

1 Nicole G. Di Camillo (Bar No. 283088)  
[ndicamillo@environmentaldefensecenter.org](mailto:ndicamillo@environmentaldefensecenter.org)

2 Margaret Morgan Hall (Bar No. 293699)  
[mhall@environmentaldefensecenter.org](mailto:mhall@environmentaldefensecenter.org)

3 ENVIRONMENTAL DEFENSE CENTER  
4 906 Garden Street  
5 Santa Barbara, California 93101  
6 Phone: (805) 963-1622  
7 Facsimile: (805) 962-3152

8 Brian Segee (Bar No. 200795)  
[bsegee@environmentaldefensecenter.org](mailto:bsegee@environmentaldefensecenter.org)  
9 ENVIRONMENTAL DEFENSE CENTER  
10 840 County Square Drive  
11 Ventura, California 93003  
12 Phone: (805) 658-2688  
13 Facsimile: (805) 648-8092

14 *Attorneys for Plaintiff*  
15 CALIFORNIA TROUT, INC.

16 **UNITED STATES DISTRICT COURT**  
17 **CENTRAL DISTRICT OF CALIFORNIA**  
18 **WESTERN DIVISION**

19 CALIFORNIA TROUT, INC., a California  
20 non-profit corporation,

21 Plaintiff,

22 vs.

23 UNITED STATES BUREAU OF  
24 RECLAMATION; LOWELL PIMLEY,  
25 Acting Commissioner, United States Bureau  
26 of Reclamation; UNITED STATES  
27 DEPARTMENT OF THE INTERIOR;  
28 SALLY JEWELL, Secretary, United States  
Department of the Interior;

Defendants.

Civil Case No. 2:14-CV-7744

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

**(Endangered Species Act,  
16 U.S.C. § 1531 *et seq.*)**

1 Plaintiff CALIFORNIA TROUT, INC. (“CalTrout” or “Plaintiff”) a  
2 California non-profit corporation, by and through its counsel, hereby alleges:

3 **JURISDICTION AND VENUE**

4 1. This Court has jurisdiction over this action pursuant to 16 U.S.C. §  
5 1540(g) (Endangered Species Act citizen suit); 28 U.S.C. § 1331 (federal  
6 question); 28 U.S.C. § 1346 (action against the United States); and 28 U.S.C. §§  
7 2201–2202 (power to issue declaratory judgments in cases of actual controversy).  
8 This case arises under 16 U.S.C. § 1540(g)(1)(A) (authorizing actions to enjoin any  
9 person alleged to be in violation of the Endangered Species Act or its  
10 implementing regulations).

11 2. On May 30, 2014, Plaintiff sent a Notice of Intent Letter (“Notice  
12 Letter”), by electronic and certified mail, pursuant to 16 U.S.C. § 1540(g)(2)(A)(i),  
13 to the United States Bureau of Reclamation (“BOR” or “Defendant BOR”),  
14 informing the agency of its violations of the Endangered Species Act (“ESA” or  
15 the “Act”) and Plaintiff’s intention to file suit after the expiration of sixty (60)  
16 days. Plaintiff also sent the Notice Letter to the Secretary of Commerce, the  
17 National Oceanic and Atmospheric Administration (“NOAA”), the National  
18 Marine Fisheries Service (“NMFS”), and the United States Department of the  
19 Interior (“DOI”), by electronic and certified mail, on May 30, 2014.

20 3. In its Notice Letter, Plaintiff explained BOR’s violations of the ESA  
21 and requested that it come into compliance with the Act. More than sixty (60)  
22 days have passed since notice was given and BOR has failed to remedy its  
23 violations. The violations complained of in the Notice Letter, and alleged in this  
24 Complaint, are continuing or reasonably likely to continue to occur, and an actual,  
25 justiciable controversy exists within the meaning of 28 U.S.C. § 2201(a).

26 4. There is no preclusion of this action because the United States has not  
27 commenced an action to impose a penalty, nor has it commenced or is it diligently  
28

1 prosecuting a criminal action to redress the violations alleged in this Complaint.  
2 *See* 16 U.S.C. § 1540(g)(2)(A)(ii)–(iii).

3 5. Venue is proper in the Central District of California pursuant to 16  
4 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(b)(2), because a substantial part of  
5 the events or omissions giving rise to Plaintiff’s claims occurred in this District.

## 6 INTRODUCTION

7 6. This case challenges BOR’s ongoing failure to adequately operate the  
8 Hilton Creek Watering System (“System”) under the Cachuma Project. BOR is  
9 required to water Hilton Creek to support Southern California steelhead  
10 (*Oncorhynchus mykiss*), one of the most endangered fish species in the United  
11 States. To date, BOR’s operations have interrupted flows into Hilton Creek on  
12 numerous occasions since 2013, causing the death of at least 393 Southern  
13 California steelhead, in violation of ESA Sections 7 and 9, 16 U.S.C. §§ 1536,  
14 1538.

15 7. The Cachuma Project includes the operation of Bradbury Dam and its  
16 associated water-transport and delivery structures on or near the Santa Ynez River.  
17 Bradbury Dam (“the Dam”) is located about twenty-five miles northwest of Santa  
18 Barbara, California on the Santa Ynez River, and its installation formed the  
19 Cachuma Reservoir. BOR owns and operates the Dam as part of the Cachuma  
20 Project. BOR also operates equipment, including pumps, which release water into  
21 Hilton Creek, a tributary of the Santa Ynez River located downstream of the Dam.

22 8. The Santa Ynez River once held the largest steelhead run in Southern  
23 California. Approximately half of the historic Southern California steelhead  
24 population lived in the River. However, construction of the Dam in 1953 put an  
25 end to this enormous steelhead run. The Dam caused the population to crash by  
26 over ninety-nine percent, leaving only a small population persisting in the Santa  
27 Ynez River and its tributaries, including Hilton Creek, located below the Dam.

1           9.     The steelhead population has declined drastically across its range due  
2 to habitat loss from water development, dams and urbanization. Because of this  
3 drastic population decrease, Southern California steelhead were listed as  
4 endangered under the ESA in 1997.

5           10.    Hilton Creek was designated “critical habitat” for Southern California  
6 steelhead in 2005 under the ESA, due to its characteristics that make it essential to  
7 the survival of the species. Because the confluence of Hilton Creek with the Santa  
8 Ynez River is immediately below the Dam, adult, migrating steelhead will turn to  
9 Hilton Creek after they hit the Dam, since they are unable to migrate further up the  
10 River.

11          11.    BOR is required to undergo consultation with NMFS about the effects  
12 of the Cachuma Project on Southern California steelhead, a listed species. *See* 16  
13 U.S.C. § 1536. Pursuant to this ESA process, NMFS prepared a Biological  
14 Opinion (“BiOp”) in 2000, which requires BOR to release water into Hilton Creek  
15 in order to support steelhead survival and recovery. Due to the Santa Ynez River  
16 watershed hydrology and the existing impediments to fish passage, Hilton Creek  
17 must be watered through water releases from the Cachuma Reservoir.

18          12.    The BiOp also contains an Incidental Take Statement (“ITS”), which  
19 describes the minimal amount of anticipated “take” of Southern California  
20 steelhead associated with operation of the Cachuma Project. Section 9 of the ESA  
21 prohibits “take” of any endangered species, which includes to “harm” or “kill.” 16  
22 U.S.C. § 1532(19). However, an ITS creates a limited “safe-harbor” to this  
23 prohibition for “take” that occurs in accordance with the scope of the ITS and in  
24 compliance its terms and conditions. The ITS for the Cachuma Project describes  
25 that one (1) adult unintentional mortality and four (4) juvenile unintentional  
26 mortalities associated with migrant trapping activities are expected.



1 individuals and other environmental stakeholders committed to Southern  
2 California steelhead recovery in Orange and San Diego Counties and Los Angeles  
3 and Ventura Counties, respectively.

4 20. Plaintiff is also an “interested party” in the California State Water  
5 Resources Control Board’s administrative proceedings related to the Defendant’s  
6 permit for operation of the Dam. Plaintiff has advocated for protection of the  
7 public trust interest in steelhead and its Santa Ynez River habitat in those ongoing  
8 proceedings.

9 21. Plaintiff has a long history of promoting steelhead conservation in  
10 Southern California. In 1996, Plaintiff commented on the California Department  
11 of Fish and Game Steelhead Restoration and Management Plan for California. In  
12 1997, Plaintiff successfully advocated for the federal listing of the Southern  
13 California steelhead as endangered under the ESA. In 2009, as a result of an ESA  
14 citizen suit it filed to protect steelhead, Plaintiff successfully obtained improved  
15 fish passage at the Vern Freeman Diversion on the Santa Clara River.

16 22. Plaintiff’s members have scientific, recreational, aesthetic, spiritual,  
17 educational, and other interests in Southern California steelhead and the species’  
18 habitat. Plaintiff’s members use and enjoy the specific areas affected by BOR’s  
19 actions, including the Santa Ynez River and its tributaries, including but not  
20 limited to Hilton Creek. BOR’s operations have caused, are causing, and will  
21 continue to cause harm to Southern California steelhead and its habitat. Plaintiff’s  
22 members use these areas, including Hilton Creek, and the Santa Ynez River to  
23 recreate, view species, and engage in scientific study, among other activities.  
24 BOR’s operations threaten or impair each of those uses or contribute to such  
25 threats and impairments. Thus, the interests of Plaintiff’s members have been, are  
26 being, and will continue to be adversely affected by BOR’s failure to comply with  
27  
28

1 the ESA. The relief sought herein will redress the harms to Plaintiff and its  
2 members caused by BOR's activities.

3 23. Continuing commission of the acts and omissions alleged above will  
4 irreparably harm Plaintiff and its members, for which harm they have no plain,  
5 speedy, or adequate remedy at law.

6 24. Defendant BOR is an agency within the DOI. BOR owns and  
7 operates Bradbury Dam as part of the Cachuma Project. BOR also operates water  
8 releases into Hilton Creek, which is a tributary of the Santa Ynez River  
9 downstream of Bradbury Dam and is designated critical habitat for Southern  
10 California steelhead. BOR's Area Manager for the South-Central California Area  
11 Office, located at 1243 N Street, Fresno, CA 93721-1813, operates the Cachuma  
12 Project.

13 25. Defendant Lowell Pimley is the Acting Commissioner of the BOR  
14 ("Commissioner"), and is sued in his official capacity as the head of the federal  
15 agency responsible for the violations of the ESA alleged herein.

16 26. Defendant DOI is a United States agency in the executive branch, and  
17 is responsible for managing the resources under its jurisdiction in accordance with  
18 all applicable laws and regulations, including the ESA.

19 27. Defendant Sally Jewell is the Secretary of the DOI ("the Secretary"),  
20 and is sued in her official capacity as the head of the federal agency responsible for  
21 the violations of the ESA alleged herein.

22 28. BOR, Lowell Pimley, DOI, and Sally Jewell are hereafter collectively  
23 referred to as "Defendants."

## 24 **LEGAL BACKGROUND**

### 25 **A. The ESA Requires Conservation of Endangered Species**

26 29. Finding that "fish, wildlife, and plants are of esthetic, ecological,  
27 educational, historical, recreational, and scientific value to the Nation and its  
28

1 people,” Congress enacted the ESA in order to “provide a program for the  
2 conservation of . . . endangered species and threatened species,” and to “provide a  
3 means whereby the ecosystems upon which endangered species and threatened  
4 species depend may be conserved.” 16 U.S.C. § 1531(a)(3),(b).

5 30. The ESA, in turn, defines “conservation” as “the use of all methods  
6 and procedures that are necessary to bring any endangered species or threatened  
7 species to the point at which the measures provided pursuant to this chapter are no  
8 longer necessary.” 16 U.S.C. § 1532(3). Accordingly, the primary purpose of the  
9 ESA is not simply to prevent the extinction of imperiled species, but to recover  
10 them to the point where the protections of the ESA are not needed. *Babbitt v.*  
11 *Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 699 (1995) (citing  
12 *TVA v. Hill*, 437 U.S. 153, 184) (1978)) (noting that the “plain intent of Congress  
13 in enacting [the ESA] . . . was to halt and reverse the trend towards species  
14 extinction, whatever the cost”). Two significant ways in which the ESA  
15 implements these goals are through Section 9 and Section 7.

16 **B. The ESA Prohibits Take of Endangered Species under Section 9**

17 31. Section 9 of the ESA prohibits the “taking” of any endangered  
18 species. 16 U.S.C. §1538(a). The ESA defines the term “take” broadly to include  
19 “harass, *harm*, pursue, hunt, shoot, wound, *kill*, trap, capture, or collect, or to  
20 attempt to engage in any such conduct.” *Id.* § 1532(19) (emphasis added). “Take”  
21 includes indirect as well as direct harm and need not be purposeful. *See Sweet*  
22 *Home, supra*, 515 U.S. at 704.

23 32. “Harm” is further defined by NMFS regulations as an act which  
24 actually kills or injures fish or wildlife, including for example: “significant habitat  
25 modification or degradation which actually kills or injures fish or wildlife by  
26 significantly *impairing essential behavioral patterns*, including, breeding,  
27  
28



1 spawning, rearing, migrating, feeding or *sheltering*.” 50 C.F.R. § 222.102 (1999)  
2 (emphasis added).

3 **C. The ESA Requires Consultation under Section 7 and Requires**  
4 **Agencies to Avoid Jeopardy and Destruction or Adverse**  
5 **Modification of Critical Habitat**

6 33. Section 7(a)(2) of the ESA requires that federal agencies, such as  
7 BOR, ensure that their actions are “not likely to jeopardize the continued existence  
8 of any endangered species or threatened species or result in the destruction or  
9 adverse modification” of the species’ critical habitat. 16 U.S.C. § 1536 (a)(2).

10 34. To jeopardize the continued existence of a listed species means “to  
11 engage in an action that reasonably would be expected, directly or indirectly, to  
12 reduce appreciably the likelihood of both the survival and recovery of a listed  
13 species in the wild by reducing the reproduction, numbers, or distribution of that  
14 species.” 50 C.F.R. § 402.02 (1986).

15 35. “Critical habitat” is a legally-designated geographic area crucial to the  
16 continued viability of an endangered species, including “the specific areas within  
17 the geographical area occupied by the species, at the time it is listed . . . on which  
18 are found those physical or biological features (I) essential to the conservation of  
19 the species and (II) which may require special management considerations or  
20 protection.” 16 U.S.C. § 1532(5)(A)(i). Critical habitat also includes “specific  
21 areas outside the geographical area occupied by the species at the time it is listed . .  
22 . upon a determination by the Secretary that such areas are essential for the  
23 conservation of the species.” *Id.* § 1532(5)(A)(ii).

24 36. The destruction or adverse modification of critical habitat means “a  
25 direct or indirect alteration that appreciably diminishes the value of critical habitat  
26 for both the survival and recovery of a listed species.” 50 C.F.R. § 402.02 (1986).

1 Alterations include “alterations adversely modifying any of those physical or  
2 biological features that were the basis for determining the habitat to be critical.” *Id.*

3 37. If the agency’s action may affect a listed species, the agency must  
4 undergo consultation with the Secretary, in this case delegated to NMFS, to  
5 prepare a biological assessment. 16 U.S.C. § 1536(c). After preparing a biological  
6 assessment, if NMFS determines that the action is likely to adversely impact the  
7 listed species, it must undergo formal consultation and prepare a BiOp to  
8 determine whether the action will likely jeopardize the continued existence of the  
9 listed species or result in the destruction or adverse modification of its critical  
10 habitat. 50 C.F.R. § 402.14(g) (1986). If NMFS determines that the action is likely  
11 to jeopardize the species, it must propose reasonable and prudent alternatives that it  
12 believes would not violate the agency’s duty to ensure against jeopardy. 16 U.S.C.  
13 § 1536(b)(3).

14 **D. The ESA Strictly Limits Incidental Take**

15 38. After consultation, if NMFS concludes that jeopardy and destruction  
16 or adverse modification of critical habitat is not likely, and determines that  
17 incidental take would not violate ESA Section 7(a)(2), it must provide an  
18 Incidental Take Statement (“ITS”), which:

- 19 (i) specifies the impact of such incidental taking on the species,  
20 (ii) specifies those *reasonable and prudent measures* that the Secretary  
21 considers necessary or appropriate to minimize such impact . . . [and]  
22 (iv) sets forth the *terms and conditions* (including, but not limited to,  
23 reporting requirements) that must be complied with by the Federal agency . .  
24 . to *implement the measures* specified under clauses (ii) and (iii).

25 16 U.S.C. § 1536 (b)(4)(C) (emphasis added).

26 39. Once an ITS is adopted, the agency must comply with any specified  
27 limits on take, the reasonable and prudent measures (“RPMs”) designed to  
28

1 minimize the impacts to the species, and the terms and conditions of the ITS that  
2 implement the RPMs. *See* 16 U.S.C. § 1536 (b)(4)(C).

3 40. This provision provides a limited exception, or safe harbor, to the  
4 prohibition on take under Section 9. *See* 16 U.S.C. § 1536(o)(2). However, this  
5 exception extends only to take that is in compliance with the ITS. Taking that is  
6 “in compliance with the terms and conditions” in the ITS is “not a prohibited  
7 taking” under Section 9. 50 C.F.R. § 402.14(i)(5) (1986).

8 41. In other words, the exception to the take prohibition only covers  
9 actions “contemplated by an [ITS] issued under Section 7 of the ESA and . . .  
10 conducted in compliance with the requirements of that statement.” *Ramsey v.*  
11 *Kantor*, 96 F.3d 434, 442 (9th Cir. 1996). An exceedance of an ITS or violation of  
12 its terms and conditions invalidates the safe harbor and exposes the agency to take  
13 liability under Section 9.

14 42. In addition to constituting unlawful take, an exceedance of an ITS  
15 triggers the agency’s obligation to *immediately* reinstate consultation under  
16 Section 7. 50 C.F.R. § 402.14 (“If during the course of the action the amount or  
17 extent of incidental taking, as specified under [the ITS], is exceeded, the Federal  
18 agency must reinstate consultation immediately.”); *see also* 50 C.F.R. § 402.16  
19 (1986) (requiring reinstatement of consultation when “discretionary Federal  
20 involvement or control over the action has been retained or is authorized by law”  
21 and “the amount or extent of taking specified in the [ITS] is exceeded”).  
22 Therefore, a violation of an ITS gives rise to both Section 7 and Section 9 claims  
23 under the ESA.

1 **FACTUAL BACKGROUND**

2 **A. The Critically-Endangered Southern California Steelhead**

3 43. The endangered Southern California steelhead, an anadromous or  
4 ocean-going form of rainbow trout, is native to coastal streams along the Pacific  
5 coast from Alaska to Mexico.

6 44. Steelhead were first listed as an endangered species in 1997; the  
7 listing for Southern California steelhead was subsequently reaffirmed in 2006,  
8 classifying the species as a distinct population segment (“DPS”) under the ESA.  
9 The listing encompasses all naturally-spawned steelhead between the Santa Maria  
10 River in northern Santa Barbara County and the United States border with Mexico.  
11 Southern California steelhead are particularly endangered due to habitat loss from  
12 water development, dams, and urbanization. According to NMFS, only about 500  
13 adult, anadromous Southern California steelhead remain alive in the entire world.

14 45. The Santa Ynez River once held the largest steelhead run in Southern  
15 California, providing habitat to approximately half of the species’ historic  
16 population. Before the Dam was built, the California Department of Fish and  
17 Game and United States Fish and Wildlife Service noted that the Dam would have  
18 adverse impacts on steelhead by blocking their migration to pristine, undeveloped  
19 habitat essential to the species’ life cycle. Accordingly, the agencies recommended  
20 protective measures, including construction of a fish ladder, and warned that the  
21 population could be substantially diminished without such measures. These  
22 measures were never adopted.

23 46. After construction of the Dam, the historic Santa Ynez River Southern  
24 California steelhead population plummeted by over ninety-nine percent. The  
25 population has fallen from an estimated 12,995–25,032 anadromous adults to a  
26 mere handful, with sampling showing that less than twenty (20) anadromous adults  
27 have ever been captured or observed in a single year since the Dam was built. This  
28

1 small population persists in the lower Santa Ynez River and its tributaries such as  
2 Hilton Creek, located below the Dam.

3 **B. The Hilton Creek Watering System: A Critical Component of**  
4 **Steelhead Recovery Efforts and ESA Compliance**

5 47. Beginning on June 14, 1999, BOR undertook consultation with NMFS  
6 regarding the Cachuma Project, which includes Bradbury Dam. In September  
7 2000, NMFS issued a BiOp addressing the impacts of the Cachuma Project on the  
8 endangered Southern California steelhead and the species' critical habitat.

9 48. NMFS determined that the project would result in incidental take of  
10 Southern California steelhead and issued an ITS anticipating a limited amount of  
11 take of Southern California steelhead, wherein the only anticipated mortalities are  
12 associated with migrant trapping activities.

13 49. On May 27, 2014, BOR requested reinitiation of consultation on the  
14 Cachuma Project. However, Plaintiff is informed and believes, and thereupon  
15 alleges, that this request for reinitiation of formal consultation did not specifically  
16 address incidental take, including the take at Hilton Creek caused by pump and  
17 infrastructure failures since 2013. To date, BOR has not requested reinitiation of  
18 consultation addressing its exceedance of take specified in the ITS. In addition,  
19 BOR did not immediately request reinitiation of consultation after each incident in  
20 which it exceeded ITS take limits.

21 50. While the 2000 BiOp concluded that jeopardy was not likely, it  
22 stressed the importance of Hilton Creek to Southern California steelhead. The  
23 BiOp identifies Hilton Creek as the "first priority" for flow enhancement to protect  
24 endangered steelhead in the Santa Ynez River. Significantly, because Hilton Creek  
25 is located below Bradbury Dam, adult, migrating steelhead will turn to the Creek  
26 after they hit the Dam, since they are unable to migrate further up the River.

1           51. Further, Hilton Creek was designated as critical habitat for Southern  
2 California steelhead on September 2, 2005 due to its characteristics, which make it  
3 essential to the survival of steelhead.

4           52. NMFS issued The Southern California Steelhead Recovery Plan (“the  
5 Plan”) in 2012, which serves as a roadmap outlining actions necessary to protect,  
6 increase and recover a viable steelhead population in the region. The Plan noted  
7 the genetic importance of the steelhead in Hilton Creek, which are native Southern  
8 California steelhead, not fish planted from the Cachuma Reservoir, and not native  
9 trout hybridized with Cachuma Reservoir trout. This fact demonstrates the  
10 importance of the Hilton Creek fish population as part of the indigenous steelhead  
11 population, which harbors native steelhead genes that are critical to the species’  
12 recovery.

13           53. In light of the Santa Ynez River watershed hydrology and the existing  
14 impediments to fish passage, Hilton Creek requires artificial watering to support  
15 Southern California steelhead, which the BOR must do pursuant to the BiOp.

16           54. While small in comparison to the habitat above the Dam, Hilton  
17 Creek, when watered, provides high quality Southern California steelhead  
18 spawning and rearing habitat. After the water system installation, Hilton Creek has  
19 become vital spawning and rearing habitat, generating numerous small trout.

20           **C. The Cachuma Project 2000 Biological Opinion**

21           55. The 2000 BiOp includes an ITS describing the minimal amounts of  
22 anticipated take associated with BOR’s monitoring plan under the Cachuma  
23 Project:

24                   4) Take (observe, harass, capture, collect, and mortalities) associated  
25 with Reclamation’s monitoring plan is anticipated as follows based on  
26 the small steelhead population in the Santa Ynez River below  
27 Bradbury Dam:  
28

1 A. Observe/harass 50 adult and 400 juvenile steelhead per year  
2 (snorkel surveys, bank observations, redd counts)

3 B. Capture/release 150 adult and 110 juvenile per year with *1 adult*  
4 *unintentional mortality and 4 juvenile unintentional mortalities*  
5 (migrant trapping).

6 C. Collection of 15 steelhead carcasses per year.

7 56. In short, the only mortalities authorized under the ITS are one (1)  
8 adult unintentional mortality and four (4) juvenile unintentional mortalities  
9 associated with migrant trapping.

10 57. The 2000 BiOp provides RPMs that BOR must implement in order to  
11 comply with the terms and conditions of the ITS. Under the 2000 BiOp,  
12 “Reclamation shall maintain flows in Hilton Creek at levels currently considered to  
13 provide optimal habitat space until better data are available.” RPM No. 2. To  
14 implement this RPM, the BOR must maintain flows in Hilton Creek “at levels no  
15 lower than 2 cfs once the pump is installed and Reclamation has the ability to  
16 provide water in 98% of years unless 1) the adaptive management committee  
17 decides otherwise and NMFS approves and/or 2) transect data indicate that habitat  
18 space does not decrease significantly at flows below 2 cfs.”

19 58. In addition, RPM No. 12 provides that “Reclamation shall relocate  
20 steelhead in danger of becoming stranded should releases fail due to mechanical or  
21 human error.” In order to implement RPM No. 12, the BOR must meet the  
22 condition that “[i]f water releases to . . . Hilton Creek fail, NMFS will be contacted  
23 immediately and [the BOR] *shall relocate any steelhead that may become stranded*  
24 *to appropriate habitats.*” (emphasis added).

1           **D.     Pump Failures and Steelhead Kills at Hilton Creek since 2013**

2           59.     Since March of 2013, there have been at least eleven (11) pump  
3 infrastructure issues, many of which have interrupted flows into Hilton Creek, and  
4 at least six (6) of which have resulted in a total of at least 393 fish mortalities.

5           60.     On March 1, 2013, the Hilton Creek Watering System (“System”)  
6 stopped flowing due to a pump shutting off, resulting in fifty-six (56) steelhead  
7 mortalities and requiring rescue of twenty-five (25) steelhead.

8           61.     On June 23, 2013, the System pumps turned off due to a power  
9 outage, resulting in eighty-seven (87) steelhead mortalities and requiring rescue of  
10 one (1) steelhead.

11          62.     On July 8, 2013, flows were interrupted when switching from gravity  
12 to pumping. This pump failure did not result in any reported steelhead mortalities.

13          63.     On September 23, 2013, there was a planned power outage that  
14 resulted in a flow interruption, requiring rescue of four (4) steelhead.

15          64.     On October 25, 2013, one of the two System pumps failed, cutting the  
16 released flow in half. This pump failure did not result in any reported steelhead  
17 mortalities.

18          65.     On October 30, 2013, BOR scheduled repairs to the damaged System  
19 pump. Repair operations were completed with no change of flow to Hilton Creek  
20 and no reported steelhead mortalities.

21          66.     On November 25, 2013, BOR scheduled and partially implemented  
22 repairs to the damaged System pump. However, repairs to the pump were not  
23 completed due to missing parts and equipment.

24          67.     On March 1, 2014, the remaining System operative pump shut down,  
25 causing interruption of flow to Hilton Creek. This resulted in approximately  
26 fourteen (14) steelhead mortalities and required rescue of four (4) steelhead.  
27  
28



1           68. From March 11 to 12, 2014, the one System operative pump shut  
2 down due to a power outage. This resulted in approximately eighteen (18)  
3 steelhead mortalities and required rescue of fifty-six (56) steelhead.

4           69. On March 26, 2014, the one System operative pump shut down twice  
5 during a two-hour period. This resulted in approximately one (1) steelhead  
6 mortality.

7           70. On May 25, 2014, the one System operative pump shut down.  
8 Continuous flow through the System was not reestablished until June 10, 2014,  
9 sixteen (16) days after the initial interruption of flow. This resulted in  
10 approximately 217 steelhead mortalities and necessitated rescue of approximately  
11 543 steelhead.

12           **E. BOR's Failure to Remedy its Violations Since May 2014**

13           71. Plaintiff sent Defendant BOR a Notice Letter on May 30, 2014, in an  
14 attempt to compel BOR's compliance with the ESA, through fixing the Hilton  
15 Creek pump infrastructure, ensuring that failures would not continue, and  
16 addressing the impacts of the System failures through consultation. To date, a  
17 permanent fix to the Hilton Creek System has yet to be implemented.

18           72. Plaintiff became aware at an August 7, 2014, special meeting held by  
19 Defendant BOR and local water agencies that repairs to the Hilton Creek pumping  
20 system were still not complete, due to several fixes requiring installation of an  
21 Emergency Backup Delivery System ("Emergency System") that has yet to be  
22 implemented.

23           73. BOR indicated to Plaintiff on June 30, 2014, that a contract for the  
24 Emergency System would be awarded no later than the week of July 20 to 25,  
25 2014. On July 30, 2014, Defendant indicated to Plaintiff that a contract for the  
26 Emergency System would not be awarded within the initial timeframe, and would  
27 instead be awarded by August 22, 2014, with an estimated sixty (60) day  
28

1 completion time after award. The contract for the Emergency System construction  
2 was not ultimately awarded until September 3, 2014, and the estimated completion  
3 date has now been extended from sixty (60) days to ninety (90) days.

4 74. While BOR initiated some repairs, until installation of the Emergency  
5 System is complete, multiple fixes to the Hilton Creek Watering System will not  
6 be completed and thus continued future take of Southern California steelhead  
7 remains imminent. Defendant BOR has indicated that the Emergency System  
8 itself is temporary and that a Hilton Creek Permanent Backup System (“Permanent  
9 System”) is required to ensure adequate and consistent flows into Hilton Creek.  
10 Defendant has indicated that the Permanent System is not yet developed and will  
11 not be implemented until approximately 2016.

12  
13 **CLAIMS FOR RELIEF**  
14 **FIRST CAUSE OF ACTION**

15 **Violation of ESA Section 9 Prohibition on Take, 16 U.S.C. § 1538(a)**

16 75. Plaintiff re-alleges each and every allegation in the preceding  
17 paragraphs as if fully set forth herein.

18 76. Section 9 of the ESA prohibits the “taking” of any endangered  
19 species, including Southern California steelhead, and taking includes to kill or to  
20 harm a species. 16 U.S.C. § 1538(a); *id.* § 1532(19).

21 77. Take that is not in compliance with an ITS invalidates any safe harbor  
22 against take and constitutes a violation of Section 9.

23 78. The only mortalities anticipated in the ITS for the Cachuma Project  
24 are one (1) adult unintentional mortality and four (4) juvenile unintentional  
25 mortalities associated with migrant trapping.

26 79. Since March 2013, Defendant BOR’s inadequate operation of the  
27 Hilton Creek component of the Cachuma Project has resulted in numerous and  
28

1 ongoing endangered Southern California steelhead mortalities, with the death of at  
2 least 393 endangered steelhead due to flow interruptions caused by pump  
3 infrastructure failures, as described in paragraphs 59–70 above.

4 80. These incidents far exceed the minimal amount of take anticipated in  
5 the ITS in the 2000 BiOp for the Cachuma Project.

6 81. In addition to violating the take allowance in the ITS, Defendant BOR  
7 has failed to comply with the terms and conditions of the ITS that implement the  
8 BiOp’s RPMs. BOR is in violation of the terms and conditions of the ITS  
9 associated with RPM No. 2, described in paragraph 57 above, because it has  
10 repeatedly failed to provide optimal habitat space for Southern California steelhead  
11 in Hilton Creek by failing to maintain adequate flows.

12 82. In addition, BOR has failed to comply with the terms and conditions  
13 that implement RPM No. 12, described in paragraph 58 above, because the  
14 mortalities of Southern California steelhead associated with pump issues and flow  
15 interruptions demonstrate that BOR has failed to relocate all stranded Southern  
16 California steelhead to appropriate habitats.

17 83. BOR has not permanently fixed the pump infrastructure and  
18 mechanical problems leading to these interruptions of flow in Hilton Creek. The  
19 pump failures, and resulting fish deaths, will therefore continue to occur without  
20 immediate corrective action on the part of BOR.

21 84. BOR’s failures have resulted in the continued take of the endangered  
22 Southern California steelhead, in violation of the terms and conditions of the ITS,  
23 and in excess of the limited incidental take of the species contemplated by the ITS,  
24 in violation of Section 9(a) of the ESA, 16 U.S.C. § 1538(a).



1 first incident over a year and a half ago, on March 1, 2013, when fifty-six (56) fish  
2 died. Moreover, BOR has yet to respond to this unauthorized take by formally  
3 reinitiating consultation with NMFS *on this issue*, as required by 50 C.F.R. §§  
4 402.14(i)(4), 402.16(a) (1986).

5 91. In addition, because BOR's actions have caused and are causing such  
6 significant mortalities of endangered steelhead, BOR has failed to meet its duty  
7 under Section 7 to ensure that its action is not likely to jeopardize the continued  
8 existence of a listed species. *See* 16 U.S.C. § 1536(a)(2).

9 92. Finally, because BOR's actions have altered and continue to alter  
10 Hilton Creek, which is designated critical habitat, Defendant BOR has failed to  
11 ensure that its action is not likely to result in the destruction or adverse  
12 modification of critical habitat. *See* 16 U.S.C. § 1536(a)(2).

13 93. BOR is therefore in violation of Section 7 of the ESA for (1) its  
14 failure to adequately respond to at least 393 Southern California steelhead deaths  
15 through reinitiation of formal consultation, in connection with exceeding the  
16 amount and extent of take under the ITS, *see* 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§  
17 402.14(i)(4), 402.16(a) (1986), and for (2) failing to ensure against jeopardy to  
18 Southern California steelhead and destruction or adverse modification of the  
19 species' critical habitat. *See* 16 U.S.C. § 1536 (a)(2).

### 20 **RELIEF REQUESTED**

21 WHEREFORE, Plaintiff respectfully requests that this Court grant the following  
22 relief:

23 1. Declare that Defendants are in violation of Section 9 of the ESA, by  
24 illegally taking the endangered Southern California steelhead; and

25 2. Declare that Defendants are in violation of the ITS for the Cachuma  
26 Project, through exceedance of the ITS take allowance and violations of the  
27 terms and conditions of the ITS, in violation of Section 9 of the ESA; and  
28

1           3.     Enjoin Defendants from engaging in operations and activities that  
2 cause take of the Southern California steelhead in violation of Section 9; and

3           4.     Order Defendants to expeditiously implement a permanent fix to the  
4 Hilton Creek pumping system that will prevent future take; and

5           5.     Declare that Defendants are violating Section 7(a)(2) of the ESA by  
6 failing to reinitiate consultation with NMFS following exceeding the take  
7 allowed under the current ITS; and

8           6.     Declare that Defendants are in violation of Section 7(a)(2) of the ESA  
9 by failing to ensure that the Cachuma Project is not likely to jeopardize the  
10 continued existence of Southern California steelhead; and

11          7.     Declare that Defendants are in violation of Section 7(a)(2) of the ESA  
12 by failing to ensure that the Cachuma Project is not likely to result in the  
13 destruction or adverse modification of the Southern California steelhead's  
14 critical habitat; and

15          8.     Order Defendants to address, through reinitiated formal consultation,  
16 pursuant to Section 7(a)(2) of the ESA, the effects of the incidents of take in  
17 exceedance of that allowed under the ITS and the methods to mitigate such  
18 take; and

19          9.     Enjoin Defendants from engaging in operations and activities that  
20 cause take of the Southern California steelhead, pending completion of  
21 consultation, in violation of Section 7(a)(2); and

22          10.    Award Plaintiff's costs and fees (including reasonable investigative,  
23 attorney, witness, compliance oversight, and consultant fees) as authorized by  
24 the ESA, 16 U.S.C. § 1540(g)(4); and

25          11.    Grant such further and other relief as the Court deems just and  
26 proper.  
27  
28

1 Respectfully submitted this 6th day of October, 2014

2  
3 /S/ Nicole Di Camillo

4 Nicole Di Camillo

5  
6 /S/ Brian Segee

7 Brian Segee

8 /S/ Margaret Morgan Hall

9 Margaret Morgan Hall

10  
11 Nicole G. Di Camillo (Bar No. 283088)  
12 [ndicamillo@environmentaldefensecenter.org](mailto:ndicamillo@environmentaldefensecenter.org)

13 Margaret Morgan Hall (Bar No. 293699)  
14 [mhall@environmentaldefensecenter.org](mailto:mhall@environmentaldefensecenter.org)

15 ENVIRONMENTAL DEFENSE CENTER  
16 906 Garden Street  
17 Santa Barbara, California 93101  
18 Telephone: (805) 963-1622  
19 Facsimile: (805) 962-3152

20 Brian Segee (Bar No. 200795)  
21 [bsegee@environmentaldefensecenter.org](mailto:bsegee@environmentaldefensecenter.org)  
22 ENVIRONMENTAL DEFENSE CENTER  
23 840 County Square Drive  
24 Ventura, California 93003  
25 Phone: (805) 658-2688  
26 Facsimile: (805) 648-8092

27 *Attorneys for Plaintiff*  
28 CALIFORNIA TROUT, INC.