

1 Julie Cavanaugh-Bill (NV Bar No. 11533)
Attorney & Counselor at Law
2 Cavanaugh-Bill Law Offices, LLC
Henderson Bank Building
3 401 Railroad Street, Suite 307
4 Elko, Nevada 89801
TEL: (775) 753-4357
5 FAX: (775) 753-4360
julie@cblawoffices.org
6 www.cblawoffices.org

7 John Buse (CA Bar No. 163156), *Application for Pro Hac Vice to be filed*
8 Lisa T. Belenky (CA Bar No. 203225), *Application for Pro Hac Vice to be filed*
CENTER FOR BIOLOGICAL DIVERSITY
9 351 California Street, Suite 600
San Francisco, CA 94104
10 Telephone: (415) 436-9682 x 307
11 Facsimile: (415) 436-9683
jbuse@biologicaldiversity.org
12 lbelenky@biologicaldiversity.org

13 *(will comply with LR IA 10-2 within 45 days)*

14 *Attorneys for Plaintiff*
15 *Additional Counsel Listed on Signature Page*

16 UNITED STATES DISTRICT COURT
17 DISTRICT OF NEVADA

18
19 CENTER FOR BIOLOGICAL DIVERSITY) Case No.
20)
21 Plaintiff,)
22 vs.) **COMPLAINT FOR DECLARATORY AND**
23) **INJUNCTIVE RELIEF**
24 U.S. FISH AND WILDLIFE SERVICE, and)
25 KEN SALAZAR, Secretary of the Interior,)
Defendants.)
_____)

I. INTRODUCTION

1
2 1. This is an action for declaratory and injunctive relief brought by Plaintiff Center
3 for Biological Diversity (the Center) raising claims under the Endangered Species Act, 16
4 U.S.C. §§ 1531 *et seq.* (ESA), NEPA, 42 U.S.C. §§ 4321 *et seq.*, the National Wildlife Refuge
5 System Improvement Act, 16 U.S.C. §§ 668dd *et seq.*, and the property clause of the U.S.
6 Constitution, U.S. Const. art. IV, § 3, cl. 2.

7 2. Defendants have violated the property clause of the U.S. Constitution by
8 relinquishing U.S. water rights expressly reserved for the Moapa Valley National Wildlife
9 Refuge for the benefit of the endangered Moapa dace. Further, Defendants have violated Section
10 7 of the ESA by failing to insure against jeopardy of extinction of the endangered Moapa dace,
11 an endangered fish found only in southeastern Nevada. The Defendants' decisions and actions
12 including, but not limited to, approval of the Muddy River Memorandum of Agreement
13 (MOA) and issuance of the related Biological Opinion (BO), were arbitrary and capricious
14 and should be set aside. Plaintiff herein challenges the Defendants' approval of the Muddy River
15 MOA and the issuance of the BO which will allow excessive groundwater pumping to begin that
16 may jeopardize the survival of the Moapa dace in the wild in violation of the ESA. Defendants'
17 approvals were not based on the best available science, and the monitoring and mitigation
18 measures suggested in the MOA and MOA BO will not adequately protect the Moapa dace if
19 adverse impacts are detected, because of the inherent time delay for groundwater systems to
20 rebound even after pumping is ended. This action seeks an order declaring that Defendants have
21 failed to uphold the U.S. Constitution and mandatory duties under the ESA and NEPA, and
22 setting aside the challenged actions.

II. JURISDICTION AND VENUE

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24 3. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 (federal
25 question), 1346 (United States as Defendant), 2201 (declaratory judgment), 2202 (injunctive
26 relief); 16 U.S.C. §§ 1540(c) and (g) (action arising under the ESA and citizen suit provision);
27 and 5 U.S.C. §§ 701 through 706 (Administrative Procedures Act (APA)).

1 4. Venue is properly vested in the District Court of Nevada pursuant to 16 U.S.C. §
2 1540(g)(3)(A) and 28 U.S.C. § 1391(e) because the alleged violations of law, and a substantial
3 part of the events or omissions giving rise to these claims, and the property that is the subject of
4 the action, occur in this district.

5 5. Plaintiff provided 60 days notice of intent to file this suit pursuant to the citizen
6 suit provision of the ESA, 16 U.S.C. § 1540(g)(2)(C), by letter to each Defendant dated and sent
7 by certified mail and facsimile on February 10, 2009. Neither Defendant responded to the notice
8 of intent to sue nor have the Defendants remedied the alleged violations. An actual controversy
9 exists between the parties within the meaning of 28 U.S.C. § 2201. For all claims, Plaintiff has
10 exhausted all of the administrative remedies available.

11 III. PARTIES

12 6. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (the Center) is a non-
13 profit corporation with offices in California, Arizona, New Mexico, Alaska, Nevada, and
14 Washington, D.C. The Center is actively involved in species and habitat protection issues
15 throughout North America and the Pacific. The Center has over 42,000 members throughout the
16 United States, including many members who reside in California and Nevada, and live, visit, or
17 recreate in and near areas that serve as habitat for the Moapa dace. The Center's members and
18 staff have educational, scientific, biological, aesthetic and spiritual interests in the survival and
19 recovery of the Moapa dace. The Center, its members and staff have participated in efforts to
20 protect and preserve the habitat essential to the continued survival of the Moapa dace and use
21 areas where the species habitat is found.

22 7. Plaintiff's staff and members live, work, visit, and/or recreate in areas of Nevada
23 that serve as Moapa dace habitat. They use areas containing habitat of the Moapa dace for
24 recreational, scientific, aesthetic, educational and conservation purposes, including, but not
25 limited to, hiking, aesthetic enjoyment, photography, nature study and wildlife observation.
26 They intend to continue to do so on an ongoing basis in the future. Plaintiff's staff and members
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1 derive recreational, aesthetic, scientific, education and conservation benefit and enjoyment from
2 the continued existence of the Moapa dace in the wild.

3 8. Plaintiff's staff and members believe that the health of the Moapa dace and
4 preservation of its habitat is a critical indicator of the overall health of the ecosystem where the
5 species is found. Defendant's failure to adequately protect this endangered species and
6 Defendant's actions in entering into the MOA and issuing a faulty Biological Opinion for the
7 MOA violate the ESA and may lead to the extinction of the species in the wild, and to harm to its
8 habitat. The failure to adequately and lawfully protect the species as required under the ESA will
9 deprive Plaintiff's members and staff of recreational, aesthetic, scientific, education,
10 conservation and other benefits.

11 9. Plaintiff's members and staff have been and continue to be actively involved in
12 efforts to protect and restore the health of the habitat of the Moapa dace and support efforts to
13 ensure its survival. No administrative process or any other public process was provided by
14 Defendants before making these decisions. Plaintiff has engaged with various state and federal
15 agencies in the past to urge increased protection for the Moapa dace and its habitat as well as for
16 other imperiled species that may be affected by Defendant's decisions challenged herein.

17 10. The above-described aesthetic, conservation, recreational, scientific, educational,
18 and other interests of Plaintiff's staff and members have been, are being, and, unless the relief
19 prayed for herein is granted, will continue to be adversely affected and irreparably injured by
20 Defendant's approval of the MOA and issuance of the BO that fail to meet the legal
21 requirements and standards of the ESA.

22 11. The injuries described above are actual, concrete injuries suffered by Plaintiff's
23 staff and members. These injuries are caused by Defendant's failure to uphold the ESA, NEPA,
24 the U.S. Constitution and other laws in taking the challenged actions. The relief sought herein
25 would redress Plaintiff's injuries. Plaintiff has no other adequate remedy at law.

26 12. Defendant UNITED STATES FISH AND WILDLIFE SERVICE ("Service" or
27 "FWS"), is the agency within the Department of the Interior that has been delegated the

1 responsibility of the Secretary of the Interior to consult with agencies regarding projects that may
2 affect non-marine species listed under the ESA, including the self-consultation which resulted in
3 the issuance of the challenged Biological Opinion. The Service's Nevada Fish and Wildlife
4 Office issued the Biological Opinion challenged herein is located in Reno, Nevada. The Service
5 is also charged with management and protection of National Wildlife Refuge (NWR) lands and
6 property including the water rights that were affected by the Service's agreement to enter into the
7 MOA challenged herein.

8 13. Defendant KEN SALAZAR is the Secretary of the Interior (the Secretary) and
9 is the federal official in whom the ESA vests final responsibility for making decisions and
10 promulgating regulations required by and in accordance with the ESA. He is sued in his official
11 capacity.

12 IV. FACTS

13 A. Legal Background

14 *Property Clause of the U.S. Constitution*

15 14. The Property Clause of the Constitution vests Congress with the sole authority to
16 dispose of Federal property. U.S. Const. art. IV, § 3, cl. 2 (The Congress shall have Power to
17 dispose of and make all needful Rules and Regulations respecting the Territory or other Property
18 belonging to the United States). Federal property includes federal water rights. While the
19 power to dispose of property can be expressly delegated by Congress, the power to dispose of
20 water rights has not been delegated to the Secretary or FWS. Indeed, to the contrary, pursuant to
21 Public Water Reserve 107 (PWR 107), established by Executive Order in 1926, government
22 agencies cannot authorize activities that will impair the public use of federal reserved water
23 rights necessary to support the resources on public lands where they occur. The purposes for
24 which federal water rights may be reserved include the survival and recovery of wildlife and fish
25 on public lands. PWR 107 created a federal reserved water right in water flows that must be
26 maintained to protect public water uses necessary to maintain endangered species such as the
27 Moapa dace. PWR 107 applies to reserve water that supports riparian areas, and to reserve water

1 that provides flow to adjacent creeks and isolated springs that are "nontributary" or which form
2 the headwaters of streams. Reserved waters covered by PWR 107 are to be protected from
3 activities that will impair the public use. PWR 107 also protects the public lands on which
4 protected water sources exist and the surrounding ecosystem.

5 *The Endangered Species Act*

6 15. *Purpose of the ESA.* Among the purposes of the ESA are "to provide a means
7 whereby the ecosystems upon which endangered species and threatened species depend may be
8 conserved, [and] to provide a program for the conservation of such endangered species and
9 threatened species . . ." 16 U.S.C. § 1531(b). To this end, Section 4 of the ESA requires that the
10 Secretary protect such species by listing them as either "threatened" or "endangered," and by
11 designating "critical habitat" for each listed threatened or endangered species at the time the
12 species is listed. 16 U.S.C. § 1533.

13 16. "Conserve" and "conservation," as defined in the ESA, "mean to use and the use
14 of all methods and procedures necessary to bring any endangered species or threatened species to
15 the point at which the measures provided pursuant to this chapter are no longer necessary." ESA
16 § 3(3), 16 U.S.C. § 1532(3). This definition of "conservation" is broader than mere survival; it
17 also includes the recovery of species. *Id.*

18 17. *Listing of Species.* The ESA requires the Secretary to issue regulations listing
19 species as endangered or threatened based on the present or threatened destruction, modification,
20 or curtailment of a species' habitat or range; over-utilization for commercial, recreational,
21 scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory
22 mechanisms; or other natural or manmade factors affecting the species' continued existence. 16
23 U.S.C. § 1533(a)(1). An endangered species is one "in danger of extinction throughout all or a
24 significant portion of its range." 16 U.S.C. § 1532(6). The ESA requires that the Secretary make
25 listing determinations "solely on the basis of the best scientific and commercial data available."
26 16 U.S.C. § 1533(b)(1)(A). Only if officially listed does a species receive the full protection of
27 the ESA. The ultimate goal of the law is to conserve and recover species so that they no longer
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1 require the protections of the ESA. 16 U.S.C. §§ 1531(b), 1532(3). The Secretary has delegated
2 his authority under the ESA to FWS for terrestrial species and non-marine fish including the
3 Moapa dace.

4 18. *Critical Habitat.* Concurrently with listing a species as threatened or endangered,
5 the Secretary must also designate the species's "critical habitat." 16 U.S.C. § 1533(b)(2).
6 "Critical habitat" is the area that contains the physical or biological features essential to the
7 "conservation" of the species and which may require special protection or management
8 considerations. 16 U.S.C. 1532(5)(A). The ESA requires the Secretary to make critical habitat
9 designations and amendments "on the basis of the best scientific data available . . ." 16 U.S.C. §
10 1533(b)(2).

11 19. *Recovery Plans.* Section 4(f) of the ESA requires the Secretary to "develop and
12 implement plans . . . for the conservation and survival of endangered species . . ." 16 U.S.C.
13 §1533(f). Recovery plans must include a description of site-specific management actions that
14 may be necessary to achieve the conservation and survival of the species; objective, measurable
15 criteria which, when met, would result in a determination that the species be removed from the
16 list; and estimates of the time required and the cost to carry out those measures needed to achieve
17 the plan's goal and to achieve intermediate steps toward that goal. 16 U.S.C. § 1533(f)(1).

18 20. *Duty to Conserve.* Federal agencies have an affirmative duty to promote the
19 conservation (*i.e.*, recovery) of threatened and endangered species. ESA Section 2(c) provides
20 that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve
21 endangered species and threatened species and shall utilize their authorities in furtherance of the
22 purposes of this Act." 16 U.S.C. §1531(c)(1). Section 7(a)(1) also establishes an affirmative
23 duty to conserve. 16 U.S.C. § 1536(a)(1). The duty to conserve applies equally to the Secretary
24 of Interior and other agencies.

25 21. *Prohibition against "take":* ESA Section 9 and its implementing regulations
26 prohibit any person from "taking" a threatened or endangered species. 16 U.S.C. § 1538(a)(1);
27 50 C.F.R. § 17.31. A "person" includes private parties as well as local, state, and federal
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1 agencies. 16 U.S.C. § 1532(13). "Take" is defined broadly under ESA to include harming,
2 harassing, trapping, capturing, wounding, or killing a protected species either directly or by
3 degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. § 1532(19).
4 The ESA not only bans the acts of parties directly causing a take, but also bans the acts of third
5 parties whose acts bring about the taking.

6 22. One exception to Section 9's take prohibitions is relevant here. Pursuant to Section
7 7 federal agency may take listed species only in accordance with an "Incidental Take Statement."
8 16 U.S.C. § 1536(b)(4). If the terms and conditions of the Incidental Take Statement are followed,
9 the federal agency and any permittee are exempted from Section 9's take prohibitions. 16 U.S.C.
10 § 1536(o)(2). A lawful Incidental Take Statement must specify the impact of incidental takings on
11 listed species by providing a specific numerical "take" number. 16 U.S.C. § 1536(b)(4)(i); 50
12 C.F.R. § 402.14(i)(1).

13 23. *Duty to insure survival and recovery; duty to consult.* Pursuant to Section 7(a)(2)
14 of the ESA, all federal agencies must "insure that any action authorized, funded or carried out by
15 such agency . . . is not likely to jeopardize the continued existence of any endangered or
16 threatened species or result in the destruction or adverse modification of habitat of such species .
17 . . . determined . . . to be critical . . ." 16 U.S.C. § 1536(a)(2). To fulfill this mandate, the acting
18 agency must prepare a biological assessment for the purpose of identifying all endangered or
19 threatened species which are likely to be affected by the action, 16 U.S.C. § 1536(c)(1), and must
20 consult with FWS whenever such actions "may affect" a listed species. 16 U.S.C. § 1536(a)(2);
21 50 C.F.R. § 402.14(a).

22 24. *Biological opinion.* Consultation under Section 7(a)(2) results in the preparation
23 of a Biological Opinion by FWS that determines if the proposed action is likely to jeopardize the
24 continued existence of a listed species or destroy or adversely modify a species' critical habitat.
25 The BO must include a summary of the information on which it is based and must adequately
26 detail and assess how the action affects listed species and their critical habitats. 16 U.S.C. §
27 1536(b)(3). Additionally, a BO that concludes that the agency action is not likely to jeopardize a
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1 listed species or destroy or adversely modify its critical habitat must include an Incidental Take
2 Statement (ITS) that specifies the impact of any incidental taking, provides reasonable and
3 prudent measures necessary to minimize such impacts, and sets forth terms and conditions that
4 must be followed. 16 U.S.C. § 1536(b)(4). Where an agency action may affect a listed species,
5 the absence of a valid BO means that the action agency has not fulfilled its duty to insure through
6 consultation that its actions will neither jeopardize a listed species nor destroy or adversely
7 modify the species's critical habitat. Agency action cannot proceed without a valid BO.

8 25. The BO must include an evaluation of the direct, indirect, and cumulative effects
9 of the action on listed species. 16 U.S.C. § 1536(a)(2); 50 CFR §§ 402.02, 402.12, 402.14(d),
10 402.14(g)(3). In addition to effects of other federal actions, cumulative effects include effects
11 of future State or private activities, not involving Federal activities, that are reasonably certain to
12 occur within the action area of the Federal action subject to consultation. 50 C.F.R. § 402.02.

13 26. Throughout its analysis, the BO must utilize the best scientific and commercial
14 data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). FWS must consider all the
15 relevant factors and articulate a rational connection between the facts and its ultimate conclusion.

16 27. *Prohibition on Commitment of Resources.* Section 7(d) of the ESA, 16 U.S.C. §
17 1536(d), provides that once a federal agency initiates consultation on an action under the ESA,
18 the agency shall not make any irreversible or irretrievable commitment of resources with
19 respect to the agency action which has the effect of foreclosing the formulation or
20 implementation of any reasonable and prudent alternative measures which would not violate
21 subsection (a)(2) of this section. The purpose of Section 7(d) is to maintain the status quo
22 pending the completion of interagency consultation. Section 7(d) prohibitions remain in effect
23 throughout the consultation period and until the federal agency has satisfied its obligations under
24 Section 7(a)(2) that the action will not result in jeopardy to the species or adverse modification of
25 its critical habitat. Whenever consultation is initiated or re-initiated the prohibitions of Section
26 7(d) apply.

27 *National Environmental Policy Act*

1 28. *Purpose of NEPA.* The purpose of NEPA is to promote efforts which will
2 prevent or eliminate damage to the environment. 42 U.S.C. § 4321. NEPA effectuates this
3 objective by requiring that federal agencies: (1) take a hard look at the environmental
4 consequences of their actions before these actions occur by ensuring that the agency carefully
5 considers detailed information concerning significant environmental impacts; and (2) make the
6 relevant information available to the public so that it may also play a role in both the decision-
7 making process and the implementation of that decision. *See, e.g.*, 42 U.S.C. § 4332(2)(C); 40
8 C.F.R. § 1500.1.

9 29. *Environmental Impact Statement.* NEPA and the regulations promulgated
10 thereunder by the Council on Environmental Quality (CEQ) require that all federal agencies,
11 including the FWS, must prepare an environmental impact statement (EIS) for all major
12 Federal actions significantly affecting the quality of the human environment. 42 U.S.C. §
13 4332(2)(C); *see also* 40 C.F.R. § 1501.4.

14 30. An EIS must provide a detailed statement of: (1) the environmental impact of the
15 proposed action; (2) any adverse environmental effects that cannot be avoided should the
16 proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship
17 between local short-term uses of the environment and the maintenance and enhancement of long-
18 term productivity; and (5) any irreversible and irretrievable commitments of resources that would
19 be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C).

20 *National Wildlife Refuge System Improvement Act*

21 31. The National Wildlife Refuge System Improvement Act states that the FWS
22 shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a
23 refuge, unless [FWS] has determined that use is a compatible use. 16 U.S.C. §
24 668(dd)(d)(3)(A)(i). Compatible use includes only a use that will not materially interfere with
25 or detract from the fulfillment of the mission of the System or the purposes of the refuge. 16
26 U.S.C. § 668ee(1).

27 32.

1 B. The Endangered Moapa Dace and its Habitat

2 33. The Moapa dace is in the unique position of being the only species in its entire
3 genus. A small fish, the dace at most grows to 4.7 inches in length and can be identified by a
4 black spot on the base of its tail, coloring that is normally olive-yellow and a white belly, and
5 small embedded scales which creates a distinctive leathery appearance.

6 34. The Moapa dace is endemic to the upper Muddy River and its tributary thermal
7 springs in the Warm Springs Area in southeastern Nevada. The Warm Springs area encompasses
8 ten thermal spring provinces, which form the headwaters of the Muddy River.

9 35. The Moapa dace can only survive in warm water, their ideal temperature being
10 around 84-86° Fahrenheit, while the coolest temperature they can withstand is around 74°
11 Fahrenheit. The Moapa dace's need for warm water effectively limits their habitat range, with
12 cooler water acting as a barrier to their greater dispersal, thus presenting the dace with numerous
13 risks to their continued viability, and making the preservation of what little habitat the dace has
14 left all the more essential.

15 36. Threats to the survival of the Moapa dace include predation, food competition
16 from non-native fish species, new diseases and parasites brought by invasive fish species, and
17 most notably, destruction of its habitat, including from groundwater withdrawals. At present the
18 groundwater pumping approved under the Muddy River MOA and BO presents an imminent
19 threat to the endangered Moapa dace and its habitat.

20 37. In 1967, due to then-increasing threats to its habitat, the Moapa dace was federally
21 listed as an endangered species, 32 Fed. Reg. 4001 (March 11, 1967), and has been protected
22 under the ESA since its in 1973. The FWS gave the Moapa dace a recovery priority of 1 (1
23 being the highest priority ranking). In 1996, the FWS adopted the Recovery Plan for the Rare
24 Aquatic Species of the Muddy River Ecosystem (öRecovery Planö) that includes the Moapa
25 dace. Critical habitat has not been designated for the Moapa dace.

26 38. On September 10, 1979, the Moapa Valley National Wildlife Refuge was
27 designated öunder the authority of the Endangered Species Act of 1969, as amended, to secure
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1 habitat for the endangered Moapa dace. The Refuge is located on 106 acres in northeastern Clark
2 County. 67 Fed. Reg. 54,229 (August 21, 2002).

3 39. As FWS admits in the BO at issue, the proposed groundwater pumping will
4 directly contribute to a decline in the Moapa dace's habitat. Since the MOA was signed and the
5 BO was issued, the Moapa dace population has already declined. Despite this, the FWS has
6 failed to fulfill its duties under the ESA to adequately protect the Moapa dace.

7 **C. Project Background**

8 *Muddy River Memorandum of Agreement*

9 40. In January, 2006, the FWS issued the *Intra-Service Programmatic Biological*
10 *Opinion for the Proposed Muddy River Memorandum of Agreement Regarding the Groundwater*
11 *Withdrawal of 16,100 Acre-Feet per Year from the Regional Carbonate Aquifer in Coyote Spring*
12 *Valley and California Wash Basins, and Establish Conservation Measures for the Moapa Dace,*
13 *Clark County, Nevada* (BO) and then signed the Muddy River Memorandum of Agreement
14 (MOA). In signing the Muddy River MOA regarding groundwater withdrawals from the
15 Coyote Springs Valley and California Wash Basins area, the FWS agreed not to assert the federal
16 water rights to oppose groundwater withdrawals of up to 16,100 acre-feet per year¹ of
17 groundwater from multiple wells in the Coyote Springs Valley and California Wash Basins.
18 The agreement allows the extraction of groundwater and depletion of groundwater resources that
19 will lead to a reduction in flow and impair the recorded/certified Federal water rights for the
20 National Wildlife Refuge. The water extraction allowed under the MOA will also cause
21 significant adverse effects to essential Moapa dace habitat and its survival. The Service was
22 aware of these adverse effects in 2006 when it entered into the MOA and since that time
23 additional scientific evidence confirms that the impacts will be significant.

24
25
26 ¹ An acre-foot is the quantity of water that would cover one acre to a depth of one foot, or
27 about 325,851.4 gallons.

1 41. After pumping of a significant amount of additional groundwater began in 2006,
2 up to 4,500 afy at the Coyote Springs site, the water levels in the springs declined and the Moapa
3 dace population declined significantly. This new information regarding the impacts to the springs
4 and the status of the Moapa dace was not evaluated by the FWS through the consultation process
5 in order to ensure against jeopardy.

6 42. Plaintiff is informed and believes and based thereon alleges that as early as
7 August, 2010, pumping will be markedly increased and a two-year pumping period will
8 commence as part of so-called "test" to determine the impacts of pumping 16,100 afy and
9 whether additional groundwater could be pumped from the basin in the future. Specifically,
10 pumping of at least 50% of the 16,100 afy of groundwater for a period of two-years will
11 commence in August, 2010, and pumping may reach as high as 13,000 afy during this two-year
12 period.

13 43. FWS holds valid rights to at least 3.5 cubic feet per second (cfs) of flow for the
14 benefit of the refuge.² FWS entered into the MOA and agreed not to assert injury to water rights
15 until flows at the Warm Springs West gauge fall to 2.7 cfs. Thus, FWS ceded at minimum 0.8
16 cfs, or more than 22 percent of its water rights in the MOA.

17 44. The Improvement Act states that the FWS "shall not initiate or permit a new use
18 of a refuge or expand, renew, or extend an existing use of a refuge, unless [FWS] has determined
19 that use is a compatible use." 16 U.S.C. § 668(dd)(d)(3)(A)(i). "Compatible use" includes only a
20 use that "will not materially interfere with or detract from the fulfillment of the mission of the
21 System or the purposes of the refuge." 16 U.S.C. § 668ee(1).

22 45. The BO for the MOA acknowledges that the proposed groundwater pumping will
23 cause further declines in groundwater within habitat for the endangered Moapa dace. Since some
24 pumping began in 2006, the Moapa dace population has in fact declined.

25 _____
26 ² One cubic foot per second over a one year period is equivalent to approximately 724 acre feet
27 per year.

V. GENERAL ALLEGATIONS

A. Violations of the Endangered Species Act Regarding the Muddy River MOA and Biological Opinion

46. In the BO for the Muddy River MOA, the Service has failed to provide an adequate level of protection of habitat for the Moapa dace. The BO fails to adequately disclose and analyze the full weight of the project's impacts to the Moapa dace and other species.

47. Because the groundwater withdrawal associated with the MOA will have a direct and severe impact on Moapa dace, in approving the MOA, the Service has violated their ESA mandated duty under Section 7(a)(2) to insure against jeopardizing the continued existence of a listed species.

48. Because the BO acknowledges that the proposed groundwater withdrawal will have a direct and severe impact on listed species, the FWS has failed to uphold its duty under the ESA to conserve the species; meaning that it must both protect the species from extinction, and take measures to restore the species so that it can be removed from the endangered/threatened species list. 16 U.S.C. § 1531(b), ESA § 3(3), 16 U.S.C. § 1532(3).

49. The MOA BO does not provide sufficient information on which FWS's conclusions are based and does not adequately detail and assess how the action affects the Moapa dace and its essential habitat. 16 U.S.C. § 1536(b)(3).

50. The MOA BO provides inadequate protection for the Moapa dace. Thus, the FWS and the Secretary have violated their ESA Section 2(c) affirmative duty to conserve these species, and have refused to use their authorities to further the purpose of the ESA and species conservation for both the Moapa dace. 16 U.S.C. § 1531(c)(1); 16 U.S.C. § 1536(a)(1).

51. The MOA BO does not address how the project will impact or impede the recovery of the listed species affected by the project as they are required to under the ESA.

52. The FWS failed to address consistency with and implement the recovery and conservation measures laid out in the Recovery Plans for the Moapa dace. FWS's failure and refusal to implement the conservation measures outlined in the Recovery Plans or any other

1 measures that would insure the survival and recovery of the species is a violation of its
2 obligations under the ESA.

3 53. Throughout its analysis, a BO must utilize the best scientific and commercial
4 data available. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §402.14(d). FWS must consider all the
5 relevant factors and articulate a rational connection between the facts and its ultimate conclusion.
6 FWS also failed to take into account best available science and data in reaching its conclusions
7 regarding impacts to listed species.

8 54. This includes, but is not limited to, the Service's refusal to take into account the
9 latest information regarding the actual population count of Moapa dace, numerous scientific
10 studies examining the devastating impact groundwater withdrawal has on the Muddy River
11 ecosystem, and the latest scientific evidence which shows that climate change due to global
12 warming is likely to reduce inflow and recharge to the aquifers which support to the Muddy
13 River ecosystem.

14 55. The Service has failed to identify the correct action area and, therefore, the agency
15 could not adequately evaluate the cumulative effects of these actions in any of the MOA BO.

16 56. The MOA BO features an incomplete and inadequate description and analysis of
17 cumulative impacts as required by the ESA. 50 C.F.R. § 402.14(g)(3).

18 57. By repeatedly deferring the analysis of the indirect and cumulative effects until
19 future review of other site-specific projects and relying on an incorrect action area, the FWS
20 failed to perform a full and adequate analysis of cumulative impacts as required by the ESA.

21 58. The FWS has violated their ESA Section 7(b)(4) duty to issue an incidental take
22 statement (ITS) with each biological opinion for animal species that specifies the amount and
23 extent of incidental take authorized to the action agency. The Service has failed to provide such
24 a take number or a sufficient alternative method of measuring take.

25 59. The Service must also issue an ITS that specifies reasonable and prudent
26 measures necessary to minimize such impacts; the Service has again violated the ESA by failing
27 to issue adequate mitigation measures.

1 60. Many of the conservation and mitigation measures identified in the MOA BO are
2 overly broad or vague, uncertain to actually occur, or themselves present potential negative
3 consequences for the Moapa dace.

4 61. The Service failed to ensure against jeopardy through consultation and therefore
5 must re-initiate consultation, when it does so the prohibitions of Section 7(d) of the ESA will
6 apply and prohibit the Service from making any irreversible and irretrievable commitment of
7 resources until it meets all of its obligations under the ESA.

8 62. The MOA BO is wholly inadequate for protecting the Moapa dace. The FWS has
9 failed to uphold its non-discretionary duties to properly conserve and recover the Moapa dace,
10 and protect them from jeopardy.

11 **B. Violations of the National Environmental Policy Act**

12 63. FWS also failed to initiate a NEPA review process prior to approving the MOA in
13 violation of law. The MOA is clearly a major federal action that triggered NEPA review and the
14 requirement that an EIS be prepared, because it has significant effects on a listed species and its
15 habitat and impacts federal water rights. FWS's failure to provide for public review and
16 comment, an alternatives analysis as well as a detailed analysis of the direct, indirect and
17 cumulative impacts of the MOA violated both the letter and spirit of NEPA.

18 **C. Violations of the National Wildlife Refuge System Improvement Act**

19 64. FWS also failed to undertake a compatibility determination and provide for public
20 review and comment on these issues before approving the MOA in violation of the National
21 Wildlife Refuge System Improvement Act. The Improvement Act states that the FWS "shall not
22 initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge,
23 unless [FWS] has determined that use is a compatible use." 16 U.S.C. § 668(dd)(d)(3)(A)(i).
24 "Compatible use" includes only a use that "will not materially interfere with or detract from the
25 fulfillment of the mission of the System or the purposes of the refuge." 16 U.S.C. § 668ee(1).
26 FWS has unlawfully agreed to allow groundwater pumping that will adversely effect the survival
27 of the Moapa dace within the Moapa Valley National Wildlife Refuge and other resources in the

1 refuge system thus permitting a use of refuge property that is incompatible with the purpose for
2 which the refuge was created.

3 **D. Violations of the Property Clause of the U.S. Constitution**

4 65. The Property Clause of the Constitution vests Congress with the sole authority to
5 dispose of Federal property. U.S. Const. art. IV, § 3, cl. 2.

6 66. Federal property includes federal water rights. By the terms of the MOA, the
7 Service agreed not to assert injury to water rights until flows at the Warm Springs West gauge
8 fall to 2.7 cfs, despite the fact that the United States holds valid water rights to at least 3.5 cfs
9 and thus through the MOA the Service unlawfully ceded federal water rights exceeding its lawful
10 powers.

11 67. The MOA represents an unlawful attempt by the Service to dispose of federal
12 property, without due process of law.

13 **VI. CLAIMS FOR RELIEF**

14 68. For each of the Claims in this Complaint, the Center incorporates by reference
15 each and every allegation set forth in this Complaint as if set out in full below.

16 **First Claim for Relief**
17 **(For Violations of the Property Clause of the U.S. Constitution**
18 **By Approving and Entering into the MOA)**

19 69. The Property Clause of the Constitution vests Congress with the sole authority to
20 dispose of Federal property. U.S. Const. art. IV, § 3, cl. 2.

21 70. Federal property includes federal water rights. By the terms of the MOA, the
22 Service agreed not to assert injury to water rights until flows at the Warm Springs West gauge
23 fall to 2.7 cfs, despite the fact that the United States holds valid water rights to at least 3.5 cfs
24 and thus through the MOA the Service unlawfully ceded federal water rights exceeding its lawful
25 powers.

1 71. The MOA represents an unlawful attempt by the Service to dispose of federal
2 property without approval of Congress, and has therefore acted in a matter that is arbitrary,
3 capricious, and not in accordance with law. *See* 5 U.S.C. §§ 701-706.

4 **Second Claim for Relief**
5 **(For Violations of NEPA by Failing to Undertake NEPA Review for the MOA)**

6 72. The activities authorized under the MOA will result in significant direct, indirect,
7 and cumulative impacts to listed species and water rights, and constitute federal action for which
8 an EIS or EA are required.

9 73. Defendants failed to undertake any NEPA review before approving the MOA.

10 74. Therefore, Defendants violated their non-discretionary duties by failing to
11 undertake NEPA review for the MOA, and have therefore acted in a matter that is arbitrary,
12 capricious, and not in accordance with law. *See* 5 U.S.C. §§ 701-706.

13 **Third Claim for Relief**
14 **(For Violations of Section 7 of the ESA by Failing to Insure Against Jeopardy through**
15 **Consultation for the MOA)**

16 75. The FWS is violating Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and its
17 implementing regulations as set forth at 50 C.F.R. §§ 402.10 and 402.16 *et seq.*, by failing to
18 ensure that its actions do not jeopardize the Moapa dace. FWS failed to insure against jeopardy
19 of the Moapa dace in agreeing to cede water rights and facilitate the withdrawal of massive
20 amounts of groundwater, which will have a direct impact on the viability of the Moapa dace and
21 impact its essential springs habitat. These violations are subject to judicial review under 16
22 U.S.C. § 1540(g). FWS has also failed to re-initiate consultation to ensure against jeopardy in
23 the face of new information and changed circumstances regarding the status of the Moapa dace
24 and impacts to its habitat.

25 76. For each of the above reasons, and others, Defendants failed to perform their non-
26 discretionary duties as required by the ESA. ESA § 11(g), 16 U.S.C. § 1540(g).

1 77. In addition, the conclusions in the MOA BO were not based on the best available
2 science, as required by the ESA, 16 U.S.C. § 1536(a)(2). The MOA BO also failed to adequately
3 analyze the impacts in the context of other threats to the Moapa dace including the cumulative
4 effects as required by ESA and its implementing regulations. *See* 50 C.F.R. § 402.14. Further,
5 the MOA BO fails to provide for the recovery of the Moapa dace as required by the ESA and
6 relies on unknown, unproven, and ineffective "reasonable and prudent measures" as mitigation
7 for the proposed project's effects on the Moapa dace and as a result fails to ensure against
8 jeopardy for the Moapa dace.

9 78. For each of the above reasons, and others, FWS's issuance of and reliance on the
10 MOA Biological Opinion violated the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and
11 FWS has therefore acted in a matter that is arbitrary, capricious, and not in accordance with law.
12 5 U.S.C. §§ 701-706.

13 **Fourth Claim for Relief**
14 **(For Violations of the National Wildlife Refuge System Improvement Act)**

15 79. The National Wildlife Refuge System Improvement Act states that the FWS
16 "shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a
17 refuge, unless [FWS] has determined that use is a compatible use." 16 U.S.C. §
18 668(dd)(d)(3)(A)(i). "Compatible use" includes only a use that "will not materially interfere with
19 or detract from the fulfillment of the mission of the System or the purposes of the refuge." 16
20 U.S.C. § 668ee(1).

21 80. The Service failed to undertake a compatibility determination required by law and
22 failed to provide for public review and comment on these issues before approving the MOA in
23 violation of the National Wildlife Refuge System Improvement Act. FWS has unlawfully agreed
24 to allow groundwater pumping that will adversely effect the survival of the Moapa dace within
25 the Moapa Valley National Wildlife Refuge and other resources in the refuge system thus
26 permitting a use of refuge property that is incompatible with the purpose for which the refuge
27 was created.

1 8. Order Defendants, through a permanent injunction, to halt all activities related to
2 the Muddy River Memorandum of Agreement.

3 9. Award Plaintiff its fees, costs, expenses and disbursements, including reasonable
4 attorneys' fees as provided by the ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal Access to Justice
5 Act, 28 U.S.C. § 2412; and

6 10. Grant the Plaintiff such additional and further relief as the court deems just and
7 proper.

8 Respectfully submitted,

9 Date: August 23, 2010

/s/Julie Cavanaugh-Bill

10 Julie Cavanaugh-Bill (NV. Bar No. 11533)
11 Attorney & Counselor at Law
12 Cavanaugh-Bill Law Offices, LLC
13 Henderson Bank Building
14 401 Railroad Street, Suite 307
15 Elko, Nevada 89801
16 TEL: (775) 753-4357
17 FAX: (775) 753-4360
18 julie@cblawoffices.org

19 John Buse (CA Bar No. 163156), *Pro Hac Vice to*
20 *be filed*

21 Lisa T. Belenky (CA Bar No. 203225), *Pro Hac*
22 *Vice to be filed*

23 CENTER FOR BIOLOGICAL DIVERSITY
24 351 California Street, Suite 600
25 San Francisco, CA 94104
26 Telephone: (415) 436-9682 x 307
27 Facsimile: (415) 436-9683
28 jbuse@biologicaldiversity.org
lbelenky@biologicaldiversity.org

Matt Kenna (CO Bar No. 22159), *Pro Hac Vice to*
be filed

679 E. 2nd Ave., Suite 11B
Durango, CO 81301
Phone: (970) 385-6941
Fax: (970) 692-2570
matt@kenna.net

(will comply with LR IA 10-2 within 45 days)

Attorneys for Plaintiff

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