



U.S. Department of Justice

Environment and Natural Resources Division

90-8-6-04262

Wildlife and Marine Resources Section

P.O. Box 7369

Ben Franklin Station

Washington, DC 20044-7369

Telephone (202) 305-0210

Facsimile (202) 305-0275

December 12, 2000

Markus B. Zimmer
Clerk of the Court
U.S. District Court for the
Central District of Utah
150 U.S. Courthouse
350 South Main Street
Salt Lake City, UT 84101-2180

Re: Grand Canyon Trust v. Bruce Babbitt
Civil No. 2:98CV-0803 S (D. UT.)

Dear Mr. Zimmer:

I enclose for filing the original and one copy of the following documents:

1. Federal Defendants' Supplemental Brief Concerning Legislation Affecting Moab Uranium Mill Tailings Site; and
2. Certificate of Service.

Please let me know if you have any question regarding the filing of these documents.

Sincerely,

Charles R. Shockey
Assistant Chief
(202) 305-0211

Enclosures

cc (w/ encls.): Counsel of Record

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PAUL M. WARNER, United States Attorney (USB #3389)
STEPHEN ROTH, Assistant United States Attorney (USB #2808)
District of Utah
185 South State Street, #400
Salt Lake City, Utah 84111-1538
Telephone: (801) 524-5682
Facsimile: (801) 524-6924

LOIS J. SCHIFFER, Assistant Attorney General
Environment and Natural Resources Division

JEAN E. WILLIAMS, Section Chief
CHARLES R. SHOCKEY, Assistant Chief
JANE P. DAVENPORT, Trial Attorney
Wildlife and Marine Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
Benjamin Franklin Station, P.O. Box 7369
Washington, DC 20044-7369
Telephone: (202) 305-0202
Facsimile: (202) 305-0275

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

GRAND CANYON TRUST, et al.,

Plaintiffs,

v.

BRUCE BABBITT, et al.,

Defendants.

Civil No. 2:98CV 0803S

**FEDERAL DEFENDANTS'
SUPPLEMENTAL BRIEF
REGARDING LEGISLATION
AFFECTING MOAB MILL
URANIUM TAILINGS SITE**

Interior federal defendants file this supplemental brief to advise the court and the other parties regarding the manner in which the government believes the recently enacted legislation affects this litigation. In summary, Secretary of the Interior Bruce Babbitt, acting through the U.S. Fish and Wildlife Service (FWS), contends that the legislation fundamentally alters the federal agency action on which FWS previously consulted. The new legal regime mandated by the legislation requires further consultation under section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. In FWS's view, this consultation should take place both with the Nuclear Regulatory Commission (NRC) for interim cleanup measures during the next year and with the Department of Energy for long-term remediation efforts.

Because the legislation alters the federal action at issue, the existing biological opinion (BiOp) issued in 1998 retains very limited utility and now must be replaced by a new consultation and opinion to examine the impact of interim measures and the DOE's future plan. FWS submits that, because the existing opinion will be replaced as a result of further consultation, the legal issues currently pending before this court are effectively moot, and the court should either dismiss the case outright or at least stay the litigation pending completion of the DOE's remediation plan. In short, there is no purpose served in litigating the validity of a biological opinion that can no longer govern the federal action in question because the action itself has been changed by legislation.

1. The Scope of the Pending Litigation – To understand the impact of the legislation, federal defendants believe that a brief review is useful to identify the federal actions being challenged and the specific nature of the plaintiffs' claims and requests for relief. The litigation focused almost exclusively on the validity of the FWS final BiOp.

The BiOp, issued to NRC on July 29, 1998, addressed the proposed reclamation plan of

the Atlas Mill Tailings Site in Moab, Utah, by Atlas Corporation, the NRC licensee. Atlas had presented the reclamation plan to NRC for approval by amendments to the Source Materials License for the imposition of license conditions by the NRC.

In its BiOp, the FWS addressed the federal action presented by NRC. The reclamation plan was limited to capping of the mill tailings in place, relocating Moab Wash, and eventually, undertaking groundwater remediation. NRC, as the action agency under ESA § 7 and the implementing regulations, 50 C.F.R. Part 402, defined the nature and scope of the action on which consultation was sought.

In September, 1998, the Atlas Corporation filed for bankruptcy. As a result of the filing, its assets became part of the bankruptcy estate, which were then subject to the bankruptcy process. The federal bankruptcy court later approved the Plan of Reorganization, which provided that NRC would receive most of Atlas's assets to continue the site reclamation. The bankruptcy court approved the appointment of Pricewaterhouse/Coopers (PWC) as the reclamation trustee. Following that appointment, NRC approved the application of PWC as the successor licensee in place of the Atlas Corporation. The trustee agreement provided that PWC would have no liability beyond expending the Atlas assets which had passed through the bankruptcy proceeding. This limitation meant that the licensee, which had been treated as an applicant by the FWS pursuant to 50 C.F.R. § 402.02, was constrained by a finite amount of money to conduct the cleanup without regarding to future operating revenues.

The plaintiffs filed their initial Complaint for declaratory and injunctive relief in November, 10, 1998, generally challenging the validity of the BiOp and specifically alleging eight separate claims for relief under ESA § 7, the implementing regulations, and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The relief sought was as follows:

- a declaration that the FWS approval to “cap” the Atlas tailings pile in place and proceed with an unknown and unproved groundwater cleanup plan is arbitrary and capricious;
- a declaration that the biological opinion’s “reasonable and prudent alternative” (RPA) to avoid likely jeopardy to the continued existence of listed species is invalid because it is arbitrary and capricious;
- a declaration that the biological opinion’s incidental take statement is arbitrary and capricious; and
- injunctive relief requiring the FWS to comply with the terms of the ESA and its implementing regulations in any subsequent BiOp.

Plaintiffs moved for a preliminary injunction on December 17, 1998, (Dkt # 14), which the court eventually denied without prejudice on September 30, 1999 (Dkt # 70). On August 9, 1999, after twice amending the Complaint, the plaintiffs filed a Third Amended Complaint for Declaratory and Injunctive Relief,^{1/} which alleged that the FWS must reinitiate consultation based on Atlas’s inability to pay for the development or implementation of a groundwater remediation plan.^{2/}

^{1/} On December 16, 1998, the plaintiffs filed a First Amended Complaint requesting the same relief as to the FWS, but the NRC was then named as a defendant. On January 20, 1999, the plaintiffs filed their Second Amended Complaint for Declaratory and Injunctive Relief, again seeking the same relief.

^{2/} On May 20, 1999, the FWS wrote to the NRC stating:

The Service will continue to rely on the NRC, as the Federal action agency with whom consultation has been completed, to assure that the actions required by the Final Biological Opinion will be implemented within the prescribed timeframes and in accordance with the license conditions outlined in the NRC’s letter to Atlas Corporation dated March 2, 1999. Implementation of the Biological Opinion is required in order for the incidental take statement contained in the Opinion to remain valid.

If for any reason the NRC cannot assure compliance with the Final Biological Opinion, we request that the NRC reinitiate consultation with the Service in a timely manner pursuant to 50 C.F.R. 402.16(b).

FWS maintains that, in light of this letter, the reinitiation claim asserted in the Third Amended Complaint already was moot when filed in August, 1999, because the FWS already had lodged a reinitiation request with the NRC.

Plaintiffs also moved for summary judgment (Dkt # 61), and FWS cross-moved for summary judgment or affirmance of agency action on October 4, 1999, (Dkt # 71), based on the 12-volume administrative record filed on September 30, 1999 (Dkt. # 69). In March, 2000, the court denied those cross-motions without prejudice and found good cause to stay the litigation temporarily to enable the parties to pursue settlement discussions (Dkt. # 89).³ Although the settlement discussions did not succeed, Congress made progress during the stay period on pending legislation to address the cleanup of the Moab site, as FWS reported to the court on August 3, 2000 (Dkt # 104). Finally, on November 15, 2000, FWS advised the court that Congress had enacted and the President had signed that legislation (Dkt # 110).

2. Summary of the Legislation – Congress enacted legislation, signed into law on October 30, 2000, which addresses the ongoing efforts to clean up the uranium mill tailings at the Moab site. Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law No. 106-398, Title XXXIV, 106th Cong., 2nd Sess. (2000)(H.R. 5408). The enactment generally provides that the NRC's licence for materials at the Moab site shall terminate within one year of enactment (by October 30, 2001) and that responsibility and title for site management will be transferred to the Department of Energy (DOE), which shall prepare a plan for remediation, including ground water restoration, of the Moab site. Specifically, the legislation provides that:

- the tailings pile be relocated and the contaminated groundwater at the site be remediated;
- the Ute Tribe may assign its portion of oil and gas royalties from production at the Oil Shale Reserve No. 2 to help fund site reclamation with these funds in addition to whatever remains from the Atlas

³ The court also granted the motion to dismiss NRC as a defendant on April 19, 2000, citing the 10th Circuit's exclusive jurisdiction over claims brought against that agency. Dkt # 90.

- Corporation now held by the trustee;
- the removal of the tailings pile (uranium byproduct material), and Congress "authorized to be appropriated" funds for this purpose;
- within one year or less from and after October 30, 2000, the NRC license will terminate, and the Secretary of Energy will develop, with the Trustee, the NRC, and the State of Utah, "an efficient and legal means for transferring all responsibilities and title to the Moab site and all the materials therein from the Trustee to the Department of Energy."
- the National Academy of Sciences is to provide technical advice, assistance and recommendations in evaluating costs, benefits and risks associated with remediation, "including removal or treatment" of materials, groundwater restoration, and management of residual contaminants;" and, finally,
- the trustee may implement "interim measures to reduce or eliminate localized high ammonia concentrations in the Colorado River identified in the USGS report dated March 27, 2000," undertake activities to dewater the mill tailings, and other activities subject to authority of the NRC and in consultation with the DOE.

3. Implications of the Legislation for this Litigation – As a result of the legislation, the federal action analyzed in the BiOp has evaporated; the federal action agency will no longer be the NRC but the DOE, and the time frame for any actions to be undertaken by the NRC will end on October 29, 2001, if not before. Given these developments, federal defendants submit that the existing BiOp has been superseded by operation of law and, as a result, the civil action challenging that BiOp now is moot.

a. The action has been rendered moot by the legislation - In light of the new legislation, this court has nothing left to decide in terms of a live case or controversy. As demonstrated above, the litigation is limited to the 1998 BiOp, which no longer will remain in place as the operative FWS opinion. Congress, not the NRC, has specifically authorized removal of the tailings and groundwater remediation. In less than one year, the NRC license will terminate and DOE will become the agency with whom ESA consultation must take place at this site. The only work that can take place at the site without further consultation involves

dewatering the pile, groundwater restoration planning, and site characterization. By operation of law, the reclamation plan and the biological opinion issued in response to it have been superseded by the statutory directive governing the cleanup of the Moab site.

FWS has set forth its position regarding the application of the new law in a letter to NRC dated December 7, 2000 (attached as Exhibit 1). FWS stated that, as a result of the legislation, “the action identified in the Opinion has been terminated and will be supplanted by a comprehensive site reclamation conducted” by DOE. Exhibit 1 at 1. Accordingly, “the Opinion addresses a Federal action (long-term site remediation pursuant to NRC’s Source Materials License) that will never take place, but does not consider or address the Federal actions (interim measures by PWC followed by long-term site remediation by DOE) that *will* be undertaken at the former Atlas site.” *Id.* at 2 (italics in original).

Because of the changed federal action, FWS “intends to withdraw the Opinion as moot no later than” 150 days from the date of the letter, or approximately May 7, 2001. The five-month period is designed to enable NRC to complete a new consultation on the proposed interim measures being undertaken by the trustee. The FWS pledged to work closely with NRC to complete this reinitiated consultation, but advised that, if “NRC chooses to not reinitiate formal consultation, the Service will proceed in withdrawing the Opinion and will seek an immediate site takeover by DOE” pursuant to the legislation, Pub. L. 106-398, § 3405(i)(1)(C). *Id.*

With regard to the continuation of interim measures at the site, FWS noted that PWC’s consultants had identified six proposed interim measures to reduce impacts to endangered fish near the Atlas site.⁴ *Id.* at 2. FWS supported further consideration of four of those measures, but

⁴ The question of interim measures relates to a second change in circumstances, which occurred in March, 2000, with the publication of the USGS studies indicating that discharges at

noted that implementing these measures “represent modifications to the Atlas site reclamation that will cause an effect to the listed species or critical habitat not considered in the Opinion, thus requiring the reinitiation of section 7 consultation.” Despite this concern, FWS “does not intend that PWC or its consultants stop work on the dewatering of the mill tailings pile during the pendency of reinitiation,” reiterating the government’s view that such ongoing efforts would not violate ESA § 7(d). *Id.* at 3. Accordingly, PWC “should continue to plan for the implementation of one or more of the four interim measures to address ammonia contamination in the Colorado River,” as FWS had noted in earlier correspondence. *Id.*

In Southern Utah Wilderness Alliance v. Smith, 110 F.3d 725 (10th Cir. 1997), a similar result occurred, although the change in legal status resulted not from legislation but from a change in the federal agency action. The plaintiffs alleged that the Bureau of Land Management (BLM) and the Secretary of the Interior violated ESA § 7 by failing to consult with the FWS concerning impacts of BLM’s management schedule for wilderness study areas. The suit was

the site had proved to be more damaging to listed species that previously considered. FWS evaluated the information contained in the USGS report, and on April 25, 2000, requested that the NRC reinitiate consultation. The NRC has neither officially agreed nor formally refused to reinitiate at this point.

FWS had informed NRC that dewatering the tailings could continue without causing a violation of ESA §7(d), which refers to the prohibition against any irretrievable or irreversible commitment of resources which would preclude the implementation of a reasonable and prudent alternative. FWS also informed NRC that the incidental take statement contained in the BiOp would remain in effect pending the reinitiation of consultation. FWS continues to believe that legal protection from the prohibition against “take” of listed species under ESA § 9 should be offered by means of the incidental take statement, but that such protection cannot continue unless reinitiation of consultation takes place with respect to the new information contained in the USGS report and with respect to any interim measures, which may affect the species in ways not previously considered. To the FWS’s knowledge, the trustee is not engaged in any activities which would violate § 7(d), but future actions, as well as interim, temporary measures, have not been analyzed. For that reason, the FWS does not believe the existing BiOp would continue to apply to those actions without reinitiation, and there would be no incidental take protection in the future for those agencies, entities, or persons undertaking the interim activities.

filed before the requisite ESA consultation was completed. Both the district court and the court of appeals agreed that the action became moot, however, because the relief sought (consultation) had been obtained. Nor was injunctive relief available because plaintiffs sought an injunction against implementation of the management schedule pending consultation.

The legislation concerning the Moab site has the same effect on plaintiffs' claims in this case as the completion of consultation did in Smith. Congress in effect set aside the NRC's reclamation plan at this site.

b. Even if a live case remains, the court should await the DOE plan

Even if the court were to conclude that the controversy between the plaintiffs and FWS is not moot in its entirety, the court should exercise its discretion to stay the litigation in order to allow the congressionally-mandated cleanup plan to proceed because the doctrine of "prudential mootness" arising from doctrines of remedial discretion is applicable. The question, in effect, is not whether the court could act but whether it should act. Here, sound reasons exists to withhold judicial resolution of the validity of a BiOp that, for all practical purposes, will cease to govern the ongoing federal cleanup efforts at the Moab site.

The legislation has so drastically altered the legal landscape surrounding the Moab site that any decision the court made at this time would have little or no practical effect in terms of providing endangered species protection. In Smith, 110 F.3d 724, 727, the Tenth Circuit noted:

In some circumstances, a controversy, though not moot in the strict Article III sense, is 'so attenuated that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant' (citation omitted). Under both Article III and prudential mootness doctrines, the central inquiry is essentially the same: have circumstances changed since the beginning of litigation forestall any occasion for meaningful relief. 13A Charles Alan Wright et al., Federal Practice and Procedure § 3533.3 (2d ed.1984). For the following reasons we find this suit is mooted under either doctrine.

Applying this principle to the present case, federal defendants respectfully submit that there is little, if any, meaningful relief that the court could grant. The plaintiffs asked that the BiOp be set aside or remanded to FWS. Congress, exercising its legislative prerogative, has seen fit to enact another approach that leads to the same practical result. Because the court no longer can grant the relief sought, the action should be dismissed or at least stayed to enable DOE to develop its cleanup plan in consultation with FWS.

Respectfully submitted this 12th day of December, 2000.

PAUL M. WARNER, U.S. Attorney

STEPHEN ROTH, Assistant U.S. Attorney
District of Utah

LOIS J. SCHIFFER, Assistant Attorney General
Environment and Natural Resources Division

JEAN E. WILLIAMS, Section Chief



CHARLES R. SHOCKEY, Assistant Chief
JANE P. DAVENPORT, Trial Attorney
Wildlife and Marine Resources Section
Environment and Natural Resources Division
U.S. Department of Justice
Benjamin Franklin Station, P.O. Box 7369
Washington, DC 20044-7369
Telephone: (202) 305-0202
Facsimile: (202) 305-0275

Attorneys for Defendants

OF COUNSEL:

GINA GUY
Regional Solicitor
U.S. Department of the Interior



United States Department of the Interior



FISH AND WILDLIFE SERVICE Mountain-Prairie Region

FWS/R6
ES

MAILING ADDRESS:
Post Office Box 25486
Denver Federal Center
Denver, Colorado 80225

STREET LOCATION:
134 Union Blvd.
Lakewood, Colorado 80228

DEC 7 2000

Michael F. Weber, Director
Division of Fuel Cycle Safety and Safeguards
Office of Nuclear Material Safety and Safeguards
Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Dear Mr. Weber:

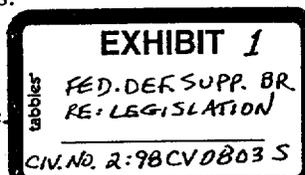
The Fish and Wildlife Service hereby requests that the Nuclear Regulatory Commission (NRC) reinstate formal consultation pursuant to section 7 of the Endangered Species Act (ESA) with respect to NRC's approval and amendment of the Source Materials License previously held by the Atlas Corporation and transferred to Price Waterhouse Coopers LLP (PWC) as the reclamation trustee. The Service believes that such reinstatement is required due to profound and fundamental changes in the proposed remediation of the Atlas mill tailings site as a result of recent Federal legislation.¹

As you are aware, previous section 7 consultation between the NRC and the Service resulted in promulgation of the 1998 Final Biological Opinion (Opinion). On April 25, 2000, the Service requested that NRC reinstate section 7 consultation due to new information that was not considered in the Opinion.² The Service has now concluded that the immediate reinstatement of consultation is also required due to fundamental changes in the action identified in the Opinion. Specifically, by Act of Congress, the action identified in the Opinion has been terminated and will be supplanted by a comprehensive site reclamation conducted by the Department of Energy (DOE). Section 3405 of the recently enacted Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. 106-398 (2000), provides that Source Materials License "shall

¹ 50 C.F.R section 402.16 requires the reinstatement of consultation if, *inter alia*, "the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion"

² The Service continues to believe that this new information, by itself, warrants the reinstatement of consultation, and intends to utilize this information in any future consultation with the NRC or other Federal agencies.

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terminate" no later than 1 year after the Act's enactment. *Id.* at section 3405(i)(1)(C). Site reclamation shall thereafter be carried out by DOE pursuant to a new remediation plan, *id.* at section 3405(i)(1)(A), (B) & (D)--a new Federal action which will necessarily be the subject of a future section 7 consultation between the Service and the Department of Energy. Prior to site takeover by DOE, PWC is authorized to undertake interim remediation measures at the Atlas site. *Id.* at section 3405(i)(1)(C).

Such interim measures to address groundwater contamination have been the topic of recent discussions between the Service, NRC, and PWC; but, they have never been analyzed in a biological opinion pursuant to the ESA. In response to the new information referenced in the Service's April 25, 2000, letter, PWC's consultants identified six proposed interim measures for reducing impacts to endangered fish near the Atlas site. Although the Service supports further consideration of four of these proposed measures, it has also identified potential take related to some of these options. (See letter from Reed Harris, Utah Field Supervisor, Fish and Wildlife Service, to Toby Wright, Shepard Miller, Inc., Oct. 12, 2000.) These interim measures therefore represent modifications to the Atlas site reclamation that will cause an effect to the listed species or critical habitat not considered in the Opinion, thus requiring the reinitiation of section 7 consultation.

As a result of the legislation discussed above, the action identified in the Opinion will be terminated and will not be carried out by NRC. The only exceptions to this legislative termination of NRC's Source Materials License are the interim measures that may be carried out by PWC prior to DOE's takeover of the site; as discussed above, these interim measures were not analyzed in the Opinion and are not addressed by the incidental take statement included therein. Stated simply, the Opinion addresses a Federal action (long-term site remediation pursuant to NRC's Source Materials License) that will never take place, but does not consider or address the Federal actions (interim measures by PWC followed by long-term site remediation by DOE) that *will* be undertaken at the former Atlas site. The Service therefore intends to withdraw the Opinion as moot no later than one hundred and fifty (150) days from the date hereof. This 150-day time period allows NRC approximately 2 weeks to submit its biological assessment of the effects of the interim measures proposed by PWC, followed by the 135-day period set forth in 50 C.F.R. section 402.14(e) for formal consultation and issuance of a new biological opinion by the Service on the proposed interim measures. I assure you that, upon receipt of your biological assessment of the effects of the proposed interim measures, the Service will conduct and complete formal consultation as expeditiously as possible. If, however, the NRC chooses to not reinitiate formal consultation, the Service will proceed in withdrawing the Opinion and will seek an immediate site takeover by DOE pursuant to section 3405(i)(1)(C) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001.

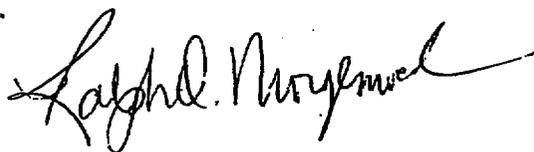
Michael F. Weber, Director

3

As stated in my April 25, 2000, letter, the Service does not intend that PWC or its consultants stop work on the dewatering of the mill tailings pile during the pendency of reinitiation. The Service does not believe that such ongoing efforts would constitute a violation of section 7(d) of the Endangered Species Act, and believes that the effects of dewatering the pile are fully addressed in the existing Opinion's incidental take statement. The Service also believes that PWC and its consultants should continue to plan for the implementation of one or more of the four interim measures to address ammonia contamination in the Colorado River that the Service considered worthy of additional consideration in its October 12, 2000, letter.

Please contact Henry Maddux, Field Supervisor of the Service's Utah Ecological Services Field Office, with your response to our request as soon as possible. He can be contacted at (801) 524-5001 ext. 126. His address is U.S. Fish and Wildlife Service, Lincoln Plaza, Suite 404, 145 East 1300 South, Salt Lake City, Utah 84115.

Sincerely,

A handwritten signature in black ink, appearing to read "Ralph D. Noyes". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Regional Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the United States Department of Justice, and that a copy of the attached Federal Defendants' Supplemental Brief Regarding Legislation Affecting Moab Uranium Mill Tailings Site was mailed by U.S. first class mail, postage prepaid, with a second copy served by facsimile, on December 12, 2000, to the following persons:

Susan Daggett
Robert Wiygul
Marie Kirk
Earthjustice Legal Defense Fund
1631 Glenarm Place, Suite 3000
Denver, CO 80202

Cullen Battle
Fabian & Clendenin
215 South State Street, Suite 1200
Salt Lake City, UT 84111

Gabrielle Sigel
Jennifer A. Burke
Jenner & Block
One IBM Plaza
330 North Wabash
Chicago, IL 60611

David C. Lashway
Shaw, Pitman, Potts & Trowbridge
2300 N Street, NW
Washington, DC 20037

Marjorie Nordlinger
Office of General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop 015B18
Washington, DC 20555

Gina Guy
Department of the Interior
Office of Regional Solicitor
755 Parfet Street, Suite 151
Lakewood, CO 80215



CHARLES R. SHOCKEY
JANE P. DAVENPORT
(202) 305-0210