0031

C/007/039 Incoming
cc: Joe
Steve C.

United States Department of the Interior

FISH AND WILDLIFE SERVICE
UTAH FIELD OFFICE
2369 WEST ORTON CIRCLE, SUITE 50
WEST VALLEY CITY, UTAH 84119

September 10, 2008

In Reply Refer To
FWS/R6
ES/UT
6-UT-08-F-018
08-F-0173

Carl Johnston
Natural Resources Specialist
Office of Surface Mining
Reclamation and Enforcement
P.O. Box 46667
Denver, Colorado 80201-6667

RE: Conclusion of Formal Section 7 Consultation for Canyon Fuel Company, LLC, Dugout Canyon Mine, Utah Sate Permit C/007/0039, 560-Acre Extension, Task ID No. 2958

Dear Mr. Johnston:

In accordance with section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the Interagency Cooperation Regulations (50 CFR 402), this document transmits the Fish and Wildlife Service's (USFWS) biological opinion for impacts to federally listed endangered species from the Canyon Fuel Company, LLC, Dugout Canyon Mine 560-Acre Extension. The USFWS received a letter from Department of Interior, Office of Surface Mining on July 3, 2008. A complete administrative record of this consultation is on file at this office.

Canyon Fuel Company proposes a 560 acre extension of their underground coal recovery operations. The project would not require any additional surface disturbance. The average annual water depletion associated with this project is approximately 131 acre-feet per year. Due primarily to water depletions, your office made the determination of "may affect, likely to adversely affect" for the four Colorado River endangered fish: Colorado pikeminnow, bonytail, humpback chub, and razorback sucker. In accordance with section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the Interagency Cooperation Regulations (50 CFR 402), this document transmits the USFWS's biological opinion for these four fish species.

On January 21-22, 1988, the Secretary of the Interior; the Governors of Wyoming, Colorado, and Utah; and the Administrator of the Western Area Power Administration were cosigners of a Cooperative Agreement to implement the "Recovery Implementation Program for Endangered

Fish Species in the Upper Colorado River Basin" (USFWS 1987). An objective of the Recovery Program was to identify reasonable and prudent alternatives that would ensure the survival and recovery of the listed species while providing for new water development in the Upper Basin.

In order to further define and clarify processes outlined in sections 4.1.5, 4.1.6, and 5.3.4 of the Recovery Program, an additional section 7 agreement and Recovery Plan addressing section 7 consultation on depletion impacts was developed (USFWS 1993b). The section 7 agreement establishes a framework for conducting all future section 7 consultations on depletion impacts related to new projects and those associated with historic projects in the Upper Basin. On an annual basis, the USFWS uses procedures outlined in the section 7 agreement in conjunction with the Recovery Plan to determine if sufficient progress is being accomplished in the recovery of the endangered fishes to enable the Recovery Program to continue to serve as a reasonable and prudent alternative to avoid jeopardy. The Recovery Plan was finalized on October 15, 1993, and is reviewed annually.

In accordance with the agreement, the USFWS has agreed to assess impacts of projects that require section 7 consultation and determine if progress toward recovery continues to be sufficient for the Recovery Program to serve as a reasonable and prudent alternative. If sufficient progress is being achieved, biological opinions will be written to identify activities and accomplishments of the Recovery Program that support it as a reasonable and prudent alternative. If sufficient progress in the recovery of the endangered fishes has not been achieved by the Recovery Program, actions from the Recovery Plan will be identified which must be completed to avoid jeopardy to the endangered fishes.

The annual evaluation by the USFWS to determine if sufficient progress has been achieved considers: (a) actions which result in a measurable population response, a measurable improvement in habitat for the fishes, legal protection of flows needed for recovery, or a reduction in the threat of immediate extinction; (b) status of fish populations; adequacy of flows; and (c) magnitude of project impacts. In addition, the USFWS considered support activities (funding, research, information and education, etc.) of the Recovery Program if they help achieve a measurable population response, a measurable improvement in habitat for the fishes, legal protection of flows needed for recovery, or a reduction in the threat of immediate extinction. The USFWS evaluates progress separately for the Colorado River and Green River subbasins; however, it gives due consideration to progress throughout the Upper Basin in evaluating progress toward recovery. Based on current Recovery Program accomplishments and the expectation that the Recovery Plan will be fully implemented in a timely manner, the USFWS has determined that sufficient progress has been achieved under the Recovery Program so that it continues to serve as the reasonable and prudent alternative to avoid jeopardy to the endangered fishes by the impacts caused by the water depletion associated with this permit.

The following excerpts are pertinent to the consultation because they summarize portions of the Recovery Program that address depletion impacts, section 7 consultation, and project proponent responsibilities:

"All future Section 7 consultations completed after approval and implementation of this program (establishment of the Implementation Committee, provision of congressional funding, and

initiation of the elements) will result in a one-time contribution to be paid to the USFWS by water project proponents in the amount of $10.00 per ac-ft based on the average annual depletion of the project . . . . This figure will be adjusted annually for inflation [the current figure is $17.79 per ac-ft] . . . . Concurrently with the completion of the Federal action which initiated the consultation, e.g., . . . issuance of a 404 permit, 10 percent of the total contribution will be provided. The balance will be ...due at the time the construction commences . . . ."

It is important to note that these provisions of the Recovery Program were based on appropriate legal protection of the instream flow needs of the endangered Colorado River fishes. The Recovery Program further states:

". . . it is necessary to protect and manage sufficient habitat to support self-sustaining populations of these species. One way to accomplish this is to provide long term protection of the habitat by acquiring or appropriating water rights to ensure instream flows . . . . Since this program sets in place a mechanism and a commitment to assure that the instream flows are protected under State law, the USFWS will consider these elements under Section 7 consultation as offsetting project depletion impacts."

Thus, the USFWS has determined that project depletion impacts, which the USFWS has consistently maintained are likely to jeopardize the listed fishes, can be offset by: (a) a water project proponent's one-time contribution to the Recovery Program in the amount of $17.79 per ac-ft of the project's average annual depletion; and/or (b) appropriate legal protection of instream flows pursuant to State law, and accomplishment of activities necessary to recover the endangered fishes as specified under the Recovery Implementation Program Recovery Action Plan.

To address the depletion associated with this project, the applicant will make a one-time payment which has been calculated by multiplying the project's average annual depletion (131 ac-ft) by the depletion charge in effect at the time payment is made. For Fiscal Year 2008 (October 1, 2008, to September 30, 2008), the depletion charge is $17.79 per ac-ft for the average annual depletion which equals a total payment of $ 2,330.49 for this project. Ten percent of the total contribution ($233.05), or total payment, will be provided to the USFWS's designated agent, the National Fish and Wildlife Foundation at the time of issuance of the Federal approvals. The balance will be due at the time the construction commences. Fifty percent of the funds will be used for acquisition of water rights to meet the instream flow needs of the endangered fishes (unless otherwise recommended by the Implementation Committee); the balance will be used to support other recovery activities for the Colorado River endangered fishes. All payments should be made to the National Fish and Wildlife Foundation.

National Fish and Wildlife Foundation
28 Second Street, 6th Floor
San Francisco, California 94105

Each payment is to be accompanied by a cover letter that identifies the project and biological opinion that requires the payment, the amount of payment enclosed, check number, and any special conditions identified in the biological opinion relative to disbursement or use of the funds

(there are none in this instance). The cover letter also shall identify the name and address of the payor, the name and address of the Federal Agency responsible for authorizing the project, and the address of the USFWS office issuing the biological opinion. This information will be used by the Foundation to notify the payor, the lead Federal Agency, and the USFWS that payment has been received. The Foundation is to send notices of receipt to these entities within 5 working days of its receipt of payment.

We appreciate your commitment in conserving endangered species. If further assistance is needed or you have any questions, please contact Paul Abate, at (801) 975-3330 extension 130.

Sincerely,

for Larry Crist
Utah Field Supervisor

cc: Division of Oil, Gas and Mining
P.O. Box 145801
Salt Lake City, Utah 84114-5801