

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

Civil Action No. _____

CENTER FOR BIOLOGICAL DIVERSITY, DINÉ CITIZENS AGAINST RUINING OUR
ENVIRONMENT, SAN JUAN CITIZENS ALLIANCE,

Plaintiffs,

v.

JOSEPH PIZARCHIK, in his official capacity as Director, Office of Surface Mining Reclamation
and Enforcement, WESTERN REGION OFFICE OF SURFACE MINING RECLAMATION
AND ENFORCEMENT, a federal agency within the U.S. Department of Interior, KEN
SALAZAR, in this official capacity as U.S. Secretary of Interior,

Defendants.

COMPLAINT FOR REVIEW OF FEDERAL AGENCY ACTION

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I. INTRODUCTION

1. Plaintiffs Center for Biological Diversity (“Center”), Diné Citizens Against Ruining our Environment (“Diné C.A.R.E.”), and San Juan Citizens Alliance (“Alliance”) (collectively “Plaintiffs”) seek judicial relief for a federal agency’s failure to comply with the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2), and ensure that a permit for a continued surface coal mine operation and expansion does not jeopardize the continued existence of endangered or threatened species or destroy or adversely modify their designated “critical habitat.”

2. BHP Billiton’s Navajo Mine is a massive surface coal mining operation. The Navajo Mine is located entirely on reserved tribal lands within the Navajo Nation (*a.k.a.* the Navajo Indian Reservation). The Navajo Mine lies both within and directly adjacent to the Chaco River which drains north into the San Juan River. The lease for the Navajo Mine extends in a southerly direction from the San Juan River for 25 miles and varies in width from 1 to 4 miles. The Navajo Mine operates 24 hours per day, 7 days per week. The Navajo Mine supplies coal to the Four Corners Power Plant operated by Arizona Public Service (“APS”).

3. The Office of Surface Mining Reclamation and Enforcement (“OSM”) is a federal agency charged with permitting coal mines on tribal lands under the Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1201, *et seq.*

4. Among other things, OSM and OSM Director Joseph Pizarchik, serving in his official capacity (hereinafter, “OSM”, “Agency” or “Defendant”), violated the ESA by failing to consult with the U.S. Fish and Wildlife Service (“FWS”), pursuant to the ESA and its implementing regulations, 16 U.S.C. § 1536(a)(2), 50 C.F.R. Part 400, regarding the effects of Federally-permitted coal mining activities at BHP Billiton’s (“BHP”) Navajo Mine)(hereinafter, “BHP

Navajo Mine”) and before granting a permit authorizing BHP to continue and expand such activities (Federal Permit No. NM-0003F).

5. Coal mining activities at the BHP Navajo Mine will affect endangered and threatened species and critical habitats including, but not limited to: the endangered Colorado pikeminnow (*Ptychocheilus lucius*) and its critical habitat; the endangered razorback sucker (*Xyrauchen texanus*) and its critical habitat; the endangered southwestern willow flycatcher (*Empidonax traillii extimus*) (flycatcher) and its critical habitat; the threatened Mesa Verde cactus (*Sclerocactus mesae-verdae*); the endangered Mancos milkvetch (*Astragalus humillimus*); the endangered Rio Grande silvery minnow (*Hybognathus amarus*) and its critical habitat; and, the endangered California condor (*Gymnogyps californianus*)(collectively referred to herein as “Listed Species and Critical Habitats”). *See e.g.*, U.S. Dep’t of the Interior, U.S. Fish and Wildlife Service, *Draft Biological Opinion for the Desert Rock Energy Project, U.S. Bureau of Indian Affairs, Gallup, New Mexico* (Oct. 2009)(“Desert Rock BO”).

6. These endangered and threatened species and their habitats are known to occur within the “action area” of the Navajo Mine and “may” be affected by the activities authorized by OSM’s Navajo Mine permit renewal and the resulting mining, transportation and combustion of coal and permanent disposal as coal combustion waste (“CCW”) as minefill.

7. On or about September 7, 2010, OSM authorized the renewal of Federal Permit No NM-0003F (“Permit”) for the continuation and expansion of surface coal mining operations at the Navajo Mine. The life of the permit is five years.

8. Prior to authorization of the Permit, OSM did not engage in or complete the section 7 consultation procedures to consider the effects of BHP's mining operations at the Navajo Mine on endangered or threatened species or critical habitat.

9. OSM's action is part of an ongoing pattern and practice of the agency of avoiding ESA compliance.

10. Renewed mining of coal at the Navajo Mine -- and the resulting mining, transport and combustion of coal and permanent disposal of CCW as minefill -- will adversely effect endangered and threatened species and critical habitats. Until and unless OSM satisfies its affirmative duties under section 7(a)(2) of the ESA, these effects will result in the "take" of listed species in violation of the strict prohibition against take of listed species found in section 9 of the ESA. *Id.* §1538.

11. Plaintiffs respectfully ask that the Court declare unlawful, enjoin and set aside Defendants' approval of a coal mine permit renewal for BHP until such time as the agency has complied with the ESA. Such relief should declare that Defendants violated the ESA and its supporting regulations by failing to insure no jeopardy to threatened and endangered species or destruction or adverse modification of designated critical habitat, through completion of consultation with FWS. In addition, Plaintiffs seek vacatur of the Permit and an injunction preventing coal mining activities under the Permit unless and until Defendants fully comply with the ESA.

12. Unless ordered to do so by this Court, Defendants will not comply with the ESA as described in this complaint.

II. JURISDICTION AND VENUE

13. Plaintiffs repeat and incorporate by reference the allegations in all paragraphs of this Complaint.

14. This Court has jurisdiction to review agency action and to order effective relief sought in this civil action pursuant to 28 U.S.C. §§ 1331 (federal question); 1346 (United States as defendant); 1361 (mandamus); 2201 (declaratory relief); 2202 (injunctive relief); and the ESA, 16 U.S.C. §1540(c).

15. Where a federal agency fails to comply with the affirmative duties and procedural requirements of the ESA, the ESA explicitly waives sovereign immunity and provides a cause of action that provides for judicial review of the federal agency's actions and omissions. 16 U.S.C. §1540(g).

16. Under the ESA, each agency has an obligation to “insure” that any action it takes is “not likely to jeopardize” listed species or their critical habitats by consulting with FWS. *See* 16 U.S.C. §1536(a)(2). OSM is required to comply with the ESA in issuance of a renewal permit to BHP. *See e.g.* 30 C.F.R. §780.16, §784.21 and §773.15(a) and (j). OSM has failed to satisfy this obligation and thus acted arbitrarily and capriciously, and without required procedures, in violation of the standard of review in the Administrative Procedure Act (“APA”), 5 U.S.C. §706, *et seq.*

17. OSM is required to comply with the ESA in issuance of a renewal permit to BHP. *See e.g.* 30 C.F.R. §780.16, §784.21 and §773.15(a) and (j).

18. On October 7, 2010, Plaintiffs provided Defendants a 60-day notice of intent to sue under the ESA. *See e.g.* 16 U.S.C. §1540(g). Service of the notice was completed by Plaintiffs

on or about October 18, 2010. Sixty days have now passed since the service of Plaintiffs' notice. Defendants did not respond to Plaintiffs' notice letter.

19. OSM's issuance the Permit constitutes a final agency action. There is a present and actual controversy between the parties that is ripe for judicial review.

20. The agency actions and permitting decisions at issue in this lawsuit were made at OSM's Western Regional Office in Denver, Colorado and therefore venue is proper in this Court. 16 U.S.C. §1540(g). All of the permitting records and agency personnel with knowledge of these issues are located in Denver, Colorado. The agency's actions and approvals and violations of federal law that are addressed in this complaint transpired in Colorado. Venue in this Court is also proper under 28 U.S.C. § 1391(e).

III. PARTIES

21. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a non-profit 501(c)(3) corporation with offices in Arizona, New Mexico, California, Nevada, Oregon, Washington, Alaska, Illinois, Minnesota, Vermont, and Washington, D.C. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center has 42,500 members throughout the United States, Colorado, New Mexico and the world. The Center is actively involved in species and habitat protection issues worldwide, including throughout the western United States. The Center, its members, and staff members use the lands in and near the BHP Navajo Mine, and in particular the Chaco and San Juan River, for recreational, scientific, and aesthetic purposes. They also derive recreational, scientific, and aesthetic benefits from these lands through wildlife observation, study, and photography. The Center and its members have an interest in preserving their ability to enjoy

such activities in the future. As such, the Center and its members have an interest in helping to ensure their continued use and enjoyment of these activities on these lands. The Center is particularly concerned about species and critical habitats that are affected by coal mining at the BHP Navajo Mine.

22. Plaintiff DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT was founded in 1988 and is a nonprofit, environmental organization based within the Navajo Nation homeland, which rests between mountains in Colorado, New Mexico and Arizona. Diné C.A.R.E. is comprised of all tribal members. Diné C.A.R.E. educates, organizes, and advocates for its tribal community, medicine and traditional people, and indigenous youth and elders in an effort to empower them to organize, speak out and determine their own destinies. Members of Diné C.A.R.E live on lands within the mine permit area, near or adjacent to the Chaco and San Juan Rivers and directly downstream in or near the town of Shiprock, New Mexico. Many Diné C.A.R.E. members live in the Navajo Mine area that is the subject of this challenge and in and along the Chaco and San Juan River watershed. Many of these members have been and will continue be directly impacted by the mining operation approved by OSM. Many members have lived on this land for their entire lives. Many members have lived on this land for generations. Further, Diné C.A.R.E. members are concerned that renewed mining of coal at the Navajo Mine - - and the resulting transport and combustion of coal and disposal of coal combustion wastes as minefill-- will effect endangered and threatened species and critical habitats. Members are concerned about the loss of biodiversity, the disappearance of species from their homeland, and the increasing desertification of the land caused by intense industrial usage for energy development.

23. Plaintiff SAN JUAN CITIZENS ALLIANCE and its members use, enjoy, and plan to continue to use and enjoy on a regular basis, the natural resources near and adjacent to the Navajo Mine including the Chaco and San Juan Rivers for health, recreational, moral, scientific, spiritual, professional, educational, aesthetic and other purposes that would continue to be degraded by OSM's failure to comply with the ESA. The Alliance is particularly concerned with the permanent disposal of millions of tons of CCW waste in the Navajo Mine. Alliance members enjoy hiking, rafting, and wildlife viewing along the Chaco and San Juan Rivers on public and private lands in the surrounding area by the permanent disposal of CCW at the Navajo Mine.

24. Plaintiffs and their members benefit from an intact ecosystem that does not include the permanent contamination of surface and groundwater, disturbance and contamination of lands, and adverse impacts to imperiled species and their habitats. Plaintiffs and their members will be adversely affected by OSM's permitting decisions made without compliance with the ESA and because these authorizations will continue to harm the biological integrity and aesthetics of the area which they strive to protect.

25. Plaintiffs and their members use, enjoy, and plan to continue to use and enjoy on a regular basis, the tribal lands, rivers, arroyos, canyons, surrounding area, and natural resources within and adjacent to the mine permit area for health, moral, spiritual, educational, aesthetic and other purposes. These purposes will be degraded or eliminated by the Defendants' approval of the Permit.

26. OSM's permitting authorizations granting use and occupancy of tribal lands for coal development and CCW disposal are causing, and continue to cause direct, immediate, and irreparable to Plaintiffs' interests by irreparably harming endangered and threatened species.

Unless the relief prayed for herein is granted, Plaintiffs and their members will continue to suffer irreparable harm and injury to their interests, including their future ability to enjoy endangered and threatened species and their habitats in the Permit area and Chaco and San Juan River watershed.

27. Granting the requested relief can remedy the injuries to Plaintiffs by providing substantive and procedural protections for threatened and endangered species and their habitats that Congress, through the ESA, put in place.

28. Defendant WESTERN REGION OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT is a federal agency within the U.S. Department of Interior. OSM is the federal permitting agency with oversight over coal mining operations occurring at the Navajo Mine. OSM also has oversight of the disposal of CCW at the Navajo Mine. The Permit was issued by OSM's Western Regional office located in Denver, Colorado. All permitting decisions challenged herein, and any required ESA compliance that should have been conducted, took place and/or were authorized by OSM officials in Denver, Colorado.

29. Defendant JOSEPH PIZARCHIK is the Director of OSM. Mr. Pizarchik as Director is the official responsible for ensuring agency compliance with the ESA and other federal laws that apply to the issuance of mine permit renewals for the Navajo Mine. Mr. Pizarchik is sued in his official capacity.

30. Defendant KEN SALAZAR is sued in his official capacity as U.S. Secretary of Interior ("Secretary"). The Secretary is responsive for ensuring that the OSM's actions, such as authorizing renewal of the BHP Navajo Mine, comply with the requirements of ESA.

31. Headquartered in Australia, BHP is the largest mining corporation in the world measured by revenue. BHP counsel has been provided a courtesy copy of this Complaint.

IV. STATEMENT OF FACTS

A. THE NAVAJO MINE

32. The Navajo Mine is located on tribal reservation lands within the Navajo Nation. The mine is operated by BHP. The existing mining operation supplies approximately 8.5 million tons of coal per year to the Four Corners Power Plant. The Navajo Mine has been operating in varying capacities since the 1960s. The Navajo Mine is within the San Juan River Basin.

33. The Navajo Nation granted a 24,000 acre coal lease in July 1957 to Utah Construction and Mining Company. Upon information and belief, through a series of subsequent lease revisions and amendments the lease area has been increased to 33,601 acres. Upon information and belief, BHP is the current lessee.

34. The coal lease is located south of the San Juan River and extends in a southerly direction for 25 miles. The northern portion of the lease is narrow (1 mile) but the southern portion widens to approximately 4 miles.

35. The coal lease is subdivided into 5 administrative areas known as Areas I, II, III, IV, and V. Mining has been completed in Area I at the north end of the lease area. No mining has occurred in areas IV and V on the south end. BHP is actively mining Areas II and III.

36. Area II consists of the Yazzie, Hosteen, and Barber pits. Area III consists of the Lowe and Dixon pits.

37. In 1960, BHP negotiated a contract with APS to provide coal to the Four Corners Power Plant, which is located adjacent to the north end of the mining lease area.

38. Upon information and belief, BHP has been disposing of CCW waste from the Four Corners Power Plant since 1971.

39. CCW consists of fly ash, scrubber sludge and bottom ash. CCW from the Four Corners Power Plant is used as backfill material in the Navajo Mine. BHP accepts approximately 1.9 million cubic yard (“mcyd”) of CCW from the Four Corners Power Plant annually. As of the year 2000, BHP had disposed of 50-55 million tons of CCW in the Navajo Mine, covering approximately 230 acres.

40. The CCW is placed in the disposal pits with the intention that the pits will serve the as a permanent repository after final reclamation of the site. Disposal of CCW from the Four Corners Power Plant at the Navajo Mine is ongoing.

41. Liner systems with internal monitoring devices are normally used to stabilize, collect, and detect unwanted migration of disposed wastes. The disposal pits at the Navajo Mine were not lined prior to the disposal of CCW. No liner system exists in the CCW pits. There is no leachate collection system under the CCW pits. The CCW is not treated prior to backfill in the disposal pits. The CCW is not tested or analyzed for relevant constituents (*i.e.* pollution content) prior to backfill in the disposal pits.

42. The CCW is buried approximately 10 feet below the surface. Upon information and belief, some CCW disposal pits are located within 50 feet from major surface water drainages.

43. Seventeen potentially toxic elements are commonly present in CCW: aluminum, antimony, arsenic, barium, beryllium, boron, cadmium, chromium, copper, lead, manganese, mercury, molybdenum, nickel, selenium, vanadium, zinc and radionuclides. When CCW becomes saturated with water, leaching of these toxic elements may occur.

44. Upon information and belief, the Permit authorized the continued disposal of CCW at the Navajo Mine.

45. CCW is often stockpiled in large quantities on the surface at the Navajo Mine prior to backfill in the disposal pits. Upon information and belief, the stockpiled CCW can become airborne with wind and lead to dust clouds of CCW. CCW dust clouds do not stay within the mine permit area boundary.

B. OSM'S RENEWAL PERMIT

46. On or about September 7, 2010, OSM authorized the Permit. The life of the permit renewal is five years. *See* U.S. Dep't of the Interior, Office of Surface Mining, Reclamation and Enforcement, *Approval of Permit Renewal for BHP Navajo Coal Company's Navajo Mine* (Sept. 7, 2010).

47. Prior to authorization of the permit renewal, OSM did not initiate or complete consultation with FWS pursuant to section 7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2), 50 C.F.R. Part 400, to consider the effects of mining operations at the Navajo Mine on species listed as threatened or endangered pursuant to the Act.

48. BHP's application for Navajo Mine permit renewal published in two regional newspapers includes no written request from OSM, in this case the action agency, to FWS to commence "formal consultation" as required by the ESA's implementing regulations. 50 C.F.R. § 402.02.

49. OSM did not disclose (or provide to the public or any agency) any existing, draft or final permit for the Navajo Mine. The limited availability and absence of circulation of any permitting documents at the draft permit stage (including information necessary for ESA consultation) prevented FWS from being able to meaningfully understand and participate in the consultation process.

50. An assessment of the probable cumulative hydrologic impacts (“CHIA”) of the permitted coal mining operations and CCW disposal activities upon surface- and ground-water systems in the cumulative impact area is required as part of BHP’s Permit application.

51. Upon information and belief, OSM did not assess the CHIA of the BHP’s operation in issuance of BHP’s permit renewal September 2011.

C. IMPACTS TO ENDANGERED AND THREATENED SPECIES

52. Threatened and endangered species are known to occur within the “action area” of the Navajo Mine and “may” be affected by the activities authorized by OSM’s Navajo Mine permit renewal and the resulting mining, transportation and combustion of coal and permanent disposal as CCW minefill.

53. For example, contaminants entering the San Juan River ecosystem from the disposal and storage of CCW at the Navajo Mine, blasting for coal mining, and/or combustion of coal from the Navajo Mine at Four Corners Power Plant affect endangered Colorado pikeminnow and razorback sucker and these species’ critical habitat by, among other things, contaminating habitat and contributing to reproductive impairment. These species are exposed to mercury and selenium through surface and groundwater contamination and ambient air exposure, deposition, and runoff into aquatic habitats, and subsequent bioaccumulation through the food chain.

54. In October, 2009, FWS prepared a draft biological opinion for the proposed Desert Rock Energy Project (“DREP”). *See, e.g.*, U.S. Dep’t of the Interior, U.S. Fish and Wildlife Service, *Draft Biological Opinion for the Desert Rock Energy Project, U.S. Bureau of Indian Affairs, Gallup, New Mexico* (Oct. 2009)(“Desert Rock BO”). FWS’s draft biological opinion predicts that 72 percent of Colorado pikeminnow in the San Juan River basin will experience

mercury-induced reproductive impairment by 2020—which “is likely to jeopardize the continued existence of the Colorado pikeminnow.” *Id.* at 120. Like the existing Four Corners Power Plant, DREP would also utilize coal from Navajo Mine and dispose of CCW at the mine as minefill.

55. Upon entering the San Juan River ecosystem, microorganisms convert mercury to methylmercury, a highly toxic form of mercury. Because methylmercury is stable and bioaccumulates in the food chain, the highest mercury concentrations are found in top predators, such as the Colorado pikeminnow, causing reproductive impairment, deformities, behavioral changes, and brain damage.

56. In the San Juan River downgradient from the Navajo Mine, 64 percent of Colorado pikeminnow currently experience reproductive impairment due to mercury pollution. By 2020, mercury deposition in the San Juan River basin is expected to increase by 35.4 percent at which point 72 percent of Colorado pikeminnow in the San Juan River basin will experience reproductive impairment.

57. Forty percent of pikeminnows and razorback suckers currently exceed the threshold for adverse effects to offspring from selenium exposure.

58. According to the U.S. Environmental Protection Agency’s Toxic release Inventory, which provides BHP reported data from 2000-2007, hundreds of pounds of mercury and tens of thousands of pounds of selenium are disposed of in the Navajo Mine annually as “minefill.”

59. At least one study has determined that CCW constituents, including selenium, are migrating into the San Juan River ecosystem. *See A Preliminary Evaluation of the Potential for Surface Water Quality Impacts from Fly Ash Disposal at the Navajo Mine, New Mexico* (May 2005)(Zimmerman).

60. The cumulative hydrological impacts of BHP's nearly half-century of permanent disposal of over a half-billion tons of CCW at the mine and contribution of CCW constituent cycling in the San Juan environment may affect listed species.

61. Airborne constituent contamination from surface storage and transportation of CCW and blasting at the mine may affect listed species.

62. In sum, the effects of OSM's issuance of the Navajo Mine permit which include, but are not limited to, mercury and selenium migration and deposition in the San Juan River, and the activities based on the permit, "may affect" the endangered southwestern Colorado pikeminnow and razorback sucker, and other threatened and endangered species and critical habitat.

V. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the Endangered Species Act and the Administrative Procedure Act:
Defendants acted arbitrarily and capriciously and without complying with procedures required under the ESA by approving BHP's 2011 Permit Renewal without completing consultation with FWS.

63. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

64. Congress enacted the ESA in 1973 to provide for the conservation of endangered and threatened fish, wildlife, and plants and their natural habitats. *See* 16 U.S.C. §§1531, 1532.

65. The ESA imposes substantive and procedural obligations on all federal agencies, including OSM, with regard to threatened and endangered species and their critical habitat. *See* 16 U.S.C. §§1536, 1538.

66. The ESA requires that each federal agency shall, in consultation with and with

assistance of FWS, 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 destruction or adverse modification of critical habitat of such species. *See* 16 U.S.C. §1536.

67. The ESA's implementing regulations set forth the process by which an action agency insures that its affirmative duties under section 7(a)(2) of the ESA are satisfied. *See* 50 C.F.R. §402, *et seq.* By this process, each federal agency must review its "actions" at "the earliest possible time" to determine whether any action "may affect" listed species or critical habitat in the "action area." *See* 50 C.F.R. §402.11

68. The definition of agency "action" is broad and includes, among other things, the granting of permits. *See* 50 C.F.R. § 402.02.

69. The "action area" is defined to mean all areas that would be "affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02.

70. The term "may affect" is broadly construed to mean "the appropriate conclusion when a proposed action may pose **any** effects on listed species or designated critical habitat." USFWS Final ESA Consultation Handbook, 3.5 at xvi (March 1998)(emphasis in original).

71. The Secretary of the Interior acts through the FWS to implement ESA requirements with respect to terrestrial species, and the Secretary of Commerce, through the National Oceanic and Atmospheric Administration's Fisheries Service ("NOAA Fisheries"), handles responsibilities for marine species. 16 U.S.C. 1532(15)(definition of "Secretary"); 50 C.F.R. §402.01(b); ESA Consultation Regulations, 51 Fed. Reg. 19926 (June 3, 1986)).

72. Whenever a ‘may affect’ situation exists, the federal agency proposing an action must either initiate formal consultation or seek written concurrence from FWS that the action ‘is not likely to adversely affect’ listed species. USFWS Final ESA Consultation Handbook, 3.5 at xvi (March 1998).

73. Consultation is a process between the federal agency proposing to take an action and FWS for activities affecting terrestrial species. “Formal consultation” commences with the action agency’s written request for consultation and concludes with FWS’s issuance of a “biological opinion” (“BiOp”). 50 C.F.R. §402. The BiOp issued at the conclusion of formal consultation “states the opinion” of FWS as to whether the federal action is “likely to jeopardize the continued existence of listed species” or “result in the destruction or adverse modification of critical habitat.” 16 U.S.C. §1536; 50 C.F.R. §402.12.

74. OSM’s issuance of a renewal permit may affect listed species and their critical habitat.

75. In issuance of a renewal permit, OSM failed to initiate and complete formal consultation with FWS.

76. In issuance of a renewal permit, OSM failed to seek written concurrence from FWS that the issuance of a renewal permit ‘is not likely to adversely affect’ listed species or their habitat.

77. OSM’s failure to initiate or complete consultation with FWS in issuing permits for the Navajo Mine is part of a pattern and practice of the agency of violating the ESA.

78. OSM’s failure to initiate or complete consultation with FWS violated the ESA and its implementing regulations and is arbitrary and capricious, an abuse of discretion, and constitutes a failure to act in accordance with law in violation of the APA, 5 U.S.C. §§551 *et seq.*

SECOND CLAIM FOR RELIEF

Violation of the Endangered Species Act and the Administrative Procedure Act:
Defendants failed to insure that their permitting actions are not likely to jeopardize listed species or destroy or adversely modify the critical habitat of such species.

79. Plaintiffs repeat and incorporate by reference the allegations in the above paragraphs and all paragraphs of this Complaint.

80. The ESA prohibits any “person” from “taking” threatened and endangered species. 16 U.S.C. § 1538; 50 C.F.R. §17.31.

81. “Person” is defined to include “any officer, employee, agent, department, or instrumentality of the Federal Government...” 16 U.S.C. §1532(13).

82. “Take” is defined to mean to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct.” 16 U.S.C. §1532(19).

83. FWS has defined “harm” to include, but are not limited to, “significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

84. Under the ESA’s implementing regulations, in order to be considered a lawful taking, the taking must be incidental to the purpose of the action. 50 C.F.R. § 402.02; 16 U.S.C.S. § 1536(b)(4). Thus, if FWS concludes in formal consultation that an action will not jeopardize the existence of a listed species or adversely modify its habitat, but that it will nevertheless result in “incidental takings” of listed species, FWS must provide a written statement with BiOp that authorizes such takings. 16 U.S.C.S. § 1536(b)(4), (o). The “Incidental Take Statement” must: (1) specify the impact of the incidental taking on the species; (2) specify the reasonable and

prudent measures that the FWS considers necessary or appropriate to minimize such impact; (3) set forth terms and conditions with which the action agency must comply to implement the reasonable and prudent measures; and (4) specify the procedures to be used to handle or dispose of any animals actually taken. 16 U.S.C.S. § 1536(b)(4); 50 C.F.R. § 402.14(i). As long as any takings comply with the terms and conditions of the Incidental Take Statement, the action agency is exempt from penalties for such takings. 16 U.S.C.S. § 1536(o)(2). Thus, a BiOp with a no-jeopardy finding effectively green-lights the proposed action under the ESA, 16 U.S.C.S. §§ 1531-1544, subject to the Incidental Take Statement's terms and conditions.

85. OSM's authorization of the Navajo Mine permit renewal and the resulting coal mining, transportation, and combustion of coal, and the permanent disposal of CCW as minefill, has resulted and will continue to harm the Colorado pikeminnow and razorback sucker, by significantly modifying or degrading their habitat and impairing reproductivity. *See* Desert Rock BO at 98,121.

86. Without satisfying section 7(a)(2) formal consultation with FWS – *i.e.*, without ensuring that the Permit will not jeopardize listed species -- there is no way to know whether take in the form of harm to Colorado pikeminnows and razorback suckers resulting from OSM's issuance of the Permit is properly incidental. Accordingly, OSM's issuance of the Permit constitutes unlawful "take" under section 9 of the ESA. 16 U.S.C. §1538.

87. OSM's failure to ensure that to avoid take of Colorado pikeminnows and razorback suckers in connection with its issuance of the Permit is arbitrary and capricious, an abuse of discretion, and constitutes a failure to act in accordance with law in violation of the APA, 5 U.S.C. §§551 *et seq.*

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment providing the following relief:

1. Declare that Defendants violated the ESA and APA in issuing the September 2010 Permit renewal to BHP by failing to insure that the coal mining activities pursuant to the Permit will not likely to jeopardize listed species or destroy or adversely modify critical habitat;
2. Declare that issuance of all such future permits and/or authorizations shall comply with ESA;
3. Vacate and remand the Permit;
4. Enjoin all activities carried out pursuant to the Permit until such time as OSM has fully complied with the ESA;
5. Grant the Plaintiffs their costs of litigation, including reasonable attorney fees as provided by the ESA, 16 U.S.C. §1540(g); and
6. Grant Plaintiffs such additional and further relief as the Court may deem just and proper.

RESPECTFULLY SUBMITTED on January 31st, 2010.

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