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Seattle, Washington 98136

February 20, 2016

Mr. Mike Kaputa, Director  
Chelan County Natural Resources Department  
411 Washington Street, Suite 201  
Wenatchee, WA 98801

Re: Icicle Strategy Scoping Comments

Dear Mr. Kaputa:

The Alpine Lakes Foundation would like to offer these comments on the scope of the environmental impact statement that Chelan County and the Washington State Department of Ecology plan to prepare on the Icicle Creek Water Management Strategy (hereafter "Icicle Strategy").

The Alpine Lakes Foundation is a Washington non-profit corporation in good standing since 1993, when it was established to act as an advocate and protector for the resources of the Alpine Lakes area. It has served in this role for the past 23 years.

All of the lakes that are the subject of your Icicle Strategy are within the Alpine Lakes Wilderness Area, established by Congress in 1976. The Icicle Strategy proposes the construction or restoration of a number of structures at these lakes, including dams, pumps, and tunnels. These raise a number of questions under the Alpine Lakes Management Act of 1976, 16 U.S.C. 1132. Note Section 2(c) of this Act states:

The Federal lands designated as the Alpine Lakes Wilderness shall be administered in accordance with the provisions of this Act and with the provisions of the Wilderness Act (78 Stat. 890), whichever is the more restrictive.

Section 2(e) of this Act provides that non-federal within the Wilderness and Intended Wilderness will become part of the Alpine Lakes Wilderness when acquired by the Federal Government. Thus, all the lakes included in the Icicle Strategy are now within the Alpine Lakes Wilderness and must be administered according to the Alpine Lakes Management Act and the Wilderness Act.

The Wilderness Act, 16 U.S.C. 1131-36, provides in section 4(c):

#### PROHIBITION OF CERTAIN USES

(c) Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this Act and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this Act (including measures required

in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

Applying this section, courts have held that Congressional awareness at the time it created a wilderness that a pre-existing dam was in the area declared wilderness does not create an implied exception to the Wilderness Act prohibition on structures. Courts also have held that the prohibition on structures in a wilderness applies equally to rebuilding, maintaining, or repairing them.

The Icicle Strategy appears to rely on water rights held by the Icicle Peshastin Irrigation District (hereafter "irrigation district"), based on rights granted to its predecessor in 1927.

The relationship between those rights, the statutes mentioned above, and the Icicle Strategy plans for lakes within the Alpine Lakes Wilderness (hereafter "Alpine Lakes") raise these questions, numbered for ease of reference:

1. What was the extent of the irrigation district's existing water rights within the Alpine Lakes Wilderness when Congress created that Wilderness in 1976?

2. Has the irrigation district forfeited any of those rights through non-use or only partial use before or after creation of the Wilderness?

3. If the irrigation district has diverted more water from streams in the Icicle basin than it stored at any of the Alpine Lakes, does that additional diversion offset any forfeiture of storage or use rights that it did not use at those lakes?

4. Whether the right to store and use water from an Alpine Lake includes the right to build or expand structures now when the irrigation district has previously relied on pumping or other non-structural methods to obtain lake water?

5. Whether the right to store and use water from an Alpine Lake includes the right to build or expand structures or tunnels upstream in the Wilderness from that lake.

6. Whether a tunnel is a "structure" or "installation" prohibited by the Wilderness Act.

7. Did the US Forest Service expand, revive, or have the authority to expand or revive any of the irrigation district's rights by granting an easement to the irrigation district in 1990 when the irrigation district conveyed lands adjoining Eightmile Lake and within the Wilderness to the federal government?

8. May the irrigation district use any of its water rights for purposes other than irrigation when that was the sole basis on which they were granted?

9. To what extent do these same issues apply to water rights claimed by the US Bureau of Reclamation and/or the US Fish and Wildlife Service for operation of the Leavenworth National Fish Hatchery with waters stored, diverted, or used from lakes within the Alpine Lakes Wilderness?

Finally, we have two procedural questions:

A. To what extent can the Icicle Work Group's so-called stakeholder-based collaborative process supersede state and federal laws (for example, the Clean Water Act and Endangered Species Act)?

B. Can the state Department of Ecology, acting as Washington state's water regulator, make objective decisions about the status of the irrigation district's water rights and the extent to which they may have been forfeited, when DOE itself is one of the lead agencies on this project, has a material interest in its success, and that success would depend on DOE's rulings?

Please share these comments with the Washington State Department of Ecology and consider them when drafting your environmental impact statement.

Should you have any questions, please feel free to contact us.

ALPINE LAKES FOUNDATION

By

A handwritten signature in black ink that reads "William B. Beyers". The signature is written in a cursive, flowing style.

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