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Public Comments Processing
Attn: FWS-R1-ES-2009-0058
Division of Policy and Directives Management
4401 N. Fairfax Drive, Ste. 222
Arlington, VA 22203

RE: State of Idaho's Comments to Federal Register FWS-R1-2009-0085 Proposed Rules Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for Bull Trout in the Coterminous United States

The State of Idaho has reviewed and analyzed the proposed revised designation of critical habitat for bull trout, issued by the U.S. Fish and Wildlife Service ("Service") on January 14, 2010. 75 Fed. Reg. 2270. The State of Idaho by and through the Governor's Office of Species Conservation ("OSC") in cooperation with the Idaho Department of Fish and Game ("IDFG")[1] is pleased to offer the following comments on the proposed revised designation of critical habitat for bull trout (hereinafter "proposed CH designation").

In its current form, the proposed CH designation calls for the designation of approximately 22,679 miles of streams and 533,426 acres of lakes and reservoirs as critical habitat for Columbia Basin bull trout in Washington, Oregon, Montana, Nevada and Idaho. This translates into 9,671 miles of streams (43%) and 197,915 acres (37%) of lakes and reservoirs in Idaho. The proposed CH designation also includes streams in Idaho currently unoccupied by the species.

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[1] Please find attached IDFG's site-specific biological comments regarding the proposed critical habitat units in Idaho (Exhibit A). The Idaho Department of Lands' comments have also been attached hereto as (Exhibit B) for the Service's convenience.

The State of Idaho has many concerns with the proposed CH designation. Chief among those concerns is the fact that the Service has proceeded to propose a vast and over-reaching critical habitat designation for bull trout without first acquiring the requisite site-specific information required by the Endangered Species Act ("ESA")—namely the requirement that the Service use the best available scientific data after taking into consideration the economic impact of such a designation. *See* 16 U.S.C. § 1533(b)(2).

The lack of site-specific information in the Service's proposal is readily apparent and without further refinement will undoubtedly lead to unnecessary regulation on otherwise lawful activities within the State of Idaho. For example, the Service cannot possibly meet the requisite precision under the ESA for knowing whether specific areas proposed for designation contain all of the attributes or Primary Constituent Elements ("PCEs") necessary for sustaining a viable population of bull trout without first collecting information from the area in question. Consequently, areas that are not essential to the conservation of the species are being proposed by the Service as critical.

Furthermore and despite the Service's unpersuasive assertions to the contrary, the State is acutely aware that the designation of critical habitat for bull trout invites the potential for additional regulatory burdens to be placed on the backs of landowners, permitted users of public land and industries in Idaho. While the Service acknowledges that it is already consulting over projects with a federal nexus pursuant to Section 7 of the ESA to ensure that those activities will not jeopardize the continued existence of bull trout, the Service cannot deny that the bar is now arguably raised as reinitiation of consultation will be required to ensure permitted activities do not adversely modify critical habitat. Furthermore, each time the Service reinitiates consultation to meet this standard, which the Service admits is largely immeasurable, indefinable and unquantifiable, it will provide yet another opportunity for groups opposed to permitting uses on Federal land to litigate the outcome.

Additionally, under the proposed CH designation additional regulatory burden will be impermissibly imposed on landowners and land managers where *unoccupied* habitat will be designated as critical habitat. *See Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) (holding that "[b]oth occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential."). Again, the Service's decision to proceed without the best scientific information has greatly exacerbated this problem.

At bottom, the Service's lack of analytical framework has placed the onus on the State of Idaho and its partners to enlighten the Service where it may be appropriate for designation of critical habitat for the species in Idaho. Ironically, the Service was already well aware of the State's position from previous correspondence over bull trout critical habitat designation, but chose to ignore that information in forming the basis for this redesignation. The State of Idaho does not believe that critical habitat designation contributes to the overall effort needed to conserve and restore the species. Thus, only where an area demonstrates the requisite PCEs, based on the best

available science, and is not otherwise excluded by law (e.g. existing regulatory protection and/or the benefit outweighs the cost) should it be designated as critical.

A. Exclusion Based on Existing Regulatory Mechanisms

Under the ESA, the statutory definition of critical habitat—e.g. "special management considerations or protection," 16 U.S.C. § 1532(5)(A)(i),—requires the Secretary of the Interior ("Secretary") to affirmatively demonstrate an actual or potential need for said management considerations. By extension, the Secretary may use the existence of an effective land management plan to obviate the actual or potential need for and legally exclude an area from special management consideration or protection. When evaluating an existing conservation plan, the Service considers: (1) whether the plan is finalized; (2) how it provides for the conservation of important physical and biological features; (3) probability of future implementation; (4) effectiveness of conservation strategies; and (5) whether the plan includes monitoring and/or adaptive management. 75 Fed. Reg. at 2294.

In the proposed CH designation, the Service inappropriately fails to consider the myriad of land use restrictions already in place on federal, state and private lands in Idaho to protect in-stream habitat, riparian habitat and water quality. Some of these restrictions include, but are not limited to the following: Interim Strategy for Managing Anadromous Fish-producing Watersheds in Eastern Oregon and Washington, Idaho, and Portions of California ("PACFISH") (U.S. Forest Service ("USFS") and Bureau of Land Management ("BLM") 1995) and Inland Native Fish Strategy: Interim strategies for managing fish-producing watersheds in Eastern Oregon and Washington, Idaho, Western Montana, and portions of Nevada ("INFISH") (USFS 1995), Southwest Idaho Eco-group (Boise, Payette, and Sawtooth National Forests) land management plans (USFS 2003)[2], Wilderness designations, Idaho Forest Practices Act, Snake River Basin Adjudication—Forestry Component, Idaho Roadless Rule, agricultural best management practices, mining best management practices, National Forest Management Plans, BLM Land and Resource Management Plans, TMDL water-quality implementation, minimum in-stream flow requirements, and Wild and Scenic River designations. The State of Idaho believes these existing mechanisms are more than adequate for the purpose of protecting bull trout habitat and lands managed under these regulatory mechanisms, and should therefore be excluded from critical habitat designation.

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[2] *See* U.S. Fish and Wildlife Service (Sept. 2008), "Biological Opinion and Conference Opinion for the Modified Idaho Roadless Rule," at 53 (concluding that "[o]ur analysis showed that…no actions that have undergone consultation (under the protection of these three regulatory regimes) were found to appreciably reduce the likelihood of survival and recovery of the bull trout. Furthermore, no actions that have undergone consultation were anticipated to result in the loss of local populations of bull trout.") (hereinafter "Idaho Roadless Bi-op"). Thus, by the Service's own analysis it does not appear necessary to designate critical habitat in areas under the management of the aforementioned regulatory regimes.

In the recently completed 5-year status review for bull trout the Service recognized the various regulatory mechanisms already in place that provide adequate protections for bull trout across the coterminous range of the species. In addition to the aforementioned, the State would like to briefly highlight the provisions and protections outlined in the Idaho Forest Practices Act ("FPA") and the Idaho Roadless Rule, 73 Fed. Reg. 61456 (Oct. 16, 2008), as bases for exclusion.

1. Idaho Forest Practices Act

Under the four factors the Service considers for exclusion based on existing regulatory mechanisms, areas managed according to the provisions of the FPA should be excluded. In sum, the FPA is finalized; it affords conservation benefits to the species addressing all the PCEs; there is a proven track-record of implementation; studies demonstrate the effectiveness of these measures; and the regulatory scheme provides for monitoring and adaptive management.

Pursuant to Idaho Code, the FPA directs the State Board of Land Commissioners to adopt rules providing for responsible forest management within the State of Idaho. Idaho Code § 38-1304. From a regulatory perspective, the FPA provides a level of protection to bull trout and other species beyond the ESA as it extends to private land with or without a federal nexus. Thus, the State of Idaho requests the Service to carefully reevaluate the provisions of the FPA as a basis for exclusion.

2. Idaho Roadless Rule

The Idaho Roadless Rule was finalized and published in the Federal Register on October 16, 2008. As required by law, the Service evaluated the adverse affects of potential activities (e.g. road building, timber harvest, and discretionary mining activities) the species. The Service concluded that implementation of the Idaho Roadless Rule would not jeopardize the continued existence of the species. Idaho Roadless Bi-op at 69.

In roadless areas designated as Wildland Recreation and Primitive, bull trout critical habitat is not necessary and should be excluded as those designations prohibit the aforementioned activities. Moreover, even where the Idaho Roadless Rule permits some activity in varying degrees and under certain criteria (e.g. Backcountry/Restoration and General Forest), the Service concluded that because management of roadless areas will still have to abide by the site-specific provisions of PACFISH and INFISH, the species will be protected. *Id.* Thus, inventoried roadless areas within the State of Idaho should not be designated as critical habitat for bull trout.

Unfortunately, despite the positive conservation benefits conferred on bull trout by these existing regulatory mechanisms, the Service's proposed CH designation gives short shrift to these measures. The State strongly urges the Service to give great credence and deference to these existing regulatory mechanisms when evaluating whether an area actually meets the statutory definition of critical habitat (e.g. areas requiring special management considerations). Upon

reexamination, the State believes that these measures are sufficient to protect the species, and therefore do not need the additional regulatory layer provided by a critical habitat designation.

B. Deficiencies in the Economic Analysis

Section 4(b)(2) of the ESA specifies that the Service should designate critical habitat for a listed species only after the economic consequences of that designation have been analyzed. Thus, the Act provides the Secretary with the discretion to exclude areas from critical habitat designation based solely on the economic impact. *See also Cape Hatteras Access Pres. Alliance*, 344 F. Supp. 2d at 126-127.

Despite this non-discretionary command, the Service essentially regurgitates the information contained in the 2004 economic analysis for bull trout critical habitat designation to satisfy its obligation under the Act for the current proposal. This *post hoc* use of economic analysis blatantly cuts against the Congressional intent of critical habitat designation where the economic analysis should form a critical basis for the overall analysis and not merely as an inconvenient paper exercise. Because national and regional economies have drastically changed since the 2004 analysis, the Service cannot consider this economic analysis to be valid. Furthermore, the admitted "baseline" economic approach employed by the Service has been routinely rejected by the courts.

The Draft Economic Analysis (DEA) also relies heavily on the assumption that relatively few additional costs will result from critical habitat designation for bull trout in occupied areas because ongoing Section 7 consultation costs will largely be borne by individual federal agencies. However, recent court decisions would seem to invalidate this assumption as those courts have held that the jeopardy standard and adverse modification standard are not synonymous. Thus, the Service would be required to entertain a level of analysis beyond the jeopardy threshold thereby increasing the overall cost of government operations.

Lastly, the DEA relies on too many unsupported assumptions and fails to legitimately analyze significant foreseeable costs. The preparers of the DEA cite a "range" of costs from $5-$7 million per year as annualized incremental costs associated with bull trout critical habitat designation. However, the preparers also claim that this "range of costs represents uncertainty in the types and cost of project modifications." Draft Economic Analysis, ES-2. Based on these statements, it is clear that the Service relied on mere speculation of the economic impacts associated with this proposal and completely disregarded the ramifications that such a far-reaching designation would have on a number of industries, small entities and State and local government agencies in Idaho. Therefore, the DEA lacks sufficient detail on the true economic impacts that will be incurred by many facets of Idaho's economy and levels of government to sufficiently satisfy the Service's burden of persuasion.

C. Failure to Conduct a NEPA Analysis

The Service also failed to prepare an Environmental Impact Statement ("EIS") pursuant to the National Environmental Policy Act ("NEPA") prior to completing this proposed rule.[3] NEPA requires Federal agencies to examine the environmental impacts of proposed Federal actions, like the proposed CH designation, in order to provide the public with a clear understanding of the environmental consequences associated with the agency's decision-making.

Given the scope and magnitude of this proposed critical habitat designation, the Service should have complied with NEPA as a matter of policy and analyzed the environmental impacts as well as impacts to the human environment. This analytical framework would have served the agency well as the Council for Environmental Quality ("CEQ") guidelines for implementing NEPA would have compelled the Service to examine this proposal through the lens of several alternatives related to the proposed action. *See* 40 C.F.R. § 1502.14 (stating "[t]his section is the *heart of the environmental impact statement*.") (emphasis added).

The requirement to explore alternatives would have also forced the Service to assemble the requisite information prior to issuing the proposed rule in order to effectively "present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public." *Id.* It is readily apparent that had the Service prepared an EIS prior to issuing the current proposal, the numerous faulty and speculative assumptions plaguing it could have been avoided at the outset.

Unfortunately, critical habitat designation has become a litigious quagmire commandeering the entire listing program. As such, the Service should have erred on the side of caution and completed an EIS for this proposed designation, which would have decreased the litigation risk and costs the taxpayer.

D. Benefits of Exclusion versus Inclusion as Critical Habitat

The ESA provides the Secretary with a great deal of discretion when considering areas to exclude from critical habitat designation. The Act states that, "[t]he Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless he determines, "based on

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[3] *See Cape Hatteras Access Preservation Alliance*, 344 F. Supp. 2d at 135, where the District Court of Columbia accepted the rationale of the Tenth Circuit Court of Appeals in *Carton County Board of Commissioners v. U.S. Fish and Wildlife Service*,75 F. 3d 1429 (10th Cir. 2002), and declared that "[t]o ignore NEPA while designating critical habitat is to argue for NEPA's implicit repeal by the ESA and amendments to the ESA, an argument not supported by the ESA's text or the legislative history." *Cf. Douglas County v. Babbitt*, 48 F. 3d 1495 (9th Cir. 1995) holding that the Service does not have to comply with NEPA.

the best scientific and commercial data available," that to do so will result in the extinction of the species. 16 U.S.C. § 1533(b)(2). Comparing the exponential increase of designated critical habitat in the proposal at issue to the 2004 Final Rule clearly underscores the Service's apparent lack of effort in analyzing the benefits of exclusion. Rather than refine the 2004 final designation based on the best scientific information, the Service takes an "Ask for it all" PCE approach and designates any and all occupied or unoccupied habitat within the State. Such an approach, as mentioned previously, impermissibly shifts the burden to states and their partners to disprove a negative determination. At bottom, it appears that this proposal was driven more by the Service's desire to settle a lawsuit with plaintiffs than provide a reasonable and prudent approach to this issue.

Moreover, the Service acknowledges that "according to some researchers," "the designation of critical habitat on private lands significantly reduces the likelihood that landowners will support and carry out conservation actions." 75 Fed. Reg. at 2295. As the Service points out, this is largely due to the fear of many landowners that harboring a listed species will result in the decline in property values due to restrictions on land-use activities. Accordingly, the Service concludes that "[w]e believe the judicious exclusion of specific areas of non-federally owned lands from critical habitat designations can contribute to species recovery and provide a superior level of conservation than critical habitat alone." 75 Fed. Reg at 2295.

Unfortunately, when one examines the current proposal, the Service did not consider the benefits to bull trout and its habitat by excluding designation of critical habitat on private lands as well as those areas in the State already covered by existing regulatory mechanisms. While private lands do offer a great deal of benefit to listed species, we believe that additional regulatory burdens placed on the backs of private land owners will result in an overall reluctance by landowners to engage in future conservation activities. The State strongly urges the Service to employ a better analytical framework for comparing the benefits of inclusion versus the benefits of exclusion.

E. Exclusion Based on Section 303(d) Water Quality Standards

The Service also failed to ensure that each area proposed as critical habitat possessed the requisite PCEs for bull trout. In Idaho, over 1,118 miles of proposed critical habitat streams do not possess some of the most critical PCEs necessary to support bull trout; such as appropriate temperatures regimes, lack of fine sediments, and lack of excess nutrients. However, the State of Idaho acknowledges that many of these streams may be important for the conservation of bull trout.

The Federal Clean Water Act ("CWA") requires that states and Tribes restore and maintain the chemical, physical, and biological integrity of the nation's waters. Pursuant to Section 303 of the CWA, states and Tribes are to adopt water quality standards necessary to protect fish, shellfish, and wildlife while providing for recreation in and on the nation's waters whenever possible. Section 303(d) of the CWA establishes requirements for states and Tribes to identify and prioritize water bodies that are water quality limited (i.e., water bodies that do not meet water

quality standards and or do not fully support aquatic biota). Additionally, states and tribes must periodically publish a priority list (a "§303(d) list" impaired waters.

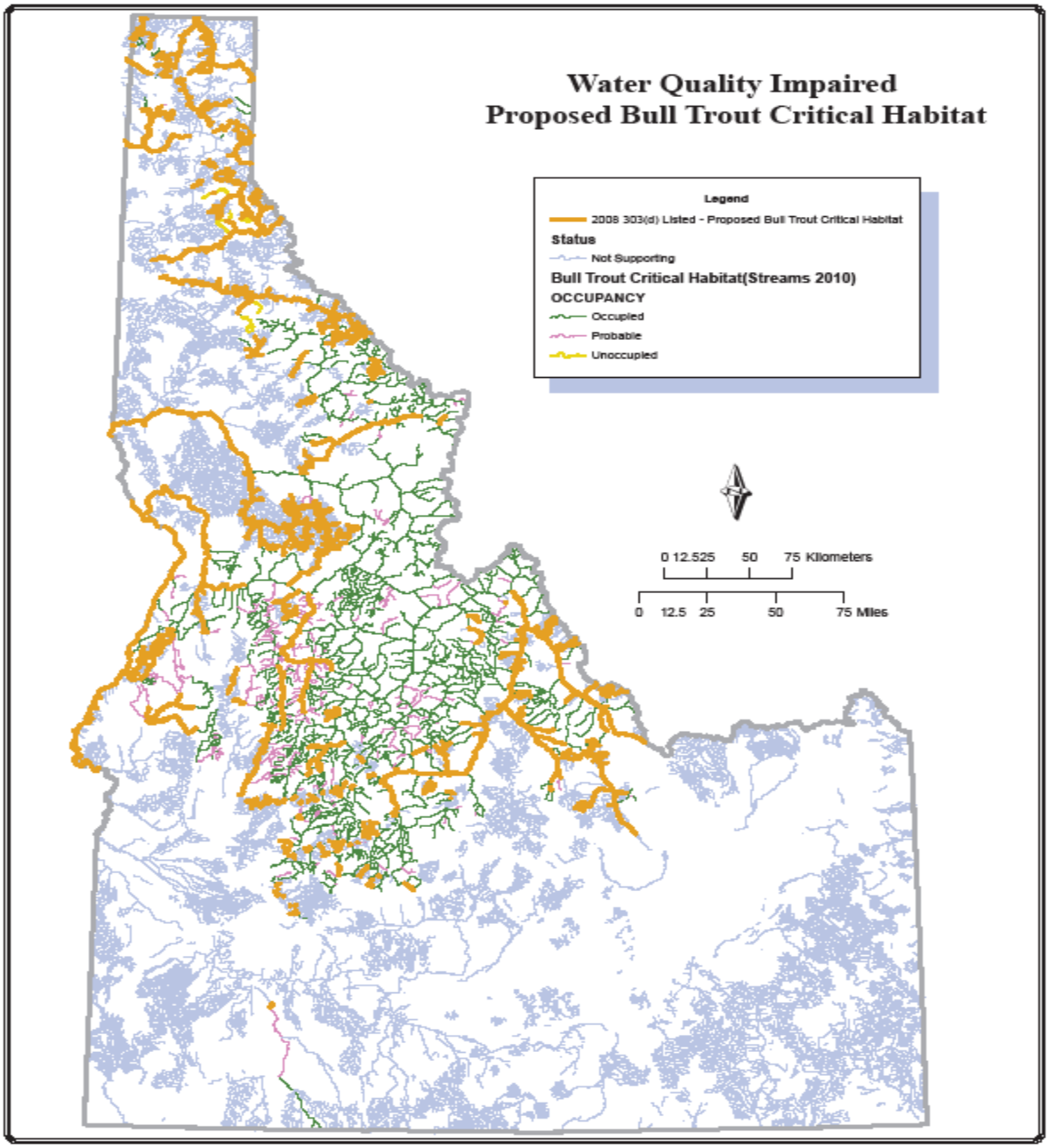

Figure 1: Water Quality Impaired Proposed Bull Trout Habitat: Burnt Orange Color depicts all proposed critical habitat areas where the Water Quality PCE is not supported.

The waters highlighted in burnt orange in the above Figure 1, labeled as "*2008 303(d) Listed – Proposed Bull Trout Critical Habitat*" illustrates the streams proposed as critical habitat not fully

supporting aquatic biota. These waters do not meet State and/or Federal water quality standards such as the 10°C federal bull trout temperature rule.

Given the PCEs published in the proposed CH designation, it is obvious that these waters listed in Figure 2 (below) do not possess all the PCEs necessary to support bull trout. Over 1088 miles of proposed "occupied" critical habitat do not fully support aquatic life. Additionally, approximately 18 miles of proposed critical habitat documented as unoccupied do not fully support aquatic life.

BTID	NAME	STATE	OCC.	HUC4CODE	Miles
1190296461886	Snake River	ID/OR	O	17060101	58.779002
1153848471132	Fly Creek	ID	O	17010304	6.0921836
1154001471373	Simmons Creek	ID	O	17010304	11.355207
1154076471511	Gold Creek	ID	O	17010304	6.4615211
1162568475575	North Fork Coeur d'Alene River	ID	O	17010301	66.00588
1168011474569	St. Joe River	ID	O	17010304	93.479891
1168011474569	St. Joe River	ID	O	17010304	34.639046
1150667467446	Swamp Creek	ID	O	17060307	5.304799
1152096457793	Bridge Creek	ID	O	17060305	3.9542076
1153441456738	Trapper Creek	ID	O	17060305	4.6287139
1153441457108	South Fork Red River	ID	O	17060305	11.594894
1154237458641	East Fork American River	ID	O	17060305	3.9914813
1154741458083	Red River	ID	O	17060305	11.223942
1155291458241	Crooked River	ID	O	17060305	5.2985113
1155987461400	Lochsa River	ID	O	17060303	68.341815
1156294459072	Pilot Creek	ID	O	17060305	5.9212271
1158892458238	Johns Creek	ID	O	17060305	11.374083
1158892458238	Johns Creek	ID	O	17060305	4.7625661
1159530468879	Floodwood Creek	ID	O	17060308	1.4773103
1159798461458	South Fork Clearwater River	ID	O	17060305	61.919515
1170397464258	Clearwater River	ID	O	17060306	74.086618
1165027489999	Kootenai River	ID	O	17010104	64.244957
1163689482800	Trestle Creek	ID	O	17010214	8.9173425
1163700482693	Pack River	ID	O	17010214	16.328248
1163700482693	Pack River	ID	O	17010214	5.6514158
1164511479535	West Gold Creek	ID	O	17010214	1.3831473
1168189483724	North Fork East River	ID	O	17010215	5.1493912
1151057436073	Big Water Gulch	ID	O	17050113	6.4995586
1129730437665	Sawmill Creek	ID	O	17040217	20.134928

1155008449625	Johnson Creek	ID	O	17060208	28.126775
1157131450148	East Fork South Fork Salmon River	ID	O	17060208	26.341978
1141861445697	Challis Creek	ID	O	17060201	8.7946299
1152301444492	Bear Valley Creek	ID	O	17060205	17.385707
1156360452722	Slaughter Creek	ID	O	17060207	4.7627909
1156659454343	Crooked Creek	ID	O	17060207	20.833837
1156750452374	Webfoot Creek	ID	O	17060207	2.1585181
NA-2961	Unnamed - North Fork Mayflower Creek	ID	O	17060207	0.9123885
1167926458560	Salmon River - mouth to Alturas Lk C	ID	O	17060201	100.85823
1133545446822	Eighteenmile Creek	ID	O	17060204	27.365257
1138891451879	Lemhi River	ID	O	17060204	54.599415
1133545446821	Texas Creek	ID	O	17060204	13.488171
1167926458560	Salmon River	ID	O	17060209	103.93549
1156302458958	Beaver Creek	ID	P	17060305	4.9151004
1132374441216	Williams Creek	ID	P	17040217	0.8007027
1159538477873	Falls Creek	ID	U	17010301	4.275193
1161317478805	Tepee Creek	ID	U	17010301	8.5954575
1162751478037	Big Elk Creek	ID	U	17010301	5.5648403
		Total Miles Impaired			1112.7159
		Total Occupied			1088.5646
		Total Probable			5.7158031
		Total Unoccupied			18.435491

Figure 2: Table identifying water quality limited proposed critical habitat by USFWS Bull Trout Segment ID.

F. Additional Bull Trout Concerns

The State of Idaho remains extremely frustrated with the Service's 1998 listing of bull trout as a threatened species under the ESA. The State disagrees with the Service that bull trout continues to warrant protection under the ESA throughout its range. For many years, we have been voicing our policy and technical differences with the Service over this listing determination. Despite repeated objections and our submission of the State's "best available science," we have not seen any significant progress made on reclassification or regulatory relief to the State of Idaho. This failure violates Section 4(i) of the ESA requiring the Secretary to "submit to the State a written

justification for his failure to adopt regulations consistent with the agency's comments or petition.

From 2007 to 2009, the State has participated in both policy and technical forums regarding the completion of the 5-year status review, reclassification, guidance regarding the statutory phrase "significant portion of the range," and distinct population segments for the species. At one point, the State was encouraged by the tenor of discussions between the Service and state fish and wildlife agencies. However, after the State and its partners invested significantly in this process, the Service about-faced and informed us that because of time and staff constraints, the agency was not going to pursue reclassification until some indeterminable length of time in the future. Instead of addressing these key issues, the Service turned its attention to developing a proposed rule for jettisoning the previous critical habitat designations and moving on to recovery planning efforts.

We realize the critical habitat designation process is being revisited because the Service asked the Court to consider a voluntary remand of the 2005 final rule and the Court subsequently granted the request. However, the State believes the Service has been disingenuous in leading us to believe that reclassification was timely and possible using internal guidance regarding "significant portion of the range" across newly minted distinct population segments. As a result, the Service got what input it wanted from the State and our partners and then arbitrarily changed the game plan. Now the Service has asked us to participate in at least another two years of process based on false assumptions and speculation. Such an approach does little to foster a cooperative relationship between the State and Federal government.

Based on our previous submittal to the Service (Bull Trout Status Review and Assessment in the State of Idaho dated December 20, 2004) and a recent peer-reviewed journal article authored by Idaho Department of Fish and Game (IDFG) biologists (High et al. 2008), we made a strong case that federal listing of the species was not warranted under the ESA because there are sufficient numbers of healthy, interacting bull trout populations in Idaho. Based on this research, we would expect the Service to provide the State of Idaho with, at a minimum, sufficient regulatory flexibility either through reclassification resulting in delisting portions of the appropriate listable entity, or special 4(d) rules.

Because the State of Idaho does not believe the listing of bull trout was warranted under ESA, we also do not support the designation of critical habitat for the species. However, in the numerous meetings State biologists recently held with the Service around the state, we identified areas that may be important to the conservation of the species. However, based on the foregoing, many of these areas should be excluded according to the ESA.

We acknowledge that the current range of bull trout has been reduced. We also acknowledge that "threats" to some <u>local</u> bull trout populations may exist and that some local bull trout populations have been extirpated. However, the State's proactive habitat restoration efforts have reduced these localized threats to the point that the protections afforded by the ESA are no longer

necessary. The current spatial distribution, abundance, population trend, and extinction risk information compiled by the IDFG taken together supports this position. High, B., K.A. Meyer, D.J. Schill, and E.R.J. Mamer. 2008. Distribution, abundance, and population trends of bull trout in Idaho. North American Journal of Fisheries Management 28: 1687-1701.

Conclusion

In conclusion, the State of Idaho believes the Service failed to meet the requirements of the Endangered Species Act and National Environmental Policy Act when it proposed this over-reaching redesignation of critical habitat for the species. While we acknowledge that some areas within the State may be important for the overall conservation of the species, the States does not believe the designation of critical habitat to the degree being proposed is either biologically warranted or legally defensible. The State looks forward to working with the Service to resolve the apparent contradiction between the proposed CH designation and the on-the-ground reality of the species' viability. Please let me know if you have any questions regarding these comments.

Very truly yours,

Nathan A. Fisher
Administrator

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EXHIBIT A

The Idaho Department of Fish and Game (IDFG) submits the following specific comments regarding proposed bull trout critical habitat units in Idaho by IDFG administrative region:

Upper Snake Region

Unit 28, Little Lost River

There is strong evidence that bull trout are not native to the Little Lost River Basin. Therefore, the State of Idaho recommends that the Service not designate critical habitat for the species in the Little Lost River and its tributaries. However, if the Service disregards this recommendation, our best available data suggests that only Sawmill Creek and tributaries, Williams Creek, Wet Creek, and Badger Creek may be important for conservation of the species.

Southwest Region- Nampa Office

Unit 26, Southwest Idaho River Basins, Sub-unit: Deadwood River

From a biological standpoint, IDFG staff agrees that the areas proposed by the Service are important for the conservation of bull trout. Most or all of this sub-unit is occupied at least seasonally. Adfluvial adults use both the upper mainstem tributaries and direct tributaries to the reservoir as spawning and rearing habitat. The mainstem above the reservoir is an important migration corridor, and the reservoir itself provides overwintering habitat for adfluvial fish. Eight of the nine primary constituent elements (PCEs) are considered favorable for bull trout. Non-native species are present in the upper headwaters and reservoir, but appear to be absent or rare in direct tributaries to the reservoir. The IDFG believes additional winter storage above historical minimum pool levels is not necessary to sustain bull trout.

Unit 26, Southwest Idaho River Basins, Sub-unit Upper South Fork Payette River

From a biological standpoint, IDFG staff agree that the areas proposed by the Service are important for the conservation of bull trout. The best available scientific data could support inclusion of the mainstem and tributaries as proposed by the Service, including downstream to the confluence with the North Fork Payette River at Banks. We acknowledge the importance of unoccupied reaches in the upper watershed based on relatively good connectivity, or the potential for restored connectivity, in most of this basin. We believe in this situation, the upper South Fork Payette River sub-unit is also important for the conservation of the species. We also note that U.S. Forest Service recently documented fluvial bull trout migrating downstream from Clear Creek and overwintering in the mainstem South Fork. Expression of this migratory life history may allow recolonization of other suitable but unoccupied streams. Historical (1950s-1960s) angling reports indicate that overwintering bull trout were present in the South Fork Payette at Banks, and the reach from there upstream to the confluence with the Middle Fork appears to have very good FMO habitat for fluvial fish.

Unit 26, Southwest Idaho River Basin, Sub-unit Middle Fork Payette River

As with the upper South Fork Payette River sub-unit, IDFG staff believe the areas proposed by the Service in the Middle Fork Payette River sub-unit are important to the conservation of bull trout

including the mainstem and tributaries. We would acknowledge, however, that known (summer) bull trout distribution is restricted to the Middle Fork Payette River headwaters and Bull Creek, and possibly Sixteen-to-One Creek. Bull trout are not known to be present in the Silver and Lightning creek drainages. , There is no known fluvial component present in the Middle Fork Payette River, but in general, connectivity is good and potential exists for fluvial fish to use FMO habitat in the lower Middle Fork or South Fork Payette rivers.

Unit 26, Southwest Idaho River Basins, Sub-unit Squaw Creek

Known (summer) distribution of bull trout includes tributaries to Third Fork and upper Squaw Creek. Second Fork and Sage Hen Reservoir and its tributaries are not occupied by bull trout. We are not aware of any documented fluvial forms or overwintering fish in the lower mainstem, but in general connectivity could allow recolonization of the upper Second Fork. Sage Hen Dam precludes natural establishment in upper Sage Hen Creek and tributaries, and reservoir tributaries do not appear amenable to establishment of adfluvial bull trout (small, with very low base summer flows and lacking adequate forage). Sage Hen Reservoir and its tributaries are not considered by the IDFG to be important to the conservation of bull trout.

Unit 26, Southwest Idaho River Basins, Sub-unit Arrowrock Reservoir

From a biological standpoint the mainstem, tributaries, and the lower South Fork Boise River may be important for the conservation of bull trout. Overall, this basin has relatively good connectivity which allows expression of resident, fluvial, and adfluvial life histories. Mainstem and lower tributary reaches are all important FMO habitat. Some headwater reaches are disconnected by natural barriers (e.g., upper East Fork Roaring River) and therefore, bull trout are not present in these reaches. Arrowrock Reservoir is important wintering habitat for adfluvial bull trout in the Boise River Basin (Flatter 1999; Salow 2001). The abundant forage base in Arrowrock Reservoir sustains wintering fish until late spring when they begin their protracted upstream spawning migration to upper basin tributaries. Long-standing federal water management based on contractually obligated irrigation demands, typically results in minimum winter water levels in Arrowrock Reservoir. However, even under existing operational regimes with the current minimum pool elevation, Arrowrock Reservoir provides important overwintering habitat for bull trout. The long-term health and viability of the Boise River Basin bull trout population is largely dependent on the adfluvial component. However, additional winter storage above historical minimum pool levels is not necessary to sustain bull trout in Arrowrock Reservoir.

Flatter, B.J. 1999. Investigations of bull trout *Salvelinus confluentus* in Arrowrock Reservoir. Idaho Department of Fish and Game report prepared for U.S. Department of Interior, Bureau of Reclamation. Cooperative Agreement No. 1425-6-FD-10-02170. Nampa, Idaho.

Salow, T. D. 2001. Population structure and movement patterns of adfluvial bull trout (Salvelinus confluentus) in the North Fork Boise River basin, Idaho. Master's Thesis. Boise State University, Boise, Idaho.

Southwest Region—McCall Office

Unit 26, Southwest Idaho River Basins, Sub-Unit North Fork Payette River

Unit 19, Hells Canyon, Sub-unit Wildhorse Creek: The IDFG agrees that areas proposed in this sub-unit are important to the conservation of bull trout. However, in reference to PCE #9, this watershed contains healthy brook trout populations rendering recovery challenging.

Unit 19, Hells Canyon, Sub-unit Indian Creek: The IDFG agrees that areas proposed in this sub-unit are important to the conservation of bull trout. However, in reference to PCE #9, this watershed contains healthy brook trout populations rendering recovery challenging.

Unit 26, Southwest Idaho River Basins, Sub-unit Weiser River

This sub-unit supports three isolated resident populations of bull trout in upper Hornet Creek, upper East Fork Weiser River, and Anderson and Sheep creeks. The IDFG and Service discussed the difficult environmental conditions faced by these three isolated populations in the Weiser River drainage. The likelihood of reconnecting these populations into a functional metapopulation is remote. The main issues are lack of stream flow, high water temperatures, and numerous unscreened irrigation diversions in the mainstem Weiser River. Therefore, it is the IDFG's opinion that the following discrete locations within the sub-unit may be important to the conservation of bull trout:

East Fork Weiser River: Stream reaches from the Dewey Creek and East Fork Confluence up into the headwaters may be important to the conservation of bull trout.

Upper Little Weiser River: Stream reaches above the livestock exclosures on the Upper Little Weiser River, Anderson Creek, and Sheep Creek and up into the headwaters may be important to the conservation of bull trout.

Upper Hornet Creek: From the west property boundary of the Payette National Forest on Hornet Creek to the headwaters and tributaries may be important to bull trout conservation.

Unit 26, Southwest Idaho River Basins, Sub-Unit North Fork Payette River: The only population of bull trout that remains in this sub-unit is in the upper North Fork Gold Fork River. The IDFG and Service discussed the very small size of this population and our limited ability to reconnect to the North Fork Payette River. The Gold Fork Diversion Dam is a complete upstream barrier and all waters are diverted in the late summer at this dam. The IDFG suggests that the Service reduce the footprint of the proposed critical habitat to an area necessary to conserve the present population such as from the Boise National Forest property boundary on the Gold Fork River upstream to the headwaters, including all tributaries as these areas may be important to bull trout conservation. The rest of the North Fork Payette River including Cascade Reservoir is in our opinion not important to the conservation of bull trout.

Unit 27, Salmon River Basin, Sub-unit Little-Lower Salmon River: If the Service feels compelled designate to areas in this sub-unit as critical habitat, the upper limit of that designation in Hazard Creek should be defined as Hazard Creek Falls. There are no bull trout above this natural barrier and there also

high densities of brook trout. Additionally, the upstream boundary of critical habitat on the Little Salmon River should be just above Hazard Creek.

Unit 27, Salmon River Basin, Sub-Unit Middle Salmon River, Chamberlain River: The current proposed critical habitat included the stretch of Warren Creek in the dredge pond areas as spawning and rearing habitat for bull trout. If there are bull trout above that area, this probably should then be delineated as FMO habitat. If bull trout are not present above the dredge ponds, then we suggest that critical habitat designation should be removed in the dredge pond area and above.

Unit 27, Salmon River Basin, Sub-unit South Fork Salmon River: The changes recommended by the State and IDFG were to include Warm Lake as an adfluvial population of bull trout. The IDFG recommends if the Service designates this area as critical habitat, that the upstream boundary should be placed on Johnson Creek near Landmark. In our opinion, this is the area that is important to the conservation of bull trout. No bull trout have been found above this point on Johnson Creek.

Unit 27, Salmon River Basin, Sub-unit Middle Fork Salmon River This sub-unit overlaps two IDFG administrative regions including the Southwest and Salmon. For additional comments, please refer to the Salmon Region. Since there is complete connectivity in this drainage, we believe these areas are important for the conservation of bull trout. The Middle Fork Salmon River is a stronghold for bull trout. This references the Southwest Region management area on the west side of the drainage. Additionally, Big Creek contains important spawning and rearing habitat for bull trout. IDFG screw trap data at Taylor Ranch indicates the presence of all sizes of bull trout in the lower end of the drainage.

Magic Valley Region

Unit 26, Southwest Idaho River Basins, Sub-unit Anderson Ranch Reservoir

In our opinion, many of the areas proposed by the Service in this sub-unit are important for the conservation of bull trout.

There is a migration barrier on Big Water Gulch that would prevent upstream movement of migrating bull trout.

There is substantial seasonal dewatering of the Feather River near the confluence with the South Fork Boise River. This could pose a seasonal migration barrier to bull trout.

On a seasonal basis, Little Smokey Creek may be unsuitable for bull trout from a temperature perspective.

Anderson Ranch Reservoir may be important wintering habitat for adfluvial bull trout in the Boise River Basin (Partridge et al. 2000). The abundant forage base in Anderson Ranch Reservoir sustains wintering fish until late spring when they begin their protracted upstream spawning migration to upper basin tributaries. Long-standing federal water management based on contractually obligated irrigation demands typically results in minimum winter water levels in Anderson Ranch Reservoir. However, even under existing operational regimes with the current minimum pool elevation, Anderson Ranch Reservoir

provides important overwintering habitat for bull trout. The long-term health and viability of the Boise River Basin bull trout population is largely dependent on the adfluvial component. However, additional winter storage above historical minimum pool levels is not necessary to sustain bull trout.

Partridge, F., K. Frank, and C. Warren. 2000. Southwest Idaho Bull Trout Restoration (South Fork Boise River) Completion Report. Project E-21-1. Idaho Department of Fish and Game, Boise.

Unit 25, Jarbidge River

The IDFG generally believes that areas proposed as critical habitat by the Service are important to bull trout conservation in the Jarbidge River within Idaho; however, we question whether the mainstem Jarbidge River in Idaho should be included as critical habitat since it is largely unknown whether it serves as overwintering habitat for bull trout.

Panhandle Region

Unit 30, Kootenai River Basin, Sub-unit Kootenai River

Service and IDFG staff reviewed known distribution and abundance data and discussed areas to be proposed as critical habitat. At the subunit level scale of analysis, the best available science would indicate that many of the areas proposed are important to the conservation of the species in the Kootenai River Basin.

Unit 31, Clark Fork River Basin, Idaho sub-units

Service and IDFG staff reviewed known distribution and abundance data and discussed areas to be proposed as critical habitat. At the subunit level scale of analysis (Priest Lakes subunit, Lake Pend Oreille subunit), IDFG staff believes that the areas proposed by the Service may be important to the conservation of the species in the Clark Fork River Basin. At the Basin scale of analysis, we don't believe all habitats proposed in the Priest Lakes subunit are essential to conservation of the species. Much of the Priest Lake subunit lacks the primary constituent element of "few or no nonnative predatory or competitive species present." Restoring functioning bull trout populations in the Priest Lakes subunit will likely require restoration (or expansion) of local populations in the spawning and rearing tributaries to Priest Lake proposed as critical habitat. Given that bull trout in the basin exhibit an adfluvial life history, it will require a significant reduction in the number of lake trout in Priest Lake, a very complex and difficult undertaking.

Unit 29, Coeur d'Alene River Basin

The Coeur d'Alene River Basin can be broadly divided into two drainages, the St. Joe and North Fork of the Coeur d'Alene rivers (NFCDA).

From a biological standpoint the streams and segments proposed as critical habitat in the St. Joe River drainage may be important for the conservation of bull trout. Areas currently unoccupied in the St. Joe River drainage have been proposed as critical habitat—most notably Marble Creek and tributaries.

Because bull trout currently utilize the mainstem St. Joe River and (at least seasonally) the lower portion of Marble Creek, recolonization or successful reintroduction of local populations in the Marble Creek drainage is a reasonable expectation. Distribution of local populations to include these streams in the mid-reaches of the St. Joe River could help ensure the long-term persistence of bull trout within the Coeur d'Alene River Basin.

Whether or not areas within the North Fork of the Coeur d'Alene River drainage (unoccupied habitat) are essential to conservation of the species depends largely on the scale of analysis. Bull trout persistence at the Recovery Unit level (Columbia Headwaters) would not likely be compromised by an absence of bull trout in the NFCDA . Additionally, the State of Idaho has concerns with the potential designation of critical habitat for bull trout in areas currently *unoccupied* by the species.

At the subunit level, an evaluation of current distribution, abundance, trend, and connectivity data suggest the Coeur d'Alene River Basin can achieve the 7 guiding principles cited in the proposed rule without inclusion of the NFCDA. Within the past five years, bull trout redds have been documented in no less than nine tributaries to the St. Joe River (as well as the St. Joe River mainstem). Though these surveyed streams are primarily in the headwaters of the St. Joe River, they represent over 50 stream miles and an area of approximately 204 square miles. In addition, there are tributaries (primarily in the Marble Creek drainage) that have good potential to support spawning and rearing populations of bull trout in the future. Bull trout in the St. Joe River system are believed to be primarily or exclusively adfluvial, migrating to Coeur d'Alene Lake. The geographic area currently used by and available to adfluvial bull trout is reason to believe sufficient habitat exists in the Coeur d'Alene River Basin to ensure conservation of the population whether or not bull trout are successfully re-established in the NFCDA River drainage.

While the habitat contains many of the PCEs, most of the streams in the NFCDA drainage proposed as critical habitat have no documentation of <u>historic</u> bull trout occupancy. It is the IDFG's opinion that it is a leap of faith to presume that bull trout could re-colonize or be effectively translocated to habitats that may never have supported bull trout historically. Many streams have significant habitat limitations that leave the ability to sustain essential life history functions of bull trout in doubt. The most notable PCE shortcomings are:

- All of the streams proposed currently exceed bull trout temperature standards for spawning and rearing (EPA standards)
- Stream temperatures <u>may</u> improve (with or without critical habitat designation) as habitat conditions in proposed critical habitat improve. Conversely, the aspect and lower elevation of the drainage, combined with the prospect of climate change, suggest that many of the streams that are currently too warm to support bull trout spawning and rearing may never provide suitable temperatures.
- The elevated temperatures and heavy metal contamination of the lower Coeur d'Alene River is not consistent with PCE #5 (migratory habitats with minimal physical, biological, or water quality impediments). The life history of any local populations in the NFCDA drainage would presumably be adfluvial, so any occupation of habitat in the NFCDA drainage will depend on migration through the lower Coeur d'Alene River. Bull trout *may* be able to effectively use the migratory habitat. The lower St. Joe River has a similar temperature profile, but still supports an

adfluvial population; however, the St. Joe River does not have the contaminant limitations of the Coeur d'Alene River.

It is doubtful that listing the NFCDA as critical habitat would affect these particular PCE limitations for the better (or how omission from critical habitat would affect them for the worse).

In the current draft recovery plan, reestablishing local populations that are broadly distributed throughout the basin has been identified as necessary for bull trout recovery. IDFG participated in development of the draft recovery plan and recognizes the value of having bull trout local populations distributed widely throughout the subunit, possibly including the NFCDA. Re-establishment of 3 or more local populations in the NFCDA would greatly expand the geographical distribution in the subunit, and presumably could provide some resilience to stochastic events in the upper St. Joe River portion of the basin. If spawning/rearing habitat ultimately limits the population spawning in the St. Joe River drainage, additional spawning and rearing habitat in the NFCDA could potentially increase total abundance, and provide additional sport fishing opportunities sometime in the future.

Unfortunately, for the reasons described above, the ability to successfully restore local populations in the NFCDA is anything but certain.

Designating critical habitat (i.e., defining areas essential to the conservation of the species) prior to a current recovery plan for the Coeur d'Alene River Basin is particularly problematic. The current draft plan calls for 3 local populations in the NFCDA without a specific plan for establishing those populations. Based on discussions to date, we expect that parties involved will propose a re-introduction program; however we don't expect recovery criteria to require local populations specifically in the NFCDA. Recovery cannot be contingent on successful reestablishment of local populations in the NFCDA, given the uncertainty of the outcome. It seems illogical to designate the NFCDA as critical habitat if the soon-to-be-revised recovery plan recognizes the NFCDA component of the population is not essential for conservation of the subunit.

Thus, the IDFG supports (in concept) reestablishing spawning and rearing populations of bull trout in the NFCDA, but we do not believe these streams meet the "...essential to the conservation of the species..."criteria for unoccupied critical habitat. We look forward to working with the Service and other stakeholders on a recovery plan that will include a reintroduction effort and development of criteria for success, but we do not believe designating unoccupied critical habitats in the NFCDA will bring meaningful benefits to those efforts.

<u>Clearwater Region</u>

In July 2009, the Service and IDFG discussed potential areas proposed as critical habitat for bull trout. During this meeting, the Service presented bull trout distribution maps of the Clearwater River Basin that were created from various sources of information. Based on IDFG input and input from the U.S. Forest Service, the Service developed revised maps that IDFG reviewed in September 2009. Based on these revised maps and subsequent discussions with the Service, it was agreed by IDFG and the Service that a number of streams were not important to the conservation of bull trout.

The below list of streams, by sub-unit, were not included in the 2010 proposed rule based largely on input from the IDFG. We used the Service Guiding Principles document to determine which streams to suggest removing from consideration as critical habitat.

Unit 21, Clearwater River, Sub-unit North Fork Clearwater River

Freeman	Howard
Isabella (near Stoney)	Cold Springs
Sawtooth	Cool
WF Butte	Junction
Sneak	Pete Ott
Rock	Elizabeth
Larson	Hidden
Little Washington	Deception
Washington	Barnard
Middle	Monroe
Death	Toboggan
Fisher	Marten
Trail	Gravey

Unit 21, Clearwater River, Sub-unit Middle-Lower Clearwater River

Orofino	SF Clear
Lolo	MF Clear
Yoosa	Clear Cr
Clear	

Unit 21, Clearwater River, Sub-unit Lochsa River

Deadman	Oldman
Coolwater	Bald Mountain
Fire	Gold Meadows
Split and EF Split	Freezeout
Boulder	California
SF Canyon	Badger
Jay	

Unit 21, Clearwater River, Sub-unit South Fork Clearwater River

Meadow	Big Elk
Silver	Little Elk (upper reach)
Twentymile	Buckhorn

Unit 21, Clearwater River, Sub-unit Selway River

Goddard	Otter
Rackliff	Three Links
Boyd	Mink
Glover	Pettybone

The IDFG has several comments that the Service should consider to update Appendix 2 regarding the Bull Trout Proposed Critical Habitat Justification. These comments all regard where the information came from that justified including that particular stream reach as critical habitat.

Page 306 North Fork Kelly Creek: It should be based on telemetry and snorkel data. This area is not part of an annual redd count survey schedule.

Page 307 Short Creek: Juvenile bull trout were captured during electrofishing (Schriever et al. 2004).

Page 308 Skull Creek: This stream is determined to be occupied by bull trout based on telemetry data.

Page 308 Vanderbilt Gulch: This stream is determined to be occupied by bull trout based on telemetry data.

The IDFG has a concern in the Clearwater River Basin regarding the permitting process for habitat restoration that is ongoing. The permit process is already complex and time consuming. It is our hope that designating bull trout critical habitat will not complicate the process and render it more time consuming. At this point, the IDFG Clearwater Region is not doing any habitat improvement projects in streams proposed to be bull trout critical habitat; however, we may move into these streams in the future. As such, it would be beneficial to develop programmatic coverage for the habitat restoration efforts ongoing in this and other IDFG administrative regions.

Schriever, E., D. Schiff, and M. Campbell. 2004. Regional Fisheries Management Investigations. North Fork Clearwater River Bull Trout. Distribution, Abundance and Hybridization of Bull and Brook Trout in the Upper North Fork Clearwater River Basin. Contract No 00-CS-11010500-015. Idaho Department of Fish and Game, Boise.

Salmon Region

Unit 27, Salmon River Basin, Sub-unit Lemhi River

The stronghold connected and functioning habitats for bull trout in this sub-unit include the mainstem Lemhi River and the Hayden Creek drainage. Currently the Hayden Creek drainage (including Bear Valley Creek) supports the only known fluvial population in the sub-unit. The Hayden Creek drainage also supports resident populations of bull trout in smaller tributaries. The mainstem Lemhi River below Hayden Creek is used primarily as FMO habitat by bull trout. Upstream of Hayden Creek, the Lemhi River currently supports fewer bull trout; however, with the recent reconnect of Big Timber Creek to the mainstem Lemhi River it is expected that fluvial bull trout originating from Big Timber Creek will begin

utilizing this area for FMO habitat. Big Timber Creek supports a robust and extensive bull trout population. The tributaries listed below support bull trout populations to varying degrees. Streams not listed are suspected to not currently be occupied by bull trout.

Small, Isolated populations

The following streams within the Lemhi River sub-unit support small, isolated populations of bull trout which are currently disconnected from the mainstem Lemhi River, and we do not believe these isolated streams are important to the conservation of bull trout in the Lemhi River sub-unit. Agency Creek– the IDFG surveyed 10 sites in 2004 and no bull trout were detected.

Big Bear Creek (Hawley Creek drainage) - bull trout were observed in 6 of 21 sites surveyed in the Hawley Creek drainage, 5 of which were in Big Bear Creek. Low densities of bull trout were documented throughout. If Big Bear Creek is reconnected, it is possible a fluvial population could exist.

Canyon Creek – 19 bull trout were observed in Rough Canyon Creek (headwaters of Canyon Creek) and this appears to be a small resident population. Bull trout are not widely distributed and were documented in only 1 of 7 sites sampled in upper Canyon Creek.

Clear Creek – Bull trout were present in 2 of 3 sites sampled but in low densities.

Eighteenmile Creek—No specific information is currently available for bull trout.

Hawley Creek– only one bull trout observed just below the confluence of Big Bear and Reservoir creeks.

Kirtley Creek – occupied by bull trout but severely disconnected from the mainstem Lemhi River and there are significant legacy mining impacts.

Middle Fork Little Timber—no specific information is available for bull trout.

Pattee Creek- no specific information is available for bull trout.

Texas Creek and tributaries – high densities of brook trout have been documented throughout the mainstem of Texas Creek; however, bull trout were observed in high densities in Deer Creek (observed in 3 of 4 sites sampled; tributary to Texas Creek).

The unnamed waterways listed on Service maps as number 39-42 on page 2408 of the proposed rule are all ditches and should be deleted from consideration as critical habitat for bull trout.

It is the opinion of the IDFG that the primary focus of conservation efforts for bull trout in the Lemhi River Basin should be given to those streams that are isolated but that support robust populations, and those streams that are well connected and support robust populations.

Robust but isolated populations

The following streams within the Lemhi River sub-unit support what the IDFG considers robust populations of bull trout. All are currently disconnected and isolated from the mainstem Lemhi River. These include: Big Eightmile, Big Timber, Bohannon, Dairy, Deer, Kenney, Lee, Little Eightmile, Little Timber, and Mill creeks. The IDFG believes all of these streams are important for the conservation of bull trout.

Robust and connected populations

The following streams within the Lemhi River sub-unit support what the IDFG considers robust populations of bull trout existing in connected watersheds: Bear Valley, Bray, Cooper, Hayden, Kadletz, Lemhi, Short, West Fork Hayden, and Wright creeks. The IDFG considers all of these streams important to the conservation of bull trout.

Unit 27 Salmon River Basin, Sub-unit Middle Fork Salmon River

The IDFG offered the Service some corrections to current bull trout distribution within this sub-unit. Although significant portions of this sub-unit are already federally protected as wilderness or wild and scenic, it is the opinion of the IDFG that the entirety of the Middle Fork Salmon River drainage is important to the conservation of bull trout. The bull trout populations within this sub-unit are the most robust in the state of Idaho.

Unit 27, Salmon River Basin, Sub-unit Lake Creek

This population of bull trout has been isolated from the mainstem Salmon River for an estimated 10,000 years due to a catastrophic mass wasting event. It is one of only three known adfluvial bull trout populations in central Idaho (along with Redfish and Alturas lakes). This population will always remain in isolation. However, because of its existence in a unique geological setting, and that it represents an adfluvial life history, the IDFG believes that Lake Creek may be important to the conservation of the species. We have also taken fin clips from a sample of bull trout from Lake Creek but they have not yet been analyzed. Because of the long-term geologic isolation of this bull trout population, they are likely genetically divergent or unique from other Salmon River Basin populations.

Unit 27, Salmon River Basin, Sub-unit Opal Lake

This is an isolated bull trout population similar in character to Lake Creek described immediately above. This population will always remain in isolation. This population does not exhibit an adfluvial life history. We have also taken fin clips from a sample of bull trout from Opal Lake but they have not yet been analyzed. Because of the long-term geologic isolation of this bull trout population, they are likely genetically divergent or unique from other Salmon River Basin populations and therefore, may be important to the conservation of the species.

Unit 27, Salmon River Basin, Sub-unit Pahsimeroi River

Historically it is likely that the Pahsimeroi River was fully connected (at least seasonally) to the mainstem Salmon River. Currently due to land use and irrigation practices, the river is fragmented into three distinct areas: 1) the lower Pahsimeroi River which is connected to the mainstem Salmon River, 2) a middle reach which is disconnected from the lower river, and the headwater portion of the watershed which is disconnected from the middle reach. The lower river bull trout populations are extremely depressed and there are no known fluvial populations. Tributaries on the eastern portion of the drainage support the bulk of the bull trout populations; however, all of the tributaries are disconnected from the mainstem Pahsimeroi River due to irrigation, effectively isolating all of these populations. Most of these isolated populations would be considered robust except for Ditch, Goldberg and Big Gulch creeks, which would be considered isolated, small, and depressed populations. The upper portions of these isolated tributaries contain good to excellent habitat. There may be real opportunities to connect various tributaries to the mainstem Pahsimeroi River, therefore other than Ditch, Goldberg, and Big Gulch creeks; the IDFG considers all tributaries to the Pahsimeroi River currently supporting bull trout to be important to the conservation of bull trout.

Unit 27, Salmon River Basin, Sub unit - Upper Salmon River

Robust fluvial bull trout populations are known to exist in the East Fork Salmon River and tributaries, Yankee Fork Salmon River and tributaries, 4th of July Creek and Warms Springs Creek. These drainages are well connected and the IDFG considers them important to the conservation of the species.

Basin and Thompson creeks also likely support fluvial populations of fish. Valley Creek likely supported (and may still support) fluvial forms of bull trout; however, high densities of brook trout in the watershed may compromise recovery. Despite some uncertainty and the presence of non-native fish species, these drainages are well connected and have sufficient enough potential to be considered important to the conservation of bull trout.

Robust adfluvial bull trout populations exist in Fish Hook Creek (Redfish Lake tributary), and Alturas and Alpine creeks (Alturas lake tributaries). Fluvial bull trout use the mainstem Salmon River prior to spawning runs into tributary environments. The IDFG considers these tributaries important to the conservation of bull trout.

Lakes: Recent observations of bull trout in Yellowbelly Lake suggest fish are infrequently migrating into the system via the Salmon River; however, consistent observations are lacking. Currently there is no evidence to suggest a bull trout population has firmly established in Yellowbelly Lake. The status of bull trout in Pettit Lake is unknown. Stanley Lake currently supports an abundance of lake trout. A single bull trout was recently observed in Hell Roaring Lake. Above Hell Roaring Lake, the system is inundated with brook trout. The observed fish is likely a transient fish from the mainstem Salmon River. There is currently no compelling evidence that these lake environments are important to the conservation of bull trout.

There are some additional habitat considerations for the Service in the Upper Salmon River sub-unit. In the Yankee Fork Salmon River, there are active recreational mining and historical (legacy) impacts. The

mainstem is highly degraded below the West Fork. However, there is the potential for active restoration to improve native fish habitats. Bayhorse Creek has the potential to support bull trout. Bull trout have been observed at mouth of the stream seeking thermal refugia. There is the potential for active restoration to improve native fish habitats. At Kinnikinnic Creek, bull trout are present in the stream immediately below a culvert on State Highway 75. If this barrier was removed, it is likely bull trout would expand into the watershed.

Unit 27, Salmon River Basin, Sub-unit Panther Creek

Robust fluvial bull trout populations are known or strongly suspected to exist in the North Fork Salmon River and tributaries, Horse Creek and tributaries, upper portions of Panther Creek and tributaries, and Indian Creek and tributaries. These specific drainages in the Panther Creek sub-unit are considered important to the conservation of bull trout.

The following drainages in the Panther Creek sub-unit are not considered to be important to the conservation of the species:

Cow and 4th of July creeks could possibly support fluvial forms; however, they are currently not documented.

Allison, McKim, Twelvemile, Williams, and Carmen creeks have no current possibility to support fluvial forms due to irrigation withdrawal.

Hat Creek has no possibility to support fluvial forms due to natural barriers.

Iron Creek was recently reconnected and may eventually support fluvial forms.

Squaw, Spring, Boulder, and Owl creeks may be too small to support fluvial forms.

Pine Creek has a culvert barrier at the mouth restricting fluvial forms. Additionally it is likely too small to support fluvial fish.

Lake Creek (below Williams Lake) is too small to support a functional bull trout population.

Jesse Creek is dewatered seasonally and has little chance of being reconnected (municipal water supply for City of Salmon, irrigation for ranches).

The IDFG has a concern in the Salmon River Basin regarding the permitting process for habitat restoration that is ongoing. The permit process is already complex and time consuming. It is our hope that designating bull trout critical habitat will not complicate the process and render it more time consuming. Many of the habitat restoration actions that have been and are being implemented in the Salmon River Basin specifically for anadromous fish species, have indirect benefits to bull trout. As such, it would be beneficial to develop programmatic coverage for the habitat restoration efforts ongoing in this and other IDFG administrative regions.

EXHIBIT B

Attn: RIN 1018-AW88
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

RE: Proposed Rule for Bull Trout Critical Habitat/Draft Economic Analysis

Dear Sir/Madam,

The Idaho Department of Lands (IDL) appreciates the opportunity to comment on the proposed revision of Critical Habitat for Bull Trout and the associated draft economic analysis.

IDL manages approximately 2.3 million acres of endowment trust lands. These lands were granted to the State through various Territorial Acts and upon statehood by the federal government for the express purpose of maximizing returns to the trust beneficiaries – the largest trust beneficiary being K-12 public schools.

IDL is also responsible for fire management on over 6 million acres and for administering the Idaho Forest Practices Act (IFPA) on State and private forestlands.

General Comments

Idaho Forest Practice Act (IFPA)

The Idaho Forest Practices Act (IFPA) requires the State Board of Land Commissioners (Land Board) to adopt rules describing forest practices standards that State and private forest landowners are required to follow during forest management activities. An FPA Advisory Committee (FPAAC) provides technical advice to the Land Board.

IFPA rules are identified in the Idaho Water Quality Standards as the approved best management practices (BMPs) for silvicultural activities. These standards also describe the monitoring and feedback (adaptive management) process. Internal monitoring and auditing is conducted annually by IDL. In addition, a more comprehensive compliance and effectiveness audit is conducted every four (4) years by the Idaho Department of Environmental Quality (IDEQ). These on-site audits review applied BMP's against appropriate criteria to assess the compliance and effectiveness of these measures in protecting designated beneficial uses. BMPs are then modified as needed to maintain, enhance, or restore beneficial uses. As a result of this adaptive management process, IFPA rules have undergone significant evolution over the years. The last revision occurred in 2009. In addition, the Idaho Legislature amended the IFPA in 1980, 1986, 1987, 1989 to 1992, 1995, and 2006 with concurrent rule amendments occurring about the same times.

As required by IFPA, the Director of IDL appoints the nine FPAAC committee members, representing a diverse group of specialists, landowners and interests. FPAAC provides recommendations to the Director and to the Land Board for their consideration based on IDEQ quadrennial interagency audit results, other IDEQ studies, internal IDL forest practices audits, and the IDL forest practices inspection and enforcement program. This approach has been widely accepted and supported within the State.

The Forest Practice Water Quality (FPWQ) Audit conducted by IDEQ every four years continues to affirm that IDL's inspection, enforcement, auditing, and monitoring efforts are adequate and that the Idaho Forest Practice Act protects water quality for beneficial uses like bull trout. The latest 2008 quadrennial audit results indicate an overall compliance of 97% with only one sector below 95% (NIPF at 91%).

IFPA inspection, compliance, enforcement, and auditing efforts by IDL are well documented and have been previously shared with the U.S. Fish and Wildlife Service (FWS) as part of the Idaho Forestry Program Document. Given the success and continual improvement of the IFPA standards, IDL disagrees with any critical habitat being designated along streams adjacent to state and private forestlands within the State of Idaho.

Draft Economic Analysis

The Draft Economic Analysis (DEA) does not consider costs to Idaho state forestlands. The DEA document references the 2004 Final Economic Analysis of Critical Habitat Designation for the Bull Trout (Columbia/Klamath Populations) as the primary source for Idaho information. IDL began tracking expenses associated with Threatened and Endangered Species in 2004. Given the associated timeframe, IDL did not have significant input into the 2004 analysis. However, since 2004 we have incurred and documented significant expenses providing protection to bull trout, which according to the DEA should have been included within the baseline impact. No economic or cost information was requested from IDL by the FWS or their contractors for this proposal, even though FWS is aware of our financial record keeping and economic analysis associated with the Idaho Forestry Program. Since there has not been an adequate economic analysis, no critical habitat should be designated along streams adjacent to state and private forestlands in Idaho.

Snake River Basin Adjudication (SRBA) / Forestry Component

IDL concurs with the FWS to exclude the lands covered under the SRBA Idaho Forestry Program (IFP). IDL has voluntarily adopted and applied the Road and Riparian Management Measures outlined in the IFP since August 2004 in the Salmon and Clearwater basins. In addition, IDL has also adopted and applied the IFP Road and Riparian Management Measures in the Kootenai River and Clark Fork River basins and to areas adjacent to fish bearing streams tributary to bull trout occupied streams throughout the state.

IDL believes that all State and private lands should be excluded from critical habitat designation given the combined protective standards currently applied on federal, state, and private lands.

<u>Specific Comments</u>

Clark Fork River Basin

Several streams in the Priest River/Lake basin are classified as "occupied".

- Trapper Creek, 1 redd in 2001, no redds since despite annual checking, no bull trout found from shocking in 2003 and 2004
- Caribou Creek, 1redd in 2003, no bull trout from annual shocking between 1993-1998
- Lion Creek, 2 redds in 2004
- Two Mouth Creek, 2 redds in 1984, no redds in 2009, no bull trout from shocking 2003-2004

Given the data, these streams should be classified as "potential" habitat and not "occupied" habitat.

Weiser River Subunit

IDL concurs with Idaho Fish and Game that the following stream reaches should not be designated critical habitat due to agricultural diversions and high water temperatures:

- Hornet Creek below the Placer Creek junction
- Olive Creek below the North and South Fork junction
- Weiser River below the East Fork Weiser River junction
- Lost Creek and Lost Valley Reservoir

North Fork Payette River Subunit

IDL concurs with Idaho Fish and Game that the following stream reaches should not be designated critical habitat due to agricultural diversions and high water temperatures:

- Lake Fork Creek upstream from Cascade Reservoir
- Little Payette Lake and Lake Fork Creek upstream to and including Brown's Pond

Unoccupied/Potential Habitat

Designating unoccupied or potential habitat as Critical Habitat will increase IDL management costs. As described above, the DEA does not consider State costs in the economic analysis and unoccupied habitat designated as critical further demarks the DEA from actual costs and economic reality. For example, consider the standard bridge construction or replacement requiring a Corps of Engineers permit (federal nexus). If bull trout are in the stream, the federal agency issuing the permit is responsible for developing the Biological Assessment (BA). However, given the workload and time constraints, it will fall to IDL (landowner) to pay for the BA. Even the simplest BA costs IDL approximately $2,000.00, with complex ones costing much more. As these costs are not identified adequately in the economic analysis, unoccupied or potential habitat should not be designated as critical on streams adjacent to State and private forestlands in Idaho.

The Idaho Department of Lands is very concerned about the potential impacts of this proposed action on state and private lands. As stated throughout these comments, IDL believes that all State and private lands should be excluded from critical habitat designation given the combined protective measures currently in place on federal, state, and private lands within Idaho.

Thank you for the opportunity to submit comments on this plan. Please contact me at (208) 769-1525 or by email at pseymour@idl.idaho.gov if you have any questions regarding these comments.

Respectfully Submitted,

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