

**PRIVILEGED AND CONFIDENTIAL**

January 6, 2009

Secretary Dirk Kempthorne  
U.S. Department of the Interior  
1849 C St., N.W.  
Washington, DC 20240

Mr. James Caswell  
Director Bureau of Land Management  
1849 C Street NW, Rm. 5665  
Washington, D.C. 20240

*Via Certified Mail/Return Receipt Requested*

**Re: Notice of Intent to Sue for Violations of the Endangered Species Act in Connection with the Bureau of Land Management’s Final Rule Managing Oil Shale Commercial Leasing in Colorado, Wyoming and Utah**

Dear Secretary Kempthorne, Director Caswell:

We write on behalf of the Center for Biological Diversity (the “Center”), The Wilderness Society (“TWS”), Western Resource Advocates (“WRA”), Southern Utah Wilderness Alliance (“SUWA”), Wilderness Workshop, the Center for Native Ecosystems (“CNE”), Red Rock Forests, Colorado Environmental Coalition (“CEC”), Defenders of Wildlife, Western Colorado Congress (WCC) and the Sierra Club to notify the Department of the Interior (“DOI”) and the Bureau of Land Management (“BLM”) that the above-named parties intend to file a civil action against the BLM and the DOI for violations of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”), in issuing final regulations for commercial oil shale exploration and development in Colorado, Utah and Wyoming. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court.<sup>1</sup>

**I. Parties**

A. The Center for Biological Diversity

Plaintiff Center for Biological Diversity (“the Center”) is a non-profit 501(c)(3) corporation with offices in California, Arizona, Oregon, New Mexico, Vermont, Illinois,

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<sup>1</sup> See 16 U.S.C. § 1540(g).

Montana 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 is actively involved in species and habitat protection issues worldwide, including throughout the western United States. The Center has over 140,000 members and online activist throughout the United States and the world. The Center, its employees, and its members use the public lands potentially subject to leasing under the regulations for recreational, scientific, aesthetic, and commercial purposes. They also derive recreational, scientific, aesthetic, and commercial benefits from the public lands through wildlife observation, study, and photography. The Center and its members have an interest in preserving the possibility of such activities in the future. As such, the Center and its members have an interest in participating in the management of these public lands and in helping to ensure their continued use and enjoyment of these lands.

#### B. Western Resource Advocates

Western Resource Advocates (WRA) is a non-profit environmental law and policy organization. WRA's mission is to protect the West's land, air, water, and wildlife. WRA's lawyers, scientists, and economists: 1) advance clean energy to reduce pollution and global climate change; 2) promote urban water conservation and river restoration; and 3) defend special public lands from inappropriate energy development and other threats. WRA collaborates with conservation partners to build a sustainable future for the West. WRA's goals include protecting habitat for threatened, endangered, and sensitive plant and animal species. WRA has a long history of involvement on oil shale and tar sands issues. WRA has focused its efforts on working through government and other channels to promote informed decision-making and to protect the West's land, water, people and climate.

#### C. The Wilderness Society

The Wilderness Society (TWS) is a not-for-profit corporation incorporated in the District of Columbia. TWS has approximately 310,000 members and supporters, including thousands in Colorado, Wyoming, and Utah. TWS's mission is to protect wilderness and inspire Americans to care for our wild places. TWS's goal is to develop a national network of wild lands through public education, scientific analysis, and advocacy to ensure that future generations will enjoy the clean air and water, wildlife, natural beauty, opportunities for recreation, and spiritual renewal that pristine forests, rivers, deserts, and mountains provide.

#### D. Southern Utah Wilderness Alliance

The Southern Utah Wilderness Alliance (SUWA) is a Utah non-profit membership organization. SUWA, based in Salt Lake City, Utah, has more than 15,000 members, many of whom reside in Utah. SUWA's mission is the preservation of the outstanding wilderness at the heart of the Colorado Plateau, the management of these lands in their

natural state for the benefit of all Americans, and the preservation of the rare and imperiled wildlife that rely upon these lands as habitat.

#### E. Wilderness Workshop

Wilderness Workshop is a non-profit advocacy organization headquartered in Carbondale, CO dedicated to conserving the natural resources and preserving the public lands of the Roaring Fork watershed, the White River National Forest, the Glenwood Springs Field Office, and adjacent public lands. To accomplish these goals, the Wilderness Workshop engages in research, education, legal advocacy, and grassroots organizing. Wilderness Workshop not only defends pristine public lands from new threats, but also helps restore the functional wildness of landscapes fragmented by human activity. Wilderness Workshop protects and preserves existing wilderness areas, advocates for expanding wilderness, and safeguards the ecological integrity of all federal public lands in its area of interest. Wilderness Workshop has a long history of participation in oil shale debates – commenting on proposed development at every opportunity and working to inform the people of Northwest Colorado about the impacts oil shale development may have.

#### F. Biodiversity Conservation Alliance

Biodiversity Conservation Alliance (BCA) is a nonprofit conservation group dedicated to protecting wildlife and wild places in Wyoming and surrounding states, particularly on public lands. BCA and its members have a strong interest in protecting sensitive lands and species likely to be irretrievably impacted by oil shale production operations enabled by leasing, particularly the loss or degradation of key habitats for BLM sensitive species such as the greater sage grouse and the destruction of wilderness-quality lands such as those found in Adobe Town in the Washakie Basin area of Wyoming.

#### G. Center for Native Ecosystems

Center for Native Ecosystems (CNE) is a nonprofit conservation group dedicated to conserving and recovering the native species and ecosystems of the Greater Southern Rockies. CNE values the clean water, fresh air, healthy communities, sources of food and medicine, and recreational opportunities provided by native biological diversity. CNE also passionately believes that all species and their natural communities have the right to exist and thrive. By using the best available science, CNE is able to further its mission through participation in policy making, public outreach and organizing, administrative processes, legal action, and education. CNE is actively seeking Endangered Species Act protection for wildflowers dependent on oil shale substrates like Graham's penstemon and Parachute penstemon. CNE has submitted extensive comments to the Bureau of Land Management regarding the potential for oil shale development to further endanger imperiled species.

#### H. Red Rock Forests

Red Rock Forests (RRF), based in Moab, Utah, has approximately 315 members, many of whom reside in Utah. RRF's mission is the preservation of Utah's forested and desert habitats. RRF relies on sound biological principles to guide its policy, goals, and decision-making, with a particular emphasis on conservation biology and uses citizen action, community organizing, and collaborative agreements, as well as legal challenges, to further its conservation mission. RRF maintains a particular interest in the forested uplands and canyon country of Utah's National Forests and public lands.

#### I. Colorado Environmental Coalition

Founded in 1965, Colorado Environmental Coalition (CEC) is the state's premier grassroots conservation alliance uniting Coloradans to protect our state's environment and quality of life. CEC has over 4,500 individual members with more than 95 affiliated partner organizations. CEC, our individual members, and our organizational affiliates have a long and well-documented interest in Colorado's public lands, as well as the wildlife population and backcountry recreation opportunities they support. This includes a lengthy history of involvement on the oil shale issue, including working to educate and engage the public and key decision makers about the implications of commercial oil shale development on the landscapes, wildlife, water supplies and communities of western Colorado.

#### J. Defenders of Wildlife

Defenders is a non-profit conservation organization dedicated to the protection and restoration of native wild animals and plants. Founded in 1947 and headquartered in Washington, D.C., Defenders currently has over one-half million members. Ensuring conservation of wildlife and habitat on federal public lands is one of Defenders' organizational priorities, which has become ever more critical in the face of global warming. Defenders has expressed its concerns about the impact of oil shale development impact on BLM lands and imperiled species through its comments on the BLM's commercial leasing regulations and its Programmatic Environmental Impact Statement on the Oil Shale and Tar Sands Resource Management Plan Amendments to Address Land Use Allocations.

#### K. The Sierra Club

The Sierra Club has approximately 700,000 members in the United States and Canada, and is a general-purpose environmental protection and conservation organization headquartered in San Francisco, CA. Its mission is to:

1. Explore, enjoy and protect the wild places of the earth;
2. Practice and promote the responsible use of the earth's ecosystems and resources;
3. Educate and enlist humanity to protect and restore the quality of the natural and human environment;
4. Use all lawful means to carry out these objectives.

## L. Western Colorado Congress

Western Colorado Congress has more than 3000 members in eight community groups in Colorado and staff in Grand Junction, Montrose, Steamboat Springs, Telluride and Paonia. WCC works to empower the community to protect and enhance their quality of life in Colorado. WCC has been involved energy development issues in the region, including oil shale development and oil and gas drilling. It also works to conserve, protect and restore Colorado's water resources and wilderness areas. Additionally, WCC has encouraged the implementation of strategies to increase the use of renewable sources of energy such as wind and solar.

## II. The Endangered Species Act

The ESA was enacted, in part, to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and] to provide a program for the conservation of such endangered species and threatened species...”<sup>2</sup> As interpreted by the Supreme Court, “[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.”<sup>3</sup> Reflecting “a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies,” the ESA serves as an important check on agencies’ actions.<sup>4</sup>

The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Commerce and Interior. The Secretaries of Commerce and Interior have delegated this responsibility to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service (“FWS”).<sup>5</sup> In this case, the FWS holds primary responsibility for administering the ESA.

Section 2(c) of the ESA establishes that it is “... the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.”<sup>6</sup> The ESA defines “conservation” to mean “... the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.”<sup>7</sup> Similarly, section 7(a)(1) of the ESA directs that the Secretary review “... other programs administered by him and utilize such programs in furtherance of the purposes of the Act.”<sup>8</sup>

To ensure federal agencies fulfill the substantive purposes of the ESA, the statute requires they engage in consultation with the FWS to “insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any

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<sup>2</sup> 16 U.S.C. § 1531(b).

<sup>3</sup> *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 175 (1978).

<sup>4</sup> *Id.* at 185.

<sup>5</sup> 50 C.F.R. §402.01(b).

<sup>6</sup> 16 U.S.C. § 1531(c)(1).

<sup>7</sup> 16 U.S.C. § 1532(3).

<sup>8</sup> 16 U.S.C. § 1536(a)(1).

endangered species or threatened species or result in the adverse modification of habitat of such species ... determined ... to be critical ...”<sup>9</sup> Additionally, section 7 requires that agencies “conference” with the FWS on any action that is “likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat.”<sup>10</sup>

Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.”<sup>11</sup> Under the ESA’s governing regulations, agency “action” means “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to “the promulgation of regulations” and “the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid.”<sup>12</sup> Through consultation, the FWS determines whether the federal agency’s proposed action is likely to jeopardize species or their critical habitats. This determination is made after the FWS completes a Biological Opinion (“BiOp”).<sup>13</sup> If the BiOp concludes that the agency’s action is likely to jeopardize a species, then it may specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action.<sup>14</sup> Additionally, the FWS may “suggest modifications” to the action during the course of consultation to “avoid the likelihood of adverse effects” to the listed species even when not necessary to avoid jeopardy.<sup>15</sup>

Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on a proposed action, the agency, as well as any applicant for a federal permit, “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” The purpose of section 7(d) is to maintain the environmental status quo pending the completion of interagency consultation. Section 7(d) prohibitions remain in effect throughout the consultation period and until the federal agency has satisfied its obligations under section 7(a)(2) by demonstrating that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

Courts have recognized the importance these procedural requirements play in ensuring that agencies carry out the substantive provisions and intent of the ESA. For example, in *Thomas v. Peterson*, the Ninth Circuit declared:

[T]he strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural

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<sup>9</sup> 16 U.S.C. § 1536(a)(2) (“section 7 consultation”).

<sup>10</sup> 50 C.F.R. § 402.10(a). FWS has proposed changes to the Section 7 regulations. While these proposed changes are unlawful, the obligation to consult is required by the statute regardless of any regulatory changes that may ultimately occur.

<sup>11</sup> 50 C.F.R. § 402.14.

<sup>12</sup> 50 C.F.R. § 402.02.

<sup>13</sup> 50 C.F.R. § 402.14.

<sup>14</sup> 16 U.S.C. § 1536(b).

<sup>15</sup> 50 C.F.R. § 402.13.

requirements are designed to ensure compliance with the substantive provisions . . . If an [action] is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter is, of course, impermissible.<sup>16</sup>

### III. Procedural Background

In 2005, Congress passed the Energy Policy Act of 2005 (“EPAct”). Section 369 of the EPAct concerns commercial development of America’s oil shale and tar sands resources. Under the statute, Congress declared its intent that “the development of oil shale [and] tar sands . . . for research and commercial development, [] be conducted in an environmentally sound manner, using practices that minimize impacts.”<sup>17</sup> Congress instructed the Secretary of the Interior to establish a leasing program for Research and Development (“RD&D program”) for oil shale and tar sands resources, complete a Programmatic Environmental Impact Statement pursuant to the National Environmental Protection Act (“NEPA”), 42 U.S.C. § 4332(2)(c), for a commercial leasing program in Colorado, Wyoming and Utah, promulgate final regulations governing this commercial leasing program and, finally, issue leases pursuant to the regulations after consulting with “Governors of States with significant oil shale and tar sands resources on public lands, representatives of local governments in such States, interested Indian tribes, and other interested persons” and finding that “sufficient support and interests in the States in the development of tar sands and oil shale resources.”<sup>18</sup>

On June 9, 2005, the BLM began its first step by initiating the RD&D program.<sup>19</sup> Eventually, the BLM awarded 6 RD&D leases, each on 160-acre parcels. These leases contain a preference right for eventual conversion to a commercial lease upon the lessee’s demonstration that it can produce commercial quantities. In 2007, Congress barred the use of Interior Department funds in fiscal year 2008 “to prepare or publish final regulations regarding a commercial leasing program for oil shale resources on public lands pursuant to section 369(d)” of the EP Act.<sup>20</sup> While this moratorium was still in effect, the BLM issued a Draft Programmatic Environmental Impact Statement (“DPEIS”) evaluating the environmental impacts of proposed resource management plan amendments that would make land available for commercial exploration and development of oil sands and tar sands.<sup>21</sup> On July 23, 2008, while the moratorium was still in place, the BLM published a proposed rule governing the management of oil shale commercial leases and development on public lands.<sup>22</sup>

The moratorium on oil shale and tar sands commercial development expired September 30, 2008, paving the way for the BLM to finalize and implement regulations governing a

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<sup>16</sup> *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (emphasis in original).

<sup>17</sup> 118 Pub. L. No. 109-58 § 369(b)(2).

<sup>18</sup> 118 Pub. L. No. 109-58 § 369(c)-(e).

<sup>19</sup> See 70 Fed. Reg. 33753 (June 9, 2005).

<sup>20</sup> See Pub.L. 110-161, 121 Stat. 2152 (Dec. 26, 2007).

<sup>21</sup> 72 Fed. Reg. 7251 (Dec. 21, 2007).

<sup>22</sup> 73 Fed. Reg. 42926 (July 23, 2008).

commercial leasing, exploration and development program for oil shale and tar sands resources in Colorado, Utah and Wyoming. As such, on November 17, 2008, the BLM signed the Record of Decision (“ROD”) for the FEIS on the resource management plan amendments (“RMP amendments”), which was released more than a month earlier on September 5, 2008, while the BLM was still subject to the moratorium.<sup>23</sup> Also, on November 17, 2008, the BLM announced the finalization of its regulations governing a leasing program for commercial oil shale development in Colorado, Wyoming and Utah.<sup>24</sup> The final regulations “set out the policies and procedures” for a commercial oil shale program and include provisions governing the lease application process, requirements for plans of development and determination of fees, rentals and royalty rates, among others.

#### **IV. Violations of the Endangered Species Act**

The BLM violated ESA section 7 requirements by failing to consult with the FWS regarding the impacts the promulgation of the final leasing regulations may have on listed species and/or their critical habitats.<sup>25</sup>

As recognized by the BLM in the final regulations, 32 species in the “study area” are “listed or candidates for listing by USFWS under the [ESA].”<sup>26</sup> These species “have the potential to occur in all oil shale basins.”<sup>27</sup> In addition, the FEIS and ROD concerning the RMP amendments described the numerous threatened and endangered species that exist in the areas being opened to commercial oil shale development.<sup>28</sup> These species include, but are not limited to, the razorback sucker, Colorado pikeminnow, Mexican spotted owl, Southwestern willow flycatcher, and Canada lynx.<sup>29</sup> Some species, including but not limited to the Clay-reed mustard, Dudley-bluffs bladderpod, Dudley Bluff twinpod and shrubby-reed mustard, are found on shale derived soils and, as a result, are “more likely to occur in potential development areas.”<sup>30</sup> Additionally, species listed as sensitive by the BLM, such as the greater sage grouse, will also be especially adversely impacted by oil shale leasing, exploration and development, as the required infrastructure for the industry will cause fragmented habitation and affect migration and brooding habits of the greater sage grouse and other similarly-situated sensitive species.<sup>31</sup> Despite the BLM’s recognition that these and other threatened and endangered species

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<sup>23</sup> 73 Fed. Reg. 51838 (September 5, 2008); 73 Fed. Reg. 72519 (November 28, 2008).

<sup>24</sup> 73 Fed. Reg. 69414 (Nov. 18, 2008).

<sup>25</sup> Additionally, the BLM did not conference with the FWS regarding the effects on the whooping crane and the black-footed ferret. Although these species are actually listed species under the ESA, because they are “experimental, non-essential” populations, they may be treated as “proposed” for purposes of consultation. See <http://ecos.fws.gov/speciesProfile/SpeciesReport.do?scode=B003> and <http://ecos.fws.gov/speciesProfile/SpeciesReport.do?scode=A004>.

<sup>26</sup> 73 Fed. Reg. 69450.

<sup>27</sup> *Id.*

<sup>28</sup> See ROD at 51; FEIS at 4-110 – 4-111. Petitioners rely largely on the FEIS and ROD in this letter as the Environmental Assessment released by the BLM regarding the impacts of the commercial oil shale regulations incorporated by reference significant portions of the FEIS.

<sup>29</sup> FEIS at 4-111.

<sup>30</sup> FEIS at 4-111.

<sup>31</sup> See FEIS at 4-78 – 4-80.

exist in the areas governed by the regulations governing commercial oil shale development and that such development on these lands may affect these species and their habitats, it failed to do the required section 7 consultation with the FWS.<sup>32</sup>

It is clear from the FEIS that commercial development of the nation's oil shale resources will directly, indirectly and cumulatively impact threatened and endangered species. Oil shale and tar sands development rely on significant amounts of water, a scarce resource in the drought-ridden Rocky Mountain West. In the FEIS, the BLM determined that one to three barrels of water "could be required for each barrel [of oil] produced for in situ projects."<sup>33</sup> This amount is even greater for surface and underground mining with surface retorts.<sup>34</sup> In addition, water will be required for "power plants that may be constructed to meet the energy demands of oil shale facilities."<sup>35</sup> This will directly and indirectly affect aquatic threatened and endangered species. Moreover, the production of fuel from oil shale and tar sands in the U.S. would require large amounts of water at a time when available water resources in the West are diminishing rapidly due to global warming. The BLM must consult with the FWS to evaluate how commercial oil shale development under these regulations will affect threatened and endangered species dependant on clean, abundant water for survival. In addition, the BLM must consult on all other direct impacts associated with oil shale, including impacts from strip mining and the building of roads and transmission lines, among others.

BLM also must consult on the impacts of the greenhouse gas emissions resulting from the project. Producing oil shale and tar sands resources requires substantial amounts of energy, as acknowledged by the BLM in its FEIS. For example, the BLM assumed that "future in situ projects would require 2,400 MW of additional electricity generation capacity" once commercial production levels are reached.<sup>36</sup> BLM appears to have obtained this figure from a study released by the RAND Corporation in 2005. The RAND study concludes that production of fuel from oil shale will require "significant energy inputs," that this energy will be supplied by fossil fuels, and, as a result, "the production of petroleum products derived from oil shale will entail significantly higher emissions of carbon dioxide, compared with conventional crude oil production and refining."<sup>37</sup> BLM, in an effort not to "underestimate[] the impacts of this development" assumed that the energy needed would come from coal-fired power plants.<sup>38</sup> This will result in huge amounts of greenhouse gas emissions. The Environmental Protection Agency ("EPA") raised this concern in its comment letter on the draft PEIS. In its letter the EPA estimated that "annual emissions from the required coal-fired generation capacity would be 7.08 million tons of carbon dioxide, which is equivalent to 1,390,000 passenger cars driven for one year."<sup>39</sup> Not only will oil shale leasing and development

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<sup>32</sup> See, e.g., FEIS at 4-91 – 4-132.

<sup>33</sup> FEIS at 4-33.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 4.34.

<sup>36</sup> FEIS at 4-14.

<sup>37</sup> Bartis, et al., *Oil Shale Development in the United States Prospects and Policy Issues* at 40 (2005).

<sup>38</sup> FEIS at 4-14.

<sup>39</sup> EPA, Letter to Sherri Thompson, Project Manager, BLM at 8, April 17, 2008 (Comment ID: OSTSD52964)

contribute significantly and directly to an increase in greenhouse gas emissions, so too, will the burning of the fuel produced from these resources result in an unacceptable increase in greenhouse gas emissions.

These greenhouse gas emissions are likely to harm endangered, threatened, and candidate species within and beyond the project area. Despite the BLM's misleading characterization of the science surrounding global warming, it is unequivocal that the planet is warming as a result of anthropogenic increases in greenhouse gas pollutants, such as carbon dioxide, methane and black carbon (soot).<sup>40</sup> Species across the globe are already suffering from this warming and will continue to suffer as increased levels of atmospheric carbon dioxide concentrations bring major changes in ecosystem structure and function, species' ecological interactions, and species' geographical ranges.<sup>41</sup> Thus, commercial oil shale development's certain contribution to significant increases in carbon dioxide from exploration, production, and eventual combustion of fuels will adversely affect listed species that are threatened by climate change, such as the polar bear, ocean corals, Clay-reed mustard, Dudley-bluffs bladderpod, Dudley Bluff twinpod and shrubby-reed mustard. The BLM must consult with the FWS concerning how the development of oil shale under these final regulations will advance global warming and, as a result, imperil locally, regionally and nationally threatened and endangered species already suffering from climate change.

The agency argues that the promulgation of these final regulations does not trigger the ESA's procedural requirements, because the regulations will not necessarily result in the issuance of any leases for commercial oil shale development.<sup>42</sup> ESA procedures, the BLM goes on to explain, will take place "before leasing occurs or project activities begin."<sup>43</sup> This explanation does not suffice. Even if ESA procedures are followed later in time, the BLM is not excused from engaging in section 7 consultation at this stage of the administrative process. Waiting until site-specific plans are submitted for the BLM's consideration subverts the intent of section 7 consultation, which is to insure that all federal agencies "review [their] actions at the earliest time possible to determine whether" they "may affect" a listed species or its critical habitat.<sup>44</sup>

Promulgation of final regulations is the first step toward exploiting potential oil shale resources on almost 2 million acres of public lands in the Rocky Mountain West. As described by the BLM, these regulations "provide[] a vehicle for the leasing and development of Federal oil shale resources."<sup>45</sup> This is the precise stage where section 7

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<sup>40</sup> Alley, et al. Summary for Policymakers in *Climate Change 2007: The Physical Science Basis Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007), available at <http://www.ipcc.ch/>.

<sup>41</sup> Bernstein, et al. Synthesis Report in *Climate Change 2007: A Report of the Intergovernmental Panel on Climate Change* (2007), available at <http://www.ipcc.ch/>.

<sup>42</sup> 73 Fed. Reg. 69450.

<sup>43</sup> *Id.*

<sup>44</sup> 50 C.F.R. § 402.14.

<sup>45</sup> 73 Fed. Reg. 69448. Further, BLM's regulations adopt a low initial royalty rate on oil shale leases precisely because such a rate "would be beneficial in *spurring investment in developing the resource*, consistent with the EP Act's direction." 73 Fed. Reg. 69428 (emphasis added).

consultation should occur, as these regulations lay out the framework governing how the BLM will award leases, as well as the stipulations and requirements applicants will have to meet in exploring and developing the oil shale resources. Without consultation, the BLM and the FWS cannot know whether these regulations establishing the commercial oil shale leasing program's requirements will jeopardize listed species and, if so, what alternatives, mitigation measures or modifications to the leasing program should be implemented now and included in the final regulations so as to avoid jeopardizing endangered and threatened species and their habitats. Considering the impacts to land, water and sensitive species commercial oil shale development will have, as explained by the BLM in its FEIS on the RMP amendments, it is likely that protections should be included in these final regulations *before* the leasing and permitting stages.<sup>46</sup>

## **Conclusion**

The BLM's promulgation of final regulations governing a commercial oil shale leasing program that could cover almost two million acres of land throughout three states is an agency action that may affect – indeed, is likely to adversely affect – threatened and endangered species and their critical habitats. The BLM's refusal to consult with the FWS constitutes an ongoing violation of section 7 of the ESA. If the BLM does not act within 60 days to correct the violations described in this letter, our organizations will pursue litigation against you and your agencies and officials in federal court. We will seek injunctive and declaratory relief, as well as legal fees and costs regarding these violations. To prevent litigation, the BLM must initiate consultation under section 7 of the ESA regarding the effects these regulations governing commercial development of oil shale resources will have on listed species.

We would be happy to discuss this matter with you if that will assist the BLM in complying with its duties under the ESA. Our contact information is below.

Sincerely,

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<sup>46</sup> See, e.g., FEIS at 4-91 – 4-132.

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Cc: Governor Bill Ritter  
Governor David Freudenthal  
Governor Jon Huntsman  
Senator Ken Salazar  
Senator-elect Mark Udall