Rebecca K. Smith
PUBLIC INTEREST DEFENSE CENTER, PC
P.O. Box 7584
Missoula, MT 59807
(406) 531-8133
publicdefense@gmail.com

Timothy M. Bechtold
BECHTOLD LAW FIRM, PLLC
P.O. Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

SAVE THE BULL TROUT, FRIENDS OF THE WILD SWAN, and ALLIANCE FOR THE WILD ROCKIES, Plaintiffs, vs. MARGARET EVERSON, in her official capacity as Director of the U.S. Fish and Wildlife Service, and DAVID BERNHARDT, in his official capacity as Secretary of the Department of the Interior, Defendants.	CV-19-

Plaintiffs Save the Bull Trout, Friends of the Wild Swan, and Alliance for the Wild Rockies, by and through their attorneys, state their claims for relief as follows:

I. INTRODUCTION

1. This case is a challenge to the U.S. Fish & Wildlife Service's (FWS) approval of the Bull Trout Recovery Plan (Recovery Plan) under Section 4(f) of the Endangered Species Act (ESA), 16 U.S.C. § 1533(f).

2. Bull trout were listed as a threatened species under the ESA approximately 19 years ago.

3. Section 4(f) of the ESA requires that FWS develop and implement a recovery plan for species listed under the ESA.

4. After years of delay, FWS has finally produced the Recovery Plan for bull trout.

5. FWS's Recovery Plan violates ESA Section 4(f) because it does not comply with basic, non-discretionary requirements found in the statute.

6. In short, the Recovery Plan fails to incorporate recovery criteria that are objective and measurable as required under Section 4(f)(B)(ii), and/or the Recovery Plan fails to incorporate recovery criteria that address the five delisting factors as required under Sections 4(f)(B)(ii), (a)(1), (b)(1)(A), and (c)(2)(B)(I).

7. Plaintiffs request that the Court declare that the Recovery Plan violates the

ESA and remand to FWS for preparation of a new recovery plan for bull trout that contains the criteria required by statute.

8. Plaintiffs seek a declaratory judgment, injunctive relief, the award of costs and expenses of suit, attorney and expert witness fees, and such other relief as this Court deems just and proper.

II. JURISDICTION

9. Jurisdiction is proper in this Court under 28 U.S.C. §1331 (federal question) because this action arises under the laws of the United States, including the ESA, 16 U.S.C. §§ 1531 et seq. The FWS's determination, as challenged here, is subject to judicial review by the Court pursuant to the citizen suit provision of the ESA, 16 U.S.C. §1540(g)(1)(C). FWS received a sixty-day notice of intent to sue prior to litigation as required by that section. 16 U.S.C. §1540(g)(2)(C).

10. An actual controversy exists between Plaintiffs and Defendants. Plaintiffs' staff, members, and supporters derive educational, scientific, aesthetic, and spiritual benefits from the bull trout's continued existence in the wild and from the ecosystems upon which it depends. They use and enjoy lands and waters throughout the bull trout's range for activities such as fishing, boating, photographing scenery and wildlife, and engaging in other vocational, scientific, spiritual, and recreational activities . Additionally, Plaintiffs' staff,

members, and supporters regularly engage in campaigns to protect bull trout and bull trout habitat.

11. The aesthetic, recreational, scientific, spiritual, and educational interests of Plaintiffs' staff, members, and supporters have been and will be adversely affected and irreparably injured by FWS's issuance of an unlawful Recovery Plan for bull trout. The Recovery Plan will not prevent the extinction of bull trout, much less lead to bull trout recovery. This is an actual, specific, and concrete injury caused by FWS's failure to comply with mandatory duties under the ESA. The requested relief would redress this injury and this Court has the authority to grant Plaintiffs' requested relief.

12. Venue in this District is proper under both 28 U.S.C. §1391(e)(1) and 16 U.S.C. § 1540(g)(3) because the Plaintiffs reside in this District and a substantial portion of bull trout habitat is located in this District. Additionally, Plaintiffs' registered offices are in Lake County and Missoula County, which are both located in the Missoula Division of the District of Montana.

III. PARTIES

13. Plaintiff ALLIANCE FOR THE WILD ROCKIES is a 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. Members of the Alliance observe, enjoy, and appreciate the native wildlife, water quality, and terrestrial habitat quality in the Northern Rockies, and expect to continue to do so in the future, including throughout the range of the bull trout. Alliance's members' professional and recreational activities are directly affected by Defendants' failure to perform their lawful duty to issue a lawful recovery plan to protect and conserve and recover the bull trout. Alliance brings this action on its own behalf and on behalf of its adversely affected members.

14. Plaintiff FRIENDS OF THE WILD SWAN 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.

15. Plaintiff SAVE THE BULL TROUT is a non-profit public interest organization dedicated to ensuring the survival and recovery of bull trout. Its registered office is located in Missoula, Montana.

16. Defendant MARGARET EVERSON is the Director of the U.S. Fish and Wildlife Service, and is sued in her official capacity. Everson is responsible for lawful administration of the Endangered Species Act.

17. Defendant DAVID BERNHARDT is the Secretary of the Department of the Interior, and is sued in his official capacity. Bernhardt is responsible for lawful administration of the Endangered Species Act.

IV. FACTUAL ALLEGATIONS

A. Biological Background

18. 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.

19. During the last 100 years, bull trout populations have declined precipitously, both in number and range.

20. 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.

21. Bull trout exhibit one of four different life history forms: resident, fluvial, adfluvial, and anadromous.

22. Resident bull trout are non-migratory and spend their entire life cycle in the same or nearby streams.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. Bull trout also require migration corridors where water temperature and habitat conditions are conducive their survival and long-term presence.

30. Climate change has, and will continue to affect bull trout habitat. These changes include warmer air and water temperatures and reduced stream flows. These changes will reduce available bull trout habitat, stress existing populations and allow more heat tolerant non-native species to out-compete bull trout.

31. 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.

32. Recent research has demonstrated the importance of preserving all remaining populations of bull trout due to the need to preserve genetic variation and habitat connectivity.

B. Procedural Background

33. In 1992, Plaintiffs Alliance for the Wild Rockies and Friends of the Wild Swan petitioned FWS to list the bull trout as an endangered species under the ESA and designate critical habitat.

34. After several rounds of litigation, in 1998 and 1999, FWS listed bull trout under the ESA. FWS segregated bull trout into populations: the Klamath population is listed as "endangered;" and the Columbia River Basin, Jarbridge, Coastal-Puget Sound, and St.Mary-Belly River populations are listed as "threatened."

35. In 2001, Plaintiffs Alliance for the Wild Rockies and Friends of the Wild Swan filed suit against FWS for failing to designate critical habitat for bull trout as required under the ESA.

36. After several rounds of litigation, in 2010 the FWS issued the final rule on bull trout critical habitat.

37. In 2013, Plaintiffs Alliance for the Wild Rockies and Friends of the Wild Swan sent a 60- day notice of intent to sue to FWS, advising FWS that it must complete a recovery plan for bull trout. After litigation commenced, FWS agreed to issue a final recovery plan no later than September 30, 2015.

38. On September 9, 2015, FWS released the Recovery Plan.

39. On October 7, 2015, Plaintiffs Alliance for the Wild Rockies and Friends of the Wild Swan sent FWS a 60-day notice of intent to sue regarding the legal inadequacy of the Recovery Plan. Litigation commenced in the District of Oregon in April 2016.

40. The District of Oregon found that it lacked subject matter jurisdiction and

entered judgment dismissing the case without prejudice. *Friends of the Wild Swan v. Thorson*, CV-16-681-AC, Doc. 31 at 6, Doc. 33 at 2 (D. Or.).

41. The plaintiffs appealed and the Ninth Circuit issued an unpublished memorandum disposition affirming the district court. *Friends of the Wild Swan, Inc. v. Dir. of United States Fish & Wildlife Serv.*, 745 F. Appx 718, 721 (9th Cir. 2018).

42. Subsequently, the plaintiffs filed a motion for leave to file an amended complaint. The district court denied the motion but stated: "I also find that Judge Acosta's F&R made no predetermination of Plaintiffs' ability to be heard on the merits if they choose to file a new complaint." *Friends of the Wild Swan Inc. v. Thorson*, No. 3:16-CV-00681-AC, 2019 WL 2996909, at *2 (D. Or. July 5, 2019).

V. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

The Bull Trout Recovery Plan fails to incorporate recovery criteria that are objective and measurable as required under Section 4(f)(B)(ii).

43. All previous paragraphs are incorporated by reference.

44. Section 4(f)(B) of the ESA requires FWS to develop a Recovery Plan that incorporates the following:

a. a description of such site-specific management actions as may be

necessary to achieve the plan's goal for the conservation and survival of the species;

b. objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

c. estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

45. These three requirements are non-discretionary duties.

46. Despite these requirements, the Bull Trout Recovery Plan does not contain objective, measurable recovery criteria.

47. Instead, the Plan states that bull trout may be delisted once FWS determines that "threats are effectively managed" in a particular number of areas.

48. First, the "threats" to be managed are not defined or delineated in the Plan; instead the Plan states that "threats" will be determined at an undisclosed later date.

49. Second, the term "effectively" is not defined, but instead will be unilaterally, and therefore subjectively, assessed by FWS.

50. Third, the term "managed" is also not defined, but instead will be unilaterally, and therefore subjectively, assessed by FWS.

51. In sum, because the Plan's recovery criterion is simply that FWS will subjectively and unilaterally decide when "threats are effectively managed," and this criterion is neither objective nor measurable, the Recovery Plan violates the non-discretionary mandate of the ESA to include recovery criteria that are both objective and measurable.

52. This claim cannot be barred by res judicata or collateral estoppel: the District of Oregon did not issue a judgment based on adjudication of the actual merits, but instead dismissed without prejudice for lack of jurisdiction. The Supreme Court holds that "adjudication upon the merits" is the opposite of "dismissal without prejudice," and "adjudication upon the merits" is "undoubtedly a necessary condition" that must be met before the doctrine of res judicata applies. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501–06 (2001); *see also Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1, 824* F.3d 1161, 1166 (9th Cir. 2016)("Any finding made by a court when the court has determined that it does not have subject matter jurisdiction carries no res judicata consequences")(citation omitted). Similarly, "dismissals without prejudice do not constitute a final determination to which collateral estoppel is applied." *Brandenfels v. Heckler*, 716 F.2d 553, 557 (9th Cir. 1983); *see also E. Bay Law v. Ford Motor Co.*, 697 F. App'x 533, 534 (9th Cir. 2017) ("Because a dismissal for

lack of jurisdiction is not a final judgment on the merits, res judicata and collateral estoppel do not apply.")

SECOND CLAIM FOR RELIEF

The Bull Trout Recovery Plan fails to incorporate recovery criteria that address the five delisting factors as required under Sections 4(f)(B)(ii), (a)(1), (b)(1)(A), and (c)(2)(B)(i).

53. All previous paragraphs are incorporated by reference.

54. Section 4(f)(B) of the ESA requires FWS to develop a Recovery Plan that incorporates the following:

a. a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

b. objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

c. estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

55. The plain language of the statute thus requires that recovery plans include "objective, measurable criteria which, when met, would result in a

determination, in accordance with the provisions of this section, that the species be removed from the list[.]" 16 U.S.C. §1533(f)(B)(ii).

56. The phrase "in accordance with the provisions of this section" refers to §1533. The required inquiry under this statutory scheme is whether the criteria, when met, "would result in a determination . . . that the species be removed from the list."

57. The provision of §1533 that addresses removal from the list is found at (c)(2)(B)(i), which states that "The Secretary shall . . . conduct, at least once every five years, a review of all species included in a list . . . and (B) determine on the basis of such review whether any such species should (i) be removed from such list . . . . Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section." 16 U.S.C. §1533(c)(2)(B)(I).

58. In turn, subsection (a) requires that in any listing determination, the Secretary "shall" consider the following five factors: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence." 16 U.S.C. §1533(a)(1).

59. Subsection (b) requires: "The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available . . . ." 16 U.S.C. §1533(b)(1)(A).

60. Thus, under the plain language of the ESA, the objective, measureable criteria in a recovery plan must result in a delisting determination "in accordance with the provisions of this section," 16 U.S.C. §1533(f)(B)(ii); "this section" requires that delisting determinations "shall be made in accordance with provisions of subsections (a) and (b) of this section," 16 U.S.C. §1533(c)(2)(B)(i); and subsection (a) requires an analysis of the five listing factors, 16 U.S.C. §1533(a)(1), and subsection (b) requires the application of the best available science, 16 U.S.C. §1533(b)(1)(A).

61. FWS's own guidance documents acknowledge these requirements: "recovery criteria comprise the standards upon which the decision to reclassify or delist a species should be based. Recovery criteria must be 'objective and measurable,' address threats as well as demographic factors and, at least for those criteria addressing threats, be written in terms of each of the 5 'listing' factors . . . ." FWS Guidance Doc. at 5.1–5.14.

62. Likewise, prior agency rules have acknowledged this requirement: "recovery criteria must indicate when a species is no longer endangered or threatened by any of the five factors. In other words, objective, measurable criteria, or

recovery criteria contained in recovery plans, must indicate when we would anticipate an analysis of the five threat factors under section 4(a)(1) would result in a determination that a species is no longer endangered or threatened. Section 4(b) of the Act requires that the determination be made 'solely on the basis of the best scientific and commercial data available.'" 76 Fed. Reg. 50680, 50681, 2011 WL 3562876 (August 11, 2011).

63. Consistently, in interpreting this provision, courts have observed that "Congress has spoken in clarion terms: the objective, measurable criteria must be directed towards the goal of removing the endangered or threatened species from the list." *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 111 (D.D.C. 1995), amended, 967 F. Supp. 6 (D.D.C. 1997).

64. As a result, "[s]ince the same five statutory factors must be considered in delisting as in listing, . . . the FWS, in designing objective, measurable criteria, must address each of the five statutory delisting factors and measure whether threats to the [listed species] have been ameliorated." *Id.* (citing *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167, 170 (D.D.C 1977) and 1982 U.S.C.C.A.N. 2807, 2812).

65. The Bull Trout Recovery Plan violates a non-discretionary duty under the ESA because the recovery criteria do not address the five delisting factors as required by the ESA under Sections 4(f)(B)(ii), (a)(1), (b)(1)(A), and

(c)(2)(B)(I).

66. Instead, the sole recovery criterion presented is that FWS will deem bull trout recovered when "threats are effectively managed" as determined by FWS. This criterion does not address each of the five delisting factors as required by law.

67. This claim cannot be barred by res judicata or collateral estoppel: the District of Oregon did not issue a judgment based on adjudication of the actual merits, but instead dismissed without prejudice for lack of jurisdiction. The Supreme Court holds that "adjudication upon the merits" is the opposite of "dismissal without prejudice," and "adjudication upon the merits" is "undoubtedly a necessary condition" that must be met before the doctrine of res judicata applies. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501–06 (2001); *see also Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1166 (9th Cir. 2016)("Any finding made by a court when the court has determined that it does not have subject matter jurisdiction carries no res judicata consequences")(citation omitted). Similarly, "dismissals without prejudice do not constitute a final determination to which collateral estoppel is applied." *Brandenfels v. Heckler*, 716 F.2d 553, 557 (9th Cir. 1983); *see also E. Bay Law v. Ford Motor Co.*, 697 F. App'x 533, 534 (9th Cir. 2017) ("Because a dismissal for

lack of jurisdiction is not a final judgment on the merits, res judicata and collateral estoppel do not apply.")

VI. RELIEF REQUESTED

For all of the above-stated reasons, Plaintiffs request that the Court award the following relief:

A. Declare that the Bull Trout Recovery Plan violates the ESA;

B. Issue injunctive relief ordering FWS to promptly develop and implement a lawful recovery plan for bull trout;

C. Award Plaintiffs their costs, expenses, expert witness fees, and reasonable attorneys' fees under 16 U.S.C. §1540; and

D. Enter such other and further relief as the Court may deem appropriate to protect, conserve, and recover the bull trout.

Respectfully submitted this 18th Day of November, 2019.

/s/ Rebecca K. Smith
Public Interest Defense Center, P.C.

Timothy Bechtold
Bechtold Law Firm, PLLC

Attorneys for Plaintiffs