CENTER *for* BIOLOGICAL DIVERSITY

VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED AND FACSIMILE

June 8, 2009

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RE: 60-Day Notice of Intent to Sue over Violations of the Endangered Species Act for Actions Relating to June 23, 2009 Oil and Gas Competitive Lease Sale of Parcels in Monterey County, California

This letter serves as a sixty-day notice on behalf of the Center for Biological Diversity (the "Center"), Ventana Conservation and Land Trust, and Los Padres ForestWatch (collectively "conservation groups"), of intent to sue the Bureau of Land Management ("BLM") over violations of Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536, related to the June 23, 2009 Oil and Gas Competitive Lease Sale of Parcels in Monterey County, California. See Notice of Competitive Lease Sale, Oil and Gas (May 8, 2009). This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. See 16 U.S.C. § 1540(g).

The Center is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has over 220,000 members and online activists throughout the United States, including many members who live in California. The Center's board, staff and members have advocated on behalf of protections for threatened and endangered species for more than 20 years. The Center's board members, our staff, and our members have ongoing interests in protecting the biological resources and air and water quality of Southern Monterey County, and in ensuring that impacts to global warming are adequately addressed in this, and in all, federal actions.

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The Ventana Conservation and Land Trust provides expert advice on a number of issues involving the care and ownership of land for conservation purposes. In addition to fee ownership of certain parcels of unique and exceptional lands containing wetland and cultural resources in southern Monterey County, the Trust also conserves under easement other properties including wetland environments in Ventura and Los Angeles Counties. The Trust nursery and field office is situated in a remote valley about one mile east of the Silver Peak Wilderness in the Nacimiento River watershed. The Trust and its staff have a long-standing and extensive working relationship with the agricultural and wilderness communities of southern Monterey County. Further areas of expertise of the Trust staff include regional planning, rural infrastructure planning, preservation of lands and resources, and special studies in preparing restorations for the dispersal of rare and endangered species, including the California red-legged frog.

Los Padres ForestWatch is a nonprofit conservation organization working to protect public lands along California's Central Coast, including the Los Padres National Forest, the Carrizo Plain National Monument, and other lands administered by the U.S. Bureau of Land Management. ForestWatch is supported by more than 700 members, including many residents of Monterey County, who value our region's public lands for their wildlife habitat, scenic landscapes, and outdoor recreation opportunities. ForestWatch has participated in several oil and gas lease sales throughout the state of California since 2005, and is particularly concerned about this one because of the parcels' remoteness and close proximity to Fort Hunter Liggett wildlands and the neighboring Ventana Wilderness.

BLM unlawfully failed to ensure against jeopardy for listed species that may be affected by the June 23, 2009 lease sale including, but not limited to, the San Joaquin kit fox, the California condor, vernal pool species, and the purple amole before approving this oil and gas lease sale. BLM's reliance on various earlier consultations and biological opinions from 1994/1995 and 2007 issued by the United States Fish & Wildlife Service ("FWS") is invalid because those consultations did not consider the site-specific impacts that will flow from these June 23, 2009 lease sales, nor the current status of the species that will be affected, and did not adequately consider the cumulative impacts to these species. As a result, BLM has failed to ensure against jeopardy through consultation, in violation of the Endangered Species Act. 16 U.S.C. § 1536(a)(2).

The failure of the BLM and other federal agencies to accurately assess the status of the species as a baseline from which to assess new proposed projects and impacts, or to account for past and ongoing take and the cumulative impacts to species, is not unique to this project approval, but is instead a pervasive problem. A recent General Accounting Office Report found that the U.S. Fish and Wildlife Service has consistently failed to track the amount of take authorized in biological opinions through monitoring reports or otherwise, and that the Service also lacks a systematic method for tracking cumulative take of most listed species. Endangered Species Act: The U.S. Fish and Wildlife Service Has Incomplete Information about Effects on Listed Species from Section 7 Consultations. (GAO-09-550), May 21 2009 (available at: http://www.gao.gov/cgi-bin/getrpt?GAO-09-550). BLM cannot continue to rely on biological opinions that are flawed in their inception, and where FWS has failed to monitor the authorized take in order to ensure against jeopardy.

Violations of the Endangered Species Act

A. Violations of Section 7(a)(2): BLM Has Failed to Ensure Against Jeopardy Through Consultation.

BLM has acted unlawfully in approving lease sales without ensuring that the June 23, 2009 lease sale will not jeopardize listed species including, but not limited to, the San Joaquin kit fox, the California condor, vernal pool species, and the purple amole. BLM must initiate consultation regarding the site-specific impacts of this agency action—the lease sale—because it represents the point of commitment for eventual development on these parcels. *See Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988) ("the sale of a non-NSO oil or gas lease constitutes the 'point of commitment;' after the lease is sold the government no longer has the ability to prohibit potentially significant inroads on the environment."). Accordingly, BLM must fulfill its duties under Section 7 and ensure at the beginning of the process, rather than after the decision has been made, that the lease sales and production will not conflict with the protections listed species require to ensure against jeopardy. *See id*. at 1453 ("agency action in this case entails not only leasing but leasing and all post-leasing activities through production and abandonment. Thus, section 7 of the ESA on its face requires the FWS in this case to consider all phases of the agency action, which includes post-leasing activities, in its biological opinion."). These leases are not NSO leases but rather allow for surface disturbing activities even with the various stipulations in place. Surface disturbances allowed by these lease sales include, but are not limited to, surface disturbances that may be associated with surveying, staking, access (to, from, and across parcels), and other exploration and data collection activities.

In issuing this lease sale, BLM attempts to rely on a biological opinion for oil and gas leasing from 1994, and a subsequent Amendment to that opinion from 1995. *See* Formal Section 7 Consultation Concerning Oil and Gas Leasing Identified in the Hollister Resource Management Plan Amendment (October 24, 1994) and Amendment of Biological Opinion ("BO") (February 24, 1995). However, the 1994/1995 biological opinion provides only standard mitigation and protection measures for the San Joaquin kit fox, red-legged frog, vernal pool species and other listed species without any site-specific information or analysis. The 1994/1995 biological opinions do not even mention the impacts to the condor or provide any protective measures for the condor. Notably, in 1994 the FWS expressly required that surveys for listed species be conducted *before* leasing, but then at the request of the BLM changed the wording of this requirement in 1995 such that it is neither clear nor comprehensible. The 1994 BO expressly required that "[a]ll lands under consideration for oil and gas leasing will be surveyed to determine whether listed species, or important habitat features for listed species, are present." 1994 BO at 19. The 1995 addendum changed this to "[a]ll sites containing surface disturbing activities will be surveyed to determine whether listed species, or important habitat features for listed species are present, and determine if the project may affect listed species." 1995 BO at 4. The phrase "sites containing surface disturbing activities" could mean those sites where leases *yet to be issued* will allow such activities, sites where leases *already issued* allow such activities, or sites where surface disturbing activities have *already occurred* —the latter two interpretations

would both violate the requirement that the BLM must ensure against jeopardy *before* approving impacts to the species.[1]

BLM also attempts to rely on the biological opinion for the Southern Diablo Mountain Range and Central Coast of California Resource Management Plan ("RMP") which provides no take exemption for any listed species in the incidental take statement ("ITS") and only the most general analysis of impacts from oil and gas drilling. *See* Formal Consultation on the Hollister Resources Management Plan and Final EIS for the Southern Diablo Mountain Range and Central Coast of California (June 8, 2007) ("2007 RMP BO") at 180-181, 153-155 (condor), 151-153 (kit fox). The 2007 RMP BO provides some status update on the San Joaquin kit fox and notes the very tenuous status of the species in this area, see, e.g., 2007 RMP BO at 61-63, but provides no meaningful analysis of how the management measures that had been in place since at least 1994, and which had not prevented the decline in the species, would nonetheless be sufficient to protect the species going forward. As noted above, the 2007 RMP BO provides no site-specific project analysis and no take exemption. Because the RMP authorizes management actions that may result in impacts to listed species causing take but the 2007 RMP BO did not provide any incidental take exemption, the 2007 RMP BO itself is likely invalid on its face. In a recent case challenging similar biological opinions issued for forest plans without providing any take exemption, the District Court for the Northern District of California found that FWS' issuance of such a biological opinion was not in accordance with the law. *Center for Biological Diversity et al. v. U.S. Fish and Wildlife Service et al.*, Case No. C 08-01278 MHP (June 8, 2009).

As noted above, the GAO recently found that FWS and other agencies have failed to keep track of impacts to species or the take authorized even where monitoring and reporting is provided for in biological opinions. Endangered Species Act: The U.S. Fish and Wildlife Service Has Incomplete Information about Effects on Listed Species from Section 7 Consultations. (GAO-09-550), May 21 2009 (available at: http://www.gao.gov/cgi-bin/getrpt?GAO-09-550). In light of this report and other new information regarding declining populations of San Joaquin kit fox and the dire predictions regarding its status if current management continues, BLM's continued reliance on earlier and programmatic biological opinions is also invalid. In a recent study, McDonald-Madden *et al.* found that if current management continues for the San Joaquin kit fox it may be extinct within 24 years. McDonald-Madden 2008. Given this new information, BLM was required to both initiate consultation before approving any additional impacts to the San Joaquin kit fox and re-initiate consultation on activities that have been authorized in the past where BLM retains discretionary control, including all oil and gas leases that may impact the San Joaquin kit fox. Although oil and gas leasing activities are not the only activities contributing to the decline in the San Joaquin kit fox population, it is clear that the oil and gas leasing and the associated activities are contributing to the impacts that are pushing this species to the brink of extinction. As a result, if BLM continues to authorize impacts to the kit fox from additional oil and gas lease sales, including the June 23, 2009 lease sale, without initiating or re-initiating consultation, it will be in violation of the ESA because BLM will have failed to ensure against jeopardy for the San Joaquin kit fox.

[1] Moreover, the change in the placement of the comma in the 1995 BO makes the entire sentence incomprehensible

The ESA prohibits agency action that is 'likely to jeopardize the continued existence of" any listed species. *16 U.S.C. § 1536(a)(2).* The jeopardy analysis in a biological opinion must also include an analysis of the likelihood of recovery of the species. *National Wildlife Federation v. NMFS*, 524 F.3d 917, 931 (9th Cir. 2008) ("BiOp was legally deficient because its jeopardy analysis did not adequately consider the proposed actions' impacts on the listed species' chances of recovery.") BLM has failed to ensure through consultation against jeopardy and to consider the likelihood of recovery of the San Joaquin kit fox, the California condor, and others listed species that are likely to be adversely affected by the June 23, 2009 lease sale.

In assessing whether a particular activity will cause jeopardy and is likely to undermine recovery chances for the species, the baseline must first be accurately assessed. *National Wildlife Federation v. NMFS*, 524 F.3d at 930; *Pacific Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 2008 U.S. Dist. LEXIS 75944, *11 (E.D. Cal. 2008) ("An action is 'jeopardizing' if it keeps recovery 'far out of reach,' even if the species is able to cling to survival."; citing *NWF v. NMFS*, 524 F. 3d at 931). Even if the impacts of an agency action are small, where a species is already in decline such actions may in fact jeopardize the species. As the Ninth Circuit has noted, to find otherwise would mean that "a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent." *National Wildlife Federation v. NMFS*, 524 F.3d at 930. As discussed above, the recent GAO report shows that FWS has not kept track of take such that it could accurately assess the baseline status and ongoing impacts to most listed species. Nothing in the 2007 RMP BO or the 1994/1994 BOs evidences that any site-specific baseline information or status information was evaluated for the species that may be affected by this lease sale. Thus, BLM's approval of the sale of leases which allow surface disturbance that may affect listed species is invalid and its reliance on earlier biological opinions for the June 23, 2009 lease sale is likewise invalid. Authorizing additional adverse impacts to listed species, including the San Joaquin kit fox and its habitat and the California condor as well as vernal pool species and other species down-gradient from the parcels at issue, without an assessment of the impacts to recovery in the context of the current status of the species violates the ESA.

Because the analysis in the biological opinions on which BLM relied in approving the June 23, 2009 lease sale failed to adequately assess the status of the species and the current baseline from past and ongoing authorized take, ongoing cumulative impacts to the species, impacts to recovery, or the site-specific impacts that may result from the June 23, 2009 lease sale itself, BLM has failed to ensure against jeopardy in violation of Section 7 of the ESA.

B. Violation of Section 2(c) and 7(a)(1); Failure to Conserve Listed Species.

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" the Act.16 U.S.C. § 1531(c)(1). 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 [the Act] are no longer necessary." 16 U.S.C. § 1532(3).

The BLM is violating section 2(c) of the ESA because the agency has refused to use its authorities to further the purpose of the ESA and species conservation for the San Joaquin kit fox, the California condor, and other species. Moreover, the BLM has failed to include adequate measures to conserve these species as mandatory terms and conditions all leases issued.

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. 16 U.S.C. § 1536(a)(1). The purpose of the ESA is to conserve endangered or threatened species. Therefore, the Secretary must ensure that the programs administered by him through the BLM, including the Hollister oil and gas leasing program and the June 23, 2009 oil and gas lease sale, further the conservation and recovery of the of the San Joaquin kit fox and the essential habitat on which it depends, the California condor and other affected species. The Secretary's failure to do so is a violation of Section 7(a)(1) of the ESA as well.

C. Violation of Section 9; Unlawful Taking of Endangered San Joaquin kit fox.

The ESA also prohibits any "person" from "taking" threatened and endangered species. 16 U.S.C. § 1538, 50 C.F.R. § 17.31. The definition of "take," found at 16 U.S.C.§ 1532(19), states,

> The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

The regulations further define the extent of actions that may "take" a listed species:

> Harass in the definition of ''take'' in the Act means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.
> . . .
> Harm in the definition of ''take'' in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3

By approving the June 23, 2009 lease sale and issuing leases that allow for surface disturbing activities that may affect listed species without ensuring through consultation against jeopardy for the San Joaquin kit fox, the California condor, and other listed species, BLM is also violating Section 9 of the ESA. If the activities allowed under the terms of any of the leases proceed before adequate consultations are completed, any and all agencies, entities, or persons that harm, harass or take listed species in any manner in the course of such activities may be in violation of Section 9 of the ESA.

D. Violation of Section 7(d); Commitment of Resources Before Consultation is Completed.

Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on an action under the ESA, the agency "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 *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) that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

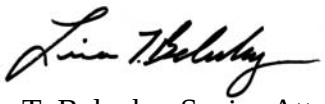
As discussed above, pursuant to the ESA, BLM cannot lawfully rely on the existing biological opinions for the oil and gas program or the RMP in this area to ensure against jeopardy of listed species that may be affected by the June 23, 2009 lease sale or any other approval and issuance of oil and gas leases in this area in the future. Therefore, when BLM reinitiates consultation for the San Joaquin kit fox, the California condor, and other species that may be adversely affected by the June 23, 2009, lease sales or for the program as a whole, as it must, the prohibitions of Section 7(d) will apply and no commitment of resources can be made until such valid consultation is completed.

IV. Conclusion

If the Bureau of Land Management does not act within 60 days to correct these violations of the ESA, the Center for Biological Diversity, Ventana Conservation and Land Trust, and Los Padres ForestWatch, will pursue litigation in federal court against the BLM and the officials named in this letter. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations.

It is our practice to pursue negotiations whenever possible. In keeping with this policy, we invite the BLM to discuss their obligations under the ESA with us. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me at any time.

Sincerely,



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