

Shiloh S. Hernandez (MT Bar No. 9970)
Laura H. King (MT Bar No. 13574)
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
hernandez@westernlaw.org
king@westernlaw.org
406.204.4861
Applicants *Pro Hac Vice*

Matt Kenna (CO Bar No. 22159)
Of Counsel, Western Environmental Law Center
679 E. 2nd Ave., Suite 11B
Durango, CO 81301
matt@kenna.net
970.385.6941
Applicant *Pro Hac Vice*

Michael Saul (CO Bar No. 30143)
Center for Biological Diversity
1536 Wynkoop St., Suite 421
Denver, CO 80202
MSaul@biologicaldivserity.org
303.915.8308
Applicant *Pro Hac Vice*

John Barth (CO Bar No. 22957)
Attorney at Law
P.O. Box 409
Hygiene, CO 80533
barthlawoffice@gmail.com
303.774.8868
Applicant *Pro Hac Vice*

Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Diné Citizens Against Ruining Our
Environment; San Juan Citizens
Alliance; Center for Biological
Diversity; Amigos Bravos; and Sierra

No. _____

COMPLAINT FOR DECLARATORY

Club,

Plaintiffs,

v.

Bureau of Indian Affairs; U.S.
Department of the Interior; Office of
Surface Mining, Reclamation and
Enforcement; Bureau of Land
Management; Sally Jewell in her
official capacity as Secretary of the U.S.
Department of Interior; and U.S. Fish
and Wildlife Service,

Defendants.

AND INJUNCTIVE RELIEF

INTRODUCTION

1. For a half century, the Four Corners region has borne the weight of the coal-fired electricity system that illuminates the cities of the American Southwest. The two coal plants straddling the San Juan River together emit more pollution than any other source in North or South America. The surrounding communities, long opposed to coal development, suffer elevated levels of lung disease. Populations of native fish in the San Juan River, poisoned by toxic mercury and selenium, are on the brink of extinction.

2. In 2015, at the behest of private energy corporations, federal agencies approved expanded coal strip-mining operations at the Navajo Mine and extended coal combustion at the Four Corners Power Plant for another quarter century. Thus, while the nation and world turn from fossil fuels to clean energy,

the Four Corners region is forced again to bear the deleterious impacts of this outdated but singularly massive coal energy complex. Once more the citizens of the region stand up in opposition.

3. Plaintiffs Diné Citizens Against Ruining Our Environment, San Juan Citizens Alliance, Center for Biological Diversity, Amigos Bravos, and the Sierra Club (collectively, “Citizen Groups”) hereby bring this civil action for declaratory and injunctive relief against the Bureau of Indian Affairs, U.S. Department of the Interior, Office of Surface Mining Reclamation and Enforcement, Bureau of Land Management, Sally Jewell in her official capacity as Secretary of the U.S. Department of Interior, and the Fish and Wildlife Service (Service) (collectively, “Federal Defendants”) under the Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1544, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370h, and the Administrative Procedure Act (APA), 5 U.S.C. § 701-706.

4. This action challenges the Service’s Biological Opinion issued April 8, 2015, determining that proposed authorizations for continued operations of the Four Corners Power Plant and the Navajo Mine (collectively, the “Project”) will neither jeopardize the survival and recovery of, nor adversely modify designated critical habitat of the Colorado pikeminnow and razorback sucker, two endangered fish native to the San Juan River, in violation of the ESA.

5. The Citizens also challenge the remaining Federal Defendants’ Record of Decision and Final Environmental Impact Statement for the Project,

issued in July and May 2015, respectively. The Record of Decision and Final Environmental Impact Statement were issued in violation of NEPA. Further, the Federal Defendants unlawfully and arbitrarily relied on the Service's faulty Biological Opinion in issuing the Record of Decision, which violated their duties under the ESA.

6. The project proponents, chiefly the Arizona-based majority owner of the coal plant (Arizona Public Service) and the Arizona-based mine owner (Navajo Transitional Energy Company), applied for multiple permits and approvals to ensure continued operation of the coal-fired power plant and adjacent strip mine from July 6, 2016, to 2041. If upheld, mine reclamation operations associated with the Project will continue through 2051 and environmental impacts from the Project's toxic mercury pollution will continue through 2074.

7. The coal-fired energy complex has operated since July 1957. The Federal Defendant's Record of Decision approved the following actions at issue in this case:

- a 25-year extension of the coal plant's lease for majority owner and operator Arizona Public Service;
- renewal of the right-of-ways for transmission lines that carry electricity from the coal plant to load centers in Arizona; and

- expansion of strip-mining in 5,568 acres in the Pinabete permit area of the mine, which would supply 5.8 million tons of coal annually to the coal plant for 25 years.

8. The multiple elements of the Project will occur in the Arizona and New Mexico portions of the Four Corners region, and on tribal lands of the Navajo Nation and the Hopi Tribe. The coal plant and strip mine are located approximately 15 miles southwest of Farmington, New Mexico, on tribal lands of the Navajo Nation, the seat of government of which is in Window Rock, Arizona. Transmission lines from the energy complex travel west across Navajo and Hopi lands into Arizona. Pollution from the coal plant and mine degrade air and water resources throughout the San Juan River Basin in Arizona, New Mexico, Colorado, and Utah.

9. The San Juan River originates in the San Juan Mountains in southwestern Colorado. The river flows from its headwaters in Colorado through New Mexico and Utah to Lake Powell in Utah and Arizona and then into the Colorado River in Arizona. The second largest of the three sub-basins of the Colorado River, the San Juan River is one of the most important waterways in the Southwest. The San Juan River is home to endangered native populations of the Colorado pikeminnow and razorback sucker and their designated critical habitat.

10. The Citizens Groups, local conservation organizations dedicated to protecting the communities and restoring the biological integrity of the San Juan

River Basin, bring this suit to protect the fish as well as the air and water of the region on which local people rely for their health and survival.

JURISDICTION AND VENUE

11. The Citizen Groups bring this action pursuant to the ESA, NEPA, and the APA, which waive Federal Defendants' sovereign immunity. The Court has federal-question jurisdiction over this action, arising under the laws of the United States, 28 U.S.C. § 1331, as well as the citizen suit provision of the ESA, 16 U.S.C. § 1540(g).

12. The Court has authority to review Federal Defendants' actions pursuant to the APA, 5 U.S.C. §§ 702-706, and the ESA, 16 U.S.C. § 1540(g). The Citizen Groups are challenging final agency actions and have exhausted all necessary administrative remedies.

13. The Court may issue declaratory relief pursuant to 28 U.S.C. § 2201 and vacatur and injunctive relief pursuant to 28 U.S.C. § 2202, 5 U.S.C. §§ 705, 706(2)(A), (D), and 16 U.S.C. § 1540(g), as well as pursuant to its general equitable powers.

14. This Court is a proper venue for this action pursuant to 28 U.S.C. § 1391(e)(1) and 16 U.S.C. § 1540(g)(3)(A). The Western Regional Office of Defendant Bureau of Indian Affairs, which approved the lease extension for Arizona Public Service and the Four Corners Power Plant, is located in Arizona. Portions of the Project are located in Arizona. Impacts of the Project will occur in

Arizona. Plaintiffs Diné Citizens Against Ruining Our Environment and Center for Biological Diversity maintain their principal places of business and residences in Arizona. The mine owner, Navajo Transitional Energy Company, and the majority owner of the coal plant, Arizona Public Service, are based in Arizona. The Salt River Project and Tucson Electric Company, minority owners of the Four Corners Power Plant, are also based in Arizona. Arizona Public Service has agreed to purchase an additional 7% share in the coal plant from El Paso Electric Company, a Texas utility; with the purchase, Arizona utilities will own an 87% share in the coal plant. The seat of the Navajo Nation is also in Arizona.

15. A present and actual controversy exists between the parties.

PARTIES

16. Plaintiff Diné Citizens Against Ruining Our Environment (Diné CARE) is an all-Navajo membership organization comprised of a federation of grassroots community activists in the Four Corners region of Arizona, New Mexico, Colorado, and Utah, and the Tribal lands with the borders of those states. Diné CARE members strive to educate and advocate for their traditional teachings derived from Diné Fundamental Laws. Diné CARE's goal is to protect all life in their ancestral homeland by empowering local and traditional people to organize, speak out, and assure conservation and stewardship of the environment through civic involvement, engagement, and oversight in decision-making processes relating to tribal development, and oversight of government agencies' compliance

with all applicable environmental laws. Diné CARE members live, use, and enjoy the areas and landscapes that are affected by the Four Corners Power Plant and the Navajo Mine, including areas in Arizona. Diné CARE members include customers of the Arizona utilities who own the Four Corners Power Plant. These members would prefer to receive electricity from less polluting energy sources. Diné CARE brings this action on its own behalf and on behalf of its adversely affected members. Its primary office is located in Dilkon, Arizona.

17. Plaintiff San Juan Citizens Alliance (the Alliance) is a non-profit membership organization with over 500 members in the Four Corners region. The Alliance is actively involved in working to improve public health, advocating for cleaner air quality and better stewardship of natural systems, monitoring and scrutinizing energy development, overseeing government decision-making and compliance with environmental laws, and promoting reduced energy consumption, energy efficiency and renewable energy. Alliance members in the Four Corners region live in areas of existing high-density energy development and infrastructure. The Alliance's members are adversely affected by pollution from the Four Corners Power Plant and the Navajo Mine. The Alliance has members living in Arizona. Alliance members include customers of the Arizona utilities who own the Four Corners Power Plant. These members would prefer to receive electricity from less polluting energy sources. The Alliance brings this action on

its own behalf and on behalf of its adversely affected members. Its primary office is located in Durango, Colorado.

18. Plaintiff Center for Biological Diversity (the Center) is a non-profit membership corporation with offices in Arizona, New Mexico, California, Nevada, Oregon, Washington, Alaska, Illinois, Minnesota, Vermont, and Washington D.C. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center has 320,000 members and online activists throughout the United States, Arizona, New Mexico and the world. The Center is actively involved in species and habitat protection issues worldwide, including throughout the western United States. The Center, its members, and staff members use the lands in and near the Four Corners Power Plant and the Navajo Mine—in particular the San Juan River—for recreational, scientific, and aesthetic purposes. They also derive recreational, scientific and aesthetic benefits from these lands through wildlife observation, study, and photography. The Center and its members have an interest in preserving their ability to enjoy such activities in the future. As such, the Center and its members have an interest in helping to ensure their continued use and enjoyment of the activities on these lands. The Center is particularly concerned about species and critical habitat that are affected by pollution from the Four Corners Power Plant and the Navajo Mine. The Center's members include customers of the Arizona utilities who own the Four Corners Power Plant. These

members would prefer to receive electricity from less polluting energy sources. The Center brings this action on its own behalf and on behalf of its adversely affected members. Its primary office is located in Tucson, Arizona.

19. Plaintiff Amigos Bravos is a nonprofit river conservation membership organization whose mission is to preserve the ecological and cultural integrity of New Mexico's rivers and watersheds by assuring compliance with environmental laws and holding polluters and governments accountable for their actions. Through this work, Amigos Bravos ensures that New Mexico's rivers and watersheds provide clean water for irrigating, swimming, fishing, and boating. Amigos Bravos' effort is inspired by New Mexico's traditional water users and guided by the vision of water as both a cultural and natural resource. Amigos Bravos has members throughout New Mexico and Arizona who use and enjoy the water resources of New Mexico and Arizona for irrigation, livestock watering, fishing, recreation, spiritual pursuits, and aesthetic interests. Amigos Bravos is increasingly concerned that the observed and anticipated impacts of global warming and climate change will compromise its interests and the interests of its members. Amigos Bravos's members include customers of the Arizona utilities who own the Four Corners Power Plant. These members would prefer to receive electricity from less polluting energy sources. Amigos Bravos brings this action on its own behalf and on behalf of its adversely affected members. Its primary office is in Taos, New Mexico.

20. Plaintiff Sierra Club is a national nonprofit organization with 64 chapters and over 625,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club works to promote safe and healthy communities, smart energy solutions to combat global warming, and an enduring legacy for America's wild places. In Arizona, the Sierra Club has over 12,500 members, including members in the Four Corners region who are adversely affected by pollution from the Four Corners Power Plant and the Navajo Mine. Sierra Club members include customers of the Arizona utilities who own the Four Corners Power Plant. These members would prefer to receive electricity from less polluting energy sources. Sierra Club brings this action on its own behalf and on behalf of its adversely affected members. Its primary office is located in San Francisco, California.

21. The Citizen Groups and their members have concrete and particularized interests in protecting the land, air, water, communities, native fish species, and ecosystems from direct, indirect, and cumulative impacts in the Four Corners region, including Arizona, from air and water pollution from the Four Corners Power Plant and the Navajo Mine. The Citizen Groups, thus, have concrete and particularized interests in the pollution and environmental

degradation that results from the coal plant and strip-mine and the direct, indirect, and cumulative effects on affected endangered species and their habitat.

22. The Citizen Groups educate and organize in the Four Corners region and beyond about coal, climate change, energy, public health, and environmental protection to protect and advance their interests. The Citizen Groups monitor and scrutinize government action related to coal combustion and coal mining to assure that the true costs of coal to the broader Four Corners region, including adversely affected endangered species, and their habitats, and communities both on and off of the Navajo Nation, are considered prior to any decision that perpetuates or increases the use of coal as an energy source.

23. The Citizen Groups and their members have concrete interests in Federal Defendants' full compliance with the ESA and NEPA prior to authorizing permits of continued coal-plant and strip-mine operations for the Four Corners Power Plant and the Navajo Mine. The groups will suffer concrete injury if Federal Defendants fail to comply with the requirements of the ESA, NEPA, and the APA in the Project's permitting process.

24. Federal Defendants' issuance and reliance upon the faulty Biological Opinion, Final Environmental Impact Statement, and Record of Decision increase the risk of environmental harm to the concrete interests of the Citizen Groups and their members.

25. If this Court requires Federal Defendants to comply with the formal consultation and other requirements of the ESA and the environmental review requirements of NEPA, the harm to the Citizen Groups and their members will be alleviated.

26. Defendant Bureau of Indian Affairs is a federal agency within the United States Department of the Interior that approved Arizona Public Service's lease extension for the coal plant and the renewals of the right-of-ways for the coal plant's transmission lines that are at issue in this action. The Bureau of Indian Affairs' Western Regional Office responsible for approving these leases is located in Phoenix, Arizona.

27. Defendant U.S. Department of the Interior is a federal department within which the Bureau of Indian Affairs, the Office of Surface Mining, and the Bureau of Land Management are located. The Department approved the actions of the Bureau of Indian Affairs, Office of Surface Mining, and Bureau of Land Management, and signed the Record of Decision that approved the Project.

28. Defendant Office of Surface Mining, Reclamation and Enforcement is a federal agency within the U.S. Department of the Interior that regulates coal strip-mining programs and operations in the United States pursuant to the Surface Mining and Control Reclamation Act, 30 U.S.C. §§ 1201-1328. The Office of Surface Mining's Western Regional Office, located in Denver, Colorado, has

permitting authority over the Navajo Nation. The Office of Surface Mining approved the renewed and expanded strip-mining operations at issue in this action.

29. Defendant Bureau of Land Management is an agency of the U.S. Department of Interior and is responsible for administering right-of-ways for the Navajo Mine and Four Corners Power Plant. The Bureau of Land Management made the determination in the Record of Decision that expanded strip-mine operations in the Pinabete permit area will achieve maximum economic coal recovery.

30. Defendant Sally Jewell is Secretary of the U.S. Department of the Interior. In this position, Secretary Jewell is responsible for ensuring compliance with the inter-agency consultation requirements of the ESA and approving the challenged actions of the remaining Federal Defendants, which are agencies within the U.S. Department of the Interior.

31. Defendant U.S. Fish and Wildlife Service is an agency within the U.S. Department of Interior and is responsible for administering the provisions of the ESA with regard to freshwater aquatic and terrestrial species, including Colorado pikeminnow and razorback sucker. The Service issued the Biological Opinion at issue in this action.

STATUTORY FRAMEWORK

I. The Endangered Species Act

32. Congress enacted the Endangered Species Act, 16 U.S.C. §§ 1531-1544, to “provide a program for the consideration of . . . endangered species and threatened species” and to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.” *Id.* § 1531(b).

33. Section 7 of the ESA prohibits federal agencies from taking discretionary actions that would “jeopardize the continued existence of any endangered species or threatened species” or cause the “destruction or adverse modification” of habitat designated as “critical” for such species. 16 U.S.C. § 1536(a)(2).

34. An agency action “jeopardizes” a protected species if it “reasonably would be expected, directly or indirectly,” to reduce appreciably the species’ likelihood of survival or recovery “by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. An action destroys or adversely modifies critical habitat if it “appreciably diminishes the value of critical habitat” for the survival or recovery of a listed species. *Id.*

35. To enforce this substantive mandate, any agency decision to take discretionary action that may affect any listed species is strictly governed by the inter-agency consultation process of section 7 of the ESA. *See* 16 U.S.C. § 1536. If the proposed action is expected to affect a protected species, the agency must initiate formal consultation with the appropriate federal wildlife agency, here the

U.S. Fish and Wildlife Service, which is in charge of ESA compliance for freshwater and terrestrial species, such as Colorado pikeminnow and razorback sucker. 50 C.F.R. § 402.01(b).

36. The consultation process culminates in the issuance of a biological opinion, in which the Service must determine, based on the “best scientific and commercial data available,” whether the proposed action will jeopardize the survival or recovery of a protected species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. In its biological opinion, the Service also must determine whether the proposed action will destroy or adversely modify a protected species’ designated critical habitat. 50 C.F.R. § 402.14(g)(4); *see* 16 U.S.C. § 1532(5)(A).

37. If the Service concludes that a proposed action is likely to jeopardize a protected species or destroy or adversely modify its critical habitat, the action may not proceed as proposed. *See* 16 U.S.C. § 1536(a)(2). In that circumstance, the Service must determine whether a “reasonable and prudent alternative” to the proposal exists that would avoid jeopardy to the species and destruction or adverse modification of critical habitat. *Id* § 1536(b)(3)(A).

38. If the Service concludes that implementing the proposed action (or the identified reasonable and prudent alternative) will not jeopardize protected species and will not destroy or adversely modify critical habitat, the agency must include in its biological opinion an incidental take statement which specifies the

amount or extent of any “take” of protected species that may be authorized as a result of the action. 50 C.F.R. § 402.14(i)(1).

39. Under the ESA, “take” means “to harass, harm, pursue, hunt, shoot, wound, trap, kill, capture, or collect” a protected species “or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). The taking of protected species is prohibited unless specifically authorized in an incidental take statement. *Id.* §§ 1538(a)(1)(B), 1539. If the authorized take limit is reached, the protection from take liability provided by the incidental take statement lapses and the federal agencies must re-initiate consultation under section 7 to ensure the proposed action will not jeopardize the affected species. *See* 50 C.F.R. § 402.16(a).

II. The National Environmental Policy Act

40. The National Environmental Policy Act is “our basic national charter for the protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA’s purpose is to “declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321.

41. NEPA recognizes that “each person should enjoy a healthful environment,” and ensures that the federal government uses all practicable means to “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,” and to “attain the widest range of beneficial

uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences,” among other policies. *Id.* § 4331(b), (c). NEPA’s policies are intended to enable the Nation “to fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.” *Id.* § 4331(b)(1).

42. To accomplish these substantive policies, NEPA sets forth stringent procedural requirements. NEPA requires federal agencies to prepare a “detailed statement” prior to approving any “major federal action significantly affecting the quality of the human environment.” *Id.* § 4332(2)(C). This statement, an environmental impact statement, must describe “the environmental impact of the proposed action,” “any adverse environmental effects which cannot be avoided should the proposal be implemented,” and “alternatives to the proposed action.” *Id.* § 4332(2)(C)(i)-(iii).

43. An environmental impact statement must consider both short- and long-term impacts. *Id.* § 4332(2)(C)(iv). NEPA specifically mandates that agencies “recognize the worldwide and long-range character of environmental problems” and “lend appropriate support to . . . preventing the decline in the quality of mankind’s world environment.” *Id.* § 4332(2)(F).

44. An environmental impact statement must “ensure that presently unquantified environmental amenities and values may be given appropriate

consideration in decisionmaking alongside economic and technical considerations.” *Id.* § 4332(2)(B).

45. The requirement to prepare an environmental impact statement creates a democratic decisionmaking process that assures that agency decision-makers and the public review and carefully consider detailed information about environmental impacts before any decision is made. Agencies must “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.” 40 C.F.R. § 1500.2(d).

46. “Ultimately, of course, it is not better documents but better decisions that count.” *Id.* § 1500.1(c). After a federal agency has issued and the public has reviewed the environmental impact statement for a proposed action, the agency issues a record of decision, stating what the agency’s decision was, what alternatives were considered, and whether all practicable means to avoid or minimize environmental harm were adopted. *Id.* § 1505.2(a)-(c).

47. NEPA mandates that the laws and regulations governing the environmental impact statement process “shall be interpreted and administered” “to the fullest extent possible” to further NEPA’s substantive goals of environmental protection. 42 U.S.C. § 4332(1).

FACTS

I. Endangered Colorado Pikeminnow and Razorback Sucker

48. As required by section 7 of the ESA, the Service issued a Biological Opinion analyzing the effects of the Project on endangered species. The Biological Opinion acknowledged the already dire state of the Colorado pikeminnow and razorback sucker populations in the San Juan River and cataloged substantial adverse impacts to these populations and their critical habitat from the continued operation of the Four Corners Power Plant and Navajo Mine. Nevertheless, the Service ultimately found that 25 more years of operations of the energy complex would not jeopardize the survival or recovery, nor adversely modify the listed critical habitat, of either species.

Colorado Pikeminnow

49. Historically, the Colorado pikeminnow (also known as the White Salmon, Colorado River Salmon, and Bigmouth Whitefish) was an apex predator throughout the warm water reaches of the Colorado River basin down to the Gulf of California. Colorado pikeminnow once grew to six feet in length and weighed nearly 100 pounds (lbs.). Colorado pikeminnow were a valuable food source for early settlers. In 1891 Colorado pikeminnow was identified as the largest and best food fish in the lower Colorado River system. In the 1900s people were known to fish for pikeminnow using small rabbits as bait. Today, Colorado pikeminnow rarely exceed three feet in length and 18 lbs. in weight.

50. The Colorado pikeminnow was federally listed as endangered in 1973, having lost approximately 75-80% of its historic riverine habitat due to dam

building and water diversions in the Colorado River basin. Up to a maximum of 48 million gallons of water per day are diverted from San Juan River for utilization at the Four Corners Power Plant. Critical habitat for the Colorado pikeminnow, designated in 1994, includes the 100-year floodplain of the species' historic range in San Juan County, New Mexico, and San Juan County, Utah. This critical habitat includes the stretch of the San Juan River adjacent to the Four Corners Power Plant and Navajo mine. Remnant populations exist in the segment of the San Juan River, from below the Navajo Dam to Lake Powell in Arizona and Utah, as well as in the Upper Colorado Basin and Green River sub-basin. Only the San Juan River population is at issue in this action.

51. Under ESA requirements, the Service issued a recovery plan for Colorado pikeminnow in 2002. To downlist the pikeminnow from “endangered” to “threatened” status there must be 1,000 fish age 5-years-old or greater in the San Juan River. To delist the pikeminnow as recovered and no longer threatened or endangered, the agency must show that the San Juan River sub-basin population is self-sustaining and exceeds 800 adult fish age 7-years-old or greater.

52. The current Colorado pikeminnow population in the San Juan River has been supported almost entirely by intensive stocking for the past two decades. Since 1996, over 4 million pikeminnow have been stocked in the San Juan River by state and federal agencies. It is believed that only a few wild Colorado pikeminnow remain in the San Juan River. Despite the aggressive and ongoing

stocking efforts by the federal San Juan River Recovery Implementation Program, there are no clear population trends (of growth or decline) of the Colorado pikeminnow in the San Juan River, and there has not been any significant increase in subadult or adult fish.

53. While some evidence of limited Colorado pikeminnow reproduction in the wild has been documented, such reproduction is far too limited and sporadic to produce pikeminnow that will survive to adulthood (i.e., recruitment). Thus, the San Juan River does not support a population that can sustain itself in the absence of continued stocking of hatchery fish. Without the current augmentation program, Colorado pikeminnow would likely be extirpated from the San Juan River.

Razorback Sucker

54. The razorback sucker, a native bottom browser in the Colorado River basin, is one of the largest sucker fish in North America. The fish can grow to nearly 3 feet in length and live for more than 40 years. Historically, razorback sucker occurred in the main channel of the Colorado River and major tributaries in Arizona, California, Colorado, Nevada, Utah, Wyoming, and New Mexico, including the San Juan River. Razorback sucker were once so numerous that they were a common food source for settlers and were sold commercially in Arizona as recently as 1949.

55. The razorback sucker was federally listed as endangered in 1991, after decades of population decline due to water depletion, invasive fish species,

and dam construction and operation. Up to a maximum of 48 million gallons of water per day are diverted from the San Juan River for utilization at the Four Corners Power Plant. The Service designated the segment of the San Juan River from the Hogback Diversion to Lake Powell as critical habitat for the razorback sucker in 1994. This critical habitat includes the stretch of the San Juan River adjacent to the Four Corners Power Plant and San Juan Mine.

56. No wild razorback sucker have been captured in the San Juan River since 1988. While there has been some evidence of limited razorback sucker reproduction in the wild, there is little to no documented recruitment of razorback sucker to adulthood. Thus, the razorback sucker population in the San Juan River is not self-sustaining and would be extirpated without continued stocking of hatchery fish.

57. The long-term population viability of the razorback sucker in the San Juan River is uncertain because of the relatively limited or degraded habitat available between Navajo Dam and Lake Powell, competition and predation from non-native fish, degraded water quality, and the uncertainty surrounding the impacts of climate change. Like the Colorado pikeminnow, the current razorback population in the San Juan River is almost entirely dependent on an intensive augmentation program that has stocked over 130,000 razorback suckers in the San Juan River over the past two decades.

Habitat Requirements

58. Colorado pikeminnow and razorback sucker share the same basic habitat requirements. The primary constituent elements identified by the Service of designated critical habitat for both fish species are (1) water: a quantity of water of sufficient quality that is delivered to a specific location in accordance with a hydrologic regime that is required for the particular life stage for the species; (2) physical habitat: areas of the Colorado River system that are inhabited or potentially habitable for spawning, feeding, rearing, as a nursery, or corridors between these areas, including oxbows, backwaters, and other areas in the 100-year floodplain which when inundated provide access to spawning, nursery, feeding, and rearing areas; and (3) biological environment: adequate food supply and ecologically appropriate levels of predation and competition.

II. Four Corners Power Plant and Navajo Mine

59. The Service prepared the Biological Opinion for the continued operation of the Four Corners Power Plant and Navajo Mine for an additional 25 years, from 2016 to 2041. The Four Corners Power Plant will continue to divert up to 48 million gallons of water per day from the San Juan River for use at the coal plant through 2041. Mine reclamation operations associated with the Project will continue through at least 2051. Mercury deposition in the San Juan River basin from the coal plant's emissions will continue to pollute the river and poison native fish through 2074.

60. The Project entails an extended lease for the coal plant, expanded mining operations at the mine, and issuance of right-of-ways for transmission lines in Arizona that lead to load centers Arizona. The lead action agency was the Office of Surface Mining. The other cooperating agencies included the Bureau of Indian Affairs, Bureau of Land Management, U.S. Environmental Protection Agency, and National Park Service.

61. The project proponents are the utilities that own and operate the coal plant. The principal plant owner and sole operator is Arizona Public Service, which owns a 63% share of the plant. Other partial owners are Public Service Company of New Mexico (13%), Salt River Project (10%), El Paso Electric (7%), and Tucson Electric Company (7%). As noted, Arizona Public Service has agreed to purchase El Paso Electric Company's 7% share in the plant. With the purchase, Arizona utilities will own an 87% share in the Four Corners Power Plant.

62. The mine owners and operators are also project proponents. The mine is owned by the Navajo Transitional Energy Company, headquartered in Window Rock, Arizona. The mine operator is BHP Billiton Mine Management Company, a wholly owned subsidiary of multinational mining company BHP Billiton, headquartered in Melbourne, Australia.

63. The strip-mine and coal plant are located on Navajo Nation tribal land, the seat of which is located in Window Rock, Arizona.

64. The Four Corners Power Plant, a massive coal-fired power plant, is a notorious polluter. It was long the largest source of ozone-forming nitrogen oxide pollution the United States, emitting over 42,000 tons each year. It has also historically been one of the largest domestic point sources of carbon dioxide, a significant greenhouse gas, and mercury, a potent neurotoxin for people and animals. The Four Corners Power Plant, together with the adjacent San Juan Generating Station, constitutes the largest collective source of air pollution in North and South America. Astronauts in 1966 reported observing only two man-made phenomena from space: the Great Wall of China and the towering smoke plume from the Four Corners Power Plant.

65. The communities surrounding the coal plant are among the most polluted in the United States. San Juan County, New Mexico, within which the coal-complex is located, is among the top ten percent of counties in the United States with the worst record for toxic releases, particulate matter air pollution, and sulfur dioxide air pollution. Unsurprisingly, San Juan County has elevated incidence of chronic lower respiratory disease, such as bronchitis, asthma, and emphysema, which is linked to elevated levels of ozone pollution. In comments on the Project, the U.S. Environmental Protection Agency described the area as having “severely compromised . . . public health.”

66. Units 1-3 of the coal plant, totaling 560 megawatts (MW) of capacity, were built in 1963 and operated for over half a century through 2013. In

2013 the owners of the coal plant opted to retire Units 1-3 rather than retrofit them to meet federally mandated pollution limits. The much larger Units 4-5 of the coal plant, totaling 1540 MW of capacity, have been operating since 1970. With the Project, Arizona Public Service intends to operate Units 4-5 through 2041, at which time the coal plant will be 71 years old. Units 4-5 alone remain one of the largest single sources of greenhouse gas pollution in the United States. Annually the two units emit hundreds of pounds of mercury, lead, and selenium, all of which are toxic to people and animals.

67. Units 4-5 burn approximately 19,000 tons of coal per day. The coal boils water to create steam which turns a turbine to generate electricity, most of which is transmitted to Arizona Public Service's service area in Arizona. The San Juan River is the coal plant's water supply. The San Juan River basin drains portions of Arizona, New Mexico, Colorado, and Utah. The river flows from headwaters in Colorado through northwestern New Mexico to Lake Powell in Arizona and Utah. The coal plant diverts up to 48 million gallons of water per day from the San Juan River.

68. The coal plant has a water right to withdraw 51,600 acre-feet per year (af/yr) of water from the San Juan River. On average the coal plant pumps approximately 27,500 af/yr from the river. The water is withdrawn via two 8 by 8.5-foot screened intake bays located just above a gated weir (referred to as the Arizona Public Service weir). The weir dams water to assure that the intake

bays are adequately submerged. Water drawn from the San Juan River is stored in Morgan Lake, a man-made reservoir adjacent to the coal plant.

69. Federal Defendants' approval of Arizona Public Service's lease extension for the Four Corners Power Plant site will allow the coal plant to continue to operate for 25 years, through 2041. The Project also approves right-of-ways for two of Arizona Public Service's transmission lines from the energy complex across Navajo and Hopi lands within Arizona. Arizona Public Service uses these lines to transmit power from the energy complex to load centers in the Phoenix area.

70. The Navajo Mine was built in tandem with the coal plant and associated transmission lines to Arizona and began operating in the early 1960s. The sprawling 33,000-acre coal strip mine historically produced approximately 9 million tons of coal annually, sold exclusively to the Four Corners Power Plant. With the closure of Units 1-3, production at the strip mine has declined to 5.8 million tons annually. The Project approves the renewal of the Navajo Transitional Energy Company's existing operations and expansion of strip-mining into 5,568 acres in the Pinabete permit area.

71. In its Biological Opinion for the Project, the Service determined that the following aspects of the Project would adversely affect Colorado pikeminnow and razorback sucker and their critical habitat:

- deposition and bioaccumulation of mercury and selenium from the Four Corners Power Plant in the San Juan River basin;
- entrainment of fish in the coal plant's intake pipes;
- blockage of fish passage by the Arizona Public Service weir;
- water withdrawals from the San Juan River; and
- release of non-native fish species from Morgan Lake.

72. As part of the project, the action agencies and project proponents developed a suite of "conservation measures" intended to reduce impacts to Colorado pikeminnow and razorback sucker. The conservation measures (1) required the Office of Surface Mining to consult with the Service on unidentified future discretionary actions that may result in mercury deposition; (2) required the project proponents to develop a plan to reduce fish entrainment in the cooling water intakes and a plan to reduce the risk of non-native species escaping from Morgan Lake, and (3) required the project proponents to partially fund fish passage at the Arizona Public Service weir, and provide additional funding for various studies, monitoring, and additional fish stocking. The Biological Opinion subsequently adopted these conservation measures as binding reasonable and prudent measures with associated terms and conditions.

III. The Fish and Wildlife Service's Biological Opinion for Colorado Pikeminnow and Razorback Sucker

73. The Service’s Biological Opinion determined that 25 more years of operations of the energy complex would not jeopardize Colorado pikeminnow or razorback sucker or adversely modify their critical habitat. The Service’s conclusion was premised largely on the determination that current stocking efforts and the Project’s conservation measures—commitment to future consultations, to develop various mitigation plans, and partial funding of certain mitigation measures—would offset the Project’s adverse effects.

74. Regarding potential jeopardy to both species, the Biological Opinion acknowledged that pollution emissions from the coal plant have a clear effect on mercury deposition in the San Juan River basin, that approximately 43 to 60% of Colorado pikeminnow are already suffering behavioral impairment because of mercury poisoning, and that *all* adult Colorado pikeminnow and *all* Colorado pikeminnow critical habitat in the San Juan River will be adversely affected by mercury pollution by 2046. By 2046, the impacts of mercury poisoning alone are expected to lead to a significant decline in the pikeminnow population in the San Juan River.

75. The Biological Opinion also found that the burden of mercury and selenium pollution in the San Juan River, entrainment in the coal plant’s water intake system, negative interactions with non-native species, loss of habitat, alteration of hydrology, and water withdrawals for the Project would decrease the population viability of Colorado pikeminnow in the San Juan River basin.

76. Despite these impacts, the Biological Opinion concluded that the Project would not jeopardize the continued existence of the Colorado pikeminnow. The Biological Opinion found that the decades-long and ongoing stocking program had stabilized the Colorado pikeminnow population in the San Juan River and that the Project would not contribute to any worsening of the already degraded conditions in the river. According to the Biological Opinion, the existing stocking program and the Project's conservation measures would continue to offset impacts.

77. The Biological Opinion reached the same conclusion about the razorback sucker. The Biological Opinion noted that mercury and selenium deposition and bioaccumulation in the action area from the project and cumulative effects, when added to existing conditions, would cause behavioral injury, reproductive injury, and mortality to razorback sucker. However, the Biological Opinion concluded that the ongoing stocking program and the Project's conservation measures are currently offsetting and will continue to offset adverse effects.

78. The Biological Opinion further concluded that together with the environmental baseline and cumulative effects, the Project would not adversely modify or destroy critical habitat for the Colorado pikeminnow or razorback sucker. The Biological Opinion determined that mercury concentrations in pikeminnow tissue would not reach a level associated with significant population

decline until 2046, five years after the expiration of the current lease extension for Four Corners Power Plant, even though elements of the Project and impacts of the Project's mercury emissions would continue for decades after the expiration of the lease. The Biological Opinion also concluded that even though the primary constituent elements of Colorado pikeminnow and razorback sucker critical habitat do not occur together in the San Juan River at levels that allow for either species' conservation and that the Project will worsen conditions, critical habitat would not be adversely modified because the ongoing stocking program is offsetting impacts to both species and, together with the Project's conservation measures, will continue to do so.

IV. The Final Environmental Impact Statement and Record of Decision

79. Federal Defendants conducted a NEPA analysis for the Project, issuing a Draft Environmental Impact Statement in March 2014, a Final Environmental Impact Statement in May 2015, and a Record of Decision in July 2015. The Office of Surface Mining was the lead agency and the other Federal Defendants were cooperating agencies.

80. The Record of Decision approved the extension of Arizona Public Service's lease for the coal-plant site through 2041, the right-of-ways for Arizona Public Service's transmission lines across Navajo and Hopi lands in Arizona, the renewed and expanded strip-mining operations over 5,568 acres in the Pinabete permit area, and the resource recovery and protection plan ensuring maximum coal

recovery at the mine. In the Record of Decision, the U.S. Department of the Interior approved the decisions of the Office of Surface Mining, Bureau of Indian Affairs, and Bureau of Land Management, which are agencies within the Department.

81. Federal Defendants received thousands of public comments on the Project, the great majority of which opposed continued operations of the energy complex. The Citizen Groups and their members submitted extensive oral and written comments, including expert reports, on the Project.

82. The Citizen Groups commented on the Draft Environmental Impact Statement's narrow statement of purpose and need and failure to explore reasonable alternatives. The Final Environmental Impact Statement's statement of purpose and need for the Project adopted the private goals of the project proponents, Arizona Public Service and Arizona-based Navajo Transitional Energy Company. The Final Environmental Impact Statement stated that the purpose of the Project was to continue operations of the Navajo Mine and the Four Corners Power Plant. The Final Environmental Impact Statement stated that the Project was needed to provide electricity using existing generation and fuel resources.

83. On the basis of this narrow statement of purpose and need, the Final Environmental Impact Statement excluded detailed consideration of any alternatives involving alternative energy sources or early retirement of the strip

mine and coal plant. The Final Environmental Impact Statement rejected alternatives that were technically and economically feasible, but were not preferred by Arizona Public Service. For example, it is economically and technically feasible to convert Four Corners Power Plant to a natural gas plant that would emit less pollution. Federal Defendants rejected this alternative because Arizona Public Service would prefer to build such a plant closer to its load centers in Arizona. Converting the plant to natural gas would virtually eliminate mercury and sulfur dioxide emissions and greatly reduce nitrogen oxide and greenhouse gas emissions.

84. All action alternatives carried forward for detailed review were virtually identical, with only cosmetic differences about the arrangement of coal combustion waste disposal areas at Four Corners Power Plant and minor variations in the shape of the strip-mine.

85. The Citizen Groups and the U.S. Environmental Protection Agency commented and submitted expert reports on the Draft Environmental Impact Statement's inadequate analysis of impacts to public health. For nearly fifty years Four Corners Power Plant was the largest point source of ozone-forming nitrogen oxide pollution in the United States. Together with the adjacent San Juan Generating Station, Four Corners Power Plant is the largest source of air pollution in North and South America. Public health on the Navajo Nation and in the surrounding area is severely compromised. Incidence of chronic lower respiratory

disease in the area is elevated, which studies have linked to elevated levels of ozone. Nonetheless, the Final Environmental Impact Statement determined that the public health impacts of 25 more years of operations of the massive mine-coal-plant complex would be negligible. The Final Environmental Impact Statement relied heavily on the area's compliance with National Ambient Air Quality Standards. However, the Environmental Protection Agency stated in comments that such reliance on ambient air quality standards was unwarranted. The Environmental Protection Agency also announced that, according to the best science, existing ambient air quality standards are not sufficient to protect public health.

86. The Citizen Groups commented and submitted expert reports on the Draft Environmental Impact Statement's inadequate analysis of the impacts of disposal of coal combustion waste. Coal combustion waste results from burning coal at the coal plant. This waste—fly ash, bottom ash, and boiler slag—is collected in the plant's boilers and pollution control equipment and then disposed of. Over the past 50 years, Arizona Public Service has disposed of approximately 33.5 million tons of coal combustion waste in lined and unlined impoundments at the plant site.

87. Coal ash contains numerous toxic constituents including heavy metals such as antimony, arsenic, barium, beryllium, cadmium, chromium, lead, mercury, nickel, selenium, and thallium. Pollutants from coal combustion waste

have leached through the bottom of existing coal combustion waste impoundments at the coal plant site and entered the groundwater migrating toward the Chaco River.

88. Arizona Public Service has constructed various intercept trenches and pump-back wells beginning in 1977 and continuing through the present to prevent this pollution from migrating to the adjacent Chaco River. Contaminated water collected in the various intercept trenches is pumped back to the coal plant's lined decant water pond. The Final Environmental Impact Statement concluded that through continued operation and expansion of the intercept trenches and pump-back wells, the coal plant's coal combustion waste disposal facilities would have "less potential" to contaminate local groundwater and water quality in the Chaco River.

89. The Citizen Groups commented on the Draft Environmental Impact Statement's assessment of harm to Colorado pikeminnow and razorback sucker from the coal plant's intake structure in the San Juan River. Impingement of both fish species against the screened intake structure may cause injury or death to hundreds of these critically endangered native species over the course of 25 years of continued operations of the energy complex. The Final Environmental Impact Statement failed entirely to address the impacts of impingement to Colorado pikeminnow and razorback sucker, yet concluded that operations of the intake structure would have only minor impacts on the species.

CLAIMS FOR RELIEF

COUNT I: SECTION 7 ESA VIOLATIONS BY THE SERVICE

A. **Arbitrary, Capricious, and Unlawful Failure to Assess Recovery Needs in No-Jeopardy and No-Adverse Modification Determinations for Colorado Pikeminnow and Razorback Sucker**

90. The Citizen Groups re-allege all previous paragraphs.

91. The goal of the ESA is to conserve and recover species that are facing extinction. 16 U.S.C. § 1531(b). In issuing a biological opinion, the Service must consider impacts to recovery as part of its assessment of jeopardy and adverse modification of critical habitat. *See id.* § 1536(a)(2).

92. The Service did not adequately consider recovery needs in its no-jeopardy and no-adverse modification of critical habitat analyses for Colorado pikeminnow and razorback sucker, as required by the ESA.

93. The Biological Opinion failed to address the delisting criteria for Colorado pikeminnow and razorback sucker, which require self-sustaining populations in the San Juan River.

94. The Biological Opinion failed to address whether the Project, together with the environmental baseline and cumulative effects, would reduce or diminish the ability of the San Juan River to support self-sustaining populations of Colorado pikeminnow and razorback sucker.

95. The mercury standard the Service relied on to assess adverse modification of critical habitat also failed to account for Colorado pikeminnow

survival. The Biological Opinion unlawfully determined that adverse modification of critical habitat would only occur when mercury concentrations reach a level associated with a modeled long-term population decline. The analysis failed to consider Colorado pikeminnow recovery needs.

96. The Biological Opinion acknowledged that that despite intensive stocking efforts over the past two decades, neither Colorado pikeminnow nor razorback sucker populations in the San Juan River are able to support sufficient recruitment to establish self-sustaining populations. Ongoing stocking efforts do nothing to improve severely degraded habitat in the San Juan River.

97. The Biological Opinion's failure to adequately assess the recovery needs of Colorado pikeminnow and razorback sucker was arbitrary and capricious in violation of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. § 706.

B. Arbitrary, Capricious, and Unlawful Reliance on Uncertain and Nonbinding Mitigation Measures in No-Jeopardy and No-Adverse Modification Determinations for Colorado Pikeminnow and Razorback Sucker

98. The Citizen Groups re-allege all previous paragraphs.

99. Under the ESA, the Service must insure that a proposed action will not jeopardize species or adversely modify or destroy critical habitat. 16 U.S.C. § 1536(a)(2). Accordingly, the Service may not rely on uncertain and non-binding mitigation measures to reach a no-jeopardy or no-adverse modification

determination. The Service may not rely on future mitigation measures without discussing interim impacts to species.

100. The Biological Opinion unlawfully relied on uncertain and non-binding mitigation measures to reach its no jeopardy or no adverse modification determinations for Colorado pikeminnow and razorback sucker.

101. The Biological Opinion also relied on future mitigation measures without properly disclosing the interim impacts to Colorado pikeminnow, razorback sucker, and their critical habitat.

102. The Service unlawfully relied on conservation measures to offset impacts to Colorado pikeminnow, razorback sucker, and their critical habitat, despite evidence that habitat conditions will worsen in coming decades and that the Project's myriad impacts will contribute to this degradation.

103. There is no analysis in the Biological Opinion that discusses how the conservation measures will offset the Project's adverse impacts.

104. The Biological Opinion's incidental take statement relied on the action agencies' taking unidentified measures to reduce mercury deposition in the future, while recognizing that the action agencies may not have discretion to take any such unidentified measures. The Biological Opinion did not discuss impacts that would occur before the uncertain and unidentified measures would, possibly, be implemented.

105. The conservation measures to mitigate adverse impacts of impingement in the coal plant's intake structures or entrainment in the cooling system, non-native species escape from Morgan Lake, and blockage of fish passage by the Arizona Public Service weir are uncertain. In addition, the Biological Opinion did not discuss the interim impacts prior to implementation.

106. The conservation measures do not address all of the Project's harmful impacts, such as impacts from water withdrawals.

107. The current stocking program, on which the Biological Opinion relied, is not permanent and is not projected to continue through the life of the Project.

108. The Biological Opinion's reliance on uncertain and non-binding mitigation measures to reach its no-jeopardy and no-adverse modification of critical habitat determinations for Colorado pikeminnow and razorback sucker was arbitrary and capricious in violation of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. § 706.

C. Arbitrary, Capricious, and Unlawful Failure to Consider Cumulative Effects to Colorado Pikeminnow and Colorado Pikeminnow Critical Habitat Occurring After 2041

109. The Citizen Groups re-allege all previous paragraphs.

110. When issuing a biological opinion, the Service must determine whether the proposed action, together with the environmental baseline and cumulative effects, will jeopardize species or adversely modify critical habitat. 50

C.F.R. § 402.14(g). The Service must use the best available science. *Id.*

§ 402.14(d).

111. The Biological Opinion determined that by 2046 mercury deposition from the Project together with the environmental baseline and cumulative effects would lead to elevated mercury concentrations in all Colorado pikeminnow in the San Juan River, which would cause a significant decline in population.

112. The Biological Opinion acknowledged that mercury emitted from the Four Corners Power Plant would remain in the San Juan River watershed and would continue to bioaccumulate in Colorado pikeminnow through 2074.

113. In reaching its no-jeopardy and no-adverse modification determinations, the Biological Opinion refused to consider the impacts from the Project's mercury deposition together with cumulative impacts after 2041.

114. The Biological Opinion's refusal and failure to consider the Project's mercury deposition impacts together with cumulative impacts after 2041 was arbitrary, capricious, and unlawful in violation of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. § 706.

D. Arbitrary, Capricious, and Unlawful Failure to Consider Projected Impacts of Climate Change in No-Jeopardy and No-Adverse Modification Determinations for Colorado Pikeminnow and Razorback Sucker

115. The Citizen Groups re-allege all previous paragraphs.

116. When issuing a biological opinion, the Service must determine whether the proposed action, together with the environmental baseline and cumulative effects, will jeopardize species or adversely modify critical habitat. 50 C.F.R. § 402.14(g). The Service must use the best available science. *Id.* § 402.14(d).

117. In assessing impacts to species and critical habitat, the Service must consider the condition of the environment that will exist both at the beginning and at the completion of a proposed action.

118. The Biological Opinion acknowledged substantial evidence showing that the impacts of climate change will significantly alter conditions in the San Juan River by 2041, when Arizona Public Service's lease extension for Four Corners Power Plant will end (though impacts from the Project will continue for decades).

119. The Biological Opinion cited multiple scientific reports forecasting worsening droughts, reduced precipitation, and decreased flow in the San Juan River by mid-century. Colorado pikeminnow populations have been documented to crash in response to drought conditions.

120. The Biological Opinion failed entirely to address evidence of significant impacts to the San Juan River basin from climate change in assessing cumulative effects and in reaching its no-jeopardy and no-adverse modification determinations for Colorado pikeminnow and razorback sucker.

121. The Biological Opinion's failure to consider the impacts of climate change in reaching its conclusions was arbitrary, capricious, and unlawful in violation of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. § 706.

E. Arbitrary, Capricious, and Unlawful Failure to Evaluate Effects of Selenium Loading from the Navajo Indian Irrigation Project

122. The Citizen Groups re-allege all previous paragraphs.

123. In a biological opinion, the Service must consider the impacts of any approved federal action that has undergone formal or informal consultation.

124. The Bureau of Indian Affairs approved the expansion of the Navajo Indian Irrigation Project, adjacent to the energy complex, in 1999, following informal consultation with the Service. This Navajo Indian Irrigation Project expansion is not completed, though full expansion has been approved.

125. Upon completion, operations of the Navajo Indian Irrigation Project will cause additional selenium loading in the San Juan River from irrigation returns upstream and in close proximity to the coal complex.

126. The Biological Opinion failed entirely to address the effects, including selenium discharges, from the Navajo Indian Irrigation Project.

127. The Biological Opinion's failure to address the effects of Navajo Indian Irrigation Project was arbitrary, capricious, and unlawful in violation of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. § 706.

F. Arbitrary, Capricious, and Unlawful Failure to Evaluate Effects of Impingement of Colorado Pikeminnow and Razorback Sucker Against

Four Corners Power Plant's Cooling Water Intakes and Other Plant Equipment

128. The Citizen Groups re-allege all previous paragraphs.

129. In a biological opinion, the Service must evaluate the effects of the action on threatened or endangered species and critical habitat. 50 C.F.R.

§ 402.14(g)-(h); 16 U.S.C. § 1536(a)(2).

130. The Biological Opinion failed to evaluate the effects of impingement of Colorado pikeminnow and razorback sucker against the Four Corners Power Plant's cooling water intake structure and other plant equipment in making its no-jeopardy and no-adverse modification determinations for both fish.

131. The Biological Opinion's failure to address the effects of impingement was arbitrary, capricious, and unlawful under the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. § 706.

G. Arbitrary, Capricious, and Unlawful Failure to Consider the Harmful Effects of Reliance on Continued Stocking on Wild Colorado Pikeminnow.

132. The Citizen Groups re-allege all previous paragraphs.

133. In a biological opinion, the Service must evaluate the effects of the action on threatened or endangered species and critical habitat, together with cumulative effects and the environmental baseline. 50 C.F.R. § 402.14(g)-(h); 16 U.S.C. § 1536(a)(2).

134. The Biological Opinion's no-jeopardy and no-adverse modification determinations for Colorado pikeminnow relied significantly on existing and continued stocking of hatchery-raised Colorado pikeminnow. The Biological Opinion's incidental take statement required funding for additional annual stocking.

135. The Biological Opinion failed to evaluate the harmful effects of reliance on continued stocking on wild Colorado pikeminnow in the San Juan River to prevent harm to the species, versus prevention of impacts that cause the harm to the species in the first place.

136. The Biological Opinion's failure to evaluate the harmful effects of reliance on continued stocking was arbitrary, capricious, and unlawful under the ESA, 16 U.S.C. § 1536(a)(2), and APA, 5 U.S.C. § 706.

H. Arbitrary, Capricious, and Unlawful Failure to Adequately Evaluate the Risk of Mercury Pollution on the Colorado Pikeminnow and Its Critical Habitat.

137. The Citizen Groups re-allege all previous paragraphs.

138. The Service must evaluate the effects of the proposed action on threatened or endangered species and critical habitat, together with cumulative effects and the environmental baseline. 50 C.F.R. § 402.14(g)-(h); 16 U.S.C. § 1536(a)(2).

139. The Service may not rely on modeling that does not correspond to real world conditions.

140. The Biological Opinion relied heavily on models funded by the Project proponents that did not correspond to real world conditions to reach its conclusion that the Project's mercury emissions, together with cumulative impacts and the environmental baseline, would not jeopardize Colorado pikeminnow or adversely modify critical habitat. The Biological Opinion determined that mercury levels in Colorado pikeminnow would cause a significant population decline within five years of the expiration of the extension of Arizona Public Service's lease for the coal plant.

141. The Biological Opinion's evaluation of the effects of mercury deposition on Colorado pikeminnow and its critical habitat was arbitrary, capricious, and unlawful in violation of the ESA, 16 U.S.C. § 1536(a)(2), and the APA, 5 U.S.C. § 706.

I. Arbitrary, Capricious, and Unlawful Incidental Take Statement

142. The Citizen Groups re-allege all previous paragraphs.

143. If the Service determines that an action is not likely to jeopardize a species or adversely modify critical habitat, but that the project will cause incidental take (injury or mortality), the agency must issue an incidental take statement as part of its biological opinion for the project. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). The incidental take statement must specify the number of incidental take of a species that may occur or use a proxy, if it would not be practical to obtain a specific number. The actual or proxy numbers limit the

amount of take that may occur that is shielded from the take prohibition of section 9 of the ESA, 16 U.S.C. § 1538(a)(1)(B). If a project exceeds the amount of authorized take, reinitiation of formal consultation must occur. 50 C.F.R. § 402.14(i)(4)-(5).

144. The Biological Opinion's incidental take statement omitted either a numeric or proxy limit for Colorado pikeminnow and razorback sucker taken as a result of the Project's water withdrawals, impingement, effluent discharges from the Project, operations of the Arizona Public Service weir, or release of non-native species from Morgan Lake into the San Juan River.

145. The incidental takes statement's failure to establish numeric limits or valid proxies for take of Colorado pikeminnow or razorback sucker was arbitrary, capricious, and unlawful in violation of the ESA, 16 U.S.C. § 1536(a)(2), (b)(4), and the APA, 5 U.S.C. § 706.

COUNT II: SECTION 7 ESA VIOLATIONS BY ACTION AGENCIES

Unlawful Reliance on Faulty Biological Opinion

146. The Citizen Groups re-allege all previous paragraphs.

147. The ESA imposes on action agencies the substantive duty to ensure that their operations are not likely to jeopardize species or adversely modify critical habitat. 16 U.S.C. § 1536(a)(1), (2).

148. An action agency violates its substantive duty to avoid jeopardy of species and adverse modification of critical habitat by relying on a faulty biological opinion.

149. As alleged above, the Service's Biological Opinion is deficient as a matter of law. The action agencies, the Bureau of Indian Affairs, Office of Surface Mining, and Bureau of Land Management, violated their substantive duties under the ESA by relying on the Service's faulty Biological Opinion to approve the Project, including approval of Arizona Public Service's lease extension, approval of Navajo Transitional Energy Company's expansion of the strip-mine into the Pinabete permit area, and renewal of the rights-of-way for transmission lines in Arizona.

150. The action agencies' reliance on the Service's faulty Biological Opinion was arbitrary, capricious, and unlawful under the ESA, 16 U.S.C. § 1536(a)(1)-(2), and the APA, 5 U.S.C. § 706(1), (2)(A).

COUNT III: NEPA VIOLATIONS BY ACTION AGENCIES

A. Arbitrary, Capricious, and Unlawfully Narrow Statement of Purpose and Need.

151. The Citizens Groups re-allege all previous paragraphs.

152. NEPA requires an environmental impact statement to contain a purpose and need statement that "briefly specif[ies] the underlying purpose and

need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13.

153. An agency may not draw its purpose and need statement so narrowly that only one alternative may accomplish its goal, making the NEPA process an empty formality. Nor may an agency adopt the goals of a private applicant as the purpose and need for federal action.

154. Federal Defendant’s Final Environmental Impact Statement adopted a purpose and need statement that merely responded to Arizona Public Service’s and Arizona-based Navajo Transitional Energy Company’s desired goals—25 years of continued operations of the Navajo Mine and Four Corners Power Plant. The Final Environmental Impact Statement’s unreasonably narrow purpose and need statement prevented consideration of alternative means of generating electricity and made the Final Environmental Impact Statement a foreordained formality.

155. The Federal Defendants’ adoption of Arizona Public Service’s and Navajo Transitional Energy Company’s desired goals to draw an unreasonably narrow purpose and need statement was arbitrary, capricious, and unlawful, in violation of NEPA, 42 U.S.C. § 4332(2)(C), (E), NEPA’s implementing regulations, and the APA, 5 U.S.C. § 706.

B. Arbitrary, Capricious, and Unlawful Failure to Consider Reasonable Alternatives

156. The Citizens Groups re-allege all previous paragraphs.

157. NEPA requires federal agencies to consider “alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii). The alternatives analysis is the “heart of the environmental impact statement.” 40 C.F.R. § 1502.14.

158. Agencies must “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E).

159. An EIS must “rigorously explore and objectively evaluate all reasonable alternatives,” including “reasonable alternatives not within the jurisdiction of the lead agency.” 40 C.F.R. § 1502.14(a), (c).

160. All action alternatives carried forward for full analysis in the Final Environmental Impact Statement were virtually identical, involving continued operation of the Navajo Mine and FCPP for 25 more years. The Final Environmental Impact Statement refused to consider reasonable alternatives, such as development of alternative energy sources, offsite disposal of coal combustion waste, or early retirement of the strip mine and coal plant.

161. The Federal Defendant’s failure to consider reasonable alternatives was arbitrary, capricious, and unlawful, in violation of NEPA, 42 U.S.C. § 4332(2)(C)(iii), (E), NEPA’s implementing regulations, and the APA, 5 U.S.C. § 706.

C. Arbitrary, Capricious, and Unlawful Failure to Take a Hard Look at Direct, Indirect, and Cumulative Effects of Air Pollution and Public Health.

162. The Citizens Groups re-allege all previous paragraphs.

163. NEPA requires federal agencies to address “any adverse environmental effects which cannot be avoided should the proposal be implemented,” including direct, indirect, and cumulative effects and their significance. 42 U.S.C. § 4332(2)(C)(ii); 40 C.F.R. §§ 1502.16(a)-(b), 1508.25(c).

164. “Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.” 40 C.F.R. § 1502.24. The scientific information in an environmental impact statement must be “accurate” and “of high quality.” *Id.* § 1500.1(b). An environmental impact statement must “discuss . . . any responsible opposing view.” *Id.* § 1502.9(b). Agencies may not rely on incorrect assumptions or inaccurate data in an environmental impact statement.

165. One fundamental purpose behind NEPA was Congress’s recognition that “each person should enjoy a healthful environment.” 42 U.S.C. § 4331(c). With NEPA, Congress mandated that federal agencies “interpret[] and administer[]” relevant laws, policies, and regulations to “the fullest extent possible” to, among other things, secure each person’s ability to “enjoy a healthful environment.” 42 U.S.C. §§ 4331(c), 4332(1).

166. The Federal Defendants’ Final Environmental Impact Statement failed to take a hard look at direct, indirect, and cumulative impacts of the Project on public health. The Final Environmental Impact Statement’s conclusion that continued operations of the energy complex—historically one the largest sources of air, water, and land pollution in the United States—would only have negligible effects on public health failed to consider or respond to current science. The Final Environmental Impact Statement also failed to adequately address the direct, indirect, and cumulative effects of air pollution from coal-fired power plants, including the Four Corners Power Plant and the neighboring San Juan Generating Station, on the already severely compromised public health on the Navajo Nation and in the Four Corners region.

167. Federal Defendants’ failure to take a hard look at the direct, indirect, and cumulative effects of the Project’s pollution on public health was arbitrary, capricious, and unlawful, in violation of NEPA, 42 U.S.C. § 4332(2)(C)(iii), NEPA’s implementing regulations, and the APA, 5 U.S.C. § 706.

D. Arbitrary, Capricious, and Unlawful Failure to Take a Hard Look at Impacts of Impingement and Mortality of Endangered Fish Species Resulting from Operation of the Four Corners Power Plant’s Intake Structure

168. The Citizens Groups re-allege all previous paragraphs.

169. NEPA requires federal agencies to address “any adverse environmental effects which cannot be avoided should the proposal be

implemented,” including direct, indirect, and cumulative effects and their significance. 42 U.S.C. § 4332(2)(C)(ii); 40 C.F.R. §§ 1502.16(a)-(b), 1508.25(c).

170. If information essential to an informed decision is lacking and the cost of obtaining the needed information is not exorbitant, federal agencies must obtain the information and include it in the environmental impact statement. 40 C.F.R. § 1502.22(a). If the cost of obtaining such information is exorbitant, the agencies must state that the relevant information is incomplete, summarize existing scientific evidence, and evaluate potential impacts based on available scientific knowledge. *Id.* § 1502.22(b).

171. Federal Defendants’ Final Environmental Impact Statement failed entirely to address the impacts of impingement and resultant mortality of endangered Colorado pikeminnow and razorback sucker that would result from continued operation of Four Corners Power Plant’s cooling water intake structures in the San Juan River.

172. Federal Defendants’ complete failure to address impingement of endangered Colorado pikeminnow and razorback sucker was arbitrary, capricious, and unlawful, in violation of NEPA, 42 U.S.C. § 4332(2)(C)(iii), NEPA’s implementing regulations, and the APA, 5 U.S.C. § 706.

E. Arbitrary, Capricious, and Unlawful Failure to Take a Hard Look at Impacts of and Failure to Adequately Respond to Comments About Coal Combustion Waste Disposal at Four Corners Power Plant.

173. The Citizens Groups re-allege all previous paragraphs.

174. NEPA requires federal agencies to address “any adverse environmental effects which cannot be avoided should the proposal be implemented,” including direct, indirect, and cumulative effects and their significance. 42 U.S.C. § 4332(2)(C)(ii); 40 C.F.R. §§ 1502.16(a)-(b), 1508.25(c).

175. “Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.” 40 C.F.R. § 1502.24. The scientific information in an environmental impact statement must be “accurate” and “of high quality.” *Id.* § 1500.1(b). An EIS must “discuss . . . any responsible opposing view.” *Id.* § 1502.9(b).

176. In preparing an environmental impact statement, federal agencies must adequately compile relevant data and information, including baseline data. Federal agencies may not rely on incorrect assumptions or inaccurate data in an environmental impact statement. Agencies must make the data underlying their environmental conclusions and decisions available to the public for inspection. Agencies may not rely on promised future mitigation to evade analysis of environmental effects.

177. If information essential to an informed decision is lacking and the cost of obtaining the needed information is not exorbitant, federal agencies must obtain the information and include it in the EIS. 40 C.F.R. § 1502.22(a). If the cost of obtaining such information is exorbitant, the agencies must state that the relevant information is incomplete, summarize existing scientific evidence, and

evaluate potential impacts based on available scientific knowledge. *Id.*

§ 1502.22(b).

178. Federal Defendants' Final Environmental Impact Statement failed to take a hard look at the direct, indirect, and cumulative impacts of coal combustion waste disposal at the Four Corners Power Plant. The Final Environmental Impact Statement failed adequately to assess potential impacts from groundwater flow from Morgan Lake through existing waste disposal areas at the coal plant. The Final Environmental Impact Statement failed to provide basic information required to assess leaching and migration of pollutants from coal combustion waste disposal areas. The Final Environmental Impact Statement failed to assure the integrity of its assessment of ground and surface water pollution from coal combustion waste disposal areas and failed to compile adequate baseline information about ground water quality. The Final Environmental Impact Statement also failed to provide underlying data to support its reliance on the effectiveness of mitigation measures to prevent pollution of ground and surface water from coal combustion waste disposal areas.

179. Federal Defendants' failure to take a hard look at the direct, indirect, and cumulative effect of coal combustion waste disposal at Four Corners Power Plant was arbitrary, capricious, and unlawful, in violation of NEPA, 42 U.S.C. 4332(2)(C)(iii), NEPA's implementing regulations, and the APA, 5 U.S.C. § 706.

PRAYER FOR RELIEF

WHEREFORE, The Citizen Groups respectfully requests the Court to grant the following relief:

- A. Issue a declaratory judgment that the Service violated section 7 of the ESA as alleged above;
- B. Issue a declaratory judgment that the Service violated section 7 of the ESA as alleged above by issuing an incidental take statement without numeric or valid proxy limitations on incidental take of Colorado pikeminnow or razorback sucker;
- C. Issue a declaratory judgment that Federal Defendants violated section 7 of the ESA and NEPA as alleged above in issuing the Record of Decision and Final Environmental Impact Statement for the Project;
- D. Issue an order setting aside the Service's Biological Opinion for the Project, including its incidental take statement, and remand the matter to the Service for completion of a lawful biological opinion;
- E. Issue an order setting aside Federal Defendants' Record of Decision and Final Environmental Impact Statement and remand the matter to the agencies for completion of a lawful NEPA analysis;
- F. Enjoin the Service from authorizing any take of Colorado pikeminnow or razorback sucker or adverse modification of critical habitat for Colorado pikeminnow or razorback sucker for any operations at the energy complex pending the Service's compliance with the ESA;

- G. Enjoin the Federal Defendants from authorizing any elements of the Project pending their compliance with NEPA;
- H. Issue any appropriate injunctive relief that the Citizen Groups may request hereafter;
- I. Award the Citizen Groups their reasonable costs, litigation expenses, and attorney fees associated with this litigation pursuant to the ESA, 16 U.S.C. § 1540(g)(4), the Equal Access to Justice Act, 28 U.S.C. § 2412, and any other applicable authorities;
- J. Grant such other relief as the Citizen Groups may request hereafter or this Court may deem necessary, just, and proper.

Respectfully submitted this 20th day of April 2016,

/s/ Matt Kenna
Matt Kenna (CO Bar # 22159)
Of Counsel, Western Environmental
Law Center
679 E. 2nd Ave., Suite 11B
Durango, CO 81301
matt@kenna.net
970.385.6941
Applicant *Pro Hac Vice*

Shiloh S. Hernandez (MT Bar No. 9970)
Laura H. King (MT Bar No. 13574)
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
hernandez@westernlaw.org
king@westernlaw.org
406.204.4861
Applicants *Pro Hac Vice*

Michael Saul (CO Bar No. 30143)
Center for Biological Diversity
1536 Wynkoop St., Suite 421
Denver, CO 80202
MSaul@biologicaldiversity.org
303.915.8308
Applicant *Pro Hac Vice*

John Barth (CO Bar No. 22957)
Attorney at Law
P.O. Box 409
Hygiene, CO 80533
barthlawoffice@gmail.com
303.774.8868
Applicant *Pro Hac Vice*

Attorneys for Plaintiffs