



February 26, 2019

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Re: Sixty-day notice of intent to sue to remedy violations of the Endangered Species Act in connection with section 7 consultation for the Enefit American Oil Utility Corridor Project

Dear Ms. Everson, Mr. Bernhardt, Ms. Walsh, Mr. Nedd, Mr. Crist, and Mr. Bankert:

On behalf of the Grand Canyon Trust, Center for Biological Diversity, Sierra Club, Natural Resources Defense Council, Living Rivers and Colorado Riverkeeper, Waterkeeper Alliance, and Utah Physicians for a Healthy Environment, in accordance with the citizen suit provision of the Endangered Species Act (ESA), 16 U.S.C. § 1540(g), we hereby provide notice that we intend to file a civil action against the U.S. Fish and Wildlife Service (FWS) and Bureau of Land Management (BLM) for violating section 7 of the ESA, 16 U.S.C. § 1536, and its implementing regulations, 50 C.F.R. Part 402, in connection with BLM's approval of five rights-of-way over federal public lands to Enefit American Oil and Moon Lake Electric Association (collectively, "Enefit"). Enefit plans to construct and operate the nation's first commercial-scale oil shale mining and processing facility. BLM's approval will enable Enefit's oil shale operations by allowing the company to construct three pipelines and two transmission lines across federal public lands that will supply utilities to, and move processed oil from, the

proposed oil shale facility. (BLM refers to the five rights-of-way collectively as the “Utility Project.”)

FWS and BLM’s consultation on the Utility Project violated the ESA because BLM’s May 4, 2018 biological assessment (BA) and FWS’s July 19, 2018 biological opinion (BiOp) failed to adequately analyze how BLM’s approval of the rights-of-way—including indirect effects, the effects of interrelated or interdependent actions, and cumulative effects—would affect four endangered fish species, two rare plant species, and their critical habitat. Most notably, the water pipeline approved by BLM will enable removal of up to 10,867 acre-feet per year (afy) of water from the Green River, for use at Enefit’s oil shale facility. This massive new diversion from the Green River would severely harm four endangered Upper Colorado River fish species and their critical habitat. But remarkably, FWS’s consultation on BLM’s approval did not consider this diversion as an effect of approving the pipeline, or even mention it.

In addition, the rights-of-way and Enefit’s oil shale operations would destroy a significant portion of the remaining critical habitat for two imperiled plant species, the Graham’s penstemon and White River penstemon (also known as beardtongues), which FWS has previously proposed for listing under the ESA.

Because of these ESA violations, FWS and BLM must undertake a new consultation and halt all Utility Project activities until the agencies fully analyze whether BLM’s action is likely to jeopardize the four endangered Upper Colorado River fish species and the two penstemon species, or destroy or adversely modify their habitat. If the agencies fail to take the actions required by law, we intend to file suit once the 60-day notice period has run.

BACKGROUND

I. ESA requirements

A. Section 7 consultation requirements

Section 7(a)(2) of the ESA prohibits federal agencies from undertaking 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, “directly or indirectly,” 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” is defined as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.” *Id.*

To enable compliance with section 7’s substantive mandate, the ESA and its implementing regulations impose specific procedural duties on federal agencies, requiring an “action agency”—in this case, BLM—to consult with FWS before undertaking any “action” that “may affect” a listed species or its designated critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). An “action” includes “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies,” in which there is “discretionary Federal

involvement or control.” 50 C.F.R. §§ 402.02, 402.03. The “may affect” threshold for consultation under section 7(a)(2) is low, and is triggered by “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character.” *Nat’l Parks Conservation Ass’n v. Jewell*, 62 F. Supp. 3d 7, 13 (D.D.C. 2014) (quoting 51 Fed. Reg. 19,926, 19,949–50 (June 3, 1986)). FWS and the action agency must use the best scientific and commercial data available throughout the consultation process. 16 U.S.C. § 1536(a)(2).

For actions that are “major construction activities,” the action agency must first prepare a BA. 50 C.F.R. § 402.12(b). The BA “shall evaluate” the potential “effects of the action” on listed and proposed species and designated and proposed critical habitat within the “action area” and determine whether any such species or habitat are “likely to be adversely affected by the action.” *Id.* § 402.12(a), (c). “Effects of the action” are defined as “the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action.” *Id.* § 402.02. “Indirect effects” are those that are “caused by the proposed action and are later in time, but still are reasonably certain to occur.” *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.* Finally, “action area” is defined as “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” *Id.*

Depending on the degree of anticipated effects determined in the BA, there are two types of consultation. Informal consultation is sufficient if the action agency determines, with FWS’s written concurrence, that the proposed action “may affect,” but is “not likely to adversely affect” the species or its critical habitat. *Id.* §§ 402.13(a), 402.14(b)(1). If informal consultation or the BA conclude that the proposed action “may affect” a listed species or its critical habitat, the action agency must initiate formal consultation with FWS. *Id.* § 402.14(a). During the consultation process, the action agency may not make any irreversible or irretrievable commitments of resources. 16 U.S.C. § 1536(d).

Formal consultation is completed when FWS issues a BiOp determining whether the proposed action, taken together with its cumulative effects, is “likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.” 50 C.F.R. § 402.14(g)(4). The BiOp must include a “detailed discussion of the effects of the action on listed species or critical habitat.” *Id.* § 402.14(h)(2). The BiOp can either find (1) no jeopardy or no adverse modification; (2) that the action will cause jeopardy or adverse modification but such jeopardy or adverse modification can be avoided by implementing certain reasonable and prudent alternatives to the proposed action as designed; or (3) that jeopardy or adverse modification is unavoidable and thus the action cannot proceed. *Id.* § 402.14(h)(3). The BiOp’s finding must be based on FWS’s independent analysis of the “action area,” the “effects of the action”—including the action’s “indirect effects” and effects of “interrelated or interdependent” activities—and the “cumulative effects” on listed species or critical habitat. *Id.* §§ 402.02, 402.14(g); *see also* FWS, Endangered Species Consultation Handbook at 4-15 (Mar. 1998) (Ex. 1) (noting that FWS can disagree with BLM’s delineation of the action area). If FWS issues a BiOp that does not adequately evaluate the effects of the action and cumulative effects on listed species and critical habitat, then FWS’s “opinion on whether the action is likely to

jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat” is factually and legally flawed. *See* 50 C.F.R. § 402.14(h)(3). In such instances, the BiOp would fail to adequately assess whether the proposed action was likely to jeopardize listed species. *See Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988).

If FWS issues a BiOp finding no jeopardy or no adverse modification, or finding that jeopardy or adverse modification can be avoided by implementing reasonable and prudent alternatives, but determines that the action may incidentally “take” individual members of a listed species, the agency must issue an incidental take statement (ITS). 16 U.S.C. §§ 1532(19), 1536(b)(4)(A), (B); 50 C.F.R. §§ 402.14(g)(7), 402.14(i)(1). An ITS must specify the impact of incidental take on the species, “reasonable and prudent measures” that FWS considers necessary to minimize that impact, and terms and conditions to implement those measures. 16 U.S.C. § 1536(b)(4)(i)–(iv). “Take” that complies with the ITS’s terms and conditions is not prohibited. *Id.* § 1536(o)(2). But without a lawful BiOp and ITS, any activity likely to result in incidental take is unlawful. *Id.* §§ 1536(o)(2), 1538(a)(1)(B). Finally, BLM must reinstate consultation if the specified level of take in the ITS is exceeded, or if new information or a modification to the action indicates previously unexamined effects. 50 C.F.R. §§ 402.14(i)(4), 402.16.

The ESA allows citizen suits to enjoin any person, including government agencies, alleged to be in violation of any provision of the ESA. 16 U.S.C. § 1540(g)(1)(A).

B. Upper Colorado River Basin-specific consultation requirements

The Upper Colorado River Basin is home to four endangered fish species: the Colorado pikeminnow, razorback sucker, humpback chub, and bonytail chub. One of the principal threats to these four fish species is habitat loss and reduction in historic range due to water diversions throughout the Basin. 58 Fed. Reg. 6,578, 6,579 (Jan. 29, 1993). In 1987, FWS determined, based on more than 100 BiOps issued over the course of a decade, that a jeopardy situation exists for the four endangered fish species. FWS, Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin at 1-3 to 1-6 (Sept. 29, 1987) (Ex. 2). Recognizing that any new depletion to the Upper Colorado River Basin would result in FWS issuing a “jeopardy” BiOp, *see id.*, numerous stakeholders—including federal agencies, three states, water users, and conservation groups—created the Upper Colorado River Basin Recovery Implementation Program (RIP). The program is intended to permit new water developments to proceed, while sufficiently working towards recovering the four endangered fish species to avoid a “jeopardy” determination. *Id.* at 1-6; *see also* Reed D. Benson, *Avoiding Jeopardy, Without the Questions: Recovery Implementation Programs for Endangered Species in Western River Basins*, 2 Mich. J. Env’tl. & Admin. L. 473, 473, 476–77 (2013). The Upper Colorado River RIP’s long-term recovery plan, called the Recovery Action Plan (RIPRAP), “identifies specific actions and time frames currently believed to be required to recover the endangered fishes in the most expeditious manner in the upper basin.” Upper Colo. River Endangered Fish Recovery Program, *Recovery Implementation Program Section 7 Consultation, Sufficient Progress, and Historic Projects Agreements and Recovery Implementation Program Recovery Action Plan* (RIPRAP) at ii (May 17, 2018) (Ex. 3).

The activities and accomplishments included in the RIPRAP are intended to provide the reasonable and prudent alternatives for projects undergoing section 7 consultation based on their water depletions to the Upper Colorado River Basin. Use of these reasonable and prudent alternatives is meant to prevent water depletions from jeopardizing the endangered fish species or destroying or adversely modifying their critical habitat. *Id.* at iv–v. In performing consultations on depletion impacts related to new projects, FWS must “assess the impacts of projects that require Section 7 consultation and determine if progress toward recovery has been sufficient for the RIP to serve as a reasonable and prudent alternative.” *Id.* at vi. If sufficient progress is being achieved, BiOps for water depletions must “identify the activities and accomplishments of the RIP that support it serving as a reasonable and prudent alternative.” *Id.* And if FWS determines that sufficient progress is not being achieved, BiOps must “be written to identify which action(s) in the RIPRAP must be completed to avoid jeopardy.” *Id.*

Under the RIPRAP, the magnitude of a water depletion determines the level of consultation and the mitigation measures necessary to ensure the diversion does not jeopardize the four fish species. Relatively small depletions of less than 0.1 afy are allowed to go forward without formal consultation. FWS, Comments on BLM Utility Corridor Project Draft Environmental Impact Statement (DEIS), contained in Final EIS (FEIS) at Appx. I1-27 (Ex. 4). New depletions between 0.1 afy and 100 afy require formal consultation, but are not required to pay a depletion fee. *Id.* at FEIS I1-28. New depletions larger than 100 afy must undergo formal consultation and pay a one-time depletion fee based on a fixed, annually inflation-adjusted rate. *Id.* The depletion fee is currently \$21.61 per acre-foot. Upper Colorado River RIPRAP at 4 (Ex. 3). The depletion fee funds recovery actions that are intended to protect and improve endangered fish populations and their habitats. For a new depletion greater than 4,500 afy, which is the case with the Utility Project and the Enenefit oil shale mining and processing facility, the project must not only undergo formal consultation and pay the depletion fee, but also the formal consultation process must identify other necessary mitigation measures. FWS DEIS Comments at FEIS Appx. I1-28 (Ex. 4); FWS, Abbreviated Assessment of Sufficient Progress Under the Upper Colorado River Endangered Fish Recovery Program at 23 (Dec. 19, 2018) (Ex. 5) (“Projects exceeding 4,500 acre-feet or that have direct or indirect effects in addition to water depletion will be evaluated to determine if they jeopardize the species’ continued existence on a case-by-case basis.”).

C. Species proposed for listing under the ESA

Distinct from the consultation requirement of section 7(a)(2), which applies to listed species, section 7(a)(4) mandates that an action agency shall “confer” with FWS on any action that is “likely to jeopardize the continued existence” of any “species proposed to be listed” or “likely to result in the destruction or adverse modification of critical habitat proposed to be designated for such species.” 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10. A “proposed species” is any species of fish, wildlife, or plant that is proposed in the Federal Register to be listed under section 4 of the ESA. 50 C.F.R. § 402.02.

The action agency’s BA “is used in determining whether . . . a conference is necessary” for a species proposed for listing. *Id.* § 402.12(a). The ESA requires that the BA “shall evaluate,” in addition to listed species, the potential “effects of the action” on proposed species

or proposed critical habitat that may be present within the “action area” and determine whether any such proposed species or habitat are “likely to be adversely affected by the action.” 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.02, 402.12(a). If the BA determines that the proposed action is likely to jeopardize the continued existence of a proposed species or to destroy or adversely modify proposed critical habitat, BLM must “confer” with FWS. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10. If a conference is required, FWS will make advisory recommendations, if any, on ways to minimize or avoid adverse effects of the action that would impact the proposed species or proposed critical habitat. 50 C.F.R. § 402.10(c). When FWS is preparing a BiOp for the proposed action, FWS’s conclusions and recommendations regarding the proposed species or critical habitat should be included in the BiOp. *Id.* § 402.10(e). If the BA indicates that the proposed action is “not likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat,” and FWS concurs, then a conference is not required. *Id.* § 402.12(k)(1).

II. Factual background

A. Enefit’s plan for oil shale mining and processing

Enefit plans to construct and operate the nation’s first commercial-scale oil shale facility, known as the “South Project,” on private land in northeastern Utah. Enefit’s oil shale facility would consist of a 9,000-acre oil shale strip mine, plus a large processing plant to “retort” and “upgrade” raw oil shale into synthetic crude oil. In 2012 and 2013, Enefit requested that BLM approve five rights-of-way over federal public lands to supply its facility with utilities and deliver the processed oil to market, Enefit intends to use the Utility Project rights-of-way to build 19 miles of water pipeline, 9 miles of natural gas pipeline, 11 miles of oil delivery pipeline, two 138-kV transmission lines, and upgrade an access road. BLM’s consideration of these right-of-way applications triggered its duty to consult with FWS under ESA section 7.

Oil shale mining and processing consumes significant amounts of water. Enefit intends to divert up to 10,867 afy from the Green River and deliver it to its facility through a water pipeline that would cross federal public lands. *See* FEIS at 4-111. This would be a substantial depletion of the Upper Colorado River Basin, at a time of increased aridity and reduced flows due to climate change. Indeed, FWS personnel reviewing the Utility Project apparently have “never seen any project that uses this much water” and had a “hard time getting their head around” such a large diversion. Email from Kelly Buckner, BLM, to Deborah Brown, BLM (Oct. 13, 2016) (Ex. 6). Consistent with these comments, FWS’s tabulation of new depletions for water projects shows that Enefit’s proposed depletion would be the largest new depletion from the Green River in more than 25 years. FWS, Section 7 Consultations For Water Depletions in the Upper Colorado River After Recovery Implementation Program Initiation (January 1988) (Through Jan. 17, 2018) (Ex. 7). Enefit’s up-to-10,867 afy depletion would reduce the Green River’s flow, degrade downstream water quality, and have potentially severe impacts on the four protected fish species.

In addition to water depletion, water pollution is also a reasonably certain effect of BLM’s approval. For instance, a spill from the oil product or natural gas pipelines, which are slated to cross the White River and several of its tributaries, would be extremely harmful to the

listed fish species. Further still, leachate and sedimentation stemming from the oil shale facility's production of millions of tons of waste rock could adversely affect the fish species. *See* FEIS at 4-113 to 4-114.

The rights-of-way and Enefit's oil shale facility will also impact the two penstemon species proposed for listing, and their proposed critical habitat. FWS proposed listing these two species as threatened or endangered in 2013, based on threats to their habitat from energy development. 78 Fed. Reg. 47,590 (Aug. 6, 2013). FWS concurrently proposed critical habitat designations. 78 Fed. Reg. 47,832 (Aug. 6, 2013). One year later, FWS withdrew the proposal for listing based on the issuance of a voluntary Conservation Agreement (which excludes the proposed oil shale facility site). 79 Fed. Reg. 46,042 (Aug. 6, 2014). In 2016, a federal court overturned FWS's decision not to list the penstemons and reinstated the listing proposal and critical habitat proposal. *Rocky Mountain Wild v. Walsh*, 216 F. Supp. 3d 1234, 1257 (D. Colo. 2016). The court concluded that it was arbitrary and capricious for FWS to determine in 2013 that existing regulatory mechanisms were insufficient, and then to reverse course in 2014 and claim "that there was no longer a threat from inadequate regulatory mechanisms because still-to-come regulatory mechanisms were somehow already 'existing.'" *Id.* at 1253. Following the court's entry of final judgment, the two penstemon species remain "proposed species," which rely on "proposed critical habitat." *See* 50 C.F.R. § 402.02. The proposed critical habitat for the two penstemon species totals 75,846 acres, and includes parcels within the proposed oil shale facility. *Rocky Mountain Wild*, 216 F. Supp. 3d at 1256; 78 Fed. Reg. at 47,855 ("Unit 1" of White River penstemon proposed critical habitat). By contrast, the Conservation Agreement protects only 44,373 acres, and its boundaries were drawn to exclude the oil shale project area. *Rocky Mountain Wild*, 216 F. Supp. 3d at 1256; Conservation Agreement and Strategy for Graham's Beardtongue and White River Beardtongue at 17 (map showing conservation area boundaries) (Ex. 8).

Enefit's oil shale operations will overlap 19 percent of all known Graham's penstemons and 26 percent of all known White River penstemons. 78 Fed. Reg. at 47,600. FWS's proposal to list the two penstemons noted the dire impacts this will cause to the two penstemon species: "At worst, all of the Graham's and White River beardtongues growing in this project area will be lost. At best, the Enefit project will fragment habitat and reduce connectivity for both species." *Id.* FWS concluded that the losses caused by the facility and related developments will result in "more isolated populations that are vulnerable to extinction." *Id.* (emphasis added).

B. ESA consultation process

i. BLM's biological assessment

On May 4, 2018, shortly before it issued the FEIS, BLM issued its BA for the Utility Project, along with a Request to Initiate Section 7 Consultation and Conference. BLM requested formal consultation for the four endangered Upper Colorado River fish species. It also requested FWS's concurrence with its determination that the Utility Project was not likely to jeopardize the Graham's and White River penstemons. The BA limits its analysis to the impact on listed species and proposed species from the rights-of-way. The BA does not analyze how the Enefit oil shale facility would impact listed species. BLM explained that the BA did not analyze these

impacts because the oil shale facility “does not meet the definition of an interrelated or interdependent action to the Utility Project (the [oil shale facility] will occur regardless of the BLM’s decision on the Utility Project),” and because “approval or disapproval of the [oil shale facility] is outside the BLM’s authority as it is located entirely on private lands and minerals.” BA at 2 (Ex. 9).

a) Impacts to fish species

The BA notes that BLM’s approval of the Utility Project would cause three direct and indirect effects to the four endangered Upper Colorado River fish species: (1) impacts related to the 8.56 acre-foot diversion from the Green River required for Utility Project construction and testing, (2) accidental chemical or product spills, and (3) increased sedimentation and leachate from construction activities. *Id.* at 63–64. The BA concludes that an 8.56 acre-foot depletion and the risk of pipeline spills and increased sedimentation would likely adversely affect the four endangered fish species, but that these indirect effects would be mitigated by various best management practices and conservation measures. *Id.* at 66. The BA also acknowledges that the right-of-way BLM granted for construction of a water pipeline will allow Enefit to divert over 10,000 afy of water from the Green River, and to transport that water across federal public lands. *Id.* at 64. Because the water right has not yet been perfected, this 10,867 afy withdrawal will be “considered a new depletion (not historic) and thus require[s] formal consultation with the FWS and payment of a one-time depletion fee at the current rate.” *Id.* at 64. Moreover, because the anticipated depletion will exceed 4,500 afy, “additional [RIPRAP] actions may be necessary.” *Id.* The BA concludes that “[t]he need for additional [RIPRAP] actions will be determined during the Section 7 consultation process.” *Id.* (emphasis added).

In the cumulative impacts section, the BA acknowledges the 10,867 afy diversion as a reasonably foreseeable future action, but it does not analyze how this diversion would cumulatively affect the listed fish species. *Id.* at pdf p. 98.¹ BLM omitted this analysis from the BA because it claimed the Utility Project “would not contribute meaningfully to cumulative effects of water withdrawal on th[ese] species,” and Enefit would construct the oil shale facility regardless of whether BLM approved the Utility Project. *Id.* at pdf p. 99. Instead, the cumulative impacts analysis attempts to minimize the impact of this depletion by claiming without support that the Green River can “easily accommodate” a 10,867 afy diversion. *Id.*

b) Impacts to penstemons

The BA states that Enefit has cooperated with FWS, BLM, and other stakeholders as part of the Conservation Agreement for the two candidate penstemon species. The BA does not anticipate that the Utility Project will have direct impacts on penstemons, because no individuals were found in the Utility Project area. It also states that Enefit intends to comply with the Conservation Agreement during the implementation of the Utility Project. *Id.* at 27. However, the BA does not acknowledge the severe impacts that Enefit’s oil shale facility would have on penstemons.

¹ The BA’s pagination appears to have been inadvertently omitted after page 70. Accordingly, this letter provides citations to the PDF page number for citations after page 70 of the BA.

Specifically, the lands on which Enefit plans to site its oil shale mining and processing operations are home to approximately 15 percent and 24 percent of all known Graham's and White River penstemon populations. 79 Fed. Reg. at 46,076. FWS has determined that the two penstemon species are vulnerable to extinction if just 21 percent and 26 percent of their known populations are destroyed. 78 Fed. Reg. at 47,600. Despite this obvious threat to the penstemon species, BLM claimed that the conservation agreement will mitigate impacts to the species. FEIS at 2-35; BA at pdf p. 94 (Ex. 9). However, the areas covered by the Conservation Agreement were drawn to exclude the Enefit oil shale facility site. *See Rocky Mountain Wild*, 216 F. Supp. 3d at 1256 n.13; *see also* Conservation Agreement and Strategy for Graham's Beardtongue and White River Beardtongue at 17 (map showing conservation area boundaries) (Ex. 8). Considering only the direct impacts of the Utility Project, the BA concludes that "[b]ased on the application of ACEPMs [applicant-committed environmental protection measures], BLM mitigation measures, and compliance with the [Conservation] Agreement, the proposed action is not likely to jeopardize the continued existence of the species and is not likely to destroy or adversely modify proposed critical habitat for either species." BA at 59 (Ex. 9). The BA does not discuss indirect or cumulative impacts to the penstemon species from implementation of the oil shale project.

ii. FWS's biological opinion

FWS issued a six-page BiOp for the Utility Project on July 19, 2018. The BiOp repeats without analysis the BA's assertion that the Utility Project is not likely to jeopardize the continued existence of the two penstemon species, and is not likely to adversely modify critical habitat for either species. BiOp at 1 (Ex. 10).

The BiOp largely focuses on how BLM's approval of the rights-of-way will affect the four endangered Upper Colorado River fish species. However, it avoids mentioning that one component of the proposed action, the water pipeline, will transport 10,867 afy of water from the Green River to the Enefit oil shale facility. Instead, the BiOp only analyzes the effects on the four species from the 8.56 acre-feet depletion required for construction and maintenance of the Utility Project. *See, e.g., id.* at 2 ("The Applicants seek authorization for a water depletion of 8.56 acre-feet from the Green River, for construction purposes."). Not surprisingly, FWS found that this 8.56 acre-foot depletion is minimal relative to the Green River's annual flow. *Id.* at 4. FWS concluded that the 8.56 acre-foot depletion is likely to adversely affect the four endangered fish species, but that the RIPRAP program adequately addresses these harms. *Id.* at 5. FWS also waived the RIPRAP depletion fee for the project, as diversions less than 100 acre-feet are exempt from the depletion fee. *Id.* at 3.

ESA VIOLATIONS

I. FWS's BiOp was arbitrary, capricious, and not in accordance with the ESA because it failed to analyze the Utility Project's indirect effects, the effects of interdependent and interrelated actions, and cumulative effects.

BLM's decision to approve the rights-of-way for Enefit's oil shale facility will allow Enefit to construct and operate a water pipeline that will cross federal public lands. This water pipeline will transport up to 10,867 afy of water from the Green River to the oil shale facility. FWS's BiOp, however, did not analyze how this large, new depletion would affect the four endangered Upper Colorado River fish species and their critical habitat. The BiOp did not even mention that the intended operation of the proposed pipeline would result in a massive water withdrawal of the Green River. Nor did it mention the possibility of Enefit paying the RIPRAP depletion fee, or of possible "additional RIPRAP actions [that] may be necessary" because the planned depletion exceeds 4,500 afy. *See* FWS DEIS Comments at FEIS Appx. 11-28 (Ex. 4). Instead, FWS's BiOp analyzed only the 8.56 acre-foot depletion that is required to upgrade the road, construct the transmission lines, and construct and test the pipelines. BiOp at 2 (Ex. 10).²

The up-to-10,867 afy depletion is an indirect effect of BLM's approval of the water pipeline right-of-way. It is also an interdependent and interrelated action, or alternatively a cumulative effect of the proposed action. FWS's failure to analyze whether this depletion is likely to jeopardize the four endangered fish species or adversely modify their critical habitat renders the BiOp arbitrary, capricious, and not in accordance with the ESA. In addition, the BiOp is flawed because it failed to analyze how pipeline spills, and the oil shale facility's sedimentation and leachate, will affect the four endangered fish species.

A. The up-to-10,867 afy depletion of the Green River is an indirect effect of the Utility Project.

The ESA and its implementing regulations require a BiOp to evaluate the "effects of the action," which include the action's "indirect effects." 50 C.F.R. §§ 402.02, 402.14(g). An "indirect effect" is (1) "caused by the proposed action," (2) occurs later in time than the action, and (3) is reasonably certain to occur. *Id.* § 402.02; *see also San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 1009 (9th Cir. 2014). The up-to-10,867 afy depletion of the Green River satisfies all three elements, and thus the depletion is an indirect effect that FWS should have analyzed in the BiOp.

First, BLM's approval of the rights-of-way will cause the up-to 10,867 afy depletion to the Green River, as this depletion would not otherwise be possible. The Utility Project will allow Enefit to construct and operate a water pipeline through which Enefit will transport the Green River water for use at the oil shale facility. *See, e.g.,* BA at pdf p. 92 (Ex. 9) ("[W]ater would be supplied directly to the [oil shale facility] via new, dedicated pipelines."). According to BLM, if it denied the right-of-way for the water pipeline, Enefit would obtain water for its oil

² The BiOp did not discuss incidental take and did not include an ITS. Accordingly, any incidental take resulting directly or indirectly from the Utility Project is unlawful.

shale operations from other sources, such as groundwater pumping or trucked water deliveries. BLM's BA and FEIS plainly state: "Without the BLM-authorized water pipeline, the South Project would require the construction of an additional multi-well array, onsite holding tanks, and water treatment facilities on private lands." *Id.* at 4 n.2; FEIS at 2-1; *see also* BLM, FEIS Comment Responses at 6 (Ex. 11) (claiming that Enefit would most likely employ groundwater pumping if BLM denies the Utility Project). Specifically, the FEIS notes that if BLM denies the rights-of-way, Enefit would seek to pump groundwater through several of the existing monitoring wells across the oil shale project area. FEIS at 4-165.

Obtaining the up-to-10,867 acre-feet of water needed for Enefit's oil shale operations through groundwater wells located more than thirty miles away from the proposed action's point of surface diversion on the Green River would have dramatically different impacts in the timing, location, and amount of depletions to the Green River, with correspondingly different impacts on the four endangered fish species. *See* Map 2-2: Green River Water Intake Location, BA at pdf p. 110; FEIS at 2-9 (showing proposed Green River surface water point of depletion more than 30 miles from the oil shale project area) (Ex. 12). Accordingly, if BLM denied the rights-of-way and Enefit were to nonetheless proceed with its planned oil shale operations, Enefit's asserted alternative means of procuring water would result in substantially different impacts to the four endangered fish species. Thus, BLM's approval of the water pipeline right-of-way is the cause of the up-to-10,867 afy depletion from the Green River.

Second, this depletion will occur after BLM approves the rights-of-way and Enefit constructs the water pipeline. FEIS at 2-31 ("All utility corridor construction is anticipated to be complete prior to startup and commissioning of the South Project."). Indeed, the depletion of the Green River will occur every year over the 30-year life of the Enefit's oil shale operations. *See* BA at 3 n.1; FEIS at 4-111.

Third, the up-to-10,867 afy depletion is reasonably certain to occur. The entire reason Enefit requested the water pipeline right-of-way is to transport water from the Green River to its oil shale operations. The pipeline serves no purpose aside from allowing Enefit to drain water from the Green River. Once BLM grants Enefit the right to construct the water pipeline (via the right-of-way), it is reasonably certain that Enefit will in fact construct the pipeline and divert the water as planned. Notably, this is not the type of case where there is uncertainty about whether an indirect effect is likely to occur based on future actions by third parties, such as when an agency decision to approve a highway could result in other companies constructing stores and residences along the new highway. *See, e.g., Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 373-74 (5th Cir. 1976). When a project proponent requests a right-of-way over federal public lands so it can construct a water pipeline, it is reasonably certain that the proponent will actually build and operate the pipeline as planned.³ There is no basis for any other assumption.

³ *See* FEIS at 1-9 ("The Applicant's goals for the Utility Project are to efficiently supply natural gas, electrical power, water, and other needed infrastructure through one or more utility corridors to produce and deliver shale oil from oil shale mined under the South Project by uninterrupted operation of an economically viable mining, oil shale retorting, and upgrading facility.").

Therefore, because the up-to-10,867 afy depletion to the Green River is an indirect effect of BLM's approval of the Utility Project, FWS's failure to analyze how this depletion will affect the four endangered fish species renders the BiOp arbitrary, capricious, and not in accordance with the ESA. *See* 50 C.F.R. § 402.14(h)(2) (a BiOp "shall include" a "detailed discussion of the effects of the action on listed species or critical habitat").

B. The up-to-10,867 afy depletion of the Green River is an interdependent and interrelated action.

In addition to analyzing the direct and indirect effects of BLM's action approving the rights-of-way, FWS's BiOp must also analyze "the effects of other activities that are interrelated or interdependent with that action." *Id.* §§ 402.02, 402.14. "Interrelated actions" are "part of a larger action and depend on the larger action for their justification." *Id.* § 402.02. "Interdependent actions" have "no independent utility apart from the action under consideration." *Id.* In determining whether an action is interrelated or interdependent, a "but-for" causation test applies, which asks "whether [the] activity in question would occur 'but for' the proposed action under consultation." FWS, *Endangered Species Consultation Handbook* at 4-27 (Ex. 1); *see also Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987).

Enefit's plan to divert up to 10,867 afy of water from the Green River for use at its oil shale facility is an interrelated and interdependent activity to the Utility Project. BLM's BA unambiguously states that if BLM were to deny the Utility Project, Enefit would not divert the water from the Green River at the proposed points of diversion. BA at 2. Instead, Enefit claims it would obtain the water necessary for its oil shale facility from groundwater wells located more than thirty miles from the proposed points of surface water diversion on the Green River. But for BLM's approval of the Utility Project, the proposed depletion to the Green River will not occur; any alternate withdrawal would deplete the Green River in a different time, place, and amount, if at all. Thus, the up-to-10,867 afy depletion to the Green River is an interrelated and interdependent action to the Utility Project. FWS's failure to analyze this depletion's impact to the four endangered fish species renders the BiOp arbitrary, capricious, and not in accordance with the ESA.

C. Alternatively, the up-to-10,867 afy depletion to the Green River is a cumulative effect of the Utility Project on the four endangered fish species.

In addition to analyzing indirect effects and interrelated and interdependent actions, FWS's BiOp must also analyze "cumulative effects" on the listed species or critical habitat. 50 C.F.R. § 402.14(g)(3), (4). "Cumulative effects" are the 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.* § 402.02.

Here, FWS adopted BLM's definition of the "action area" from the BA to include the "Green River from approximately 0.5 miles from the upstream end of the project continuing downstream to Lake Powell." BA at 2. Accordingly, the up-to-10,867 afy depletion to the Green River would occur within this same action area. Additionally, Enefit's planned depletion is a future private activity that is reasonably certain to occur. BLM's BA even acknowledged

that the up-to-10,867 afy depletion to the Green River to supply Enefit's oil shale facility is a cumulative effect of the Utility Project and analyzed—albeit inadequately—the impact of this depletion on the four endangered fish species. BA at 68.⁴

Therefore, even if the up-to-10,867 afy depletion to the Green River were not an indirect effect or interrelated and interdependent action to the Utility Project, FWS's failure to analyze this depletion as a cumulative effect that impacts the four endangered fish species renders the BiOp arbitrary, capricious, and not in accordance with the ESA. *See* 50 C.F.R. § 402.14(g)(3)–(4).

D. Potential natural gas or oil product pipeline spills are an indirect effect of the Utility Project, an effect of interdependent or interrelated actions, or a cumulative effect.

In addition to approving a water pipeline, BLM's approval of the rights-of-way allows Enefit to construct natural gas and oil product pipelines, both of which will cross the White River and several of its tributaries. FEIS at 4-142. Spills from one of these hydrocarbon pipelines could be extremely harmful to the four endangered fish species. The risk of a pipeline spill during Enefit's oil shale operations is an indirect effect of the Utility Project and an effect of the interrelated and interdependent action, or a cumulative effect of the Utility Project. As such, it must have been analyzed in the BiOp. But FWS entirely failed to consider these effects.

BLM did acknowledge in the BA and FEIS that potential natural gas and oil product pipeline spills during Enefit's oil shale operations are indirect effects of the operation of the Utility Project and could adversely affect the four endangered fish species. BA at 63–65 (discussing, albeit inadequately, natural gas or oil product spills as indirect effects); FEIS at 4-40, 4-67 (same). Because the BA states that if BLM were to deny the Utility Project, Enefit would truck in natural gas or build a different pipeline and would truck out oil product, the risk of a potential pipeline spill is an effect “caused by the proposed action,” “later in time,” and “reasonably certain to occur.” BA at 4 n.2; *see also* 50 C.F.R. § 402.02. Just as the water depletion to the Green River would not occur but for BLM's approval of the water pipeline—because any alternate withdrawal would deplete the Green River in a different time, place, and amount—any potential petroleum spill into the White River or its tributaries from hydrocarbon pipelines would not occur but for BLM's approval of those pipelines. Any alternate means to move the petroleum would result in a different risk of a spill in a different location. Moreover, BLM also acknowledged that a potential spill would be a cumulative effect of the Utility Project.

⁴ The BA's cumulative effects analysis acknowledges that water depletions from the Colorado River system cause numerous impacts to the four endangered fish species, such as reducing water quantity in the river and degrading fish habitat. BA at pdf p. 98. The BA also acknowledges that Enefit plans to supply water to the South Project by diverting up-to-10,867 afy of water from the Green River. *Id.* at pdf pp. 97–98. Additionally, the BA states that the Enefit oil shale facility is a reasonably foreseeable future activity, and claims that its water impacts “have been incorporated into the cumulative impacts analysis.” BA at 68. But the BA fails to analyze how depletion up-to-10,867 afy from the Green River would actually affect the fish species by reducing water quantity or modifying their habitat.

BA at pdf pp. 98–99 (discussing, albeit inadequately, natural gas or oil product spills as cumulative effects); FEIS at 4-141 (same).⁵

The BA’s discussion of pipeline spill risk cannot substitute for a discussion of this risk in the BiOp, which must contain a “detailed discussion of the effects of the action” (including indirect effects) on listed species. *See* 50 C.F.R. § 402.14(h)(2) (requirement for BiOps); *id.* § 402.02 (defining “effects of the action” to include indirect effects). FWS is also required to evaluate cumulative effects on listed species. *Id.* § 402.14(g)(3). With regard to the risk of a pipeline spill, FWS did neither. Although BLM’s BA concluded that “[s]pills occurring in proximity to streams would potentially result in lethal levels of toxic substances affecting Colorado River fish and other aquatic organisms,” BA at 65 (Ex. 9), the BiOp failed to analyze the risk of a pipeline spill and its impacts on the four endangered fish species as either an indirect effect of the Utility Project, an effect of an interrelated or interdependent action, or a cumulative effect. The BiOp is arbitrary, capricious, and not in accordance with the ESA. *See* 50 C.F.R. § 402.14(h)(2).

E. Sedimentation and leachate from the oil shale facility’s waste rock is an indirect effect of the Utility Project, an effect of an interrelated or interdependent action, or a cumulative effect.

Enefit’s oil shale operations would produce hundreds of millions of tons of waste rock, which could contain salts, metals, and hydrocarbons. *See* FEIS at 4-92 (acknowledging Enefit’s plans to mine 28 million tons of raw oil shale per year for 30 years); *id.* at 4-110 (noting without analysis that “[s]pent shale piles and mine tailings [] might be sources of contamination for salts, metals, and hydrocarbons for both surface and groundwater”). Leachates containing these contaminants “may enter nearby surface water bodies or groundwater and continue to degrade the water quality well after site reclamation.” *Id.* at 4-114. Additionally, a “significant concern is increased soil erosion resulting from ground disturbance,” *id.* at 4-106, as disturbed areas “can become sources of sediment and dissolved salt to surface water bodies.” *Id.* at 4-113.

ESA regulations require FWS to base its BiOp on independent analysis of the “action area,” the “effects of the action” (including the action’s “indirect effects” and effects of “interrelated or interdependent activities”), and the “cumulative effects” on listed species or critical habitat. 50 C.F.R. §§ 402.02, 402.14(g). Based on Enefit’s stated purpose for obtaining the rights-of-way, its oil shale mining and processing facility is, at minimum, a “private activit[y] . . . reasonably certain to occur,” and thus a cumulative effect of the federal approval. *See* 50 C.F.R. § 402.02 (definition of “cumulative effects”). Although FWS has drawn its “action area” to exclude the majority of the Enefit oil shale facility, *see* BiOp at 2, case law is clear that an “overly narrow” action area, which results in “exclusion of certain relevant impacts,” will lead to a deficient BiOp. *See Defs. of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 128 (D.D.C. 2001). Moreover, BLM’s BA and FEIS do acknowledge that sedimentation impacts on the four endangered fish species caused by the Enefit oil shale project are a reasonably foreseeable

⁵ This discussion is inadequate because it simply acknowledges that a pipeline rupture would drain into ephemeral or perennial streams—it does not actually evaluate the impacts of a possible spill on listed species.

cumulative effect. BA at pdf pp. 97–99 (Ex. 9); FEIS at 4-140 to 4-141. Accordingly, the ESA required that the BiOp analyze the cumulative effects of the oil shale facility’s sedimentation and leachate on the four endangered fish species.

Additionally, BLM has not made public any information to verify one of its core assumptions: that the Enefit oil shale facility would be technically and economically feasible without federal rights-of-way. In support of this critical assumption, BLM has contended that Enefit will simply deliver the necessary natural gas, electricity, and water through other means, and will transport the produced oil offsite using trucks rather than a pipeline. *See, e.g.*, BA at 4 n.2, 70. This explanation of the alternative means to provide utilities for Enefit’s oil shale facility, however, merely parrots Enefit’s unsubstantiated assurances that such alternative means exist. *See* Enefit Letter to BLM (Nov. 18, 2016) (Ex. 13); Enefit Letter to BLM (Feb. 28, 2017) (Ex. 14). It does not reflect any independent technical or economic feasibility analysis by BLM. *See also* Grand Canyon Trust et al., Comments on FEIS at 3–8 (July 9, 2018) (Ex. 15). Without independent analysis of Enefit’s self-serving statements and assertions, BLM’s conclusion that Enefit will construct its oil shale facility regardless of the rights-of-way is arbitrary, capricious, and an abuse of discretion. *See Hammond v. Norton*, 370 F. Supp. 2d 226, 251–53 (D.D.C. 2005).

At present, all evidence in BLM’s public NEPA documentation indicates that the oil shale facility could not exist without the subsidy provided by federal rights-of-way. *See id.* This means that BLM’s approval of the Utility Project would be the but-for cause of the Enefit oil shale facility. Accordingly, BLM had a duty to consider the oil shale facility’s effects—including sedimentation and leachate impacts—on the four fish species as indirect effects of the Utility Project, effects of interrelated or interdependent actions, or as cumulative effects. Because FWS failed to analyze leachate and sedimentation impacts on the four endangered fish species, the BiOp is arbitrary, capricious, and not in accordance with the ESA. *See* 50 C.F.R. § 402.14(h)(2) (BiOp “shall include” a “detailed discussion of the effects of the action on listed species or critical habitat”).

II. BLM violated its duty under ESA section 7(a)(2) to ensure that its actions are not likely to jeopardize the continued existence of the four endangered fish species or result in destruction or adverse modification of their critical habitat.

ESA section 7(a)(2) prohibits BLM from undertaking actions that are “likely to jeopardize the continued existence” of any listed species or “result in the destruction or adverse modification of” their critical habitat. 16 U.S.C. § 1536(a)(2). In addition to the direct effects of the proposed action, BLM must ensure that the “indirect effects” and effects of “interrelated or interdependent activities,” together with “cumulative effects” of the action, are not likely to jeopardize a listed species or adversely modify their critical habitat. *See id.*; 50 C.F.R. §§ 402.02, 402.12. The consultation process, including BLM’s BA and culminating in FWS’s BiOp, is the procedural requirement that is designed to ensure compliance with section 7(a)(2)’s substantive duty. “Arbitrarily and capriciously relying on a faulty Biological Opinion violates this duty.” *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1127 (9th Cir. 2012); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 532 (9th Cir. 2010) (quoting *Def. of Wildlife v. U.S. Evtl. Prot. Agency*, 420 F.3d 946, 976 (9th Cir.2005)). Specifically, “an

agency cannot meet its section 7 obligations by relying on a [BiOp] that is legally flawed or by failing to discuss information that would undercut the opinion’s conclusions.” *Ctr. for Biological Diversity*, 698 F.3d at 1127–28 (citing *Wild Fish Conservancy*, 628 F.3d at 532).

Here, as described above, FWS’s BiOp was legally flawed because it failed to analyze the up-to-10,867 afy depletion of the Green River, which is an indirect effect, an interdependent and interrelated action, or cumulative effect of the Utility Project. BLM, in turn, relied on the fatally deficient BiOp in approving the Utility Project. BLM, Record of Decision at 7, 19–20 (Sept. 24, 2018) (Ex. 16). Accordingly, BLM’s approval of the Utility Project was arbitrary, capricious, and not in accordance with the ESA, as BLM violated section 7(a)(2)’s mandate to ensure the Utility Project is not likely to jeopardize the continued existence of the four endangered fish species or result in the destruction or adverse modification of their critical habitat. *See* 16 U.S.C. § 1536(a)(2).

Moreover, BLM has also violated its section 7(a)(2) duty based on the findings and requirements of the Upper Colorado River RIPRAP. As detailed above, the genesis of RIPRAP was FWS’s determination, based on more than 100 BiOps issued over the course of a decade, that any new depletions to the Upper Colorado River Basin would likely jeopardize the continued existence of the four endangered fish species or adversely modify their critical habitat. *See* FWS, Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin, at 1-3 to 1-6 (Ex. 2). As a consequence, depending on the quantity of the proposed depletion, the RIPRAP requires an applicant for a proposed action to pay a depletion fee and to implement certain mitigation measures. FWS DEIS Comments at FEIS Appx. I1-28 (Ex. 4). Assuming FWS finds sufficient progress in recovering the four fish species, the RIPRAP depletion fee and other measures will serve as the reasonable and prudent alternative to avoid a “jeopardy” BiOp for actions that will deplete the Upper Colorado River Basin. Upper Colorado River RIPRAP at iv (Ex. 3); *see also id.* at v (“Activities and accomplishments under the RIP are intended to provide the reasonable and prudent alternatives which avoid the likelihood of jeopardy to the continued existence of the endangered Colorado River fishes”); *id.* at 1 (“[T]he Recovery Program is intended to serve as a reasonable and prudent alternative to avoid the likelihood of jeopardy”). Accordingly, if a proposed action’s direct effects, indirect effects, or effects of interrelated or interdependent activities will result in the depletion of the Upper Colorado River Basin, that action, according to FWS and RIPRAP, will presumptively jeopardize the continued existence of the four fish species or adversely modify their habitat unless RIPRAP’s measures—including the depletion fee and other necessary mitigation measures—are fully implemented as the action’s reasonable and prudent alternative.

Here, the BiOp failed to analyze the up-to-10,867 afy depletion in the context of RIPRAP, even though that depletion was an indirect effect of the Utility Project, and an interrelated or interdependent action. Without RIPRAP serving as the Utility Project’s reasonable and prudent alternative under the ESA regulations, FWS has determined, in establishing the RIPRAP, that a depletion to the Green River of up to 10,867 afy will likely jeopardize the four fish species or adversely modify their critical habitat. In fact, because BLM’s approval of the rights-of-way will result in a depletion to the Green River that is far greater than 4,500 afy, as well as significant non-depletion impacts, and therefore requires separate and independent project-specific consultation, FWS cannot reasonably determine at this stage

whether RIPRAP could even serve as the reasonable and prudent alternative to avoid jeopardy. *See* FWS, Abbreviated Assessment of Sufficient Progress Under the Upper Colorado River Endangered Fish Recovery Program, at 23 (Dec. 19, 2018) (Ex. 5) (“Projects exceeding 4,500 acre-feet . . . will be evaluated to determine if they jeopardize the species’ continued existence on a case-by-case basis.”). Therefore, BLM violated section 7(a)(2)’s mandate to ensure the Utility Project is not likely to jeopardize the continued existence of the four endangered fish species or result in the destruction or adverse modification of their critical habitat. 16 U.S.C. § 1536(a)(2).

III. BLM’s BA and FWS’s BiOp were arbitrary, capricious, and not in accordance with the ESA’s conferral requirements for proposed species.

BLM’s decision to approve rights-of-way that will enable Enefit’s oil shale operations will cause substantial harm to two penstemon species proposed for listing: Graham’s penstemon and White River penstemon. FWS has previously concluded that Graham’s penstemon is vulnerable to extinction if just 21 percent of the known population is destroyed, and the White River penstemon is vulnerable to extinction if 26 percent of the known population is destroyed. 78 Fed. Reg. at 47,600. FWS has conceded that Enefit’s oil shale facility could push these two species to the brink of extinction, as the mine and the processing plant will overlap 19 percent of all known Graham’s penstemons and 26 percent of all known White River penstemons. *Id.*

The ESA’s implementing regulations require that BLM’s BA “shall evaluate” the “effects of the action” on proposed species and proposed critical habitat within the “action area” and determine whether any such proposed species or habitat are “likely to be adversely affected by the action.” 50 C.F.R. §§ 402.02, 402.12(a). The ESA requires BLM to “confer” with FWS on proposed actions that are “likely to jeopardize the continued existence of” a proposed species, or to destroy or adversely modify proposed critical habitat. 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10. This conference must evaluate the direct and indirect effects of the action on the species proposed for listing. *See, e.g.*, 50 C.F.R. § 402.02 (defining an “action” as “actions directly or indirectly causing modifications to the land, water, or air;” and defining “jeopardize” and “adverse modification” to include direct or indirect impacts).

FWS should consider Enefit’s construction of its oil shale facility an indirect effect of BLM’s decision to grant the rights-of-way, as well as an interdependent and interrelated action. Enefit applied for the rights-of-way over federal land so that it could deliver electricity, water, and natural gas to its oil shale facility, and transport the produced crude oil offsite. As the BA noted, “[n]atural gas, electricity, and water would be supplied directly to the South Project via new, dedicated pipelines and power lines.” BA at pdf p. 92. However, BLM has assumed that Enefit will be able to move forward with its oil shale mining and processing operations regardless of whether BLM approves the rights-of-way, based on delivery of utilities and produced oil by alternative means. *See, e.g.*, BA at 3–4. As discussed above, that assumption is deeply flawed and based only on the applicant’s own self-serving statements and assertions. *See supra* p. 15; Grand Canyon Trust et al., Comments on FEIS at 3–8 (Ex. 15). Without the natural gas, electricity, and water that its oil shale operations require, existing evidence in the record suggests that Enefit could not construct or operate its planned oil shale facility.

Because Enefit's oil shale facility very likely would be technically or economically infeasible without the rights-of-way, FWS should have considered the Utility Project as the but-for cause of the facility and its adverse impacts on the penstemon species. Accordingly, the BA should have analyzed how the facility would affect the two penstemon species. The BA, however, did not analyze the full effect of the Enefit oil shale facility, as either an indirect effect, an interrelated or interdependent action, or a cumulative effect. By concurring in this flawed determination, the BiOp failed to adequately assess impacts to penstemons.

While the BA did analyze the oil shale facility's impacts to the penstemons as a reasonably foreseeable cumulative effect, that analysis was unreasonably narrow and flawed. *See* BA at pdf pp. 93–96. For example, the BA simply notes that 2013 surveys found hundreds of the two penstemon species in the area where Enefit will construct its oil shale facility and that the development could disturb over 1,288 acres of suitable penstemon habitat. *Id.* at pdf p. 94. But that is the extent of the BA's cumulative impacts analysis. BLM failed to acknowledge FWS's earlier finding that the Enefit oil shale operations will likely destroy up to 19 percent of Graham's penstemons and 26 percent of White River penstemons, and "will decrease the viability of both species by reducing total numbers and increasing habitat fragmentation, which will lead to smaller and more isolated populations that are prone to extinction." 78 Fed. Reg. at 47,600. Although the BA states that the oil shale project will disturb suitable penstemon habitat, it ignores the clear inference that the project would bring these two plant species to the brink of extinction.

Moreover, the BA's assertion that any oil shale-related impacts on the penstemon species will be reduced because Enefit intends to comply with the penstemon Conservation Agreement is erroneous. *See* BA at pdf p. 94 ("The Applicant intends to comply with the Agreement, or most recent guidance document, in conservation and interim areas during implementation of the [oil shale project], which is expected to reduce the impacts on Graham's beardtongue and White River beardtongue."). In fact, the conservation areas in the Conservation Agreement were drawn to exclude the South Project so that no mitigation measures will be required of Enefit. *Id.* (because these habitat areas are considered "Private Non-conservation Areas," "[m]anagement or mitigation is not required").

Accordingly, the BA's conclusion that the Utility Project would not jeopardize the two proposed penstemon species or adversely modify their critical habitat was arbitrary, capricious, and not in accordance with the ESA. FWS's concurrence, in its BiOp, with the BA's conclusion was also arbitrary, capricious, and not in accordance with the ESA.

CONCLUSION

For the reasons stated herein, FWS and BLM violated ESA section 7 and its implementing regulations. FWS and BLM must undertake a new consultation and halt all Utility Project activities until the agencies fully analyze whether the Utility Project and Enefit's oil shale facility will jeopardize the four endangered Upper Colorado River fish species and the two proposed penstemon species, or destroy or adversely modify their habitat.

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If BLM and FWS do not remedy these violations of the ESA within 60 days of the date of this letter, we intend to file a citizen suit seeking preliminary and permanent injunctive relief, as well as attorney fees and costs. *See* 16 U.S.C. § 1540(g)(2)(A)(i).

Thank you for your attention to this matter. Please contact us should you have any questions.

Very truly yours,



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TABLE OF EXHIBITS

Exhibit	Description
1	FWS, Endangered Species Consultation Handbook (Mar. 1998)
2	FWS, Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin (Sept. 29, 1987)
3	Upper Colo. River Endangered Fish Recovery Program, <i>Recovery Implementation Program Section 7 Consultation, Sufficient Progress, and Historic Projects Agreements and Recovery Implementation Program Recovery Action Plan</i> (RIPRAP) (May 17, 2018)
4	FWS, Comments on BLM Utility Corridor Project Draft Environmental Impact Statement (DEIS), contained in Final EIS (FEIS)
5	FWS, Abbreviated Assessment of Sufficient Progress Under the Upper Colorado River Endangered Fish Recovery Program (Dec. 19, 2018)
6	Email from Kelly Buckner, BLM, to Deborah Brown, BLM (Oct. 13, 2016)
7	FWS, Section 7 Consultations For Water Depletions in the Upper Colorado River After Recovery Implementation Program Initiation (January 1988) (Through Jan. 17, 2018)
8	Conservation Agreement and Strategy for Graham’s Beardtongue and White River Beardtongue
9	BLM, Biological Assessment for Utility Project (May 4, 2018)
10	FWS, Biological Opinion for Utility Project (July 19, 2018)
11	BLM, FEIS Comment Responses
12	BLM, FEIS Excerpt at 2-9
13	Enefit Letter to BLM (Nov. 18, 2016)
14	Enefit Letter to BLM (Feb. 28, 2017)
15	Grand Canyon Trust et al., Comments on FEIS (July 9, 2018)
16	BLM, Record of Decision (Sept. 24, 2018)