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Western Environmental Law Center

Defending the West Wildlands, Water, and Western Communities

December 20, 2007

Sent via Certified Mail, Return Receipt Requested

Secretary Samuel W. Bodman
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington D.C. 20585

Secretary Dirk Kempthorne
U.S. Department of Interior
1849 C Street, N.W.
Washington D.C. 20240

Secretary Carlos M. Gutierrez
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Re: Notice of Intent to Sue for Violations of the Endangered Species Act in Connection with the Department of Energy's Designation of the Southwest National Interest Electric Transmission Corridor (Docket No. 2007-OE-02).

Dear Secretaries Bodman, Kempthorne and Gutierrez:

I am writing on behalf of the Center for Biological Diversity ("Center") to notify the Department of Energy ("DOE"), Department of Interior ("DOI"), and Department of Commerce ("DOC") that the Center intends to file a civil action against DOE for violations of the Endangered Species Act ("ESA") as a result of DOE's failure to consult as required by the ESA for its designation of the Southwest National Interest Electric Transmission Corridor (Docket No. 2007-OE-02). ESA section 11(g)(2)(A)(i) requires

citizens to give notice to the Secretary¹ and to any alleged violator of his/her intent to file suit sixty (60) days prior to the initiation of a civil action under ESA section 11(g). 16 U.S.C. § 1540(g). This letter constitutes the required notice of the violations described below.

I. IDENTITY OF PERSONS GIVING NOTICE AND THEIR COUNSEL

The Center is a non-profit organization with offices throughout the West and, as relevant to this case, in the Southwest. The Center combines conservation biology with litigation, policy advocacy, and an innovative strategic vision, and works to secure a future for animals and plants hovering on the brink of extinction, for the wilderness they need to survive, and by extension for the spiritual welfare of generations to come. The Center may be contacted at the following address:

Amy Atwood
Center for Biological Diversity
PO Box 11374
Portland OR 97211
Phone: 503-283-5474
Fax: 503-283-5528
Email: atwood@biologicaldiversity.org

The Center has retained the Western Environmental Law Center (“WELC”) to represent it in this matter. WELC is a non-profit public interest law firm dedicated to ensuring that our nation’s environmental laws are implemented and enforced. WELC counsel can be contacted at the following addresses:

Megan Anderson
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Western Environmental Law Center
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Durango, CO 81301
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¹ Because there are species that fall under the jurisdiction of both the DOI and DOC pursuant to ESA regulations, the Center hereby notifies both the Secretary of Interior and Secretary of Commerce.

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II. BACKGROUND

The Energy Policy Act of 2005 (“EPAct”) amended the Federal Power Act (“FPA”) by, among other amendments, adding a new section 216, codified at 16 U.S.C. section 824p, which directs the Secretary of Energy to conduct a study of electric transmission congestion. “After considering alternatives and recommendations from interested parties,” the Secretary must issue a report on the study, and may, in that report, “designate any geographic area experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers as a national interest electric transmission corridor.” 16 U.S.C. § 824p(a)(2).

On October 5, 2007, DOE designated two national interest electric transmission corridors (“NIETC”), one of which was the Southwest Area NIETC (Docket No. 2007–OE–02) (“SW NIETC”). 72 Fed. Reg. 56,992 (Oct. 5, 2007). The SW NIETC includes seven counties in southern California and three counties in southwestern Arizona, an area covering almost 70,000 square miles.

ESA section 7 requires that each federal agency insure that any action authorized, funded, or carried out by that agency is not likely to jeopardize the continued existence, which includes both survival and recovery, of any endangered or threatened species or result in the destruction or adverse modification of habitat designated as critical for an endangered or threatened species. 16 U.S.C. § 1536(a)(2). In meeting this duty, an agency shall consult with the appropriate Secretary so that the Secretary can determine if the action will jeopardize the species or cause destruction or adverse modification to critical habitat, and if so, how jeopardy can be avoided. 16 U.S.C. § 1536(b)(3). An agency shall review its actions “at the earliest possible time” to determine if the action “may affect listed species or critical habitat.” 50 C.F.R. 402.14.

III. VIOLATIONS OF THE ENDANGERED SPECIES ACT

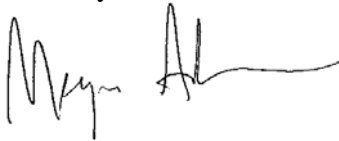
DOE violated ESA section 7 consultation requirements by failing to consult with the Secretaries of Interior and Commerce regarding the impacts of the SW NIETC on ESA listed species and critical habitat. There are numerous threatened and endangered species present within the SW NIETC as well as large tracts of designated critical habitat. Indeed, San Diego County alone, which encompasses over 4,200 square miles, has more threatened and endangered species than anywhere else in the continental United States. Las Californias, where California and Baja California meet and an area included within the SW NIETC, is at the center of an internationally-recognized biodiversity hotspot.

Some of the ESA listed species that may be affected include, but are not limited to: Arroyo Southwestern Toad, San Sebastian Leopard Frog, Desert Tortoise, Flat-tailed Horned Lizard, Desert Pupfish, California Gnatcatcher, Coastal Cactus Wren, Least Bell’s Vireo, Quino Checkerspot Butterfly, San Diego Fairy Shrimp, Peninsular Bighorn Sheep,

Stephen's Kangaroo Rat, Del Mar Manzanita, Del Mar Mesa Sand Aster, Encinitas Baccharis, Lakeside Ceanothus, Little Mousetail, San Diego Button Celery, San Diego Mesa Mint, San Diego Thorn Mint, Southern California Steelhead, Spreading Navarretia, Willowy Monardella.² Critical habitat for these species and others also may be affected. DOE should consult with U.S. Fish and Wildlife and the National Marine Fisheries Service to obtain a list of threatened and endangered species as well as critical habitat designated for those species and to determine the impact of the SW NIETC on those species and their critical habitat.

If DOE does not initiate consultation before the end of this 60-day notice period, the Center intends to file a civil action to correct this violation. Please contact us if you have any questions or wish to discuss this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Megan Anderson', with a long horizontal flourish extending to the right.

Megan Anderson
Western Environmental Law Center

cc. via electronic mail only:

Amy Atwood, Staff Attorney
Center for Biological Diversity
atwood@biologicaldiversity.org

² A more complete list of species that may be affected by the SW NIETC designation follows this letter.

ESA Listed Species That May Be Affected By The SW NIETC Designation:

1. Coachella Valley Fringe-toed Lizard
2. Kern Primrose Sphinx Moth
3. Santa Ana Sucker
4. Vail Lake Ceanothus
5. Laguna Beach Dudleya
6. Encinitis Baccharis
7. Otay Tarweed
8. San Diego Thornmint
9. Pedate Checker-mallow
10. Cushenbury Milk-vetch
11. Triple-rib Milk-vetch
12. San Clemente Island woodland star
13. Gambel's water cress
14. Marsh Sandwort
15. Orcutt's Spineflower
16. Beautiful Pawpaw
17. Wide-leaf Warea
18. Munz's Onion
19. Yaqui Chub
20. Lane Mountain Milk-vetch
21. California Jewelflower
22. San Diego Ragweed
23. Otay Mesamint
24. Desert Pupfish
25. San Diego Fairy Shrimp
26. Slender-petaled Thelypodium
27. Bluntnose Leopard Lizard
28. Woundfin
29. Yaqui Catfish
30. Bear Valley Sandwort
31. California Tiger Salamander
32. Thread-leaved Brodiaea
33. Beautiful Shiner
34. Giant Gartersnake
35. Sand Skink
36. Parish's Daisy
37. Spreading Navarretia
38. San Diego Mesa Mint
39. California Orcutt Grass
40. San Clemente Island bushmallow
41. Stephens's Kangaroo Rat
42. Arroyo Toad
43. Giant Kangaroo Rat

44. Nevin's Barberry
45. Mexican Flannelbush
46. Michaux's Sumac
47. Riverside Fairy Shrimp
48. Braunton's Milk-vetch
49. Paper-like Whitlow-wort
50. Large-flowered Bonamia
51. Pigeon Wings
52. Vernal Pool Fairy Shrimp
53. Small's Jointweed
54. Scrub Plum
55. Lewton's Polygala
56. San Joaquin Woolly Threads
57. Tidewater Goby
58. Topeka Shiner
59. Britton's Bear-grass
60. Desert tortoise
61. Kern Mallow
62. Ventura Marsh Milk-vetch
63. Santa Ana River Woolly-star
64. coastal dunes milk-vetch
65. San Jacinto Valley Crownscale
66. Scrub Lupine
67. San Bernardino Kangaroo Rat
68. Mohave Tui Chub
69. Unarmored Threespine Stickleback
70. Sierra Nevada Bighorn Sheep
71. Buena Vista Lake Shrew
72. Mountain Yellow-legged Frog - Southern California
73. Light-footed Clapper Rail
74. Sonoran Pronghorn
75. Pacific Pocket Mouse
76. El Segundo Blue
77. Desert Slender Salamander
78. Delhi Sands Flower-loving Fly
79. Quino Checkerspot; Wright's Checkerspot
80. Laguna Mountains Skipper
81. Coastal California Gnatcatcher
82. Peirson's Milk-vetch
83. Little Kern Golden Trout
84. San Diego Button Celery
85. Bakersfield Beavertail Cactus
86. Saltmarsh Bird's-beak
87. Trask's Island Lotus
88. San Diego County Monardella
89. Coachella Valley Milk-vetch

90. Kit Fox - San Joaquin Valley Population
91. Least Bell's Vireo
92. California Least Tern
93. Scrub Buckwheat
94. Yuma Clapper Rail
95. Southern California Steelhead