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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

Alliance for the Wild Rockies, Inc., Friends
of the Wild Swan, Inc.,

Plaintiffs,

v.

DAVE ALLEN, Regional Director, U.S. Fish
and Wildlife Service; UNITED STATES
FISH AND WILDLIFE SERVICE, an agency
of the United States Department of the
Interior; GALE NORTON, Secretary, U.S.
Department of the Interior,

Defendants,

BUILDING INDUSTRY ASSOCIATION OF
WASHINGTON, IDAHO FARM BUREAU
FEDERATION,

Intervenors.

CAUSE NO. 04-1813-JO

AMENDED COMPLAINT (SECOND)

INTRODUCTION

This case arises from the failure of the Defendants to properly designate critical habitat for bull trout (*salvelinus confluentus*) as required by the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.* In response to litigation brought before this Court by these same

Plaintiffs, the United States Fish and Wildlife Service (Service) published draft and final rules for bull trout critical habitat. The final designation of critical habitat for all populations of bull trout in the lower 48 states, published on September 26, 2005, eliminates approximately 82% of the habitat that the Service initially proposed for critical habitat designation in the draft rule, and constitutes only a minute fraction of the historic and current habitat needed to ensure the protection and recovery of the species. 70 Fed. Reg. 56211. Critical habitat is defined under the ESA as habitat that is “essential to the conservation of the species ... and that may require special management considerations or protection.” Designation of critical habitat is one of the ESA’s cornerstone safeguards to ensure the protection and recovery of imperiled species. Plaintiffs herein challenge the 2005 Final Rule that applies to all bull trout populations in the lower 48 states because it fails the mandatory requirements of the ESA; fails to provide for the protection and recovery of the species; is not based upon the best available science, relies on unlawful exclusions; fails to consider the relevant factors for bull trout survival and recovery; and is arbitrary, capricious and not in accordance with the law.

I. PARTIES

1. Plaintiffs Alliance for the Wild Rockies, Inc. and Friends of the Wild Swan, Inc. are both Montana Non-Profit, Public Benefit Corporations. Each organization and its members have a long-standing interest in the protection of the fish and the aquatic environment on which they depend in the Northern Rockies and Pacific Northwest. The Plaintiffs and their member organizations collectively have several thousand individual members who reside throughout the present range of the bull trout, and numerous member businesses and organizations. Plaintiffs’ members work as fishing guides, outfitters, and researchers who are directly impacted by the declining numbers of native bull trout throughout its range. Other members fish for, observe, and otherwise enjoy and appreciate the aesthetic beauty of native bull trout in their natural

habitat, and expect to continue to do so in the future. The Plaintiffs and their members are adversely affected by the decline in bull trout populations and habitat, and the inadequate government actions to protect the species including the failure to designate critical habitat. The economic, recreational, and aesthetic interests of the Plaintiffs and their members are directly and adversely affected by the failure of the Defendants to designate critical habitat. In addition, Plaintiffs' members and their organizations have an interest in ensuring that the substantive law and procedures required by the ESA with respect to bull trout are followed by the Defendants, and in ensuring that the best scientific information regarding bull trout is used in the process and is available to the public for dissemination. The actions and inactions of the Defendants as alleged herein have harmed those interests as well. This suit is brought on behalf of each Plaintiff organization and on behalf of its members who are directly and adversely affected by the proposed action.

2. The Defendants are described as follows:

a. Dave Allen is the Regional Director of the United States Fish and Wildlife Service located in Portland, Oregon. He denied the relief requested in Plaintiffs' 60-Day Notice. He is sued in his official capacity.

b. The United States Fish and Wildlife Service, an agency within the United States Department of Interior, is the federal agency in charge of administering the Endangered Species Act including making critical habitat designations. Dale Hall is the Director of USFWS and is sued in his official capacity.

c. Gale Norton is the Secretary of the Interior and is the government official with overall responsibility for implementation of the Endangered Species Act. She is sued in her official capacity.

II. JURISDICTION AND VENUE

3. The Court has jurisdiction of this matter pursuant to 28 U.S.C. §1331 in that this matter arises under the laws of the United States, and the Defendants are agencies or officials of the United States. The Court also has jurisdiction under the Administrative Procedure Act 5 U.S.C. §701 *et seq.* This court may issue a declaratory judgment and further relief pursuant to 28 U.S.C. §2201 and 2202. Mandamus may lie pursuant to 28 U.S.C. §1361. There is a real and present controversy between the parties.

4. Venue in this action is conferred upon this Court by 28 U.S.C. § 1391(e)(1) which states in pertinent part that a civil action against an agency of the United States or any officer thereof may be brought in any judicial district in which the officer resides. Defendant Allen, Director of Region One of the Fish and Wildlife Service, resides in this District.

III. GENERAL ALLEGATIONS

A. BACKGROUND ON BULL TROUT

5. Native to the Pacific Northwest and Northern Rockies, bull trout were historically widely distributed and abundant in both major river systems and smaller mountain streams. Over the last one hundred years bull trout have declined precipitously, both in number and range. Compared to other salmonids, bull trout have more specific habitat requirements that appear to influence their distribution and abundance. These habitat components include very cold water temperature, cover, channel form and stability, valley form, stream elevation, spawning and rearing substrates, and migratory corridors. Human activities over the last century in bull trout habitat, such as logging, road construction, dams, mining, grazing, and urban development have impacted bull trout habitat, causing widespread and significant population declines and local extirpations. In addition, the introduction of exotic species and over-fishing contributed to the ongoing demise of the species.

6. Bull trout exhibit one of four different life history forms: resident, fluvial, adfluvial, and anadromous. Resident bull trout are non-migratory and spend their entire life cycle in the same or nearby streams. They do not distribute themselves through a basin as do migratory forms and so they do not re-colonize vacant habitats. They face threats of habitat degradation, competition and predation by exotic species and are particularly vulnerable to stochastic events.

7. Fluvial, adfluvial and anadromous bull trout are migratory. They spawn in tributary streams and as juveniles migrate to either a lake (adfluvial), large river (fluvial), or salt water (anadromous) to mature, and return to small streams to reproduce. Large migratory bull trout can exceed 30 pounds. Migratory bull trout facilitate genetic interchange among local and regional populations and ensure sufficient variability within populations. They also serve to recolonize local populations extirpated by natural or human-caused events. Migratory bull trout have been restricted or eliminated from most of their habitat due to human caused stream habitat alterations including dams; irrigation diversions; detrimental changes in water quality; increased water temperature; and the alteration of natural stream flow patterns from logging, mining and grazing. Persistence of these migratory life history forms and maintenance or re-establishment of stream migration corridors is essential to the ultimate viability of the bull trout.

8. Bull trout require clean, cold water that is free of barriers to migration, with clean spawning gravel in headwater creeks. Furthermore, bull trout require migratory corridors where water temperature and habitat conditions are conducive to their survival and long-term persistence. Bull trout are extremely sensitive to changes in their habitat. Timely designation of critical habitat, with the protections such designation provide, is essential to the survival and recovery of bull trout.

9. Scientific research has demonstrated the precarious and tenuous nature of the remaining bull trout populations and the need to protect them from human activities that have

caused their decline. This research formed the basis of the decision to protect bull trout under the ESA. Recent research has demonstrated the importance of preserving all remaining populations of bull trout based on genetic differences in different populations, the fact that many existing populations are isolated and threatened with extirpation, and the wide-ranging nature of the species. In order to preserve all remaining populations and ensure the recovery of the species it will be necessary to designate extensive portions of their current and former habitat as critical habitat.

B. ADMINISTRATIVE AND LEGAL PROCEEDINGS REGARDING BULL TROUT

10. On October 27, 1992, Plaintiffs petitioned the Service pursuant to 16 U.S.C. § 1533 and 50 C.F.R. § 424.14 for a rule to list the bull trout as an endangered species throughout its range with concurrent designation of critical habitat. Plaintiffs also requested emergency listing and critical habitat designation for bull trout in select ecosystems where the species faces an imminent threat of extinction.

11. On May 17, 1993, the Service found Plaintiffs' petition to contain substantial information indicating that a listing may be warranted. 58 Fed. Reg. 288849.

12. The Service is required to rule on the merits of such a Petition within twelve months, 16 U.S.C. § 1533(b)(3)(B). The Service failed to rule on Plaintiffs' petition within twelve months, and on February 8, 1994, the Plaintiffs filed a Complaint to compel such a ruling. *Alliance for the Wild Rockies et. al. v. Babbitt*, (Civ. No. 94-0246 (JLG) D.D.C. 1994).

13. Pursuant to a stipulation to resolve the above-referenced lawsuit, the Service, through the Region One office in Portland, issued a 12-month Administrative Finding on June 10, 1994, and the lawsuit was dismissed. The Service made a number of factual findings regarding the bull trout, the widespread decline of bull trout, its extirpation from vast portions of its historical range, the demise of its habitat at the hands of human activity, and the inadequacy of existing

government efforts to protect bull trout. These findings led the Service to conclude that listing the bull trout as an endangered species was warranted throughout its range. However, the Service stated that a final rule listing the bull trout as endangered was precluded due to other higher priority listing actions.

14. Plaintiffs filed suit in federal district court in Oregon challenging the warranted but precluded finding. After numerous legal proceedings, Judge Jones held that the warranted but precluded finding for bull trout was arbitrary and capricious in violation of the ESA. *Friends of the Wild Swan v. U.S. Fish and Wildlife Service*, 945 F. Supp. 1388 (D. Or. 1996). In the November 1996 ruling cited above, the Court granted summary judgment to Plaintiffs on all claims resulting in publication of a proposed rule to list bull trout throughout the Columbia River Basin. 62 Fed. Reg. 32268 (June 13, 1997). The Columbia Basin and Klamath populations of bull trout were listed as threatened and endangered respectively on June 10, 1998. Klamath and Columbia Populations Final Rule, 63 Fed. Reg. 31647 (1998) (codified at 50 C.F.R. pt. 17).

15. The Service then segregated three other sub-populations of bull trout as Distinct Population Segments and found them not warranted for listing. Plaintiffs challenged this separation of populations as arbitrary based on the Service's earlier consideration of the entire population. Judge Jones again issued summary judgment for Plaintiffs which resulted in a proposed rule to list remaining populations. *Friends of the Wild Swan v. U.S. Fish and Wildlife Service*, 12 F. Supp. 2d 1121 (D. Or. 1997). The Jarbidge population was listed as threatened on April 8, 1999. Jarbidge Population Final Rule, 64 Fed. Reg. 17110 (1999) (codified at 50 C.F.R. pt. 17). This was followed by the Coastal Puget Sound and St. Mary-Belly River population being listed as threatened on November 1, 1999. Coastal Puget Sound and St. Mary-Belly River Population Final Rule, 64 Fed. Reg. 58909 (1999) (codified at 50 C.F.R. pt. 17).

16. These populations are collectively referred to as the "listed populations" in this Complaint. By this reference Plaintiffs do not agree biologically or legally with the Service's separation of bull trout populations, but that decision is not challenged herein.

17. On November 16, 2000, Plaintiffs sent the Defendants a 60-Day Notice of Intent to Sue under the Endangered Species Act. The Notice stated that the Defendants had failed to designate critical habitat within the time frames required by the ESA and that if Defendants failed to designate critical habitat within 60 days of the date of the Notice, that suit would be filed to require the designation of critical habitat for the listed populations.

18. On December 18, 2000, Ann Badgley, then Regional Director for Region One of the United States Fish and Wildlife Service in Portland Oregon, wrote Plaintiffs' attorney Jack R. Tuholske in response to the 60-Day Notice. Then Regional Director Badgley acknowledged receipt of the aforementioned 60-Day Notice. In response to the 60-Day Notice she acknowledged that the Service had not yet designated critical habitat for the listed populations and would not do so within the time frames required by the ESA or prior to the expiration of the 60-Day Notice.

19. Plaintiffs then filed suit again, asking the Court to order the Service to designate habitat critical to bull trout survival and recovery. The parties entered into a Consent Decree requiring the timely designation of critical habitat, which was approved by this Court. After another year of delay, and after missing the deadlines in the Consent Decree in November of 2002, the Service finally proposed 18,450 stream miles and approximately 532,700 acres of lakes and reservoirs as critical habitat for the bull trout. 67 Fed. Reg. 71235. Those miles and acres of critical habitat were proposed after consultation with field personnel and scientists as well as review of public comment, and was based upon the agency's own determination of the needs of the species and the habitat essential to the conservation and recovery of the species.

20. On October 6, 2004, the Service published a Final Rule for Designation of Critical Habitat for Bull Trout in the Columbia and Klamath Basins. In the Final Rule, the Service designated as critical habitat for the bull trout only 1,748 miles of streams and 61, 235 acres of lakes, approximately 10% of the critical habitat they proposed in the draft rule.

21. On October 6, 2004, Plaintiffs served on Defendants, by certified mail, a Notice of Intent to Sue informing them of Plaintiffs intent to take legal action regarding violations of §4 of the ESA.

22. On November 12, 2004, Plaintiffs served on Defendants, by certified mail, a Notice of Intent to Sue informing them of Plaintiffs intent to challenge the Defendants' failure to provide notice and opportunity for comment on the final rule, a rule that excluded approximately 90% of the habitat proposed in the draft rule to be designated as critical habitat for bull trout and that the Service had engaged in a pattern and practice of arbitrary critical habitat designations. After 60 days passed, Plaintiffs filed a complaint challenging the 2004 Rule.

23. On June 25, 2005, the Court issued an Order granting the agency's request for a partial remand of the 2004 Rule. This Court retained jurisdiction over the case. Pursuant to that Order, and a subsequent request for an extension, the Service published a new Final Rule on September 26, 2005 (2005 Rule) which combines critical habitat designation for all populations of bull trout in the lower 48 states. The 2005 Rule also excludes over 80% of the critical habitat originally proposed by the Service. The 2005 Rule perpetuates most of the same legal problems posed by the 2004 Rule, and is challenged herein.

24. Plaintiffs sent, by certified mail, a second Notice of Intent to Sue, to challenge the 2005 rule pursuant to the ESA. Sixty days have expired since the Notice was sent, without a response by the Defendants. Pursuant to a Stipulation between the parties and approved by the Court, Plaintiffs file this Second Amended Complaint challenging the 2005 Rule.

C. CRITICAL HABITAT DESIGNATION UNDER THE ESA

25. Critical habitat is habitat that is “necessary for the conservation of the species.” *Fund for Animals v. Babbitt*, 903 F. Supp 96, 103 (D. D.C.1995); 16 U.S.C 1532(5). Conservation is a concept that is broader and more protective than mere survival; it is defined by the ESA as “the use of all methods . . . which are necessary to bring any endangered species . . . to the point at which the protections of the ESA are no longer needed, i.e. to the point at which the species is recovered.” 16 U.S.C. § 1532(3); *Middle Rio Grande Conservancy Dist. v. Norton*, 294 F.3d 1220, 1230 (10th Cir. 2002). Referring to language chosen by Congress in the Endangered Species Act, the Ninth Circuit Court recently emphasized, “Clearly, then, the purpose of establishing ‘critical habitat’ is for the government to carve out territory that is not only necessary for the species’ survival but also essential for the species’ recovery.” *Gifford Pinchot Task Force v. United States Fish & Wildlife Service*, 378 F.3d 1059, *24 (9th Cir. 2004).

26. Regulation defines Critical Habitat as: “(1) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (i) essential to the conservation of the species and (ii) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it was listed, upon a determination that such areas are essential for the conservation of the species.” 50 C.F.R. 424.02(d).

27. The ESA mandates that in making a critical habitat determination, the Service shall make such determination “on the basis of the best scientific data available.” 16 U.S.C. §1533(b)(2). “A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with §§ 424.19.” 40 C.F.R. § 424.12(a). As alleged

below, the exclusions from critical habitat in the 2005 Rule were not based on the best scientific data available, and were arbitrary, capricious and not in accordance with the law.

28. Without even considering the importance of formerly occupied habitat on a site specific basis, the Service excluded from the final rule, all habitat that is not currently occupied by bull trout, despite recognition of the fact that the bull trout's population is dramatically and dangerously limited in its current range. The best available science demands that the Service evaluate whether formerly occupied habitat is necessary for the survival and recovery of the species. The Service's failure to do so, and then to automatically exclude all formerly occupied bull trout habitat from critical habitat designation is arbitrary, capricious and not in accordance with the law.

29. Additionally, formerly occupied but currently unoccupied habitat throughout the lower 48 states must be included in the final critical habitat designation because all of the best available scientific evidence demonstrates that the survival and recovery of bull trout requires fully connected, widely dispersed self-sustaining populations. Spawning and rearing habitat, as well as interconnecting migratory corridors that are not presently occupied by bull trout but are essential to the recovery of bull trout, must be considered on a site specific basis, and if they fulfill the requirements of critical habitat they must be designated as such. The Defendants have failed to assess on a site specific basis each water body that contains formerly occupied bull trout habitat, and have failed to provide a rational basis for excluding them. The Service's decision to exclude all formerly occupied bull trout habitat in the 2005 Rule is arbitrary, capricious and not in accordance with the law.

30. The 2005 Rule failed to provide the necessary linkages between areas that are currently occupied and now designated as critical habitat. The best scientific data available recognizes the importance of ensuring connectivity between separated habitat. Genetic viability,

necessary for both survival and recovery, mandates that migratory corridors be protected. The Service recognizes the essential role that migratory corridors play in maintaining the migratory life history forms of bull trout and that such corridors are essential for genetic exchange between local populations. At page 56215, the Final Rule states: "In fact, migratory corridors with minimal physical, biological, or water quality impediments are identified as a PCE in the critical habitat rule." At page 56234, the Final Rule further states: "Our methods included consideration of information regarding habitat essential to maintaining the migratory life history forms of bull trout, in light of the repeated emphasis about the importance of such habitat in the scientific literature." In addition, the Service notes that, "Migratory corridors also are essential for movement between populations. Thus, in addition to considering areas important for migration within populations, our method also included considering information regarding migration corridors necessary to allow genetic exchange between local populations. Corridors that allow such movements can support eventual recolonization of unoccupied areas or otherwise play a significant role in maintaining genetic diversity and metapopulation viability. Because these factors are important in identifying the features and areas that are essential to bull trout conservation, our method included consideration of the various roles that migratory corridors have for bull trout." *Id.* Despite this recognition of migratory corridors' essential function to the recovery and survival of bull trout, the Service excluded numerous occupied migratory corridors and all unoccupied former migratory corridors from the 2005 Rule. The exclusion of migratory corridors is arbitrary, capricious, not in accordance with the law, and an abuse of discretion.

31. Furthermore, the Service's failure to address the fundamental role of habitat degradation in the demise of the species, which was also documented in the draft and final bull trout listing rules, as well as other scientific publications and studies, renders the final rule arbitrary, capricious and in violation of the ESA. Cold, clean water and complex habitat are

universally recognized in the literature as essential to the survival of bull trout. Degradation of habitat and the resulting loss of clean, cold water and complex habitat components caused by human activities has led to the near demise of the species. As recognized in the draft and final listing rules, logging, road building, dams, mining, grazing and urban/suburban development are directly linked to bull trout habitat degradation and the subsequent listing of the species under the ESA. Yet the Service's final critical habitat rule does not adequately consider, and in many cases arbitrarily ignores, the pertinent role of protecting and restoring habitat and the need to assess the habitat degradation factors that led to the demise of the species in crafting a critical habitat rule that leads to the conservation of bull trout.

32. The Defendants have excluded areas from critical habitat on the basis that those areas were subject to alternative forms of management or protection for which the Service determined that the benefits of exclusion outweighed the benefits of inclusion. The use of these exclusions in the 2005 Rule is an unconstitutional delegation to other agencies and government entities of the Service's duties under the ESA to designate for protection critical habitat necessary for the survival and recovery of the species.

33. The exclusion of all critical habitat that has or will in the future have some alternative protection in place is arbitrary and capricious and a violation of the ESA's mandate. The ESA does permit the Defendants to not provide bull trout the protection and recovery benefits afforded by the ESA's critical habitat designation because some alternative protection exists or will exist in the future, particularly where that protection is discretionary, is wholly in the hands of a non-federal agency, is subject to revision or abandonment beyond the control of the Service, and does not provide the kind of stringent requirements contained in the ESA. The various rationales and justifications for the use of the exclusions as set forth in the 2005 Rule are unlawful, arbitrary and capricious because the exclusions are contrary to the record developed by

the Service for bull trout recovery and survival, and fail to consider the relevant factors including those regarding the protection and recovery of the species and fail to use the best available scientific data necessary to both the survival and recovery of the species. Plaintiffs do not allege herein every specific deficiency with respect to the exclusions in the 2005 Rule but provide the following representative allegations below.

34. The Service concluded that areas recognized in the draft as critical were not included in the final rule because they allegedly do not need “special management or protection,” because they are being managed under *PACFISH/INFISH*. Just because *PACFISH/INFISH* may provide some habitat protection is not grounds for exclusion because critical habitat designation is a separate legal requirement above and beyond what other agencies may do for bull trout. Defendants have no control over the implementation, or even the continued use of *PACFISH/INFISH* by the U.S Forest Service and Bureau of Land Management. The Service’s reliance on *INFISH/PACFISH* is further flawed because those strategies were designed to be temporary, and are being ignored, or modified, by some National Forests during forest plan revisions. Furthermore, the land management agencies never completed the Interior Columbia Basin Ecosystem Management Plan (ICBEMP), which was represented to this Court in prior litigation as providing the final plan for long term viability for bull trout on public lands. This Court has already determined that *PACFISH/INFISH* cannot provide for long term protection and viability of bull trout. *Friends of the Wild Swan v. U. S. Forest Service*, 966 F. Supp. 1002 (D. Or. 1997). The Defendants themselves have catalogued the deficiencies with *PACFISH/INFISH* in previous Biological Opinions. These factors, and other relevant factors, are not addressed by the Defendants in the 2005 Rule excluding *PACFISH/INFISH* from critical habitat. The exclusion of habitat because it is managed under *PACFISH/INFISH* is arbitrary, capricious, fails

to consider the relevant factors regarding the survival and recovery of the species, is not in accordance with the law and is an abuse of discretion.

35. The Service excludes the Northwest Forest Plan Aquatic Conservation Strategy (ACS) on the same basis as *INFISH/PACFISH*. Fed. Reg. at 56251. The Service also excludes ICBEMP from critical habitat, though the Service does not explain how ICBEMP, which was never finalized and has been completely abandoned by the federal government, provides any protection at all. The Service refers to ICBEMP as a “strategy” though the Plaintiffs are unaware of any Record of Decision adopting it. The same arguments against using a temporary management strategy adopted by another agency as a substitute for critical habitat discussed in the context of *INFISH/PACFISH* above apply to the ACS and ICBEMP. This Court has similarly cast doubt on the Northwest Forest Plan as a long term protection strategy. *Friends of the Wild Swan v. U. S. Forest Service*, 966 F. Supp.1002 (D. Or. 1997). The Service’s reliance on other land management plans in order to gain what the Service claims is a benefit of avoiding costly Section 7 consultations is neither a valid biological nor legal basis to exclude these lands from critical habitat designation. Furthermore, the Service would likely have to perform Section 7 consultations on actions under the management plans anyway, based on the requirement to avoid jeopardy which is separate from Section 7 critical habitat consultations. The Service’s exclusion of lands under these land management plan fails to consider the relevant factors regarding the survival and recovery of the species, is arbitrary, capricious, not in accordance with the law and an abuse of discretion.

36. The Service also excludes the Southwest Idaho Land and Resource Management Plans. Fed. Reg. at 56251. The Service, without any reasoned explanation, concludes that these plans are “far beyond any protection provided by a critical habitat designation.” *Id.* Such

sweeping generalizations amount to little more than wishful thinking. In reality, these plans eliminate the mandatory standards from *INFISH/PACFISH*; eliminate the viability requirement from the NFMA regulations; contain no prohibitions on specific land management activities that harm bull trout; and contain vague, illusory promises of ecosystem management. The Service fails to explain how the vague promises of these plans replace the management statutory protections contained in the ESA for critical habitat. Not only is there no legal basis for these exclusions, there is no factual basis either. The same is true for the Southwest Oregon Resource Management Plan. The Service claims this plan relies on ICBEMP, which does not exist as a formally adopted management plan. The Service claims this plan provides all manner of benefits, but provides no specific examples. The Service fails to explain how the vague promises of these plans replace the statutory protections contained in the ESA for critical habitat. The use of these exclusions fails to consider the relevant factors regarding the survival and recovery of the species, and is arbitrary, capricious and not in accordance with the law.

37. With vague and generalized rationale, the Service excludes the Federal Columbia River Power System from critical habitat designation. Though the Service claims that critical habitat is unlikely to “achieve measurable results,” the Service provide no basis for the statement. Absent from the Service’s rationale is a cogent explanation as to how laws governing the Federal Columbia River Power System provide the same protection that critical habitat affords. The Service’s unsupported conclusion that the exclusion “will not result in extinction of the bull trout,” Fed. Reg. at 56254, is legally irrelevant. Given the importance of the Columbia as a migratory corridor that transects vast swaths of bull trout habitat, its exclusion is not based on the best scientific data, fails to consider the relevant factors regarding the survival and recovery of the species, and is arbitrary, capricious, not in accordance with the law and an abuse of discretion.

38. The Service has excluded all lands covered by the Snake River Adjudication, which is not a land management plan at all. Whatever conservation benefits may accrue to the Tribes and ultimately bull trout under the Adjudication, those benefits are not defined in the Final Rule, are not categorized on a site specific basis, are speculative at best and do not substitute for the long-term habitat protection afforded by critical habitat designation. Although the Service states that it avoids “even the appearance of bad faith,” the Final Rule does not even explain which particular lands are being excluded. Fed. Reg. at 56254. Snake River Adjudication lands are important to the conservation of bull trout and the Service fails to explain how the exclusion is consistent with the best available scientific data, or justify the exclusion under the law. The exclusion of all lands covered by the Snake River Adjudication fails to consider the relevant factors regarding the survival and recovery of the species, is arbitrary, capricious, not in accordance with the law and an abuse of discretion.

39. Without specific habitat information, without examples of real benefits, and without sound legal basis for the exclusion, the Service excludes waters impounded behind dams from critical habitat. The public does not even know which waters are being excluded. No basis is provided explaining how the exclusion is consistent with the conservation and recovery of the species. The exclusions of all waters impounded behind dams fails to consider the relevant factors regarding the survival and recovery of the species, and is arbitrary, capricious, not in accordance with the law and an abuse of discretion.

40. The Service justifies its exclusion of all critical habitat for the Jarbidge bull trout on its oft-repeated claims that critical habitat designation does little to protect the species: “Because we anticipate that little if any conservation benefit to the bull trout will be foregone as a result of excluding these lands and the species and much of its habitat is still protected under section 7 as described above, the exclusion will not result in the extinction of the bull trout.” Fed. Reg. at

56251. The Service's assertions that critical habitat does little to protect species have been rejected by several courts and cannot provide a basis for excluding the habitat currently supporting the Jarbidge bull trout population. The Service's exclusion of private lands is based upon a novel theory that acquiescence to local political demands far removed from biological requirements is a legitimate basis for excluding lands from critical habitat. Fed. Reg. at 56250. The Service cites the Shovel Brigade as a basis for this approach, and lauds the Certificate of Appreciation it received from Elko County. The Shovel Brigade advocated lawlessness and showed a stunning disregard for the rule of law, as well as the role of law in our democracy. Under the Service's rationale, local groups should take unauthorized actions on federal lands, violate federal laws, threaten federal officials; they will then be rewarded with federal acquiescence to their demands. The Service also relies on potential purchase of private lands as further basis not to designate any private lands in the Jarbidge. Reliance on possible future conservation efforts is not a lawful basis for exclusion. The exclusion of all habitat for the Jarbidge population fails to consider the relevant factors regarding the survival and recovery of the species, and is arbitrary, capricious, not in accordance with the law and an abuse of discretion.

41. The Service excludes private lands that are covered by Habitat Conservation Plans (HCP), Conservation Agreements and Easements. While these tools can provide benefits for listed species, they are not a substitute for critical habitat. The Service's reference to the importance of HCP's in Hawaii as a parallel to bull trout HCPs is irrelevant and has no biological basis. HCPs serve a fundamentally different role in the ESA's protection and recovery mandate - they are separate statutory provisions because Congress intended them to serve different functions. These instruments do not abide by the "no adverse modification" mandate of Section

7, and the protection that they might provide cannot be equated with the role of Section 7 in both preventing jeopardy and promoting recovery. The exclusion of these private lands fails to consider the relevant factors regarding the survival and recovery of the species, and is arbitrary, capricious, not in accordance with the law and an abuse of discretion.

42. The Service prepared an economic analysis for bull trout critical habitat that failed to include the economic benefits of bull trout designation. Despite repeated comments to the Service about this problem, the Service persisted with a “costs only” economic analysis, and then continued to rely on its deficient economic analysis “in balancing the benefits of including and excluding areas from critical habitat.” Fed. Reg. at 56260. Furthermore, the Service claims not to rely on its economic analysis, which was based in part on the administrative costs of Section 7 consultations, but then uses the cost of Section 7 consultations throughout the 2005 Rule as a primary reason for approving the use of the exclusions addressed above. The failure to prepare an economic analysis that includes benefits as well as costs, and the Service’s continued reliance on the defective analysis, fails to consider the relevant factors, is arbitrary and capricious, not in accordance with the law and is an abuse of discretion.

COUNT I

43. Plaintiffs reallege all previous counts as if set forth in full.

44. The ESA imposes a duty upon the Service to properly designate critical habitat necessary for the survival, conservation and recovery of bull trout. For the reasons set forth herein, the Service failed to designate adequate critical habitat in the 2005 Final Rule, as the ESA requires, which is necessary for the survival and recovery of bull trout.

45. For the reasons set forth herein, the Service failed to rely on the best scientific and commercial data available; failed to consider the relevant factors that have led to listing and near

demise of the species; failed to properly assess the economic benefits and costs of critical habitat designation; based its 2005 Final Rule on arbitrary assumptions, inadequate analysis and unlawful exclusions, and therefore is in violation of section 4(b)(2) of the ESA.

COUNT II

46. Plaintiffs reallege all previous counts as if set forth in full.

47. In the alternative, the 2005 Rule is final agency action and subject to judicial review under the Administrative Procedure Act (APA). The Final Rule is arbitrary and capricious, an abuse of discretion, and not in observance of statutorily mandated duties, and the Defendants' decision is therefore in violation of the APA, 5 U.S.C. § 706 (2).

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs respectfully request that the Court enter judgment providing the following relief:


- (1) Declare that the Service violated the ESA, or in the alternative the APA, for the reasons alleged herein, by failing to comply with mandatory duties under Section 4 of the ESA upon designating critical habitat for bull trout;
- (2) Order the Service through an injunction to designate adequate critical habitat to ensure the survival and recovery of bull trout;
- (3) Order the Service to immediately initiate a new rulemaking process and complete a new final designation within 120 days;
- (4) Order the Service through a mandatory injunction to temporarily implement its original proposed critical habitat designation as set forth in the November 2002 proposed critical habitat for bull trout in the Columbian and Klamath basins, as interim critical habitat designation in those areas, and to order the Service to designate appropriate interim critical habitat in the Puget Sound, Jarbidge and St. Mary's-Belly River basins as set forth in the original proposed

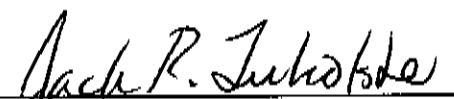
critical habitat designations for those areas, and to require ESA Section 7 consultations for all actions that may adversely modify such temporary critical habitat, until such time as a lawful final rule is approved.

(5) Award Plaintiffs' costs, including reasonable attorneys' and expert witnesses' fees;

(6) Provide such other relief as the court deems just and proper.

DATED this 5th day of January, 2006.


Gary K. Kahn
REEVES KAHN AND HENNESSY


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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 5th day of January, 2005, the foregoing was filed via the Court's electronic filing system which will automatically generate electronic service on the counsel identified below:

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