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

WILDEARTH GUARDIANS	)
	) Case No. 1:16-cv-439
Plaintiff,	)
	) <b>COMPLAINT FOR DECLARATORY</b>
v.	) <b>AND INJUNCTIVE RELIEF</b>
	)
KIT MULLEN, in her official capacity as Sawtooth	)
National Forest Supervisor; UNITED STATES	)
FOREST SERVICE; DANIEL ASHE, in his	)
official capacity as Director of the United States	)
Fish and Wildlife Service; UNITED STATES FISH	)
AND WILDLIFE SERVICE	)
	)
Defendants.	)
_____	)

INTRODUCTION

1. Plaintiff WildEarth Guardians (“Guardians”) respectfully files this suit against Defendants Kit Mullen, the United States Forest Service, Daniel Ashe, and the United States Fish and Wildlife Service (collectively “Defendants”) and challenges Defendants’ failure to reinstate and complete consultation under Section 7 of the Endangered Species Act (“ESA”), 16

U.S.C. § 1536(a)(2), regarding (1) the continued implementation and impacts of the travel management plan for the Fairfield Ranger District on the Sawtooth National Forest (“Travel Plan”) on bull trout (*Salvelinus confluentus*) 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 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(c) & (g) (ESA citizen suit provision and grant of jurisdiction to federal district courts). 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 (Administrative Procedure Act (“APA”)). The Defendants’ 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 13, 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. After the 60-day notice period had run, the U.S. Forest Service did respond to the notice letter on September 22, 2016, but its response was insufficient to remedy the alleged

violations of the law described in the July 13, 2016 notice letter and to negate the need for this lawsuit.

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. Defendants Kit Mullen, the United States Forest Service ("Forest Service"), and the United States Fish and Wildlife Service ("FWS") 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 Camas County, Idaho and Elmore County, Idaho. Camas County, Idaho and Elmore County, Idaho are located in the Southern Division of this District. Additionally, Supervisor Kit Mullen and the Forest Service maintain an office in Twin Falls County and FWS maintains its Idaho State Office in Ada County. Both Twin Falls County and Ada County are 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 visit and recreate on the Fairfield Ranger District of the Sawtooth National Forest. Guardians' staff and members regularly recreate on the Fairfield Ranger District of the Sawtooth National Forest for the purposes of hiking, recreation, bird watching, observing wildlife including bull trout, spiritual rejuvenation, photography, camping, 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 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 on national forests across the West, 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 Fairfield Ranger District of the Sawtooth National Forest in Idaho. Guardians' members, staff, and supporters have an interest in knowing that bull trout are still present on the Sawtooth National Forest.

13. Failing to reinitiate and complete 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 Fairfield Ranger District of the Sawtooth 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's, and supporters' interests will be redressed and/or alleviated. If this Court issues the relief requested, the harm to Guardians' organizational interests will be redressed and/or alleviated.

15. Defendant KIT MULLEN is the Forest Supervisor for the Sawtooth National Forest and, in that capacity, is the federal official with responsibility for her and other Forest Service officials' actions and/or inactions challenged in this complaint. Supervisor Mullen is sued in her official capacity.

16. The UNITED STATES FOREST SERVICE is the agency within the Department of Agriculture that is charged with managing activities in the Sawtooth National Forest. The Forest Service, like all other federal agencies, is required to comply with the federal laws and

regulations that serve as the bases for the challenges in this complaint in the administration of its duties.

17. Defendant DANIEL ASHE is the Director of the FWS and, in that capacity, is the federal official with responsibility for all Fish and Wildlife Service officials' actions and/or inactions challenged in this complaint. Director Ashe is sued in his official capacity.

18. Defendant UNITED STATES FISH AND WILDLIFE SERVICE is the agency within the Department of the Interior that is responsible for applying and implementing the federal laws and regulations that serve as the bases for the challenges in this complaint.

19. Guardians and Defendants are "persons" within the meaning of 16 U.S.C. § 1540(g)(1) and 5 U.S.C. § 702.

#### LEGAL BACKGROUND

##### The Endangered Species Act

20. The ESA is a comprehensive federal statute that declares that endangered and threatened species are of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). Accordingly, the purpose of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species ...." Id. § 1531(b). To this end, the ESA directs all federal agencies to work to conserve endangered and threatened species and to use their authorities to further the purposes of the ESA. See id. § 1536(a).

21. Section 4 of the ESA requires FWS to protect imperiled species by listing them as either "endangered" or "threatened" and to designate their "critical habitat." Id. § 1533. Critical habitat includes areas that are essential to the conservation of the species. Id. § 1532(5)(A).

22. Section 7(a)(2) of the ESA requires each federal agency (the “action agency”), in consultation with the FWS<sup>1</sup> to ensure “that any action authorized, funded, or carried out” by the agency “is not likely to jeopardize the continued existence of” listed species or result in the destruction or adverse modification of critical habitat of such species. 16 U.S.C. § 1536(a)(2).

23. The action agency must “review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat.” 50 C.F.R. § 402.14(a).

24. “Action” is broadly defined to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” and includes “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

25. If any listed species may be present in the action area, the action agency must prepare a Biological Assessment (“BA”). See 16 U.S.C. § 1536(c)(1). The BA must “evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary.” 50 C.F.R. § 402.12(a).

26. If the action agency determines that its action may affect, but is not likely to adversely affect, a proposed or listed species or its proposed or designated critical habitat, it may engage in “informal consultation” with FWS. See 50 C.F.R. §§ 402.13(a), 402.14(b)(1). If, as a result of informal consultation, FWS issues a written “concurrence” to the action agency that its proposed action is not likely to adversely affect a listed species or its critical habitat, the consultation process ends. See 50 C.F.R. §§ 402.13(a), 402.14(b)(1). However, if either agency believes that

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<sup>1</sup> The ESA delegates responsibility for Section 7 consultation with action agencies to two cabinet-level Secretaries, Interior and Commerce. 16 U.S.C. § 1532(15); 16 U.S.C. § 1536(a). The Secretary of the Interior has sub-delegated authority to FWS, see 50 C.F.R. § 402.01, who has primary responsibility for freshwater species of fish, such as the bull trout.

adverse effects are possible, the agencies must engage in formal consultation.

27. If the action agency determines that its proposed action “may affect” any listed species, the agency must engage in “formal consultation” with the FWS. 50 C.F.R. § 402.14; see also 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that “may affect” broadly includes “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character”). The action agency must provide FWS with a written request to initiate consultation, which must include a description of the action to be considered; a description of the specific area that may be affected by the action; a description of any listed species or critical habitat that may be affected by the action; a description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects; and any relevant reports or other relevant available information. See 50 C.F.R. § 402.14.

28. After formal consultation, the FWS issues a Biological Opinion (“BO”) to explain whether the agency action is likely to “jeopardize” any species’ existence or “result in the destruction or adverse modification” of a listed species’ critical habitat. 16 U.S.C. § 1536(a)(2). The BO must include a summary of the information on which it is based and must adequately detail and assess how the proposed action affects listed species and their critical habitat. 50 C.F.R. § 402.14(h). The BO must also include an evaluation of the “cumulative effects on the listed species or critical habitat.” 50 C.F.R. § 402.14(g)(3).

29. If the action is likely to cause jeopardy or destruction or adverse modification of critical habitat, then the BO shall specify reasonable and prudent alternatives (“RPAs”) that avoid jeopardy or adverse modification of critical habitat. See 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3). If the FWS concludes that the action or the RPAs will not cause jeopardy, it will issue an incidental take statement (“ITS”) that specifies “the impact, i.e., the amount or extent, of

. . . incidental taking” that may occur. See 50 C.F.R. § 402.14(i)(1).

30. The action agency’s and FWS’s consultation duties do not end with the issuance of a BO. Both the action agency and FWS are required to reinitiate of consultation in certain situations “where discretionary Federal involvement or control over the action has been retained or is authorized by law . . .” See 50 C.F.R. § 402.16.

31. Where the discretionary federal involvement or control requirement is met, the agencies both bear the responsibility to reinitiate consultation:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If 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;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16 (emphasis added).

32. Once consultation is initiated or reinitiated, Section 7(d) of the ESA prohibits the agency from “mak[ing] any irreversible or irretrievable commitment of resources” toward a project that would “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures . . .” 16 U.S.C. § 1536(d). The 7(d) prohibition “is in force during the consultation process and continues until the requirements of Section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09.

33. Actions brought to compel an agency to reinitiate and complete consultations do not challenge a final agency action, but instead attempt to “compel agency action unlawfully withheld or unreasonably delayed” under APA Section 706(1). 5 U.S.C., § 706(1); see also Friends of the Clearwater v. Dombeck, 222 F.3d 522, 560 (9th Cir. 2000) (“An action to compel an agency to prepare [supplemental NEPA documents] ... is not a challenge to a final agency

decision, but rather an action arising under 5 U.S.C. § 706(1), to ‘compel agency action unlawfully withheld or unreasonably delayed.’”) (citation omitted). However, where the agency considers whether to reinitiate consultation and decides not to, the Court must overturn that decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or “without observance of procedures required by law,” within the meaning of the APA. 5 U.S.C. §§ 706(2)(A), (D); see also generally Envtl. Prot. Info. Ctr. v. Simpson Timber Co., 255 F.3d 1073 (9th Cir. 2001).<sup>2</sup>

34. The ESA’s goals cannot be met where the action agencies and FWS fail to comply with the procedural and substantive requirements of the Act. Compliance is critical to conserve endangered and threatened species and the habitat they rely on. Therefore, failure to consult where the law requires consultation is a serious violation of the ESA.

#### FACTS

35. Bull trout were listed as a threatened species under the ESA throughout the coterminous United States in 1999. 64 Fed. Reg. 58,910 (Nov. 1, 1999). However, FWS did not designate critical habitat for the species concurrent with their listing.

36. Since listing bull trout as threatened, the FWS has designated and redesignated bull trout critical habitat multiple times.

37. On October 6, 2004, the FWS designated 1,748 miles of streams and 61,235 acres of lakes as bull trout critical habitat. 69 Fed. Reg. 59,996. The October 6, 2004 bull trout critical

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<sup>2</sup> In addition to differing *standards* of review, claims under APA sections 706(1) and 706(2) also have differing *scopes* of review. While review of claims under APA section 706(2) are generally limited to the administrative record (see Lands Council v. Powell, 395 F.3d 1019, 1029-30 (9th Cir. 2005) (listing exceptions)), review of claims that USFS failed to act under APA section 706(1) are not limited to the record “because there is no final agency action to demarcate the limits of the record.” Dombeck, 222 F.3d at 560 (citation omitted).

habitat designation did not designate any critical habitat for bull trout on the Sawtooth National Forest.

38. On September 26, 2005, the FWS designated 3,828 miles of streams, 143,218 acres, of lakes, and 985 miles of shoreline as bull trout critical habitat. 70 Fed. Reg. 56,212. The September 26, 2005 bull trout critical habitat designation did not designate any critical habitat for bull trout on the Sawtooth National Forest.

39. On October 18, 2010, the FWS released its current critical habitat designation 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.

40. The October 18, 2010 decision designated bull trout critical habitat on the Sawtooth National Forest.

41. The Decision Notice and Finding of No Significant Impact for the Fairfield Ranger District portion of the Sawtooth Travel Plan was signed on February 22, 2008. The Sawtooth Travel Plan designated a system of roads and trails for motorized use on the Sawtooth National Forest.

42. The Forest Service retains discretionary control and involvement over the Sawtooth Travel Plan, including over the portion of the Sawtooth Travel Plan covering the Fairfield Ranger District.

43. In November of 2007, the Sawtooth completed a Biological Assessment of the Fairfield Ranger District's Travel Plan Revision ("2007 BA") as part of the ESA Section 7 consultation process for the Sawtooth Travel Plan.

44. The FWS received ranger district-level Biological Assessments from the Forest Service as part of the ESA Section 7 consultation process for the Sawtooth Travel Plan Revisions for the

Fairfield and Ketchum Ranger Districts. The FWS issued a concurrence letter on January 30, 2008 for the Fairfield and Ketchum Ranger Districts on the Sawtooth.

45. The ESA Section 7 consultation process covered designation of motorized vehicle routes and alterations to the road and trail system on the Sawtooth.

46. The 2007 BA states that bull trout populations occur in the South Fork Boise River subbasin on the Fairfield Ranger District, and that fish spawn and rear young in many of the tributaries in 13 subwatersheds.

47. The 2007 BA states that the majority of subwatersheds in the action area had higher amounts of surface fine sediments in pool tailouts or low gradient riffles because of more erosion, and that sedimentation had increased due to localized impacts from causes including roads and recreation.

48. Subwatersheds within the Fairfield Ranger District include Basalt Creek, Bit Water-Virginia, Boardman, Houseman-Beaver, Kelley Creek, Lick-Five-Points, M.F. Lime, S.F. Lime, S.F. Lime Hearn, Miller-Bowns-Salt, Redrock-Carrie, Upper Little Smoky Creek, Upper S. Fork Lime Cr., and Worswick-Grindstone.

49. The Kelley Creek, Big Water-Virginia, and Houseman-Beaver subwatersheds were listed as impaired by the Idaho Department of Environmental Quality under Section 303(d) of the Clean Water Act in 2002.

50. Numerous road culverts block fish habitat on subwatersheds that are designated bull trout critical habitat. See 2007 BA Appendix 1 at 22. For example, road culverts on Big-Water Virginia subwatershed block 6.83 miles of fish habitat. Road culverts on Miller-Bowns-Salt subwatershed block 1.17 miles of fish habitat. Road culverts on Redrock-Carrie subwatershed block 3.7 miles of fish habitat. Road culverts on Upper Little Smoky Creek subwatershed block

0.54 miles of fish habitat. In addition, several culvert barriers occur in close proximity to migratory bull trout or near tributaries that support local populations in the South Fork Boise River.

51. The 2007 BA indicated that many of the subwatersheds would see increases in the miles of system motorized trails under the Travel Plan.

52. The Travel Plan increased the miles of designated system motorized trails by 6.82 miles in the Basalt Creek subwatershed. The Travel Plan increased designated system motorized trails by 6.68 miles in the Big Water-Virginia subwatershed. The Travel Plan increased designated system motorized trails by 0.36 miles in the Boardman Creek subwatershed. The Travel Plan increased designated system motorized trails by 2.66 miles in the Kelley Creek subwatershed. The Travel Plan increased designated system motorized trails by 1.92 miles in the Lick-Five-Points subwatershed. The Travel Plan increased designated system motorized trails by 0.96 miles in the Middle Fork Lime Creek subwatershed. The Travel Plan increased designated system motorized trails by 0.17 miles in the Redrock-Carrie subwatershed. The Travel Plan increased designated system motorized trails by 1.69 miles in the South Fork Lime-Hearn subwatershed. The Travel Plan increased designated system motorized trails by 12.48 miles in the Upper Little Smoky Creek subwatershed. The Travel Plan increased designated system motorized trails by 1.8 miles in the Upper South Fork Lime Creek subwatershed. The Travel Plan increased designated system motorized trails by 5.37 miles in the Worswick-Grindstone subwatershed.

53. The majority of subwatersheds (Abbott-Shake, Big Peak, Big Water-Virginia, Houseman-Beaver) had overall aquatic conditions functioning at risk due to some culvert

barriers, total road densities averaging 0.56 miles per square mile (“mi/mi<sup>2</sup>”), and road densities in riparian conservation areas (“RCAs”) averaging 1.34 mi/mi<sup>2</sup>.

54. Lick-Five-Point, Miller-Bowns-Salt, and Redrock-Carrie subwatersheds had overall aquatic conditions functioning at unacceptable risk due to more culvert barriers, total road densities above 1.00 mi/mi<sup>2</sup>, and average road densities in RCA’s of 3.10 mi/mi<sup>2</sup>.

55. The 2007 BA stated that increases in the miles of designated motorized system trails would not impact bull trout or its habitat because none of the new designated routes would cross “occupied” bull trout habitat.

56. The 2007 BA also stated that FWS had not designated any critical habitat for bull trout in the South Fork Boise River subbasin.

57. The 2007 BA described the scope of the BA as “entire subwatersheds (6th Fields) where bull trout occur.”

58. The 2007 BA determined that implementation of the Travel Plan was not likely to adversely affect bull trout, but did not make an adverse modification determination as to bull trout critical habitat.

59. In its 2008 Concurrence Letter, FWS stated that if environmental conditions change or there is new information about the potential effects of travel management, the Forest Service should verify with FWS that the conclusions are still valid.

60. In 2010, FWS included streams within the Fairfield Ranger District in the bull trout critical habitat rule. 75 Fed. Reg. at 64,037-43 (Unit 26).

61. Unit 26 of the designated bull trout critical habitat includes South Fork Boise River, Boardman Creek, Salt Creek, Big Smoky Creek, Big Peak Creek, Big Water Gulch, Beaver Creek, Little Smoky Creek, and Carrie Creek.

62. Multiple roads and trails designated as part of the Travel Plan have adverse impacts on these streams. For example, Little Smoky Road (FR 015, 70015) crosses Little Smoky Creek at least 5 times and Dollarhide Jeep Road crosses it once. Dollarhide Jeep Road also crosses Carrie Creek twice and runs adjacent to it. King of the West (FR 70013), Tyrannis Road (FR 70225), and Little Smoky Road also all cross Carrie Creek.

63. The 2007 BA states that no designated bull trout critical habitat occurs in the analysis area.

64. Roads, trails, and motor vehicle use in and along bull trout critical habitat on the Fairfield Ranger District cause adverse impacts that were not considered by the 2007 BA. Roads, trails, and motor vehicle use on the Fairfield Ranger District cause adverse impacts to bull trout critical habitat in ways that differ from impacts to bull trout. Roads, trails, and motor vehicle use on the Fairfield Ranger District cause adverse impacts to bull trout critical habitat in ways that were not considered by the 2008 Concurrence Letter. Roads, trails, and motor vehicle use on the Fairfield Ranger District may result in the destruction or adverse modification of bull trout critical habitat.

65. 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 and complete consultation regarding the effects of the Travel Plan revision on bull trout critical habitat. The Forest Service did not respond to the December 18, 2015 notice letter.

66. On July 13, 2016, Guardians sent a second notice of its intent to sue Defendants for violations of the Endangered Species Act.

67. Guardians' July 13, 2016 notice letter informed Defendants *that newly designated critical habitat* required the reinitiation and completion of consultation under ESA Section 7. 50 C.F.R. § 402.16(d).

68. The July 13, 2016 notice letter also informed Defendants *that new information existed* that required the reinitiation and completion of consultation under ESA Section 7. 50 C.F.R. § 402.16(b). This new information includes the designation of bull trout critical habitat in the Sawtooth National Forest, which, as discussed above, is also its own reinitiation trigger under 50 C.F.R. § 402.16(d). Additionally, this new information includes new studies regarding the impacts of climate change that reveal that the 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, including by warming stream temperatures, altering stream hydrology, and changing the frequency, magnitude, and extent of climate-induced events including floods, droughts, and wildfires.

69. Guardians' July 13, 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 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).

70. The articles included in and attached to Guardians' July 13, 2016 notice letter document the larger role of climate change in affecting the status of bull trout and their critical habitat throughout the species' 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 and designated critical habitat.

71. The articles included in Guardians' July 13, 2016 notice letter detail new methods of documenting bull trout. The articles included in Guardians' July 13, 2016 notice letter detail new documentation of bull trout occurrence. The articles included in Guardians' July 13, 2016 notice letter detail new management and restoration efforts affecting bull trout and their critical habitat. These articles indicate that the Travel Plan may affect bull trout and designated bull trout critical habitat to a greater extent than previously considered.

72. 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.

73. Cold-water refuge streams for bull trout identified by the Forest Service exist on the Fairfield Ranger District. These cold-water refuge streams for bull trout were not considered during the consultation process related to the Travel Plan.

74. The new information included in Guardians' July 13, 2016 notice letter reveals the 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 Travel Plan. Climate change effects were not considered as a factor affecting bull trout at the time it was listed under the ESA.

75. The 2007 BA did not mention, let alone analyze, climate change impacts to bull trout or their critical habitat. The 2008 Concurrence Letter prepared by the FWS related to the Travel Plan did not mention, let alone analyze, climate change impacts to bull trout or their critical habitat.

76. Defendants did not respond to the notice letter during the 60-day notice period. The Forest Service did respond to the notice letter on September 22, 2016, after the 60-day notice period had run.

77. In its September 22, 2016 response letter, the Forest Service indicated that it had reinitiated informal consultation with FWS. The response letter did not declare that the Defendants had violated the ESA. The response letter did not ensure that the Forest Service's actions would not jeopardize the continued existence of bull trout or result in the destruction or adverse modification of their critical habitat. The response letter did not explain whether consultation would cover all of the new information identified by Plaintiff in the notice letter. The response letter did not provide a date by which consultation would be completed. The notice letter did not complete consultation. As a result, the response letter did not remedy the alleged violations described in Guardians' July 13, 2016 notice letter.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the ESA: failure to comply with 16 U.S.C. § 1536(a)(2) (substantive duties)

78. Guardians incorporates all preceding paragraphs by reference.

79. Defendants have violated the ESA by failing to reinitiate and complete Section 7 consultation regarding the continued implementation and impacts of the Travel Plan on bull trout and bull trout critical habitat. Section 7(a)(2) of the ESA requires that each federal agency consult with FWS to ensure that any action authorized, funded, or carried out by such agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. See 16 U.S.C. § 1536(a)(2).

80. Defendants' failure to reinitiate and complete Section 7 consultation on the Travel Plan after FWS designated bull trout critical habitat and in light of the climate change information identified by Guardians fails to ensure that the agency action is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.16(b), (d). This is a significant violation of the ESA.

SECOND CLAIM FOR RELIEF

Violation of the ESA: failure to comply with 16 U.S.C. § 1536(a)(2) (procedural duties triggered by critical habitat listing)

81. Guardians incorporates all preceding paragraphs by reference.

82. Defendants' failure to reinitiate and complete Section 7 consultation regarding the continued implementation and impacts of the Travel Plan on bull trout and bull trout critical habitat after critical habitat was designated is a significant violation of the ESA. 50 C.F.R. §

402.16(d).

THIRD CLAIM FOR RELIEF

Violation of the ESA: failure to comply with 16 U.S.C. § 1536(a)(2) (procedural duties triggered by new climate change information)

83. Guardians incorporates all preceding paragraphs by reference.

84. Defendants have violated the ESA by failing to reinitiate and complete Section 7 consultation regarding the continued implementation and impacts of the Travel Plan on bull trout and bull trout critical habitat despite information related to climate change revealing the Travel Plan may affect bull trout and its critical habitat in a manner or to an extent not previously considered. 50 C.F.R. § 402.16(b). This is a significant violation of the ESA.

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 ensure that the 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 Plaintiff its 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; and

6. Grant such other and further relief as the Court deems just and equitable.

Respectfully submitted and dated this 30th day of September, 2016.

/s/ Dana Johnson

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