



April 15, 2009

VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Steven Chu, Secretary
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

Ken Salazar, Secretary
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

David Geiser, Acting Director
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1000 Independence Ave., SW
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Mike Pool, Acting Director
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1849 C Street NW, Rm. 5665
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Steve Shiesswohl
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Department of Energy
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Bureau of Land Management
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Lakewood, CO 80215-7093

Re: **Notice of Intent to Sue for Violations of the Endangered Species Act in Connection with the Department of Energy, Office of Legacy Management Uranium Leasing Program**

Dear Secretary Chu, Secretary Salazar, Acting Director Geiser, Acting Director Pool, Mr. Shiesswohl, and State Director Wisely:

On behalf of the Center for Biological Diversity, Colorado Environmental Coalition, Information Network for Responsible Mining, and Center for Native Ecosystems (“groups”), I formally notify you that the groups intend to amend and commence litigation against the Department of Energy, Office of Legacy Management (“DOE/OLM”) to include violations of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA”), in connection with the DOE’s Uranium Leasing Program (“ULP”). 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.¹

¹ See 16 U.S.C. § 1540(g).

I. Groups

A. The Center for Biological Diversity

The Center for Biological Diversity (the “Center”) is a non-profit 501(c)(3) corporation with offices in Arizona, New Mexico, California, Nevada, Oregon, 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 over 180,000 members and online activists throughout the United States and the world. The Center is actively involved in species and habitat protection issues worldwide, including throughout the western United States. The Center, its employees, and its members use the public lands subject to the ULP 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 helping to ensure their continued use and enjoyment of these lands.

B. Colorado Environmental Coalition

The Colorado Environmental Coalition (“CEC”) is a Colorado-based environmental advocacy organization with three field offices in western Colorado and a main office in Denver. CEC has approximately 3,500 individual members and over 90 affiliated organizations. CEC campaigns engage citizens in the protection of Colorado’s wild places, open spaces, wildlife and quality of life. CEC is a known and active participant in public land management in Colorado, with a demonstrated interest in energy development on Colorado’s BLM lands and the lands managed by the BLM/DOE as part of the ULP. CEC members are concerned with protecting wildlife, scenery, water quality, quality of life, and other values. CEC members live in the Dolores River Watershed and use and enjoy the public lands which contain the lease tracts, the lease tracts themselves, and the rivers and streams which characterize this dry region. CEC, its staff and members have an interest in preserving these values and public lands in the future.

C. Information Network for Responsible Mining

The Information Network for Responsible Mining (“INFORM”) is a nonprofit organization with the mission of educating the public about the dangers that exist when unsafe and irresponsible mining practices are permitted. INFORM is Colorado’s only statewide nonprofit citizens group participating in local, state and federal permitting and regulating of hard-rock mining. INFORM’s goal is to ensure social, economic and environmental justice for all inhabitants of Colorado. Pursuing this goal requires INFORM to educate the public about the dangers that exist when unsafe and irresponsible mining practices are permitted. INFORM does this through the dissemination of information and through education; moreover, INFORM helps organize local people whose water, quality of life and economy are most threatened by irresponsible mining. INFORM members use and enjoy the public lands which contain the lease tracts, the lease tracts themselves, and the rivers and streams which characterize this dry region. INFORM, its staff and members have an interest in preserving these values and public lands in the future.

D. Center for Native Ecosystems

The Center for Native Ecosystems (“CNE”) is a nonprofit advocacy organization dedicated to conserving and recovering naturally functioning ecosystems in the greater southern Rocky Mountains. CNE maintains an office in Denver, Colorado. CNE has approximately 300 members in Colorado and other states. CNE and its members and staff value the ways that humans benefit from protecting native biological diversity, including protecting clean water and fresh air, healthy human communities, sources of medicines and foods, and recreational opportunities. CNE and its members and staff believe that all species and their natural communities have the right to exist and thrive. CNE uses the best available science to forward its mission through participation in policy formation, administrative processes, legal action, public outreach and education. CNE is specifically interested in conserving rare and imperiled species and ecosystems in the Dolores Watershed. CNE is working to protect the integrity of ecosystems in the Dolores River Basin, and particularly to ensure the persistence of the many rare and imperiled species and unique natural communities that inhabit the Basin. CNE has nominated Areas of Critical Environmental Concern to protect rare and imperiled species and unique natural communities in the Dolores River Watershed, worked to ensure that energy development is done in a manner that results in minimal impacts to rare and imperiled species, and commented on project proposals and Resource Management Plans for BLM-managed lands in the Dolores River Watershed. CNE’s members and staff regularly use lands throughout the Dolores Watershed for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. CNE’s members and staff derive scientific, recreational, conservation, and aesthetic benefits from the existence of rare and imperiled native species in the Dolores Basin. For CNE’s members and staff, the presence of these species and the health of their habitat are key components of their visits to these places. The ULP will lead to the decline of a number of species, and will adversely affect the interests of CNE and its members.

II. 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”² 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.”³ 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.⁴

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 (“NMFS”) and the U.S. Fish and Wildlife Service (“FWS”), respectively.⁵

² 16 U.S.C. § 1531(b).

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

⁴ *Id.* at 185.

⁵ 50 C.F.R. §402.01(b).

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.”⁶ 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.”⁷ 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.”⁸

To ensure federal agencies fulfill the substantive purposes of the ESA, the statute requires that 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 endangered species or threatened species or result in the adverse modification of habitat of such species ... determined ... to be critical”⁹ 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.”¹⁰

Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.”¹¹ 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 ... (d) actions directly or indirectly causing modifications to the land, water, or air.”¹² 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 either a Biological Assessment (“BA”), a Biological Opinion (“BiOp”), or in some cases, both.¹³ 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.¹⁴ 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.¹⁵

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

⁶ 16 U.S.C. § 1531(c)(1).

⁷ 16 U.S.C. § 1532(3).

⁸ 16 U.S.C. § 1536(a)(1).

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

¹⁰ 50 C.F.R. § 402.10(a).

¹¹ 50 C.F.R. § 402.14.

¹² 50 C.F.R. § 402.02.

¹³ 50 C.F.R. § 402.14.

¹⁴ 16 U.S.C. § 1536(b).

¹⁵ 50 C.F.R. § 402.13.

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 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.¹⁶

In addition, courts have also determined that the “act of approving, amending, or revising a land and resource management plan constitutes ‘action’ under § 7(a)(2) of the ESA.”¹⁷

III. Procedural Background

On July 6, 2007, DOE/OLM finalized the Uranium Leasing Program Programmatic Environmental Assessment (“Programmatic EA”) and issued a Finding of No Significant Impact (“FONSI”) for the preferred alternative, which continued and greatly expanded the active uranium leasing program by immediately extending 13 previously-leased claims and setting the stage to lease up to 25 additional leases on over 25,000 acres of public land that form the eastern edge of the Colorado Plateau. The Programmatic EA purported to analyze the environmental consequences of continuing and expanding the ULP pursuant to the National Environmental Policy Act.¹⁸ The Programmatic EA, along with the associated site-specific actions made in reliance on it, is the subject of federal litigation that is pending in the U.S. District Court for the Court of Colorado.¹⁹

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

¹⁷ *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1154 (10th Cir. 2007).

¹⁸ National Environmental Policy Act, 42 U.S.C. § 4321 (“NEPA”); 40 C.F.R. Part 1500 (implementing regulations). DOE/OLM issued the Uranium Leasing Program Final Programmatic Environmental Assessment (“Programmatic EA”) and the Finding of No Significant Impact in July 2007.

¹⁹ See *Colorado Envtl. Coal., et al. v. Office of Legacy Management, et al.*, 08-cv-01624WYD-MJW (D. Colo.).

In October 2007, DOE took the following actions in reliance on the Programmatic EA and FONSI:

- Redefined the lease tract boundaries to incorporate prior existing unpatented mining claims that were located within the withdrawal boundaries and subsequently became invalid and reverted back to the withdrawal.
- Reconfigured the number of inactive lease tracts from 25 to 19 by combining some of the less-favorable lease tracts with other nearby lease tracts to make them more attractive to potential bidders.
- Revised the standard lease agreement to incorporate lease language required by DOE, new royalty calculation methodology, and environmental stipulations from the final Programmatic EA.
- Developed a Web-based inactive lease tract bid-solicitation process, populated it with current and historical information retained by DOE for each of the 19 inactive lease tracts, and initiated the Web-based solicitation process that gave over 100 potential bidders access to all of the compiled lease tract data.
- Prepared separate and distinct lease agreements for the 13 active lease tracts and the 19 inactive lease tracts.
- Evaluated all bids received during the solicitation process, including supplemental information submitted by the apparent high bidders, and determined the successful bidder for each inactive lease tract.

This process culminated in the execution of 31 new 10-year lease agreements. Thirteen lease agreements with existing leaseholders of active lease tracts were made effective April 30, 2008, resulting in authorization of mining and reclamation operations pursuant to active mine plans on these pre-existing leases. DOE also executed 18 new 10-year lease agreements for inactive lease tracts, effective June 27, 2008. One lease tract received no interest during the bid-solicitation process and will remain in inactive status indefinitely. *See* Attachment A (list of lease ULP tracts).

These actions have helped to trigger renewed interest in uranium mining and milling in the Uravan Mineral Belt and throughout the Colorado Plateau, with approximately 10,000 new mining claims staked out on nearby lands since July 2007 and a new uranium mill proposed nearby.

The public lands directly affected by the ULP – all of which remain under BLM ownership – are world-renown for their unique and impressive mesas, canyons, arches, and wild sections of river that draw recreationists from around the world. The unique ecosystems support crytobiotic soils, vegetation, fish and wildlife, and the Dolores River watershed, which flows into the Colorado River System on which millions of people and four critically endangered fish species depend.

Uranium development causes numerous environmental consequences to imperiled species and their habitats. As DOE/OLM recognized in the Programmatic EA, uranium mining can cause vegetation to be removed, foraging opportunities for large birds of prey to be reduced, and wildlife to be killed and displaced by noise, light, traffic, and other activities. The heavy metals released by mining activities can also contaminate waterways and bioaccumulate in fish.

IV. Violations of the Endangered Species Act

DOE/OLM and BLM have violated the ESA by failing to consult with FWS, under section 7, 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 400, to consider the effects of continuing, expanding, and implementing the ULP to listed species and/or their critical habitat. Additionally, the agencies refused to confer with the FWS regarding the effects of the ULP on species that are proposed for listing under the ESA.

It is clear that the uranium leasing can affect plants and wildlife species, as recognized by DOE/OLM in the Programmatic EA. There are threatened and endangered species that are known to, or may, occur on lease tracts, and whose survival and long-term recovery may be impacted by mining activities.

All four of the endangered Colorado River fish species may be present in the Colorado River just downstream from the confluence with the Dolores. Colorado pikeminnow occurred historically in the Dolores River and still persist in the Colorado River downstream from the confluence with the Dolores River.²⁰ The razorback sucker may occur in the Colorado River downstream from the confluence with the Dolores River and is stocked in the Colorado River upstream of the confluence with the Dolores River.²¹ There are relatively large and healthy populations of humpback chub in the Colorado River near the confluence with the Dolores River.²² One of the very few remaining wild populations of bonytail occurs in the Colorado River upstream from the confluence with the Dolores River, and since 1996 bonytail have been stocked in the Colorado River in Utah near the confluence with the Dolores River.²³ In addition, critical habitat for all four of the endangered Colorado River fish has been designated in portions of the Colorado River downstream from the confluence of the Dolores River.

ULP activities may affect these fish species in two primary ways. First, mining operations on the lease tracts will result in consumptive use of a minimum of 140 acre feet of water per year from the Dolores and Colorado River Basins, while past, present and reasonably foreseeable other actions on DOE lease tracts and BLM lands in the region have depleted water from the Dolores and Colorado Rivers. The direct, indirect, and cumulative effect of these depletions to the fish must be considered.

In addition, uranium mining and milling operations pursuant to the ULP may result in discharges of pollutants that may be toxic to the fish, including uranium, selenium, ammonia, arsenic,

²⁰ U.S. Fish and Wildlife Service. 2007. Recovery implementation program recovery action plan: recovery implementation program for endangered fish species in the upper Colorado River Basin in Region 6, ed: Denver, CO. *See also* Valdez RA, Masslich WJ, Wasowicz A. 1992. Dolores River native fish habitat suitability study in Utah Division of Wildlife Resources, ed: Salt Lake City, UT.

²¹ U.S. Fish and Wildlife Service. 2008. Programmatic biological opinion for water depletions associated with Bureau of Land Management's fluid mineral program within the Upper Colorado River Basin in Colorado in Ecological Services Office, ed: Grand Junction, CO.

²² U.S. Fish and Wildlife Service (2008), *supra* note 21.

²³ U.S. Fish and Wildlife Service (2007), *supra* note 20.

molybdenum, aluminum, barium, copper, iron, lead, manganese, vanadium and zinc. Selenium is an element of particular concern, as elevated selenium can be taken up directly from water by aquatic organisms, resulting in acute toxicity at relatively high concentrations, and accumulate in the aquatic food chain.²⁴ This can result in myriad adverse effects on fish and waterfowl populations, including impaired reproduction, deformities, reduced survival and other problems.²⁵ Selenium contamination in the Colorado River basin has been implicated in the decline of the four endangered Colorado River fish species, and may be impeding their recovery.²⁶ There is evidence that high selenium levels may adversely affect reproduction and recruitment in these fishes.²⁷

It is therefore imperative that the agencies consider the effects of degraded water quality that will result or is already resulting from ULP activities – particularly when the effects of other past, present, and reasonably foreseeable water degrading activities are considered as well. Past uranium mining and processing on ULP lease tracts and in the surrounding region, oil and gas development, and irrigation in areas with soils high in selenium have already caused water quality problems in the Dolores and Colorado Rivers. For example, uranium mill tailings on DOE lease tracts near the Dolores River have contaminated the alluvial aquifer with uranium, selenium, manganese, molybdenum, nitrate, radium 226, radium 228, benzene, and toluene during the last uranium boom in the Dolores River watershed.²⁸ According to FWS, “[u]ranium processing facilities operated during the late 1940s through the 1960s severely impacted the river and may have contributed to the decline of Colorado pikeminnow in the Dolores River drainage.”²⁹ Another study found that “[n]ative fish composition and abundance were found to

²⁴ Hamilton, SJ. 2004. Review of selenium toxicity in the aquatic food chain. *Science of the Total Environment* 326: 1-31. *See also* Lemly AD. 1999. Selenium impacts on fish: an insidious time bomb. *Human and Ecological Risk Assessment* 5: 1139-1151.

²⁵ *Id.*

²⁶ Hamilton SJ. 1999. Hypothesis of historical effects from selenium on endangered fish in the Colorado River Basin. *Human and Ecological Risk Assessment* 5: 1153-1180.

²⁷ Such effects may not be limited to the four endangered Colorado River fish species. Runoff or discharge of water with very low concentrations of selenium can result in adverse impacts on many species of fish and fish-eating waterfowl and mammals. One study in waters downstream from uranium mining and milling operations in Canada found that in areas where water concentrations of selenium are very low, selenium has been incorporated into the food chain via primary producers, gradually built up in sediments and benthic biota, and reached levels that have the potential to cause reproductive impairment in fish. In addition, a short pulse event can quickly load an aquatic environment with selenium, and that selenium could then be conserved in the ecosystem for long periods of time. Muscatello JR, Belknap AM, Janz DM. 2008. Accumulation of selenium in aquatic systems downstream of a uranium mining operation in northern Saskatchewan, Canada. *Environmental Pollution* xx: 1-7.

²⁸ Department of Energy. 1995. Finding of no significant impact proposed remedial action at two uranium processing sites near Slick Rock, CO in Uranium Mill Tailings Remedial Action Project Office, ed: Albuquerque, NM. *See also* Department of Energy. 2007. Uranium leasing program final programmatic environmental assessment in Office of Legacy Management, ed: Grand Junction, CO.

²⁹ U.S. Fish and Wildlife Service (2007), *supra* note 20.

be poor downstream of the San Miguel confluence, a river reach heavily impacted by poor water quality due to uranium tailings.”³⁰ Proposed uranium mines and mills in the area (including the Whirlwind mine and the Paradox uranium mill) may also result in runoff and discharge of contaminants into the Dolores River Basin.³¹ As FWS recently reiterated in a biological opinion for oil and gas development on BLM lands:

An increase in contaminant concentrations in the river would likely result in an increase in the bioaccumulation of these contaminants in the food chain, which could adversely affect the endangered fishes, particularly the predatory Colorado pikeminnow. Selenium may be of particular concern due to its effects on fish reproduction and its tendency to concentrate in low velocity areas that are important habitats for the Colorado pikeminnow and razorback suckers.³²

Despite the susceptibility of the four endangered Colorado River fish species to the effects of water depletions and water degradation, as well as the presence in the “action area” of many other listed species, DOE/OLM did not conduct consultation with FWS pursuant to section 7 of the ESA and its implementing regulations to consider the effects to *all* endangered and threatened species that may result from continued and expanded uranium development in the Uravan Mineral Belt, even despite being warned by BLM, *e.g.*, that “water depletion and/or toxic discharges [resulting from uranium mining] may affect 4 species of Colorado River fish downstream” *See* Attachment B (Meeting/Telephone Conference Record (Sep. 6, 2005)).

DOE/OLM has suggested that it will consider these effects before “site disturbance activities” are allowed. *See* Programmatic EA at D-4. However, this position cannot be squared with section 7’s implementing regulations, which make clear that federal agencies must “review [their] actions at the *earliest time possible* to determine whether” their actions “may affect” a listed species or its critical habitat.³³ Doing so can better insure that to the extent necessary, conservation and mitigation measures can be implemented to extinguish or quell adverse impacts to threatened and endangered species and their habitats. This is especially important at the programmatic level. Waiting until site disturbance activities are imminent does not further the purpose of the ESA even if section 7 consultation occurs at that stage; for example, consultation at the programmatic level might have resulted in the DOE/OLM limiting the number of acres leased or excluding areas altogether due to their special environmental sensitivity. DOE’s suggestion that it forestall review until “site disturbance activities” also fails to account for the fact that some of the lease tracts that DOE has issued lease extensions pursuant to the PEA have previously authorized mining plans, and it appears that mining activities could proceed at any time. Under the ESA’s implementing regulations, section 7 consultation at the programmatic

³⁰ Valdez et al. (1992), *supra* note 20.

³¹ In fact, discharge of treated water from dewatering activities at the Whirlwind Mine has exceeded state water quality standards for uranium and selenium on several occasions.

³² U.S. Fish and Wildlife Service. 2008. Programmatic Biological Opinion for Water Depletions Associated With Bureau of Land Management’s Fluid Mineral Program within the Upper Colorado River Basin in Colorado.

³³ 50 C.F.R. § 402.14 (emphasis added).

level and site specific level is still necessary in order to direct the agency in establishing a course of action at the outset that does not jeopardize threatened or endangered species.³⁴

Finally, while the ULP is managed by DOE/OLM on certain public lands that have been withdrawn from all forms of appropriation under the public-land laws, BLM retains ownership of all of the affected lands as well as continuing management authority over non-mined surfaces of ULP lease tracts and haul roads. Accordingly, BLM actions in connection with the agencies' implementation of the ULP may affect threatened and endangered species, and, thus, trigger BLM's ESA section 7 consultation duties as well.


V. Conclusion

Continuation and expansion of the ULP, including issuance of any leases and/or extension of leases with existing mining plans, which affects over 25,000 acres of land in western Colorado and may affect water quantity and quality downstream, are agency actions that may adversely affect threatened and endangered species and their critical habitats. DOE/OLM's and BLM's refusal to consult with the FWS constitutes an ongoing violation of section 7 of the ESA. If DOE/OLM and BLM do not act within 60 days to correct the violations described in this letter, the groups will add claims to pending litigation against these agencies in federal court, and will seek injunctive and declaratory relief as well as legal fees and costs regarding these violations. To prevent litigation, DOE/OLM and BLM must initiate consultation under section 7 of the ESA and consider the effects to listed species that will result from making these lands available for continued and expanded uranium leasing.

If you have any questions or wish to discuss this matter, please do not hesitate to contact me. Thank you.

³⁴ To the extent that DOE or BLM have conducted any section 7 consultation activities at all in connection with the Programmatic EA, they seem to have limited themselves to a very cursory analysis that considered only those species that might be located within the direct footprint of the lease areas. Thus, the agencies did not identify any listed species that are located outside of lease tracts but still occur within the "action area" of the ULP, and certainly did not consider the effects of ULP activities to such species. *See, e.g.*, Attachment C (Meeting/Telephone Conference Record (Sep. 20, 2005) (indicating that BLM requested information from FWS about listed species in the immediate "area" of the lease "tracts" themselves, and did not consider the presence of any listed species, *e.g.*, located downstream of the affected lands); *see also* 50 C.F.R. § 402.02 ("action area" means "all areas to be affected directly or indirectly by the Federal action and *not merely the immediate area involved in the action*") (emphasis added). Indeed, no official memoranda or correspondence appear to have been generated as a result of this very truncated "consultation." The agencies failure to properly comply with ESA section 7(a)(2) and its implementing regulations at the programmatic level, moreover, appears to have undermined their ability to carry out adequate consultation at the site-specific level, since such consultations would essentially tier to the "consultation" for the Programmatic EA and consider, if at all, only those effects of ULP activities that affect listed species or critical habitat that are located in the direct footprint of lease tracts. This is woefully inadequate under the ESA, its implementing regulations, and case law.

Sincerely,



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DOE Uranium Leasing Program -- Lease Tract Metrics

Lease Tract	Lessee	Lease Date	Bid (%)	Reclamation Bond ^a	Total Acres	Acres Excluded ^b	Comment
C-JD-5	Gold Eagle Mining, Inc.	04/30/08	12.00	37,000	150.71		
C-JD-5A	Golden Eagle Uranium, LLC	06/27/08	20.10	5,000	24.54		
C-JD-6	Cotter Corporation	04/30/08	14.20	19,000	530.08		
C-JD-7	Cotter Corporation	04/30/08	27.30	1,206,000	327.64		
C-JD-7A	Cotter Corporation	04/30/08	31.30	*** ^c ***	165.37		
C-JD-8	Cotter Corporation	04/30/08	36.20	4,000	954.62		
C-JD-8A	No bids received - remains inactive	N/A	N/A	N/A	77.91		
C-JD-9	Cotter Corporation	04/30/08	24.30	72,000	1,036.50		
C-SR-10	Golden Eagle Uranium, LLC	06/27/08	13.10	5,000	618.16	19.48	Blackjack Mining Claim
C-SR-11	Cotter Corporation	04/30/08	11.67	43,000	1,303.22	200.25	Summit Canyon
C-SR-11A	Golden Eagle Uranium, LLC	06/27/08	14.30	5,000	1,296.81		
C-SR-12	U.S. Uranium Corporation	06/27/08	17.57	5,000	641.31		
C-SR-13	Gold Eagle Mining, Inc.	04/30/08	20.60	39,000	1,077.33		
C-SR-13A	Cotter Corporation	04/30/08	36.20	6,000	419.72	98.07	Dolores River Floodplain
C-SR-14	Zenith Minerals, LLC	06/27/08	9.17	5,000	971.33		
C-SR-15	Gold Eagle Mining, Inc.	04/30/08	18.60	4,000	349.81		
C-SR-15A	Golden Eagle Uranium, LLC	06/27/08	15.05	5,000	172.29		
C-SR-16	Golden Eagle Uranium, LLC	06/27/08	15.10	5,000	1,790.26	167.74	Summit Canyon
C-SR-16A	Energy Fuels Resources	06/27/08	7.67	5,000	585.44		
C-WM-17	Golden Eagle Uranium, LLC	06/27/08	15.20	5,000	474.98		
C-SM-18	Cotter Corporation	04/30/08	15.60	37,000	1,180.89		
C-AM-19	Zenith Minerals, LLC	06/27/08	8.65	5,000	671.35		
C-AM-19A	U.S. Uranium Corporation	06/27/08	28.61	5,000	1,204.00		
C-AM-20	U.S. Uranium Corporation	06/27/08	27.11	5,000	627.48		
C-LP-21	Cotter Corporation	04/30/08	18.40	48,000	652.07		
C-LP-22	Golden Eagle Uranium, LLC	06/27/08	15.10	5,000	224.25		
C-LP22A	Golden Eagle Uranium, LLC	06/27/08	12.10	5,000	409.17		
C-LP-23	U.S. Uranium Corporation	06/27/08	17.79	5,000	596.00		
C-CM-24	Energy Fuels Resources	06/27/08	8.60	5,000	200.94		
C-CM-25	Cotter Corporation	04/30/08	25.10	4,000	639.23		
C-G-26	Energy Fuels Resources	06/27/08	18.77	5,000	3,988.61	37.89	Calamity Camp Historic Site
C-G-27	Energy Fuels Resources	06/27/08	16.61	5,000	1,766.40		
Total Acreage					25,128.42	523.43	

^a The reclamation performance bond for the 18 lease tracts awarded on June 27, 2008, was initially set at a minimum \$5,000; they will be re-assessed when the lessee proposes some activity.

^b These acres are either a privately held claim within the boundary of the lease tract or areas withheld from lease activities for environmental reasons (as noted in the "Comment" field to the right).

^c The reclamation performance bond for C-JD-7A has been incorporated into the reclamation performance bond required for C-JD-7.

U.S. Department of Energy at Grand Junction

2597 B ¼ Road, Grand Junction, CO 81503 • (970) 248-6000

Follow-Up Action Required:

Include comments and concerns in EA

File:

cc: _____

Meeting/Telephone Conference Record

Date 9/20/05

Time 1:15 / 1:35 pm

DOE ID Number _____

Location Address _____

Between Barb Osmundsen

of U. S. Fish and Wildlife

Phone 970-243-2778

of _____

Phone _____

of _____

Phone _____

and Linda Sheader

of Battelle/Stoller

Phone 6711

Subject:

T&E issues on ULP lease tracts in Mesa, Montrose and San Miguel Counties

Summary:

The major overlap for T&E species is for Gunnison sage grouse. Their occupied habitat overlaps with the western portion of Tract 9 at the Monogram Mesa site in Montrose County. Barb indicated that she consulted with their staff botanist, and there is no real range overlap for any species of T&E plants. She mentioned that there may be some non-critical bald eagle habitat in the area of some of the tracts. No known overlap for mammalian or other species. Barb asked to be "kept in the loop" as the EA process continues.

Follow-Up Action Required:

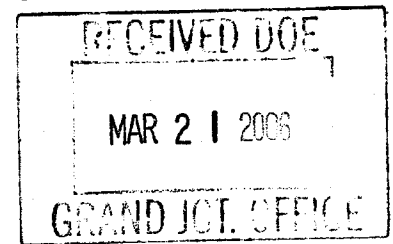
File:

cc: _____



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Ecological Services
764 Horizon Drive, Building B
Grand Junction, Colorado 81506-3946



IN REPLY REFER TO:
ES/CO:DOE
MS 65412 GJ

March 20, 2006

Ms. Tracy B. Plessinger, Project Manager
Department of Energy - Office of Legacy Management
2597 B ¼ Road
Grand Junction, Colorado 81503

Dear Ms. Plessinger:

Thank you for providing the U.S. Fish and Wildlife Service (Service) the opportunity to review and comment on your draft environmental assessment (EA) for the uranium leasing program. We are providing the following comments.

1) **Page 3-15.** The possibility of leaseholders constructing mine-water discharge/treatment ponds is discussed. Of potential concern are any hazardous materials occurring within these ponds, which affect water quality and impact migratory birds. All migratory birds killed by coming in contact with hazardous materials will be considered as birds taken in violation of the Migratory Bird Treaty Act (MBTA). The MBTA, 16 United States Code Sections 703-707, prohibits any "take" of migratory birds. The definition of take includes killing, possessing, or collecting of migratory birds. Most birds found in Colorado are listed as migratory birds with the exception of English sparrows, European starlings, rock doves (common pigeons), and birds commonly referred to as upland game birds such as pheasants, chukkers, and grouse. Upland game birds are managed by the Colorado Division of Wildlife. To prevent violations of the MBTA, companies should take actions to insure that migratory birds do not come in contact with oil, hypersaline water, or hazardous materials. This can be done by use of physical barriers such as netting, coupled with fencing. Flagging is **not** an effective deterrent. Please visit our web site at <http://www.r6.fws.gov/contaminants/oilpits.htm>.

2) **Page 4-21.** Why aren't the listed and sensitive plant species mentioned on page 4-20 included in Table 4-5?

3) **Page 4-20, 4th paragraph.** Because no plants occur on State lists of endangered, threatened, or species of special concern, they are probably not protected by State statutes.

4) **Page 4-20, 3rd paragraph.** On Bureau of Land Management (BLM) and Forest Service lands, sensitive species habitat should be identified, surveyed (during blooming season), and impacts should be avoided or minimized per conditions specified during on-site inspections. In habitat where Uinta Basin hookless cactus could occur, surveys need to be conducted, and if this cactus is found, Endangered Species Act section 7 consultation should be initiated.

5) Page 5-18, 2nd paragraph. Because of desirable sagebrush habitat for the Gunnison sage-grouse which exists on top of Monogram Mesa, there is potential for future habitat expansion into this area to connect occupied habitat in Dry Creek Basin with potential habitat in the Paradox Valley. Therefore, we recommend that access roads or mine portals that may be constructed in this area avoid sagebrush habitat. If possible, avoid operational activities, including new access roads, within 100 feet of cottonwood galleries to avoid disturbance to migratory birds in riparian habitat, including the yellow-billed cuckoo.

If the Service can be of further assistance, please contact Barb Osmundson at the letterhead address or (970) 243-2778, extension 21.

Sincerely,



Allan R. Pfister
Western Colorado Supervisor

BOSmundson:DOEDraftUraniumLeasingProgramEACCommentLetter.doc:032006