



1 **INTRODUCTION**

2 1. The endangered population of Kootenai River white sturgeon (“sturgeon”) is  
3 rapidly approaching the point of no return in its struggle to survive in the wild. The species’  
4 population is experiencing a dramatic decline primarily due to loss of suitable habitat for the  
5 species’ reproductive needs. This loss of suitable habitat can be attributed to human disruption  
6 of natural and historic river flows on the Kootenai River, which in turn, can be traced to the  
7 installation and operation of Libby Dam in the State of Montana. The sturgeon has suffered from  
8 an almost complete lack of recruitment of juveniles into the population since 1974, the date of  
9 the species’ last successful spawning, and not coincidentally, the year Libby Dam became  
10 operational.

11 2. In this civil action for declaratory and injunctive relief under the Endangered  
12 Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”) and the Administrative Procedure Act (“APA”), 5  
13 U.S.C. § 551 *et seq*, Plaintiffs, Center for Biological Diversity and the Wildwest Institute,  
14 (collectively “plaintiffs”), have challenged the failure of the U.S. Fish and Wildlife Service  
15 (“FWS”) to adequately protect the sturgeon through (1) a suitable critical habitat designation,<sup>1</sup>  
16 and (2) the development of a reasonable and prudent alternative in the course of a consultation  
17 with the action agency, U.S. Army Corps of Engineers, which would avoid jeopardy to the  
18 sturgeon and adverse modification of the species’ critical habitat.<sup>2</sup>

19 3. The present amended complaint adds the U.S. Army Corps of Engineers  
20 (“Corps”) as a Federal Defendant and consolidates Plaintiffs’ pre-existing claims against FWS  
21 from the original Complaint and Supplemental Pleading together with Plaintiffs’ new claims  
22 against the Corps.

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24 <sup>1</sup> See Dkt # 1, Complaint for Declaratory and Injunctive Relief, Third Claim for  
Relief; see also May 25, 2005 Order granting summary judgment to Plaintiffs on Claim III.

25 <sup>2</sup> See Dkt # 74, Supplemental Pleading to Complaint for Declaratory and Injunctive  
26 Relief, dated May 2, 2006.

1           4.       Despite this Court’s May 25, 2005 order, amended July 15, 2005, requiring a new  
2 final critical habitat designation by February 1, 2006, FWS has yet to issue a final critical habitat  
3 designation for the sturgeon. Rather, on February 8, 2006, FWS published an “interim” final  
4 rule, which by the agency’s own admission served merely as a “proposed” rule for a final  
5 designation that would come at some future date. 71 Fed. Reg. 6383 at 6387. No such final  
6 designation has ever been promulgated. Plaintiffs respectfully request an order from this Court  
7 requiring FWS to show cause why it has failed to publish a final critical habitat designation for  
8 the sturgeon, and further requiring that such designation be promulgated immediately.

9           5.       On February 18, 2006, the FWS issued a biological opinion, (hereinafter “2006  
10 BiOp”), addressing the effects of Libby Dam operations on the Kootenai River population of  
11 white sturgeon and that species’ critical habitat.

12           6.       The 2006 BiOp, prepared pursuant to Section 7 of the Endangered Species Act  
13 (“ESA”), 16 U.S.C. § 1536, concluded that the proposed operation of Libby Dam would  
14 jeopardize the continued existence of the sturgeon. The 2006 BiOp also concluded that the  
15 proposed action would adversely modify the sturgeon’s critical habitat. Accordingly, pursuant to  
16 the requirements of ESA section 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A), and 50 C.F.R. §  
17 402.14(h)(3), FWS proposed in the 2006 BiOp a “reasonable and prudent alternative” course of  
18 action (the “RPA”) which FWS concludes will avoid both jeopardy to the species and adverse  
19 modification of its critical habitat. Hand in hand with this flawed decision, FWS issued an  
20 incidental take statement purporting to authorize the “take” of protected sturgeon. As the action  
21 agency, the Corps will implement the RPA and be subject to the terms and conditions of the  
22 incidental take statement from the 2006 BiOp in the course of its operation of Libby Dam.

23           7.       The FWS, though prior biological opinions and otherwise, has recognized that  
24 past and present operation of Libby Dam are directly responsible for the serious decline of the  
25 Kootenai River population of white sturgeon since 1975, the year Libby Dam became  
26 operational. Principal among the reasons for this precipitous population decline are reduced river

1 flows in the Spring and degraded habitat conditions in the Kootenai River downstream of Libby  
2 Dam. Two prior biological opinions (1995 and 2000) required that in order to avoid jeopardy to  
3 the sturgeon, the Corps must increase flows from Libby Dam by installing an additional turbine if  
4 providing the additional flows could not otherwise be achieved.

5 8. The 2006 BiOp, like its predecessors, continues to recognize the importance of  
6 additional flows from Libby Dam to support successful reproduction. Indeed, additional flows  
7 form a central component of FWS' RPA and its conclusion that jeopardy and adverse  
8 modification will be alleviated by implementing the RPA. However, in sharp contrast to the two  
9 previously-issued biological opinions, the 2006 BiOp does not require the installation of turbines.  
10 Rather, the 2006 BiOp relies on use of the spillway to increase flows, which will violate Montana  
11 water quality standards potentially necessitating a variance which the State has to date denied,  
12 and other speculative measures that fail to alleviate jeopardy to the species.

13 9. Plaintiffs allege, and request declaratory relief finding, that the RPA contained in  
14 FWS' 2006 BiOp lacks any rational or credible explanation or qualitative assessments of the  
15 benefits of the proposed measures, runs counter to the available evidence, and is contrary to the  
16 best available scientific information and the ESA. The 2006 BiOp is therefore arbitrary and  
17 capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the  
18 ESA and APA.

19 10. Plaintiffs further allege, and request declaratory relief finding, that the Corps, as  
20 the action agency charged with implementing the flawed 2006 BiOp and RPA, is jeopardizing  
21 the continued existence of the sturgeon, adversely modifying the species' critical habitat, and in  
22 the absence of a valid incidental take statement, exceeding the amount of authorized take of a  
23 protected species, each in violation of the ESA and APA. The Corps' violation of the ESA arises  
24 both from its reliance on a the flawed 2006 BiOp as adequate to alleviate jeopardy and adverse  
25 modification to the sturgeon and its habitat, respectively, and alternatively, from its failure to  
26 even implement the terms, conditions and requirements of the 2006 BiOp.



1 Missoula Division is proper.

2 **PARTIES**

3 16. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-  
4 profit corporation with offices in Portland, Oregon; San Francisco, San Diego, Los Angeles, and  
5 Joshua Tree, California; Phoenix and Tucson, Arizona; Pinos Altos, New Mexico; and  
6 Washington D.C. The Center is actively involved in species and habitat protection issues  
7 throughout the western United States, northern Mexico and Alaska. The Center has members  
8 throughout these regions, including in and near areas which serve as habitat for the Kootenai  
9 River white sturgeon. The Center’s members and staff include local residents with educational,  
10 scientific research, moral, spiritual and recreational interests in this species and its habitat. The  
11 Center’s members and staff also enjoy the biological, recreational and aesthetic values of the  
12 areas inhabited by this species. The Center, its members and staff have participated in efforts to  
13 protect and preserve the habitat essential to the continued survival of this species, including filing  
14 the lawsuit which resulted in the sturgeon’s critical habitat designation, and they use many of the  
15 exact tracts of land where the species is present and where critical habitat should be expanded to  
16 for the above purposes. The Center’s efforts to protect species include, among other activities,  
17 the submission of petitions with both the Federal and States’ governments to secure protected  
18 status for threatened or endangered species under Federal and State law, and the pursuit of  
19 litigation to enforce the timely processing of such petitions and the resulting listing and critical  
20 habitat determinations. Additionally, the Center pursues administrative and legal proceedings to  
21 ensure that actions are not taken which will harm protected species and/or their habitats. The  
22 Center has brought numerous successful lawsuits to obtain these goals throughout the country.  
23 The Center brings this action on its own behalf and on behalf of its adversely affected members  
24 and staff.

25 17. Plaintiff WILDWEST INSTITUTE is a non-profit conservation group, based in  
26 Missoula, Montana, dedicated to the protection and restoration of ecological integrity and

1 biological diversity in the Rocky Mountains and Northern Great Plains Region of the United  
2 States and Canada, and committed to facilitating the increased involvement of citizens in public  
3 land management decision making. Wildwest Institute is the legal successor in interest of the  
4 Ecology Center, the original named co-plaintiffs in this action. Wildwest Institute actively and  
5 extensively participates in agency proceedings and decisions concerning the management of  
6 forest, prairie, and river ecosystems in the Northern Rockies and Northern Great Plains, including  
7 lands and waters within the states of Montana, Wyoming, Idaho, Oregon, Washington, Nebraska,  
8 North Dakota, and South Dakota in the United States, and the provinces of Alberta and British  
9 Columbia in Canada. Wildwest Institute has over 100 members living in these states and  
10 provinces that enjoy using public lands and waters for scientific research, recreation, education,  
11 and spiritual renewal. Wildwest Institute members and staff have visited and enjoyed areas with  
12 populations of Kootenai River white sturgeon and are committed to protecting this species  
13 against harm.

14 18. Defendant UNITED STATES FISH & WILDLIFE SERVICE is a federal agency  
15 within the Department of Interior authorized and required by law to protect and manage the fish,  
16 wildlife and native plant resources of the United States, including protection of the Kootenai  
17 River white sturgeon under the ESA. FWS issued the Biological Opinion and RPA that  
18 Plaintiffs challenge herein.

19 19. Defendant, UNITED STATES ARMY CORPS OF ENGINEERS is a branch of  
20 the United States Army charged with the operation of Libby Dam on the Kootenai River. As the  
21 action agency the Corps is responsible, in cooperation with the FWS, for ensuring that its actions  
22 do not jeopardize the continued existence of protected species or destroy or adversely modify  
23 such species' critical habitat.

24 20. Plaintiffs' members and staff rely on FWS to comply fully with all provisions of  
25 the ESA, including the requirement that protected species have designated critical habitat as well  
26 as the Section 7 consultation requirements. Critical habitat is necessary to secure both the

1 survival and recovery of protected species. FWS' failure to designate critical habitat is hindering  
2 sturgeon recovery, thereby harming the sturgeon and Plaintiffs' interests in that species.

3 21. Section 7 consultation assures that federal agencies incorporate protections for  
4 threatened and endangered species into project planning, design, and implementation. The  
5 consultation process provides agency decision-makers, Plaintiffs, and the public with essential  
6 information regarding the effects of such actions on threatened and endangered species. FWS'  
7 failure to issue a lawful BiOp and RPA designed to mitigate the harmful impacts of the agency's  
8 actions on the sturgeon, and the Corps reliance on that flawed BiOp, is preventing the  
9 implementation of protective measures for the sturgeon and its habitat. As a result, the aesthetic,  
10 recreational, scientific, educational and religious interests of plaintiffs' members and staff have  
11 been, are being, and unless the relief requested is granted, will continue to be adversely affected  
12 and injured by those agencies' failure to comply with the ESA. These are actual, concrete  
13 injuries caused by defendant's failure to comply with mandatory duties under the ESA and the  
14 APA. Plaintiffs have no adequate remedy at law and the injuries would be redressed by the relief  
15 sought.

16 22. As noted above, Plaintiffs' members and staff spend time in areas adversely  
17 affected by the Corps' and FWS' alleged violations of the ESA. Plaintiffs' members and staff  
18 intend to continue to use and enjoy on a frequent and on an ongoing basis in the future the habitat  
19 adversely affected by the agency actions challenged in this complaint.

### 20 **LEGAL BACKGROUND**

#### 21 **The Administrative Procedure Act, 5 U.S.C. § 551 et seq** ("APA")

22 23. The Administrative Procedure Act ("APA") authorizes courts reviewing agency  
23 action to hold unlawful and set aside final agency action, findings, and conclusions that are  
24 arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5  
25 U.S.C. § 706(2)(A). Biological opinions issued pursuant to Section 7 of the ESA are reviewed  
26 under this provision of the APA. See, e.g., Bennett v. Spear, 520 U.S. 154, 175 (1997).

1 **The Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”)**

2 24. The purposes of the ESA “are to provide a means whereby the ecosystems upon  
3 which endangered species and threatened species depend may be conserved, [and] to provide a  
4 program for the conservation of such endangered species and threatened species . . .” 16 U.S.C.  
5 § 1531(b). To this end, the ESA requires that the Secretary protect such species by listing them  
6 as either “threatened” or “endangered,” and by designating “critical habitat” for each listed  
7 threatened or endangered species. 16 U.S.C. § 1533.

8 25. The ESA “is the most comprehensive legislation for the preservation of  
9 endangered species ever enacted by any nation.” Tennessee Valley Auth. v. Hill, 437 U.S. 153,  
10 180 (1978). “[T]he plain intent of Congress in enacting this statute was to halt and reverse the  
11 trend toward species extinction, whatever the cost.” Id. at 184. Congress intended that the ESA  
12 would be implemented in a manner characterized by “institutionalized caution,” under which  
13 endangered species would be afforded the “highest of priorities.” Id. at 194.

14 26. In order to further effectuate the purposes of the ESA, Federal agencies are  
15 required to engage in consultation with the FWS to “insure that any action authorized, funded, or  
16 carried out by such agency . . . is not likely to jeopardize the continued existence of any  
17 endangered species or threatened species or result in the adverse modification of habitat of such  
18 species . . .determined . . . to be critical . . .” 16 U.S.C. § 1536(a)(2) (Section 7 consultation).

19 27. Section 7 consultation is required for “any action [that] may affect listed species  
20 or critical habitat.” 50 C.F.R. § 402.14. An agency “action” is defined in the ESA's  
21 implementing regulations to include “(c) the granting of licenses, contracts, leases, easements,  
22 rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications  
23 to the land, water, or air.” 50 C.F.R. § 402.02.

24 28. Under the Section 7 consultation process, a federal agency proposing an action  
25 that “may affect” a listed species, including the Kootenai River population of white sturgeon,  
26 must prepare and provide to the appropriate expert agency, here FWS, a “biological assessment”

1 of the effects of the proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). For those  
2 actions that may adversely affect a species, FWS must review all information provided by the  
3 action agency, as well as any other relevant information, to determine whether the proposed  
4 action is likely to jeopardize a listed species or destroy or adversely modify its designated critical  
5 habitat. 50 C.F.R. § 402.14(h)(3).

6 29. At the completion of the Section 7 consultation process FWS issues a Biological  
7 Opinion (BiOp) that determines if the agency action is likely to jeopardize the species' continued  
8 survival and/or is likely to adversely modify the species' critical habitat. Id.; 16 U.S.C. §  
9 1536(b)(3)(A).

10 30. If FWS concludes that the proposed action is likely to jeopardize a listed species,  
11 or destroy or adversely modify its critical habitat, it must identify and describe any reasonable  
12 and prudent alternative ("RPA") to the proposed action that it believes would avoid jeopardy and  
13 adverse modification. 16 U.S.C. § 1536(b)(3)(B). An RPA may only consist of measures that  
14 are within the scope of the action agency's legal authority and jurisdiction, that can be  
15 implemented consistent with the purpose of the proposed action, and that will avoid jeopardizing  
16 the continued existence of the listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02.  
17 The effects of an RPA must be analyzed under the same section 7 framework as an action  
18 proposed by an action agency. Finally, if FWS believes that there is no reasonable and prudent  
19 alternative to the proposed action, its biological opinion must so state. 50 C.F.R. § 402.14(h)(3).

20 31. If FWS reaches a no-jeopardy/no-adverse modification finding for either a  
21 proposed action or a reasonable and prudent alternative course of action, it may also issue an  
22 Incidental Take Statement ("ITS") for any take of a listed species that is likely to occur as a  
23 consequence of those actions and which would otherwise constitute an unlawful take under  
24 Section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B); 50 C.F.R. § 402.14(I).

25 32. "Take" is defined in the ESA to mean to "harass, harm, pursue, hunt, shoot,  
26 would, kill, trap, capture, or collect, or to attempt to engage in such conduct." 16 U.S.C. §

1 1532(19). The term “harm” has been further defined to include “significant habitat modification  
2 or degradation where it actually kills or injures wildlife by significantly impairing essential  
3 behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3. “Harassing” a  
4 threatened or endangered species is an act which “creates a likelihood of injury to wildlife by  
5 annoying it to such an extent as to significantly disrupt normal behavioral patterns . . .” *Id.*  
6 “Take” by federal agencies is permitted only if the agency receives an Incidental Take Statement  
7 (“ITS”) pursuant to Section 7(b)(4), upon completion of formal consultation. 16 U.S.C. §  
8 1536(b)(4) (Take of listed species that is consistent with an incidental take statement is not  
9 subject to the prohibition against take in section 9 of the ESA.)

## 10 **FACTUAL BACKGROUND**

### 11 **A. The Kootenai River white sturgeon**

12 33. The white sturgeon is one of eight sturgeon species occurring in North America  
13 which historically occurred on the Pacific Coast from the Aleutian Islands to central California.  
14 The Kootenai River population of the white sturgeon (*Acipenser transmontanus*) is one of  
15 eighteen land-locked populations of white sturgeon known to occur in western North America.  
16 Because this distinct population of white sturgeon on the Kootenai River is in danger of  
17 extinction throughout its range, FWS found that it fit the ESA’s definition of an endangered  
18 species. 59 Fed. Reg. 45,989 (September 6, 1994). Individual members of Kootenai River white  
19 sturgeon may live up to seventy years and have been known to weigh up to 350 pounds.

20 34. The Kootenai River originates in British Columbia, Canada, then flows south into  
21 Montana, northwest into Idaho, then north back into British Columbia. Kootenai River white  
22 sturgeon occur in Idaho, Montana, and British Columbia, and are currently restricted to  
23 approximately 168 river miles of the Kootenai River extending down river from Kootenai Falls,  
24 Montana, located 31 river miles below Libby Dam.

25 35. “The Kootenai River population of white sturgeon is threatened by factors  
26 including hydropower operations, flood control operations, poor recruitment, loss of habitat, and

1 possibly, contaminants (water quality impacts).” 66 Fed. Reg. 46,548 (September 6, 2001).<sup>3</sup>  
2 “The primary threat to this species involves effects of the greatly altered natural hydrograph in  
3 the Kootenai River downstream of and beginning with the operations of Libby Dam in 1975.” Id.  
4 at 46,549.

5 36. Recent findings indicate that “the wild population now consists of an aging cohort  
6 of large, old fish.” 2006 BiOp at p. 85. “[P]opulation estimates have declined from  
7 approximately 7,000 white sturgeon in the late 1970s to 760 fish in 2000. At the current  
8 mortality rate of 9 percent per year, fewer than 500 adults remain in 2005, and there may be  
9 fewer than 50 remaining by 2030.” Id. Although white sturgeon may survive up to 70 years,  
10 most sturgeon species only reproduce within the age brackets of 10 to 25 years for females, 59  
11 Fed. Reg. at 45,991, and at 4 to 6-year intervals. 2006 BiOp at p. 85. “Annually numbers of  
12 female spawners have declined from 270 per year in 1980 to about 77 per in 2002.” Id.

13 37. In light of an “almost complete lack of recruitment of juveniles into the  
14 population since 1974,” a date which closely coincides with the initial operation of Libby Dam,  
15 FWS determined in 1994 that many of the fish in the Kootenai River white sturgeon population  
16 are passing, or have past, the years in which they are reproductively active; “few of the remaining  
17 white sturgeon [are] younger than 20 years old,” (59 Fed. Reg. 45,995), and noted that “[t]he  
18 population may be reaching the age of reproductive senescence.” Id. at 45,995. However, the  
19 ability of Kootenai sturgeon to produce a significant year class , presuming favorable spawning  
20 and recruitment conditions, is not limited by their current size as each individual spawning  
21 female releases an average of at least 100,000 eggs per spawning year. 2006 BiOp at p. 85.

22 38. White sturgeon require habitat with uncovered, rocky river bottoms in order to  
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24 <sup>3</sup> As a result of the Court’s order directing the FWS to reissue its critical habitat  
25 designation for the Kootenai sturgeon, FWS on February 8, 2006 published an interim final rule  
26 in the Federal Register designating an additional 6.9 miles of critical habitat to the existing 11.2  
27 miles. See 71 Fed. Reg. at 6387. The interim rule reaches the same conclusion that is identified  
in this paragraph.

1 spawn successfully. After being broadcast, white sturgeon eggs settle on the river bottom, where  
2 – ideally – they attach to rocks. Those rocks provide shelter and incubation for the eggs until  
3 they hatch. When forced to spawn over sandy river bottoms, or where deprived of suitable gravel  
4 or rock bottomed river habitat, sturgeon cannot successfully recruit; deprived of suitable anchors,  
5 the eggs are left adrift and unprotected. Rocky substrates also provide cover for yolk sac larvae  
6 before they become free-swimming.

7 **B. Libby Dam**

8 39. Libby Dam is located on the Kootenai River in the State of Montana. The dam is  
9 a part of the Federal Columbia River Power System, and was made fully operational in 1975.

10 40. The last significant sturgeon recruitment in the Kootenai River occurred in 1974,  
11 before Libby Dam became fully operational and when flows peaked at an elevation of 1765.5 feet  
12 above sea level. Prior to 1974 successful spawning occurred at water elevations between 1765  
13 and 1770 feet. The Corps' proposed operation of Libby Dam envisions maintaining a regulated  
14 water surface elevation below 1764 feet, lower than the minimum elevations historically  
15 accompanying successful spawning and recruitment years. FWS concluded that operation of  
16 Libby Dam under this management proposal would preclude significant natural recruitment of  
17 the sturgeon.

18 41. Operation of Libby Dam affects water elevations, flows, flood stages,  
19 temperatures, and river bottom characteristics, forcing the species spawn in areas that lack  
20 suitable habitat characteristics.

21 42. As a result, sturgeon currently spawn over sandy substrate, and most sturgeon  
22 eggs are destined to drift along a sandy river bottom unable to adhere to a rocky or gravel bottom  
23 necessary for the eggs' development and protection. 66 Fed. Reg. at 46,549. In fact, "there is  
24 evidence that very high levels of mortality of sturgeon eggs and sac fry are occurring annually at  
25 the sites now being used for spawning, egg incubation, and yolk sac fry development." Id.  
26 During the last 14 years of intensive monitoring with techniques proven suitable elsewhere, only

1 one hatching embryo has been found, and no free-swimming larvae or young-of-the-year have  
2 been captured. To date, only 96 unmarked juvenile sturgeon have been captured that can be aged  
3 to the post-Libby Dam era, including 23 that have been aged to the period of experimental  
4 augmentation flows beginning in 1991. 2006 BiOp at p. 85.

5 43. Libby Dam has effectively prevented the Kootenai River population of white  
6 sturgeon from successfully reproducing. 66 Fed. Reg. at 46,549.

7 **C. Administrative and Judicial Actions Leading up to the Issuance of the 2006 BiOp**

8 44. On December 20, 2000, FWS issued its Biological Opinion (“2000 BiOp”)  
9 assessing the impacts of the Federal Columbia River Power System – which includes Libby Dam  
10 – on species protected by the ESA, including the Kootenai white sturgeon. After reviewing the  
11 current status of the sturgeon, the environmental baseline for the action area, the effects of the  
12 proposed action and the cumulative effects, the FWS concluded in the 2000 BiOp that the  
13 proposed operation of Libby Dam would jeopardize the continued existence of the Kootenai  
14 River white sturgeon.

15 45. FWS based its conclusion on the probability of continued high levels of mortality  
16 of fertilized eggs, and the resulting lack of significant recruitment for the Kootenai River  
17 population of white sturgeon. FWS further supported its jeopardy finding stating that the  
18 proposed action would continue to appreciably reduce the likelihood of both the survival and  
19 recovery of the species in the wild by essentially eliminating its reproductive capacity and  
20 directly contributing to declining population numbers.

21 46. FWS proposed a reasonable and prudent alternative means of operating Libby  
22 Dam which it deemed necessary and appropriate to avoid jeopardy. That alternative contained  
23 several components intended to modify operations of Libby Dam to assure storage of water  
24 specifically allocated for augmentation of Kootenai River flows during sturgeon spawning and  
25 development during early life stages.

1           47. Pursuant to the RPA, and based on historical data indicating that when the  
2 sturgeon last successfully recruited in 1974, flow levels below Libby Dam were at 40,000 cfs, the  
3 Corps was required to increase the release capacity of the dam by 10,000 cfs to 35,000 cfs in two  
4 5,000 cfs increments. The first spill test was conducted in 2002 with the Corps concluding that  
5 only 1,000 cfs, rather than 5,000 cfs, could be passed over the spillway, thus limiting the  
6 maximum outflow from the dam to 26,000 cfs, far short of the 35,000 cfs requirement in the  
7 RPA.

8           48. In the event that 5,000 cfs could not be passed over the spillway, FWS established  
9 an additional RPA which required the Corps to immediately begin preparation of documentation  
10 pursuant to the National Environmental Policy Act (“NEPA”) and to seek funding for installation  
11 of one additional turbine or spillway flow deflectors that will be operational by spring 2004. The  
12 Corps never initiated this process despite not having been able to pass 5,000 cfs over the  
13 spillway.

14           49. The RPA also required the Corps to complete a number of studies related to Libby  
15 Dam’s effect on the sturgeon, its habitat, and surrounding areas, including (1) a report on flood  
16 levels and public safety concerns along the banks of the Kootenai River below Libby Dam, and  
17 the feasibility of increasing releases above any identified channel capacity constraints through  
18 structural or non-structural means; (2) quantification of the effects of groundwater seepage  
19 associated with the magnitude and duration of sturgeon flows on crops in the Kootenai Valley  
20 relative to all other types high flow/stage events which occur in the Kootenai River; (3) studies  
21 necessary to determine the indirect effects of Libby Dam operations on sturgeon recruitment and  
22 mortality; and (4) a report on the effects of load following on levee integrity throughout the  
23 Kootenai Valley over the last 26 years, all to be provided to FWS by December 1, 2001.

24           50. At the time of the issuance of the 2000 Biological Opinion, no critical habitat had  
25 been designated, therefore, it was simply concluded that none would be affected.  
26

1           51.     In September 2001, the FWS designated critical habitat for the Kootenai River  
2 population of white sturgeon. 66 Fed. Reg. 46,548.

3           52.     In February 2003, Plaintiffs sought judicial review under the APA and ESA of the  
4 U.S. Army Corps of Engineers' implementation of the 2000 BiOp, as well as its failure to  
5 reinitiate consultation with the FWS in light of new information regarding the effects of the  
6 agency action, the effective modification of the proposed action at Libby Dam resulting from the  
7 Corps' failure to implement the RPA, and the subsequent designation of critical habitat for the  
8 sturgeon. The lawsuit also alleged that the FWS was in violation of Section 4 of the ESA, 16  
9 U.S.C. § 1533, and the APA by failing to include known, essential, suitable spawning habitat in  
10 the sturgeon's critical habitat designation..

11           53.     In July 2003, just months after Plaintiffs filed suit and nearly two years after the  
12 FWS had designated critical habitat, the Corps reinitiated consultation with the FWS. In June  
13 2004, pursuant to Federal Defendants' motion, this Court dismissed Plaintiffs' claim seeking  
14 reinitiation of consultation and stayed Plaintiffs' claims alleging ESA Section 7 and 9 violations  
15 (Claims 1 and 2).

16           54.     Plaintiffs and Federal Defendants then filed cross-motions for summary judgment  
17 on the remaining critical habitat claim (Claim 3). In May 2005, this Court granted Plaintiffs'  
18 summary judgment motion, noting:

19           Whether the Kootenai River white sturgeon will be saved from extinction is  
20 unknowable at this point. However, it is clear that if the fish do not begin to  
21 recruit young before the females reach reproductive senescence, the fish are on a  
22 very slow train to extinction. Therefore, something must change, and FWS's  
23 habitat designation must include habitat that assists that change.

24           Order, dated May 25, 2005 at p. 18. In July 2005, pursuant to Federal Defendants' motion, the  
25 Court amended its Order and directed the FWS to reissue its critical habitat designation for the  
26 endangered Kootenai River white sturgeon by February 1, 2006.

27           55.     On February 8, 2006, FWS published an interim final rule in the Federal Register  
designating an additional 6.9 miles of critical habitat above the existing 11.2 miles. Following a

1 public comment period, the FWS plans to issue a new final rule that will replace the interim final  
2 rule. See 71 Fed. Reg. at 6387.

3 **D. The February 8, 2006 Interim Final Critical Habitat Designation**

4 56. By order of this Court, dated May 25, 2005, amended July 15, 2005, Plaintiffs  
5 were granted summary judgment on Claim III of their complaint and FWS was required to  
6 prepare a new final critical habitat designation for the sturgeon by February 1, 2006. FWS has  
7 yet to issue a final critical habitat designation on remand.

8 57. On February 8, 2006, FWS issued an “interim” final critical habitat designation  
9 for the sturgeon. 71 Fed. Reg. 6383-6396. This new rule was to become effective on March 10,  
10 2006, however, it also indicated that FWS would accept public comment through April 10, 2006.  
11 FWS also acknowledges that this rule is the equivalent of a proposed rule, stating that “in effect,  
12 this interim final rule will serve as the proposed final rule for the later final rule, and the Service  
13 will treat this interim final rule as the proposed rule for the purpose of complying with ESA sec.  
14 4(b)(5).” FWS further stated that “[f]ollowing public comment, we will consider all public  
15 comments received and issue a new final rule that will replace this interim final rule.”) 71 Fed.  
16 Reg. at 6387.

17 58. No such final critical habitat rule has replaced FWS’ “interim” final/proposed  
18 critical habitat designation.

19 59. In March, 2007, an Inspector General report concluding an investigation into the  
20 activities of then Deputy Assistant Secretary for Fish and Wildlife and Parks, Julie MacDonald,  
21 found that she improperly influenced findings regarding the range of river flows suitable for  
22 sturgeon spawning in that species’ critical habitat designation. In the absence of a final critical  
23 habitat rule for the sturgeon is it impossible to determine at this point whether FWS will correct  
24 any substantive omissions in the present “interim” rule resulting from Ms. MacDonald’s role.

25 **E. The February 2006 Biological Opinion**

26 60. On February 18, 2006, FWS issued the revised 2006 BiOp assessing the impacts

1 of Libby Dam on the endangered Kootenai River white sturgeon, its designated critical habitat,  
2 and the threatened bull trout.

3 61. The 2006 BiOp, like the 2000 BiOp, concludes that the proposed operation of  
4 Libby Dam would jeopardize the endangered Kootenai River white sturgeon. 2006 BiOp at 121.  
5 The 2006 BiOp also concludes that the proposed actions would destroy or adversely modify the  
6 sturgeon's designated critical habitat. 2006 BiOp at 122.

7 62. FWS based its jeopardy conclusion on the probability of continued high levels of  
8 mortality of fertilized eggs, and the resulting lack of significant recruitment for the Kootenai  
9 River population of white sturgeon. FWS observed that the construction and past and present  
10 operations of Libby Dam have altered the natural hydrograph of the Kootenai River, resulting in  
11 Kootenai sturgeon being unable to successfully reproduce. FWS observed that "[s]ince Libby  
12 Dam came into operation in the 1970s, peak flows have been reduced by about 50 percent, and  
13 sturgeon spawning areas have been adversely altered with respect to flow, water velocity, depth,  
14 substrate, and water temperatures." 2006 BiOp at 121. FWS concluded that the proposed  
15 operation of Libby Dam would maintain degraded habitat conditions and insufficient flows.  
16 FWS further noted that although actions had been proposed to augment flows and improve  
17 habitat conditions, "these actions are experimental, the schedule for their implementation is not  
18 well-defined, and their effects on the sturgeon are uncertain." 2006 BiOp at 122.

19 63. FWS based its adverse modification conclusion on the probability of continued  
20 limited co-occurrence of the primary constituent elements defined for Kootenai sturgeon critical  
21 habitat, thus preventing critical habitat from serving its intended conservation role of providing  
22 breeding habitat conditions necessary for successful sturgeon recruitment at levels that will  
23 provide for the conservation of the species. FWS noted that "[g]iven the extremely imperiled  
24 conservation condition of the sturgeon, it is imperative that the suite of conditions associated  
25 with the co-occurrence of the primary constituent elements be provided seasonally over as much  
26 of the designated critical habitat as possible in as timely a manner as possible." 2006 BiOp at

1 122. FWS furthermore noted that although actions had been proposed to augment flows and  
2 improve habitat conditions, “these actions are experimental, the schedule for their  
3 implementation is not well-defined, and their effects on the sturgeon are uncertain.” Id.

4 64. Pursuant to the RPA, FWS requires the Corps, in collaboration with other state,  
5 federal, and tribal entities, to develop a “flow plan implementation protocol,” which principally  
6 involves river flows and releases from the dam. The RPA requires several test releases known as  
7 “powerhouse plus 10,000 cfs,” provided that sufficient water is available. A release of this  
8 volume of water from Libby Dam would result in the violation of Montana water quality  
9 standards (see 2006 BiOp at 13), and thus would require a variance from the Montana  
10 Department of Environmental Quality. Given the uncertain nature of the Corps’ ability to  
11 provide 10,000 cfs in addition to powerhouse capacity, FWS states in the BiOp that “[f]or  
12 purposes of this analysis, the Service is considering implementation of the proposed ‘powerhouse  
13 capacity plus’ action as uncertain.” 2006 BiOp at 103.

14 65. The 2006 BiOp and RPA required the Corps to provided increased flows through  
15 Libby Dam’s spillway three times in first four years, if water conditions allowed, to coincide with  
16 the sturgeon spawning season. 2006 BiOp at p. 126. Despite favorable conditions, the Corps has  
17 neglected this requirement such that it will now be unable to comply in three of the first four  
18 years.

19 66. In the first year, (2006), the Corps decided not to provide the increased flows even  
20 though conditions would have allowed it. However, later in the same high water year, as a result  
21 of the Corps’ admitted failure to properly implement its variable discharge flood control  
22 operations, known as “VARQ”, the agency was forced to release massive amounts of water from  
23 the spillways resulting in extensive downstream flooding and millions of dollars in crop damage.  
24 These releases, however, came too late to be of any benefit to the sturgeon which needed the  
25 higher flows to coincide with the species’ earlier spawning season. Moreover, had the Corps  
26 properly implemented VARQ and released higher flows during sturgeon spawning season as

1 envisioned, the agency would not have been forced to release such a large quantity of water later  
2 in that high water season and the damaging floods could have been avoided.

3 67. In 2007, despite favorable water conditions, the Corps again failed to conduct the  
4 experimental flows beneficial to the sturgeon, rendering it impossible for the agency to now  
5 comply with the RPA requirement that it conduct such flows in three of the first four years  
6 following the 2006 BiOp, (2006-2009).

7 68. As discussed above, the RPA in the 2000 BiOp also required the Corps to  
8 immediately begin preparation of documentation pursuant to the National Environmental Policy  
9 Act (“NEPA”) and to seek funding for installation of one additional turbine or spillway flow  
10 deflectors that would be operational by Spring 2004 in the event that 5,000 cfs could not be  
11 passed over the spillway. Despite determining that it is not possible to pass 5,000 cfs over the  
12 spillway without violating Montana’s water quality standards, the Corps never completed this  
13 process. The 2006 BiOp does not include this RPA component. Nor does FWS provide an  
14 explanation for this significant departure, except to observe, “[t]he Corps and BPA have  
15 concluded that adding generating units and the associated transmission is not a reasonable or  
16 economically prudent near-term option for implementation.” 2006 BiOp at 13.

17 69. The 2006 BiOp also required the Corps to evaluate implementation of alternative  
18 flood control operations at Libby Dam, called variable discharge flood control, or “VARQ”. In  
19 April of 2006, the Corps issued a Final Environmental Impact Statement (“FEIS”) entitled *Upper*  
20 *Columbia Alternative Flood Control and Fish Operations*. However, the Corps has yet to issue  
21 its Record of Decision formally adopting long-term implementation of VARQ as envisioned in  
22 the 2006 BiOp. Rather, in January, 2007, the Corps issued a “Determination and Finding” that  
23 VARQ would be implemented for the 2007 water year, but deferred a decision on long-term  
24 VARQ implementation to the “upcoming Record of Decision” for the above referenced FEIS.  
25 As of the date of this filing, no Record of Decision has been issued.

1           70.     The majority of additional RPA components involve multi-year habitat studies  
2 and various other experimental pilot studies. The FWS noted with respect to one such pilot  
3 study, the Shorty's Island rock placement study, that "[n]o supporting data are provided in terms  
4 of expected effects from the rock placement to either the sturgeon or the habitat." 2006 BiOp at  
5 104-05. Regarding how the Shorty's Island pilot study would affect critical habitat, FWS noted  
6 that "the proposed Shorty's Island pilot project is experimental and the effects of its  
7 implementation on th[e] PCE [involving the presence of approximately 5 miles of rocky  
8 substrate] are uncertain." 2006 BiOp at 118.

9           71.     The remaining RPAs address the ongoing Conservation Aquaculture Program,  
10 Kootenay Lake and Kootenai River productivity enhancement activities, and monitoring and  
11 reporting.

12           72.     FWS explains its conclusion that implementation of the 2006 BiOp RPA is likely  
13 to avoid jeopardy and adverse modification in five sentences. FWS reasons that the RPA  
14 "includes components that address" identified conservation needs of the Kootenai sturgeon.  
15 2006 BiOp at 130.

16           73.     There are a number of substantial and fundamental defects in FWS' analysis that  
17 render the no-jeopardy/no-adverse modification conclusions of the BiOp for the RPA arbitrary,  
18 capricious, and otherwise not in accordance with law. These defects include the unreasonable  
19 reliance on the speculative actions of other state entities beyond the control or authority of the  
20 Corps and the unreasonable reliance on long-term experimental pilot projects whose results are  
21 uncertain and speculative and that lack supporting data.

1 **CLAIMS FOR RELIEF**

2 **Third Claim for Relief**

3 **(U.S. Fish and Wildlife Service)**  
4 **(Failure to include essential spawning habitat in critical habitat designation)**

5 74. Plaintiffs reallege and incorporate by reference each and every allegation set forth  
6 above in this Amended Pleading as well as the Supplemental Pleading and in Plaintiffs' original  
7 Complaint.

8 75. Based on the above facts and legal obligations, FWS has violated the ESA and  
9 this Court's May 25, 2005 Order, by failing to finalize the sturgeon's critical habitat designation.  
10 FWS' failure to designate critical habitat is arbitrary and capricious, an abuse of discretion, not in  
11 accordance with law, and without observance of procedure required by law in violation of the  
12 ESA and the APA, 5 U.S.C. §§ 701-706.

13 **Fourth Claim for Relief**

14 **(U.S. Fish and Wildlife Service)**  
15 **(2006 BiOp Fails to Avoid Jeopardy in Violation of APA and ESA)**

16 76. Plaintiffs reallege and incorporate by reference each and every allegation set forth  
17 above in this Amended Pleading as well as the Supplemental Pleading and in Plaintiffs' original  
18 Complaint.

19 77. Based on the above facts and legal obligations, the FWS has violated the  
20 requirements of ESA section 7 and its implementing regulations by failing to rely on the best  
21 available science and concluding in the 2006 BiOp that the actions set forth in the RPA are not  
22 likely to jeopardize the Kootenai River white sturgeon or destroy or adversely modify its critical  
23 habitat. The defects in the 2006 BiOp include, but are not limited to, the following:

- 24 • FWS' assessment of why the steps it proposes in the BiOp's RPA will avoid jeopardy and  
25 adverse modification of critical habitat relies extensively on: (1) actions which would  
26 violate Montana water quality standards, for which Montana has yet to, and is unlikely to,  
27 provide a variance; and, (2) long-term experimental pilot projects whose results are

1 uncertain and speculative and that lack supporting data;

- 2 • FWS' cursory analysis of why the RPA and the speculative actions by others and  
3 uncertain and experimental pilot projects will avoid jeopardy and adverse modification of  
4 critical lacks any rational or credible explanation or qualitative assessments of the  
5 benefits of these measures, runs counter to the available evidence, and is contrary to the  
6 best available scientific information and the ESA;
- 7 • FWS' 2006 BiOp fails to explain its dramatic departure from prior biological opinions  
8 that required the Corps to install additional turbines and related infrastructure if providing  
9 necessary additional flows could not otherwise be achieved; and
- 10 • FWS' grant of an incidental take statement to accompany the RPA is contrary to the  
11 requirements of the ESA and its implementing regulations.

12 78. FWS' actions and omissions are arbitrary, capricious and without any rational  
13 basis; an abuse of discretion; and otherwise not in accordance with law, and are reviewable under  
14 the APA, 5 U.S.C. §§ 701-706.

15 **Fifth Claim for Relief**

16 **(U.S. Army Corps of Engineers)**  
17 **(Failure to Ensure Against Jeopardy to the Sturgeon and**

18 **Adverse Modification of Sturgeon Critical Habitat in Violation of APA and ESA)**

19 79. Plaintiffs reallege and incorporate by reference each and every allegation set forth  
20 above in this Amended Pleading as well as the Supplemental Pleading and in Plaintiffs' original  
21 Complaint.

22 80. Based on the above facts and legal obligations, the Corps is violating Section  
23 7(a)(2) of the ESA, and its implementing regulations, 50 C.F.R. Part 402, by failing to ensure,  
24 based on "the best scientific and commercial data available," that its operation of Libby Dam on  
25 the Kootenai River does not jeopardize the Kootenai River population of white sturgeon by  
26 precluding the species' reproduction. This violation arises from the Corps' reliance on the

1 flawed 2006 jeopardy Biological Opinion and accompanying Reasonable and Prudent  
2 Alternative, which failed to remove jeopardy to the species or adverse modification of its habitat.

3 81. Also based on the above facts and legal obligations, the Corps in violating Section  
4 7(a)(2) of the ESA, and its implementing regulations, 50 C.F.R. Part 402, by failing to comply  
5 with the requirements of the 2006 BiOp and RPA, including *inter alia*, (1) that the Corps provide  
6 increased flows through Libby Dam's spillway three times in first four years, if water conditions  
7 allowed, to coincide with the sturgeon spawning season, and (2) that it implement the variable  
8 discharge flood control regime known as VARQ and evaluate and adopt a program for the long-  
9 term implementation of VARQ.

10 82. For these reasons, the Corps has violated the APA, 5 U.S.C. §§ 701-706, by acting  
11 in a manner that is arbitrary, capricious, not in accordance with law, and without observance of  
12 procedure required by law.

13 **RELIEF REQUESTED**

14 WHEREFORE, Plaintiffs respectfully request that the Court:

15 1. Adjudge and declare that FWS has violated ESA Section 7 and its implementing  
16 regulations by failing to require measures in its Reasonable and Prudent Alternative which would  
17 avoid jeopardy to the sturgeon and adverse modification to that species' critical habitat, which  
18 would otherwise occur under the proposed action as identified in the 2006 Biological Opinion;

19 2. Enjoin FWS to withdraw the 2006 BiOp, the RPA, and the accompanying  
20 incidental take statement, notify the Corps of these withdrawals, and reinitiate consultation with  
21 the Corps in order to prepare a biological opinion for the Libby Dam operations and any related  
22 actions that complies with the requirements of the ESA, on a schedule to be set by the Court;

23 3. Adjudge and declare that the Corps is violating the ESA Section 7 and its  
24 implementing regulations by operating Libby Dam in a manner which is jeopardizing the  
25  
26

1 continued existence of the Kootenai River population of white sturgeon; destroying or adversely  
2 modifying that species' critical habitat; and resulting in unauthorized take of the species; and for  
3 these and other reasons is acting in a manner which is arbitrary, capricious, an abuse of discretion  
4 and otherwise not in accordance with law;

5 4. Enjoin the Corps from continuing to implement the 2006 BiOp; order the Corps to  
6 reinitiate consultation with the FWS over Libby Dam operations and any related actions; and  
7 pending completion of a new BiOp which complies with the ESA and its implementing  
8 regulations, order the Corps to operate Libby Dam under the terms, provisions and other  
9 requirements of the prior 2000 BiOp, including long-term implementation of VARQ and NEPA  
10 analysis of installing additional turbines at Libby Dam;

11 5. Adjudge and declare that FWS has violated ESA Section 7 and its implementing  
12 regulations, as well as this Court's May 25, 2005 Order, by failing to issue a final critical habitat  
13 designation for the Kootenai River population of white sturgeon, and order the FWS to publish  
14 such final designation immediately;

15 6. Award plaintiffs their reasonable fees, costs, expenses, and disbursements,  
16 including attorneys fees, associated with this litigation; and,

17 7. Grant plaintiffs such further and additional relief as the Court may deem just and  
18 proper.

19  
20 DATED this 17<sup>th</sup> day of September, 2007.

21 Respectfully submitted,

22  
23           /s/ Geoff Hickcox            
24 Geoff Hickcox  
25 Counsel for Plaintiffs

26 Ronni M. Flannery  
27 Local/Co-Counsel for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 Pursuant to L.R. 5.2(b), I hereby certify that on September 17, 2007 a copy of the foregoing  
3 document was served on the following persons by the following means:

4 1, 2, 3, 4, 5, 6 CM/ECF  
5 \_\_\_\_\_ Hand Delivery  
6 \_\_\_\_\_ Mail  
7 \_\_\_\_\_ Overnight Delivery Service  
8 \_\_\_\_\_ Fax  
9 \_\_\_\_\_ E-Mail

- 10 1. Clerk, U.S. District Court  
11 2. Robert P. Williams  
12 U.S. Department of Justice  
13 ENRD, Wildlife & Marine Resources Section  
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15 Washington, D.C. 20044-7369  
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14 /s/Geoff Hickcox  
15 Geoff Hickcox (Counsel for Plaintiffs)