

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

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.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, by Defendant U.S. Forest Service for failing to complete mandatory consultations under Section 7 of the ESA regarding 23 surface water diversions and associated ditches and other facilities located, operated, and/or maintained on the Sawtooth National Forest and the adverse impacts these diversions have on salmon and steelhead in Idaho’s Sawtooth Valley.

2. The Sawtooth Valley includes the headwaters of the Salmon River and multiple upper Salmon River tributaries. These streams are home to important populations of sockeye salmon, Chinook salmon, steelhead, and bull trout. These “endangered” and “threatened” species and their habitat are protected under the ESA.

Water diversions and ditches can directly and indirectly injure, kill, and disrupt these fish and destroy and degrade their habitat. Water diversions can decrease water flows in rivers where fish spawn, rear, and migrate; block fish from passing up and down the rivers; and divert fish out of rivers.

3. Section 7 of the ESA requires federal agencies to consult with U.S Fish and Wildlife Service (FWS) and/or NOAA Fisheries (“NOAA”) (jointly, “Services”) over their actions as early as possible to ensure their actions will not jeopardize listed species or adversely modify their critical habitat. In 2001, the Forest Service prepared a Biological Assessment (BA) for the Sawtooth Valley and found that most of the 23 diversions at issue are “likely to adversely affect” one or more of these protected salmon and steelhead species and their habitat.

4. In an initial effort at Section 7 consultation, the Forest Service submitted the BA to NOAA and FWS. However, the Forest Service never completed consultation. More than 16 years later, the Forest Service continues to authorize these 23 diversions to be used, operated, and maintained without ESA consultation, even though sockeye salmon, Chinook salmon, steelhead, bull trout, and their habitat have been, are being, and will continue to be harmed by the diversions.

5. Plaintiff Idaho Conservation League (ICL) seeks relief against the Forest Service under the ESA’s citizen suit provision, 16 U.S.C. §1540(g), and/or the Administrative Procedure Act, 5 U.S.C. § 706(1), for the Forest Service’s ongoing violations of ESA Section 7 by continuing to authorize and/or reauthorize each of the 23 water diversions without fulfilling its mandatory duties to complete Section 7(a)(2) consultations and avoid any irreversible and irretrievable commitment of resources during the consultation process under Section 7(d).

6. To remedy these violations, ICL seeks relief ordering the Forest Service to promptly initiate, undertake, and complete ESA Section 7 consultations for the 23 diversions within firm Court-ordered deadlines, and to take appropriate precautions to protect the Sawtooth Valley's listed salmon and steelhead species and their habitat in the interim until the consultations are complete.

JURISDICTION AND VENUE

7. 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).

8. 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.

9. 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.

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

PARTIES

11. 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, and offices in Ketchum and Sandpoint, Idaho.

12. ICL’s mission is to protect Idaho’s clean water, clean air, healthy families, and unique way of life. ICL and its approximately 30,000 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, including in the Salmon River basin.

13. ICL board members, staff, and supporters use and enjoy the waters of the Sawtooth Valley and upper Salmon River basin, including those in the Sawtooth National Forest, 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 Sawtooth Valley and the upper Salmon River basin. ICL board members, staff, and supporters intend to continue using and enjoying waters and fish of the Sawtooth Valley and the Sawtooth National Forest at issue here.

14. These interests of ICL, its board and staff, and its supporters are directly affected by the Forest Service’s failure to conduct ESA consultations for the 23 diversions in the Sawtooth Valley. 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.

15. 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 Sawtooth National Forest in accordance and compliance with federal laws and regulations, including the ESA.

LEGAL BACKGROUND

A. The Endangered Species Act

16. The Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, is the nation's preeminent wildlife protection law. 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 conservation of such species. 16 U.S.C. § 1531(b).

17. 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 "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).

18. Section 7(a)(2) of the ESA 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 their critical habitat. 50 C.F.R. § 402.14. Agency action for purposes of Section 7(a)(2) includes federal agency authorization of private activities.

19. To fulfill Section 7(a)(2)’s mandate, the “action agency” must consult with NOAA and/or FWS if a proposed action “may affect” a listed species or its critical habitat. 16 U.S.C. § 1536; 50 C.F.R. § 402.14(a). The 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).

20. NOAA is responsible for consultation regarding anadromous fish species, including sockeye salmon, Chinook salmon, and steelhead. *See* 50 C.F.R. § 402.01. FWS is responsible for consultation for bull trout. *See id.* 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. 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 and FWS. 50 C.F.R. § 402.14(b).

21. During ESA consultation, the consulting Service (NOAA or FWS) must review all relevant information, evaluate the current status of the species or critical habitat, and evaluate the 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 Service must utilize the “best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. §402.14(d).

22. Informal consultation concludes with a Letter of Concurrence from the consulting Service. 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* FWS & NMFS, *Endangered Species Consultation Handbook* (1998), pp. 3–12.

23. 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 the species’ critical habitat. 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). Cumulative effects are those effects of future state or private activities that are reasonably certain to occur within the action area. *Id.*

24. 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 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).

25. Section 7(d) of the ESA provides that during the consultation process, the action agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action” which would have the effect of foreclosing the formulation of implementation of any reasonable and prudent alternative measures. 16 U.S.C. § 1536(d).

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

26. The Forest Service issues Special Use Permits and Ditch Bill Easements to authorize surface water diversions on National Forest lands.

27. 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).

28. Other statutes also give the Forest Service the authority and duty 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.”

29. 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. *County 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

A. ESA-Listed Fish in the Sawtooth National Forest

30. Chinook salmon, steelhead, and bull trout are species of fish listed as “threatened” under the Endangered Species Act. Sockeye salmon are listed as “endangered.” Each species and its habitat are found in the Sawtooth Valley and the Sawtooth National Forest.

Sockeye Salmon

31. Reports from the 1880s suggest that around 150,000 sockeye salmon historically ascended the Snake River to spawn in natural lakes. Historically, five lakes in the Stanley Basin, including four in the Sawtooth Valley, contained sockeye (Alturas, Pettit, Stanley, Yellowbelly, and Redfish). Today, the only extant sockeye population in the Snake River Basin is in Redfish Lake in the Sawtooth Valley and Sawtooth National

Forest. This population is supported by a captive brood stock program, but its numbers are still perilously low.

32. Snake River sockeye salmon were designated as “endangered” under the ESA in 1991. 56 Fed. Reg. 58619 (Nov. 20, 1991). Adult returns to Redfish Lake from 1955 to 1965 ranged from 11 to 4,361 fish. Despite ESA listing, from 1987 to 2008, only 18 natural origin sockeye returned to Redfish Lake, and only 345 captive brood program adults returned from 1999 to 2005.

33. Anadromous sockeye salmon returning to Redfish Lake travel a greater distance from the sea (approximately 900 miles) to a higher elevation (6,500 feet) than any other sockeye salmon population and are the southern-most population in the world. Adults enter the Columbia River in June and July and arrive at Redfish Lake in August and September. Spawning peaks in October, and fry emerge in late April and May and move to open waters of the lake to feed for 1 to 3 years before migrating to the ocean, leaving Redfish Lake in late April through May. Sockeye spend 2 to 3 years in the Pacific Ocean.

Chinook Salmon and Steelhead

34. 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.

35. 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.

36. As a result, NOAA Fisheries listed 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 listed 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.

37. 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 Sawtooth National Forest in the Sawtooth Valley. River reaches in the Sawtooth Valley and adjacent riparian zones are designated critical habitat for Chinook salmon and steelhead.

38. 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.

39. 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

40. The Columbia River bull trout (bull trout) also once thrived in the waters of the larger Columbia River Basin, but like salmon and steelhead, its populations have declined at an alarming rate. FWS listed 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).

41. 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 Sawtooth National Forest in the Upper Salmon River Basin. Many stream reaches in the Sawtooth National Forest 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.

B. Adverse Impacts of Surface Water Diversions on ESA-listed Fish

42. 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).

43. This is confirmed by the BA that the the Forest Service prepared for diversions in the Sawtooth Valley and submitted to NOAA and FWS in 2001, and is further confirmed by consultation documents prepared by the Forest Service, NOAA, and FWS for other diversions in the upper Salmon River basin located on the nearby Salmon-Challis National Forest.

44. Surface water diversions can harm sockeye salmon, 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.

45. 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.

46. 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.

47. 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.

48. 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.

C. The 2001 Biological Assessment

49. More than 16 years ago, the Forest Service began the process of consulting with NOAA Fisheries and FWS over the effects of ongoing Forest Service actions in the Sawtooth Valley on aquatic species, when it prepared the *Biological Assessment of Effects of Ongoing and Proposed Federal Actions on the Sawtooth Valley Subpopulation of listed Snake River Sockeye, Snake River Spring/Summer Chinook Salmon, Snake River Steelhead, and Columbia River Bull Trout* (hereafter the “Sawtooth Valley All Aquatics BA” or the “BA”). By letters dated May 31, 2001, the Forest Service submitted the BA to NOAA Fisheries and FWS, and requested initiation of ESA consultation with each agency for 26 ongoing federal actions in the Sawtooth Valley watershed that the Forest Service determined “may affect” the ESA-listed fish.

50. Two of the 26 federal actions identified in the Sawtooth Valley All Aquatics BA did not involve surface water diversions or ditches. Another of the 26 federal actions—the authorization of Pole Creek Diversion (PC7)—was recently permitted by the Forest Service through a separate process as part of a project to improve conditions on Pole Creek for fish, which included relocating the point of diversion, building a new diversion structure, and setting minimum stream flows. The other 23 federal actions—which are the subject of this Complaint—are proposals for the Forest Service to issue and/or reissue special use permits authorizing and/or reauthorizing the

maintenance and use of the following surface water diversions and ditches, as identified in the BA:

- Warm Creek Diversion (WMC1)
- Champion Creek Ditch (CHC3)
- Champion Creek Diversion (CHC4)
- Champion Creek Diversion (CHC5)
- Champion Creek Diversion (CHC6)
- Champion Creek Diversion (CHC7)
- Fourth of July Creek Ditch (FJC1)
- Fourth of July Creek Diversion (FJC3)
- Fisher Creek Diversion (FC0)
- Fisher Creek Injection (FC4)
- Salmon River Diversion (S39)
- Salmon River Diversion (S39A)
- Salmon River Diversion (S40)
- Salmon River Diversion (S41)
- Salmon River Diversion (S42)
- Salmon River Diversion (S43)
- Gold Creek Ditch (GOC0)
- Gold Creek Diversion (GOC2)
- Club Canyon Creek Injection (CCC2)
- Boundary Creek Diversion (BOC1)
- Cleveland Creek Diversion (CLC1)
- Grover Gulch Diversion (GRG1)
- Grover Gulch Injection (GRG2).

51. In the BA, the Forest Service determined that 21 of these 23 diversions and ditches are “likely to adversely affect” Chinook salmon, steelhead, and bull trout and their habitat. These “LAA” diversions and ditches are WMC1, CHC3, CHC4, CHC5, CHC6, CHC7, FJC1, FJC3, FC0, FC4, S40, S41, S42, S43, GOC0, GOC2, CCC2, BOC1, CLC1, GRG1, and GRG2. The Forest Service made the LAA findings because the listed fish use, or could use, the rivers and streams associated with each diversion and ditch, and because the existence and operation of the diversions and ditches reduce stream flows (fully drying up some streams during irrigation season), impede fish passage (sometimes completely blocking fish passage), and present entrainment risk at

unscreened diversions. The Forest Service determined that the other 2 diversions (S39 and S39A) “may affect” but are not likely to adversely affect Chinook salmon, steelhead, and bull trout.

52. With respect to sockeye salmon, the Forest Service determined that the 6 Salmon River diversions (S39, S39A, S40, S41, S42, and S43) “may affect” but are “not likely to adversely affect” the species. The Forest Service made no effect findings for sockeye for the rest of these 23 diversions and ditches.

53. In a response letter dated June 8, 2001, NOAA notified the Forest Service that the information provided in the Sawtooth Valley All Aquatics BA was insufficient to initiate formal consultation on the 21 LAA diversions and insufficient to support the Forest Service’s NLAA determination for the other 2 water diversions. NOAA notified the Forest Service of additional information needed to initiate consultation. ICL understands that the Forest Service never submitted that information, and has never completed consultation with NOAA or FWS for its authorizations and reauthorizations of these 23 diversions and ditches.

FIRST CLAIM FOR RELIEF:
Violations of Endangered Species Act § 7(a)(2)

54. Plaintiff realleges all preceding paragraphs.

55. 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.

56. By failing to complete ESA consultation over the 23 Sawtooth Valley diversions and ditches with NOAA and FWS, the Forest Service is in violation of Section 7(a)(2), and its implementing regulations, 50 C.F.R. Part 401.

57. The Forest Service's ongoing violations of ESA § 7(a)(2) constitute a failure to perform a mandatory duty which is subject to judicial review and entry of judicial relief under the ESA citizen suit provision, 16 U.S.C. § 1540(g).

WHEREFORE, Plaintiff prays for relief as set forth below.

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

58. Plaintiff realleges all preceding paragraphs.

59. 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). 16 U.S.C. § 1536(d).

60. The Forest Service initiated consultation for the 23 diversions in the Sawtooth National Forest through the 2001 BA thus triggering application of ESA Section 7(d), yet the Forest Service has failed to complete the ESA consultation. During the intervening 16 years (and counting), 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 each diversion prior to completing consultation, in violation of Section 7(d) of the ESA.

61. The Forest Service's ongoing violations of ESA § 7(d) constitute a failure to perform a mandatory duty which is subject to judicial review and entry of relief under the ESA citizen suit provision, 16 U.S.C. § 1540(g).

WHEREFORE, Plaintiff prays for relief as set forth below.

THIRD CLAIM FOR RELIEF:
Violations of APA Section 706(1)

62. Plaintiff realleges all preceding paragraphs.

63. 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).

64. Initiating and completing ESA Section 7 consultation for each of the 23 Sawtooth Valley diversions and ditches at issue here is a discrete agency action which the Forest Service is legally required to take. The Forest Service has unlawfully withheld such action and/or committed unreasonable delay by failing to complete the required ESA consultations, and thus is subject to judicial review and relief directing compliance pursuant to the APA, 5 U.S.C. § 706(1).

65. The Forest Service has no reasonable excuse for its delay of 16 years or more in initiating and completing ESA consultation. Furthermore, the consequences of the Forest Service's delay have been severe. Sockeye salmon remain on the brink of extinction, and Chinook salmon, steelhead, and bull trout are still threatened species which are failing to recover. Yet the Forest Service has continued to authorize diversions which the agency found likely to adversely impact these species and their habitat without the required protections of ESA consultation.

66. Plaintiff is injured and substantially prejudiced by the Forest Service's unlawful failure to act and/or unreasonable delay in not completing the ESA consultations that are required.

WHEREFORE, Plaintiff prays for relief as set forth below.

PRAYER FOR RELIEF

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

A. Order, declare, and adjudge that the Forest Service is in ongoing violation of ESA Sections 7(a)(2) and/or 7(d) in failing to initiate and complete consultation for each of the 23 diversions in the Sawtooth Valley, and/or that the Forest Service has 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);

B. Enter declaratory and/or injunctive relief ordering the Forest Service to promptly initiate the required ESA Section 7 consultation for each of the 23 Sawtooth Valley diversions and ditches identified herein, and establish firm Court-ordered dates for the Forest Service to complete such consultations;

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

D. 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

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

Dated this 29th day of January, 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 Idaho Conservation League