

# Law Office of Jack Silver

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January 9, 2012

***Via Certified Mail -  
Return Receipt Requested***

Patricia Ann Johnson, Trustee  
Johnson Family Ranch  
Johnson Orchards, Inc.  
801 Babcock Lane  
Ukiah, CA 95482

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

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

Dear Ms. Johnson and Secretary Locke:

## NOTICE

The Endangered Species Act (“ESA”) Section 11(g), [16 U.S.C. § 1540(g),] requires that 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 to the Secretary of Commerce. This Notice is written on behalf of Northern California River Watch (“River Watch”) to notify Patricia Ann Johnson, Trustee, hereafter referred to as “the Diverter,” of alleged violations of ESA § 9, [16 U.S.C. § 1538] with respect to the harm and unauthorized take of federally protected salmonid species in the Russian River Basin, specifically the West Branch of the Russian River, Redwood Valley, Mendocino County, California, due to the agricultural activities described in this Notice.

Following expiration of the 60-day notice period, River Watch may file suit in federal court against the Diverter to enjoin her from alleged violations of the ESA and/or regulations issued under the authority of the ESA. If prior to the expiration of the notice period the Diverter is legally enjoined from further violations of the ESA, lawsuit would be filed.

Notice is also provided by this letter to the Secretary of Commerce, that after the expiration of the notice period, River Watch may file suit in federal court against the Secretary 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 by the Diverter as 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, or collect, or attempt to engage in any such conduct. TAKE includes direct as well as indirect harm. *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. *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9<sup>th</sup> Cir. 1994).

TAKE includes habitat modification which actually kills or injures an endangered species or significantly disrupts vital biological functions, such as breeding patterns. ESA § 9 is a strict liability statute such that the illegal TAKE 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 prohibited by law. A 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 (8<sup>th</sup> 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. Provisions of the ESA authorize any person or entity concerned about a TAKE to commence a civil suit on its own behalf to protect listed species and to enjoin any entity 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. *Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1066 (9<sup>th</sup> Cir. 1996).

### FACTUAL BACKGROUND

The Diverter's property is comprised of approximately 135 acres of cultivated land, primarily in wine grapes, located in Mendocino County California and designated by the Mendocino County Assessor's Office as including APN #161-120-29-00 and APN #161-120-31-00, to the best of River Watch's information.

On or about April 29, 2011, the Diverter is alleged to have pumped approximately 50 gallons of water per minute/per acre directly from surface waters or hydraulically-connected groundwater of the West branch Russian River to coat grape buds for several hours during one of numerous predicted frost events. This conservative estimate of water pumped from overhead sprinklers and water canons is the equivalent of 300,000 gallons of water per hour onto approximately 100 acres of a non-food crop, for a period of 3 hours – a total of 900,000 gallons of freshwater. Actual stream flow that day was approximately 14 cubic feet per second and the overall calculated frost water demand for this stretch of the Russian River was 60 cubic feet per second. (*National Marine Fisheries Service - Hydrology and Hydraulic Conditions of the West Branch Russian River during the Steelhead Stranding Event on 29 April, 2011. Brian Cluer - 2011 Citing Lewis, et al – 2008*).

Instead of utilizing the numerous alternatives to overhead spraying available including reliance on personal crop insurance, the use of wind machines, or planting of wine grapes out of frost zones, the Diverter allegedly turned on water pumps which contributed to the TAKE of Steelhead, listed as threatened with extinction in the Russian River Basin.

### Protected Species in the Context of Frost Protection Activities

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. (*National Marine Fisheries Service - Spring 2009 PowerPoint for State Water Resources Control Board*). 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 refuse in cobble substrates. In the Russian River Basin, fry, as well as older fish known as "smolts" have been observed dead from sudden agricultural water drawn down and stranding.

According to resource agencies, 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 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. As is well known and documented, rapid reduction in flows, and in some cases complete de-watering of sections of creeks and rivers is occurring and has been linked to excessive and unreasonable diversions, illegal diversions, and illegal storage by agricultural interests.

In 1997 the State Water Resources Control Board ("SWRCB") staff released a report identifying those vineyard practices which 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, Chinook, and Steelhead. In 1972 the courts found that frost protection activities in the Napa River Basin were harmful to listed fish species. Nevertheless, such frost protection activities in Sonoma and Mendocino Counties continue and have increased over the years.

In 2000, 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 fall without the risk of harming fishery resources. (Staff Report SWRCB 7/2000).

The diversion of water from the habitat of listed species occurs multiple times a year. 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 agricultural practices have and will continue to harm, harass or kill protected listed species.

### ACTIONS ALLEGED TO TAKE PROTECTED SPECIES

#### Habitat Modification - Rapid Flow Reductions

River Water alleges the Diverter, in the process of frost protection including filling of reservoirs directly from the West Branch of the Russian River, or from closely connected groundwater, operated pumps and sprinklers and coated vines on her property in water for several hours on or about April 29, 2011. These operations rapidly reduced water in critical habitat of the West Branch of the Russian River, causing the trapping or stranding of Steelhead, and leading to the mortality of many of these salmonid species.

Habitat modification due to decreased flows happens rapidly, in as short as a few hours, and leaves fish stranded and dead, or seriously stressed inhibiting survival and growth. The rapid draw down of flows which are the subject of this Notice occurred in the spring when the Diverter allegedly used surface water, reservoirs filled by withdrawals from surface waters, or wells connected to surface waters to wet the vines and buds on Diverter's property in order to protect them from fluctuations in temperatures in the cooler regions of the Russian River Basin.

#### Habitat Modification - Upland and Riparian Destruction

Due to the Diverter's alleged frost protection activities in April of 2011, Steelhead which had just emerged from their redds downstream of the Diverter's water diversions, were left without enough water necessary for survival. Many fry perished while witnesses were unable to rescue others. It is alleged the Diverter withdrew water for purposes of frost protection and de-watered the critical habitat of these fish to such a low level as to create an unsustainable environment; in some cases creating a direct kill of fish and in other circumstances causing an indirect kill by contributing to an environment hostile to fish survival.

On stream and off stream reservoirs are major contributors to salmonid fatalities. It is alleged that the Diverter operates reservoirs and hydraulically-connected wells, and/or pumps water directly from habitat of listed species of fish, which traps, harasses or modifies their habitat leading to their mortality.

This Notice alleges the Diverter to be responsible for the agricultural practices described herein, taking place in April of 2011, resulting in harm and a TAKE of Steelhead listed as threatened with extinction.

In addition to diversion of water from creeks in large amounts, it is alleged that the Diverter has modified and/or removed Class I, II, III, and IV streams, engaged in well development activities, water impoundments, water appropriations, removal of riparian vegetation, and reservoir development all of which have contributed to the TAKE of protected species.

#### VIOLATIONS

##### ESA § 9 - Prohibition Against Take of Species Threatened with Extinction

ESA § 9 prohibits the TAKE of protected species. The alleged frost protection activities of the Diverter have resulted in a TAKE of protected species including west coast Steelhead (*Oncorhynchus mykiss*) occurring adjacent to and downstream of the Diverter's

property on the West Branch of the Russian River, Redwood Valley, near East School Way Bridge. On the morning of April 29, 2011, overhead sprinklers were observed in operation. Over 20 Steelhead fry perished while over 40 were rescued by witnesses.

Since the frost protection-related fish kills occurring in 2008, resource agencies and others have been working to prevent the loss of listed species associated with the pumping of vast amounts of water for frost protection through education and voluntary measures. Nevertheless, the Diverter allegedly continued her past practice of employing water intensive frost protection activities which predictably and rapidly lowered water in critical habitat resulting in a TAKE of protected species.

It is expected that frost protection of crops by the Diverter will continue. In the spring of 2011 the temperatures in Redwood Valley fell below 35 degrees Fahrenheit 14 times. It is reasonably foreseeable that the Diverter will cause additional TAKE of listed salmonids by direct kills and habitat modification leading to species decline.

#### ESA §10 - Take in the Absence of an Incidental Take Permit

It is also alleged that the Diverter has not applied for an incidental TAKE permit for west coast Steelhead under ESA § 10, [16 U.S.C. § 1539]. The Diverter does not fall within the category of those persons permitted to incidentally TAKE endangered species. Acts and operations on the part of the Diverter have allegedly resulted in the unpermitted TAKE of protected species which includes trapping, harassing, and harm to habitat that leads to interference with essential breeding, feeding and sheltering behavior.

#### IDENTIFICATION OF ENTITIES BRINGING NOTICE / CONTACT INFORMATION

The entity bringing this Notice is Northern California River Watch identified collectively throughout this Notice as "River Watch". 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 P.O. Box 817, Sebastopol, CA 95472, Telephone and Facsimile 707-824-4372, Email:US@ncriverwatch.org.

River Watch has retained legal counsel with respect to the claims set forth in this Notice. All communications with respect to this Notice should be provided to:

Jack Silver  
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 members of River Watch who reside, work and recreate in the affected area. River Watch and its respective members use this watershed 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 River Watch are specifically impaired by the Diverter's alleged violations of the ESA as alleged herein.

River Watch believes this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter, River Watch intends to file a citizens' suit under the ESA against the Diverter for the violations enumerated herein. During the 60-day notice period, River Watch and its counsel are willing to discuss effective remedies for the violations described in this Notice. However, if the Diverter 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. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when the notice period ends

Very truly yours,

  
Jack Silver

JS:lh

cc: William Thomas Johnson - Registered Agent  
Johnson Orchards, Inc.  
599 Redwood Avenue  
Ukiah, CA 95482