



VIA CERTIFIED MAIL

June 12, 2017

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**Re: Supplemental Sixty-Day Notice of Endangered Species Act Violations related to the Proposed Rosemont Copper Mine in Arizona**

Dear Sirs:

The U.S. Forest Service ("Forest Service"), U.S. Army Corps of Engineers ("USACE"), Environmental Protection Agency ("EPA"), U.S. Fish and Wildlife Service ("FWS"), and U.S. Secretary of the Interior ("Secretary") are hereby notified that the Center for Biological Diversity intends to file suit, pursuant to the citizen suit provision of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, to challenge (1) FWS's April 28, 2016 Amended Biological Opinion for the Rosemont Copper Mine; (2) the Forest Service's unlawful reliance on FWS's 2016 Amended Biological Opinion for the Rosemont Copper Mine in approving the June 6, 2017 Record of Decision on the Rosemont Copper Project; (3) the USACE and EPA's unlawful reliance on FWS's 2016

Amended Biological Opinion for the Rosemont Copper Mine; (4) FWS's issuance of unlawful regulations defining "destruction or adverse modification of critical habitat" (81 Fed. Reg. 7214, February 11, 2016) and reliance upon those unlawful regulations in the 2016 Amended Biological Opinion; and (5) FWS's unlawful revision of the critical habitat designations for the jaguar, Gila chub, Chiricahua leopard frog, and southwestern willow flycatcher. The Forest Service, USACE, EPA, FWS and the Secretary have sixty days to remedy the violations identified herein.<sup>1</sup>

**I. Identity of the Organization Giving Notice:** The name, address, and phone number of the organization giving notice of intent to sue under the ESA are:

Center for Biological Diversity  
P.O. Box 710  
Tucson, Arizona 85702-0710  
Tel: 520-623-5252

**II. Requirements of the ESA**

Congress enacted the ESA in 1973 to provide "a program for the conservation of . . . endangered species and threatened species." 16 U.S.C. § 1531(b). Section 2(c) of the ESA establishes that it is "...the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c)(1). The ESA defines "conservation" to mean "... the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." 16 U.S.C. § 1532(3). Similarly, Section 7(a)(1) of the ESA directs that all federal agencies "utilize their authorities in furtherance of the purposes" of the ESA. 16 U.S.C. § 1536(a)(1).

Section 4 of the ESA directs the Secretary of the Interior to designate species that are threatened or endangered with extinction, and to designate "critical habitat" for such species. 16 U.S.C. § 1533(a). "Critical habitat" is the area that contains the physical or biological features essential to the "conservation" of the species and which may require special protection or management considerations. 16 U.S.C. § 1532(5)(A). The ESA lays out a specific process for the designation and revision of critical habitat. 16 U.S.C. §§ 1533(a) & (b).

Section 4 also requires the Secretary to develop and implement recovery plans for threatened and endangered species, unless the Secretary finds that such a plan will not promote the conservation of the species. 16 U.S.C. § 1533(f).

Section 7(a)(2) of the ESA requires each federal agency, in consultation with FWS, to insure that

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<sup>1</sup> This notice is provided pursuant to the requirements of 16 U.S.C. § 1540(g) for any claims that may require such notice. We note however that for claims brought under the APA, such notice is not required and the Center need not wait 60 days prior to bringing suit. We nevertheless describe some of these claims in the hopes that FWS, the Forest Service, USACE, and EPA promptly act to avoid or correct any such violations of law, thereby obviating the need for litigation.

any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species, or result in the destruction or adverse modification of the critical habitat of such species. 16 U.S.C. § 1536(a)(2). During consultation, both the action agency and FWS must use the best scientific data available. *Id.*

For each proposed action, the action agency must request from FWS whether any listed or proposed species may be present in the area of the proposed action. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12. If listed or proposed species may be present, the action agency must prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. *Id.* If the agency determines that its proposed action may affect any listed species or critical habitat, the agency must engage in “formal consultation” with FWS. 50 C.F.R. § 402.14.

To complete formal consultation, FWS must provide the action agency with a “biological opinion” explaining how the proposed action will affect the listed species or habitat. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14. If FWS concludes in the biological opinion that the proposed action will jeopardize the continued existence of a listed species, or will result in the destruction or adverse modification of critical habitat, FWS must outline “reasonable and prudent alternatives” to the proposed action that FWS believes would not jeopardize listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(b)(3)(A).

If the biological opinion concludes that the proposed action is not likely to jeopardize the continued existence of a listed species, or result in the destruction or adverse modification of critical habitat, FWS must provide an “incidental take statement” (“ITS”) along with the biological opinion, specifying the amount or extent of such incidental taking on the species, any “reasonable and prudent measures” that FWS considers necessary or appropriate to minimize such impact, and setting forth the “terms and conditions” that must be complied with by the agency to implement those measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). In order to monitor the impacts of incidental take, the agency must report the impact of its action on the listed species to FWS. 50 C.F.R. § 402.14(i)(3). If during the course of the action the amount or extent of incidental taking is exceeded, the agency must reinstate consultation immediately. 50 C.F.R. § 402.14(i)(4); 50 C.F.R. § 402.16.

Section 9 of the ESA and its implementing regulations prohibit the unauthorized “take” of any endangered or threatened species of fish or wildlife. 16 U.S.C. § 1538(a)(1); 16 U.S.C. § 1533(d); 50 C.F.R. § 17.31. “Take” is defined broadly to include harming, harassing, trapping, capturing, wounding, or killing a protected species either directly or by degrading its habitat. 16 U.S.C. § 1532(19). Taking that is in compliance with the terms and conditions of an ITS in a biological opinion is exempt from the Section 9 take prohibition. 16 U.S.C. § 1536(o)(2).

### **III. The Proposed Rosemont Copper Mine**

Rosemont Copper Company (“Rosemont”) has submitted a proposed mining plan of operations to the Forest Service for a proposed mine on the Coronado National Forest. *See* October 30, 2013 Final Biological and Conference Opinion for the Rosemont Copper Mine p. 14 (“2013 BiOp”). The proposed Rosemont Mine would be a large-scale open-pit copper mine on the east side of the Santa Rita Mountains, approximately 30 miles south of Tucson, Arizona. *Id.* Mine

activities are proposed on 995 acres of private lands, and 3,670 acres of the Coronado National Forest. *Id.* The active mining phase is expected to last 20 to 25 years. *Id.*

The Forest Service identified the “Barrel Alternative” as the preferred alternative in the Environmental Impact Statement (“EIS”). 2013 BiOp at 14. The Barrel Alternative places all of the tailings and waste rock in upper Barrel Canyon and the lower portion of Wasp Canyon. *Id.* at 16. The project would include a 955-acre open pit of up to 3,000 feet deep, a processing plant and associated facilities, transmission lines, waste rock and tailings facilities, and new roads. *Id.* at 17. Total fresh water to be used during operations of the mine would be about 4.8 million gallons per day, mostly supplied by groundwater wells in the Santa Cruz Valley. *Id.* at 22.

The proposed mine would be surrounded by a perimeter barbed wire fence within which public access would not be allowed. 2013 BiOp, p. 18. Within the perimeter fence, a separate security fence would be constructed around the waste rock and tailings facilities. *Id.* The security fence would not be removed upon closure of the mine, presenting a permanent barrier to wildlife movement. A total of approximately 5,431 acres of land would be directly affected by the mine, including 4,013 acres within the security fence, the primary access road (226 acres), the utility line corridor (889 acres), new forest roads (59 acres), and rerouted trailheads (19 acres). *Id.*

The action area encompasses a large proportion of the greater Cienega Creek watershed, which provides some of the highest quality stream and wetland ecosystems in Arizona. Nov. 7, 2013 letter from the EPA to USACE at 1.<sup>2</sup> The construction of the Rosemont Mine would permanently fill approximately 18 miles of streams, and cause the permanent regional drawdown of groundwater that currently sustains hundreds of acres of springs, seeps, streams, and wetlands as well as fish, wildlife and plant species. *Id.* at 1-2. The mine pit would permanently convert the hydrologic regime of the proposed site from a water source area to a terminal sink, significantly lowering the surrounding regional aquifer. As summarized by the EPA:

The 2,900-foot mine pit will permanently convert the hydrologic regime of the site from a water source area to a terminal sink, significantly lowering the surrounding regional aquifer. The pit will permanently reverse the natural direction of groundwater flow toward and into the mine pit, and away from the sensitive aquatic habitats in Las Cienegas NCA and Cienega Creek Natural Preserve. This will add to a baseline trend of decreasing groundwater, causing a permanent reduction of water in streams and wetlands along the Empire Gulch, Mattie Canyon, Gardner Canyon and Cienega Creek with potential adverse impacts to over 30 seasonal and perennial wetlands, and threatened and endangered aquatic habitat dependent plants, fish and wildlife.

*Id.* at Attachment at 4.

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<sup>2</sup> All documents cited in this letter are already in the possession of the FWS, the Forest Service, USACE, and EPA and are therefore properly part of the administrative record for the 2016 Biological Opinion and any agency decisions made in reliance upon that opinion.

#### **IV. The 2016 Amended Biological Opinion**

On April 28, 2016, FWS issued the Amended Final Reinitiated Biological and Conference Opinion for the Rosemont Copper Mine (“2016 Biological Opinion”).<sup>3</sup> FWS prepared the 2016 Biological Opinion to assess the environmental impacts of the proposed Rosemont Mine on a large number of threatened and endangered species that occur within the action area for the mine.

Listed species adversely impacted by the Rosemont Mine include the jaguar, ocelot, Gila chub, Gila topminnow, desert pupfish, Chiricahua leopard frog, northern Mexican gartersnake, southwestern willow flycatcher, western yellow-billed cuckoo, lesser long-nosed bat, Huachuca water umbel, and the Pima pineapple cactus. Several of these species, including the jaguar, Gila chub, Chiricahua leopard frog, and southwestern willow flycatcher also have critical habitat in the action area that will be adversely impacted by the mine.

Throughout the consultation process FWS determined that the mine would result in severe negative impacts to many of these species and their critical habitats. At various points in the process, FWS expert staff concluded that the Rosemont Mine would jeopardize the continued existence of several species and/or destroy or adversely modify their critical habitats. For example, the April 12, 2013 draft of the biological opinion concluded that the mine would adversely modify jaguar critical habitat. However, notwithstanding the advice of its experts, FWS ultimately concluded in the 2016 Biological Opinion that the mine is not likely to jeopardize the continued existence of any threatened or endangered species, and is not likely to ~~destroy or adversely modify the designated critical habitat for the jaguar or any other listed~~ species.

The 2016 Biological Opinion suffers from numerous flaws that render it legally untenable. For terrestrial species impacted by the mine, the opinion’s treatment of the jaguar is particularly troubling. The proposed mine would be located in the portion of critical habitat that comprises the home range for one of the three known wild jaguar in the entire United States. FWS acknowledges that the mine would result in long-term or permanent negative effects to over 6,000 acres of jaguar critical habitat, including over 4,000 acres that would be permanently lost due to the construction of new roads, trails, and the “security fence.” 2016 BiOp at 298-99. The mine would also modify and destroy critical habitat that provides connectivity to and from Mexico. *Id.* at 302. FWS determined in draft biological opinions that implementation of the mine would result in adverse modification to jaguar critical habitat, resulting both from direct impacts to critical habitat in the project area, and by restricting connectivity and movement between the affected units and jaguar habitat in Mexico.<sup>4</sup>

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<sup>3</sup> In the 2016 Biological Opinion, FWS at times relies on and incorporates by reference its October 30, 2013 Final Biological and Conference Opinion for the Rosemont Copper Mine (“2013 BiOp”). For purposes of this letter, unless specifically citing to a page number specific to the 2013 (“2013 BiOp”) or 2016 documents (“2016 BiOp”), all references to the “2016 Biological Opinion” also include those portions of the 2013 BiOp that remain legally operative.

<sup>4</sup> Drafts of the biological opinion are obviously part of the record before FWS. The relevant portions of these opinions were also submitted to the agency as attachments to our August 5, 2014 letter to FWS.

In the final 2016 Biological Opinion, however, FWS changed course and concluded that the project would not result in the destruction or adverse modification of jaguar critical habitat. The 2016 Biological Opinion does not address or explain the agency's prior adverse modification determination and ignores a number of relevant factors that it had earlier considered in assessing the mine's impacts on jaguar critical habitat. 2016 BiOp at 309. Moreover, in concluding that the mine would not result in the destruction or adverse modification of critical habitat, FWS also relied on a "high probability" standard and threshold, instead of the "likely" standard that is required by the plain language of Section 7 of the ESA. *Id.* at 311; 16 U.S.C. § 1536(a)(2). In making its no jeopardy and no destruction or adverse modification determinations, FWS also relied on mitigation measures that are uncertain, non-specific, unenforceable, and likely to be ineffective and inadequate.

The 2016 Biological Opinion's treatment of critical habitat for the Gila chub, Chiricahua leopard frog, and southwestern willow flycatcher contains similar flaws to that for the jaguar in terms of the standards applied, the sufficiency of the analysis, and the reliance upon mitigation measures. For all species with critical habitat, the agency also applied its new regulatory definition of "destruction or adverse modification of critical habitat" which is at odds with the statute's plain language, purposes, legislative history, and relevant caselaw.

The 2016 Biological Opinion also suffers from significant problems related to its treatment of aquatic species. The proposed Rosemont Mine would also result in "significant degradation of the aquatic ecosystem on which the Gila club, Gila topminnow, desert pupfish, Huachuca water umbel, Chiricahua leopard frog, and northern Mexican gartersnake depend." 2016 BiOp, p. 60. Upper Empire Gulch would suffer the most severe effects, "with the potential to be subject to over 300 days of zero flow by 50 years post-mining." *Id.* The main stem of Cienega Creek would also "experience measurable losses of discharge, increases in the occurrence of zero flow and extremely low flows, and reductions in the number, depth, volume, and surface area of pools." *Id.* The mine drawdown-related effects in the main stem of Cienega Creek would "represent significant degradations of the aquatic ecosystem." *Id.*

More specifically for the Gila chub, FWS recognized that Cienega Creek has the only known stable and secure population of Gila chub in existence, and that all of the Gila chub critical habitat in the Cienega Creek watershed is in the action area of the proposed Rosemont Mine. 2013 BiOp at 253. FWS determined that the combined impacts of the Rosemont Mine and climate change would "cause four of the six key reaches in Cienega Creek to lose at least 24 percent" of their June flow, with three of those four key reaches losing "at least half of their June flow," and with one reach "projected to have zero flow." 2016 BiOp at 80. FWS somehow concluded, however, that the mine would not jeopardize the Gila chub, nor result in the destruction or adverse modification of its critical habitat. *Id.* at 94-95, 97.

Similarly, FWS recognizes in the 2016 Biological Opinion that the natural population of Gila topminnow in Las Cienegas NCA is "the only extant one on public lands" and "by far the largest of all remaining natural populations in the United States." 2016 BiOp at 110. As with the Gila chub, the groundwater drawdowns that would result from the mine would adversely affect the Gila topminnow. *Id.* at 112. "However, a reduction in the wetted perimeter and pool surface area will be more deleterious for topminnow than Gila chub, since all life stages of Gila

topminnow prefer and use shallow waters much more than chub.” *Id.* “Therefore, habitat that is likely to be occupied by topminnow . . . will be lost or reduced by the proposed action.” *Id.* Nonetheless, FWS concludes that the proposed mine “is not likely to jeopardize the continued existence of the Gila topminnow.” *Id.* at 116.

FWS also discloses in the 2016 Biological Opinion that the mine would result in severe impacts to Chiricahua leopard frog (“CLF”) and its critical habitat at multiple locations. For instance, there would be a complete loss of CLF habitat within the security fence of the mine. 2016 BiOp, p. 148. The degradation and disappearance of surface water in the upper portion of Empire Gulch “would permanently remove the longest standing and most prolific site occupied by the [CLF] in the Las Cienegas NCA metapopulation.” *Id.* at 150. The “streamflow loss, pool reduction, and decreased water quality” in four key reaches of upper Cienega Creek from mine-only drawdown “are especially of concern” because they provide stable breeding sites and connectivity. *Id.* at 151. And groundwater withdrawal may affect all dispersal and nonbreeding critical habitat within the Las Cienegas NCA and Eastern Slope of the Santa Rita Mountains CH Units. *Id.* at 153. “Almost half of the Las Cienegas NCA CH Unit may be completely lost,” with the remaining half diminished. *Id.* at 156. Nevertheless, FWS concludes that the mine “is not likely to jeopardize the continued existence of the Chiricahua leopard frog nor destroy or adversely modify its designated critical habitat.” *Id.* at 157.

Within the analysis of impacts to the northern Mexican gartersnake, FWS further emphasizes the significant impacts to both CLF and the gartersnake resulting from the proposed mine, as the CLF is a prey species of the gartersnake:

We expect significant losses of northern Mexican gartersnakes as an indirect effect from the anticipated degradation and ultimate disappearance of Empire Spring. Empire Spring is considered extremely important for the [CLF] metapopulation in the Las Cienegas NCA . . . If lost, this vital site would be unable to act as a source population of frogs for the area which greatly increases the odds of extirpation of this metapopulation . . . The loss or significant degradation of the resident [CLF] metapopulation in the area, as a result of the loss of a critical source population, would place significant nutritional strain on northern Mexican gartersnakes and weaken the functionality of the habitat for recovery as a whole for northern Mexican gartersnakes, in perpetuity.

2016 BiOp at 182-83. Despite the anticipated severe impacts from the mine, FWS concludes that the mine “is not likely to jeopardize the continued existence of the northern Mexican gartersnake nor destroy or adversely modify its proposed critical habitat.” *Id.* at 190.

The 2016 Biological Opinion contains an incidental take statement (“ITS”). For a number of aquatic and riparian dependent species, including Gila chub, Gila topminnow, desert pupfish, Chiricahua leopard frog, northern Mexican gartersnake, yellow-billed cuckoo, and Southwestern willow flycatcher, FWS claims it was unable to determine a numeric estimate or limit on take. For each of these species, FWS instead relies on “groundwater elevations” as a “surrogate measure” for incidental take. *See e.g.* 2016 BiOp at 100. FWS relies on one groundwater model—Tetra Tech (2010)—to estimate the anticipated “post-mining groundwater drawdown,”

which is calculated for 0, 20, 50, and 150 years post-mining. *Id.* at 101-02. As FWS recognizes, however, these time intervals “are not meaningful for monitoring take.” *Id.* at 102. FWS therefore relies on annual groundwater monitoring at unspecific sites, for which the agencies, project proponent, and the University of Arizona will seek to reach consensus as to whether “the observed groundwater drawdowns exceed the upper bounds of the sensitivity analyses for the modeled groundwater drawdowns.” *Id.* at 105.

In reaching the no jeopardy and no adverse modification determination for aquatic and riparian dependent species, FWS relies heavily on conservation measures, including the Cienega Creek Watershed Conservation Fund and the Sonoita Creek Ranch conservation measures. *See e.g.* 2016 BiOp at 97. FWS failed to adequately consider and address, however, the significant concerns of EPA, USACE, and others regarding these proposed conservation measures, including concerns regarding the likely effectiveness, certainty, appropriateness, adequacy, enforceability, durability, timing, distance and relationship to the mine site, and implementation of these measures. *See, e.g.* Nov. 7, 2013 letter from EPA to USACE, Attachment at 5-8; May 13, 2014 letter from USACE to Rosemont.

In assessing the impacts of the mine on aquatic and riparian dependent species, FWS relies extensively on groundwater models. 2016 BiOp at 23. FWS further relies on one of the groundwater models in its ITS for aquatic and riparian dependent species. *Id.* at 101. FWS failed to adequately consider, however, the significant concerns with and deficiencies of the groundwater models that the agency relies on to reach its conclusions. *See e.g.* May 6, 2016 Prueha Report. As summarized by Dr. Prueha:

Following my review, I found a number of issues with model development, including the overall methodology, characterization, conceptualization of flow, model setup/assumptions, calibration of the model and the selection process for selecting an appropriate software modeling tool to meet stated objectives. These issues alone reduce the overall credibility and accuracy of the modeling to such a level that it is difficult to trust major conclusions that the pumping will have only limited impacts on water resources within the LCNCA . . . I believe that had they conducted a more formal uncertainty analysis, which considers all sources of uncertainty and the significant model calibration error in the LCNCA, they would have found a much greater range of impacts to water resources within the LCNCA.

*Id.* at 4.

## **V. The 2017 Record of Decision**

On June 6, 2017, the Forest Service signed the Final Record of Decision for the Rosemont Copper Project and Amendment of the Coronado Land and Resource Management Plan. The Forest Service relied on the FWS’s 2016 Biological Opinion within the 2017 Record of Decision to satisfy the Forest Service’s obligations under the ESA. *See* Final ROD, p. 87 (“Based on the conclusions summarized above as supported in the USFWS’s BO, I find that the selected action meets the Endangered Species Act.”).



## **VI. Violations of the ESA**

### **A. Violations by FWS and the Secretary**

FWS's issuance of the 2016 Biological Opinion<sup>5</sup> violates the ESA and is arbitrary, capricious, an abuse of discretion, and not in accordance with law for a number of reasons, including but not limited to the following:

(1) failing to consider all relevant factors in making its jeopardy and destruction/adverse modification determinations for a number of listed species, including jaguar, ocelot, Gila chub, Gila topminnow, desert pupfish, Chiricahua leopard frog, northern Mexican gartersnake, southwestern willow flycatcher, western yellow-billed cuckoo, lesser long-nosed bat, Huachuca water umbel, and the Pima pineapple cactus;

(2) failing to articulate a rational connection between the facts found and the choices made in making its jeopardy and destruction/adverse modification determinations for a number of listed species, including jaguar, ocelot, Gila chub, Gila topminnow, desert pupfish, Chiricahua leopard frog, northern Mexican gartersnake, southwestern willow flycatcher, western yellow-billed cuckoo, lesser long-nosed bat, Huachuca water umbel, and the Pima pineapple cactus;

(3) relying on conservation measures that are not reasonably specific, binding, or certain to occur, and that are unproven, uncertain, unenforceable, unreliable and of limited duration, and hence unlikely to ensure that the mine will not jeopardize the continued existence of any listed species or result in the adverse modification or destruction of any species' critical habitat;

(4) failing to properly analyze the potential effects of the mine on the recovery of listed species and their critical habitats and/or setting a "tipping point" threshold for such effects;

(5) unlawfully applying a "high probability" standard and threshold, instead of the required "likely" standard, in making the destruction or adverse modification determinations for jaguar and other species with designated critical habitat in the action area;

(6) unlawfully applying a "greatly diminished" standard and threshold in making the destruction or adverse modification determination for the Gila chub;

(7) failing to provide a reasoned explanation and analysis concerning the agency's change in position from earlier agency documents including draft biological opinions for the

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<sup>5</sup> To the extent FWS and the action agencies continue to rely on or incorporate by reference the 2013 BiOp, the 2013 BiOp violates the ESA and is arbitrary, capricious, and abuse of discretion, and not in accordance with law for these same reasons.

Rosemont mine proposal;

(8) failing to adequately explain why it was impracticable to express a numeric population measure of the anticipated incidental take of a number of listed species including Gila chub, Gila topminnow, desert pupfish, Chiricahua leopard frog, northern Mexico gartersnake, yellow-billed cuckoo, and Southwestern willow flycatcher;

(9) failing to choose a proper surrogate instead of a numerical population measure or any other sufficient measure of the incidental take authorized for a number of listed species including Gila chub, Gila topminnow, desert pupfish, Chiricahua leopard frog, northern Mexico gartersnake, yellow-billed cuckoo, and Southwestern willow flycatcher;

10) relying upon unlawful regulations defining “destruction or adverse modification of critical habitat” which conflict with the plain language, purposes, legislative history and relevant caselaw regarding the conservation purposes of critical habitat, including, *inter alia*, by allowing activities in designated critical habitat that do not fall within the definition of “conservation,” 16 U.S.C. § 1533(3); allowing activities in designated critical habitat that conflict with recovery plans, 16 U.S.C. § 1533(f); allowing activities in designated critical habitat that wholly or significantly negate the conservation purposes for which those portions of the critical habitat were designated; and by conflating the separate terms “destroy” and “adversely modify,” 16 U.S.C. § 1536(7)(a)(2);<sup>6</sup>

11) failing to adequately describe and analyze the environmental baseline and cumulative effects, including the effects of activities on federal and non-federal lands in the action area, as well as the impacts of invasive species, drought, and climate change;

(12) failing to provide the benefit of doubt to listed species; and

(13) failing to use the best scientific data available.

FWS has also violated Section 4 of the ESA by revising the critical habitat designations for the jaguar, Gila chub, Chiricahua leopard frog, and southwestern willow flycatcher without following proper procedures. 16 U.S.C. § 1533. Each of these species has critical habitat designated in the action area. These areas are by definition essential to the conservation of these species. 16 U.S.C. § 1532(5). Critical habitat can only be revised pursuant to the specific notice-and-comment rulemaking procedures under Section 4 of the ESA and any such revision must comply with the procedural and substantive standards for critical habitat designation. 16 U.S.C. §§ 1533(a)(3)(A) & (b). By authorizing construction of the Rosemont Mine within designated critical habitat for the jaguar, Gila chub, Chiricahua leopard frog, and southwestern willow flycatcher through the 2016 Biological Opinion, an action that will wholly negate the conservation value of those impacted areas, FWS implicitly revised the species’ critical habitat designations so as to effectively exclude these areas from the designations without complying

<sup>6</sup> On October 14, 2014, the Center submitted comments to FWS regarding its proposed changes to the definition of “destruction or adverse modification of critical habitat.” Those comments, which describe in further detail how these regulations are in conflict with the plain language and purposes of the ESA, are incorporated by reference herein.

with the notice and comment rulemaking procedures of the ESA. *See Bennett v. Spear*, 520 U.S. 154, 172 (1997) (finding ESA cause of action for claim that biological opinion resulted in implicit designation of critical habitat).

FWS's issuance of the 2016 Biological Opinion, issuance of and reliance upon the February 11, 2016 regulations defining "destruction or adverse modification of critical habitat" (81 Fed. Reg. 7214), and improper revisions to the critical habitats of the jaguar, Gila chub, Chiricahua leopard frog, and southwestern willow flycatcher are arbitrary, capricious, and otherwise unlawful under the ESA and APA and are subject to judicial review thereunder. 16 U.S.C. § 1540(g) and 5 U.S.C. §§ 701-706.

#### B. Violations by the Forest Service, USACE, and EPA

The Forest Service, USACE, and EPA each have an independent, substantive duty under Section 7(a)(2) of the ESA to ensure that their actions are not likely to jeopardize listed species or destroy or adversely modify these species' critical habitats. 16 U.S.C. § 1536(a)(2). In relation to the proposed Rosemont Mine, as land owner, the Forest Service's actions include approval of a mining plan of operations and reclamation plan, amendment of the Coronado National Forest Land and Resource Management Plan, signing a Record of Decision ("ROD"), and related actions and approvals necessary for the construction and operations of the mine (e.g. roads, fences, utility corridors). As agencies responsible for administration of the Clean Water Act ("CWA"), USACE and EPA actions include issuance and oversight of permits and certifications under Sections 404 and 401 of the CWA.

Because, as described above, the 2016 Biological Opinion for the proposed Rosemont Mine violates the ESA and is unlawful, the Forest Service violated and remains in violation of Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), for relying on the 2016 Biological Opinion in approving and authorizing the 2017 Record of Decision. *Center for Biological Diversity v. BLM*, 698 F.3d 1101, 1127-28 (9th Cir. 2012) ("[A]n agency cannot meet its section 7 obligations by relying on a Biological Opinion that is legally flawed. . . . Accordingly, the BLM violated its substantive duty to ensure that its authorization of the Project would not jeopardize the survival of the [listed species] or adversely modify the species' critical habitat."). Additionally, any further reliance by the Forest Service, USACE, and EPA on the 2016 Biological Opinion to fulfill their Section 7 procedural and substantive obligations would also be arbitrary, capricious, and in violation of the ESA. *Id.*

Without a lawful and valid biological opinion, the Forest Service, USACE, and EPA cannot ensure that their actions related to the proposed mine, including the Forest Service's 2017 Record of Decision, are not likely to jeopardize the continued existence of any of the listed species, or result in the destruction or adverse modification of the species' critical habitat, as required by the ESA. 16 U.S.C. § 1536(a)(2); *Center for Biological Diversity*, 698 F.3d at 1127-28.

Additionally, because of the flawed biological opinion, lawful and proper consultation on the proposed Rosemont Mine has not yet been completed. Consequently, the Forest Service is in violation of Section 7(d) of the ESA for signing and approving the 2017 Record of Decision. 16

U.S.C. § 1536(d). The Forest Service, USACE, and EPA are or will also be in further violation of Section 7(d) of the ESA if they approve or otherwise authorize the Rosemont Mine to proceed through any additional permits and authorizations under the CWA. *Id.*

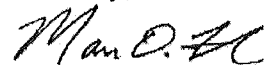
As federal agencies, the Forest Service, USACE, and EPA also each have independent affirmative obligations to protect and conserve endangered and threatened species. Section 2(c) of the ESA establishes that it is "...the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c)(1). Similarly, Section 7(a)(1) of the ESA directs that all federal agencies "utilize their authorities in furtherance of the purposes" of the ESA. 16 U.S.C. § 1536(a)(1). These obligations to affirmatively conserve listed species are in addition to the procedural and substantive obligations related to consultation under Section 7(a)(2) including the action agencies' independent duty to avoid jeopardy and destruction and adverse modification of critical habitat.

In order to avoid violating the mandate of Section 7(a)(2) to not jeopardize any listed species or destroy or adversely modify any designated critical habitats, as well as to comply with their affirmative conservation obligations under Sections 2(c) and 7(a)(1), the Forest Service, USACE, and EPA should promptly affirmatively deny any pending applications, requests, permits, authorizations, and certifications under their respective jurisdictions related to the proposed Rosemont Mine.

## **VI. Conclusion**

For the above stated reasons, FWS and the Secretary have violated and remain in ongoing violation of the ESA for their issuance of the flawed 2016 Biological Opinion; the Forest Service has violated and remains in ongoing violation of the ESA for its reliance on the unlawful 2016 Biological Opinion is approving the June 6, 2016 Record of Decision; and any additional approvals or authorizations for the Rosemont Mine by the Forest Service, USACE, and/or the EPA in reliance upon the flawed opinion would also be violations of the ESA. If these violations are not cured within sixty days, the Center for Biological Diversity intends to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs. This notice letter was prepared based on good faith information and belief after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please notify us promptly.

Sincerely,



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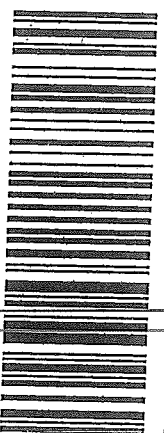
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