

WESTERN MINING ACTION PROJECT

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Via Certified Mail

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Mr. Calvin N. Joyner, Regional Forester
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Sonny Purdue, Secretary
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Ryan Zinke, Secretary of the Interior
U.S. Dept. of the Interior
1849 C Street, NW
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Re: Sixty-Day Notice of Intent to Sue to Remedy Violations of the Endangered Species Act in the Forest Service’s Issuance of a Record of Decision and Amendment of the Coronado Land and Resource Management Plan for the Rosemont Copper Project

Dear Officials of the U.S. Department of Agriculture and Interior,

On behalf of Save the Scenic Santa Ritas, Center for Biological Diversity, Arizona Mining Reform Coalition, and the Sierra Club and its Grand Canyon Chapter (collectively, “SSSR”), I hereby provide you notice in accordance with the citizen suit provision of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), of SSSR’s intent to sue for violations of the ESA and its implementing regulations arising from the U.S. Forest Service’s (“USFS”) issuance of a Record of Decision (ROD) for the Rosemont Copper Project (or Mine) in Pima County, Arizona, including the Final Environmental Impact Statement for the Project (“FEIS”) relied upon by the ROD. The ROD was signed by Coronado Forest Supervisor Kerwin Dewberry on June 6, 2017. <https://www.rosemonteis.us/files/final-eis/rosemont-feis-final-rod.pdf>

This ROD documents my decision and rationale for the selection of “Alternative 4 – Barrel Alternative” (referred to in this ROD as the “selected action”). Alternative 4 (Barrel Alternative or selected action) is described in chapter 2 of the FEIS. It is also described in detail in appendix A of this ROD. My decision includes the associated transportation system, design features, mitigation and monitoring measures as amended in this decision (appendix B of the FEIS and errata 6), changes to the Arizona National Scenic Trail, and forest plan amendments (FEIS chapter 2, p. 117), as described in this document and the FEIS. My decision allows development of the Rosemont mineral deposit in a manner that is consistent with the selected action.

ROD at 12. The Forest Service’s ROD and authorization for Rosemont/Hudbay to implement the Plan of Operations, as revised by the ROD’s chosen Alternative 4 for the Rosemont Project in the Final EIS, is in violation of ESA Section 7(a)(1), 16 U.S.C. § 1536(a)(1). SSSR had previously submitted formal Objections to the Regional Forester’s Office in February, 2014, which are incorporated by reference herein.

Unless the Forest Service withdraws its ROD for the Rosemont Project within 60 days of this letter, SSSR intends to challenge the ROD, FEIS, and related approval decisions in federal district court, asserting violations of Section 7(a)(1) of the ESA and other laws.

The USFS’s Failure to Comply with Section 7(a)(1)

Section 7(a)(1) requires that:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

16 U.S.C. 1536(a)(1). As one leading federal appeals court stated:

Section 7(a)(1) of the ESA imposes a separate obligation upon federal agencies and, in relevant part, states that all federal agencies “shall,” in consultation with the FWS or National Marine Fisheries Service, “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed species].” 16 U.S.C. § 1536(a)(1). The ESA defines “conservation” as “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 chapter are no longer necessary.” *Id.* § 1532(3).

Florida Key Deer v. Paulison, 522 F.3d 1133, 1145 (11th Cir. 2008).

In this case, the USFS’s actions in authorizing the Project in the ROD will, at a minimum, not “further the purposes” of the ESA and will not “conserve” the endangered and threatened species affected by the Rosemont Project.

Threatened and endangered species that would be adversely impacted by the Project include the Gila chub, Gila topminnow, desert pupfish, Chiricahua leopard frog, northern Mexican gartersnake, Huachuca water umbel, and other listed species noted in the FEIS such as the western yellow-billed cuckoo and southwestern willow flycatcher. Several of these species, including the Gila chub and Chiricahua leopard frog also have critical habitat in the action area that would be adversely impacted by the Mine.

The ROD's authorization of groundwater pumping and dewatering will result in severe adverse impacts to Empire Gulch, Cienega Creek, and associated habitat. FEIS at 546-547. For Empire Gulch, the Project is predicted to result in "changes that would occur in the type of vegetation and habitat in Empire Gulch, and the potential transition of the stream from perennial to ephemeral." FEIS at 546. The FEIS admits that:

[I]mpacts to Empire Gulch are more certain to occur than those to other perennial streams, and most scenarios indicate that effects would be seen within 50 years of closure of the mine. These effects would gradually increase over time, likely affecting flow at the springs in Empire Gulch, stream flow within the Empire Gulch channel, and the riparian gallery present along the channel.

FEIS at 546. This pumping/dewatering and related activities will significantly and adversely affect the listed species and habitat noted above which depend on the flows in the springs and waters of Empire Gulch, Cienega Creek, and other affected waters. For example, as noted in the April, 2016 amended Biological Opinion issued by the U.S. Fish and Wildlife Service:

The proposed action contributes incremental effects that will, at varying levels, further diminish surface flows, the dimensions of pool habitat, and reduce water quality, resulting in significant degradation of the aquatic ecosystem on which the Gila chub, Gila topminnow, desert pupfish, Huachuca water umbel, Chiricahua leopard frog, and northern Mexican gartersnake depend.

Upper Empire Gulch (EG1) may suffer the most appreciable effects, with the potential to be subject to over 300 days of zero flow by 50 years post-mining. The number, depth, volume, and surface area of upper Empire Gulch's pools may all be appreciably reduced, primarily due to mine effects, thus significantly degrading the aquatic habitat available in the reach.

April 28, 2016 Amended Biological Opinion, at 60. As another example, regarding the critical habitat for the Chiricahua leopard frog: "Degradation and ultimate disappearance of surface water as modeled in the upper portion of Empire Gulch, would permanently remove the longest standing and most prolific site occupied by the Chiricahua leopard frog in the Las Cienegas NCA metapopulation and likely within RU2 for the frog." *Id.* at 150.

Despite these severe impacts, the USFS failed to "use ... 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 chapter are no longer necessary." 16 U.S.C. § 1532(3). Instead of preparing and adopting a mitigation plan to "further the purposes" of the ESA, "conserve" these species, and bring these species "to the point at which the measures provided pursuant to this chapter are no longer necessary," as required by Section 7(a)(1), the USFS took the erroneous position that it does not have any authority to mitigate or prevent these impacts.

“Due to the Forest Service’s jurisdictional limitation that mitigation measures can be required only on NFS surface resources, no mitigation measures are proposed that would directly offset the impacts predicted to occur along Empire Gulch.” FEIS at 546 (emphasis added). Due to the lack of mitigation measures for affected streams (e.g., Empire Gulch and Cienega Creek), this position was adopted throughout the USFS’ review of the Project. Note that this failure to even consider this mitigation not only violates the ESA, but also the USFS’s procedural duties under NEPA and other laws.

The 2,900-foot deep 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 Empire Gulch, Mattie Canyon, Gardner Canyon, and Cienega Creek with adverse impacts to over 30 seasonal and perennial wetlands, and on which the above noted threatened and endangered aquatic habitat plants, fish, and wildlife depend.

Groundwater drawdown will result in stress and degradation of riparian habitat, including wetlands. The FEIS admits that indirect effects from the proposed mine project will change the composition of 1,071 acres of riparian vegetation along Empire Gulch (*i.e.*, 407 acres of hydriparian) and Barrel and Davidson canyons. Several additional springs, seeps, streams, emergent marshes, and riparian areas within the project assessment area likely contain jurisdictional waters, including wetlands, which will be indirectly impacted by the proposed project, primarily from groundwater drawdown.¹

¹ As noted in the EPA’s November 7, 2013 letter:

“[F]or Empire Gulch and Cienega Creek all three groundwater models predict near- and long-term stream flow drawdown along Upper Cienega Creek. Comparing these projected model drawdowns with minimum monthly stream flows (2001-2010 period of record) for Upper Cienega Creek indicates that the predicted drawdown would cause the stream to go dry during critical low flow months (Chapter 3, Figure 70). The FEIS further concludes that a small change in stream flow could result in the loss of surface flow during these drought periods. In addition, the FEIS states that Upper Cienega Creek receives surface water [and groundwater] flow from Empire Gulch and the potential exists for a reduction in Empire Gulch stream flow to result in reductions in Cienega Creek’s stream flow as well. Small amounts of groundwater drawdown could affect near-and long-term stream flow in Empire Gulch and Cienega Creek and hydrologic changes predicted for Empire Gulch from drawdown could have a potential effect on springs and stream flow, potentially shifting some or all of the stream length from perennial to intermittent. Pima County, as well as the BLM which manages the NCA, have expressed similar concerns regarding the secondary effects to Empire Gulch and Cienega Creek surface waters from groundwater drawdown (Comments submitted to the Forest Service by Pima County and BLM on the PAFEIS, dated August 14, 2013). In addition, secondary impacts to intermittent surface flows are likely to occur in Box Canyon, Sycamore Canyon, Adobe Tank Wash, and Mulberry Canyon which all lie within the modeled 5-foot drawdown area (Comments submitted to the Forest Service by Pima County on the PAFEIS, dated August 14, 2013).” EPA letter at 4, n. 8.

The waters and associated lands in and along Empire Gulch and Cienega Creek are within the congressionally-designated “Las Cienegas National Conservation Area” (“LCNCA”) which is administered by the U.S. Bureau of Land Management (“BLM”). Streams within the Las Cienegas National Conservation Area, such as Empire Gulch and Cienega Creek, as well as the springs that support these streams, are protected by federal reserved water rights. The BLM has raised concerns about their Federal reserved water rights, particularly those associated with Las Cienegas National Conservation Area.

“The FEIS documents that impacts to the Las Cienegas National Conservation Area (NCA) are likely to occur which are detrimental to the purposes for which the Las Cienegas NCA has been established if the preferred [Barrel] alternative is implemented.” Letter from David Baker, Tucson Field Office Manager, BLM, to Jim Upchurch, Forest Supervisor, Coronado National Forest, Aug. 15, 2013. Of the 21 federal reserved water rights identified for BLM, 3 are associated with springs on the west side of the Santa Rita Mountains (Helvetia, Chavez, and Zackendorf Springs), 4 are associated with ephemeral tributaries to Cienega Creek (North Canyon, Middle Canyon, and Oak Tree Canyon), and 13 are associated with Empire Gulch. The Empire Gulch water rights cover the entire reach from the confluence with Cienega Creek upstream to the boundary of the Las Cienegas National Conservation Area near SR 83.

The federal reserved water rights in the LCNCA were established to fulfill the purposes of the congressional statute establishing the LCNCA, Public Law 106–538, (Dec. 6, 2000); 16 U.S.C. §§ 460000-0007. Las Cienegas National Conservation Area Act, (“LCNCA Act”). Pursuant to Section 4 of the LCNCA Act: “In order to conserve, protect, and enhance for the benefit and enjoyment of present and future generations the unique and nationally important aquatic, wildlife, vegetative, archaeological, paleontological, scientific, cave, cultural, historical, recreational, educational, scenic, rangeland, and riparian resources and values of the public lands described in subsection (b) while allowing livestock grazing and recreation to continue in appropriate areas, there is hereby established the Las Cienegas National Conservation Area in the State of Arizona.” 16 U.S.C. § 460000-3.

BLM has issued the Las Cienegas NCA Resource Management Plan. That Plan lists a number of goals for management of the Conservation Area. Predicted impacts from the Rosemont Copper Project would be inconsistent with a number of these goals, including goals to maintain and improve watershed health; maintain and improve native wildlife habitats and populations; maintain and restore native plant diversity and abundance; protect water quantity; and maintain the region’s scenic beauty and open spaces. While the selected action contains a number of mitigation measures to reduce impacts, potential impacts are not expected to be completely offset. Therefore, the conflict between implementation of the Rosemont Copper Project and achieving the goals of the resource management plan cannot be rectified.

Neither the FEIS nor ROD determined whether, and the extent to which, each of the federal reserved water rights identified by BLM will be affected such that they can no longer fulfill the purposes for which they were established, including the protection of habitat for the listed species noted above. Neither the FEIS nor the ROD imposes mitigation requirements on the Project that will prevent the loss of flows in the federal reserved water rights.

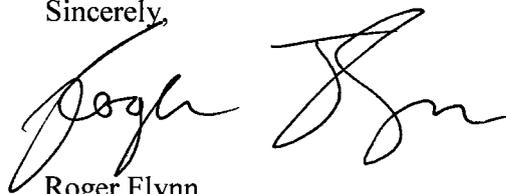
BLM has expressly stated to the USFS that: “BLM does not relinquish existing BLM surface and groundwater rights.” August 15, 2013 Letter from David Baker, Field Manager, BLM Tucson Field Office to USFS Supervisor Jim Upchurch, “BLM Comments on the

Rosemont Copper Project,” Attachment at p. 3 of 9. BLM highlighted the inadequacies of the EIS and NEPA process in connection to the unacceptable adverse impacts to the LCNCA and its water rights. *Id.*

CONCLUSION

For the reasons set forth in this letter, the Objections, and documents and comments incorporated by reference, the failure of the USFS to take any measures to prevent the predicted dewatering impacts to these listed species and their habitat, especially in Empire Gulch, Cienega Creek, and the LCNCA, violates ESA Section 7(a)(1) and its implementing regulations. Unless the Forest Service revokes its ROD within 60 days of this letter, the parties to this notice letter will institute a legal action to challenge those Forest Service actions in federal district court.

Sincerely,



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