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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

CASCADIA WILDLANDS; WILLAMETTE RIVERKEEPER; OREGON WILD; and NATIVE FISH SOCIETY,

Plaintiffs,

v.

EUGENE WATER & ELECTRIC BOARD,

Defendant.

Case No.: 6:25-cv-00446-MTK

MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT

Oral Argument Requested

MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Cascadia Wildlands, Willamette Riverkeeper, Oregon Wild, and Native Fish Society hereby move to obtain an order from this Court requiring Eugene Water & Electric Board ("EWEB") to take immediate actions to reduce mortality and injury to Upper Willamette River ("UWR") Chinook salmon and bull trout from EWEB's ongoing operation of the Carmen-Smith Hydroelectric Project ("Carmen-Smith Project"). EWEB is violating the Endangered Species Act ("ESA") by continuing to operate the Carmen-Smith Project in ways that cause take of Chinook and bull trout. Counsel for Plaintiffs and counsel for Defendant conferred in a good-faith effort to resolve this dispute, but they were unable to do so. *See* Local Rule 7-1(a)(1)(A).

In light of the extremely precarious status of these imperiled species, Plaintiffs request an injunction that would alter operations of EWEB's temporary trap-and-haul process at Trail Bridge Dam and improve interim downstream fish passage to better meet the needs of UWR Chinook salmon and bull trout pending resolution of this case. Plaintiffs request an order from the Court by July 25, 2025, so EWEB can undertake measures by August 25, 2025, to improve interim fish passage at the dam near the start of the species' upcoming spawning seasons.

In light of the important public interest nature of this litigation and the nonprofit status of the litigants, Plaintiffs request that this Court waive any injunction bond under Federal Rule of Civil Procedure 65(c).

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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ESA	Endangered Species Act
EWEB	Eugene Water & Electric Board
FERC	Federal Energy Regulatory Commission
FWS	Fish & Wildlife Service
NMFS	National Marine Fisheries Service
UWR	Upper Willamette River

INTRODUCTION

UWR Chinook salmon and bull trout in the Willamette Basin once thrived, but their populations have declined dramatically due to loss of habitat, warming water temperatures, and other external factors. The upper McKenzie River subbasin contains some of the remaining and most important cold-water habitat for the fish in the entire Willamette Basin. Dams on the river block this habitat, inhibiting the fish's migration, spawning, and other essential behaviors. Trail Bridge Dam is one such dam.

Trail Bridge Dam is the lowermost dam in EWEB's Carmen-Smith Project on the upper McKenzie River and stands as an absolute barrier to fish passage. EWEB has known for almost two decades that it must provide fish passage at the dam but has failed to even initiate construction. Consequently, EWEB is many years past its deadlines for completion of the facilities as required under its ESA authorizations. This means the dam continues to block access to Chinook critical spawning habitat, isolate a bull trout population, and otherwise impair the species' essential behaviors and migratory patterns. In the meantime, EWEB funds and operates a temporary but flawed system to move fish above the dam via a trap or hook and line and transport by truck ("trap-and-haul"). This system has proven ineffective and results in additional unnecessary harm, harassment, injury, and mortality of the fish. Fish migrating downriver must go through the dam's dangerous spillway or turbine, also resulting in significant injury and mortality. EWEB's current operation of the Carmen-Smith Project is thus contributing to the decline of these already extremely at-risk fish species.

EWEB's failure to abide by the ESA authorizations issued by the National Marine Fisheries Service ("NMFS") and U.S. Fish and Wildlife Service ("FWS") (collectively, "the Services") has and continues to result in unlawful take of threatened Chinook salmon and bull

trout, in violation of Section 9 of the ESA. Preliminary injunctive relief to improve EWEB's temporary trap-and-haul and downstream passage is necessary to minimize further irreparable harm to the fish while this litigation moves forward.

STATEMENT OF FACTS

I. ESA-LISTED FISH SPECIES IN THE MCKENZIE RIVER SUBBASIN

A. Upper Willamette River Chinook Salmon

UWR Chinook are spring-run salmon native to the Willamette River above Willamette Falls. Ex.1 at 56. Due to their geographic isolation and migration timing, they are one of the most genetically distinct groups of Chinook salmon in the Columbia River Basin. *See id.* at 58.

UWR Chinook salmon are born in freshwater streams in the UWR Basin, then migrate downriver to the ocean, where they live for several years before returning to their natal streams to spawn. *See* 70 Fed. Reg. 52,630, 52,662 (Sept. 2, 2005). Returning adult UWR Chinook ascend Willamette Falls in the spring during peak water flows. Ex.1 at 58. Once above the falls, UWR Chinook migrate to cooler waters in the Upper Willamette and its tributaries, where they hold in deep pools through the summer. Schroeder Decl. ¶ 12. Chinook deposit their eggs at a time that maximizes the likelihood their fry will emerge the following spring. *Id.* ¶ 13. The timing of spawning varies with water temperature, typically occurring in September and October. *Id.* ¶¶ 12–13; 64 Fed. Reg. 14,308, 14,322 (March 24, 1999); Ex.1 at 59. Juveniles emigrate to the ocean either as sub-yearlings in the fall or as yearlings in the spring. Ex.1 at 59.

In 1999, NMFS listed the UWR Chinook salmon as threatened under the ESA, 64 Fed. Reg. at 14,308, and in 2005, designated critical habitat in the UWR Basin, 70 Fed. Reg. at 52,720. The species' critical habitat includes the McKenzie River subbasin up- and downstream of Trail Bridge Dam. *Id.* Key habitat features for the species include water quality and quantity,

spawning gravels and substrate, forage, natural cover including side channels and large wood, unobstructed migration corridors, and floodplain connectivity. *Id.* at 52,664–65; Ex.2 at 53–54, 58. In listing UWR Chinook, NMFS identified that blockage and degradation of spawning and rearing habitat by dams contribute to the decline of the species. 64 Fed. Reg. at 14,322–23. This problem persists today. *See* Ex.3 at 32, 34.

Historically, the Upper Willamette supported hundreds of thousands of Chinook salmon. Ex.1 at 60. Now, fewer than 10,000 wild Chinook return to the basin each year. *Id.*; Schroeder Decl. ¶ 14. The McKenzie River Chinook population is one of seven UWR Chinook populations, and was once a stronghold of natural production for the species. Ex.2 at 49, 51. It is considered a "core" and "genetic legacy" population. Schroeder Decl. ¶ 14. Because of its historically high productivity and larger abundance of wild fish, the McKenzie population's status is important to the entire UWR Evolutionarily Significant Unit. *See id.* ¶¶ 14–15. In 2024, NMFS determined that the McKenzie population "remains well below its recovery goal," with nearly half of the spawning population comprised of hatchery-origin fish. Ex.3 at 27–28. However, the vast majority of Chinook salmon in the upper part of the McKenzie subbasin—such as those affected by Trail Bridge Dam—are still wild. Schroeder Decl. ¶ 16. One of the "greatest opportunit[ies] to advance the recovery of UWR Chinook" is to provide effective passage at dams and access to historical spawning and rearing habitat, including at Trail Bridge Dam. Ex.3 at 34–35.

B. Bull Trout

Bull trout are a type of char in the salmonid family native to waters of western North America, including the Willamette Basin. 63 Fed. Reg. 31,647, 31,647 (June 10, 1998). While bull trout populations can be either resident or migratory, "[t]he ability to migrate is important to the persistence of bull trout," and they must be able to move both up- and downstream to carry

out their life history strategies. Ex.4 at 36–37, 40. Bull trout spawn in small streams and then migrate to rear in lake, river, or saltwater environments. 63 Fed. Reg. at 31,647. The fish spawn from August to November, and fry typically emerge from early April through May. *Id.* at 31,648. Young bull trout feed primarily on aquatic invertebrates, and adults eat mostly other fish species. *Id.* Within a "Core Area," bull trout migrate between local populations, ensuring regular interchange of genetic material that aids in the recovery of the species. 69 Fed. Reg. 59,996, 60,023 (Oct. 6, 2004).

Bull trout in the McKenzie River belong to the threatened Columbia River Distinct Population Segment, listed under the ESA in 1998. 63 Fed. Reg. at 31,647. In 2004, FWS designated critical habitat in the McKenzie River subbasin, including upstream of Trail Bridge Dam. 69 Fed. Reg. at 59,996; Ex.4 at 66–67. Key habitat elements for bull trout are similar to UWR Chinook. 69 Fed. Reg. at 60,023–24. In listing bull trout, FWS recognized that one of the primary factors contributing to their threatened status was the blockage of migratory corridors by dams. 63 Fed. Reg. at 31,657. "Impassable dams have caused declines of bull trout primarily by preventing access of migratory fish to spawning and rearing areas in headwaters and precluding recolonization of areas where bull trout have been extirpated." *Id.*

Although bull trout were once widely distributed within the UWR Basin, there are now estimated to be fewer than 280 adults within just four local populations in this Core Area. Ex.4 at 57. These populations are found in the McKenzie and Middle Fork Willamette subbasins and have been fragmented by dams into four isolated populations, one of which exists above Trail Bridge Dam. *Id.* at 57–58. Due to small population size and physical isolation by dams that prevent gene flow between populations, bull trout in the Upper Willamette Core Area are at risk of extinction. *Id.* at 54, 59. In 2016, the Oregon Department of Fish and Wildlife estimated there

were only 75 adults in the Mainstem McKenzie population and 86 in the Trail Bridge population; its maximum estimate for the Trail Bridge population is 150 adults/subadults. *Id.* at 62–63.

Today, "bull trout abundance in the Upper Willamette Core Area is *significantly below* the threshold thought to be necessary to maintain genetic variation important for long-term evolutionary potential and persistence." *Id.* at 59 (emphasis added). A key action for connecting populations to conserve genetic and life history diversity is upstream and downstream passage at Trail Bridge Dam. Schroeder Decl. ¶ 24; Ex.4 at 59.

II. THE CARMEN-SMITH HYDROELECTRIC PROJECT

A. The Carmen-Smith Project

The Carmen-Smith Hydroelectric Project is a series of three dams, three reservoirs, and two powerhouses in the upper reach of the McKenzie River. Ex.5 at 4–6; Ex.6 at 8. In 1958, EWEB, the owner and operator, obtained the initial hydropower license for the Project, and in 1963, hydropower production began. Ex.7 at 29. The Project consists of two developments: the

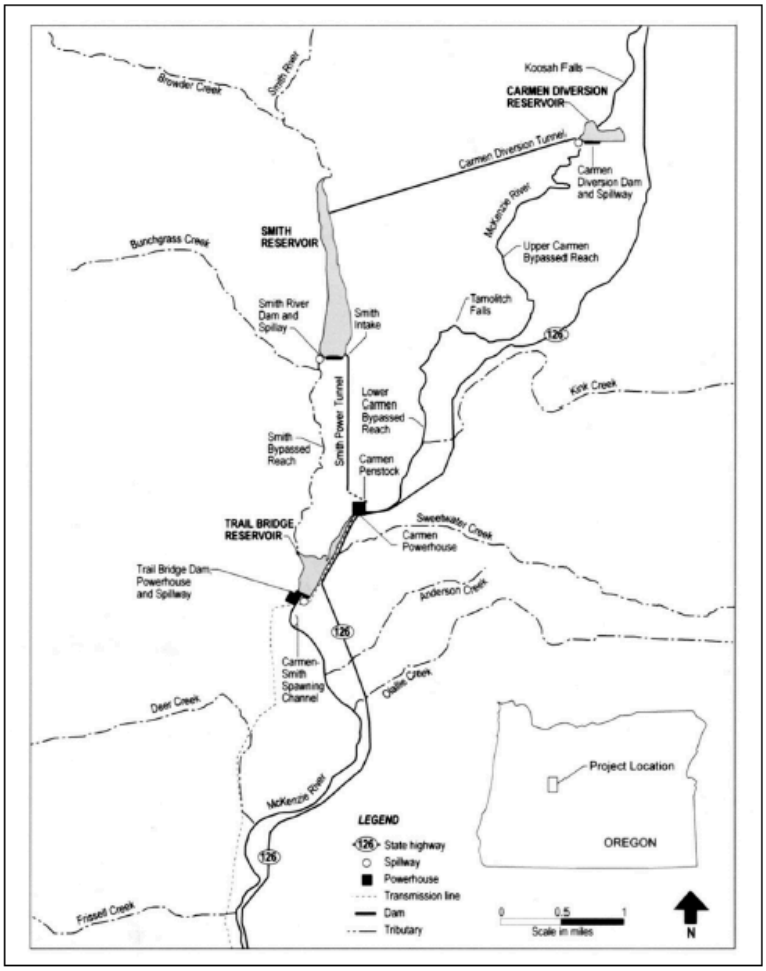

Figure 1. Location and project facilities of the Carmen-Smith Hydroelectric Project (Source: EWEB, 2006, as modified by staff).

Carmen Development and the Trail Bridge Development. Ex.5 at 4.

The Carmen Development includes the Carmen Dam, Smith Dam, and Carmen Powerhouse. *Id.* at 4–6. The Carmen Dam is the uppermost dam and diverts some water from the McKenzie River into Smith Reservoir; the rest of the river flows down to Trail Bridge Reservoir. *Id.* The Carmen Powerhouse operates as a peaking facility and is the Project's primary source of energy production. *See id.* at 7. It produces power at different levels throughout the day depending on demand, creating highly fluctuating water levels below the powerhouse. *Id.*

The Trail Bridge Development includes the roughly 100-foot-high Trail Bridge Dam, Trail Bridge Reservoir, and Trail Bridge Powerhouse. *Id.* at 5–6. The Trail Bridge Dam is the lowermost dam and releases water from Trail Bridge Reservoir into the McKenzie River through one power turbine or via a spillway. *Id.* The Trail Bridge Development operates to minimize water flow fluctuations below the dam and produces a small amount of power that varies with river flows. *Id.* at 7–8. Just below Trail Bridge Dam is the Carmen-Smith Spawning Channel that was constructed by EWEB to mitigate for the loss of fish habitat above the Project dams. *Id.* at 7 n.19; Ex.4 at 84.

B. Harm to UWR Chinook Salmon and Bull Trout at Trail Bridge Dam

Trail Bridge Dam stands as an absolute barrier to Chinook's access to upstream critical habitat. Ex.2 at 87–88. This inaccessible habitat provides some of the highest quality spawning and rearing grounds in the McKenzie watershed due to cold water temperatures, good water quality, and relatively pristine habitat conditions. *See* Schroeder Decl. ¶¶ 27–28. The lack of a safe connection to and from this habitat puts Chinook's chance of recovery in jeopardy. *See* Ex.3 at 34–35; Schroeder Decl. ¶¶ 29, 34, 45–47.

Bull trout are similarly impacted. Trail Bridge Dam isolates the small population of bull trout above the dam, preventing migration downriver. *See* Ex.4 at 59. Thus, the population is unable to carry out essential behavioral strategies like foraging in larger downriver habitat and cannot interbreed with other populations below the dam. *Id.*; Schroeder Decl. ¶¶ 30, 33. By inhibiting genetic diversity and decreasing population viability, the dam puts these small populations at a higher risk of extinction. Ex.4 at 59. Lack of habitat connectivity also prevents bull trout from re-establishing in areas where their populations were previously extirpated, decreasing their overall ability to recover. *See id.*

The only way fish can move downstream is through the dam's dangerous power turbine, spillway, or a specific valve outlet near the base of the dam. Ex.1 at 83; Ex.4 at 76. Juvenile fish mortality through the Trail Bridge turbine is estimated to be >10% and likely higher at the valve. Ex.1 at 83. Fish are more likely to pass through the spillway than through the turbine, but the current spillway was not designed to safely pass fish and spillway passage mortality ranges from 0 to 15%. *Id.* at 83–84; Ex.4 at 81. Fish that do survive incur injuries from striking the turbine blades or the sides of the spillway gate. *See* Ex.4 at 80–81; Ex.1at 123 (estimating that 200 Chinook salmon fry and juveniles are killed, injured, or stressed each year by passage through the spillway). As fish size increases, mortality and injury rates increase. *Id.* at 83; Ex.4 at 81. When the spillway is shut off, fish also get trapped in a small pool above the base of the spillway. Ex.2 at 63. Spillway operations can cause additional harm by exposing fish to excessive total dissolved gas in the river below the dam. Ex.8 at 4; Ex.9 at 3.

Fish are also harmed, injured, and killed by the dam and associated infrastructure in other ways. The dam's tailrace barrier tries to direct adult fish into the Carmen-Smith Spawning Channel below Trail Bridge Dam, but some fish get past the barrier and end up at the base of the

dam. Ex.2 at 59–60. These fish can be injured or killed if they are attracted to the turbine discharge or try to use draft tubes as cover. *See id.* The upstream end of the spawning channel is a complete passage barrier, Ex.4 at 84, and adult and juvenile fish can be injured or killed if they are entrained between the channel headgate (upstream exit) and diffuser, Ex.1 at 86. Fish in Trail Bridge Reservoir can also be killed by predators or stranded on the banks due to water level fluctuations within EWEB's control. *See* Ex.2 at 63, 116; Ex.4 at 94; *see also* Ex.10 at 13 (predation in spawning channel). Habitat conditions are also degraded: reservoirs reduce the amount of high-quality river habitat; natural water flows are altered in bypassed diversion reaches; water temperatures are increased; and important habitat features like woody debris and spawning gravels are blocked from moving downriver. Ex.2 at 65, 72–76; Ex.4 at 67–71.

Without upstream passage, Chinook and bull trout have only been able to get above Trail Bridge Dam by manual capture of adult fish and transport in trucks to release sites upstream ("trap-and-haul"). *See* Ex.2 at 113; Ex.4 at 75; Schroeder Decl. ¶ 35. But the trap-and-haul process itself harms, injures, and kills fish. *See* Ex.4 at 140; Schroeder Decl. ¶¶ 35–40; Moody Decl. ¶¶ 7–9. Additionally, the trap-and-haul system is often unsuccessful. The trap to capture adult fish in the spawning channel is ineffective because it is too small, in a bad location, has insufficient attraction flow, and requires constant monitoring. *See* Schroeder Decl. ¶¶ 38–39, 48; Moody Decl. ¶¶ 7–9. Furthermore, wildfire closures prevent and interfere with trap-and-haul operations. Ex.10 at 12–13; Moody Decl. ¶¶ 10–11. Even when successfully caught and transported, some fish can fall back through the dam's spillway and end up back at the base of the dam. *See* Ex.1 at 85; Ex.10 at 12. For fish that make it past these obstacles, upstream passage is further limited by the Carmen Power Plant tailrace located at the head of Trail Bridge

Reservoir, which can cause additional delay, injury, and mortality during attempted migration. Ex.1 at 86.

III. 2008–2011: FERC RELICENSING PROCESS, SETTLEMENT AGREEMENT, AND INITIAL BIOLOGICAL OPINIONS ON VOLITIONAL FISH PASSAGE

In November 2008, EWEB's initial 50-year hydropower license for the Carmen-Smith Project expired. EWEB worked with the Federal Energy Regulatory Commission ("FERC"), state and federal wildlife agencies—including NMFS and FWS—local tribes, and conservation organizations—including Plaintiffs Cascadia Wildlands and Oregon Wild—to enter into a relicensing settlement agreement process to inform the terms and conditions of EWEB's new license. Ex.11 at 7.

The 2008 Settlement Agreement included various measures to address impacts to threatened fish. Most critically, EWEB committed to complete construction of a volitional fish ladder to provide upstream passage around Trail Bridge Dam as well as a screen and bypass system for downstream passage within six years of license issuance. Ex.11 at 84–87. NMFS, FWS, and others supported this approach versus a trap-and-haul system because fish ladders "permit volitional fish migration . . . , require far less maintenance than trap-and-haul . . . , operate reliably throughout the year with little human intervention required, operate year round regardless [of] the number of fish present, and operate continuously to pass large numbers of fish without delay, crowding, and injury." Ex.12 at 6; *see also* Ex.13 (conservation organizations favoring fish ladder).

To ensure the new hydropower license complied with the ESA, FERC consulted with the Services. NMFS and FWS each issued a biological opinion analyzing the impacts on listed UWR Chinook salmon and bull trout of the proposed relicensing with the conservation measures from

the 2008 Settlement Agreement.[1] Both opinions concluded that relicensing would not jeopardize the continued existence of the species or adversely modify their critical habitat. Ex.14 at 173; Ex.1 at 191. Those conclusions were contingent, however, on EWEB's timely implementation of the 2008 Settlement Agreement conservation measures—chiefly, volitional fish passage at Trail Bridge Dam. *See, e.g.*, Ex.1 at 133 (volitional passage "would enable Chinook salmon to access historical spawning and rearing habitat"); Ex.14 at 113 (same for bull trout). Only implementation of those measures would significantly reduce the adverse impacts to the species and their critical habitat at Trail Bridge Dam. Ex.14 at 174–76; Ex.1 at 190–91. The Services issued incidental take statements for the Project based on the anticipated level of take from Project construction and operations, as well as during the interim period before completion of fish passage. Ex.14 at 180–84; Ex.1 at 192–94.

IV. 2016–2019: REVISED SETTLEMENT AGREEMENT, REVISED BIOLOGICAL OPINIONS ON TRAP-AND-HAUL, AND NEW FERC HYDROPOWER LICENSE

A. 2016 Revised Settlement Agreement

In the seven years following the 2008 Settlement Agreement, EWEB made no progress on fish passage at Trail Bridge Dam. Instead, in 2016, EWEB asked FERC to delay issuance of the new Project license so that EWEB could complete an updated economic analysis. Ex.15 at 1. That updated analysis concluded that volitional fish passage was now uneconomical. *Id.* at 2. EWEB therefore requested one year to modify the Settlement Agreement with a new solution for fish passage. *Id.* at 4. The new 2016 Settlement Agreement eliminated an upstream fish ladder and downstream screen and bypass system, and provided EWEB would instead:

- provide for upstream passage at Trail Bridge Dam by constructing a new trap-and-haul facility within three years of license issuance (**Article 29)**;

[1] The biological opinions covered EWEB as the owner, operator, and FERC license applicant. Ex.1 at 15; Ex.14 at 9.

- provide for upstream passage at the Carmen-Smith Spawning Channel within four years of license issuance (**Article 30**);
- and improve downstream fish passage at the dam by modifying the spillway, gate and hoist system within three years of license issuance, and upon completion of the fish passage facilities ceasing operation of the Trail Bridge Power Plant (**Article 33**).

Compare Ex.6 at 107–12, 114–20 *with* Ex.11 at 84–87. In the interim before fish passage measures were completed, EWEB agreed to fund a temporary trap-and-haul process with Oregon Department of Fish and Wildlife for upstream passage and implement water flows to facilitate downstream passage. Ex.6 at 29.

NMFS and FWS rejoined the 2016 Settlement Agreement despite their opinion that "trap-and-haul systems are typically less effective than volitional passage, often significantly less so," because EWEB agreed to expedite the timeline for fish passage at Trail Bridge Dam to three years. *See* Ex.16 at 2. FWS expressly represented that this "narrow timeline was *the only* significant change that was more beneficial to ESA-listed fish in the 2016 Settlement Agreement." Ex.9 at 2 (emphasis added). Cascadia Wildlands and Oregon Wild did not agree with this less-effective approach to fish passage and thus did not rejoin the Settlement Agreement. *See* Ex.6 at 6.

B. 2018 Biological Opinions

In light of the 2016 Settlement Agreement's fish passage revisions, in 2018, FWS and NMFS issued new biological opinions assessing the effects of relicensing the Carmen-Smith Project. Ex.4; Ex.2. Both opinions again concluded that the relicensing would not jeopardize the continued existence of either fish species or modify their critical habitat. Ex.4 at 131; Ex.2 at 128. However, the opinions were again expressly contingent on EWEB's prompt implementation of the 2016 Settlement Agreement, including the new requirements for up- and downstream fish passage at Trail Bridge Dam *within three years of license issuance*. Ex.4 at 131–33, 147; Ex.2 at

135–36. The Services concluded these measures and the expedited timeline would reduce the Project's adverse impacts on the fish. Ex.4 at 131–32; Ex.2 at 125–26.

FWS's 2018 biological opinion reiterated that the lack of effective up- and downstream passage at Trail Bridge Dam impairs bull trout migration in the McKenzie River and connectivity with other local bull trout populations. Ex.4 at 75–76. It found EWEB's proposed new passage facilities would "significantly reduce" ongoing and future Project impacts, providing long-term benefits and contributing to the species' survival and recovery. *Id.* at 72, 75. Yet, it also found trap-and-haul could result in injury or mortality to fish during the capture, holding, transport, or release processes. *Id.* at 75. For downstream passage, the proposed spillway modifications would "provide bull trout of all ages a safer and more accessible downstream passage route than is currently available," which FWS determined should increase bull trout populations both up- and downstream of Trail Bridge Dam. *Id.* at 76. FWS found that once spillway modifications were complete, there would be "little injury or mortality to bull trout associated with downstream passage." *Id.* at 77. Since juvenile Chinook are an important component of bull trout's prey base, fish passage benefits to Chinook would also benefit bull trout. *Id.* at 76.

NMFS's 2018 biological opinion similarly discussed the importance of fish passage to Chinook. It found that in the interim period until new passage facilities are built, lack of access to upstream spawning habitat would limit abundance and productivity of the population, and some 4,000 Chinook fry and juveniles will be killed or injured annually attempting to migrate through the existing turbine or spillway. Ex.2 at 87–88. It concluded "[u]ntil the new passage facilities are in operation (within three years of the new license issuance), the ongoing condition at Trail Bridge Dam would be likely to reduce the abundance, productivity, and spatial structure

of the McKenzie Chinook population." *Id.* at 88. Once new up- and downstream fish passage measures are completed, however, these adverse impacts would be minimized. *Id.* at 125–26.

Both FWS and NMFS issued new incidental take statements for the Project, which determined the Project was expected to take bull trout and UWR Chinook, particularly in the interim period before fish passage measures are completed. Ex.4 at 138–43. Ex.2 at 129–31.

FWS's incidental take statement estimated that the amount of take likely to occur annually from downstream passage during the interim period would be almost double the amount that would occur after completion of fish passage facilities. Ex.4 at 139–41. Similarly, there would be significantly more take of adult fish during interim upstream passage compared to the estimated amount after the new trap-and-haul facility is built (15% of handled fish versus 5%). *Id.* at 140–41. To avoid ESA Section 9 take liability, FWS explicitly required that EWEB "fully comply with the conservation measures described as part of the proposed action." *Id.* at 147.

NMFS stated it could not quantify the amount of take that would occur during the interim period and simply estimated the extent of take as the amount that would occur under the interim flow operations, expecting those to occur for only three years. Ex.2 at 133. It predicted an annual take of 2% mortality and 5% injury of Chinook fry and juveniles once spillway modifications are completed, and <1% mortality of adults once upstream trap-and-haul is completed. *Id.* at 130. NMFS specifically stated that the take exempted by the incidental take statement "would be exceeded if [EWEB] fails to carry out the proposed action in strict accordance with the [2016 Settlement Agreement]," *id.* at 132, and included a mandatory term and condition that ordered EWEB to "[f]ollow all of the [2016 Settlement Agreement] provisions that relate to Chinook salmon (including, but not limited to fish passage . . .) for this Project," *id.* at 136.

C. 2019 FERC Hydropower License

On May 17, 2019, FERC granted EWEB a new 50-year hydropower license to allow EWEB's continued operation of the Carmen-Smith Project. Ex.5 at 1. The new license incorporated the 2016 Settlement Agreement and included 34 license articles, including the articles specific to fish passage (Articles 29, 30, and 33). *Id.* at 129–55.

Based on the expedited timeframe agreed to in the 2016 Settlement Agreement, the following deadlines were set: provide upstream passage at Trail Bridge Dam through a trap-and-haul system and removal of the tailrace barrier by **May 2022** (**Article 29**); provide upstream passage at Carmen-Smith Spawning Channel by **May 2023** (**Article 30**); and improve downstream passage at Trail Bridge Dam by modifying the spillway and gate hoist system and ceasing power generation at Trail Bridge Powerhouse by **May 2022** (**Article 33**). *See id.* at 144–55; Ex.17 at 13, 16. The hydropower license also included an adaptive management provision requiring the construction of a volitional fish ladder if, after ten migration seasons, the trap-and-haul system proved inadequate. Ex.5 at 97.

V. 2019–PRESENT: EWEB'S FAILURE TO IMPLEMENT THE FISH PASSAGE MEASURES REQUIRED BY THE 2018 BIOLOGICAL OPINIONS

On May 18, 2020—not even one year into the new license—EWEB informed FERC that it expected delays in completing the requisite fish passage facilities and submitted a new timeline for their design and construction, which the Services and FERC disapproved. Ex.18 at 3–6. Over the next two years, EWEB made little progress. *See* Ex.17 at 14–15. On May 16, 2022—the month that fish passage construction was supposed to be completed—EWEB filed a self-report of non-compliance and identified new completion dates of December 2027 for the upstream trap-and-haul facility (Article 29), and December 2029 for downstream passage (Article 33). Ex.19 at 7. EWEB blamed its delay on purported dam safety issues, primarily sinkholes in Trail Bridge

Reservoir. *Id.* A year later, EWEB filed an extension of time request until August 2029 to fulfill the spawning channel modifications (Article 30). Ex.18 at 17.

In late October 2023, NMFS and FWS filed letters with FERC describing EWEB's non-compliance with the biological opinions and hydropower license. Ex.8; Ex.9. The Services were emphatic: EWEB's "lack of progress toward completion of the Project's required fish passage measures is unacceptable." Ex.9 at 1. The letters detailed EWEB's pattern and practice of delaying progress "at every turn" and "bad faith behavior." *Id.*; Ex.8 at 3. NMFS's letter included a declaration from a former EWEB hydropower compliance staff member who made allegations that EWEB never intended to meet the three-year deadline for fish passage, made false statements about the reasons for the delay, and overall was acting in bad faith. Ex.8 at 9–15. The Services agreed: EWEB's actions "have led to significant harm to ESA-listed fish and the economic justification for those changes have proven false." Ex.9 at 2; Ex.8 at 2. To remedy the harm associated with EWEB's delay, the Services requested that EWEB "design and construct facilities to allow for the volitional upstream and downstream migration of ESA-listed [fish species] . . . on the fastest possible timeline, with no further excuses for delay." Ex.8 at 5; Ex.9 at 3. EWEB responded to NMFS and FWS's letters denying all allegations that EWEB deliberately delayed construction of fish passage facilities or falsified information. Ex.20; Ex.21.

Following the October 2023 letters, FWS and NMFS each informed FERC that due to EWEB's continued delays in implementing fish passage and other conservation measures, impacts to the fish and the expected level of incidental take went beyond what was analyzed in the Services' biological opinions. Ex. 22; Ex.16. Therefore, the Services would have to re-analyze the impacts of the Project through reinitiated ESA consultation. Ex.22; Ex.16. For

similar reasons, NMFS and FWS each notified FERC they were withdrawing from the 2016 Settlement Agreement. Ex.23; Ex.24.

On April 11, 2024, FERC issued a non-compliance order finding EWEB out of compliance with the fish passage articles of its license. Ex.17 at 13–17. As to Articles 29 and 33, FERC noted "a perceived lack of regard to expedite construction and implementation schedules of these measures" and found EWEB's continued delay went "beyond solely dam safety matters." *Id.* at 15–16. It required EWEB to continue to file quarterly progress reports. *Id.* at 16. As to Article 30, FERC denied EWEB's request for an extension of time of five years given the delays under Articles 29 and 33 and the Service's feedback. *Id.* at 17. Instead, FERC approved an extension of two years, until May 17, 2025. *Id.*

As of EWEB's April 30, 2025, progress report, EWEB has still failed to initiate construction of the fish passage facilities, and does not have an estimate of when fish passage will be completed. Ex.10 at 8–9. EWEB's failure to implement these fish passage measures subjects UWR Chinook and bull trout to continuing harm, injuries, and mortalities. *See* Ex.8 at 4; Ex.9 at 2–3 (finding harm from barrier to up- and downriver migration, injury and mortality during downstream passage through the dam, stranding of fish in the reservoir, and injury and mortality from excessive total dissolved gas). In addition, EWEB's temporary trap-and-haul system has itself resulted in harm, injury, and mortality to the fish, and has otherwise failed. Ex.9 at 2; Ex.8 at 4. Fish that are captured, handled, and transported above the dam experience physiological stress and potential physical injury that can reduce their fitness and reproductive success, and some have died, all of which is unlawful take for which EWEB is liable. Schroeder Decl. ¶¶ 35–40; Ex.10 at 12–13. In addition, some UWR Chinook salmon and bull trout adults released into Trail Bridge Reservoir fall back through the spillway and end up below the dam,

causing additional risk and injury. *See, e.g.*, Ex.10 at 12. In both 2023 and 2024, wildfires and other factors curtailed efforts to capture adult Chinook below the dam and no fish were moved above the dam via the temporary trap-and-haul. *Id.* at 12–13; Moody Decl. ¶ 11. These problems will continue to harm, injure, and kill Chinook salmon and bull trout without immediate changes to the trap-and-haul system.

ARGUMENT

I. FOR ESA INJUNCTIONS, THE EQUITIES AND PUBLIC INTEREST ALWAYS TIP IN FAVOR OF THE SPECIES.

Plaintiffs seeking a preliminary injunction must show they are "likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008).

In ESA cases, however, courts may not apply traditional equitable balancing because the "plain intent of Congress in enacting th[e] statute was to halt and reverse the trend toward species extinction, whatever the cost," and thus "the balance has been struck in favor of affording endangered species the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184, 194 (1978). The Ninth Circuit has reaffirmed that in ESA cases, the equities and public interest factors *always* tip in favor of the protected species. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 817 (9th Cir. 2018). Because Plaintiffs are likely to succeed on the merits and likely to suffer imminent irreparable harm, injunctive relief is warranted here.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

Plaintiffs raise a single legal claim in this case: EWEB is causing or contributing to unlawful take of UWR Chinook salmon and bull trout through its operation of the Carmen-Smith Project that continues to harass, harm, wound, kill, trap, capture, and collect the fish due to

inadequate fish passage at Trail Bridge Dam and ineffective trap-and-haul operations. Complaint ¶¶ 94–98. Plaintiffs are likely to succeed in showing that EWEB is causing take of the listed species. And, because EWEB has failed to comply with the biological opinions and incidental take statements issued by NMFS and FWS, Plaintiffs are likely to succeed in showing that EWEB is no longer exempt from the prohibition on take and is thus violating ESA Section 9.

A. ESA Standards

FWS or NMFS must list a species as endangered under the ESA if it is in danger of going extinct throughout all or a significant portion of its range, and must list it as threatened if it is likely to become endangered in the foreseeable future. 16 U.S.C. §§ 1532(6), 1532(20), 1533(a)(1). FWS is responsible for terrestrial species, such as bull trout, while NMFS is responsible for marine species, such as salmon. The Services consult with other federal agencies that authorize, fund, or carry out activities that may affect listed species; and if an activity is "likely to adversely affect" a listed species, the Services must determine in a "biological opinion" whether the activity will jeopardize the continued existence of the species—i.e., reduce appreciably the likelihood of its survival and recovery in the wild. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.02 402.14.

The ESA and its regulations also prohibit any person from "taking" endangered or threatened species, including salmon and bull trout. 16 U.S.C. § 1538; 50 C.F.R. §§ 17.31(a), 223.203. "Take" encompasses acts that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" any member of an ESA-protected species. 16 U.S.C. § 1532(19). ESA regulations define "harm" as "an act which actually kills or injures wildlife," including "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; *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 697–701 (1995) (upholding definition of "harm" as supported by the statute's text); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996) (same). Harassment is "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.

The Services can authorize take of a listed species through an "incidental take statement" that accompanies a biological opinion if the taking is incidental to an otherwise lawful activity and does not cause jeopardy to the species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The statement must specify the amount or extent of take that is anticipated to occur from the agency action, and must also contain reasonable and prudent measures and terms and conditions to minimize the impact of the anticipated taking. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1). Take that conforms to the terms and conditions within an incidental take statement is exempt from the ESA's Section 9 take prohibition. 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(6).

Once ESA consultation is complete, agencies must ensure that it remains valid. Reinitiation of consultation is required if: (a) "the amount or extent of taking specified in the incidental take statement is exceeded;" (b) "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;" (c) "the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion;" or (d) "a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. §§ 402.16, 402.14(i)(5).

B. EWEB's Operation of Trail Bridge Dam and the Temporary Trap-and-Haul System is Causing Take of Salmon and Bull Trout.

As explained herein and supported by Plaintiffs' accompanying evidence, EWEB is causing take of threatened Chinook salmon and bull trout due to inadequate fish passage at Trail Bridge Dam. Take is resulting from: (1) Trail Bridge Dam and Reservoir operations that harm, wound, and kill salmon and bull trout; and (2) interim trap-and-haul methods that trap, capture, collect, harm, harass, wound, and kill Chinook salmon and bull trout.

Dams that limit access to important habitat for listed fish species or injure or kill the fish when they attempt to pass the dam—as Trail Bridge Dam does here—cause or contribute to take under the ESA. *See e.g., Nw. Env't Defense Ctr. v. U.S. Army Corps of Eng'rs,* 479 F. Supp. 3d 1003, 1021–23 (D. Or. 2020) (dams in Upper Willamette Basin caused take of UWR Chinook salmon and steelhead due to mortality of juveniles during downstream migration); *Puyallup Tribe of Indians v. Electron Hydro, LLC,* No. C20-1864-JCC, 2024 WL 664407, at *3–5 (W.D. Wash. Feb. 16, 2024), *aff'd,* No. 24-954, 2024 WL 3842099 (9th Cir. Aug. 16, 2024) (dam's temporary spillway caused take of Chinook, steelhead, and bull trout by impeding safe fish passage and reducing the fish's ability to successfully reproduce); *San Luis Obispo Coastkeeper v. County of San Luis Obispo*, 758 F. Supp. 3d 1153, 1163–67 (C.D. Cal. 2024) (dam likely caused take of steelhead by limiting access to historic habitat and degrading current habitat); *Wishtoyo Found. v. United Water Conservation Dist.*, No. CV-16-3869-DOC, 2018 WL 6265099, at *58–61 (C.D. Cal. Sept. 23, 2018), *aff'd*, 795 Fed.Appx. 541 (9th Cir. 2020) (diversion dam caused take of steelhead due to lack of access to habitat, injury and mortality when passing the dam, water flow alterations that impact migration, and trapping and trucking fish around the dam). Trail Bridge Dam is causing similar impacts to Chinook salmon and bull trout here, constituting ongoing take of these listed species.

i. Trail Bridge Dam and Reservoir Cause Take.

Trail Bridge Dam and Reservoir cause and contribute to take of Chinook salmon and bull trout by harming, wounding, and killing the fish in multiple ways.

First, Trail Bridge Dam is an absolute barrier to the natural migration of Chinook salmon and bull trout, injuring the fish by significantly impairing their breeding, feeding, sheltering, and migration behaviors. Thus, the dam's modification of habitat constitutes take of each species. *Cascadia Wildlands v. Scott Timber Co.*, 105 F.4th 1144, 1156–58 (9th Cir. 2024) (habitat modification that impaired breeding was actual injury and, thus, was "harm" under the ESA's definition of take); *San Luis Obispo Coastkeeper*, 758 F. Supp. 3d at 1166–67 (dam that impaired fish's "ability to migrate, spawn, and rear in their high-quality historic habitat" caused take).

Trail Bridge Dam cuts off prime Chinook spawning and rearing habitat that has colder, cleaner water and better spawning gravels than much of the downriver habitat. Schroeder Decl. ¶¶ 13, 27–29. Such habitat is important because Chinook need cold water pools to hold in during the summer before they spawn in fall, and their eggs need cold, clean water for optimal incubation. *Id.* ¶ 27. NMFS stated that delays to fish passage at Trail Bridge Dam have caused and will continue to cause "extensive" impacts to Chinook, including "[i]nability to utilize historic salmon spawning habitat in the McKenzie River above the Project due to blocking of adult and juvenile passage." Ex.8 at 4; *see also* Ex.2 at 117 (until passage facilities are built, Trail Bridge Dam will "continue to block upstream and downstream access to spawning and rearing habitat in the upper McKenzie River and Smith River").

"Lack of access to spawning habitat above the Trail Bridge Reservoir limits abundance and productivity by forcing spawners to compete for the available downstream habitat." Ex.2 at

88. In fact, modeling indicates that upstream passage would allow for natural production of an additional 1,250 Chinook salmon smolts. *Id.* at 91, 126. Indeed, NMFS found that the harm to Chinook salmon from lack of access to and from upstream spawning habitat constitutes take of Chinook. *Id.* at 87–88 (describing harm from Trail Bridge Dam), 129–33 (take prior to fish passage modification includes "harm to adult fish by blocking upstream passage" prior to fish passage modifications). As Plaintiffs' expert explains, the lack of upstream and downstream passage at Trail Bridge Dam—which results in the inability of Chinook salmon to reach and use historic spawning and rearing habitat upstream of the dam—is hindering recovery of the McKenzie Chinook population, as well as UWR Chinook as a whole. Schroeder Decl. ¶¶ 27–29, 32, 34, 45–46, 55–56.

Moreover, climate change makes habitat in the upper McKenzie River subbasin—such as that above Trail Bridge Dam—even more important as it will retain colder water while temperatures and high flow events lower in the watershed increase. Schroeder Decl. ¶¶ 28, 46; Ex.2 at 127 (lower quality habitat below dam may be further degraded by climate change); Ex.1 at 78–79 (climate change impacts to currently accessible habitat expected to be substantial, emphasizing importance of fish passage into higher, cooler portions of the watershed). Without passage to colder headwater areas, climate change would put some UWR Chinook populations at high risk of extinction by 2040. Ex.8 at 4.

For bull trout, Trail Bridge Dam is a barrier to upstream and downstream migration for populations above and below the dam. The dam impedes gene flow between populations, causing genetic drift within populations and reducing their long-term viability. Schroeder Decl. ¶¶ 30–31, 34, 46; Ex.4 at 40, 59. It also prevents the population above the dam from migrating to and from downriver feeding and overwintering habitat, and prevents the population below the

dam from using the high-quality spawning and rearing habitat above the dam. Schroeder Decl. ¶¶ 22–23, 27–29, 33, 46; Ex.4 at 37, 40; Ex.9 at 2. In general, migratory bull trout are larger, have higher reproduction, and can recolonize areas if a catastrophic event destroys some of their habitat, whereas an isolated resident population would likely be extirpated if their habitat is significantly disturbed. Ex.4 at 37, 40; Schroeder Decl. ¶ 22. "The isolation of these local populations, due to barriers imposed by dams, exacerbates the potential for genetic loss due to inbreeding, and for extirpation due to stochastic events." Ex.4 at 59.

As FWS recognized, without permanent fish passage, Trail Bridge Dam impairs bull trout population abundance, health, and resilience to disturbance by impeding access to spawning sites, genetic connectivity, the expression of the migratory life history form, and the opportunity to forage on prey downriver. Ex.4 at 75; *see also id.* at 59 ("Current lack of passage restricts access to suitable habitat and may limit attainment of viable numbers in each bull trout local population."). It also reduces the bull trout prey base above the dam because juvenile Chinook salmon are an important prey item but few adult Chinook are spawning there. Schroeder Decl. ¶ 29. And as with Chinook, climate change impacts make the cold headwaters habitat even more important. Schroeder Decl. ¶¶ 26, 28, 46. Accordingly, the lack of passage at Trail Bridge Dam significantly impairs bull trout migration, breeding, feeding, and sheltering.

Second, direct injuries and mortalities occur when fish above the dam attempt to migrate downriver by going through the dam. For instance, juvenile and adult bull trout from the population above the dam, as well as juvenile Chinook that are produced from adults transported above the dam, pass the dam by going through gates in the spillway when the dam is spilling water, through the turbine if the dam is generating power, or through another outlet that is rarely used. Ex.1 at 83; Ex.4 at 76. Of the three routes, fish mostly use the spillway for downstream

passage. Ex.4 at 80. While the spillway is generally safer than the other routes, it was not designed to safely pass fish, thus causing injuries and mortalities. Ex.1 at 83–84; Ex.4 at 76, 80–83; Schroeder Decl. ¶ 42.

For example, fish may collide with the spillway gate, walls, or chute, or be harmed from shear stress or pressure changes. Schroeder Decl. ¶ 42. Fish that initially survive but are injured during passage may subsequently die as they continue to migrate downriver. *Id.* NMFS and FWS estimated that hundreds of Chinook and bull trout will be killed, injured, or stressed each year during downstream passage through the dam until modifications to the spillway occur. Ex.1 at 123, 192; Ex.2 at 87–88; Ex.4 at 82–83, 138–39. Mortality and injury rates increase with fish size. Schroeder Decl. ¶ 42; Ex.4 at 80–82. Therefore, subadult and adult bull trout attempting to migrate downriver are most likely to experience injury or mortality.

Finally, EWEB's operation of Trail Bridge Dam and Reservoir causes additional take, including harm to fish subjected to high levels of total dissolved gas from spill, injuries to fish that get past the tailrace barrier below the dam, and mortalities of juvenile fish in Trail Bridge Reservoir that are eaten by predators or stranded along the edge of the reservoir when the water level drops from water releases through Trail Bridge Dam. *See supra* pp. 8; Ex.2 at 59–60, 63, 116–17; Ex.4 at 94, 142; Ex.8 at 4; Ex.9 at 2–3; Schroeder Decl. ¶¶ 41, 43.

ii. The Temporary Trap-and-Haul System Causes Take.

To mitigate the acknowledged harm to the species from lack of fish passage at Trail Bridge Dam, EWEB has been authorizing and funding temporary methods to attempt to move Chinook and bull trout above the dam. However, this temporary system is largely ineffective and itself results in various forms of take, including trapping, capturing, collecting, harming, wounding, and killing adult fish.

To move adult Chinook, EWEB constructed a temporary trap in 2023 at the upper end of the artificial spawning channel that is below Trail Bridge Dam, where the fish are trapped, collected by humans, transferred to trucks, driven above the dam, and released into Trail Bridge Reservoir or the Smith River.[2] Schroeder Decl. ¶ 35; Moody Decl. ¶¶ 6–7, 11; Ex.10 at 12. Trapping, capturing, and collecting the fish are all take of Chinook under the ESA when not covered by a valid incidental take statement. 16 U.S.C. § 1532(19). Additionally, as NMFS explained, trap-and-haul can result in "physical injury, death, and physiological stress during capture, holding, or release; predation and cannibalism during holding or transport; and potential horizontal transmission of disease and pathogens and stress-related phenomena during holding or transport." Ex.2 at 113; *see also* Ex.4 at 75 (describing similar impacts from trap-and-haul process); Schroeder Decl. ¶¶ 35–38 (same); Moody Decl. ¶¶ 7–9 (same). These impacts also constitute take. 16 U.S.C. § 1532(19) (actions that harass, harm, wound, and kill are take).

Furthermore, the trap-and-haul process has been unsuccessful. Fish rarely enter the temporary trap, and those that are transported above the dam often fall back to the river below, leading to additional injuries or mortalities. Schroeder Decl. ¶¶ 38–39, 48; Moody Decl. ¶¶ 7–11; Ex.25 at 236–38 (20 of 22 Chinook released above dam in 2022 fell back to river below, and one died), 241 (only 3 Chinook released above dam in 2023); Ex.10 at 13 (discussing problems trapping fish, with no Chinook transported above dam in 2024 and one dead from predation in the spawning channel); Ex.26 at 14 (noting that temporary trap below Trail Bridge Dam "has not yet proven effective at attracting and collecting adult Chinook salmon for transport above Trail Bridge Dam"); Ex.9 at 2 (noting failure to trap adult bull trout for upstream passage at the

[2] The temporary trap-and-haul system is not included within EWEB's hydropower license. Therefore, FERC's licensing process does not govern changes to the system, such as constructing a fish trap in 2023.

temporary trap due to inadequate conditions).

Adult bull trout below the dam are mostly caught via hook and line by contracted anglers. Moody Decl. ¶¶ 6–7. Once the fish are captured, they are collected and put in trucks, driven above the dam, and released into Trail Bridge Reservoir. *Id.* Like with Chinook, capturing, collecting, handling, transporting, and releasing bull trout causes take. Moody Decl. ¶¶ 7–8; Schroeder Decl. ¶ 40; Ex.4 at 75. In fact, FWS estimated annual take of 15% of adult bull trout that are handled during temporary upstream passage measures. Ex.4 at 83, 140.

A further problem with the trap-and-haul system is the reliance on human involvement in late summer and early fall when the road along the river may be inaccessible due to wildfire closures. People must be able to access the river to collect the fish below the dam and then truck them above the dam during the late summer spawning period. This cannot occur if roads accessing the river are closed, which happened in 2023 and 2024, when wildfires shut down Highway 126 along the McKenzie River. Ex.10 at 12–13; Moody Decl. ¶¶ 10–11; Cotton Decl. ¶ 16. Because the spawning period for Chinook and bull trout occurs at the same time as peak wildfire season, this lack of access is almost certain to arise in the future with any trap-and-haul system. Schroeder Decl. ¶ 54; Moody Decl. ¶ 10. The temporary trap-and-haul system thus does not effectively reduce the take caused by the dam being a barrier to upstream fish passage. *See supra* pp. 21–23.

In sum, Trail Bridge Dam and the temporary trap-and-haul system cause or contribute to multiple forms of take of UWR Chinook salmon and bull trout. Schroeder Decl. ¶¶ 25–46. As NMFS stated, the dam "will continue as a barrier to upstream and downstream fish passage, affecting survival of fry, juvenile and adult Chinook salmon," Ex.2 at 87, and the same is true for bull trout, Ex.4 at 59.

C. EWEB Violated the Services' Biological Opinions and Incidental Take Statements and is Thus Liable for Take.

An incidental take statement authorizes a party to take a listed species provided the party complies with the terms and conditions and stays within the limit of take identified in the statement. *See* 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i). Because EWEB has failed to comply with the terms and conditions and exceeded the level of take authorized in the NMFS and FWS incidental take statements, it is no longer protected by those statements and is liable for its ongoing take of Chinook salmon and bull trout.

A party is liable for take under ESA Section 9 when it violates an incidental take statement by: (1) failing to comply with its conditions; or (2) exceeding the level of take authorized by the statement. *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1038–40 (9th Cir. 2007); *Or. Nat. Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982, 999, 1005 (D. Or. 2010). Furthermore, if a party does not comply with conditions needed to avoid jeopardy, it must reinitiate consultation, rendering the original biological opinion and incidental take statement invalid, no longer shielding the party from liability for take. *Allen*, 476 F.3d at 1040; *Ctr. for Biological Diversity v. U.S. BLM*, 698 F.3d 1101, 1108 (9th Cir. 2012).

The conditions of the incidental take statements here required compliance with the 2016 Settlement Agreement fish passage measures. NMFS stated that the Settlement Agreement incorporated measures that were expected to reduce the dam's effects on habitat, and the take exempted by the incidental take statement "would be exceeded if [EWEB] fails to carry out the proposed action in strict accordance with the [Settlement Agreement]." Ex.2 at 132. The first "Reasonable and Prudent Measure" to minimize the impact of the anticipated take of Chinook salmon, and the first "Term and Condition" to implement that Measure, explicitly required EWEB to follow all of the provisions in the Settlement Agreement relating to Chinook salmon,

including completion of upstream and downstream fish passage within three years of license issuance (May 2022). *Id.* at 29–30, 135–36. Moreover, the amount or extent of take that NMFS anticipated would occur from the proposed action was based on the expectation that the upstream and downstream fish passage facilities would be completed within three years of license issuance (May 2022). *Id.* at 130, 133.

Similarly, FWS stated that it expected EWEB to fully implement the design elements and conservation measures identified in the 2016 Settlement Agreement, which were incorporated into the proposed action, and that, "[t]o be exempt from the prohibitions of Section 9 of the Act, [EWEB] must fully comply" with those conservation measures. Ex.4 at 146–47. FWS also identified the amount of bull trout take it expected to occur during up- and downstream passage, estimating a higher level of take (injury and mortality) prior to completion of fish passage facilities compared to after. *Id.* at 139–41. It expected the higher level of take to occur for no more than three years after license issuance (May 2022). *Id.* The no-jeopardy conclusions in both opinions were based on this anticipated level of take. Ex.2 at 135; Ex.4 at 146.

When EWEB failed to even initiate construction of the fish passage facilities by the May 2022 deadline for *completion* of those facilities, NMFS and FWS sent letters to FERC about EWEB's noncompliance. Ex.8; Ex.9. The Services admonished EWEB for its delays, citing evidence that the delays were intentional and not in good faith, and EWEB's current estimates for completion of fish passage were still eight years away. Ex.8 at 2–3, 8–15; Ex.9 at 1–2 & n.3. They both outlined "extensive" and "significant" harm to Chinook and bull trout from the lack of access to habitat, as well as injury and mortality during upstream trap-and-haul and downstream migration through the dam. Ex.8 at 4; Ex.9 at 2–3. Notably, NMFS found the conclusions of the biological opinion were no longer accurate due to EWEB's non-compliance with the three-year

window for completion of fish passage facilities—measures that were needed "to drastically reduce the otherwise ongoing injury and mortality caused by the project." Ex.8 at 4. FWS likewise stated its analysis in the 2018 biological opinion "relied on the proposed fish passage requirements," and a new plan for completing fish passage is required. Ex.9 at 2–3.[3]

The Services followed up with letters in December 2023 and January 2024, informing FERC that EWEB's noncompliance with the action analyzed in the biological opinions had triggered the duty to reinitiate consultation. Ex.16 at 1; Ex.22 at 1. They stated that the opinions' assessment of impacts was based on the assumption that the continued harm to salmon and bull trout caused by the existing dam and its operation would extend for only three additional years beyond the licensing decision, and that the incidental take statements' anticipated levels of take were similarly based on the three-year timeline for constructing passage facilities. Ex.16 at 2; Ex.22 at 2. Because EWEB's delays in implementing numerous mitigation measures altered the impacts to UWR Chinook salmon and bull trout for an indefinite period of time, NMFS and FWS could no longer rely on the analyses and findings in their opinions, and thus reinitiation of consultation was required to revisit the Project's effects. Ex.16 at 2; Ex.22 at 3.

EWEB's failure to fulfill the conditions required by the Services' incidental take statements invalidated those authorizations. *Allen*, 476 F.3d at 1040; *Tidwell*, 716 F. Supp. 2d at 1005; *see also White v. U.S. Army Corps of Eng'rs*, No. 3:22-cv-6143-JSC, 2023 WL 7003263, at *6 (N.D. Cal. Oct. 23, 2023) (failure to comply with Reasonable and Prudent Measure invalidated take statement). Likewise, exceeding the expected level of take by failing to complete permanent fish passage within three years rendered the take authorizations invalid. *See*

[3] Both letters also stated that a new plan for fish passage should require volitional passage, rather than trap-and-haul, because of its numerous benefits and to make up for the 15-year delay in passage facilities. Ex.8 at 5; Ex.9 at 3.

Nw. Env't Defense Ctr., 479 F. Supp. 3d at 1021–23 (exceeding anticipated fish mortality from migration through dam); *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106, 1119–20 (N.D. Cal. 2017) (exceeding expected disease infection rates in fish). Finally, the biological opinions and incidental take statements were also invalidated by the need to reinitiate consultation because the no-jeopardy conclusions are no longer accurate. *Allen*, 476 F.3d at 1040; *Ctr. for Biological Diversity*, 698 F.3d at 1108. Accordingly, the Services' incidental take statements no longer shield EWEB from liability, and EWEB's ongoing take of Chinook salmon and bull trout is violating ESA Section 9.

III. INJUNCTIVE RELIEF IS NECESSARY TO AVOID IMMINENT IRREPARABLE HARM FROM EWEB'S OPERATIONS AT TRAIL BRIDGE DAM.

To establish the need for injunctive relief, Plaintiffs must show that, absent an injunction, irreparable harm is likely. *Flathead-Lolo-Bitterroot Citizen Task Force v. Montana*, 98 F.4th 1180, 1191 (9th Cir. 2024). Establishing irreparable harm under the ESA "should not be an onerous task" given "the stated purposes of the ESA in conserving endangered and threatened species and the ecosystems that support them." *Cottonwood Env't Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1091 (9th Cir. 2015). "A reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of the ESA." *Marbled Murrelet*, 83 F.3d at 1066. Plaintiffs do not need to prove harm to Chinook and bull trout on a population-wide level or that they will go extinct absent an injunction. *Nat'l Wildlife Fed'n v. NMFS*, 886 F.3d at 818–19. As the Ninth Circuit recently pronounced, "[t]he ESA accomplishes its purpose in incremental steps, which include protecting the remaining members of a species . . . . Harm to those members is irreparable because once a member of an endangered species has been injured, the task of preserving that species becomes all the more difficult." *Id.* at 818 (cleaned up); *see also Allen*, 476 F.3d at 1040 ("§ 9 of the ESA issues a blanket prohibition on

the taking of *any member* of a listed species.") (emphasis added). Further, "a plaintiff need not . . . show that the action sought to be enjoined is the *exclusive* cause of the injury." *Nat'l Wildlife Fed'n v. NMFS*, 886 F.3d at 819 (emphasis added).

EWEB's operation of the Carmen-Smith Project without adequate fish passage at Trail Bridge Dam has, and is likely to continue to, cause irreparable harm to UWR Chinook and bull trout by unlawfully "taking" individual members of the species. *See supra* pp. 20–26. Irreparable harm to Chinook and bull trout translates to irreparable harm to Plaintiffs, who live near, recreate on, and otherwise use the McKenzie River in the area of Trail Bridge Dam for fishing, wildlife viewing, hiking, boating, photography, and professional activities. *See* Moody Decl. ¶¶ 2–5, 22–23; Fairbrother Decl. ¶¶ 13, 19–24, 26–33; Archer Decl. ¶¶ 5–11, 13–15; Daughters Decl. ¶¶ 7–15; Heiken Decl. ¶¶ 6–8, 14–22; LeGue Decl. ¶¶ 6–14; Laughlin Decl. ¶¶ 9–23; Thomas Decl. ¶¶ 17–26; Cotton Decl. ¶¶ 6–13, 16–18; Emmons Decl. ¶¶ 6–13.[4]

Courts have not hesitated to find irreparable harm in similar cases involving harm to and take of ESA-listed fish from lack of passage and habitat degradation caused by dams. For instance, in *Northwest Environmental Defense Center v. United States Army Corps of Engineers*, 558 F. Supp. 3d 1056 (D. Or. 2021 *amended*, No. 3:18-CV-00437-HZ, 2021 WL 12319692 (D. Or. Sept. 21, 2021), this Court found "the Corps' failure to provide adequate fish passage and mitigate water quality issues [was] causing substantial, irreparable harm." *Id.* at 1064. Similarly, in *San Luis Obispo Coastkeeper*, the court granted a preliminary injunction based on evidence of harm to threatened steelhead from defendant's operation of a dam that physically blocked up- and downstream fish migration, as well as altered the creek's natural hydrology. 758 F. Supp. 3d at 1168–70; *see also Nat'l Wildlife Fed'n v. NMFS*, 839 F. Supp. 2d 1117, 1131 (D. Or. 2011)

[4] These declarations also establish that Plaintiffs have standing to pursue this case.

(finding substantial harm to threatened fish species caused by operation of dams constituted irreparable harm warranting an injunction). Here, Trail Bridge Dam continues to be a significant barrier to fish migration because the upstream trap-and-haul system has not been successful—not a single fish was collected from the temporary trap in 2023 or 2024—and the dam's spillway has not been modified to improve downstream passage. *See supra* pp. 16–17, 23–26.

In addition, Chinook and bull trout are also directly harmed by the measures being used to move adult fish above the dam. The current system requires that these fish be extensively handled during the hook-and-haul process for bull trout and the trap-and-haul process for Chinook, which causes stress and injuries, and potential mortality, to the fish. *See supra* pp. 8, 24–26; Schroeder Decl. ¶¶ 35–40; Moody Decl. ¶¶ 6–9. Without changes to the system—particularly improvements to the fish trap in the Carmen-Smith Spawning Channel—these interim passage measures will continue to have low success as well as cause stress, injuries, and mortalities to adult and juvenile Chinook and bull trout. The inadequacies of this interim system thus make a preliminary injunction even more critical. *See Wishtoyo Found.*, 2018 WL 6265099, at *65–66 (irreparable harm established by showing operation of diversion dam constituted harm to steelhead "with respect to fish passage, infrastructure, water diversions, and trapping, resulting in take that violates the ESA"). Furthermore, harm to *any* adult Chinook or bull trout at Trail Bridge Dam would be detrimental because of the importance and precarious status of the Chinook and bull trout populations; both populations remain at risk of extinction and lag far behind their recovery goals. Ex.3 at 27–28; Ex.4 at 59.

As to Chinook, NMFS specifically noted "[u]ntil the new passage facilities are in operation . . . the ongoing condition at Trail Bridge Dam would be likely to reduce the abundance, productivity, and spatial structure of the McKenzie Chinook population." Ex.2 at 88.

NMFS recently instructed EWEB that the "need for passage improvements at the project" is "urgent." Ex.8 at 4. The stakes are particularly high given the importance of *wild* Chinook to the population as a whole. UWR Chinook "are one of the most genetically distinct groups of Chinook salmon in the Columbia River Basin," and these fish "still contain a unique set of genetic resources compared to other Chinook stocks." Ex.1 at 58; Schroeder Decl. ¶¶ 11, 14–15. The McKenzie population in particular is a "genetic legacy" population that retains important genetic traits. Schroeder Decl. ¶ 14. The Chinook near Trail Bridge Dam are almost exclusively wild fish, and actions that harm these fish are particularly detrimental given the low abundance and productivity of wild fish in the McKenzie population. *See id.* ¶¶ 11, 14–20, 45, 55–56.

Bull trout in the Upper Willamette Core Area are similarly vulnerable. Due to dams, the species has been fragmented into just four small, isolated populations that lack necessary genetic exchange. Ex.4 at 57; Schroeder Decl. ¶¶ 21, 24, 30–31, 34. As a result, "bull trout abundance in the Upper Willamette Core Area is *significantly below* the threshold thought to be necessary to maintain genetic variation important for long-term evolutionary potential and persistence." Ex.4 at 59 (emphasis added). Because of the small size and isolation of the bull trout population above Trail Bridge Dam, harm to any adults from that population will further impair its abundance, productivity, and genetic diversity. *See* Ex.4 at 59–62; Schroeder Decl. ¶¶ 30–31. With each season that passes without safe, adequate fish passage, these species' timeline for recovery extends further into the future while the likelihood of extinction increases.

Preventing or impeding a species' progress toward recovery, even for a short time, can independently establish irreparable harm. The Ninth Circuit upheld short-term injunctions over the operation of Columbia River dams due to the substantial harm they caused salmon, which were already in a precarious state. *Nat'l Wildlife Fed'n v. NMFS*, 886 F.3d at 818–22 (2-year

injunction); *Nat'l Wildlife Fed'n v. NMFS*, 422 F.3d 782, 793, 795 (9th Cir. 2005) (preliminary injunction); *see also San Luis Obispo Coastkeeper*, 758 F. Supp. 3d at 1170, 1175 (preliminary injunction); *S. Yuba River Citizens League v. NMFS*, 804 F. Supp. 2d 1045, 1049, 1054–68 (E.D. Cal. 2011) (8-month injunction); *Cal. Nat. Res. Agency v. Ross*, No. 1:20-CV-00426-DAD-EPG, 2020 WL 2404853, at *16–19, 22 (E.D. Cal. May 11, 2020) (3-week preliminary injunction). The impending harm to McKenzie River Chinook salmon and bull trout from continued lack of passage past Trail Bridge Dam as well as the current trap-and-haul system warrants immediate injunctive relief. Schroeder Decl. ¶¶ 27–47, 55–58.

IV. PLAINTIFFS PROPOSE A NARROWLY TAILORED INJUNCTION.

Preliminary injunctive relief to improve EWEB's temporary trap-and-haul methods is necessary to alleviate some of the impending harm that will occur during the pendency of this litigation. Plaintiffs propose a narrowly tailored injunction aimed at (1) improving the temporary trap-and-haul methods to increase the number of fish likely to be successfully transported above the dam, and reduce harm to fish during that process; and (2) improving downstream passage through existing dam infrastructure to reduce harm to fish during downstream migration. *See Nw. Env't Def. Ctr.*, 558 F. Supp. 3d at 1064–65 ("Because the Corps' interim measures do not adequately address these adverse impacts to the listed salmonids, the Court finds that continuation of the status quo could result in irreparable harm to the threatened species absent interim measures that improve fish passage and water quality . . . .") (cleaned up).

Chinook and bull trout continue to come back to the base of Trail Bridge Dam to try and make it upstream. *See* Ex.25 at 236, 240–41 (identifying bull trout and Chinook below dam in 2022 and 2023); Ex.10 at 13 (Chinook in spawning channel in 2024); Schroeder Decl. ¶ 48 (Chinook observed holding near temporary trap); *see also* Ex.27 at 15–17 (data showing

Chinook redds in reach of river below Trail Bridge Dam); Fairbrother Decl. Ex.1 (same). Plaintiffs' expert, who has studied UWR Chinook salmon—including in the McKenzie River—for decades, proposes short-term measures to improve the success of and reduce the harm to fish from the temporary trap-and-haul methods and downstream passage. Schroeder Decl. ¶¶ 48–53.

Mr. Schroeder proposes the following, which are laid out in detail in the accompanying Proposed Preliminary Injunction Order:

- Construct a new fish trap and modify its location in the Carmen-Smith Spawning Channel by late August 2025 to increase the likelihood of fish entering the trap and to facilitate safe collection of fish for transport above the dam with less human handling, *id.* ¶¶ 48–49;
- Implement measures to monitor the efficacy of the changes to trap-and-haul, *id.* ¶ 50;
- If monitoring shows that the trap is still not effectively capturing fish, implement more significant changes before summer 2026, including moving the trap out of the spawning channel, *id.* ¶ 51; and
- Immediately make improvements to facilitate safe downstream passage, including enlarging the gate opening, and take actions to reduce adult fallback over the dam, *id.* ¶¶ 52–53.

Plaintiffs request that the Court order these measures by July 25, 2025, to allow time to implement them by August 25, 2025, which would put them in use for the majority of the Chinook and bull trout spawning periods. *See id.* ¶ 49.

CONCLUSION

EWEB's continued delays in completing fish passage have resulted in unlawful take of Chinook and bull trout and put these imperiled species in an increasingly vulnerable state. Plaintiffs respectfully request that the Court grant their motion for preliminary injunction and order their requested relief by July 25, 2025, so EWEB can undertake measures to improve interim fish passage at the dam by late August.

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Respectfully submitted,

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