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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE DIVISION

PUYALLUP TRIBE OF INDIANS,)	No. 2:20-CV-1864
)	
Plaintiff,)	COMPLAINT
)	
vs.)	
)	
ELECTRON HYDRO, LLC; THOM A. FISCHER;)	
TOLLHOUSE ENERGY COMPANY,)	
)	
Defendants.)	
_____)	

1. Plaintiff Puyallup Tribe of Indians (“Puyallup Tribe”) files suit against Defendants Electron Hydro LLC, Thom A. Fischer, and Tollhouse Energy Company (“Electron”), to challenge operations of the Electron hydroelectric project (“Project”) on the Puyallup River in Washington. By maintaining, operating, and renovating the Project, Electron has unlawfully taken, and continues to unlawfully take, Chinook salmon, steelhead trout, and bull trout, which are listed as threatened with extinction under the Endangered Species Act (“ESA”).

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JURISDICTION

2. This Court has jurisdiction pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540, and because this case involves a federal question. 28 U.S.C. § 1331. On October 1, 2020, the Puyallup Tribe gave Electron notice of its intent to sue under the ESA. More than 60 days have elapsed since Electron received this notice. The Puyallup Tribe seeks relief authorized by the ESA and the Declaratory Judgment Act. 16 U.S.C. § 1540; 28 U.S.C. §§ 2201-02.

3. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e). Seattle is the appropriate division within this district for this suit. LCR 3(d). Defendants Electron Hydro, LLC, Thom A. Fischer, and Tollhouse Energy Company reside in Whatcom County. Two active cases exist in this division related to the Project: *American Whitewater v. Electron Hydro, LLC*, No. 2:16-cv-00047-JCC (W.D. Wash.), and *United States of America v. Electro Hydro, LLC*, No. 2:20-cv-1746-RAJ (W.D. Wash.).

4. A present and actual controversy exists between the parties to this action.

PARTIES

5. Plaintiff Puyallup Tribe of Indians is a federally recognized Indian Tribe with its Reservation located in Tacoma, Washington. The Tribe's Reservation includes the Puyallup River, and the Tribe owns the bed and banks of the Puyallup River within its reservation and downstream of the Electron Facility. The Tribe and its members have, for time immemorial, fished the waters of the Puyallup River, the Puyallup River Watershed, and Commencement Bay and the Tribe's treaty fishing rights are protected under the Medicine Creek Treaty and confirmed by the Puyallup Tribe of Indians Settlement Act of 1989. These Treaty Fishing rights, which are essential to the Tribe and its members existence and culture, have been irreversibly impacted by the Electron Hydro's actions and violations of the Endangered Species Act as identified herein.

6. Defendant Electron Hydro, LLC is a limited liability corporation registered in the State of Washington. Electron Hydro, LLC owns the Project. Electron Hydro, LLC is

1 responsible for operations of the Project. Electron Hydro, LLC is a joint venture owned by
2 Electron Management, LLC and by Electron Holdings, Inc. Electron Management, LLC is
3 owned primarily by Thom A. Fischer.

4 7. Defendant Thom A. Fischer formed or helped form Electron Hydro, LLC.
5 Thom A. Fischer supervises, manages, or directs staff at the Project. Thom A. Fischer
6 supervises, manages, or directs operations of the Project. Thom A. Fischer has decided or
7 directed when the control gate on the intake to the flume is shut to prevent water from
8 entering the flume, or opened to allow it. Thom A. Fischer has decided or directed when the
9 forebay at the Project is drained. Thom A. Fischer has applied for permits to perform the
10 Diversion Repair and Spillway Replacement Project. Thom A. Fischer decided or directed
11 other elements of the Project, such as components of the Diversion Repair and Spillway
12 Replacement Project.

13 8. Defendant Tollhouse Energy Company is owned by Thom A. Fischer.
14 Tollhouse Energy Company is developing hydroelectric projects in the states of Washington
15 and Montana. Tollhouse Energy Company owns part of Valtec Power, LLC. Valtec Power,
16 LLC owns Black Creek hydroelectric project. Black Creek hydroelectric project is affiliated
17 with Electron Hydro, LLC. Thom A. Fischer uses or has used a Tollhouse Energy Company
18 email for work associated with the Project. Thom A. Fischer uses or had used a Tollhouse
19 Energy Company email to correspond with the Washington Department of Fish and Wildlife
20 about obtaining a Hydraulic Project Approval permit.

21 **FACTS**

22 9. The Puyallup River originates on Mount Rainier in the Cascade Mountains in
23 Washington. The Puyallup River flows approximately 65 miles to Commencement Bay in
Puget Sound. The Puyallup River watershed forms the third largest tributary to Puget Sound.
The Puyallup River watershed encompasses approximately 665,000 acres (approximately
1000 square miles).

1 10. Nine native salmonid species inhabit the Puyallup River watershed. These
2 species include Chinook salmon, coho salmon, chum salmon, pink salmon, sockeye salmon,
3 steelhead trout, bull trout, and cutthroat trout. Certain of these salmonids are important prey
4 for orcas in Puget Sound.

5 11. Historically, the Puyallup River and its tributaries supported approximately
6 42,000 Chinook salmon (*Oncorhynchus tshawytscha*). In 1999, the National Marine Fisheries
7 Service (“NMFS”) listed Chinook salmon in Puget Sound, including in the Puyallup River, as
8 threatened with extinction under the ESA. In 2007, NMFS adopted a Recovery Plan for
9 Chinook. As of 2007, escapement of Chinook in the Puyallup River watershed (including
early/spring returns to the White River) was estimated to be 1,300 fish.

10 12. Adult Chinook salmon migrate up the Puyallup River generally from June
11 through October. Adult Chinook salmon in the Puyallup River spawn generally in September.
12 Adult Chinook salmon in the Puyallup River spawn upstream of the Project. Chinook salmon
13 in the Puyallup River emerge from redds generally in February. Chinook salmon in the
14 Puyallup River outmigrate generally in April through June. Chinook salmon are present at the
Project site at least from April through October.

15 13. Historically, the Puyallup River and its tributaries supported approximately
16 6,000 steelhead trout (*Oncorhynchus mykiss*). In 2007, NMFS listed steelhead trout in Puget
17 Sound, including in the Puyallup River, as threatened with extinction under the ESA. The
18 current steelhead population in the Puyallup River watershed is approximately 1,500 adults.

19 14. Anadromous steelhead trout migrate up the Puyallup River generally in March
20 through May. Steelhead trout in the Puyallup River spawn generally in April through June.
21 Steelhead trout in the Puyallup River spawn upstream of the Project. Steelhead trout in the
22 Puyallup River emerge from redds generally in June through August. Steelhead trout in the
23 Puyallup River rear in the river generally for two years. Steelhead trout in the Puyallup River
may rear in the river for up to seven years. Steelhead trout are present in the Puyallup River
throughout the year. Steelhead trout migrate through parts of the Puyallup River throughout

1 the year. Steelhead trout are present at the Project site throughout the year. Anadromous
2 steelhead trout in the Puyallup River outmigrate throughout the year, with peak out-migration
3 occurring from March to July.

4 15. Historically, the Puyallup River and its tributaries supported bull trout
5 (*Salvelinus confluentus*). In 1999, the U.S. Fish and Wildlife Service (“FWS”) listed
6 populations of bull trout in the Coastal/Puget Sound region in Washington, including in the
7 Puyallup River, as threatened with extinction under the ESA. In the Coastal/Puget Sound
8 region, the Puyallup River is one of eight “core areas” for bull trout. Bull trout populations in
9 the Puyallup River include anadromous, fluvial, and resident populations. Bull trout in the
10 Puyallup River are the southernmost, anadromous bull trout population in the Coastal
11 Recovery Unit. Maintaining the bull trout population in the Puyallup is critical to maintaining
12 the overall distribution of migratory bull trout in the Recovery Unit.

13 16. Bull trout are present at the Project site throughout the year. The Project site
14 provides foraging, migration, and overwintering habitat for bull trout. Bull trout in the
15 Puyallup River spawn generally in September. Bull trout in the Puyallup River spawn in
16 reaches of the river upstream of the Project. Bull trout in the Puyallup River emerge from
17 redds generally in March through April. In 2004, the Service issued a draft Recovery Plan for
18 the Coastal/Puget Sound bull trout. The abundance target for bull trout in the Puyallup River
19 is 1,000 adults. Currently, fewer than 100 adult bull trout spawn annually in the upper
20 Puyallup River and its tributaries.

21 17. The Project is located on the Puyallup River in the foothills of Mount Rainier,
22 about 42 miles southeast of Seattle, in Pierce County. Puget Sound Power & Light Company
23 began building the Project in 1902 and completed it in 1904. On November 14, 2014, Puget
24 Sound Energy sold the Project to Electron Hydro, LLC.

25 18. The Project includes a headworks facility at river mile 41.7. Historically, the
26 headworks facility included a timber crib diversion structure that was approximately 200 feet
27 long and spanned the river. The diversion structure slows water for diversion. The purpose of

1 the headworks facility is to divert water from the Puyallup River into a flume that carries
2 water downslope to an artificial lake where sediment is dropped from the water by a slowing
3 of the flow, and then to a forebay where water is slowed again until it exits the forebay
4 through penstocks leading to turbines at the powerhouse. At the powerhouse, which is
5 significantly lower than the forebay in elevation, the water has significant force and is forced
6 through the turbines to generate electricity.

7 19. The Puyallup River upstream of the Project conveys sediment. The headworks
8 facility traps sediment. The Puyallup and Mowich Rivers convey approximately 900,000 to 1
9 million tons of sediment annually into Commencement Bay.

10 20. The headworks facility includes an intake immediately upstream of the
11 diversion structure. The intake exists in the water slowed behind the diversion structure. The
12 intake is 52-feet wide and five-feet tall. The intake includes a gate. The gate can be opened or
13 shut. When the gate is open, water flows into a flume. When the gate is shut, water does not
14 flow into a flume.

15 21. The Project includes a flume to transport water downslope to the forebay. The
16 flume is approximately 10.1 miles long. After water enters the flume, it passes over rock
17 chutes. The rock chutes are designed to divert or flush out of the flume bedload such as rocks
18 and cobbles. Flows from the rock chutes return to the river. Flows from the rock chutes attract
19 Chinook salmon. Flows from the rock chutes attract steelhead trout. Flows from the rock
20 chutes attract bull trout. Flows from the rock chutes impede migration of fish.

21 22. After passing over the area of the rock chutes, water in the flume flows to a
22 settling basin. The settling basin is approximately 1,600 feet-long. The purpose of the settling
23 basin is to have sediment settle for removal. No gates or other devices on the flume at the
entrance to or from the settling basin prevent water from continuing downslope. Periodically,
Electron ceases to divert water at the headworks facility to clean the settling basin. When it
cleans the settling basin, Electron does not first seek to trap or net any fish.

1 23. Water exiting the settling basin flows into a forebay above the powerhouse.
2 The forebay is approximately 20 acres in size. Water from the forebay flows into five
3 penstocks, and then into a powerhouse. The opening of each penstock is covered by a trash
4 rack of steel bars spaced roughly one inch apart. The powerhouse includes five Pelton wheels
5 each connected to a generator.

6 24. In 1998, facilities were built in the forebay to seek to capture any fish. The
7 purpose of the facilities is to capture fish and transport them into the Puyallup River
8 downstream of the powerhouse. The facilities include a guide net. The guide net remains in
9 place and functions at all times. The facilities include a fish trap. The facilities include a fish
10 holding area. The facilities include an adjustable weir gate. The fish capture facilities in the
11 forebay are automated. The fish capture facilities operate based on water elevation. The fish
12 capture facilities operate when the Project is producing electricity.

13 25. Fish captured in the forebay are transferred downstream.

14 26. Electron has diverted water from the Puyallup River in order to produce
15 electricity. Electron has diverted Chinook salmon into the intake, flume, and forebay. Electron
16 has diverted steelhead trout into the intake, flume, and forebay. Electron has diverted bull
17 trout into the intake, flume, and forebay.

18 27. When water is diverted from the Puyallup River, different species of fish are
19 diverted into the forebay. Chinook salmon are periodically present in the forebay. Steelhead
20 trout are periodically present in the forebay. Bull trout are periodically present in the forebay.
21 Cutthroat trout are periodically present in the forebay. Coho salmon are periodically present
22 in the forebay. Fish may be present in the forebay for significant periods of time. Bull trout in
23 the forebay prey on Chinook salmon. Bull trout in the forebay prey on steelhead trout.
Steelhead trout in the forebay prey on bull trout. Cutthroat trout in the forebay prey on
Chinook salmon. Cutthroat trout in the forebay prey on steelhead trout. Cutthroat trout in the
forebay prey on bull trout.

1 28. Periodically, Electron attempts to collect fish in the forebay in order to release
2 them downstream. The collection facilities do not collect all Chinook salmon. The collection
3 facilities do not collect all steelhead trout. The collection facilities do not collect all bull trout.
4 Chinook salmon pass through the trash rack and are entrained in the penstocks or turbines.
5 Steelhead trout pass through the trash rack and are entrained in the penstocks or turbines. Bull
6 trout pass through the trash rack and are entrained in the penstocks or turbines.

7 29. Some Chinook salmon are harmed or die when collected in the forebay. Some
8 Chinook salmon are harmed or die when the guide net is maintained. Some steelhead trout are
9 harmed or die when collected in the forebay. Some steelhead trout are harmed or die when the
10 guide net is maintained. Some bull trout are harmed or die when collected in the forebay.
11 Some bull trout are harmed or die when the guide net is maintained.

12 30. Periodically, Electron ceases to divert water in order to dewater the forebay.
13 Electron dewateres the forebay to remove sediment and debris from the bed of the forebay.
14 Electron dewateres the forebay to remove debris from the debris racks at the entrance to the
15 penstocks. To dewater the forebay, Electron closes the gate in the intake.

16 31. Before Electron dewateres the forebay, it attempts to collect Chinook salmon
17 from the forebay. Before Electron dewateres the forebay, it attempts to collect steelhead trout
18 from the forebay. Before Electron dewateres the forebay, it attempts to collect bull trout from
19 the forebay. Some Chinook salmon are harmed or die when they are collected. Some
20 steelhead trout are harmed or die when they are collected. Some bull trout are harmed or die
21 when they are collected.

22 32. The mean annual flow of the Puyallup River at the headworks facility is 527
23 cubic feet per second (“cfs”). The Project diverts up to 400 cfs. Diverting water decreases
flows downstream in a 10.5-mile section of the Puyallup River. This section is called the
“bypass reach” or “middle reach.” In the summer, the diversion of water decreases flows in
the bypass reach by up to 50%. In the late fall and winter, the diversion of water decreases
flows in the bypass reach up to 70%. In spring and early fall, the diversion of water decreases

1 flows in the bypass reach up to 90%. In the summer, water temperatures in the bypass reach
2 increase 3.8 degrees Fahrenheit. Minimum flow in the bypass reach is 80 cfs from July 15 to
3 November 15. Minimum flow in the bypass reach is 60 cfs from November 16 to July 14.
4 Reduced flows in the bypass reach degrades habitat for bull trout in the Puyallup River.

5 33. In 1997, Puget Sound Energy and the Puyallup Tribe entered into a Resource
6 Enhancement Agreement.

7 34. Approximately 26 miles of fish habitat exists in the mainstem Puyallup River
8 upstream of the headworks facility. Approximately eight miles of fish habitat exists in
9 tributaries to the Puyallup River upstream of the headworks facility.

10 35. When the headworks facility was built, it did not include facilities that would
11 allow Chinook salmon to migrate above it. When the headworks facility was built, it did not
12 include facilities that would allow steelhead trout to migrate above it. When the headworks
13 facility was built, it did not include facilities that would allow bull trout to migrate above it.

14 36. Beginning in 1997, the Puyallup Tribe planted Chinook salmon into
15 acclimation ponds upriver from the Project. In 2000, Puget Sound Energy built a fish ladder
16 on the right (east) side of the river opposite of the intake. The river thalweg is on the right
17 (east) side of the river. The ladder can function as both a pool/weir system and a roughened
18 channel. To function properly, the ladder must remain connected to the river above and below
19 the headworks facility. To function properly, flows through the ladder must range between 10
20 and 52 cfs. To function properly, flows through the ladder must enable fish to stage before
21 entering the ladder, and allow fish to jump into the ladder.

22 37. The fish ladder enabled upstream fish passage at the headworks facility for the
23 first time since the headworks facility was built. Chinook salmon use the ladder and migrate
upstream of the headworks facility, and spawn upstream. Steelhead trout use the ladder and
migrate upstream of the headworks facility, and spawn upstream. Bull trout use the ladder and
migrate upstream of the headworks facility, and spawn upstream.

1 38. Electron has sought to renovate the Project. In a phase 1, Electron proposed to
2 repair the wooden crib diversion structure and replace the then-existing spillway. Electron
3 proposed to replace the spillway with a 70-foot wide rubber bladder spillway. A purpose of
4 the bladder is to enable Electron to pass sediment loads. A purpose of the bladder is to enable
5 Electron to better control flows into the intake. In phase 1, Electron proposed to install
6 approximately 985 feet of bank protection along the left (west) bank. In phase 1, Electron
7 proposed to place concrete of varying depth in front of the intake structure to allow for
8 installation of a trash rack and other facilities.

9 39. The U.S. Army Corps of Engineers authorized certain aspects of Electron’s
10 proposed work. Pierce County authorized certain aspects of Electron’s proposed work.

11 40. In 2020, Electron began some proposed work. Electron built a coffer dam and
12 diverted the Puyallup River to the right (east). Electron lined the diversion channel with
13 approximately 2,400 square yards of artificial turf. Some artificial turf tore. Some artificial
14 turf was released into the Puyallup River. Approximately six cubic yards of rubber pellets
15 from artificial turf were released or deposited into the Puyallup River. Amounts of the rubber
16 pellets remain in the Puyallup River. The amounts of rubber pellets are toxic to fish or other
17 aquatic life in the Puyallup River.

18 41. In 2020, Electron placed concrete on the left (west) bank of the river upstream
19 of the headworks facility. Electron placed concrete on the left (west) bank of the river
20 downstream of the headworks facility. Electron placed concrete near the intake to build a
21 trash rack.

22 42. In 2020, Electron removed the spillway portion of the wooden diversion
23 structure. In 2020, Electron did not replace the removed portion with a rubber bladder
spillway. In 2020, Electron built a rock dam where the removed portion of the spillway had
existed. The rock dam entrains downstream migrating adult fish. The rock dam entrains
downstream migrating smolts. The rock dam creates attraction flows and impede upstream
migration of fish. The rock dam prevents upstream migration of fish.

1 43. The diversion of the river in 2020 created higher water velocities at the base of
2 the fish ladder than historically existed. The diversion of the river scoured the area at the base
3 of the fish ladder. The scouring of the river increased the distance from the river to the bottom
4 step of the fish ladder. The river velocities and increased distance to the bottom step rendered
5 the fish ladder inoperable to fish passage. During 2020, the fish ladder was rendered
6 impassable to Chinook salmon. During 2020, the fish ladder was rendered impassable to
7 steelhead trout. During 2020, the fish ladder was rendered impassable to bull trout. Because
8 the fish ladder was rendered impassable for a period of time, most of the run of adult Chinook
salmon returning to spawning areas above the headworks facility in 2020 was lost.

9 44. On July 29, 2020, Electron dewatered the forebay. A fish biologist for the
10 Washington Department of Fish and Wildlife was present when the forebay was dewatered.
11 The biologist issued a report of what she witnessed. The biologist estimated “thousands” of
12 fish were killed during dewatering, handling or transport. Chinook salmon were killed during
13 the forebay dewatering, handling, or transport. Steelhead trout were killed during the forebay
14 dewatering, handling, or transport. Bull trout were killed during the forebay dewatering,
handling, or transport.

15 45. Electron does not possess a federal permit or other federal authorization[s] that
16 authorizes it to “take” Chinook salmon in maintaining or operating the Project. Electron does
17 not possess a federal permit or other federal authorization[s] that authorizes it to “take”
18 steelhead trout in maintaining or operating the Project. Electron does not possess a federal
19 permit or other federal authorization[s] that authorizes it to “take” bull trout in maintaining or
operating the Project.

20 CLAIM FOR RELIEF

21 *Count One: Violation of the Endangered Species Act.*

22 46. The Puyallup Tribe realleges all previous paragraphs.

23 47. Section 9 of the ESA prohibits any person from taking an endangered species.
16 U.S.C. § 1538(a)(1)(B). NMFS extended the take prohibition to Chinook salmon and

1 steelhead trout as species listed as threatened with extinction. 50 C.F.R. § 223.203(a). FWS
2 extended the take prohibition to bull trout as a species listed as threatened with extinction. 50
3 C.F.R. § 17.31(a). The ESA defines “take” to mean “to harass, harm, pursue, hunt, shoot,
4 wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C.
5 § 1532(19). The ESA defines a “person” to include “an individual, corporation, partnership,
6 trust association, or any other private entity” 16 U.S.C. § 1532(13). Electron has
7 violated, is violating, and will continue to violate Section 9 of the ESA, by causing or
8 committing “take” of Chinook salmon, steelhead trout, and bull trout, through its ownership,
9 maintenance, operation, and renovation of the Project.

10 48. The ESA defines “take” to mean “to harass, harm, pursue, hunt, shoot, wound,
11 kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. §
12 1532(19). “Harass” means “an intentional or negligent act or omission which creates the
13 likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt
14 normal behavioral patterns which include, but are not limited to, breeding, feeding, or
15 sheltering.” 50 C.F.R. § 17.3. “Harm” means “an act which actually kills or injures wildlife.
16 Such act may include significant habitat modification or degradation where it actually kills or
17 injures wildlife by significantly impairing essential behavioral patterns, including breeding,
18 feeding or sheltering.” 50 C.F.R. § 17.3. When Electron lined the Puyallup River with
19 artificial turf, and the artificial turf released toxic pellets into the river, Electron harmed and
20 harassed Chinook salmon and steelhead and bull trout.

RELIEF REQUESTED

- 21 1. Declare that Electron has violated the ESA as alleged herein;
- 22 2. Order Electron to cease diverting water and fish from the Puyallup River in the
23 period before it obtains incidental take permits from NMFS and from FWS;
3. Order Electron to obviate take of fish caused by the rock dam and the fish
ladder, when rendered inoperable or not properly operated;

1 4. Award the Puyallup Tribe its reasonable attorneys' fees and costs under the
2 ESA;

3 5. Grant such other relief as the Court deems necessary and proper.

4 Respectfully submitted this 30th day of December, 2020,

5 THE PUYALLUP TRIBE OF INDIANS

6 By: s/ Lisa AH Anderson

7 By: s/ Samuel J. Stiltner

8 By: s/ Lois Y. Boome

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