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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE,

Plaintiff,

vs.

U.S. FOREST SERVICE and
NOAA FISHERIES

Defendants.

Case No. 14-cv-216

COMPLAINT

NATURE OF THE ACTION

1. This case seeks injunctive and declaratory relief for ongoing violations of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, by Defendants United States Forest Service and NOAA Fisheries for their failures to complete mandatory consultations under Section 7 of the ESA over surface water diversions and associated ditches and other facilities located, operated, and maintained on the Salmon-Challis National Forest (SCNF) in the Salmon River watershed in Idaho.

2. The SCNF is home to important populations of Chinook salmon, steelhead, and bull trout. These “threatened” species and their habitat are protected under the ESA. Diversions harm these species and their habitat by decreasing water flows in

rivers where fish spawn, rear, and migrate; blocking fish from passing up and down the rivers; and diverting fish out of rivers.

3. Section 7 is the heart of the ESA, and it requires federal agencies to consult over their actions as early as possible to ensure their actions will not jeopardize listed species or adversely modify their critical habitat. In response to a 2001 lawsuit, the Forest Service agreed to initiate consultation under Section 7 of the ESA for its actions authorizing surface water diversions located in the SCNF—something it had never done. To complete this task, the SCNF was divided into eleven watersheds, and by the end of 2007 the Forest Service had prepared a Biological Assessment (BA) for each watershed. The Forest Service submitted each of the eleven watershed BAs to NOAA Fisheries, requesting ESA consultation for Chinook salmon and steelhead, and to the U.S. Fish and Wildlife Service (FWS), requesting ESA consultation for bull trout.

4. The BAs proposed to authorize, reauthorize, and allow the use, operation, and maintenance of approximately 150 existing surface water diversions in the SCNF. In the BAs, the Forest Service identified numerous diversions that were significantly reducing streamflows, blocking fish passage, and entraining fish into ditches. The Forest Service concluded that many diversions were likely to adversely affect Chinook salmon, steelhead, bull trout, and/or their habitat.

5. Even though six years or more have passed since the Forest Service initiated each watershed consultation, nine consultations have still not been completed. NOAA has failed to complete eight watershed consultations for Chinook salmon and steelhead. And one watershed consultation for bull trout is incomplete because after

FWS failed to complete this consultation for many years, the Forest Service terminated the consultation in August 2013.

6. As a result, Section 7 consultation has still not been completed for more than 100 surface water diversions in the SNCF, including many diversions that the Forest Service documented to be adversely impacting listed fish and their habitat. Nevertheless, the Forest Service continues to allow these diversions to be used, operated, and maintained. And Chinook salmon, steelhead, bull trout, and their habitat have been, are being, and will continue to be harmed by the Forest Service's actions.

7. Plaintiff Idaho Conservation League (ICL) seeks relief declaring that NOAA Fisheries has unlawfully withheld and/or unreasonably delayed its nondiscretionary duty to complete the eight remaining watershed consultations for Chinook salmon and steelhead, in violation of the Administrative Procedure Act (APA), 5 U.S.C. §§ 555(b), 706(1), and 706(2), and ordering NOAA to complete the consultations within 145 days.

8. ICL also seeks relief against the Forest Service under the ESA's citizen suit provision, 16 U.S.C. § 1540(g), for continuing to authorize and reauthorize diversions in the SCNF for which consultation with NOAA is not yet complete. The Forest Service is causing the unauthorized "take" of Chinook salmon and steelhead, jeopardizing the continued existence of these species, adversely modifying their designated critical habitat, and making an irretrievable and irreversible commitment of resources, in violation of Sections 7 and 9 of the ESA.

9. ICL also seeks relief under the ESA's citizen suit provision against the Forest Service for continuing to authorize diversions in the Panther Creek Watershed

without undertaking ESA consultation for bull trout. The Forest Service has failed to initiate consultation and is causing the unauthorized take of bull trout, jeopardizing the continued existence of bull trout, adversely modifying its designated critical habitat, and making an irretrievable and irreversible commitment of resources, in violation of Sections 7 and 9 of the ESA.

JURISDICTION AND VENUE

10. Jurisdiction is proper in the Court under 18 U.S.C. § 1331 because this action arises under the laws of the United States, including the ESA, 16 U.S.C. § 1531 *et seq.*; the APA, 5 U.S.C. § 701 *et seq.*; the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*; and the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.* An actual, justiciable controversy now exists between Plaintiff and Defendants, and the requested relief is therefore proper under 5 U.S.C. §§ 701–06; 28 U.S.C. §§ 2201–02; and 16 U.S.C. § 1540(g).

11. Venue is properly vested in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) because all or a substantial part of the alleged ESA violations occurred within this judicial district, and pursuant to 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district, Plaintiff ICL resides in this district, Defendants have offices in this district, and the public lands and resources in question are located in this district.

12. As required by the ESA, 16 U.S.C. § 1540(g)(2)(A)(i), ICL provided notice of its intent to bring this action to the Forest Service and the Secretaries of the U.S. Departments of Interior and Commerce more than 60 days prior to bringing this action.

13. The Federal Government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702 and 16 U.S.C. § 1540(g)(1).

PARTIES

14. Plaintiff IDAHO CONSERVATION LEAGUE (“ICL”) is a non-profit conservation organization incorporated under the laws of Idaho with its principal place of business in Boise, Idaho.

15. ICL’s mission is to protect Idaho’s clean water, clean air, healthy families, and unique way of life. ICL and its approximately 20,000 supporters are dedicated to protecting and conserving Idaho’s natural resources, including its water resources and aquatic life. ICL and its supporters are active in public education, administration, and legislation of conservation issues in Idaho, including issues related to water and fish. As an organization, and on behalf of its staff and supporters, ICL is greatly concerned with protecting and improving the quality of Idaho’s surface waters and with recovering and sustaining viable populations of ESA-listed fish species.

16. ICL board members, staff, and supporters use and enjoy the waters of the Salmon River watershed, including those in the SCNF, for health, recreational, scientific, and aesthetic purposes. ICL board members, staff, and supporters derive health, recreational, scientific, and aesthetic benefits from drinking, fishing, boating, study, contemplation, photography, and other activities in and around the waters of the SCNF and the Salmon River watershed. ICL board members, staff, and supporters intend to continue using and enjoying waters and fish of the Salmon River watershed and the SCNF, including in the watersheds at issue here: Yankee Fork, Camas Creek, Panther Creek, Middle Fork, Lower Canyon, North Fork, Lower Salmon, and Middle Salmon.

17. These interests of ICL, its staff, and its supporters are directly affected by NOAA's failure to complete ESA consultations for diversions in eight SCNF watersheds. These interests are also directly affected by the Forest Service's failure to initiate ESA consultation with FWS for diversions in the Panther Creek Watershed. These interests are also directly affected by the Forest Service's continued authorization of diversions in these watersheds for which consultation has never been completed. These interests have been, are being, and will continue to be irreparably injured by these legal violations unless the relief prayed for herein is granted.

18. Defendant NOAA FISHERIES (NOAA, also referred to as the National Marine Fisheries Service, or NMFS) is an agency or instrumentality of the United States and is responsible for administering the provisions of the ESA with regard to threatened marine species, including Snake River spring/summer Chinook salmon and Snake River Basin steelhead.

19. Defendant U.S. FOREST SERVICE (Forest Service) is an agency or instrumentality of the United States and is charged with managing the public lands and resources of the Salmon-Challis National Forest in accordance and compliance with federal laws and regulations.

LEGAL BACKGROUND

The Endangered Species Act

20. The ESA is the nation's preeminent wildlife protection law. It was enacted "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such [] species." 16 U.S.C. § 1531(b). The ESA was "designed to

prevent the loss of any endangered species, regardless of the cost.” *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 n.34 (1978) (emphasis in the original).

21. Under the ESA, the Secretary of the Interior or Commerce lists a species as “endangered” if it is “in danger of extinction throughout all or a significant portion of its range,” or as “threatened” if it is “likely to become an endangered species within the foreseeable future.” 16 U.S.C. §§ 1533(a)(1), 1532(6) & (20). Concurrently with listing a species as threatened or endangered, the Secretary also must designate “critical habitat” for the species. 16 U.S.C. § 1533(a)(3). Critical habitat is the area that contains the physical or biological features essential to the conservation of the species and which may require special protection or management considerations. 16 U.S.C. § 1532(5)(A).

22. ESA Section 7(a)(2) requires all federal agencies “insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [designated critical] habitat.” 16 U.S.C. § 1536(a)(2). The ESA’s implementing regulations require federal agencies to review their actions at the “earliest possible time” to determine whether an action may affect listed species or critical habitat. 50 C.F.R. § 402.14.

23. Agency action for purposes of Section 7(a)(2) includes federal agency authorization of private activities. *See, e.g., Wash. Toxics Coal. v. Env’tl. Prot. Agency*, 413 F.3d 1024, 1031–33 (9th Cir. 2005) (agency approval and registration of pesticides); *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (agency issuance of permits allowing fishing on the high seas).

24. To fulfill Section 7(a)(2)'s mandate, the "action agency" must consult with NOAA or FWS if a proposed action "may affect" a listed species or its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). NOAA is responsible for consultations regarding anadromous fish species, including Chinook salmon and steelhead; FWS is responsible for inland fish species, including bull trout. *See id.* § 402.01.

25. The action agency prepares a biological assessment to evaluate the potential effects of the action on listed species and to determine whether a species is "likely to be adversely affected" (LAA) or "not likely to be adversely affected" (NLAA) by the action. 50 C.F.R. § 402.12. For LAA actions, the action agency must seek "formal" consultation with NOAA or FWS. 50 C.F.R. § 402.14(a). For NLAA actions, the action agency may seek "informal" consultation with NOAA or FWS. *See id.* at § 402.14(b).

26. During consultation, NOAA Fisheries or FWS must review all relevant information, evaluate the current status of the species or critical habitat, and evaluate the effects and cumulative effects of the proposed action on the listed species and its critical habitat. 50 C.F.R. § 402.14(g)(1)–(3). Throughout its analysis, the consulting agency must utilize the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

27. Informal consultation concludes with a Letter of Concurrence from NOAA or FWS. 50 C.F.R. § 402.14(b). A letter of concurrence is only appropriate when the BA or other information demonstrates that the action has no likelihood of adverse

effect to the listed species. *Id.* See also *Endangered Species Consultation Handbook*, FWS & NMFS (1998), p. 3-12.

28. Formal consultation results in a Biological Opinion (BiOp) from NOAA or FWS. The BiOp determines whether the proposed action is likely to jeopardize the continued existence of a listed species or adversely modify the species' critical habitat.

29. The BiOp must include a detailed discussion of the current status of the species, the existing environmental conditions (or baseline), and the effects and cumulative impacts of the action, when added to the baseline, on listed species or critical habitat. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.14(g)(3), (h)(2). "Effects of the action" refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, added to the environmental baseline. 50 C.F.R. § 402.02. Cumulative effects are those effects of future state or private activities that are reasonably certain to occur within the action area. *Id.*

30. If NOAA or FWS makes a jeopardy determination, the BiOp may specify reasonable and prudent alternatives that will avoid jeopardy and will allow the agency to proceed with the action. 16 U.S.C. § 1536(b).

31. Congress established the consultation process explicitly "to ensure compliance with the [ESA's] substantive provisions." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). As the Ninth Circuit stated: "If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." *Id.* See also *Conner v. Burford*, 848 F.2d 1441, 1458 (9th Cir. 1988) (the ESA's "strict

substantive provisions . . . justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.”).

32. NOAA’s and FWS’s duty to complete ESA consultation and prepare a BiOp is mandatory. *See* 16 U.S.C. §§ 1536(b)(1)(A), 1536(b)(3)(A). Additionally, the ESA, its implementing regulations, and NOAA’s and FWS’s guidance documents recognize that consultation is mandatory and shall be prompt and not be indefinite. *See* 16 U.S.C. §§ 1536(b)(1)(A) (consultation “shall be concluded within the 90-day period” unless the action agency and Service agree to another time), 1536(b)(3)(A) (“[p]romptly after conclusion of consultation . . . the Secretary shall provide” a written statement to the action agency setting forth the Secretary’s opinion and a summary of the information upon which the opinion is based); 50 C.F.R. § 402.14(e) (“[f]ormal consultation concludes within 90 days after its initiation unless extended”); Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultation and Conferences (“Consultation Handbook”), U.S. Fish & Wildlife Service and National Marine Fisheries Service, March 1998, pp. 4–7 (providing that the “Services ensure the biological opinion, including the incidental take statement, is prepared and delivered within 135 days of initiation of formal consultation,” that the “consultation timeframe cannot be ‘suspended,’” and that extensions should not be indefinite and should specify a schedule).

33. The duty to comply with Section 7(a)(2) remains the action agency’s even after issuance of a BO. After the completion of consultation, the action agency must

determine whether and in what manner to proceed with the action in light of its Section 7 obligations and the BiOp. 50 C.F.R. § 402.15(a).

34. During the consultation process, the action agency may not make any irreversible or irretrievable commitments of resources, which would have the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures (RPAs). 16 U.S.C. § 1536(d). Section 7(d) of the ESA provides that after consultation has been initiated, the action agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action,” which would foreclose the formulation or implementation of any RPAs. 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09. Congress enacted Section 7(d) “to prevent Federal agencies from ‘steamrolling’ activity in order to secure completion of the projects regardless of their impact on endangered species.” *Pac. Rivers Council v. Thomas*, 936 F.Supp. 738, 745 (D. Idaho 1996) (quotation omitted).

35. Section 9 of the ESA prohibits any person from “taking” a threatened or 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 listed species either directly or by degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. § 1532(19).

36. An exception to Section 9’s take prohibition is that a person may take a listed species in accordance with an Incidental Take Statement (ITS) issued by NOAA or FWS. 16 U.S.C. § 1536(b)(4). If a person obtains an ITS, they must follow the terms and conditions of the ITS to be exempt from liability for take. *Id.* § 1536(o)(2).

37. The BiOp should include an ITS if take may occur. 50 C.F.R. § 402.14(g)(7). The ITS (1) specifies the amount or extent of the impact on the species of any incidental taking, (2) specifies Reasonable and Prudent Measures to minimize such impact, and (3) sets forth the Terms and Conditions that must be complied with to implement the Reasonable and Prudent Measures. *Id.* at § 402.14(i)(1)(i), (ii), (iv).

38. If the amount or extent of incidental taking specified in the ITS is exceeded during the course of the action, the action agency must immediately reinstate consultation. 50 C.F.R. §§ 402.14(i)(4), 402.16(a).

39. Under the citizen suit provision of the ESA, “any person may commence a civil suit on his own behalf . . . against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.” 16 U.S.C. § 1540(g)(2)(C).

The Administrative Procedure Act

40. The Administrative Procedure Act provides the standard of review for actions taken under the ESA. *See* 5 U.S.C. § 706; *Idaho Farm Bureau v. Babbitt*, 58 F.3d 1392, 1401 (9th Cir. 1994). Under the APA, a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be: arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law. 5 U.S.C. § 706(2).

41. The APA requires agencies to conclude issues presented to them “within a reasonable time” and empowers reviewing courts to “compel agency action unlawfully

withheld or unreasonably delayed.” 5 U.S.C. §§ 555(b), 706(1). Courts generally use four factors to consider an unreasonable delay claim: (1) the length of the delay since the agency came under a duty to act; (2) the reasonableness of the delay in the context of the statute authorizing agency action; (3) the consequences of the delay; and (4) any plea of administrative error, administrative inconvenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources. *See In re Int’l Chemical Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992); *Biodiversity Legal Found. v. Norton*, 285 F.Supp.2d 1, 12–17 (D.D.C. 2003) (FWS’s four-year delay in revising critical habitat under ESA for endangered Cape Sable seaside sparrow was unreasonable); *Ctr. for Biological Diversity v. Evans*, 2005 WL 1514102, *4–7 (N.D. Cal. 2005) (NOAA’s nine-year delay in designating critical habitat under ESA for the endangered right whale was unreasonable); *Idaho Conservation League v. Browner*, 968 F.Supp. 546, 549 (W.D. Wash. 1997) (seven-month delay in meeting Clean Water Act duty to “promptly” prepare water quality standards was unreasonable); *Defenders of Wildlife v. Browner*, 909 F.Supp. 1342, 1344–50 (D. Ariz. 1995) (eleven-month and nineteen-month delays in meeting Clean Water Act duty to “promptly” prepare water quality standards were unreasonable).

42. Agency action includes an agency’s failure to act. 5 U.S.C. § 551(13). If a court finds an agency’s failure to act is “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law,” the court may hold unlawful and set aside the agency’s decision. 5 U.S.C. § 706(2). *See Ctr. for Biological Diversity v. Evans*, 2005 WL 1514102, No. C 04-04496 WHA, *5 (N.D. Cal. Jun. 14, 2005) (NOAA’s failure to make a decision to designate or not designate critical habitat, which is a duty under the

ESA, “not only amounted to an unreasonable delay but was ‘arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.’”).

Forest Service Authorization of Diversions and Duties to Protect Fish and the Environment

43. The Forest Service issues Special Use Permits to authorize surface water diversions on National Forest Land. The Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* (FLPMA), authorizes the Forest Service to “grant, issue, or renew rights-of-way over” National Forest lands for “ditches . . . for the . . . transportation of water.” 43 U.S.C. § 1761(a)(1). Under FLPMA, such rights-of-way “shall contain . . . terms and conditions which will . . . minimize damage to . . . fish and wildlife habitat and otherwise protect the environment.” *Id.* at § 1765(a).

44. Other statutes also give the Forest Service the authority and to protect fish and the environment in administering the National Forests. The National Forest Management Act (NFMA) requires the Forest Service to specify guidelines for land management plans (commonly called “Forest Plans”) that “provide for . . . watershed, wildlife, and fish” and “provide for diversity of plant and animal communities.” 16 U.S.C. § 1604(g)(3)(A) & (B). The Organic Administration Act, 16 U.S.C. § 475, provides that “[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows.” And the Multiple Use Sustained-Yield Act of 1960, 16 U.S.C. § 528, provides that “[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”

45. The Ninth Circuit has affirmed the Forest Service’s authority to protect ESA-listed fish through terms and conditions in Special Use Permits for surface water diversions, including requiring minimum instream flows. *Cnty. of Okanogan v. Nat’l Marine Fisheries Serv.*, 347 F.3d 1081, 1084 (9th Cir. 2003) (rejecting argument that “the Forest Service does not have the authority to condition the use of the rights-of-way in a national forest on the maintenance of instream flows because such restrictions deny [water users] their vested water rights under state law.”).

STATEMENT OF FACTS

ESA-Listed Fish in the SCNF

46. Chinook salmon, steelhead, and bull trout are species of fish listed as “threatened” under the Endangered Species Act. Each species and its habitat are found in the SCNF.

Chinook Salmon and Steelhead

47. Snake River spring/summer Chinook salmon (Chinook salmon or Chinook) and Snake River Basin steelhead trout (steelhead) are anadromous fish species that historically lived in, migrated from, and returned to the Snake River Basin in massive numbers. Historically, 1.5 million Chinook salmon returned from the Pacific Ocean to spawn in the Snake River Basin; but these returns have declined by as much as 97 percent since the late 1800s, and Chinook salmon have been extirpated in over half of their pre-European spawning range within the Snake River Basin.

48. According to the Idaho Department of Fish and Game, as recently as the 1960s the Snake River supported wild runs of adult Chinook salmon and steelhead on the

order of 120,000 fish (approximately 60,000 each). However, populations of these fish have since declined at an alarming rate.

49. As a result, NOAA Fisheries protected the Snake River spring/summer Chinook salmon as a “threatened” species under the ESA in 1992, 57 Fed. Reg. 14653 (Apr. 22, 1992), designated critical habitat for Chinook salmon in 1993, and revised the designation in 1999. NOAA Fisheries protected the Snake River Basin steelhead trout as a threatened species in 1997, 62 Fed. Reg. 43937 (Aug. 18, 1997), and designated critical habitat for steelhead in 2005. NOAA Fisheries also protected Snake River Sockeye salmon as endangered in 1991, 56 Fed. Reg. 58619 (Nov. 20, 1991). Snake River Coho salmon are extinct.

50. Historically, the Salmon River watershed, which is within the Snake River Basin, produced between 39 and 45 percent of the Chinook salmon and 55 percent of the steelhead in the Columbia River Basin. The Salmon River remains the most important tributary for Chinook salmon and steelhead in the Snake River Basin. Chinook salmon and steelhead migrate, spawn, and rear in streams in the SCNF in the Upper Salmon River Basin. River reaches in the SCNF and adjacent riparian zones are designated critical habitat for Chinook salmon and steelhead.

51. The causes of the declines of Chinook salmon and steelhead in the Snake River Basin are multiple, including loss of habitat and disruption of migration due to dams and diversions for irrigation and power supply; loss and degradation of habitat from logging, mining, grazing, irrigation, and industry; commercial and recreational harvest; and competition or genetic alteration from hatchery-raised fish.

52. According to a salmon recovery proposal issued by nine federal agencies in July 2000, a central aspect of Chinook salmon and steelhead recovery is restoration of habitat in tributary streams in the Upper Salmon River subbasin. Integral components of such restoration include restoring or increasing in-stream water flows, improving water quality and riparian conditions, and removing barriers to fish movement and migration.

Bull Trout

53. The Columbia River bull trout (bull trout) also once thrived in the waters of the larger Columbia River Basin, but like salmon and steelhead, their populations have declined at an alarming rate. FWS protected the bull trout as a threatened species under the ESA in 1998, which includes bull trout native to the Salmon River watershed. 63 Fed. Reg. 31647 (Jun. 10, 1998). FWS designated critical habitat for bull trout in 2010. 75 Fed. Reg. 63897 (Oct. 18, 2010).

54. FWS has identified the bull trout subpopulations of the Upper Salmon River Basin as among the most important remaining subpopulations for the survival and recovery of the Columbia River bull trout. Bull trout migrate, spawn, and rear in streams in the SCNF in the Upper Salmon River Basin. Many stream reaches in the SCNF are designated critical habitat for bull trout. FWS's listing rule emphasizes the threats to bull trout in the Upper Salmon River Basin from irrigation diversions and other forms of habitat degradation.

Adverse Impacts of Surface Water Diversions on ESA-listed Fish

55. As identified by both NOAA and FWS in their various rules pertaining to Chinook salmon, steelhead, and bull trout, the diversion of water and dewatering of streams which are habitat for these listed species have adversely affected the species,

contributing to their listing under the ESA; and further may constitute a prohibited “take” of the fish under Section 9 of the ESA. *See, e.g.*, 65 Fed. Reg. 42422 (Jul. 10, 2000); 63 Fed. Reg. 31647 (Jun. 10, 1998). This is confirmed by the ESA consultation documents that the Forest Service, NOAA, and FWS have produced for diversions in the SCNF.

56. Surface water diversions can harm Chinook salmon, steelhead, bull trout, and their habitat in a variety of ways. Diversions reduce the wetted width and depth of streams below the diversion structure, which increases water temperature and reduces the amount of water available in side channels for fish habitat. In turn, this increases physiologic stress and susceptibility to diseases, reduces oxygen, and reduces access to overhanging branches and structures that provide food and protection from predators.

57. By eliminating downstream water, diversions reduce water flow in streams and can disconnect sections of a stream, which reduces depth or eliminates water over fish redds, isolates individual fish in pools or stream segments, isolates fish populations, and creates physical barriers to fish movement. In turn, this can dry eggs and pre-emergent fry, reduce the ability of fish to move to cooler areas and spawning areas, decrease genetic diversity, and trap fish in inhospitable environments.

58. Diversions reduce the height of the water table in stream banks, which reduces plant biomass available for insects, reducing food for fish. In turn, this reduces fish growth rates.

59. Diversions divert stream channel flow into a ditch or canal, which can divert or entrain the fish themselves into diversion channels, trapping and stranding fish in inhospitable environments.

60. Finally, diversions require the placement or maintenance of dam material

in the stream channel, which creates physical barriers to fish movement, stirs sediment, and impacts streambeds. In turn, this can reduce the suitability of spawning gravel, smother and trap eggs and pre-emergent fry, crush eggs and pre-emergent fry, and injure juveniles and adults.

Diversions in the SCNF

61. Numerous surface water diversions are located in rivers in the Salmon River watershed on federal land in the SCNF, primarily for agricultural use.

62. Diversion structures vary. Some are unscreened and allow fish to be diverted (entrained) into the irrigation ditch or canal, while others have fish screens that generally prevent entrainment. Some diversion structures present a complete physical barrier to fish passage, while others allow for fish to pass by the diversion in the stream.

63. Additionally, the amount of water removed from a stream varies with each diversion, and the percentage of instream flow removed varies by stream, by year, and by season. Many diversions divert the *entire stream* during portions of the year.

Forest Service Initiation of ESA Consultation for Diversions in the SCNF

64. In 2001, the Forest Service was sued for failing to initiate ESA Section 7 consultation with NOAA and FWS on the authorization to use SCNF lands to divert and transmit water. *Western Watersheds Project, et al. v. Matejko, et al.*, No. CIV 01-0259-E-BLW (D. Idaho Jun. 7, 2001). On June 20, 2002, the Forest Service entered into a settlement agreement in which the diversions were grouped into eleven watersheds, and the Forest Service agreed to initiate Section 7 consultation for diversions in each of the eleven watersheds by December 31, 2007.

65. After the settlement agreement, the Forest Service prepared the diversion

BAs and initiated consultation with NOAA and FWS, completing BAs for all eleven watersheds by the end of 2007 and submitting them to the NOAA and FWS. The eleven watersheds are: Camas Creek; Panther Creek; Little Lost River; Lemhi River; Middle Fork of the Salmon River; Yankee Fork of the Salmon River; North Fork of the Salmon River; Lower Canyon of the Salmon River; Middle Salmon River; Upper Salmon River; and Lower Salmon River.

66. Approximately 150 total diversions were identified in the BAs. Most of these diversions are used, operated, and maintained by private parties. For each private diversion, the Forest Service's proposed action is to issue, renew, or continue to administer a Special Use Permit to authorize the private party to continue to use, operate, and maintain the diversion. Other diversions are used, operated, and maintained by the Forest Service; for each of these, the Forest Service's proposed action is for the agency to continue to administratively use, operate, and maintain the diversion.

Chinook Salmon and Steelhead Consultation Has Not Been Completed in Eight SCNF Watersheds

67. To date, Section 7 consultation between the Forest Service and NOAA has not been completed for *eight of the eleven* watersheds in the SCNF. For one watershed (the Little Lost River), consultation with NOAA was not required because Chinook salmon or steelhead and their habitat are not present. For two watersheds, consultation has been completed: NOAA issued BiOps for the Lemhi River Watershed on February 27, 2012, and for the Upper Salmon River Watershed on August 10, 2012.

68. Notably, in both the Lemhi and Upper Salmon BiOps, NOAA found that the Forest Service's continued authorization of diversions in each watershed was *likely to jeopardize the continued existence* of Chinook salmon and steelhead and *adversely*

modify their designated critical habitat. As required by the ESA, the BiOps set forth numerous precautions the Forest Service has to take to reduce the adverse impacts to Chinook salmon, steelhead, and their habitat if the Forest Service is to continue to authorize the diversions in these two SCNF watersheds. These precautions include imposing minimum stream flows; removing and/or replacing diversions that block fish passage; installing headgates, fish screens, and water measuring devices at diversions; and monitoring diversions and stream flows.

69. Yet for the remaining eight SCNF watersheds, NOAA has failed to produce BiOps and complete Section 7 consultation. These watersheds are: Camas Creek; Panther Creek; Middle Fork of the Salmon River; Yankee Fork of the Salmon River; North Fork of the Salmon River; Lower Canyon of the Salmon River; Middle Salmon River; and Lower Salmon River.

70. It has been *at least six years* since the Forest Service initiated consultation with NOAA for diversions in these eight watersheds. The Forest Service issued BAs for two of these watersheds nearly ten years ago: Camas Creek (June 23, 2004); and Panther Creek (June 24, 2004). The Forest Service issued two BAs over seven years ago: Lower Canyon of the Salmon River (September 30, 2006); and Yankee Fork of the Salmon River (September 30, 2006). And the Forest Service issued BAs for the remaining three watersheds over six years ago: Middle Fork of the Salmon River (December 15, 2007); Middle Salmon River (December 26, 2007); North Fork of the Salmon River (December 26, 2007); and Lower Salmon River (December 27, 2007).

71. In the BAs for these eight watersheds, the Forest Service proposed to authorize and reauthorize more than 100 total surface water diversions. In the BAs, the

Forest Service found that many diversions are “likely to adversely affect” Chinook salmon and/or steelhead, and/or are “likely to adversely modify” Chinook salmon and/or steelhead critical habitat, primarily because the diversions were found likely to entrain fish, block fish passage, and/or significantly reduce stream flow. The Forest Service also found that many diversions were causing take.

72. Even though ESA consultation has never been completed for these admittedly harmful diversions, the Forest Service has continued to authorize, reauthorize, and/or allow the use, operation, and maintenance of these diversions. These diversions have harmed, are harming, and will continue to harm Chinook salmon, steelhead, and each species’ designated critical habitat.

Bull Trout Consultation Has Not Been Completed in One SCNF Watershed

73. From around 2008 through 2012, FWS completed diversions consultation for bull trout in ten of the eleven SCNF watersheds. FWS conducted formal consultation and issued BiOps for eight watersheds and conducted informal consultation and issued Letters of Concurrence for two watersheds. However, as of early 2013, FWS had failed to complete consultation and produce a BiOp for one remaining watershed: Panther Creek.

74. The Forest Service issued a BA for the Panther Creek Watershed on June 24, 2004, identifying 34 diversions located in the SCNF. Like for Chinook salmon and steelhead, the Forest Service found that many of these diversions harm bull trout and impair its habitat by entraining bull trout in ditches, blocking bull trout passage, and significantly reducing stream flows.

75. ICL notified FWS of its intent to sue the agency for unlawfully

withholding and/or unreasonably delaying preparing a BiOp and concluding consultation for the Panther Creek Watershed by letter dated June 18, 2013. FWS notified ICL's counsel by letter dated August 15, 2013, that the SCNF withdrew its request for Section 7 consultation on August 14, 2013. According to FWS, the SCNF said it would consider changed circumstances and re-initiate the consultation. FWS stated in its letter to ICL's counsel: "Once we receive a biological assessment from the SCNF that meets the requirements for initiating formal consultation, the Service [FWS] would complete consultation and issue a biological opinion within 135 days of initiating formal consultation in accordance with the implementing regulations for Section 7 [50 CFR §402.14(e)]." (Second set of brackets in the original).

76. To date, the Forest Service has not reinitiated consultation with FWS for diversions in the Panther Creek Watershed. Even though this ESA consultation has never been completed, the Forest Service has continued to authorize, reauthorize, and/or allow the use, operation, and maintenance of the 34 diversions in this watershed. These diversions have harmed, are harming, and will continue to harm threatened bull trout and its designated critical habitat.

FIRST CLAIM FOR RELIEF:
NOAA Violations of the Administrative Procedure Act

77. Plaintiff realleges all preceding paragraphs.

78. Nearly *ten years* have passed since the Forest Service issued BAs and initiated consultation with NOAA for diversions in the Panther Creek and Camas Creek watersheds. Over *seven years* have passed since the Forest Service issued BAs and initiated consultation with NOAA for diversions in the Lower Canyon of the Salmon River and the Yankee Fork of the Salmon River watersheds. And over *six years* have

passed since the Forest Service issued BAs and initiated consultation with NOAA for diversions in the Lower Salmon River, Middle Salmon River, and Middle Fork of the Salmon River watersheds.

79. Even though these consultations have never been completed, the Forest Service has continued to authorize, reauthorize, and/or allow the operation of more than 100 diversions in these watersheds. The Forest Service determined in its BAs that many of these diversions are likely to adversely affect Chinook salmon and steelhead and are likely to adversely modify their critical habitat because they substantially reduce stream flows, block fish passage, and entrain fish, among other documented adverse impacts. In its listing rules for Chinook salmon and steelhead, NOAA discussed that diversions have played a role in each species' decline. And in the two watershed BiOps that NOAA has completed for similar diversions in the SCNF (Lemhi and Upper Salmon watersheds), NOAA concluded that the Forest Service's authorization of diversions in each of those watersheds was *jeopardizing the continued existence of each species and adversely modifying their critical habitat*.

80. However, NOAA has failed to prepare diversion consultations for the other eight watersheds in the SCNF. NOAA has unlawfully withheld its discrete, nondiscretionary duty to consult with the Forest Service and prepare a BiOp for each watershed, in violation of the APA, 5 U.S.C. § 706(1). The Ninth Circuit has stated: "Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." *ONRC v. BLM*, 150 F.3d 1132, 1137 (9th Cir. 1998). The ESA's plain language contains directives to the Services preceded by the word "shall" that demand the Services arrive at a certain outcome—to conclude

consultation and produce a BiOp. *See* 16 U.S.C. §§ 1536(b)(1)(A) & (b)(3)(A).

81. NOAA has also unreasonably delayed and continues to unreasonably delay completion of each of these eight consultations, in violation of the APA, 5 U.S.C. § 706(1). Each of these delays—ranging from more than six years to nearly ten years—extends substantially beyond the consultation timeframes contemplated in the ESA, its implementing regulations, and the Consultation Handbook. Each of NOAA's delays has undermined and continues to undermine the ESA's statutory scheme to protect and recover listed species, and the consequences of NOAA's delays have been substantial in bringing these species closer to extinction and/or inhibiting their recovery.

82. NOAA's failure to act on each of these consultations is also arbitrary and capricious, an abuse of discretion or otherwise not in accordance with law, in violation of APA, 5 U.S.C. § 706(2). NOAA has a nondiscretionary duty under the ESA to complete consultations and produce BiOps. The APA requires NOAA to conclude consultation within a reasonable time; and the ESA, its implementing regulations, and the Consultation Handbook require NOAA to complete consultations promptly and provide that consultation shall not be indefinite. NOAA, however, has failed to complete consultation and issue BiOps.

SECOND CLAIM FOR RELIEF:
Forest Service Violations of Endangered Species Act § 7(d)

83. Plaintiff realleges all preceding paragraphs.

84. The Forest Service has made and is making an irreversible and irretrievable commitment of resources by continuing to authorize, reauthorize, and/or allow the use, operation, and maintenance of over 100 surface water diversions in the SCNF prior to completing consultation, in violation of Section 7(d) of the ESA.

85. ESA Section 7(d) prohibits the action agency, once it has initiated consultation, from making any irreversible or irretrievable commitment of resources with respect to the agency action, which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate Section 7(a)(2). 15 U.S.C. § 1536(d).

86. Courts have consistently stated that the purpose of Section 7(d) is to “ensur[e] that the status quo will be maintained during the consultation process.” *Conner v. Burford*, 848 F.2d 1441, 1455 n.34 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989). *See also Lane Cnty. Audubon Soc’y v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992) (“In order to maintain the status quo, section 7(d) forbids ‘irreversible or irretrievable commitment of resources’ during the consultation period.”). Where consultation is underway for an ongoing action, the status quo contemplates the *absence of the action* in order to ensure that the species does not further decline pending completion of consultation. *See Pac. Rivers Council v. Thomas*, 936 F.Supp. 738, 745–46 (D. Idaho 1996).

87. Consultation has been initiated by the Forest Service, but has not yet been completed in eight SCNF watersheds: Camas Creek; Panther Creek; Middle Fork of the Salmon River; Yankee Fork of the Salmon River; North Fork of the Salmon River; Lower Canyon of the Salmon River; Middle Salmon River; and Lower Salmon River.

88. By continuing to allow the use, operation, and maintenance of more than 100 diversions in these watersheds, the Forest Service is failing to maintain the status quo, putting ESA-listed fish at greater risk of jeopardy, adverse modification of critical habitat, and take. These diversions are injuring Chinook salmon, steelhead, and bull trout

and their designated critical habitat by threatening the fish with entrainment, blocking passage, and reducing water flows, which impairs fish passage and degrades habitat in many ways. The Forest Service itself found that continuing to use many of the surface water diversions on the SCNF where consultation is still underway would be “likely to adversely affect” one or more of these species and would be likely to “adversely modify” their critical habitat.

THIRD CLAIM FOR RELIEF:

Forest Service Violations of Endangered Species Act § 7(a)(2)

89. Plaintiff realleges all preceding paragraphs.

90. The Forest Service is in violation of Section 7(a)(2) for its failure to ensure that by authorizing, reauthorizing, and/or allowing the use, operation, and maintenance of surface water diversions in the SCNF will not jeopardize the continued existence of threatened Chinook salmon, steelhead, and bull trout, or destroy or adversely modify their critical habitat in those watersheds for which ESA consultation has not been completed.

91. Section 7(a)(2) of the ESA requires federal agencies to consult with either NOAA or FWS to “insure” that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any listed species or destroy or adversely modify its designated critical habitat. 16 U.S.C. § 1536(a)(2). The duty to consult applies to future action as well as “ongoing agency action.” *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1053 (9th Cir. 1994).

92. For Chinook salmon and steelhead, the Forest Service has not completed consultation for diversions in eight SCNF watersheds: Camas Creek; Panther Creek; Middle Fork of the Salmon River; Yankee Fork of the Salmon River; North Fork of the

Salmon River; Lower Canyon of the Salmon River; Middle Salmon River; and Lower Salmon River. In its own BAs, the Forest Service found that many of these diversions are likely to adversely affect these species and their designated critical habitat. The Forest Service, however, has continued to authorize, reauthorize, and allow the use, operation, and maintenance of these diversions without completing consultation. The Forest Service is thus failing to ensure that its actions will not jeopardize the continued existence of Chinook salmon and steelhead or adversely modify each species' designated critical habitat, in violation of Section 7(a)(2) of the ESA.

93. For bull trout, the Forest Service has not completed consultation for diversions in the Panther Creek Watershed. While the Forest Service had previously initiated ESA consultation with FWS for these diversions, the Forest Service withdrew its request for consultation with FWS in August 2013. In its BA, the Forest Service found that diversions in the Panther Creek Watershed were likely to adversely affect bull trout and modify its critical habitat. The Forest Service, however, has continued authorize, reauthorize, and allow the use, operation, and maintenance of these diversions without completing ESA consultation. The Forest Service is thus failing to ensure that its actions will not jeopardize the continued existence of bull trout or adversely modify its designated critical habitat, in violation of Section 7(a)(2).

FOURTH CLAIM FOR RELIEF:
Forest Service Violation of Endangered Species Act § 9

94. Plaintiff realleges all preceding paragraphs.

95. By continuing to authorize, reauthorize, and/or allow the use, operation, and maintenance of stream diversions on federal lands in the SCNF for which ESA consultation has not been completed, the Forest Service has caused, is causing, and will

reasonably foreseeably continue to cause the unauthorized “take” of Chinook salmon, steelhead, and bull trout, in violation of Section 9 of the ESA, 16 U.S.C. § 1538.

96. Such illegal “take” includes, but is not limited to, causing death, injury, harm, and/or adverse modification of habitat of the listed species in multiple ways associated with the subject stream diversions, including through stream dewatering, obstructing fish passage, and entraining fish into irrigation channels and devices.

97. The Forest Service has not completed Chinook salmon and steelhead consultation for diversions in eight SCNF watersheds: Camas Creek; Panther Creek; Middle Fork of the Salmon River; Yankee Fork of the Salmon River; North Fork of the Salmon River; Lower Canyon of the Salmon River; Middle Salmon River; and Lower Salmon River. There are no incidental take statements for the Forest Service’s actions to authorize, reauthorize, and/or allow the use, operation, and maintenance of the more than 100 diversions in these watersheds, and all take caused by these diversions is unauthorized under the ESA.

98. The Forest Service also has not completed bull trout consultation for diversions in the Panther Creek Watershed. Thus, there is no incidental take statement for the Forest Service’s authorization of more than 30 diversions in this watershed, and any take caused by the use, operation, and maintenance of these diversions is unauthorized under the ESA.

99. The use, operation, and maintenance of these diversions has caused, is causing, and will reasonably foreseeably cause take of Chinook salmon, steelhead, bull trout, and their habitat. Some of these diversions entrain these fish into ditches, resulting in death or injury to the fish. Some of these diversions impair fish passage, which can

strand and kill fish and can isolate populations of fish. And many of these diversions significantly reduce stream flow, which harms fish and fish habitat in a variety of ways, including stranding individual fish, isolating fish populations, reducing available habitat, and degrading habitat. In fact, the Forest Service itself characterized these impacts as “take” in its BAs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

A. Order, declare, and adjudge that NOAA Fisheries has failed to produce BiOps and/or Letters of Concurrence and complete consultation for each of the eight SCNF diversion BAs, and that NOAA has, thus, unlawfully withheld and/or unreasonably delayed fulfilling its nondiscretionary duty under Section 7 of the ESA to complete each consultation, in violation of the APA, 5 U.S.C. § 706(1), and/or that NOAA’s failure to act to complete each consultation is arbitrary, capricious, and not in accordance with law under APA, 5 U.S.C. § 706(2)(A);

B. Enter declaratory and/or injunctive relief holding unlawful and setting aside NOAA’s decisions, and ordering NOAA to complete each watershed consultation by preparing BiOps and/or Letters of Concurrence within 145 days;

C. Order, declare, and adjudge that by authorizing, funding, and/or carrying out the diversions in the SCNF for which Section 7 ESA consultation has not been completed, the Forest Service is failing to ensure that it is not jeopardizing the continued existence of or adversely modifying the critical habitat of threatened Chinook salmon, steelhead, and bull trout; making an irretrievable and irreversible commitment of

resources; and/or causing unauthorized take, in violation of the ESA, 16 U.S.C. §§ 1536(a)(2), 1536(d) & 1538;

D. Order the Forest Service to initiate bull trout consultation with FWS for diversions in the Panther Creek Watershed within 90 days;

E. Enter such temporary, preliminary, or permanent injunctive relief as specifically sought by Plaintiff hereafter to prevent harm to the listed fish species pending Defendants' full compliance with the ESA;

F. Award Plaintiff its reasonable costs, litigation expenses, and attorney's fees associated with this litigation pursuant to ESA, the Equal Access to Justice Act, and/or all other applicable authorities; and/or

G. Grant such further relief as the Court deems just and proper in order to remedy Defendants' violations of law alleged herein and to protect the interests of Plaintiff, the public, and the listed fish species at issue.

Dated this 2nd day of June, 2014.

Respectfully submitted,

/s/ Bryan Hurlbutt
Bryan Hurlbutt

*Attorney for Plaintiff Idaho
Conservation League*