Bark ● Center for Biological Diversity ● Defenders of Wildlife ● Desert Survivors
Great Old Broads for Wilderness ● Klamath-Siskiyou Wildlands Center
National Parks Conservation Association ● National Trust for Historic Preservation
Natural Resources Defense Council ● Oregon Natural Desert Association ● Sierra Club
Southern Utah Wilderness Alliance ● The Wilderness Society ● Western Resource Advocates
Western Watersheds Project ● County of San Miguel, Colorado

July 6, 2009

VIA FACSIMILE AND CERTIFIED MAIL/
RETURN RECEIPT REQUESTED

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Re: Notice of Intent to Sue for Violations of the Endangered Species Act in Connection with the Bureau of Land Management's and Forest Service's Records of Decision for Designation of Energy Corridors on Bureau of Land Management- and Forest Service-Administered Lands in the Western States

Dear Secretary Salazar, Acting Director Pool, Acting Under Secretary Bartuska, and Chief Kimbell:

On behalf of the undersigned groups, we hereby notify you that these parties intend to file a civil action against the Department of Interior, Bureau of Land Management ("BLM"), and U.S. Forest Service for violations of the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. ("ESA"), in connection with the Final Programmatic EIS/Records of Decision for the Resource Management Plan Amendments for designation of energy corridors on BLM- and Forest Service-administered lands in the western states ("Records of Decision").[1] This letter is

[1] U.S. Dep't of the Interior/Bureau of Land Management, *Approved Resource Management Plan Amendments/Record of Decision (ROD) for Designation of Energy Corridors on Bureau of Land Management-Administered Lands in the 11 Western States* (Jan. 2009); U.S. Dep't of Agriculture/U.S. Forest Service, *Designation of Section 368 Energy Corridors on National Forest System Land in 10 Western States* (Jan. 14, 2009).

provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA to the extent such notice is deemed necessary by a court.[2]

I. Endangered Species Act

The ESA was enacted, in part, to provide a "means whereby the ecosystems upon which endangered species and threatened species depend may be conserved ... [and] to provide a program for the conservation of such endangered species and threatened species ...."[3] As interpreted by the Supreme Court, "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost."[4] Reflecting "a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies," the ESA serves as an important check on agencies' actions.[5]

The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Commerce and Interior. The Secretaries of Commerce and Interior have delegated this responsibility to the National Marine Fisheries Service ("NMFS") and the U.S. Fish and Wildlife Service ("FWS"), respectively.[6]

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."[7] 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."[8] Similarly, 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."[9]

To ensure federal agencies fulfill the substantive purposes of the ESA, the statute requires they engage in consultation with NMFS and FWS to "insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species ... determined ... to be critical ...."[10] Additionally, section 7 requires that agencies "conference" with the FWS on any action that is "likely to jeopardize the continued existence of

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[2] *See* 16 U.S.C. § 1540(g). This notice supplements the notice of intent to sue for the same violations that was sent by the Center for Biological Diversity and Oregon Natural Desert Association on January 16, 2009.
[3] 16 U.S.C. § 1531(b).
[4] *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 175 (1978).
[5] *Id.* at 185.
[6] 50 C.F.R. §402.01(b).
[7] 16 U.S.C. § 1531(c)(1).
[8] 16 U.S.C. § 1532(3).
[9] 16 U.S.C. § 1536(a)(1).
[10] 16 U.S.C. § 1536(a)(2) ("section 7 consultation").

any proposed species or result in the destruction or adverse modification of proposed critical habitat."[11]

Section 7 consultation is required for "any action [that] may affect listed species or critical habitat."[12] Under the ESA's governing regulations, agency "action" means "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to ... (d) actions directly or indirectly causing modifications to the land, water, or air."[13] Through consultation, NMFS and FWS determine whether the federal agency's proposed action is likely to jeopardize species or their critical habitats. This determination is made after NMFS and/or FWS complete either a Biological Assessment ("BA"), a Biological Opinion ("BiOp"), or in some cases, both.[14] If the BiOp concludes that the agency's action is likely to jeopardize a species, then it may specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action.[15] Additionally, NMFS and/or FWS may "suggest modifications" to the action during the course of consultation to "avoid the likelihood of adverse effects" to the listed species even when not necessary to avoid jeopardy.[16]

Section 7(d) of the ESA, 16 U.S.C. § 1536(d), provides that once a federal agency initiates consultation on a proposed action, the agency, as well as any applicant for a federal permit, "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 environmental 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) by demonstrating that the action will not result in jeopardy to the species or adverse modification of its critical habitat.

Courts have recognized the importance these procedural requirements play in ensuring that agencies carry out the substantive provisions and intent of the ESA. For example, in *Thomas v. Peterson*, the Ninth Circuit declared:

> [T]he strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions.... If an [action] is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance

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[11] 50 C.F.R. § 402.10(a).
[12] 50 C.F.R. § 402.14.
[13] 50 C.F.R. § 402.02.
[14] 50 C.F.R. § 402.14.
[15] 16 U.S.C. § 1536(b).
[16] 50 C.F.R. § 402.13.

> that a violation of the ESA's substantive provisions will not result. The latter is, of course, impermissible.[17]

In addition, courts have also determined that the "act of approving, amending, or revising a land and resource management plan constitutes 'action' under § 7(a)(2) of the ESA."[18]

II. Procedural Background

In 2005, Congress passed the Energy Policy Act of 2005 ("EPAct"). Section 368 of the EPAct directed the Secretaries of Agriculture, Commerce, Defense, Energy, and Interior to designate corridors for oil, gas, and hydrogen pipelines, and electricity transmission and distribution facilities on federal land in the 11 contiguous Western States; perform any environmental reviews that may be required to complete the designation of such corridors; incorporate the designated corridors into the relevant agency land use and resource management plans; ensure that additional corridors for oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities on federal land are promptly identified and designated as necessary; and expedite applications to construct or modify oil, gas, and hydrogen pipelines and electricity transmission and distribution facilities within such corridors. Congress also provided that Section 368 corridors should specify the centerline, width, and compatible uses of the corridors.[19]

The Draft Programmatic Environmental Impact Statement for the Designation of Energy Corridors on Federal Land in the 11 Western States ("Draft PEIS") was made available for public review and comment from November 16, 2007 to February 14, 2008. The Draft PEIS included just two alternatives, including a "no action" alternative and a preferred alternative that proposed a spaghetti-like network of energy corridors extending across 6,000 acres of public lands. The Final Programmatic Environmental Impact Statement for the Designation of Energy Corridors on Federal Land in the 11 Western States ("Final PEIS") was made available for review on November 28, 2008, although the public protest period guaranteed by Department of Interior regulations was not provided.[20] The Final PEIS included a slightly revised version of the network of corridors set forth in the proposed action. On January 14, 2008, BLM and the Forest Service signed the Records of Decision, which amend 92 BLM Resource Management Plans and

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[17] *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985) (emphasis in original).
[18] See, e.g., *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1154 (10th Cir. 2007).
[19] 118 Pub. L. No. 109-58 § 368.
[20] *See* 43 C.F.R. § 1610.2(f) (provides that "[p]ublic notice and opportunity for participation in resource management plan preparation . . . shall be provided" at certain, specific points in the planning process, including when the BLM publishes a "proposed resource management plan and final environmental impact statement"). BLM, the lead agency for the West-wide Energy Corridor planning process, claimed that "[b]ecause any decision regarding these plan amendments is being made by" the DOI Assistant Secretary, Land and Minerals Management, "it is the final decision for the DOI" and "is not subject to administrative review (protest) under the BLM (DOI) land use planning regulations (43 CFR 1610.5–2)." 73 Fed. Reg. at 72525; *but see* 43 C.F.R. § 1610.2(f) (publication of a PRMP and FEIS "triggers the opportunity for protest").

38 Forest Service Land Management Plans throughout the 11 western states, opening up millions 6,000 miles of public lands to energy corridor development, including oil, gas, and hydrogen pipelines, and electricity transmission and distribution facilities.[21] The adopted, finalized network of energy corridors line up almost precisely with existing and proposed coal-fired power plants and other fossil fuel-based energy sources that are located on public lands throughout the west.

III. Violations of the Endangered Species Act

BLM and the Forest Service violated the ESA by failing to consult with NMFS and FWS under section 7 of the Act, 16 U.S.C. § 1536(a)(2); 50 C.F.R. Part 400, to consider the effects of the RMP and LMP amendments on listed species and/or their critical habitat. Additionally, BLM and the Forest Service refused to confer with the NMFS and FWS regarding the effects of the RMP and LMP amendments on species that are proposed for listing under the ESA.

It is clear that the ROD will lead to energy corridor development on the nation's public lands—including oil, gas, and hydrogen pipelines, and electricity transmission and distribution facilities—that will directly, indirectly, and cumulatively impact many threatened and endangered species. As recognized in the FEIS, for example, dozens of threatened and endangered species, as well as those proposed for listing, exist on the 6,000 miles of public land that are designated for corridors under the ROD. These species include imperiled springsnails, butterflies, fish, frogs, lizards, birds, marine mammals, and rare plants.[22] Affected mammals include the gray wolf, Utah prairie dog, kangaroo rat, lesser and Mexican long-nosed bat, Canada lynx, ocelot, Peninsular and Sierra Nevada bighorn sheep, jaguar, black-footed ferret, grizzly bear, and many others.[23] As NMFS pointed out, corridors will directly impact listed salmonids in Washington and Oregon or overlap and/or cross their critical habitat.[24] Despite BLM's, the Forest Service's, and the other participating federal agencies' recognition that these and other listed species exist in the areas that are now available for energy corridor development under the ROD, and that such development on these lands may affect these species and their habitats, BLM and the Forest Service refused to do the required section 7 consultation with NMFS and FWS.

BLM and the Forest Service claim that they cannot engage in section 7 consultation on the basis that until site-specific plans are developed and presented to the agency for development, determining which species may be affected and how would require reliance on assumptions and speculation. This reasoning is particularly weak given that listed species and their critical habitat will be directly impacted by corridor designations, and as NMFS correctly observed, such

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[21] The Forest Service published a Notice of Availability for the Forest Service ROD on March 24, 2009, and stated that the ROD became effective on April 23, 2009. Accordingly, by this NOI, the Center for Biological Diversity and Oregon Natural Desert Association provide supplemental notice of their intent to sue under the Endangered Species Act, since these two parties provided notice on January 16, 2009, after both RODs were made final.
[22] FPEIS at 3-167 to 3-202.
[23] *Id*.
[24] *See* National Oceanic and Atmospheric Administration, Comments on the 11 Western States Energy Corridor Draft PEIS.

impacts clearly warrant consultation under the ESA.[25] Moreover, the agencies' position cannot be squared with section 7's implementing regulations, which make clear that federal agencies must "review [their] actions at the *earliest time possible* to determine whether" their actions "may affect" a listed species or its critical habitat.[26] Thus, agencies must consult early in the process so that, to the extent they are necessary, conservation and mitigation measures can be implemented to extinguish or quell adverse impacts to threatened and endangered species and their habitats. Waiting until site-specific plans are presented does not further the purpose of the ESA, even if section 7 consultation occurs at that stage as well; consultation with the NMFS and FWS at the programmatic level might have resulted in the agencies limiting the number of acres designated in the RMP and LMP amendments or excluding areas altogether due to their special environmental sensitivity.

Especially when considering that land use management plans set forth the guiding principles for BLM's and the Forest Service's management of public lands, consultation at the programmatic level is necessary in order to direct the agencies in establishing RMPs and LMPs that, at the outset, do not jeopardize threatened or endangered species. The ESA requires agencies to consult as early in the process as possible, and in this case, the "earliest time possible" when BLM, the Forest Service, and the other participating federal agencies could consider the effects of its actions to listed species and their habitats is during programmatic-level planning, when it is drawing the map for the future management of 6,000 miles of public lands and their resources for years to come. BLM and the Forest Service had a duty to consult with NMFS and FWS, which they have failed to satisfy.

IV. Conclusion

BLM's and the Forest Service's plan amendment, affecting 6,000 miles of land throughout 11 states, constitute agency action that may adversely—and perhaps even appreciably—affect threatened and endangered species and their critical habitats. The agencies' refusal to consult with NMFS and FWS is an ongoing violation of section 7 of the ESA. If BLM and the Forest Service do not act within 60 days to correct the violations described in this letter, our organizations will pursue litigation against you and your agencies in federal court, and will seek injunctive and declaratory relief as well as legal fees and costs regarding these violations. To prevent litigation, BLM, the Forest Service, and the other participating agencies must withdraw the ROD and initiate consultation under section 7 of the ESA regarding the effects opening these lands to energy corridor development will have on listed species.

If you have any questions or wish to discuss this matter, please contact the undersigned. Thank you.

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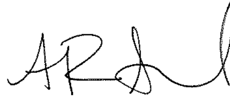
[25] *See id.*

[26] 50 C.F.R. § 402.14 (emphasis added).

Sincerely,



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