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August 2, 2016

MEMORANDUM

TO: Council Members

FROM: John Shurts

SUBJECT: Bull trout ESA litigation update

ESA litigation affecting the Columbia hydroelectric facilities involves more than salmon and steelhead. This past few months have seen two lawsuits filed in the federal district court of Oregon regarding the efforts to protect and recovery bull trout listed as threatened under the ESA. We will provide a brief update on the bull litigation at the August Council meeting in Polson.

Attached to this memorandum are the summary notes for the presentation largely prepared by our legal extern this summer, Sam Shurts, covering:

- 1) Status of bull trout and ESA actions for bull trout and brief history of litigation
- 2) Recovery plan lawsuit filed in April 2016
- 3) ESA consultation lawsuit filed in July 2016

Bull trout litigation presentation notes (August 2016)

Presentation:

- 4) Status of bull trout and ESA actions for bull trout and brief history of litigation by these environmental groups (Alliance for the Wild Rockies and Friends of the Wild Swan)
- 5) Recovery plan lawsuit filed in April 2016
- 6) ESA consultation lawsuit filed in July 2016

Status of bull trout and ESA actions for bull trout and brief history of litigation

- USFWS designated bull trout as threatened under ESA in 1998; especially important has been degradation of spawning and early life-stage habitat quality; particularly need for cold water especially for spawning; vulnerable to climate change
 - FWS status review in 2008 - retained listing
- Bull trout biological opinions -- all no jeopardy:
 - FCRPS 2000
 - Libby Dam (2006)
 - Bureau projects in Snake River 1999; 2005
 - Corps projects in Willamette 2008
- FWS designated bull trout critical habitat across OR, WA, MT, ID and NV in 2010
- FWS released recovery plan in 2015
- History of litigation since early 1990s: 7th and 8th times these plaintiffs have sued defendants over bull trout, involving: listing of bull trout; designation of critical habitat, FWS's recovery plan for the species; and over the need for Section 7 consultation following critical habitat designation

Recovery plan lawsuit

- Filed in April 2016 in US District Court of Oregon
- Plaintiffs are Friends of the Wild Swan and Alliance for the Wild Rockies
- Defendants are FWS and Interior
- Alleges USFWS's plan does not comply with Section 4(f) of the ESA
 - Generally, ESA 4(f) requires that USFWS develop and implement recovery plan which must include: (a) "site-specific management actions"; (b) "objective, measurable criteria"; and (c) "estimates of the time...and the cost," all with the aim of recovery and delisting

- Nine claims for relief -- 8 ESA violations or, in the alternative, 1 APA violation:
 - 1) The recovery plan allows for 25% of certain populations to die off (Coastal, Mid-Columbia, Upper Snake and Columbia Headwaters units)
 - 2) The plan's goals, objectives and criteria are not consistent with the methodology of certain NMFS/FWS guiding documents, for instance by failing to include specific population or habitat size targets
 - 3) Instead of using the best available science to monitor recovery based on quantitative targets, the plan makes numerous assumptions in order to base recovery on whether certain threats have been "managed"
 - 4) The plan fails to rely on habitat metrics for assessing recovery and delisting, or explain how "managing threats" will achieve the necessary habitat conditions
 - 5) The plan fails to "effectively or objectively evaluate threats" (despite basing its criteria on managing threats)
 - 6) The plan relies on "adaptive management and monitoring" that are "vaguely defined and lack protocols"
 - 7) USFWS has provided "no clear evidence" that a "threats are managed" finding can be made with "sufficient certainty that it should be the primary basis" of protection and evaluating recovery
 - 8) The plan does not adequately address the effects of climate change on the cold water habitat needed by bull trout
 - 9) In the alternative to granting claims 1-8 under the ESA, plaintiffs ask the court to find that defendants have acted arbitrarily and capriciously under the APA (in the same 8 ways explained in the preceding claims)

- Complaint asks for a declaratory judgment that defendants are violating the ESA, or the APA, and an injunction ordering them to develop and implement a "lawfully adequate recovery plan"

- Federal defendants filed a Motion to Dismiss on July 15, arguing that the ESA authorizes suit against the USFWS only when it fails to perform a mandatory *non-discretionary* duty imposed by the ESA

- Since the "substance" of the bull trout recovery plan is left to the discretion of the USFWS, plaintiffs have failed to state a claim

- Next, plaintiffs have 30 days to file a response, then defendants have 30 days for a reply

ESA consultation lawsuit

- Filed in July 2016 in US District Court of Oregon

- Plaintiff is Alliance for the Wild Rockies

- Defendants are Corps of Engineers, Bureau of Reclamation and Bonneville
- Complaint alleges:
 - Section 7 of the ESA requires these federal agencies to consult with USFWS before taking any action which might negatively affect a listed species or its habitat
 - Defendants have not done so despite continued operation and maintenance of these hydroelectric projects located in or affecting critical habitat
 - In the process defendants have failed to prevent “adverse modification” of the habitat
 - The complaint asks for a judicial order that defendants comply with the consultation requirements of the ESA
- The complaint notes that all defendants, responding to the “Notice of Intent to Sue,” have asserted that formal consultation related to bull trout and its critical habitat is ongoing. The complaint does not respond directly, but presumably plaintiff does not agree that these consultations are moving fast enough.

Bull Trout ESA Litigation





(1) Summary of ESA status of bull trout; ESA actions for bull trout; brief history of bull trout litigation

(2) Bull trout recovery plan lawsuit (filed April 2016)

(3) Bull trout critical habitat ESA consultation lawsuit (filed July 2016)

Bull Trout Spawning Grounds – Cold Water

USFWS listed bull trout as threatened in 1998; status reviewed and retained in 2008

Bull trout biological opinions (all no jeopardy):

- FCRPS 2000
- Libby Dam 2006
- Bureau projects in Snake River 1999; 2005
- Corps projects in Willamette 2008

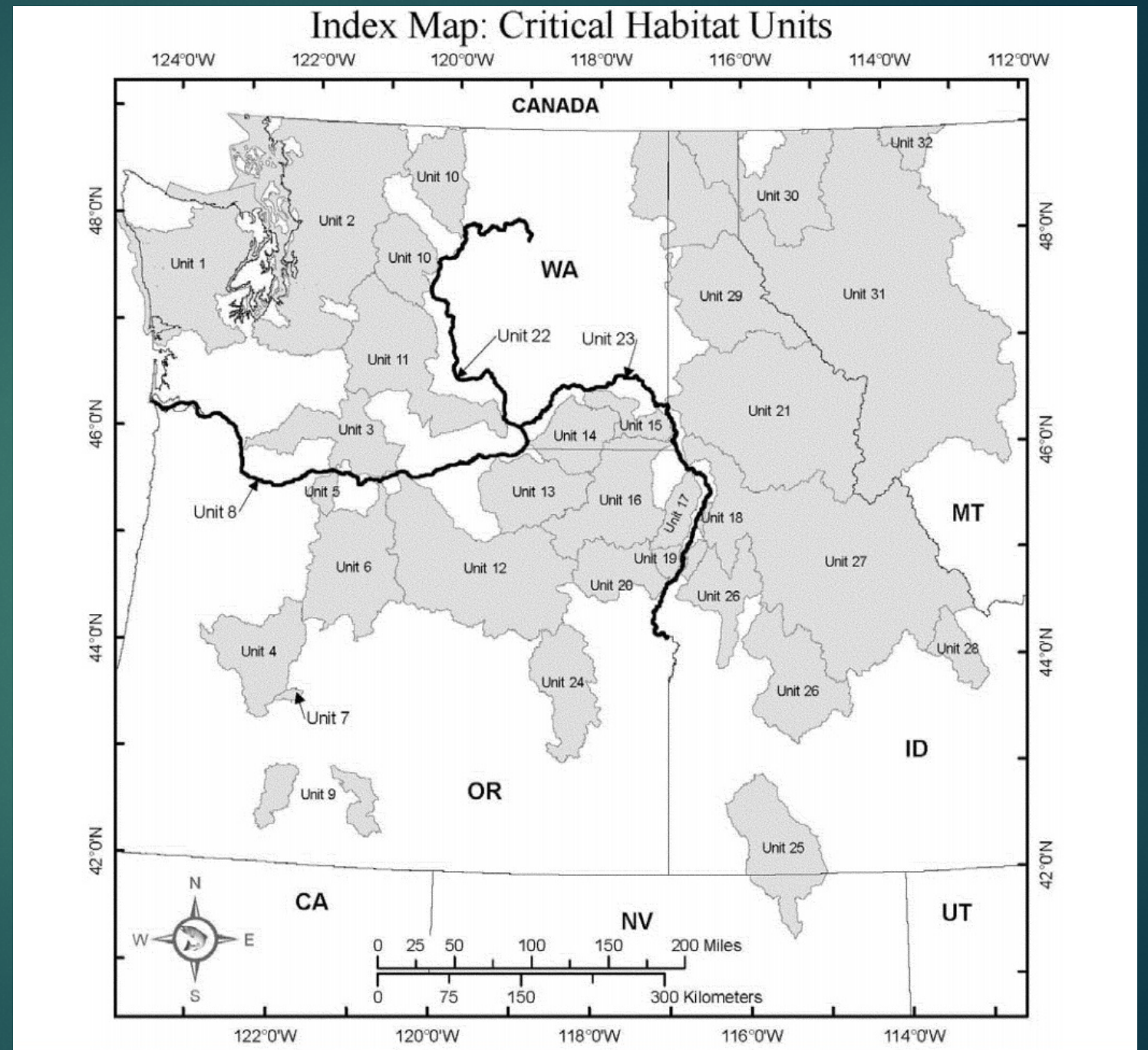


USFWS designated bull trout critical habitat across OR, WA, MT, ID and NV in 2010

USFWS released recovery plan in 2015

History of litigation since early 1990s:

- listing of bull trout
- designation of critical habitat



Recovery Plan challenge: *Friends of the Wild Swan and Alliance for the Wild Rockies v. U.S. Fish and Wildlife Service*

- ▶ Filed April 2016 – US District Court of Oregon
- ▶ Alleges USFWS's bull trout recovery plan does not comply with the recovery plan requirements of §4 of the ESA
- ▶ 9 separate claims for relief -- 8 ESA violations or, in the alternative, 1 APA violation
- ▶ Federal defendants filed a motion to dismiss in July – substance of recovery plan is at discretion and judgment of FWS

Section 7 consultation lawsuit: *Alliance for the Wild Rockies v. Corps of Engineers, Bureau of Reclamation and Bonneville*

- ▶ Filed July 2016 – US District Court of Oregon
- ▶ Alleges that these federal agencies have failed to comply with §7 of the ESA by failing to complete consultation with the USFWS regarding effects of 26 federal hydropower projects on bull trout critical habitat
- ▶ Federal defendants have asserted that formal consultation related to bull trout and its critical habitat is ongoing