

**U.S. Army Corps of Engineers
Northwestern Division**

Record of Consultation and Statement of Decision

**Consultation on the
Effects of Libby Dam Operations
on the Kootenai River White Sturgeon, Bull Trout and
Kootenai Sturgeon Critical Habitat**

INTRODUCTION AND SUMMARY

Record of Consultation and Statement of Decision

This Record of Consultation and Statement of Decision (ROCASOD) is the U.S. Army Corps of Engineers (Corps) notification to the U.S. Fish and Wildlife Service (USFWS) of the Corps' decision concerning implementation of the recommendations in the *Fish and Wildlife Service Biological Opinion regarding The Effects of Libby Dam Operations on the Kootenai River White Sturgeon Bull Trout and Kootenai Sturgeon Critical Habitat* (1-9-01-F-0279R), dated February 18, 2006 (2006 BiOp), pursuant to 50 CFR 402.15.

This ROCASOD identifies the relevant factors and considerations that the Corps has taken into account in making the decision to operate and maintain Libby Dam for congressionally authorized project purposes consistent with responsibilities pursuant to the Endangered Species Act (ESA) and other applicable statutes, regulations and treaties. Accordingly, the Corps concurs with the USFWS that achieving habitat attributes through implementation of a performance based suite of actions consistent with the USFWS 2006 BiOp and Reasonable and Prudent Alternative (RPA) will avoid jeopardy to endangered Kootenai River white sturgeon and threatened bull trout, and will ensure the survival and recovery of these species. Further, the Corps concurs with the USFWS determination that implementing a performance based suite of actions in a manner consistent with the USFWS 2006 BiOp and RPA will not adversely modify the listed sturgeon's designated critical habitat.

This document supplements the Corps' May 15, 2001 Record of Consultation and Statement of Decision (2001 ROCASOD) concerning the USFWS Biological Opinion issued on December 20, 2000 on the Effects to Listed Species from Operations of the Federal Columbia River Power System (FCRPS). The operation of the remainder of the Corps' FCRPS projects addressed in the 2000 USFWS BiOp will continue as described in the 2001 ROCASOD. For listed anadromous species (salmon and steelhead), the operation of the Corps' FCRPS projects, including Libby Dam, will continue as described in the 2005 ROCASOD Concerning the Final Updated Proposed Action for the FCRPS

Biological Opinion Remand and NOAA's National Marine Fisheries Service November 30, 2004 Biological Opinion, Consultation on Remand for Operation of the Columbia River Power System and 19 U.S. Bureau of Reclamation Projects in the Columbia Basin (2005 ROCASOD).

Proposed Action and Biological Opinion

The Corps and Bureau of Reclamation (Reclamation) FCRPS projects are operated as a system in an integrated, coordinated manner for congressionally authorized purposes, including flood control, hydropower generation, irrigation, navigation, fish, wildlife, water quality, municipal and industrial water supply, and recreation. Libby Dam, one of 14 FCRPS projects, is operated by the Corps for flood control, hydropower generation, navigation, recreation, and fish and wildlife, consistent with applicable federal and state statutes, regulations and treaties.

Under the ESA, the Corps is responsible for consulting on the effects of the operation of Libby Dam on listed species and designated critical habitat. The Corps and Bonneville Power Administration (BPA) initiated ESA Section 7 consultation with the USFWS to address the effects of the operation of Libby Dam on the endangered Kootenai River white sturgeon (sturgeon), its designated critical habitat, and the threatened bull trout.

In a Supplemental Biological Assessment, dated July 2004, the Corps and BPA identified a Proposed Action that included certain operations at Libby Dam. The USFWS concluded in the 2006 BiOp that the Proposed Action was likely to jeopardize the continued existence of the sturgeon and set forth a RPA, which includes six components that reflect a performance-based, adaptive management approach to achieve habitat attributes necessary for successful sturgeon spawning and recruitment. Under this RPA, the action agencies have the flexibility to select how the habitat attributes and measures will be achieved.

BACKGROUND

Congress authorized the Corps to construct, operate and maintain dam and reservoir projects in the Columbia Basin to provide for multiple uses substantially in accordance with the applicable House Documents incorporating the respective Report of the Chief of Engineers. The Corps has been granted broad discretion by Congress in planning, constructing, and operating federal water resource projects based on Corps' experience and technical expertise. However, this discretion is not unconstrained; the authorizing legislation mandates the Corps provide for specified project uses. The Corps is responsible for making decisions on the operation and maintenance of the FCRPS projects for multiple uses based on engineering expertise, operating experience, public health and safety, and the needs of the Pacific Northwest and the Nation. In exercising its responsibilities, the Corps must comply with the requirements of the ESA and its implementing regulations.

ESA Consultation History

In response to the ESA listing of several fish species in the basin, and the designation of critical habitat since 1991, the Corps has consulted with the USFWS and NOAA Fisheries on the operation of the FCRPS.

In December 1999, the Corps initiated consultation with NMFS and USFWS with the submission of a Multi-Species Biological Assessment of the FCRPS. A Biological Opinion on Effects to Listed Species from Operations of the Federal Columbia River Power System was issued by the USFWS on December 20, 2000. On December 21, 2000, the National Marine Fisheries Service (referred to as NMFS or NOAA Fisheries) issued its Biological Opinion on the Reinitiation of Consultation on Operation of the Federal Columbia Power System, Including the Juvenile Fish Transportation Program, and 19 Bureau of Reclamation Projects in the Columbia Basin. The Corps' 2001 ROCASOD documented the Corps response to both the USFWS 2000 BiOp and NOAA 2000 BiOp.

USFWS Consultation

Subsequent to the issuance of the USFWS 2000 BiOp and the Corps' 2001 ROCASOD, the USFWS designated 11.2 miles of the Kootenai River in Boundary County, Idaho as sturgeon critical habitat on September 6, 2001 (66 FR 46548). In response to the critical habitat designation, and based on information that had been developed and obtained since the issuance of the USFWS 2000 BiOp, the Corps and BPA requested reinitiation of consultation on the effects of Libby Dam operations on listed sturgeon, bull trout and designated sturgeon critical habitat.

A Supplemental Biological Assessment (Supplemental BA) was submitted to the USFWS on July 7, 2004. The Supplemental BA evaluated the effects of the operation of Libby Dam on the sturgeon, its critical habitat, and on bull trout. The Corps and BPA provided additional information to the USFWS on May 6, and September 30, 2005 to further clarify the details of the Proposed Action.

On February 8, 2006 the Service published an Interim Rule designating an additional 6.9 miles of critical habitat for the Kootenai River white sturgeon upstream of the existing designated habitat. The Corps and BPA provided the USFWS with an assessment of the effects of the operation of Libby Dam on the additional designated habitat on February, 17, 2006. ESA consultation was concluded with the issuance of the USFWS 2006 BiOp.

NOAA Fisheries Consultation

The NOAA Fisheries 2000 BiOp was challenged in *National Wildlife Federation v. NMFS*, Civ. No. 01-640-RE (D. Oregon). The U.S District Court, District of Oregon found the biological opinion invalid and remanded it to NOAA Fisheries. NOAA Fisheries issued a Biological Opinion: *Consultation on Remand for Operation of the Columbia River Power System and 19 Bureau of Reclamation Projects in the Columbia*

Basin (2004 NOAA Fisheries BiOp), dated November 30, 2004. The Corps' 2005 ROCASOD provides the basis for the Corps decision to implement actions identified in the Federal Action Agencies' Updated Proposed Action and considered in the NOAA Fisheries 2004 BiOp.

In October 2005, the U.S. District Court, District of Oregon, ordered the 2004 NOAA Fisheries BiOp remanded to NMFS to address the Court's opinions and orders issued on May 7, 2003, and May 26, 2005. During the remand period, NOAA Fisheries, the Corps, and Reclamation are collaborating with the sovereign entities, the States and Tribes, to develop a Proposed Action and an analysis for the revision of the biological opinion.

The actions described in the USFWS 2006 BiOp and this ROCASOD are consistent with the operation of the Corps FCRPS projects as described in the 2005 ROCASOD and 2004 NOAA Fisheries BiOp. As the 2004 NOAA Fisheries BiOp has been remanded, future actions or changes to Libby Dam operations for listed anadromous species may affect operations consulted on in the USFWS 2006 BiOp.

2006 BIOLOGICAL OPINION REASONABLE AND PRUDENT ALTERNATIVE

The USFWS 2006 BiOp contains a performance-based Reasonable and Prudent Alternative (RPA) that identifies habitat attributes that the USFWS determined are necessary for successful sturgeon spawning and natural in-river production. These attributes are depth, velocity, temperature, and substrate. The RPA recommends implementation of six components and provides the Corps and BPA flexibility to select from a suite of actions to achieve these habitat attributes. The RPA includes an adaptive management approach recognizing that the habitat attributes, and the actions or measures to achieve these, may be modified and refined as information is gained through monitoring, studies, and additional analysis.

Performance Based Approach for Achieving Habitat Attributes

The RPA describes actions to address the conservation needs of the Kootenai sturgeon and the intended conservation function of its critical habitat as follows: (1) provide adequate habitat conditions that will allow the sturgeon to successfully spawn and recruit in an unsuitable area where they now spawn in the Meander Reach; (2) provide adequate habitat conditions that will facilitate sturgeon to successfully spawn in areas of the Braided Reach where the existing habitat is of better quality; and (3) provide for the future of the sturgeon population by continuing the operation of the conservation aquaculture program.

The Corps considers the habitat attributes identified in the RPA to be consistent with the intent of the proposed flow and habitat improvements submitted to the USFWS by the Corps and BPA in the Supplemental BA. Specifically, the Supplemental BA concluded that "[i]mportant characteristics of flow, such as water velocity, water temperature, turbulence, turbidity, and depth, appear to provide cues to trigger sturgeon spawning and

provide conditions suitable for egg and larvae survival, which include unembedded substrates for egg attachment and development, and larval hiding cover.”

The USFWS RPA noted that there may be several mechanisms to provide appropriate conditions for sturgeon in the Meander and Braided reaches; for instance, a mixture of flow management and habitat improvements provided in the May into July period when sturgeon are moving upstream to spawn. The RPA recommends, because of the critically endangered status of the species, meeting the attributes as soon as possible and includes actions that the USFWS has concluded will facilitate this outcome. One such action is implementation of test releases of powerhouse capacity plus 10,000 cfs, in coordination with the State of Montana, three or more times during the next ten years (2006-2016), and three times within the next four years (2006-2009), if conditions allow. The test is to be designed to be “biologically meaningful.”

Implementation of a test release of powerhouse capacity plus 10,000 cfs will require the use of the spillway which causes exceedances of the State of Montana’s water quality standard for total dissolved gas (TDG). Therefore, coordination with Montana to develop a mechanism to test these releases given the TDG effects will be pursued. Scientific information provided to the USFWS by the Corps and BPA in the Supplemental BA indicated that “based on the best science and information available, it has not been demonstrated that providing the recommended additional 10 kcfs will result in the intended biological benefits.” The Corps maintains that a comprehensive evaluation which tests different flow strategies including the powerhouse capacity plus 10 kcfs, with an assessment of biological effectiveness, is necessary to satisfactorily provide for the sturgeons’ conservation needs and the identified habitat attributes.

The performance based approach in the RPA provides alternatives to providing flows above powerhouse capacity for achieving the habitat attributes using means such as habitat improvements in the Braided Reach. Habitat improvements have the additional benefit of attaining sufficient depths over a wider range of flows. This provides increased depths, with appropriate velocities, temperature, and substrate over a greater number of years; and, reduces or potentially negates the need for releasing flows that cause exceedances of the Montana TDG water quality standard.

The Corps supports this scientifically sound adaptive management approach to test different flow releases and undertake habitat improvements to achieve the habitat attributes.

The following discussion summarizes the implementation of the components of the USFWS 2006 BiOp RPA.

RPA Component 1

The Supplemental BA included several operational actions at Libby Dam to benefit sturgeon and bull trout such as interim implementation of VARQ, variable end-of - December flood control, forecasting procedures, tiered sturgeon flows, bull trout flows,

and ramping rates. The Kootenai River Ecosystem Function Restoration Flow Plan dated May 5, 2005, was provided to the USFWS to further clarify operations and adopted a normative river concept with augmenting peak local inflows at Bonners Ferry with up to 35 kcfs from Libby Dam to: (1) create attraction flows; (2) stimulate spawning behavior; and, (3) enhance velocity for egg incubation. Based on an analysis of the biological information in these documents and a review of the information contained in the 2006 BiOp, the Corps agrees that normative flows are an essential component of a functioning ecosystem and play a key role in the survival and recovery of the sturgeon.

This RPA component identifies several actions concerning Libby Dam operations including:

- (1) completion of a collaboratively developed flow plan implementation protocol, which addresses the evaluation of full powerhouse and powerhouse plus 10,000 cfs flow releases (up to approximately 35 kcfs) from Libby Dam (Actions 1.1 to 1.4);
- (2) continued implementation of VARQ flood control procedures (Action 1.5);
- (3) providing for study and evaluation of sturgeon habitat attributes (Action 1.6);
- (4) providing one additional transformer for powerhouse reliability (Action 1.7);
- (5) developing short- and long-term implementation plans for attaining the habitat attributes (Action 1.8 and 1.9);
- (6) continued coordination of annual operations through the Regional Forum and the Technical Management Team (Action 1.10); and,
- (7) coordination with Canada on potential operations of Kootenay Lake (Action 1.11).

As recommend in RPA Component 1, Action 1.1, the Corps and BPA worked collaboratively with the USFWS, Idaho Department of Fish and Game, Montana Fish, Wildlife and Parks, the Kootenai Tribe of Idaho, the Confederated Salish - Kootenai Tribe, and the U.S. Geological Survey to develop a flow plan implementation protocol. The *Kootenai River Ecosystem Function Restoration Flow Plan Implementation Protocol* (Protocol) was provided to the USFWS on April 14, 2006, and provides a scientifically sound adaptive management approach for implementing different flow strategies and assessing their effectiveness. The Protocol describes potential Libby Dam operations (test treatments) under various water conditions, the hydrological parameters for the different test treatments, the physical and biological monitoring to be performed, and the biological criteria to evaluate the different operations. As new information is gained each year, the Protocol will be updated as appropriate.

The Corps prepared a Final Environmental Impact Statement for the Upper Columbia Alternative Flood Control and Fish Operations addressing long-term implementation of VARQ flood control procedures and releases up to 35 kcfs out of Libby Dam for sturgeon flow. This was published in the April 28, 2006, Federal Register under the Environmental Protection Agency's Notice of Availability of Environmental Impact Statements. After public review and comment, the Corps will issue a Record of Decision for Libby Dam flood control and fish operations.

The Corps will work with BPA on an evaluation of sturgeon habitat attributes, acquisition of an additional transformer, and coordination with Canada on Kootenay Lake

operations. The Corps will jointly prepare with BPA implementation plans in 2007 and 2008 to describe specific flow operations, habitat improvements, fertilization activities, conservation aquaculture, and other appropriate actions for sturgeon in future years.

Libby Dam operations for sturgeon, bull trout and anadromous species will continue to be coordinated regionally through the Technical Management Team (TMT). The Corps' in-season decisions during the migration and fish passage season will be made after considering recommendations of the TMT. The TMT meets throughout the year to monitor, evaluate, and make recommendations on shaping available water based on real time flow conditions and biological information, and on other system operational matters affecting fish such as spill and fish transportation for listed juvenile anadromous species. In coordination with NOAA Fisheries and USFWS, the Corps may adopt alternative operations as required for flood damage reduction, research, emergencies, navigation, or to meet other requirements or operations for other project or system uses.

RPA Components 2 and 3

RPA Components 2 and 3 address habitat improvements in the Braided and Meander Reaches of the Kootenai River respectively. Each of these components include the following steps: developing pilot study plans to improve habitat attributes lacking in each of the reaches; implementing pilot projects with appropriate monitoring as soon as possible; and, based on monitoring results, implementing permanent habitat features. In addition, the RPA provides that the Corps and BPA continue to work with the Kootenai Tribe of Idaho, USFWS, USGS, Idaho Department of Fish and Game, and the British Columbia Ministry of Environment to evaluate and implement habitat restoration measures as part of an overall ecosystem approach to recovery.

The Corps has evaluated the proposed habitat actions in the RPA and finds these actions to be similar and consistent with the proposed habitat actions contained in the Supplemental BA and clarifying documents provided to the USFWS during consultation. These habitat actions are intended to create habitat conditions that will induce sturgeon to spawn naturally over appropriate substrate in the Braided Reach, and provide suitable habitat where sturgeon currently spawn in the Meander Reach. The Corps concurs that such habitat improvements can provide for the attributes identified in the RPA.

A planned habitat project is the construction of a pilot project in the Meander Reach in the late summer of 2006. This project is designed to test the sustainability of placing rock substrate in a reach where sturgeon are known to spawn over unsuitable substrate. Sands and clays are deposited in this reach, and the pilot project will help inform design parameters to maintain appropriate rock substrate clean of silts and clays for a larger scale project.

The Corps will work with BPA on implementation of the actions in RPA Component 2 and 3, and pursue habitat improvements using the Section 1135 Continuing Authorities program.

RPA Component 4

RPA Component 4 is continuing support for the Conservation Aquaculture Program. BPA, through the Northwest Power and Conservation Council's (Council) Fish and Wildlife Program, funds the Kootenai Tribe of Idaho's Multidisciplinary Conservation Aquaculture Program. In the Supplemental BA, the Corps and BPA, in conjunction with regional biologists, determined that to sustain this sturgeon population it is necessary to augment the population through continuation and expansion of the conservation aquaculture program. The Corps supports BPA's continued implementation of this program.

RPA Component 5

RPA Component 5 is implementation of actions to enhance productivity of Kootenay Lake and the Kootenai River. BPA, through the Council's Fish and Wildlife Program, funds these activities. As documented in the supporting materials the Corps and BPA provided to the USFWS on May 6, 2005, the Kootenay Lake fertilization project has been successful in increasing the productivity of the lake and increasing the kokanee population, a food source for adult sturgeon. The Kootenai River fertilization experiment is intended to improve food availability for the early life stage of sturgeon by increasing the productivity of the river. The Corps supports BPA's continued implementation of actions to improve the productivity of Kootenai River and Kootenay Lake.

RPA Component 6

RPA Component 6 sets forth the mechanisms for implementation of this performance-based biological opinion with monitoring and evaluation of results, and using adaptive management to modify actions in response. RPA Action 6.1 calls for the notification to the USFWS of the Corps decision on implementing the RPA, consistent with 50 CFR 402.15. RPA Action 6.2 establishes an annual progress report on implementation of the RPA by the Corps and BPA, with the USFWS' assessment of compliance with the objectives of the Biological Opinion. RPA Action 6.3 provides for modifications to the habitat attributes based on monitoring results or other new biological information.

This ROCASOD completes the notification as requested in Action 6.1. The Corps will work with BPA to develop the reporting process (Action 6.2), and the adaptive management process for modifications to the habitat attributes (Action 6.3) when appropriate.

CONSIDERATIONS AFFECTING DECISIONS AND IMPLEMENTATION

The Corps has taken into account following factors and considerations in the decision to implement the 2006 BiOp. These factors may affect the schedule for completion or the scope of the actions, as well as operational decisions.

Authorities

The Corps has reviewed its authorities concerning implementation of the 2006 BiOp RPA components pertaining to Libby Dam operations and habitat improvements.

As indicated above, Libby Dam, one of fourteen FCRPS projects was authorized, in part, to provide for system and local flood control downstream of the project, as well as for hydroelectric power generation, navigation, recreation, and fish and wildlife. In furtherance of the flood control responsibility, the Corps plans to continue operating Libby Dam to the extent practicable, at or below the 1764-foot flood stage measured at Bonner Ferry as designated by the National Weather Service. The Corps has determined that the operation of Libby Dam as described in this ROCASOD, pursuant to the 2006 BiOp RPA, is consistent with its authorizing legislation.

To implement habitat improvements in the Kootenai River, the Corps intends to utilize the Continuing Authorities Program, PL 99-662 Water Resources Development Act of 1986, Section 1135. The Corps will also continue to coordinate with BPA and local interests to develop and implement habitat projects through the Council's Fish and Wildlife program.

The Corps will take appropriate action consistent with the existing authorized project and system uses to implement RPA actions requiring additional congressional authority and/or direction. This may include preparation of documents supporting authorization, requests for appropriations, notification to congressional committees, preparation of NEPA documents or other applicable actions. For instance, if releases of powerhouse capacity plus 10,000 cfs results in a demonstrable biological benefit to sturgeon that can not be otherwise provided, and the Corps and BPA, in coordination with the USFWS, determine there is a long-term need to reliably provide the additional 10,000 cfs, the Corps and BPA will examine possible modifications to Libby Dam consistent with the authorized uses and move forward with the appropriate course of action.

Emergencies

Unforeseen project emergencies, drought, power reliability, floods, or other natural disasters can occur and may require modifications in Libby Dam operations. Operational actions including powerhouse operations, spill, reservoir fill or draft goals, and other actions may be modified or curtailed if necessary for flood control, or to maintain power system reliability, or sufficiency, or for other emergencies. To the extent possible, modifications will be coordinated with the Region before they are undertaken. Protocols to address emergency situations have been developed for the FCRPS. The Corps would consider the effects identified through this process in making final decisions on adopting operations that differ from those in this ROCASOD.

Tribal/Trust Responsibilities

The United States government recognizes the sovereign status of Native American Tribes. Treaties between the U.S. and some Columbia Basin Tribes document agreements reached between the federal government and these Tribes. The federal government has a trust responsibility to protect the tribal rights under these treaties.

Presidential executive orders were used to reserve lands for other Columbia River Basin Tribes, and the federal government has extended rights to these executive order tribes as well.

The government's trust responsibility is an obligation under which federal officials consult with Tribes on management and use of resources, such as preserving and maintaining the trust asset. In carrying out its fiduciary duty, it is the Corps' responsibility to ensure that Indian treaty rights are given full effect.

The Corps will act in accordance with the Executive Order on Consultation and Coordination with Indian Tribal Governments. In formulating and implementing activities that have Tribal implications, the Corps will consult with the affected tribes.

In developing the Supplemental BA, ESA Section 7 consultation with the USFWS, and the preparation of the Protocol, the Corps worked with and sought input from the Kootenai Tribe of Idaho and the Confederated Salish-Kootenai Tribe.

Columbia River Treaty

Pursuant to the Columbia River Treaty (Treaty) between the United States and Canada, the Corps' Division Engineer and the Administrator of BPA are designated as the U.S. Entity, and have responsibility for coordinating the planning and operation of the FCRPS with the Canadian Entity. Coordination includes the development of assured operating plans and detailed operating plans, and arrangements with Canada for mutually beneficial non-power uses agreements. To the extent possible, the Corps works through the Entities to coordinate operations identified in biological opinions.

Pursuant to the Treaty, an agreement was developed to address operational changes at Libby. The Libby Coordination Agreement (LCA) sets forth the implementing procedures for the Entities continuing cooperation on coordination of the operation of Libby Dam with the operation of hydroelectric plants on the Kootenay River in Canada. The U.S. Entity provides annual updates to the Canadian Entity on the expected operation of Libby Dam including power, flood control, and other nonpower requirements. The updates are referred to as the Libby Operating Plan (LOP). As a result of the consultation with the USFWS and the 2006 BiOp and RPA, the U.S. Entity has updated the LOP to reflect relevant changes in Libby Dam operations. The implementation of the 2006 BiOp RPA, does not rely on specific operations of projects in Canada.

International Joint Commission (IJC) 1938 Order on Kootenay Lake

The operation of Libby Dam is also governed by the 1938 IJC Order on Kootenay Lake, which is in Canada, 140 miles downstream from Libby Dam. The 1938 Order addresses Kootenay Lake elevations and can constrain the operation of Libby Dam, particularly in January through March. Releases from Libby Dam cannot exceed the natural inflow to the reservoir behind Libby Dam, if the level of Kootenay Lake is above the elevation specified in the Order. The Corps coordinates Libby Dam operations with BC Hydro and Fortis BC (formerly Aquila, Inc.) to assure compliance with the 1938 IJC Order.

Pacific Northwest Electric Power Planning and Conservation Act

Under the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), the Corps is required to exercise its responsibilities for operating the FCRPS in a manner that provides equitable treatment for fish and wildlife with other purposes for which the Corps facilities are operated and managed; and, to take into consideration in its decision making the Council's Fish and Wildlife Program and Mainstem Amendments to the fullest extent practicable.

The Mainstem Amendments recommend Libby Dam summer operations that consist of stable or flat flows extending into September with a 10 foot draft limit in most years. This operation differs from the current operations, which provide for a 20 foot draft limit by August 31st as addressed in the NOAA Fisheries 2004 BiOp and analyzed in the USFWS 2006 BiOp. The current summer flow augmentation operation of Libby Dam and other FCRPS operations for listed anadromous species are under discussion in the Court ordered collaborative remand process in the U.S. District Court, District of Oregon. The operation of Libby Dam as recommended in the Mainstem Amendments, if adopted in the FCRPS consultation on anadromous species through the collaborative remand process, or future adaptive management, is consistent with the USFWS 2006 BiOp RPA. The Mainstem Amendments summer operation of Libby Dam would not affect sturgeon operations, and could be beneficial to bull trout and other resident fish.

The Corps considered the Council's Fish and Wildlife Program and Mainstem Amendments in making this decision on the operation of the Libby Dam pursuant to the USFWS 2006 BiOp and RPA, and will take these Amendments into consideration in future actions. Further, the Corps believes the actions adopted by this ROCASOD provide for the equitable treatment of fish and wildlife with the other purposes for which the Corps facilities are operated and managed.

National Environmental Policy Act (NEPA)

The Corps has considered the effects of the actions recommended in the USFWS 2006 BiOp RPA based upon existing NEPA documents and concluded the effects of Libby Dam operations within current powerhouse capacity are addressed in these documents. These NEPA documents include the Libby Dam and Lake Koocanusa EIS dated January 1972 and the System Operation Review EIS (SOR EIS) completed with the issuance of a

Record of Decision (ROD) in 1997. The Upper Columbia Alternative Flood Control and Fish Operations Final Environmental Impact Statement, which is currently undergoing public review (included in the Federal Register on April 28, 2006, under the Environmental Protection Agency's Notice of Availability of Environmental Impact Statements), evaluates long-term implementation of VARQ flood control procedures and provision of fish flows up to 10,000 cfs above powerhouse capacity (35,000 cfs total release) from Libby Dam, consistent with the 2006 BiOp RPA. A ROD is planned for summer, 2006.

Any additional NEPA documentation necessary for future habitat actions will be completed prior to implementation.

Federal Water Pollution Control Act (Clean Water Act (CWA))

The actions recommended in the USFWS 2006 BiOp RPA will be implemented consistent with the Corps legal obligations under the CWA, to the extent practicable. One action included in the RPA is to provide additional releases from Libby Dam that exceed powerhouse capacity, which is approximately 25,000 cfs. Specifically, the 2006 RPA calls for Libby Dam releases of approximately 35,000 cfs, requiring spill of the additional 10,000 cfs. Based on a test operation called for in the USFWS 2000 BiOp conducted in 2002, it was demonstrated that spilling 10,000 cfs will result in exceeding the State of Montana's water quality standard of 110% saturation for TDG along the Kootenai River between Libby Dam and Kootenai Falls.

The 2000 BiOp called for the Corps and BPA to conduct tests and studies to examine whether there are means of releasing additional water above powerhouse capacity that are consistent with Montana's TDG water quality standard. In response, the Corps and BPA performed several analyses, including studies of spillway and penstock modifications, and installation of additional turbines. These are summarized in the Supplemental BA and supporting documents.

In the Supplemental BA, the Corps concluded that the desired reduction in TDG, consistent with the Montana water quality standard, would not occur with the installation of flow deflectors on the Libby Dam spillway when spilling 10,000 cfs. The Supplemental BA concluded that installation of additional units at Libby Dam is not feasible because BPA determined additional transmission facilities would be needed and the current market for hydroelectric power would not support this action. Because of the scientific uncertainty associated with the biological response anticipated with the flows up to 35,000 cfs, the Corps and BPA indicated in the Supplemental BA that it is not feasible or prudent to move forward with these modifications unless there is sufficient justification supported by resolution of these uncertainties and the demonstration of the efficacy of providing the additional flows up to 35,000 cfs.

The Corps reaffirms its conclusions in the Supplemental BA and supporting documents concerning the necessity and efficacy of pursuing structural modifications of Libby Dam at this time. Furthermore, given the flexibility provided in the RPA to achieve the habitat

attributes identified in the 2006 BiOp, such as habitat improvements, that attain the depth attribute over a wider range of flows, it is not reasonable to initiate actions to install additional generation or making spillway modifications at this time.

The Corps believes that in the near term, testing flows up to 35,000 cfs using spill is the mechanism available to assess and possibly resolve this scientific uncertainty. However, because there are significant issues concerning the elevated TDG levels associated with releases above powerhouse capacity, the Corps intends to engage in discussions with the State of Montana to address these concerns. The Corps' objective is to operate Libby Dam in a manner that harmonizes compliance with both the ESA and applicable state water quality standards.

Endangered Species Act

The 2006 RPA contains a suite of actions developed from the Proposed Action, including Libby Dam flow releases and habitat improvements in the Kootenai River, continued support for the Conservation Aquaculture Program, and actions to improve productivity of Kootenay Lake and the Kootenai River.

The Corps and BPA, in preparing the Supplemental BA and supporting material during consultation, sought input from Federal, State and Tribal biologists with scientific expertise on the needs of Kootenai sturgeon (the Kootenai River White Sturgeon Recovery Team). Based on this input and our independent biological evaluation of the actions included in the 2006 BiOp, the Corps concurs that the adaptive management approach that provides flexibility to select from a suite of actions to achieve the habitat attributes, with the additional actions proposed in the Supplemental BA, will avoid the likelihood of jeopardizing the continued existence of the listed Kootenai River white sturgeon and bull trout, and will not result in the adverse modification of the sturgeon's designated critical habitat.

As additional new information becomes available on the status of sturgeon, bull trout, their habitat requirements, and potential restoration actions to achieve habitat attributes, the Corps, in coordination with BPA, USFWS and regional biologists, will adjust and tailor actions to maximize benefits. In addition to meeting the needs of the listed species and designated critical habitat, the Corps' implementation of the 2006 USFWS BiOp and RPA is consistent with the 2004 Updated Proposed Action operations for salmon and steelhead considered in the 2004 NOAA BiOp. The operation of the remainder of the FCRPS projects will continue consistent with the 2000 USFWS BiOp.

The Corps and BPA concluded that the Proposed Action contained in the Supplemental BA would not modify the effects on the listed bald eagle, grizzly bear, gray wolf, Canada lynx, and Ute ladies' tresses previously considered in the 2000 USFWS consultation. The USFWS concurred with this finding in the 2006 BiOp.

Other Laws, Regulations, etc

The Corps is responsible for complying with other applicable laws and regulations in its decisionmaking. These laws and regulations include:

- Archaeological Resources Protection Act
- National Historic Preservation Act
- Native American Graves Protection and Repatriation Act
- Clean Air Act
- Fish and Wildlife Coordination Act
- Migratory Bird Treaty Act
- Coastal Zone Management Act
- Safe Water Drinking Act
- Flood Control Act of 1844
- Wild and Scenic Rivers Act
- Oil Pollution Act
- Rivers and Harbors Act
- Executive Orders and CEQ Guidelines and Memoranda
- Other Federal, State, and Local Plans and Laws

INCIDENTAL TAKE STATEMENT

The Corps has reviewed and considered the Incidental Take Statement (ITS) provided by the USFWS in the 2006 BiOp for sturgeon and bull trout. The USFWS concluded that achieving the suite of habitat attributes provided in the RPA will avoid take of sturgeon. The ITS for bull trout includes Reasonable and Prudent Measures with Terms and Conditions to avoid take.

The Corps intends to comply with the provisions of the sturgeon and bull trout ITS, including the implementation of the Reasonable and Prudent Measures, and Terms and Conditions in cooperation and coordination with BPA.

STATEMENT OF DECISION

The Corps has taken into consideration the environmental consequences, the economic costs and the biological information and data supporting the operations at Libby Dam, habitat improvement projects, associated research and monitoring, and other actions addressed in the USFWS 2006 BiOp, the Supplemental BA, and additional supporting information provided to the USFWS during the course of the consultation.

The Corps has determined that adequate authority, NEPA documentation, and biological rationale exist to implement Libby Dam operations including the evaluation of different flow scenarios recommended in the 2006 BiOp and RPA that are consistent with applicable federal and state statutes and regulations. Libby Dam operations will be

implemented consistent with the Corps' legal obligations under the CWA to the extent practicable. The State of Montana's water quality standards have been taken into consideration, and the Corps has determined that actions exceeding state water quality standards require coordination with the State with the objective of operating Libby Dam in a manner that harmonizes compliance with both the ESA and applicable state water quality standards.

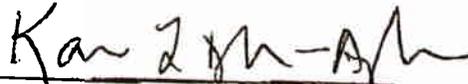
Long-term implementation of selected flood control operations and fish flows are under consideration in the Upper Columbia Flood Control and Fish Operations Final EIS. Once public review is completed a Record of Decision will be prepared.

Funding for additional habitat actions will be pursued under the Section 1135 Continuing Authorities Program and other available resources. NEPA documentation for additional habitat actions will be completed, when appropriate. The Corps will coordinate these actions with other actions being implemented by BPA (conservation aquaculture, fertilization, habitat improvements and RM&E efforts).

In making this decision, as a federal agency representing the U.S. Government, the Corps has considered the Tribal treaty and trust responsibilities and believes this ROCASOD is consistent with this responsibility. The actions the Corps will implement pursuant to this ROCASOD are designed to increase survival and recovery of Kootenai River white sturgeon and bull trout, as are related actions taken pursuant to the 2005 ROCASOD concerning listed salmon and steelhead in the Columbia. These actions will provide beneficial results to tribal fisheries and benefits to the northwest region as a whole.

The Corps finds that the determinations made in this ROCASOD are sufficient to implement the RPA and the Incidental Take Statement provided in the 2006 BiOp. This complement of actions include a combination of flow management with monitoring and evaluation, habitat improvement actions, research, monitoring and evaluation to improve our understanding of the species needs, and to shape future actions. The Corps has determined that these actions, taken together with actions being undertaken by BPA, will meet the Corps' responsibilities under the ESA to ensure that the operation of Libby Dam is not likely to jeopardize the continued existence of the Kootenai River white sturgeon or bull trout or adversely modify the sturgeon's critical habitat. This is also consistent with the 2000 USFWS BiOp and 2001 ROCASOD, the 2004 NOAA BiOp and 2005 ROCASOD.

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