

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

CENTER FOR BIOLOGICAL DIVERSITY,)
WILDWEST INSTITUTE,)
)
Plaintiffs,)
)
and)
)
THE STATE OF MONTANA)
)
Plaintiff-Intervenor,)
v.)
)
U.S. FISH AND WILDLIFE SERVICE,)
U.S. ARMY CORPS OF ENGINEERS,)
)
Defendants,)
)
and)
)
KOOTENAI TRIBE OF IDAHO,)
)
Defendant-Intervenor.)
_____)

Case No. CV 03-29 DWM

**STIPULATED SETTLEMENT
AGREEMENT**

WHEREAS Plaintiffs Center for Biological Diversity ("CBD") and the Ecology Center ("Plaintiffs") filed this action on February 18, 2003 pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq.: (1) seeking to compel the U.S. Army Corps of Engineers ("Corps") to reinitiate consultation pursuant to ESA Section 7(a)(2) with the U.S. Fish and Wildlife Service ("the Service") regarding the effects of the operations of Libby Dam on the

endangered Kootenai River white sturgeon; (2) challenging the Corps' implementation of the reasonable and prudent alternatives found in the Service's 2000 biological opinion ("BiOp") regarding the operations of Libby Dam; and (3) challenging the Service's critical habitat designation for the sturgeon (66 Fed. Reg. 46548 (Sept. 6, 2001)); and

WHEREAS in July 2003, the Corps voluntarily reinitiated ESA § 7 consultation with the Service and the Court granted Federal Defendants' motion to dismiss Plaintiffs' claim seeking to compel reinitiation of consultation and stayed Plaintiffs' claims regarding the Corps' alleged failure to implement the 2000 BiOp's reasonable and prudent alternatives ("RPAs") (Dckt. No. 19); and

WHEREAS the Court allowed Plaintiffs' challenge to the critical habitat designation to go forward and on May 25, 2005 granted Plaintiffs' motion for summary judgment on count III, ordering the Service to submit a new final critical habitat designation for publication in the Federal Register by February 1, 2006 (Dckt. Nos. 49, 57); and

WHEREAS on February 8, 2006, the Service published a new critical habitat designation for the sturgeon in the Federal Register (71 Fed. Reg. 6383 (Feb. 8, 2006)), which added approximately 6.9 river miles of the Kootenai River in Boundary County, Idaho to the 11.2 miles previously designated as critical habitat for the Kootenai sturgeon; and

WHEREAS to meet the Court-ordered deadline for submission to the Federal Register, the critical habitat designation was submitted for publication as an interim final rule without prior opportunity for public comment because prior notice and public procedure would have been impracticable; and

WHEREAS the Service stated in the interim final rule that it would issue a new final rule

to replace the interim final rule after considering all comments received during the public comment period; and

WHEREAS the Service issued a new BiOp on February 18, 2006, which considered the effects of the Corps' and the Bonneville Power Administration's ("BPA") proposed operation of Libby Dam in Idaho and Montana on the endangered Kootenai sturgeon and the sturgeon's newly designated critical habitat; and

WHEREAS on April 10, 2006, the Court approved the Parties' joint stipulation in which Plaintiffs agreed to voluntarily dismiss, with prejudice, counts I and II of their original complaint pursuant to Fed. R. Civ. P. 41(a) (Dckt. No. 71); and

WHEREAS on September 17, 2007 Plaintiffs filed an amended complaint (Dckt. No. 124), which sought to: (1) compel the Service to withdraw the 2006 BiOp; (2) enjoin the Corps from implementing the 2006 BiOp; (3) compel the Corps to reinitiate ESA § 7 consultation with the Service for preparation of a new BiOp and to implement the reasonable and prudent alternatives of the previous 2000 BiOp ; and (4) compel the Service to issue a final rule for the sturgeon's critical habitat designation; and

WHEREAS the State of Montana filed a complaint in intervention alleging that the Service violated the ESA in connection with the promulgation of the 2006 BiOp (Dckt. No. 93) and the Kootenai Tribe of Idaho intervened as a Defendant, filing answers to the intervenor complaint and to Plaintiffs' amended complaint (Dckt. Nos. 101, 102, 130); and

WHEREAS on July 9, 2008 a final critical habitat designation for the Kootenai River population of white sturgeon was published in the Federal Register, 73 FR 39506; and

WHEREAS the action agencies for Libby Dam operations (the "Action Agencies") are

the Corps and the Bonneville Power Administration ("BPA"), a non-Party to this litigation; and

WHEREAS, the Parties agree that settlement of this action in this manner is in the public interest and is an appropriate way to resolve the dispute between them;

THE PARTIES AGREE AND STIPULATE AS FOLLOWS:

REQUEST FOR CLARIFICATION OF 2006 BIOLOGICAL OPINION

1. On behalf of the Action Agencies, the Corps^{1/} agrees to submit a request to the Service within 30 days of execution of this Agreement by all Parties requesting the Service to clarify the 2006 Biological Opinion. The request for clarification of the RPA shall be substantially similar to Exhibit A attached hereto (draft request for clarification of RPA).

2. The Service shall, in good faith, consider the Action Agencies' request within 30 days of its receipt and notify the Parties of its intent to either clarify the 2006 Biological Opinion RPA, or determine that clarification is not warranted. If the Service determines clarification of the RPA is warranted, it shall issue a clarification of the RPA within 60 days after making such a determination. Any clarified RPA shall state that the Action Agencies are required to reinitiate consultation in the event that any of the reinitiation triggers set forth in 50 C.F.R. § 402.16 arise, and that failure to implement the RPA will trigger a duty to reinitiate if such failure causes an effect to the Kootenai white sturgeon or its designated critical habitat in a manner or to an extent that the Service did not previously consider.

3. The Parties agree that the Service, in coordination with the regional team of biologists from the entities identified in the Flow Plan Implementation Protocol (FPIP) and the

^{1/} Because BPA is a nonparty to this litigation and is exempted from suit in district court under the Northwest Power Act, BPA is not a signatory to this stipulated settlement agreement. *See* 16 U.S.C. § 839f(e)(5).

Action Agencies, shall, in good faith, make a determination in 2008 and in 2009 as to whether interim operations at Libby Dam have been successful in providing for sturgeon reproductive and spawning needs.

4. The Parties agree and acknowledge that determining success (*i.e.*, documenting spawning, incubation, and recruitment in the braided reach) is inherently difficult. As such, the Action Agencies agree to include the following criteria for determining success of the interim operations (2008 and 2009) as part of their request to the Service for clarification of the 2006 Biological Opinion:

- a. Migration of 40% of the tagged F4 fish in the river to the Hwy 95 bridge or above; and
- b. Presence of those fish in the reach of river at or above the Hwy 95 Bridge for 5 or more days; and
- c. Capture of > 5 unmarked juveniles of the same cohort in 2009 from 2006 or 2007 year classes, when improved temperature control and a descending limb were integral components of sturgeon operations at Libby Dam.

The Parties agree that these criteria will apply only to evaluation of the success of interim operations, and are not intended to govern any other determination.

5. The Service will, in coordination with the team of regional biologists and the Action Agencies, evaluate the success of the interim operations on the basis of the criteria set forth in Paragraph 4, and will advise the Parties and the Action Agencies of its determination. If the Service determines that interim operations were not successful, Montana agrees to provide a waiver of its water quality standard for total dissolved gas (TDG), currently 110%, for the

purpose of providing voluntary spill above powerhouse capacity from Libby Dam for the benefit of ESA listed sturgeon. The compliance point for measuring TDG will be USGS Gauge at RM 221.3. The waiver of Montana's water quality standard will be subject to the following conditions:

- a. The waiver of Montana's water quality limit for total dissolved gas (TDG) issued by the Montana Department of Environmental Quality (DEQ) shall be solely for purposes of allowing the spill test described herein to go forward without violating Montana's Water Quality Act;
- b. The Montana DEQ waiver shall not be interpreted as having any application beyond this agreement, nor shall anyone use, rely upon, cite or repeat the fact of this waiver as precedent for any proposition in this matter or any other, or as indication of the biological, technical or legal merit of such waiver, except as may be necessary to evaluate the efficacy of the spill test;
- c. Water temperature shall be maintained at or above 8 degrees centigrade, as measured at the USGS gauge just downstream of Libby Dam;
- d. Tagged sturgeon must be documented at or upstream of Ambush Rock;
- e. The spill will be targeted in the minimum amount of 5,000 cfs, potentially to a maximum of 10,000 cfs;
- f. Notwithstanding the waiver described above, in order to reduce the incidence of gas bubble trauma (GBT) in bull trout and other resident fish, TDG in excess of Montana's water quality standard of 110% caused by spill shall be limited to seven (7) days during each calendar year, excluding any unforeseen flood control

measures that do not coincide with sturgeon related spills intended to satisfy the objectives of this agreement;

- g. TDG during the spill event shall never exceed a standard of 123%, as measured at the USGS Gauge at RM 221.3;
- h. If fish mortality from GBT is observed in any Kootenai River fish, spill shall be reduced to maintain TDG at or below 120%, remaining subject to the seven (7) days period during which TDG is in excess of 110%; and
- i. Subject to the foregoing condition, terms and limitations, the waiver of Montana's water quality limit for total dissolved gas (TDG) shall be issued in subsequent years until the Kootenai River Restoration Project is implemented or until expiration of the 2006 Biological Opinion, whichever comes first; and
- j. Notwithstanding the above, if spill is demonstrably harming sturgeon or other fish at a population level, significantly impeding the ability to maintain a gradual decline in flow after the spring pulse, or causing the Kootenai River to exceed flood control limits at Bonners Ferry, Idaho or below Libby Dam, spill shall cease.

6. The Corps agrees to initiate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, process for structural modifications to the Libby Dam Selective Withdrawal System by March 31, 2009. In the event that an environmental impact statement is found to be unnecessary, the Corps will initiate NEPA analysis with a targeted completion date of March 31, 2010. Further, in the event that an environmental impact statement is found to be unnecessary, the Corps agrees to initiate construction implementing the selected alternative, and

complete such construction, as soon as practicable following completion of NEPA analysis with a targeted completion date of December 2012. Federal Defendants agree to inform CBD if the schedule for substantial completion of said structural modifications is delayed beyond December 2012.

7. The Federal Defendants agree to cooperate in good faith with and support the Tribe's good-faith efforts to implement the Kootenai River Restoration Project Master Plan, including developing a funding strategy to implement the Plan. The targeted deadline for completion of the Master Plan/Feasibility Study, which will include a proposed funding analysis, is December 2008. The Federal Defendants, in coordination with the Kootenai Tribe, agree to inform CBD of the proposed schedule for completion of the Kootenai River Restoration Project within 90 days following the completion of the Master Plan/Feasibility study and allow CBD 30 days to comment on such schedule. The Federal Defendants and the Kootenai Tribe will consider in good faith CBD's comments in developing the final schedule.

8. The Parties agree that, if construction on the Kootenai River Restoration Project has not begun by December 2012, is determined not to be feasible, or otherwise does not proceed to implementation, reinitiation of consultation will be triggered, interim river operations will continue, and the Action Agencies will evaluate the benefits to sturgeon associated with additional Kootenai River flows through the use of spill over Libby Dam consistent with Paragraph 5. If the additional flows prove successful as identified pursuant to Paragraph 4 above, the Action Agencies will analyze the benefits to sturgeon associated with installation of an additional turbine or turbines at Libby Dam under NEPA.

DOCUMENT SHARING AND REPORTING

9. The Corps, in coordination with BPA, shall provide CBD with a status report in January and July of each year this settlement agreement is in effect regarding implementation of: (1) the "interim measures" identified above; (2) the River Restoration Project; and (3) structural modifications (*i.e.*, modifications to the selective withdrawal system). Each status report shall provide CBD with an update as to the progress made toward accomplishing the three objectives mentioned in this paragraph as of the date of the report, and each report shall inform CBD of any significant setbacks or delays. Accompanying each status report, Federal Defendants agree to provide CBD with copies of all relevant, significant, and non-privileged scientific and economic studies, reports, intra and inter-agency communications, etc. related to the above three activities, that otherwise would be subject to a Freedom of Information Act request.

GENERAL PROVISIONS

10. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that the Kootenai Tribe of Idaho obligate or pay Tribal funds. Nothing in this Agreement creates, expands, diminishes, impairs, predetermines, or otherwise affects any rights of the Kootenai Tribe reserved or established by or in any treaty, executive order, statute or other agreement. Further, nothing in this Agreement is intended to nor shall it create, expand, abrogate, diminish, or otherwise alter the responsibilities and obligations of the United States toward the Kootenai Tribe under any treaty, executive order, statute or other agreement. The Kootenai Tribe is not consenting to suit or waiving its sovereign immunity by executing this Agreement. The Parties further agree that there are no third party beneficiaries to the Kootenai River Restoration Contract between the Tribe and BPA.

11. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that the United States obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other law or regulation.

12. The terms of this Agreement do not constitute a commitment or requirement that the Federal agencies take any actions in contravention of the ESA, the APA, or any other law or regulation, either substantive or procedural, or otherwise modify the discretion afforded to any of the agencies under any of the applicable statutes.

13. This Agreement shall expire upon the expiration of the 2006 Biological Opinion.

14. Plaintiffs' third claim for relief, alleging a failure by the FWS to issue a final critical habitat designation for the Kootenai River population of white sturgeon, having become moot following the July 9, 2008 publication of a final critical habitat designation, is hereby dismissed with prejudice.

15. Upon the Service's issuance of a clarification of the 2006 RPA, and upon the condition that the Service's final clarification of the RPA is substantially similar to the Action Agencies' initial request for clarification to the RPA consistent with Exhibit A, counts Four and Five of Plaintiffs' complaint and all claims of Plaintiff-Intervenor's complaint shall be dismissed with prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(1). Plaintiffs and Plaintiff-Intervenor shall not challenge any amended or clarified RPA for the 2006 biological opinion or decision document therefore that is substantially similar to the proposed RPA described in Exhibit A to this agreement, provided that dismissal shall not preclude plaintiffs or plaintiff-intervenor from pursuing legal claims alleging a failure to implement any clarified RPA or arising from the release of new NEPA analyses related to actions being taken pursuant to this

settlement agreement. Federal Defendants reserve all defenses to any such action.

16. This Agreement was negotiated in good faith and constitutes a settlement of claims that were vigorously contested, denied and disputed by the Parties. This Agreement does not represent an admission by the Parties to any fact, claim, or defense in this lawsuit and thus has no precedential value as to either the merits of any claims or as to attorneys' fees and/or costs.

17. Non-governmental Plaintiffs are entitled to reasonable attorney's fees and other costs of litigation under ESA §11. The Parties agree that they will negotiate in good faith as to the amount to which the Plaintiffs are entitled. If the Parties are unable to reach agreement within 120 days after this Agreement is signed, they will submit a stipulated briefing schedule to the Court for the purpose of resolving the issue.

18. The Parties agree the Court should retain jurisdiction over this matter to enforce the terms of this Agreement and to oversee any subsequent dispute over attorneys' fees and litigation expenses. In the event of a disagreement between the Parties concerning this Agreement and/or its implementation, the dissatisfied entity shall provide the Parties with written notice of the dispute and a request for negotiations. The Parties shall confer in an effort to resolve the dispute within 14 days of the written notice, or such time thereafter as is mutually agreed. If the Parties are unable to resolve the dispute within 30 days of such meeting, then any party to the Action may file a motion to enforce the terms of the Agreement. The Parties further agree that the Tribe is not consenting to suit or waiving its sovereign immunity by way of this paragraph or through implication by executing this Agreement, and that there are no third party beneficiaries to the Kootenai River Restoration Contract between the Tribe and BPA.

19. The undersigned representatives of each party certify that they are fully authorized by the Party or Parties they represent to execute this stipulation.

IT IS SO STIPULATED

Dated: September 2, 2008

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