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15 **IN THE UNITED STATES DISTRICT COURT**
16 **FOR THE DISTRICT OF MONTANA**
17 **MISSOULA DIVISION**

18 CENTER FOR BIOLOGICAL DIVERSITY; ECOLOGY
19 CENTER,

20 Plaintiffs,

21 v.

22 UNITED STATES ARMY CORPS OF ENGINEERS;
23 UNITED STATES FISH AND WILDLIFE SERVICE,

24 Defendants.

CV 03-29-M-OWM

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

25 **INTRODUCTION**

26 1. This is a civil action for declaratory and injunctive relief under the Endangered
27 Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"), in which plaintiffs Center for Biological
Diversity, and the Ecology Center (collectively "plaintiffs") challenge the actions of the United
States Fish and Wildlife Service ("FWS") and the United States Army Corps of Engineers ("the
Corps") as they relate to the endangered Kootenai River population of white sturgeon.

1 | Complaint. Well more than sixty days have passed since the agencies were put on notice of these
2 | alleged violations. They have not remedied the alleged violations.

3 | 7. An actual, justiciable controversy exists between plaintiffs and defendants and the
4 | requested relief is proper under 28 U.S.C. §§ 2201 & 2202 (declaratory and injunctive relief), and
5 | 5 U.S.C. §§ 705 & 706.

6 | VENUE

7 | 8. Venue is properly vested in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A),
8 | because a substantial portion of the violations occur in this district, and 28 U.S.C. § 1391(e),
9 | because a substantial part of the events and omissions giving rise to Plaintiffs' claims occur in this
10 | judicial district. Plaintiff, the Ecology Center maintains its office in this district; the species has
11 | habitat located in this district; and Libby Dam, the operation of which is central to plaintiffs'
12 | claims, is located in this district. Pursuant to Local Rule 3.3(a), assignment of this case to the
13 | Missoula Division is proper.

14 | PARTIES

15 | 9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-
16 | profit corporation with offices in Berkeley, San Diego and Idyllwild, California; Phoenix and
17 | Tucson, Arizona; Silver City, New Mexico; Bozeman, Montana; and Sitka, Alaska. The Center is
18 | actively involved in species and habitat protection issues throughout the western United States,
19 | northern Mexico and Alaska. The Center has members throughout these regions, including in and
20 | near areas which serve as habitat for the Kootenai River white sturgeon. The Center's members
21 | and staff include local residents with educational, scientific research, moral, spiritual and
22 | recreational interests in this species and its habitat. The Center's members and staff also enjoy the
23 | biological, recreational and aesthetic values of the areas inhabited by this species. The Center, its
24 | members and staff have participated in efforts to protect and preserve the habitat essential to the
25 | continued survival of this species, including filing the lawsuit which resulted in the sturgeon's
26 | critical habitat designation, and they use many of the exact tracts of land where the species is

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1 present and where critical habitat should be expanded to for the above purposes. The Center's
2 efforts to protect species include, among other activities, the submission of petitions with both the
3 Federal and States' governments to secure protected status for threatened or endangered species
4 under Federal and State law, and the pursuit of litigation to enforce the timely processing of such
5 petitions and the resulting listing and critical habitat determinations. Additionally, the Center
6 pursues administrative and legal proceedings to ensure that actions are not taken which will harm
7 protected species and/or their habitats. The Center has brought numerous successful lawsuits to
8 obtain these goals throughout the country. The Center brings this action on its own behalf and on
9 behalf of its adversely affected members and staff.

10 10. Plaintiff THE ECOLOGY CENTER, INC. is a non-profit conservation group,
11 based in Missoula, Montana, dedicated to the protection and restoration of ecological integrity
12 and biological diversity in the Rocky Mountains and Northern Great Plains Region of the United
13 States and Canada, and committed to facilitating the increased involvement of citizens in public
14 land management decision making. The Ecology Center actively and extensively participates in
15 agency proceedings and decisions concerning the management of forest, prairie, and river
16 ecosystems in the Northern Rockies and Northern Great Plains, including lands and waters within
17 the states of Montana, Wyoming, Idaho, Oregon, Washington, Nebraska, North Dakota, and
18 South Dakota in the United States, and the provinces of Alberta and British Columbia in Canada.
19 The Ecology Center has over 100 members living in these states and provinces that enjoy using
20 public lands and waters for scientific research, recreation, education, and spiritual renewal.
21 Ecology Center members and staff have visited and enjoyed areas with populations of Kootenai
22 River white sturgeon and are committed to protecting this species against harm.

23 11. Plaintiffs' members and staff rely on the Corps to comply fully with all provisions
24 of the ESA, including the Section 7 consultation requirements, which assure that federal agencies
25 incorporate protections for threatened and endangered species into project planning, design, and
26 implementation. The consultation process provides agency decision-makers, Plaintiffs, and the

1 public with essential information regarding the effects of such actions on threatened and
2 endangered species.

3 12. Plaintiffs similarly rely on the FWS to comply with that agency's duty under the
4 ESA to designate as critical habitat those areas which are essential to a species' conservation.

5 13. The FWS' failure to include areas essential to the sturgeon's conservation in that
6 species' critical habitat designation, as well as the Corps' failure to implement and comply with
7 the RPA designed to mitigate the harmful impacts of the agency's actions on the sturgeon and
8 failure to reinitiate consultation with FWS, have prevented the implementation of protective
9 measures for the sturgeon and its habitat. As a result, the aesthetic, recreational, scientific,
10 educational and religious interests of plaintiffs' members and staff have been, are being, and unless
11 the relief requested is granted, will continue to be adversely affected and injured by those
12 agencies' failure to comply with the ESA. Plaintiffs are also being denied the essential
13 information and the benefits of the ESA's Section 7 consultation provision. These are actual,
14 concrete injuries caused by defendants' failure to comply with mandatory duties under the ESA
15 and the APA. Plaintiffs have no adequate remedy at law and the injuries would be redressed by
16 the relief sought.

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

21 15. Defendant, UNITED STATES ARMY CORPS OF ENGINEERS is a branch of
22 the United States Army charged with the operation of Libby Dam on the Kootenai River, and is
23 the action agency responsible for implementing and complying with the RPA contained in the
24 2000 Biological Opinion entitled "Effects to Listed Species from Operations of the Federal
25 Columbia River Power System."

26 16. Defendant UNITED STATES FISH & WILDLIFE SERVICE is a federal agency

1 within the Department of Interior authorized and required by law to protect and manage the fish,
2 wildlife and native plant resources of the United States, including protection of the Kootenai
3 River white sturgeon under the ESA. FWS published the allegedly deficient critical habitat
4 designation challenged in this complaint, and also issued the Biological Opinion containing the
5 RPAs with which co-defendant Army Corps of Engineers allegedly failed to comply.

6
7 **LEGAL BACKGROUND**

8 **The Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA")**

9 17. The purposes of the ESA "are to provide a means whereby the ecosystems upon
10 which endangered species and threatened species depend may be conserved, [and] to provide a
11 program for the conservation of such endangered species and threatened species . . ." 16 U.S.C.
12 § 1531(b). To this end, the ESA requires that the Secretary protect such species by listing them
13 as either "threatened" or "endangered," and by designating "critical habitat" for each listed
14 threatened or endangered species. 16 U.S.C. § 1533.

15 18. Critical habitat is defined in Section 3 of the ESA as:

16 (i) the specific areas within the geographical area occupied by a species, at the time
17 it is listed in accordance with the Act, on which are found those physical or
18 biological features (I) essential to the conservation of the species and (II) that may
19 require special management considerations or protection; and (ii) specific areas
20 outside the geographical area occupied by a species at the time it was listed, upon
21 a determination that such areas are essential for the conservation of the species.

22 16 U.S.C. § 1532(5)(A).

23 19. "Conservation" means the use of all methods and procedures needed to bring the
24 species to the point at which listing under the act is no longer required. 16 U.S.C. § 1532(3).

25 20. The ESA also mandates that in making a critical habitat determination, the
26 Secretary shall make such determination "on the basis of the best scientific data available." 16
27 U.S.C. § 1533(b)(2).

28 21. Designation of additional spawning habitat upstream from the currently designated

1 critical habitat for the sturgeon would provide important protections not otherwise provided by
2 law, including an absolute ban on destruction or adverse modification of such habitat from actions
3 funded, authorized or carried out by federal agencies. 16 U.S.C. § 1536(a)(2).

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

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

14 24. At the completion of the Section 7 consultation process FWS issues a Biological
15 Opinion (BO) that determines if the agency action is likely to jeopardize the species' continued
16 survival. If so, the opinion may specify "Reasonable and Prudent Alternatives" designed to avoid
17 jeopardy while allowing the agency to proceed with the action. 16 U.S.C. § 1536(b).

18 25. An agency's duty to avoid jeopardy is continuing, and "where discretionary
19 Federal involvement or control over the action has been retained or is authorized by law," the
20 agency must in certain circumstances reinstate formal consultation. Reinstatement of consultation is
21 "required" and "shall" be requested by the action agency or the FWS "(a) If the amount or extent
22 of taking specified in the incidental take statement is exceeded; (b) If new information reveals
23 effects of the action that may affect listed species or critical habitat in a manner or to an extent not
24 previously considered; (c) If the identified action is subsequently modified in a manner that causes
25 an effect to the listed species or critical habitat that was not considered in the biological opinion;
26 or (d) If a new species is listed or critical habitat designated that may be affected by the identified

1 action." 50 C.F.R. §§ 402.16(a)(b)(c)&(d).

2 26. Section 9 of the ESA prohibits the "taking" of any endangered species. 16 U.S.C.
3 § 1538(a)(1)B). "Take" is defined in the ESA to mean to "harass, harm, pursue, hunt, shoot,
4 would, kill, trap, capture, or collect, or to attempt to engage in such conduct." 16 U.S.C. §
5 1532(19). The term "harm" has been further defined to include "significant habitat modification
6 or degradation where it actually kills or injures wildlife by significantly impairing essential
7 behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. "Harassing" a
8 threatened or endangered species is an act which "creates a likelihood of injury to wildlife by
9 annoying it to such an extent as to significantly disrupt normal behavioral patterns" *Id.*

10 27. If the FWS determines that a taking of listed species may occur incidental to the
11 agency's action, but that such taking would not result in jeopardy to the species and so violate
12 subsection (a)(2), the ESA requires that the FWS provide the agency "with a written statement
13 that- (i) specifies the impact of such incidental taking on the species, (ii) specifies those reasonable
14 and prudent measures that the Secretary considers necessary or appropriate to minimize such
15 impact," and "(iv) sets forth terms and conditions (including but not limited to reporting
16 requirements) that must be complied with by the Federal Agency... to implement the measures
17 specified under clause[] (ii)." 16 U.S.C. § 1536 (b)(4) (emphasis added). When the FWS issues
18 an incidental take statement any "take" that falls within the terms and conditions set forth in the
19 ITS is exempted from the prohibitions of Section 9, 16 U.S.C. § 1536(o)(2).

20 28. The ongoing and proposed activities at Libby Dam as described in the 2000
21 Biological Opinion are agency actions as defined in 50 C.F.R. § 402.02.

22 **FACTUAL BACKGROUND**

23 **A. The Kootenai River white sturgeon**

24 29. The white sturgeon is one of eight sturgeon species occurring in North America
25 which historically occurred on the Pacific Coast from the Aleutian Islands to central California.
26 The Kootenai River population of the white sturgeon (*Acipenser transmontanus*) is one of

1 | eighteen land-locked populations of white sturgeon known to occur in western North America.
2 | Because this distinct population of white sturgeon on the Kootenai River is in danger of extinction
3 | throughout its range, FWS found that it fit the ESA's definition of an endangered species. 59 Fed.
4 | Reg. 45,989 (September 6, 1994). Individual members of Kootenai River white sturgeon may
5 | live up to seventy years and have been known to weigh up to 200 pounds.

6 | 30. The Kootenai River originates in British Columbia, Canada, then flows south into
7 | Montana, northwest into Idaho, then north back into British Columbia. Kootenai River white
8 | sturgeon occur in Idaho, Montana, and British Columbia, and are currently restricted to
9 | approximately 168 river miles of the Kootenai River extending down river from Kootenai Falls,
10 | Montana, located 31 river miles below Libby Dam.

11 | 31. "The Kootenai River population of white sturgeon is threatened by factors
12 | including hydropower operations, flood control operations, poor recruitment, loss of habitat, and
13 | possibly, contaminants (water quality impacts)." 66 Fed. Reg. 46,548 (September 6, 2001). "The
14 | primary threat to this species involves effects of the greatly altered natural hydrograph in the
15 | Kootenai River downstream of and beginning with the operations of Libby Dam in 1975." *Id.* at
16 | 46,549.

17 | 32. In 1997 it was estimated that there were only 1,468 adult sturgeon remaining in
18 | the Kootenai River population, including only 539 females. *Id.* at 46,548. Although white
19 | sturgeon may survive up to 70 years, most sturgeon species only reproduce within the age
20 | brackets of 10 to 25 years for females. 59 Fed. Reg. at 45,991. In light of an "almost complete
21 | lack of recruitment of juveniles into the population since 1974," a date which closely coincides
22 | with the initial operation of Libby Dam, FWS determined in 1994 that many of the fish in the
23 | Kootenai River white sturgeon population are passing, or have past, the years in which they are
24 | reproductively active; "few of the remaining white sturgeon [are] younger than 20 years old,"
25 | (*id.*), and noted that "[t]he population may be reaching the age of reproductive senescence." *Id.* at
26 | 45,995. More than eight years later, in 2003, the effect of continued failure to successfully spawn
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1 and recruit young is even more significant and alarming.

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

9 **B. Libby Dam**

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

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

20 36. Operation of Libby Dam affects water elevations, flows, flood stages,
21 temperatures, and river bottom characteristics, forcing the species to relocate and altering the
22 characteristics of the Kootenai River where the sturgeon attempts to spawn.

23 37. As a result, in the Kootenai River most of the currently occupied sturgeon habitat
24 is over-sandy substrate, and most sturgeon eggs are destined to drift along a sandy river bottom
25 unable to adhere to a rocky or gravel bottom necessary for the eggs' development and protection.
26 66 Fed. Reg. at 46,549. In fact, "there is evidence that very high levels of mortality of sturgeon

1 | eggs and sac fry are occurring annually at the sites now being used for spawning, egg incubation,
2 | and yolk sac fry development." Id. With an estimated 3.8 million eggs released annually, during
3 | the nine years preceding the 2000 Biological Opinion, only two larvae and a few empty egg cases,
4 | indicating successful hatching, have been found. In the absence of increased releases from Libby
5 | Dam, FWS estimates that near total mortality of 3.8 million eggs released annually is anticipated
6 | to occur under the proposed action.

7 | 38. FWS has identified two possible explanations for the sturgeon's inability to
8 | successfully spawn and the resulting lack of significant recruitment since the construction of Libby
9 | Dam:

10 | (1) The current spawning site selection is a predominant behavioral response to changed
11 | river velocities and depths from the operations of Libby Dam, which may be causing the
12 | sturgeon to spawn primarily at new sites below the confluence with Deep Creek, about 3
13 | river miles below Bonners Ferry, with unsuitable sandy riverbed substrates; or (2) the
14 | substrate at historic spawning sites has been altered by the operations of Libby Dam that
15 | have greatly reduced peak flood flows and associated stream energy. In turn, this may be
16 | causing rocky substrate, otherwise suitable for egg incubation and sac fry development, to
17 | be covered with sand.

18 | Id. at 46549. Whether because the Dam has caused sturgeon to select new, unsuitable spawning
19 | sites due to inadequate water levels, or rendered unsuitable the sites at which sturgeon historically
20 | spawn, Libby Dam has effectively prevented the Kootenai River population of white sturgeon
21 | from successfully reproducing. Id.

22 | C. The December 2000 Biological Opinion

23 | 39. On December 20, 2000, FWS issued its Biological Opinion assessing the impacts
24 | of the Federal Columbia River Power System - which includes Libby Dam - on species protected
25 | by the ESA, including the Kootenai white sturgeon.

26 | 40. After reviewing the current status of the sturgeon, the environmental baseline for
27 | the action area, the effects of the proposed action and the cumulative effects, the FWS concluded
28 | that the proposed operation of Libby Dam would jeopardize the continued existence of the
29 | Kootenai River white sturgeon.

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

8 42. FWS proposed a reasonable and prudent alternative means of operating Libby
9 Dam which it deemed necessary and appropriate to avoid jeopardy. That alternative contained
10 several components intended to modify operations of Libby Dam to assure storage of water
11 specifically allocated for augmentation of Kootenai River flows during sturgeon spawning and
12 development during early life stages.

13 43. Pursuant to the RPA, and based on historical data indicating that when the
14 sturgeon last successfully recruited in 1974, flow levels below Libby Dam were at 40,000 cfs, the
15 Corps was required to increase the release capacity of the dam by 10,000 cfs to 35,000 cfs in two
16 5,000 cfs increments. The first spill test was conducted in 2002 with the Corps concluding that
17 only 1,000 cfs, rather than 5,000 cfs, could be passed over the spillway, thus limiting the
18 maximum outflow from the dam to 26,000 cfs, far short of the 35,000 cfs requirement in the
19 RPA.

20 44. In the event that 5,000 cfs could not be passed over the spillway, FWS established
21 an additional RPA which required the Corps to immediately begin preparation of documentation
22 pursuant to the National Environmental Policy Act ("NEPA") and to seek funding for installation
23 of one additional turbine or spillway flow deflectors that will be operational by spring 2004. The
24 Corps has failed to initiate this process.

25 45. Although the Corps is currently conducting NEPA analysis of implementing a
26 flood control regime called VarQ, that narrowly tailored analysis is only intended to satisfy the
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1 water storage component of the RPA, and its completion is not anticipated until the end of 2004.
2 The scope of this NEPA analysis is too narrow and the timeline for its completion is too long to
3 satisfy the RPA requirements regarding increased water release.

4 46. FWS also required the Corps to immediately reinitiate consultation with the FWS
5 if at any point it is determined that either of the above two 5,000 cfs (10,000 cfs total) increased
6 release increments scheduled for spring of 2002, or 2004 and 2007, is not achievable. Despite the
7 2002 failure to provide the first incremental increase, the Corps has failed to reinitiate consultation
8 as required.

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

20
21 **D. The September 2001 Critical Habitat Designation**

22 48. The Kootenai River population of white sturgeon was listed as an endangered
23 species under the ESA on September 6, 1994. 59 Fed. Reg. 45,989. Its critical habitat was
24 designated exactly six years later on September 6, 2001. 66 Fed. Reg. 46,548.

25 49. At the time of the December 2000 Biological Opinion no critical habitat had been
26 designated, therefore, it was simply concluded that none would be affected. Thus, adverse

1 modification to critical habitat was not a factor considered in the Biological Opinion.

2 50. The 2001 critical habitat designation included only 11.2 river miles of the Kootenai
3 River located in the State of Idaho. The sandy river bottom characteristic of this stretch of the
4 Kootenai River and the inadequate flows and water levels resulting from operation of the Libby
5 Dam have rendered this habitat unsuitable for sturgeon spawning.

6 51. Exposed gravel substrate habitat, which by FWS' admission appears suitable for
7 sturgeon spawning and early-life-stage rearing, exists in the Kootenai River upstream of the area
8 FWS designated as critical habitat. Modest experimental augmentation flows in 1996 and 1997
9 intended to attract spawning sturgeon to this area were successful. Indeed, the augmented flows
10 required in the Biological Opinion are intended to induce sturgeon to utilize this habitat for
11 spawning. Nonetheless, FWS has not included this essential habitat in the sturgeon's critical
12 habitat designation, leaving the species with no suitable spawning habitat within its designated
13 critical habitat.

14 52. Neither the Corps nor the FWS have sought to reinstate consultation based on the
15 designation of critical habitat.

16 CLAIMS FOR RELIEF

17 First Claim for Relief

18 (U.S. Army Corps of Engineers)
19 (Jeopardizing continued existence of an endangered species)

20 53. Plaintiffs reallege and incorporate by reference each and every allegation set forth
21 above in this Complaint.

22 54. 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' failure to implement

1 and comply with the RPA of the 2000 jeopardy Biological Opinion intended to mitigate the
2 impacts of that dam's operation on the sturgeon, and its failure to reinitiate consultation with the
3 FWS based on the new information and modification of the proposed action effectively arising
4 from the failure to implement the RPA, and the designation of critical habitat for the sturgeon.
5 For these reasons, the Corps has violated the APA, 5 U.S.C. §§ 701-706, by acting in a manner
6 that is arbitrary, capricious, not in accordance with law, and without observance of procedure
7 required by law.

8 55. The Corps' failure to implement and comply with the particular components of the
9 RPA as required by the Biological Opinion also constitutes agency action that is unreasonably
10 delayed and/or unlawfully withheld as provided by Section 706(1) of the Administrative
11 Procedure Act ("APA") and is subject to judicial review thereunder. 5 U.S.C. §§ 701 through
12 706.

13 **Second Claim For Relief**

14 **(U.S. Army Corps of Engineers)**
15 **(Exceeding authorized "take" of an endangered species)**

16 56. Plaintiffs reallege and incorporate by reference each and every allegation set forth
17 above in this Complaint.

18 57. Based on the above facts and legal obligations, the Corps is violating Section 9 of
19 the ESA by continuing to operate Libby Dam in a manner that will result in take of an endangered
20 species through further mortality of sturgeon eggs and sac fry, without complying with the
21 Reasonable and Prudent Alternative of the operative Biological Opinion which was intended in
22 part to limit or avoid such take. 16 U.S.C. § 1538(a)(1). For these reasons, the Corps has
23 violated the APA, 5 U.S.C. §§ 701-706, by acting in a manner that is arbitrary, capricious, not in
24 accordance with law, and without observance of procedure required by law.

THIRD CLAIM FOR RELIEF

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

58. Plaintiffs reallege and incorporate by reference each and every allegation set forth above in this Complaint.

59. Based on the above facts and legal obligations, FWS has violated the ESA by failing to include known, essential, suitable spawning habitat in the sturgeon's critical habitat designation. FWS is required to designate as critical habitat "areas outside the geographical area occupied by the species" when "such areas are essential for the conservation of the species." For these reasons, FWS has violated the APA, 5 U.S.C. §§ 701-706, by acting in a manner that is arbitrary, capricious, not in accordance with law, and without observance of procedure required by law.

RELIEF REQUESTED

Plaintiffs respectfully request that this court enter judgment providing the following relief:

A. A declaration that defendant Army Corps of Engineers is in violation Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), and the APA by failing to ensure that its actions at Libby Dam will not jeopardize the continued existence of the endangered Kootenai River white sturgeon. This violation arises from the Corps' failure to implement and comply with the RPA of the 2000 jeopardy Biological Opinion intended to mitigate the impacts of that dam's operation on the sturgeon, and from the agency's failure to reinstate consultation with the FWS based on the new information and modification of the proposed action effectively arising from the failure to implement the RPA, and the designation of critical habitat for the sturgeon;

B. A declaration that defendant Army Corps of Engineers' failure to implement and comply with the RPA of the 2000 jeopardy Biological Opinion constitutes agency action that is unreasonably delayed and/or unlawfully withheld as provided by Section 706(1) of the APA;

1 C. A declaration that defendant Army Corps of Engineers is violating Section 9 of the
 2 ESA, 16 U.S.C. § 1538, and the APA by continuing to operate Libby Dam in a manner that will
 3 result in take of an endangered species without complying with the Reasonable and Prudent
 4 Alternative of the operative Biological Opinion which was intended in part to limit or avoid such
 5 take;

6 D. A declaration that defendant Fish and Wildlife Service has violated Section 4 of the
 7 ESA, 16 U.S.C. § 1533, and the APA by failing to include known, essential, suitable spawning
 8 habitat in the sturgeon's critical habitat designation;

9 E. An order requiring the Corps to comply with the terms of the Biological Opinion
 10 by immediately implementing all measures required by that opinion, and to reinstate consultation
 11 based on the effects of delayed implementation of such measures, the inability to comply with the
 12 required increased releases, and the designation of critical habitat for the sturgeon;

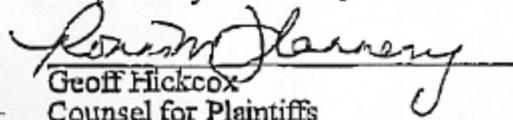
13 F. An order requiring the FWS to immediately revisit the critical habitat designation
 14 for the Kootenai River population of white sturgeon in order to evaluate the need to designate
 15 known, essential, suitable spawning habitat located upstream from the currently designated critical
 16 habitat;

17 G. Award plaintiffs their costs, expenses, expert witness fees, and reasonable attorney
 18 fees under applicable law; and

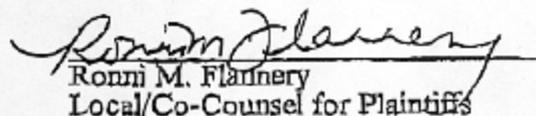
19 H. Grant plaintiffs such further relief as may be just, proper, and equitable.

20 DATED this 18th day of February, 2003.

21 Respectfully submitted,

22 
 23 Geoff Hickcox
 24 Counsel for Plaintiffs

FOR

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