

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

ROCKY MOUNTAIN WILD,
GRAND CANYON TRUST,
CENTER FOR BIOLOGICAL DIVERSITY,
SIERRA CLUB,
SOUTHERN UTAH WILDERNESS ALLIANCE,
BIODIVERSITY CONSERVATION ALLIANCE, and
LIVING RIVERS,

Plaintiffs,

v.

NEIL KORNZE, Principal Deputy Director, Bureau of Land Management, and
U.S. BUREAU OF LAND MANAGEMENT,

Defendants.

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF/PETITION
FOR REVIEW**

INTRODUCTION

1. In this lawsuit, a coalition of environmental organizations challenge the U.S. Bureau of Land Management's (BLM) complete failure to comply with the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), upon amending nine Resource Management Plans (RMP Amendments). The RMP Amendments dictate that 810,000 acres of public lands in Colorado, Utah and Wyoming may be destroyed or significantly degraded by mining for and developing oil shale and tar sands deposits.

2. Oil shale and tar sands are immature petroleum deposits that are imbedded within rock, sand and clay. Once extracted, oil shale and tar sands deposits require significant heat to separate the fuel sources and produce a liquid that can be refined into a

transportation fuel.

3. Developing these fuel sources on 810,000 acres of BLM lands will adversely impact several imperiled species that are subject to ESA protection and regulation. The survival and recovery of four fish species that inhabit rivers and creeks in the Colorado River Basin, multiple plants found only on the Colorado Plateau, and an imperiled owl that survives in the Plateau's canyon country depend on the clean flowing waters, abundant natural habitat, and unpolluted air that typifies these BLM lands.

4. In March 2013, BLM approved the nine RMP Amendments. These decisions made available 678,000 acres of public lands in Colorado, Utah, and Wyoming for oil shale leasing, and 132,000 acres in Utah for tar sands leasing. BLM's approval of each RMP Amendment is an "agency action" that "may affect" species listed as threatened or endangered under the ESA. Accordingly, BLM was required to initiate and complete ESA "consultation" with the U.S. Fish & Wildlife Service (FWS) to insure these RMP Amendments do not jeopardize the continued existence of any threatened or endangered species, or result in the destruction or adverse modification of their critical habitat. See 16 U.S.C. § 1536(a)(2). For relief, Plaintiffs seek a declaration finding BLM violated the ESA, and an order setting aside the nine RMP Amendments and enjoining all oil shale and tar sands leasing approvals and development activities taken under the authority of the RMP Amendments.

JURISDICTION AND VENUE

5. This Court has jurisdiction 16 U.S.C. § 1540(c) and (g)(1)(A) (actions arising under the ESA and citizen suit provision). In accordance with the citizen suit provision of the ESA, 16 U.S.C. § 1540(g)(2), Plaintiffs provided written notice to

Defendants of the ESA violations alleged in this complaint more than 60 days ago. Defendants have not remedied the ESA violations or otherwise responded to Plaintiffs' notice letter. Alternatively, this Court has jurisdiction under 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.* Plaintiffs challenge the nine RMP Amendments, which are final agency actions within the meaning of the APA. Plaintiffs challenge BLM's failure to undergo ESA consultation before approving each of the nine RMP Amendments, which are final agency actions under the APA. Plaintiffs commented upon and protested BLM's nine RMP Amendments. An actual controversy exists between the parties.

6. Venue is proper pursuant to 28 U.S.C. § 1391 because the Plaintiffs have offices and members in this judicial district, BLM has offices in this district, and because events and omissions giving rise to Plaintiffs' claim and injuries took place in this district.

PARTIES

7. Plaintiff ROCKY MOUNTAIN WILD is a non-profit membership organization based in Colorado with offices in Denver and Durango. Rocky Mountain Wild has 1,200 members, mostly in Colorado. Rocky Mountain Wild and its members are dedicated to protecting and restoring biodiversity, including imperiled species and their habitats, in the Southern Rockies and the surrounding region.

8. Plaintiff GRAND CANYON TRUST (Trust) is a non-profit corporation with offices in Durango and Denver, Colorado and Moab and Salt Lake City, Utah and its headquarters in Flagstaff, Arizona. The Trust has approximately 16,000 members, including those who reside in Colorado, Utah and Wyoming. The mission of the Trust is

to protect and restore the Colorado Plateau – its spectacular landscapes, flowing rivers, clean air, diversity of plants and animals, and areas of beauty and solitude. One of the Trust’s goals is to ensure that the Colorado Plateau is a region characterized by vast open spaces with restored, healthy ecosystems, and habitat for all native fish, animals, and plants. To accomplish this, the Trust works to curb climate change and advocates for sustainable energy policies across the Colorado Plateau.

9. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (Center) is a non-profit 501(c)(3) corporation with offices in California, Arizona, New Mexico, Oregon, Minnesota, Nevada, Alaska, Vermont, and Washington, D.C. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues worldwide. The Center has over 40,000 members throughout the United States and the world, including in Colorado, Wyoming, and Utah.

10. Plaintiff SIERRA CLUB is a national non-profit organization with over 600,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; practicing and promoting the responsible use of the earth’s ecosystems and resources; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and using all lawful means to carry out those objectives. The Rocky Mountain Chapter (Colorado) has approximately 15,600 members, the Utah Chapter of the Sierra Club has more than 3,800 members; and the Wyoming Chapter has about 900 members. The Sierra Club’s concerns encompass the protection of wildlands, wildlife habitat, and water resources in Colorado, Utah, and Wyoming.

11. Plaintiff SOUTHERN UTAH WILDERNESS ALLIANCE (SUWA) is a

non-profit membership organization. SUWA, based in Salt Lake City, Utah, has more than 12,000 members, including those who reside in Colorado and Utah. SUWA's mission is the preservation of the outstanding wilderness at the heart of the Colorado Plateau, and the management of these lands in their natural state for the benefit of all Americans. SUWA is the founding member of the Utah Wilderness Coalition and promotes local and national recognition of the region's unique character through research and public education; supports both administrative and legislative initiatives to permanently protect Utah's wild places within the National Park and National Wilderness Preservation System or by other protective designations where appropriate; builds support for such initiatives on both the local and national level; and provides leadership within the conservation movement through uncompromising advocacy for wilderness preservation. BLM frequently solicits SUWA's input and participation in the land use planning process for a variety of resource decisions. SUWA actively participates in all levels of BLM's decision-making processes, including the RMP Amendments being challenged in this case.

12. Plaintiff BIODIVERSITY CONSERVATION ALLIANCE (BCA) is a non-profit conservation group based in Laramie, Wyoming, with members in Wyoming, Colorado and Utah, and other states. BCA is dedicated to protecting Wyoming's wildlife and wild places, particularly on public lands. BCA has a long record of advocating for environmentally sound energy development in Wyoming and throughout the West, and has been active in watchdogging oil shale development in the Green River Formation. BCA and its members benefit from the intact ecosystem found on the public lands subject to the RMP Amendments.

13. Plaintiff LIVING RIVERS is a nonprofit organization based in Moab, Utah that promotes river restoration through mobilization. By articulating conservation and alternative management strategies to the public, Living Rivers seeks to revive the natural habitat and spirit of rivers by undoing the extensive damage done by dams, and water-intensive energy development on the Colorado Plateau. Living Rivers has approximately 1,200 members, the majority of whom live in Utah.

14. Plaintiffs' members actively and regularly use and enjoy the BLM lands that have been made available for oil shale and tar sands leasing by the nine RMP Amendments, as well as adjacent and nearby public lands and rivers. Plaintiffs' members use these lands for hiking, camping, photographing wildlife and scenery, scientific study and for other recreational, conservation, and educational activities. Plaintiffs' members derive recreational, inspirational, religious, scientific, educational, and aesthetic benefits from their regular use and activities on these public lands and rivers. Plaintiffs members' use and enjoyment of these public lands is greatly enhanced by the presence of a wide diversity of fish and wildlife species, including the continued existence and eventual recovery of the threatened and endangered species that reside within and depend upon these public lands and rivers. Plaintiffs' members will continue to pursue these activities on these public lands and rivers in the future.

15. BLM's RMP Amendments harm and injure Plaintiffs and their members' interests in wildlife and biodiversity protection. BLM's RMP Amendments are threshold decisions that are necessary before oil shale and tar sands leasing can occur on public lands managed by BLM. BLM's RMP Amendments facilitate the development of related projects, including oil shale and tar sands development on state lands and the construction

of access roads, new highways, new pipelines, and new refineries, each of which harms Plaintiffs' interests in the protection of wildlife, native plants, clean air and water. BLM's RMP Amendments are compelling Plaintiffs' members to visit these newly-designated BLM lands, and the lands and rivers adversely affected by these designations, before they are destroyed and degraded by oil shale and tar sands leasing and development. As a result, Plaintiffs' members are foregoing recreational, conservation, and educational activities on other public lands and rivers.

16. Defendants' ESA violations in connection with the RMP Amendments harm Plaintiffs members' interests. These injuries occur due to BLM's failure to define the RMP Amendments' action area, disclose status quo baseline conditions of the affected threatened and endangered species and their critical habitat, and assess impacts within the action area to threatened and endangered species and their critical habitat from the development of oil shale and tar sands on all lands made available through the RMP Amendments. Defendants' ESA violations also harm Plaintiffs because no mandatory conditions have been imposed on any future oil shale and tar sands projects through an ESA biological opinion and incidental take statement, including mandatory monitoring, tracking and reporting requirements.

17. Plaintiffs' injuries will be redressed by a court order finding BLM violated the ESA, and setting aside the nine RMP Amendments until BLM completes an ESA consultation process on RMP Amendments.

18. Defendant NEIL KORNZE is sued in his official capacity as Acting Director of BLM. Mr. Kornze is responsible for ensuring that BLM lands are managed in accordance with all applicable laws and regulations.

19. Defendant U.S. BUREAU OF LAND MANAGEMENT is an agency of the United States within the Department of the Interior. BLM is responsible for managing its lands, including the lands opened for oil shale and tar sands leasing by the nine RMP Amendments challenged here, in accordance with federal law.

LEGAL BACKGROUND

I. The Endangered Species Act

20. The ESA provides a safety net for species at risk of extinction. Its purpose is “to provide a program for the conservation [of] endangered species and threatened species” and “to provide a means whereby the ecosystems upon which [such] species depend may be conserved.” 16 U.S.C. § 1531(b). Pursuant to the ESA, the FWS has a duty to list a species as threatened or endangered solely on the basis of biological criteria and the best available scientific and commercial data. Id. §§ 1533(b), 1533(c). A threatened species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20). An endangered species is “any species which is in danger of extinction throughout all or a significant portion of its range[.]” Id. § 1532(6). Once a species is listed as threatened or endangered, its critical habitat must be designated. Id. § 1533(a)(3). Critical habitat includes both occupied and unoccupied areas that contain features that are “essential to the conservation of the species[.]” Id. § 1532(5)(A)(i)(I).

21. Through the ESA, FWS regulates federal agency actions that impact threatened and endangered species. Section 7(a)(2) of the ESA requires federal agencies to avoid actions that are “likely to jeopardize the continued existence” of any listed species or “result in the destruction or adverse modification of” critical habitat. 16 U.S.C.

§ 1536(a)(2). Jeopardy results when it is reasonable to expect that the action would “reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50

C.F.R. § 402.02. Adverse modification occurs when it is reasonable to expect that the action will result in “a direct or indirect alteration that appreciably diminishes the value of critical habitat for ... the survival [or] recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” *Id.* § 402.02.

22. To ensure compliance with these Section 7(a)(2) prohibitions, the “action agency” must undergo a consultation process with FWS upon proposing to authorize, fund, or carry out an action that “may affect” a species or its critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. The consultation process ensures a rigorous review of the actions’ impacts on threatened and endangered species and serves as an independent check on the tendency of federal agencies to pursue their other goals and mandates at the expense of imperiled species. “Formal” consultation is required when the agency’s action is likely to “adversely affect” listed species or critical habitat. 50 C.F.R. §§ 402.13, 402.14(a). Formal consultation concludes with a FWS biological opinion. In a biological opinion, FWS determines whether “jeopardy” or “adverse modification” is likely to occur due to the action and, if so, sets forth the reasonable and prudent alternatives that could avoid such ESA violations. 16 U.S.C. § 1536(b)(3)(A).

23. In considering an agency’s proposed action, FWS must identify the action area, the environmental baseline, and the effects of the action. The “action area” includes

“all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action.” 50 C.F.R. § 402.02. The “environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area.” *Id.* The effects of the action include the direct, indirect, and cumulative effects to a species from the proposed agency action, as well as “interrelated and interdependent actions.” *Id.* (defining “effects of action”), § 402.14(c)(4) & (8). Direct impacts are caused by the action and occur at the same time and place. *Id.* § 402.02. Indirect impacts are those that are caused by the proposed action, but are later in time and reasonably certain to occur. *Id.* Cumulative effects include “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.* Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. *Id.* Interdependent actions are those that have no independent utility apart from the action under consideration. *Id.* During the ESA consultation process and in developing a biological opinion, both FWS and the action agency must use the best scientific and commercial data available. *Id.* § 1536(a)(2).

24. In addition to the Section 7(a)(2) prohibitions on agency actions, the ESA also prohibits agency actions that “take” threatened and endangered species. 16 U.S.C. § 1538(a)(2); 50 C.F.R. § 17.31(a). “Take” means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). ESA regulations further define “harm” as “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.

25. Congress created two "incidental take" exceptions to the take prohibition, including "incidental take statements" that are issued to federal agencies. 16 U.S.C. §§ 1536(b)(4)(A), 1536(o)(2). Like biological opinions, FWS issues incidental take statements at the conclusion of the ESA section 7(a)(2) consultation process. *Id.* § 1536(b)(4)(A). FWS must issue incidental take statements if it (1) concludes in a biological opinion that the agency's action will neither jeopardize the species nor destroy or adversely modify critical habitat, and (2) the agency action "may" take a listed species. 50 C.F.R. §§ 402.14(g)(7); 402.14(i)(1). An incidental take statement must (1) limit and quantify the amount of take, (2) specify the reasonable and prudent measures that FWS considers necessary to minimize such impact, (3) set forth terms and conditions that must be complied with by the federal agency to implement these reasonable and prudent measures, and (4) establish monitoring and reporting requirements. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). Any taking that exceeds the limits set forth in an incidental take statement triggers the need to immediately reinstate consultation. *See* 50 C.F.R. § 402.16.

FACTS SUPPORTING THE CLAIMS

I. Oil Shale and Tar Sands

26. Oil shale and tar sands deposits are immature fuel sources that have not remained in the ground long enough to liquefy. As compared to traditional fuel sources, oil shale and tar sands require additional processing to produce a transportation fuel.

27. Oil shale is a sedimentary rock that contains an organic material called kerogen. To separate and convert the kerogen into a liquid, the rock must be heated to

between 600-750 degrees Fahrenheit. After this separation, the liquid kerogen must be further processed to produce a crude oil that can then be refined.

28. Oil shale is extracted by surface strip mining or underground *in situ* mining. Strip mining occurs where the oil shale is within 500 feet of the surface. Underground mining is required when the oil shale is found deeper than 500 feet. For both mining techniques, water is needed to separate the kerogen from the rock, to convert the kerogen to a liquid form, and to process into a crude oil. According to BLM, when strip mining occurs, producing one barrel of crude oil requires 2.6 to 4 barrels of water. According to BLM, when underground mining is the method of extraction, 1 to 3 barrels of water is required to produce one barrel of crude oil. BLM found that both oil shale mining methods produce at least one ton of a waste byproduct (or spent shale) per barrel of crude oil. Spent shale includes arsenic, boron, fluoride, and selenium.

29. The world's largest oil shale deposits, covering approximately 16,000 square miles, are found in the Green River formation in Colorado, Utah and Wyoming. Federal lands overlay more than 70% of the oil shale deposits in the Green River formation. In Colorado, attempts to recover and develop oil shale deposits occurred over the last century. These efforts failed because it was not economically viable to develop these deposits on a commercial scale.

30. Tar sands are a combination of clay, sand, water and "bitumen." To produce a fuel, bitumen must be extracted, separated, "upgraded" to a crude oil, and refined. Tar sands are extracted by strip mining or underground *in situ* mining. Once extracted, bitumen must be separated from the sand and clay. Water is needed to separate the bitumen and to process into a crude oil. The separation process differs depending on

the mining technique. For surface mining, the separation process involves either heating at extreme temperatures or applying a chemical solvent to the extracted tar sands deposit. When underground mining is employed, separation occurs by injecting superheated steam underground. Once separated, the bitumen is very viscous. To upgrade bitumen to a crude oil that can be shipped and refined, additional heating at high temperatures occurs.

31. Both strip mining and underground *in situ* mining of tar sands produces waste byproducts. According to BLM, strip mining for tar sands produces 2.6 tons of waste byproduct for each barrel of oil produced and these wastes contain salts, metals, mobilized hydrocarbons, and other contaminants. BLM found that recycling the steam needed to separate the bitumen from sands during underground mining produces a sludge that contains heavy metals, minerals, and mobilized hydrocarbons.

32. Tar sands deposits are found in Utah, but not Colorado or Wyoming. In 1980 and 1981, the U.S. Geological Survey delineated eleven “special tar sands areas” (STSAs) covering one million acres in eastern Utah. 45 Fed. Reg. 76,800; 46 Fed. Reg. 6077. These areas were specially designated because, according to USGS, they contain substantial deposits of tar sands. Nearly two-thirds of the total acreage of tar sands deposits within these STSAs are found on BLM lands.

33. In 1981, Congress enacted the Combined Hydrocarbon Leasing Act. The Combined Hydrocarbon Leasing Act authorized the Secretary of the Interior, through BLM, to convert traditional oil and gas leases to tar sands leases within STSAs. 30 U.S.C. § 226(n), § 181 (defining “combined hydrocarbon leases”); 43 C.F.R. § 3140.0-5. In the early 1980s, BLM received applications to convert traditional oil and gas leases

within three of the STSAs (Tar Sands Triangle, Pariette and P.R. Spring STSAs) to tar sand leases. BLM did not act on these conversion lease applications in accordance with statutory deadlines. Instead, between 2006 and 2008, BLM retroactively “suspended” these 1980s conversion applications to allow for further review and consideration. No tar sands deposits within these suspended Utah leases have been extracted. Some of the suspended leases overlap with lands where tar sands leasing and development activities are now prohibited, including lands within the Grand Staircase-Escalante National Monument and Glen Canyon National Recreation Area. Some of the suspended leases are on lands made available in the RMP Amendments or adjacent to lands made available in the RMP Amendments.

34. Strip mining for oil shale and tar sands deposits destroys all surface resources at the site. The extraction process strips the surface bare. Ancillary facilities must be constructed at the mine site, such as access roads, storage facilities, waste pits, pipelines, transmission lines, and employer-provided housing. In addition, on-site power plants are built to supply energy needed to separate the resources from rock and sand and to upgrade the fuels so they can be transported to refineries.

35. Because strip mining removes all vegetation, it creates unstable soils that are blown in the direction of prevailing winds. This transports contaminated soils and materials in waste piles to nearby environments. Remaining disturbed areas are vulnerable to colonization by non-native weeds that compromise native plant survival. Cryptobiotic soil crusts are found on the Colorado Plateau. The organisms in cryptobiotic soils join otherwise-loose soil particles together, rendering them resistant to both wind and erosion. Strip mining eliminates cryptobiotic soil crusts. When

cryptobiotic soil crusts are destroyed, erosion becomes prevalent. Wind and water transport eroded materials into water sources.

36. During most of the last decade, Colorado, Utah and Wyoming have been in a drought. Water required for oil shale and tar sands mining and development will come from surface and groundwater supplies within the Colorado River Basin, including the Green River, the White River, the Colorado River, and their tributaries. Oil shale and tar sands development will degrade water quality in the Colorado River Basin. Water withdrawals will decrease total streamflow, and thereby concentrate pollutant levels in streams. Water withdrawals will also raise water temperatures to levels that are lethal to aquatic organisms. Runoff from waste piles located at leased parcels will enter surface waters.

37. Oil shale and tar sands development will increase smog. Ground level ozone pollution, or smog, is formed when emissions of volatile organic compounds (VOC) and nitrogen oxide (NO_x) are affected by temperature, sunlight, wind, and other weather factors. Oil shale and tar sands development will result in emissions of VOC and NO_x. Ground level ozone pollution damages plants, animals and fish, and their habitats. Ground level ozone has exceeded the National Ambient Air Quality Standard in the Vernal RMP planning area. Ground level ozone has exceeded the National Ambient Air Quality Standard in the Kemmerer and Green River RMP planning areas. Oil shale and tar sands development in the Vernal, Kemmerer and Green River RMP planning areas are likely to cause additional exceedances of the National Ambient Air Quality Standard for ozone.

38. Oil shale and tar sands development will increase greenhouse gas

emissions. The primary greenhouse gases are carbon dioxide, methane and nitrous oxide. Increasing greenhouse gas concentrations cause the Earth's atmosphere to retain a greater proportion of the sun's energy, warming the Earth's climate and changing climate patterns. The more greenhouse gases are emitted into the atmosphere, the more warming will occur.

39. Carbon dioxide, methane, and nitrous oxide are released during the development and production of oil shale and tar sands deposits. More energy is required for the extraction, separation, upgrading and refining processes relating to oil shale and tar sands than conventional oil production. In addition, the end use of the refined product of oil shale and tar sands – burning liquid fuel in motor vehicles – will cause more greenhouse gas emissions.

40. The lands and waters of Colorado, Utah, and Wyoming are adversely impacted by climate change. Current climate models predict that by 2100, reductions in precipitation in the Western United States, coupled with temperature increases of up to 5°F, and associated increases in evapotranspiration could reduce water runoff in the Colorado River Basin of up to 20 percent. Disturbed dust resulting from large-scale strip mining will be deposited on nearby mountain snowpack, in turn leading to early snowmelt and increased regional temperatures that exacerbate climate change effects.

II. The 2013 Amendments To The Nine Resource Management Plans

A. Federal Land Policy and Management Act And Resource Management Plans

41. BLM manages federal public lands in Colorado, Utah and Wyoming. BLM lands are divided into management units known as districts or resource areas. For each such unit, the Federal Land Policy and Management Act (FLPMA) requires BLM to

develop a resource management plan (RMP). 43 U.S.C. § 1712(a). In an RMP, BLM determines what land uses are permitted within a BLM district or resource area, and where they may occur. *Id.* Pursuant to BLM regulations, “[r]esource management plans are designed to guide and control future management actions.” 43 C.F.R. § 1601.0-2. According to BLM’s Land Use Planning Handbook, “[l]and use plans and planning decisions are the basis for every on-the-ground action the BLM undertakes.” BLM’s Handbook provides that “[l]and use plans must identify uses, or allocations, that are allowable, restricted, or prohibited on the public lands.”

42. Once in place, BLM must manage and make project-specific decisions in compliance with the RMP. 43 U.S.C. § 1732(a). FLPMA’s implementing regulations provide that “[a]ll future resource management authorizations and actions . . . shall conform to the approved plan.” 43 C.F.R. § 1610.5-3(a). Conformity is defined as: “a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment.” *Id.* § 1601.0-5(b). “Consistent” is then defined as requiring that management actions “will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans.” *Id.* § 1601.0-5(c). The failure of a BLM decision to comply with the requirements of a RMP is a violation of FLPMA and its regulations.

B. Energy Policy Act

43. In 2005, Congress passed the Energy Policy Act (EPAAct). In EPAAct, Congress identified oil shale and tar sands deposits as important sources of domestic transportation fuels. 42 U.S.C. § 15927(b). Under EPAAct, the development of oil shale

and tar sands deposits must be conducted in “an environmentally sound manner” and through “practices that minimize impacts.” Id.

44. The EAct directs the Secretary of the Interior, through BLM, to establish a “program” for oil shale and tar sands on public lands. 42 U.S.C. § 15927(c). Congress believed that the program would encourage companies to invest in developing these resources. As part of this EAct program, BLM must “make available” some lands for oil shale and tar sands leasing. Id. Available lands are those “most geologically prospective lands within” Colorado, Utah, and Wyoming. Id. § 15927(d). Available lands are also those BLM “considers to be necessary to conduct research and development activities with respect to technologies for the recovery of liquid fuels from oil shale and tar sands resources on public lands.” Id. § 15927(c).

C. 2008 Resource Management Plan Amendments

45. To fulfill EAct’s mandate to make available certain lands in Colorado, Utah, and Wyoming for oil shale and tar sands leasing, BLM initiated a process to amend its RMPs within Colorado, Utah and Wyoming.

46. Prior to EAct, BLM had designated as available lands within the White River RMP area in Colorado for oil shale leasing and development. Except for the White River RMP, no other BLM lands in Colorado, Utah and Wyoming had been made available in an RMP for oil shale leasing and development. No BLM lands in Utah had been made available in an RMP for tar sands leasing and development.

47. As part of its RMP process and in accordance with EAct, BLM prepared an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) for its RMP Amendments. 42 U.S.C. § 15927(d). NEPA applies to “major

federal actions” that “may” result in significant impacts to the environment. 42 U.S.C. § 4332(C). BLM found that amending its RMPs to designate certain areas available for oil shale and tars sands required preparing an EIS.

48. On November 17, 2008, BLM finalized a programmatic EIS that assessed the amendments to its RMPs in Colorado, Utah, and Wyoming where oil shale and tar sands deposits are located. As approved through a Record of Decision, the 2008 RMP Amendments designated over 2 million acres available for oil shale leasing and approximately 430,000 acres for tar sands leasing.

49. Shortly thereafter, a lawsuit was filed challenging the 2008 RMP Amendments. In adopting the 2008 RMPs Amendments, BLM did not undergo an ESA section 7(a)(2) consultation process. The case settled, wherein BLM agreed to revisit the RMP Amendments and complete a new administrative process.

D. 2013 Amendments: Designating Lands And RD&D Leases

50. On March 13, 2013, BLM completed its administrative process, issued a new Record of Decision, and approved the nine RMP Amendments. In doing so, BLM denied Plaintiffs’ administrative protests. The RMP Amendments were supported by a November 2012 EIS.

51. The 2013 Amendments included two significant BLM decisions. First, the RMP Amendments made available 678,000 acres of lands in Colorado, Utah, and Wyoming for oil shale leasing and 132,000 acres in Utah for tar sands leasing. As compared to the 2008 RMPs, the 2013 RMP Amendments reduce the acreage available for oil shale and tar sands leasing.

52. The RMP Amendments designated available lands according to BLM’s

definition of the “most geologically prospective” oil shale deposits. For oil shale in Colorado and Utah, deposits are those that yield 25 gallons of crude oil per ton of rock and the deposits are 25 feet thick or greater. For oil shale in Wyoming, BLM identified the “most geologically prospective” deposits as those that yield 15 gallons or more of crude oil per ton of rock, and the deposits are 15 feet thick or greater. The RMP Amendments did not define or identify the most geologically prospective tar sands deposits in Utah. In addition, the RMP Amendments excluded from tar sands and oil shale leasing lands that included “core and priority sage-grouse habitat, lands identified by the BLM as having wilderness characteristics, ACECs [areas of critical environmental concern], the Adobe Town Very Rare or Uncommon area, land with wilderness characteristics (LWC) and other wildlife resources.”

53. Second, in the RMP Amendments, BLM decided to lease lands for oil shale through “Research, Development and Demonstration” (RD&D) leasing. Through this RD&D leasing process, BLM intends to fulfill Congress’ goal of encouraging companies to invest in oil shale. BLM limited RD&D leases to 160-acre sites. Other than this acreage limitation, BLM imposed no restrictions on a RD&D lease. An RD&D lease includes a “preference right” to expand operations to adjacent lands and convert an RD&D lease to a commercial lease. To convert, BLM must find that the developer has secured a technology that allows for “production in commercial quantities.” 43 C.F.R. § 3926. Previously, the size of a preferential right was up to 4,960 acres. In the RMP Amendments, BLM reduced the size of a preferential right to 480 acres.

54. In its 2013 decision, BLM authorized oil shale development within two Colorado RMPs: the Grand Junction and White River RMPs. The Grand Junction RMP

Amendment designates 180 acres as available for oil shale leasing. The White River RMP Amendment designates 26,000 acres as available for oil shale leasing. BLM has issued two RD&D leases for oil shale within lands designated as available in the White River RMP Amendment. These leases cover 160 acres, and include a preferential lease right to an additional 480 acres. BLM did not complete ESA section 7(a)(2) consultation prior to approving these two RD&D leases.

55. In Utah, BLM amended four RMPs to authorize oil shale and tar sands leasing. The Monticello RMP governs public lands in Southern Utah, next to Canyonlands National Park, Glen Canyon National Recreation Area, and Natural Bridges National Monument. The White Canyon STSA is located within the Monticello RMP. BLM's Monticello RMP Amendment designated 59 acres as available for tar sands leasing and development. The Richfield RMP governs public lands in Southern Utah and borders Canyonlands National Park. The Tar Sands Triangle STSA is located within the Richfield resource area. In the Richfield RMP Amendment, BLM designated 134 acres within Tar Sands Triangle STSA as available for tar sands leasing.

56. The Price RMP governs public lands in central-eastern Utah. The Price resource area drains into the Green River and its tributaries, including the Price and San Rafael Rivers. In the Price RMP Amendment, BLM designated as available for oil shale and tar sands leasing approximately 29,240 acres. The Vernal RMP governs public lands in northeastern Utah. In the Vernal RMP Amendment, BLM designated 360,350 acres of land as available for oil shale leasing. In the Vernal RMP Amendment, BLM designated as available for tar sands leasing 102,704 acres, located within the Argyle Canyon, Asphalt Ridge, Hill Creek STSA, Pariette, P.R. Spring, Raven Ridge, and Sunnyside

STSAs. The Vernal RMP planning area is entirely within the Uinta Basin, which produces more oil and gas than any other area in Utah. BLM is currently processing a tar sands lease application covering over 2,000 acres within the Vernal RMP area and the Asphalt Ridge STSA. BLM is not undergoing an ESA section 7(a)(2) consultation process on this lease application.

57. BLM amended three RMPs in Wyoming to designate lands available for oil shale leasing. The Green River RMP governs public lands in southwestern Wyoming and includes the Green River and its tributaries. In the Green River RMP Amendment, BLM designated 210,000 acres as available for oil shale leasing. The Kemmerer RMP governs public lands in southwestern Wyoming. In the Kemmerer RMP Amendment, BLM designated 50,000 acres as available for oil shale leasing. The Rawlins RMP governs public lands in south-central Wyoming. In the Rawlins RMP Amendment, BLM designated 31,745 acres of land as available for oil shale leasing.

58. According to BLM, the following threatened and endangered species and their habitat, including designated critical habitat, occur within or nearby the lands made available in the nine RMP Amendments for oil shale and tar sands leasing: bonytail chub, razorback sucker, humpback chub, Colorado pikeinnow, Mexican spotted owl, San Rafael cactus, Winkler's cactus, Wright fishhook cactus, Pariette cactus, Uinta Basin hookless cactus, Ute Ladies'-tresses, Last Chance townsendia, Barneby reed-mustard, shrubby reed mustard, clay reed mustard, Maquire daisy, Dudley-bluffs twinpod, Dudley-bluffs bladderpod, Jones cycladenia, Navajo sedge, blowout penstemon, and Colorado butterfly plant.

CLAIM FOR RELIEF

(Violation of the ESA Section 7(a)(2) Against BLM -- Failure to Initiate and Complete Consultation on Nine RMP Amendments)

59. Each and every allegation set forth in this complaint is incorporated herein by reference.

60. BLM's nine RMP Amendments are "agency actions" within the meaning of ESA, section 7(a)(2), 16 U.S.C. § 1536(a)(2). ESA regulations define agency actions as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies. 50 C.F.R. § 402.02. Agency actions include "the promulgation of regulations" and actions "directly or indirectly causing modifications to land, water or air." Id. BLM's RMP Amendments implement EPA's requirement that BLM "make available" some public lands for oil shale and tar sands leasing. 42 U.S.C. § 15927(c). Each of the nine RMP Amendments designates public lands available for oil shale and/or tar sands leasing. The nine RMP Amendments authorize oil shale and tar sands leasing on 810,000. Through the RMP Amendments, BLM excluded lands from oil shale and tar sands leasing. Public lands are not available for oil shale or tar sands leasing absent designation in the RMP Amendments. In the RMP Amendments, BLM restricted to size of new oil shale leases to 160 acres. According to BLM, the RMP Amendments facilitate development of oil shale deposits by requiring RD&D leases on 160 acres.

61. BLM has determined that "[a]pproval of a resource management plan is considered a major Federal action significantly affecting the quality of the human environment." 43 C.F.R. § 1601.0-6. BLM prepared an EIS under NEPA in connection with the RMP Amendments. In the 2012 EIS, BLM evaluated designating as available

different acreage amounts for oil shale and tar sands leasing. BLM evaluated the potential impacts of oil shale and tar sands leasing in its EIS. BLM determined that oil shale and tar sands leasing on 810,000 acres of public lands may result in significant impacts to the environment.

62. In approving the RMP Amendments, BLM undertook steps to comply with section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, and its regulations at 36 C.F.R. § 800 *et seq.* The NHPA Section 106 process applies to federal agency “undertakings.” 16 U.S.C. § 470w(7); 36 C.F.R. § 800.16(y). The RMP Amendments are agency undertakings.

63. BLM determined that its 2008 “revisions” to the Utah RMPs required compliance with ESA section 7(a)(2). BLM initiated and completed ESA consultation on its 2008 revisions to the Utah RMPs. FWS issued a biological opinion on the Utah RMP revisions.

64. Each of the nine RMP Amendments may affect endangered species, threatened species, or critical habitat of these listed species within the “action area.” The term “may affect” means “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character.” 51 Fed. Reg. 19,926, 19,949 (June 3, 1986). As defined by ESA regulations, “action area” includes all areas affected “directly or indirectly” by the agency action and not “merely the immediate area involved in the action.” 50 C.F.R. § 402.02. Indirect effects are “those that are caused by the proposed action and are later in time, but still are reasonably foreseeable.” *Id.* BLM and FWS must use the best available scientific and commercial data available in an ESA consultation process. 16 U.S.C. § 1536(a)(2).

65. Threatened and endangered species and their critical habitat occur on the lands that BLM designated as available for oil shale and tar sands leasing in the RMP Amendments. Threatened and endangered species and their critical habitat occur on lands and within waters indirectly affected by the RMP Amendments. Strip mining on the oil shale and tar sands leases and related activities necessary to procedure a crude oil on these leases or nearby are direct and/or indirect effects of the RMP Amendments.

65. BLM found that the nine RMP Amendments may affect endangered species, threatened species and/or their critical habitat. In its programmatic EIS for all nine RMP Amendments, BLM determined that oil shale and tar sands leasing on lands designated as available have the “potential for negative impacts” to listed species and their critical habitat. BLM found that lands designated for oil shale and tar sands leasing are occupied by listed species or contain designated critical habitat. BLM identified measures to mitigate adverse impacts to endangered and threatened species from the RMP Amendments and EPAct program. The RMP Amendments will result in water depletions. Significant amounts of water are necessary to develop oil shale and tar sands on BLM’s public lands in Colorado, Utah and Wyoming. According to BLM, the processes necessary to convert bitumen and kerogen to crude oil require more than one gallon of water per gallon of oil produced. The RMP Amendments will result in water pollution. Runoff from strip mining within the Colorado River watershed will increase sediment loads and salinity levels in the rivers and creeks. Runoff from strip mining within the Colorado River watershed will wash contaminants into rivers and creeks. Contaminants exposed through strip mining and waste stockpiles may leach into shallow groundwater aquifers.

66. The nine RMP Amendments cover lands within the Colorado River watershed. The Colorado River watershed supports the continued survival of the four endangered fish species in the Colorado River Basin (the bonytail chub, Colorado Pikeminnow, razorback sucker, and humpback chub). FWS designated critical habitat for these four Colorado River fish throughout the Colorado River watershed. By designating lands available for oil shale and tar sands leasing, BLM has taken an action that will cause water withdrawals and contamination. Reduced water supply and degraded water quality will adversely affect the continued survival and recovery of the four endangered fish species in the Colorado River Basin.

67. BLM's decision in the Richfield, Price, and Monticello RMP Amendments to designate lands as available for oil shale and tar sands may affect the Mexican spotted owl. The Mexico spotted owl occurs on the lands made available by these RMP Amendments and on lands within the action area of the RMP Amendments. Mexico spotted owl critical habitat occurs on the lands made available by these RMP amendments and on lands within the action area of the RMP Amendments.

68. Three ESA-listed plants - Dudley Bluffs bladderpod, Dudley Bluffs twinpod and Ute Ladies'-tresses orchid – occur on lands designated as available for oil shale leasing in the White River RMP Amendment or within the action area of the White River RMP Amendment. The White River RMP Amendment may affect the Dudley Bluffs bladderpod, Dudley Bluffs twinpod and Ute Ladies'-tresses orchid.

69. Two ESA-listed plant - Dudley Bluffs bladderpod and Dudley Bluffs twinpod - occur on lands designated as available to oil shale leasing by the Grand Junction RMP Amendment, or within the action area of the Grand Junction RMP

Amendment. The Grand Junction RMP Amendment may affect the Dudley Bluffs bladderpod and Dudley Bluffs twinpod.

70. Six ESA-listed plants - Pariette cactus, shrubby reed-mustard, clay reed-mustard, Barneby reed mustard, Ute Ladies'-tresses, and Uinta Basin hookless cactus - occur on lands designated as available to oil shale and tar sands leasing by the Vernal RMP Amendment, or within the action area of the Vernal RMP Amendment. The Vernal RMP Amendment may affect the Pariette cactus, shrubby reed-mustard, clay reed-mustard, Barneby reed mustard, Ute Ladies'-tresses, and Uinta Basin hookless cactus.

71. Five ESA-listed plants – San Rafael cactus, Winkler’s cactus, Wright fishhook cactus, Last Chance Townsendia, and Barneby reed-mustard -- occur on lands designated as available to oil shale and tar sands leasing by the Richfield RMP Amendment, or within the action area of the Richfield RMP Amendment. The Richfield RMP Amendment may affect the San Rafael cactus, Winkler’s cactus, Wright fishhook cactus, Last Chance Townsendia, and Barneby reed-mustard.

72. One ESA-listed plant – Navajo sedge -- occurs on lands designated as available to oil shale and tar sands leasing by the Monticello RMP Amendment, or within the action area of the Monticello RMP Amendment. The Monticello RMP Amendment may affect the Navajo sedge.

73. Ten ESA-listed plants -- shrubby reed-mustard, clay reed-mustard, Barneby reed-mustard, Uinta Basin hookless cactus, San Rafael cactus, Winkler cactus, Wright fishhook cactus, Maguire daisy, Jones cycladenia, and Last Chance townsendia -- occur on lands designated as available to oil shale and tar sands leasing by the Price RMP Amendment, or within the action area of the Price RMP Amendment. The Price RMP

Amendment may affect the shrubby reed-mustard, clay reed-mustard, Barneby-reed mustard, Uinta Basin hookless cactus, San Rafael cactus, Winkler cactus, Wright fishhook cactus, Maguire daisy, Jones cycladenia, and Last Chance townsendia.

74. Three ESA-listed plants – Blowout penstemon, Ute’s Ladies’-tresses and Colorado butterfly plant -- occur on lands designated as available to oil shale and tar sands leasing by the Rawlins RMP Amendment, or within the action area of the Rawlins RMP Amendment. The Rawlins RMP Amendment may affect the Blowout penstemon, Ute’s Ladies’-tresses and Colorado butterfly plant.

75. One ESA-listed plant – Ute Ladies’-tresses -- occurs on lands designated as available to oil shale and tar sands leasing by the Kemmerer RMP Amendment, or within the action area of the Kemmerer RMP Amendment. The Kemmerer RMP Amendment may affect the Ute Ladies’-tresses.

76. Two ESA-listed plants – Ute Ladies’-tresses and blowout penstemon -- occur on lands designated as available to oil shale and tar sands leasing by the Green River RMP Amendment, or within the action area of the Green River RMP Amendment. The Green River RMP Amendment may affect the Ute Ladies’-tresses and blowout penstemon.

77. In March 2013, BLM amended the Price, Vernal, Monticello and Richfield RMPs in Utah, the White River and Grand Junction RMPs in Colorado, and the Green River, Kemmerer, and Rawlins in Wyoming. BLM completed these nine RMP Amendments without undergoing ESA section 7(a)(2) consultation. BLM failed to prepare a biological assessment. BLM failed to provide a list of species found in the action area of each of the nine RMP Amendments.

78. Accordingly, BLM violated Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by failing to initiate and complete consultation with FWS, including the failure to prepare a biological assessment and request a list of species from FWS, before issuing the nine RMP Amendments. BLM is also violating Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), by failing to insure that the nine RMP Amendments are not likely to jeopardize the continued existence of any threatened or endangered species, or result in the destruction or adverse modification of their critical habitat. BLM's failure to initiate and complete ESA section 7(a)(2) consultation before completing and approving the nine RMP Amendments constituted agency actions unlawfully withheld and/or unreasonably delayed under the APA. 5 U.S.C. § 706(1). By not initiating and completing ESA section 7(a)(2) consultation on the nine RMPs Amendments and not insuring against jeopardizing listed species or adverse modification of critical habitat, BLM's nine RMP Amendments are agency actions that are arbitrary, capricious, an abuse of discretion, and not in accordance with law, without observance of procedure required by law, and in excess of statutory jurisdiction, authority, or limitations, within the meaning of the judicial review provisions of the APA. 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Declare that BLM violated the ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), upon approving and issuing the nine RMP Amendments;
- B. Set aside and vacate BLM's nine RMP Amendments;
- C. Order BLM to initiate and complete formal consultation under ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), with FWS before the nine RMP Amendments are

adopted and implemented;

D. Enjoin BLM from issuing any oil shale or tar sands leases or development approvals under the nine RMP Amendments;

E. Award to Plaintiffs their costs, expenses, expert witness fees, and reasonable attorney fees pursuant to ESA, 16 U.S.C. § 1540, and the Equal Access to Justice Act, 28 U.S.C. § 2412; and

F. Grant Plaintiffs such further relief as may be just, proper, and equitable.

Respectfully submitted,

July 25, 2013

/s/ Neil Levine

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