83810

Jerry Meyers, Commissioner (Vice
chairman)
Idaho Fish & Game Commission
254 Fourth of July Creek
North Fork, ID 83466

**RE: 60-Day Notice Pursuant to 16 U.S.C. § 1540(g) of Violations of the
Endangered Species Act in Authorizing and Implementing Fisheries That
Take Snake River Basin Steelhead.**

This letter serves as a sixty-day notice on behalf of The Conservation Angler,
Wild Salmon Rivers, Idaho Rivers United, Snake River Waterkeeper, Wild Fish
Conservancy, and Friends of the Clearwater of intent to sue the Governor of Idaho and
officials of the Idaho Department of Fish & Game (“IDFG”) and Idaho Fish & Game

Commission (“Commission”), in their official capacities, to enjoin violations of Section 9 of the Endangered Species Act (“ESA”), 16 U.S.C. §1538, for authorizing and implementing fisheries that incidentally take wild (intact adipose fin) Snake River Basin steelhead in Idaho. The individuals and members of the organizations providing this notice use the streams and natural resources affected by these fisheries and have a long-standing interest in the preservation of wild fish stocks in Idaho and throughout the range of Snake River Basin steelhead. The actions of the state officials and commissioners named in this notice have harmed and will continue to harm these interests in preservation of wild fish stocks and in the survival and recovery of the critically imperiled Snake River Basin steelhead.

I. STATUTORY AND REGULATORY BACKGROUND

Section 9 of the ESA prohibits any person—federal, state & local government agencies and officials as well as private individuals and entities—from “taking” an endangered species. 16 U.S.C. § 1538(a)(1); *see also* 50 C.F.R. § 17.31. “Take” is defined broadly under the ESA and its regulations to include harassing, harming, wounding, killing, trapping, capturing, or collecting a protected species either directly or by degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. § 1532(19).

In the definition of take, “[h]arass ... means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. “Harm ... means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.*

The National Marine Fisheries Service (“NMFS”) has extended this take prohibition to fish with an intact adipose fin that are members of the West Coast Evolutionarily Significant Units (“ESUs”) and Distinct Population Segments (“DPSs”) that NMFS has listed as “threatened.” 50 C.F.R. §§ 223.203(a); 223.102(e).

If an action will or is likely to result in “take” to a listed species, a person engaged in take may seek ESA coverage to allow the action to proceed either through the consultation process under § 7 (federal actors) or through an incidental take permit (“ITP”) issued pursuant to § 10 (non-federal actors). When non-federal actors’ actions are contemplated by an ITS issued under § 7, and are conducted in compliance with the requirements of that statement, its incidental taking of members of a listed species are exempt from § 9 take liability. *Ramsey v. Kantor*, 96 F.3d 434, 442 (9th Cir. 1996).

As an alternative to §§ 7 and 10, a state operating a fishery may seek coverage from ESA § 9 liability through administrative rules created pursuant to § 4(d) of the Act. Section 4(d) requires that the Secretary issue regulations deemed “necessary and advisable” to conserve threatened species. 16 U.S.C. § 1533(d). Limit 4 of the final 4(d)

Rule, amended in 2005 (70 Fed. Reg. 37,160), allows for fishery harvest activities notwithstanding § 9 of the ESA, provided that they are conducted in accordance with a NMFS-approved Fishery Management and Evaluation Plan (“FMEP”) and a letter of concurrence from NMFS, among other requirements.

II. FACTUAL BACKGROUND

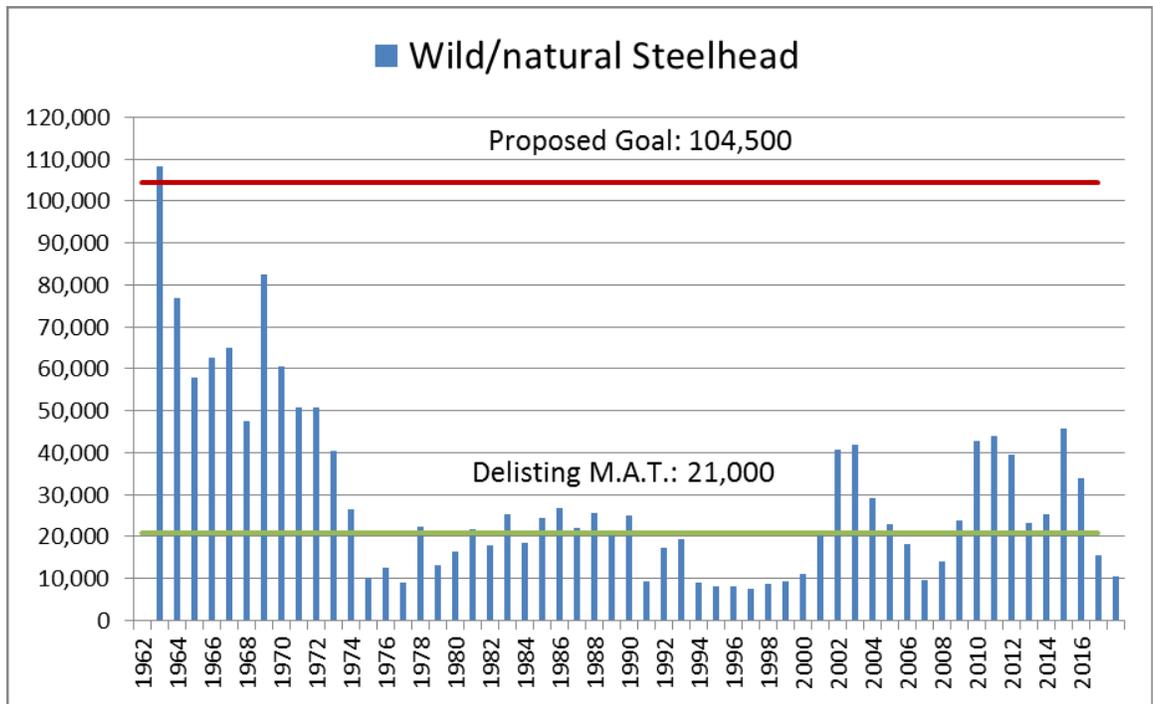
NMFS listed the Snake River Basin steelhead DPS as a threatened species (62 Fed. Reg. 43,937) on August 18, 1997. The threatened status was reaffirmed in 2006 and most recently on April 14, 2014 (79 Fed. Reg. 20,802). Critical habitat for the DPS was designated on September 2, 2005 (70 Fed. Reg. 52,769). Twenty four historical populations and five artificial propagation programs are included in the DPS, which includes all naturally spawned anadromous *Oncorhynchus mykiss* originating below natural and manmade impassable barriers in streams in the Snake River Basin of southeast Washington, northeast Oregon, and Idaho.

The Snake River Basin steelhead DPS consists of A-Index steelhead, which primarily return to spawning areas beginning in the summer, and the B-Index steelhead, which begin their migration in the fall. B-Index fish predominantly reside in the ocean for 2 years, while A-Index steelhead typically reside in the ocean for 1-year—as a result, B-Index steelhead are generally larger than A-Index fish. The differences in the two fish stocks represent an important component of phenotypic and genetic diversity in this DPS. Some Snake River Basin steelhead populations support both A-Index and B-Index life history expressions.

The Snake River Basin steelhead DPS is at high risk of becoming unviable and going extinct. The most recent (2015) Status Review Update describes that 12 of the 24 natural populations had a “high” overall viability risk, while ten were rated as “maintained”—meaning that the population does not meet the criteria for a viable population but does support ecological functions and preserve options for species recovery. One population was not rated, and only the population in Oregon’s Joseph Creek was listed as “highly viable.” Four out of the five Major Population Groups (“MPGs”) are not meeting the specific objectives in the Snake River Recovery Plan, and the status of many individual populations remain uncertain. A major problem in evaluating the status of Snake River Basin steelhead is that population-specific adult population abundance is generally not available for the species. Nevertheless, the Snake River Basin steelhead DPS continues to be listed only as “threatened.”

In Idaho, wild (intact adipose fin) populations of Snake River Basin steelhead occur in the Clearwater River and its tributaries (Lochsa River drainage, Selway River drainage, and Lower Clearwater tributaries) and in the Salmon River and its tributaries (South Fork Salmon River drainage, Rapid River, Middle Fork Salmon River drainage, and Salmon River tributaries from the mouth to the Middle Fork Salmon River).

As recently as the early 1960s, over 100,000 wild Snake River Basin steelhead passed up the Snake River. In 2017–2018, only 12,981 wild fish passed Lower Granite Dam—far below IDFG’s proposed escapement goal for these fish.



IDFG, Draft Fisheries Management Plan 2019 – 2024, p. 53.

One of the major limiting factors in the recovery of Snake River Basin steelhead is harvest, particularly of the B-Index steelhead. Steelhead were historically harvested in tribal and non-tribal gillnet fisheries, and in recreational fisheries in the mainstem Columbia River and in tributaries. Steelhead are still harvested in tribal fisheries and there is incidental mortality associated with mark-selective recreational and commercial fisheries. In recent years, total exploitation rates (the sum of all harvest) on the A-Index have been around 5%, while exploitation rates on the B-Index have generally been in the range of 15–20%.

In Idaho, over the past two decades, hatchery-produced fish have provided the only sport fishing and harvest opportunity for salmon and steelhead. The Commissioners and IDFG officials authorize and implement fisheries for adipose-fin clipped steelhead and adipose-fin clipped Chinook salmon in Idaho that incidentally take wild Snake River Basin steelhead. Wild steelhead are also taken for use in hatchery broodstock.

The primary disturbance to listed salmon and steelhead caused by recreational fishing is incidental catch and release by anglers targeting adipose fin-clipped hatchery fish. “Take,” as defined and prohibited by the ESA, occurs when listed steelhead with intact adipose fins are killed, wounded, or injured by catch-and-release incidental to an authorized fishery, and by the simple act of trapping or capturing the protected fish. For

example, IDFG estimated that 26,816 natural-origin steelhead entered Idaho in the 2014–15 run year, and that 16,062 natural-origin steelhead were caught and released during Idaho steelhead fisheries during that run year. IDFG estimated that the *mortality* from this catch-and-release was 2.99% of the natural steelhead entering Idaho—that is, the steelhead fishery alone in Idaho caused the death of approximately 803 wild (intact adipose fin) Snake River Basin steelhead.

In 2018, IDFG forecast a return of 22,400 wild A-Index steelhead and 2,380 wild B-Index steelhead. However, due to returns that are about half of the pre-season forecast, the fishery managers in neighboring Oregon and Washington have closed the Columbia River to all steelhead fishing that affects Snake River Basin steelhead. Rather than closing its fishery, IDFG only temporarily reduced the bag limit for adipose-fin-clipped steelhead to one from September 3, 2018 through October 14, 2018 (and now extended through December 31, 2018), at which time the bag limit will expire. As of September 30, 2018, the steelhead count at Lower Granite Dam for total hatchery-origin and wild steelhead was 19,826 (22.7% of the Ten Year Average of 87,406), with only 4,674 wild steelhead (20.1% of the Ten Year Average of 23,272). The updated prediction for the 2018 wild B-Index steelhead run was 2,600 fish, a 23% reduction.

The 2017 return also was less than half of the 10-year average return—and the 2018 return is now expected to be even worse. Nevertheless, at the same mortality rate as in 2014–15, and factoring in the low return, the authorized steelhead fishery in 2018–19 will result in mortality of at least two hundred wild Snake River Basin steelhead in what is the second of two disastrous runs for these imperiled fish.

The Idaho steelhead fishery does not currently have an approved FMEP covering this incidental take of wild Snake River Basin steelhead, nor any other authorization or exemption from the ESA take prohibition for this fishery.

In addition, Snake River spring/summer-run Chinook salmon ESU and Snake River fall Chinook salmon ESU runs overlap with the runs of Snake River Basin A-Index and B-Index steelhead. There is considerable overlap between the distributions of Chinook salmon and steelhead, although Chinook salmon tend to occupy streams with lower gradients than steelhead. Fisheries for spring/summer Chinook salmon run from approximately April through August, while fisheries for fall Chinook salmon run from approximately August through the end of October. Steelhead bound for Idaho enter the Columbia River from about June 1 through October 1 each year, but a portion of the run spends the winter in the Columbia and Snake rivers downstream of Lower Granite Dam, and migrates into Idaho in the spring of the following year. Wild steelhead are present in Idaho rivers and streams throughout the fishing seasons for Chinook salmon that the Commissioners and IDFG officials authorize and implement, and are incidentally taken in those fisheries. The 2017 FMEP for spring/summer Chinook salmon does not cover the incidental take of steelhead, and the fall Chinook salmon fishery does not currently have an approved FMEP covering the incidental take of steelhead, nor is there any other authorization or exemption from the ESA take prohibition for these fisheries.

In addition, the 2018 Biological Opinion that addresses incidental take of Snake River Basin steelhead in the Columbia River under the management agreement stemming from the *United States v. Oregon* case does not authorize incidental take of these fish in Idaho.

III. VIOLATIONS OF THE ESA: UNLAWFUL TAKING OF LISTED SPECIES

The Commissioners and IDFG officials have authorized and are implementing steelhead, spring/summer Chinook salmon, and fall Chinook salmon fisheries that incidentally take wild (intact adipose fin) Snake River Basin steelhead without any exemption or authorization for this incidental take. The fisheries authorized and implemented by the Commissioners and IDFG officials cause mortality, wounding, injury, and capture of wild Snake River Basin steelhead through catch-and-release fishing for the wild members of this species incidental to the authorized fisheries for adipose-fin-clipped fish. If the steelhead and Chinook salmon fisheries proceed, they will continue to take wild Snake River Basin steelhead in violation of ESA § 9 and the implementing regulations.

IV. CONCLUSION

We urge the officials and commissioners of the Idaho Fish & Game Department and Idaho Fish & Game Commission to take immediate action to halt the fisheries they authorize which are causing unpermitted incidental take of wild Snake River Basin steelhead or otherwise act to bring these Idaho fisheries into compliance with the ESA. If these state officials and commissioners do not act within 60 days to correct their violations of ESA Section 9, The Conservation Angler, Wild Salmon Rivers, Idaho Rivers United, Snake River Waterkeeper, Wild Fish Conservancy, and Friends of the Clearwater will pursue litigation in federal court against the officials and commissioners named in this letter. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. The parties giving notice are available during the sixty-day notice period to discuss effective remedies and actions that will assure future compliance with the ESA. Please contact David Moskowitz at (971) 235-8953 or theconservationangler@gmail.com or Dave Becker at (503) 388-1960 or davebeckerlaw@gmail.com, to discuss this matter further, or if you believe any of the above statements to be in error or any critical information is missing.

V. PARTIES GIVING NOTICE OF INTENT TO SUE

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Sincerely,

A handwritten signature in black ink, appearing to read "David H. Becker", with a long horizontal flourish extending to the right.

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to Sue