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10  
11 IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON

12 NORTH IDAHO COMMUNITY ACTION,  
13 NETWORK, a non-profit organization; and  
14 WILLIAM R. LEWIS, an individual,

15 Plaintiffs,

16 vs.

17 ANTHONY J. HOFMANN, in his official capacity )  
as District Commander, U.S. Army Corps of )  
18 Engineers' Walla Walla District; STEVEN R. )  
MILES, in his official capacity as Commander )  
19 and Division Engineer, U.S. Army Corps of )  
Engineers' Northwest Division; ROBERT VAN )  
20 ANTWERP, in his official capacity as )  
Commander and Chief Engineer, U.S. Army Corps )  
21 of Engineers; and the U.S. ARMY CORPS OF )  
ENGINEERS, )

22 Defendants.  
23

Civil Action No. \_\_\_\_\_

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

24 INTRODUCTION

25 1. Plaintiffs, North Idaho Community Action Network and William Lewis  
26 ("NICAN" or "Plaintiffs") hereby bring this civil action for declaratory and  
27

1 injunctive relief against the above named Defendants (the U.S. Army Corps of  
2 Engineers or “Corps”) pursuant to the Administrative Procedure Act (“APA”), 5  
3 U.S.C. §§ 701 to 706, for violations of the Federal Water Pollution Control Act  
4 (“Clean Water Act” or “CWA”), 33 U.S.C. §§ 1251 to 1387, National  
5 Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 to 4370e, and Executive  
6 Order (“EO”) 11990, 42 Fed. Reg. 26961.

7         2. This civil action arises out of the Corps’ decision issue the Idaho  
8 Transportation Department (“ITD”) a dredge and fill permit *without first*  
9 completing a NEPA analysis, taking a hard look at cumulative impacts and  
10 practicable alternatives, or adopting all practicable measures to minimize harm to  
11 Sand Creek and adjacent wetlands as required by law.

12         3. On September 21, 2007 the Corps issued a section 404 of the CWA  
13 permit authorizing ITD to dredge and permanently remove approximately 17,035  
14 cubic yards (“cy”) of material from Sand Creek and discharge approximately  
15 77,250 cy of crushed rock, sand and concrete, and fill material into Sand Creek  
16 and adjacent wetlands, thereby destroying the natural function and value of the  
17 area and forever altering downtown Sandpoint’s attractive waterfront.

18         4. The proposed dredge and fill activity is being requested by ITD to  
19 construct a number of additions and amenities to the proposed US-95 Highway  
20 Project, including a pedestrian and bicycle pathway, three “habitat enhancement”  
21 areas, a shoreline extension, and various bridge structures.

22         5. Despite the environmental consequences and controversial nature of the  
23 Corps’ decision, and local community opposition to ITD’s plan to forever alter  
24 Sand Creek’s aquatic ecosystem, the Corps chose to short-cut the permitting  
25 process and forgo preparation of its own NEPA analysis altogether. The Corps  
26 chose not to prepare either an environmental assessment (“EA”) or environmental  
27 impact statement (“EIS”) for the new permit – as required by the Corps’

1 regulations – and instead adopt ITD’s previous, outdated NEPA documents that  
2 fail to analyze the impacts of dredging and filling Sand Creek. As such, the  
3 impacts of, and alternatives to, ITD’s plan to dredge and fill Sand Creek have  
4 *never been* analyzed in a NEPA document.

5         6. In a rush to finalize the permit for ITD, the Corps also failed to take a  
6 hard look at practicable alternatives to the dredge and fill activity and failed to  
7 require practicable measures to minimize harm to Sand Creek as required by the  
8 CWA’s implementing regulations and EO 11990. In short, the Corps blindly  
9 accepted, without any independent verification, ITD’s conclusion that no practical,  
10 less damaging alternatives or ways to minimize harm to Sand Creek’s aquatic  
11 resources exist.

12         7. The Corps’ actions in this case have resulted, and will continue to  
13 result, in unnecessary and avoidable impacts to Sand Creek’s aquatic environment.  
14 The Corps’ actions also result in uninformed decision-making and creates an  
15 increased risk of actual, threatened, and imminent harm to NICAN’s concrete  
16 interests in protecting Sand Creek’s aquatic resources.

17         8. Wherefore, NICAN – a local community-based organization comprised of  
18 Sandpoint residents, business owners, and individuals dedicated to protecting the  
19 aquatic resources and values inherent in Sand Creek and Sandpoint’s historic  
20 waterfront – is hereby compelled to bring this civil action.

21         9. The Corps’ failure to comply with NEPA, the CWA’s implementing  
22 regulations, and EO 11990 as alleged in this complaint is “arbitrary and  
23 capricious, an abuse of discretion, and not in accordance with law” and represents  
24 “agency action unlawfully withheld or unreasonably delayed” and 5 U.S.C. §§ 706  
25 (2)(A) and (1).

JURISDICTION AND VENUE

10. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (Federal Question).

11. The Court has the authority to review the agency inaction and/or action of the Corps complained of herein, and grant the relief requested, pursuant to the APA, 5 U.S.C. §§ 701-706.

12. The relief sought is authorized by 28 U.S.C. § 2201 (Declaratory Judgment), 28 U.S.C. § 2202 (Injunctive Relief), and 5 U.S.C. § 706 (APA).

13. Venue is properly before this Court pursuant to 28 U.S.C. § 1391(e). The Corps’ September 21, 2007 permit decision at issue in this case was made by the Corps’ Walla Walla District Office located in Southeastern Washington. The Corps’ Walla Walla District Office is responsible for all regulatory functions governing activities affecting waters and wetlands in Idaho.

14. There is a present and actual controversy between the parties.

PARTIES

15. Plaintiff, NORTH IDAHO COMMUNITY ACTION NETWORK (“NICAN”), is a non-profit, 501 (c)(3) community based organization in Sandpoint, Idaho with approximately 200 members. NICAN is dedicated to bringing unbiased information to the community and encouraging local participation in federal and state agency decisions that have the potential to impact environmental and aesthetic values, economic viability and the quality of life in Sandpoint and the surrounding area. The primary focus of NICAN since its formation has been the protection of Sand Creek’s aquatic ecosystem and Sandpoint’s historic waterfront district from the Idaho Transportation Department’s proposal to construct a bypass highway on the east bank of Sand Creek adjacent to downtown Sandpoint. Many of NICAN’s members are long time residents of Sandpoint that have a concrete interest in the continued

1 preservation and protection of Sandpoint's historic waterfront district along Sand  
2 Creek – an area that many of NICAN's members and staff have and will continue  
3 to use. NICAN's members and staff derive aesthetic, ecological, conservation,  
4 recreational, and professional benefits from spending time along Sand Creek and  
5 exploring the quiet riparian areas, viewing waterfowl and other birds, including  
6 bald eagles, walking the trails, and spending time among the historic sites. Many  
7 of NICAN's members and staff actually live in and around Sand Creek or own  
8 businesses and/or property near or adjacent to Sand Creek. NICAN believes  
9 strongly that preserving and protecting the Sand Creek waterway , the area's  
10 aquatic resources, and the adjacent peninsula area is vital to Sandpoint for  
11 economic, ecological, and historical reasons. NICAN's membership includes  
12 owners of new and established restaurants and other businesses that are located on  
13 the west bank of Sand Creek. The economic success of these members' businesses  
14 is dependent in large part on the preservation of the downtown waterfront  
15 amenities that make Sandpoint unique and attractive to visitors and seasonal and  
16 year-round residents (several of the new restaurants and retail businesses in  
17 downtown Sandpoint are oriented towards the creek to take advantage of the  
18 waterfront setting). NICAN believes that the Corps' failure to comply with  
19 NEPA, the CWA, and EO 11990, as alleged in this complaint, has impacted, and  
20 will continue to seriously and unnecessarily impact the natural function and value  
21 of Sand Creek's aquatic resources and wetlands, NICAN's concrete interests in  
22 protecting Sand Creek's aquatic resources and values, and results in uninformed  
23 decisions which creates an increased risk of actual, threatened, and imminent harm  
24 to the area and NICAN's concrete interests. NICAN believes that if the Corps is  
25 ordered to comply with the CWA, NEPA, and EO 11990 as requested in this civil  
26 action then the harm to NICAN's interests will be alleviated.

27 16. Plaintiff WILLIAM R. LEWIS was born, raised, and is a life-long

1 resident of Sandpoint, Idaho. As a native and long-term resident, Mr. Lewis has a  
2 a concrete interest in the continued preservation and protection of Sandpoint's  
3 historic waterfront district along Sand Creek – an area that he has and will  
4 continue to use. Mr. Lewis derives aesthetic, ecological, conservation, and  
5 recreational benefits from spending time along Sand Creek and exploring the quiet  
6 riparian areas, viewing waterfowl and other birds, including bald eagles, walking  
7 the trails, and spending time among the historic sites. Mr. Lewis believes strongly  
8 that preserving and protecting the Sand Creek waterway, the area's aquatic  
9 resources, and the adjacent peninsula area is vital to Sandpoint for economic,  
10 ecological, and historical reasons. Mr. Lewis believes that the Corps' failure to  
11 comply with NEPA, the CWA, and EO 11990, as alleged in this complaint, has  
12 impacted, and will continue to seriously and unnecessarily impact that natural  
13 function and value of Sand Creek's aquatic resources and wetlands and his  
14 concrete interests in protecting Sand Creek's aquatic resources and values. Mr.  
15 Lewis also believes that the Corps' did not take a hard look at the impacts to Sand  
16 Creek's aquatic resources or practical alternatives to the dredge and fill activity.  
17 Mr. Lewis believes that the Corps' failure to comply with the law, as outlined in  
18 this complaint, also results in uninformed decisions which creates an increased  
19 risk of actual, threatened, and imminent harm to the area and his concrete interests.  
20 Mr. Lewis believes that if the Corps is ordered to comply with the CWA, NEPA,  
21 and EO 11990 as requested in this civil action then the harm to his interests will be  
22 alleviated.

23 17. Defendant ANTHONY J. HOFMANN is sued in his official capacity as  
24 District Commander for the Corps' Walla Walla District Office. As the District  
25 Commander for the Walla Walla District, Mr. Hofmann is the Corps' official with  
26 ultimate responsibility for all the Corps officials' inactions or actions challenged  
27 in this complaint. Mr. Hofmann is the Corps official who signed the decision

1 document which is the subject of this civil action.

2 18. Defendant STEVEN R. MILES is sued in his official capacity in as  
3 Commander and Division Engineer for the Corps' Northwest Division which  
4 includes the Walla Walla District. As the Commander and Division Engineer, Mr.  
5 Miles is the federal official with ultimate responsibility for all the Corps officials'  
6 inactions or actions challenged in this complaint.

7 19. Defendant ROBERT VAN ANTWERP is sued in his official capacity  
8 as Commander and Chief Engineer of the Corps. As the Commander and Chief  
9 Engineer, Mr. Van Antwerp is the federal official with ultimate responsibility for  
10 all the Corps officials' inactions or actions challenged in this complaint.

11 20. Defendant U.S. ARMY CORPS OF ENGINEERS ("Corps") is the  
12 federal agency responsible for applying and implementing the federal laws and  
13 regulations challenged in this complaint.

#### 14 FACTUAL BACKGROUND

##### 15 SAND CREEK AND SANDPOINT'S HISTORIC WATERFRONT

16 21. The Corps' dredge and fill permit will impact Sand Creek and adjacent  
17 wetlands along Sandpoint's historic waterfront.

18 22. Sand Creek is a tributary to Lake Pend Oreille. Lake Pend Oreille is  
19 classified as a Special Resource Water by the State of Idaho.

20 23. Sand Creek flows from north to south in the wide valley between the  
21 Selkirk and Cabinet mountain ranges.

22 24. Historic downtown Sandpoint is situated on the west bank of Sand  
23 Creek near its outflow into Lake Pend Oreille. Sandpoint City Beach Park is  
24 located on Lake Pend Oreille immediately east of the proposed location for the  
25 highway. The busy Sandpoint Marina is located near the mouth of Sand Creek  
26 within the project area.

27 25. The substrate in lower Sand Creek is comprised of very deep (>600

1 feet) saturated sandy soils that are highly unstable.

2 26. Sand Creek supports cold water native trout that may migrate upstream  
3 to spawn. The Lake Pend Oreille watershed supports one of the healthiest  
4 remaining sub-populations of threatened bull trout. It is possible that bull trout  
5 use lower Sand Creek in the project area for resting and feeding during the  
6 summer but their presence is unknown since no fish surveys have been conducted  
7 for the last 20 years.

8 27. During the summer months lower Sand Creek is inundated when the  
9 water level in Lake Pend Oreille is raised by a downstream dam on the Pend  
10 Oreille River. When inundated, lower Sand Creek becomes a 330 foot wide  
11 estuary, providing special habitat for cold water trout and other aquatic species  
12 and recreational opportunities (boating, fishing swimming) for residents and  
13 visitors, as well as a beautiful waterfront setting for the town.

14 28. In the fall and spring when the water level is lower and the mudflats are  
15 exposed, thousands of migrating waterfowl use lower Sand Creek for feeding and  
16 resting. Bald eagles are present along the creek during the winter months, using  
17 the mature cottonwoods along the eastern shoreline of Sand Creek for perching,  
18 hunting and roosting. Eagles are often viewed from the downtown businesses  
19 located on the western shoreline of the creek

## 20 THE PROPOSED US-95 PROJECT

21 29. The Corps' 404 permit to dredge and fill Sand Creek and adjacent  
22 wetlands was requested by, and issued to, ITD for the purpose of building various  
23 additions and amenities to the Sand Creek segment of the U.S. Highway 95  
24 Sandpoint North and South Project ("US-95 Project").

25 30. As outlined below, these additions and amenities were not part of the  
26 original, two-lane design for the US-95 Project outlined in a 1999 environmental  
27

1 impact statement (“EIS”) but were added later and described in a 2005  
2 environmental assessment (“EA”).

### 3 The Original, Two-Lane Design of the US-95 Project

4 31. In 1999, the Federal Highway Administration (“FHA”) in cooperation  
5 with ITD prepared an EIS for the original, two-lane design of the US-95 Project.

6 32. On May 23, 2000 the FHA and ITD issued a record of decision  
7 (“ROD”) for the US-95 Project. In the ROD, FHA and ITD selected the “Sand  
8 Creek Two-Lane Alternative” – the preferred alternative in the draft EIS – as the  
9 proposed action.

10 33. The Sand Creek Two-Lane Alternative is comprised of four segments,  
11 extending from mile post 469.75 in Sagle to mile post 477.44 in Ponderay. These  
12 four segments include (from south to north): Sagle to Long Bridge, Long Bridge  
13 Widening, Sand Creek Byway, and Sandpoint to Kootenai Cut Off Road.

14 34. For the Sand Creek Byway segment, in the 1999 EIS ITD proposed: (1)  
15 constructing two miles of a new two-lane highway along the east side of Sand  
16 Creek; (2) building a partial interchange/bridge structure over Sand Creek and  
17 Bridge Street; and (3) a full diamond interchange at the junction of US-95 and  
18 State Highway 200 in Ponderay.

19 35. The Sand Creek Two-Lane Alternative – which was identified as the  
20 preferred alternative in the draft EIS and the chosen alternative in the final EIS  
21 and ROD – is a practicable alternative for the US-95 Project.

22 36. The Sand Creek Two-Lane Alternative which was identified as the  
23 preferred alternative in the draft EIS and the chosen alternative in the final EIS  
24 and ROD is available and capable of being done after taking into consideration  
25 cost, existing technology, and logistics in light of the overall project purposes.

26 37. At the time ITD and the FHA prepared the 1999 EIS for the original  
27 design of the US-95 Project, they prepared a 404(b)(1) evaluation in anticipation

1 of needing a 404 permit from the Corps to dredge and fill Sand Creek and/or  
2 adjacent wetlands but failed to include any analysis on the impacts of such activity  
3 in the EIS.

4 38. ITD's plan to dredge and fill Sand Creek and adjacent wetlands is not  
5 analyzed in the 1999 EIS or ROD for the US-95 Project.

6 39. The Sand Creek Two-Lane Alternative in the 1999 EIS did not include  
7 a pedestrian and bicycle pathway, habitat enhancement areas, lightweight fill  
8 structure, a shoreline extension, or a southbound off ramp bridge.

9 40. As compared to the proposed US-95 Project outlined in ITD's 404  
10 permit application, the Sand Creek Two-Lane Alternative outlined in the 1999 EIS  
11 would require less dredging and filling of Sand Creek and adjacent wetlands.

12 41. As compared to the proposed US-95 Project outlined in ITD's 404  
13 permit application, the Sand Creek Two-Lane Alternative outlined in the 1999 EIS  
14 would have less adverse impact on Sand Creek's aquatic ecosystem.

#### 15 The Eleven Changes and New Amenities to the US-95 Project

16 42. On April 15, 2005 ITD and the FHA released a revised EA that  
17 describes eleven changes to the Sand Creek Two-Lane Alternative outlined in the  
18 1999 EIS.

19 43. The eleven changes – all of which occur in the Sand Creek Byway  
20 segment – include the following: (1) an additional southbound off ramp bridge; (2)  
21 an additional third “auxiliary” lane which encroaches on Sand Creek; (3) a  
22 shoreline extension fill into Sand Creek; (4) a long span bridge over Sand Creek  
23 instead of pilings; (5) concrete walls (instead of pilings) which require the  
24 placement of fill into Sand Creek; (6) a new bridge street bridge; (7) lightweight  
25 fill structure near the historic railroad Depot; (8) additional fill for railroad  
26 embankments; (9) a pedestrian and bicycle pathway on Sand Creek's eastern  
27 shoreline for the entire length of the project; (10) three artificial “habitat

1 enhancement” areas in Sand Creek; and (11) a loop on/off ramp at the north end of  
2 the project.

3 44. The eleven changes outlined in the 2005 EA are not essential to  
4 achieving the overall purpose and need of the US-95 Project.

5 45. The pedestrian and bicycle pathway is not essential to meeting the  
6 overall purpose and need of the US-95 Project.

7 46. The three habitat “enhancement” areas are not essential to meeting the  
8 overall purpose and need of the US-95 Project.

9 47. The Southbound off ramp bridge is not essential to meeting the overall  
10 purpose and need of the US-95 Project.

11 48. The eleven changes to the US-95 Project outlined in the EA were not  
12 mentioned, discussed, or analyzed in the 1999 EIS.

13 49. The 2005 EA only addresses the impacts of the eleven additions and  
14 changes to the US-95 Project.

15 50. The eleven changes to the US-95 Project outlined in the EA require the  
16 dredging and and filling of Sand Creek and adjacent wetlands.

17 51. The eleven changes to the US-95 Project outlined in the EA necessitate  
18 the need for a 404 permit from the Corps.

19 52. The eleven changes to the US-95 Project outlined in the EA require  
20 more dredging and filling of Sand Creek and adjacent wetlands than the Sand  
21 Creek Two Lane Alternative outlined in the 1999 EIS.

22 53. Building the new pedestrian and bicycle pathway – one of the eleven  
23 changes outlined in the EA – will require the dredging and filling of Sand Creek  
24 and/or adjacent wetlands.

25 54. Building the new shoreline extension – one of the eleven changes  
26 outlined in the EA – will require the dredging and filling of Sand Creek and/or  
27 adjacent wetlands.

1           55. Building three habitat “enhancement” areas in Sand Creek – one of the  
2 eleven changes outlined in the EA – will require the dredging and filling of Sand  
3 Creek and/or adjacent wetlands.

4           56. Building the southbound off ramp bridge – one of the eleven changes  
5 outlined in the EA – will require the dredging and filling of Sand Creek and/or  
6 adjacent wetlands.

7           57. In the EA, ITD and FHA estimate that approximately 2.82 wetlands will  
8 be impacted by the changes to the US-95 Project.

9           58. The EA on the eleven changes to the US-95 Project does not address or  
10 analyze alternatives to the eleven changes, such as alternative designs and/or  
11 locations for the shoreline extension, pedestrian and bicycle pathway, or habitat  
12 enhancement areas.

13           59. The EA on the eleven changes to the US-95 Project does not analyze  
14 the impacts of dredging and filling Sand Creek.

15           60. The EA on the eleven changes to the US-95 Project does not mention,  
16 discuss, or analyze any impacts from dredging Sand Creek.

17           61. The dredging of Sand Creek is not discussed, mentioned, or analyzed in  
18 any of ITD’s and FHA’s NEPA documentation.

19           62. ITD and FHA have never assessed the direct, indirect, or cumulative  
20 impacts of dredging and filling Sand Creek in a NEPA document or considered a  
21 reasonable range of alternatives to the dredging and filling activity in a NEPA  
22 document.

23           63. The EA mentions the need to discharge fill material into Sand Creek  
24 and/or adjacent wetlands but does not analyze the impacts of, or alternatives to,  
25 discharging fill material into Sand Creek and/or adjacent wetlands.

1 Additional Changes to the US-95 Project Included in ITD's Environmental Re-  
2 Evaluation

3 64. On August 17, 2006 ITD released an environmental re-evaluation  
4 announcing, for the first time, its plans to dredge Sand Creek.

5 65. In the environmental re-evaluation, ITD announced they will: (1)  
6 conduct channel hydraulics dredging of sections of Sand Creek to "reduce the  
7 hydraulic effects of placing the Shoreline Extension in the Sand Creek Channel;"  
8 (2) conduct bank stabilization dredging in connection with the proposed bank  
9 stabilization features; (3) conduct "fill benching dredging" to "construct a bench  
10 cut for fill in Sand Creek; (4) dredge to remove "approximately 8,945 cubic yards  
11 of imported fill placed between sheet pile cofferdams required for the proposed  
12 Shoreline Extension;" (5) dredge to remove the temporary fill adjacent to the  
13 proposed bridges; (6) dredge behind sheet pile cofferdams for the bridge piers; (7)  
14 dredge for the Lightweight Fill Structure to "key the structure into the existing  
15 ground and match alignment with adjacent structures;" (8) dredge for the creation  
16 of new "pond outlets;" and (9) dredge for cultural resource data recovery. In total,  
17 ITD estimates that this dredging activity will permanently remove approximately  
18 17,035 cubic yards of material from Sand Creek.

19 66. This dredging activity outlined in the re-evaluation was not mentioned,  
20 discussed, or analyzed in the 1999 EIS or 2005 EA for the US-95 Project.

21 67. The environmental re-evaluation does not analyze the direct, indirect, or  
22 cumulative impacts of the dredging and filling of Sand Creek and/or adjacent  
23 wetlands or evaluate reasonable alternatives to the dredging and filling of Sand  
24 Creek and/or adjacent wetlands.

25 68. The original design of the US-95 Project in the EIS and eleven changes  
26 in the EA are not mentioned, discussed, or analyzed in the re-evaluation. The re-  
27 evaluation only addresses project changes "since issuance of the FONSI 2005."

1           69. An environmental re-evaluation is not a NEPA document or NEPA  
2 analysis.

3           70. ITD's environmental re-evaluation was never circulated or made  
4 available for public review and comment.

5 The Corps' 404 Permit for the Proposed US-95 Project

6           71. On August 3, 2006 ITD submitted an application for a 404 permit to the  
7 Corps to discharge approximately 84,750 cy of crushed rock, sand and concrete  
8 fill material and approximately 29,980 cy of dredged material into approximately  
9 2.71 acres below the ordinary high water mark of Sand Creek and approximately  
10 2.82 acres of wetlands adjacent to Sand Creek.

11           72. The dredge and fill activity is needed in order to process ITD's request  
12 to construct two bridges for the Sand Creek Byway, a pedestrian and bicycle  
13 pathway, three "habitat enhancement" areas, a shoreline extension, bank  
14 stabilization, temporary construction access, temporary cofferdams, concrete for  
15 fence post footings, two screened water intakes, and stormwater pond outlet  
16 structures.

17           73. The Corps sent out public notice of the permit application on September  
18 11, 2006.

19           74. A public hearing on the permit application was held on November 20,  
20 2006.

21           75. NICAN submitted comments on ITD's permit application and provided  
22 testimony at the public hearing.

23           76. On March 15, 2007 the Corps sent ITD a letter requesting more and  
24 accurate information from ITD in order to complete the evaluation of the  
25 proposed project and ITD's request for a 404 permit.

26           77. In the March 15, 2007 letter, the Corps asked for: (1) an updated and  
27 accurate wetlands delineation (the previous delineation relied upon by ITD and

1 submitted to the public underestimated the wetlands impacts); (2) an accurate  
2 identification of all the proposed discharges of dredged or fill material (the  
3 application did not include this information); (3) an assessment of cumulative  
4 impacts; (4) a revision of the project's purpose; (5) an alternatives analysis; (6)  
5 more information on the need to use riprap along Sand Creek's shoreline; (7) more  
6 information on mitigation, a revised functional assessment, and performance  
7 standards to measure wetland mitigation success; (8) more information on the use  
8 of temporary work bridges on pilings instead of temporary fills; (9) more  
9 information on the types of dredging that will require cofferdams; (10)  
10 information on other temporary fills; (11) more information on the precise location  
11 of ITD's proposed channel dredging near the shoreline extension; (12) information  
12 on the types of best management practices ("BMPs") to be used; (13) an  
13 evaluation of unstable soils in the vicinity of stormwater ponds; (14) measures  
14 used to abate noise and dust; (15) an evaluation of impacts to the historic train  
15 Depot; and (16) an evaluation of impacts to downtown Sandpoint's aesthetics.

16         78. In response to the Corps' March 15, 2007 letter ITD provided a revised  
17 Wetland Delineation and Request for Jurisdictional Determination dated May,  
18 2007 (prepared by CH2MHill). The Corps sent a letter to ITD transmitting the  
19 Jurisdictional Determination based on the revised Wetland Delineation on June 6,  
20 2007. The revised Wetland Delineation identified additional wetlands that would  
21 be impacted by the proposed project.

22         79. On July 18, 2007 ITD sent a response to the Corps' March 15, 2007  
23 letter.

24         80. ITD's July 18, 2007 response did not address all of the Corps'  
25 questions, concerns, and requests for information concerning the 404 permit  
26 application.



1           89. Section 404 of the CWA prohibits the dredging or filling of waters of  
2 the United States, including wetlands, without a permit from the Corps authorizing  
3 the dredge and fill activity. 33 U.S.C. § 1344.

4           90. Pursuant to 40 C.F.R. § 230.10 the Corps is prohibited from issuing a  
5 404 permit “if there is a practicable alternative to the proposed discharge which  
6 would have less adverse impact on the aquatic ecosystem, so long as the  
7 alternative does not have other significant adverse environmental consequences.”  
8 40 C.F.R. § 230.10(a).

9           91. A “practicable alternative” is one that is “available and capable of being  
10 done after taking into consideration cost, existing technology, and logistics in light  
11 of overall project purposes.” 40 C.F.R. § 230.10 (a)(2).

12           92. When a non-water dependent activity such as the US-95 Project  
13 requires the dredging and filling of “special aquatic sites” such as wetland areas,  
14 “practicable alternatives that do not involve special aquatic sites are presumed to  
15 be available, unless clearly demonstrated otherwise.” 40 C.F.R. § 230.10(a)(3).  
16 Based on this presumption, the Corps may not issue a 404 permit unless the  
17 applicant, with independent verification by the Corps, provides detailed, clear and  
18 convincing information proving that a practicable alternative with less adverse  
19 impact does not exist.

20           93. Pursuant to 40 C.F.R. § 230.10, the Corps can only issue a dredge and  
21 fill permit if all “appropriate and practicable steps have been taken which will  
22 minimize potential adverse impacts of the discharge on the aquatic ecosystem.” 40  
23 C.F.R. § 230.10 (d).

24           94. Pursuant to 40 C.F.R. § 230.10 (g), the Corps must make a  
25 determination of cumulative effects on the aquatic ecosystem. The Corps “shall  
26 collect information and solicit information from other sources about the  
27 cumulative impacts on the aquatic ecosystem. This information shall be

1 documented and considered during the decision-making process.” 40 C.F.R. §  
2 230.10 (g).

3 95. Pursuant to 40 C.F.R. § 230.10 (h), the Corps must make a  
4 determination of secondary effects on the aquatic ecosystem. Information “on  
5 secondary effects on aquatic ecosystems shall be considered prior to the time final  
6 section 404 action is taken by the permitting authorities.” 40 C.F.R. § 230.10 (h).

7 96. In issuing ITD a 404 permit to dredge and fill Sand Creek and adjacent  
8 wetlands to build the redesigned US-95 Project, the Corps violated 40 C.F.R. §  
9 230.10 by: (1) failing to take a hard look at all practicable alternatives to the  
10 proposed discharges of dredge and fill material (for example, not building certain  
11 additions or amenities to the US-95 Project and/or not exploring alternative  
12 designs, alignments, and locations for certain additions and amenities to the US-95  
13 Project that would either completely avoid or minimize the adverse impacts to  
14 Sand Creek and adjacent wetlands); (2) failing to require clear and convincing  
15 evidence to support, and to independently verify, ITD’s assertions that practicable  
16 alternatives with less impacts on Sand Creek and adjacent wetlands do not exist;  
17 (3) artificially constraining (and/or permitting ITD to artificially constrain) the  
18 practicable alternatives analysis by defining the purpose of the US-95 Project in an  
19 overly narrow manner; (4) failing to take appropriate and practicable steps to  
20 minimize potential adverse impacts of the discharge on Sand Creek’s aquatic  
21 ecosystem; and (5) failing to adequately consider cumulative and secondary  
22 effects to Sand Creek’s aquatic environment as required by 40 C.F.R. §§ 230.10.

23 97. The Corps failure to comply with 40 C.F.R. § 230.10 is “arbitrary and  
24 capricious, an abuse of discretion, and not in accordance with law” and/or  
25 constitutes “agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C.  
26 §§ 706 (2)(A), 706(1).

COUNT II  
NEPA Violations

1  
2 98. Plaintiffs repeat and incorporate by reference the foregoing paragraphs.

3  
4 99. Pursuant to NEPA, the Corps must analyze the direct, indirect, and  
5 cumulative impacts of its decision to issue ITD a 404 permit to dredge and fill  
6 Sand Creek and adjacent wetlands in either an EA or EIS.

7  
8 100. Pursuant to NEPA, the Corps must consider a reasonable range of  
9 alternatives to its decision to issue ITD a 404 permit to dredge and fill Sand Creek  
10 and adjacent wetlands in either an EA or EIS.

11  
12 101. Pursuant to the Corps' regulations, a "decision on a [404] permit  
13 application will require either an environmental assessment [EA] or an  
14 environmental impact statement [EIS] unless it is included within a categorical  
15 exclusion [CE]. 33 C.F.R. § 325.2 (4).

16  
17 102. The Corps did not prepare an EA or EIS for its decision to issue ITD a  
18 404 permit to dredge and fill Sand Creek and adjacent wetlands and the decision  
19 was not included within a CE.

20  
21 103. Pursuant to 40 C.F.R. § 1506.3, the Corps "adopted" ITD's and FHA's  
22 EIS and supporting documents for the US-95 Project "in satisfaction of its NEPA  
23 compliance for [the] permit action."

24  
25 104. ITD's and FHA's EIS and supporting documents for the US-95  
26 Project, however, do not analyze the impacts (direct, indirect, and cumulative) of,  
27 or alternatives to, ITD's proposal to dredge and fill Sand Creek and adjacent  
28 wetlands.

105. ITD's plan to dredge Sand Creek and adjacent wetlands, for instance,  
was not mentioned, discussed, or analyzed in any of ITD's or the FHA's previous  
NEPA documents.

1 106. To date, no NEPA analysis on the impacts of, and alternative to, ITD's  
2 plan to dredge and fill Sand Creek and adjacent wetlands has been completed.

3 107. ITD's plan to dredge and fill Sand Creek will have direct, indirect, and  
4 cumulative impacts on Sand Creek's aquatic environment.

5 108. To date the Corps is failing to assess the direct, indirect, and  
6 cumulative impacts of, and a reasonable range of alternatives to, its decision to  
7 issue ITD a 404 permit to dredge and fill Sand Creek and adjacent wetlands in a  
8 NEPA document.

9 109. To date, the public has never been given the opportunity to review and  
10 comment on a NEPA analysis completed for ITD's final plan to dredge and fill  
11 Sand Creek and adjacent wetlands.

12 110. The Corps' failure to comply with NEPA when issuing ITD a 404  
13 permit to dredge and fill Sand Creek and adjacent wetlands is "arbitrary and  
14 capricious, an abuse of discretion, and not in accordance with law" and/or  
15 constitutes "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C.  
16 §§ 706 (2)(A), 706(1).

17 **COUNT III**  
18 **Executive Order 11990 Violations**

19 111. Plaintiffs repeat and incorporate by reference the foregoing  
20 paragraphs.

21 112. Pursuant to Executive Order ("EO") 11990 the Corps "shall avoid  
22 undertaking or providing assistance for new construction located in wetlands  
23 unless the head of the agency finds (1) that there is no practicable alternative to  
24 such construction, and (2) that the proposed action includes all practicable  
25 measures to minimize harm to wetlands which may result from such use. In  
26 making this finding the head of the agency may take into account economic,  
27 environmental and other pertinent factors." 42 Fed. Reg. 26961.

1 113. Pursuant to EO 11990, the Corps must also “provide opportunity for  
2 early public review of any plans or proposals for new construction in wetlands, in  
3 accordance with Section 2 (b) of Executive Order No. 11514.” 42 Fed. Reg.  
4 26961. Section 2 (b) of EO 11514 states that the Corps must develop “procedures  
5 to ensure the fullest practicable provision of timely public information and  
6 understanding of Federal plans and programs with environmental impact in order  
7 to obtain the views of interested parties. These procedures . . . shall provide the  
8 public with relevant information, including information on alternative courses of  
9 action.” 35 Fed. Reg. 4247.

10 114. In issuing a 404 permit for the project that allows ITD to dredge and  
11 fill Sand Creek and adjacent wetlands to build amenities for the US-95 Project, the  
12 Corps violated EO 11990 by: (1) failing to take a hard look at practicable  
13 alternatives to the destruction of Sand Creek’s wetlands; (2) failing to review and  
14 include all practicable measures to minimize harm to the wetlands; and (3) failing  
15 to provide the public with accurate, relevant information on ITD’s proposed  
16 destruction of Sand Creek’s wetlands and information on alternative courses of  
17 action.

18 115. The Corps’ failure to comply with EO 11990 when issuing ITD a 404  
19 permit to dredge and fill Sand Creek and adjacent wetlands is “arbitrary and  
20 capricious, an abuse of discretion, and not in accordance with law” and/or  
21 constitutes “agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C.  
22 §§ 706 (2)(A), 706(1).

23  
24 **COUNT IV**  
**Public Notice Violation**

25 116. Plaintiffs repeat and incorporate by reference the foregoing  
26 paragraphs.

1 117. Pursuant to section 404 (a) of the CWA, the Corps may only issue  
2 dredge and fill permits “after notice and opportunity for public hearings.” 33  
3 U.S.C. §1344 (a).

4 118. Pursuant to the Corps’ regulations for processing permits, meaningful  
5 public notice of the all applications for a 404 permit must be given. 33 C.F.R. §  
6 325.3. The “public notice is the primary method of advising all interested parties  
7 of the proposed activity for which a permit is sought and of soliciting comments  
8 and information necessary to evaluate the probable impact on the public interest.  
9 The notice must, therefore, include sufficient information to give a clear  
10 understanding of the nature and magnitude of the activity to generate meaningful  
11 comment.” 33 C.F.R. § 325.3 (a).

12 119. The Corps violated their own public notice requirement by failing to  
13 provide accurate, up-to-date, and sufficient information to the public on ITD’s 404  
14 application to dredge and fill Sand Creek and adjacent wetlands.

15 120. The Corps’ September 11, 2006 public notice for ITD’s permit  
16 application includes misleading and inaccurate information on: (1) the total  
17 number and acreage of wetlands to be impacted by the dredge and fill activity (the  
18 Corps told that public that only 2.82 acres would be filled but permitted ITD to fill  
19 5.20 acres of wetlands); (2) the total volume and acreage of fill material to be  
20 placed in Sand Creek and adjacent wetlands; (3) the function and value of Sand  
21 Creeks’s mudflats; and (4) ownership of the property.

22 121. In a March 15, 2007 letter the Corps pointed out deficiencies and  
23 misinformation included in ITD’s permit application.

24 122. After pointing out the deficiencies and misinformation in ITD’s permit  
25 application, however, the Corps did not provide new public notice or reissue  
26 public notice on ITD’s permit application even after receiving new information  
27 regarding the impacts of the project in ITD’s response to the March letter. As a

1 result, the public was never provided accurate or sufficient information on ITD's  
2 proposal the dredge and fill Sand Creek and adjacent wetlands.

3 123. The Corps' failure to provide new public notice or reissue public  
4 notice on ITD's permit application after becoming aware of the misleading and  
5 inaccurate statements made in the public notice of ITD's permit application is  
6 "arbitrary and capricious, an abuse of discretion, and not in accordance with law"  
7 and/or constitutes "agency action unlawfully withheld or unreasonably delayed." 5  
8 U.S.C. §§ 706 (2)(A), 706(1).

9 PRAYER FOR RELIEF

10 124. Plaintiffs repeat and incorporate by reference the allegations of all  
11 foregoing paragraphs.

12 125. WHEREFORE, Plaintiffs respectfully request that this Court grant the  
13 following relief:

14 A. Issue a declaratory judgment that the Corps' actions and/or inactions, as  
15 alleged in this complaint, have violated, and continue to violate, NEPA, the CWA,  
16 and EO 11990 as alleged in this complaint and are arbitrary, capricious, an abuse  
17 of discretion, or otherwise not in accordance with law or constitutes agency action  
18 unlawfully withheld or unreasonably delayed, or under the APA;

19 B. Issue a mandatory injunction requiring the Corps to comply fully with  
20 NEPA, the CWA, and EO 11990 as alleged in this complaint;

21 C. Issue a mandatory injunction suspending the Corps' issuance of ITD a  
22 404 permit until all violations of law complained of herein are remedied;

23 D. Issue a mandatory injunction prohibiting the Corps from authorizing  
24 ITD or the FHA from conducting any dredging and filling activity in Sand Creek  
25 and/or adjacent wetlands or in anyway making irreversible commitments of  
26 resources towards conducting such activity until all violations of law complained  
27 of herein are remedied;

1 E. Issue such declaratory and/or injunctive relief as Plaintiffs may  
2 subsequently request or that this Court may deem appropriate;

3 F. Retain continuing jurisdiction of this matter until the Corps fully  
4 remedies the violations of law complained of herein;

5 G. Grant Plaintiffs their costs and expenses of litigation, including  
6 reasonable attorneys' fees for claims pursuant to the Equal Access to Justice Act  
7 (EAJA), 28 U.S.C § 2412;

8 H. Grant such other relief as this Court may deem just and proper.

9 Respectfully submitted this 14<sup>th</sup> day of January, 2008.

10  
11 CENTER FOR JUSTICE

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