



ADVOCATES for the West
P.O. Box 1612 | Boise, ID 83701

March 13, 2017

Via Certified Mail (Return Receipt Requested)

Kit Mullen, Forest Supervisor
Sawtooth National Forest
2647 Kimberly Road East
Twin Falls, ID 83301-7976

Secretary
Department of Agriculture
1400 Independence Ave., SW
Washington, DC 20250

Chief
USDA Forest Service
1400 Independence Ave., SW
Washington, DC 20250

Re: Notice of Intent to Sue the Forest Service Over Violations of the Endangered Species Act for Authorizing Water Diversions in the Sawtooth Valley, Sawtooth National Forest

Dear Forest Supervisor Mullen; Chief of the Forest Service; and Secretary of the Department of Agriculture:

I write on behalf of my client, the Idaho Conservation League (ICL), to provide this notice of intent to sue the United States Forest Service under the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), for actions authorizing and/or reauthorizing the construction, use, operation, and maintenance of 23 surface water diversions and ditches in the Sawtooth National Forest in violation of the ESA. Unless the Forest Service takes the steps necessary to remedy these ESA violations, ICL intends to file suit in U.S. District Court following the expiration of the required 60-day notice period, seeking injunctive and declaratory relief.

The 23 diversions and ditches are located in and near streams in Idaho's Sawtooth Valley, part of the Upper Salmon River basin. The Sawtooth Valley contains some of the most important habitat in the United States for Chinook salmon, sockeye salmon, steelhead, and bull trout, each of which is a protected species under the ESA. Water diversions and ditches can directly and indirectly injure, kill, and disrupt these fish and destroy and degrade their habitat. ICL appreciates that the Forest Service has participated in projects over the years to reduce the adverse impacts caused by some water diversions in the Sawtooth Valley. However, there remain 23 diversions and ditches located in the Sawtooth Valley and in the Sawtooth National Forest which the Forest Service has determined may affect ESA-listed fish and their habitat and which the Forest Service continues to authorize and/or reauthorize through special use permits without addressing the adverse impacts.

As set forth below, the Forest Service actions authorizing and/or reauthorizing these 23 water diversions and ditches violate ESA Sections 7 and 9 by: (1) failing to consult with NOAA Fisheries (also known as National Marine Fisheries Services, or NMFS) and with the U.S. Fish and Wildlife Service (FWS) over the effects the diversions and ditches have on ESA-listed fish; (2) jeopardizing the continued existence of these species and/or adversely modifying their designated critical habitat; (3) causing an irreversible or irretrievable commitment of resources; and (4) causing unauthorized “take” by harassing, harming, and/or killing listed fish.

The Forest Service recently completed numerous watershed-level ESA consultations for authorizing existing surface water diversions located in the Upper Salmon River basin on the neighboring Salmon-Challis National Forests. Those consultations confirm that adverse impacts from surface water diversions to ESA-listed fish in the Upper Salmon River basin are very significant. There, the Forest Service, NOAA Fisheries, and FWS found many diversions were harming ESA-listed fish and adversely impacting their habitat. In three of the watersheds, NOAA Fisheries determined that the Forest Service’s authorization of diversions was likely to jeopardize the continued existence of some fish species. Accordingly, both NOAA and FWS imposed conditions on the Forest Service’s authorizations to avoid adverse impacts to fish, including requirements to monitor and report; to install head gates, measuring devices, and/or fish screens; and, in some instances, to meet minimum instream flows. NOAA and FWS also issued incidental take statements, shielding farmers, ranchers, and other diverters from liability for taking ESA-listed fish when properly operating diversions and ditches located on the Salmon-Challis National Forests.

Until the Sawtooth National Forest takes similar action, diversions and ditches on the Forest will continue to harm fish and fish habitat in the Sawtooth Valley, and the farmers, ranchers, and others who use these diversions and ditches will remain susceptible to potential ESA liability.

PARTY GIVING NOTICE

The name, address, and telephone number of the party providing this notice is:

Idaho Conservation League
Att’n: Marie Kellner
P.O. Box 844
Boise, ID 833701
208.345.6933 x32
mkellner@idahoconservation.org

The Idaho Conservation League is a non-profit conservation organization incorporated in Idaho with its main office in Boise. ICL’s mission is to protect and restore the water, wildlands, and wildlife of Idaho. ICL and its approximately 25,000 supporters are dedicated to protecting and conserving Idaho’s natural resources, including

protecting and improving the quality of Idaho's lakes, rivers, and streams and the strength of native fish populations.

ICL, as an organization and on behalf of its staff and supporters, is greatly concerned with the health of Chinook salmon, sockeye salmon, steelhead, and bull trout and their habitat in the Upper Salmon River basin, the Sawtooth Valley, and the Sawtooth National Forest. ICL has expended and continues to expend organizational resources on public education, outreach, advocacy, and litigation to protect and restore fish habitat in the Upper Salmon River basin. ICL staff and members regularly visit, use, and enjoy the Sawtooth Valley watershed, Upper Salmon River basin, and Sawtooth National Forest for many professional, recreational, aesthetic, and other purposes. ICL staff and members derive benefits from these fish and their habitat. These interests of ICL, its staff, and its supporters have been, are being, and will continue to be irreparably injured by the Forest Service's failures to comply with the ESA.

The attorney representing ICL in this notice is:

Bryan Hurlbutt, Staff Attorney
Advocates for the West
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LEGAL BACKGROUND

The Endangered Species Act

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).

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).

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. *See, e.g., Wash. Toxics Coal. v. Envtl. Prot. Agency*, 413 F.3d 1024, 1031–33 (9th Cir. 2005) (agency approval and registration of pesticides); *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (agency issuance of permits allowing fishing on the high seas); *County of Okanogan v. Nat’l Marine Fisheries Serv.*, 347 F.3d 1081 (9th Cir. 2003) (Forest Service special use permit for irrigation diversion on National Forest).

To fulfill Section 7(a)(2)’s mandate, the “action agency” must consult with NOAA Fisheries 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).

NOAA Fisheries 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 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).

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

Informal consultation concludes with a Letter of Concurrence from the consulting agency. 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), p. 3–12.

Formal consultation results in a Biological Opinion (BiOp) from the consulting agency. 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.*

If the consulting agency 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).

Congress established the consultation process “to ensure compliance with the [ESA’s] substantive provisions.” *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). “If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA’s substantive provisions will not result.” *Id.*

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). Congress enacted Section 7(d) “to prevent Federal agencies from ‘streamrolling’ activity in order to secure completion of the projects regardless of their impact on endangered species.” *Pac. Rivers Council v. Thomas*, 936 F.Supp. 738, 745 (D. Idaho 1996) (quotation omitted).

Section 9 of the ESA and implementing regulations further prohibit the unauthorized “take” of listed endangered species, including the Snake River sockeye salmon at issue here. *See* 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 17.21(c). Under Section 4(d) of the ESA, 16 U.S.C. § 1533(d), NOAA and the FWS extended the “take” prohibition to Snake River spring/summer Chinook salmon, Snake River steelhead, and bull trout, thus prohibiting “take” of these threatened species as unlawful. 58 Fed. Reg. 68543 (Dec. 28, 1993); 65 Fed. Reg. 42422 (July 10, 2000); 50 C.F.R. §§ 17.31(a) and 17.44(w). “Take” is defined broadly to include harassing, harming, wounding, killing, trapping, capturing, or collecting a listed species either directly or by degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. § 1532(19).

An exception to Section 9’s take prohibition is that a person may take a listed species in accordance with an Incidental Take Statement (ITS) issued by NOAA or FWS. 16 U.S.C. § 1536(b)(4). If a person obtains an ITS, they must follow the terms and conditions of the ITS to be exempt from liability for take. *Id.* § 1536(o)(2). The BiOp should include an ITS if take may occur. 50 C.F.R. § 402.14(g)(7). The ITS (1) specifies the amount or extent of the impact on the species of any incidental taking, (2) specifies Reasonable and Prudent Measures to minimize such impact, and (3) sets forth the Terms

and Conditions that must be complied with to implement the Reasonable and Prudent Measures. *Id.* at §§ 402.14(i)(1)(i), (ii), (iv). If the amount or extent of incidental taking specified in the ITS is exceeded during the course of the action, the action agency must immediately reinitiate consultation. *Id.* at §§ 402.14(i)(4), 402.16(a).

FACTUAL BACKGROUND

Adverse Impacts of Water Diversions to Fish & Fish Habitat

Surface water diversions harm fish and fish habitat in a variety of ways. For example, diversions reduce water flow in streams and can disconnect sections of a stream. Reduced flow 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. 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.

Diversions also 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. 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. Relatedly, diversions reduce the height of the water table in stream banks, which reduces plant biomass available for insects, reducing food for fish. This reduces fish growth rates.

Diversions also divert stream channel flow into a ditch or canal, which can divert or entrain fish into diversion channels, and trap and strand fish in inhospitable environments.

Additionally, diversions require the placement and maintenance of dam material in the stream channel, which creates physical barriers to fish movement, stirs sediment, and impacts streambeds. Physical barriers to fish passage block fish from accessing the waterways they need in order to survive and reproduce. Sediment and streambed impacts of dam installation and maintenance 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.

ESA-Listed Fish in the Sawtooth Valley, Sawtooth National Forest

Threatened and endangered sockeye salmon, Chinook salmon, steelhead trout, and bull trout inhabit the Upper Salmon River basin, which includes the Sawtooth Valley watershed. The Sawtooth Valley watershed includes the headwaters of the Salmon River, and portions of the watershed are within the Sawtooth National Forest.

Sockeye Salmon: 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.

The 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.

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: Historically, the Salmon River system may have supported more than 40% of the total return of spring and summer Chinook salmon to the Columbia River system. However, annual returns of adult Chinook to the Snake River tributaries have dropped from estimates of more than 1.5 million historically, to roughly 100,000 by the late 1960s, to a low of 1,797 in 1995.

The Snake River spring/summer Chinook salmon was listed as a “threatened” species under the ESA in 1992. 57 Fed. Reg. 14653 (Apr. 22, 1992). NMFS designated critical habitat for Chinook salmon in 1993, and revised that designation in 1999. Despite receiving ESA protection over 20 years ago, Chinook abundance has remained extremely low, and today, all drainages in the Upper Salmon River produce very small populations below the minimum abundance levels for population viability set by NMFS.

Adult Chinook salmon enter the Columbia River on their upstream spawning migration from February through March and arrive at their natal tributaries, which include streams in the Upper Salmon Basin, from June through August. Spawning occurs in August and September. Juveniles rear in their natal streams during their first summer before beginning their migration to the ocean the following spring, where they rear for 2 to 3 years.

Steelhead: Historically, Snake River Basin steelhead trout supported more than 55% of total steelhead production in the Columbia River Basin. Estimates of abundance prior to construction of the Ice Harbor Dam in 1962 are not available, but at that time, close to 116,000 wild and hatchery steelhead returned to the Snake River Basin.

Abundance dropped quickly in subsequent years as more dams were built on the Snake River.

The Snake River Basin steelhead was listed as a “threatened” species under the ESA in 1997. 62 Fed. Reg. 43937 (Aug. 18, 1997). NFMS designated critical habitat for steelhead in 2005. Despite ESA listing, production of natural steelhead is now substantially below historic levels and none of the populations in the Salmon River MPG currently meet viability criteria.

Adult steelhead return from the ocean to main stem rivers from late summer through fall, where they hold for several months before moving upstream into smaller tributaries. The majority of adults disperse into tributaries from March through May, and spawning begins shortly after. Juveniles emerge from redds in 4 to 8 weeks, hold in slow and shallow areas, and progressively move toward deeper water as they grow in size. Juveniles typically reside in fresh water for 2 to 3 years, and smolts in the Snake River Basin migrate downstream during spring runoff from March to mid-June.

Bull Trout: The Columbia River bull trout also once thrived in the waters of the larger Columbia River Basin, but like salmon and steelhead, their populations have declined at an alarming rate. Bull trout was listed as a “threatened” species under the ESA in 1998. 63 Fed. Reg. 31647 (Jun. 10, 1998). FWS designated critical habitat for bull trout in 2010. 75 Fed. Reg. 63897 (Oct. 18, 2010).

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 species. Bull trout migrate, spawn, and rear in streams in the Sawtooth National Forest in the Upper Salmon River Basin. Many streams 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.

The Forest Service’s Incomplete Efforts to Consult Over 23 Existing Diversions and Ditches That Impact Fish and Fish Habitat in the Sawtooth Valley

More than 15 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. The Forest Service 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”). And 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 ESA-listed fish.

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 notice letter—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)

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 these 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 streamflows (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.

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.

In a response letter dated June 8, 2001, NOAA Fisheries 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 Fisheries 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 Fisheries or FWS for its authorizations and reauthorizations of these 23 diversions and ditches.

FOREST SERVICE VIOLATIONS OF THE ESA

Violations of ESA Section 7(a)(2) for Failure to Consult

The Forest Service has authorized and/or reauthorized, and continues and proposes to authorize and/or reauthorize, the following 23 surface water diversions and ditches in the Sawtooth Valley and the Sawtooth National Forest through special use permits but has failed to complete mandatory Section 7 ESA consultations with NOAA Fisheries and with FWS:

- 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 (GC2)
- Club Canyon Road Injection (CCC2)
- Boundary Creek Diversion (BOC1)
- Cleveland Creek Diversion (CLC1)
- Grover Gulch Diversion (GRG1)
- Grover Gulch Injection (GRG2)

The authorization or reauthorization of each diversion is Forest Service action that "may affect" sockeye salmon, Chinook salmon, steelhead, and/or bull trout; therefore consultations with NOAA Fisheries and with FWS are required. *See* 16 U.S.C. § 1536; 50 C.F.R. § 402.14(a). Because the Forest Service has failed to consult while continuing to authorize and/or reauthorize these surface water diversions, the Forest Service is in violation of Section 7(a)(2) of the ESA. 16 U.S.C. § 1536(a)(2).

Violations of ESA Section 7(a)(2) for Jeopardy and Adverse Modification

Section 7(a)(2) of the ESA imposes a substantive duty on 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). By authorizing and/or reauthorizing the diversions identified above without consulting, the Forest Service has failed to insure against jeopardy of sockeye salmon, Chinook salmon, steelhead, and bull trout, and has failed to insure against the destruction or adverse modification of each species’ designated critical habitat, in violation of ESA Section 7(a)(2).

These 23 diversions may in fact be causing jeopardy and adverse modification or destruction of habitat. For example, in the Sawtooth Valley All Aquatics BA, the Forest Service found 21 of the diversions were likely to be adversely affecting ESA-listed species and their habitat, including unscreened diversions that may entrain and strand fish, diversions and ditches that create fish passage barriers that likely isolate fish and block fish migration, and diversions that reduce streamflows that may render streams uninhabitable or impassable due to insufficient flows and increased water temperature, among other adverse impacts. Furthermore, in the neighboring Salmon-Challis National Forests, NOAA Fisheries determined that the Forest Service’s authorization and/or reauthorization of similar surface water diversions in three nearby Upper Salmon River basin watersheds would jeopardize species and adversely modify critical habitat.

Violations of ESA Section 7(d) for Irreversible and Irrecoverable Commitment of Resources

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). To the extent that the Forest Service has initiated consultation for any of the 23 surface water diversions and ditches identified above, the Forest Service is causing an irreversible and irretrievable commitment of resources in violation of ESA Section 7(d) by continuing to authorize and reauthorize the use of those diversions and ditches and, thereby, adversely affecting fish and fish habitat.

Violations of ESA Sections 4(d) & 9 for Unauthorized Take

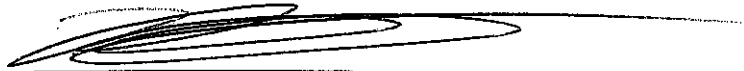
By continuing to authorize and reauthorize the 23 surface water diversions identified above without an ITS, the Forest Service is causing the unauthorized take of ESA-listed species by authorizing diversions that impair or block fish passage, reduce stream flows, entrain fish, increase stream temperatures, and harm fish by other means, in violation of ESA Sections 4(d) & 9, 16 U.S.C. § 1538(a)(1)(B) & 1533(d), and implementing regulations at 50 C.F.R. § 17.31(a) & § 17.44(w), by causing unauthorized “take” of the listed species.

CONCLUSION

ICL anticipates filing suit after 60 days from the date of this notice in Federal District Court, requesting injunctive and declaratory relief and recovery of its litigation expenses (including reasonable attorney fees), if the Forest Service has not yet taken appropriate action to remedy these violations by initiating and completing ESA consultation for each diversion and taking steps necessary to protect listed fish from all unauthorized take and irreversible and irretrievable commitments of resources at each water diversion while consultation is underway.

One of the principal reasons of the notice requirement of the ESA is to allow the parties to discuss resolution of claims short of litigation. During the 60-day notice period, Marie Kellner at the Idaho Conservation League and I will be available to discuss alternative remedies and actions that might be taken to assure future compliance with the ESA and to remedy past violations. If the Forest Service has any information suggesting that one or more of the violations outlined in this notice did not occur or is stated incorrectly, please immediately provide that information to ICL, specifying the violation in question.

Sincerely,

A handwritten signature in black ink, appearing to read "Bryan Hurlbutt", with a long horizontal line extending to the right.

Bryan Hurlbutt

Attorney for Idaho Conservation League

Cc via certified mail (return receipt requested):

Secretary
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