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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

JCS

CV Case No. 13 2293

13 ENVIRONMENTAL PROTECTION)
14 INFORMATION CENTER,)
15)
16 Plaintiff,)
17)
18 vs.)
19)
20 STAFFORD LEHR, CHARLTON H. BONHAM)
21 SALLY JEWELL, MICHAEL L. CONNOR,)
22 DAVID MURILLO, U.S. BUREAU OF)
23 RECLAMATION,)
24)
25 Defendants.)
26)
27)
28)

COMPLAINT

FILED
2013 MAY 20 P 3:59
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 Introduction.

2 1. Plaintiff Environmental Protection Information Center (“EPIC”) hereby respectfully files this
3 suit to challenge the actions of officials in the California Department of Fish and Wildlife
4 (“California Fish and Wildlife”) and the U.S. Bureau of Reclamation (“BOR”) to fund, administer,
5 and operate the Trinity River fish hatchery on the Trinity River in northern California. The hatchery
6 produces and releases hatchery Chinook and coho salmon and steelhead trout to mitigate for the loss
7 of wild Chinook and coho salmon and steelhead trout due to construction of the Trinity and
8 Lewiston dams and operation of the Central Valley Project. Hatchery Chinook and coho salmon and
9 steelhead trout compete with, prey upon, and interbreed with wild coho salmon that are listed as
10 threatened with extinction under the federal Endangered Species Act (“ESA”). California Fish and
11 Wildlife has violated the ESA by “taking” wild coho salmon by collecting them for use as
12 broodstock in the Trinity hatchery without the explicit approval of the National Marine Fisheries
13 Service (“NMFS”). California Fish and Wildlife has also violated the ESA by releasing hatchery
14 Chinook and coho salmon and steelhead trout that compete with, prey upon, or interbreed with wild
15 coho salmon, and thus cause “take” of the listed fish. BOR is liable under the ESA for failing to
16 consult with NMFS as to the effects of its choice to finance the hatchery, and by jeopardizing the
17 continued existence of wild coho salmon and adversely modifying their critical habitat.

18 Jurisdiction.

19 2. The Court has jurisdiction over ESA claims alleging illegal take and the failure to consult,
20 because the ESA authorizes citizens’ suits that allege those claims. 16 U.S.C. § 1540(g)(1). EPIC
21 served all named defendants with written notice of intent to sue more than sixty days ago, as
22 required by the ESA. 16 U.S.C. § 1540(g)(2). The named defendant state and federal agency
23 officials have not remedied their violations of the ESA, which are ongoing and likely to continue.
24 The Court may issue declaratory relief pursuant to 28 U.S.C. § 2201. The Court may issue
25 injunctive relief pursuant to 16 U.S.C. § 1540(g)(1)(A), 28 U.S.C. § 2202, and 5 U.S.C. §§ 701-706.

26 Intradistrict Assignment.

27 3. Venue is proper in the Northern District of California under 16 U.S.C. § 1540(g)(3)(A) and
28 28 U.S.C. § 1391. San Francisco is the appropriate place for filing this suit under Civil L.R. 3-2(d).

1 The ESA-listed wild coho that are the subject of this suit are a part of a evolutionarily significant
2 unit of wild coho that find habitat in numerous rivers in this district, including the Trinity, Mad,
3 Smith, and Klamath Rivers. Plaintiff EPIC has its headquarters in Arcata, California. California
4 Fish and Wildlife has an office in Eureka, California. NMFS has an office in Arcata, California.
5 Degradation of fish habitat from the release of fish from the Trinity hatchery occurs in this district.

6 Parties.

7 4. EPIC is a non-profit conservation group based in Arcata, California, that works to protect and
8 restore ancient forests, watersheds, coastal estuaries, and native species in northern California. EPIC
9 uses an integrated, science-based approach, combining public education, citizen advocacy, and
10 strategic litigation. The funding, authorization, and operation of the Trinity hatchery harms EPIC
11 and its members by, among other things, capturing and harming wild coho salmon, and introducing
12 hatchery Chinook and coho salmon and steelhead trout that harm wild coho salmon. EPIC and its
13 members have also been harmed by the failure of BOR to consult with NMFS as to the effects of its
14 financing of the Trinity hatchery.

15 5. Stafford Lehr is Branch Chief of the Fisheries Division of the California Department of Fish
16 and Wildlife. Mr. Lehr is sued in his official capacity. Mr. Lehr's responsibilities include managing
17 California Fish and Wildlife's anadromous fisheries program, which includes certain hatchery
18 operations.

19 6. Charlton H. Bonham is the director of the California Department of Fish and Wildlife. Mr.
20 Bonham is sued in his official capacity. Mr. Bonham's responsibilities include the overall direction
21 of California Fish and Wildlife, including its decisions related to fisheries management.

22 7. Sally Jewell is the Secretary of the Interior. Ms. Jewell is sued in his official capacity. Ms.
23 Jewell oversees the Department of the Interior, which includes the BOR.

24 8. Michael L. Connor is the Commissioner of the BOR. Mr. Connor is sued in his official
25 capacity. Mr. Conner directs the BOR's operations generally.

26 9. David Murillo is the Director of the Mid Pacific Regional Office of the BOR. Mr. Murillo is
27 sued in his official capacity. Mr. Murillo oversees management of the Trinity and Lewiston dams
28 and associated projects.

1 10. The U.S. Bureau of Reclamation is an agency within the U.S. Department of the Interior.
2 BOR has constructed federal dams, powerplants, and canals in 17 western states. BOR built the
3 Trinity and Lewiston dams. BOR funds operations at the Trinity fish hatchery.

4 Facts.

5 11. The Trinity River flows north-northwest 165 miles from the California Coast Range
6 Mountains to its confluence with the Klamath River at Weitchpec, approximately 20 miles from the
7 Pacific Ocean. The South Fork Trinity River, which enters the mainstem Trinity River below any
8 impoundments, is the longest undammed river in California. Before reaching its confluence with the
9 South Fork, the mainstem Trinity River flows into Trinity Lake, an impoundment created by the
10 Trinity Dam, which stores water for the Central Valley Project. Seven miles downstream of the
11 Trinity Dam is Lewiston Lake, an impoundment created by the Lewiston Dam, where stored water is
12 diverted into the Sacramento River basin.

13 12. The Trinity hatchery is located at river mile 110 immediately downstream of the Lewiston
14 Dam. The Trinity hatchery was built to mitigate the loss of salmon and steelhead habitat due to the
15 construction of the Trinity and Lewiston dams and the operation of the Central Valley Project. BOR
16 funds the Trinity hatchery. California Fish and Wildlife operates the Trinity hatchery.

17 13. Each year the Trinity hatchery produces approximately 4.6 million juvenile Chinook salmon,
18 500,000 juvenile coho salmon, and 800,000 juvenile steelhead trout. Each year the Trinity hatchery
19 releases approximately 2.6 million Chinook salmon in June and 2 million Chinook salmon in
20 October. Each year the Trinity hatchery releases 500,000 coho salmon between March and April.
21 Each year the Trinity hatchery releases 800,000 steelhead trout in March. Fish are released from the
22 Trinity hatchery into the Trinity River.

23 14. The Trinity River provides habitat for wild coho salmon. Wild coho salmon in the Trinity
24 River and its tributaries are part of the Southern Oregon/Northern California Coast ("SONCC")
25 evolutionarily significant unit ("ESU"). SONCC coho are listed as threatened with extinction under
26 the ESA. Critical habitat for the SONCC coho ESU includes all accessible reaches of the Klamath
27 River and the Trinity River and the tributaries to each.

28 15. Wild coho salmon have a three-year life cycle divided equally between fresh and salt water.

1 Wild coho salmon spawn in their natal streams between mid autumn and early winter. However, in
2 times of water shortage, wild coho salmon will wait to enter fresh water, sometimes delaying
3 spawning until the early spring. Wild coho salmon typically construct redds in the substrate of
4 smaller tributaries to mainstem rivers. Wild coho salmon die after they spawn.

5 16. Juvenile wild coho salmon emerge as fry from redds in the late winter and spring, and move
6 to relatively slow waters to rear. Juvenile wild coho salmon typically remain in fresh water for one
7 year. Some juvenile wild coho salmon remain close to their natal sites, while others disperse
8 throughout the watershed. Juvenile wild coho salmon undergo smoltification during their second
9 spring season, approximately 18-19 months after egg fertilization, and outmigrate to the ocean.
10 Outmigration typically occurs between the beginning of March and the end of May, although timing
11 patterns can vary year-to-year depending on environmental factors. Juvenile wild coho salmon do
12 not migrate downstream continuously, but rather continue to forage and hold as they travel. After
13 16-17 months in the ocean, adult wild coho salmon return to their natal streams to spawn.

14 17. Historically, wild coho salmon were widely-distributed throughout the Trinity River system.
15 The Lewiston Dam blocks upstream fish passage to 109 miles of historical spawning habitat. This
16 mileage is approximately fifty percent of historic spawning habitat. In the remainder of the Trinity
17 River basin, wild coho salmon populations have declined to a small fraction of historic levels.
18 Currently, approximately fifteen percent of coho that return to the Trinity River are of wild origin.

19 18. California Fish and Wildlife collects wild coho salmon from the Trinity River to use as
20 broodstock in the Trinity hatchery. California Fish and Wildlife collects broodstock using a fish
21 ladder leading to a gathering tank located at the base of the Lewiston Dam. The Trinity hatchery
22 collects a minimum of 500 adult female coho salmon and 500 adult male coho salmon for
23 broodstock, about twenty percent of which are of wild origin. California Fish and Wildlife does not
24 have a permit or authorization from NMFS to collect wild coho salmon. BOR does not have a
25 permit or authorization from NMFS to finance the collection of wild coho salmon.

26 19. California Fish and Wildlife releases juvenile hatchery coho salmon from the Trinity
27 hatchery into the Trinity River. All hatchery fish are fin-clipped for identification. Hatchery coho
28 salmon harm wild coho salmon when the two populations interbreed. Hatchery coho salmon alter

1 the genetic composition, phenotypic traits, and behavior of wild coho salmon. Genetic
2 introgression—the transfer of genetics from stray hatchery fish to wild populations—lowers the
3 fitness and genetic variability of wild coho salmon populations, decreasing productivity and
4 abundance.

5 20. The release of hatchery-raised Chinook and coho salmon and steelhead trout have harmful
6 ecological effects on wild coho salmon and their habitat. Hatchery fish prey on wild coho salmon.
7 Hatchery fish introduce and transmit diseases to wild coho salmon. Hatchery fish compete with
8 wild coho salmon for food and spawning and rearing habitat. These ecological effects decrease the
9 fitness and abundance of listed wild coho salmon.

10 Claim for Relief.

11 Violations of the ESA.

12 21. EPIC realleges all previous paragraphs.

13 22. Under the ESA, it is unlawful for an entity to “take” a listed species. 16 U.S.C § 1538. In
14 2000 and 2005, NMFS promulgated regulations under section 4 of the ESA that extend the “take”
15 prohibition in 16 U.S.C § 1538 to SONCC wild coho salmon with intact adipose fins in the Trinity
16 River and the Klamath River. 50 C.F.R. § 223.203(a). The ESA defines “take” as “to harass, harm,
17 pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.”
18 16 U.S.C § 1532(19). “Harm” includes “an act which actually kills or injures wildlife. Such act may
19 include significant habitat modification or degradation where it actually kills or injures wildlife by
20 significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50
21 C.F.R. § 17.3. “Harassment” includes “an intentional or negligent act or omission which creates the
22 likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal
23 behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.* The
24 prohibition applies to direct take, as well as to takings that are “incidental to, and not the purpose of,
25 the carrying out of an otherwise lawful activity.” *Id.*; see 50 C.F.R. § 402.14. To avoid liability, any
26 deliberate or incidental take of listed SONCC wild coho salmon in the Trinity River by operations of
27 the Trinity hatchery must be authorized by a Hatchery and Genetic Management Plan approved
28 pursuant to NMFS’ section 4(d) regulations, or other explicit authorization by NMFS. See, e.g., 50

1 C.F.R. § 223.203(b)(5); 16 U.S.C. § 1539(a)(1).

2 23. California Fish and Wildlife has violated the ESA by causing the illegal take of SONCC wild
3 coho salmon for use as broodstock in the Trinity River hatchery, in the absence of any approval by
4 NMFS. California Fish and Wildlife has also violated the ESA by causing the illegal take of native
5 SONCC wild coho salmon, by producing and releasing hatchery Chinook and coho salmon and
6 steelhead trout that prey upon, compete with, or interbreed with SONCC wild coho salmon, in the
7 absence of any approval by NMFS.

8 24. Section 7 of the ESA requires that federal agencies consult with either the U.S. Fish and
9 Wildlife Service or NMFS to “insure that any action authorized, funded, or carried out by such
10 agency...is not likely to jeopardize the continued existence of any endangered species or threatened
11 species or result in the destruction or adverse modification of habitat of such species...” 16 U.S.C. §
12 1536(a)(2). A federal agency must initiate consultation if its action “may effect” a listed species or
13 its critical habitat. 50 C.F.R. § 402.14(a). If an action is likely to adversely affect a listed species or
14 its critical habitat, the agency must engage in formal consultation to avoid jeopardy. 50 C.F.R. §
15 402.14(a). BOR has violated the ESA by financing the capture of SONCC wild coho salmon, and
16 the rearing and release of hatchery Chinook and coho salmon and steelhead trout from the Trinity
17 hatchery, before consulting with NMFS and obtaining its opinion as to the effects of those actions.
18 BOR has violated the ESA by financing hatchery operations that jeopardize the continued existence
19 of listed threatened SONCC wild coho salmon, and result in the destruction or adverse modification
20 of habitat for such species. 16 U.S.C. § 1536(a)(2).

21 25. BOR has also violated section 9 of the ESA by financing operations of the Trinity River
22 Hatchery. 16 U.S.C. § 1538. The collection of SONCC wild coho salmon is a direct take, and the
23 release of hatchery Chinook and coho salmon and steelhead trout constitutes an indirect or incidental
24 take of SONCC wild coho salmon. BOR lacks authorization from NMFS for these prohibited
25 actions.

26 Relief Requested.

1 1. Declare that California Fish and Wildlife has violated the ESA by causing the illegal take of
2 SONCC wild coho salmon for use as broodstock in the Trinity River hatchery, in the absence of any
3 approval by NMFS.

4 2. Declare that California Fish and Wildlife has violated the ESA by causing the illegal take of
5 SONCC wild coho salmon, by producing and releasing hatchery Chinook and coho salmon and
6 steelhead trout that prey upon, compete with, or interbreed with SONCC wild coho salmon, in the
7 absence of any approval by NMFS.

8 3. Declare that BOR has violated the ESA by causing the illegal take of SONCC wild coho
9 salmon, by financing the collection of it for broodstock and the release of hatchery Chinook and
10 coho salmon and steelhead trout from the Trinity River hatchery.

11 4. Declare that BOR has violated the ESA by financing operations of the Trinity River
12 Hatchery, without having first consulted with and obtained the biological opinion of NMFS as to the
13 effects of those operations on listed SONCC wild coho salmon.

14 5. Enjoin California Fish and Wildlife from collecting SONCC wild coho salmon for use as
15 broodstock in the Trinity River hatchery, and from releasing hatchery Chinook and coho salmon and
16 steelhead trout from the Trinity River hatchery, in the absence of approval by NMFS.

17 6. Enjoin BOR from approving or disbursing any funds for the Trinity River hatchery in the
18 absence of a biological opinion and incidental take statement or other approval by NMFS.

19 7. Award Plaintiffs their reasonable attorneys' fees, costs, and other expenses under the ESA,
20 16 U.S.C. § 1540(g)(4), and/or the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

21 8. Grant such other relief as the Court deems necessary and proper.

22
23 Dated: May 17, 2013.

Respectfully submitted,

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