

INTRODUCTION

1. This citizen suit, brought under the Endangered Species Act (“ESA”), 16 U.S.C. §1540(g), seeks to enjoin The Jeannette D. Crume Trust, Sharon Keeton (nee Crume), Steve Keeton, Ronald Crume, and Rodney Crume, to provide adequate fish passage at the Fielder Dam abutting or on defendants’ property on Evans Creek, Oregon, a tributary of the Rogue River.

2. The Fielder Dam on Evans Creek is causing “take” of Southern Oregon/Northern California coast coho (“Southern Oregon coho”) salmon, which are listed as threatened under the ESA, in violation of Sections 4(d) and 9 of the ESA, 16 U.S.C. §1533(d) and 1538(a)(1)(B). The Fielder Dam is causing take of Southern Oregon coho by blocking adult salmon migration and access to spawning habitat; harming or killing adult salmon in their efforts to traverse the dam to migrate or spawn; harming or killing juvenile salmon by blocking access to rearing habitat both up and downstream of the dam; harming or killing juvenile salmon by blocking out-migration from spawning and rearing areas; harming or killing juvenile salmon by spilling them over the dam onto the concrete sill; and harming or killing juvenile salmon in their efforts to traverse the dam and the shallow reservoir created by the dam to access rearing habitat or for out-migration.

3. The Fielder Dam is owned and controlled, or is on land owned and controlled, by the Jeannette D. Crume Trust and/or Steven and Sharon Keeton and/or Sharon Keeton, Ronald Crume, and Rodney Crume.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to the ESA citizen suit provision, 16 U.S.C. § 1540(g).

5. As required by 16 U.S.C. § 1540(g)(2)(A)(i), plaintiff, WaterWatch of Oregon, provided the defendants notice of the violations described in this complaint by letter dated November 30, 2012. Plaintiff sent the notice to each of the defendants by regular U.S. mail, by

certified U.S. mail return receipt requested, and by electronic mail to Steven and Sharon Keeton. Plaintiff also provided a copy of the notice to the Secretary of Commerce, to the National Oceanic and Atmospheric Association, and to the Oregon Department of Fish and Wildlife. More than 60 days have passed since defendants received these notices and defendants have not responded to the notices.

6. Venue in this district and division is proper under 16 U.S.C. § 1540(g)(3)(A), 28 U.S.C. § 1391, and Local Rule 3-2 because Evans Creek and Fielder Dam are located in Jackson County, Oregon in this district.

PARTIES

7. WaterWatch of Oregon (“WaterWatch”) is a non-profit conservation organization dedicated since 1985 to the protection and restoration of adequate and unimpaired flows in Oregon’s rivers and streams in order to sustain native fish, wildlife, and aquatic ecosystems as well as the people and communities who depend on healthy rivers. WaterWatch is incorporated and has its headquarters in the State of Oregon. WaterWatch has worked for years in the Rogue River Basin to restore salmon and stream flows within the Basin, including work to remove significant fish passage barriers such as dams. WaterWatch has been instrumental in dam removal and flow improvement throughout the Rogue River Basin using voluntary agreements, education, and where necessary, litigation in order to protect the River, its tributaries and fish. Evans Creek is an important salmon and steelhead spawning tributary that enters the Rogue River upstream of the former site of Savage Rapids Dam. WaterWatch worked for over 21 years on the removal of Savage Rapids Dam and the fishery benefits of removing Savage Rapids Dam on the mainstem of the Rogue River are compromised by the harm caused by Fielder Dam. Of particular concern to WaterWatch are Southern Oregon coho salmon, listed as threatened under the ESA, and the impacts on Southern Oregon coho from habitat alteration, degradation, and

barriers such as dams. WaterWatch has approximately 1,000 members in Oregon. WaterWatch members participate in recreational activities such as hiking, backpacking, fishing, wildlife-viewing, and river and lake boating and kayaking throughout Oregon, including throughout the Rogue River Basin.

8. Steve and Sharon Keeton (nee Crume) live at 3316 W. Evans Creek Road, Rogue River, Oregon and, based on information and belief, own that property which is located on the west side of Evans Creek that is adjacent to, abuts and/or includes part or all of the Fielder Dam (the “West Side Property”).

9. Rodney Crume lives at 3855 W. Evans Creek Road, Rogue River, Oregon and based upon representations by Steve and Sharon Keeton, is or was a trustee of the Jeanette D. Crume trust, and/or is co-owner of the property on the east side of Evans Creek that is adjacent to, abuts, and/or includes part or all of the Fielder Dam (the “East Side Property”).

10. Ronald Crume lives at 121 Chaparral Drive, Grants Pass, Oregon and, based upon representations by Steve and Sharon Keeton, is or was a trustee of the Jeannette D. Crume trust, and/or owner of the East Side Property.

11. Jeannette D. Crume is a former owner, now deceased, of the East Side Property. In approximately 1998, the East Side Property was placed into the Jeannette D. Crume Revocable Living Trust. Either Sharon Keeton individually, or Sharon Keeton along with Rodney Crume and Ronald Crume were trustees for the trust after Mrs. Crume’s death.

12. Property records for Jackson County for the East Side Property are not clear on present ownership. It appears that the East Side Property ownership may have been in the Jeannette Crume Trust with Sharon Keeton, Ronald Crume, and Rodney Crume as trustees in the early 2000s, prior to Mrs. Crumes’ death. After Mrs. Crume’s death, it appears that attempts

were made in approximately 2002 to transfer ownership of the East-Side Property either to Rodney Crume, Ronald Crume, and Sharon Keeton as tenants in common or to Sharon Keeton individually, but a title search suggests all or some of the East Side Property ownership may currently remain with the Jeannette D. Crume Trust.

13. It further appears from Jackson County records that the Fielder Dam is owned, in whole or in part, by the owners of the East Side Property, whether the trust, Mrs. Keeton or the three tenants in common, although the dam also appears to be adjacent to, abuts, and/or is on, in whole or in part, the West Side Property.

BACKGROUND

14. Southern Oregon coho are listed as a threatened species under the Endangered Species Act. 50 C.F.R. 223.102. Southern Oregon coho were first proposed for listing in July of 1995, 60 Fed. Reg. 38011 (July 25, 1995), and first listed as threatened in May of 1997. 62 Fed. Reg. 24588 (May 6, 1997). The listing was reaffirmed in June of 2005. 70 Fed. Reg. 37160 (June 28, 2005).

15. Southern Oregon coho salmon populations have declined precipitously over the past several decades. Habitat degradation, including blocked or decreased access to habitat and blocked or decreased ability to migrate to and from spawning grounds in tributary streams due to man-made or man-caused obstacles, has been a major factor in the decline. In proposing to list Southern Oregon coho salmon as threatened under the ESA, the National Marine Fisheries Services (“NMFS”) found that dams and the effects associated with dams such as sedimentation, loss of habitat connectivity, impairment of juvenile and adult migration, impairment of juvenile rearing, and increased stream temperatures were all factors contributing to the decline and supporting the listing of Southern Oregon coho salmon as threatened.

16. Evans Creek is a tributary to the Wild and Scenic Rogue River, entering the river

at the town of Rogue River. Evans Creek's headwaters are near the borders of the Umpqua and Rogue River National Forests.

17. Evans Creek is habitat for a variety of anadromous fish, including Southern Oregon coho. Areas of Evans Creek, particularly above river mile 9, have been identified as high quality spawning and rearing habitat for Southern Oregon coho. As a result, state and federal agencies have identified Evans Creek, and restoring access to habitat throughout the Creek, as important to the recovery of Southern Oregon coho.

18. Fielder Dam is an approximately 25 foot high dam on Evans Creek, approximately 3 miles upstream of the Creek's confluence with the Rogue River. Fielder Dam completely spans Evans Creek.

19. Fielder Dam (originally or also known as the "Old Mill" dam) was constructed in 1934 to serve as diversion dam for irrigation. Defendants do not have any valid existing water storage or diversion rights associated with Fielder Dam and the dam is no longer used or operated for irrigation diversion. Historical records show no storage or reservoir rights ever issued for Fielder Dam, though the dam does store water. The original diversion right or rights associated with the Fielder Dam have been transferred and/or cancelled and/or abandoned. There have been no authorized diversions from the reservoir or at the dam since abandonment of the dam in approximately 1986.

20. There is a fish ladder on the east side of Fielder Dam that was constructed in the mid-1940s.

21. The area above Fielder Dam is largely filled with sediment creating a shallow reservoir.

22. In 2000, the Oregon Department of Fish and Wildlife ("ODFW") investigated a

report of dead Chinook salmon at the Fielder Dam fish ladder. The agency determined the fish were unable to negotiate the jumps and turns required to traverse the poorly-designed ladder and had jumped out of the ladder onto the adjacent land where they died.

23. As early as 2002, NMFS identified Fielder Dam as a passage impediment and hazard for migrating adult and juvenile Southern Oregon coho and other salmon. The agency concluded the dam was causing a prohibited take of listed Southern Oregon coho salmon. NMFS noted at the time that there were no permits for any take at Fielder Dam.

24. Also as early as 2002, NMFS found that the fish ladder at Fielder Dam was inadequate. Among the problems identified were jump height at the bottom of the ladder, velocity barriers during certain flow conditions, blockage in the ladder, and improper placement and design of the ladder causing false attraction to the face of the dam away from the ladder.

25. Again as early as 2002, ODFW also identified Fielder Dam as a passage impediment and hazard for migrating Southern Oregon coho salmon adults and juveniles and found that the fish ladder was inadequate, allowing fish passage only in very limited flow conditions.

26. In the early 2000s, the Rogue Basin Fish Access Team, (a subgroup of the Rogue Basin Coordinating Council comprised of the eight watershed councils in the Rogue Basin), issued a fish passage report placing Fielder Dam in the top 30% of all Rogue Basin barriers needing passage improvement or removal.

27. In its Recovery Plan for Southern Oregon coho, NMFS identifies barriers such as dams as having a highly negative impact on Southern Oregon coho recovery and specifically identified dams on Evans Creek, including Fielder Dam, as a target for removal because they impeded passage to almost the entirety of Evans Creek.

28. In a 2012 letter to WaterWatch, NMFS specifically noted that Evans Creek Southern Oregon coho salmon are part of the Upper Rogue River (“URR”) population of listed Southern Oregon coho. NMFS further noted:

individuals of the URR population inhabiting Evans Creek are important for spatial and genetic diversity of the URR population. The recovery plan also identifies the headwaters of Evans Creek as an important place to provide immediate habitat restoration and threat reduction. We will be one step closer to reducing a threat to the URR SONCC coho salmon population by eliminating the fish barrier at Fielder Dam.

29. Also in 2012, ODFW wrote to WaterWatch noting:

[i]n its current condition, Fielder Dam significantly hinders upstream passage for [coho]. There is a fish ladder at Fielder Dam, however the fish ladder does not meet current criteria for jump heights, water velocities or attraction flows. Upstream adult passage at Fielder Dam is only possible under ideal flow conditions. Fielder Dam may be a complete barrier to upstream migrating juveniles under all flow conditions.

ODFW added that by removing Fielder Dam or by restoring passage, 68 miles of high quality Southern Oregon coho habitat would be made available.

30. In 2013, ODFW issued its list of priorities for removal of fish barriers and hazards to fish. ODFW identified the Fielder Dam on Evans Creek as a barrier and hazard for fish, such as listed Southern Oregon coho, and identified Fielder Dam as a top ten priority for removal statewide.

31. The Fielder Dam has been, is, and continues to be injuring and/or killing Southern Oregon coho salmon by blocking adult and juvenile migration, causing and/or contributing to increased sedimentation and increased temperatures, exposing juveniles to increased predation; and by injuring or killing adults and juveniles outright when salmon exhaust themselves in attempting to pass by the dam, when the spill over the lip of the dam to the concrete sill below, or when they jump out of the poorly-designed ladder.

32. Jackson County property records show the West Side Property is owned by Steve

and Sharon Keeton. The Keeton's have owned the property on the west side of Fielder Dam at least since the 2002 inspections of Fielder Dam by NMFS and ODFW.

33. Jackson County property records show the East Side Property is owned either by the Jeannette D. Crume Trust (trustees Sharon Keeton nee Crume, or Sharon Keeton with Rodney Crume and Ronald Crume), or Sharon Keeton, Rodney Crume and Ronald Crume, individually or as tenants in common. The property on the east side of Fielder Dam has been owned by some member of the Crume family or the Jeannette D. Crume trust since before the 2002 inspections of Fielder Dam by NMFS and ODFW.

CAUSES OF ACTION

COUNT I

34. WaterWatch restates and realleges all preceding paragraphs.

35. The ESA prohibits any person from "taking" an endangered species. 16 U.S.C. § 1538(a)(1)(B). The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

36. By regulation, NMFS has defined "harm" to include:

Significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.

50 C.F.R. § 222.102. "Harassment" includes unintentional acts that make it more difficult for an endangered species to breed, feed, shelter, reproduce or raise its offspring. H.R. Rep. No. 412, 93rd Cong. 1st Sess. at 11 (1973); 50 C.F.R. § 17.3.

37. NMFS has also asserted that its definition of "harm" is consistent with the definition of "harm" in regulations promulgated by the U.S. Fish and Wildlife Service which definition includes failure to act where a person has a duty to do so in order to avoid or prevent the harm. *See* Fish and Wildlife Serv., Endangered and Threatened Wildlife and Plants; Final

Redefinition of “Harm,” 46 Fed. Reg. 54,748, 54,750 (Nov. 4, 1981) (stating in response to comments that “the Service feels that ‘act’ [in the definition of ‘harm’] is inclusive of either commissions or omissions which would be prohibited by section 9”).

38. Under Section 4(d) of the ESA, 16 U.S.C. § 1533(d), NMFS has the authority to issue regulations extending the take prohibition to threatened species. NMFS has adopted a regulation pursuant to Section 4(d) making the take prohibition applicable to Southern Oregon coho salmon. 50 C.F.R. § 223.203; *See also* 65 Fed. Reg. 42422 (July 10, 2000) and 70 Fed. Reg. 37160 (June 28, 2005). Under 16 U.S.C. § 1538(a)(1)(G), it is unlawful to take threatened Southern Oregon coho salmon in violation of the Section 4(d) regulation.

39. The ESA take prohibition applies to all “persons.” 16 U.S.C. § 1538(a)(1). The ESA defines a “person” to include an individual, corporation, partnership, trust, association or any other private entity. 16 U.S.C. § 1532(13). The defendants in this case are “persons” as defined by the ESA.

40. The ESA citizen suit provision authorizes suits to enforce the ESA and its implementing regulations against any person who is alleged to be in violation of any provision of the ESA or regulations implementing the ESA. 16 U.S.C. § 1540(g).

41. Defendants, as the owners of Fielder Dam, have violated and continue to violate the take prohibitions in Section 9 of the ESA by failing to remove the dam or provide adequate fish passage at the dam as required by Oregon law, which failure has caused and continues to cause harm, harassment, injury and death to Southern Oregon coho salmon.

42. Defendants are maintaining a dam and causing water to be stored behind a dam for which they have no valid storage or diversion right under Oregon water law. Under Oregon law a person may not construct a dam or other obstruction for water diversion or storage without

first applying for and receiving a valid water right. *See generally* ORS §§ 537.130, 537.211, and 537.400-407.

43. Oregon’s fish passage statute requires that defendants remove or provide adequate fish passage over Fielder Dam. *See* O.R.S. § 509.585(2) (“a person owning or operating an artificial obstruction may not construct or maintain any artificial obstruction across any waters of this state that are inhabited . . .by native migratory fish without providing passage for native migratory fish”); *id.* § 509.610(3) (“A person owning or operating an artificial obstruction is responsible for maintaining, monitoring, and evaluating the effectiveness of fish passage or alternatives to fish passage”).

44. Defendants’ failure to either provide adequate fish passage or remove Fielder Dam is the proximate cause of unlawful take of Southern Oregon coho.

45. Defendants are liable for the unlawful take of Southern Oregon coho salmon in Evans Creek and WaterWatch is entitled to an order enjoining defendants from continued take of Southern Oregon coho salmon, requiring either removal of the dam or provision of adequate fish passage.

COUNT II

46. WaterWatch restates and realleges all preceding paragraphs.

47. Defendants have on several occasions been informed that the Fielder Dam is killing and injuring salmon that are listed as threatened under the ESA.

48. Defendants have been approached several times, most recently by WaterWatch, with requests and offers of assistance for removal of the Fielder Dam.

49. Defendants have refused to enter into an agreement to remove the dam, have failed to remove the dam, and have failed to provide adequate fish passage at Fielder Dam.

50. Defendants are intentionally maintaining a structure that kills and injures

Southern Oregon coho salmon in violation of 16 U.S.C. § 1538. These intentional acts are the proximate cause of unlawful take of Southern Oregon coho salmon.

51. Defendants are liable for the unlawful take of Southern Oregon coho salmon in Evans Creek and WaterWatch is entitled to an order enjoining defendants from continued take of Southern Oregon coho salmon, including requiring the removal of the dam or provision of adequate fish passage.

REQUEST FOR RELIEF

WHEREFORE, plaintiffs request an order from this Court:

A. Declaring that defendants have, jointly and severally, violated the salmon 4(d) rule, 50 C.F.R. § 223.203 and the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(G), and 1538(1)(B) by failing to provide adequate fish passage at the Fielder Dam and/or by failing to remove the Fielder Dam;

B. Enjoining defendants, jointly and severally, from continuing to maintain the Fielder Dam in a manner that violates section 9 of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(G), and 1538(1)(B), because of their failure to provide adequate fish passage and requiring either removal of Fielder Dam or construction of adequate fish passage as defined by the most recent NMFS and ODFW criteria and the best commercially available fish passage science and engineering criteria, within 6 months of the court's order;

C. Enjoining defendants, jointly and severally, from continuing to use Fielder Dam to store water in the reservoir created by the dam without a permit in a manner that violation section 9 of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(G), and 1538(1)(B), and requiring either removal of the dam or drainage of the reservoir and adequate fish passage;

D. Awarding plaintiffs their costs and attorneys' fees pursuant to 16 U.S.C. § 1540(g)(4); and

E. Granting such other and further relief as the court deems just and equitable.

Respectfully submitted this _____ day of April, 2013.

KARL G. ANUTA (OSB #861423)
kga@integra.net
Law Office of Karl G. Anuta, P.C.
735 S.W. First Avenue, 2nd Floor
Portland, Oregon 97204
(503) 827-0320 | Phone
(503) 228-6551 | Fax

Local Counsel for Plaintiffs

JANETTE K. BRIMMER (WSB #41271)
jbrimmer@earthjustice.org
TODD D. TRUE (WSB #12864)
ttrue@earthjustice.org
[Pro Hac Vice Pending]
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340 | Phone
(206) 343-1526 | Fax

Attorneys for Plaintiffs