



September 26, 2019

Commissioner, U.S. Bureau of Reclamation  
1849 C Street NW  
Washington DC 20240-0001

Secretary, Department of Interior  
1849 C Street, N.W.  
Washington DC 20240

Director, U.S. Fish & Wildlife Service  
1849 C Street, NW  
Washington, DC 20240

**RE: 60 DAY NOTICE OF INTENT TO SUE UNDER THE  
ENDANGERED SPECIES ACT. Unpermitted take and failure to  
consult: Saint Mary Diversion Dam & Canal/Milk River Irrigation  
Project, bull trout/bull trout critical habitat.**

**FACTUAL BACKGROUND**

The St. Mary River originates at Gunsight Lake in Glacier National Park, and flows northeast about 10 km before entering St. Mary Lake. Upon leaving the lake, the river flows onto the Blackfeet Reservation and continues northeast for about 2 km before entering Lower St. Mary Lake. From that lake, the river meanders northerly about 25 km to the Canadian border, then continues north through shrub-grassland habitat about 55 km to St. Mary Reservoir. The St. Mary River that flows from the reservoir joins the Oldman River about 8 km upstream from Lethbridge, Alberta.

Between 1914 and 1921, the U.S. Bureau of Reclamation (USBOR) built several water control and delivery structures in the St. Mary River drainage, as part of the Milk River Irrigation Project (irrigation project). Among those structures is the St. Mary Diversion dam, which is located 1.2 km downstream from Lower St. Mary

Lake.

Annually between about April and September, this dam diverts approximately 650 cfs (18.4 m<sup>3</sup>/s) of water into the unscreened St. Mary Canal. The canal conveys the water about 50 km – over the watershed divide from the St. Mary River drainage into the Missouri River drainage – to the North Fork of the Milk River. In addition, the lower reach of Swiftcurrent Creek, which formerly flowed into the St. Mary River downstream from Lower St. Mary Lake, was channeled into the lake itself. That allowed water released from Lake Sherburne to be diverted into the St. Mary Canal. Sherburne Dam is completely closed to allow for refilling of the reservoir during the non-irrigation months (fall-winter, approximately 6 months).

The native fish assemblage of the St. Mary drainage has been affected by the irrigation project in a number of ways: (1) The St. Mary Diversion Dam is a known barrier to upstream migration of bull trout and other fishes, at least seasonally; (2) During the annual diversion period (irrigation season) the unscreened St. Mary Canal entrains many species of fish. Most of these fish die when the canal is dewatered; and (3) During the non-irrigation period (typically October-March), while Sherburne Dam is closed for refilling of the reservoir, Swiftcurrent Creek is left dry from the dam to the Boulder Creek confluence. This annual dewatering of Swiftcurrent Creek results in the mortality of bull trout and many other native fish.

The effect on native fish is so great that the irrigation project has been identified as the primary threat to bull trout in the Saint Mary Recovery Unit. Two aspects of the project represent the primary threats: (1) The design and management of the Saint Mary Diversion Dam is resulting in entrainment of up to 600 juvenile bull trout each year, and also impairs upstream passage of pre-spawning adult bull trout; and (2) Operation of the Sherburne Dam is resulting in suboptimal instream flow and thermal conditions for bull trout downstream.

The USBOR has been operating the Saint Mary Diversion and Sherburne Dams since bull trout were listed without consulting with U.S. Fish & Wildlife Service (USFWS) under the Endangered Species Act. Instead, USFWS and USBOR have been “gathering biological information” on this project for over 20 years. One agency report from 2011 concluded: “With an estimated annual loss of more than 470 bull trout (age-2 and older) to canal entrainment, our findings indicate that the unscreened St. Mary Diversion represents a significant threat to this important ‘listed’ population and highlights the urgent need for improvements to the Milk River Irrigation Project.”

Despite the admitted urgency, in 2015, USBOR staff admitted that they had been “kicking the can down the road” regarding ESA consultation and the implementation of protections for bull trout. In 2015, USFWS staff requested that USBOR initiate formal ESA consultation on the project. Internal agency notes indicate that USFWS understood that USBOR would submit a Biological Assessment to USFWS in July of 2015, with the expectation that USFWS would issue a Biological Opinion and Incidental Take Statement by October of 2015. Subsequent agency notes indicated that USBOR intended to submit a Biological Assessment to USFWS by mid-August of 2015.

USFWS subsequently received word from USBOR that a Biological Assessment would only address immediate maintenance/repairs and would not address overall operations for the project and the ongoing entrainment of up to 600 bull trout per year. USBOR stated it was the agency’s policy not to consult on project operations unless the agency changed operations; therefore, it would not consult on the operational effects on bull trout (entrainment) caused by the St. Mary Diversion Dam/Canal/irrigation project.

Ultimately, on August 27, 2015, USBOR informed USFWS that the 2015 maintenance/repairs to the St. Mary Diversion would have “no effect” on bull trout, and USBOR refused to prepare a biological assessment for the project as a whole. Therefore, USBOR refused to address bull trout entrainment in a biological assessment. Accordingly, no ESA consultation on bull trout entrainment occurred in 2015. In September 2016, USFWS prepared a “briefing statement” on the issue. It stated: “BOR remains unwilling to enter into any type of consultation agreement with the Service.”

On January 24, 2019, Alliance for the Wild Rockies sent a FOIA request to USFWS requesting in part: “5. Saint Mary Diversion Biological Opinion & Incidental Take Statement; 6. All biological assessments, biological evaluations, monitoring, reports, and correspondence regarding (5) above . . . .” On June 5, 2019, USFWS provided its full response to this request. USFWS indicated that it was withholding eleven documents; however, none of these documents related to the St. Mary Diversion/canal/irrigation project. The responsive FOIA documents provided by USFWS do not include a biological assessment or biological opinion for the St. Mary Diversion/canal/irrigation project.

Thus, as of the date of this letter, the agencies have not initiated or completed formal ESA consultation on the effects of the irrigation project/St. Mary

Diversion/Canal on bull trout or bull trout critical habitat, and USBOR does not have an incidental take statement/permit for the hundreds of bull trout that are entrained each year as a result of this project.

### LEGAL VIOLATIONS

The ESA is the “most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The ESA contains powerful, non-discretionary requirements that protect listed species. ESA Section 7 requires inter-agency consultation on agency actions that may affect listed species. If an activity is likely to adversely affect a listed species, the agencies must conduct formal consultation. The action agency must prepare a biological assessment and the wildlife agency must provide a formal biological opinion with an incidental take statement. Section 9 of the ESA prohibits any person from “taking” listed species without an incidental take statement/permit that permits the take. Causing the death of a member of a listed species constitutes a “take.” A “take” constitutes a per se “adverse effect” for the purpose of triggering formal Section 7 consultation.

The agencies have violated, and are continuing to violate, the ESA by failing to initiate and complete formal ESA Section 7 consultation for the St. Mary Diversion/Canal/Milk River Irrigation Project as it pertains to adverse effects to bull trout and bull trout critical habitat and unpermitted incidental take of bull trout, including but not limited to the ongoing annual entrainment of up to 600 bull trout per year in the St. Mary Canal. Additionally, the USBOR’s incidental take of up to 600 bull trout per year in the St. Mary Canal constitutes unlawful, unpermitted take, in violation of ESA Section 9. If the violations of law described above are not cured within 60 days, the Alliance intends to file a complaint in federal district court for declaratory and injunctive relief, as well as attorney and expert witness fees and costs.

Sincerely,

/s/Rebecca K. Smith

Rebecca K. Smith, Counsel for Notifier

cc: U.S. Attorney General  
U.S. Department of Justice  
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Washington, DC 20530-0001