



VIA CERTIFIED MAIL; RETURN RECEIPT AND EMAIL

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RE: 60 Day Notice of Intent to Sue over Violations of the Endangered Species Act for Failure to Reinitiate Consultation on the 2006 Memorandum of Agreement Regarding Groundwater Withdrawals, the Kane Springs Valley Groundwater Development Project, and the Coyote Springs MSHCP

This letter serves as a sixty-day notice on behalf of the Center for Biological Diversity (“Center”) of intent to sue the U.S. Fish & Wildlife Service (“FWS” or the “Service”) and the Bureau of Land Management (“BLM”) over violations of the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1536, 1539. The Center is a non-profit, public interest environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has over 900,000 members and on-line activists throughout the United States including many members who live in Nevada and visit and enjoy the areas that may be affected by the decisions challenged herein.

In light of new information regarding impacts of groundwater pumping including the analysis provided in the Nevada State Engineer’s Ruling # 6255 issued January 29, 2014, FWS and BLM must both reinitiate consultation (or self-consultation) on several projects. Those projects include, but are not limited to, the 2006 Memorandum of Agreement Regarding Groundwater Withdrawals, the Kane Springs Valley Groundwater Development Project, and the Coyote Springs MSHCP. The violations in this notice are related to the failure to reinitiate consultation in light of new information.

This notice incorporates by reference the notice provided to you by the Center on February 10, 2009. (Attached hereto: 60 Day Notice of Intent to Sue over Violations of the Arizona • California • Nevada • New Mexico • Alaska • Oregon • Montana • Illinois • Minnesota • Vermont • Washington, DC

Endangered Species Act for Actions Relating to the 2006 Memorandum of Agreement Regarding Groundwater Withdrawals, the Kane Springs Valley Groundwater Development Project, and the Coyote Springs MSHCP). The activities approved by FWS and BLM are all related actions that will have adverse effects on the endangered Moapa dace as well as the threatened desert tortoise and its critical habitat. As the previous notice explained in detail, the Center noticed violations related to the following:

- the U.S. Fish and Wildlife Service's ("FWS") approval of the Memorandum of Agreement ("MOA") and the Biological Opinion for the MOA entitled "Intra-Service Programmatic Biological Opinion for the Proposed Muddy River Memorandum of Agreement Regarding Groundwater Withdrawal of 16,100 Acre-Feet per Year from the Regional Carbonate Aquifer in Coyote Springs Valley and California Wash Basins, and Establishing Conservation Measures for the Moapa Dace, Clark County, Nevada," issued on January 30, 2006 (File No. 1-5-05-FW-536) ("MOA BiOp");
- the BLM's approval of the Kane Springs Valley Ground Water Development Project in the Record of Decision issued on November 19, 2008, and the Biological Opinion entitled "Request for Formal and Informal Consultation on the Kane Springs Valley Groundwater Development Project in Lincoln County, Nevada," issued on October 29, 2008 (File Nos. 84320-2008-F-007 and 84320-2008-I-0216) ("KSV BiOp");
- the FWS' issuance of the Coyote Springs Multiple Species Habitat Conservation Plan Incidental Take Permit ("MSHCP"), the implementing agreement, and the "Final Biological Opinion on the Issuance of a Section 10(a)(1)(B) Incidental Take Permit to Coyote Springs Investment Development, LLC for a Multiple-Species Habitat Conservation Plan in Lincoln County, Nevada," issued on October 22, 2008 (File Nos. 84320-2008-F-0113 and 84320-2008-1-0499) ("CSI MSHCP BiOp").

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).

Taken together the projects approved through these actions may lead to the extinction of the Moapa dace and destruction of its remaining habitat, will take desert tortoise, and will both destroy and adversely modify desert tortoise critical habitat.

These three projects are all connected in some way with the Coyote Springs sprawl development project¹ and groundwater pumping projects that will individually and taken

¹ While construction of this development project has been delayed several times, it remains active. (*See, e.g.*, Las Vegas Review-Journal, July 8, 2015, Henry Brean, "Coyote Springs owners say they're ready to build a new city in the desert" available at <http://www.reviewjournal.com/business/housing/coyote-springs-owners-say-they-re-ready-build-new-city-the-desert>)

together have a direct and profound impact on the Moapa dace, both in terms of direct take through loss of habitat and may jeopardize the Moapa dace's ability to survive through continuing habitat loss and degradation. Despite acknowledging that the projects will have a direct impact on the dace, the FWS has, in violation of the ESA, failed ensure against jeopardy for the Moapa dace.

I. New Information: Pump Test Results, DOI Report, and Nevada State Engineer's Ruling #6255

There is significant new information available regarding the water rights and water availability for Moapa dace habitat. The pump test related to Nevada State Engineer's Order 1169 was reduced in scope and finally completed in December 2012. The initial results of the pump test showed that pumping only approximately one-third of the already-appropriated water rights in the basins lead to significant decreases in springs and stream flow in the Muddy River basin.²

The Nevada State Engineer requested reports from the applicants for additional water rights and from protesting parties including the Fish and Wildlife Service, Bureau of Land Management, and National Park Service. These agencies within the Department of Interior submitted a joint report³ which found, among other things, that:

“With respect to spring discharge impacts, if the current rate of pumping, drawdown, and decline in discharge observed during the test continues in the near-term, Pederson Spring, the highest elevation and most sensitive spring in the MRSA [Muddy River Springs Area], *will reach zero discharge in about 1.5 years. Pederson East Spring, the second most sensitive spring, will reach zero discharge in about 2.5 to 3 years.* We note again that the annual carbonate pumping rate in CSV during the test was only about one-third of the total appropriated volume in that basin.”⁴

“We assume that a reduction in habitat, if it were to occur, would be followed by a decline in Moapa dace numbers since population size of many endangered species is thought to be limited by the amount of suitable habitat available to them (Williams et al., 2002). Over the last five years, the majority (up to 90%) of the dace population counted during fish surveys in the MRSA has been in the Pederson and Plummer springbrooks. Thus, habitat loss within these streams is expected to adversely affect the overall dace population. Additionally, dace only spawn in the Pederson, Plummer, and Apcar/Jones spring systems, while no dace are found in the other two major spring systems (Baldwin and Muddy Spring). Reduction and/or cessation of thermal spring discharge within the three occupied springbrooks, particularly Pederson and Plummer, would reduce the amount of spawning habitat (i.e., waters at the appropriate temperature for spawning),

² Data available at <http://water.nv.gov/mapping/order1169/>

³ Available at http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/DOI%20Bureaus/

⁴ “Test Impacts and Availability of Water Pursuant to Applications Pending Under Order 1169” Presentation to the Office of the Nevada State Engineer, U.S. Fish and Wildlife Service, Bureau of Land Management, National Park Service, June 28, 2013 (Herein after “DOI Report”) at page 55 (emphasis added).

thereby affecting the dace's ability to successfully reproduce and reducing fecundity and overall population numbers. This could have negative implications for survival and/or recovery of the species.”⁵

The agencies' statement that springs would dry up and the Moapa dace population could be impacted is of present and immediate concern as SNWA continues to pump large amounts of water from the system:

“Although the pumping test has been completed, SNWA has chosen so far to continue the pumping at MX-5 in CSV at approximately the same rate, presumably to augment water supply for Las Vegas. It is not known how much longer this pumping will continue. Numerical pumping simulations performed by Tetra Tech (2012b) show that pumping in the carbonate-rock aquifer at the rates imposed during the test (or greater) can be expected to result in substantial additional declines in groundwater levels and spring and stream flows beyond those observed as of the end of the test. The results of the ‘post-audit’ simulation of the second year of the test suggest that the Tetra Tech Version 1.0 Model used to perform these pumping simulations (Tetra Tech, 2012a) underestimates the amount of drawdown created by pumping and the impacts to spring discharges, and overestimates the timeframes in which the projected impacts will occur, but the areal extent of drawdown is simulated accurately.”⁶

Reports submitted by several other protestants in the water rights matter reached similar conclusions. For example, the report from Tom Myers filed on behalf of Great Basin Water Network, concludes:

“Pumpage from Coyote Springs Valley during the Order 1169 pump test occurred at rates that are much less than half of the underground water rights already granted in Coyote Springs Valley. About a third of the total current underground water rights in Muddy Springs Valley were pumped at the same time. Just this small amount of pumping, in comparison with the total permits in the valleys, has caused significant drawdown in the carbonate aquifer of the Muddy River Springs basin. The drawdown is significant because it almost caused discharge from the Moapa Springs to decrease to a critical point. Continued pumping at those rates would have lowered the groundwater table in the carbonate aquifer further and caused the discharge from the springs to decrease further. It is apparent from the Order 1169 pump test data and from the predictions made using the groundwater model (Tetra Tech, 2012b) that *full pumpage of even existing groundwater rights in these two valleys will cause the spring discharge to decrease to rates far insufficient for maintenance of the endangered species dependent on the Moapa Springs.*”⁷

⁵ DOI Report at page 81.

⁶ DOI Report at page 4-5.

⁷ “Technical Memorandum Comments on Carbonate Order 1169 Pump Test Data and the Groundwater Flow System in Coyote Springs and Muddy River Springs Valley, Nevada,” June 12, 2013 Prepared by: Tom Myers, Ph.D., Hydrologic Consultant, Prepared For: Great Basin Water Network, Baker, NV (available at http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/GBWN%20Order1169%20Report.pdf) at page 24 (emphasis added).

The report from the Moapa Band of Paiutes also reached a similar conclusion and in order to protect the Muddy River ecosystem the tribe recommended:

“If future periods of eliminated Muddy River base flows in the Springs-area headwater reaches are to be avoided, the currently undeveloped permits within the proposed management unit must be largely revoked, restricted, or otherwise creatively managed because they total up to a similar order of magnitude as remaining minimum base flows resulting from current diversion impacts in the Springs area.”⁸

On January 25, 2014, after reviewing the pump test results and the reports submitted, the Nevada State Engineer issued Ruling #6255 (“Ruling”) which found that the pending applications in conjunction with existing appropriations would impact other existing rights and is not in the public interest and, therefore, denied the pending applications.

“One of the main goals of Order 1169 and the associated pumping test was to observe the effects of increased pumping on groundwater levels and spring flows. The Pedersen and Pedersen East springs, the highest elevation springs in the area and which are considered to be the "canary in the coal mine" with respect to impacts from pumping, showed an unprecedented decrease in flow during the pumping test. Pedersen spring flow decreased to 0.08 cfs, down from its average of about 0.22 cfs prior to the test. Pedersen East decreased to 0.12 cfs, down from its average flow of 0.2 cfs prior to the test. [] The Warm Springs West gage, the site at which trigger levels have been set among parties to a memorandum of agreement, [] declined from 3.6 to 3.3 cfs during the test. [] Baldwin and Jones Springs declined about 4% during the test. The Muddy River at the Moapa gage did not display any decrease in flow, [] although the MBOP report points out that total flux of the system is variable, and argues that flows in the river would have been even higher if Order 1169 pumping had not occurred. []

The State Engineer finds that pumping under the Order 1169 test measurably reduced flows in headwater springs of the Muddy River, and it is clear that if pending water right applications were permitted and pumped in addition to existing groundwater rights in Coyote Spring Valley and the other Order 1169 basins, headwater spring flows would be reduced in tens of years or less to the point that there would be a conflict with existing rights. The State Engineer finds the Muddy River and the Muddy River springs, the discharge location of the bulk of the region's water, is fully appropriated. As for the Muddy River, the State Engineer finds that evidence submitted by the DOI Bureaus and MBOP is convincing that pumping of groundwater under the pending applications in addition to existing rights would reduce the flow of the Muddy River in tens of

⁸ Mifflin & Associates, Inc., “Summary of Order 1169 Testing Impacts, per Order 1169A A Report Prepared in Cooperation with the Moapa Band of Paiutes,” June 28, 2013. (available at http://water.nv.gov/mapping/order1169/Order_1169_Final_Reports/MBOP/MBOP%20Order1169%20Report.pdf) at page 30.

years or less to the point where there would be a conflict with existing rights.”⁹

“The Moapa dace is an endangered species that lives only in the headwater springs of the Muddy River. The USFWS holds water rights on some of the springs in the Muddy River Springs Area that were appropriated specifically for the protection of the dace. The State Engineer finds to permit the appropriation of additional groundwater resources in the Coyote Spring Valley, which is directly connected to the regional aquifer in the Order 1169 area, would impair protection of these springs and the habitat of the Moapa dace and therefore threatens to prove detrimental to the public interest.”¹⁰

“The State Engineer concludes that there is no additional groundwater available for appropriation in the Coyote Spring Valley Hydrographic Basin without conflicting with existing water rights in the Order 1169 basins.

...

The State Engineer concludes that approval of the applications would threaten to prove detrimental to the public interest by removing water that in the past has been available for the endangered species in the Muddy River Springs Area. The State Engineer concludes that while the use of the water under these applications may have a public benefit, removing the water from the springs would threaten to prove detrimental to the public interest in that it would threaten the water resources upon which the endangered Moapa dace are dependent.”¹¹

In addition, as noted above, significant concerns were raised by the DOI Report and other protestants regarding whether the existing rights (many of which have never been utilized), are already adversely impacting Moapa dace and its habitat. Specifically, concerns have been raised regarding the ongoing pumping by SNWA that is already impacting the springs and dace.

While the Ruling discusses these significant concerns that have been raised regarding existing rights which may be over-appropriated, the Ruling did not reach the issue of over-appropriation. Because there is evidence that the ongoing pumping of even one-third of SNWA’s existing rights may significantly impact the Moapa dace population and its habitat, FWS must consider these issues through re-consultation on the MOA and CSI MSHCP, and BLM must consider these issues through re-consultation with FWS on the Kane Springs Valley Groundwater Project.

II. Violations of the Endangered Species Act Regarding the Moapa Dace

In light of the new information detailed above, FWS is required to re-initiate consultation on both the MOA and CSI MSHCP and BLM is required to re-initiate consultation on Kane Springs Valley groundwater development project because all of these actions depended on assumptions regarding impacts to the Moapa dace that the new information calls into question. Accordingly, the BiOps for each of these projects must be revised. No new activities can be

⁹ Ruling #6255 (available at <http://water.nv.gov/data/stateengineer/rulings.cfm>) at page 27-28 (footnotes omitted).

¹⁰ Ruling at page 29.

¹¹ Ruling at page 29-30.

undertaken or approved that depend on these BiOps and any reliance upon these documents by the FWS or BLM violates both Section 7 and Section 9 of the ESA and any activities undertaken in reliance on the MSHCP will be in violation of Section 9.

A. 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, because new information requires reinitiation of consultation on all of the BiOps, when FWS and BLM reinitiate consultation for the Moapa dace, as they must, the prohibitions of Section 7(d) will apply and no commitment of resources can be made until such valid consultation is completed.

B. Violation of Section 9; Unlawful Taking of Endangered Moapa Dace.

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.

By taking any actions under the MOA and KSV projects without a valid biological opinion, FWS and BLM are also violating Section 9 of the ESA. If the groundwater pumping under the MOA, the Kane Springs Valley project, and/or the MSHCP (to the extent it may arguably authorize such activity) proceeds or continues before re-consultations are completed, any and all agencies, entities, or persons that continue to extract groundwater may be liable for take of the Moapa dace and will be in violation of Section 9 of the ESA.

C. Violations of Section 7(a)(2): Failure to Ensure Against Jeopardy

Pursuant to Section 7(a)(2) of the ESA, FWS and BLM are required to “insure” that any actions and approvals are “not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species . . . determined . . . to be critical . . .” 16 U.S.C. § 1536(a)(2). This applies to the FWS’ approval of the MOA, to BLM’s approval of the KSV project, and to FWS’ approval of the MSHCP.

At the most basic level, FWS and BLM failed to ensure that the projects as approved will not lead to the extinction of the Moapa dace (as detailed in our 2009 60-day notice), and new

information shows that the ongoing pumping by SNWA may already be placing the dace in jeopardy. FWS must reinitiate consultation on the MOA and the CSI MSHCP and BLM must reinitiate consultation on the Kane Springs project.

These violations of the law are compounded by FWS' failure to assert and protect *all* of the water rights it holds (through permit or as reserved rights) on behalf of the public to protect the National Wildlife Refuge. BLM's failure to protect public reserved water rights also violates its duties to protect the public lands and resources it manages including the endangered Moapa dace and its habitat in the Muddy River ecosystem. *See Cappaert et al. v. U.S.*, 48 L. Ed. 2d 523 (1976).

In light of the new information on the impacts of water pumping to the Muddy River ecosystem, the agencies should take immediate steps to preserve the habitat of the Moapa dace including, but not limited to, withdrawing all approvals for groundwater pumping or infrastructure on public lands that affects the water available for Moapa dace habitat and ensuring the recognition of all federal water rights necessary to ensure the dace's survival and recovery.

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

As detailed in our 2009 60-day notice, the incidental take statements in the BiOps were all inadequate on several bases. Among the purposes of an ITS are to set a limit on anticipated take, which acts as a "trigger" for reinitiation of consultation if the limit is exceeded, and to provide for monitoring and reporting of the take that does occur. *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1040 (9th Cir. 2007). In the MSHCP and KSV BiOps, FWS failed to provide a specific quantification of the likely take of Moapa dace (or any proxy to quantify take if direct quantification could not be estimated for example, based on habitat loss), and therefore, failed to provide the needed trigger for re-consultation or monitoring and reporting of the take that has and will occur.¹²

III. Violation of Section 7(a)(1); Failure to Conserve the Moapa Dace.

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).

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 and the Service must ensure that the ITSs and the incidental take permit issued for the MSHCP, together with any other take permits issued for Moapa dace for other

¹² In *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, the Ninth Circuit held that the MOA BiOp appropriately deferred the formulation of an incidental take statement for Moapa dace "to second level analysis." 2015 U.S. App. LEXIS 16558,*52-53. Thus, it is appropriate for the MSHCP and KSV BiOps to quantify take.

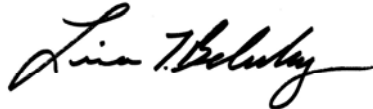
projects or programs in the action area, further the conservation and recovery of the of the Moapa dace and the Muddy River ecosystem. The FWS' failure to do so is a violation of Section 7(a)(1) of the ESA as well.

IV. Conclusion

If the Fish and Wildlife Service and the Bureau of Land Management do not act within 60 days to correct these violations of the ESA, the Center for Biological Diversity will pursue litigation in federal court against the agencies 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 agencies 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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ATTACHMENTS:

Center for Biological Diversity, February 10, 2009, 60 Day Notice of Intent to Sue over Violations of the Endangered Species Act for Actions Relating to the 2006 Memorandum of Agreement Regarding Groundwater Withdrawals, the Kane Springs Valley Groundwater Development Project, and the Coyote Springs MSHCP