



**VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED AND FACSIMILE**

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**RE: 60-Day Notice of Intent to Sue over Violations of the Endangered Species Act for Actions Relating to the San Joaquin kit fox (*Vulpes macrotis mutica*)**

This letter serves as a sixty-day notice on behalf of the Center for Biological Diversity (the “Center”) and Desert Survivors (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, for its repeated reliance on the Revised Formal Consultation on the Oil and Gas Programmatic Biological Opinion in Kings and Kern Counties, California, reference number 1-1-01-F-0063 (“Programmatic BiOp”) issued by the United States Fish & Wildlife Service (“FWS”) on September 28, 2001, related to “certain small scale projects associated with the BLM’s oil and gas leasing and development in Kern and Kings Counties within the Bakersfield Office.” 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 200,000 members and online activists throughout the United States, including many members who live in California.

Desert Survivors is a conservation organization with approximately 800 members focused on the protection of desert plants, wildlife and ecosystems. Desert Survivors also engages in a vigorous program of public education about desert lands and their unique character.

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Desert Survivors' primary goals are to protect fragile desert lands and to teach visitors to those lands about their value. Desert Survivors members place a high value on the continuing existence and essential value of desert wildlife and leads educational and service trips to desert lands including recent trips to the Carrizo Plain National Monument.

BLM unlawfully failed to ensure against jeopardy for the San Joaquin kit fox in approving oil and gas lease sales most recently the March 11, 2009 lease sale. BLM's continued reliance solely on the Programmatic BiOp<sup>1</sup> is invalid because the status of the San Joaquin kit fox has deteriorated significantly since the time the Programmatic BiOp was issued such that the impacts of the lease sale program on the survival and recovery of the species may be far greater than identified by FWS or BLM at the time the Programmatic BiOp was issued in 2001.

## **I. Introduction**

The San Joaquin kit fox was listed as an endangered species on March 11, 1967 (32 Fed. Reg. 4001); there is no critical habitat for the species. The San Joaquin kit fox is included in the Recovery Plan for Upland Species of the San Joaquin Valley – 1998. A 5-year review of the species was noticed in 2006 by FWS (71 Fed. Reg. 14538-14542 (March 22, 2006)) but is not expected to be completed until September 30, 2010.

According to the Recovery Plan, the largest remaining populations of kit fox are in western Kern County, near the City of Bakersfield in eastern Kern County, and the Carrizo and Elkhorn Plains of eastern San Luis Obispo County. In addition, in recent years there has been a notable decline in kit fox reproductive rates and low survivorship of dispersing kit foxes due to predation and other factors including habitat loss and fragmentation. The kit fox is subject to impacts from multiple sources including, but not limited to, impacts from oil and gas exploration and development activities, rodenticide use, agriculture, urban and suburban development and roads.

Much of the remaining kit fox habitat is fragmented and riddled with competition from livestock and oil drilling. (Cypher 2000). The total kit fox population is also highly fragmented into three large populations and ten smaller subpopulations, equaling a very limited genetic exchange capacity. *Id.* Maintaining these remaining populations is critical to the species' survival. This in turn makes the kit fox more susceptible to "genetic bottlenecks." *Id.* Because of the sensitive nature of the remaining kit fox population due to extreme habitat fragmentation, it is becoming increasingly important to preserve what little connected habitat the kit fox has left.

The Recovery Plan takes an ecosystem approach. "An ecosystem approach to recovery in the San Joaquin Valley recognizes not only the common origins and interdependencies of the remnant natural communities, but also the fact that the entire region today is a landscape dominated by human activities." Recovery Plan at viii. As such, the Recovery Plan encourages "continuation of traditional land uses, such as seasonal livestock grazing, oil production, hunting, and wildland recreation, *when compatible with listed species management needs.*" Recovery

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<sup>1</sup> The conservation groups are aware that BLM recently initiated Section 7 consultation with FWS regarding several site-specific proposals for geophysical survey activities. That consultation does not by its terms cover the impacts authorized under the lease sale program that are the subject of this notice.

Plan at x (emphasis added). Thus, activities such as oil and gas production should continue only where they are compatible with management needs of listed species in order to protect and recover these species.

In the Recovery Plan the San Joaquin kit fox is considered an umbrella species because it

occurs in nearly all the natural communities used by other species featured in this plan, but these others are much more restricted in their choice of habitats. The broad distribution and requirement for relatively large areas of habitat mean conservation of the kit fox will provide an umbrella of protection for many other species that require less habitat. Therefore, the San Joaquin kit fox is an umbrella species for purposes of this recovery plan. Many of its habitat management and research needs are given higher priority in recovery actions at the ecosystem level than those of other species because it is one of the species that will be hardest to recover. Fulfilling the San Joaquin kit fox's habitat management and research needs also meets those of many other species.

Recovery Plan at 177-178. By recovering the kit fox and its habitat many other species (including listed species) that share this ecosystem will benefit as well, and similarly, the decline of the kit fox is a sign that the ecosystem is not functioning well and that other species are likely in decline. Thus, BLM's failure to ensure against jeopardy for the San Joaquin kit fox may well evidence a failure to ensure against jeopardy for many of the other listed and imperiled species affected by the project.

BLM's Bakersfield Office oil and gas leasing program includes over 473 active leases on over 260,000 acres. BLM 2005 California Oil and Gas statistics, [http://www.blm.gov/ca/st/en/fo/bakersfield/Programs/Minerals/bkfo\\_minerals.html](http://www.blm.gov/ca/st/en/fo/bakersfield/Programs/Minerals/bkfo_minerals.html) Much of the leasing program is in kit fox habitat. FWS issued the Programmatic BiOp in September 2001, and since that time the Bakersfield office has held approximately 16 lease sales. In 2008, BLM's Bakersfield Office approved and held 4 lease sales totaling over 60,000 acres. During that same time the San Joaquin kit fox population has continued to decline. On January 23, 2009, BLM approved another lease sale—the March 11, 2009 lease sale. This notice relates to the January 23, 2009 decision, the 2008 lease sales, and the ongoing program.

### **III. Violations of the Endangered Species Act**

#### **A. Violations of Section 7(a)(2)**

##### **1. BLM Has Failed to Ensure Against Jeopardy**

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 acted unlawfully in approving lease sales without ensuring against

jeopardy and considering the likelihood of recovery of the San Joaquin kit fox, most recently in its decision on January 23, 2009, approving the March 11, 2009 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 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. In this instance, BLM’s continued approval of lease sales that include surface occupancy leases allowing for surface disturbance in kit fox habitat are one of many factors that continue to impact the kit fox and may in fact be jeopardizing the species.

The Programmatic BiOp acknowledged that “conservation efforts for kit foxes have not been successful at reversing the declining trend in its status, and the conservation needs of the species have not been met.” Programmatic BiOp at 54. The BiOp failed to include any analysis of the likelihood of recovery of the species but simply references the recovery plan. In discussing the baseline, the BiOp again notes the downward trend in the population throughout its range. *Id.* at 62. The BiOp also acknowledges that the development of oil and gas fields “could result in the removal and reduction in the quality of kit fox habitat.” *Id.* The BiOp nonetheless concludes that minimization measures and compensation for lost habitat will reduce the impacts of the leasing program to “less than significant.” *Id.* at 64. The basis for this conclusion is in part that the impacts are small “relative to the range of the species.” *Id.* In addition, the BiOp falsely assumes that the restoration of potential habitat in one area can compensate for the loss of occupied habitat in another. While restoration and compensation are necessary, they are not sufficient to off-set the impacts of the loss of occupied habitat on the species. BLM follows this same faulty logic in its discussion in the EA.

BLM’s environmental review for the recent March 11, 2009 lease sale decision also shows that the agency has failed to take into account relevant factors and failed to ensure against jeopardy. In the draft EA for the March 11, 2009 lease sale BLM acknowledges that likely effects of the action include, but are not limited to, “direct mortality, loss of dens, loss or alteration of habitat, human disturbance, and exposure to oil field chemicals.” Draft EA at 33; Final EA at 33. The action will impact core populations of kit fox in the Carrizo Plain and Western Kern. BLM tries to dismiss the impacts by contrasting the size of the impacts to the kit fox range overall. BLM’s bare conclusion that the “habitat loss is not expected to conflict with the recovery plan goals” is unfounded and fails to take into account a proper baseline and the current status of the species. *Id.* at 33. BLM tries to dismiss new impacts to intact habitat by reference to compensation requirements. While compensation is necessary, it cannot fully offset the impacts to the species and its habitat. The loss of intact habitat can have a significant impact on a species and its recovery even if similar habitat is conserved elsewhere or even on the same lease sale site. Moreover, the EA provides no information about the amount of habitat disturbed

to date in reliance on the Programmatic BiOp, or the amount of compensation habitat secured or restored and fully protected.

Since the time the Programmatic BiOp was issued, the status of many of the imperiled species in this area has declined including the San Joaquin kit fox. In the environmental review for the March 11, 2009 lease sale, as in many prior environmental review documents for quarterly lease sales, BLM failed to provide current up to date information on the status of imperiled species, most notably the kit fox, and their chances for recovery. For example, just since January 1, 2001, FWS has issued at least an additional 151 biological opinions that relate to take of the San Joaquin kit fox. Pursuant to the regulations, the environmental baseline includes “the past and present impacts of all Federal, State or private actions and other human activities in the action area” and “the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation.” 50 C.F.R. § 402.02. By relying solely on the Programmatic BiOp for recent lease sales, BLM has failed to ensure against jeopardy in light of increasing impacts that have moved the baseline significantly since the time the BiOp was issued. In addition, BLM has also failed to account for the cumulative impacts to the species on this basis as well and has failed to ensure that each of its lease sale decisions is not undermining the survival and recovery of the species. Because BLM has continued to approve oil and gas lease sales without considering the change in the baseline conditions and the cumulative impacts to the San Joaquin kit fox in light of the other projects in the area, on this basis as well as others, BLM has failed to ensure against jeopardy.

Because the analysis in the BiOp on which BLM relied in approving lease sales fails to adequately assess the impacts of the program on the species, or of the recent lease sales on the species, BLM has failed to ensure against jeopardy in violation of Section 7 of the ESA.

**2. The Leases Are Inconsistent with the Recovery Needs of the Species as Identified in the Recovery Plan, and the Stipulations are Insufficient.**

BLM’s approval of lease sales that will impact the San Joaquin kit fox including impacts to core populations, reserves, and corridor lands is inconsistent with the recovery needs of the species as identified in the recovery plan. The Recovery Plan criteria for downlisting the kit fox call for protection of “three core populations, Carrizo Natural Area, western Kern County, and Ciervo-Panoche Area; three satellite populations” as well as “[s]table or increasing populations in the three core areas through one precipitation cycle; population interchange between one or more core populations and the three satellite populations.” Recovery Plan at 183. The two recovery actions in the plan are “The Habitat Protection and Population Interchange” and “Population Ecology and Management.” “Protect natural lands in western Kern County” is listed first among the habitat protection actions. Recovery Plan at 135. Nonetheless, the oil and gas leases allow kit fox habitat to be destroyed and fragmented, and movement corridors to be impaired and further fragmented.

In the Decision Record for the March 11, 2009 lease sale, BLM states that “All parcels would be subject to special leasing stipulations that would protect both endangered species and sensitive species and their habitats.” Decision Record at 2 (no page numbers on document). BLM’s “special lease stipulation” “Stipulation No. 1 –Limited Surface Use – Protected Species”

states that “Surface disturbing activities will be prohibited on the lease only where: a. The proposed action is likely to jeopardize the continued existence of a listed or proposed species, or b. the proposed action is inconsistent with the recovery needs of a listed species as identified in an approved USFWS Recovery Plan.” Draft EA at 46 (Appendix B). In this instance both circumstances may exist, and BLM should prohibit all surface disturbing activities until consultation has been completed. The draft EA notes that 278 acres offered in the March 11, 2009 sale are within reserves that are to be managed for species conservation under the recovery plan and 1,920 acres are within corridors. Draft EA at 31. BLM relies on the Programmatic BiOp to justify the impacts to reserve and corridor lands. *Id.* Then, as noted above, BLM provides only a bare conclusion that the “habitat loss is not expected to conflict with the recovery plan goals.” *Id.* at 33. This is insufficient to show that the lease sale is consistent with the recovery plan.

Stipulation No. 1 also states that: “Prior to the authorization of any surface disturbing activities, a preliminary environmental review will be conducted to identify the potential presence of habitat for these species.” Final EA at 64. BLM indicates that it will later determine whether or not to initiate consultation regarding site specific impacts. This procedure violates the most basic policies of the ESA, to evaluate impacts to species from agency actions at the earliest time possible.

As BLM itself admits, “[g]enerally, the BLM cannot deny a lessee the right to drill once a lease is issued unless the action is in direct conflict with another existing law.” Final EA at 3. *See Connor 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 that the lease sales and production will not conflict with the protections listed species require to ensure against jeopardy, not after the decision has been made. *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.”)

Moreover, oil and gas lease sales also create bureaucratic momentum towards development. As such, before approving the leases in the ACECs, BLM was required to fully examine the impacts to listed species even though it approved only non-surface occupancy (NSO) leases in those areas.

### **3. New Information Regarding Species’ Status Under Current Management Requires That BLM Re-initiate Consultation.**

BLM’s reliance solely on the Programmatic BiOp is also unsupportable in the face of new information regarding the kit fox and its likely status into the near future under current management. (McDonald-Madden 2008) In this 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. Given this new information BLM could not continue to rely on the Programmatic BiOp even if that biological opinion had been sufficient when written. Rather, given the dire state of

the species, 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. BLM cannot continue to rely on the Programmatic BiOp to continue its current management for this species on BLM lands through the oil and gas leasing program or to approve additional impacts to the species without re-initiating consultation.

BLM's failure to ensure through consultation that its actions are not jeopardizing the San Joaquin kit fox and its failure to either re-consult on the program or consult regarding the individual lease sales in light of new information violates the Endangered Species Act.

### **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 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 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. Moreover, the BLM has failed to include adequate measures to conserve this 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 oil and gas leasing program at issue here, further the conservation and recovery of the of the San Joaquin kit fox and the essential habitat on which it depends. 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 lease sales and issuing leases with ensuring through consultation against jeopardy for the San Joaquin kit fox 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 continue to destroy kit fox habitat and otherwise take kit fox will 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 and the terms of the Programmatic biological opinion BLM cannot lawfully rely solely on that biological opinion and BLM’s continued approval and issuance of oil and gas leases, including the approval of the March 11, 2009 lease sale, likewise violates the ESA. Therefore, when BLM reinitiates consultation for the San Joaquin kit fox, as it must, either for the program as a whole or for the individual lease sales, 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 and Desert Survivors 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,

A handwritten signature in black ink, appearing to read "Lisa T. Belenky". The signature is fluid and cursive, written in a professional style.

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Please note change of address as of June 1, 2008