Bryan Hurlbutt (ISB # 8501)
Laurence ("Laird") J. Lucas (ISB # 4733)
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
(208) 342-8286 (fax)
bhurlbutt@advocateswest.org
llucas@advocateswest.org

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE,

Plaintiff,

vs.

U.S. FOREST SERVICE,

Defendant.

Case No. 1-18-cv-44-BLW

ICL'S OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON LIABILITY

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INTRODUCTION

Plaintiff Idaho Conservation League respectfully moves the Court to enter summary judgment in its favor on its First and Third Claims for Relief, holding Defendant U.S. Forest Service in violation of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and/or the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, for its ongoing failure and refusal to conduct ESA Section 7 consultation for 23 existing surface water diversions and associated ditches in the Sawtooth Valley that are located, operated, and maintained on public lands in Idaho's Sawtooth National Forest.

The Sawtooth Valley diversions and ditches divert and transport water from the mainstem Salmon River and several tributaries that are home to sockeye salmon, Chinook salmon, steelhead, and/or bull trout—all listed as "endangered" or "threatened" species under the ESA. Water diversions and ditches directly and indirectly harm these fish by reducing stream flows, impeding fish passage, entraining fish into ditches, and degrading water quality.

Private entities have used these public land diversions for years without required Forest Service authorization. Since at least 1994, the Forest Service has planned to authorize each diversion and has known it must conduct ESA consultation first. Yet the Forest Service has repeatedly failed and refused to initiate the ESA consultations—expressly stating that it would wait until it was sued. Without this Court's intervention, the Forest Service will continue to postpone consultation indefinitely and will allow the diversions to continue operating as they have for decades without the kind of monitoring and improvements to protect fish that come about through ESA consultation.

By failing to consult for over two decades and counting, the Forest Service is violating its mandatory duty under ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), to initiate consultation at the

"earliest possible time," 50 C.F.R. § 402.14, warranting summary judgment under ICL's First Claim. The Forest Service has also committed unreasonable delay in violation of the APA, 5 U.S.C. § 706(1), under ICL's Third Claim. Accordingly, the Court should grant ICL's summary judgment motion as to liability, and then address appropriate remedies.[1]

LEGAL BACKGROUND

I. THE ENDANGERED SPECIES ACT.

Congress enacted the ESA 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 recovery and conservation of these species. 16 U.S.C. § 1531(b).

The Secretaries of Commerce and Interior share responsibility for implementing the ESA. The Secretary of Commerce is responsible for listed marine species, including anadromous fish species like salmon and steelhead, and administers the ESA through the National Marine Fisheries Service ("NMFS"). The Secretary of the Interior is responsible for listed terrestrial and inland fish species, including bull trout, and administers the ESA through the U.S. Fish and Wildlife Service ("FWS"). *See id.* § 1532(15); 50 C.F.R. §§ 17.11, 402.01(b). NMFS and FWS are collectively referred to as "the Services."

Under the ESA, the appropriate Secretary lists a species as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range," or "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 must designate "critical habitat" for the species. 16 U.S.C. § 1533(a)(3). Critical

[1] Per the Court-approved litigation plan, the parties will address remedies after the Court rules on the merits of ICL's claims. *See* ECF No. 24. The Court limited participation by Intervenor Salmon Headwaters Conservation Association to remedies proceedings. *See* ECF No. 22.

habitat contains 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).

After a species is listed, ESA Section 7(a)(2) requires that each federal agency must "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).

To fulfill Section 7(a)(2)'s mandate, the "action agency" must consult with NMFS and/or FWS before taking a proposed action that "may affect" a listed species or its critical habitat. 16 U.S.C. § 1536; 50 C.F.R. § 402.14(a). ESA regulations provide that such consultation is required for "all actions in which there is discretionary Federal involvement or control," *id.* § 402.03, including the granting of permits or rights-of-way, *id.* § 402.02(c). The regulations require action agencies to review their actions at the "earliest possible time" to determine whether an action may affect listed species or their critical habitat. 50 C.F.R. § 402.14(a).

The action agency prepares a biological assessment ("BA") 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. *See* 50 C.F.R. § 402.12. For LAA actions, the action agency must seek "formal" consultation with NMFS and/or FWS. 50 C.F.R. § 402.14(a). For NLAA actions, the action agency may seek "informal" consultation with NMFS and/or FWS. 50 C.F.R. § 402.14(b). Informal consultation concludes with a Letter of Concurrence from the consulting Service. *Id.* A letter of concurrence is only appropriate when the action has no likelihood of adverse effect to the listed species. *Id.*

Formal consultation results in a Biological Opinion (BiOp) from the consulting Service. The BiOp determines whether the proposed action is likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. If the consulting Service 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). After completing consultation, the action agency determines 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).[2]

Section 9 of the ESA and regulations prohibit the unauthorized "take" of listed species, including the fish at issue here. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.21(c). *See also* 58 Fed. Reg. 68543 (Dec. 28, 1993); 65 Fed. Reg. 42422 (Jul. 10, 2000); 50 C.F.R. §§ 17.31(a) & 17.44(w) (extending take prohibition to Chinook salmon, steelhead, and bull trout). "Take" is defined broadly to include harassing, harming, wounding, killing, trapping, capturing, or collecting a listed species directly or indirectly by degrading its habitat. 16 U.S.C. § 1532(19).

One way take can be authorized is by complying with an Incidental Take Statement ("ITS") issued by NMFS or FWS in a BiOp. *Id.* § 1536(b)(4); 50 C.F.R. § 402.14(g)(7). An ITS specifies the amount, or extent of the impact of, incidental taking; specifies Reasonable and Prudent Measures (RPMs) to minimize impact; and sets binding Terms and Conditions that must be complied with to implement the RPMs. 50 C.F.R. §§ 402.14(i)(1)(i), (ii), & (iv).

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[2] While consultation is underway, ESA Section 7(d) prohibits the action agency and any permit or license applicant from "making any irreversible and irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate" the Section 7(a)(2) jeopardy prohibition. 16 U.S.C. § 1536(d). ICL's Second Claim alleged Section 7(d) violations against the Forest Service, but in light of the Administrative Record facts showing that the Forest Service never initiated consultation over the Sawtooth Valley diversions, ICL is not pursuing that claim now. ICL reserves the right to do so, however, if the Forest Service argues that it has initiated consultation over any of the diversions.

The ESA citizen suit provision authorizes any person to commence a civil suit to enjoin any person, including the United States, who is alleged to be in violation of any provision of the ESA or its implementing regulations. 16 U.S.C. § 1540 (g)(1)(A).

II. FOREST SERVICE AUTHORIZATION OF DIVERSIONS AND DITCHES.

The Forest Service is obligated to regulate the "use and occupancy" of the National Forests to protect National Forest land, watersheds, wildlife and fish, and other values. *See* Organic Administration Act, 16 U.S.C. § 551 (Forest Service must regulate "occupancy and use" of National Forest lands "to preserve the forests thereon from destruction"); National Forest Management Act ("NFMA"), 16 U.S.C. § 1604(g)(3)(A) (requiring Forest Service to specify guidelines in land management plans to "provide for . . . watershed, wildlife, and fish"). NFMA also requires that Forest Service management decisions be consistent with the applicable land management plan, here the Sawtooth Forest Plan. 16 U.S.C. §1604(i); 36 C.F.R. § 219.10(e).

The Federal Land Policy and Management Act ("FLPMA") authorizes the Forest Service to "grant, issue, or renew rights-of-way over" public lands for "ditches . . . for the . . . transportation . . . of water." 43 U.S.C. § 1761(a)(1). FLPMA requires that such grants of rights-of-way "shall contain" terms and conditions which will:

> (i) carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public environmental protection, and siting, construction, operation, and maintenance if those standards are more stringent than applicable Federal standards.

Id. § 1765(a).

One way the Forest Service authorizes water diversions and related facilities located on National Forest land is by issuing "Special Use Permits" (or "SUPs"), which are a type of special

use authorization. Pursuant to its statutory authorities, the Forest Service has adopted "special use authorization" regulations, which provide:

> All uses of National Forest System lands, improvements, and resources, except those authorized by the regulations governing sharing use of roads (§ 212.9); grazing and livestock use (part 222); the sale and disposal of timber and special forest products, such as greens, mushrooms, and medicinal plants (part 223); and minerals (part 228) are designated "special uses." Before conducting a special use, individuals or entities must submit a proposal to the authorized officer and must obtain a special use authorization from the authorized officer, unless that requirement is waived by paragraphs (c) through (e)(3) of this section.

36 C.F.R. § 251.50(a).

The regulations define "special use authorization" as "a written permit, term permit, lease, or easement that authorizes use or occupancy of National Forest System lands and specifies the terms and conditions under which the use or occupancy may occur." 36 C.F.R. § 251.51. A "permit" is "a special use authorization which provides permission, without conveying an interest in land, to occupy and use National Forest System land or facilities for specified purposes, which is both revocable and terminable." *Id.* "[A] special use authorization terminates when, by its terms, a fixed or agreed-upon condition, event, or time occurs." *Id.* § 251.60(a)(2)(iii).

The regulations lay out a process for applying for a SUP, and for the Forest Service to review and either approve, approve with conditions, or deny the SUPs. *See id.* § 251.54. SUPs must include "[t]erms and conditions" to meet the requirements of FLPMA above, including to "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." 36 C.F.R. § 251.56(a)(1)(i). SUPs must also contain terms and conditions the Forest Service deems necessary to protect other lawful users of the lands; protect the interests of individuals living in the general area who rely on fish, wildlife, and biotic resources for subsistence; require siting to cause the least damage to the environment, taking into

consideration feasibility and other factors; and otherwise protect the public interest. 43 U.S.C. § 1765(b); 36 C.F.R. § 251.56(a)(1)(ii).

The Forest Service also authorizes water diversions and related facilities by issuing "Ditch Bill Easements" or "DBEs." Under the Act of October 27, 1986 (also known as the "Colorado Ditch Bill"), Congress amended FLPMA to authorize certain qualifying water diversions on National Forest land by issuing permanent easements. *See* P.L 99-545, *now codified at* 43 U.S.C. § 1761(c). Unlike a SUP application, which the Forest Service has discretion to deny, the Forest Service is required to approve a qualifying DBE application. *Id.*

To qualify for a DBE, a diversion on National Forest land must have been "constructed and in operation or placed into operation prior to October 21, 1976." *Id.* § 1761(c)(1). The diversion must also meet six criteria:

> (A) the traversed National Forest lands are in a State where the appropriation doctrine governs the ownership of water rights;
>
> (B) at the time of submission of the application the water system is used solely for agricultural irrigation or livestock watering purposes;
>
> (C) the use served by the water system is not located solely on Federal lands;
>
> (D) the originally constructed facilities comprising such system have been in substantially continuous operation without abandonment;
>
> (E) the applicant has a valid existing right, established under applicable State law, for water to be conveyed by the water system;
>
> (F) a recordable survey and other information concerning the location and characteristics of the system as necessary for proper management of National Forest lands is provided to the Secretary of Agriculture by the applicant for the easement; and
>
> (G) the applicant submits such application on or before December 31, 1996.

Id. The Colorado Ditch Bill thus provided a window of just over 10 years within which entities could file a DBE application, ending on December 31, 1996. *Id.* Any extension or enlargement

of the diversion after October 21, 1976, is not eligible for a DBE and requires "separate authorization," such as by SUP. *Id.* § 1761(c)(2)(D).

The Colorado Ditch Bill Act states that it did not "diminish any such power or authority of [the Secretary of the Interior] under applicable law," and that "[e]xcept as otherwise provided in this subsection, all rights-of-way issued pursuant to this subsection are subject to all conditions and requirements of [FLPMA]." *Id.* § 1761(c)(3)(B)–(C). Thus, DBEs—like SUPs—must include terms and conditions to "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment" and may include other terms and conditions the Forest Service deems necessary to minimize environmental damage and protect the public interest. *Id.* § 1765. *See also* 36 C.F.R. § 251.56(a)(1).

STATEMENT OF RELEVANT FACTS

I. ESA-LISTED FISH SPECIES IN THE SAWTOOTH VALLEY.

The Sawtooth Valley is home to Snake River sockeye salmon ("sockeye"), Snake River spring/summer Chinook salmon ("Chinook salmon"), Snake River Basin steelhead trout ("steelhead"), and Columbia River bull trout ("bull trout") and their habitat. SOF, ¶ 1–6.[3] The Sawtooth Valley includes the main Salmon River, as well as tributaries originating in the

[3] Pursuant to Local Rule 7.1(c)(2), ICL submits herewith a Separate Statement of Undisputed Facts ("SOF") with supporting citations to the Administrative Record ("A.R.") filed by the Forest Service, *see* ECF No. 25, and to exhibits to the accompanying Declaration of Bryan Hurlbutt ("Hurlbutt Decl., Ex.__"). Because ICL's First Claim arises under the ESA citizen suit provision, and the Third Claim alleges unreasonable delay under APA Section 706(1), the Court may properly consider the exhibits, which are relevant but were not included in the Administrative Record. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011) (allowing extra-record evidence to support ESA citizen suit claim); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) (review of an unreasonable delay claim "is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record").

Sawtooth and White Cloud mountain ranges, all upstream from the town of Stanley, Idaho. *See* AR001637 (map of Sawtooth Valley diversions, streams, and Chinook salmon observations).

Due to population declines, habitat loss, and ongoing threats, each of these species is listed under the ESA. NMFS listed sockeye as "endangered" in 1991, Chinook salmon as "threatened" in 1992, and steelhead as threatened in 1997. SOF, ¶¶ 1 & 3. FWS listed bull trout as threatened in 1998. SOF, ¶ 5. NMFS and FWS identified water diversions as one of the factors contributing to the decline of each of these species and the need to protect them under the ESA. *See* SOF, ¶ 1–5. NMFS and FWS continue to recognize diversions as threats to each species and their habitat, contributing to their risk of extinction and impeding their recovery. *Id.*

Surface water diversions can cause or contribute to habitat loss and degradation and to direct and indirect fish mortality in numerous ways, as NMFS, FWS, and the Forest Service have documented. *See id.*; (AR000256). Diversions can create barriers to fish movement up and down streams and block access to headwaters spawning and rearing habitats; "entrain" fish in ditches and fields, where they die; increase water temperature and contribute to degraded water quality; and fragment habitat and isolate local populations. *Id.*

This Court has addressed similar harmful impacts of outmoded or antiquated diversions on listed fish in the Upper Salmon River basin in past cases. *See, e.g.,* Memorandum Decision, *Idaho Watersheds Project et al. v. Jones et al.,* No. 00-cv-730-BLW (D. Id. Nov. 14, 2002) (granting summary judgment and permanent injunction over Otter Creek diversion on Salmon-Challis National Forest); Memorandum Decision, *Western Watersheds Project et al. v. Matejko, et al.*, No. 01-cv-259-BLW (D. Id. March 25, 2004) (granting summary judgment over pre-FLPMA "test case" diversions on BLM lands in Upper Salmon basin).

The *Matejko* decision was reversed by the Ninth Circuit, *see* 468 F.3d 1099 (9th Cir. 2006), because the pre-FLPMA diversions at issue were vested under old rights-of-way acts without any BLM "action" triggering ESA duties; but that ruling does not apply to the Forest Service diversions here which do require Forest Service action. In fact, that same litigation also challenged diversions on the Salmon-Challis National Forests, and those claims were settled when the Forest Service agreed to conduct watershed consultations over them. *See* Order Approving Partial Settlement Agreement and Partial Dismissal of Claims Against Forest Service Defendants, *WWP v. Matejko*, No. 01-cv-259-BLW (D. Id., Oct. 16, 2003). It has taken further ESA notice letters and lawsuits to force the Salmon-Challis National Forest, NMFS, and FWS to complete those consultations. *See, e.g., Idaho Conservation League v. U.S. Forest Service et al.*, No. 14-cv-216-EJL (D. Id.) (challenging failure to consult over numerous Salmon-Challis NF diversions). Now, those consultations are largely complete, and the Forest Service has taken steps, and continues to take steps, to monitor and modernize diversions and reduce impacts to listed fish, as explained further below. *See* Hurlbutt Decl., Exs. 10–13.

II. THE 23 SAWTOOTH VALLEY DIVERSIONS AT ISSUE.

The 23 diversions at issue are all located on either the main Salmon River or tributaries flowing from the White Cloud mountains side (east side) of the Sawtooth Valley. *See* AR001637. The diversions are located on public land in the Sawtooth National Forest ("Sawtooth NF") and also within the Sawtooth National Recreation Area ("SNRA"). *See* SOF, ¶ 6. Even though the diversions have operated on National Forest land for decades, most of them have never received Forest Service authorization. *See* SOF, ¶ 7. For the few diversions that were previously authorized, those authorizations expired decades ago. *Id.*

Six of the diversions are located on the main Salmon River. *See* SOF, ¶ 6; AR001637. Five of the diversions are located on Champion Creek. *Id.* Fourth of July Creek, Fisher Creek, Gold Creek, and Grover Gulch each have two diversions. *Id.* The remaining four diversions are located on Warm Creek, Cleveland Creek, Boundary Creek, and Club Canyon Creek. *Id.*

Since at least the mid 1990s, the Forest Service has recognized diversions are harming listed fish and their habitat in the Sawtooth Valley and other parts of the SNRA. *See*, *e.g.*, AR000256–58 (Forest Service 1995 memo on SNRA diversions). In 1995, the Forest Service had deterimed diversions "are believed to be, by far, the most significant effect on designated critical habitat within the [S]NRA." AR000256. At that time, the Forest Service expected a "continued decline" in fish populations and warned effects would be "catastrophic to aquatic ecosystems" if the diversions were not addressed. AR000258.

In its 2001 Biological Assessment for diversions in the Sawtooth Valley (the "Sawtooth Valley Aquatics BA"), the Forest Service determined that most of the diversions in the Sawtooth Valley—including 21 of the 23 diversions at issue here—were "likely to adversely affect" one or more species of listed fish and their habitat. *See* SOF, ¶ 18. But since 2001, very little has been done to address adverse impacts of the 23 Sawtooth Valley diversions. SOF, ¶ 25. Since 2001, changes have been made to only 4 of the 23 Sawtooth Valley diversions. *See* AR001401. And the Forest Service and other agencies continue to recognize the Sawtooth Valley as a priority watershed within the upper Salmon River basin for improving fish populations. *See* AR001386.

III. FROM 1995 TO 2001, THE FOREST SERVICE PLANNED TO CONSULT AND AUTHORIZE THE DIVERSIONS.

In the mid 1990s, the Forest Service inventoried diversions throughout the SNRA. *See* AR000886. The Forest Service found that most of the 118 diversions located on public lands in the SNRA and in the Salmon River drainage had never received Forest Service authorization.

AR000256. Only seven diversions were authorized at the time. *Id.* So in 1995, the Forest Service contacted diverters and asked them to apply for authorization—in the form of DBEs or SUPs—so it could begin the process of authorizing their diversions. AR000288.

By 1997, the Forest Service received numerous applications for SUPs and/or DBEs for diversions in the SNRA, including for the 23 Sawtooth Valley diversions at issue here, and began estimating the hours of staff time and expense required to authorize each diversion, including time to complete ESA consultations. SOF, ¶ 9. The Forest Service determined it could process most of the SNRA applications, including ESA consultation, by 1998, and that it could finish processing all applications by 2000. *Id.*; AR000432–33.

By 2000, however, the Forest Service had not yet consulted or processed any of the applications; though it was still preparing to do so. *See* SOF, ¶¶ 10–13. In October 2000, the Forest Service received an ESA notice of intent to sue for failing to consult over some diversions in the Sawtooth National Forest, including some of the diversions at issue in this matter. *See* AR000871. In response, Sawtooth NF Supervisor Levere committed to initiate ESA consultation for all diversions in the Sawtooth Valley. *Id.*

To follow through on its commitment, the Forest Service began preparing the Sawtooth Valley Aquatics BA and meeting with NMFS. *See* SOF, ¶ 17. On October 31, 2001, the Forest Service submitted the Sawtooth Valley Aquatics BA to NMFS and FWS and requested to initiate ESA consultation for the diversions. *See* AR000930–31 (Forest Service letter to NMFS); Hurlbutt Decl., Ex. 4 (Forest Service letter to FWS).[4] In the BA, the Forest Service proposed issuing an "interim" SUP for each diversion for up to five years to allow the Forest Service

[4] The Forest Service sought consultation over 26 federal actions, including authorization of the 23 diversions at issue in this lawsuit; authorization of a diversion on Pole Creek, which has since been authorized and consulted on through a separate process; and authorization of two non-diversion projects. *See* AR000930–31.

additional time to gather information to issue DBEs where warranted. *See* SOF, ¶ 18.

The BA, however, failed to include sufficient information to initiate consultation, and neither the consultation with NMFS nor FWS proceeded. *See* SOF ¶ 19. On June 8, 2001, NMFS sent a list of information about each diversion, associated water right, and potential impacts to fish that the Forest Service needed to submit to initiate consultation. AR000943–44.

IV. THE FOREST SERVICE'S REFUSAL TO CONSULT THEREAFTER.

In June 2001, the Forest Service was still planning to gather the needed information and consult. *See* AR000953. However, sometime thereafter, the Forest Service stopped working on the consultation and by at least 2005 decided not to proceed until it was sued. *See* SOF, ¶¶ 20–22. According to meeting notes from March 2005, the Forest Service admitted the information it needed to consult was readily available, but it decided on a strategy to "hold" off and "[w]ait to resubmit to consulting agencies until we get an NOI [notice of intent to sue]." *See* AR001081.

Even though the Forest Service pushed off the consultation, it continued to gather information on the diversions. *See*, *e.g.*, AR001159–1206 ("Assessment of Diversion Related Structures within the Sawtooth National Recreation Area" (Jan. 9, 2006)). But the Forest Service never used that information to consult. Now, nearly 25 years after it inventoried diversions in the SNRA in 1994, the Forest Service still has not consulted.

V. ESA CONSULTATION & AUTHORIZATION OF DIVERSIONS IN THE SALMON-CHALLIS NF.

In the neighboring Salmon-Challis National Forests ("Salmon-Challis NF"), the Forest Service has completed ESA consultations with NMFS and FWS for existing water diversions on National Forest lands, including formal consultation in *nine* different Upper Salmon basin watersheds. The Forest Service prepared BAs for each watershed and submitted them to NMFS and FWS requesting ESA consultation. *See*, *e.g.*, Hurlbutt Decl., Ex. 10, p. 7; Ex. 11, p. 12.

NMFS issued the BiOp for the first of these nine watersheds in February, 2012, and the last BiOp in December, 2016. *See* Ex 11, p. 11, Table 1. For bull trout, FWS issued most of the BiOps by 2012 and issued the last BiOp in October, 2016. *See* Hurlbutt Decl., Ex. 10, p. 7.

Through these consultations, NMFS and FWS identified diversions that were adversely impacting fish and their habitat and imposed binding terms and conditions on the Forest Service (through incidental take statements) to reduce these impacts. *See*, *e.g.*, Hurlbutt Decl., Ex. 10, pp. 56–58; Ex. 11, pp. 88–89 (FWS & NMFS BiOps for Panther Creek watershed diversions). The Services required the Forest Service to condition SUPs and DBEs to ensure that diversions are rebuilt, relocated, or improved to add fish screens, measuring devices, and/or headgates when needed. *See*, *e.g.*, Hurlbutt Decl., Ex. 10, p. 57, Ex. 12, pp. 144–46, Ex. 13, 124–25. They also required the Forest Service to begin regularly inspecting many diversions to ensure they are properly maintained and functioning, not entraining fish, not blocking stream passage, and not diverting too much water. *See*, *e.g.*, Hurlbutt Decl., Ex. 10, pp. 57–58, Ex. 11, pp. 88–89, Ex. 12, pp. 129–131, Ex. 13, pp. 108–112.

In three Salmon-Challis NF watersheds, NMFS found that the adverse impacts of water diversions were so severe that authorizing them would jeopardize the continued existence one or more fish species and adversely modify their critical habitat. Hurlbutt Decl., Ex. 11 (Panther Creek BiOp), p. 4, Ex. 12 (Lemhi watershed BiOp), p. 4 & Ex. 13 (Upper Salmon watershed BiOp), p. 4. In these three jeopardy watersheds, NMFS required the Forest Service to condition its approvals of SUPs and DBEs to improve flows in key streams to avoid jeopardy and adverse modification. Hurlbutt Decl., Ex. 11, pp. 82–83, Ex. 12, pp. 121–22 & Ex 13, pp. 104.

With consultation completed, and important fish protections in place or underway, the Forest Service is now moving forward to issue SUPs and DBEs. *See* Hurlbutt Decl., Exs. 6 & 7.

ARGUMENT

I. THE FOREST SERVICE'S FAILURE TO CONSULT OVER THE SAWTOOTH DIVERSIONS VIOLATES THE ESA.

As explained below, Forest Service authorization of a diversion on National Forest lands—whether by SUP or DBE or both—is "agency action" under the ESA. Furthermore, authorizing each Sawtooth Valley diversion by SUP and/or DBE "may affect" ESA-listed fish and their habitat. Because issuing SUPs and DBEs are agency actions which may affect listed species, the ESA and its implementing regulations require that the Forest Service consult *before* taking such action and at the *earliest possible time*. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). By failing to consult, despite its decades-long commitment to authorize the 23 Sawtooth Valley diversions, the Forest Service is in violation of these mandatory duties, and the Court should grant summary judgment on ICL's First Claim.

A. Authorizing a Diversion by SUP or DBE Is "Agency Action" Under the ESA.

ESA consultation is required for "agency action" which may affect listed species or their habitat. 16 U.S.C. § 1536(a)(2). The ESA defines agency action as "any action authorized, funded or carried out by [a federal] agency." *Id.* The ESA implementing regulations provide:

> Action means all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserved listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) action directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.02.

The Ninth Circuit has instructed that "the ESA's use of the term 'agency action' is to be construed broadly." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1020 (9th Cir. 2012). Under "established case law" there is agency action "whenever an agency makes an affirmative, discretionary decision about whether, or under what conditions, to allow private

activity to proceed." *Id.* at 1027. *Karuk Tribe* set out a two-part test for determining what constitutes agency action: "First, we ask whether a federal agency affirmatively authorized, funded or carried out the underlying activity. Second, we determine whether the agency had some discretion to influence or change the activity for the benefit of protected species." *Id.* at 1021. As explained below, Forest Service issuance of a SUP or DBE to authorize a water diversion on National Forest land satisfies this two-part test.

1. Issuing a SUP or DBE Satisfies the First Prong From *Karuk Tribe*.

At issue in *Karuk Tribe* was whether the Forest Service's approval of a miner's notice of intent ("NOI") to conduct mining activities is an agency action. 681 F.3d at 1012–13. In response to an NOI, the Forest Service must notify the miner within 15 days whether the NOI is approved or whether a more detailed plan is required for further review. *Id.* at 1013. *Karuk Tribe* held that approval of an NOI constitutes an agency action, because it affirmatively authorizes mining activities. *Id.* at 1021. Similarly here, SUPs and DBEs must be approved or denied by the Forest Service, and an approval affirmatively authorizes the diversion of water.

For SUPs, as explained above, Forest Service regulations lay out a process for receiving, reviewing, and approving or denying SUP applications. *See* 36 C.F.R. § 251.54. An individual or entity proposing to occupy and use National Forest lands is required to contact the Forest Service as early as possible and must file a proposal in writing. *Id.* § 251.54(a) & (b). After evaluating the application and "other information such as environmental findings," the Forest Service "shall decide whether to approve the proposed use." *Id.* § 251.54(g)(4). "Rights or privileges to occupy and use National Forest System lands under this subpart are conveyed only through issuance of a special use authorization." *Id.* § 251.54(c) (emphasis added). Thus, reviewing a SUP application, deciding whether to approve it, and approving it is the kind of affirmative authorization of a water diversion that satisfies the first prong of *Karuk Tribe*.

Approving permanent easements under the Colorado Ditch Bill—DBEs—is also affirmative agency approval under *Karuk Tribe*. Unlike a SUP, which the Forest Service has discretion to deny, the Forest Service is required to approve a qualifying DBE application under 43 U.S.C. § 1761(c). Nevertheless, authorization of a DBE is not automatic; like with a SUP, the Forest Service must receive, review, and approve an application before a DBE is granted. The Colorado Ditch Bill Act expressly requires an "application," *id.,* and repeatedly states that DBEs are "issued." *Id.* §§ 1761(c)(2)(B), (2)(C), (3)(A), (3)(C) & (3)(D). As explained above, there are several prerequisite conditions to qualify for a DBE that the Forest Service must evaluate, including that the diversion on National Forest land was "constructed and in operation or placed into operation prior to October 21, 1976"; an application for a DBE was submitted by December 31, 1996; and the applicant has a valid state water right and has used the diversion continuously for irrigation or livestock watering. *Id.* § 1761(c)(1).

Thus, issuance of a DBE is not automatic; the Forest Service must affirmatively approve a DBE. This is further supported by the current Forest Service Manual (revised Oct. 2018) sections on DBEs, which set forth a process for the Forest Service to receive applications for DBEs, review the applications, and either issue the DBE, issue it with conditions, or deny it. *See* Hurlbutt Dec., Ex. 9, pp. 90–93 (FSM 2729.16a, d, e & f). This is also supported record, in which the Forest Service consistently admits that, despite having applications for DBEs and SUPs on file for all of them, the 23 Sawtooth diversions are not currently authorized and will not be until the Forest Service takes action. *See* SOF, ¶¶ 7–9, 13, 20–21 & 24.

2. Issuing a SUP or DBE Satisfies the Second Prong Of *Karuk Tribe*.

Next, under *Karuk Tribe*'s test for ESA "agency action," courts consider whether the agency has "some discretion" to influence the action to benefit listed species. 681 F.3d at 1021. *See also Nat. Resources Defense Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) ("*NRDC"*)

(holding second prong satisfied where agency retained discretion to renegotiate contract terms to benefit species). The court in *Swan View Coalition v. Weber*, 52 F.Supp.3d 1133 (D. Montana 2014), described the second prong as follows:

> Recently, the Ninth Circuit reasserted the *low standard* for discretionary control in assessing "agency action," holding that "so long as a federal agency retains '*some discretion*' to take action to benefit a protected species," Section 7(a)(2)'s consultation requirement is triggered. [*NRDC*], 749 F.3d at 784. Moreover, "[t]he agency lacks discretion only if another legal obligation makes it impossible for the agency to exercise discretion for the protected species' benefit. *Id.*

Id. at 1142 (emphases added). When acting on a SUP or DBE application, the Forest Service retains some discretion to benefit listed fish and, thus, meets this low standard.

For SUPs, the Forest Service has significant discretion to deny or condition a SUP to benefit ESA-listed species. In fact, the Forest Service is required by FLPMA, the Organic Act, and NFMA to protect fish and the environment when issuing a SUP. Based on the Forest Service's authority and obligation to protect fish and the environment under these statutes, the Ninth Circuit has ruled that "the Forest Service ha[s] the authority to restrict the use of rights-of-way to protect endangered fish" when issuing SUPs for water diversions on National Forest lands. *County of Okanogan v. NMFS*, 347 F.3d 1081, 1085 (9th Cir. 2003).

In *County of Okanogan*, the Forest Service prepared BAs and initiated formal consultation with NMFS and FWS before issuing SUPs for two irrigation diversion ditches on National Forest land diverting water from the Chewuch River with listed fish species. *Id.* at 1083. NMFS issued BiOps and recommended increasing water flows and other measures to protect the fish and fish habitat from each diversion. *Id.* at 1083–84. Accordingly, the Forest Service conditioned the SUPs to require instream flows be measured and that the ditches be lined. *Id.* at 1084. The Ninth Circuit rejected arguments that the Forest Service lacked authority

to restrict the use of ditches to maintain instream flow levels to protect fish under the ESA, and that such conditions deny water uses of their vested water rights under state law. *Id.* at 1084–85.

Thus, based on the Forest Service's substantial statutory authority to protect fish and the environment under the Organic Act, NMFA, and FLPMA, and as confirmed by the Ninth Circuit in *County of Okanogan*, the Forest Service retains authority to condition SUPs to benefit listed fish on the Sawtooth Valley diversions, satisfying the second prong from *Karuk Tribe*.

For DBEs, while the Forest Service lacks the discretion to deny a qualifying DBE application, the Forest Service nevertheless retains discretion to condition its approval of a DBE to benefit listed fish. The Colorado Ditch Bill Act states that, in amending FLPMA to allow for DBEs, it did not "diminish any such power or authority of [the Secretary of the Interior] under applicable law," and that "[e]xcept as otherwise provided in this subsection, all rights-of-way issued pursuant to this subsection are subject to all conditions and requirements of [FLPMA]." 43 U.S.C. § 1761(c)(3)(B)–(C). Thus, like SUPs, DBEs must comply with FLPMA, and FLPMA requires the Forest Service to include terms and conditions to "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. § 1765(a). *See also* 36 C.F.R. § 251.56(a)(1)(i) (same). FLPMA and Forest Service regulations also expressly vest the agency with discretion to include other terms and conditions deemed necessary to minimize environmental damage and protect the public interest. 43 U.S.C. § 1765(b); 36 C.F.R. § 251.56(a)(1)(ii).

The Forest Service itself recognizes that DBEs may contain such conditions. The current Forest Service Manual for special uses (Oct. 1, 2018) explains that, while granting these easements "is not discretionary and, therefore, does not constitute a Federal action subject to analysis or review [under NEPA] . . . [c]onditions of the grant, including operations and

maintenance activities [], may require environmental analysis and review…." Hurlbutt Decl., Ex. 9, p. 93 (FSM 2729.16f). The Forest Service Manual also prescribes operation and maintenance plans for diversions, including: "The plan should describe how facilities will be operated and maintained to prevent unacceptable damage to National Forest system lands and resources." *Id.* at 95 (FSM 2729.16k). In the Sawtooth NF, the Forest Service has planned on imposing necessary conditions through DBE operation and maintenance plans. *See*, *e.g.*, AR000416. And as explained above, in the neighboring Salmon-Challis NF, the Forest Service completed consultation in numerous watersheds, which identified conditions required to be included in any approvals to protect fish. *See* Hurlbutt Decl., Exs. 10–13. The Forest Service, thus, recognizes it can impose conditions on operation and maintenance of diversions in a DBE, including terms needed to comply with the ESA.

In addition to the laws and regulations discussed above, the Sawtooth Forest Plan includes many provisions to protect fish and streams, including specific provisions to protect fish from new and existing water diversions. *See*, *e.g.*, Hurlbutt Decl., Ex. 14, pp. 11 (binding standard "TEST07") & 22 (binding standard "SWST05"). Within the Upper Salmon area of the Sawtooth NF, which includes the Sawtooth Valley, the Forest Plan includes additional provisions to protect fish and streams, including specifically from diversions. *See*, *e.g.*, Hurlbutt Decl., Ex. 15, p. 13 (Objective 0243 directing the Forest Service to "[r]emove human-caused migration barriers and resolve instream flow and habitat quality conflicts, primarily related to the numerous irrigation diversions to assist in the restoration of depressed populations and degraded fish habitat for listed species" and identifying Fourth of July and Champion watersheds as priorities). *Id.* at 13. Under NFMA, Forest Service approval of SUPs or DBEs must be consistent with these Sawtooth Forest Plan requirements. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e).

The SNRA Act, 16 U.S.C. § 460aa *et seq.*, gives the Forest Service additional authorities and duties to protect fish and fish habitat in the Sawtooth Valley. The SNRA was established "to assure the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildlife values and to provide for the enhancement of the recreational values associated therewith." 16 U.S.C. § 460aa(a). Under the SNRA Act, the Forest Service "shall administer" the SNRA in accordance with laws, rules, and regulations governing national forests in such a manner as will "best provide" for the "protection and conservation of salmon and other fisheries," as well as for the "management, utilization, and disposal of natural resources on federally owned lands" but only "insofar as their utilization will not substantially impair the purposes for which the recreation area is established." 16 U.S.C. § 460aa-1(a).

In summary, the Forest Service has substantial discretion to benefit listed fish by denying a SUP application or imposing conditions on it, satisfying the second prong from *Karuk Tribe*. And for DBEs, while the Forest Service lacks discretion to deny a qualifying DBE application, it still retains discretion—and multiple obligations—to condition the DBE to benefit listed fish, which satisfies the "low standard" of discretionary control.

B. Authorizing Each Sawtooth Valley Diversion "May Affect" ESA-Listed Fish or Their Habitat.

Where the two prongs from *Karuk Tribe* are met, ESA Section 7 consultation is required if the agency action "may affect" listed fish or their habitat. *Karuk Tribe*, 681 F.3d at 1027. The "may affect" threshold is very low and includes "[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character." *Id.* "An agency may avoid the consultation requirement only if it determines that its action will have 'no effect' on a listed species or critical habitat." *Id.* "[A]ctions that have any chance of affecting listed species or critical habitat—even

if it is later determined that the actions are 'not likely' to do so—require at least some consultation under the ESA." *Id.*

As far back as 1995, the Sawtooth National Forest's hydrologist and anadromous fish program coordinator Mark Moulton found that "[w]ater withdrawal, and the necessary diversion facilities, are believed to be, by far, the most significant effect on designated critical habitat within the [S]NRA." AR00256. Further, in the 2001 Sawtooth Valley All Aquatics BA, the Forest Service determined that every diversion at issue here "may affect" at least one listed fish species or its critical habitat, and that 21 of the 23 diversions were "likely to adversely affect" at least one fish species and its habitat. *See* AR000930–31. These impacts greatly exceed the "may affect" threshold and confirm that ESA consultation is required here.

Since the Forest Service made its "affects" findings in 2001, only 4 of the 23 Sawtooth diversions have been upgraded or improved in any way. *See* SOF, ¶ 25. Therefore, 19 diversions continue to operate as they did before and are expected to have similar adverse affects to what they did in 2001. Even the 4 diversions that were improved since 2001 surely still meet the low threshold of "may affect". Since 2001, two diversions on Champion Creek (CHC4 and CHC7) were consolidated and screened, and two others (S40 and CHC6) were improved to remove fish passage barriers on the mainstem Salmon and Champion Creek. *Id.* However, even for diversions with fish screens and with structures that do not block fish passage, the Forest Service cannot plausibly claim "no effect" for a diversion where listed fish or their habitat may be present. For example, NMFS found in its 2015 recovery plan that screened diversions on the Salmon River may still entrain fish into ditches or cause significant bypass mortality and contribute to elevated water temperatures and sediment pollution. SOF, ¶ 2. And listed fish are present in both the Salmon River and Champion Creek. *See*, *e.g.*, AR001636–38.

Thus, there is no reasonable dispute here that all 23 of the Sawtooth Valley diversions meet the low "may affect" threshold requiring ESA consultation.

C. The ESA and ESA Regulations Require Consulting Before Engaging in Agency Action and At the Earliest Possible Time.

As explained above, the Ninth Circuit has emphasized that ESA Section 7 imposes the duty to consult "*before* engaging in any discretionary action that may affect a listed species or critical habitat." *Karuk Tribe*, 681 F.3d at 1020 (emphasis added). "The purpose of consultation is to obtain the expert opinion of wildlife agencies to determine whether the action is likely to jeopardize a listed species or adversely modify its critical habitat and, if so, to identify reasonable and prudent alternatives that will avoid the action's unfavorable impacts." *Id.* "The consultation requirement reflects 'a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies.'" *Id.* at 1020 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 185 (1978)).

The ESA's implementing regulations require that: "Each Federal agency *shall* review its actions at the *earliest possible time* to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a) (emphases added). If the agency makes a may affect determination, then "formal consultation is *required*," and a "written request to initiate formal consultation *shall* be submitted." *Id* § 402.14(a) & (c) (emphases added). The ESA regulations also provide that the agency seeking consultation "shall provide . . . the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects." *Id* § 402.14(d).

The Forest Service has known since at least 1994 that it needs to properly authorize the 23 Sawtooth Valley diversions and conduct ESA consultation before doing so. *See*, *e.g.*, SOF, ¶¶ 6, 8 & 10. And since 1997, the Forest Service has had DBE and SUP applications on file for

each diversion. SOF, ¶ 11. In 2001, the Forest Service even prepared the Sawtooth Valley Aquatics BA and tried—unsuccessfully—to initiate consultation with NMFS and FWS so it could issue interim SUPs to each diversion. *See* SOF, ¶ 18. Since 2001, the Forest Service continued gathering information it could use to initiate consultation, including investigating all the diversions in 2006. *See* SOF, ¶ 22. Also since 2001, the DBE and SUP applications from the 1990s are still on file and pending. *See* SOF, ¶ 24; AR001630.

Whatever the earliest possible time may be, we are clearly now well beyond that point in time; yet, the Forest Service has failed to initiate formal consultation in violation of its duty to consult under ESA Section 7(a)(2) and the ESA regulations at 50 C.F.R. § 402.14. Until it completes ESA consultation, the Forest Service cannot proceed to properly authorize the diversions through SUPs or DBEs, since consultation is necessary to determine the impacts of the diversions and identify measures—such as those adopted on the Salmon-Challis NF—to protect the listed fish and avoid or mitigate adverse impacts of the diversions. Unless the Court intervenes now and orders the Forest Service to consult, the agency will continue putting off ESA consultation and acting on the pending applications. The Court should, therefore, grant ICL's First Claim.

II. THE FOREST SERVICE'S DELAY IN CONSULTING AND AUTHORIZING THE DIVERSIONS IS UNREASONABLE UNDER THE APA.

By failing to complete its ESA consultation for the Sawtooth Valley diversions for over 20 years, and counting, the Forest Service is also violating the APA under ICL's Third Claim. The APA imposes a duty on federal agencies to complete the matters presented to them within a reasonable time, 5 U.S.C. § 555(b), and empowers federal courts to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

"[A] claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed

to take a *discrete* agency action that it is *required* to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("*SUWA*") (emphasis in original). *See also Vietnam Veterans of Am. v. Cent. Intelligence Agency*, 811 F.3d 1068 (9th Cir. 2016) (affirming district court order to compel discrete, required agency action under APA §706(1) to notify and provide medical care to veterans). Courts use the so-called "*TRAC* factors" to determine whether a discrete, required agency action has been unreasonably delayed, following *Telecommunications Research and Action Center v. Federal Communications Commission*, 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"). *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, n.11 (9th Cir. 2002) (*TRAC* factors apply where there is no firm statutory deadline); *In re Pesticide Action Network.*, 798 F.3d 809, 813–14 (9th Cir. 2015) (applying *TRAC* factors to 706(1) claim and finding EPA's 8-year delay in responding to rulemaking petition unreasonable).

As set forth below, initiating the Sawtooth Valley diversions consultation is a discrete, required action under *SUWA*, and the Forest Service's delay is unreasonable under the *TRAC* factors. Thus, the Court should grant summary judgment on ICL's Third Claim.

A. Consulting Over the Diversions Is "Discrete" Action Under *SUWA*.

The first prong from *SUWA* requires that the agency action to be compelled be a discrete agency action. 542 U.S. at 64. The discrete action limitation prohibits plaintiffs from bringing "broad programmatic attacks" requiring "pervasive oversight by federal courts," rather than challenges to specific agency actions. *Id.* at 64, 67.

Preparing an adequate BA and properly submitting it to NMFS and FWS to initiate Section 7 consultation on the 23 diversions is a discrete agency action, not a general or broad action like the action at issue in *SUWA*. Consultation has a beginning and end, and ESA regulations and guidance spell out step-by-step how to consult. *See* 50 C.F.R. § 402.01–402.08;

Hurlbutt Decl., Ex. 8 (FWS & NMFS *Endangered Species Act Consultation Handbook*). Furthermore, in response to the Forest Service's attempt to initiate consultation in 2001, NMFS identified specific information the Forest Service needed to gather and submit to properly initiate consultation. Confirming that consultation is a discrete action, on the neighboring Salmon-Challis NF, the Forest Service already initiated and completed many watershed-level diversion consultations like the one at issue here. *See*, *e.g.*, Hurlbutt Decl., Exs. 10 & 11.

Thus, ICL is not mounting a broad programmatic attack under *SUWA*, but rather seeks to compel the Forest Service to perform a discrete action it has failed to take.

B. Consulting Over the Diversions Is "Required" Action Under *SUWA*.

The Forest Service's failure to consult also satisfies the second prong from *SUWA*: the agency must be "required" to take the action at issue. In *SUWA*, the Supreme Court explained that required actions include actions mandated by statute and by agency rules with the force of law. 542 U.S. at 65. That is the case here.

As already explained, the ESA and its implementing regulations require the Forest Service to consult before it can authorize the diversions and at the earliest possible time. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. The Colorado Ditch Bill requires the Forest Service to issue DBEs in response to timely applications for qualifying diversions. 43 U.S.C. § 1761(c)(1). Special use regulations require the Forest Service to act on SUP applications by either approving, approving with modifications, or disapproving. 36 C.F.R. § 251.54(g)(4). The Forest Service is, thus, required to act on the pending applications for each Sawtooth Valley diversion, and since consultation must occur *before* the Forest Service can act on the applications, consultation itself is also required action under *SUWA*.

Furthermore, without consulting while the diversions continue operating year after year, the Forest Service is unable to fulfill its other duties under the ESA, Organic Act, FLPMA,

NFMA, the Sawtooth Forest Plan, and SNRA Act to protect listed fish and their habitat. For example, the ESA and ESA regulations not only require consultation, but they impose substantive duties on the Forest Service not jeopardize listed species, not to destroy or adversely modify their critical habitat, and not to cause the unauthorized take of listed species. 16 U.S.C. § 1536(a)(2) & 1538(a)(1)(B); 50 C.F.R. § 17.21(c). Consultation is the process through which the Services identify terms and conditions the Forest Service must impose on the SUPs and DBEs to avoid jeopardy and adverse modification, and to reduce and authorize any incidental take. Initiation of consultation is thus required for the Forest Service to meet these substantive ESA mandates, and similar mandates under the other laws mentioned above.

Another basis for finding agency action here is the Forest Service's own statements and actions committing to consult on the Sawtooth Valley diversions. In *SUWA*, the Supreme Court recognized that language in agency documents can create binding commitments that satisfy *SUWA*'s required action prong. *Id.* at 71. In *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011), the Ninth Circuit held that an agency can create required action under *SUWA* by making a "binding commitment" to take an action pursuant to its statutory authority, such as through the agency's own policies and plans. *Shinseki* explained:

> As the [*SUWA*] Court recognized . . . agencies may be required to take actions not only by Congress, but also by themselves. Agency action "demanded by law . . . includes, of course, agency regulations that have the force of law." [*SUWA*, 542 U.S. at 65]. Even a less formal agency "plan" may "itself create[] a commitment binding on the agency," if there is "clear indication of binding commitment in the terms of the plan." [*Id.* at 69]. Thus we have held that "agencies may be required to abide by certain internal policies," such as their own "internal procedures." *Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004).

Id. at 870.[5]

[5] The *Shinseki* decision was overturned on other grounds upon rehearing *en banc*, *see* 678 F.3d 1013 (9th Cir. 2012), but this analysis remains valid. Indeed, in *Alcaraz* (cited in the quote from *Shinseki* above), the Ninth Circuit held that, even though the Attorney General had discretionary

Here, throughout the record, the Forest Service repeatedly committed to consult over the Sawtooth Valley diversions. From 1995 to 2000, in the Sawtooth NF, the Forest Service inventoried diversions (including the Sawtooth Valley diversions), solicited DBE and SUP applications from diverters, and coordinated with regional and national offices to consult and act on the applications. *See* SOF, ¶¶ 8–13. In December 2000, in response to a notice of intent to sue for failing to consult, the Forest Service committed to consulting on the Sawtooth Valley diversions. AR000871. In 2001, the Forest Service repeatedly used words like "committed" and "commitment" to describe its plans internally and to other agencies to follow through on the consultation. *See* SOF, ¶ 15. Based on this commitment, the Forest Service prepared and submitted the Sawtooth Valley Aquatics BA to NMFS and FWS in 2001, stating that it was requesting initiation of consultation. AR000930–31; Hurlbutt Decl., Ex 4. These statements committing to consult, plus taking substantial steps toward consulting by preparing and submitting the BA, rise to the level of required action.

Under similar circumstances, the court in *Otter Project v. Salazar*, 712 F.Supp.2d 999 (N.D. Cal. 2010), found "required" agency action under *SUWA*. There, FWS had taken steps—including preparing several drafts of the action—that showed the agency made a commitment to take action (to make a "failure determination"). *Id.* at 1005–06. The court found the "act of engaging in the drafting process itself demonstrates FWS's own understanding that it was under a duty to make a failure determination." *Id.* at 1005. The court also found "on numerous occasions, FWS made public statements indicating its intent to complete the failure

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authority, not mandatory authority, under statute to "repaper" eligible aliens (to allow them to reapply for cancellation of deportation orders), the BIA may nevertheless be obligated to repaper the Alcarazes based on the agency's internal policy and practice. 384 F.3d at 1162. The Ninth Circuit in *Alcaraz* remanded for the district court to consider "whether various memoranda issued by the agency are sufficient to establish a policy to which the agency was bound." *Id.*

determination, which themselves may constitute commitments binding the agency to take further action," *id.*, including "public statements to the effect that the determination would be finalized in the near future." *Id.* at 1006.[6]

Similarly here, the Forest Service made repeated statements that it was committed to consulting, and the Forest Service drafted the Sawtooth Valley Aquatics BA and submitted it to FWS and NMFS requesting consultation, demonstrating the Forest Service's own understanding it was under a duty to consult.

Likewise, in *Biodiversity Legal Foundation v. Norton*, 285 F.Supp.2d 1 (D.D.C. 2003), plaintiffs alleged FWS committed unreasonable delay under APA § 706(1) by failing to revise a critical habitat designation for the endangered Cape Sable seaside sparrow. *Id.* at 2. The court found an enforceable duty under APA § 706(1) based on language in the sparrow recovery plan where FWS made a finding that the sparrow's critical habitat needed revision. *Id.* at 2–3. The court held that, while FWS would otherwise have discretion under the ESA whether to revise a critical habitat designation, the language in the recovery plan "can only be seen as a manifestation of FWS's intention finally to revise the critical habitat designation to help save this bird from its near-certain demise." *Id.* at 14.

[6] *Otter Project* is in accord with other district courts within the Ninth Circuit that have found, in dicta, that agency acts and statements can demonstrate a commitment rising to the level of required action under *SUWA*. In *Soda Mountain Wilderness Council v. Norton*, 424 F.Supp.2d 1241 (E.D. Cal. 2006), the court found that agency statements in the record of decision for a land use plan appeared to constitute a binding commitment under *SUWA*. Because the agency in *Soda Mountain* "went out of its way to make clear it was committing to a certain process," the court found that "withdrawing from that 'compact with the public' would appear to subject the agency to suit under § 706(1)." *Id.* at 1260. Similarly, in *Friends of Animals v. Sparks*, 200 F.Supp.3d 1114 (D. Mont. 2016), the court found a binding commitment to act that could satisfy *SUWA*'s required action prong where "BLM went out of its way to make clear it was committing to a certain process" in a record of decision and other agency documents. *Id.* at 1125.

Similarly here, even if the Forest Service initially had some discretion about when or whether to initiate consultation, the Forest Service's actions and statements, particularly in preparing the Sawtooth Valley Aquatics BA and submitting it to NMFS and FWS, can only be seen as a manifestation of its intent to consult and help protect ESA-listed fish from near-certain harm from the ongoing operation of the Sawtooth Valley diversions.

C. The Forest Service's Delay in Consulting Is Unreasonable.

Applying the *TRAC* factors, the Forest Service's delay in consulting is unreasonable. The six factors identified in *TRAC* for considering claims of unreasonable delay are:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed at which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d at 80. In *Center for Science in the Public Interest v. FDA*, 74 F.Supp.3d 295 (D.D.C. 2014), the court boiled down the *TRAC* factors to "three basic inquiries":

> First, is there a rhyme or reason—congressionally prescribed or otherwise—for [the agency's] delay (factors one and two)? Second, what are the consequences of delay if the Court does not compel the [agency] to act (factors three and five)? Finally, how might forcing the agency to act thwart its ability to address other priorities (factor four)?

74 F.Supp.3d at 300.

Under the first boiled-down *TRAC* factor, there is no "rhyme or reason" justifying the Forest Service's delay. The extreme length of the Forest Service's delay alone is unreasonable. "[A] reasonable time for agency action is typically counted in *weeks or months, not years*." *In re Am. Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004) (emphasis added), *citing Midwest Gas Users*

Ass'n v. FERC, 833 F.2d 341, 359 (D.C. Cir. 1987) ("a reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade") (quotation omitted). *See also The Fund for Animals v. Norton*, 294 F.Supp.2d 92, 113 (D.D.C. 2003) ("a *five-year* delay smacks of unreasonableness on its face") (emphasis in original).

Sockeye, Chinook salmon, steelhead, and bull trout were listed 1991, 1992, 1997, and 1998, respectively. SOF, ¶¶ 1, 3, 5. By 1995, the Forest Service identified existing water diversions throughout the SNRA and recognized various ways the diversions harm listed fish and habitat. *See* AR000256–58 (Moulton SNRA diversions memo). And by 1997, the Forest Service had received DBE and/or SUP applications for all the diversions, was actively preparing to complete consultation and act on the applications, and had estimated it could do so for all SNRA diversions—even the "most complex cases"—by 2000. *See* SOF, 9–11.

But after the Forest Service's unsuccessful attempt to initiate the Sawtooth Valley diversions consultation in 2001, the Forest Service has never had a reasonable timeframe in place. In 2004, Sawtooth NF staff were not sure whether they were supposed to move forward consulting and processing applications or whether they should "continue to hold for 'plan'." AR001061. By 2005, the Sawtooth NF had decided on a "[s]trategy" to "[w]ait to resubmit to consulting agencies until we get an NOI [(notice of intent to sue)]." AR001081.

It has been 27 years since sockeye were listed, 23 years since the Forest Service was well aware it needed to consult, and 21 years since 1997 when the Forest Service estimated it would complete consultations for even the most complex diversions within a few years. Twenty-plus years of delay by the Forest Service here is a far cry from weeks or months typical for reasonable agency action, extends way beyond a year or two which is "occasionally" reasonable, *see*

Midwest Gas Users Ass'n, 833 F.2d at 359, and is more than 4 times longer than a five-year delay that "smacks of unreasonableness on its face," *Fund for Animals*, 294 F.Supp.2d at 113.

The unreasonableness of the Forest Service's decades of delay is even more apparent since the ESA demands swift action to protect species from extinction. Again, the ESA's implementing regulations require agencies review their actions at the "earliest possible time" to determine whether formal consultation is required. 50 C.F.R. § 402.14(a). The regulations also call for formal consultation to "conclude within 90 days after its initiation" unless extended. *Id.* § 402.14(e). The Forest Service's delay is in no way reasonable in light of the ESA's goals.

Under the second boiled-down *TRAC* factor, the consequences of delay if the Court does not order the Forest Service to consult are significant, because the diversions will continue operating without important protections for fish. In 1995, the Sawtooth NF hydrologist and anadromous fish program coordinator listed multiple ways diversions harm listed fish and habitat, said that diversions are believed to be "by far, the most significant effect on designated critical habitat within the [S]NRA," and even worried that without addressing diversions the effects could be "catastrophic to aquatic ecosystems." *See* AR000256–58 (Moulton SNRA diversions memo).

In 2001, the Forest Service determined that 21 of the 23 Sawtooth Valley diversions were likely to adversely affect at least one listed fish species and its habitat. AR000941–42. In three watersheds in the Salmon-Challis NF, NMFS found water diversions were having such severe impacts that they would jeopardize the continued existence of Chinook salmon and/or steelhead if operations continued as is. Without the Court's interventions, diversions in the Sawtooth Valley will continue operating unchanged, taking a toll on listed fish.

Meanwhile, all 13 species of threatened and endangered Columbia and Snake River salmon and steelhead, including those at issue here, "remain in a precarious state." *National Wildlife Federation v. NMFS*, 184 F.Supp.3d 851, 879 (D. Oregon 2016). In its 2015 recovery plan, NMFS recognized sockeye remain at risk of extinction and will not be recovered until spawning fish return in "far greater numbers." Hurlbutt Decl., Ex. 1, p. 30. NMFS also recognized that climate change is expected to make the situation worse. *Id.* at 42. In its 2017 recovery plan, NMFS found the majority of Snake River Chinook salmon populations—including all eight populations in the Upper Salmon—"remain at high overall risk of extinction, with low probability of persistence within 100 years." Hurlbutt Decl., Ex. 2, pp. 111, 114.

Similar interests were at issue in *In re American Rivers*, where the court found unreasonable delay. 372 F.3d at 418–20. The plaintiffs petitioned the Federal Energy Regulatory Commission ("FERC") to take steps to protect threatened and endangered fish in the Snake River basin from the impacts of hydroelectric dams. *Id.* at 414. The court found FERC's 6-year delay in responding to plaintiffs' petition unreasonable, and ordered FERC to act within 45 days to end the agency's "marathon round of administrative keep-away." *Id.* at 414, 420. Here, the Forest Service is playing an even longer *ultramarathon* round of "keep away" and cannot be expected to consult any time soon without the Court's intervention.

Another consequence of continued delay is that the Forest Service is leaving itself and Sawtooth Valley water users exposed to liability for unauthorized take under ESA Section 9. Through consultation, NMFS and FWS can issue an incidental take statement to authorize take; but without consulting, there is no authorization for take that may be occurring. Also, without consulting, the Forest Service is unable to act on water users' pending applications for DBEs and SUPs. As a result, none of the diversions are authorized, and the diverters are unlawfully

occupying National Forest land. For all of the above reasons, the consequences of the Forest Service's delay are severe.

Under the third boiled-down *TRAC* factor, the Forest Service cannot claim ordering consultation will interfere with competing priorities. Whatever competing priorities it has, the Forest Service cannot reasonably claim that initiating the diversions consultation will cause much interference. The Forest Service has already done a lot of leg work necessary to consult, including preparing the Sawtooth Valley All Aquatics BA in 2001. *See* SOF, ¶¶ 17 & 18. After that, NMFS gave the Forest Service a list of specific information to gather to initiate consultation. AR000943–44. By 2005, the Forest Service admitted information needed to resume consultation was readily available. AR001081. And in January 2006, the Forest Service prepared the "Assessment of Diversion Related Structures within the [SNRA]", which included surveys of the Sawtooth Valley diversions and evaluations of fish issues. AR0001159–1206. Initiating and completing consultation, thus, should not appreciably interfere with other priorities.

Furthermore, protecting the Sawtooth Valley's iconic fish from the well-documented harm that water diversions cause should be one of the Forest Service's top priorities. Since 1995, the Forest Service recognized existing diversions as "by far, the most significant effect" on listed fish habitat in the SNRA and warned that without addressing diversions the Forest Service expects a "continued decline" in fish species with "catastrophic" effects. AR000256, AR000258. The Forest Service's failure to conduct such an important consultation cannot be squared with these statements or with the Forest Service's obligations to protect fish and streams under the ESA, Organic Act, FLPMA, NFMA, Sawtooth Forest Plan, and the SNRA Act. *See*

Fund for Animals, 294 F.Supp.2d at 114 (National Park Service's failure to act could not be squared with the statutory scheme requiring it to protect National Parks).

For these reasons, the Forest Service's delay is unreasonable in violation of the APA.

CONCLUSION

For the foregoing reasons, Plaintiff ICL respectfully prays that the Court grant summary judgment on its First and/or Third Claims for Relief, and proceed to address proper remedies.

Dated this 14th day of December, 2018.

Respectfully submitted,

/s/ Bryan Hurlbutt
Bryan Hurlbutt (ISB # 8501)
Laurence ("Laird") J. Lucas (ISB # 4733)
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
(208) 342-8286 (fax)
bhurlbutt@advocateswest.org
llucas@advocateswest.org

Attorneys for Plaintiff ICL