

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

GRAND CANYON TRUST, et al.,

Plaintiffs,

v.

GALE NORTON<sup>1</sup>, et al.,

Defendants,

MOAB MILL RECLAMATION TRUST,

Intervenors.

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Case No. 2:98CV0803S

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JOINT STIPULATION OF DISMISSAL

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COME NOW, the Grand Canyon Trust, et al., the U.S. Fish and Wildlife Service, and the Moab Mill Reclamation Trust, and respectfully request that the Court dismiss the instant action without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) for the following reasons:

1. The original action involved a challenge to the adequacy of the U.S. Fish and Wildlife Service's July 29, 1998 Final Biological Opinion for the Proposed Reclamation of the Atlas Mill Tailings Site in Moab, Utah ("Biological Opinion"). As part of the requested relief, the plaintiffs asked the Court to invalidate, or set aside, the Biological Opinion.

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<sup>1</sup> Pursuant to Federal Rule of Civil Procedure 25(d), the current Secretary of Interior is automatically substituted for her predecessor, Bruce Babbitt.

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2. On April 25, 2000, the Fish and Wildlife Service requested that the Nuclear Regulatory Commission reinstate consultation based on new information. The Nuclear Regulatory Commission declined to reinstate consultation at that time.

3. In October 2000, after this case was fully briefed on summary judgment motions but before the Court issued a ruling, the U.S. Congress enacted the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. Law. No. 106-398, section 3405, Title XXXIV, 106<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (2000). That Act transfers responsibility for the Moab site from the Nuclear Regulatory Commission to the Department of Energy after October 31, 2001.

4. Following enactment of the legislation, on December 7, 2000, the Fish and Wildlife Service again requested that the Nuclear Regulatory Commission reinstate consultation at the site because of the legislation; however, the Nuclear Regulatory Commission again declined to reinstate consultation.

5. On February 8, 2001, the Fish and Wildlife Service formally withdrew its Biological Opinion, voiding the incidental take provisions in the Biological Opinion. See Letter from R. Morgenweck to M. Weber (Feb. 8, 2001) (Exh. A).

6. Although the Court has never ruled on the merits of this case, because the Biological Opinion has been withdrawn, there is no need for a ruling on the merits.

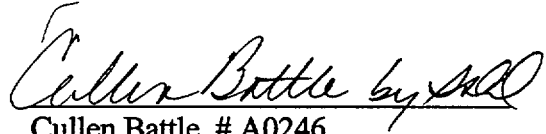
7. The parties agree that each party shall bear its own attorneys' fees and costs.

For the foregoing reasons, the parties respectfully request that the Court dismiss this case without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2).

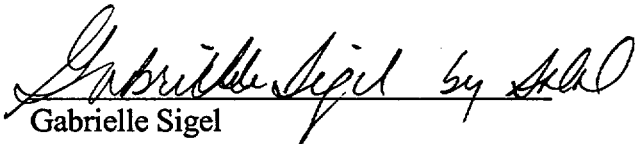
Submitted this 26<sup>th</sup> day of July, 2001.



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Robert B. Wiygul  
Marie A. Kirk  
Earthjustice Legal Defense Fund, Inc.  
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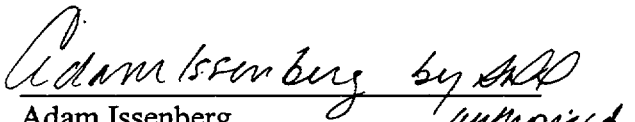


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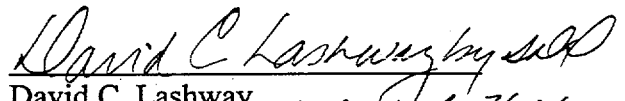
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2300 N St., N.W  
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Attorney for Defendant-Intervenor

**CERTIFICATE OF SERVICE**

I certify that on the 26th day of July, 2001, I served a true and accurate copy of the Joint Stipulation of Dismissal upon the following individuals by U.S. mail, postage prepaid:

David C. Lashway  
Shaw Pittman  
2300 N St., N.W.  
Washington, D.C. 20037

A handwritten signature in cursive script, reading "Lynne Lovett", written in black ink.

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# **EXHIBIT A**



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

Montana-Prarie Region

BY HANDY METHOD NO.

FWS/R6  
ES

MAILING ADDRESS:  
Post Office Box 25486  
Denver Federal Center  
Denver, Colorado 80225-0486

STREET LOCATION:  
134 Union Blvd.  
Lakewood, Colorado 80228-1807

FEB 8 2001

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:

On April 25, 2000, in a letter to Mr. John Surmeier, we requested that the Nuclear Regulatory Commission reinstate Endangered Species Act Section 7 consultation on the Source Materials License for the Mosb Mill Tailings site held by Price Waterhouse Coopers LLP as the reclamation trustee. Our request for reinstatement was based on new information relating to higher than anticipated fish mortality from contaminated ground water entering the Colorado River and delays in reinitiating a ground water corrective action and dewatering plans. We also requested during the reinstatement that expedited analysis be conducted to determine what interim measures might be implemented by the trustee to reduce ground water discharges to reduce the ongoing harm to listed fish.

Mr. John Greeves responded to our April 25 request for reinstatement on May 25, 2000. In that response, the Commission requested that we answer questions and issues raised in a letter from Mr. Anthony Thompson, counsel for the trustee. Mr. Thompson raised concerns about the necessity for and the appropriateness of reinitiating consultation and stated that, if reinstatement occurred, the trustee would halt reclamation work at the site because of increased risk of legal liability under the Endangered Species Act.

In our June 28 response, we disagreed with several contentions in Mr. Thompson's letter, explained our rationale, and reconfirmed our request for reinstatement of consultation. We also restated that our April reinstatement request specifically provided that the Incidental Take Statement contained in the Final Biological Opinion would remain in effect during the reinstatement, one of the trustee's main concerns related to legal liability.

This is your future. Don't leave it blank. - *Support the 2000 Census.*

Michael F. Weber, Director

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On September 22 you responded that the trustee still argued that our June 28 letter was not responsive to their concerns, and that the Commission would make no decision with respect to reinitiation until we addressed, in detail, the issues raised by the trustee.

On December 7, 2000, we once again requested the Commission reinitiate consultation due to the profound and fundamental changes in the proposed remediation plan resulting from the passage of the Floyd D. Spence National Defense Authorization Act. That legislation requires that the site be turned over to the Department of Energy no later than 1 year after passage or October 30, 2001. In the interim, the trustee is authorized to undertake ground water remediation at the Atlas site. As noted in our December request for reinitiation, any interim measure that is implemented represents a modification to the existing site reclamation plan and affects listed species as well as designated critical habitat. Because interim measures were not considered in the 1998 Final Biological Opinion, reinitiation is required.

In your December 20, 2000, response you once again declined to reinitiate consultation and requested that we consult informally with the Commission. You also stated that the Fish and Wildlife Service involvement in the Enlibra process was equivalent to informal consultation and that any subsequent formal consultation would only delay site reclamation.

The Service cannot engage in informal consultation once formal consultation has been completed. In this case, where a formal Biological Opinion has been issued, reinitiation is the only avenue to modify that Opinion. In addition, when we commented (October 12, 2000, letter to Toby Wright) on the six proposed interim measures for reducing impacts to endangered fish near the Atlas site, we informed the trustee's consultant that reinitiation "may be required depending upon disturbance to or removal of tamarisk, water volume removed, fish entrainment potential and adverse modification of the riverine fish habitat." In that letter, we also noted that our comments were submitted in the context of the Enlibra process and subject to the parameters of the Enlibra agreement. It should be noted that the Enlibra process does not in any way replace required consultations between Federal agencies under Section 7 of the Endangered Species Act.

Therefore, your continued refusal to reinitiate consultation as requested on several occasions by the Service leaves us no choice but to withdraw our FINAL BIOLOGICAL OPINION FOR THE PROPOSED RECLAMATION OF THE ATLAS MILL TAILINGS SITE IN MOAB, UTAH, dated July 29, 1998. This action also voids the incidental take provisions of that Biological Opinion. The Biological Opinion is hereby withdrawn. Accordingly, the Commission is no longer exempted from the Endangered Species Act's prohibitions against take through actions specified in the withdrawn 1998 Biological Opinion. Except as expressly provided below, any actions the Commission (or its trustee) undertakes at the site risk violating Section 9 of the Endangered Species Act and potentially expose both the Commission and the trustee to enforcement action under Section 9.

Michael F. Weber, Director

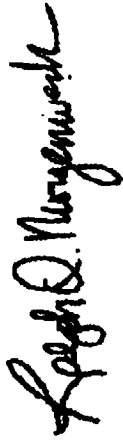
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We understand that the Commission and the Department of Energy have agreed that the actions below need to be accomplished by the trustee between the date hereof and the termination/transfer date (on or before October 30, 2001). These actions are:

1. Protection from erosion of the tailings pile;
2. Treatment of side slopes with surfactant to reduce dust;
3. Development of a pumping system to move drain water from the wicks to an evaporation area; and
4. Environmental monitoring and sampling and cell maintenance as agreed to by Department of Energy in coordination with the Service.

We agree that the above actions are necessary to contain site contamination and enhance dewatering of the tailings pile. We also believe that these actions can be accomplished without adverse impacts to or take of the endangered species or adverse modification of the fishes' designated critical habitat. We therefore concur in a determination that these actions are not likely to adversely affect and may beneficially affect the endangered species. These conclusions are premised on the understanding that none of these activities will involve the destruction of tamarisk habitat or the withdrawal of water from the Colorado River. Therefore, the Service believes that withdrawal of the Biological Opinion will not preclude the trustee from undertaking the three actions specified above.

Sincerely,



Regional Director

cc: Honorable Robert F. Bennett  
United States Senate  
Washington, D.C. 20510-4403

Honorable James V. Hansen  
House of Representatives  
Washington, D.C. 20515-4401

Honorable Chris Cannon  
House of Representatives  
Washington, D.C. 20515-4403



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ORDER

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Having reviewed the parties' Joint Stipulation of Dismissal and for good cause shown, it is hereby ORDERED that this case shall be DISMISSED WITHOUT PREJUDICE with each of the parties to bear its own fees and costs.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

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DAVID SAM  
UNITED STATES DISTRICT COURT