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VIA FACSIMILE AND CERTIFIED MAIL/RETURN RECEIPT

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Re: 60-Day Notice of Intent to Sue for Violations of the Endangered Species Act Concerning the Ely Resource Management Plan

Dear Secretary Salazar, and Messrs. Pool, Wenker, and Williams:

This letter provides notice that the Center for Biological Diversity (the “Center”) intends to sue the U.S. Bureau of Land Management (“BLM”) and the U.S. Fish and Wildlife Service (“FWS”) for violations of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531, *et seq.* arising from the Ely Resource Management Plan (“RMP”). This letter is provided to you pursuant to the 60-day notice requirement of the ESA’s citizen suit provision, to the extent such notice is deemed necessary by a court. 16 U.S.C. § 1540(g)(2). The activities described in this notice violate the ESA and, if they are not curtailed, the Center intends to commence a civil action against you for violations of section 7 of the ESA. 16 U.S.C. § 1536(a)(2).

I. Legal Background

Section 7 of the ESA requires each federal agency, in consultation with FWS, to insure that any action authorized, funded, or carried out by the agency is not likely to (1) jeopardize the continued existence of any threatened or endangered species or (2) result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to include actions that may directly or indirectly cause modifications to the land, water, or air; and actions that are intended to conserve listed species or their habitat. 50 C.F.R. §

402.02.

For each federal action, the federal agency must request from FWS whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the federal agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* If the agency determines that its proposed action may affect any listed species or critical habitat, the agency must engage in “formal consultation” with FWS. 50 C.F.R. § 402.14.

To complete formal consultation, FWS must provide the action agency with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. The biological opinion “is required to address both the ‘no jeopardy’ and ‘no adverse modification’ prongs of Section 7.” *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, 1127 (N.D. Cal. 2006), *citing* 50 C.F.R. § 402.14(g)(4).

If FWS concludes that the proposed action “will jeopardize the continued existence” of a listed species, the biological opinion must outline “reasonable and prudent alternatives.” 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, FWS must provide an “incidental take statement,” specifying the amount or extent of such incidental taking on the species, any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the agency to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). “Both the [biological opinion] and the Incidental Take Statement must be formulated by the FWS during the formal consultation process; indeed the regulations specifically require the FWS to provide the Incidental Take Statement ‘with the biological opinion.’” *Oregon Natural Resources Council v. Allen*, 476 F.3d 1031, 1036 (9th Cir. 2007), *citing* 50 C.F.R. §§ 402.14(g), (i)(1).

In order to monitor the impacts of incidental take, the federal agency must report the impact of its action on the listed species to FWS. 50 C.F.R. § 402.14(i)(3). If during the course of the action the amount or extent of incidental taking is exceeded, the agency must reinstate consultation immediately. 50 C.F.R. § 401.14(i)(4); *see also* 50 C.F.R. § 402.16.

In addition, section 9 of the ESA and its implementing regulations prohibit the unauthorized “take” of any endangered species of fish or wildlife. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. “Take” is defined broadly under the ESA to include harming, harassing, trapping, capturing, wounding or killing a protected species either directly or by degrading its habitat. *See* 16 U.S.C. § 1532(19); *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d at 1127 n. 7.

II. Factual Background

A. The Ely Resource Management Plan

The Ely RMP is BLM's plan for managing natural resources within a vast area of public lands in east-central Nevada. The RMP planning areas covers White Pine, Lincoln, and a portion of Nye counties, an area of about 13.9 million acres, of which the BLM's Ely Field Office manages approximately 11.5 million acres. The purpose of the Ely RMP is "to provide the Ely Field Office with a comprehensive framework for managing lands in the planning area under the jurisdiction of the BLM." The RMP governs a wide range of activities managed by BLM on public lands, including livestock grazing, mining, oil and gas leasing, energy production (including programmatic land use approval for three new coal-fired power plants), powerline corridor rights of way, water development, and off-road vehicle ("ORV") use.

The RMP is a programmatic plan, and anticipates that site-specific projects would be reviewed and approved in conformance with the broad provisions of the RMP. However, many actions covered by the plan were implemented or became effective upon approval of the RMP, including land-use designations and designations of Areas of Critical Environmental Concern ("ACECs").

BLM issued a draft RMP, together with a draft Environmental Impact Statement ("EIS") in 2005. Subsequently, BLM made substantial changes to the proposed action and issued a Proposed RMP/Final EIS in November 2007. The changes included proposals for the sale of certain public lands within the Ely District for the construction and long-term operation of three new coal-fired power plants within the RMP planning area and proposals for major new water development projects. BLM's Nevada State Director approved the Ely RMP and adopted a Record of Decision on August 20, 2008.

B. ESA Listed Species in the Ely RMP Area

Numerous species protected by the ESA inhabit the RMP planning area. These include the threatened Mojave population of the desert tortoise, the threatened Big Spring spinedace, the endangered White River springfish, the endangered White River spinedace, the endangered Pahrump poolfish, the endangered Hiko White River springfish, the endangered Pahrnatat roundtail chub, the threatened Railroad Valley springfish, the endangered southwestern willow flycatcher, and the threatened Ute ladies'-tresses. Critical habitat has been designated within the RMP planning area for the desert tortoise, the Big Spring spinedace, the White River springfish, the White River spinedace, the Hiko White River springfish, and the Railroad Valley springfish.

C. The Biological Opinion for the Ely RMP

On July 10, 2008, BLM and FWS completed a formal consultation pursuant to section 7(a)(2) of the ESA for the Ely RMP, and FWS issued a programmatic Biological Opinion. In the Biological Opinion, FWS concluded that implementation of the Ely RMP is not likely to jeopardize the continued existence of the Mojave population of the desert tortoise, the Big Spring spinedace, the

White River springfish, the Pahrump poolfish, or the southwestern willow flycatcher (the “covered species”), or destroy or adversely modify any designated critical habitat for these species. This conclusion was based on several assumptions, including the assumptions that BLM will implement the measures described in the Biological Opinion and that BLM will implement the recommendations of approved recovery plans within its authority.

The Biological Assessment prepared by BLM concluded that implementation of the Ely RMP will have no effect on the Hiko White River springfish, the Pahranaagat roundtail chub, the White River spinedace, the Railroad Valley springfish, and the Ute ladies’-tresses. Accordingly, these species are not covered by the Biological Opinion.

The Biological Opinion further included an incidental take statement for the affected species, and described the “reasonable and prudent measures” that FWS believes are necessary to minimize incidental take.

The Biological Opinion’s stated “action area” is all habitat for covered species within the RMP planning area as well as “habitat of listed species outside the planning area that may be indirectly adversely affected by actions proposed in the RMP/Final EIS.” Biological Opinion at p. 9.

The Biological Opinion states that its term is 10 years but that “BLM and the Service may establish conservation measures for listed species in this document and/or the RMP/Final EIS that extend beyond 10 years such as ACEC designations, or species and habitat protections in accordance with approved recovery plans.” Biological Opinion at p. 8.

The Biological Opinion fails to adequately analyze the effects of ongoing and future ORV use and other motorized travel on covered species. The impacts of ongoing ORV use and motorized travel in the RMP planning area are evaluated in a manner that is inadequate and inconsistent with the Biological Opinion’s analysis of other ongoing impacts. For grazing, for example, the Biological Opinion notes that up to 50,000 acres of desert tortoise critical habitat and up to 470,000 acres of non-critical desert tortoise habitat occur in allotments that may be grazed. Although the Biological Opinion anticipates no new disturbance of habitat due to proposed grazing under the RMP, it acknowledges that ongoing grazing is “anticipated to result in some level of habitat disturbance and impact which will be determined at the allotment-level consultation for each allotment.” Biological Opinion at p. 10. For ORV use (covered under the category “Travel Management/OHV Management”), however, the Biological Opinion concludes that ongoing activities will have no impact on desert tortoise habitat, despite the existence of roads and trails within tortoise habitat. *Id.* There is no explanation for treating ongoing ORV use differently from grazing. On the contrary, ongoing ORV use has and will continue to have an adverse impact on desert tortoises and their habitat. Indeed, elsewhere the Biological Opinion states that “*Continued use of existing roads* may result in habitat fragmentation; increased opportunities for collection or vandalism; introduction of alien plants and exotic animals; injury or mortality as a result of encounters with visitors’ pets; and illegal release of pet tortoises including exotic species.” *Id.* at p. 103, emphasis added. Accordingly, the Biological Opinion

fails to adequately describe the BLM action and how it will affect listed species and their critical habitats as required by ESA section 7(b). 16 U.S.C. § 1536(b).

Similarly, the Biological Opinion's conclusion that the Ely RMP will not jeopardize the continued existence of desert tortoises, or destroy or adversely modify desert tortoise critical habitat is not supported by evidence. The RMP allows ORV use within designated critical habitat for the desert tortoise and within ACECs. As noted above, the Biological Opinion acknowledges that existing roads and motorized trail use may result in habitat fragmentation and other adverse effects. In addition, the Biological Opinion states that BLM estimates that an "impact area" of 148,160 acres in desert tortoise critical habitat and 165,120 acres in non-critical habitat exists alongside roads and trails where mortality, injury, and harassment of tortoises may occur.

The Biological Opinion acknowledges that activities that will occur under the Ely RMP, such as ongoing grazing, will disturb desert tortoise habitat and are not compatible with recovery. *See, e.g.,* Biological Opinion at p. 83 (recovery team that livestock grazing in Desert Wildlife Management Areas is incompatible with desert tortoise recovery). Nonetheless, The Biological Opinion fails to consider potential jeopardy to the desert tortoise and destruction or adverse modification of desert tortoise critical habitat due to implementation of the Ely RMP in light of the desert tortoise's recovery needs, as required by the ESA. *See Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 933 (9th Cir. 2008) (holding that the ESA requires consideration of impacts to species' prospects for recovery in jeopardy analysis); *Gifford Pinchot Task Force v. United States Fish and Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004). An analysis of the Ely RMP's impacts on desert tortoise recovery is particularly essential because the tortoise population continues its downward population decline despite federal listing and recovery plan which was published in 1994. The desert tortoise's habitat continues to shrink and the threats to its survival are increasing. Although the Biological Opinion acknowledges the deteriorating condition of the tortoise's designated critical habitat in this area and others, the RMP authorizes ongoing and new activities that will increase the threats to the tortoise and its designated critical habitat. Similarly, the Biological Opinion does not consider jeopardy and adverse modification of critical habitat for other covered species in light of these species' recovery needs.

The Biological Opinion also fails to account for the already degraded baseline condition of the desert tortoise either in this recovery unit or for the species as a whole. *See Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008) (the agency cannot it looked only at "the proportional share of responsibility the federal agency bears for the decline in the species," but must look at "what jeopardy might result from the agency's proposed actions in the present and future human and natural contexts."); *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 127-28 (D.D.C. 2001) ("Simply reciting the activities and impacts that constitute the baseline and then separately addressing only the impacts of the particular agency action in isolation is not sufficient.") FWS has determined that healthy tortoise populations in all six recovery units are necessary to the recovery of the species. The Desert Tortoise Recovery Plan's recovery criteria include the protection of large areas of functional habitat for the desert tortoise in each of six distinct recovery units. Desert Tortoise Recovery Plan at 38, 43-46. Therefore, an analysis of

impacts to recovery must take into account both the impacts to the individuals in this recovery unit and the species as a whole.

The Biological Opinion fails to consider the most recent scientific studies regarding threats to the desert tortoise and is thus not based on the best available scientific data as required by ESA section 7(a)(2). 16 U.S.C. § 1536(a)(2).

The Biological Opinion fails to evaluate the Ely RMP's impacts on other listed species that occur within the RMP planning area, including the Hiko White River springfish, the Pahranaagat roundtail chub, the White River spinedace, the Railroad Valley springfish, and the Ute ladies'-tresses, although these species and their critical habitat (where designated) may be affected by the RMP.

The Biological Opinion improperly defers analysis of the impacts of certain site specific activities, including grazing, ORV use and travel management, and energy development, on covered species. The RMP indicates that these activities are reasonably foreseeable, and the Biological Opinion acknowledges that they may adversely affect covered species, yet contrary to the requirements of section 7 of the ESA, the analysis of their impacts and the formulation of specific mitigation measures is deferred. See *Center for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) ("Mitigation measures must be reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.").

Although the Ely RMP provides programmatic authorization for three new coal-fired power plants, the Biological Opinion contains no discussion of the direct, indirect, or cumulative effects of these coal-fired plants on covered species and other listed species. Accordingly, the Biological Opinion fails to adequately describe the BLM action and how it will affect listed species and their critical habitats as required by ESA section 7(b). 16 U.S.C. § 1536(b).

The Biological Opinion completely fails to discuss the effects of climate change on the covered species and on other listed species in the stated action area – either in terms of the environmental baseline or in terms of species' management requirements in light of anticipated climate change.

The Biological Opinion acknowledges the adverse effects of extended drought periods on desert tortoises, but does not evaluate the potential for extended drought increasing the impacts of ORV use and grazing on tortoises during the term of the Ely RMP. The Biological Opinion further fails to include additional measures to protect desert tortoises during periods of extended drought.

III. Violations of the ESA

A. Violations of Section 7(a)(2); Unlawful Reliance on Inadequate Biological Opinion

Pursuant to section 7(a)(2) of the ESA, BLM has a substantive duty to avoid jeopardy to listed species regardless of the conclusion reached by the consulting agency. *See Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1993) (“Consulting with the [FWS] alone does not satisfy an agency’s duty under the Endangered Species Act.”); *Center for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d at 1157 (“under the ESA, the Army has an independent duty to insure that its actions satisfy § 7 and the jeopardy standard”). Here, the BLM has failed to ensure that its actions are not jeopardizing the listed species or adversely modifying or destroying designated critical habitat in the Ely Resource Management Area because they are relying on an arbitrary and capricious biological opinion. Federal agencies may not take action that could harm listed species or designated critical habitat until they have completed consultation and received a valid biological opinion. Further, the BLM and FWS failed to rely on the best scientific and commercial data available as required by the ESA. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).

The deficiencies in the biological opinion render FWS’s “no jeopardy” and “no adverse modification” conclusions and BLM’s reliance on those conclusions arbitrary and capricious and therefore unlawful under the ESA and the Administrative Procedures Act. BLM and FWS are therefore in violation of their substantive mandate to insure against jeopardy and adverse modification of critical habitat for the covered species. As detailed above, the biological opinion on which BLM relied in adopting the disputed plan is substantially flawed and thus FWS’s conclusions that the management of these lands pursuant to those plan amendments would not jeopardize listed species or destroy or adversely modify critical habitat for listed species are unsupported. Therefore, the FWS’s issuance of the biological opinion and the BLM’s implementation of the plan in reliance on the biological opinion violate the substantive and procedural provisions of Section 7 of the ESA.

B. Violation of Section 7(b)(4); Unlawful Reliance on Inadequate ITS

The FWS is required under Section 7(b)(4) of the ESA to issue an incidental take statement (“ITS”) with each biological opinion for animal species that specifies the amount and extent of incidental take authorized to the action agency. Additionally, the ITS must specify reasonable and prudent measures necessary to minimize such impacts. Finally, the ITS must include terms and conditions implementing the reasonable and prudent measures.

The ITS in the Biological Opinion is inadequate and unlawful in several respects. The ITS fails to specify the amount of non-lethal take and understates the amount of lethal take of desert tortoises due to “Travel and OHV Management” although the Biological Opinion acknowledges that motorized use of roads and trails in the RMP planning area results in habitat fragmentation and other adverse effects. Biological Opinion at pp. 127-28. There are no terms and conditions specifically addressing the impacts of ORV use on desert tortoises. *See Center for Biological*

Diversity v. BLM, 422 F. Supp. 2d 1115, 1141 (N.D. Cal. 2006) (“The Service’s failure to include terms and conditions to minimize the potential for incidental take of desert tortoises during recreational use violates the plain language of the ESA, 16 U.S.C. § 1536(b)(4), and is therefore arbitrary and capricious.”) In addition, the ITS improperly defers formulation of terms and conditions to minimize the ORV and motorized use impacts to the southwest willow flycatcher. Likewise, the ITS improperly defers the monitoring plans, population thresholds, and habitat thresholds required to assess potential take of Big Spring spinedace and Pahrump poolfish as a result of ongoing grazing activities. These grazing activities and their impacts on these species were reasonably foreseeable at the time the ITS was issued and should have been evaluated in the Biological Opinion.

C. Violation of Section 9; Unlawful Taking of Listed Species

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 BLM is in violation of section 9 of the ESA. Because the BLM is in violation of sections 7(a)(2), 7(d) and 50 C.F.R. § 402.16, and because the biological opinion and the accompanying ITS are inadequate and unlawful, no take of listed species is properly authorized.

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

Section 7(a)(1) of the ESA requires that the Secretary of the Interior (the “Secretary”) shall 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. Among the “other programs administered by” the Secretary is the BLM’s administration of the lands covered by the Ely RMP. Section 7(a)(1) applies to all listed species found on BLM lands covered by this plan.

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.” 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 this Act are no longer necessary.” 16 U.S.C. § 1532(3).

The BLM’s implementation of the plan and authorization of activities including ORV use, motorized travel, and grazing is violating section 2(c) of the ESA because the BLM refuses to use its authorities to further the purpose of the ESA and species conservation on these lands. For example, the BLM has failed to fully implement the recovery plan for the Mojave population of the desert tortoise on these lands which calls for eliminating grazing from critical habitat and limiting off-road vehicle activity in desert tortoise habitat. Similarly, the FWS is violating

section 2(c) of the ESA because the Biological Opinion fails to apply the Secretary's affirmative responsibility to conserve listed species by including measures required to conserve these species as mandatory terms and conditions of any ITS.

IV. Remedy

If BLM and FWS do not act within 60 days to correct these violations of the ESA, the Center will pursue litigation in federal court against the agencies and officials named in this letter. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations.

If you have any questions, or would like to discuss this matter further, please contact me at your earliest convenience.

Sincerely,

A handwritten signature in blue ink that reads "John Buse". The signature is written in a cursive style and is placed on a light yellow rectangular background.

John Buse
Senior Attorney
Center for Biological Diversity