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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION**

FRIENDS OF THE WILD SWAN, INC., a Montana  
nonprofit corporation; ALLIANCE FOR THE WILD  
ROCKIES, INC., a Montana nonprofit corporation,

Plaintiffs,

vs.

ROBYN THORSON, Pacific Region Director, U.S.  
Fish and Wildlife Service; U.S. FISH AND  
WILDLIFE SERVICE, an agency of the U.S.  
Department of the Interior; SALLY JEWELL,  
Secretary, U.S. Department of the Interior; U.S.  
DEPARTMENT OF THE INTERIOR, a federal  
executive department of the United States.

Defendants.

Case No.:

**COMPLAINT**

Endangered Species Act  
16 U.S.C. § 1533(f)

Or in the alternative

Administrative Procedures Act  
Section 706(1)

COME NOW the Plaintiffs, by and through their attorneys, and state their claims for relief as follows:

## **I. INTRODUCTION**

1 This case arises from the Defendants' failure to develop and implement a final recovery plan for the conservation and survival of the bull trout (*Salvelinus confluentus*), as required by Section 4(f) of the Endangered Species Act (the "ESA"), 16 U.S.C. § 1533(f).

2 The bull trout was listed as a threatened species under the ESA approximately 15 years ago. Since that time, bull trout populations have remained in a precarious state, as the human-caused threats that led to their listing under the ESA have remained present or even accelerated.

3 Section 4(f) of the ESA requires the Defendants to develop and implement a final recovery plan for the bull trout. Although the Defendants have acknowledged the importance of complying with this mandatory duty with respect to the bull trout, at present a final recovery plan has not been developed, much less implemented. Indeed, although the Defendants initiated the recovery plan process more than a decade ago, this process has been subject to repeated delays and now appears hopelessly stalled.

4 Accordingly, the Plaintiffs have commenced this action to respectfully request that the Court order the Defendants to comply with their obligations under the ESA. In particular, the Plaintiffs request a declaratory judgment that the Defendants' delay in developing and implementing a final bull trout recovery plan constitutes a violation of the ESA, or, alternatively, of the Administrative Procedure Act (the "APA"). The Plaintiffs further request a mandatory injunction requiring the Defendants to promptly develop and implement a draft and

then final recovery plan for the bull trout, and order that the Defendants publish a draft recovery plan within 90 days of the Court's order

## **II. PARTIES**

5. Plaintiffs Alliance for the Wild Rockies Inc., and Friends of the Wild Swan, Inc., are both membership-based Montana nonprofit public benefit corporations. The Plaintiffs and their members have a longstanding interest in the protection of the bull trout and the aquatic environment that bull trout depend on in the Northern Rockies and Pacific Northwest.

6. Plaintiff Friends of the Wild Swan Inc. is a tax-exempt, public-benefit Montana non-profit corporation. Its principal place of business is in Swan Lake, Lake County, Montana. Friends of the Wild Swan is dedicated to protecting and restoring water quality and fish and wildlife habitat in Montana.

7. Plaintiff Alliance for the Wild Rockies Inc. is a tax-exempt, non-profit public interest organization dedicated to the protection and preservation of the native biodiversity of the Northern Rockies Bioregion, its native plant, fish, and animal life, and its naturally functioning ecosystems. Its registered office is located in Missoula, Montana. The Alliance has over 2,000 members, many of whom live in watersheds with bull trout habitat. Members of the Alliance are researchers, scientists, naturalists, and nature enthusiasts who observe, enjoy, fish for and appreciate Montana's native fish, water quality, and aquatic habitat quality, and expect to continue to do so in the future.

8. Plaintiffs' members observe, fish, and otherwise enjoy and appreciate the aesthetic beauty of the bull trout in its natural habitat on a regular and on-going basis through the species' range, and expect to continue to do so in the future. The Plaintiffs and their members are adversely affected by the decline in bull trout populations and habitat, and by inadequate

government efforts to protect the species including timely preparation of a recovery plan which is mandated by law. The recovery plan is the government's blueprint to fully recover the species, and the delay in promulgating it delays the recovery of bull trout to the detriment of Plaintiffs' members. In particular, the aesthetic, recreational, and economic interests of the Plaintiffs and their members are directly and adversely affected by the failure of the Defendants to develop and implement a final recovery plan for the bull trout. In addition, the Plaintiffs and their members have an interest in ensuring that the Defendants adhere to the substantive law and procedures required by the ESA for the protection of bull trout, and in ensuring that the best scientific information regarding bull trout is used in the recovery plan process and is available to the public. The Defendants' actions as alleged herein – and, more precisely, the Defendants' failure to take action as required by the ESA – have harmed those interests as well. This suit is brought on behalf of each Plaintiff organization and on behalf of its members who are directly and adversely affected by the Defendants' violations of the ESA.

9 The Defendants are described as follows:

- a. Robyn Thorson is the Pacific Region Director of the U.S. Fish and Wildlife Service, located in Portland, Oregon. She is sued in her official capacity.
- b. The U.S. Fish and Wildlife Service (the "Service") is the agency in charge of administering the ESA, including developing and implementing recovery plans for threatened and endangered species.
- c. Sally Jewell is the Secretary of the Interior, and is the government official with overall responsibility for implementation of the ESA. She is sued in her official capacity.

d The U.S. Department of the Interior is the federal executive department that houses the U.S. Fish and Wildlife Service, and which therefore has overall responsibility for the implementation of the ESA.

## II. JURISDICTION AND VENUE

10 The Court has jurisdiction of this matter pursuant to 28 U.S.C. §1331, because this matter arises under the laws of the United States, and the Defendants are agencies or officials of the United States. The Court also has jurisdiction under 16 U.S.C. §1540 (c) and (g), pursuant to citizen suit provisions of the ESA, or, alternatively, under the APA, 5 U.S.C. §701 *et seq.* The Court may issue declaratory judgment and further relief pursuant to 28 U.S.C. § 2201 and 2202. Mandamus may lie pursuant to 28 U.S.C. §1361. There is a real and present controversy between the parties.

11. Venue in this action is conferred upon this Court by 28 U.S.C. § 1391(e)(1)(a), which provides that a civil action against an agency of the United States or any officer thereof may be brought in any judicial district in which the officer resides. Defendant Thorson, Pacific Region Director of the U.S. Fish and Wildlife Service, resides in this District. The Regional Office is the lead office for bull trout listing, critical habitat and recovery planning. In addition, venue is proper under 28 U.S.C. § 1391(e)(1)(b) because a significant part of the subject matter of this action – listed populations of bull trout – is located in this District, and also because a substantial part of the events or omissions giving rise to the claims occurred here. Moreover, this Court has previously adjudicated approximately eight other cases involving bull trout.

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### III. GENERAL ALLEGATIONS

#### A. Background on Bull Trout

12 Native to the Pacific Northwest and Northern Rockies, bull trout were historically widely distributed and abundant in major river systems as well as smaller mountain streams. During the last 100 years, bull trout populations have declined precipitously, both in number and range. Compared to other salmonids, bull trout have more specific habitat requirements that appear to influence their distribution and abundance. These habitat components include very cold water temperature, cover, channel form and stability, valley form, stream elevation, spawning and rearing substrates, and migratory corridors. Human activities in bull trout habitat over the last century, such as logging, road construction, dams, mining, grazing and urban development, have negatively impacted bull trout habitat, causing widespread and significant population declines and local extirpations. In addition, overfishing and the introduction of exotic species have contributed to the ongoing demise of the species.

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

14. Fluvial, adfluvial and anadromous bull trout are migratory. These migratory forms spawn in tributary streams and, as juveniles, migrate either to lakes (adfluvial), large rivers (fluvial), or salt water (anadromous) to mature. Mature migratory bull trout return to small tributary streams to reproduce. Large migratory bull trout can exceed 30 pounds. Migratory bull

trout facilitate genetic interchange among local and regional populations and ensure sufficient variability within populations. They also serve to recolonize local populations extirpated by natural or human-caused events. Migratory bull trout have been restricted or eliminated from most of their habitat due to human activity, including dams; irrigation diversions; detrimental changes in water quality; increased water temperature; and the alteration of natural stream flow patterns from logging, mining and grazing. Persistence of these migratory life history forms and maintenance or reestablishment of stream migration corridors is essential to the ultimate viability of the bull trout.

15. Bull trout are extremely sensitive to changes in their habitat. They require clean, cold water that is free of barriers to migration, with clean gravel in headwater creeks on which to spawn. Bull trout also require migration corridors where water temperature and habitat conditions are conducive their survival and long-term presence. Accordingly, the development and implementation of a final recovery plan is essential to the bull trout's protection, conservation and recovery.

16. Scientific research has demonstrated the precarious and tenuous nature of the remaining bull trout populations, and has established the need to protect these populations from the human activities that have caused their decline. This scientific research formed the basis for the decision to protect bull trout under the ESA. Furthermore, recent research has demonstrated the importance of preserving all remaining populations of bull trout, given the need to preserve genetic variation in different populations, the fact that many existing populations are isolated and threatened with extirpation, and the wide-ranging nature of the species. Developing and implementing a final recovery plan is an essential step in preserving all remaining bull trout populations and ensuring the recovery of the species.

**B. Administrative and Legal Proceedings Regarding Bull Trout**

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

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

19. Although the Service was required under the ESA to rule on the merits of such Petition within twelve months, *see* 16 U.S.C. § 1533(b)(3)(B), the Service failed to do so. Accordingly, on February 8, 1994, the Plaintiffs filed suit to compel such a ruling. *Alliance for the Wild Rockies, et al. v. Babbitt*, Civ. No. 94-0246 (JLG) (D.D.C. 1994).

20. Pursuant to a stipulation to resolve the Plaintiff's lawsuit, the Service, through the Pacific Region office in Portland, issued a twelve-month Administrative Finding on June 10, 1994, and the lawsuit was dismissed. The Service made a number of factual findings regarding the widespread decline of the bull trout, its extirpation from vast portions of its historical range, the demise of its habitat due to human activity, and the inadequacy of existing government efforts to protect bull trout. These findings led the Service to conclude that listing the bull trout as an endangered species throughout its range was warranted. Despite these findings, however, the Service concluded that a final rule listing the bull trout as endangered was precluded due to other higher priority listing actions.

21. Plaintiffs then filed suit before this Court, challenging the Service's decision not to list the bull trout as endangered. In November 1996, after numerous legal proceedings, Judge



Jones held that the Service's determination that listing the bull trout was "warranted but precluded" was arbitrary and capricious, and in violation of the ESA. *Friends of the Wild Swan v U S Fish and Wildlife Service*, 945 F Supp 1388 (D. Or. 1996). The Court thus granted summary judgment to Plaintiffs on all claims, resulting in the publication of a proposed rule to list bull trout throughout the Columbia River Basin. 62 Fed. Reg. 32268 (June 13, 1997). On June 10, 1998, the Columbia River Basin and Klamath population of bull trout were listed as threatened and endangered, respectively. Klamath and Columbia Populations Final Rule, 63 Fed. Reg. 31647 (1998) (codified at 50 C.F.R. pt. 17).

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

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

24. On January 26, 2001 plaintiffs filed suit against the U.S. Fish and Wildlife Service for failing to designate critical habitat for bull trout as required under the Endangered Species Act. A year later plaintiff groups and USFWS reached a settlement agreement setting out timeline for critical habitat designation. On November 29, 2002 USFWS proposed critical habitat for 18,450 miles of streams and 532,700 acres of lakes in Montana, Idaho, Washington and Oregon. (67 FR 71235) In June 2004 USFWS proposed critical habitat for the Coastal-Puget Sound, St. Mary-Belly River and Jarbidge bull trout populations. (69 FR 35768)

25. On October 6, 2004 the USFWS published the final bull trout critical habitat rule designating only 1,748 miles of streams and 61,235 acres of lakes in the Columbia and Klamath River basins. No critical habitat was designated in Montana. (69 FR 59995) Plaintiffs filed suit in December 2004 for failing to designate an adequate amount of critical habitat to ensure the survival and recovery of bull trout in the Columbia and Klamath Basins and challenging the designation as politically motivated by then Under-Secretary Julie MacDonald. The case was voluntarily remanded back to the agency for revision in April 2005.

26. On September 26, 2005 the USFWS issued a new critical habitat designation for: Columbia, Klamath, Coastal-Puget Sound, Jarbidge and St. Mary Belly River. The designation totaled approximately 3,828 miles of stream, 143,218 acres of lakes in Idaho, Montana, Oregon and Washington and 985 miles of shoreline paralleling marine habitat in Washington. (70 FR 56212) In January 2006 plaintiffs again filed suit against the critical habitat final rule for being inadequate.

27. In March 23, 2007 the Dep't of the Interior Inspector General released a report alleging possible interference by Deputy Assistant Secretary of the Interior Julie MacDonald with the bull trout critical habitat designation. On December 15, 2008 the Inspector General

released a new investigative report concluding that Julie MacDonald did interfere with the designation of critical habitat for bull trout in several instances. She instructed agency biologists to abandon the best available science, to exclude all federal lands and exclude all lands that had any “plan” governing land use whether that plan was adequate or specific to bull trout.

28 On October 18, 2010 the USFWS issued the final rule on bull trout critical habitat that included: 19,729.0 miles of streams in Montana, Idaho, Washington, Oregon and Nevada; 754.0 miles of marine shoreline in Washington; and 488,251.7 acres of reservoirs and lakes in Montana, Idaho, Washington and Oregon. (75 FR 63898)

29 In 2004 the Service undertook a five-year status review to determine whether bull trout were still warranted for listing. In April 2008 the Service determined that bull trout should remain a threatened species. The Service cited bull trout’s reliance on the 4C’s (i.e., clean, cold, complex, and connected habitats); fragmentation of the species’ range by various threats at multiple scales, impacting the ability of the species to persist; invasive species such as lake trout that are a direct and increasing threat to many strong populations; anticipated ongoing and likely additional threats expected to create local extirpation in core areas; and low likelihood that existing threats will be eliminated and species status will improve. Evolutionarily, the bull trout uses multiple life history strategies to reduce risk, but fragmentation of its habitat by dams, water diversions, and culverts has adversely affected this strategy. Roads present an additional threat. The completion of the status review is further evidence that the Service has adequate information to prepare a recovery plan.

30 On April 1, 2013, the Plaintiffs sent the Defendants a 60-Day Notice of Intent to Sue (“NOI”) under the ESA. The NOI noted that pursuant to Section 4(f) of the ESA, the “Secretary shall develop and implement [recovery] plans . . . for the conservation and survival of

endangered and threatened species . . . unless he finds that such a plan will not promote the conservation of the species.” 16 U.S.C. § 1533(f). The NOI further stated that although the first populations of bull trout were listed under the ESA more than 15 years ago, no recovery plan is yet in place, and efforts to complete such a plan appear to be hopelessly stalled. Indeed, more than a decade has transpired since the Service released its first draft recovery plans in 2002 and 2004. As set forth in the NOI, the Defendants’ lengthy delay in formulating a bull trout recovery plan is without legal justification and in violation of the ESA. Accordingly, the Plaintiffs requested that the Defendants undertake prompt action to develop and implement a final recovery plan for bull trout.

31. On June 3, 2013, the State Supervisor for the Service’s Idaho Fish and Wildlife Office responded to the Plaintiffs’ notice. In its letter, the Service conceded that a final recovery plan for the bull trout has not yet been completed. The Service averred that it was in the process of preparing a revised draft recovery plan for the bull trout, and stated that it anticipated publishing a Notice of Availability for the draft plan in the Federal Register by January 30, 2014. The Service further stated that it expected to complete a final recovery plan within a year of the close of the public comment period for the draft plan.

32. However, the Defendants did not publish a Notice of Availability, have not yet prepared a draft recovery plan, and have subsequently stated that such plan has been further delayed.

33. As of the date of filing this Complaint, Plaintiffs have exhausted their administrative remedies with respect to the development and implementation of a final recovery plan for the listed populations of bull trout. As of the date of this Complaint, the Defendants have neither developed nor implemented such a final recovery plan.

C. Recovery Plans Under the ESA

34 ESA Section 4(f) requires that the Service “shall develop and implement” a recovery plan for each threatened or endangered species, “unless [the agency] finds that such a plan will not promote the conservation of the species.” 16 U.S.C. § 1533(f)(1); *Southwest Ctr for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1136 (S.D. Cal. 2006) (“The statutory scheme contemplates orderly and timely progression of action to list the species; designate its critical habitat; and create a recovery plan.”). A recovery plan provides a critical roadmap, detailing management measures necessary to reduce and eventually eliminate a species’ risk of extinction, designing and funding research priorities, and securing cooperation from other federal, state, regional, and local governmental and private entities. *See Fund for Animals v. Babbitt*, 903 F. Supp. 96, 104 (D.D.C. 1995)

35. The Service’s own “Endangered and Threatened Species Recovery Planning Guidance” publication (updated in June 2010) explains that the recovery planning process consists of three phases. First, during the pre-planning phase, the Service prepares a recovery outline. The outline is designed to provide interim strategies and goals for recovering the threatened or endangered species and sets forth how a recovery plan is to be developed, as well as who will have responsibility for developing it. The recovery outline is designed to “get the ball rolling” for the development of a recovery plan and, as such, is to be completed within 60 days from the date of listing. *See* Guidance at 1.5.1.

36. Second, the planning phase involves the actual writing of the recovery plan. Under the ESA, each recovery plan must identify: (1) “site-specific management actions” that “may be necessary . . . for the conservation and survival of the species,” (2) “objective, measurable criteria which, when met, would result” in the species’ delisting, and (3) “estimates

of the time . . . and the cost” required to achieve the plan’s goals. 16 U.S.C. § 1533(f)(1)(B). Further, the agency “shall, to the maximum extent practicable give priority to those . . . species . . . that are most likely to benefit from such plans, particularly those species that are . . . in conflict with construction or other development projects or other forms of economic activity.” *Id.* § 1533(f)(1)(A). An agency must provide the public an opportunity for notice and comment before finalizing a recovery plan. *Id.* § 1533(f)(4). This phase therefore includes solicitation and incorporation of comments via peer review and public comment. Final recovery plans “should be completed within 2.5 years of listing.” Guidance at 1.5.1.

37. The third and final phase consists of the actual implementation of the recovery actions called for in the recovery plan, as well as monitoring of implementation and the effectiveness of the actions, and adaptation of the plan, if necessary.

38. As explained by the Service, the development and implementation of recovery plans is necessary to the protection of listed species, and fulfills the ultimate goal of the ESA in recovery and eventually removing such species from the ESA’s protection. In this connection, a recovery plan is vitally important because it spells out the variety of actions needed to achieve recovery. “[W]ithout a plan to organize, coordinate and prioritize the many possible recovery actions, the effort may be inefficient or even ineffective.” Guidance at 1.1. The prompt development and implementation of recovery plans “ensures that recovery efforts target limited resources effectively and efficiently into the future.” *Id.* Recovery plans are a “road map for species recovery – [they] lay[] out where [the Service] needs to go and how best to get there.” *Id.* As such, recovery plans are “one of the most important tools” to ensure sound decision making throughout the recovery process. *Id.*

39       The ESA thus clearly requires the Service to “develop and implement” a recovery plan for each endangered or threatened species<sup>1</sup> 16 U.S.C. § 1533(f)(1). Such requirement is a mandatory, non-discretionary duty for the Service. The bull trout has been listed for over fifteen years, yet the Service has not issued a recovery plan for the species, much less implemented the recovery actions identified therein. The agency’s failure to timely develop and implement a recovery plan for the bull trout therefore violates the ESA. *Id*

40       The Plaintiffs acknowledge that the Service has initiated a recovery plan process for the bull trout. According to the Service’s April 2012 Bull Trout Planning Recovery Update #2, as well as the Service’s June 3, 2013 letter in response to the Plaintiff’s NOI, the Service is still working on its draft recovery plan. However, the Service has now been working on a draft plan for over a decade; indeed, its first draft plans were released in 2002 and 2004. While the Plaintiffs appreciate that the new draft plan will contain updated information on bull trout that became available since the original 2002 and 2004 draft recovery plans, this is not a valid excuse to delay the process, because there will always be new information available. Indeed, the Service completed its mandatory Five-Year Status Review in 2008 and at that time had the information it needed then to complete a recovery plan.

41       While FWS promised further updates in May 2012, to the Plaintiffs’ knowledge nothing substantively has transpired, and any additional steps that have occurred at the administrative level will not obviate the fact that the final recovery plan remains unfinished.

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<sup>1</sup> The ESA requires a recovery plan “unless [the agency] finds that such a plan will not promote the conservation of the species.” 16 U.S.C. § 1533(f)(1). The Service has clearly expressed its intent to develop a recovery plan for the bull trout, and indeed undertook efforts for a recovery plan more than ten years ago, indicating the agency rightfully believes a plan will promote the species’ conservation.

42. Furthermore, the prompt development and implementation of a final recovery plan is critically important for the bull trout. Bull trout habitat is under increasing pressure from human activities, and the outlook for remaining bull trout populations is tenuous. The species is clearly “in conflict” with habitat-altering development activities, making the bull trout recovery plan a particularly high priority. 16 U.S.C. § 1533(f)(1)(A). As these threats to bull trout populations and habitat accelerate, identifying “site-specific management actions” and “objective, measurable criteria” for recovery will prompt conservation, coordinated international and domestic activities, and direct research priorities. *Id.* § 1533(f)(1)(B).

43. The state fish and game agencies of the respective states where bull trout reside have taken steps to promote the recovery of bull trout and would benefit from a formal recovery plan.

44. In sum, timely development and implementation of a final bull trout recovery plan is required under the ESA, and the Service is in violation of the statute by unlawfully withholding or unreasonably delaying final approval of a recovery plan. Accordingly, the Service must immediately issue a bull trout recovery plan to comply with the ESA’s mandate and to provide the species a chance for survival.

## **COUNT I**

45. Plaintiffs reallege all previous paragraphs as if set forth in full.

46. Bull trout populations in the United States have been listed under the ESA since 1998-1999.

47. Section 4(f) of the ESA requires that the Service “shall develop and implement” a recovery plan for each threatened or endangered species, “unless [the agency] finds that such a plan will not promote the conservation of the species.” 16 U.S.C. § 1533(f)(1). This section



creates a mandatory duty on the Service to develop and implement a recovery plan for the bull trout.

48. Said duty is enforceable pursuant to the citizen suit provisions of the ESA. 16 U.S.C. § 1540(g).

49. The threats to the bull trout that led to its listing under the ESA remain present, and ongoing activities by the federal government and private actors continue to negatively affect bull trout populations and habitat.

50. There has been no finding by the Service that a recovery plan “will not promote conservation” of the bull trout. 16 U.S.C. § 1533(f)(1). To the contrary, the Service recognized its obligation to promptly prepare a recovery plan in 2002 and 2004 when it initiated the recovery plan process. However, to date the Service has failed to develop and implement a bull trout recovery plan.

51. The Service has completed critical habitat designation and conducted status reviews under the ESA. The Service has all of the information it needs to prepare a recovery plan and indeed initiated the process over 12 years ago.

52. Accordingly, the Defendants have violated Section 4(f) of the ESA by failing to timely develop and implement a recovery plan for the bull trout.

## **COUNT II**

53. Plaintiffs reallege all previous paragraphs as if set forth in full

54. In the alternative to Count I, the APA grants this Court the authority to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

55. Section 4(f) of the ESA creates a mandatory duty on the Service to develop and implement a recovery plan for the bull trout.

56. This duty arose approximately 15 years ago, and was acknowledged by the Service more than 12 years ago. However, to date the Service has failed to develop and implement a recovery plan for the bull trout.

57. The Service's delay in developing and implementing a recovery plan for the bull trout is unreasonable, particularly considering the precarious status of the species, the purposes and objectives of the ESA, the Service's resources, and the Service's acknowledgement of the need for a bull trout recovery plan.

58. Accordingly, the Defendants have unlawfully withheld or unreasonably delayed taking action as required by the ESA, and have therefore violated the APA 5 U.S.C. § 706(1).

### **PRAYER FOR RELIEF**

WHEREFORE, the Plaintiffs pray for relief from this Court as follows:

A. To issue a declaratory judgment that the Defendants are in violation of Section 4(f) of the ESA.

B. In the alternative, to issue a declaratory judgment that the Defendants are in violation of the APA, 5 U.S.C. § 706(1)

C. To issue a mandatory injunction ordering the Defendants to promptly develop and implement a recovery plan for listed populations of the bull trout, and in no case to delay publishing a Notice of Availability for the draft recovery plan for more than 90 days from the date judgment, and to establish a deadline for the final recovery plan within 6 months of the close of public comment on the draft plan.

D. To award the Plaintiffs reasonable costs and attorney's fees incurred in prosecuting this action

E. For any other relief this Court deems just and proper in this action.

Dated this 1st day of April, 2014

REEVES, KAHN, HENNESSY & ELKINS

/s/ Peggy Hennessy

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