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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

SAVE THE BULL TROUT and ALLIANCE FOR)
THE WILD ROCKIES,)

Plaintiffs,)

vs.)

UNITED STATES FOREST SERVICE,)

Defendant.)

COMPLAINT

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1. This is a challenge to the U.S. Forest Service’s ongoing, unpermitted incidental take of bull trout each year via entrainment and suboptimal instream flow and thermal conditions for bull trout downstream from

the East Fork of Rock Creek diversion on the Beaverhead-Deerlodge National Forest.

2. Plaintiffs here request that the Court declare the Forest Service's allowance of unpermitted incidental take of bull trout violates Section 9 of the Endangered Species Act.

I. JURISDICTION

3. This action arises under the laws of the United States and involves the United States as a Defendant. Therefore, this Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 28 U.S.C. §§ 1331, 1346.
4. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs' members have been at the forefront of bull trout conservation for decades, and have fought against all odds, including immense political pressure and the vast resources of the federal government, to ensure the survival and recovery of bull trout under the Endangered Species Act. Plaintiff's members use and enjoy the area affected by the East Fork diversion for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Plaintiff's

members intend to continue to use and enjoy the area frequently and on an ongoing basis in the future.

5. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiffs' members have been and will be adversely affected and irreparably injured if Defendants' failure to comply with law. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under the ESA. The requested relief would redress these injuries and this Court has the authority to grant Plaintiffs' requested relief under 28 U.S.C. §§ 2201 & 2202, and 16 U.S.C. §1540(g).
6. Plaintiffs sent Defendants a 60-Day Notice of Intent to Sue for violations of the ESA and that 60-day notice period has expired. Thus this Court has jurisdiction to review Plaintiffs' claims.

II. VENUE

7. Venue in this case is proper under 28 U.S.C. §1391(e) and Local Rule 3.2. The East Fork diversion is located in the Missoula Division of the United States District Court for the District of Montana.

III. PARTIES

8. Save the Bull Trout is a non-profit public interest organization dedicated to ensuring the survival and recovery of bull trout. Its registered office is located in Missoula, Montana.
9. Alliance for the Wild Rockies is a tax-exempt, public interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and its naturally functioning ecosystems. Its registered office is located in Missoula, Montana. The Alliance has over 2,000 individual members, many of whom are located in Montana. Members of the Alliance work as fishing guides, outfitters, and researchers, who observe, enjoy, and appreciate Montana's native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future. Alliance's members' professional and recreational activities are directly affected by Defendants' failure to perform their lawful duty to protect bull trout from unpermitted take under the ESA. Alliance for the Wild Rockies brings this action on its own behalf and on behalf of its adversely affected members.
10. Defendant UNITED STATES FOREST SERVICE (USFS) is an administrative agency within the U.S. Department of Agriculture.

IV. FACTUAL ALLEGATIONS

11. The Montana Department of Natural Resources and Conservation (DNRC) owns a dam, diversion, canal, and reservoir on East Fork Rock Creek in the Beaverhead-Deerlodge National Forest.
12. The DNRC dam and diversion takes water from East Fork Rock Creek and diverts it to the Flint Creek drainage.
13. The DNRC has operated the dam and associated facilities since 1939 on a special use permit from Defendant USFS with no expiration date.
14. East Fork Rock Creek is designated bull trout critical habitat.
15. The dam and associated facilities entrain and kill ESA-listed bull trout.
16. On March 29, 2013 the US Fish and Wildlife Service released a Biological Opinion on the East Fork Rock Creek dam and infrastructure.
17. FWS identified several areas of concern to bull trout, including, inter alia, effective minimum pool height of the reservoir, flushing flows, instream flows and dewatering, entrainment in irrigation ditches, and degraded stream channels.
18. FWS issued an Incidental Take Statement for the fish screen project that required the Forest Service to assume and implement the terms

and conditions of the ITS in order to avoid §9 unauthorized take of the ESA-listed bull trout.

19. The Incidental Take Statement covered a two-year period for reconstruction of the dam and infrastructure.
20. The Forest Service subsequently issued a Decision Notice and Finding of No Significant Impact adopting the terms and conditions of the Biological Opinion.
21. The DN&FONSI provided that the Forest Service would engage in §7 consultation with FWS to address the impact to bull trout of the Montana DNRC's management of the reservoir to control water storage and the volume of water releases, the DNRC's management of diversion headgate to divert water to the Flint Creek Ditch, and the operation, evaluation, and maintenance of the fish screen.
22. On September 16, 2019, Plaintiffs sent a 60-Day Notice of Intent to Sue under the ESA's citizen suit provision, alleging violations of the ESA
23. On November 15, 2019, the Forest Service requested formal re-initiation of §7 consultation with FWS for the East Fork Rock Creek Reservoir and associated infrastructure and notified Plaintiffs of the request.

24. On January 27, 2020, Plaintiffs sent a follow-up 60-day notice under the ESA's citizen's suit provision, notifying the agencies that they had not completed consultation within 60 days as requested by Plaintiffs, and that the agencies remained out of compliance with the Incidental Take Statement issued on March 29, 2013, thus are responsible for §9 unauthorized take of the ESA-listed bull trout.
25. The DN&FONSI and terms of the incidental take statement provided, inter alia, that annual reports on the status of the ESA-listed bull trout and dam infrastructure would be issued. Such annual reports have not been issued on a regular basis.

V. CLAIMS FOR RELIEF

COUNT 1

The unpermitted incidental take of bull trout violates ESA §9

26. All previous paragraphs are incorporated by reference.
27. Bull trout were listed under the ESA in 1999. 64 FR 58910 (Nov. 1, 1999).

28. Pursuant to ESA §9, “it is unlawful for any person . . . to take any [listed] species within the United States” 16 USC §1538(a)(1)(B).
29. The ESA states: “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532 (19).
30. ESA regulations state: “Harass in the definition of ‘take’ in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.
31. ESA regulations state: “Harm in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.
32. However, ESA Section 10 states: “The Secretary may permit . . . any taking otherwise prohibited by section 1538(a)(1)(B) of this title if

such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. §1539 (a)(1)(B).

33. Section 10 further clarifies: “In connection with any action alleging a violation of section 1538 of this title, any person claiming the benefit of any exemption or permit under this chapter shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.” 16 U.S.C. § 1539 (g).
34. If the offending party is a federal agency, the permit for incidental take is usually issued as part of an “incidental take statement” under ESA Section 7, which “(i) specifies the impact of such incidental taking on the species, (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, . . . and (iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).” 16 U.S.C. § 1536 (b)(4).
35. The Forest Service does not have a current incidental take statement for the incidental take of ESA-listed bull trout entrained by the dam

and canal, and for suboptimal instream flow and thermal conditions for bull trout caused by the dam and associated infrastructure.

36. The Forest Service is not in compliance with the last issued incidental take statement for the ESA-listed bull trout entrained by the dam and canal, and for suboptimal instream flow and thermal conditions for bull trout caused by the dam and associated infrastructure.
37. Unless and until the Forest Service receives a current valid incidental take statement from the FWS, its unpermitted take of bull trout violates ESA §9.

VI. RELIEF REQUESTED

For all of the above-stated reasons, Plaintiffs request that this Court award the following relief:

- A. Declare that the Forest Service is violating the ESA;
- B. Order the Forest Service to obtain an incidental take statement;
- C. Order the Forest Service to immediately implement interim protective measures to protect bull trout until it receives an incidental take statement;
- D. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees under ESA; and

E. Grant Plaintiffs any such further relief as may be just, proper, and equitable.

Respectfully submitted this 4th day of June, 2021.

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