

Dana Johnson (ISB # 8359)
Law Office of Dana Johnson, PLLC
P.O. Box 9623
Moscow, ID 83843
(208) 310-7003 (phone)
johnsondanam@gmail.com

John R. Mellgren, applicant *pro hac vice* (OR Bar # 114620)
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401
Ph: (541) 359-0990
mellgren@westernlaw.org

Matthew K. Bishop, applicant *pro hac vice* (MT Bar #9968)
Western Environmental Law Center
103 Reeder's Alley
Helena, Montana 59601
Ph: (406) 324-8011
bishop@westernlaw.org

Attorneys for Plaintiff WildEarth Guardians

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO
SOUTHERN DIVISION**

WILDEARTH GUARDIANS,

Plaintiff,

v.

KEITH LANNOM, in his official capacity as
Payette National Forest Supervisor; UNITED
STATES FOREST SERVICE; DANIEL ASHE,
in his official capacity as Director of the U.S. Fish
and Wildlife Service; UNITED STATES FISH
AND WILDLIFE SERVICE

Defendants.

Case No. 1:16-cv-428

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

INTRODUCTION

1. Plaintiff WildEarth Guardians (“Guardians”) respectfully files this suit against Defendants Keith Lannom et al. and challenge Defendants’ failure to reinitiate and complete consultation under Section 7 of the Endangered Species Act regarding (1) the continued implementation and impacts of the Payette National Forest’s 2007 travel management plan (“travel plan”) on bull trout and bull trout critical habitat; and (2) significant new information revealing the travel plan may affect bull trout and its critical habitat in a way not previously considered.

2. This suit seeks declaratory and injunctive relief against Defendants for violations of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.* Defendants have violated and continue to violate the ESA by failing to reinitiate and complete consultation under Section 7 of the ESA.

JURISDICTION AND VENUE

3. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question) and 16 U.S.C. § 1540 (ESA). An actual, present, justiciable controversy exists between Guardians and Defendants.

4. This Court has the authority to review Defendants’ actions and/or inactions complained of herein and grant the requested relief under 16 U.S.C. § 1540(g) (ESA citizen suit provision), 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. § 705 & 706 (APA). The Service’s sovereign immunity is waived under the ESA, 16 U.S.C. § 1540(g) and the APA, 5 U.S.C. § 702.

5. Guardians sent notice of its intent to sue Defendants as required by the ESA on July 6, 2016. More than sixty days have elapsed since Guardians sent notice of its intent to sue Defendants. More than sixty days have elapsed since Defendants’ received Guardians’ notice of intent to sue. Defendants did not attempt to contact Guardians regarding the contents of the July 6, 2016 ESA 60-day notice of intent to sue letter. Defendants did not attempt to resolve the ESA violations

described in the July 6, 2016 ESA 60-day notice of intent to sue letter after they received the letter and before Plaintiff filed suit.

6. Venue in this court is proper under 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391. A substantial part of the events or omissions giving rise to Guardians' claims occurred in this District. Defendant Keith Lannom, U.S. Forest Service, and U.S. Fish and Wildlife Service maintain offices within this District.

7. This case is properly filed in the Southern Division of this District under District Local Rule Civ 3.1 because a substantial part of the events or omissions giving rise to Guardians' claims occurred in Valley County, Idaho; Adams County, Idaho; Washington County, Idaho; and Idaho County, Idaho. Valley County, Idaho; Adams County, Idaho; Washington County, Idaho are located in the Southern Division of this District.

PARTIES

8. Plaintiff WildEarth Guardians (Guardians) is suing on behalf of its organizational, staff, and members' interests. Guardians is a non-profit organization dedicated to protecting and restoring the wildlife, wild places, wild rivers, and health of the American West. Guardians has more than 168,000 members and supporters including many who reside and recreate in Idaho, and specifically on the Payette National Forest. Guardians' staff and members regularly recreate on the Payette National Forest. Guardians' staff and members recreate in these areas for the purposes of hiking, recreation, bird watching, observing wildlife including bull trout, spiritual rejuvenation, photography, and other recreational and professional pursuits. Guardians' staff and members have engaged in these activities in the past, and intend to do so again in the near future. Guardians staff and members have a procedural interest in ensuring that all of Defendants' activities comply with all applicable federal statutes and regulations. For many years, Guardians has advocated for the restoration of bull trout to its historic range.

9. Guardians' members, staff, and supporters are dedicated to ensuring the long-term survival and recovery of bull trout throughout its historic range. Guardians regularly advocates for the conservation and recovery of bull trout and protection of bull trout critical habitat, with particular focus on reducing the harmful impacts from forest roads and the motorized trail network on the national forests. Guardians does outreach and education about this issue to members, supporters, and the general public through articles in professional magazines, Guardians' newsletters, monthly emails to members and supporters, and social media. In comments on site-specific projects, including projects on the Payette National Forest, Guardians urges the Forest Service to comply with the ESA to ensure conservation and recovery of bull trout. Guardians also regularly encourages, organizes and submits comments from members, supporters, and concerned citizens aimed at convincing the Forest Service to address the impacts from its over-sized road system and motorized trail network to ensure bull trout recovery.

10. Guardians' members, staff, and supporters recreate in or near, and enjoy, areas occupied by bull trout and designated as critical habitat for bull trout for the purposes of hiking, backpacking, camping, observing wildlife such as bull trout, bird watching, and other recreational and professional pursuits.

11. Guardians' members, staff, and supporters enjoy observing, attempting to observe, and studying bull trout in the wild, including signs of bull trout presence in or near areas occupied by bull trout, and in or near areas designated as bull trout critical habitat under the ESA.

12. Guardians' members, staff, and supporters derive aesthetic, recreational, scientific, inspirational, spiritual, educational, and other benefits from these activities and from working to protect and restore bull trout throughout its range, and in particular on the Payette National Forest in Idaho. Guardians' members, staff, and supporters have an interest in knowing that bull trout are still present on the Payette National Forest.

13. Failing to reinitiate consultation under Section 7 of the ESA—as alleged in this Complaint—causes actual and procedural harm to Guardians’ members, staff, and supporters’ interests in bull trout and bull trout critical habitat on the Payette National Forest.

14. The interests of Guardians’ members, staff, and supporters—as well as Guardians’ organizational interests—have been, are being, and unless the requested relief is granted, will continue to be harmed by Defendants’ actions and/or inactions challenged in this Complaint. If this Court issues the relief requested, the harm to Guardians’ members, staff, and supporters’ interests will be redressed and/or alleviated. If this Court issues the relief requested, the harm to Plaintiff’s organizational interests will be redressed and/or alleviated.

15. Defendant KEITH LANNOM is sued in his official capacity as Forest Supervisor for the Payette National Forest. As Forest Supervisor, Mr. Lannom is the federal official with responsibility for his and other Forest Service officials’ actions and/or inactions challenged in this complaint.

16. Defendant UNITED STATES FOREST SERVICE is an agency within the United States Department of Agriculture that is responsible for applying and implementing the federal laws and regulations challenged in this complaint.

17. Defendant DANIEL ASHE is sued in his official capacity as the Director of the United States Fish and Wildlife Service. As Director, Mr. Ashe is the federal official with responsibility for all Service officials’ actions and/or inactions challenged in this complaint.

18. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is an agency within the United States Department of the Interior that is responsible for applying and implementing the federal laws and regulations challenged in this complaint.

FACTS

19. Bull trout (*Salvelinus confluentus*) is a species listed as threatened under the ESA throughout the coterminous United States.

20. Since listing bull trout as threatened, the U.S. Fish and Wildlife Service (“Service”) has designated and redesignated bull trout critical habitat multiple times.

21. On October 6, 2004, the Service designated 1,748 miles of streams and 61,235 acres of lakes as bull trout critical habitat. The October 6, 2004 bull trout critical habitat designation did not designate any critical habitat for bull trout on the Payette National Forest.

22. On September 26, 2005, the Service designated 3,828 miles of streams, 143,218 acres, of lakes, and 985 miles of shoreline as bull trout critical habitat. The September 26, 2005 bull trout critical habitat designation did not designate any critical habitat for bull trout on the Payette National Forest.

23. On October 18, 2010, the Service most recently designated critical habitat for bull trout. The October 2010 decision designated approximately 19,729 miles of streams, 488,251.7 acres of lakes, and 754 miles of shoreline as bull trout critical habitat.

24. The October 18, 2010 designation designated bull trout critical habitat on the Payette National Forest.

25. In April 2007, the Payette National Forest (“Payette”) completed an Environmental Impact Statement (“EIS”) to assess the environmental impacts of its 2007 travel plan. The 2007 travel plan designated a system of roads, trails, and over-snow use areas on the Payette.

26. The 2007 EIS states that all fish bearing streams on the Payette would meet Regional Aquatic Organism Passage Guidelines. The 2007 EIS does not address non-fish bearing streams that might provide suitable fish habitat.

27. The 2007 EIS states that the miles of designated motorized trails in the selected alternative would degrade soil productivity, accelerate erosion, and deliver sediment to streams on management areas 2, 3, 6, 10, 11, and 13. The 2007 EIS concluded the selected alternative would degrade management areas 2, 7, and 11 based on the miles of designated roads and motorized trails within

Riparian Conservation Areas (“RCA”). The 2007 EIS concluded the selected alternative would degrade management areas 6 and 11 based on the number of inventoried stream crossings from designated roads and motorized trails.

28. The 2007 EIS concluded motorized travel on the Payette as a result of the selected alternative would result in degraded conditions in the short and long term for Deep Creek.

29. The 2007 EIS concluded motorized travel on the Payette as a result of the selected alternative would result in degraded conditions in the short and long term for tributaries to the Brownlee Reservoir.

30. The 2007 EIS concluded motorized travel on the Payette as a result of the selected alternative would result in degraded conditions in the short and long term for Weiser River basin.

31. The 2007 EIS concluded motorized travel on the Payette as a result of the selected alternative would result in degraded conditions in the short and long term for most of the Little Salmon River basin.

32. The 2007 EIS concluded motorized travel on the Payette as a result of the selected alternative would result in degraded conditions in the short and long term for most Salmon River tributaries.

33. The 2007 EIS concluded motorized travel on the Payette as a result of the selected alternative would result in degraded conditions in the short and long term for the upper and lower South Fork Salmon River and its tributaries.

34. The 2007 EIS determined the selected alternative would not affect any designated bull trout critical habitat. No designated bull trout critical habitat existed on the Payette when the 2007 EIS was finalized.

35. In January 2008, the Payette released the Record of Decision (ROD) for snow-free motorized travel on the Weiser Ranger District.

36. In October 2008, the Payette released the ROD for snow-free motorized travel on the McCall and Krassel Ranger Districts.
37. No bull trout critical habitat was designated on the Payette at the time the ROD related to the 2007 EIS and 2007 travel plan were signed.
38. The Forest Service retains discretionary control and involvement over the Payette snow-free motorized travel decisions.
39. The Payette completed separate Biological Assessments for each watershed on the Forest as part of the ESA Section 7 consultation process for the Payette travel plan.
40. The Service prepared Biological Opinions for each watershed on the Forest after receiving watershed-level Biological Assessments from the Forest Service as part of the ESA Section 7 consultation process for the Payette 2007 travel plan.
41. The ESA Section 7 consultation process covered several activities occurring on the Forest including motorized vehicle travel on the Payette.
42. In 2007, the Forest Service completed a Biological Assessment for the Brownlee Reservoir watershed. The Brownlee Reservoir watershed Biological Assessment concluded the 2007 travel plan was likely to adversely affect bull trout. The Brownlee Reservoir watershed Biological Assessment states that no designated bull trout critical habitat occurs in the analysis area.
43. The Brownlee Reservoir watershed Biological Assessment did not assess all subwatersheds. Not all subwatersheds were analyzed because the Forest Service determined that bull trout were not present and there was no designated bull trout critical habitat.
44. The Forest Service's travel management decision increased roads and trails by 0.8 miles in or near the Indian Creek area. The Forest Service's travel management decision increased roads and trails by 6.9 miles in or near the Bear Creek and Crooked River areas.

45. In 2009, the Service completed a Biological Opinion for the Brownlee Reservoir watershed. The Brownlee Reservoir watershed Biological Opinion concluded that the Payette 2007 travel plan was likely to adversely affect bull trout. The Brownlee Reservoir watershed Biological Opinion states the Forest Service must reinitiate formal consultation if new critical habitat is designated that may be affected by the 2007 travel plan.

46. Bull trout are known to exist in Upper Indian Creek. Bull trout are known to exist in Bear Creek. Bull trout are known to exist in Crooked River. Bull trout are known to exist in Camp Creek.

47. In 2010, the Service designated Indian Creek as bull trout critical habitat. In 2010, the Service designated Bear Creek as bull trout critical habitat. In 2010, the Service designated Crooked River as bull trout critical habitat. In 2010, the Service designated Wildhorse River as bull trout critical habitat.

48. The Payette 2007 travel plan affects bull trout critical habitat in the Brownlee Reservoir watershed. Impacts to bull trout critical habitat in the Brownlee Reservoir watershed were not considered or analyzed in the 2007 Brownlee Reservoir watershed Biological Assessment. Impacts to bull trout critical habitat in the Brownlee Reservoir watershed were not considered or analyzed in the 2009 Brownlee Reservoir watershed Biological Opinion.

49. The Forest Service did not reinitiate consultation under ESA Section 7 after the Service designated bull trout critical habitat in the Brownlee Reservoir watershed. The Forest Service has not completed consultation under ESA Section 7 after the Service designated bull trout critical habitat in the Brownlee Reservoir watershed. The Forest Service did not make a “no effect” determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Brownlee Reservoir watershed. The Forest Service did not make a “not likely to adversely affect” determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Brownlee Reservoir watershed.

50. In 2007, the Forest Service completed a Biological Assessment for the Weiser River watershed. The Weiser River watershed Biological Assessment concluded the 2007 travel plan was likely to adversely affect bull trout. The Weiser River watershed Biological Assessment states that no designated bull trout critical habitat occurs in the analysis area.

51. The Weiser River watershed Biological Assessment did not assess all subwatersheds. Not all subwatersheds were analyzed because the Forest Service determined that bull trout were not present and there was no designated bull trout critical habitat.

52. The Forest Service's travel management decision increased roads and trails by 5 miles in the Upper East Fork Weiser River subwatershed.

53. In 2009, the Service completed a Biological Opinion for the Weiser River watershed. The Weiser River watershed Biological Opinion concluded that the Payette 2007 travel plan was likely to adversely affect bull trout. The Weiser River watershed Biological Opinion states the Forest Service must reinitiate formal consultation if new critical habitat is designated that may be affected by the 2007 travel plan.

54. In 2010, the Service designated Hornet Creek as bull trout critical habitat. In 2010, the Service designated Placer Creek as bull trout critical habitat. In 2010, the Service designated North Creek as bull trout critical habitat. In 2010, the Service designated Grouse Creek as bull trout critical habitat. In 2010, the Service designated Olive Creek and its tributaries as bull trout critical habitat. In 2010, the Service designated the East Fork Weiser River as bull trout critical habitat. In 2010, the Service designated Dewey Creek as bull trout critical habitat. In 2010, the Service designated the Little Weiser River as bull trout critical habitat. In 2010, the Service designated Anderson Creek as bull trout critical habitat.

55. The Payette's 2007 travel plan affects bull trout critical habitat in the Weiser River watershed. Impacts to bull trout critical habitat in the Weiser River watershed were not considered

or analyzed in the 2007 Weiser River watershed Biological Assessment. Impacts to bull trout critical habitat in the Weiser River watershed were not considered or analyzed in the 2009 Weiser River watershed Biological Opinion.

56. The Forest Service did not reinitiate consultation under ESA Section 7 after the Service designated bull trout critical habitat in the Weiser River watershed. The Forest Service did not complete consultation under the ESA Section 7 after the Service designated bull trout critical habitat in the Weiser River watershed. The Forest Service did not make a “no effect” determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Weiser River watershed. The Forest Service did not make a “not likely to adversely affect” determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Weiser River watershed.

57. In 2007, the Forest Service completed a Biological Assessment for the Deep Creek watershed. The Deep Creek watershed Biological Assessment concluded the 2007 travel management plan was likely to adversely affect bull trout. The Deep Creek watershed Biological Assessment states that no designated bull trout critical habitat occurs in the analysis area.

58. In 2009, the Service completed a Biological Opinion for the Deep Creek watershed. The Deep Creek watershed Biological Opinion concluded that the Payette 2007 travel plan was likely to adversely affect bull trout. The Deep Creek watershed Biological Opinion states the Forest Service must reinitiate formal consultation if new critical habitat is designated that may be affected by the 2007 travel management plan.

59. Bull trout are known to exist in the Deep Creek watershed.

60. In 2010, the Service designated the Snake River as bull trout critical habitat. In 2010, the Service designated Granite Creek as bull trout critical habitat.

61. The Payette's 2007 travel plan affects bull trout critical habitat in the Deep Creek watershed. Impacts to bull trout critical habitat in the Deep Creek watershed were not considered or analyzed in the 2007 Deep Creek watershed Biological Assessment. Impacts to bull trout critical habitat in the Deep Creek watershed were not considered or analyzed in the 2009 Deep Creek watershed Biological Opinion.

62. The Forest Service did not reinitiate consultation under ESA Section 7 after the Service designated bull trout critical habitat in the Deep Creek watershed. The Forest Service did not complete consultation under the ESA Section 7 after the Service designated bull trout critical habitat in the Deep Creek watershed. The Forest Service did not make a "no effect" determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Deep Creek watershed. The Forest Service did not make a "not likely to adversely affect" determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Deep Creek watershed.

63. In 2007, the Forest Service completed a Biological Assessment for the Little Salmon River watershed. The Little Salmon River watershed Biological Assessment concluded the 2007 travel plan was likely to adversely affect bull trout. The Little Salmon River watershed Biological Assessment states that no designated bull trout critical habitat occurs in the analysis area. Tributaries to the Little Salmon River occur on the Payette.

64. In 2009, the Service completed a Biological Opinion for the Little Salmon River watershed. The Little Salmon River watershed Biological Opinion concluded that the Payette 2007 travel plan was likely to adversely affect bull trout. The Little Salmon River watershed Biological Opinion states the Forest Service must reinitiate formal consultation if new critical habitat is designated that may be affected by the 2007 travel management plan.

65. Bull trout are known to exist in Hard Creek. Bull trout are known to exist in Hazard Creek. Bull trout are known to exist in Boulder Creek. Bull trout are known to exist in Rapid River.

66. In 2010, the Service designated the Little Salmon River as bull trout critical habitat. In 2010, the Service designated Boulder Creek and an unnamed tributary of it as bull trout critical habitat. In 2010, the Service designated the lower section of Hazard Creek as bull trout critical habitat. In 2010, the Service designated Ant Basin Creek as bull trout critical habitat.

67. The Payette's 2007 travel plan affects bull trout critical habitat in the Little Salmon River watershed. Impacts to bull trout critical habitat in the Little Salmon River watershed were not considered or analyzed in the 2007 Little Salmon River watershed Biological Assessment. Impacts to bull trout critical habitat in the Little Salmon River watershed were not considered or analyzed in the 2009 Brownlee Reservoir watershed Biological Opinion.

68. The Forest Service did not reinitiate consultation under ESA Section 7 after the Service designated bull trout critical habitat in the Little Salmon River watershed. The Forest Service did not complete consultation under the ESA Section 7 after the Service designated bull trout critical habitat in the Little Salmon River watershed. The Forest Service did not make a "no effect" determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Little Salmon River watershed. The Forest Service did not make a "not likely to adversely affect" determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Little Salmon River watershed.

69. In 2007, the Forest Service completed a Biological Assessment for the Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds. The Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds Biological Assessment concluded the 2007 travel plan was likely to adversely affect bull trout. Middle Fork Salmon River

Tributaries NW and Main Salmon River Tributaries SE watersheds Biological Assessment states that no designated bull trout critical habitat occurs in the analysis area.

70. In 2009, the Service completed a Biological Opinion for the Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds. The Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds Biological Opinion concluded that the Payette 2007 travel plan was likely to adversely affect bull trout. The Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds Biological Opinion states the Forest Service must reinitiate formal consultation if new critical habitat is designated that may be affected by the 2007 travel plan.

71. Bull trout occupy much of the mainstem Salmon River and associated tributary systems.

72. In 2010, the Service designated streams in the Middle Fork Salmon River watershed as bull trout critical habitat. In 2010, the Service designated Disappointment Creek as bull trout critical habitat. In 2010, the Service designated Hungry Creek as bull trout critical habitat. In 2010, the Service designated Starvation Creek as bull trout critical habitat. In 2010, the Service designated Dismal Creek as bull trout critical habitat. In 2010, the Service designated the Salmon River as bull trout critical habitat. In 2010, the Service designated Devils Toe Creek as bull trout critical habitat. In 2010, the Service designated Big Creek as bull trout critical habitat. In 2010, the Service designated Lick Creek as bull trout critical habitat. In 2010, the Service designated Rush Creek as bull trout critical habitat. In 2010, the Service designated Cabin Creek as bull trout critical habitat. In 2010, the Service designated Cave Creek as bull trout critical habitat. In 2010, the Service designated Crooked Creek as bull trout critical habitat. In 2010, the Service designated Big Ramey Creek as bull trout critical habitat. In 2010, the Service designated East Fork Big Ramey Creek as bull trout critical habitat. In 2010, the Service designated Hand Creek as bull trout critical habitat. In 2010, the Service designated Boulder Creek as bull trout critical habitat. In 2010, the Service designated Beaver Creek

as bull trout critical habitat. In 2010, the Service designated Smith Creek as bull trout critical habitat. In 2010, the Service designated Logan Creek as bull trout critical habitat. In 2010, the Service designated Monumental Creek as bull trout critical habitat. In 2010, the Service designated Snowside Creek as bull trout critical habitat. In 2010, the Service designated West Fork Monumental Creek as bull trout critical habitat. In 2010, the Service designated Chamberlain Creek as bull trout critical habitat. In 2010, the Service designated Big Cottonwood Creek as bull trout critical habitat. In 2010, the Service designated Marble Creek as bull trout critical habitat. In 2010, the Service designated Little Cottonwood Creek as bull trout critical habitat. In 2010, the Service designated Buck Creek as bull trout critical habitat.

73. The Payette's 2007 travel plan affects bull trout critical habitat in the Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds. Impacts to bull trout critical habitat in the Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds were not considered or analyzed in the 2007 Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds Biological Assessment. Impacts to bull trout critical habitat in the Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds were not considered or analyzed in the 2009 Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds Biological Opinion.

74. The Forest Service did not reinitiate consultation under ESA Section 7 after the Service designated bull trout critical habitat in the Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds. The Forest Service did not complete consultation under ESA Section 7 after the Service designated bull trout critical habitat in the Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds. The Forest Service did not make a "no effect" determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE

watersheds. The Forest Service did not make a “not likely to adversely affect” determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Middle Fork Salmon River Tributaries NW and Main Salmon River Tributaries SE watersheds.

75. In 2007, the Forest Service completed a Biological Assessment for the Main Salmon River SW watershed. The Main Salmon River SW watershed Biological Assessment concluded the 2007 travel plan was likely to adversely affect bull trout. The Main Salmon River SW watershed Biological Assessment states that no designated bull trout critical habitat occurs in the analysis area.

76. The Main Salmon River SW watershed Biological Assessment did not assess all subwatersheds.

77. In 2009, the Service completed a Biological Opinion for the Main Salmon River watershed. The Main Salmon River watershed Biological Opinion concluded that the Payette 2007 travel plan was likely to adversely affect bull trout. The Main Salmon River watershed Biological Opinion states the Forest Service must reinitiate formal consultation if new critical habitat is designated that may be affected by the 2007 travel management plan.

78. Resident bull trout populations are known to occur in several Main Salmon River tributaries. Bull trout are known to exist in Lake Creek. Bull trout are known to exist in Partridge Creek. Bull trout are known to exist in Fall Creek. Bull trout are known to exist in Warren Creek.

79. In 2010, the Service designated Lake Creek as bull trout critical habitat. In 2010, the Service designated Partridge Creek as bull trout critical habitat. In 2010, the Service designated Elkhorn Creek as bull trout critical habitat. In 2010, the Service designated Fall Creek as bull trout critical habitat. In 2010, the Service designated East Fork Fall Creek as bull trout critical habitat. In 2010, the Service designated California Creek as bull trout critical habitat. In 2010, the Service designated Warren Creek as bull trout critical habitat. In 2010, the Service designated Houston Creek as bull

trout critical habitat. In 2010, the Service designated Mitchell Creek as bull trout critical habitat. In 2010, the Service designated Thomas Creek as bull trout critical habitat.

80. The Payette's 2007 travel plan affects bull trout critical habitat in the Main Salmon River watershed. Impacts to bull trout critical habitat in the Main Salmon River watershed were not considered or analyzed in the 2007 Main Salmon River watershed Biological Assessment. Impacts to bull trout critical habitat in the Main Salmon River watershed were not considered or analyzed in the 2009 Main Salmon River watershed Biological Opinion.

81. The Forest Service did not reinitiate consultation under ESA Section 7 after the Service designated bull trout critical habitat in the Main Salmon River watershed. The Forest Service did not complete consultation under ESA Section 7 after the Service designated bull trout critical habitat in the Main Salmon River watershed. The Forest Service did not make a "no effect" determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Main Salmon River watershed. The Forest Service did not make a "not likely to adversely affect" determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the Main Salmon River watershed.

82. In 2007, the Forest Service completed a Biological Assessment for the South Fork Salmon River watershed. The South Fork Salmon River watershed Biological Assessment concluded the 2007 travel plan was likely to adversely affect bull trout. The South Fork Salmon River watershed Biological Assessment states that no designated bull trout critical habitat occurs in the analysis area.

83. In 2009, the Service completed a Biological Opinion for the South Fork Salmon River watershed. The Brownlee Reservoir watershed Biological Opinion concluded that the Payette 2007 travel plan was likely to adversely affect bull trout. The South Fork Salmon River watershed Biological Opinion states the Forest Service must reinitiate formal consultation if new critical habitat is designated that may be affected by the 2007 travel management plan.

84. Bull trout are known to occur in at least 27 streams or stream complexes in the South Fork Salmon River watershed. Bull trout are known to occur in Upper Lake Creek. Bull trout are known to occur in Grouse-Flat Creek. Bull trout are known to occur in Ruby Creek. Bull trout are known to occur in Summit Creek. Bull trout are known to occur in Victor Creek. Bull trout are known to occur in Loon Creek. Bull trout are known to occur in Lick Creek. Bull trout are known to occur in Zena Creek. Bull trout are known to occur in Fitsum Creek. Bull trout are known to occur in Buckhorn Creek. Bull trout are known to occur in Cougar Creek. Bull trout are known to occur in Fourmile Creek. Bull trout are known to occur in Blackmare Creek. Bull trout are known to occur in Upper East Fork South Fork Salmon River. Bull trout are known to occur in Sugar Creek. Bull trout are known to occur in Tamarack Creek. Bull trout are known to occur in Profile Creek. Bull trout are known to occur in Quartz Creek. Bull trout are known to occur in Elk Creek. Bull trout are known to occur in Pony Creek. Bull trout are considered widespread throughout the subwatersheds listed in this paragraph. The Service assumes that bull trout occur in these subwatersheds between documented sightings.

85. In 2010, the Service designated Lake Creek as bull trout critical habitat. In 2010, the Service designated the South Fork Salmon River as bull trout critical habitat. In 2010, the Service designated Blackmare Creek as bull trout critical habitat. In 2010, the Service designated Fourmile Creek as bull trout critical habitat. In 2010, the Service designated Buckhorn Creek as bull trout critical habitat. In 2010, the Service designated North Fork Buckhorn Creek as bull trout critical habitat. In 2010, the Service designated West Fork Buckhorn Creek as bull trout critical habitat. In 2010, the Service designated South Fork Buckhorn Creek as bull trout critical habitat. In 2010, the Service designated Goar Creek as bull trout critical habitat. In 2010, the Service designated Indian Creek as bull trout critical habitat. In 2010, the Service designated Fitsum Creek as bull trout critical habitat.

86. The Payette's 2007 travel plan affects bull trout critical habitat in the South Fork Salmon River watershed. Impacts to bull trout critical habitat in the South Fork Salmon River watershed were not considered or analyzed in the 2007 South Fork Salmon River watershed Biological Assessment. Impacts to bull trout critical habitat in the South Fork Salmon River watershed were not considered or analyzed in the 2009 South Fork Salmon River watershed Biological Opinion.

87. The Forest Service did not reinitiate consultation under ESA Section 7 after the Service designated bull trout critical habitat in the South Fork Salmon River watershed. The Forest Service did not complete consultation under ESA Section 7 after the Service designated bull trout critical habitat in the South Fork Salmon River watershed. The Forest Service did not make a "no effect" determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the South Fork Salmon River watershed. The Forest Service did not make a "not likely to adversely affect" determination regarding the effects of the 2007 travel plan on bull trout critical habitat in the South Fork Salmon River watershed.

88. Roads, trails, and motor vehicle use in bull trout critical habitat on the Payette cause impacts that were not considered by any of the watershed-level Biological Opinions. Roads, trails, and motor vehicle use on the Payette cause impacts to bull trout critical habitat in ways that differ from impacts to bull trout. Roads, trails, and motor vehicle use on the Payette cause impacts to bull trout critical habitat in ways that were not considered by any of the watershed-level Biological Opinions. Roads, trails, and motor vehicle use in bull trout critical habitat on the Payette cause impacts on streams and subwatersheds that were not considered or analyzed by any of the watershed-level Biological Opinions. Roads, trails, and motor vehicle use on the Payette may result in the destruction or adverse modification of bull trout critical habitat.

89. On December 18, 2015, Guardians sent the Forest Service a notice of its intent to sue—as required by the ESA—asserting that the Forest Service had failed to reinitiate consultation regarding

the effects of its 2007 travel plan on bull trout critical habitat. The Forest Service did not respond to the December 18, 2015 notice letter.

90. On July 6, 2016, Guardians sent notice of its intent to sue Defendants for violations of the Endangered Species Act. Defendants did not respond to the July 6, 2016 notice letter. Defendants did not seek to use the 60-day notice period to attempt to avoid litigation regarding the alleged violations described in the July 6, 2016 notice letter. Defendants did not remedy the alleged violations described in the July 6, 2016 notice letter.

91. Guardians' July 6, 2016 notice letter informed Defendants that significant new information existed that required the reinitiation of consultation under ESA Section 7. New studies regarding the impacts of climate change reveal that the Payette's 2007 travel plan may affect bull trout and its designated critical habitat in a way or to an extent not previously considered. This new information shows that climate change is affecting bull trout and its critical habitat by warming stream temperatures, altering stream hydrology, and changing the frequency, magnitude, and extent of climate-induced events including floods, droughts, and wildfires.

92. Guardians' July 6, 2016 notice letter included citation to a number of new scientific articles, including information produced by the Forest Service itself. Guardians attached copies of the relevant studies to the notice letter. These articles include:

- Luce, C. H, J. T. Abatzoglou, and Z. A. Holden. 2013. The Missing Mountain Water: Slower Westerlies Decrease Orographic Enhancement in the Pacific Northwest USA. *Science* 342: 1360-1364 (documenting declining trends in streamflow timing and volume attributed to orographic precipitation enhancement, in addition to increased temperatures).
- Isaak, D. J., et al. 2016. Slow climate velocities of mountain streams portend their role as refugia for cold-water biodiversity. *Proc Natl Acad Sci*, DOI: 10.1073/pnas.1522429113 (showing temperature resistance of mountain streams and highlighting their importance in

buffering cold-water species from climate change).

- U.S. Forest Service Rocky Mountain Research Station, Climate Shield Cold-Water Refuge
- Streams for Native Trout, available at <http://www.fs.fed.us/rm/boise/AWAE/projects/ClimateShield.html> (last accessed September 19, 2016) (identifying colder, high-elevation streams that serve as a refugia for native bull trout with the goal of improving the odds of preserving native trout populations).
- Auerbach, N. A., K. A. Wilson, A. I. T. Tulloch, J. R. Rhodes, J. O. Hanson, and H. P. Possingham. 2015. Effects of threat management interactions on conservation priorities. *Conservation Biology* 29:1626-1635 (concluding species conservation management that does not consider interactions between actions may result in misplaced investments or misguided expectations of the effort to mitigate threats to species).
- Barnas, K. A., et al. 2015. Is habitat restoration targeting relevant ecological needs for endangered species? Using Pacific Salmon as a case study. *Ecosphere* 6(7), art 110 (identifying improvements for habitat management to improve efficiencies in matching identified needs for conserving a species with explicit management actions).
- Meyer, K.A. et al. 2014. Bull trout trends in abundance and probabilities of persistence in Idaho. *North American Journal of Fisheries Management* 34:202-214 (describing bull trout population trends and probability of persistence in Idaho).
- Wilcox, T. M. et al. 2014. A blocking primer increases specificity in environmental DNA detection of bull trout (*Salvelinus confluentus*). *Conservation Genetics Resources* 6:283-284 (newly developed environmental DNA survey methods are improving agencies' ability to assess bull trout distribution and identify watersheds where bull trout are at risk of extirpation).

93. The articles included in and attached to Guardians' July 6, 2016 notice letter document the larger role of climate change in affecting the status of bull trout and their critical habitat throughout its range. The articles also show the importance of reducing non-climate change stressors to bull trout and their critical habitat, such as open motorized routes and motor vehicle use in or near occupied bull trout waterways.

94. The articles included in Guardians' July 6, 2016 notice letter detail new methods of documenting bull trout. The articles included in Guardians' July 6, 2016 notice letter detail new documentation of bull trout occurrence. The articles included in Guardians' July 6, 2016 notice letter detail new management and restoration efforts affecting bull trout and their critical habitat. These articles indicate the Payette 2007 travel plan may affect bull trout and designated bull trout critical habitat to a greater extent than previously considered.

95. The Forest Service predicts cold-water refuge streams will play an important role in the future protection and recovery of bull trout in light of anticipated climate change-related temperature increases.

96. Cold-water refuge streams for bull trout identified by the Forest Service exist on the Payette. These cold-water refuge streams for bull trout were not considered during the consultation process related to the Payette's 2007 travel plan.

97. The significant new information included in Guardians' July 6, 2016 notice letter reveals the Payette's 2007 travel plan may affect bull trout and its designated critical habitat in a manner not previously considered. None of the articles or information included in the notice letter were available to Defendants during the ESA Section 7 consultation process on the Payette's 2007 travel plan. Climate change effects were not considered as a factor affecting bull trout at the time it was listed under the ESA.

98. The Biological Assessments prepared by the Forest Service related to the Payette's 2007 travel plan did not consider climate change. Aside from the Little Salmon River Biological Assessment, the Biological Assessments prepared by the Forest Service related to the Payette's 2007 travel plan did not discuss climate change. The Little Salmon River Biological Assessment briefly mentions a potential decrease in flow resulting from climate change.

99. The Biological Opinions prepared by the Service related to the Payette's 2007 travel plan mention climate change once as a potential threat to bull trout. The Biological Opinions prepared by the Service related to the Payette's 2007 travel plan did not analyze the effects of climate change on bull trout. The Biological Opinions prepared by the Service related to the Payette's 2007 travel plan did not analyze the effects of climate change on bull trout critical habitat.

**FIRST CLAIM FOR RELIEF
VIOLATIONS OF THE ENDANGERED SPECIES ACT**

100. Plaintiff incorporates by reference all preceding paragraphs.

101. ESA § 7(a)(2) requires the Service to insure that projects are not likely to jeopardize the continued existence of any endangered or threatened species or to result in the destruction or adverse modification of the designated critical habitat of a listed species. 16 U.S.C. § 1536(a).

102. After the Service issues a Biological Opinion, if, during the course of the action, new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, the Forest Service—as the action agency—has an obligation to reinitiate formal consultation under the ESA. 50 C.F.R. § 402.16(b).

103. After the Service issues a Biological Opinion, if, during the course of the action, new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, the Service has an obligation to reinitiate formal consultation under the ESA. 50 C.F.R. § 402.16(b).

104. After the Service issues a Biological Opinion, if, during the course of the action, new critical habitat is designated that may be affected by the identified action, the Forest Service—as the action agency—has an obligation to reinitiate formal consultation under the ESA. 50 C.F.R. § 402.16(d).

105. After the Service issues a Biological Opinion, if, during the course of the action, new critical habitat is designated that may be affected by the identified action, the Service has an obligation to reinitiate formal consultation under the ESA. 50 C.F.R. § 402.16(d).

106. Defendants have violated the ESA by failing to reinitiate and complete consultation regarding the effects of the Payette travel plan on designated bull trout critical habitat.

107. Defendants have violated the ESA by failing to reinitiate and complete consultation after significant new information related to the effects of climate change on bull trout and bull trout critical habitat were presented to Defendants.

108. By failing to reinitiate and complete formal consultation on the action covered by the Biological Opinion, Defendants have failed to insure that the Payette travel plan will not jeopardize the continued existence of bull trout or result in the destruction or adverse modification of bull trout critical habitat, in violation of ESA § 7(a)(2).

109. By failing to reinitiate and complete formal consultation on the action covered by the Biological Opinion and continuing to implement the 2007 travel plan, Defendants have violated ESA § 7(d) by making an irreversible and irretrievable commitment of resources. 16 U.S.C. § 1536(d).

PLAINTIFF'S REQUEST FOR RELIEF

Plaintiff WildEarth Guardians respectfully requests that this Court:

1. Issue a declaratory judgment that Defendants are in violation of ESA Section 7 for failing to reinitiate and complete formal consultation and for failing to insure that the Payette travel plan will not jeopardize the continued existence of bull trout or result in the destruction or adverse

modification of bull trout critical habitat as required by ESA Section 7 and its implementing regulations;

2. Issue an order requiring Defendants to reinitiate and complete consultation by a date certain as required by ESA Section 7 and its implementing regulations;
3. Issue any other appropriate injunctive, mitigating, and/or other relief as Plaintiff may hereafter request;
4. Retain continuing jurisdiction over this matter until such time as Defendants have fully remedied the violations of law described in this complaint;
5. Award Plaintiffs their costs, attorneys' fees, and other expenses under the Endangered Species Act, 16 U.S.C. § 1540(g) and/or the Equal Access to Justice Act, 28 U.S.C. § 2412;
6. Grant such other and further relief as the Court deems just and equitable.

Respectfully submitted and dated this 21st day of September, 2016.

/s/ Dana Johnson

Dana Johnson (ISB # 8359)
Law Office of Dana Johnson, PLLC
P.O. Box 9623
Moscow, ID 83843
Ph: (208) 310-7003
johnsondanam@gmail.com

/s/ John R. Mellgren

John R. Mellgren, applicant *pro hac vice* (OSB # 114620)
Western Environmental Law Center
1216 Lincoln Street
Eugene, Oregon 97401
Ph: (541) 359-0990
mellgren@westernlaw.org

/s/ Matthew K. Bishop

Matthew K. Bishop, applicant *pro hac vice* (MT Bar # 9968)
103 Reeder's Alley
Helena, Montana 59601
Ph: (406) 324-8011
bishop@westernlaw.org

Counsel for Plaintiff WildEarth Guardians