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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION

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ALLIANCE FOR THE WILD  
ROCKIES

Plaintiff,

vs.

BRENDA BURMAN, Commissioner,  
U.S. Bureau of Reclamation; DAVID  
BERNHARDT, Secretary, U.S.  
Department of Interior,

Defendants.

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CV-20-

COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF

## I. INTRODUCTION

1. This case is a challenge to the U.S. Bureau of Reclamation's (Reclamation) ongoing, unpermitted incidental take of hundreds of bull trout each year via entrainment of bull trout in the unscreened St. Mary Canal, impaired upstream passage of pre-spawning adult bull trout due to the St. Mary Diversion Dam, and suboptimal instream flow and thermal conditions for bull trout downstream from Sherburne Dam in Swiftcurrent Creek. All three areas are located east of Glacier National Park, and are part of the Milk River Irrigation Project (irrigation project)
2. Plaintiff requests that the Court declare that Reclamation's unpermitted incidental take of bull trout violates Section 9 of the Endangered Species Act (ESA).

## II. JURISDICTION

3. This action arises under the laws of the United States and involves the United States as a Defendant. Therefore, this Court has subject matter jurisdiction over the claims specified in this Complaint pursuant to 28 U.S.C. §§ 1331, 1346.
4. An actual controversy exists between Plaintiff and Defendants. Plaintiff's members have been at the forefront of bull trout conservation for decades, and have fought against all odds, including immense political pressure and

the vast resources of the federal government, to ensure the survival and recovery of bull trout under the Endangered Species Act. Plaintiff's members use and enjoy the area affected by the St. Mary Diversion Dam and Canal on the east side of Glacier National Park for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities. Plaintiff's members intend to continue to use and enjoy the area frequently and on an ongoing basis in the future.

5. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiff's members have been and will be adversely affected and irreparably injured by Defendants' failures to comply with law. These are actual, concrete injuries caused by Defendants' failure to comply with mandatory duties under the ESA. The requested relief would redress these injuries and this Court has the authority to grant Plaintiffs' requested relief under 28 U.S.C. §§2201 & 2202 and 16 U.S.C. 1540 (g).
6. Plaintiff sent Defendants a 60-Day Notice of Intent to Sue for violations of the ESA and that 60-day notice period has expired. Thus, the Court has jurisdiction to review Plaintiff's claims.

### III. VENUE

7. Venue in this case is proper under 28 U.S.C. §1391(e) and LR 3.2(b)(1)(A).

The area at issue in this case- the St. Mary Diversion Dam and Canal on the east side of Glacier National Park- falls within Glacier County, which is within the Great Falls Division of the U.S. District Court for the District of Montana.

#### IV. PARTIES

8. Plaintiff ALLIANCE FOR THE WILD ROCKIES (Alliance) 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 individual members, many of whom are located in Montana. Members of the Alliance work as fishing guides, outfitters, and researchers, who observe, enjoy, and appreciate Montana's native wildlife, water quality, and terrestrial habitat quality, and expect to continue to do so in the future. Alliance's members' professional and recreational activities are directly affected by Defendants' failure to perform their lawful duty to protect bull trout from unpermitted take under the ESA. Alliance for the Wild Rockies brings this action on its own behalf and on behalf of its adversely affected members.
9. Defendant BRENDA BURMAN is the Commissioner of the U.S. Bureau of

Reclamation (Reclamation) and in that capacity is charged with responsibility for ensuring that Reclamation decisions are consistent with applicable laws, including but not limited to the Endangered Species Act.

10. Defendant DAVID BERNHARDT is the Secretary of the U.S. Department of Interior (Interior) and in that capacity is charged with responsibility for ensuring that Interior decisions are consistent with applicable laws, including but not limited to the Endangered Species Act.

## V. FACTUAL BACKGROUND

11. The St. Mary River originates at Gunsight Lake in Glacier National Park, and flows northeast about 10 km before entering St. Mary Lake.
12. Upon leaving the lake, the river flows onto the Blackfeet Reservation and continues northeast for about 2 km before entering Lower St. Mary Lake. From that lake, the river meanders northerly about 25 km to the Canadian border, then continues north through shrub-grassland habitat about 55 km to St. Mary Reservoir.
13. The St. Mary River that flows from the reservoir joins the Oldman River about 8 km upstream from Lethbridge, Alberta.
14. Between 1914 and 1921, Reclamation built several water control and delivery structures in the St. Mary River drainage, as part of the Milk River Irrigation Project (irrigation project).

15. Among those structures is the St. Mary Diversion Dam, which is located 1.2 km downstream from Lower St. Mary Lake.
16. Annually between about April and September, this dam diverts approximately 650 cfs (18.4 m<sup>3</sup>/s) of water into the unscreened St. Mary Canal.
17. The canal conveys the water about 50 km – over the watershed divide from the St. Mary River drainage into the Missouri River drainage – to the North Fork of the Milk River.
18. In addition, the lower reach of Swiftcurrent Creek, which formerly flowed into the St. Mary River downstream from Lower St. Mary Lake, was channeled into the lake itself, which causes water released from Lake Sherburne to be diverted into the St. Mary Canal.
19. Sherburne Dam is completely closed to allow for refilling of the reservoir during the non-irrigation months (fall-winter, approximately 6 months).
20. The native fish assemblage of the St. Mary drainage has been affected by the irrigation project in a number of ways: (1) The St. Mary Diversion Dam is a known barrier to upstream migration of bull trout and other fish, at least seasonally; (2) During the annual diversion period (irrigation season) the unscreened St. Mary Canal entrains many species of fish. Most of these fish die when the canal is dewatered; and (3) During the non-irrigation period

(typically October-March), while Sherburne Dam is closed for refilling of the reservoir, Swiftcurrent Creek is left dry from the dam to the Boulder Creek confluence.

21. This annual dewatering of Swiftcurrent Creek results in the mortality of bull trout and many other native fish.
22. The effect on native fish is so great that the irrigation project has been identified as the primary threat to bull trout in the Saint Mary Recovery Unit.
23. Two aspects of the project represent the primary threats: (1) The design and management of the Saint Mary Diversion Dam is resulting in entrainment of up to 600 juvenile bull trout each year, and also impairs upstream passage of pre-spawning adult bull trout; and (2) Operation of the Sherburne Dam is resulting in suboptimal instream flow and thermal conditions for bull trout downstream.
24. Reclamation has been operating the Saint Mary Diversion Dam and Sherburne Dam since bull trout were listed (in 2000) without consulting with U.S. Fish & Wildlife Service (FWS).
25. Instead, Reclamation has been “gathering biological information” on this project for over 20 years.
26. One agency report from 2011 concluded: “With an estimated annual loss of more than 470 bull trout (age 2 and older) to canal entrainment, our findings

indicate that the unscreened St. Mary Diversion represents a significant threat to this important ‘listed’ population and highlights the urgent need for improvements to the Milk River Irrigation Project.”

27. Despite the known urgency, in 2015, Reclamation staff admitted that they had been “kicking the can down the road” regarding ESA consultation and the implementation of protections for bull trout.
28. In 2015, FWS staff requested that Reclamation initiate formal ESA consultation on the project.
29. Internal agency notes indicate that FWS understood that Reclamation would submit a Biological Assessment to FWS in July of 2015, with the expectation that FWS would issue a Biological Opinion and Incidental Take Statement by October of 2015.
30. Subsequent agency notes indicated that Reclamation intended to submit a Biological Assessment to FWS by mid-August of 2015.
31. FWS subsequently received word from Reclamation that a Biological Assessment would only address immediate maintenance/repairs and would not address overall operations for the project and the ongoing entrainment of up to 600 bull trout per year.
32. Reclamation stated it was the agency’s policy not to consult on project operations unless the agency changed operations; therefore, it would not

consult on the operational effects on bull trout (entrainment) caused by the St. Mary Diversion Dam/Canal/irrigation project.

33. Ultimately, on August 27, 2015, Reclamation informed FWS that the 2015 maintenance/repairs to the St. Mary Diversion would have “no effect” on bull trout, and Reclamation refused to prepare a biological assessment for the project as a whole.
34. Thus, no ESA consultation on bull trout entrainment occurred in 2015.
35. In September 2016, FWS prepared a “briefing statement” on the issue. It stated: “BOR remains unwilling to enter into any type of consultation agreement with the Service.”
36. On January 24, 2019, Plaintiff sent a FOIA request to FWS requesting in part: “5. Saint Mary Diversion Biological Opinion & Incidental Take Statement; 6. All biological assessments, biological evaluations, monitoring reports, and correspondence regarding (5) above . . . .”
37. On June 5, 2019, FWS provided its full response to this request. FWS indicated that it was withholding eleven documents; however, none of these documents related to the St. Mary Diversion/canal/irrigation project.
38. The responsive FOIA documents provided by FWS do not include a biological assessment or biological opinion for the St. Mary Diversion/canal/irrigation project.

39. After determining that there was no ESA consultation for the St. Mary Diversion/canal/irrigation project, on September 26, 2019, Plaintiff sent Reclamation a 60-day notice of intent to sue under the ESA for violations of ESA Section 7 (failure to consult) and ESA Section 9 (unpermitted incidental take).
40. In response, Reclamation sent Plaintiff a one-page letter it sent to FWS, dated November 19, 2019, in which Reclamation states in part: “On behalf of the Department of the Interior, Bureau of Reclamation, Montana Area Office, I am requesting initiation of the Endangered Species Act (ESA) section 7 consultation for bull trout within the Milk River Project , St. Mary Unit, Montana. . . . Reclamation will be preparing a Biological Assessment for your review as part of this consultation.”
41. No biological assessment was attached to Reclamation’s November 19, 2019 letter to FWS, and no time frame for preparation or delivery was provided.
42. As noted above, Reclamation has previously provided FWS with similar assurances that turned out to be false.
43. Plaintiff sent Reclamation a reply on December 4, 2019, which in part states that Reclamation “still does not have an incidental take permit for the unlawful incidental take of hundreds of bull trout each year. Diversion operations generally run from April to September. If consultation is not complete and/or

if USBOR does not have the legally-mandated incidental take permit prior to the commencement of operations in April 2020, Notifier still plans to file suit.”

44. Reclamation has never responded to Plaintiff’s December 4, 2019 letter.
45. On March 19, 2020, seeking to ascertain whether Reclamation had complied with its legal duties prior to April operations, Plaintiff sent a FOIA request to FWS for “the Saint Mary Diversion Dam & Canal/Milk River Irrigation Project Incidental Take Statement for bull trout. This may also be referred to as the 'St. Mary Unit, Milk River Project.'”
46. In response to this FOIA request, on March 23, 2020, FWS stated: “FWS has no records responsive to your request.”
47. In other words, Reclamation does not yet have an incidental take statement/permit for the incidental take of hundreds of bull trout that will likely occur this year.

## VI. CLAIM FOR RELIEF

**The unpermitted incidental take of hundreds of bull trout each year violates Section 9 of the ESA.**

48. All previous paragraphs are incorporated by reference.
49. Bull trout were listed under the ESA in 1999. 64 Fed. Reg. 58910 (Nov. 1, 1999).
50. ESA Section 9 states: “it is unlawful for any person . . . to take any [listed]

species within the United States . . . .” 16 U.S.C. § 1538 (a)(1)(B).

51. The ESA states: “The term ‘take’ means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532 (19).
52. ESA regulations state: “Harass in the definition of ‘take’ in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” 50 C.F.R. § 17.3.
53. ESA regulations state: “Harm in the definition of ‘take’ in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.
54. However, ESA Section 10 states: “The Secretary may permit . . . any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 16 U.S.C. §1539 (a)(1)(B).
55. Section 10 further clarifies: “In connection with any action alleging a violation of section 1538 of this title, any person claiming the benefit of any exemption

or permit under this chapter shall have the burden of proving that the exemption or permit is applicable, has been granted, and was valid and in force at the time of the alleged violation.” 16 U.S.C. § 1539 (g).

56. If the offending party is a federal agency, the permit for incidental take is usually issued as part of an “incidental take statement” under ESA Section 7, which “(i) specifies the impact of such incidental taking on the species, (ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact, . . . and (iv) sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).” 16 U.S.C. § 1536 (b)(4).
57. In this case, Reclamation does not have an incidental take permit/statement for its incidental take of hundreds of ESA-listed bull trout each year due to entrainment and impaired upstream passage caused by the St. Mary Diversion Dam and Canal, and suboptimal instream flow and thermal conditions for bull trout caused by the Sherburne Dam.
58. Unless and until Reclamation receives an incidental take permit/statement from FWS, its unpermitted incidental take of hundreds of bull trout violates ESA Section 9.

59. In a similar case, the Ninth Circuit held: “Under the relevant substantive law, the [defendants] should be enjoined to use a fish screen and a head gate in their diversion if there is a reasonably certain imminent threat, [], that the lack of a fish screen or a head gate will kill or injure bull trout or will modify habitat in a way that kills and injures bull trout (including by significantly impairing their breeding, shelter, or feeding), see 50 C.F.R. § 17.3.” *Idaho Watersheds Project v. Jones*, 127 F. App'x 976, 977 (9th Cir. 2005)(unpublished)(citation omitted).
60. Such a reasonably certain imminent threat that the diversion will kill or injure bull trout is present here, and therefore Reclamation should be enjoined to use a fish screen, or implement other similar protective measures as deemed necessary by experts. *See id.*

## VIII. RELIEF REQUESTED

For all of the above-stated reasons, Plaintiff requests that this Court award the following relief:

- A. Declare that Reclamation is violating the ESA;
- B. Order Reclamation to obtain an incidental take statement/permit;
- C. Order Reclamation to immediately implement interim protective measures, such as temporary fish screens, to protect bull trout until it receives its incidental take statement/permit;
- D. Award Plaintiff its costs, expenses, expert witness fees, and reasonable

attorney fees under the ESA; and

E. Grant Plaintiff any such further relief as may be just, proper, and equitable.

Respectfully submitted this 25th Day of March, 2020.

/s/ Rebecca K. Smith

Rebecca K. Smith

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Attorneys for Plaintiff