

BEFORE THE OREGON FISH & WILDLIFE

COMMISSION & DEPARTMENT

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4 Michael Finley, Chair  
Oregon Fish and Wildlife Commission

5 And

6 Robert Webber, Vice-Chair  
7 Holly Akenson, Commissioner  
8 Jim Bittle, Commissioner  
9 Bruce Buckmaster, Commissioner  
Greg Wolley, Commissioner

10 And

11 Curt Melcher, Director  
Oregon Department of Fish and Wildlife

12  
13 Petitioners:

14 David A. Moskowitz  
15 The Conservation Angler  
3241 NE 73<sup>rd</sup> Avenue  
Portland, OR 97213

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17 Trout Unlimited  
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18 Cottage Grove, OR 97424

PETITION TO ADOPT RULES TO  
IDENTIFY COLD WATER REFUGIA  
AND ESTABLISH SPORT FISHING  
REGULATIONS TO PROVIDE  
PROTECTION AND SANCTUARY  
FOR MIGRATING WILD SALMON  
AND STEELHEAD



1 2. The actual in-season run-size for both wild and hatchery summer  
2 steelhead has come in under the low forecast for all three summer steelhead  
3 components (Skamania, A-run and B-run) for the past several years.

4 3. Environmental factors including drought, predicted warm water  
5 temperatures and recent poor NOAA ocean productivity forecasts for the next  
6 several years will create downward pressure on returning wild steelhead and  
7 recent and forthcoming juveniles throughout Oregon.

8 4. Wild steelhead spawning escapements are not being met in other Oregon  
9 tributaries where warm water – cold water mixing zones attract large numbers of  
10 fish and make these resting, holding wild fish vulnerable to angling-related stress.

11 5. Wild steelhead have an extremely plastic and variable life history and their  
12 migratory behaviors do not conform to aggregated and artificial management  
13 structures placed upon them by fishery managers, which invariably places wild  
14 steelhead diversity at risk.

15 Based on these factors, the Commission finds it must take immediate actions in  
16 2019 to further conserve wild salmon and steelhead in the Columbia River, and  
17 in other basins.

#### 18 **IV. Introduction to the Rule Adoption Request**

19 Pursuant to OAR 137-001-0070, The Conservation Angler and Trout  
20 Unlimited (collectively “Petitioners”) hereby petition the Oregon Department of  
21 Fish and Wildlife (ODFW) to amend an existing rule. In light of recent scientific  
22 studies indicating that wild steelhead and salmon extensively use specific,  
23 identifiable cold water refugia to mitigate the effects of warm water encountered  
24 during their migration to their spawning grounds, Petitioners propose the Oregon  
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1 Sport Fishing Regulations be amended to prohibit sport fishing within or near  
2 specific, identifiable areas to protect migrating wild steelhead and salmon. The  
3 Administrative Procedures Act requires that the Commission either deny the  
4 petition in writing or initiate rulemaking proceedings within 90 days after receipt of  
5 a rulemaking petition. ORS 183.390(1). The 90-day period is a maximum period  
6 and the Commission may deny or initiate a rulemaking request at any time after  
7 receipt.

## 8 **V. Rule Change Requested**

9 The 2018 Oregon Sport Fishing Regulations describe areas open or  
10 closed for recreational angling in Oregon rivers. The various zone regulations  
11 currently allow recreational fishing within all areas that are otherwise not  
12 specifically limited or closed. Existing administrative rules already prohibit  
13 commercial and Treaty subsistence and commercial fishing in specific river  
14 mouth areas identified as sanctuaries where most commercial fishing is already  
15 prohibited by administrative rule. -

16 Any proposed amended permanent rule would add language clarifying the  
17 location of any sanctuaries.  
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## 19 **VI. Background**

### 20 **OAR 137-001-0070(1)(b) Reasons for the request**

21 Sport fishers commonly fish at confluences of tributaries and mainstem  
22 river reaches within Oregon waterways. Anglers target fall Chinook, Coho,  
23 summer steelhead and sockeye salmon which all use these confluence areas  
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1 during migration. The upstream migration of summer and fall salmon and  
2 steelhead regularly occurs as the mainstem water temperatures begin to rise  
3 above temperatures considered harmful to wild salmon productivity and health.

4       Where both large and small tributaries enter mainstem areas, wild salmon  
5 and steelhead will congregate in the cold water plume to hold and rest before  
6 further migration. Research shows that wild steelhead will use these cold water  
7 refugia (CWR) for days and weeks when the temperatures of the receiving water  
8 body rise from 64f to 68f. That research also shows that wild steelhead residency  
9 within the CWR increases to weeks and months when the mainstem water  
10 temperatures rise above 68.5f. Anglers target steelhead and salmon within these  
11 CWR because that is where the fish are congregated – creating, in angler’s  
12 terms – a “bucket.” Anglers will fish in these areas for days and weeks. Although  
13 no studies have yet calculated the encounter rate of wild steelhead and salmon  
14 in these CWR and the overall effect of catch and release fishing on wild salmon  
15 populations, the link between increased fish density, fishing effort, encounter rate  
16 and mortality in migrating wild steelhead and salmon should not be ignored. In  
17 order to protect, preserve, and promote the protection and recovery of these  
18 important fish species, the Sport Fishing Regulations should be amended to  
19 establish sanctuaries to reduce the impact of sport angling within these cold  
20 water refugia.  
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22 **OAR 137-001-0070(2)(a) Options for achieving the existing rule’s**  
23 **substantive goals while reducing the negative economic impact on**  
24 **businesses**  
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1 The principle goal of the Oregon Fish and Wildlife Commission (the  
2 Commission) and ODFW, through its Sport Fishing Regulations, is to conserve  
3 and enhance Oregon's indigenous species and prevent their depletion. The  
4 secondary goal is to provide for the use and enjoyment of Oregon's indigenous  
5 species for both present and future generations. It is this secondary goal, to  
6 provide use and enjoyment through both recreational and commercial fisheries,  
7 that ODFW also maintains both Sport and Commercial fishing regulations.  
8 Limiting the places and times permissible for sport fishing in Oregon is one  
9 component of that goal. By adding language that prohibits the fishing in certain  
10 specific areas during specific periods of time, the Commission and ODFW further  
11 the goal of preventing the serious depletion of indigenous fish species, while still  
12 providing the use and enjoyment to both present and future generations.  
13 Although the limits proposed by these rules may reduce important elements of  
14 "use and enjoyment" in specific geographic zones, increased recruitment and  
15 population resiliency should increase overall, resulting in increased "use and  
16 enjoyment" for present and future anglers. These regulations should also  
17 increase the duration and geographic scope of fishable populations.

19 Amending the basic rule to prohibit angling within CWR directly addresses  
20 the source of the issue which is preventing high encounter rates with ESA-listed  
21 wild steelhead and salmon under stressful environmental conditions. A rule  
22 prohibiting angling within CWR is also fitting with "fair chase" principles that are  
23 an important element of big game hunting.

24 **OAR 137-001-0070(2)(b) Continued need for the existing rule**

1 The existing rule specifies permissible areas of the Columbia River where  
2 recreational fishing for food and game fish is open in Oregon, and continues to  
3 be necessary to further ODFW's goals of protecting and preserving all  
4 indigenous fishes in Oregon, while allowing the "use and enjoyment" of these  
5 species. The proposed amendment only prohibits recreational fishing in specific  
6 areas to better achieve the goal of protecting and recovering ESA-listed  
7 indigenous fishes in the Columbia River Zone and other specific areas  
8 throughout Oregon.

9 **OAR 137-001-0070(2)(c) Complexity of the existing rule**

10 The existing rule is straightforward yet inadequate. Adopting the proposed  
11 language creating sanctuaries adds the specificity required to address the certain  
12 but un-quantified consequence of increased fish mortality rates due to higher  
13 encounter rates with indigenous ESA-listed steelhead and salmon in fisheries  
14 conducted in areas where environmental conditions force migrating steelhead  
15 and salmon to be vulnerable to intensive fisheries over a specific, condensed  
16 period.  
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18 **OAR 137-001-0070(2)(d) Extent to which the existing rule overlaps,  
19 duplicates, or conflicts with other state or federal rules and with local  
20 government regulations**

21 The creation of sanctuaries for ESA-listed steelhead and salmon at known  
22 and specific CWR will not conflict with or duplicate other state or federal rules or  
23 any local government regulations under current Sport Fishing Regulations.  
24 Creation of Sanctuaries applicable to recreational fishing will overlap but not  
25 conflict with existing river-mouth sanctuaries where commercial fishing is

1 prohibited. Creating Sanctuaries in specific CWR to protect and conserve ESA-  
2 listed wild steelhead and salmon is consistent with the duties of the Commission.  
3 Additionally, ORS 506.036 imposes upon the Commission the duty of “protection,  
4 preservation, propagation, cultivation, development and promotion of all fishes.”  
5 Existing Sport Fishing Regulations allow recreational fishing within the existing  
6 specific CWR, which results in mortalities that are preventing the conservation  
7 and recovery of ESA-listed steelhead and salmon, which directly counteracts the  
8 Commission’s duty in ORS 496.012 and 506.036.

9         The current Sport Fishing Regulations allow activity otherwise prohibited  
10 by federal regulations. Federal regulations prohibit unauthorized “take” of ESA-  
11 listed salmon and steelhead species without an approved Fishery Management  
12 and Evaluation Plan (FMEP) submitted by Oregon. Neither Oregon nor  
13 Washington have received authorization or approval of FMEPs for portions of the  
14 CWR that are being proposed in this rule amendment.

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16         Amending the Sport Fishing Regulations to prohibit recreational angling in  
17 known, specific areas of main-stem rivers where CWR exist will put the anglers  
18 on notice that “fair chase” principles validly apply to sport fishing. The  
19 amendment will provide the necessary recognition for the application of the  
20 “refuge” concept to recreational fishing and help resolve the conflict between the  
21 predominant goal of the Commission to “prevent the serious depletion of any  
22 indigenous species” and the subservient, secondary goal of providing for the “use  
23 and enjoyment for present and future generations.” ORS 496.012.  
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1 **OAR 137-001-0070(2)(e) Degree to which technology, economic conditions,**  
2 **or other factors have changed in the subject area affected by the existing**  
3 **rule, since the agency adopted the rule**

4 The three primary factors that have changed in the area of sport fishing  
5 regulations and the affected area are 1) the rising water temperatures and  
6 dropping stream flows in mainstem Oregon rivers which present harmful and at  
7 times, lethal migratory conditions for indigenous salmon and steelhead; and 2)  
8 the emerging scientific research that shows the increasing and extensive use of  
9 CWR by ESA-listed steelhead and salmon which makes fish vulnerable to catch  
10 and release mortality due to focused, intensive recreational angling within the  
11 CWR; and 3) the rapidly declining populations of ESA-listed wild steelhead and  
12 salmon returning to the Columbia River since 2014, particularly the very low  
13 returns of wild B-run steelhead.

#### 14 **VII. CONCLUSION**

15 ODFW and WDFW should work together to create Refuges for migrating  
16 wild salmon and steelhead in the Columbia, and ODFW should work to create  
17 other necessary Refuges in Oregon to protect migrating wild salmon and  
18 steelhead. Prohibiting recreational angling in specific CWR in the Sport Fishing  
19 Regulations is an important step in protecting, and ultimately, recovering wild  
20 steelhead and salmon from undue recreational angling encounters that result in  
21 an unknown mortality rate. Rules applying "fair chase" principles to angling in  
22 water bodies where cold water refugia attract and retain wild fish will raise  
23 awareness among recreational fishers. Establishing "fair chase" angling rules  
24 will place recreational and commercial fishers on the same page regarding  
25 protecting river mouth sanctuaries.

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Respectfully submitted on February 7, 2019

David A. Moskowitz

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The Conservation Angler

Dean Finnerty (e-signature approved via phone)

Dean Finnerty

Trout Unlimited – NW Sportsman’s Conservation Project