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Via Certified Mail - Return Receipt Requested

Dorothy R. Rice, Executive Director
State Water Resources Control Board
1001 I Street
P.O. Box 100
Sacramento, CA 95812-0100

Gary Locke -Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

**NOTICE OF VIOLATIONS AND INTENT TO FILE SUIT UNDER THE
ENDANGERED SPECIES ACT**

Dear Ms. Rice and Secretary Locke:

The Endangered Species Act (“ESA”) Section 11(g), 16 U.S.C. § 1540(g), requires that sixty (60) days prior to the initiation of a civil action under the ESA, an entity must give notice of its intent to sue to the alleged violator and the Secretary of Interior or Commerce.

I am writing on behalf of the Center for Biological Diversity, Northern California River Watch, and Coast Action Group (collectively “Noticing Parties”), to notify all addressees of this **Notice** of violations of Section 9 of the ESA, 16 U.S.C. §1538 with respect to the harm and unauthorized take of federally protected salmonid species in the Russian River and Gualala River watersheds of Mendocino and Sonoma counties, California.

After the expiration of the 60-day notice period, the Noticing Parties intend to file suit in federal court against Dorothy R. Rice, in her official capacity as Executive Director (hereafter, the “Director”) of the California State Water Resources Control Board (hereafter, “SWRCB”) to enjoin her, the SWRCB, and its employees, agents, and assigns, from violations of the ESA and/or regulations issued under the authority of the ESA. If prior to expiration of the 60-day notice period the Director corrects these violations and is legally enjoined from further violations of the ESA, the Noticing Parties will not proceed to suit.

The Noticing Parties also give notice to the Secretary of Commerce (the “Secretary”) that after the expiration of the 60-day hold period, they will file suit in federal court to enforce the ESA, unless the Secretary has commenced an action to impose a penalty pursuant to 16 U.S.C. § 1540(a); or, if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress the violations of the ESA alleged in this **Notice**.

STATUTORY FRAMEWORK

Under ESA § 9, 16 U.S.C. § 1538(a)(1)(B), it is unlawful for any person to TAKE an endangered species. Under ESA § 4(19), 16 U.S.C. § 1532(19), the term “TAKE” includes to harass, harm, wound, kill, trap, capture, collect, or attempt to engage in any such conduct. TAKE includes direct as well as indirect harm and need not be purposeful. See *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. § 687, 704 (1995). In fact, a TAKE may even be the result of an accident. See *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir. 1994).

ESA § 9 is a strict liability statute, meaning that the illegal TAKING need not be intentional. Cumulative acts resulting in a TAKE are also actionable. Therefore, if water diversion in a habitat is caused by several entities rather than one, all entities may be prosecuted even if the act of one was insufficient to cause a TAKE. Attempting to cause almost any level of injury to an endangered species is also prohibited by law. TAKE is defined in the ESA in the broadest possible manner to include every conceivable way in which a person or entity can TAKE or attempt to TAKE any fish or wildlife. *Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294, 1300 (8th Cir. 1989). The ESA § 9 prohibition on TAKE applies equally to threatened species.

The ESA not only prohibits the acts of those parties that directly exact the TAKING, but also bans acts by a third party which bring about the acts exacting a TAKE. For instance, a governmental third party entity such as the DIRECTOR pursuant to whose authority an actor directly exacts a TAKING may be deemed to have violated the ESA. *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir.1997) See also *Loggerhead Turtle v. County Council of Volusia Co.*, 148 F.3d 1231 (11th Cir.1998); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991).

The ESA has a broad citizen suit provision allowing any entity to commence a civil suit on its own behalf to enjoin any entity that is alleged to be in violation of any provision of the ESA or regulation issued under the authority thereof. A plaintiff can seek to enjoin both present activities which constitute an ongoing TAKE and future activities reasonably likely to result in a TAKE. See *Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1066 (9th Cir. 1996).

FACTUAL BACKGROUND

De-watering of rivers and streams is occurring in Sonoma and Mendocino counties, and has been linked to diversions and pumping by agricultural interests and acts or failure to act on the part of the DIRECTOR in charge of water allocation, use, or diversion. For example, in 1997 the SWRCB staff released a report identifying vineyard practices that adversely impact listed species of fish struggling to survive in the Russian River Basin and its tributaries. The report found that frost protection activities harmed listed species of fish including coho salmon, chinook salmon, and steelhead trout. (As used herein, the term “listed species” will refer to coho salmon, chinook salmon, and/or steelhead trout unless otherwise designated or described). Although this has been known since at least 1972 when the courts found that frost protection activities in the Napa River Basin were harmful to listed fish species, such frost protection activities in Sonoma and Mendocino Counties continue to occur and have increased over the years.

In 2000, the SWRCB staff referred to its 1997 report emphasizing that under certain conditions, adequate water is available for appropriation in the winter, but no water is available in the spring, summer or autumn without the risk of harming fishery resources. In addition, the Gualala River watershed is experiencing large conversions of forests to vineyards. Hundreds if not thousands of acres of vineyards have recently been planted by a relatively few large landholders above the Wheatfield Fork of the Gualala River. That watercourse now has documented dry stretches which have historically supported listed species, rearing pools, and flows sufficient to keep juvenile salmonids, also known as fry, secure until such time as they are proficient swimmers. The Wheatfield Fork also used to provide flows adequate to support juveniles of listed fish until the time they made their way down stream to the sea to mature before their return migration to spawn. Streams that supported protected salmonids only a few years ago are now turning into deserts. The Wheatfield Fork is being especially hard hit. The habitat of the listed species is being decimated. Where there were pools last year and the year before there is dried vegetation, hot exposed gravels, hot puddles, and in many instances, a complete absence of the once abundant salmonids.

Rapid and dramatic draw downs of flows in creeks associated with agricultural interests in the Russian River Basin have been documented and correlated to many users using groundwater and stream flows at or near the same time to irrigate, frost protect, heat protect, and post-harvest irrigate the vines. (Kondolf, Deitch, and Merenlender - 2006 & 2008; D. Hines National Marine Fisheries Service - April 29, 2009). Water withdrawals resulted in rapid de-watering of creeks and rivers leaving young salmon and steelhead stranded in lethally hot and crowded pools or lying in dried out gravels struggling to escape and unable to breathe.

According to the National Marine Fisheries Service (Exhibit B), rapid de-watering near potential or actual listed species' habitat has caused TAKE of listed species such as coho salmon, chinook salmon, and steelhead trout. In the spring of 2008, fry of listed species were stranded in near shore gravels in the main stem Russian River at Hopland and Felta Creek, a tributary. In the Felta Creek watershed, over 200 acres are planted in grapes. This is a relatively small but very important critical habitat tributary for spawning coho and steelhead. Despite knowledge and warnings, water withdrawals created a hostile environment where fish could not survive the low water levels, increased temperatures and non-sustainable conditions for fish propagation and survival. There was another TAKE in these same areas in the spring of 2009. National Marine Fisheries February 19, 2009, NOAA - June 27, 2008. Over the past several years, concerned members of the public have undertaken to alert the growers in the Gualala watershed to the rapidly deteriorating habitat of protected species in the Wheatfield Fork. Nonetheless, the watercourse has lost its ability to provide the important habitat that it once did, due to the diversions of huge amounts of the flows for grapes – flows needed for the survival of the listed species.

Continuing water diversion permitted by the DIRECTOR, the failure of the DIRECTOR to responsibly manage water resources, its failure to exercise its duty to protect the public trust, and its failure to enforce current law, have caused TAKE and are a continuing threat of TAKE of threatened and endangered listed species. Frost pumping, a form of water diversion, is widespread. The harmful impacts on survival and recovery for listed species following frost protection pumping are well documented. The region's significant fisheries are near extinction. Water diverted from creeks and rivers for frost protection is widespread and the harmful impacts on salmonid survival and recovery are well documented. There are at least 1,778 miles of potential listed species' habitat in the Russian River watershed. All of it is needed for the recovery of the coho, chinook, and steelhead as described in recovery plans. There are at least 60,640 acres of vineyards in the Russian River, 70 percent of which are within 300 feet of listed species' habitat.

Young fish, or "fry", emerge from their eggs/redds in April or May and have poor swimming ability. They are susceptible to stranding and take refuge in cobble substrates. In the Russian River Basin, fry have been observed dead from sudden agricultural water draw

down and stranding as have older fish known as “smolts.” Listed species’ populations in critical habitat are at a very high risk of extinction due to frost protection irrigation as well as other farming practices described below. (Exhibit A – National Marine Fisheries Service - Spring 2009 PowerPoint for SWRCB).

On stream and off stream reservoirs are major contributors to salmonid fatalities. Diversions, pumps, and water storage facilities authorized by the DIRECTOR or otherwise operated with the knowledge of the DIRECTOR pull water from habitat of the listed fish species. In addition to the thousands of permitted agricultural reservoirs, evidence suggests there are approximately **800 illegal** reservoirs in the Russian River watershed. These reservoirs contribute to the habitat water draw down insofar as they are filled by way of diversions of flows (either by instantaneous draw down, or cumulative effects on stream hydrology) that historically have provided adequate flows in the watercourses.

This **Notice** alleges the DIRECTOR is responsible for TAKE of listed species by authorization of diversions and storage in the over-allocated Russian River and Gualala River watersheds, by consenting to improper use, and by failing to enforce existing regulations. The diversion of water from listed species’ habitat occurs multiple times a year. Not all occurrences are due to frost. Statistics show that diversion is more extreme in dry years when fish are at greater risk. Diversion events do not always correlate with frost risk and over response appears to be increasing.

There is clear documentation that these actions have and will continue to harm, harass or kill protected fish species.

Protected Status and Habitat Needs

Coho salmon, chinook salmon, and steelhead trout within the Russian River and Gualala River watersheds are part of the evolutionarily significant units (“ESUs”), or populations, of federally listed fish species protected under the ESA. The Central California Coast ESU of coho salmon is listed as endangered. The California Coastal ESU of chinook salmon and the Northern California and Central California Coast ESUs of steelhead trout are listed as threatened. The watersheds of the Russian and Gualala Rivers adversely affected by the DIRECTOR’S actions are habitat for the listed species referenced in this **Notice**.

Central California Coast coho salmon (*Oncorhynchus kisutch*) were listed as threatened in 1996, then uplisted to endangered status in 2005. Critical habitat for Central California Coast ESU coho salmon was designated on May 5, 1999. TAKE prohibitions for this ESU were published on June 28, 2005.

Coho salmon spend approximately the first half of their life cycle rearing and feeding in streams and small freshwater tributaries. Spawning habitat is small streams with stable gravel substrates. The remainder of their life cycle is spent foraging in estuarine and marine waters of the Pacific Ocean. Adult coho migrate back from a marine environment into the freshwater streams and rivers of their birth in order to mate. They spawn only once and then die.

Adult coho return to their stream of origin to spawn and die, usually at around 3 years old. Females prepare several redds (nests) where the eggs will remain for 6 to 7 weeks until they hatch.

The California Coast population of chinook salmon (*Oncorhynchus tshawytscha*) was listed as threatened in 1999, and the status was reaffirmed in 2005. Critical habitat was designated for the California Coast population of chinook salmon on September 2, 2005. Protective regulations were issued for this ESU on June 28, 2005.

Juvenile chinook may spend from 3 months to 2 years in fresh water before migrating to estuarine areas as smolts and then into the ocean to feed and mature. Chinook remain at sea for 1 to 6 years (more commonly 2 to 4 years), with the exception of a small proportion of yearling males called “jack salmon”, which mature in freshwater or return after 2 or 3 months in salt water. Scientific studies shows that unless smolts reach a certain size before ocean migration, they have little chance of survival.

There are different seasonal (i.e., spring, summer, autumn, or winter) “runs” in the migration of chinook from the ocean to freshwater, even within a single river system. These runs have been identified on the basis of when adult chinook enter freshwater to begin their spawning migration. However, distinct runs also differ in the degree of maturation at the time of river entry, the temperature and flow characteristics of their spawning site, and their actual time of spawning. Freshwater entry and spawning timing are believed to be related to local temperature and water flow regimes.

Adult female chinook will prepare a redd in a stream area with suitable gravel type composition, water depth and velocity. The adult female chinook may deposit eggs in 4 to 5 “nesting pockets” within a single redd. Spawning sites have larger gravel and more water flow up through the gravel than the sites used by other Pacific salmon. After laying eggs in a redd, adult chinook will guard the redd from a few days to nearly a month before dying.

Chinook salmon eggs will hatch, depending upon water temperatures, between 3 to 5 months after deposition. Eggs are deposited at a time to ensure that young fry emerge during the following spring when the river or estuary productivity is sufficient for juvenile survival and growth.

The Northern California ESU of steelhead trout (*Oncorhynchus mykiss*) was listed as threatened in 2000 and the listing status was reaffirmed in 2006. Critical habitat was designated for this ESU on September 2, 2005 and protective regulations were issued on June 28, 2005. The Central California Coast ESU of steelhead trout was listed as threatened in 1997 and the listing status was reaffirmed in 2006. Critical habitat was designated for this ESU on September 2, 2005 and protective regulations were issued on June 28, 2005.

Steelhead trout are a unique species. Individuals develop differently depending on their environment. While all steelhead hatch in gravel-bottomed, fast-flowing, well-oxygenated rivers and streams, some stay in fresh water all their lives. These fish are then called rainbow trout. The steelhead that migrate to the ocean develop a much more pointed head, become more silvery in color, and typically grow much larger than the rainbow trout that remain in fresh water.

Adults migrate from a marine environment into the freshwater streams and rivers of their birth in order to mate. Unlike other Pacific salmonids, they can spawn more than one time. Young animals feed primarily on zooplankton. Adults feed on aquatic and terrestrial insects, mollusks, crustaceans, fish eggs, minnows, and other small fishes.

The stream-maturing type (summer-run Steelhead in the Pacific Northwest and northern California) enter freshwater in a sexually immature condition between May and October and require several months to mature and spawn.

The ocean-maturing type (winter-run steelhead in the Pacific Northwest and northern California) enter freshwater between November and April with well-developed gonads, and spawn shortly thereafter. Coastal streams are dominated by winter-run steelhead, whereas inland steelhead of the Columbia River basin are almost exclusively summer-run steelhead.

Adult female steelhead will prepare a redd in a stream area with suitable gravel type composition, water depth, and velocity. The adult female may deposit eggs in 4 to 5 nesting pockets within a single redd. The eggs hatch in 3 to 4 weeks.

Steelhead are capable of surviving in a wide range of temperature conditions. They do best where dissolved oxygen concentration is at least 7 parts per million. In streams, deep low-velocity pools are important wintering habitats. Spawning habitat consists of gravel substrates free of excessive silt.

Salmonids require perennial aquatic habitat and adequate stream flows 24 hours a day/365 days a year in order to live.

ACTIONS ALLEGED TO TAKE PROTECTED SPECIES

Habitat Modification

The species of fish which are the subject of this **Notice** spawn and mature in freshwater, migrate to the sea to finish growing and maturing, and then return to the creeks of their birth to spawn again. These anadromous fish, in order to survive long enough to migrate to the sea, require freshwater habitat with year round flows, deep pools, adequate food, adequate shelter, and clean cold waters.

Upland and riparian habitats associated with aquatic habitat are essential to maintain salmon and steelhead populations throughout their life stages. They provide food and essential shade to cool the ambient air and protect the streams from the heating effects of solar radiation when thin shade or no shade canopy is available. Maintaining the integrity of aquatic sites by protecting them from disturbance and supporting the normal functions of the aquatic habitat is critical and known to be an important factor in reducing water temperature and sedimentation of creeks.

Loss and adverse modification of Class I, II, III, and IV streams, well development activities, water diversions, and lined reservoir development are major contributors to the TAKE of these protected species. The DIRECTOR continues to improperly carry out the SWRCB's duties to supervise authorized and unauthorized diversions for beneficial uses and the public trust with respect to agricultural water consumptive demands, at the expense of the protected non-consumptive needs of fish and wildlife, which contributes to the TAKING of listed species.

Over Allocation of Water Resources

Diversions of water occur for several reasons. The effect on listed species and their habitat include the rapid draw down of both flows and de-watering of vital pools natural to creeks and rivers such as that those that have occurred due to the failure of the DIRECTOR to properly manage and protect these habitats.

Fry of listed species utilize shallow gravels for safety from predators, where they can grow and become proficient swimmers. Juvenile listed species spend a summer in the creek in which they were born and are completely dependent upon adequate flows, cool water, and deep pools for growth and survival in various life stages and in order to avoid predation. As described herein, when the flows are reduced by the over allocation of resources and poor management of resources by the DIRECTOR, water recedes from the gravels and young fish become stranded in place where they quickly die. When pools are not drained entirely, they become warm and shallow exposing the smolts to overcrowding and predators. The rapid

draw downs that have harmed and continue to harm listed species are associated with both direct diversions from surface waters and pumping of wells in proximity to creeks which has occurred and continues to occur due to illegal practices, in violation of the ESA. These diversions are used to protect budding grapes from frost and are also used for heat protection and general irrigation practices.

In February 2009, in response to observed smolt mortality associated with frost protection in the Russian River, the National Marine Fisheries Service stated its concern that “water diversions, that may otherwise be legal under California water law, will be causing significant salmonid mortality” (Exhibit A; page 10) and urged the SWRCB to take immediate action to protect public trust salmonid resources from further harm. To date, the SWRCB has not acted, and has continued to authorize and administer diversions in the over allocated Russian and Gualala systems. Due to the over allocation of water resources and the failure to enforce existing laws and regulations, the DIRECTOR and SWRCB have failed to prevent excess de-watering of protected species habitat. De-watering occurs in the process of frost protection, filling of reservoirs and other water intensive practices. Habitats are de-watered at a rate too rapid for the habitat to recover. When the habitat can no longer provide a healthy or safe environment for listed species, a TAKE has occurred. Listed species die in the absence of water, are trapped in shallow, warm pools or die due to sudden exposure to predators. Low levels of water due to authorized, and known unauthorized, agricultural practices such as storage and impoundment of water create unhealthy and often times lethal biological conditions such as nitrification and eutrophication.

Stream flows of specific depth and volume are needed to sustain listed species in their various life stages. Spawning listed species need sufficient flows to migrate upstream to spawn. Flows are needed to cover redds and newly hatched fish. Stream flow is needed for rearing purposes, to support food sources and access to food sources, and to allow movement and refuge from predation. Flows also affect stream temperature which can cause thermal barriers, stress fish, induce disease and low growth rate, and induce predation. The alleged diversions permitted or otherwise approved by the DIRECTOR are adversely affecting stream flows thus harming both the listed species as well as their habitat.

Stream flows have been shown to be diminished and interrupted by allowed, condoned, or ignored diversions for frost protection and irrigation. In some cases, there are diversion-induced dry sections of streams which until recent times, have never been seen before. These stressors, related to low flows, end up producing smaller smolts. Small smolts have a very high rate of mortality in the ocean.

Habitat modification due to decreased flows often times happens dramatically in a short period of time – as short as several hours, and leaves fish stranded and dead or seriously stressed, inhibiting survival and growth. The de-watering of habitat occurs in the spring

when grape growers use creek water, reservoirs filled by withdrawals from creeks and rivers, and nearby stream wells to wet the vines and buds in order to protect them from fluctuations in temperatures associated with the area in which the grapes were allowed to be planted. De-watering also occurs in the summertime when temperature fluctuations place the grape crop in a tenuous situation due to its susceptibility to heat.

LIABILITY

The ESA prohibits any person, agency, or entity from killing or harming species listed as endangered or threatened. The actions of the DIRECTOR, therefore must comply with the ESA. In addition, state law requires that the DIRECTOR must “take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.” (Water Code Section 275 and Article 10 Section 2 of the California Constitution). Permitted and unpermitted use of water to protect grape crops from frost has been determined, through legal proceedings, to be an unreasonable, wasteful, and excessive use of water. Such use is contrary to the California Constitution. In addition, the DIRECTOR is empowered to regulate the use and conservation of water for beneficial uses. (Water Code Section 174). Beneficial uses of the Russian River and Gualala River include spawning, reproduction, rearing, migration, and critical habitat for salmon and steelhead.

“The state’s natural resources belong to the people of California, and the state, as sovereign, is the trustee of that resource, with a duty to manage and protect that resource for the public good”. *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983). The California Supreme Court held in 1983 that the state had the power and the duty to protect and manage public trust resources for the benefit of all Californians.

Although the use of water to protect wine grapes from frost has been determined to be unreasonable and harmful to protected species, such use has nevertheless been ignored and condoned by the DIRECTOR in the Russian and Gualala River watersheds. The DIRECTOR allegedly improperly authorized diversions, impoundments, appropriations as well as failed to regulate known illegal diversions and impoundments, in the SWRCB’s review and approval of water rights applications, licenses, and permits to divert and store water. The DIRECTOR continues, despite the legal determination, to allow landowners to engage in the practice of frost protection. In so doing, the DIRECTOR has contributed and caused direct harm to protected species.

Although required to do so by both federal and state law, in permitting water withdrawals which have resulted in a TAKE of listed species, the DIRECTOR has failed to protect beneficial uses of water including managing for species listed as endangered or threatened under the ESA. For example, although water for frost protection has already been

determined to be an unreasonable use, the DIRECTOR has failed to regulate and properly carry out its duties to prohibit this practice in the Russian and Gualala River basins. The DIRECTOR has failed to prevent trespass onto the state's waters in the spring and summer (Title 23 CCR Section 1052). The result is repeated, rapid de-watering of critical habitat and modification of habitat resulting in repeated TAKE of listed fish species protected under the ESA. Because the DIRECTOR has failed to carry out its mandates, a direct TAKE of species protected under the ESA has occurred.

The DIRECTOR administers the California Water Code and is governed by several principles including the requirement that anyone seeking to appropriate water from creeks, lakes, rivers, or subterranean streams must file a Statement of Diversion with the DIRECTOR and apply for or register that use or claim of right.

The DIRECTOR must determine the extent that beneficial use of the water is to be made, as to both amount and season as specified in the terms and conditions of a permit before a license to divert may be issued. The DIRECTOR has a duty to consider public trust values before approving water right applications, and a continuing duty to supervise the taking and use of appropriated water (*National Audubon Society v. Superior Court of Alpine Co.* 33 Cal. 3d 419, 1983). The DIRECTOR administers the Water Code by way of reviewing and issuing permits for water diversions. In so doing, the DIRECTOR must limit the water to be appropriated so that existing rights, combined with the permit will not yield a right to use an unreasonable quantity of water or unreasonable effects on public trust or public interest uses of water. (See Title 23, Chapter 3, subchapter 2, Articles 18 and 22 of the California Code of Regulations; California Water Code Section 275 et. seq.; and California Water Code Section 1050, et. seq.)

In order for the DIRECTOR to approve an application, unappropriated water must be available to supply the applicant. Prior to issuing permits to divert more water, the DIRECTOR must determine the right to the use of unappropriated water; i.e. water that is available and is not already in use under prior and existing rights. In that review process, the DIRECTOR must recognize that water cannot be stored and withheld for a deferred use (other than regulatory storage) under claim of riparian right. *Seneca Consol. Gold Mines Co. v. Great Western Power Co.*, 209 Cal. 206, 287 Pac. 93; *Colorado Power Co. v. Pac. Gas and Electric Co.*, 218 Cal. 559, 24 p. 2d 495; *Moore v. California Oregon Power Co.*, 22 Cal. 2d 725, 140 p. 2d 798). That is to say, a riparian owner is subject to the doctrine of reasonable use, which limits all rights to the use of water to that quantity reasonably required for beneficial use, and prohibits waste or unreasonable use or unreasonable methods of use or diversion. (Sec. 3, Article XIV, Const. of Cal.; *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 40 Pac. 2d 486; *Tulare Irr. Dist. et al v. Lindsay Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 Pac. 2d 972; *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 81 P. 2d 533) .

The DIRECTOR is required to supervise the use of water by licensed and unlicensed diverters and to manage water for beneficial uses and the public trust. It reviews proposed projects which have the potential to impact water supply and the public trust. The DIRECTOR and SWRCB have failed in their duty to supervise the use of water by licensed and unlicensed diverters and to manage for beneficial uses and the public trust. The DIRECTOR'S review and approval of projects and applications, and response to complaints are carried out with the knowledge of the dire situation which exists in the Russian and Gualala River watersheds, pointed out by the DIRECTOR's own staff in 1997 (and in light of the February 2009 National Marine Fisheries Service emergency request to pass regulations in the spring of 2009 to protect listed species from a take). Although the SWRCB is the agency responsible for implementing the California Water Code in compliance with the state's constitution and federal law, the DIRECTOR and SWRCB have continued to allow frost protection and unreasonable and excessive use to continue in the watersheds. The DIRECTOR and SWRCB have further failed to pass regulations deemed necessary to avoid TAKE in the spring of 2009 and TAKE of the protected species went ahead unabated. Properly issued permits will limit the water to be appropriated so that existing rights, combined with the permit will not yield a right to use an unreasonable quantity of water.

Water in many streams has already been fully appropriated during the dry seasons of the year. As is the case in the Russian River and Gualala River watersheds referenced herein and many others including the Shasta and Scott Rivers, the DIRECTOR has approved licenses and permits in over-appropriated water bodies and has thereby harmed protected species and violated the public trust.

Lastly, applications to divert water must be reviewed and analyzed for possible adverse cumulative environmental impacts as required by the California Environmental Quality Act of 1970. The de-watering of creeks and rivers is a significant adverse cumulative environmental impact caused by the improper approval of permits to divert and store water by the DIRECTOR's failure to properly regulate for beneficial uses and protected species.

VIOLATIONS

ESA § 9

ESA § 9 prohibits the TAKE of protected species. The acts, operations, and failure to act properly on the part of the DIRECTOR have resulted in TAKE of protected species which includes harm to habitat, and threaten reasonably foreseeable future TAKE. The alleged TAKE of protected species has occurred in the Russian River and Gualala River watersheds in Sonoma and Mendocino Counties.

In April of 2008, law enforcement of the National Marine Fisheries Service was notified of two episodes of fish stranding mortality: Steelhead fry perished along the mainstream Russian River near Hopland, and coho fry died in Felta Creek, a tributary to Dry Creek, which empties into the Russian River. Similar impacts were documented on Maacama Creek, a tributary of the Russian River. Although a repeat of this biological disaster was predicted and regulatory agencies were warned to take immediate steps to prevent such harm, the fish kills occurred again in the spring of 2009. The DIRECTOR's failure to heed the warnings and act accordingly resulted in the TAKE of protected species in the spring of 2009.

Biologists have also documented unprecedented de-watering in the Gualala watershed corresponding to large changes in the landscape including conversions of forests to vineyards.

Agricultural practices are required by law to be conducted in such a manner so as to avoid impacts to listed species. The water diversions authorized by the DIRECTOR as described herein have harmed listed species. Water development activities authorized by the DIRECTOR proceed without due regard for the impacts on listed species' habitat. Such activities as described herein have resulted in and continue to result in direct and indirect TAKE of the listed species.

The DIRECTOR is violating ESA Section 9, 16 U.S.C. § 1538, if it has authorized or otherwise caused the activities described herein that TAKE protected species. It is alleged herein that the operations authorized by and/or carried out by the DIRECTOR have repeatedly killed threatened and endangered listed species.

The DIRECTOR is violating ESA Section 9 because the state's natural resources belong to the people of the state, the state, as sovereign, is the trustee of those resources, with a duty to manage and protect that resource for the public good. The state not only has the power, but the duty to protect and manage public trust resources for the benefit of all Californians. The critical status of the fisheries in the Russian River and Gualala River watersheds attributable to low flow conditions demonstrates - as does the fact that even in the face of compelling facts, the DIRECTOR stood by and watched the creation of lethal low flow conditions - the DIRECTOR and SWRCB did not and will not fulfill their public trust duty.

It is expected that frost protection and heat protection of crops will continue. Permit approvals for vineyards will continue. Many vineyard projects are in the pipeline in the Russian River and Gualala River watersheds that will add diversions of water from creeks. All these activities must be conducted in a manner which will not harm listed species. These harmful activities are continuing in nature.

The DIRECTOR must take immediate action to conform to the federal mandate of the ESA and cease harmful activities within the known habitat of these protected species. In addition to other remedies, the DIRECTOR must stop activities which likely contribute to the loss of year round, cold, clean water essential for the migration, reproduction, rearing, safety, food, survival and recovery of the listed species.

IDENTIFICATION OF ENTITIES BRINGING NOTICE

The entities bringing this **Notice** are the Center for Biological Diversity, Northern California River Watch, and Coast Action Group.

The Center for Biological Diversity is a national, non-profit conservation organization with more than 240,000 members and online activists dedicated to protecting endangered species and wild lands. The Center works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. Main Office - P.O. Box 710, Tucson, AZ 85702. Telephone 520-623-5252, Email center@biologicaldiversity.org.

Northern California River Watch is a non-profit corporation organized under the laws of the State of California, dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams and groundwater in Northern California. Northern California River Watch is located at 500 North Main Street, Suite 110, Sebastopol, CA 95472, Telephone 707-824-4372, Email: US@ncriverwatch.org.

Coast Action Group is an organization dedicated to the protection of fishery and water quality resources on the north coast of California. Coast Action Group has a history of actions supporting the protection of fish, forest, and water quality resources dating back to 1990. Coast Action Group exists in order to protect fish and wildlife through state and federal water laws. It comments on issues of statewide concern in order to protect in-stream flows and water quality. It is currently participating in meetings and on a task force attempting to deal with important issues which affect listed species of coho and steelhead. Coast Action Group is located at P.O. Box 215, Point Arena, CA 95468, Telephone 707-882-2484, Email: alevine@mcn.org.

CONTACT INFORMATION

The Noticing Parties have retained legal counsel to represent them in this matter. All communications with respect to the issues raised in this **Notice** should be addressed to the following counsel:

Jack Silver, Esquire
Law Office of Jack Silver
P.O. Box 5469
Santa Rosa, CA 95402-5469
Tel. 707-528-8175
Fax. 707-528-8675

CONCLUSION

The violations as set forth in this **Notice** affect the health and enjoyment of the members and staff of the Noticing Parties who reside, work and recreate in the affected area. The Noticing Parties and their respective members use these watersheds for domestic water supply, agricultural water supply, recreation, sports, fishing, swimming, hiking, photography, nature walks, restoration activities, and the like. The health, property rights, use, and enjoyment of these areas by the members of Noticing Parties are specifically impaired by the violations of the ESA as alleged herein.

The Noticing Parties believe this **Notice** sufficiently states the grounds for filing suit. At the close of the 60-day notice period or shortly thereafter the Noticing Parties intend to file a citizens' suit under the ESA against the DIRECTOR for the violations enumerated herein. During the 60-day notice period, the Noticing Parties are willing to discuss effective remedies for the violations described in this **Notice**.

However, if the DIRECTOR wishes to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated within the next 20 days so that they may be completed before the end of the 60-day notice period. The Noticing Parties do not intend to delay the filing of a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,


Jack Silver

JS:lhbm